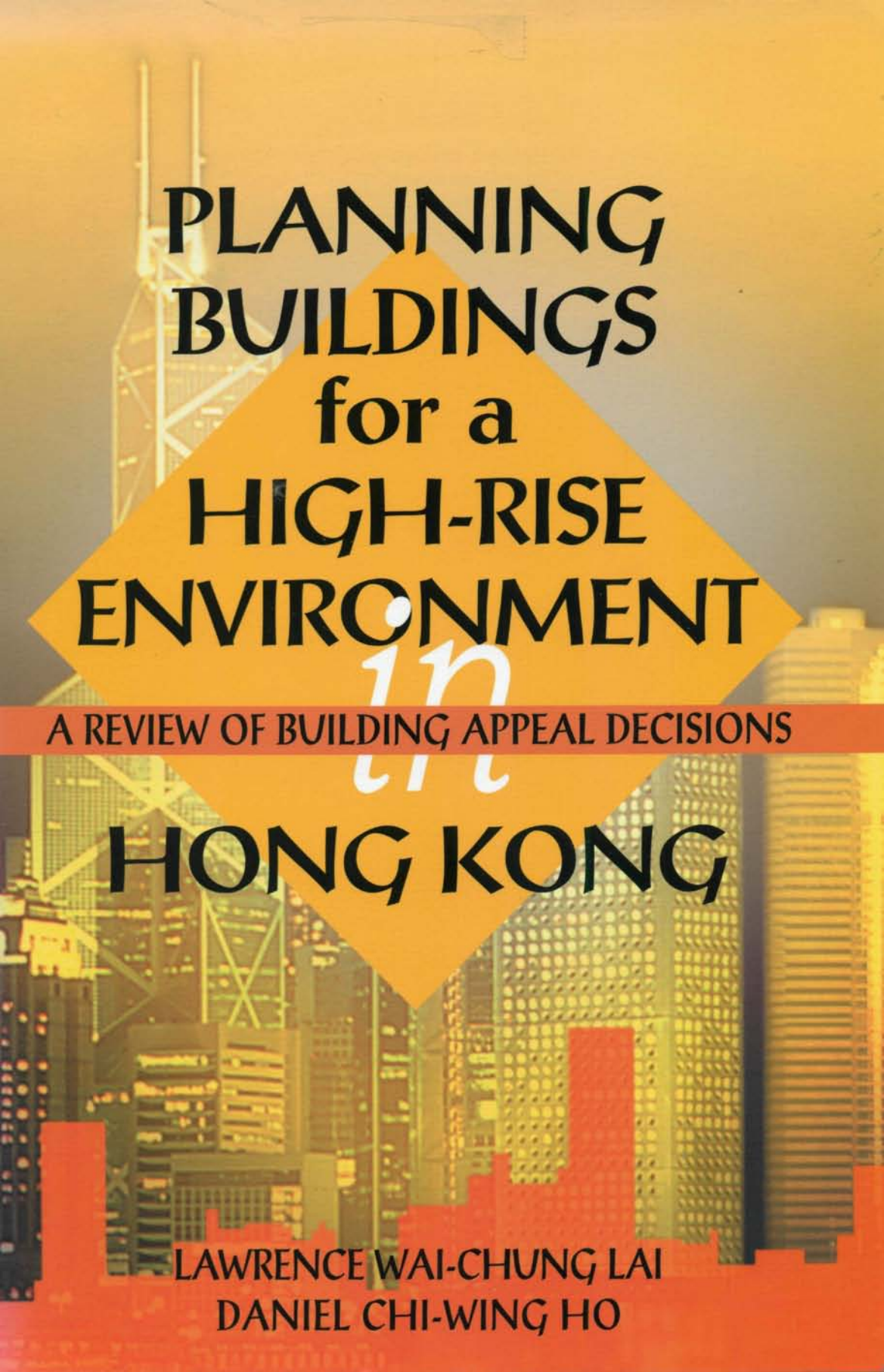

PLANNING BUILDINGS for a HIGH-RISE ENVIRONMENT in HONG KONG
A REVIEW OF BUILDING APPEAL DECISIONS
LAWRENCE WAI-CHUNG LAI
DANIEL CHI-WING HO

PLANNING BUILDINGS FOR A HIGH-RISE ENVIRONMENT IN HONG KONG

A REVIEW OF BUILDING APPEAL DECISIONS

To our students
at the University of Hong Kong
and the Hong Kong Polytechnic University

PLANNING BUILDINGS FOR A HIGH-RISE ENVIRONMENT IN HONG KONG

A REVIEW OF BUILDING APPEAL DECISIONS

LAWRENCE WAI-CHUNG LAI
BSocSc (Hons), MSocSc (Econ), PhD (HKU), LLB (Hons) (London),
MTCP (Sydney), MRAPI, MHKIP, MCIT, Registered Professional Planner

DANIEL CHI-WING HO
BSc, MBA (CUHK), PhD (HKU), FRICS, FHKIS,
Registered Professional Surveyor (BS), Authorized Person

香港大學出版社
HONG KONG UNIVERSITY PRESS

Hong Kong University Press
14/F Hing Wai Centre
7 Tin Wan Praya Road
Aberdeen
Hong Kong

First published 2000
Reprinted 2002

ISBN 962 209 505 4

Secure On-line Ordering
http://www.hkupress.org

Cover designed by Lea & Ink Design
Printed in Hong Kong by Liang Yu Printing Factory Company Ltd.

CONTENTS

FOREWORD

Hong Kong's economy is one that is land and development driven. In the densely packed urban areas of Hong Kong and Kowloon, where most buildings do not last for more than 50 years, cyclical redevelopment on the same piece of land is the 'name of the game'. Marine Lot No. 104, for instance, the land which Hong Kong Bank sits on, has been enlarged and redeveloped over 4 times since its first development in the 1850s.

During the course of redevelopment of old building lots, it is inevitable that the owners' desire to cater for modern comfort, and keep maximize their financial return by fully developing sites, will create many conflicts. Disputes and appeals are often the results.

This book is about building appeals. It examines over 40 unreported cases, which are systematically categorized and analysed, and gives the reader an overall perspective of each situation. As a member of the architectural profession and of the academia, I find it most useful.

The authors, Lawrence Lai and Daniel Ho, two of my most respected colleagues in the Department of Real Estate and Construction, the University of Hong Kong, undoubtedly have invested a great deal of effort in researching, assembling and introducing the materials in a thoughtful and orderly manner. Their work will make the research tasks of others immeasurably easier. They are to be congratulated for their noble effort.

David Lung
Professor of Architecture, The University of Hong Kong
Chairman of Antiquities Advisory Board
Member of the Managing Board, Land Development Corporation
December 1999

PREFACE

This book was Lawrence Lai's idea. Inspired and encouraged by his *Town Planning in Hong Kong: A Review of Planning Appeal Decisions*, we felt that there should be a similar volume which addresses the key issues arising from the decisions of the Building Appeal Tribunal. As a result, we each suffered a twelve-month solitary confinement after lectures to work on this book and risked failing our own examinations (there are just too many examinations in life!). We hope that our efforts have paid off in providing a detailed analysis of planning considerations in building appeals.

Statutory building control is a key link between the overall planning and development control of the built-form of Hong Kong. The hallmark of Hong Kong built-form is its extremely high density and high-rise approach to nearly all types of land use. This is unique in the world. In terms of town planning, statutory building control through the building plans application process has been the major vehicle of enforcing statutory town plans, which do not have enforcement powers except for those that begin their lives as 'interim development permission area' plans prepared for the rural areas.

In this context, it is unfortunate for both professionals and students in town planning and building development that there have been few systematic accounts of the major decisions of the Building Appeal Tribunal. A notable exception is an article written by Mr Bokhary, now a Court of Final Appeal Judge, on s. 16(1)(g) of the *Buildings Ordinance*. It was published in the *Hong Kong Law Journal* in 1989. Nor is there any integrated work on the relationship of town planning, building control and valuation in the development process. An exception is the succinct and excellent work, *Valuation of Development Land in Hong Kong*, written by Mr P. J. Roberts. It was published 24 years ago by Hong Kong University Press, and by now outdated.

By conducting a comparative analysis of 40 selected building appeal cases

in the past 15 years, this book is intended to initate the development of literature on statutory building control — an important aspect of site planning and development control in Hong Kong.

The 40 cases in this work are categorized in 9 themes. While each has a specific focus, they often overlap in various aspects. The first category is called 'procedures and principles', consisting of 5 cases. The second, 'immediate neighbourhood', has 4 cases. The third, 'width of streets', has 2 cases. The fourth, 'lanes', has 6 cases. The fifth and sixth categories, 'access and parking' and 'stepped streets', have 6 respectively. The seventh category, 'means of escape (MOE)', is exemplified by one case. The eighth, 'unauthorized structures and enforcement orders', has 9 cases whereas the ninth category, 'demolition', has one. Categories 2 to 8 are the salient features of planning and controlling built-forms in Hong Kong, and they are areas of key interest to Authorized Persons who have the legal monopoly for submitting building plans to the Building Authority. Of the 40 cases, three has been reported in the Hong Kong Law Reports (HKLR) and five were challenged by judicial review applications.

Foreign observers and lay people in Hong Kong often find it difficult to understand why arguments over the delineation of the 'immediate neighbourhood', the width of the street in front of a development or service lanes through a building site may need to be resolved in court. The reason behind such arguments is simple: it is a matter of profit. According to the existing building legislation, all these factors affect 'plot ratio', or the ratio between the gross floor area to the gross site area and building heights. In areas with high population density, land is a scarce commodity. Developers are prepared to fight legal battles in the hope of gaining marginal gains in plot ratios. Of crucial importance in evaluating the maximum permissible plot ratio of a site is 'site classification' under Regulations 20 to 22 of the *Building (Planning) Regulations*. For a site of the same size, a class A site allows the smallest plot ratio while a class C site allows the greatest. Site classification depends on the number and widths of streets the site abuts. This is subject to any applicable statutory or contractual controls, notably airport height restrictions (AHR), plot ratio ceilings in statutory town plans, and terms in the government leases.

While plot ratios and related dimensions of the building law may be a matter of degree, the problems posed by 'stepped streets' and 'means of escape' from fire can be a matter of kind. No redevelopment exceeding the existing floor space or any development can be permitted if they are considered problematic and insurmountable.

The issue of 'stepped streets' is a typical development context for areas in the old Victoria City and Kennedy Town on Hong Kong Island. It reminds tourists who visited Hong Kong years ago of the picturesque hillside development. If they visit Hong Kong again today or look at the photographs in this book (and those recorded in the 'photo albums' listed as part of the Bibliography), they will find that a lot of the old architecture — elegant or

humble, yet always in harmony with the steep topography of the Island — have been replaced by a dense foliage of high-rise buildings which pay no respect to contour features.

In this context of de facto anarchistic and intrusive urban form, it is perhaps too late for critics to call for 'harbour protection'. The target of the critics is the town planner. The harbour may seem to be protected from further massive reclamation from a bird's-eye view. However, harbour views from the Island's hill walks, such as Bowen Road or Sir Cecil's Ride, have all gone. Views of the mountain backdrops of urban Hong Kong Island from the harbour have also been screened or discontinued by high-rise development. If building control remains in its present form, the harbour protection campaign, backed by developers with interests along the water front, is mere shadow boxing. If we compare the cross-sections of Victoria Harbour in Hong Kong and that of Sydney Harbour, in Australia (Appendix 1), we can find that the former pays little respect to the topography of the highlands on either side of the harbour.

After the relocation of Hong Kong's international airport from Kai Tak to Chek Lap Kok, the previously uniform city skyline of Kowloon has disappeared as the AHR for buildings in Kowloon was lifted. This means that a major discount of the plot ratio as measured according to the site classified under the *Buildings Ordinance* is now removed. Developers rush to submit redevelopment plans for higher buildings that would capture views of Hong Kong Island across Victoria Harbour. In order to prevent such development from overburdening the infrastructure, the Town Planning Board has published a series of new statutory town plans with plot ratio ceilings that compromise the relaxation of plot ratio control due to the lifting of the AHR. If a developer submits two sets of building plans of different plot ratio implications, one before and one after the publication of a statutory town plan, which set of plans will be permitted? The answer to this question regarding the interaction of the *Buildings Ordinance* and the *Town Planning Ordinance* is provided in one of the cases reviewed in this book. Such interaction would shape the building profile of the Kowloon Peninsula.

In many respects, illegal structures are of crucial importance. First, they reflect that land in Hong Kong is scarce and that the population in Hong Kong is hungry for land. Secondly, they reflect the ambivalent attitude of the government towards private property. In the past, hillside squatting provided accommodation for people with small means. Since the late 1980s, the government has succeeded in controlling hillside squatting. The law of conservation of energy will not fail. As public housing is never enough and not all poor people are eligible for immediate public housing, squatting on rooftops or canopies of buildings continues to flourish. Even the better-off 'squat' increases the amount of private space by using all kinds of imaginative means: 'cages', penthouses, and so on. The government has never had adequate resources to enforce the *Buildings Ordinance*.

These two arguments above may be seen by some as 'bookish'. However,

our third argument is definitely 'practical' (and in fact may expose certain unethical intentions of some): when property prices fall, buyers would like to find good grounds to rescind the contract to purchase. The presence of unauthorized structures on a property renders the title of the property 'defeasible'. Sellers would try to find better reasons to resist such attempt. Whether a property is free from unauthorized structures and the legal implications of such structures are typical points involved in legal battles.

This book has four chapters. Chapters 1 to 3 serve as an introduction to statutory planning control, and the rules for each case are examined in Chapter 4. Each appeal case selected is grouped under the nine said categories and is individually analysed with rules identified. The facts of the cases are presented and arranged in chronological order with arguments, reasons for decision and 'rules' distilled. Photographs and drawings have also been used to illustrate our arguments.

This book is intended to be read by those who are interested in statutory building control, as an aspect of planning of built-forms in Hong Kong. It is especially relevant to Authorized Persons, architects, lawyers, town planners, surveyors and researchers who need more information about past building appeal decisions. We also hope that this book would be of use to student building surveyors for the preparation of their professional examinations and continuing professional development.

There is no claim in this book that the coverage is complete in terms of scope or time. Nor is this a 'case book' for making commercial or legal decisions. Readers must also consult the original decisions so as to construct their own views, or seek advice from Authorized Persons and legal practitioners.

It is, however, our hope that this book would stimulate discussion and provide starting points for further and better endeavours in the research and publication regarding building control in Hong Kong.

Lawrence Wai-chung Lai and Daniel Chi-wing Ho
The University of Hong Kong

December 1999

ACKNOWLEDGEMENTS

The authors would like to thank the following people for their support without which this book would not have been possible: their colleagues in the Department of Real Estate and Construction at the University of Hong Kong for their encouragement; the University of Hong Kong Committee on Research and Conference Grant for their part financial support of this project; Mr Lee Chak Lam, MRICS Chartered Surveyor, BSc (Surveying) and PCLL, graduate of the University of Hong Kong, for his assistance in case law research; Mr Wong Chi Choi, Mr Kwok King Wai, and Miss Choi Kit Man, BSc (Surveying) graduates of the University of Hong Kong, for assistance in the compilation of Appendices 2, 3 and 4; and the anonymous referee for his or her constructive comments and advice which made this book read well.

They would also like to thank the Lands Department for their kind permission to reproduce their survey plans and illustrations in this volume.

Finally, they would like to dedicate this book to all the students they have taught at the Hong Kong Polytechnic (now University) and the University of Hong Kong in the past 16 years. They have been constantly giving the authors intellectual stimulation, challenges and support, and for these, the authors are eternally grateful.

NOTE ON REPRINT EDITION

Since the publication of this book, three major works on land and building control have appeared. The paper 'Defective Buildings and Defective Law: The Duty of Care in Negligence' by Rick A. Glofcheski was published in 2000 in the *Hong Kong Law Journal* (Glofcheski, 2000). The second edition of P. J. Roberts and Johnny C. P. Siu's book appeared in 2001 (Roberts and Siu, 2001). However, the most important work is the *Doctoral Dissertations on Hong Kong*, 1900–1977 by Frank J. Shulman and Anna L. Shulman (2001), which registers 23 entries of doctoral dissertations that address various aspects of 'buildings' in Hong Kong.

The authors are indebted to Mr Hui Siu Wai, Chief Building Surveyor, and his colleagues at the Buildings Department, for their advice on the first edition of this book and suggestions for corrections and improvements. All faults of course remain ours.

Lawrence Wai-chung Lai
Daniel Chi-wing Ho
The University of Hong Kong
May 2002

ILLUSTRATIONS

FIGURES

PHOTOGRAPHS

BUILDING APPEAL CASES

PROCEDURES AND PRINCIPLES

IMMEDIATE NEIGHBOURHOOD

WIDTH OF STREETS

LANES

UNAUTHORIZED STRUCTURES AND ENFORCEMENT ORDERS

DEMOLITION

1 INTRODUCTION

An understanding of the criteria of building appeal decisions should help professionals in the development field grasp the key to success in making building applications or responses to orders issued by the Building Authority. It should also enable researchers to better appreciate the peculiar nature of planning and development control in Hong Kong. Unfortunately, there have been few, if any, systematic accounts on building law or appeal decisions. This book attempts to develop the literature on building appeals by conducting a comparative analysis of selected building appeal decisions.

It is a well-known fact that building development in Hong Kong is high-rise and in extremely high density by world's standards. It is also well-known to many local people that the Building Authority has the powers to (a) approve or reject building plans, and (b) to issue orders enforcing certain statutory provisions in the *Buildings Ordinance*. However, many people still do not understand the decision criteria or 'rules' of appeals against the Building Authority's decisions or orders. Their ignorance is largely due to the lack of information in this area. This has become complicated because the Town Planning Board (and Appeal Board) and the Lands Authority* have overlapping jurisdictions over a number of key concerns in the planning and development process. The interaction of the Building Authority, Town Planning Board and Lands Authority in respect of these concerns is even more complicated and confusing.

As if this picture is not messy enough, the Country Parks and Marine Parks Board and the Housing Authority also play a significant role in forward planning or development control for land. Their significance becomes

* The term 'Lands Authority' is not a statutory term but a commonly used expression in professional practice in the development field.

immediately clear as soon as one realizes that the Country Parks and Marine Parks Board controls country parks which occupy more than 70% of land in Hong Kong, and that the housing estates controlled by the Housing Authority accommodate more than 50% of the population in Hong Kong. The building planning or control functions of these bodies, however, are outside the scope of this book.

THE GENERIC MEANING OF 'PLANNING' AND 'DEVELOPMENT Control'

In order to appreciate the nature and significance of building appeals, one must first fully understand the meaning of 'planning' and 'development control'.

'Planning', as exercised by the government, refers to the *specification* of parameters, rules, standards, guidelines, and procedures for land uses and built-forms by the government for private individuals in relation to land. An individual may be a developer and land includes buildings. Planning as such is often described as 'forward planning'.

'Development control' means that the government processes or orders to ensure that the matters specified in the planning process are followed by private individuals, as backed by enforcement in case of non-compliance.

In terms of geographical scope, planning or development control (in descending order of coverage and usually in ascending order of details) can be territory-wide, sub-regional, district, estate, and individual building sites.

Private individuals of course also conduct their own planning and development control. However, this kind of private planning or development control (by restrictive covenants, notably those in a Deed of Mutual Covenant (DMC) for multi-storey buildings in Hong Kong), which has been heavily regulated by government planning, is not the focus of this book.

THE BUILDING AUTHORITY AND LANDS AUTHORITY AS FORWARD PLANNING AND DEVELOPMENT CONTROL BODIES

In the history of planning and development control in Hong Kong, the Lands Authority was once the main planning and development control authority. The functions of planning and development control have gradually been replaced, displaced or duplicated by the Building Authority and the town planners in the government (see Appendix 5). As early as the 1840s, the Lands Authority planned by:

(a) 'laying out' districts;
(b) delineating roads and land parcels within districts;
(c) subdividing land parcels or lots;
(d) stipulating in lease documents development restrictions, such as those upon subdivision and right of ways in favour of adjoining property;

(e) stipulating in lease documents for each land lot 'user' (land use) or 'user restrictions', such as prohibition against offensive trades;
(f) stipulating in lease documents for each land lot building restrictions, such as the types of buildings permitted (including 'European type houses', 'houses', and 'flats'); their height; site coverage; non-building areas; set-backs; access location; plot ratios; maintenance of slopes and support to other properties.

The activities in (a) and (b) have been taken over by administrative town planning in the government. Superimposed on such administrative town planning is statutory planning of the Town Planning Board.

All other forward planning methods have been retained and 'modernized' by the Lands Authority through introducing 'master layout plans' (MLP) and 'design-disposition-height' (DDH) clauses. However, most of the remaining and modernized forward planning methods have been 'borrowed' by both the Building Authority and the Town Planning Board:

(a) The *Buildings Ordinance* and its subsidiary legislation provide for: (i) a system of building application that adds to the building planning stipulations in the lease, and (ii) a system of site classification for the purpose of calculating plot ratios for buildings as well as (iii) the statutory consideration of the 'immediate neighbourhood'.
(b) The Town Planning Board has introduced plot ratio and building height restrictions. These have been held as valid, *intra vires* planning concerns in the *CC Tze Case*.
(c) The Town Planning Board has imported from the Lands Authority the concept of 'master layout plans' for the 'Comprehensive Development Area' zones.

Since the 1840s, the Lands Authority has conducted development control by:

(a) considering applications for lease modification in respect of subdivision or combination of lots; change in user restrictions; change in building restrictions and other types of development restriction; and
(b) enforcing breach of lease terms, including those relating to user and building matters.

The introduction of the *Buildings Ordinance* means that the development control function of the Lands Authority in respect of enforcing against unauthorized building is substantially taken over by the Building Authority. The introduction of the *Town Planning Ordinance* also means that:

(a) the decision of the Lands Authority in respect of a lease modification application becomes contingent upon the decision of the Town Planning Board in case planning permission is necessary; and

(b) the decision of the Building Authority in respect of a building application also becomes contingent upon the decision of the Town Planning Board in case planning permission is necessary.

However, statutory town planning and the decisions of the Town Planning Board are independent of both the Lands Authority and Building Authority in the following respects:

(1) Enforcement of statutory town plans (other than those with a history of interim development permission areas) relies on the *Buildings Ordinance.*
(2) 'Planning conditions' imposed by the Town Planning Board for an approved planning application is enforceable if they are incorporated in the lease or conditions as 'lease conditions'.
(3) Successful planning applications do not automatically entail successful lease modifications.
(4) Successful planning applications and lease modifications do not guarantee building permission.

The splitting or the so-called 'defederalization' of the lands, building and planning authorities (the last is supported by the planners in the government) into three separate departments from one single department (namely the Public Works Department and later Buildings and Lands Department) has led to greater specialization in processing development applications. The 'defederalization' is definitely in the interest of 'empire building' of bureaucrats and is perhaps a measure taken against corruption. However, it may also lead to some delay and interdepartmental coordination problems. As this book is not written from a public administration perspective, we will not elaborate on this observation.

BUILDING APPEALS IN PLANNING AND DEVELOPMENT CONTROL CONCERNS IN HONG KONG

Given the above definitions of 'planning' and 'development control', and the functional relationship among the three authorities, we shall now turn to the specific areas over which the Building Authority, Town Planning Board and Lands Authority have overlapping jurisdictions. These areas cover a number of key tools, considerations and concerns in both planning and development. **Figure 1.1** illustrates this observation.

Both the Town Planning Board and the Building Authority have specific statutory powers to deal with, i.e. 's. 16 planning applications' under the *Town Planning Ordinance* and 'building applications' under the *Buildings Ordinance* (and its subsidiary legislation). Such statutory powers are exercised without the consent of private individuals. The Lands Authority deals with lease allocation and lease modification applications by private individuals on

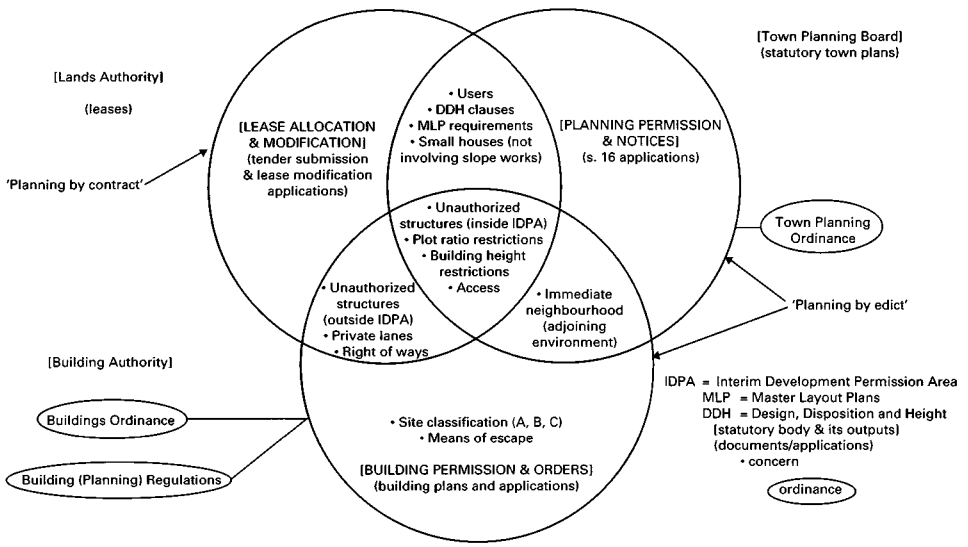


Figure 1.1 Some overlapping planning and development control functions of the Building Authority, the Lands Authority and the Town Planning Board
[NB. The Lands, Building and Planning Departments have started issuing 'joint practice notes' since February 2001.]

a contractual basis. One may therefore describe government 'planning' by lease as 'planning by contract' (Lai 1998).

Though the three authorities have specific and independent powers or contractual capacities, their tools, considerations and concerns for planning and development control in exercising such powers or capacities do overlap. The most common examples are presented in Figure 1.1. A total of six such tools, considerations and concerns as found in the appeal cases reviewed in this book are detailed as follows:

Common Concerns of the Building Authority and the Town Planning Board

Development Control

(1) The statutory interpretation of '**immediate neighbourhood**' under s. 16 (1)(g) of the *Buildings Ordinance*, is equivalent to the general concept of '**adjoining environment**' or '**adjoining development**' in the 's. 16 application' development control process under the *Town Planning Ordinance*. The focus of s. 16 (1)(g) of the *Buildings Ordinance* is **building height and its derivative factors:** fire prevention and escape, and access. However, in determining building appeals, the Building Appeal Tribunal does consider wider issues relating to compatibility with adjoining land uses. These issues are also the emphasis of the Town Planning Board decisions.

Common Concerns of the Building Authority and the Lands Authority

Planning

(2) The extinguishing or preservation of **private lanes** or **right of ways** is forward planning and development control. This concerns both the Building Authority and the Lands Authority. From their respective point of view, the consequence for public convenience and legitimate interests of the public are of paramount importance. The Building Authority's particular concern is the consequence for increase/decrease in plot ratio, and hence gross floor area. The Lands Authority's specific concern is the premiums payable as a result of the increased value of the land and the rights of other landowners and the public.

Development Control

(3) **'Unauthorized' structures** found *outside* areas being covered or once covered by a statutory 'Interim Development Permission Area' (IDPA) plan prepared under the *Town Planning Ordinance* by the Director of Planning (not the Town Planning Board) are the common development control concerns for the Building Authority and the Lands Authority, as they constitute a violation of expressed or implied conditions of sale/lease and the provisions of the *Buildings Ordinance*. The methods of 'enforcement' differ between the authorities. The Building Authority may issue **'orders'** for demolition whereas the Lands Authority may levy **'forbearance fees'** and apply to the court for **re-entry** of the land. In making decisions about enforcement, the primary concern of the Building Authority appears to be **immediate danger to the public**. Subsidiary considerations are fairness and ease of implementation where there is no imminent safety threat [see comments on cases regarding unauthorized structures, p. 68]. The primary consideration of the Lands Authority appears to be purely financial. Note that structures erected contrary to the *Buildings Ordinance* or *Town Planning Ordinance* may or may not result in a breach of the lease.

Common Concerns of the Building Authority, the Lands Authority and the Town Planning Board

Planning and Development Control

(4) **Building heights restrictions** can be imposed as:

(a) a forward planning parameter — **a mandatory ceiling** in conditions of sale/lease conditions and/or statutory town plans; and/or
(b) a development control consideration or 'condition' — a matter of **discretion** of the Building Authority in considering building plans

under s. 16(1)(g) of the *Buildings Ordinance,* or of the Town Planning Board in considering s. 16 planning applications.

The common concern is the visual impact and fire implications of building height on the adjoining environment, built and natural.

Planning and Development Control

(5) **Plot ratio restrictions** can be imposed as:

(a) a forward planning parameter — **a mandatory ceiling** in conditions of sale/lease conditions and/or statutory town plans; and/or
(b) a development control consideration or 'condition' — a matter of **discretion** of the Building Authority in considering building plans under s. 16(1)(g) of the *Buildings Ordinance,* or of the Town Planning Board in considering s. 16 planning applications.

The common concerns connected with plot ratios are:

(a) building height;
(b) the total amount of resulting floor space — a proxy for estimating population, traffic implications and environmental impacts on the adjoining environment, built and natural.

Planning and Development Control

(6) **Access and parking specifications/requirements** in forward planning and **traffic impacts** are development control factors. They are the considerations and conditions frequently invoked by the three authorities in exercising their respective powers or capacities. Note, however, that the court has decided that the Building Authority should leave general traffic considerations to the town planners. See *Wing On Co. Ltd. and Anor v Building Authority* [1996] 6 HKPLR 423.

The common concerns are convenience and safety.

BUILDING APPEALS IN THE PLANNING AND DEVELOPMENT PROCESS

In order to properly understand the six concerns in the private development process, one needs to fully understand the interrelationships among the following contractual, administrative or legislative documents:

(a) government leases;
(b) statutory town plans prepared by the Town Planning Board (Outline Zoning Plans; Development Permission Area Plans);

(c) statutory town plans prepared by the Planning Department (Interim Development Permission Area Plans);
(d) administrative town plans and planning documents prepared by the Planning Department (notably the Explanatory Statements to both statutory and administrative town plans; documents of the Territorial Development Strategy (TDS) Review; documents of Sub-Regional Development Studies, particularly the Development Statements; Outline Development Plans; Layout Plans; and *Town Planning Manual*);
(e) administrative guidelines of the Lands Department (*Lands Instructions*);
(f) administrative standards and guidelines of the Planning Department (Hong Kong Planning Standards and Guidelines (HKPSG));
(g) administrative guidelines of the Town Planning Board (Town Planning Board Guidelines);
(h) practice notes and practice directions of the Lands Department (Nissim 1998);
(i) practice notes and practice directions of the Buildings Department (Appendix 2); and
(j) the relevant statutory provisions in the *Buildings Ordinance, Building (Planning) Regulations, Town Planning Ordinance* and other pieces of legislation.

Conceptually, town planners in the government have the following logical and 'hierarchical' concept of how planning and development control should take place:

(1) formulation/revision of Territorial Development Strategy and the Hong Kong Planning Standards and Guidelines (the former is spatial and the latter a spatial-and-site specific);
(2) derivation/revision of Sub-Regional Development Strategies under (1) above;
(3) formulation/revision of Development Statements under (2) above;
(4) implementation of detailed district studies;
(5) preparation of Outline Zoning Plans under (3) and (4) above to serve as guides for future development;
(6) preparation of more detailed Outline Development Plans;
(7) preparation of Layout Plans under (6) above;
(8) drafting lease conditions (and engineering conditions) according to (5) and (6) above;
(9) allocation of land to lessees (and specific government departments);
(10) planning applications under Outline Zoning Plans (if necessary);
(11) lease modifications applications (if necessary);
(12) building applications; and
(13) actual development or redevelopment.

Note that in this conceptual scheme, administrative town planning using Outline Development Plans and Layout Plans should be governed by statutory

planning under Outline Zoning Plans. (For rural New Territories, Outline Zoning Plans are preceded by the Interim Development Permission Area and Development Permission Area Plans. This work does not consider the scenario of recent urban and rural development commencing with statutory planning that runs ahead of administrative planning.)

A broad outline of the actual, as opposed to the conceptual, steps taken by the government in planning and controlling an urban development area is given as follows. The procedures set out are assumed to be taken in an idealized scenario where there is no rejection to various applications by the lessee:

(1) prepare a Layout Plan and site formation;
(2) prepare an Outline Development Plan;
(3) prepare lease documents;
(4) allocate land to various lessees;
(5) the Building Authority approves building application by lessees (thereafter the lessees start building works; they will be unlikely to require major lease modification regarding user since the lease was granted not too long ago);
(6) prepare an Outline Zoning Plan (until recently, often a few years after completion of building work — the area can be considered an 'old urban area' now);
(7) the Town Planning Board approves applications for any change of use under s. 16 of the *Town Planning Ordinance* (or rezoning under the same Ordinance) by lessees which are caught under Column 2 and are not permitted under Column 1 or the cover Notes to the Outline Zoning Plan;
(8) the Lands Authority approves a lease modification (if the proposed use is not allowed under the lease); and
(9) the Building Authority approves building applications by lessees.

In the above process, it is assumed that the lessees do not need to overcome a s. 17(1) planning review or s. 17B planning appeal under the *Town Planning Ordinance*. Throughout the process, the Lands and Building Authorities maintain regular enforcement inspections. Steps (7) to (9) are the typical sequence for development, as the area becomes older. Note that for new development areas, administrative planning under Layout Plans and Outline Development Plans precedes statutory planning under Outline Zoning Plans. Outline Zoning Plans are hence initially plans for 'development control' whereas Layout Plans and Outline Development Plans are for 'forward planning'.

From the above conceptual and actual development process analysis, one can see that **building approvals are the key to development as it is in the most upstream direction of actual building development**. Successful planning applications and lease modifications amount to nothing if permissions for the proposed building plans are refused. In Hong Kong, buildings are expensive commodities. It pays to work faster. Besides, planning permissions have only a short life span of 2 to 3 years, outside which the proposed building

plans cannot be approved for contravention of town plans. Thus, **the building appeal procedures provide a developer hopes of overcoming the final hurdle to building construction**.

Having provided a general survey of the relationship among building, lands and planning authorities, we can now turn to the work of the Building Authority.

THE BUILDING AUTHORITY AND LEGISLATION

The *Buildings Ordinance* and its subsidiary legislation provide the legal basis for the work of the Building Authority whose main duties are to plan and control building development in respect of health and safety of occupants in buildings. The preamble to the *Buildings Ordinance* (Chapter 123, Laws of Hong Kong) reads:

> To provide for the planning, design and construction of buildings and associated works; to make provision for the rendering safe of dangerous buildings and land; and to make provision for matters connected therewith.

The administration of the *Buildings Ordinance* is vested with the Buildings Department. The Director of Buildings is the Building Authority.

The *Buildings Ordinance* provides the legal framework within which the following key aspects of building, planning and development control are regulated:

- **Planning** in terms of control on plot ratio, site coverage, open space, lanes, etc.
- **Design** in terms of provision of lighting and ventilation, projections, etc.
- **Construction** in terms of loading requirements, structural use of materials, retaining walls, etc.
- **Associated works** in terms of erection of hoarding, covered walkways, demolition, etc.
- **Safety** in terms of provision of means of escape, staircases, structural stability, etc.
- **Dangerous buildings** in terms of inspection, application of closure orders, issue of orders for repair or actual implementation of the repair works, etc.

All 'buildings' in Hong Kong are subject to control of the *Buildings Ordinance* except (under s. 41):

- buildings belonging to the HKSAR government;
- buildings upon any land vested in or under the control of the Housing Authority; etc.

Therefore, in general, all private developments of whatever uses (or users) will subject to control of the *Buildings Ordinance*. Building works in existing buildings which 'do not involve the structure of any building may be carried out in any building without application to or approval from the Building Authority' (ss. 41(3) and (3A)).

Thus, the scope of control under the *Buildings Ordinance* includes the following:

- exercising control on all **new** building developments, e.g. office buildings, residential blocks and other associated works such as foundation, demolition, structural and drainage works;
- exercising control on **dangerous buildings**, dangerous signs and slopes by a system of inspection, order and enforcement;
- exercising control on **unauthorized building works** by a system of inspection, order, prosecution and enforcement;
- providing **emergency** service to damaged buildings and scaffoldings, hoarding and signs in times of typhoon, flooding, fire damage, etc.
- **administering** the *Buildings Ordinance* in respect of prosecution, disciplinary actions, appeals, litigation and legislative review.

The *Buildings Ordinance (Application to the New Territories) Ordinance* (Chapter 121) allows the Building Authority to exempt certain works in the New Territories from the provisions of the *Buildings Ordinance*. Notable examples are 'New Territories Exempted Houses' or 'small houses'.

Subsidiary legislation to the *Buildings Ordinance* details the above requirements. Such subsidiary legislation refers to:

- *Building (Administration) Regulations*
- *Building (Construction) Regulations*
- *Building (Demolition Works) Regulations*
- *Building (Planning) Regulations*
- *Building (Private Streets and Access Roads) Regulations*
- *Building (Refuse Storage and Material Recovery Chambers and Refuse Chutes) Regulations*
- *Building (Standards of Sanitary Fitments, Plumbing, Drainage Works and Latrines) Regulations*
- *Building (Ventilation Systems) Regulations*
- *Building (Oil Storage Installations) Regulations*
- *Building (Energy Efficiency) Regulation*
- *Building (Appeal) Regulation*

There are a number of codes of practice which cover aspects such as fire safety, energy conservation and structural design for practitioners. They are also added as 'deemed to satisfy' designs. These codes of practice supplement and elaborate on the requirements stipulated in the *Ordinance* and *Regulations*.

There is also a set of Practice Notes for Authorized Persons and Registered Structural Engineers (PNAP) which updates current practice in respect of procedures and discretion of the Building Authority. Since 2001, 'joint practice notes' have been issued by the Lands Department, Buildings Department and Planning Department in respect of matters of common interests to the three government departments (see Appendix 2).

ORGANIZATION OF THE BUILDINGS DEPARTMENT

The Buildings Department was established as a separate department on 1 August 1993, and replaced the former Buildings Ordinance Office (BOO). It is a member of the Planning and Lands Bureau of the Government Secretariat. The department is divided into divisions covering the following areas:

- new buildings
- existing buildings
- technical and legal support
- special duties
- administration, information and building innovation

BUILDING DEVELOPMENT APPROVAL

In accordance with s. 14 of the *Buildings Ordinance*, approval should be obtained from the Building Authority before the commencement of any construction work. Under s. 4(1) of the *Buildings Ordinance*, any person for whom the building works is carried out shall appoint an Authorized Person (AP) acting as the coordinator of the works.

Authorized Persons are either architects, engineers or surveyors (mostly building surveyors) who have proven local experience and are registered under s. 3 of the *Buildings Ordinance*. In general, the AP provides professional advice to the client, prepare development proposals, carry out supervision, and coordinate with the Buildings Department regarding approvals, amendments, testing and inspection upon final completion of work.

The approval for new developments under the *Buildings Ordinance* takes two stages. The first stage is the approval of development drawings and associated designs. Under the current 'centralized processing system' (see PNAP 30), the Buildings Department will circulate plans to other relevant government departments for comments and concurrence, or approval. The vetting of plans and comments as required under various legislation for other government departments will be incorporated in a letter of approval or disapproval to the applicant. Here we shall concentrate on the approval procedure within the Buildings Department under the *Buildings Ordinance*.

Once a development proposal is submitted, the following fundamental aspects of a building proposal will be checked (see PNAP 99):

- density — site parameters, plot ratio, site coverage;
- safety — means of access for fire-fighting and rescue, means of escape in

case of fire, fire resistance and compartmentation, geotechnical assessment of potential landslip hazard;
- health and environment — lighting, ventilation, open space; and
- fundamental issues under allied legislation — fire safety, Outline Zoning Plans, access for persons with disability, airport height restrictions and railway reserve protection.

In accordance with s. 30 (3) of the *Building (Administration) Regulations*, the Building Authority should notify the AP within 60 days upon submission of plans on whether the plans are approved or not. The plans are deemed to have been approved if notice is not given within the statutory period. Thus, the Buildings Department's staff has to meet the 60-day deadline or else the developer's plans are deemed to be approved.

The second stage of the process is application for consent to commence work under s. 14 (1)(b) of the *Buildings Ordinance*. A statutory period of 28 days applies within which the Building Authority must notify the AP of its decision (s. 32 of the *Building (Administration) Regulations*). Upon receipt of the consent, seven days' prior notice must be given to the Building Authority before the actual commencement of construction work on site.

GROUNDS FOR REFUSAL OF PLANS

Refusal of plans of building works, street works and consent to commence work shall be made in accordance with s. 16 of the *Buildings Ordinance*. The followings are common grounds for refusal:
- plans submitted are not as prescribed by regulations;
- plans submitted are not endorsed or accompanied by a certificate from the Director of Fire Services;
- plans are not submitted using the prescribed forms;
- carrying out of works would contravene the *Buildings Ordinance* or other enactment, or would contravene any approved plan or draft plan prepared under the *Town Planning Ordinance*;
- there are inadequate documents to support the proposal as prescribed by regulations;
- prescribed fees are not paid;
- the carrying out of the building works would result in a building differing in height, design, type or intended use from buildings in the immediate neighbourhood or previously existing on the same site;
- new access is likely to be dangerous or prejudicial to the safety and convenience of traffic;
- further and better particulars are needed for consideration;
- the Department is not satisfied with the further particulars submitted in accordance with the above;
- the new building works require demolition of building which renders adjacent buildings dangerous;

- site formation works, piling works, excavation works or foundation works render adjacent land and building dangerous;
- the proposed domestic use is likely to contravene s. 49 of the *Building (Planning) Regulations* or is used for dangerous trade such as storage of dangerous goods, motor repair shop, and paint shop;
- the plans for proposal are on land that is under resumption;
- the plan is an unsatisfactory connection to public street;
- there is unjustified use of hand-dug caissons; and
- there is incompatibility with sewage tunnel works under s. 17A of the *Buildings Ordinance*.

The granting of an approval may be subject to specific conditions, such as the erection of shoring to adjacent buildings.

MODIFICATIONS OF BUILDING PLANS

There are cases where the building design, due to various reasons, cannot satisfy certain provisions of the regulations. The AP can apply to the Building Authority for exemption from and modification of the *Buildings Ordinance* and *Regulations* under s. 42 of the *Buildings Ordinance*.

The application must be made in the prescribed form. The Building Authority will consider every case on its own merits and shall not be required to take account of exemptions granted in the past.

Items modified shall not prejudice the standard of structural stability and public health. The usual items modified include inadequate lighting and ventilation to toilets, slight excess of gross floor area as a result of additional cladding to external walls, and erection of canopies over street for protection of public.

THE BUILDING APPEAL TRIBUNAL

Part VI of the *Buildings Ordinance* deals with appeal against decisions or orders of the Building Authority.

Under s. 44 of the *Buildings Ordinance*, 'a person' can appeal against decisions of the Building Authority objecting the refusal of plans or discretion exercised by the Building Authority under the *Buildings Ordinance*.

Under s. 45 of the *Buildings Ordinance*, the Chief Executive (previously the Governor) shall appoint persons to form an Appeal Tribunal Panel to deal with appeal cases. The period of appointment of panel members shall not be more than 3 years.

Upon receipt of a 'Notice of Appeal', the Chief Executive shall appoint, from the Appeal Tribunal Panel, a Tribunal consisting of a Chairperson and not less than 2 members to hear the appeal.

The Chairperson must be qualified for appointment as a District Court Judge under s. 5 of the *District Court Ordinance* (Cap. 336). The composition

of the Tribunal is such that the majority cannot be public officers. Those public officers acting as Chairperson or members of the Tribunal shall act in their personal capacity and not subject to any direction to consider the case as if he or she is a public officer.

The Chairperson and members of the Appeal Tribunal and any witness, counsel, solicitor or legal officer appearing before the Appeal Tribunal shall have the same privileges and immunities similar to a judge of the High Court in relation to civil proceedings (s. 53 (A) of the *Buildings Ordinance*).

Any person who refuses or fails without reasonable excuse to comply with any order or directions of the Appeal Tribunal or interferes with the proceedings commits an offence and is liable to a fine of $100 000 and to imprisonment for 6 months.

PROCEDURES OF THE BUILDING APPEAL TRIBUNAL

Under s. 38(1B) of the *Buildings Ordinance*, the Chief Executive in Council may by regulation provide for the procedures regarding appeal as well as the practice and procedures of the Appeal Tribunal. The *Building (Appeal) Regulation* gives detailed procedures under this section of the *Ordinance*.

Notice to Appeal must be made to the Secretary to the Appeal Tribunal in the prescribed manner and within 21 days after the notification of decision under appeal is sent.

Within 28 days from the Notice of Appeal is given, the appellant shall provide the following documents to the Secretary of the Appeal Tribunal and the Building Authority:

- particulars of the decisions the appeal relates;
- the grounds of appeal if not yet specified;
- a detail description of matters relating to the appeal;
- documents to be produced for the hearing;
- description of related property or land and declares any interest of the appellant on them; and
- particulars of the witness intends to call.

Upon receipt of the above documents, the Building Authority shall, within 28 days, furnish to the Secretary and the appellant any documents, representations in writing in his or her custody which he or she considers would assist the Tribunal to determine or otherwise dispose of the appeal. Either party can request the other party to furnish further particulars relevant to the case. The Tribunal may dismiss the appeal if the appellant is unable to furnish the required documents or comply with the request. However, the Chairperson may extend the time limits as stated above upon application by either of the parties.

Under s. 49 of the *Buildings Ordinance*, the Appeal Tribunal may hold a **preliminary hearing** to determine whether there is a good cause for a full hearing. The appeal may be dismissed if there is no such good cause. A 21-

day notice shall be given to each party on the date, time and place of the hearing. The appellant may withdraw his or her appeal or abandon any part of it by giving notice in writing to the Secretary and to the Building Authority. Appendices 3 and 4 compare the building and planning application/appeal systems and procedures.

CONDUCT OF THE BUILDING APPEAL TRIBUNAL

All decisions have to be made by a majority vote of the members of the Appeal Tribunal (s. 50 of the *Buildings Ordinance*). The Chairperson shall have a casting vote if there is an equality of votes. **Where there is any question of law, the Chairperson can refer to the Court of Appeal for its decision by way of 'case stated'.**

The hearing of an appeal shall be in public (s. 9(1) of the *Building (Appeal) Regulation*). The Chairperson may order the hearing or part of the hearing to be held in private by considering views or the private interest of the parties concerned and any claim as to privilege by any party to the appeal.

The Building Authority or the appellant may be represented in person or by counsel or solicitor. With the approval of the Chairperson, the Building Authority or the appellant may be represented by any person authorized by the party concerned in writing.

In the course of proceeding, the Appeal Tribunal (or by order a public officer) may enter and inspect any land or premises it considers relevant for the appeal, including opening up, taking samples and removing anything that obstructs the access.

As far as evidence is concerned, the Appeal Tribunal adopts a more relaxed guideline compared with formal proceedings in court. The Appeal Tribunal may receive all kinds of evidence such as oral and documentary, and it does not matter as to whether the evidence is on oath or affirmation.

The Appeal Tribunal can issue summons to the effect requiring any person to give evidence and produce any document. The decision of the Appeal Tribunal can confirm, vary or reverse the decision that is appealed against or substitute with another order it thinks fit.

Details of the appeal are to be recorded including details of the appellant and witness, evidence given, decisions, reasons and any order for cost. **The decision may be published in full or in part, whether or not the hearing is held public or private**. Members of the public can inspect decisions of the appeals by application to the Secretary of the Building Appeal Tribunal.

The Appeal Tribunal can make order to cover the cost of the hearing and determination, but will not award any compensation in relation to the appeal. If the cost is awarded against the appellant, it shall be recovered in accordance with s. 33 of the *Buildings Ordinance*. It is similar to the recovery of cost incurred by the Building Authority in carrying out works, supervision, abortive visits and other services for a particular person or project. Any costs awarded against the Building Authority shall be paid out of the general revenue.

2 BUILDING APPEAL RULES AND PRINCIPLES

GENERAL RULES

The 'rules' and principles in this chapter are decision criteria identified by the authors from the cases reviewed. Readers should note that although the Appeal Tribunal has stated that it is bound by its earlier decisions, the cases reviewed here are not exhaustive and all decisions are subject to case law in the relevant area. Examples of the applicable law cases are listed in Chapter 4. For the convenience of readers, we deliberately allow repetitions of some rules that are applicable to more than one heading.

Jurisdiction over Land Owned by Foreign Sovereign States

(1) The Tribunal has jurisdiction over property owned by foreign sovereign states. (*The No. 3 Barker Road Case*)

Tribunal Follows Rules Laid down by Its Predecessors

(1) The Tribunal generally abides by rules laid down by its predecessors as explained in the decisions in the following cases: *Cheer Kent, Jenxon Investment, China Engineers.*
(2) The Tribunal is bound by its earlier decisions. It should consistently apply the same principles to similar facts. To dismiss an appeal contrary to previous decisions will amount to condoning a double-standard practice. (*The Hedland Investments (2) Case*)
(3) On the grounds of precedents alone, the Tribunal must allow or dismiss an appeal. (*The Hedland Investments (2) Case*)

(4) When an appellant does not appear, the Tribunal may proceed to dismiss the appeal. (*The Cumberland Road Case*)

Costs

(1) The party which loses his or her case but is not represented when costs are asked for by the winning party may be given specific time to explain why costs should not be paid. (*The Laguna City Case*)
(2) Although costs would normally follow the event, the Tribunal, where much of the time is wasted by the appellant in pondering over irrelevant matters, may issue an order of half cost in favour of the successful party. (*The Shek O Village Case*)

Presumption of Compliance with Lease Conditions

(1) There should be a presumption that an applicant in a building application who is a lessee and/or his or her successors in title and assignment would observe the lease conditions. (*The Hong Kong Trade Mart Case*)

Property Rights Considerations

(1) In exercising its discretion under the second limb of section 16(1)(g), the Building Authority should attach significantly greater weight in the resulting negative factors if a refusal was to be justified **'because the use of the section limits a developer's right to develop his or her site to its full extent otherwise granted to him or her by the "Crown Lease" (now Government Lease) and the *Buildings Ordinance* and *Building (Planning)Regulations.*'** (*The Super Mate (2) Case*) (emphasis added)

Building and Town Planning Control

The Tribunal has stated more than once that section 16(1)(g) should not be used to limit developments in respect of town planning matters. Instances are the *No. 1 Robinson Road Case* and *NKIL53, Sect. C, Ngau Tau Kok Road Case.*

In the *No. 1 Robinson Road Case*, section 16(1)(g) was used by the Building Authority to prevent traffic congestion. The Tribunal said: 'The use of Section 16(1)(g) to plug a gap in town planning legislation, however laudable the motive, or pressing the situations of general public policy, would not be a proper exercise of the discretion vested in the Building Authority under that provision. . . .' Also, in the *Nos. 101, 103 and 105 Boundary Street Case (No. 2)*, density and positioning were ruled to be outside the ambit of section 16(1)(g) (Bokhary 1989).

In the *NKIL53, Sect. C, Ngau Tau Kok Road Case*, the Tribunal expressed: 'It would clearly be inappropriate for Section 16(1)(g) to be used as a stick to

obtain a limitation of building volume below the scales laid down in the first and second Schedules to the Building (Planning) Regulations.' It went on further to the extent which, in all practical sense, was uncompromising: 'It has been urged upon us and we accept that purchasers of land should be able to ascertain with complete precision the extent to which that land can be developed since the purchase price will reflect this development potential.' In other words, it is not justified to use section 16(1)(g) simply to avoid traffic saturation, limit density or control positioning.

An 'exception' is illustrated in *No. 2–11 Hok Sz Terrace Case*, which was decided merely three months after the *NKIL53, Sect. C, Ngau Tau Kok Road Case*. The site was served by stepped streets and there were concerns on the accessibility by fire engines, ambulances and, to a lesser extent, garbage collection vehicles. The use of section 16(1)(g) to curb development due to the lack of vehicular access was upheld by the Tribunal. It did not only uphold the rejection but also went further to suggest that the Building Authority should determine the site coverage and plot ratio for the site as if the case was under *Building (Planning) Regulations 19*, which said: 'Where a street abuts on a street less than 4.5 m wide or does not abut on a street, the height of a building on that site or of that building, the site coverage for the building and any part thereof and the plot ratio for the building shall be determined by the Building Authority.' The Tribunal regarded the application as an 'exceptional case' and there was 'overriding consideration' to ensure 'reasonable standards of safety'. The result of this case was that the Building Authority would decide on the site coverage and plot ratio for a site and then use its power of rejection under section 16(1)(g) indirectly to impose such restrictions on the site. The lack of normal road access was once again mentioned in the *No. 16 Repulse Bay Road Case* as one 'underlying factor' to which the second limb of section 16(1)(g) applied (Bokhary 1989).

(1) In considering an appeal in relation to the first limb of s. 16(1)(g) of the *Buildings Ordinance*, the Tribunal should not speculate on what future OZPs would or would not allow. (*The Jenxon Investment Case*)

(2) Section 16(1)(g) of the *Buildings Ordinance* cannot be used to plug gaps in the planning legislation. (The *China Engineers Case*, referring to the rules laid down by previous Tribunals.)

(3) The correct approach employed by the government to restrict development generally in stepped street areas is not to use the second limb of s. 16(1)(g) but to do so by way of an *Outline Zoning Plan* for the particular area. Under this OZP, the areas of limited access are defined and development restricted either by way of height limitation or limitation of plot ratio, or both. (*The Super Mate (2) Case*)

(4) Where the Notes to the OZP give no guidance as to how plot ratio is to be calculated, plot ratio should be determined by reference to the *Buildings Ordinance* and the *Building (Planning) Regulations*. Regulations 19 to 23 expressly deal with plot ratios of buildings in Hong

Kong. The Regulations recognize that there is a distinction between the calculation of GFA and the exceeding of plot ratio: see, for example, Regulation 22, compared with Regulation 23(3). This distinction has been recognized in practice. (*The Eaton Hotel Case*)

(5) The OZP is a piece of subsidiary legislation subject to the usual rules of statutory interpretation. (*The Eaton Hotel Case*)

Moral Obligation of the Government in Clarifying Development Potential

The government has a moral obligation to announce the areas and situations where Authorized Persons would be wise to make tentative inquiries from the Buildings Department. There is no question of any exercise of discretion under section 16(1)(g) unless the plans are actually submitted. The government cannot take into account possible future events and developments. The Tribunal has power to make its own decision in the light of the facts and evidence brought before it and, if appropriate, to impose its own decision in place of that of the Building Authority (Bokhary 1989).

In the *Nos. 2–11 Hok Sz Terrace Case*, which was referred to and its principle followed in the *Cheer Kent Case*, it was stated:

> It is true that the operation of Section 16(1)(g) may make it difficult for developers to know with precision the value of land, which reflects its development potential, and we feel there is a strong moral obligation upon Government to give wide publicity to areas and situations where developer's architects would be wise to make tentative enquires from the BOO as to extent of permitted development for instance in respect of all sites served only by stepped access.

No Consideration of Land Value Implications

(1) 'In reaching a decision about congruity of buildings, though the Tribunal should take account of the fact that the Crown Lease is unrestricted as to height which is different from all other lots in the area. . . . The discretion given under Section 16(1)(g) is quite clear and the fact that no compensation is given to land owners when the Building Authority decide to invoke Section 16(1)(g) is not a factor which can or should be taken into account by this Tribunal though it is something which might be considered before the Building Authority invokes its discretionary power under Section 16(1)(g).' (*The No. 6 Tai Po Road Case,* as cited in the *Jenxon Investment Case*)

(2) 'We upheld the decision of the Building Authority only because we felt it right in the end that Section 16(1)(g) should be invoked. The Appellant acquired an industrial site in 1975 in the expectation that such site could be developed to its full potential under the provisions of the *Buildings Ordinance*. As a result of later residential development

this safety factor had to weigh predominantly in the minds of those charged with the administration of the *Buildings Ordinance*. (*The Hedland Investments (1) Case*)

(11) The Director of Fire Services has no power to withhold a certificate where the problem is lack of access rather than failure to meet the Code of Practice published from time to time by the Director. The fact that the Director of Fire Services has issued a certificate pursuant to section 16(1)(b) is irrelevant for the purposes of determining matters regarding means of escape. (*The Hedland Investments (1) Case*)

(12) From the following leading appeal decisions,

(a) Nos. 2–11 Hok Sz Terrace, which was decided on 27 February 1973;
(b) Nos. 29–31 Sands Street, Case File No. GR/AT/70;
(c) Sheung Shui – S.S.I.L.5, Case File No. GR/AT/14/79;
(d) No. 115 Caine Road, Case No. 22/90;
(e) No. 8 U Lam Terrace, Case No. 54/90; and
(f) Nos. 4–5 Knutsford Terrace, Case No. 9/87 (referred also to as the *Cheer Kent Case* in this book),

two fundamental principles are established:

(a) the Building Authority is the proper authority to administer the *Buildings Ordinance*; and
(b) in exercising its discretion under section 16(1)(g) of the *Buildings Ordinance* and Regulation 19(2) of the *Building (Planning) Regulations*, the Building Authority must do so fairly and properly so as to ensure that public health and safety is not compromised. (*The Hedland Investments (2) Case*)

(13) The Tribunal is bound by its earlier decisions. It should consistently apply the same principles to similar facts. To dismiss an appeal contrary to previous decisions will condone a double-standard practice. (*The Hedland Investments (2) Case*)

(14) On the grounds of precedents alone, the Tribunal must allow or dismiss an appeal. (*The Hedland Investments (2) Case*)

(15) Unless their authors are available for cross-examination in the hearing, reports should not be produced. (*The Hedland Investments (2) Case*)

(16) The Building Authority has discretionary power in respect of s. 16(1)(g) of the *Buildings Ordinance*. (*The Super Mate (2) Case*)

(17) The manner in which discretionary power is exercised by the Building Authority is informed by Mr Justice Mayo in *Miscellaneous Proceedings 3896 of 1991* set out at pages 10 and 11:

> The principal matter that the Authority was concerned with was the safety of people in and around a building. S. 16(i)(g) related to the height of buildings and adjoining buildings in its vicinity. It was unrealistic to attempt to argue as Mr. Li had that 16(i)(g) was primarily concerned with aesthetic factors such as the overall profile of the buildings. The height of buildings primarily dictated the number of

Lack of access roads prevents firefighting vehicles from getting close to the buildings that are served in this area only by stepped streets. The problem of access extends also to ambulances and, to a lesser extent, garbage collection.' (The *Nos. 29–31 Sands Street Case,* as cited in the *No. 8 U Lam Terrace Case;* also cited in the *Hedland Investments (1) Case*)

(7) The *No. 115 Caine Road and Nos. 1–6 Po Wa Street (Case No. 22/90)* was also situated in a stepped street with no vehicular access. The proposed building was of 27 storeys in height with 6 units per floor making a total of 162 units. In dismissing the appeal, the Tribunal referred to the decisions of the *Nos. 2–11 Hok Sz Terrace* and *Nos. 29–31 Sands Street Cases. (The Hedland Investments (1) Case)*

(8) The *No. 8 U Lam Terrace Case (Case No. 54/90)* was also a stepped street with no vehicular access. In dismissing the appeal, the Tribunal referred to the decisions of the *Nos. 2–11 Hok Sz Terrace, Nos. 29–31 Sands Street and No. 115 Caine Road* and *Nos. 1–6 Po Wa Street (Case No. 22/90)Cases. (The Hedland Investments (1) Case)*

(9) Although the *Sheung Shui – S.S.I.L.5 Case* does not relate to proposed developments adjacent to stepped streets, the following passage from the Tribunal's decision, on the second limb of section 16(1)(g) of the *Buildings Ordinance,* is relevant:

> How then are we to construe the discretion vested in the Building Authority under the second limb of 16(1)(g)?
>
> Counsel for the Appellants has submitted that the Building Authority should exercise a discretion under the second limb only in the context of safety and public health and Counsel relies upon the general nature and character of the Buildings Ordinance which by its short title indicates that it is to amend and consolidate the law relating to the construction of buildings.
>
> With some reluctance we have come to the conclusion that the Building Authority's discretion under the second limb should be for the general purposes of the Ordinance, i.e. safety and public health, and not for the preservation of particular areas so as to maintain the character of these areas, which would amount to the assumption by the Building Authority of powers in the nature of town planning powers. (*The Sheung Shui – S.S.I.L.5 Case*, as cited in the *Hedland Investments (1) Case*)

(10) From the decisions in the *Nos. 2–11 Hok Sz Terrace, Nos. 29–31 Sands Street, No. 115 Caine Road and Nos. 1–6 Po Wa Street (Case No. 22/90), No. 8 U Lam Terrace (Case No. 54/90)* and *Sheung Shui – S.S.I.L.5 Cases*, the Tribunal found that the Building Authority, in exercising its discretion under the second limb of section 16(1)(g), had to constantly bear in mind a reasonable standard of safety for occupants in a high-rise building. In deciding whether or not to approve the building plans,

(3) It is well established that there are two limbs to section 16(1)(g). The Building Authority may refuse to approve building plans where a proposed building would differ in height, design, type or intended use from (a) buildings in the immediate neighbourhood (first limb) or (b) buildings previously existing on the same site (second limb). The second limb covers situations in which a proposed building 'would result in a building differing in height from the building previously existing on the same site.' (*The Hedland Investments (1) Case*)

(4) 'We take the view that the instant case is on all fours with the 3 cases referred to above. In each case, the street was stepped and there was no vehicular access so that vehicles such as ambulances and fire engines would not be able to reach the premises. In each case, the BA invoked section 16(1)(g) because he was concerned about the "safety of the occupants and the [sic] inadequate servicing for the proposed high-rise development". In our view, he is rightly so concerned: the safety of occupants in a high-rise building must weigh predominantly in deciding whether or not to approve the building plans.' (Comments of the Tribunal on the *Nos. 2–11 Hok Sz Terrace; Nos. 11–13 Sands Street and No. 105 Caine Road Cases* as cited in the *No. 8 U Lam Terrace Case*)

(5) 'When considering an appeal of this kind it is our duty to weigh very carefully the considerations which underlie the decision appealed against. On the one hand, developers should not be at the mercy of Government as to whether or not they will be able to develop sites to the maximum extent permitted by the schedules to the *Building (Planning) Regulations*. Intending purchasers make searches through architects and solicitors to ascertain whether or not the lease conditions contain restrictions on development, or whether the plans are subject to "special approval". If a developer is told that there are no such provisions, and that his intentions do not contravene any approved or draft plan prepared under the *Town Planning Ordinance*, he will normally conclude that a full development of the lot will be permitted, if plans are presented which comply with the relevant regulations. On the other hand, there are exceptional cases where there is some overriding consideration relating to the particular proposals for development in which the Building Authority would be failing in his duty to ensure reasonable standards of safety if he passed plans which otherwise conformed, and in these few cases failing within the precise language of Section 16(1)(g) plans can be disapproved even though all other requirements of the *Buildings Ordinance* have been observed.' (The *Nos. 2–11 Hok Sz Terrace Case,* as cited in the *No. 8 U Lam Terrace Case;* also cited in the *Hedland Investments (1) Case*)

(6) 'The duty of the Building Authority is to administer the Buildings Ordinance so as to have due regard to the safety of the occupants of buildings affected by planning proposals. As we said in the Hok Sz Terrace determination, in the final analysis the Building Authority is responsible for the due and proper administration of the Ordinance.

(19) The presence of non-residential uses (such as a duck processing factory, a building contractor's yard and a building contractor's storage facilities) are 'very much part of the life of a New Territories village the use of which is essentially residential'. (*The China Engineers Case*)
(20) When an appellant does not appear, the Tribunal may proceed to dismiss the appeal. (*The Cumberland Road Case*)

Immediate Neighbourhood in the New Territories

(1) The presence of non-residential uses (such as a duck processing factory, a building contractor's yard and a building contractor's storage facilities) are 'very much part of the life of a New Territories village the use of which is essentially residential'. (*The China Engineers Case*)

'Previously Existing' and 'Stepped Access': Second Limb of s. 16(1)(g)

(1) The second limb of section 16(1)(g) stipulates that buildings proposals which differ in height, design, type or intended use from buildings previously existing on the same site may be refused. In the *Sheung Shui Inland Lot No. 5 Case*, the Tribunal ruled: '. . . in a second limb case congruity is not the test because it is difficult to envisage how congruity with a building which is to be demolished would, per se, be in the public interest.' It further elaborated: '. . . the Building Authority's discretion under the second limb should be for the general purposes of the Ordinance, i.e., safety and public health, and not for the preservation of particular areas so as to maintain the character of these areas, which would amount to the assumption by the Building Authority of powers in the nature of town planning powers.' (Bokhary 1989)

It seems that the second limb is similar to the **design, disposition and height of buildings** clause stipulated in some government leases. However, the Tribunal has said: 'it is not for the Tribunal to comment upon the matter of enforcement of lease condition, which is outside the scope of Section 16 of the Buildings Ordinance' (Bohkary 1989) (emphasis added).

(2) The Tribunal has said more than once that there are two alternative limbs to section 16(1)(g): the Building Authority may refuse to approve building plans where a proposed building would differ in height, design, type or intended use from (a) buildings in the immediate neighbourhood, or (b) buildings previously existing on the same site. Where the Building Authority invokes the second limb rather than the first, namely the proposed building 'would result in a building differing in height from the building previously existing on the same site', whether the proposed building would differ from buildings in the immediate neighbourhood (a question falling within the first limb) is an irrelevant consideration. (*The No. 8 U Lam Terrace Case*)

"neighbourhood", it indicates a smaller much more compact unit having identifiable common features.' (*The No. 1 Robinson Road Case,* as cited in the *Jenxon Investment Case*)

(11) Even if members of the Tribunal did, either unanimously or by a majority, define the 'immediate neighbourhood' of the subject site as being larger than that defined by the Case Officer, it would still be in order for the Tribunal to substitute its definition for the Building Authority's, and proceed to consider the question of whether the proposed building would be incongruous with (differed in height from others) in that neighbourhood to an extent which would justify the Building Authority in exercising its discretion under s. 16(1)(g). (*The Jenxon Investment Case*)

(12) 'In reaching a decision about congruity of buildings, though the Tribunal should take account of the fact that the Crown Lease is unrestricted as to height which is different from all other lots in the area. . . . The discretion given under Section 16(1)(g) is quite clear and the fact that no compensation is given to land owners when the Building Authority decides to invoke Section 16(1)(g) is not a factor which can or should be taken into account by this Tribunal though it is something which might be considered before the Building Authority invokes its discretionary power under Section 16(1)(g).' (*The No. 6 Tai Po Road Case,* as cited in the *Jenxon Investment Case*)

(13) Section 16(1)(g) of the *Buildings Ordinance* cannot be used to plug gaps in the planning legislation. (*The China Engineers Case*)

(14) The 'existing use' which has to be examined in relation to the 'immediate neighbourhood' of a site is the use of buildings outside the site in question, not the existing use of the site. (*The China Engineers Case*)

(15) 'A neighbourhood does have common features of identity, and is usually defined by roads, open spaces or other physical features. When the word "immediate" precedes the word "neighbourhood", it indicates a smaller, more compact unit having identifiable common features.' (*The No. 1 Robinson Road*, as cited in the *China Engineers Case*)

(16) The 'intended use' of a proposed building is the use indicated in the building plans submitted for approval rather than a use claimed. (*The China Engineers Case*)

(17) It is not true that it is only appropriate to differentiate between residential and industrial uses and that it is inappropriate to subdivide industrial uses any further for the purposes of section 16(1)(g). The reason, in the words of the Tribunal, is that 'there is nothing in the Ordinance which requires us to do this and, in reality, there are a large number of different industrial uses. The tables to Regulations 25 and 184 of the *Building (Construction) Regulations* make distinctions between certain types of industrial use.' (*The China Engineers Case*)

(18) In ascertaining 'the use' of the immediate neighbourhood, it is appropriate for the Building Authority to look at the immediate neighbourhood and see whether there is any 'predominant' use. (*The China Engineers Case*)

also decide not to invoke s. 16(1)(g) of the *Buildings Ordinance*. It may take into consideration other factors in deciding whether or not to exercise its power. Where it decides to exercise that power, it does not mean that the Authority is 'plugging a gap' in the *Town Planning Ordinance*. (*The Jenxon Investment Case*)

(3) The Tribunal said that it is '. . . apparent from the language [of section 16(1)(g)] that discretionary power is given to refuse plans for incongruous buildings'. (*The No. 1 Robinson Road Case*) (Bokhary 1989)

(4) In order to dismiss any case on incongruity, the immediate neighbourhood must be congruous in the first place. The '. . . argument [of incongruity] is only relevant if the immediate neighbourhood is of a like character, . . .' (*The Nos. 10–18 Kennedy Terrace Case*) (Bokhary 1989)

(5) Generally: 'If there is no congruity to preserve, then an exercise of discretion based on the prevention of incongruity is bad.' (*The No. 12 Bowen Road Case*) (Bokhary 1989)

(6) '. . . to establish a case on incongruity the Crown must show that it (the proposal) is totally out of place and out of context in a defined area . . .' (*The No. 16 Repulse Bay Road Case*) (Bokhary 1989)

(7) The Building Authority should consider the fact and degree of incongruity in each case. The fact that the Tribunal accepted a 20-storey block amongst low-rise blocks before does not necessarily mean that a 42-storey block is also acceptable (*The No. 2A Mount Davis Road Case*). Besides, the fact that there are a number of buildings of different heights in the area does not necessarily mean that one more building of different height would make any difference. Note, however, in the *No. 12 Bowen Road Case*, the developer was successful in arguing the proposed 31-storey building would not result in incongruity amongst the 3 high-rise buildings within the immediate neighbourhood (one of 24 storeys and two of 17 storeys). (Bokhary 1989)

(8) In considering an appeal in relation to s. 16(1)(g) of the *Buildings Ordinance*, the Tribunal should not speculate on what future OZPs would or would not allow. (*The Jenxon Investment Case*)

(9) The Tribunal 'can and should look at current development in the area, for example, where building works are currently progressing or possibly where plans for development have been approved and the works are about to commence. On the other hand, *future possibilities and the massive development in the Tai Po area which is only projected or has not yet started should be discounted.*' (*The No. 6 Tai Po Road Case,* as cited in the *Jenxon Investment Case*)

(10) 'In interpreting the expression "in the immediate neighbourhood", this is clearly broader and more flexible than "adjacent" or "nearly adjacent" or "in the same street" (expressions normally to be found in a Rate and Range Clause in a Crown Lease), but a neighbourhood does have common features of identity, and is usually defined by roads, open spaces or other physical features. When the word "immediate" precedes the word

As regards the question of access as a test on how far the immediate neighbourhood should extend, the Tribunal in the *Nos. 16–18 MacDonnell Road Case,* in considering the immediate neighbourhood, excluded two buildings simply because they had entrances served by roads other than MacDonnell Road.

As regards whether the 'height' of the proposed building is different from the immediate neighbourhood (as determined by the Tribunal), the number of storeys is not the sole consideration. The Building Appeal Tribunal has indicated that *actual height measurement*, rather than the number of storeys, is more important. In the *Nos. 1–3 Leung I Fong Case*, all the existing buildings in the immediate neighbourhood of the subject site were of three storeys except one (of two storeys). The Tribunal indicated that as long as the proposed building was not higher than the existing building on the site (which was 41 feet), '. . . the Appellant's Architects may well be able to design a building containing as many as four storey, . . .'

However, a mere difference in height within the immediate neighbourhood has not been regarded by the Tribunal as proper basis for rejecting an application. This is indicated in the *Victoria Road Case* where the question is whether such a difference gives rise to incongruity.

Where 'there was no absolute uniformity of type, height, size or shape, but the common feature is that all the buildings are low-rise, and the high-rise development of 16 storeys in the immediate neighbourhood of the subject site would, in our view, be incongruous . . . Whilst section 16(1)(g) cannot be used as a stick to limit building volumes below the scales laid down in the Buildings Ordinance, the provision is in our view available to preserve the character of a clearly-defined neighbourhood, . . .' (*The Nos. 101, 103 and 105 Boundary Street Case (No. 1)*)

(1) The following questions should be answered in determining the 'immediate neighbourhood' for the purpose of building height control under s. 16(1)(g):
   (a) What is the immediate neighbourhood of the subject site?
   (b) Having defined the immediate neighbourhood of the subject site, would the proposed building works differ in height from others in that neighbourhood to an extent that would justify the Building Authority's exercising discretion under section 16 (1)(g)? (*The Master Bright Case*)

(2) The following rule stated by the Tribunal in the *No. 12 Bowen Road case* should be noted in relation to the preservation of building character of a neighbourhood:
   (a) 'If there is no congruity to preserve, then an exercise of discretion based on the preservation of incongruity is bad.' (*The Master Bright Case*)
   (b) Once there is an immediate neighbourhood incongruity, the Building Authority may refuse to give its approval of the plans but it may

factors in the balance and decide whether or not there is such a weight of negative factors resulting from the difference in height as to justify a refusal. We believe there must be some significantly greater weight in the resulting negative factors if a refusal is to be justified because the use of the section limits a developer's right to develop his site to the full extent otherwise granted to him by the Crown Lease and the Building Ordinance and Regulations.' (*The U Lam Terrace Case*, as cited in the *Ying Fai Terrace Case*)

Regulation 5(2) of the *Building (Planning) Regulations* and Regulation 6(1) of the *Building (Private Street and Access Roads) Regulations*

(1) The Building Authority has a discretion in the matter of Regulations 5(2) and 6(1). The Tribunal finds that there has been an impressive consistency with which the Building Authority's policy has been followed over the years. It was said, 'we are not persuaded that the policy is out of date nor do we see any compelling reason why it should not be followed in the instant case. Regulation 5(2) and regulation 6(1) are there for a particular purpose: they are there to ensure the safety and well-being of the public in general and the residents of buildings in particular. Indeed, we would be failing in our duty if we, by a stroke of the pen, reversed that well-established policy overnight.' (*The Perfect Chance Case*)

'Immediate Neighbourhood': First Limb of s. 16(1)(g)

General Notes (Bokhary 1989)

In the *No. 1 Robinson Road Case*, the Building Appeal Tribunal stated: '. . . a neighbourhood does have common features of identity, and is usually defined by roads, open spaces or other physical factors. When the "immediate" precedes the word "neighbourhood", it indicates a smaller, more compact unit having identifiable common features.' This definition was adopted in the *No. 3 MacDonnell Road Case* and the *No. 12 Bowen Road Case*. Site visits are often conducted by members of the Tribunal in order that they can inspect the 'neighbourhood' concerned. The 'immediate neighbourhood' for an urban area is usually taken to refer to a much smaller in the area than in a rural setting (see the *No. 6 Tai Po Road Case*).

The Tribunal would decide the meaning of the 'immediate neighbourhood'. Areas 'immediately' adjacent to a site may not necessarily fall in the 'immediate neighbourhood' delineated by the Tribunal. In the *Inland Lot No. 2603, Victoria Road Case (No. 1 & 2)*, the developer succeeded in arguing for the exclusion of Bisney Villas from the 'immediate neighbourhood' relevant for deciding the case in question. Bisney Villas consisted of houses and low-rise flats upon narrow internal roads which were physically adjacent to the subject site.

the height of a building on that site or of that building, the site coverage for the building and any part thereof and the plot ratio for the building shall be determined by the Building Authority.' The Tribunal regarded the application as an 'exceptional case' and there was 'overriding consideration' to ensure 'reasonable standards of safety'. The result for this case was that the Building Authority would decide on the site coverage and plot ratio for a site and then use its power of rejection under section 16(1)(g) indirectly to impose such restrictions on the site. The lack of normal road access was once again mentioned in the *No. 16 Repulse Bay Road Case* as one 'underlying factor' to which the second limb of section 16(1)(g) applies (Bokhary 1989).

(1) Once there is an immediate neighbourhood incongruity, the Building Authority may refuse to give its approval of the plans but it may also decide not to invoke s. 16(1)(g) of the *Buildings Ordinance*. It may take into consideration other factors in deciding whether or not to exercise its power. Where it decides to exercise that power, it does not mean that it is 'plugging a gap' in the *Town Planning Ordinance*. (*The Jenxon Investment Case*)

(2) Section 16(1)(g) of the *Buildings Ordinance* cannot be used to plug gaps in the planning legislation. (*The China Engineers Case*, referring to the rules laid down by previous Tribunals)

(3) Even if members of the Tribunal did, either unanimously or by a majority, define the 'immediate neighbourhood' of the subject site as being larger than that defined by the Case Officer, it would still be in order for the Tribunal to substitute its definition for the Building Authority's and proceed to consider the question of whether the proposed building would be incongruous with (differed in height from others) in that neighbourhood to an extent which would justify the Building Authority in exercising its discretion under s. 16(1)(g). (*The Jenxon Investment Case*)

(4) In considering an appeal in relation to s. 16(1)(g) of the *Buildings Ordinance*, the Tribunal should not speculate on what future OZPs would or would not allow. (*The Jenxon Investment Case*)

(5) Where a proposed new building is superior than an existing one it replaces in terms of fire safety and its additional population would create negligible adverse impacts, then it is not appropriate to reject the proposal on general policy grounds concerning the adverse consequences under s. 16(1)(g) of the *Buildings Ordinance*. (*The Nos. 4, 4A and 4B, Ying Fai Terrace Case*)

(6) 'It seems to us that what the Building Authority has to do when considering the exercise of his discretion under this limb of Section 16(1)(g) is to ask himself what negative factors will result from the difference in height between the buildings previously on the site and the proposed building. After doing this the Building Authority has to weigh both the positive factors resulting from redevelopment and such negative

5 Case, the Tribunal ruled: '. . . in a second limb case congruity is not the test because it is difficult to envisage how congruity with a building which is to be demolished would, per se, be in the public interest'. It further elaborated: '. . . the Building Authority's discretion under the second limb should be for the general purposes of the Ordinance, i.e., safety and public health, and not for the preservation of particular areas so as to maintain the character of these areas, which would amount to the assumption by the Building Authority of powers in the nature of town planning powers' (Bokhary 1989).

It seems that the second limb is similar to the **design, disposition and height of buildings** clause stipulated in some government leases. However, the Tribunal has said: 'it is not for the Tribunal to comment upon the matter of enforcement of lease condition, which is outside the scope of Section 16 of the Buildings Ordinance' (Bohkary 1989) (emphasis added).

The Tribunal has stated more than once that section 16(1)(g) should not be used to an extent to limit developments in respect of town planning matters. Instances are the *No. 1 Robinson Road Case* and *NKIL53, Sect. C, Ngau Tau Kok Road Case*.

In the *No. 1 Robinson Road Case*, the Building Authority used section 16 (1)(g) to prevent traffic congestion; the Tribunal said: 'The use of Section 16 (1)(g) to plug a gap in town planning legislation, however laudable the motive, or pressing the situations of general public policy, would not be a proper exercise of the discretion vested in the Building Authority under that provision . . . '. Also, in the *Nos. 101, 103 and 105 Boundary Street Case (No. 2)*, density and positioning are ruled to be outside the ambit of section 16(1)(g) (Bokhary 1989).

In the *NKIL53, Sect. C, Ngau Tau Kok Road Case*, the Tribunal expressed: 'It would clearly be inappropriate for Section 16(1)(g) to be used as a stick to obtain a limitation of building volume below the scales laid down in the first and second Schedules to the Building (Planning) Regulations.' It went on further to the extent which, in all practical sense, was uncompromising: 'It has been urged upon us and we accept that purchasers of land should be able to ascertain with complete precision the extent to which that land can be developed since the purchase price will reflect this development potential.'

In other words, it is not justified to use section 16(1)(g) simply to avoid traffic saturation, limit density or control positioning.

An 'exception' is illustrated in the *No. 2–11 Hok Sz Terrace Case*, which was decided merely three months after the *NKIL53, Sect. C, Ngau Tau Kok Road Case*. The site was served by stepped streets and there were concerns on the accessibility by fire engines, ambulances and, to a lesser extent, garbage collection vehicles. The use of section 16(1)(g) to curb development due to the lack of vehicular access was upheld by the Tribunal. The Tribunal did not only uphold the rejection but also went further to suggest that the Building Authority should determine the site coverage and plot ratio for the site as if the case was under *Building (Planning) Regulation 19*, which states: 'Where a street abuts on a street less than 4.5 m wide or does not abut on a street,

Section 16(1)(d) and Town Planning

Section 16(1)(d) stipulates that 'the Building Authority may refuse to give his approval of any plans of building works where . . . (d) the carrying out of the building works shown thereon would contravene the provision of this Ordinance or of any other enactment, or would contravene any approved or draft plan prepared under the Town Planning Ordinance (Cap. 131); . . .' This was illustrated in the *Nos. 101, 103 and 105 Boundary Street Case (No. 2)*. Before the decision to allow an appeal under section 16(1)(g) was given, a Draft Zoning Plan which imposed a maximum plot ratio restriction on the site was published in the gazette. Apparently, the use of section 16(1)(g) seemed to serve the purpose to delay the decision on the case so that the proposal would eventually be rejected by invoking section 16(1)(d). As Bokhary (1989) pointed out, 'section 16(1)(g) held the fort long enough for a draft town plan to gallop to rescue'.

(1) Zone 1 parking standards should apply to a site which abuts both Zone 1 and Zone 2 roads. (*The Nos. 1–9 Breezy Terrace Case*)

Interpretation of s. 16(1)(g)

Section 16(1)(g) provides that 'The Building Authority may refuse to give his approval of any plans of building works where . . . (g) the carrying out of the building works shown thereon would result in a building differing in height, design, type or intended use from buildings in the immediate neighbourhood or previously existing on the same site'. It is more common for the Building Authority to rely on the 'immediate neighbourhood' limb for refusal of plans (Bokhary 1989). See *'Immediate Neighbourhood': First Limb of s. 16(1)(g)* below.

Section 16(1)(d) stipulates that 'the Building Authority may refuse to give his approval of any plans of building works where . . . (d) the carrying out of the building works shown thereon would contravene the provision of this Ordinance or of any other enactment, or would contravene any approved or draft plan prepared under the Town Planning Ordinance (Cap. 131); . . .' This was illustrated in the *Nos. 101, 103 and 105 Boundary Street Case (No. 2)*. Before the decision to allow an appeal under section 16(1)(g) was given, a Draft Zoning Plan which imposed a maximum plot ratio restriction on the site was published in the gazette. Apparently, the use of section 16(1)(g) seemed to serve the purpose to delay the decision on the case so that the proposal would eventually be rejected by invoking section 16(1)(d). As Bokhary pointed out, 'section 16(1)(g) held the fort long enough for a draft town plan to gallop to rescue' (Bokhary 1989).

The second limb of section 16(1)(g) stipulates that buildings proposals which differ in height, design, type or intended use from buildings previously existing on the same site may be refused. In the *Sheung Shui Inland Lot No.*

(such as the gazetting of an Outline Zoning Plan) is not relevant and should not be taken into account. Likewise we would think that the approval of plans for buildings in the immediate neighbourhood given after the decision of the Building Authority would also not be relevant. However, any evidence which clarifies the circumstances ruling at the time of the Building Authority's decision is relevant and can be taken into account.' (*The China Engineers Case*)

(2) Unless their authors are available for cross-examination in the hearing, reports should not be produced. (*The Hedland Investments (2) Case*)

(3) The Building Authority shall make full disclosure of the minutes of relevant meetings in an appeal hearing. (*The Hedland Investments (2) Case*)

(4) Reports should not be produced in evidence in an appeal hearing unless the reports have been considered by the Building Authority. (*The Super Mate (2) Case*)

Section 42 Exemptions

(1) The Tribunal is not bound by any internal practice memorandum of the government. (*The Hoi Yuen Road Case*)

(2) In deciding the provision of 'streets' on a site 'having adequate connection to public streets', the Tribunal will ask itself two questions: (1) whether or not it is correct for the Authority to consider that the site comes within s. 16(1)(p) of the *Buildings Ordinance*; and (2) whether any proposed driveway is sufficient. The second question in turn depends on two sub-questions: whether (a) the site is provided with 'streets'; and (b) if so, whether such streets are adequate connection to 'a public street'. (*The Hoi Yuen Road Case*)

(3) The Tribunal has jurisdiction over property owned by foreign sovereign states. (*The No. 3 Barker Road Case*)

(4) The purpose of the *Building (Private Streets and Access Roads) Regulations* is 'to lay down minimum requirements which the Government considers necessary to safeguard those using private streets and access roads. One fundamental part of these Regulations is that pedestrian traffic and vehicular traffic should be safely segregated from each other'. (*The No. 3 Barker Road Case*)

(5) The existence of illegal structures is not a special circumstance for exemption under s. 42 of the *Buildings Ordinance*. (*The No. 24 Java Road Case*)

(6) Section 14(2) of the *Buildings Ordinance* is usually cited as permitting the Building Authority to grant approval to plans for development even though plans infringe the legal rights of others. (*The No. 24 Java Road Case*)

(13) Section 16(1)(h) of the *Buildings Ordinance* should not be limited to a potential traffic hazard or inconvenience in the immediate vicinity of an access opening to or from a street. This position is adopted by the Tribunal in the *No. 101 Pokfulam Road Case* where the Tribunal held that section 16(1)(h) applied to a potential traffic hazard which might occur some distance away from the subject site. (*The Kennedy Road Case*)

(14) Where a proposed new building is superior than an existing one it replaces in terms of fire safety and its additional population would create negligible adverse impacts, then it is not appropriate to reject the proposal on general policy grounds concerning the adverse consequences under s. 16(1)(g) of the *Buildings Ordinance*. (*The Nos. 4, 4A and 4B, Ying Fai Terrace Case*)

(15) 'It seems to us that what the Building Authority has to do when considering the exercise of his discretion under this limb of Section 16 (1)(g) is to ask himself what negative factors will result from the difference in height between the buildings previously on the site and the proposed building. After doing this, the Building Authority has to weigh both the positive factors resulting from redevelopment and such negative factors in the balance and decide whether or not there is such a weight of negative factors resulting from the difference in height as to justify a refusal. We believe there must be some significantly greater weight in the resulting negative factors if a refusal is to be justified because the use of the section limits a developer's right to develop his site to the full extent otherwise granted to him by the Crown Lease and the Buildings Ordinance and Regulations.' (*The U Lam Terrace Case*, as cited in the *Ying Fai Terrace Case*)

(16) The owner, not the Authorized Person, is the proper person to whom an Order under s. 24(A) of the *Buildings Ordinance* be served. (*The True Dragon Properties Case*)

Rules of Evidence in Appeals

(1) 'The *Buildings Ordinance* contains very little assistance as to what powers the Tribunal has except to the very limited extent set out in Section 44 of the Ordinance. It is clear that the Tribunal can require witnesses to attend and give evidence, they can compel production of documents, inspect premises and enter and view premises. Building Appeal Tribunals have in the past heard evidence on relevant matters and in this sense the appeal is by way of rehearing. However the question arises as to whether there is any limit to the evidence which can be put before the Tribunal, particularly in respect of events which have occurred since the decision of the Building Authority in question. We consider it to be right (and it has been accepted by previous Tribunals) that evidence of new circumstances arising after the decision of the Building Authority

> are sufficient. This would certainly impinge on the safety of the Building. I have no doubt that the Authority was not acting illegally when it made the determination it did in the present case (as cited in the *Super Mate (2) Case*).

(9) The evidence the Tribunal can admit: 'The Buildings Ordinance contains very little assistance as to what powers the Tribunal has except to the very limited extent set out in Section 44 of the Ordinance. It is clear that the Tribunal can require witnesses to attend and give evidence, they can compel production of documents, inspect premises and enter and view premises. Building Appeal Tribunals have in the past heard evidence on relevant matters and in this sense the appeal is by way of rehearing. However the question arises as to whether there is any limit to the evidence which can be put before the Tribunal, particularly in respect of events which have occurred since the decision of the Building Authority in question. We consider it to be right (and it has been accepted by previous Tribunals), that evidence of new circumstances arising after the decision of the Building Authority (such as the gazetting of an Outline Zoning Plan) is not relevant and should not be taken into account. Likewise we would think that the approval of plans for buildings in the immediate neighbourhood given after the decision of the Building Authority would also not be relevant. However any evidence which clarifies the circumstances ruling at the time of the Building Authority's decision is relevant and can be taken in account.' (*The China Engineers Case* as cited in the *Super Mate (2) Case*)

(10) The proper approach that the Building Authority should follow in exercising its discretion under the second limb of section 16(1)(g) is to ask itself what negative factors will result from the difference in height between the buildings previously on the site and the proposed building. After doing this, the Building Authority has to weigh both the positive factors resulting from redevelopment and such negative factors in the balance and decide whether or not there is such a weight of negative factors resulting from the difference in height as to justify a refusal. (*The Super Mate (2) Case*)

(11) In exercising its discretion under the second limb of section 16(1)(g), the Building Authority should attach significantly greater weight in the resulting negative factors if a refusal was to be justified **'because the use of the section limits a developer's right to develop his or her site to its full extent otherwise granted to him by the "Crown Lease" (now Government Lease) and the *Buildings Ordinance and Building (Planning)Regulations*.'** (*The Super Mate (2) Case*) (emphasis and brackets added)

(12) In exercising its discretion under the second limb of section 16(1)(g), when the Building Authority is evaluating resulting negative factors on policy considerations, such considerations must relate specifically to the site rather than a general policy for a wide area. (*The Super Mate (2) Case*)

the decision of the Building Authority in the way which the Court was limited when approaching the exercise of discretion by the licensing authority in the Wednesbury case. In the absence of any guidance from the ordinance and, bearing in mind that we have the power to take evidence, call for documents, inspect premises and generally conduct an appeal by way of rehearing, we consider it our duty to ascertain whether or not the decision of the Building Authority was correct bearing in mind all the circumstances at the time the discretion was exercised. This means that if we consider after taking into account all the relevant evidence, that a right decision was made (even if it was flawed in the Wednesbury sense) we can still uphold the exercise of discretion. This may involve the Tribunal, in an appropriate case, exercising its own discretion and substituting it for that of the Building Authority. We are conscious that we may be developing upon or even expanding the powers which previous Building Appeal Tribunals have thought they were exercising. However, we take comfort from the fact that previous Tribunals (for instance that in *16A–16B Victory Avenue Case*) have adopted this procedure. It would be certainly of assistance if the legislature were to clarify these matters.' (*The China Engineers Case*)

(6) The Building Authority has discretionary power in respect of s. 16(1)(g) of the *Buildings Ordinance*. (*The Super Mate (2) Case*)

(7) The Tribunal said that it is '. . . apparent from the language of [section 16(1)(g)] that discretionary power is given to refuse plans for incongruous buildings'. (*The No. 1 Robinson Road Case*)

(8) The manner in which discretionary power is exercised by the Building Authority is informed by Mr Justice Mayo in Miscellaneous Proceedings 3896 of 1991 set out at pages 10 and 11:

> The principal matter that the Authority was concerned with was the safety of people in and around a building. S. 16(i)(g) related to the height of buildings and adjoining buildings in its vicinity. It was unrealistic to attempt to argue as Mr. Li had that 16(i)(g) was primarily concerned with aesthetic factors such as the overall profile of the buildings. The height of buildings primarily dictated the number of occupants who would be using them and the Authority was undoubtedly under a duty to take into account such factors as the density of the development.
>
> I have no doubt that Miss Harstein's view of the matter is the correct one. It is evident from a perusal of the section that wide discretions are given to the Authority. I can see no difficulty if these powers and discretions are exercisable side by side with power exercisable by such bodies as the Planning Board and the Fire Services Department. Each body views the overall situation from a different perspective but it is the Building Authority's responsibility to ensure that all requirements are adhered to. The height of a building is very much the concern of the Building Authority and there is a definite duty imposed on it to ensure that such matters as access to the Building

permitted by the Government, an unacceptable potential "interface" has been created between the residential blocks very close to the west of the site and the intended building on the site. **It is, indeed, possible that Section 16(1)(g) could be used legitimately by the Building Authority to prevent even a new smaller industrial building being erected on the Appellant's site.** The industrial development potential of the site has been stultified and **no right to compensation** is given to the Appellant. Clearly **it is entitled to sympathetic treatment if it applies for a change of use of the site to residential and we trust that Government will allow the full industrial floor area permitted by the *Buildings Ordinance and Regulations* (discounting Section 16(1)(g)) for the purposes of calculating the value of the site under its present uses.**' (*The China Engineers Case*) (emphasis added)

Government Land for Private Road Upgrading

(1) Section 29 deals with the maintenance of private streets and access roads and not with improvements of access roads to the standards laid down by Regulations 6(1) and 11(1). (*The Skilland Development Case*)

Administrative Law Principles for the Exercise of Discretionary Powers

(1) Considerations are taken into account in the exercise of discretion powers: 'As is well-known discretionary powers must all be exercised in good faith for the purpose for which they are granted and within the limits of the Ordinance or other instruments conferring the discretion. The discretion must also be exercised fairly and in accordance with proper legal principles and these standards imply that all relevant considerations must be taken into account and that extraneous considerations be disregarded by the person or body, in this case the Building Authority, exercising that power. The exercise of a discretion is invalidated if the way it was exercised was significantly influenced by the improper regard or disregard of the factors in issue (see *Associated Provincial Picture Houses Limited v Wednesbury Corporation* [1947] 2 AER 685).' (*The Pak On Building Case*)

(3) The Tribunal has no jurisdiction 'to look into administrative matters' of the Building Authority even where the latter first rejected and later approved the appellant's proposals, prejudicing the appellant. (*The Multi-Strategic Investment Case*)

(4) Where there is nothing to appeal against, as in a situation where the Building Authority approves an application before notice to appeal, no appeal inquiry will proceed. (*The Multi-Strategic Investment Case*)

(5) 'However we do not think that this Tribunal is limited in its approach to

> occupants who would be using them and the Authority was undoubtedly under a duty to take into account such factors as the density of the development.
>
> I have no doubt that Miss Harstein's view of the matter is the correct one. It is evident from a perusal of the section that wide discretions are given to the Authority. I can see no difficulty if these powers and discretions are exercisable side by side with power exercisable by such bodies as the Planning Board and the Fire Services Department. Each Body views the overall situation from a different perspective but it is the Building Authority's responsibility to ensure that all requirements are adhered to. The height of a building is very much the concern of the Building Authority and there is a definite duty imposed on it to ensure that such matters as access to the Building are sufficient. This would certainly impinge on the safety of the building. I have no doubt that the Authority was not acting illegally when it made the determination it did in the present case. (as cited in the *Super Mate (2) Case*)

(18) The evidence the Tribunal can admit: 'The Buildings Ordinance contains very little assistance as to what powers the Tribunal has except to the very limited extent set out in Section 44 of the Ordinance. It is clear that the Tribunal can require witnesses to attend and give evidence, they can compel production of documents, inspect premises and enter and view premises. Building Appeal Tribunals have in the past heard evidence on relevant matters and in this sense the appeal is by way of rehearing. However, the question arises as to whether there is any limit to the evidence which can be put before the Tribunal, particularly in respect of events which have occurred since the decision of the Building Authority in question. We consider it to be right (and it has been accepted by previous Tribunals), that evidence of new circumstances arising after the decision of the Building Authority (such as the gazetting of an Outline Zoning Plan) is not relevant and should not be taken into account. Likewise we would think that the approval of plans for buildings in the immediate neighbourhood given after the decision of the Building Authority would also not be relevant. However, any evidence which clarifies the circumstances ruling at the time of the Building Authority's decision is relevant and can be taken in account.' (*The China Engineers Case* as cited in the *Super Mate (2) Case*)

(19) The proper approach that the Building Authority should follow in exercising its discretion under the second limb of section 16(1)(g) is to ask itself what negative factors will result from the difference in height between the buildings previously on the site and the proposed building. After doing this, the Building Authority has to weigh both the positive factors resulting from redevelopment and such negative factors in the balance and decide whether or not there is such a weight of negative factors resulting from the difference in height as to justify a refusal. (*The Super Mate (2) Case*)

(20) In exercising its discretion under the second limb of section 16(1)(g), the Building Authority should attach significantly greater weight in the resulting negative factors if a refusal is to be justified **'because the use of the section limits a developer's right to develop his or her site to its full extent otherwise granted to him or her by the "Crown Lease" (now Government Lease) and the *Buildings Ordinance* and *Building (Planning) Regulations*.'** *(The Super Mate (2) Case)* (emphasis and brackets added)

(21) In exercising its discretion under the second limb of section 16(1)(g), when the Building Authority is evaluating resulting negative factors on policy considerations, such considerations must relate specifically to the site rather than simply a general policy for a wide area. *(The Super Mate (2) Case)*

(22) Reports should not be produced in evidence in an appeal hearing unless the reports have been considered by the Building Authority. *(The Super Mate (2) Case)*

(23) The correct approach for the government to restrict development generally in stepped street areas is not to use s. 16(1)(g) but to do so by way of an *Outline Zoning Plan* for the particular area. Under this OZP, the areas of limited access are defined and development is restricted either by height limitation or limitation of plot ratio, or both. *(The Super Mate (2) Case)*

(24) Where a proposed new building is superior than an existing one it replaces in terms of fire safety and its additional population would create negligible adverse impacts, then it is not appropriate to reject the proposal on general policy grounds concerning the adverse consequences under s. 16(1)(g) of the *Buildings Ordinance. (The Nos. 4, 4A and 4B, Ying Fai Terrace Case)*

(25) 'It seems to us that what the Building Authority has to do when considering the exercise of his discretion under this limb of Section 16 (1)(g) is to ask himself what negative factors will result from the difference in height between the buildings previously on the site and the proposed building. After doing this, the Building Authority has to weigh both the positive factors resulting from redevelopment and such negative factors in the balance and decide whether or not there is such a weight of negative factors resulting from the difference in height as to justify a refusal. We believe there must be some significantly greater weight in the resulting negative factors if a refusal is to be justified because the use of the section limits a developer's right to develop his site to the full extent otherwise granted to him by the Crown Lease and the Buildings Ordinance and Regulations.' *(The No. 8 U Lam Terrace Case,* as cited in the *Ying Fai Terrace Case)*

(26) The proper comparison for evaluating the increase in population due to a proposal is to compare the estimated population of the proposal with that of an existing or previously existing building, not another proposed building on the subject site. *(The Rich Resources Enterprises Case)*

(27) The *No. 8 U Lam Terrace Case* is the authority for stepped streets. (*The Rich Resources Enterprises Case*)

(28) Safety is a major issue which should not be overlooked in deciding applications for building in stepped accesses. However, where an Outline Zoning Plan is not present, the Tribunal has to rely on s. 16(1)(g) of the *Buildings Ordinance. (The Rich Resources Enterprises Case)*

(29) **'There are two alternative limbs to Section 16(1)(g)**: the Building Authority may refuse to approve building plans where a proposed building would differ in height, design, type or intended use (a) from buildings in the immediate neighbourhood or (b) from buildings previously existing on the same site. **It is settled that the BA has "both avenues in which to go".**' (*The Rich Line Enterprises Case*) (emphasis added)

(30) Under s. 16(1)(b)(ii) of the *Buildings Ordinance*, the Director of Fire Services has no power to withhold a certificate where the problem is lack of access rather than failure to meet a Code of Practice published from time to time by the Director of Buildings. (*The Rich Line Enterprises Case*)

Section 16(1)(h) of the *Buildings Ordinance*: Access to Street

(1) Section 16(1)(h) of the *Buildings Ordinance* should not be limited to a potential traffic hazard or inconvenience in the immediate vicinity of an access opening to or from a street. This position is adopted by the Tribunal in the *No. 101 Pokfulam Road Case* where the Tribunal held that section 16(1)(h) applied to a potential traffic hazard which might occur some distance away from the subject site. (*The Kennedy Road Case*)

Section 16(1)(p) of the *Buildings Ordinance* and Provision of Streets on a Site (Bokhary 1989)

The Building Authority was about to issue a certificate that in its opinion the determination involved a matter of government policy such that the matter must be reviewed by the Governor (now the Chief Executive) in Council (under section 46(1) of the *Buildings Ordinance 1985*, which has been repealed). The Building Authority eventually withdrew the certificate upon being promised support for amending legislation, which is now section 16(1)(p). (*The NKIL53 Sect. C Ngau Tau Kok Road Case*)

(1) The Tribunal is not bound by any internal practice memorandum of the government. (*The Hoi Yuen Road Case*)

(2) In deciding the provision of 'streets' on a site 'having adequate connection to public streets', the Tribunal will ask itself two questions: (1) whether or not it is correct for the Authority to consider that the site comes within s. 16(1)(p) of the *Buildings Ordinance*; and (2) whether any

proposed driveway is sufficient. The second question in turn depends on two sub-questions: (a) whether the site is provided with 'streets'; and (b) if so, whether such streets are adequate connections to 'a public street'. (*The Hoi Yuen Road Case*)

Width of a Street

(1) To determine the width of a street under Regulation 19 of the *Building (Planning) Regulations*, retaining walls which support a site should be excluded as being part of the street. (*The Blotner Case*)

(2) To determine the width of a street under Regulation 19 of the *Building (Planning) Regulations*, kerbstones should be included as being part of the street according to *Beaux Estates Ltd. v Attorney General. (The Blotner Case)*

(3) As the Tribunal said in the *Knutsford Terrace Case (*or the *Cheer Kent Case)*, the object of Regulation 19 of the *Building (Planning) Regulations* would be defeated if one merely looked at the point where a site abutted the street but ignored the width of the other parts of the street when determining the width of that street. (*The Blotner Case*)

(4) For determining whether a site is a Class A site abutting a street of more than 4.5 metres wide, the street is not just measured in terms of its width immediately in front of the site but the entire length of the access to or from the site. (*The Cheer Kent Case*)

(5) The government has a moral obligation to clarify development potential and entertain the legitimate expectation of developers about the redevelopment potential of their property in the light of the potential of other properties in the vicinity. (*The Cheer Kent Case*)

(6) The moral obligation of the government in respect of clarifying development potential is stated in the case of the *No. 2–11 Hok Sz Terrace*, where the Tribunal had this to say:

> It is true that the operation of Section 16(1)(g) may make it difficult for developers to know with precision the value of land, which reflects its development potential, and we feel there is a strong moral obligation upon Government to give wide publicity to areas and situations where developer's architects would be wise to make tentative enquires from the BOO as to extent of permitted development — for instance in respect of all sites served only by stepped access. (followed in the *Cheer Kent Case*)

Regulations 4 and 5 of the *Building (Private Streets and Access Roads) Regulations*

(1) The Tribunal is not bound by any internal practice memorandum of the government. (*The Hoi Yuen Road Case*)

(2) In deciding the provision of 'streets' on a site 'having adequate connection

to public streets', the Tribunal will ask itself two questions: (a) whether or not it is correct for the Authority to consider that the site comes within s. 16(1)(p) of the *Buildings Ordinance*; and (b) whether any proposed driveway is sufficient. The second question in turn depends on two sub-questions: (i) whether the site is provided with 'streets'; and (ii) if so, whether such streets are adequate connections to 'a public street'. (*The Hoi Yuen Road Case*)

Regulations 4, 5, 6, 9, 12 and 27 of the *Building (Private Streets and Access Roads) Regulations*

(1) The Building Authority has a discretion in the matter of Regulations 5 (2) and 6(1). The Tribunal finds that there has been an impressive consistency with which the Building Authority's policy has been followed over the years. It was said: 'we are not persuaded that the policy is out of date nor do we see any compelling reason why it should not be followed in the instant case. Regulation 5(2) and regulation 6(1) are there for a particular purpose: they are there to ensure the safety and well-being of the public in general and the residents of buildings in particular. Indeed, we would be failing in our duty if we, by a stroke of the pen, reversed that well-established policy overnight.' (*The Perfect Chance Case*)

(2) The Tribunal is not bound by any internal practice memorandum of the government. (*The Hoi Yuen Road Case*)

(3) In deciding the provision of 'streets' on a site 'having adequate connection to public streets', the Tribunal will ask itself two questions: (1) whether or not it is correct for the Authority to consider that the site comes within s. 16(1)(p) of the *Buildings Ordinance*; and (2) whether any proposed driveway is sufficient. The second question in turn depends on two sub-questions: (a) whether the site is provided with 'streets'; and (b) if so, whether such streets are adequate connections to 'a public street'. (*The Hoi Yuen Road Case*)

(4) The Tribunal has jurisdiction over property owned by foreign sovereign states. (*The No. 3 Barker Road Case*)

(5) The purpose of the *Building (Private Streets and Access Roads) Regulations* is 'to lay down minimum requirements which the Government considers necessary to safeguard those using private streets and access roads. One fundamental part of these Regulations is that pedestrian traffic and vehicular traffic should be safely segregated from each other.' (*The No. 3 Barker Road Case*)

Regulation 19 of the *Building (Planning) Regulations*

(1) To determine the width of a street under Regulation 19 of the *Building (Planning) Regulations*, retaining walls which support a site should be excluded as being part of the street. (*The Blotner Case*)

(2) To determine the width of a street under Regulation 19 of the *Building (Planning) Regulations*, kerbstones should be included as being part of the street according to *Beaux Estates Ltd. v Attorney General. (The Blotner Case)*

(3) As the Tribunal said in the *Knutsford Terrace Case (*or the *Cheer Kent Case)*, the object of Regulation 19 of the *Building (Planning) Regulations* would be defeated if one merely looked at the point where a site abutted the street but ignored the width of the other parts of the street when determining the width of that street. (*The Blotner Case*)

Regulation 21 of the *Building (Planning) Regulations*

(1) Zone 1 parking standards should apply to a site which abuts both Zone 1 and Zone 2 roads. (*The Nos. 1–9 Breezy Terrace Case*)

Regulation 23 of the *Building (Planning) Regulations*

(1) The onus of proof is on the appellant who seeks to argue that an area is not part of a 'service lane'. (*The Shum Yee Hing Tong Case*)

(2) Where an area is part of a service lane, Regulation 23(2)(a) of the *Building (Planning) Regulations* dictates that such area cannot be approved for the purpose of site area calculation. (*The Shum Yee Hing Tong Case*)

Meaning of Class A Sites by Reference to Width of Street

(1) For determining whether a site is a Class A site abutting a street of more than 4.5 metres wide, the street is not just measured in terms of its width immediately in front of the site but the entire length of the access to or from the site. (*The Cheer Kent Case*)

(2) The government has a moral obligation to clarify development potential and entertain the legitimate expectation of developers about the redevelopment potential of their property in the light of the potential of other properties in the vicinity. (*The Cheer Kent Case*)

(3) The moral obligation of the government in respect of clarifying development potential is stated in the case of *Nos. 2–11 Hok Sz Terrace*, where the Tribunal had this to say:

> It is true that the operation of Section 16(1)(g) may make it difficult for developers to know with precision the value of land, which reflects its development potential, and we feel there is a strong moral obligation upon Government to give wide publicity to areas and situations where developer's architects would be wise to make tentative enquires from the BOO as to extent of permitted development — for instance in respect of all sites served only by stepped access. (followed in the *Cheer Kent Case*)

Plot Ratio Concessions

(1) Where the Notes to the OZP give no guidance as to how plot ratio is to be calculated, plot ratio should be determined by reference to the *Buildings Ordinance* and the *Building (Planning) Regulations*. Regulations 19 to 23 expressly deal with plot ratios of buildings in Hong Kong. The Regulations recognize that there is a distinction between the calculation of GFA and the exceeding of plot ratio: see, for example, Regulation 22 compared with Regulation 23(3). This distinction has been recognized in practice. (*The Eaton Hotel Case*)

(2) The OZP is a piece of subsidiary legislation subject to the usual rules of statutory interpretation. (*The Eaton Hotel Case*)

Exceeding Plot Ratio

(1) Section 29 deals with the maintenance of private streets and access roads and not with improvements of access roads to the standards laid down by Regulations 6(1) and 11(1). (*The Skilland Development Case*)

Upgrading Private Access and Access Road

(1) Section 29 deals with the maintenance of private streets and access roads and not with improvements of access roads to the standards laid down by Regulations 6(1) and 11(1). (*The Skilland Development Case*)

Extinguishing Private Lanes

(1) Before relying on *Building (Planning) Regulations 23(2)(a)*, the Building Authority will have to determine whether the area in question is subject to any private or public rights of way.

Private Right of Way

The most obvious private right of way is the one created by express grant. There may be a right of way by necessity as in the case of a 'land-locked' allotment with no other means of access. There can, however, be no private right of way by prescription, as held by Deputy Judge Chan in *Tang Tim-fat & Anor v Chan Fok Kei & Ors* [1973] 2 HKLR 273 (High Court).

Public Right of Way

Public rights of way would be either by express dedication or assumed dedication. The latter arises from 'long and uninterrupted use' of the land by the public for the purpose of passage with the apparent consent of the government.

(Decision of judicial review of the *No. 40 Fort Street Case,* HCMP 600/94)

(2) That an area of land has the physical characteristics of a street does not mean that it is a street for the purpose of building density control.

(Decision of judicial review of the *No. 40 Fort Street Case,* HCMP 600/94)

(3) The following factors are relevant considerations favourable to an application for extinguishing and building over a private service lane:
   (a) the lane to be extinguished serves little purpose;
   (b) it is undesirable to retain the lane from a town planning point of view;
   (c) the appellant would provide a public passage way at the expense of ground floor shop space;
   (d) refusing the application would cause substantial economic loss to the appellant;
   (e) the appellant gives up the bonus plot ratio as a result of dedicating a passage for use by the public; and
   (f) there is no more than an addition of one floor as a result of approving the proposal.

(See the *Des Voeux Road West Case.*)

(4) The existence of illegal structures is not a special circumstance for exemption under s. 42 of the *Buildings Ordinance. (The No. 24 Java Road Case)*

(5) Section 14(2) of the *Buildings Ordinance* is usually cited as permitting the Building Authority to grant approval to plans for development even though the plans infringe the legal rights of others. (*The No. 24 Java Road Case*)

(6) It is not legitimate for the Building Authority to apply Practice Note 15 automatically to any service lane which is still being used, thereby effectively excluding consideration of the special circumstances being put forward by the appellants. (*The Leung's Family Investment Case*)

(7) There is no statutory definition of service lanes and any distinction between the rear lane and the side lane must be justified on the facts. (*The Leung's Family Investment Case*)

(8) The Building Authority must consider the extent of the increase in size of the building if lanes are to be included when the Building Authority has to decide on an application for exemption under section 31. (*The Leung's Family Investment Case*)

(9) The onus of proof is on the appellant who seeks to argue that an area is not part of a 'service lane'. (*The Shum Yee Hing Tong Case*)

(10) Where an area is part of a service lane, Regulation 23(2)(a) of the *Building (Planning) Regulations* dictates that such area cannot be

approved for the purpose of site area calculation. (*The Shum Yee Hing Tong Case*)

(11) The relevant factors for consideration in deciding the closure of lanes and private streets are as follows:

(a) Whether the street or lane proposed to be closed contains any public or private rights of passage. (*The Tien Poa Street Case*)

(b) Whether there is any evidence that the street or lane proposed to be closed serves any useful purpose to anyone other than the residents living in the area affected. (*The Tien Poa Street Case*)

(c) Whether the building plans submitted by the developer allow continued access through the area by the public and to existing utilities and escape routes. (*The Tien Poa Street Case*)

(d) Whether the building plans submitted by the developer would lead to a development that would significantly improve the area and thus would be in public interest. (*The Tien Poa Street Case*)

(e) Whether the development potential of the site would be very significantly reduced if the proposal was not permitted. (*The Tien Poa Street Case*)

Dangerous Goods (DG) Tanks

(1) The replacement of roof and plates of DG tanks are works within the meaning of s. 14 of the *Buildings Ordinance*. (*The Shum Tse Street Case*)

(2) Where proposed works involve the demolition and replacement of the roof and plates of DG tanks which fall within the definition of 'building works' under s. 2 of the *Buildings Ordinance*, the building plans for such works have to be approved by the Building Authority under s. 14(1) of the *Buildings Ordinance*. Regulation 10 of the *Building (Oil Storage Installations) Regulations* does not apply to exempt the works from approval.

Trade Mart Buildings

(1) There should be a presumption that an applicant in a building application who is a lessee and/or his or her successors in title and assignment would observe the lease conditions. (*The Hong Kong Trade Mart Case*)

(2) Other than Regulation 41(1), there is no other legislation defining what provisions under which a building need incorporate 'means of escape' in case of an emergency, save and except several codes of practice published by the Building Authority. [NB: The *Code of Practice for the Provision of Means of Escape in Case of Fire 1996* is the most commonly used code for 'MOE'. After the fatal Hong Kong Bank (Shek Kip Mei Branch) fire accident, a new *Fire Safety (Commercial Premises) Ordinance* has been enacted.] (*The Hong Kong Trade Mart Case*)

(3) The Tribunal accepts this definition of a 'trade mart building':

> A trade mart building has two different functions; one is for use for specific trade exhibitions by multiple exhibitors and the other is for specific use types of product display and trade discussion by individual exhibitors and manufacturers, both in connection with wholesale trade in manufactured goods . . . (*The Hong Kong Trade Mart Case*)

(4) A trade mart building is not an ordinary commercial office building for the purpose of designing and evaluating means of escape. (*The Hong Kong Trade Mart Case*)

(5) For the purpose of designing and evaluating means of escape in a trade mart building, it should be presumed that only specialists rather than ordinary members of the public would visit the building. (*The Hong Kong Trade Mart Case*)

(6) For the purpose of designing and evaluating means of escape in a trade mart building, it should not be presumed that all escalators intended to be installed would become inoperable in the event of fire. (*The Hong Kong Trade Mart Case*)

Means of Escape

(1) The Building Authority, not the Director of Fire Services, is 'the authority for means of escape'. (*The Perfect Chance Case*)

   (a) The practice of the Director of Fire Services issuing letters of concern has now ceased. (*The Perfect Chance Case*)

   (b) The Fire Services Department will not refuse a certificate (under section 16(1)(b) of the *Buildings Ordinance*) on the grounds that the means of access to the building is inadequate. The Director of Fire Services is obliged to issue a certificate under section 16(1)(b) once the prescribed requirements are met: he or she has no power to withhold such certificate. (*The Perfect Chance Case*)

   (c) The Director of Fire Services has no power to withhold a certificate where the problem is lack of access rather than failure to meet the Code of Practice published from time to time by the Director. The fact that the Director of Fire Services has issued a certificate pursuant to section 16(1)(b) is irrelevant for the purposes of determining matters regarding means of escape. (*The Hedland Investments (1) Case*)

   (d) It would be more effective to fight fire if fire engines were as close to the location of a fire as possible rather than to operate from a distance, drawing water indirectly from a service inlet rather than directly from the hydrant of a fire engine. (*The Perfect Chance Case*)

   (e) 'The duty of the Building Authority is to administer the Buildings Ordinance so as to have due regard to the safety of the occupants of buildings affected by planning proposals. As we said in the Hok Sz

> determination, in the final analysis the Building Authority is responsible for the due and proper administration of the Ordinance. Lack of access roads prevents firefighting vehicles from getting close to the buildings that are served in this area only by stepped streets. The problems of access extends also to ambulances and, to a lesser extent, garbage collection.' (*The Nos. 29–31 Sands Street Case,* as cited in the *Perfect Chance Case*)

(2) There should be a presumption that an applicant in a building application who is a lessee and/or his or her successors in title and assignment would observe the lease conditions. (*The Hong Kong Trade Mart Case*)

(3) Other than Regulation 41(1), there is no other legislation defining what provisions under which a building need incorporate 'means of escape' in case of an emergency, save and except several published by the Building Authority. The *Code of Practice for the Provision of Means of Escape in Case of Fire 1996* is the most commonly used code. After the fatal Hong Kong Bank (Shek Kip Mei Branch) fire accident, a new *Fire Safety (Commercial Premises Ordinance)* has been enacted. (*The Hong Kong Trade Mart Case*)

(4) The Tribunal accepts this definition of a 'trade mart building':

> A trade mart building has two different functions; one is for use for specific trade exhibitions by multiple exhibitors and the other is for specific use types of product display and trade discussion by individual exhibitors and manufacturers, both in connection with wholesale trade in manufactured goods . . . (*The Hong Kong Trade Mart Case*)

(5) A trade mart building is not an ordinary commercial office building for the purpose of designing and evaluating means of escape. (*The Hong Kong Trade Mart Case*)

(6) For the purpose of designing and evaluating means of escape in a trade mart building, it should be presumed that only specialists rather than ordinary members of the public would visit the building. (*The Hong Kong Trade Mart Case*)

(7) For the purpose of designing and evaluating means of escape in a trade mart building, it should not be presumed that all escalators intended to be installed would become inoperable in the event of fire. (*Hong Kong Trade Mart*)

Traffic Circulation and Parking within Buildings

(1) The Highways Department's role in a proposed building would be to ensure that the traffic arrangements — or traffic flow — on access roads are not interfered by the proposed development. However, the final decision as to whether carparking should be allowed *inside* the building and the arrangements *within* the building area as to vehicles would be left to the Building Authority and would be dealt with under the *Buildings Ordinance*. (*The Perfect Chance Case*)

(2) If private cars are to be parked within a proposed building, then in accordance with *Building (Planning) Regulation 5(2)*, the Building Authority requires an access road to be provided within the site. By reference to *Building (Private Streets and Access Roads) Regulation 6 (1)*, the width of the carriageway and the footpath of such an access road should not be less than 5 metres and 1.6 metres respectively. (*The Perfect Chance Case*)

Meaning of 'Structures'

(1) Whether a cabinet on the roof becomes a 'structure' depends on its size and its connection (fixed or unfixed) to the roof. This is irrespective of its loading implications or the reason for fixing. (*The Laguna City Case*)

Section 24 Orders: Illegal Structures and Enforcement

(1) Considerations are taken into account in the exercise of discretion powers:

> As is well-known discretionary powers must all be exercised in good faith for the purpose for which they are granted and within the limits of the Ordinance or other instruments conferring the discretion. The discretion must also be exercised fairly and in accordance with proper legal principles and these standards imply that all relevant considerations must be taken into account and that extraneous considerations be disregarded by the person or body, in this case the Building Authority, exercising that power. The exercise of a discretion is invalidated if the way it was exercised was significantly influenced by the improper regard or disregard of the factors in issue (see *Associated Provincial Picture Houses Limited v Wednesbury Corporation* [1947] 2 AER 685). (*The Pak On Building Case*)

(2) If building plans are not submitted to the Building Authority, there is no way the Building Authority can check and satisfy itself as to whether the building works, when completed according to the approved plans, would be safe. The Building Authority is legally entitled, unless the building works are exempted works, to issue an order under s. 24 of the *Buildings Ordinance*, if plans for the works have not been submitted for its approval and approved by it, or its consent has not been obtained for the commencement of the works. **There is no basis for the suggestion that the unauthorized building works should be demonstrated to be unsafe before the Building Authority should consider issuing an order under s. 24.** (*The Discovery Bay Case*) (emphasis added)

(3) Section 24 of the *Buildings Ordinance* provides that where any building works have been or are being carried out in contravention of any of the provisions of the Ordinance, 'the Building Authority **may** by order require the demolition of the same' (emphasis added). Therefore, the Building

Authority has a discretion to take action to enforce or not to take action to enforce against the illegal works involved. (*The Discovery Bay Case*)

(4) 'The word "significant" used in the 1988 press release qualifies the word "works" rather than the word "new". If the intention was that the word "significant" should qualify the word "new", the statement should have read "significantly new". It is also fair and reasonable that unauthorised building works, if not significant, although new, should not merit priority treatment. Irrespective of whether the works are old or new, if the works are not significant, the Building Authority should, in his discretion, consider whether enforcement action should be taken at all.' (*The Discovery Bay Case*)

(5) The Tribunal attaches great significance to the decision of Mr Justice Godfrey in *Yeung Pui Yee v Building Authority* in respect of the April 1988 Practice Note issued by the Building Authority. The full terms of the Practice Note are set out on pages 2 and 3 of Mr Justice Godfrey's decision. Mr Justice Godfrey then states on page 3 of the judgment that the Practice Note applies, on its true construction, to the commencement, carrying out, or completion of any building works whether they are unauthorized alterations and additions or not. On page 5 of the judgment, Mr justice Godfrey states as follows:

> As it seems to me, the April 1988 Practice Note is concerned only with the problem to which it in terms relates . . . **It has the effect of reminding authorised persons that no building works can be effected without first obtaining such approval and consent**. Despite the heading, it seems to me irrelevant whether the building works are new building works or works of alteration and addition. To **all** such building works, Section 14(1) of the Buildings Ordinance applies.
>
> The provisions of Section 42 of the Buildings Ordinance (which relate to modification of requirements under the Buildings Ordinance) are not applicable to applications to dispense with the requirements of Section 14 and authorised persons are reminded of this also.
>
> When the Building Authority states as it does:
>
> 'It is therefore abundantly clear that I have no powers to give retrospective approval or consent in respect of building works which have already been commenced, carried out or completed'
>
> the Building Authority states the law correctly. It states it correctly both in respect of new building works and in respect of unauthorised alterations and additions to existing building works, whether those existing building works were themselves originally authorised under Section 14 or not.
>
> (*The Wylie Road Case*) (emphasis added)

(6) The Tribunal is bound by *Yeung Pui Yee v Building Authority* in rejecting

an application for approval of plans for a temporary structure which has already been erected in a substantially although not identical form to the temporary structure shown in the application. (*The Wylie Road Case*)

(7) It would be quite wrong for the Building Authority to be put in the position of having to approve plans under s. 16 of the *Buildings Ordinance* in isolation of the surrounding circumstances. If a structure had been erected without the necessary consent of the Building Authority under s. 14 of the *Buildings Ordinance*, the Building Authority would be correct in refusing to process the plans submitted. Section 42(5) of the *Buildings Ordinance* gives the Building Authority no power of exemption in these circumstances. (*The Wylie Road Case*)

(8) The *Pak On Building Case* relates to remedial works to existing unapproved structures. This is not a case of approval being sought for plans relating to existing unapproved structures. (*The Wylie Road Case*)

(9) The principle of the *Pak On Building Case* is that where the Building Authority is requested to consider plans for the construction of **remedial work to existing buildings**, it is irrelevant that the plans for the existing building have not been approved. (*The Wylie Road Case*) (emphasis added)

(10) Toleration of illegal structures on the basis that there is no immediate danger to the public does not imply that there is also the power to grant retrospective approval. Section 42, which empowers the Building Authority to permit modification, expressly excludes s. 14. The latter requires approval and consent before building works can be carried out. This was affirmed by the case *Yeung Pui Yee v the Building Authority* (MP No. 930 of 1988). (*The Mirador Mansion Case*)

(11) The submission that the Building Authority needs to allow alteration or rectification of unauthorized works has no legal or rational basis. (*The Mirador Mansion Case*)

(12) Whether a cabinet on the roof becomes a 'structure' depends on its size and its connection to the roof (fixed or unfixed). It is irrespective of its loading implications or the reason for fixing. (*The Laguna City Case*)

(13) The party which loses its case but is not represented when costs are asked for by the winning party may be given specific time to explain why costs should not be paid. (*The Laguna City Case*)

(14) The guidelines contained in *C and E Division Manual — Section 3, Instruction No. 70* do not prevent a programme of replacement or repair from being carried out in stages over a period of time. Although the permitted repairs may be described in the guidelines as 'cosmetic', **the guidelines do apparently allow quite substantial rebuilding in the interests of safety or the comfort of the occupants, whether or not such repairs involve entirely new materials or a percentage of the old materials**. (*The Yin Hing Building Case*) (emphasis added)

(15) The existence of illegal structures is not a special circumstance for exemption under s. 42 of the *Buildings Ordinance*. (*The No. 24 Java Road Case*)
(16) Section 14(2) of the *Buildings Ordinance* is usually cited as permitting the Building Authority to grant approval to plans for development even though the plans infringe the legal rights of others. (*The No. 24 Java Road Case*)
(17) The Building Authority must seek to justify the priority given to the demolition of the illegal building works on the ground that they constitute 'an imminently dangerous situation' that goes beyond visual inspection. If no justification is provided, then the only question for the Tribunal is whether on the evidence the Building Authority has made good its case, based on the ground which the subject building works are significant and new at the material times. (*The Marina Cove Case*)
(18) For the purpose of an appeal against an order under s. 24, the Tribunal does not find it necessary to ascertain the legal title to the property and proceed to hear the appeal. (*The Shek O Village Case*)
(19) Although costs would normally follow the event, the Tribunal may issue an order of half cost in favour of the successful party if the appellant has wasted much time in pondering over irrelevant matters. (*The Shek O Village Case*)
(20) In establishing that an order for enforcing against unauthorized structures poses an immediate danger to life or property, the Building Authority must have evidence as to the danger. (*The Sam Pei Square Case*)

Order under s. 24(A) of the *Buildings Ordinance*

(1) The owner, not the Authorized Person, is the proper person to whom an order under s. 24(A) of the *Buildings Ordinance* is served. (*The True Dragon Properties Case*)
(2) Removal of precautionary works required to support adjoining buildings in demolition works triggers an order under s. 24(A) of the *Buildings Ordinance*. (*The True Dragon Properties Case*)

Roles and Duties of Authorized Persons

(1) The owner, not the Authorized Person, is the proper person to whom an order under s. 24(A) of the *Buildings Ordinance* is served. (*The True Dragon Properties Case*)

3 COMMENTS ON BUILDING APPEAL CASES

This chapter presents our comments on the cases presented and reviewed in detail in Chapter 4 in terms of nine headings with case law references:

1. PROCEDURES AND PRINCIPLES

Comments on Individual Building Appeal Cases

Shum Tse Street

The decision in this case was followed by the AP's subsequent dealing with the Building Authority and the Tribunal. See the *Union Carbide Asia Case.*

The focus of this case is on the definition of 'building works', and the differences between 'building' works and 'maintenance' works. It incidentally involves a major town planning consideration.

Dangerous goods tanks which contain certain categories of gas or liquid exceeding a certain amount are called 'potentially hazardous installations' (PHIs). In the high population density context of Hong Kong, where the planning standard is as high as 2300 per ha for new towns, the presence of PHIs is a major planning constraint. Within the 'consultation zones' of these PHIs, no major development should be permitted as a matter of policy. The dangerous goods tanks in this case are not PHIs, but it is reasonable to take extra care for the sake of public safety and that of the workers.

Multi-Strategic Investment

This is purely a procedural case involving the exchange of letters from the Building Authority and the AP. The issue for the appeal pertains to s. 31, which deals with 'projections on or over streets'.

Union Carbide Asia

Ensuing from the *Shum Tse Street Case*, this case demonstrates that an appellant needs to supply the relevant plans and information to the Building Authority for deciding an application. The reference to safety distance in this case indicates the significance of building control in the town planning mechanism in Hong Kong. [This case led to a judicial review case: *Union Carbide Asia Ltd. & Anor v The Appeal Tribunal & The Building Authority*, unreported MP No. 136 of 1989 (22 June 1989) [1989] HKLY 4.]

Eaton Hotel

The focus of this case is upon the exercise of discretionary power regarding s. 16 (1)(d), i.e., the provisions of the *Buildings Ordinance* or 'other enactments', specifically plans prepared under the *Town Planning Ordinance*. This case is a good example of the interaction and overlapping in scope between the building and town planning legislation in Hong Kong. In particular, it gives a detailed exposition of the different approaches being employed according to the *Buildings Ordinance* on the one hand, and those governed by the *Town Planning Ordinance* on the other. The concession was intended to help the tourist industry, while plot ratio control in town plans was to restrict the intensity of development. The contradiction between these two approaches is obvious. In effect, the Building Authority's role in monitoring the stage of the development process immediately before construction means that the Authority can 'moderate' the restrictive effect of a statutory town plan. The case law has established that the Building Authority has the discretion not to be bound by plot ratio stipulations in statutory town plans.

Cumberland Road

Professional advisors to applicants should remind the latter that they should appear or be represented in appeal hearings in order that their client's appeal stands a chance of success.

Comments on All Building Appeal Cases

The cases reviewed reveal two lessons for the APs: (a) they should be co-operative in dealing with the Building Authority, and (b) advise their client to appear in an appeal hearing, for otherwise it is likely that the appeal will fail. However, a bad relationship with the Building Authority should not be a discriminating factor for deciding an application, as revealed in the *Pak On Building Case*.

Relevant Judicial Review and Appeal Cases on Powers and Procedures

R v Building Authority [1913] HKLR 44, MP No. 5 of 1913 (5, 15 March 1913) Full Court [*Public Health and Building Ordinance*, 1903, mandamus, space, windows, room, storey, height of building]

Wotford Construction Co. v Secretary for the New Territories [1978] HKLR 410, CA [implied restrictions against building on agricultural lots]

Hang Wah Chong Investment Co. Ltd. v Attorney General of Hong Kong [1981] HKLR 336 (PC) [a block of flats is not a 'detached' or 'semi-detached' dwelling]

Attorney General v Firebird Ltd. [1983] 1 HKC 1, PC App. No. 17 of 1982 (no appeal to Appeal Tribunal) [relevant town plans are those at the time of the consideration of building plans]

Mexx Consolidated Far East Ltd. v Attorney General [1987] HKLR 1210

Yeung Pui Yee v the Building Authority [1988] MP No. 930 of 1988 [no retrospective approval of UBW]

Union Carbide Asia Ltd. & Anor v The Appeal Tribunal & The Building Authority, unreported MP No. 136 of 1989 (22 June 1989) [1989] HKLY 4 [leave for judicial review refused]

The Appeal Tribunal v Peter A. De Kantzow and Anor, unreported HCMP No. 3193 of 1990 (7 February 1991)

The Appeal Tribunal v Peter A. De Kantzow and Anor [1992] 1 HKLR 55 (CA No. 53 of 1991) (8 Oct 1991) CA [decision of Appeal Tribunal not to hold a full inquiry quashed]

Re: Peninsula Knitts Ltd., unreported, HCMP No. 3788 of 1992 (28 April 1993) [1993] HKLY 3 (no appeal to appeal tribunal) [notification of Building Authority's decision and implication as regards the relevant town plan]

The Hong Kong Bar Association v City West Investment Ltd. and Others [1994] 2 HKLR 39 (CA No. 29 of 1994) (11 March 1994) CA [s. 44(a) *Legal Practitioners Ordinance*]

In re Super Mate Ltd. [1995] 1 HKLR 287, HCMP No. 200 of 1994 (9 June 1994) [the relevant town plan is one that is applicable at the time of correct consideration of building plans]

Hedland Investments Ltd. v Attorney General & Anor [1994–1995] CPR 53, HCMP No. 684 of 1994 (25–26, 31 October 1994) [resubmission of similar plans is not a fresh application and hence the relevant town plan is one at the date of the original application]

Chung Kwok Yiu Ringo v Leung Chi-shing [1996] MP No. 2489 of 1995 [architect's certificate is necessary to answer requisition that alteration is non-structural]

Building Authority v Head Step Ltd. [1996] 6 HKPLR 87, CA No. 131 of 1995 (4, 25 October 1995) CA [BA unlawfully held that s. 16(1) (d) applied]

Wong Kwok Gee v Building Authority, unreported, MP No. 963 of 1995 (3 November 1995) [the relevant town plan is one that is applicable at the time of correct consideration of building plans]

Wing On Co. Ltd. & Anor v Building Authority [1996] 6 HKPLR 423, MP No. 1279 of 1996 (19, 25 July 1996)

Wing On Co. Ltd. & Anor v Building Authority [1996] 6 HKPLR 432, CA No. 168 of 1996 (14 Nov 1996) CA [the Building Authority has a discretion to approve building plans though they are not in compliance with statutory town plans; traffic generated from a new building is not a matter of concern for the Building Authority but town planners]

Building Authority v Appeal Tribunal (Buildings) [1998] 1 HKC 484, CFI Admin. Law List No. 85 of 1997 (1, 5 December 1997) [the Building Authority cannot make an order that deprives owners of their rights of appeals]

Lee To Ming v Tam Kin Sum William [1999] 2 HKC 865 [breach of height restriction in lease terms]

Summit Investment Ltd. v Shia Ning Enterprises Ltd. [1999] HCMP No. 1532/98 [breach of occupation permit without structural alteration]

Relevant Judicial Review Cases and Application for Declaration Relating to *Town Planning Ordinance*

Crozet Ltd. & Others v Attorney General [1973–1976] HKC 97, HCMP No. 409 of 1973 (8 April 1974) (no appeal to Appeal Tribunal) [statutory town plans may stipulate plot ratio control; refusal of building plans on grounds of contravention of statutory town plans]

Singway Ltd. v Attorney General [1974] HKLR 275, Action No. 3826 of 1973 (20 June 1974) Original jurisdiction (no appeal to Appeal Tribunal) [statutory town plans at the time null and void]

Wah Yick Enterprises Co. Ltd. v Building Authority [1997] 3 HKC 758, CFI MP No. 1623 of 1997 (no appeal to Appeal Tribunal)

Wah Yick Enterprises Co. Ltd. v Building Authority [1999] 1 HKLRD 237, CA No. 210 of 1997 (24–25 February and 1 April 1998) (no appeal to Appeal Tribunal)

Wah Yick Enterprises Co. Ltd. v Building Authority [1999] 1 HKLRD 840, Final Appeal No. 12 of 1998 (Civil) (3, 4 February and 1 March 1999) (no appeal to Appeal Tribunal) [meaning of 'house' in column 2 of Village Type Development Zones]

Relevant Cases on Closure Orders

Building Authority v Business Rights Ltd., unreported, DC Case No. 940 1993 (26 November 1993) [1993] HKLY 166

Building Authority v Business Rights Ltd. [1994] 2 HKLR 341 CA No. 212 of 1993 (17–19 May 1994) CA [nomination of a tribunal member is consistent with Article 14 of the *Bill of Rights Ordinance*]

Re: An application by Ho King Kwan for Judicial Review [1986] HKLR (MP No. 385 of 1986) (14, 18 and 29 April 1986) HC [no legitimate expectation, order upheld]

Tam Chun Chung v Building Authority, unreported, HCA No. 1624 of 1995 (14 March 1995) [1995] HKLY 129 [plaintiff has no locus standi as he was not a person interested or affected by the order]

2. IMMEDIATE NEIGHBOURHOOD

Comments on Individual Building Appeal Cases

Master Bright

The key lesson in this case is the statement of the Tribunal about 'no congruity to preserve', which is a fact accomplice suggesting the arbitrariness of the concept of immediate neighbourhood. A similar remark is made in the *Ying Fai Terrace Case*, post.

Incongruity, discontinuity and chaos have been the themes of the urban landscape of Hong Kong Island after the Second World War, and Kowloon after the Kai Tak Airport APH was lifted.

Jenxon Investment

The Tribunal was definitely correct in refusing to speculate on future statutory planning for the subject site or its immediate neighbourhood. However, the same position was not adhered to in the *China Engineers Case*.

The proposed development was situated at the 'Tuen Mun-Yuen Long Corridor' in a location close to the interchange leading to Tin Shui Wai. Tuen Mun, Yuen Long and Tin Shui Wai are high-rise (30- to 40-storey buildings); they are high-density new towns designated by the government. In terms of their adopted planning concepts, this decision is definitely acceptable to government town planners. This case gives a good example of how the Building Authority can also be a planning authority in situations where development is out of reach of the Town Planning Board.

The China Engineers

In the *Jenxon Investment Case*, it was said by the Tribunal that it would not

speculate on the future planning of the area. In this case, the Tribunal reiterated the same point. The dismissal of the appeal was based largely on the presence of low-rise village development on the same side of Castle Peak Road as the site. The presence of high-rise residential towers (on the other side of the road in the vicinity) had obviously created a situation of 'no congruity to preserve' referred to in the *Master Bright Case*. This was ignored as the 'immediate neighbourhood' and literally *divisible* into two categories. This division of an 'immediate neighbourhood' was arbitrary in terms of built-form though it was probably reasonable in terms of *land use mix*. However, as the Tribunal stated, it would not help 'plug gaps in the planning legislation'. This decision was hardly satisfactory. Note that in the *Cheer Kent Case*, the Tribunal in allowing the appeal said that it would have decided otherwise had the proposed building been used differently. Obviously, as in this case, the Tribunal focused on the planning issue of land use, thereby contradicting its stated principle that it would not bother itself with planning legislation.

The Tribunal in the *Supermate (2) Case* applied the same approach regarding the planning legislation.

Rich Line Enterprises

This is also a case involving stepped access and lanes, and its most interesting dimension is the reference to s. 16(1)(g), i.e. 'immediate neighbourhood'. We find it hard to comprehend the point about 'congruity' because there was 'no congruity to preserve' in the Caine Road area.

Comments on All Building Appeal Cases

The introduction of the concept of 'immediate neighbourhood' was likely to be a kind of covert discrimination against Chinese residents in colonial Hong Kong. The application of this statutory consideration could oust 'Chinese tenement' from intruding into European neighbourhoods, with all explicit laws against Chinese inhabitation in designated areas — notably the Peak Area — in 1946. With the gradual fading out of racial prejudice, the concept survives more or less as a de facto statutory planning control or urban design device. This applies to districts not yet covered by town plans prepared under the *Town Planning Ordinance,* or where such town plans have been published for uses not requiring planning applications.

The problem of applying 'immediate neighbourhood' as a town planning or urban design law is one of arbitrary delineation. The arbitrariness is not so much a question of the sound judgment of the Authority or the Tribunal, but of the absence of compensation and prior knowledge, or subsequent announcement of the boundaries of the referent 'neighbourhood'. This state of affairs is obviously a ferment ground for corruption and abuse of power.

Note that by invoking the notion of 'immediate neighbourhood' to reject a building application, the action officer in the Buildings Department must

seek endorsement of the relevant Assistant Director (as a matter of internal policy). This seems to suggest that the Building Authority is now reluctant to rely on this ground to reject building plans. However, the concept remains in the law and therefore cannot be ignored.

We think that the application of 'immediate neighbourhood' concept should be confined to demonstrable structural or other physical aspects of buildings, such as support and ventilation. The town planning aspect of the concept should better be relegated to the *Town Planning Ordinance* under which the development falls in Column 2 of a statutory town plan or any other category requiring planning applications. It can also be dealt with by the Lands Authority where it involves a 'DDH' clause. The Tribunal's emphasis that s. 16(1)(g) cannot be used to plug gaps in the planning legislation should be adhered to.

Relevant Judicial Review Cases on s. 16(1)

Rich Resources Enterprises Ltd. v Attorney General, unreported, MP No. 3896 of 1991 (10 April 1992)[1992] HKLY 2 (no appeal to Appeal Tribunal) [successful judicial review by appellant]

Circumwealth Co. Ltd. v Attorney General [1993] 2 HKLR 193 (HCMP No. 3209 of 1992)(19 January and 4 February 1993) HC [s. 16(1) (h), inadequate means of access to a street]

3. WIDTH OF STREETS

Comments on Individual Building Appeal Cases

Cheer Kent

This case involves site classification and thus is categorized under 'width of streets' in this book. The focus of the Tribunal was placed upon the measurement of Knutsford Terrace. The appeal was ultimately decided by reference to the concept of 'legitimate expectation'. The Tribunal's explanation leaves an impression that once an irregular decision has been made in favour of one or more applications, the same shall be made for all subsequent cases.

The point about dismissing the case if the use is school instead of residential is unconvincing. Why should a different use be treated in contrasting ways? Both a school and an apartment block accommodate considerable population. Again, as in the *China Engineers Case*, the Tribunal was making decision on the basis of land use differences.

Blotner

This case is a good illustration of the technical details and legal background involved in measuring the width of a street. The importance of Assignment Plans in conveyancing is reflected by this case.

Comments on All Building Appeal Cases

Note that the Building Authority has issued in December 1998 a *Development Division Manual Practice Note 63*, 'Determination of Development Intensity under B(P)R 19(2)', which adopts an 'interpolation' approach in the determination of plot ratio with respect to the width of streets.

Relevant Judicial Review and Appeal Cases on Plot Ratios; Meaning of Streets and Sites; Class of Sites; Site Coverage and Width of Streets

The Club Lusitano v Director of Public Works [1961] HKLR 554, MP No. 197 of 1961 (26 August 1961) (Original Jurisdiction) (no appeal to Appeal Tribunal) [the width of a street for the purpose of Regulation 20(4)(a)]

Aik San Realty Ltd. & Others v Attorney General [1980] HKLR 927, MP No. 651 of 1980 (23 December 1980) HC (no appeal to Appeal Tribunal)

Aik San Realty Ltd. & Others v Attorney General [1981] HKLR 561, CA No. 14 of 1981 (15, 16 and 30 June 1981) CA (no appeal to Appeal Tribunal) [The meaning of 'abutting' and 'fronting' on a road — a 15-inch width strip of land under separate ownership prevented the piece of land behind from abutting the street]

Beaux Estates Ltd. v Attorney General [1983] MP No. 1446 of 1982 [embankment excluded from 'site']

Cho Hsun Co. Ltd. v Attorney General [1993] 1 HKC 620 [temporary structures on street do not reduce its width]

Mighty Stream Ltd. v Attorney General [1982] HKLR 56, CA No. 122 of 1981 (2 December 1981, 21 January 1982) CA (no appeal to Appeal Tribunal) [kerbstone, but not a nullah, is not part of a street]

Attorney General v Mighty Stream Ltd. [1983] 1 HKC 8, PC App. No. 31 of 1982 (9 May 1983) (no appeal to Appeal Tribunal)

Attorney General v Cheng Yick-Chi and Others [1983] 1 HKC 14, PC App. No. 32 of 1982 (21 June 1983) (no appeal to Appeal Tribunal) ['site' refers to land being used or having realistic prospect of controlling]

Hinge Well Co. Ltd. v Attorney General [1988] 1 HKLR 32 [1986–88] CPR 51 [lane must be extinguished before it can be included in computation for site coverage and plot ratio]

Cinat Co. Ltd. v Attorney General [1994] 1 HKLR 425 CA No. 131 of 1993 (7 December 1993) (no appeal to Appeal Tribunal)

Cinat Co. Ltd. v Attorney General [1994–95] CPR 59, PC App. No. 31 of 1994 (15 Nov 1994) (no appeal to Appeal Tribunal) [the same piece of land cannot be relied on for calculating plot ratio for more than one development]

Building Authority v Head Step Ltd. [1996] 6 HKPLR 87, CA No. 131 of 1995 (4, 25 October 1995) CA

Wing On Co. Ltd. & Anor v Building Authority [1996] 6 HKLR 423, MP No. 1279 of 1996 (19, 25 July 1996)

Wing On Co. Ltd. & Anor v Building Authority [1996] 6 HKLR 432, CA No. 168 of 1996 (14 November 1996) [the Building Authority has discretion to approve building plans though they may contravene town plans]

4. LANES

Comments on Individual Building Appeal Cases

No. 24 Java Road

Compare the approach employed in this case and subsequent cases in the same category. The subsequent cases were all allowed except the last one, which was held to be erroneous in a judicial review.

Des Voeux Road West

Note the key considerations in this decision, namely public access provided by the developer and the original function of the lane.

Shum Yee Hing Tong

This is a classic case where a lane, unless it can be proved otherwise, cannot be used for the purpose of site calculation. The reason behind the decision is not explained.

Tien Poa Street

This is a significant case involving lawyers. It indicates that the impact on redevelopment potential — a land economics concern — is an important consideration. Recall that in the *China Engineers Case*, the factor of 'absence of compensation' under the *Buildings Ordinance* was mentioned, and that in the *Cheer Kent Case*, the issue of 'legitimate expectation' was emphasized. This case similarly reflects the sympathetic concern of the Tribunal for proprietors and developers. This concern was also expressed in the *Leung's Family Investment Case.*

Leung's Family Investment

This case was partly decided on the technical definition of 'service lanes' and partly on the legitimate expectation of the appellant as created by the letter of 1981 from the Building Authority. Note that the Tribunal took into account the floor space loss of the appellant if the appeal was not allowed.

Fort Street

This case ended up in a judicial review which nullified the decision of the Tribunal.

Comments on All Building Appeal Cases

Lanes in building control in Hong Kong is a good example of the application of modern building control on an outmoded city layout. Generally speaking, service lanes in the old urban core (which serve three- to six-storey structures well) have lost their original functions such as fire breaks, ventilation, source of natural light or servicing. It is because modern high-rise buildings and their technology are totally alien to them. The justifiable functional reasons to retain them are public access and, above all, the fact that their extinguishment and absorption into a site would have a significant implication for the maximum permissible plot ratio.

As indicated in the *Tien Poa Street Case*, the onus is on the Building Authority to prove what constitutes the actual public use of lanes or streets that are proposed to be closed by developers.

Relevant Judicial Review and Appeal Cases on Lanes

Attorney General v Hinge Well Co. Ltd. [1986] HKLR 255, CA No. 47 of 1985 (14 October 1985) (no appeal to Appeal Tribunal)

Hinge Well Co. Ltd. v Attorney General [1986–88] CPR 51, PC App. No. 5 of 1986 (11 June 1986)

5. ACCESS AND PARKING

Comments on Individual Building Appeal Cases

Skilland Development

- Delay incurred

  This appeal had a rather long history that could be traced back to 1981. We do not, however, know the history of the 1981 application.

- Missing link: how much extra traffic?

  Though the key issue is proper access planning, the Tribunal did not consider just how much more extra traffic would be created by 28 apartment units, as compared to an unreported number of units in the existing 4-storey and 2-storey structures.

- Plot ratio and road-widening

  An interesting point to consider: had the road been upgraded and the developer's proposal approved, what would have happened to the redevelopment and hence traffic generation potential of the neighbourhood?

- Government land

  How practically could a developer widen the existing road in a project involving the use of government land? The Tribunal was not invited to address this point.

Perfect Chance

This case was decided on technical grounds; it involved the requirement for the provision of access road on the site.

Kennedy Road

This case illustrates the planning role of the Building Authority in respect of access design. [This appeal led to an unsuccessful application for judicial review, *Circumwealth Co. Ltd. v Attorney General* [1993] 2 HKLR 193.]

Hoi Yuen Road

This is a good case to show that the Building Authority is a road planning authority for internal access where a site exceeds 3500 m^2.

No. 3 Barker Road

This is another example showing the access design control role of the Building Authority.

Nos. 1–9 Breezy Terrace

Like the *Kennedy Road Case*, this case was decided meticulously on technical traffic grounds with reference to applicable standards.

Comments on All Building Appeal Cases

The cases show that the Building Authority has important road planning authority and functions. The Authority has a say on external access design (*Skilland Development* and *Barker Road*), as well as internal access if parking spaces are involved (*Perfect Chance*), or where a site exceeds a certain area (*Hoi Yuen Road*). The larger is the scale of the development, the greater will be the effect of such authority on development potential of the site. Note that the Building Authority cannot consider traffic impact as they are matters for town planners, per *Wing On Co. Ltd. and Anor v Building Authority* [1996] 6 HKPLR 423. The Authority can, however, have a say on access design, as illustrated in the *Kennedy Road Case*.

Relevant Judicial Review and Case on Access

Circumwealth Co. Ltd. v Attorney General [1993] 2 HKLR 193 [Building Authority was acting *intra vires* re s. 16(1) (h) in the *Kennedy Road Case*]

6. STEPPED STREETS

Comments on Individual Building Appeal Cases

Super Mate (1) Case

See the *Super Mate (2) Case*.

Super Mate (2) Case

In this case, the Tribunal emphasized site specific policy, rather than district area wide policy, in building control. The preferred solution of imposing an Outline Zoning Plan is consistent with our argument in respect of the notion of 'immediate neighbourhood'. The notion should similarly be restricted to deal with building, not land use planning matters.

Hedland Investments (1)

See the *Hedland Investments (2) Case*.

This case led to another appeal, *Hedland Investments (2) (No. 57/91)* (the next unreported case). It arose from the encouragement of the Tribunal given to the appellant: (a) about the height of buildings that the Tribunal might accept; and (b) for its hope that the appellant's subsequent application for a less intensive development might be approved by the Building Authority.

Hedland Investments (2)

The major point of interest is the irrelevance of planning considerations, which are in the form of a proposed planning report. In the *China Engineers Case*, as followed in the *Supermate (2) Case*, it was decided that the Tribunal should ignore any planning proposals made known after the decision of the Building Authority. In the *Supermate (2) Case*, it was decided that a non site-specific transport policy was irrelevant. In this case, it was decided that a preliminary planning report (which was a review of stepped streets) was also irrelevant and *should not be produced*. The town planner would certainly be alarmed by this approach of the Tribunal.

Compare this case with the *Rich Resources Enterprises Case* regarding the discovery and production of planning reports.

[There was a further building appeal which led to a successful judicial review application by the appellant, in *re Super Mate Ltd.* [1995] 1 HKLR 287, HCMP No. 210 of 1994 (9 June 1994).]

Rich Resources Enterprises

The appellant in this case was represented by Mr Andrew Li, now the Chief Justice of the Court of Final Appeal.

Note that the Tribunal in the *Hedland Investments (2) Case* stated that such a report should not be produced. In this case, it was the appellant who complained that the same report was not made available to them.

Ying Fai Terrace

The statement that 'the high-rise development which has already been allowed has gone a long way to destroy such atmosphere in the area' reminds us of the statement 'no congruity to preserve' in the *Master Bright Case*.

Comments on All Building Appeal Cases

Stepped streets are mostly found in older districts of Hong Kong Island north. All cases in this category were allowed on the basis that the technical problems regarding access or fire escape were surmountable.

Relevant Judicial Review and Appeal Case on Stepped Streets

Rich Resources Enterprises Ltd. v The Attorney General [1991] HCMP No. 3896 of 1991 [successful application]

Hedland Investments Ltd. v Attorney General & Anor [1994–1995] CPR 53, HCMP No. 684 of 1994 (25–26, 31 October 1994)

In *re Super Mate Ltd* [1995] 1 HK LR 287, HCMP No. 210 of 1994 (9 June 1994) [what is the relevant town plan when considering building plans?]

7. MEANS OF ESCAPE (MOE)

Comments on Individual Building Appeal Cases

Hong Kong Trade Mart

Means of escape (MOE) is not a key issue in building appeals because APs are good at complying with the relevant statutory and policy requirements for building 'conventional' residential, industrial or commercial buildings. Layouts for these types of buildings are almost standardized. This case is an exception as it involves a type of purpose-built building new to Hong Kong at that time. Adjustment in design to meet MOE criteria may go to the root of the architecture of the proposal. The concern of the Building Authority in the appeal was the fire escape aspect of the proposed building as an attraction for a large population. The Tribunal found that the Authority's worries were excessive and were based on irrelevant consideration.

We have reservations about certain grounds for the decision in this case.

No evidence by firefighting experts was considered and the assertion that 'specialists' who visited the premises would behave in significantly different manner from 'ordinary members of the public' is unconvincing. Besides, there was no reference as to whether there were any lease terms that did not allow public access to the trade mart.

8. UNAUTHORIZED BUILDING WORKS (UBW): ILLEGAL STRUCTURES AND ENFORCEMENT ORDERS

Comments on Individual Building Appeal Cases

Pak On Building

At the time the case was decided, there was no need for building plan submission in respect of demolition or repair works. Had the Building Authority not ordered the appellant to submit plans for remedial works but simply remove the illegal structures, the appellant probably would have lost.

Compare this case with the *Wylie Road Case* in which the appellant sought to rely on the ruling present case unsuccessfully, as well as the *Union Carbide Case* in respect of the relationship between the appellant and the Building Authority. [This case cumulated in a closure order: MP No. 2759 and 512 of 1987.]

Wylie Road

This case occurred after the publication of the 1988 policy, which nullifies the effect of the *Pak On Building Case*. In this case, the appellant attempted in vain to rely on the *Pak On Building Case*. The Tribunal distinguished the present case, which involves an application for approval for plans relating to existing unauthorized structures, with the *Pak On Building Case*. The latter case pertains to approval for plans relating to *remedial works* on existing unauthorized works. Such a distinction, notwithstanding Mr Justice Godfrey's decision in *Yeung Pui Yee v Building Authority*, is unconvincing since the whole thrust of the distinction depends on whether or not the 'remedial works' were ordered by the Authority (as in the *Pak On Building Case*). [This appeal led to an unsuccessful judicial review application by the appellant: *Filipino Club v Building Appeal Tribunal & Anor* [1995] 3 HKC 356, HCMP No. 977 of 1985 (29 June; 14 September 1995).]

Discovery Bay

This case is an example of the application of the 1988 policy. In this case, the Tribunal dismissed the appeal in respect of certain items but allowed the appeal in respect of others. Though the Tribunal stated categorically that safety of unauthorized works was an irrelevant consideration, the case taken

as a whole had followed a pragmatic approach which took into account both public safety and resources of the government in enforcement: the Building Authority should first decide whether certain unauthorized works were 'significant'. If they were, then whether or not they were safe did not matter; they must be removed. Delay in taking action did not matter. This approach was followed in the *Marina Cove Case* where the criteria were 'significant and new'. Compare this approach with the decision in the *Laguna City Case*, which took on a different route.

As revealed in the *Yin Hing Building Case*, this approach is subject to what one may say an 'equity principle' and would be abandoned where removal of the structures create social unrest.

Note that in this case, the Tribunal threw away the expert witness report of the appellant on the grounds that it was based on a mere visual inspection and that no test had been conducted. However, in the *Marina Cove Case*, the visual approach was adopted in respect of the Building Authority's experts.

Mirador Mansion

The Tribunal stated that there was no legal or rational basis suggested for the submission unless there were strong reasons to the contrary. It also stated that the Building Authority ought to allow 'alteration/rectification' of unauthorized works so as 'to put an end to the contravention' and that it could think of a number of reasons why that would be a most unwise policy. It is most unfortunate that the Tribunal did not mention the reasons. This is another example of the application of the 1988 policy.

Laguna City

It is unfortunate that the view of the dissenting member was not recorded. Apparently, the Tribunal in this case adopted a legalistic approach and did not follow the pragmatic approach employed in the *Discovery Bay Case*. Does the barbecue cabinet constitute 'significant work'? Another interesting question for conveyancing is whether the fixing of the cabinet as an UBW violates the Deed of Mutual Covenant of Laguna City development.

Yin Hing Building

This is an important example of the application of the 1988 policy as it involves the determination of the 'priority' of action against unauthorized structures, which would affect the livelihood of many rooftop squatters and might involve 'social unrest'. The emphasis on equal treatment rather than the 'significance' or 'legality' of the structures as indicated in the *Discovery Bay Case* is absent from the case.

Marina Cove

This case consistently applied two aspects of the *Discovery Bay Case*. In the

Discovery Bay Case, the Tribunal threw away the expert witness report of the appellant on the grounds that it was based on a mere visual inspection and that no test had been conducted. In this case, the same approach was adopted, but this time in respect of the Building Authority's experts. The criterion of 'significant and new' was also consistent with the ruling in the *Discovery Bay Case*.

Shek O Village

This case was largely decided on the basis of evidence. Similar to the *Discovery Bay* and *Marina Cove Cases*, stringent standards were also adopted here for the reliability of inspection reports. The same was followed in the *Sam Pei Square Case*. Contrast this case with the *Discovery Bay Case* in respect of the point about 'works', and the gist of the *Wylie Road* and *Mirador Mansion Cases*.

Sam Pei Square

In the *Discovery Bay Case*, the rule revealed is that the Building Authority should first decide whether the unauthorized works involved are 'significant'. If they are, then whether or not they are safe does not matter; they must be removed. Delay in taking action does not matter. This approach was followed in the *Marina Cove Case* where the criterion was 'significant and new'. In this case, the Tribunal specified the standards for the Building Authority where it sought to establish that unauthorized works posed 'an immediate danger to life or property'.

Comments on All Building Appeal Cases

As for the 1988 policy, there appears to be a distinction between those involving 'social unrest', as represented by the *Yin Hing Building Case*, and those which may not. In the latter category, the leading case is the *Discovery Bay Case*, as followed in the *Marina Cove Case*, and further developed in the *Sam Pei Square Case* in respect of the proof of 'an immediate danger to life or property'.

As for the rule of evidence, see the *Discovery Bay, Marina Cove, Shek O Village* and *Sam Pei Square Cases* in which criminal standards are adopted for the reliability of inspection by experts.

Relevant Cases on Unauthorized Structures and Enforcement Orders

Woomera Co. Ltd. v Provident Centre Ltd. [1984] HCA No. 12647 of 1982 [UBW pose no real risk]

Ho King Kwan v Attorney General [1986] HKLR 1148 (CA No. 61 of 1986) (1

and 2 July 1986) CA [no legitimate expectation that no further enforcement measures would be taken]

Re: An Application by Ho King Kwan for Judicial Review [1986] HKLR (MP No. 385 of 1986) (14, 18 and 29 April 1986) HC [no legitimate expectation, closure order upheld]

Building Authority v Owners of the Illegal Structures on the Roof of 9/F, and Roof above Flats A1 & A2 on 10/F, 105 Austin Road, MP No. 275 and 512 of 1987 (30 October) [1988] HKLY 61 [closure order ensuing from the *Pak On Building Case*]

Yeung Pui Yee v the Building Authority [1988] MP No. 930 of 1988 [no retrospective approval]

Kok Chung Ho v Double Value Development Ltd. [1989–91] CPR 600 [re-entry of whole land?]

Giant River Ltd. v Asia Marketing Ltd. [1990] 1 HKLR 297 ['As is' clause relates to physical conditions, not title]

Re: Yick Fung Garment Factory Ltd., unreported, HCMP No. 1410 of 1992 (20 August 1992) [service of appeal notice out of time]

Active Keen Industries Ltd. v Fok Chi Keung [1994] 1 HKLR 396 [UBW in other units of a building would not affect title of a unit]

Sun Great International Ltd. v Hui Lai Ying Polly, HC Action No. A10742 of 1994 [title defect incurable by removal of UBW]

Wah Ying Properties Ltd. v Sound Cash [1994] 1 HKC 786 [limiting clause was ineffective because vendor was aware of and failed to disclose remedial order]

Filipino Club v Building Appeal Tribunal & Anor [1995] 3 HKC 356, HCMP No. 977 of 1995 (29 June, 14 September 1995) [no retrospective approval]

Lam Mee Hing v Chiang Shu Yin [1995] 3 HKC 247 [order regarding slopes, title defective]

Chung Kwok Yiu Ringo v Leung Chi-shing [1996] MP No. 2489 of 1995 [no building permission needed for alteration not involving structural alteration; certificate of an AP suffices]

Worldfull Investments Ltd. v Young King Asia Ltd. [1996] 4 HKC 238 [breach of occupation permit]

Wan Moon Ling Wandy v Sino Gain Investment Ltd. [1997] 1 HKC 592 [reference to approved plans are essential]

Douglas Ltd. v Jishan International Investments Ltd. [1998] 2 HKC 165 [UBW not necessarily renders titled defective]

Century Legend Ltd. v Chiu Chung Shing Investment Co. Ltd. [1999] MP No. 606/98 [purchaser must exercise due diligence regarding UBW]

Ng Lung Sang Anita v Lam Yuk Lan [1999] HCA No. A 14345/97 [raising requisitions out of time]

Spark Rich (China) Ltd. v Valrose Ltd. [1999] CACV No. 249/98 [MEPC test regarding UBW]

DEMOLITION

Comments on Individual Building Appeal Case

True Dragon Properties

The lesson of this case is similar to that in the *Shum Tse Street–Union Carbide Asia Cases* in respect of the working relationship between the AP and the Building Authority.

Relevant Judicial Review and Related Cases on Demolition Orders

Quebostock Ltd. v Building Authority & Anor, unreported, HCMP No. 1410 of 1985 (13 June 1985)

Quebostock Ltd. v Building Authority & Anor [1986] HKLR 467 (12 Dec 1985) CA No. 102 of 1985 [the Appeal Tribunal has jurisdiction to hear appeals from decisions made under s. 24(1)]

The Appeal Tribunal v Peter A. De Kantzow and Anor, unreported, HCMP No. 3193 of 1990 (7 February 1991)

The Appeal Tribunal v Peter A. De Kantzow and Anor [1992] 1 HKLR 55 (CA No. 53 of 1991) (8 Oct 1991) CA [decision of the Appeal Tribunal not to hold a full inquiry was quashed]

4 SUMMARY AND ANALYSIS OF BUILDING APPEAL CASES

PROCEDURES AND PRINCIPLES

SHUM TSE STREET

- **Building Appeal Case Name:** DG Tanks Nos. T6, T7, T8 and T9, Shum Tse Street, Sham Tseng, New Territories, DD390, Lot 190 [**Shum Tse Street**] (followed by the **Union Carbide Asia** Case)
- **Building Appeal Case No. :** 14/87 (followed by 49/88)
- **Similar Case:** 49/88 *Union Carbide Asia*
- **Nature of the Case:** replacement of dangerous goods (DG) tanks; s. 4(1) of the *Buildings Ordinance; Buildings (Oil Storage Installations) Regulations*
- **Date of Hearing:** 9 November 1987
- **Date of Decision:** 9 November 1987
- **Chairperson of Tribunal:** Mr Edmund Y. S. Cheung
- **Representation:** names cannot be verified
- **Decision:** appeal dismissed, inquiry refused
- **Rules Laid down by the Decision:**

  (1) The replacement of roof and plates of DG tanks are works within the meaning of s. 4, *Buildings Ordinance.*
  (2) Where proposed works involve the demolition and replacement of the roof and plates of DG tanks which fall within the definition of 'building

works' under s. 2 of the *Buildings Ordinance*, the building plans for such works have to be approved by the Building Authority under s. 4(1) of the *Buildings Ordinance*. Regulation 10 of the *Building (Oil Storage Installations) Regulations* does not apply to exempt the works from approval.

- **Background:**

The subject site was located at Shum Tse Street, Sham Tseng, in DD 304 and 390, Lot 190. The Authorized Person (AP) for the appellant sent a letter dated 28 May 1987 to the Building Authority for 'written authorization' for the appellant to replace the corroded dangerous goods (DG) tanks no. BA–24–6 to BA–24–9 'by new ones of identical materials and construction as the old ones'. The AP stated the following: 'We trust that your office already has in hand the record drawings of the existing tanks. Hence we believe there is no point for duplicating the same drawings for your record.'

The Building Authority in a letter dated 3 June 1987 informed the appellant that he needed to make a formal application under the *Buildings Ordinance* for consent to demolish the existing tanks and rebuild new ones if he wished to proceed with his rebuilding programme.

The AP submitted by a letter dated 9 July 1987 to the Building Authority Forms 9 and 10 with (a) two sets of structural drawings 'showing the construction of new replacement DG Tanks Nos T6, T8 and T9' and (b) one copy of the tankage and foundation structural calculations for approval. In the letter, reference was made to 'thicker shell plates with ample corrosion allowance (having been) specified in the new tanks'.

The Authority rejected the proposals. This decision was made known to the appellant by a letter dated 22 July 1987. The grounds for the rejection were stated as follows:

(a) Under Section 16(1)(i) of the *Buildings Ordinance* as your corresponding building plans have not yet been approved.
(b) Under Section 16(1)(i) of the *Buildings Ordinance* the following are to be given and/or further investigated :–

  (i) Investigations into the construction and condition of the existing foundations to establish and confirm their suitability for retention as the foundations for the proposed new tanks.

The AP gave the Notice of Appeal to the Appeal Tribunal by a letter dated 27 July 1987.

- **Arguments:**

The appellant had the following grounds for appeal against the Building Authority's 'refusal to issue written authorisation for the [sic] carrying out tank replacement (repair works)'.

(a) 'The Building Authority has misdirected itself in that the application was not and should not be treated as an application under Section 14 of the *Buildings Ordinance* but an application under Regulation No. 10 of the *Buildings (Oil Storage Installations) Regulations* for written authorisation to carry out the repair works to overcome the corrosion problem for licence renewal.'
(b) The grounds upon which the BA disapproved the AP's proposals 'were irrelevant because such factors had no substance in it and had nothing to do with the proposed repair works for overcoming corrosion problem for licence renewal'.
(c) 'The proposed tank replacement works were basically of repair works nature for which Regulation No. 10 of the *Building (Oil Storage Installations) Regulations* should apply.'

- **Reasons for Decision:**

The Tribunal dismissed the appeal on the grounds that it could not accept any of the three grounds submitted by the appellant.

Replacement of roof and plates of DG tanks were works within the meaning of s. 4

The Tribunal found that the replacement of roof and plates of DG tanks were works within the meaning of s. 4 of the *Buildings Ordinance*, despite the AP's assertion that the frames of the tanks would not be demolished. The Tribunal stated that the AP had submitted Forms 9 and 10 together with structural drawings and calculations for the approval of the Building Authority. This indicated that the application was under s. 4 of the *Buildings Ordinance*.

Form 9 was basically for the application of building works/street works. That he did not furnish any building plan was probably due to his consideration that the Building Authority had 'the record drawings of the existing tanks' such that 'there is no point of duplicating the same drawings for your (Building Authority's) records'.

Building application was required

The Tribunal could not agree that the AP did not need to submit building plans simply because similar drawings had been submitted back in the early 1970s. As the AP admitted that the new tanks would consist of 'thicker shell plates', the new tanks would not be exactly the same as the existing ones.

Regulation 10 of the Building (Oil Storage Installations) Regulations did not apply

The Tribunal viewed that Regulation 10 of the *Building (Oil Storage Installations) Regulations* did not apply.

> Except in the case of emergency, no person shall repair or cause or permit the repair of any tank in an oil storage installation without the written authorization of the Building Authority.

The proposed works involved the demolition and replacement of the roof and plates of the tanks which fell within the definition of 'building works' under s. 2 of the *Buildings Ordinance*. Therefore, it follows that the building plans for such works had to be approved by the Building Authority under s. 4(1) of the *Buildings Ordinance*. Regulation 10 of the *Building (Oil Storage Installations) Regulations* did not apply.

MULTI-STRATEGIC INVESTMENT

- **Building Appeal Case Name:** 12–18 Swatow Street, Hong Kong [**Multi-Strategic Investment**]
- **Building Appeal Case No. :** 41/88
- **Similar Case:** 49/88 *Union Carbide Asia*
- **Nature of the Case:** no case to appeal against; prejudice against applicant rectified before application for appeal made.
- **Date of Hearing:** 30 September 1988
- **Date of Decision:** 30 September 1988
- **Chairperson of Tribunal:** Edmund Y. S. Cheung
- **Representation:** no counsel representation for both parties
- **Decision:** appeal dismissed, inquiry refused
- **Rules Laid down by the Decision:**

  (1) The Tribunal has no jurisdiction 'to look into administrative matters' of the Building Authority even where the latter first rejected and later approved the appellant's proposals, prejudicing the appellant.
  (2) Where there is nothing to appeal against, as in a situation where the Building Authority approves an application before notice to appeal, no appeal inquiry will proceed.

- **Background:**

The Authorized Person (AP) for the applicant, Multi-Strategic Investment Ltd., submitted certain sheet piling and shoring plans to the Building Authority for approval by a letter dated 4 May 1988.

The Building Authority informed the AP that his proposals were rejected by a letter on 30 June 1988.

The AP gave the Building Authority a Notice of Appeal by a letter dated 1 July 1988. Grounds of appeal were set out in the notice.

The Building Authority reviewed its decision upon receipt of the AP's Notice of Appeal and agreed to approve the plans submitted by the AP and to grant exemption from s. 31(1) of the *Buildings Ordinance*.

The Buildings Authority wrote to the AP on 16 August 1988 advising of its new decision. On 22 August 1988 and 23 August 1988, the AP wrote two different letters to the Building Authority. The second letter said in the last paragraph that: 'I require either you approve my plan or else you contest my appeal.'

A preliminary meeting of the Appeal Tribunal was convened on 30 September 1988 to consider if an inquiry should be held.

- **Arguments:**

The Tribunal was of the view that although the Building Authority erred in refusing the appellant's proposals in the first instance and thus 'prejudiced' the appellant, it had no jurisdiction 'to look into administrative matters' or appeal to hear.

- **Reasons for Decision:**

The reason was that the Building Authority had agreed to approve the appellant's proposals in principle by the letter of 16 August 1988, simply on the grounds that 'there is nothing to appeal against'. (para. 5)

UNION CARBIDE ASIA

- **Building Appeal Case Name:** DG Tanks Nos. BA 24–6 to BA 24–9, Shum Tse Street, Sham Tseng, New Territories, DD 390, Lot 190 [**Union Carbide Asia**] (ensuing from the *Shum Tse Street Case*)
- **Building Appeal Case No. :** 49/88
- **Similar Cases:** no case to appeal: *Multi-Strategic Investment* (41/88); dangerous goods tanks: *Shum Tse Street* (14/87)
- **Nature of the Case:** no case to appeal against
- **Date of Hearing:** 30 September 1988
- **Date of Decision:** 30 September, 1988
- **Chairperson of Tribunal:** Edmund Y. S. Cheung
- **Representation:**

  (a) no counsel representation for the appellant
  (b) C. W. Yeung for the respondent

- **Decision:** appeal dismissed, inquiry refused
- **Rule Laid down by the Decision:** Repair works/alteration and addition works are building works.

- **Background:**

This is the aftermath of the *Shum Tse Street Case*. On 8 December 1987, the Authorized Person (AP) of the applicant, Union Carbide Asia Ltd., submitted to the Building Authority (the BA) '6 sets of building plans for DG Nos. T6–T9 (drg. No. RW1/1, FR1/1) detailing my tank repair proposals for your consideration and approval' and '2 sets of record structural plans for the existing tanks (drg. No. T1/13–T13/13) with dimensions converted into metric units are submitted herewith for your record and retention'. The third paragraph of that letter reads:

> Under my tank repair proposal, no change will be done to the tank skeleton. Only the corroded shell and roof plates would be replaced by new shell plates of the same thickness and materials as that of the original tank.

By a letter dated 31 December 1987 the Building Authority replied to the AP. In the second paragraph of the letter, it reads:

> You clarified in the telephone conversation that the complete tank shells including the bottom and roof plates were to be replaced. As such, I have to reiterate my comments in my letter of 3 June 1987 that building plans for the proposed works which involve the demolition and replacement of the bottom and roof plates shall be submitted and approved by the Building Authority under Section 14 of the Buildings Ordinance. In this connection, I also refer you to the minutes of the meeting held by the Appeal Tribunal on 9 November 1987 which were sent to you by the Clerk to Appeal Tribunal in his letter of 2 December 1987.

By another letter dated 5 January 1988, the AP resubmitted to the BA a full set of drawings for 'approval under Section 14 of the Buildings Ordinance'.

By a letter dated 4 March 1988, the BA informed the AP that his proposals 'in respect of Alteration & Addition Works (Building)' were not approved on the following grounds under the s. 16 (1)(i) of the *Buildings Ordinance*:

(a) The AP had not demonstrated that the design and construction of the proposed new tanks met the standards laid down in the Code of Practice, in particular that the tankage layout and safety distances of the proposed new tanks met the recommendations of the IPMS Code. (*Building (Oil Storage Installation) Regulation* 3 referred.) Besides, the tankage layout and safety distances of the proposed new tanks had not been shown.
(b) Plans and details of the proposed new tanks were not shown. The AP only showed the existing tanks in his submitted drawings.

By a letter dated 8 March 1988, the AP queried the Building Authority as to why the Authority took safety distance 'into pollution consideration'.

In its reply dated 16 March 1988 to the AP, the Building Authority explained that its letter dated 4 March 1988 was intended to advise the AP that his plans were disapproved on the grounds that further information were required. Nothing was mentioned regarding pollution.

The Appeal Tribunal noted that subsequent correspondence between the AP and the Building Authority showed that the AP 'was harping on the question of safety distance to tankage layout while the BA insisted that further information was required before consideration would be given to approving the plans in question'.

On 23 May 1988, the AP resubmitted 2 sets of plan for approval. However, the Building Authority found that those plans did not incorporate the required information. In its letter dated 20 June 1988 to the AP, the Authority said in the last paragraph:

> May I put it on record here that you resubmitted on 23 May 1988 two sets of plans for approval, but these plans did not incorporate the required information. You are [sic] contacted on several occasions and detailed explanations were given to you regarding the information required. However, you refused to furnish such information. These plans will be processed under the Buildings Ordinance separately.

By another letter dated 21 June 1988, the Building Authority informed the AP that his proposals 'in respect of Alteration & Addition Works (Building)' were disapproved on the following grounds under s. 16(1)(j) of the *Buildings Ordinance*, and that the required information and particulars as specified in the Authority's letter dated 4 March 1988 were still outstanding.

In his subsequent correspondence with the Building Authority, the AP argued that the proposed works were 'repair works' rather than 'Alteration & Addition Works (Building)'.

In its letter dated 23 July 1988 to the AP, the Building Authority stated that the proposed works involved 'the demolition and replacement of the roof and plates of the tanks and are conventionally considered by this office to be known as "Alteration and Addition (Building)" ' and that 'such use bears no significance under the Buildings Ordinance'.

By a letter dated 27 July 1988, the AP served a Notice of Appeal against the Authority's decisions dated 4 March 1988 and 23 July 1988. The grounds of the appeal were as follows:

(a) The proposed works were repair works and not alteration and addition works.
(b) Regulation 3 of the *Building (Oil Storage Installation) Regulations* empowers the Building Authority to control pollution and should not

be used to disapprove the AP's proposals as stated in the Building Authority's letter dated 4 March 1988.

- **Reasons for Decision:**

The Building Authority came to the conclusion that the appellant had failed to show a good cause why an enquiry should be held and accordingly refused to hold the same. The reasons were as follows:

Replacement of the roof and plates was building works

It was common ground that the complete tank shells including the bottom and roof plates were to be replaced. As pointed out by the respondent in Appeal Tribunal Case No. 14–87 (Shum Tse Street) where the same appellant and the same AP were involved, the Tribunal held 'that the replacement of the roof and plates is building works within the meaning of Section 14 of the Buildings Ordinance'.

Repair works or alteration and addition works were building works

The Tribunal held that it was not necessary or relevant to decide whether the proposed works were in fact repair works or alteration and addition works (building). It held that whatever label one put on such works, the fact remained that they were building works within the meaning of s. 14(1) of the *Buildings Ordinance.*

The Building Authority must ask for further information

The Tribunal was satisfied that the Building Authority had acted rightly, and was perfectly entitled to require the AP to supply the information and particulars requested under s. 16(1)(i) and (j) of the *Buildings Ordinance* without which the Building Authority would not be in a position to approve the plans in question. The Tribunal went on to suggest that the Building Authority would have failed in its duty if it had not asked for the said information.

- **Comments:**

In passing, the Tribunal stated that it noted that there was a sense of grievance and dissatisfaction towards the Building Authority, which was regarded as both personal and emotive. The fact was that the AP copied all correspondence to OMELCO. The Tribunal regarded that the AP had 'chosen to engage in protracted and unproductive arguments with fruitless result. The upshot is that a great deal of valuable time has been wasted — to the detriment of all concerned, and in particular, the Appellant.'

Whether the Tribunal was correct or not, this case should provide APs a good reference to dealing with the Building Authority. AP should be co-operative in furnishing the Authority factual information relevant to building works.

EATON HOTEL

- **Building Appeal Case Name:** Proposed Extension to the Eaton Hotel, No. 380, Nathan Road, Kowloon **[Eaton Hotel]**
- **Building Appeal Case No. :** 28/94
- **Nature of the Case:** Jurisdiction of the Tribunal; *Temporary Control of Density of Building (Kowloon and New Kowloon) Ordinance, 1989; Regulation 21(3) of the Building (Planning) Regulations; Regulation 22 of the Building (Planning) Regulations; Draft Yau Ma Tei Outline Zoning Plan No. S/K2/6; Practice Note No.111 dated 11 February 1985;* Practice Note No. 111 dated 11 February 1985 as updated in August 1994: 'Hotel Concessions' ; Practice Note dated 11 February 1990; 'Calculation of Gross Floor Area and Non-Accountable Gross Floor Area'; views of District Planning Officer; costs paid to appellant
- **Dates of Hearing:** 2 and 3 November 1994
- **Date of Decision:** 6 December 1994
- **Chairperson of Tribunal:** Mr Geoffrey Ma, QC
- **Representation:**

  (a) Mr Denis Chang QC and Mr Mok Yeuk-chi for the appellant
  (b) Mr Nicholas Cooney for the respondent

- **Decision:** appeal allowed
- **Rules Laid down by the Decision:**

  (1) Where the Notes to the OZP give no guidance as to how plot ratio is to be calculated, plot ratio should be determined by reference to the *Buildings Ordinance* and the *Building (Planning) Regulations.* Regulations 19 to 23 expressly deal with plot ratios of buildings in Hong Kong. The Regulations recognize that there is a distinction made between the calculation of GFA and the exceeding of plot ratio: see for example Regulation 22 compared with Regulation 23(3). This distinction has been recognized in practice.
  (2) The OZP is a piece of subsidiary legislation subject to the usual rules of statutory interpretation.

- **Background:**

  The subject property of this appeal was the Eaton Hotel (the hotel) which was situated at 380 Nathan Road, Kowloon. The hotel was a part of the building located at the site. The relevant part of the building for the purposes of this appeal was the hotel. The Tribunal referred to the whole building simply as 'the hotel'.

  The hotel was built in the early 1990s. The building plans were first approved by the Building Authority on 28 March 1988.

When the Building Authority approved the plans, certain concessions were made by the Authority. The concessions were contained in a Form 30 document dated 28 March 1998 made by the Building Authority pursuant to section 42 of the *Buildings Ordinance*. These concessions were twofold:

(a) concessions made which qualified for an excess in plot ratio; and
(b) concessions which resulted in the exclusion of various area in the hotel from the calculation of the Gross Floor Area (GFA) of the building. In this latter respect, the areas excluded from the calculation of GFA comprised the basement floors and the ground floor parking, loading and unloading areas.

On 9 February 1994, the owner of the hotel, Grow On Development Limited submitted plans for constructing an extension to the hotel. These proposed extensions consisted of the addition of 123 guest-rooms, a swimming pool, a lounge and changing rooms, all to be constructed on the 9th floor and above in the East Wing of the hotel.

The proposals by the owner for the extensions to the hotel were submitted to the Building Authority for approval on 9 February 1994 by a letter from the owner's Authorized Person (AP) and Architect (Mr Kenneth Chau of CYS Associates (Hong Kong) Limited).

The Building Authority made a decision rejecting plans and the decision was made known to the appellant by a letter dated 8 April 1994.

A number of reasons were given for the rejection of approval. These were contained in paragraph 7 of the letter dated 8 April 1994.

It would, however, appear to the Tribunal that only one reason was relevant for the purpose of this appeal. Paragraph 7(A)(1) states as follows:

> 7.(A) Under Buildings Ordinance s. 16(1)(d), the following contravention are noted:–
>
> (1) Your proposal contravenes the draft Yau Ma Tei OZP S/K2/6 [that is, the OZP]. In this regard, please note comments of District Planning Office/Kowloon as listed in para. 10 below.

The appellant appealed to the Tribunal and a preliminary meeting was held on 1 September 1994.

- **Arguments:**

The Tribunal had no jurisdiction

At the preliminary hearing of the appeal in which the Tribunal decided that the appeal could proceed, Mr Cooney raised a question of jurisdiction.

The argument was that since the Building Authority had not exercised any discretion in the refusal to approve plans, but had merely followed without question the views of the District Planning Officer/Kowloon (DPO/Kowloon), there was no discretion of the Building Authority that could be

challenged by an appeal under s. 44 of the *Buildings Ordinance*. The Tribunal ruled that this submission could not be accepted.

When the matter came before the Tribunal at the substantive appeal, the same argument was raised again in the written submission despite its earlier ruling. However, no time was taken up on the matter during the hearing.

The argument was that since the BA had no discretion in a matter falling under s. 16(1)(d) of the *Buildings Ordinance*, by reason of *Singway Company Limited v The Attorney General* [1977] HKLR 275 (*The Singway Case*), there was no discretion to appeal from for the purposes of s. 44 of the *Buildings Ordinance*.

Previous concessions were counted in plot ratio calculation under OZP

The hotel concessions signified an instance of where the plot ratio was allowed to be exceeded. Since paragraph (2) of the Remarks in the Notes to the OZP for the Commercial Zone specifically referred to the exceeding of plot ratios by reference only to *Regulation 22 of the Building (Planning) Regulations*, the concessions should therefore be excluded from consideration under the OZP. Certainly, the concessions were to be excluded when paragraph (1) of the Remarks referred to 'plot ratio' on a true construction of that paragraph.

The exceeding of plot ratio was entirely within the province of the Town Planning Board (who was responsible for the implementation of the OZP) and therefore outside the ambit of the Building Authority's function. (The Tribunal found that this argument was presumably a consequence of the *Singway* decision.)

The appellant argued on the following grounds:

Previous concessions should be included

The true interpretation of the OZP depended on the fundamental distinction in building law and practice between the exceeding of plot ratio and the calculation of plot ratio.

The concessions in the present case related to concessions given in relation to the calculation of GFA and not as such to the exceeding of plot ratio. The distinction could be described in this way:

(a) In order to arrive at the plot ratio for any given building on a site, there were 2 parts to the equation, being the GFA and the area of the site (GSA) in question (*Regulation 21(3) of the Building (Planning) Regulation*).
(b) In calculating the GFA of a building, certain concessions might be allowed under the *Buildings Ordinance*. Hotel concessions, including the hotel concessions in the present case, came within this category.
(c) After the GFA was arrived at, the plot ratio could then be calculated.
(d) Under the *Building (Planning) Regulations*, maximum plot ratios for

buildings in Hong Kong were specified. In certain circumstances, the permitted plot ratio might be exceeded. Those circumstances were set out in Regulation 22 of the *Building (Planning) Regulations*, which was the very provision mentioned in para. 2 of the Remarks in the Notes for Commercial Zones of the OZP.

If the distinction did exist, there was nothing in the Remarks for the Commercial Zones of the OZP that disallowed taking into account of the hotel concessions.

That was, after all, part of the exercise of calculating the GFA. This in turn determined the plot ratio. It had nothing to do with the exceeding of the plot ratio envisaged by paragraph 2 of the Remarks and by the opening words of paragraph 1 'Except as otherwise provided herein . . . '

- **Reasons for Decision:**

The Appeal Tribunal allowed the appeal on the following grounds.

The Tribunal had jurisdiction

The Tribunal rejected the 'startling' submission and held that it had jurisdiction to hear the appeal because:

(a) a non-exercise of discretion (or a refusal to do so) was no different from a discretion exercised on wholly erroneous grounds and this was covered by s. 44;
(b) although it was unnecessary to decide this, the Tribunal had considerable doubts on the evidence that in fact the Building Authority did not exercise or purport to exercise their discretion.

These reasons applied to the two submissions of the respondent. The Tribunal also noted several key facts and issues.

Temporary Control of Density of Building (Kowloon and New Kowloon) Ordinance, 1989

At the time the plans for the hotel were considered by the Building Authority, the *Temporary Control of Density of Building (Kowloon and New Kowloon) Ordinance, 1989* (TCBDO) was enacted. The TCBDO applied to the site in question.

Section 3 of the TCBDO read: 'The Building Authority shall refuse to give his approval under section 14 of the *Buildings Ordinance* (Cap. 123) of any plans of building works intended to be carried out in an area where the carrying out of the building or buildings which would exceed the maximum plot ratio for that plot.' The maximum plot ratio for buildings was defined in the *Buildings Ordinance*.

The Tribunal considered that the significance of the TCBDO lied in the following respects:

(a) Section 3 of the Ordinance made a specific reference to the limit of plot ratios of buildings as a means of controlling the building development density in Kowloon.
(b) The issue of plot ratio was directly linked to the *Buildings Ordinance* and the Building Authority.
(c) The Ordinance expired on 31 December 1993. In order to continue the control of density in the Yau Ma Tei district, the *Draft Yau Ma Tei Outline Zoning Plan No. S/K2/6* (the OZP) was published in the gazette on 24 December 1993. Mr Cooney acknowledged that the OZP had the effect of continuing the density control which had been the intention of the TCBDO.

Concessions and GFA

The concessions granted by the Building Authority for the construction of the hotel were recognized by the Tribunal as lying at the heart of the present case.

> It serves to be reminded that these concessions were granted in relation to GFA calculation. In other words, areas which are 'conceded' fall to be deducted from the calculation of GFA. The importance of calculating GFA is that by dividing the GFA of a building by the area of the site on which the building is erected, one arrives at the plot ratio for the building. This is the standard definition of plot ratio and is actually so stated under *Regulation 21(3) of the Building (Planning) Regulations* ['*the BPR*'].
>
> The BO sets out the limits of plot ratios for buildings in Hong Kong depending on whether the site is class A, B or C site and also on whether the building is a domestic or non-domestic one: *see the First Schedule to the BPR*. The present building is on a class C site and is a composite building. For composite buildings, the calculation of permitted plot ratios is determined by Regulation 21(2) of the BPR.
>
> At present, the actual plot ratio of the Hotel is 10.299 which is marginally less than the permitted plot ratio of 10.301 (that is, the plot ratio permitted under the provisions of the BO). (emphasis added by authors)

The provisions of the Notes to the OZP

The Tribunal referred to the OZP in more detail. 'The important part of that document are the Remarks [in the Notes to the OZP] made under the Commercial section [for Commercial Zones] (which particularly apply to the Hotel).' (square brackets added) The 'remarks' were as follows:

> Remarks
>
> (1) Except as otherwise provided herein, on land designated 'Commercial', no new development or addition, alteration and /

or modification to the existing building(s) shall result in the plot ratio for the building(s) upon development or redevelopment being in excess of 12.0 or the plot ratio of the existing building (s), whichever is the greater.

(2) Where the permitted plot ratio as defined in Building (Planning) Regulations is permitted to be exceeded in circumstances as set out in Regulation 22(1) or (2) of the said Regulations, the plot ratio for the Building(s) on land to which paragraph (1) applies may be increased by the additional plot ratio by which the permitted plot ratio is permitted to be exceeded under and in accordance with the said Regulation 22(1) of (2), notwithstanding that the relevant maximum plot ratio specified in paragraph (1) above may thereby be exceeded.

Comments of the DPO re plot ratios were clarified

The Tribunal noted paragraph 10 of the letter dated 8 April 1994 to the appellant:

10. District Planning Office/Kowloon has the following comments:

It is noted that the proposed PR of the existing hotel development and the proposed extension (9/F to 20/F) is 11.995 excluding the 5-level basement. Obviously the total PR of the current submission exceeds that stipulated (i.e. PR 12) under the current draft Yau Ma Tei OZP S/K2/6. Therefore the building plans (Drawing Nos. AA-1 to AA-8 dated 9.2.94) for the proposed hotel extension at 9/F & above should be rejected under s. 16(1)(d) of the Buildings Ordinance as a result of contravening the PR control stipulation in the current OZP unless the AP could satisfactorily demonstrate that the proposed PR of 11.995 plus that of the 5-level basements is within the PR of the existing building(s) (which was in existence on 24.12.93).

The reference to plot ratio by the DPO was not entirely clear. The Tribunal clarified what the DPO intended to say:

In a nutshell, the plot ratio of the Hotel **together with proposed extensions** would amount to 11.995, which is less than the plot ratio of 12 mentioned in the OZP (Remarks paragraph (1)). The figure of 11.995 assumes the continuation of the hotel concessions. However, the stance taken by the BA was that these concessions should not be taken into account for the purposes of establishing plot ratio under the OZP. If the hotel concessions are ignored, the plot ratio for the Hotel plus extensions would be well in excess of 12. On this basis, the BA refused to approve the plans submitted for the extension (and this continues to be their argument). Reliance was placed on section 16(1)(d) of the BO. It was argued that where that sub-section was applicable, the BA had no discretion but to refuse permission, this being the effect of a decision of Leonard J. in *Singway Company Limited v The Attorney General* [1977] HKLR 275 (emphasis added).

The Issue: Did plot ratios stipulated in the OZP exclude concessions previously granted by the Building Authority?

The Tribunal found that the key issue was whether the concessions enjoyed by the appellant would be counted in plot ratio calculation under the OZP.

> The primary issue that both parties raised was the true interpretation of the OZP. Put simply, it is for the purposes of the said paragraph (1) of the Remarks section, **does the reference to plot ratio exclude the applicability of hotel concessions in general and the hotel concessions granted to the owner in particular?** There were a number of subsidiary issues raised on behalf of the appellant owner consequent upon a finding that on a true interpretation of the OZP, hotel concessions were to be excluded from the calculation of plot ratio. On the view that we have taken on the primary issue, it becomes unnecessary to decide these other issues (emphasis added).

Decision on the primary issue

The Tribunal found that a distinction did exist between plot ratios under the concession and those under the OZP because of the following reasons:

(a) Paragraph 1 in the Remarks of the Notes to the OZP gave no guidance as to how plot ratio was to be calculated. There was just a simple reference to 'plot ratio'.
(b) The concept of plot ratio was clearly spelt out in the *Buildings Ordinance* and the *Building (Planning) Regulations*. Regulations 19 to 23 expressly dealt with plot ratios of buildings in Hong Kong.
(c) The Regulations recognized the distinction that was made between the calculation of GFA and the exceeding of plot ratio: see for example Regulation 22 compared with Regulation 23(3).
(d) This distinction had been recognized in practice. The granting of the hotel concessions by Form 30 dated 28 March 1988 was a striking example of this distinction as actually applied to the hotel: contrast paragraph 1(i) with paragraph 1(ii). This was also confirmed by the evidence of Mr Cheung Hau Wai (the Chief Building Surveyor of the Buildings Department). Further examples of this distinction in practice could be identified from the Practice Notes issued by the BA in relation to hotel concessions and the calculation of GFA: see Practice Note No. 111 dated 11 February 1985 as updated in August 1994, which were headed 'Hotel Concessions' (in particular contrast paragraph 2(a) with paragraph 2(b)(ii) of the updated version) and Practice Note dated 11 February 1990 headed 'Calculation of Gross Floor Area and Non-accountable Gross Floor Area'.
(e) 'This distinction has been in existence for many years in Hong Kong now and is well known to all those who deal with building. It seems

quite surprising for the distinction to disappear when one comes to consider the true meaning of the OZP. We find it very difficult indeed to be convinced that the reference to "plot ratio" in paragraph (1) of the Remarks should have a meaning different to the way that the term has been understood in the BO and in practice. Nothing within the OZP compels this conclusion. Indeed, we think, quite the contrary since the term "plot ratio" (and limits to plot ratios) can only have any sort of meaning when applied to buildings in Hong Kong and that leads one inevitably to the BO and the BPR. Further, the reference to Regulation 22 of BPR in paragraph (2) of the Remarks is clearly a reference to the exceeding of plot ratio, as supposed to the circumstances in which allowances to the calculation of GFA are allowed.'

(f) 'Unless there are compelling reasons shown, we see no justification for there to be different meanings ascribed to the term "plot ratio" where it is found in pieces of legislation dealing with more or less the same matter. No such compelling reasons are shown.'

(g) **'We treat the OZP as a piece of subsidiary legislation subject to the usual rules of statutory interpretation.'** (emphasis added)

(h) 'One consequence of this is to reject a submission raised by Mr. Cooney that we should treat as persuasive the views of the Town Planning Board ["TPB"]. Evidence was sought to be adduced of the views of the TPB that under the OZP, it was not intended that hotel concessions should be made and taken into account when considering the question of plot ratio under paragraph (1) of the Remarks. During the hearing, we upheld the objection by Mr. Chang that such evidence was impermissible as an aid to the true and proper construction of a statute. It would be quite wrong for such evidence to be admitted. In any event, the evidence sought to be adduced by Mr. Cooney (in the form of testimony by Mr. Michael Chan of the Metro Group section of the Planning Department) was, as admitted by Mr. Cooney, not even conclusive of the views of the TPB.'

(i) 'Much the same point can be made in respect of the evidence of Mr. Cheng Kam Shing of the Planning Department of the Kowloon District Planning Office. What they thought was the true intention or meaning of the OZP carries no weight as to the true interpretation of that document as a matter of law.'

The Tribunal held therefore that the distinction still existed in respect of paragraph (1) of the Remarks.

> The hotel concessions, having already been granted, must, in our view, continue to be taken into account when the plot ratio for the Hotel comes to be calculated for the purpose of paragraph (1) of the Remarks. As mentioned before, the plot ratio for the Hotel together

with proposed extensions is 11.995, which is below the stipulated figure of 12.

It was necessary to deal with other issues

'In view of our decision on the primary issue, we do not think it necessary to decide on the other issues raised by the parties nor is it desirable to do so. It is sufficient merely to indicate that if the BA was correct in its interpretation of the OZP, it would be difficult to find that there had been a wrongful exercise of discretion by the BA.'

Determination was notified

The Tribunal allowed the appeal. It proposed that costs followed the event so that the costs of this hearing and those of the appellant would be paid by the Building Authority. This proposed order would be final unless otherwise indicated by the parties within 14 days of the date that the determination was notified to the parties.

- **Comment:**

Leave for the appellant's application for judicial review was not granted. See *Union Carbide Asia Ltd. and Choy Bing-wing v The Appeal Tribunal and the Building Authority*, MP No. 136 of 1989.

CUMBERLAND ROAD

- **Building Appeal Case Name:** No. 7 Cumberland Road, Kowloon, N.K.I.L. 686 [**Cumberland Road**]
- **Building Appeal Case No.:** 17/81
- **Nature of the Case:** *s. 16(1)(g) Buildings Ordinance*; immediate neighbourhood
- **Date of Hearing:** 27 July 1984
- **Date of Decision:** 7 July 1984
- **Chairperson of Tribunal:** Mr William Turnbull
- **Representation:**

  (a) no counsel representation for the appellant
  (b) N. L. Strawbridge for the respondent

- **Decision:** appeal dismissed
- **Rule Laid down by the Decision:**

  (1) When an appellant does not appear, the Tribunal may proceed to dismiss the appeal.

- **Background:**

  The Building Authority stated in a letter dated 22 October 1981 its decision to reject certain plans under s. 16(1)(g) of the *Buildings Ordinance* as their implementation would result in a building differing in height from buildings in the immediate neighbourhood. The neighbourhood was considered by the Authority as the entire Kowloon Tong Garden Estate.

  The applicant appealed and a special meeting was arranged to be held on 27 July 1984. The appellant did not turn up and the Tribunal decided that the appeal was dismissed.

- **Reasons for Decision:**

  The Tribunal did not state the reason for decision but it is obvious that the absence of the appellant means definite failure in an appeal.

IMMEDIATE NEIGHBOURHOOD

MASTER BRIGHT

- **Building Appeal Case Name:** Inland Lot No. 2456 (Nos. 10, 11 and 12, Fung Fai Terrace), Village Road, Happy Valley, Hong Kong [**Master Bright**]
- **Building Appeal Case No. :** 03/87
- **Similar Cases:** *Nos. 6–18 MacDonnell Road Case; No. 12 Bowen Road Case*; *Jenxon Investment Case* (18/88)
- **Nature of the Case:** meaning of an 'immediate neighbourhood' for building height control; congruity of buildings to preserve; discretion under s. 16(1)(g); visit of members of the Tribunal to subject site
- **Dates of Hearing:** 5 October 1987, 23 November 1987 and 2 December 1987
- **Date of Decision:** 26 January 1988
- **Chairperson of Tribunal:** Mr Edmund Y. S. Cheung
- **Representation:**

  (a) Mr Barrie Barlow, counsel for the appellant
  (b) Mr Bernard Whaley and Mr Anthony Wu for the respondent

- **Decision:** appeal allowed
- **Rules Laid down by the Decision:**

  (1) The following questions should be answered in determining the 'immediate neighbourhood' for the purpose of building height control under s. 16(1)(g):

(a) What is the immediate neighbourhood of the subject site?
(b) Having defined the immediate neighbourhood of the subject site, would the proposed building works differ in height from others in that neighbourhood to an extent that would justify the Building Authority exercising its discretion under section 16 (1)(g)?

(2) The following rule stated by the Tribunal in the *No. 12 Bowen Road Case* should be noted in relation to the preservation of building character of a neighbourhood: 'If there is no congruity to preserve, then an exercise of discretion based on the preservation of incongruity is bad.'

- **Background:**

The Building Authority rejected an application of the appellant (Master Bright Co. Ltd.) in a letter dated 6 February 1987, to develop its property on Fung Fai Terrace. The reason for the decision would result in a building differing in height from the buildings in the 'immediate neighbourhood'.

The proposed development was a high-rise building of 27 storeys. They were domestic floors above a podium of 5-level carparks.

- **Arguments:**

The Building Authority defined 'the immediate neighbourhood' of the subject site to include Nos. 27–33 Village Terrace, the whole of Fung Fai Terrace (at which the proposed development was situated), the Hong Kong Sanatorium and Hospital, the Hindu Cemetery and a piece of vacant land half way up a slope to the west as shown in **Photograph 4.1.**

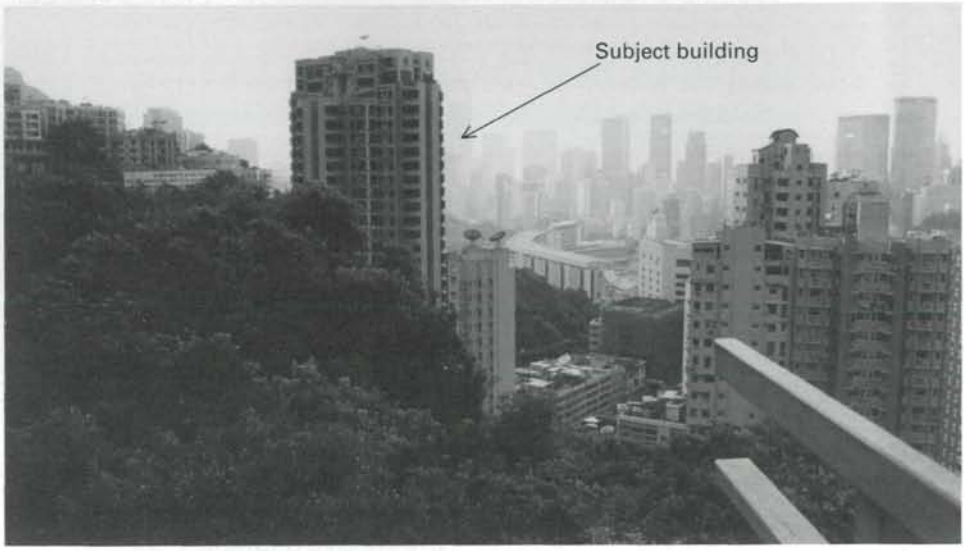
The reasons for defining the area referred to above were that (a) there was a common identity between the subject site and the low-rise buildings on Nos. 27–33 Village Terrace, Fung Fai Terrace; and (b) there was a nullah separating the subject site from the high-rise buildings to the east. The representative of the Building Authority explained that a high- rise building on the subject site would stand out like a 'sore thumb'.

Counsel for the appellant argued that like the Peak Tram track in the *Nos. 16–18 MacDonnell Road Case*, the nullah should not have been taken as a boundary so as to give a separate identity to the buildings on the east side of the subject site. The immediate neighbourhood of the subject site should instead include the entire area shown in **Photograph 4.2.**

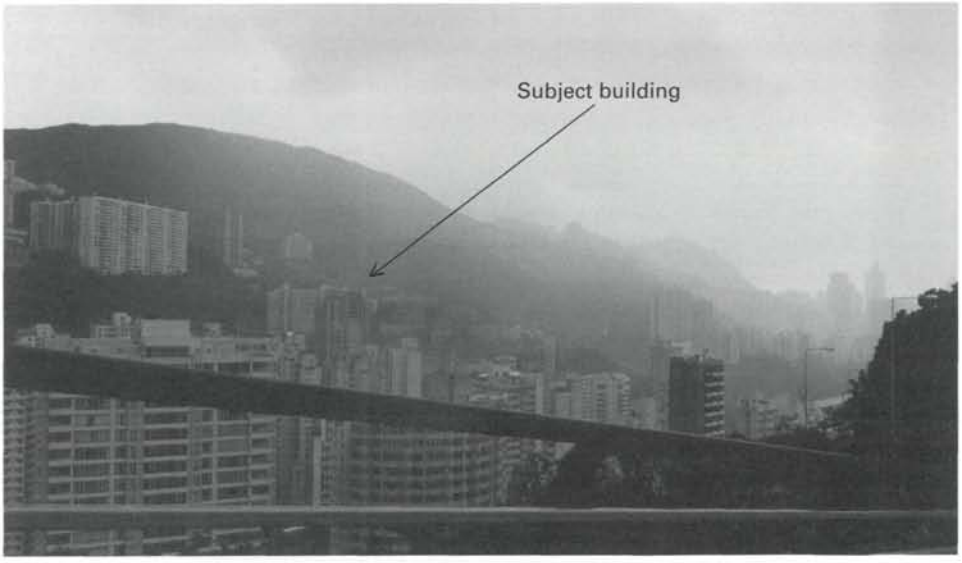
Members of the Tribunal perused the photos and drawings produced by the appellant and visited the subject site.

- **Reasons for Decision:**

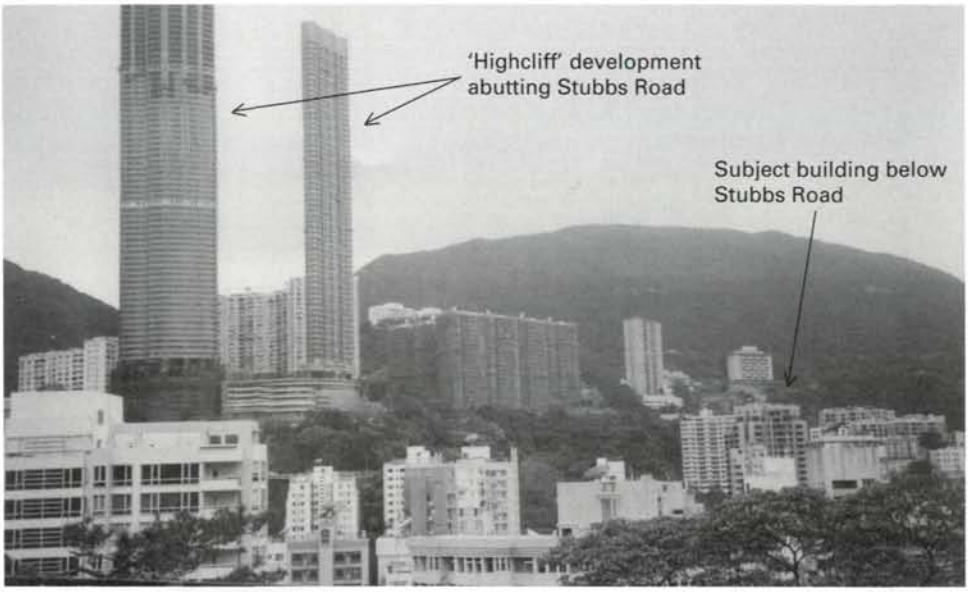
The Tribunal stressed that for the purpose of determining the appeal, it should follow what its predecessors had done in the past by deciding two questions:



Photograph 4.1 The subject building seems to stand out from the immediate neighbourhood (view from Stubbs Road): 2000



Photograph 4.2a The subject building seems to be set amidst buildings around Happy Valley (view from Broadwood Road): 2000



Photograph 4.2b The subject building seems to be set amidst buildings around Happy Valley (view from Broadwood Road): March 2002

(1) What was the immediate neighbourhood of the subject site?
(2) Having defined the immediate neighbourhood of the subject site, would the proposed building works differ in height from others in that neighbourhood to an extent that would justify the Building Authority exercising its discretion under section 16 (1)(g)?

The immediate neighbourhood was defined

As regards the definition of the 'immediate neighbourhood', the Appeal Tribunal considered the Building Authority's definition of 'immediate neighbourhood' of the subject site as being artificial and that the presence of the nullah did not give a separate identity to the buildings located to the east of the subject site on Village Road. The Tribunal agreed that the 'immediate neighbourhood' of the subject site should encompass the area shown in Photograph 4.2.

Would the proposed building works differ substantially in height from others in that neighbourhood: Would the proposed building be congruous or stand out like a 'sore thumb'?

The following rule stated by the Tribunal in the *No. 12 Bowen Road case* was noted by the Tribunal in relation to the preservation of the building

character of a neighbourhood: 'If there is no congruity to preserve, then an exercise of discretion based on the preservation of incongruity is bad.'

As the Tribunal found that the buildings in the immediate neighbourhood defined by the Tribunal ranged from 3 to 28 storeys, the proposed building of 27 storeys would not differ in height from other buildings in the immediate neighbourhood. There was no question of the proposed building being incongruous as there was no congruity to preserve.

- **Comments:**

In the year 2002, two high-rise blocks, 'Highcliff', of more than 70 storeys abutting Stubbs Road were completed, as shown in Photograph 4.2b taken in March 2002. Such development renders arguments of 'immediate neighbourhood' highly suspect.

JENXON INVESTMENT

- **Building Appeal Case Name:** Lot 4070, DD 124, Hung Shui Kiu, Yuen Long, New Territories [**Jenxon Investment**]
- **Building Appeal Case No. :** 18/88
- **Similar Cases:** *No. 6 Tai Po Road Case*; *Nos. 16–18 MacDonnell Road Case; No. 12 Bowen Road Case; Master Bright Case* (03/88); not to speculate on future statutory zoning: *The China Engineers Case* (52/88)
- **Nature of the Case:** *Town Planning Ordinance*; Outline Zoning Plans; meaning of an 'immediate neighbourhood' for building height control; congruity of buildings to preserve; s. 16(1)(d); discretion under s. 16(1)(g)
- **Dates of Hearing:** 31 October 1988, 14 and 16 December 1988
- **Date of Decision:** 3 March 1989
- **Chairperson of Tribunal:** Mr Edmund Y. S. Cheung
- **Representation:**

  (a) Mr Barrie Barlow, counsel for the appellant
  (b) Mr David Logan, counsel for the respondent

- **Decision:** appeal dismissed
- **Rules Laid down by the Decision:**

  (1) Once there is an immediate neighbourhood incongruity, the Building Authority may refuse to give its approval of the plans but it may also decide not to invoke s. 16(1)(g) of the *Buildings Ordinance*. It may take into consideration other factors in deciding whether or not to exercise its power. Where it decides to exercise that power, it does

not mean that the Authority is 'plugging a gap' in the *Town Planning Ordinance*.

(2) In considering an appeal in relation to s. 16(1)(g) of the *Buildings Ordinance*, the Tribunal should not speculate on what future OZPs would or would not allow.

(3) The Tribunal 'can and should look at current development in the area, for example, where building works are currently progressing or possibly where plans for development have been approved and the works are about to commence. On the other hand, **future possibilities and the massive development in the Tai Po area which is only projected or has not yet started should be discounted**.' (*The No. 6 Tai Po Road Case*) (emphasis added)

(4) 'In interpreting the expression "in the immediate neighbourhood", this is clearly broader and more flexible than "adjacent" or "nearly adjacent" or "in the same street" (expressions normally to be found in a Rate and Range Clause in a Crown Lease), but a neighbourhood does have common features of identity, and is usually defined by roads, open spaces or other physical features. When the word "immediate" precedes the word "neighbourhood" it indicates a smaller much more compact unit having identifiable common features.' (*No. 1 Robinson Road Case,* as cited in *the Jenxon Investment Case*)

(5) Even if members of the Tribunal had, either unanimously or by a majority, defined the 'immediate neighbourhood' of the subject site as being larger than that defined by the Case Officer, it would still be in order for the Tribunal to substitute its definition for the Building Authority's and proceed to consider the question of whether the proposed building would be incongruous with (differed in height from others) that neighbourhood to an extent that would justify the Building Authority in exercising its discretion under s. 16(1)(g).

(6) 'In reaching our decision, we have taken account of the fact that the Crown Lease is unrestricted as to height which is different from all other lots in the area. . . The discretion given under Section 16(1)(g) is quite clear and the fact that **no compensation is given to land owners when the Building Authority decide to invoke Section 16(1)(g) is not a factor which can or should be taken into account by this Tribunal though it is something which might be considered before the Building Authority invokes its discretionary power under Section 16(1)(g)**.' (*No. 6 Tai Po Road Case*)(emphasis added)

- **Background:**

The subject site was Lot No. 4070 in DD 124. The appellant, Jenxon Investment Ltd., on 22 January 1988 submitted through their Authorized Person (AP) a proposal to erect a building of 27 storeys on the subject site. (*The Master Bright Case* also involved a proposal of 27 storeys.)

The Building Authority rejected the building application in a letter dated 22 March 1988. The appellant appealed to the Appeal Tribunal.

In rejecting the building application, the Building Authority stated that under the *Buildings Ordinance* sections 16(1)(d) and (g), 'the height of the proposal differs from those buildings [sic] in the immediate neighbourhood'.

The Building Authority defined the 'immediate neighbourhood' of the subject site as the area bounded by Castle Peak, L4, L8 and L10 as shown on the *Hung Shui Kui Layout Plan No. RU/HSK/2C*. The Case Officer had suggested a larger area.

- **Arguments:**

The respondent argued on the following grounds:

(a) Once there was an immediate neighbourhood incongruity, the Building Authority might refuse to give its approval of the plans but it might also decide not to invoke s. 6(1)(g). It might take into consideration other factors in deciding whether or not to exercise its power. In this particular case, it decided to exercise that power. That it did so did not mean that the Authority was plugging a gap in the *Town Planning Ordinance*.

(b) The Tribunal should not speculate on what future OZPs would or would not allow. Mr Barlow representing the appellant referred the Tribunal to what the Tribunal had said in the *No. 6 Tai Po Road Case*:

> It is clear from the arguments before us that we can and should look at current development in the area, for example, where building works are currently progressing or possibly where plans for development have been approved and the works are about to commence. On the other hand, **future possibilities and the massive development in the Tai Po area which is only projected or has not yet started should be discounted**. (*The No. 6 Tai Po Road Case*) (emphasis added)

The appellant had four grounds before the Tribunal:

(a) The Building Authority failed to take into account an important relevant consideration, namely the fact that by invoking the sub-section it was reducing the value of the Crown's Grant since the Crown Lease permitted the proposed development, in the exercise of its discretion under section 16(1)(g).

In substantiating this argument, Mr Barlow, counsel for the appellant, submitted two points. The first point was that 'the decision to invoke s. 16(1)(g) was taken in order to plug what the Building Authority considered to be a gap in the *Town Planning Ordinance*'. (para. 4)

The second point was that 'Given the way that the Government is committed to the development of the areas on both of the Castle Peak Road between Tuen Mun and Yuen Long (and in particular the area in which the site is located), there is no reason that when an Outline Zoning Plan (OZP) is produced, the development will necessarily be restricted to 12 storeys.'

(b) The Building Authority's definition of the lot's 'immediate neighbourhood' was incorrect. Mr Vincent Chu for the appellant submitted that Yuen Long and Tuen Mun, on either side of Castle Peak Road and Tin Shui Wai, could all be classified as immediate neighbourhood of the subject site within the meaning of s. 16(1)(g).

(c) The Building Authority took into account extraneous and irrelevant considerations in the exercise of its discretion under section 16(1)(g). The irrelevant considerations were: (i) the effect of which approving the plans might have on other cases; and (ii) the effect of which approving the plans might have on the environment and/or the 'infrastructure'.

(d) The Building Authority's disapproval of the plans in the exercise of its discretion under section 16(1)(g) was a wrongful exercise of discretion since the building works **would not result in a building differing in height from buildings in the immediate neighbourhood**.

- **Reasons for Decision:**

The Tribunal dismissed the appeal on the following grounds:

The Building Authority did not 'plug a gap in the Town Planning Ordinance'

Having regard to the minutes of the Building Authority Land Conference (BALC) held on 4 March 1988, the Tribunal did not find the Building Authority 'plugging a gap' in the *Town Planning Ordinance* in rejecting the building application. The minutes of the BALC were reported to be:

> Recommendation
>
> That the proposed redevelopment be rejected under BO s. 16(1)(g) (1st leg).
>
> Problem
>
> The height of the proposal differs from those buildings in the immediate neighbourhood.
>
> Powers/Remedies
>
> BO s. 16(1)(g)

Background/Argument

(i) .....
(ii) .....
(iii) ..... However, the subject proposal grossly exceeds the permitted development criteria and the scale of the other "C/R" developments in the surrounding area, and is therefore not supported. While the Lease Conditions have not specified any height restrictions, it appears that in this case Section 16(1)(g) of the Buildings Ordinance should be applied, because the proposed development would result in a building differing in height and design from buildings in the immediate neighbourhood or previously existing on the same site.
(iv) Members should note that in a previous case in Luen Wo Market (MA I (1) 41/85 dated 15.10.85) Conference ruled that as the ODP had no statutory effect and (since the creation of one high-rise building would change the present uniformity in height and probably negate the future availability of BO Section 16(1)(g)) there would then be no control over the height of buildings in that area should the 13 storey proposal was (sic) allowed to proceed. The ODP had, however, indicated a 40 m height limit and Conference was reluctant to take a step which could frustrate that objective of the planning authority. The plans, in that case, were disapproved under BOs 16(1)(g). An OZP No.S/FSS/1 has now been produced.
(v) In this case, similarly, the max. building height limit of 36 m (12 storeys) as contained in the Explanatory Notes attached to the Hung Shui Kiu Layout Plan No. RU/HSK/2C which has not statutory effect cannot be enforced until an OZP is produced.
(vi) .....
(vii) .....

- PROCEEDINGS IN CONFERENCE

Discussion/Decision

GBS/D presented a site plan and adopted layout plan of the area on which "C/R" developments are permitted m and he pointed out that the proposal was incongruous with the other buildings of 3–6 storeys in the immediate neighbourhood.

Conference therefore advised and the BA agreed to endorse the recommendations to invoke s. 16 (1)(g) of the BO, first leg, to reject the proposal, identifying immediate neighbourhood to be the area bounded by Castle Peak Road, L4, L8 and L10 as shown on the adopted Hung Shui Kiu Layout Plan No. RU/HSK/2C. Apart from incongruity, the proposal would represent a trend leading to possible imbalances in the infrastructure, and was environmentally objectionable as some visual relief was needed between the two high-rise townscapes of Tuen Mun and Yuen Long.

The Tribunal held that the minutes clearly showed that while the question of infrastructure and environment was discussed, the primary objection to the proposal was that it would be incongruous with the immediate neighbourhood. The Tribunal accepted the counsel for the respondent's submission about the proper application of s. 6(1)(g) and concluded that the Building Authority had not 'plugged a gap' in the town planning legislation.

As regards the future statutory planning of the subject site, the Tribunal also held that it would not make any speculation about future statutory planning. On this point, the Tribunal expressed that it would follow the rule of its predecessor in the *No. 6 Tai Po Road Case*.

The Building Authority's definition of immediate neighbourhood was right; the Building Authority had not taken into account irrelevant considerations

The Tribunal agreed with the Building Authority's definition of 'the immediate neighbourhood' rather than that of the Case Officer. However, the Tribunal disagreed with Mr Chu's submission and held that neither Yuen Long nor Tuen Mun could be by any stretch of imagination a part of the immediate neighbourhood of the subject site. The reason was that Yuen Long was some 2.6 km north of the site while Tuen Mun some 3 km south. Even allowing that an immediate neighbourhood might have a larger area in the rural area, Mr Chu's idea could not be accepted.

In determining the immediate neighbourhood of the subject site, the Tribunal referred to the test set out in the *No.1 Robinson Road Case:*

> In interpreting the expression 'in the immediate neighbourhood', this is clearly broader and more flexible than 'adjacent' or 'nearly adjacent' or 'in the same street' (expressions normally to be found in a Rate and Range Clause in a Crown Lease), but a neighbourhood does have common features of identity, and is usually defined by roads, open spaces or other physical features. When the word 'immediate' precedes the word 'neighbourhood' it indicates a smaller much more compact unit having identifiable common features. (*No. 1 Robinson Road Case,* as cited in the *Jenxon Investment Case*)

The Tribunal could substitute its definition of immediate neighbourhood

The Tribunal disagreed with Mr Barlow's submission that if the Tribunal agreed that the Building Authority's definition of the immediate neighbourhood was wrong, then the appeal had to be allowed and that the Tribunal could not substitute its own definition for the Building Authority.

The Tribunal stated that even if members of the Tribunal had, either unanimously or by a majority, defined the 'immediate neighbourhood' of the subject site as being larger than that defined by the Case Officer, it would still be in order for the Tribunal to substitute its definition for the

Building Authority's and proceed to consider the question of whether the proposed building would be incongruous with (differed in height from others) that neighbourhood to an extent that would justify the Building Authority in exercising its discretion under s. 16(1)(g).

The proposed building was incongruous with the immediate neighbourhood

The Tribunal found that the buildings in the immediate neighbourhood it defined were no more than 6 storeys. It agreed with Mr Logan that even if it had taken the larger area as the immediate neighbourhood, there were only scattered buildings of 2 to 3 storeys in the area. The proposed 27 storeys building would be incongruous.

Section 16(1)(g) provides no compensation for reduction of land values

The Tribunal referred to the *No. 6 Tai Po Road Case* cited by Mr Logan and concluded that though it was not without sympathy to the appellant, the appellant's ground on land values had to fail. It was stated in the *No. 6 Tai Po Road Case*:

> In reaching our decision, we have taken account of the fact that the Crown Lease is unrestricted as to height which is different from all other lots in the area. . . . The discretion given under Section 16(1)(g) is quite clear and the fact that no compensation is given to land owners when the Building Authority decide to invoke Section 16(1)(g) is not a factor which can or should be taken into account by this Tribunal though it is something which might be considered before the Building Authority invokes its discretionary power under Section 16(1)(g). (*No. 6 Tai Po Road Case*)

THE CHINA ENGINEERS

- **Building Appeal Case Name:** Lot 104, DD 388, Tsing Lung Tau, New Territories [**The China Engineers**]
- **Building Appeal Case No. :** 52/88
- **Similar Cases:** *Nos. 6–18 MacDonnell Road Case; No. 12 Bowen Road Case; No. 1 Master Bright Case, Jenxon Investment Case* (18/88)
- **Nature of the Case:** future statutory planning of the area and the interpretation of the redevelopment of an existing use currently permitted by the lease as being congruous with the immediate neighbourhood or not; meaning of an 'immediate neighbourhood' for building height control; congruity of buildings to preserve; discretion under s. 16(1)(g); visit of members of the Tribunal to subject site; Regulations 25 and 184 of the *Building (Construction) Regulations*

- **Dates of Hearing:** 15 and 16 June 1989, 24 November 1989
- **Date of Decision:** 15 December 1989
- **Chairperson of Tribunal:** Mr R. S. Peard
- **Representation:**

  (a) Mr Neil Kaplan QC and Miss Teresa Cheng, counsels for the appellant
  (b) Mr S. P. O'Sullivan for the respondent

- **Decision:** appeal dismissed
- **Rules Laid down by the Decision:**

  (1) Section 16(1)(g) of the *Buildings Ordinance* cannot be used to plug gaps in the planning legislation.
  (2) The 'existing use' which has to be examined in relation to the 'immediate neighbourhood' of a site is the use of buildings outside the site in question, not the existing use of the site.
  (3) 'A neighbourhood does have common features of identity, and is usually defined by roads, open spaces or other physical features. When the word "immediate" precedes the word "neighbourhood", it indicates a smaller, more compact unit having identifiable common features.' (*No. 1 Robinson Road,* as cited in this case)
  (4) The 'intended use' of a proposed building is the use indicated in the building plans submitted for approval rather than a use claimed.
  (5) It is not true that it is only appropriate to differentiate between residential and industrial uses and that it is inappropriate to subdivide industrial uses any further for the purposes of section 16(1)(g). The reason, in the words of the Tribunal, is that 'there is nothing in the Ordinance which requires us to do this and, in reality, there are a large number of different industrial uses. The tables to Regulations 25 and 184 of the *Building (Construction) Regulations* make distinctions between certain types of industrial use.'
  (6) In ascertaining 'the use' of the immediate neighbourhood, it is appropriate for the Building Authority to look at the immediate neighbourhood and see whether there is any 'predominant' use.
  (7) The presence of non-residential uses, such as a duck processing factory, a building contractor's yard and a building contractor's storage facilities, are 'very much part of the life of a New Territories village the use of which is essentially residential'.
  (8) 'However we do not think that this Tribunal is limited in its approach to the decision of the Building Authority in the way which the Court was limited when approaching the exercise of discretion by the licensing authority in the Wednesbury case. In the absence of any guidance from the Ordinance and, bearing in mind that we have the power to take evidence, call for documents, inspect premises and

generally conduct an appeal by way of rehearing, we consider it our duty to ascertain whether or not the decision of the Building Authority was correct bearing in mind all the circumstances at the time the discretion was exercised. This means that if we consider after taking into account all the relevant evidence, that a right decision was made (even if it was flawed in the Wednesbury sense) we can still uphold the exercise of discretion. This may involve the Tribunal, in an appropriate case, exercising its own discretion and substituting it for that of the Building Authority. We are conscious that we may be developing upon or even expanding the powers which previous Building Appeal Tribunals have thought they were exercising. However we take comfort from the fact that previous Tribunals (for instance that in 16A–16B Victory Avenue case) have adopted this procedure. It would be certainly of assistance if the legislature were to clarify these matters.'

(9) 'The Buildings Ordinance contains very little assistance as to what powers the Tribunal has except to the very limited extent set out in Section 44 of the Ordinance. It is clear that the Tribunal can require witnesses to attend and give evidence, they can compel production of documents, inspect premises and enter and view premises. Building Appeal Tribunals have in the past heard evidence on relevant matters and in this sense the appeal is by way of rehearing. However the question arises as to whether there is any limit to the evidence which can be put before the Tribunal, particularly in respect of events which have occurred since the decision of the Building Authority in question. We consider it to be right (and it has been accepted by previous Tribunals), that evidence of new circumstances arising after the decision of the Building Authority (such as the gazetting of an Outline Zoning Plan) is not relevant and should not be taken into account. Likewise we would think that the approval of plans for buildings in the immediate neighbourhood given after the decision of the Building Authority would also not be relevant. However any evidence which clarifies the circumstances ruling at the time of the Building Authority's decision is relevant and can be taken into account.
'

- **Background:**

The subject site was Lot 104 in DD 388, Tsing Lung Tau, New Territories. It was located near the indigenous village of Tsing Lung Tau and a disused acid factory.

The lease for the subject site had been an 'agricultural' lot until 1964 when it was modified by Conditions of Exchange to 'general industrial' and/or 'godown' purposes. These purposes excluded any trade which might be an offensive trade under the *Public Housing and Urban Services*

Ordinance or any amendment or re-enactment thereof and for no other purposes whatsoever.

A two-storey brewery was constructed on the subject site. This use was continued until the early 1970s. In 1975, the appellant acquired the subject site and completed the conversion of the two-storey building into a depot/workshop in 1977. From 1977 to the date of the appeal, the use of the subject site included the sale of heavy construction equipment and the after-sale services for such equipment.

In 1981, two substantial high-rise residential blocks were built south of the site. Later in the mid-1980s, at the time of the appeal, another substantial high-rise residential development started immediately to the west of the site. This later development would comprise 28 residential blocks ranging from 19 to 23 storeys. Restaurant and shopping facilities would be provided in this development.

On 30 June 1988 the appellant submitted plans for the development of a 26-storey new building for the use of 'workshop' with car ports on the first floor.

On 18 August 1988 the Buildings and Lands Conference was held. In the Conference, 'Members were informed that the *Draft Tsuen Wan West OZP* was under preparation and would be presented to the Town Planning Board in September showing the area for residential use. Members were also informed that the Town Planning Office supported the recommendation to invoke BO s. 16(1)(g) to prevent any industrial development in the area as this would adversely affect the predominantly residential neighbourhood.'

Accordingly, the Building Authority endorsed the recommendation to invoke s. 16(1)(g) of the *Buildings Ordinance* to disapprove the proposal. The rationale was that 'the proposed industrial building would result in the "intended use" (i.e. residential use) from the buildings in the immediate neighbourhood' (case notes by CBS).

The appellant appealed to the Tribunal. Members of the Tribunal perused the photos and drawings produced by the appellant and visited the subject site.

- **Arguments:**

The respondent argued on the following grounds:

(a) The 'immediate neighbourhood' bounded on the east and west by high ground on the south by the sea and on the north by the Tuen Mun highway. Broadly speaking, this area encompassed the old village of Tsing Lung Tau, the site in question and the new residential buildings surrounding it to the south and west.

(b) It was appropriate to subdivide industrial uses for the purposes of section 16(1)(g).

The appellant argued on the following grounds:

(a) Bearing in mind the use of the lot in question was then industrial, this meant that the use of buildings in the immediate neighbourhood was industrial; therefore there was no ground in law for the Building Authority to invoke section 16(1)(g) since the intended **use of the building to be erected under the plans was the same as the use in the immediate neighbourhood**.

(b) The 'immediate neighbourhood' of the subject site included Tsing Lung Tau and Sham Tseng to the east. This would, of course, have included substantial industrial development to be found in Sham Tseng and some other small non-residential sites outside the immediate neighbourhood contended for by the Building Authority.

(c) The immediate neighbourhood should be defined taking into account the pattern of daily activities of residents who resided in the ribbon development along the Old Castle Peak Road, where various facilities were found and where residents of Tsing Lung Tau would go as part of their daily lives.

(d) The Building Authority should not have taken into account the speculation that an Outline Zoning Plan (OZP) was about to be submitted to the Town Planning Board. This was mentioned in the discussion/decision section of the Buildings and Lands Conference on 18 August 1988 and in the discussion/decision section of the Building Committee held on 16 August 1988. Furthermore, the wording of the actual decision stated that the Building Authority agreed to endorse the recommendation to invoke the *Buildings Ordinance* section 16(1)(g) to disapprove the proposal. This was because it was recognized that the proposed industrial building would result in a building different in the 'intended use' (i.e. residential use) from buildings in the immediate neighbourhood. This clearly indicated that the Building Authority took account of the OZP when making its decision.

(e) As regards the issue of whether uses should be categorized in any particular way for the purposes of the *Buildings Ordinance* and, in particular, section 16(1)(g), a distinction could be drawn between **domestic** and **non-domestic** buildings in section 2 of the Ordinance. It was only appropriate to differentiate between residential and industrial uses; it was not appropriate to subdivide industrial uses any further for the purposes of section 16(1)(g).

(f) The Building Authority took a mistaken view of the use of buildings in the immediate neighbourhood and non-residential uses did exist in the immediate neighbourhood of the subject site.

(g) Once it was established that there was any building in the immediate neighbourhood which had the same use as the building to be erected, then section 16(1)(g) of the *Buildings Ordinance* could not be invoked.

As the proposed building was industrial and likewise the uses in the vicinity were also industrial, section 16(1)(g) could not be invoked.

- **Reasons for Decision:**

Before addressing the arguments of the appellant, the Tribunal noted the provisions of s. 16(1)(g), the common ground for the appeal and explained what evidence was relevant for the purpose of the appeal. The notice and explanation of the Tribunal in this case elucidated in quite unusual detail as the Chairman of the Appeal Tribunal was new to the job — the principles of sound determination of an appeal. Hence substantial extracts from the appeal decision are reproduced below for the benefit of the reader.

Section 16(1)(g) of the Buildings Ordinance

Section 16(1)(g) reads as follows:

> The Building Authority may refuse to give his approval of any plans of building works where:–
> (g) the carrying out of the building works shown thereon would result in a building differing in height, design, type or **intended use** from **buildings in the immediate neighbourhood** or **previously existing** on the same site. (emphasis added)

Issue for the appeal

For the purposes of the appeal, it was agreed that the Building Authority had to decide in its discretion: whether the implementation of the building works shown on the plans submitted on 30 June 1988 would result in a building 'differing in intended use from buildings in the "immediate neighbourhood" ', as this had been the reason for disapproval given in the decision of the Building Authority.

The relevant evidence 'served' the purposes of the appeal

The Tribunal explained its role:

> The *Buildings Ordinance* contains very little assistance as to what powers the Tribunal has except to the very limited extent set out in Section 44 of the Ordinance. It is clear that the Tribunal can require witnesses to attend and give evidence, they can compel production of documents, inspect premises and enter and view premises. Building Appeal Tribunals have in the past heard evidence on relevant matters and in this sense the appeal is by way of rehearing. However the question arises as to whether there is any limit to the evidence which can be put before the Tribunal, particularly in respect of events which have occurred since the decision of the Building Authority in question. (para. 4)

The Tribunal clearly explained that the following categories of evidence were **not** relevant for the appeal:

(a) evidence of new circumstances arising **after** the decision of the Building Authority (including the publication of an Outline Zoning Plan (OZP) in the gazette) ; and
(b) evidence of the approval of plans for buildings in the immediate neighbourhood given **after** the decision of the Building Authority.

The following category of evidence **was** relevant for the appeal:

Evidence which would clarify the circumstances ruling at the time of the Building Authority's decision

> We consider it to be right (and it has been accepted by previous Tribunals), that evidence of new circumstances arising after the decision of the Building Authority (such as the gazetting of an *Outline Zoning Plan*) is not relevant and should not be taken into account. Likewise we would think that the approval of plans for buildings in the immediate neighbourhood given after the decision of the Building Authority would also not be relevant. However any evidence which clarifies the circumstances ruling at the time of the Building Authority's decision is relevant and can be taken into account. (para. 4)

How should the Tribunal approach the decision of the Building Authority?

The Tribunal gave a lecture on the 'Wednesbury reasonableness'.

> Previous Tribunals appear to have applied the principles set out in *Associated Provincial Picture Houses Limited v Wednesbury Corporation reported at the Law Reports* (1948) 1KB Page 223 ('the Wednesbury case'). The Court of Appeal was considering an appeal from a Judgement in an action where the Plaintiff sought a declaration that a condition attached by a licensing authority in the exercise of its discretion was ultra vires and unreasonable. In the end the argument boiled down to a question of whether the exercise of discretion by the licensing authority in imposing the condition was unreasonable. Lord Greene, the Master of the Rolls, with whom the other Judges agreed, stated at the end of his Judgement what was the principle applicable. At the foot of page 233, he says:
>
> > 'The Court is entitled to investigate the action of the local authority with a view to seeing whether they have taken into account matters which they ought not to take into account, or, conversely, have refused to take into account or have neglected to take into account matters which they ought to have taken into account. Once that question in favour of the local authority has kept within the four corners of the matters which they

> ought to consider, they have nevertheless come to a conclusion so unreasonable that no reasonable authority could ever have come to it. In such a case, again, I think the Court can interfere. The power of the Court to interfere in each case is not as an appellate authority to override the decision of the local authority, but as a judicial authority which is concerned, and concerned only, to see whether the local authority have contravened the law by acting in excess of the power which Parliament has confided in them'.

This case is one of the foundations for the principles upon which the Courts in Hong Kong will exercise the power of judicial review over decisions of all kinds, ranging from the exercise of a discretion by such authorities as licensing authorities to decisions made by bodies exercising quasi-judicial functions such as this Tribunal.

However we do not think that this Tribunal is limited in its approach to the decision of the Building Authority in the way which the Court was limited when approaching the exercise of discretion by the licensing authority in the Wednesbury case. In the absence of any guidance from the ordinance and, bearing in mind that we have the power to take evidence, call for documents, inspect premises and generally conduct an appeal by way of rehearing, we consider it our duty to ascertain whether or not the decision of the Building Authority was correct bearing in mind all the circumstances at the time the discretion was exercised. This means that if we consider after taking into account all the relevant evidence, that a right decision was made (even if it was flawed in the Wednesbury sense) we can still uphold the exercise of discretion. This may involve the Tribunal, in an appropriate case, exercising its own discretion and substituting it for that of the Building Authority. We are conscious that we may be developing upon or even expanding the powers which previous Building Appeal Tribunals have thought they were exercising. However we take comfort from the fact that previous Tribunals (for instance that in 16A–16B Victory Avenue case) have adopted this procedure. It would be certainly of assistance if the legislature were to clarify these matters. (para. 5)

The 'intended use' of the building meant the use of buildings outside the subject site

The Tribunal did not accept the appellant's submission that the intended use of the building to be erected under the plans was the same as the use in the immediate neighbourhood, i.e. industrial, on the grounds that the use of the lot and the immediate neighbourhood then were both industrial. The Tribunal explained:

> Section 16(1)(g) clearly involves the Building Authority in looking at buildings. On the one hand he has to examine the existing use of the buildings in the immediate neighbourhood and on the other he has

> to examine the intended use of the building which is going to be erected under the plans put forward. The question which arises is 'in the immediate neighbourhood of what?' The answer must be the site on which it intended to erect the building. **Therefore as a matter of plain English the Appellant's construction must be wrong. It is clear, in our view, that the existing use which has to be examined is the use of buildings outside the site in question.** We are reinforced in this view by the last part of Section 16(1)(g) which suggests that a separate view has to be taken of the use of existing buildings on the site, this being the only occasion under the Section when the existing use of the site is relevant. (emphasis added)

The Building Authority's definition of the immediate neighbourhood using physical characteristics was correct

The Tribunal accepted the definition of the Building Authority for the immediate neighbourhood and rejected that of the appellant. The Tribunal referred to the rule in the *No. 1 Robinson Road Case* to help explain the interpretation:

> Tribunals in the past have first looked at what is the immediate neighbourhood as a first step and we intend to follow this practice in the No.1 Robinson Road decision dated 23rd November 1973, the Tribunal states at the foot of page 8:
>
> > 'A neighbourhood does have common features of identity, and is usually defined by roads, open spaces or other physical features. When the word "immediate" precedes the word "neighbourhood", it indicates a smaller, more compact unit having identifiable common features.'

The Tribunal did not accept the wider definition of the appellant because of the following reasons:

(a) Having conducted a site inspection, the Tribunal had substantial doubts as to whether the inhabitants of Tsing Lung Tau would shop extensively in Sham Tseng in view of the substantial shopping facilities available in Tsing Lung Tau itself.

(b) The Tribunal found it difficult to see what difference there would be between the appellant's view of the neighbourhood and the immediate neighbourhood. Though it appreciated that immediate neighbourhood might comprise a larger area in a rural as opposed to an urban setting, it insisted that the word 'immediate' must carry some meaning. As previous Tribunals had used physical features to define the immediate neighbourhood, the Tribunal in this case also considered that it was appropriate to rely on *physical characteristics* rather than *activities* 'because the immediate neighbourhood must be adjacent enough to the site in question for the height, design, type or

> intended use of the building to be constructed on it to have an effect on the buildings in that immediate neighbourhood. Failing this no real comparison can be made. Here the large hill dividing the immediate neighbourhood as defined by the Building Authority from Sham Tseng clearly eliminates any potential effect the intended use of the Appellant's intended building would have on buildings in Sham Tseng or anywhere to the east of the hill in question.'

The intended use of the building was that shown in the building plans submitted: Unrestricted workshop uses

The Tribunal found the intended use of all parts of the proposed building on the subject site to be 'unrestricted' godown uses and that such parts might be later alienated by the owner. The Tribunal noted but did not give much weight to the submission that the intended use was for 'self use' by the appellant on the basis of the information shown in the building plans submitted:

> Here we were asked to accept the evidence of Mr. Daniel Lam as to what the Appellant intended to use the intended building for. Mr. Lam stated that the Appellant intended to use the building mainly for its own purposes (70% for light industrial and godown uses) and any surplus accommodation would be let to outside tenants on a controlled use basis for light industrial and storage, following the policy which is used for industrial development by the group of which the Appellant form part. This is not entirely consistent with the plans submitted by Mr. Lam as there is no mention of godown use on such plans. Regulation 8(1)(a) of the *Building (Administration) Regulations* provides that plans submitted in respect of building works must (inter alia) show the intended use of every part of the building. As the plans submitted showed 'workshops', we must treat the exercise of the Building Authority's discretion as being in respect of such use. Mr. Lam's evidence of the Appellant's intentions, while it may be taken into account by us, does not limit the possible uses since the Appellant could change its mind and sell the building floor by floor after construction. We must assume unrestricted use as described on the plans.

The predominant use of buildings in the immediate neighbourhood was residential

Having heard the evidence in regard to this, the Tribunal divided the buildings in the immediate neighbourhood into two categories:

(a) large **residential blocks** with shopping and restaurant facilities to the south and east of the site
(b) New Territories **village type development** to the east and north-east of the site which included certain non-residential uses as follows:

(i) a 'duck processing' factory
(ii) a building contractor's yard
(iii) a building contractor's storage facility

As regards (b), the Tribunal stated that it did not believe the appellant would seek to dispute that uses such as (i) to (iii) above were 'normally found in a New Territories village where the inhabitants are involved in processing activities which are linked to agriculture (such as the duck processing factory) and small residential buildings such as those normally found in New Territories villages (very often exempted from the *Buildings Ordinance*)'. In other words, the village development was 'predominantly residential'.

The Tribunal rejected the submission that it was only appropriate to differentiate between residential and industrial uses and that it was not appropriate to subdivide industrial uses any further for the purposes of section 16(1)(g). The Tribunal explained that 'there is nothing in the Ordinance which requires us to do this and, in reality, there are a large number of different industrial uses. The tables to Regulations 25 and 184 of the *Building (Construction) Regulations* make distinctions between certain types of industrial use'.

The Tribunal considered that it was appropriate for the Building Authority to look at the immediate neighbourhood and see whether there was a predominant use. On the basis of the evidence examined and observation in the site visit, the Tribunal agreed with the Building Authority that:

(a) the 'predominant use' of the immediate neighbourhood was residential; and
(b) such non-residential uses as existing were very much part of the life of a New Territories village the use of which was 'essentially residential'.

The Building Authority properly exercised discretion

Bearing in mind the findings established above as to the extent of the immediate neighbourhood, the intended use of the building erected by the appellant and the use of buildings in the immediate neighbourhood, the Tribunal did not find the Building Authority wrongly exercising discretion:

(a) The Building Authority's decision was NOT made on the basis of future statutory planning of the subject site or its immediate neighbourhood, though there were indications that the Building Authority attempted to 'plug the gap in the planning legislation' when applying s. 16(1)(g).

We have heard evidence from Mr. Viney (who was present at the

> Buildings and Lands Conference). They were both clear in their evidence that, although the OZP was mentioned to them as background information, it did not enter into the reasoning for the Building Authority's decision. They were aware that it was not permissible to take into account planning considerations. They admitted that the wording of the decision was poorly drafted and Mr. Burley said that the words '(i.e. residential use)' should have been at the end of the sentence so that it would read 'The proposed industrial building would result in a building differing in the "intended use" from the buildings in the immediate neighbourhood (i.e. residential use)'. We note that the problem being taken into account at the start of the minutes of the Buildings and Lands Conference is 'the proposed industrial development is not compatible with the surrounding residential environment'. This confirms that the decision should have been worded as suggested by Mr. Burley in evidence and we cannot accept that Mr. Viney and Mr. Burley were misleading us when they said that planning considerations arising under the OZP were not considerations taken into account when the Building Authority reached his decision. We must however deprecate the fact that the OZP entered into the discussion of the invocation of Section 16(1)(g). **Previous Tribunal have clearly laid down that the Section cannot be used to plug gaps in the planning legislation and the mentioning of the OZP cannot but lead to a suspicion that this is precisely what the Building Authority was doing.** It was only on hearing evidence that we were able to clarify the matter. (emphasis added)

(b) As regards the appellant's criticism that the Building Authority came to a mistaken view of the use of buildings in the immediate neighbourhood, and the appellant's point that non-residential did exist in the immediate neighbourhood, the Tribunal did not consider that the Building Authority had ignored the fact that such uses normally found in New Territories villages were going on in the immediate neighbourhood. The basis of the Tribunal's finding was that Mr Burley gave evidence that he was aware these sorts of uses would be going on.

(c) As regards the appellant's assertion that (i) once it was established that there was not any building in the immediate neighbourhood of the same use as the building to be erected, then section 16(1)(g) could not be invoked; and (ii) their building was industrial and likewise the uses set out in paragraph 9 above were industrial, hence section 16(1)(g) could be invoked, the Tribunal concluded that this argument was based on **a misconception** of how the Building Authority and the Tribunal should look at the use of buildings.

> Our task when deciding whether or not the Building Authority was correct in his decision is to see whether the intended building containing 26 floors of workshops is different from the duck

> processing factory, the contractors yard and contractors storage previously referred to. Taking a common sense view of the matter, we are clearly of the opinion that the type of use intended by the Appellant for their building is different from all the uses in the immediate neighbourhood.

Conclusion: The appeal had to be dismissed

The Tribunal had to dismiss the appeal because of the following:

(a) **Applying the test of incongruity as adopted in previous appeal cases, the proposed 26-storey flatted factory building was incompatible in terms of use with the 'essentially residential' environment of Tsing Lung Tau as it existed on the date of the Building Authority's decision:**

> Previous Tribunals have applied the **test of incongruity** in relation to Section 16(1)(g). We think it appropriate we should also apply this test. We should ask ourselves, essentially, whether the intended use of the Appellant's building 'sticks out like a sore thumb' when compared with the uses of buildings in the immediate neighbourhood. We cannot ignore the fact that **a 26-storey flatted factory building is incompatible in terms of use with the essentially residential environment of Tsing Lung Tau as it existed at the date of the Building Authority's decision**. We therefore must find that the Building Authority correctly invoked Section 16(1)(g) in this case. (emphasis added)

(b) The **Building Authority acted reasonably** and passed the Wednesbury test if such test was to apply. However, there was no need to apply this test for this particular case:

> If we are obliged to apply the principles in the Wednesbury case to the Building Authority's decision, then we would find that he acted legally; he took into account such matters as he ought to have considered and that he came to a reasonable decision. However, as stated above, we do not think that we should apply the Wednesbury test.

The appellant should be given sympathetic consideration when applying for a change in use to residential

However, the Tribunal was sympathetic to the appellant as it stated the following:

(a) The Tribunal upheld the decision of the Building Authority only because the members felt it right in the end that section 16(1)(g) should be invoked.
(b) The appellant acquired an industrial site in 1975 in the expectation that such site could be developed to its full potential under the

provisions of the *Buildings Ordinance*. As a result of later residential development permitted by the government, an unacceptable potential 'interface' had been created between the residential blocks very close to the west of the site and the intended building on the site.

(c) The appellant had nevertheless **no right to compensation** though the industrial development potential of the site had become stultified.

The Tribunal went as far as saying that the appellant was entitled to sympathetic treatment if he applied for a change of use of the site to residential and it believed that the government would allow the full industrial floor area permitted by the *Buildings Ordinances and Regulations* (discounting section 16(1)(g)) for the purposes of calculating the value of the site under its present industrial uses. In the words of the Tribunal:

> Finally, we cannot leave this case without expressing our strong sense of sympathy with the Appellant. Its case was ably put to us by Mr. Kaplan and Miss Cheng; they brought forward all the points which could be made on the Appellant's behalf. We upheld the decision of the Building Authority only because we felt it right in the end that Section 16(1)(g) should be invoked. The Appellant acquired an industrial site in 1975 in the expectation that such site could be developed to its full potential under the provisions of the *Buildings Ordinance*. As a result of later residential development permitted by the Government, an unacceptable potential 'interface' has been created between the residential blocks very close to the west of the site and the intended building on the site. **It is, indeed, possible that Section 16(1)(g) could be used legitimately by the Building Authority to prevent even a new smaller industrial building being erected on the Appellant's site**. The industrial development potential of the site has been stultified and **no right to compensation is given to the Appellant. Clearly it is entitled to sympathetic treatment if it applies for a change of use of the site to residential and we trust that Government will allow the full industrial floor area permitted by the Buildings Ordinances and Regulations (discounting Section 16(1)(g)) for the purposes of calculating the value of the site under its present uses**. (emphasis added)

RICH LINE ENTERPRISES

- **Building Appeal Case Name:** No. 115 Caine Road and Nos. 1–6 Po Wa Street, Hong Kong [**Rich Line Enterprises**]
- **Building Appeal Case No. :** 22/90
- **Similar Cases:** *Nos. 2–11 Hok Sz Terrace Case; Nos. 29–31 Sands Street Case*

- **Nature of the Case:** s. 16(1)(b)(ii) of the *Buildings Ordinance*; s. 16(1)(d) of the *Buildings Ordinance*; s. 16(1)(g) of the *Buildings Ordinance*: second limb; s. 31 (1) of the *Buildings Ordinance*; Regulation 23(2), *Building (Planning) Regulations*
- **Date of Hearing:** 5 March 1990
- **Date of Decision:** 5 March 1990
- **Chairperson of Tribunal:** Mr Edmund Y. S. Cheung
- **Representation:**

  (a) no counsel representation for the appellant
  (b) Mr Anthony Wu for the respondent

- **Decision:** appeal dismissed, inquiry refused
- **Rules Laid down by the Decision:**

  (1) 'There are two alternative limbs to Section 16(1)(g): the Building Authority may refuse to approve building plans where a proposed building would differ in height, design, type or intended use (a) from buildings in the immediate neighbourhood or (b) from buildings previously existing on the same site. **It is settled that the BA has "both avenues in which to go".** ' (emphasis added)
  (2) Under s. 16(1)(b)(ii) of the *Buildings Ordinance*, the Director of Fire Services has no power to withhold a certificate where the problem is lack of access rather than failure to meet a Code of Practice published from time to time by the Director of Building.

- **Background:**

The appellant, Rich Line Enterprises Ltd., was the owner of 115, Caine Road and Po Wa Street, Hong Kong, i.e. the subject site.

By a letter dated 27 November 1989, the appellant's Authorized Person (AP) resubmitted building plans relating to the proposed new building to be erected on the site to the Building Authority for approval.

By a letter dated 22 December 1989, the Building Authority disapproved the resubmitted building plans on the grounds that the AP's proposal was not acceptable under s. 16(1)(d) and s. 16(1)(g) of the *Buildings Ordinance*. The reasons relating to s. 16 (1)(d) were:

(a) The existing lane and Po Wah Street had been shown to be built over (s. 31 (1), *Buildings Ordinance*);
(b) Po Wah Street had not been deducted from site area (Regulation 23 (2)(a), *Building (Planning) Regulation*).

> In this connection, I would advise you that your explanation and justification set out in your letter dated 27th November

> 1989 have been duly considered. Being unable to identify anything in the **public interest**, the Building Authority has decided that exemptions of Buildings Ordinance Section 31 (1) cannot be granted. (emphasis added)

The reason relating to s. 16(1)(g) was 'the carrying out of the works shown thereon would result in a building differing in height from that previously existing on the same site'.

The Building Authority also advised the AP in view of the present stepped street access and limited/uncertain access from Caine Road, the Building Authority was concerned about the restricted access to the site, the safety of the occupants and the inadequate servicing for the proposed high-rise development.

By a letter dated 5 January 1990, the AP gave a Notice of Appeal to the Tribunal against the Building Authority decision to disapprove the building plans.

- **Arguments:**

The grounds of appeal were as follows:

(a) The proposed bridge over the service lane was required to provide a convenient connection between the two parts of the site at different levels. That portion of the lane below the bridge was owned by the appellant.
(b) The lane was short and seldom used. The bridge would be only 2.7 m wide at a height of 5.5 m above the lane surface.
(c) Access via the bridge to the new building from Caine Road would be to the convenience and benefit of the occupants of the new building, as well as visitors and others servicing the building. The essential means of escape would be separated from the bridge facility.
(d) Po Wa Street was a very short private street; in fact, it was a cul-de-sac with no through pedestrian traffic.
(e) Residents of Wa In Fong would not need Po Wa Street for access or exit.
(f) The occupants of the new building would not use Po Wa Street for access. Consequently, the appellant would like to 'extinguish the street, make use of it as site area and build upon and over a portion of the old street'.
(g) In the light of the above considerations (a to f), 'there are no good reasons, in the public interest, why the requested modification and exemption should not be permitted. . . .'
(h) The new building would not be incongruous with other buildings in the neighbourhood where there were many high-rise buildings.
(i) The new building would be residential. Therefore, it would not attract a large number of visitors. There would be amenities such as residents' sitting-out area, children's playground and ample elevators. No vehicle parking would be provided.

(j) There would be adequate means of escape. The Director of Fire Services had raised no objections to the building plans.
(k) The new building was slightly set back from the site boundaries which would improve the environmental impact.
(l) In the light of the above considerations (h to k), the Building Authority should not have exercised its discretion to invoke section 16(1)(g) and disapprove the building plans.

The respondent had several reasons for rejecting all three applications.

- **Reasons for Decision:**

Provisions of s. 31

The Tribunal noted the provisions of s. 31:

(1) Save where exempted by the Building Authority no building or other structure shall be erected in, over or upon any portion of any street whether or not on land held under lease from the Crown.
(2) Where in the opinion of the Building Authority the public interest so requires he may
.....
(3) .....
(4) .....

The Tribunal refused to hold an enquiry on the following grounds:

No real public interest was served by the proposed bridge

The Tribunal agreed that the proposed bridge would be convenient to the occupants of the new building, visitors and others servicing the building. However, the Tribunal considered that 'such convenience would in fact be for the ultimate benefit of the occupants themselves because no-one would need to visit or service the new building but for the existence of the building and its occupants. We would not consider such benefit to be "in the public interest" in the true sense of the term'.

No public interest had resulted from extinguishing Po Wa Street

The Tribunal considered that the 'extinguishment' of Po Wa Street might be in the interest of the appellant. However, it also stated that 'we fail to appreciate how it can be said to be in the public interest'.

The Building Authority was right about s. 31 (1) of the Buildings Ordinance and Regulation 23(2)(a) of the Building (Planning) Regulations

The Tribunal agreed with the Building Authority that the AP had not

shown it was in the public interest to grant exemption from and modification of s. 31 (1) of the *Buildings Ordinance* and Regulation 23(2)(a) of the *Building (Planning) Regulations*. Therefore grounds (a) to (f) of the appeal failed.

The Nos. 2–11 Hok Sz Terrace and Nos. 29–31 Sands Street Cases were applied

The Tribunal considered that the proposed development should be treated in the same way as the *Nos. 2–11 Hok Sz Terrace and Nos. 29–31 Sands Street Cases*.

> The proposed new building would be of 27 storeys with 6 units on each floor making a total of 162 units. Assuming each unit would house an average of 4 persons, there would be 648 occupants in the building. The present access is stepped and there would be no vehicular access to the building.
>
> . . .
>
> In the case of 2–11, Hok Sz Terrace, there was, as in the instant case, also no vehicular access; the proposed buildings were of 21 storeys and 25 storeys. In dismissing the appeal in that case, the Appeal Tribunal had this to say:
>
> > 'Where considering an appeal of this kind it is our duty to weigh very carefully the considerations which underlie the decision appealed against. On the one hand, developers should not be at the mercy of Government as to whether or not they will be able to develop sites to the maximum extent permitted by the schedules to the Building (Planning) Regulations. Intending purchasers make searches through architects and solicitors to ascertain whether or not the lease conditions contain restrictions on development, or whether the plans are subject to special approval'. If a developer is told that there are no such provisions, and that his intentions do not contravene any approved or draft plan prepared under the Town Planning Ordinance, he will normally conclude that a full development of the lot will be permitted, if plans are presented which comply with the relevant regulations. On the other hand, there are exceptional cases where there is some overriding consideration relating to the particular proposals for development in which the Building Authority would be failing in his duty to ensure reasonable standards of safety if he passed plans which otherwise conformed, and in these few cases failing within the precise language of Section 16(1)(g) plans can be disapproved even though all other requirements of the Buildings Ordinance have been observed.
>
> . . .

> In the case of 29–31, Sands Street, the situation was similar to the Hok Sz Terrace case. Sands Street also lacked vehicular access and was stepped. In that case, however, only tentative plans had been submitted for approval and the Appeal Tribunal held that the BA had no jurisdiction to approve such plans and dismissed the appeal. Having done that, the Appeal Tribunal went on to express its views as follows :
>
> > 'The duty of the Building Authority is to administer the Buildings Ordinance so as to have due regard to the safety of the occupants of buildings affected by planning proposals. As we said in the Hok Sz determination, in the final analysis the Building Authority is responsible for the due and proper administration of the Ordinance. Lack of access roads prevents firefighting vehicles from getting close to the buildings that are served in this area only by stepped streets. The problem of access extends also to ambulances and, to a lesser extent, garbage collection.'

Having cited the two cases, the Tribunal held that 'We take the view that the instant case falls on all fours with the Hok Sz Terrace case and Sands Street case.' The reason was:

> In each case, there was no vehicular access so that vehicles such as **ambulances and fire engines would not have been able to reach the premises**. In each case, the BA invoked Section 16(1)(g) because he was concerned about the 'safety of the occupants and the inadequate servicing for the proposed high-rise development'. In our view, he is rightly so concerned: the safety of over 600 occupants in a building must weigh predominantly in deciding whether or not to approve the AP's building plans. (emphasis added)

This was a s. 16(1)(g) second limb case

The Tribunal then explained the applicability of s. 16(1)(g). It was explained that it was up to the Building Authority (BA) to choose whichever one limb of the two under s. 16(1)(g). The present case involved the application of the second limb.

> **There are two alternative limbs to Section 16(1)(g)**: the Building Authority may refuse to approve building plans where a proposed building would differ in height, design, type or intended use a) from buildings in the immediate neighbourhood or b) from buildings previously existing on the same site. **It is settled that the BA has 'both avenues in which to go.'** (emphasis added)
>
> In the present case, the BA has invoked the second limb to Section 16(1)(g) rather than the first. Whether a building is incongruous with other buildings in the neighbourhood falls within the first limb.

Therefore, the point made by the AP in relation to the congruity of building profile, considerations (h) to (k) above, was irrelevant.

Director of Fire Services had no power to withhold a certificate

Under s. 16(1)(b)(ii) of the *Buildings Ordinance*, the Director of Fire Services had no power to withhold a certificate where the problem was lack of access rather than failure to meet a Code of Practice published from time to time by the Director of Building. Therefore, arguments (i) and (j) of the appellant were inapplicable.

WIDTH OF STREETS

CHEER KENT

- **Building Appeal Case Name:** Kowloon Inland Lot Nos. 7049 and 7414 (4–5 Knutsford Terrace, Tsim Sha Tsui, Kowloon), **[Cheer Kent]**
- **Building Appeal Case No. :** 09/87
- **Similar Case:** *Nos. 2–11 Hok Sz Terrace*
- **Nature of the Case:** moral, albeit not legal, obligation of the government to clarify development potential; legitimate expectations of developers; measurement of the width of street under s. 16(1)(d); measurement of the width of street for determining whether a site abutting the street is a 'class A site' under Regulations 2 and 19 of the *Building (Planning) Regulations*
- **Dates of Hearing:** 9 December 1987, 18 January 1988 and 26 January 1988
- **Date of Decision:** 21 March 1988
- **Chairperson of Tribunal:** Mr Edmund Y.S. Cheung
- **Representation:**

  (a) Mr Barrie Barlow counsel for the appellant
  (b) Mr Anthony Wu for the respondent

- **Decision:** appeal allowed
- **Rules Laid down by the Decision:**

  (1) For determining whether a site is a Class A site abutting a street of more than 4.5 metres wide, the street is not just measured in terms of its width immediately in front of the site but the entire length of the access to and from the site.
  (2) The government has a moral obligation to clarify development potential and entertain the legitimate expectation of developers about the redevelopment potential of their property in the light of the potential of other properties in the vicinity.

(3) The moral obligation of the government in respect of clarifying development potential is stated in the case of *Nos. 2–11 Hok Sz Terrace*, where the Tribunal had this to say:

> It is true that the operation of Section 16(1)(g) may make it difficult for developers to know with precision the value of land, which reflects its development potential, and we feel there is a strong moral obligation upon Government to give wide publicity to areas and situations where developer's architects would be wise to make tentative enquires from the BOO as to extent of permitted development — for instance in respect of all sites served only by stepped access. (Followed in the *Cheer Kent Case.*)

- **Background:**

The subject site was located at Knutsford Terrace, Tsim Sha Tsui. In a letter dated 6 August 1987, the Building Authority rejected a building application for development on the subject site. The applicant appealed to the Building Appeal Tribunal.

- **Arguments:**

The disapproval of the Building Authority was based on the ground that Regulation 19 of the *Building (Planning) Regulations* applied to the subject site because it abutted on a street of less than 4.5 m wide. Mr Wu, counsel for the respondent, had two grounds:

(1) For ascertaining whether a site abutted 'a street of more than 4.5 m wide', the relevant width of the street was **the overall width of a street, rather than the point on which a site abutted**. The object of Regulation 19 was to empower the Building Authority to restrict developments where 'access to and from a site', i.e. 'a street', was less than 4.5 m. This object would be defeated if, in determining the width of a street, one merely looked at the point where a site abutted the street and ignored the widths of other parts of the street (emphasis added).

(2) It was undisputed that part of Knutsford Terrace in front of Li Sing Hall (13–17 Observatory Road) was less than 4.5 m wide and that the width of Knutsford Terrace between the front retaining wall and the gate of the subject site was 2.75 m as at 3 March 1987 when it was measured by the BOO staff.

The appellant had the following grounds for appeal:

(1) 'Knutsford Terrace is a street wider than 4.5 metres. Mr. Barlow for the appellant argued that for the purpose of Regulation 19 of the *Building (Planning) Regulations*, the effective width of a street is the distance between a site and the other side of the street irrespective of the width of the rest of the street. As the distance between the subject site to the other side of Knutsford

Terrace is more than 4.5 m wide, the subject site 'abuts on a street more than 4.5 m wide'.

(2) If, as denied by the Building Authority, the site did not abut a street more than 4.5 m wide, the Building Authority had exercised his discretion under s. 16(1)(d) of the *Buildings Ordinance* and Regulation 19 of the *Building (Planning) Regulations* unreasonably and has reached a decision which no Building Authority acting reasonably could have reached. Mr Barlow pointed out that the Building Authority had up to now allowed every property owner of Knutsford Terrace wishing to develop his property to build up to 14 storeys so long as the building was set-back from the original parameter. The appellant's proposal provided for a 20 feet set-back. The Building Authority had an 'obligation' to adhere to his policy hitherto adopted by him of allowing new buildings of up to 14 storeys.

(3) Of the 8 buildings then standing on the north side of Knutsford Terrace, one, used as a school, was of 6 storeys; one was of 12 storeys; one, also used as a school, was of 13 storeys, the other 5 were all of 14 storeys. Nos. 2–3, Knutsford Terrace were recently developed to 14 storeys by an associate company of the appellant. Therefore, the Building Authority had given the appellant a 'reasonable expectation' that their proposals for a 14-storey building would be approved.

(4) The proposed development would not result in a more intensive development than those previously existed on the site as it would have less intensive occupancy than its predecessors. The proposed building consists of 14 storeys for domestic purposes while its predecessor was a 12-storey building used as a school.

(5) The Building Authority had no discretion to disapprove plans on the grounds of what may or may not happen on a site which was outside the appellant's control, namely the corner site adjacent to 14 Knutsford Terrace at the junction of Knutsford Terrace and Observatory Road.

Mr Viney, giving evidence for the respondent, said that the reason for the Building Authority invoking Regulation 19 to restrict the proposed building to 12 storeys was 'in the interests of public safety as emergency vehicles were unable to reach the site'. On this basis, the Building Authority had reviewed its policy to allow new buildings up to 14 storeys.

- **Reasons for Decision:**

The Tribunal allowed the appeal. In reaching its decision, the Tribunal first stated that it was common ground that two main questions were to be answered:

(1) Is the subject site a class A site within the meaning of Regulation 2 of the *Building (Planning) Regulations*?

(2) If not, has the Building Authority exercised its discretion under section 16(1)(d) of the *Buildings Ordinance* and Regulation 19 fairly and reasonably?

The Tribunal gave a negative answer to the each of the question and allowed the appeal. In reaching its decision, the Tribunal noted the following statutory provisions:

(1) Regulation 2 of the *Building (Planning) Regulations* defines 'class A site' as 'not being a class B or class C site, that abut on a street not less than 4.5 m wide or on more than one such street'.
(2) Regulation 19 of the *Building (Planning) Regulations* reads: 'Where a site abuts on a street less than 4.5 m wide or does not abut on a street, the height of a building on that site or of that building, the site coverage for the building and any part thereof and the plot ratio for the building shall be determined by the Building Authority.'
(3) Section 2(1) of the *Buildings Ordinance* and Regulation 2 of the *Building (Planning) Regulations* both define the term 'street'.

The Tribunal also took note of the fact that the width of Knutsford Terrace for the purpose of the appeal at the point where the subject site abutted was more than 4.5 m wide as it was common ground that the gate of the subject site had since 3 March 1987 been removed and that the proposed new building would be set back 20 feet from the road.

The explanation of the Tribunal as regards the two questions is given below.

The overall width rather than the width of the street immediately in front of a site mattered

The Tribunal accepted the respondent's submission that the overall width of the access to a site was the relevant width for determining the class of the site. The Tribunal gave two hypothetical examples to explain its position. Example 1: if the overall width of Knutsford Terrace was only 2 m except the point where the subject site abutted the street which was more than 4.5 m, would the subject site qualify as a class A site? The answer of the Tribunal was negative. Example 2: if parts of a lengthy street were over 4.5 m wide while other parts were less than 4.5 m wide, then would a site on this street qualify as a class A site? The answer of the Tribunal was that it would depend on 'the particular circumstances of each case'.

For the subject site, the Tribunal stated that 'we are fortified in our view by both the definition of "class A site" and the wording of Regulation 19. The expression "abuts on a street (not) less than 4.5 m wide" means, in our view, "abuts on a street whose overall width is (not) less

than 4.5 m" '. Therefore, the Tribunal ruled that the subject site was **not** a class A site and that Regulation 19 applied.

There was a reasonable and legitimate expectation of the appellant to build up to 14 storeys and there should be a moral obligation of the government as stated in the Hok Sz Terrace Case

The determination of the subject site as a non-class A site notwithstanding, the Tribunal considered that the appellant had a legitimate expectation to build up to 14 storeys and the government had a moral obligation to permit the realization of such expectation. The Tribunal referred to the case of *Nos. 2–11 Hok Sz Terrace*, where the Tribunal had this to say:

> It is true that the operation of Section 16(1)(g) may make it difficult for developers to know with precision the value of land, which reflects its development potential, and we feel there is a strong moral obligation upon Government to give wide publicity to areas and situations where developer's architects would be wise to make tentative enquires from the BOO as to extent of permitted development — for instance in respect of all sites served only by stepped access.

The rationale of the Tribunal was as follows:

(1) The proposed building would not result in a more intensively utilized development than its predecessor

Though it agreed with Mr Viney that public safety was of paramount importance in deciding whether or not to invoke s. 19, it also agreed with Mr Barlow that the proposed 14-storey building would not generate more intensive occupancy than its predecessor, a school. 'We do not consider that public safety would be endangered by the development of a 14-storey building for domestic use any more than by a 12-storey building used as a school. Firefighting hand appliances would not reach a building of 12 storeys on Knutsford Terrace in any event. We might have taken a different view if the proposed building had been restricted to 4 storeys rather than 12 or if the proposed building had been intended to be used as a school.'

(2) The appellant had a legitimate expectation to build up to 14 storeys

The Tribunal considered that the moral obligation issue in the *Hok Sz Terrace Case* applied and that the appellant had a moral obligation to build up to 14 storeys, as its associate company and other owners of Knutsford did.

BLOTNER

- **Building Appeal Case Name:** Section A, Inland Lot No. 588 at junction of Seymour Road and Castle Steps, Hong Kong [**Blotner**] (report in HKLR [1993]: 9–14)
- **Building Appeal Case No. :** 75/90
- **Similar Cases:** *Knutsford Terrace Case* (09/87); *Hang Chong Building Case*
- **Nature of the Case:** section 2 (1) of the *Buildings Ordinance*; Regulation 19 of the *Building (Planning) Regulations*; measurement of the width of a road: exclusive or inclusive of retaining walls which support a site? assignment plans; retaining walls; stepped access; site visit of members of the Tribunal
- **Dates of Hearing:** 5 and 6 November 1990
- **Date of Decision:** 6 February 1991
- **Chairperson of Tribunal:** Mr Edmund Y. S. Cheung
- **Representation:**

  (a) Mr Y. C. Mok for the appellant
  (b) Miss V. Patel for the respondent

- **Decision:** appeal dismissed
- **Rules Laid down by the Decision:**

  (1) To determine the width of a street under Regulation 19 of the *Building (Planning) Regulations*, retaining walls which support a site should be excluded as being part of the street.
  (2) To determine the width of a street under Regulation 19 of the *Building (Planning) Regulations*, kerbstones should be included as being part of the street according to *Beaux Estates Ltd. v Attorney General.*
  (3) As the Tribunal said in the *Knutsford Terrace Case (or the Cheer Kent Case)*, the object of Regulation 19 of the *Building (Planning) Regulations* would be defeated if one merely looked at the point where a site abutted the street but ignored the width of the other parts of the street when determining the width of that street.

- **Background:**

  Blotner Limited, the appellant, was the registered owner of Section A of Inland Lot No. 588, the subject site. It was located at the junction of Seymour Road and Castle Steps, Hong Kong. There was a retaining wall running along Seymour Road and Castle Steps. The existing property was supported by this retaining wall.

The appellant appealed against the Building Authority's determination that the width of Castle Steps was less than 4.5 m under Regulation 6 of the *Building (Planning) Regulations* (the Regulations).

Members of the Tribunal paid a visit to the subject site and its vicinity.

- **Arguments:**

Mr Mok's submission

Mr Mok, on behalf of the appellant, argued on the following grounds:

In *Mighty Stream Ltd. v Attorney General* [Civil Appeal 122 of 1981], the Court of Appeal held that the kerbstones on both sides of a road-bridge formed part thereof and should be included in the measurement of its width, even though the usable width of the carriageway was on average less than 4.5 m wide. This followed from the definition of 'street' in the *Buildings Ordinance* which included 'the whole or any part of any road-bridge'. When the kerbstones were included, the relevant width of 4.5 m was reached. The Court of Appeal's decision was upheld by the Privy Council.

In *Sandgate Urban District Council v Kent County Council* [1895–9] AER Rep. 1077, the House of Lords held that if the erection of a wall was necessary for the protection of a road, the wall should be considered as part of the road for the purpose of determining the liability for payment of maintenance charges in respect of the wall.

In the light of the English cases, the retaining wall formed part of Castle Steps in width measurement because:

(a) there had been a redefinition of the boundary of the subject site so as to exclude the retaining wall from the subject site; and
(b) the retaining wall was necessary for the protection of Castle Steps.

The respondent disagreed with Mr Mok's submission and contended that the retaining wall lied within the subject site and did not form part of Castle Steps.

Mr Siu Wai-ching's evidence

Mr Siu Wai-ching was a land surveyor of the Buildings and Lands Department. He gave the following reasons in support of the Building Authority's contention:

(a) The retaining wall which ran along Seymour Road and Castle Steps was 'a contiguous structure' which provided the support to the subject site. It was understood that the owner of the subject site (Inland Lot No. 588 s.A.) was going to surrender a strip of his lot fronting Seymour Road (including the retaining wall) for the purpose of road widening.

It would be inconsistent to include the retaining wall fronting Seymour Road as part of the subject site but exclude it along Castle Steps.

(b) The assignment plan for the subject site prepared some ninety years ago, dated 15 December 1898, clearly depicted four pillars. These pillars were still in existence and could be found in positions shown on SRP No. HK 4098. The assignment plan also showed the boundary of the subject site as being running along the front face of two of the pillars. The Channels, represented by dotted lines on the assignment plan, were still in existence along both sides of Castle Steps. The corners of the pillars and other prominent features of the land parcel had been resurveyed and the results of a field survey had been plotted. They agreed well with the information on the assignment plan. The field survey confirmed that the boundary of Inland Lot No. 588 s.A. ran along the back of the channel and, therefore the retaining wall was included as part of the land parcel.

(c) The boundary line of the subject site along Castle Steps was shown on the assignment plan as a straight line. There was hence no reason to introduce a link along the boundary at the junction of Castle Steps and Seymour Road.

(d) In Hong Kong, it was the normal responsibility of landowners to maintain slopes or retaining walls that were part of the supporting structures to the land parcel. There was no reason to suspect that the retaining wall along Castle Steps was an exception.

Miss Patel's submission

Miss Patel disputed the submissions of the appellant. She said that 'it suits the appellant to claim the part of the retaining wall along Seymour Road as its own as this will benefit it substantially by way of plot ratio and site coverage bonuses whereas that part of the retaining wall facing Castle Steps is an impediment to its development and accordingly it suits Blotner Ltd. to disown it'. In other words, the appellant could not have the best of both worlds.

As regards the discrepancy between the registered area and the physical area of the subject site, Miss Patel argued that the registered area of a piece of land was provided by the owner and the government had nothing to do with such area.

Mr Mok's rebuttal

In the appellant's rebuttal, Mr Mok referred to the development of Hang Chong Building on Queen's Road Central (Building Authority Case File No. GR/At2) and suggested that 'under the old Building Regulations, the "width of the street" abutting the Hang Chong Site at the Queen's Road Central side was <u>determined</u> [emphasis added by the Tribunal] by the

Building Authority at the time to include the total width of the street the followings:

(a) the width of Queen's Road Central (Q.R.C.);
(b) the width of the pedestrian sidewalks at both side of Q.R.C.;
(c) the width of the retaining wall (retaining the slope where Battery Path was found);
(d) the width of the slope;
(e) the width of Battery Path; and
(f) the width of the retaining wall abutting Battery Path.

The structures from (c) to (f) were more than 20 to 30 feet above Queen's Road Central.'

- **Reasons for Decision:**

The relevant questions for the issue: Whether the width of Castle Steps was 4.5 m

The Tribunal stated that the sole issue in this appeal was whether the width of Castle Steps was within the meaning of Regulation 19. If Castle Steps was not less than but equal to or more than 4.5 m wide, then more extensive development in terms of site coverage and plot ratio would be permitted under the Regulation.

This issue in turn would depend on the answers to the following questions:

(a) Whether the retaining wall between the subject site and Castle Steps (the retaining wall) formed part of Castle Steps.
(b) If the answer to (a) above was in the affirmative, whether the thickness of the retaining wall should be taken into account in measuring the width of Castle Steps for the purpose of Regulation 19.

'Street' was defined

The Tribunal noted the definition of a 'street' under the *Buildings Ordinance* and *Building Regulations*. Section 2(1) of the *Buildings Ordinance* defined 'street' as including 'the whole or any part of any square, court or alley, highway, lane, road, road-bridge, footpath or passage whether a thoroughfare or not'. Regulation 2(1) of the *Buildings Regulations* defined 'street' as including 'any footpath and private and public street'.

The Tribunal noted that:

(a) Castle Steps was a partly stepped lane or footpath for pedestrian access only. It was not designed for vehicular traffic; and
(b) it was common ground that Castle Steps was less than 4.5 m wide if the retaining wall was excluded but that if the thickness of the

retaining wall was included, the measurement of the width of Castle Steps would reach 4.5 m.

The Hang Chong Building Case

The Tribunal noted the salient facts of the *Hang Chong Building Case*. The appellant in *Hang Chong Building Case* contended that the fact that his site faced a large open space and Battery Path opposite the site constituted special circumstances which justified a modification of Regulations 17 and 20 of the then *Building (Planning) Regulations 1956* so that the volume of the proposed new building to be erected on the site should be based on a hypothetical width of Queen's Road Central of 80 ft.

The Building Authority proposed a modification width of 60 square feet plus an additional amount of 250 000 cubic feet subject to a set-back of 10 feet at ground floor level.

The Tribunal accepted the Building Authority's proposal subject to:

(a) a set-back of 10 feet at ground floor level;
(b) a set-back being at a height of 90 feet rather than at ground floor level; and
(c) two other conditions.

In that case, the appellant applied to the Building Authority to exercise its discretion under section 29 of the then *Buildings Ordinance 1955*. **The Building Authority was NOT called upon to determine, nor did it determine, the width of Queen's Road Central.**

The Tribunal dismissed the appeal on the following grounds:

The retaining wall should form part of the subject site, not Castle Steps

The Tribunal agreed with the respondent that it was inconsistent to include the retaining wall along Seymour Road as part of the subject site but exclude it from the site along Castle Steps. If that portion of the retaining wall along Seymour Road formed part of the subject site, there would be little grounds to support that the remainder of the wall along Castle Steps should not also form part of the subject site. That wall was a contiguous structure. The Tribunal pointed out that apart from a question raised as regards whether the retaining wall provided support for the subject site, Mr Siu's evidence regarding the inconsistency in the appellant's argument was not challenged or rebutted by the appellant. The Tribunal also agreed with Miss Patel that the appellant could not have the best of both worlds.

Discrepancy between registered area and the actual area of the subject site was immaterial

The Tribunal agreed with Miss Patel and did not consider such discrepancy to be of any assistance to the appellant one way or another.

The answer to the first question was negative

The Tribunal did not find any evidence, or any sufficient evidence, to support the appellant's contention that the boundary of the subject site had been redefined so as to exclude the retaining wall from the subject site.

On the evidence before them and having inspected the subject site and Castle Steps, members of the Tribunal had no hesitation in finding that the retaining wall lay within the subject site and did not form part of Castle Steps. This finding was supported by Mr Tarrant who gave evidence on behalf of the appellant. In his answers to questions put forward by the Tribunal, Mr Tarrant in no uncertain terms agreed that the boundary of the subject site was 'at the point of line A' — drawn by a member of the Tribunal for Mr Tarrant's benefit — which was at the toe of the retaining wall facing Castle Steps.

The Tribunal stated that this answer disposed of the first question posed above for determining the width of Castle Steps and indeed 'would suffice to put an end to this appeal'. However, the Tribunal added that 'if we are wrong in our finding, then it would be necessary for us to proceed to consider the second question'.

The answer to the second question was also negative

The Tribunal considered that the answer to their second question was also negative because of the following reasons:

(a) As the Tribunal said in the *Knutsford Terrace Case* (Case No. 9 of 1987), the object of Regulation 19 was to empower the Building Authority to restrict developments where access to and from a particular site, i.e. a street, was less than 4.5 m so as to ensure adequate means of access and passage to the site.

(b) The decision in the *Mighty Stream Case* did not help the appellant's case. Even if the retaining wall formed part of Castle Steps, the Tribunal still considered that it should not be included in the measurement of the width of Castle Steps. While the **kerbstones** in the *Mighty Stream Case* might be used for **pedestrian** access or passage, there could be no question of the **retaining wall** serving the same purpose. This view was supported by the *Beaux Estates Ltd. v Attorney General Case*, which qualified the *Mighty Stream Case* advanced by the appellant.

In his judgment in, Mayo J in the *Beaux Estates Case* had the following observations on the *Mighty Stream Case*:

> In the Mighty Stream case similar considerations arose and the court had to decide whether a roadway over a bridge adjoining the property in question should only include the roadway itself or whether the metal verges should also be included. This was critical as the road itself was only an average of 4.3 metres wide whereas if the verges were included the measurement came to in excess of 4.5 metres. Cons J. A. had this to say on page 62 of the report:–
>
> 'To avoid the clutches of Regulation 19 a site must abut a street that is not less than 4.5 metres wide. The carriageway of the bridge is an average of only 4.3 metres although by adding the width of the two kerbs the necessary size is reached. Mr. Kaplan, who appears for the Attorney General, argues that we should look only to the carriageway, for a street is for people either to drive or walk along and if there is something adjacent which allows them to do neither it can hardly be counted as part of the street. I must confess to a great sympathy with that argument, but I have eventually come to the conclusion that the express words of the legislature — "the whole of" — must be given meaning and that the bridge in this instance must be taken as not less than 4.5 metres wide.'

It is relevant to consider the extent to which the circumstances of this case corresponded with the present application. It is my impression that the verge which was being considered in the Mighty Stream case was paved verge upon which a pedestrian could have walked had they wished to do so. [emphasis added by the Tribunal]

The Tribunal drew inference from the passage quoted above and stated that, according to Mayo J, if the 'verge' or kerbstones in the *Mighty Stream Case* were incapable of serving as a pedestrian access or passage, the decision would have been the other way round.

> In the *Beaux Estates Case* itself, Mayo J. held that the verges on both sides of the road should be included in its measurement. The learned Judge had this to say, at p. 3 of his judgement:–
>
> 'On neither side of the road is the vegetation such as to seriously impede pedestrians in using the area at the side of the road should it be necessary for them to do so as a result of vehicles using the road. I am by no means convinced that it is realistic to attempt to differentiate the present state of the land adjoining the roadway from the situation which would arise if it was paved intentionally for the use of pedestrians.'
>
> And in the last paragraph of the judgement, at p. 7 :–
>
> 'While I accept that pedestrians would not normally use the

> verge in preference to the metal part of the road I do not think that it would be a completely unforeseeable eventuality that they would walk on the verge if there was traffic using the metal part of the road. Also the existence of the vegetation on particularly the south side of the road would not unduly impede the passage of pedestrians.'

The Tribunal found that it was from the passage quoted above that 'if the verges in the Beaux Estates case were such as to impede pedestrian passage or to be inaccessible to pedestrians at all, the decision would have been entirely different. If the learned Judge had been confronted with a retaining wall rather than the verges with vegetation, we have no doubt in our mind that the plaintiff (the owner) would have failed.

(c) In view of the finding above, the Tribunal did not consider that it was necessary to deal with the *Sandgate Case*. 'Suffice it to repeat that that case concerned the **liability for payment of maintenance charges of a seawall**; it did not concern the definition of "street" or the width of a street' (emphasis added).

(d) The *Hang Chong Building Case* was irrelevant, as the Building Authority did not determine the width of a street.

(e) The Tribunal did not agree with Mr Mok's contention that only the width of that portion of a street abutting a particular site is relevant and that the width of the street beyond the site was not. As the Tribunal said in the *Knutsford Terrace Case*, the object of Regulation 19 would be defeated if one merely looked at the point where a site abutted the street but ignored the width of the other parts of the street.

Conclusion

As a result, the answers to both questions posed by the Tribunal above were in the negative and the Tribunal held that the width of Castle Steps was less than 4.5 m. Accordingly, the Tribunal dismissed the appeal.

LANES

NO. 24 JAVA ROAD

- **Building Appeal Case Name:** No. 24 Java Road and Nos. 23–29 North Point Road, Hong Kong I.L. 7516 to 7520 [**No. 24 Java Road**]
- **Building Appeal Case No. :** 13/83
- **Nature of the Case:** *s. 14 (2) Buildings Ordinance*; *s.42 Buildings Ordinance*

- **Date of Hearing:** 12 April 1984
- **Date of Decision:** 28 June 1984
- **Chairperson of Tribunal:** Mr William Turnbull
- **Representation:**

  (a) Mr Robert Kotewall for the appellant
  (b) Mr Bernard Whaley for the respondent

- **Decision:** appeal dismissed
- **Rules Laid down by the Decision:**

  (1) The existence of illegal structures is not a special circumstance for exemption under s. 42 of the *Buildings Ordinance*.
  (2) Section 14(2) of the *Buildings Ordinance* is usually cited as permitting the Building Authority to grant approval to plans for development even though the plans infringe the legal rights of others.

- **Background:**

The appellant was the owner of a corner site which originally comprised a number of buildings fronting on to North Point Road and Java Road. The service lane separating various premises on the site did not continue with its full width of approximately 3 metres into Java Road but split into two narrower lanes of approximately 105 metres each. One such narrower lane led direct to Java Road and the other went at right angles into Yuet Yuen Street. The appellant proposed that the 1.5-metre lane leading direct to Java Road should be closed and replaced by a 3-metre wide new service lane leading to North Point Road, which would be at right angles to the principal service lane. The proposed new 3-metre wide service lane would be slightly offset from the 1.5-metre lane leading to Yuet Yuen Street so that there would almost be a T-Junction lane but not quite.

The appellant made an application dated 26 May 1983 under section 42 of the *Buildings Ordinance* for modification. Section 42 of the *Ordinance* empowers the Building Authority to grant modifications where in the opinion of the Building Authority, special circumstances render it desirable.

The modification so far as it concerned this appeal comprised two parts, namely:

(1) permission to build over the existing lane between the rear of Nos. 23–29 North Point Road and No. 24 Java Road;
(2) Permission to include the following lanes in the site area:
  (a) the existing lane between the rear of Nos. 23–29 North Point Road and 24 Java Road; and
  (b) the new diversionary lane between No. 23 and No. 21A, North Point Road.

The application was rejected by the Building Authority and the decision was contained in a letter dated 19 July 1983. The appellant thus appealed.

- **Arguments:**

The appellant argued that there were special circumstances which made the requested modifications desirable. The Tribunal summarized these special circumstances into two categories:

(1) The existing service lane was blocked by illegal structures so that it could not be used and the proposed new service lane was wider than the previous lane. In short, a wider unobstructed lane must be better than a narrow obstructed lane.
(2) The proposed new service lane was wider and better than the existing service lane. It was twice as wide. The developer should be encouraged to create such a service lane by being allowed to build a larger building on the site.

The respondent submitted that:

(a) It was the intention of the Building Authority to take immediate action now that its attention had been drawn to the existing state of affairs. A new building was about to be completed in Yuet Yuen Street but it was unlikely that the occupation permit for this new building would be issued unless and until the service lane was cleared of illegal structures.
(b) By closing down the existing service lane there was more likelihood of illegal structures arising because the integrity of the existing lane had been lost.

- **Reasons for Decision:**

The Tribunal was not impressed by either of the two categories of reasons submitted, though it considered that the second had more substance. The Tribunal could find no special circumstances to merit a modification of *Building (Planning) Regulation 23(2)(a)* and accordingly dismissed the appeal because of the following reasons:

Illegal structures were no special circumstances

Though the Tribunal agreed that the problem of illegal structures in Hong Kong was well-known, it did not consider that the existence of illegal structures could in itself form a special circumstance as:

(a) The Hong Kong government with the assistance of the District Boards was making progress in clearing illegal structures. In the present case, there was clearly an urgent need for the Building Authority to take action because of the existing danger to life and property posed by the illegal structures.

(b) The Tribunal noted the intention of the Building Authority to take immediate action to tackle illegal structures and that it was unlikely the occupation permit for a new building near completion at Yuet Yuen Street would be issued unless and until the service lane was cleared of illegal structures.
(c) It would be dangerous for the Building Authority to decide that the existence of illegal structures was a 'special circumstance'. To do so would suggest that the new service lane would not have the same possibility of illegal structures coming into existence. The Tribunal agreed with the respondent that by closing down the existing service lane there was more likelihood of illegal structures arising.

The appellant's proposals were merely meeting requirements of the Authority

The Tribunal carefully studied the plans and found that in reality the appellant was offering no more than the Building Authority in any event required before the BA would be prepared to approve the plans and

(a) if the lane were less than 3 metres then the plans would be disapproved;
(b) the Building Authority had indicated that it would be prepared to allow the existing 1.5-metre lane to be closed and replaced by the new 3-metre service lane. This in itself was a major modification and a modification without which the appellant's proposed development could not proceed;
(c) *Building (Planning) Regulation 23(2)(a)* clearly stated that service lanes were not to be included in the site area. To modify this provision would increase the density of development in an already densely developed area in Hong Kong. All that the appellant was offering in exchange for the requested concession was to provide open spaces and a service lane which he must in any event provide if his plans were to be approved.

Note that in the course of hearing, the Tribunal realized that the proposed development could not proceed legally in any event because the existing 1.5-metre service lane was protected by rights of way granted to third parties.

> Neither Counsel for the Appellant nor Counsel for the Building Authority considered this to be a material factor. However this Tribunal is concerned about such matters and queries whether or not they are material factors. Section 14(2) of the Buildings Ordinance is usually cited as permitting the Building Authority to grant approval to plans for development even though plans infringe the legal rights of others. One of the main arguments of the Building Authority in the present appeal was that the new service lane would not have the

integrity of the old service lane. We would have thought that part of the integrity of the old service lane was the fact that the old service lane was protected by enforceable rights of way whereas the new service lane would have no such protection. As the matter was not argued before the Tribunal we do not comment further on this aspect of the appeal.

DES VOEUX ROAD WEST

- **Building Appeal Case Name:** Nos. 2–16 even numbers, Des Voeux Road West, Hong Kong **[Des Voeux Road West]**
- **Building Appeal Case No. :** 20/85
- **Nature of the Case:** incorporation of private service lanes in building proposal; projection of building over private service lanes; extinguishing private service lanes; discretion under s. 16; bonus plot ratio; calculation of site area; economic loss to the appellant as a consideration; confrontation between planning consultants and BOO staff
- **Date of Hearing:** 14 March 1986
- **Date of Decision:** 18 September 1986
- **Representation:**

  (a) no counsel representation for the appellant
  (b) Mr Patrick Hamlin for the respondent

- **Chairperson of Tribunal:** Mr B. S. McEleny
- **Decision:** appeal allowed
- **Rules Laid down by the Decision:**

  (1) The following factors are relevant considerations favourable to an application for extinguishing and building over a private service lane:

  (a) the lane to be extinguished serves little purpose;
  (b) there is an undesirability of retaining the lane from a town planning point of view;
  (c) the appellant would provide a public passage way at the expense of ground floor shop space;
  (d) refusing the application would cause substantial economic loss to the appellant;
  (e) the appellant gives up bonus plot ratio as a result of dedicating a passage for use by the public;
  (f) there is no more than an addition of one floor as a result of approving the proposal.

- **Background:**

The appellants were the owners of Nos. 2–16 even numbers, Des Voeux Road West (the subject site). The street layout of the subject site is shown in Figure 4.1. They proposed to incorporate the private lane shaded in Figure 4.1 in a new building as a covered public passage way at ground level and count that passageway (32 m^2) as part of the site area.

The plans submitted to the Building Authority for approval eliminated and incorporated in the proposed building that portion of a private service lane which ran along the back of the proposed building. It was between the proposed building and No. 247 Wing Lok Street. This inclusion was approved by the Building Authority. However, the proposal to incorporate the other portion of the private service lane next to No. 85 Bonham Strand West was rejected.

The applicant lodged an appeal under s. 43 of the *Buildings Ordinance* against the exercise of discretion by the Building Authority for:

(a) refusing permission for the existing lane (shaded in Figure 4.1) to be built over; and
(b) rejecting the application of the covered passageway.

- **Arguments:**

The appellant argued that:

(a) the present user of the lane served no useful purpose other than being reserved for sewers, there being no staircase discharging onto it;
(b) a dispute between the planning consultant of the appellant and BOO staff exacerbated the problem of communication and perhaps led to the decisions of the Building Authority.

Other reasons advanced in favour of the appellants were as follows:

(a) The covered passage way was the most valuable part of the proposed building, namely the ground floor shop area. The use of this prime area to provide access to the service lane and the fire exit for the secondary staircase of a building further back in a manner suggested by the BOO would mean a substantial loss to the appellants.
(b) The owners' proposal would provide a permanent passage or right of way for the public. As this would be a dedicated passage, bonus plot ratio should be allowed accordingly. However, they did not claim the bonus on condition that (i) the area of the passage way, i.e. 32 m^2, was allowed for site area and (ii) the lane could be built over.
(c) The Chief Town Planning/Island advised that the existing private lane was undesirable from a planning point of view and could be extinguished and built upon.
(d) A favourable decision would only add one floor to the total height of the building.

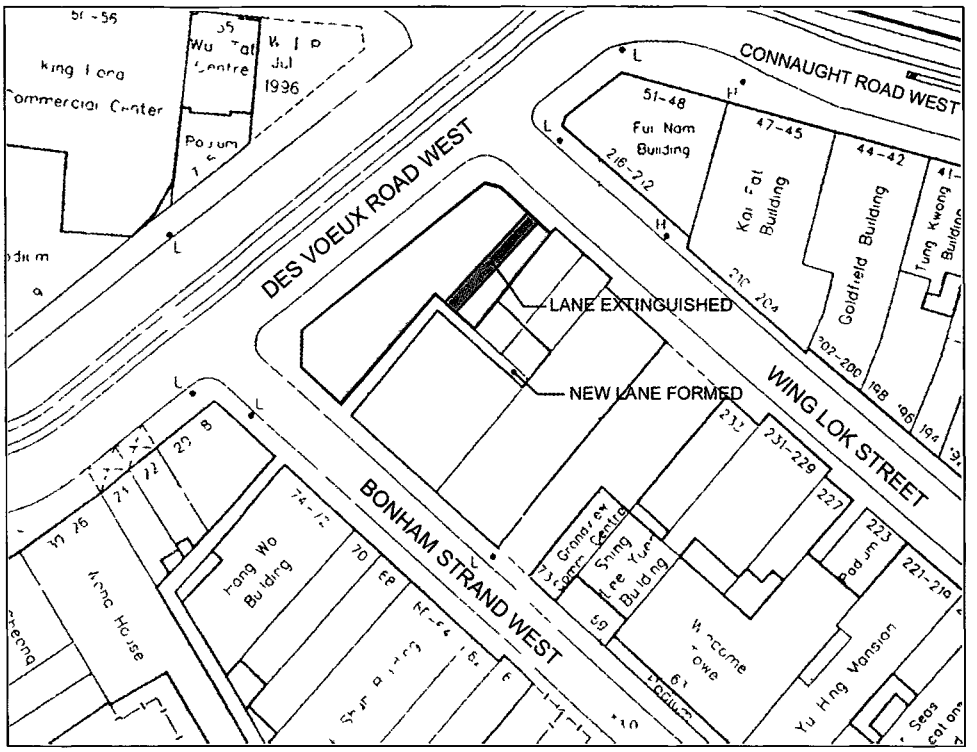


Figure 4.1 Site plan of Nos. 2–16 Des Voeux Road West (proposed) (the *Des Voeux Road West Case*), reproduced with permission of The Director of Lands, © Government of Hong Kong SAR Licence No. 40/1999

- **Reasons for Decision:**

The Appeal Tribunal allowed the appeal. It did not dispute the reasons advanced in favour of the appellants. It found the near vendetta between the consultant of the appellant and BOO staff most unfortunate.

The Appeal Tribunal concluded that discretion should have been exercised in favour of the appellants as there were sufficient 'special circumstances' for such an exercise of discretion and the Building Authority had been wrong in not exercising discretion in favour of the appellants because of the following reasons:

(a) The Appeal Tribunal considered that the lane served little functional purpose. 'The only advantage of the lane we could see is that it helps to provide light and air for lavatories backing onto the lane.'
(b) The developers demonstrated that they had acted in a responsible manner in the development of their property by providing a public passage way through the ground floor.

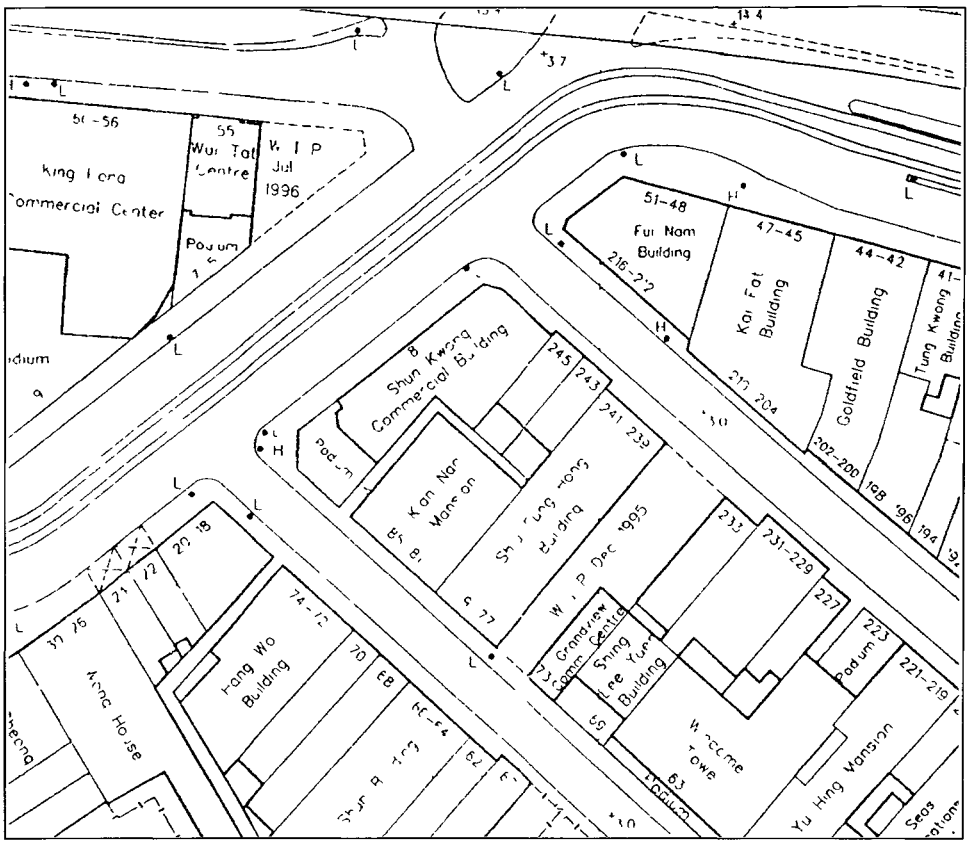


Figure 4.2 Site plan of Nos. 2–16 Des Voeux Road West (built) (the *Des Voeux Road West Case*), reproduced with permission of The Director of Lands, © Government of Hong Kong SAR Licence No. 40/1999

SHUM YEE HING TONG

- **Building Appeal Case Name:** Nos. 266–270, Des Voeux Road Central, Hong Kong [**Shum Yee Hing Tong**]
- **Building Appeal Case No. :** 65/90
- **Nature of the Case:** s. 16 (1)(d) *Buildings Ordinance*; s. 23(2)(a) *Building (Planning) Regulations*; mandatory exclusion of private lane for site area calculation
- **Date of Hearing:** 13 July 1990 (preliminary hearing)
- **Date of Decision:** 10 August 1990

- **Chairperson of Tribunal:** Mr Edmund Y. S. Cheung
- **Representation:** no counsel representation for both parties
- **Decision:** appeal dismissed, inquiry refused
- **Rules Laid down by the Decision:**

  (1) The onus of proof is on the appellant who seeks to argue that an area is not part of a 'service lane'.
  (2) Where an area is part of a service lane, Regulation 23(2)(a) of the *Building (Planning) Regulations* dictates that such area cannot be approved for the purpose of site area calculation.

- **Background:**

The appellant was the owner of Nos. 266–270 Des Voeux Road Central, Hong Kong, the subject site. In 1987, the appellant obtained building permission for the redevelopment of the subject site through his Authorized Person (AP). The approved plans were then amended.

By a letter dated 23 February 1990, the AP submitted the amended plans to the Building Authority for approval. The proposal was for a building of 25 storeys with offices over shops. By a letter dated 22 March 1990, the Building Authority approved the amended plans.

On 30 March 1990, the AP submitted further amended plans and applied for 'modification of and/or exemption from Building (Planning) Regulation 23 (2) so as to permit an area of rear lane (shown on the building plans as REAR yard) to be included in measurement of site area' to the Building Authority.

It was recorded that the amended plans differed from the plans approved in February 1990 and the total gross floor area of the proposed building would be increased.

The Building Authority refused to give permission and this was made known by a letter dated 30 April 1990 on two grounds: (a) a certificate from the Director of Fire Services had not been obtained (s. 16(1)(b) of the *Buildings Ordinance*); and (b) the existing rear lane should have been excluded for the purpose of site area calculation under s. 16 (1)(d) and s. 23 (2)(a).

On 21 May 1990, the AP gave the Building Authority a Notice of Appeal on behalf of the appellant.

- **Arguments:**

The main grounds of the appeal stated in the AP's letter dated 21 May 1990 were as follows:

(a) The proposal was not required by *Building (Planning) Regulation 28* to have a service lane;
(b) The area described by the Building Authority as 'an existing service

lane' was actually a rear yard and there was no evidence that this yard had ever served the function of a service lane. The area was, at the moment of the application, occupied by structures that appeared to have been there for many years.

(c) No other building in the vicinity discharged exit route(s) onto the area and there was no traffic across the rear yard, which being at the moment derelict, was likely the unintended results of earlier building works.

(d) The proposal did not involve buildings over the rear yard, except a security wall and gate.

- **Reasons for Decision:**

The Tribunal dismissed the appeal and refused to hold an enquiry on two grounds:

It was a service lane, not a rear yard

The Tribunal noted two points:

(a) the area described as 'rear yard' (the area) was a private lane adjoining a public lane; and

(b) the door of No. 58, Wing Lok Street discharged onto the area and the windows of the ground floor toilet of No. 58 also obtained ventilation from the lane.

The Tribunal took the view that:

(a) unless the appellant could rebut both points above, it would agree with the Building Authority that the area in fact formed part of a service lane and served as a service lane;

(b) the burden was on the appellant to show that the area was in fact a 'rear yard' but the appellant had no evidence to that effect.

No discretion to approve

The Tribunal also noted the provision of Regulation 23(2)(a) of the *Building (Planning) Regulations*, which stated in 'determining for the purpose of Regulations 20, 21 or 22, the area of the site on which a building is erected – (a) no account shall be taken of any part of any street or service lane; . . . '

The Tribunal accordingly dismissed the appeal and refused to hold an enquiry on the grounds that as the 'rear yard' was in fact part of a service lane and hence **the Building Authority 'had no discretion to grant the AP's application under Regulation 23(2)(a): the word "shall" renders the Regulation mandatory**.' (emphasis added)

TIEN POA STREET

- **Building Appeal Case Name:** Nos. 1–8 Tien Poa Street, Hong Kong [**Tien Poa Street**]
- **Building Appeal Case No. :** 55/93 and 70/93
- **Nature of the Case:** *s. 14 Buildings Ordinance*; *s. 31(1) Buildings Ordinance*; *s. 42 Buildings Ordinance*; *Building (Planning) Regulations 20, 21, and 22(1)*
- **Date of Hearing:** 24 February 1994
- **Date of Decision:** 27 April 1994
- **Chairperson of Tribunal:** Mr Philip T. Nunn
- **Representation:**

  (a) Mr Neville Thomas QC and Mr Anthony Ismail for the appellant
  (b) Mr Robert Andrews and Miss Cheryl Delaney for the respondent

- **Decision:** appeal allowed
- **Rules Laid down by the Decision:**

  The relevant factors for consideration in deciding the closure of lanes and private streets are as follows:

  (1) Whether the street or lane proposed to be closed contains any public or private rights of passage.
  (2) Whether there is any evidence that the street or lane proposed to be closed serves any useful purpose to anyone other than residents living in the affected area.
  (3) Whether the building plans submitted by the developer allow continued access through the area by the public and continued access for existing utilities and escape routes.
  (4) Whether the building plans submitted by the developer would lead to a development which would significantly improve the area and thus would be in the public interest.
  (5) Whether the development potential of the site would be very significantly reduced if the proposal was not permitted.

- **Background:**

  This appeal involved two appeals before the Tribunal all relating to a proposed residential development by Swire Properties at Nos. 1–8 Tien Poa Street, Wanchai, Hong Kong. The two appeals related to the following applications:

(1) an application dated 19 April 1993 was rejected by the Building Authority on 18 June 1993;
(2) an application dated 19 October 1993 was rejected by the Building Authority on 17 November 1993;
(3) an application dated 13 January 1994 was rejected by the Building Authority on 7 February 1994.

The applications, which were the subject of the three appeals, were rejected by the Building Authority on similar legal grounds. The third application, however, took into account various technical objections from the Building Authority to the first two applications and as such was regarded by the Tribunal as the 'least objectionable' of the three. This application was advanced by the appellants during the course of the hearing, although the first two applications were not formally abandoned.

- **Arguments:**

The respondent had several grounds objecting to all three applications.

The first objection: The applications involved building on Tien Poa Street and over the Scavenging Lane adjacent to 17 Wing Fung Street

The principal ground of objection by the Building Authority to all three applications was that the applications involved building on Tien Poa Street (the 'Street') and over the scavenging lane adjacent to 17 Wing Fung Street West (the 'Scavenging Lane') contrary to s. 31(1) of the *Buildings Ordinance*:

(a) Tien Poa Street and the Scavenging Lane were 'streets' for the purposes of the *Ordinance*. Section 31(1) of the *Buildings Ordinance* required that private streets should not be built upon without the consent of the Building Authority and the proposed development included building upon Tien Poa Street and over the Scavenging Lane.
(b) Neither the Street nor the Lane could be extinguished by the appellant without prior permission of the Building Authority notwithstanding that both were private property. Section 14 of the *Buildings Ordinance* provided that no person shall commence or carry out any 'building works' or 'street works' without first having obtained the Building Authority's approval. As such consent had not been obtained for the Street or Lane, both would remain as streets at the time the development was to commence.
(c) The *Buildings Ordinance*, as supplemented by the *Building (Planning) Regulations*, could only work effectively if the law had control over private streets as well as public streets. It could be correct that a private street could be removed at the will of the owner, as this would throw the whole legislation into chaos. For instance, the site

coverage and plot ratio of sites and their classification as class A, B or C sites would depend upon the existence or proximity of public or private streets. The consent of the Building Authority was required for the removal of a private street. However in this instance, approval had not been given. As a consequence, at the time the development was to take place, Tien Poa Street and the Scavenging Lane would still exist. To build on or over these streets would be in contravention of section 31(1) of the *Buildings Ordinance*.

(d) A further related ground for rejecting the three applications was that the appellants had wrongly taken into account for site coverage and plot ratio calculations the areas of Tien Poa Street and the Scavenging Lane contrary to the provisions of *Building (Planning) Regulation 23 (2)(a)*.

Figure 4.3 Site plan of Nos. 1–8 Tien Poa Street (the *Tien Poa Street Case*), reproduced with permission of The Director of Lands, © Government of Hong Kong SAR Licence No. 40/1999

Photograph 4.3 View of Tien Poa Street looking towards Star Street

(e) The *Hinge Well Case* could be distinguished. Firstly, the facts of that case were very different from the proposed development at Tien Poa Street. In the *Hinge Well Case*, the area being considered had been flattened and the private street in question had completely lost its physical identity as a street. Furthermore, in the *Hinge Well Case*, the private street in question was not to be built upon or removed and the proposed redevelopment would not have prevented the exercise of rights of passage over the street. In addition, and more importantly, at the time the proposed development at Tien Poa Street was to take place, Tien Poa Street and the Scavenging Lane would still exist as streets both physically and legally. No application had been made or approved to extinguish these streets, and in any event, the removal of the streets would be part of the development and the streets would therefore still exist at the date of commencement of the development.

(f) Historically, Tien Poa Street had been a street for some 74 years and was surfaced, curbed, drained, illuminated and named. It was therefore an amenity that had been enjoyed by the public for some considerable time and as such was a feature of the neighbourhood. In determining the significance of Tien Poa Street, consideration had

to be taken 'of the actual use that the street enjoys and not only any legal rights of passage vested in third parties'.

(g) The Scavenging Lane formed part of an established lane pattern connecting Star Street with Wing Fung Street West and the lane at the rear of 17 Wing Fung Street. Besides, the Scavenging Lane contained underground utilities and was also used by at least two buildings along its route for the purposes of means of escape (even though the means of escape had been blocked for some time). In particular, exit staircases from Nos. 12–16 Star Street and the rear yard from No. 17 Wing Fung Street West made use of the Scavenging Lane, and the rear lane adjoining Nos. 8–16 at Star Street (the 'Rear Lane') for means of passage and escape. A sewer and storm water drained from Nos. 8–16 Star Street ran under the Scavenging Lane and the Rear Lane.

The second objection: Objections under Building (Planning) Regulations 20, 21 and 23(2)(a)

Under *Building (Planning) Regulation 23(2)(a)*, Tien Poa Street and the Scavenging Lane should be excluded from the site area for the purposes of site coverage and plot ratio calculations. In addition, the permitted site coverage and plot ratio under *Building (Planning) Regulations 20 and 21* had been acceded by the appellant in his applications.

The third objection: Objections under the Building (Planning) Regulation

There were three objections by the Building Authority to the application submitted by the appellant on 13 January 1994. They are as follows:

(a) Under the *Building (Planning) Regulations*, the quantity of light and air available to the windows of No. 17 Wing Fung Street West, Nos. 12–16 Star Street, and Nos. 8–10A Wing Fung Street would be reduced. This objection related to the appellant's design of the partly uncovered lane adjoining Nos. 8–10A Wing Fung Street. It was not considered acceptable to meet the requirement under *Building (Planning)* ***Regulation 37*** and the proposed set-back forming a 4.5-metre wide strip of land was not regarded as a street under the *Buildings Ordinance*.

(b) The quantity of light and air available to the windows at No. 17 Wing Fung Street West and Nos. 12–16 Star Street would be reduced and the application contravened *Building (Planning)* ***Regulation 37***.

(c) The set-back area for lane widening at the Rear Lane should be excluded from the site area for the purposes of calculating site coverage and plot ratio. No site coverage and plot ratio bonus should be granted under *Building (Planning)* ***Regulation 22(1)*** for the dedicated area for widening the Rear Lane.

The appellants had the following reasons in support of their appeal:

Building on Tien Poa Street and over the Scavenging Lane adjacent to 17 Wing Fung Street was not a problem

(a) Tien Poa Street and the Scavenging Lane would no longer exist

At the time they were to undertake the new development, Tien Poa Street and the Scavenging Lane would no longer exist. As these streets were private streets, the streets could be removed at any time at their discretion and such removal would not need any consent from the Building Authority. Hence, once the street were demolished, they were free to build on their own land and this would not be in contravention of s. 31(1) of the *Buildings Ordinance*, which did not permit developments to be undertaken on streets unless exemption was granted by the Building Authority under s. 42 of the *Buildings Ordinance*.

(b) Section 14 of the *Buildings Ordinance* did not apply due to s. 2

The definition of 'street works' in s. 2 of the *Buildings Ordinance* did not include removal or demolition of streets but only construction of streets. The definition of 'building works' did not encompass the demolition of a private street. As a consequence, s. 4 of the *Buildings Ordinance* did not apply.

(c) Not contrary to *Building (Planning) Regulation* s. 23(2)(a)

Again, at the time the development was to commence, there would be no private streets to take account of as the private streets would have been demolished and would cease to exist. Hence, these streets did not need to be excluded from the site area for the purposes of site coverage and plot ratio calculations.

(d) The rule in the *Hinge Well Case* applied: The relevant time for deciding whether streets existed was the time they wished to commence their development

As the validity of the Authority's two principal grounds of objection hinged upon whether the appellants were entitled to remove the private streets within their lot boundary without the consent of the Building Authority, one could depend upon the Privy Council decision in the case of *Hinge Well v The Attorney General* [1988] 1 HKLR 32. This case supported the contention that **the relevant time for deciding whether streets existed was the time they wished to commence their development**. They were free to demolish these streets and would do so before the development commenced. Thus, when the development commenced there would be no streets in existence. In particular, the comments of Lord Oliver at page 41 of the judgment was relevant:

> The appellant contends — and this must, in their Lordships' view, be correct — that the material time for determining whether there is or is to be a street or service lane within the meaning of Regulation 23(2) is the time at which the proposed development is to be undertaken. The appellant argues first that where the Ordinance and the Regulations refer to a street they are referring to something having a physical configuration on the ground and not merely to an area of land across which some right of passage exists or may exist. Put another way, it is an essential element in the concept of a street that it should be identifiable physically on the ground and since there was, at the material time, no physical configuration of the former scavenging lane, it was not and is not a street for the purposes of Regulation 23(2)(a).

(e) As regards the Scavenging Lane, there were special circumstances for allowing an application for modification and/or exemption from the provisions of s. 31(1) of the *Buildings Ordinance* to allow Tien Poa Street to be built on and the Lane to be built over. The Tribunal should have regard to the current use of Tien Poa Street and the Scavenging Lane and their value to the neighbourhood. The Tribunal should also have regard to the attractiveness of the proposed scheme in comparison with what could be achieved on the site if exemption was not given.

(f) The appellants denied the Building Authority's assertion about the public use of Tien Poa Street or its real value to the public at large in the immediate neighbourhood. There was no public use of this street, and it did not add to the amenities available to the public in the immediate neighbourhood. A 4.5-metre wide footpath link would, in any event, be maintained linking Wing Fung Street West with Star Street.

(g) As regards the Scavenging Lane, it should be noted that it was currently cramped, slippery, generally in a poor state of repair and in parts virtually inaccessible. On the other hand, the new space to be constructed in its place would provide a safer and more convenient passage than the existing Scavenging Lane. As regards to the existing underground utilities beneath the Scavenging Lane and the fire exit routes leading to the Scavenging Lane, the appellants were prepared to set aside a covered space with a head room of 3.8 metres beneath the podium roof in the existing Scavenging Lane area. This would act as an exit route from the adjoining buildings and for maintenance of existing underground utilities. The existing Scavenging Lane was 1.8 metres in width. The newly provided covered space to be created as part of the new development would be 2.5 metres wide and would be surfaced with non-slip tiles. It would be lit at night and naturally ventilated with a void of 1.5 metres in width on the podium roof. As a

consequence, the newly provided covered space would provide a much better surface and much safer exit route than the existing Scavenging Lane. Furthermore, the existing fire exits of the adjoining building had been blocked and were not used for some considerable time. In short, any prohibition against the erection of the proposed building over the existing Scavenging Lane would not serve any legitimate public interest or the interests of adjoining owners.

(h) The development plan submitted on 13 January 1994 envisaged a reduction to the footprint of the podium.

(i) The proposed development would not be constructed upon a portion of the existing Tien Poa Street (18.38 metres long by 2.67 metres wide) so that there would remain a footpath of 4.5 metres in width from the building face of Wing Fung Building running through the entire length of the rear frontage of Nos. 8–10A Wing Fung Street. The setting back of the proposed building was to create a footpath of 4.5 metres in width, a street under the *Buildings Ordinance*.

- **Reasons for Decision:**

The first objection

The basis for the Privy Council upholding the decision of the Building Authority in **Hingewell** was that third party rights of way or passage existed over the private street in question. **There is no argument in this case of there being any rights of way or passage over Tien Poa Street being reserved to anyone other than the owners of 1–8 Tien Poa Street.**

Having carefully considered the arguments of the Building Authority and the Appellants, we have reached the conclusion that **the consent of the Building Authority is necessary for the extinguishment or demolition of a private street**. Section 14 of the Ordinance makes it clear that approval and consent is required for the commencement or carrying out of any 'building works' or 'street works'. The definition of 'street works' makes it clear that 'street works' are works for the construction, formation or laying out of any private street or access road. This definition is therefore not applicable to works for the demolition of a private street. However, we can see no reason why the demolition of a private street should not fall within the definition of 'building works' which includes any kind of building construction, site formation works, ground investigation, foundation works, repairs, demolition, alteration, addition and every kind of building operation. We have therefore concluded that **the Building Authority does have control over the private street in question**. The Appellants have not obtained the consent of the Building Authority for removal or demolition of the streets and hence

at the time the development is to commence, there will still be streets in existence. Furthermore, part of the development process would be demolition of the private streets and at the date of commencement of the proposed development the streets would still physically exist. We therefore believe that **the Hingewell case is distinguishable from the present case and cannot be relied upon by the Appellants in support of their applications. The Building Authority was therefore correct in holding that the applications contravened Section 31(1) of the Buildings Ordinance and Regulation 23 (2)(a) of the Building (Planning) Regulations.**

Given the legal position set out above, **we believe that the Building Authority have significant powers to control not only public but also private streets. However, we believe that with power must come responsibility. The greater the power the greater the responsibility.** If the Building Authority is to have such powers of control over private land those powers must be reasonably exercised and the Authority must respect not only the interests of the public but also the owners' interests. Under Section 42 of the Buildings Ordinance, the Building Authority has the power to grant exemption or modifications from the provisions of the Ordinance where, in the opinion, of the Authority, special circumstances exist. In exercising its powers under this section, **we believe the Authority must take into account the fact that private rights are affected.**

Given that the authority were legally correct in rejecting the applications under section 31(1) and Regulation 23(2)(a), the Tribunal has to decide whether special circumstances exist such as to permit exemptions or modifications to the Ordinance or the Regulations being granted to the Appellants. This involves if the significance of Tien Poa Street and the Scavenging Lane as streets and the public interest as against the Appellants' wish to build on or over those streets. It also involves deciding whether it is in the public interest for those streets to be excluded from the site area for site coverage and plot ratio calculations.

The Appellants have not formally applied for exemption from Section 31(1) of the Buildings Ordinance to allow them to build on Tien Poa Street (presumably on the basis that they consider Tien Poa Street to be a private street and removable at their discretion). They have however applied for modification and/or exemption from the provisions of Section 31(1) so as to permit the podium roof at first floor level of the new development to be erected over the area of the existing Scavenging Lane. For the purposes of these appeals, we have assumed that as a result of our decision on the continued legal existence of Tien Poa Street, an application for modification and/or exemption from the provisions of Section 31(1) will also be made to permit building on Tien Poa Street.

> The Building Authority say that historically Tien Poa Street has been a street for some 74 years and is surfaced, curbed, drained, illuminated and named. It is therefore an amenity that has been enjoyed by the public for some considerable time and as such is a feature of the neighbourhood. The Building Authority assert that in determining the significance of Tien Poa Street, it must be made of the actual use that the street enjoys and not only any legal rights of passage vested in third parties. It is common ground that there are no legal rights of passage over the street available to any persons other than the owners and occupiers of 1–8 Tien Poa Street. **However, despite this assertion, the Authority have not put forward any direct evidence of the actual public use that this street enjoys** (emphasis added).

After reviewing all the circumstances, the Tribunal came to the conclusion that **there were special circumstances in this case which should be taken into account by the Building Authority in exercising its power to grant an exemption** from the provisions of s. 31(1) of the *Buildings Ordinance* with regard to the appellant's third application dated 13 January 1994.

The Tribunal also found that the Building Authority accepted that there were no public rights of way over Tien Poa Street or the Scavenging Lane. The Building Authority had put forward no evidence as to the use by or value to the public of Tien Poa Street. The only evidence put forward as to the utility of the Scavenging Lane was that it was part of a network of lanes, and utilities and escape routes would be affected. These were all matters taken into account by the appellants in their third application. The use of the lane as part of a network of lanes would be preserved, as would access to utilities and the use of the lane as an escape route for adjoining properties.

The Tribunal had no doubt that poor quality and less desirable development would result if the appellants were not allowed to build upon Tien Poa Street or over the Scavenging Lane. The Tribunal also had no doubt that the Scavenging Lane was in a poor state of repair and would clearly be improved by the proposed redevelopment.

However, the Tribunal did not give any significant weight to this factor, 'as the poor condition of the Scavenging Lane was due to lack of maintenance . . . the Appellants should be permitted to build on Tien Poa Street (with the exception of an area of 18.38 metres by 2.67 metres adjoining 8 to 10A Wing Fung Building) and over the Scavenging Lane as proposed by the Appellants in their application of 13th January 1994. The one condition is that the Scavenging Lane be retained as a private street and the new area provided by the Appellants to widen the Scavenging Lane from 1.8 metres to 2.5 metres becomes a part of the private street. This will ensure the preservation of this street as part of the network of lanes in the area.'

The second objection

As regards the second objection of the Building Authority, the Tribunal held that similar legal arguments applied to this ground of objection as to the first ground of objection relating to s. 31(1) of the *Buildings Ordinance*. If no streets existed, the Building Authority would have no right to object to Tien Poa Street and the Scavenging Lane being included for the purposes of site coverage and plot ratio calculations. The Tribunal considered that such streets would continue to exist and the Building Authority was correct in refusing permission on the basis of *Building (Planning) Regulation* ***23(2)(a)***.

This left the Tribunal again to consider whether there were 'special circumstances' for the exercise of discretion under **s. 42** of the *Buildings Ordinance*. This was to grant an exemption or modification from the provisions of *Building (Planning) Regulation 23(2)* in respect of Tien Poa Street and the Scavenging Lane.

For the reasons given above relating to exemption under **s. 31 (1)** of the *Buildings Ordinance*, the Tribunal ruled that **an exemption should also be given under *Building (Planning) Regulation 23(2)(a)* for Tien Poa Street** (with the exception of the 18.38 metres by 2.67 metres set-back area for widening the footpath that adjoined Nos. 8–10A Wing Fung Building) to be included in the site area for the purposes of site coverage and plot ratio calculations.

Similarly, with regard to the Scavenging Lane, for the reasons given above, the Tribunal also ruled that **'special circumstances' did exist to allow exemption under *Building (Planning) Regulation 23(2)(a)* to be granted so that the area of the Scavenging Lane would be included in the site area for the purposes of site coverage and plot ratio calculations**.

The above concession was made subject to the provision that the newly constructed 2.5-metre wide lane remained (or in relation to the added area, became) a private street and would continue to form part of the network of streets in the neighbourhood and be available for utility services and means of escape for adjoining premises. In reaching this conclusion, the Tribunal took into account:

(a) the submission that the appellants were prepared to utilize land to widen the existing Scavenging Lane and make improvements to it; and
(b) the fact that the site area would be reduced by 7.38% if this exemption was not granted.

The third objection: Wing Fung Street

As regards the third objection of the Building Authority in connection with the *Building (Planning) Regulations*, the Tribunal had the following determination.

In view of the decision that Tien Poa Street would remain a street and that this part of Tien Poa Street should not be extinguished or built upon, **there could be no contravention of *Building (Planning) Regulation 37***. The 18.38-metre by 2.67-metre strip of Tien Poa Street on which the appellant was not to build together with the 1.83 metre-wide existing footpath created a 4.5-metre wide *footpath*. **For the purposes of the *Building (Planning) Regulations*, a street was defined as including any footpath and private or public street.** The appellant had proposed to dedicate the 18.38-metre by 2.67-metre strip to the public for the purpose of passage. 'However, given our decision of the status of this strip of land, the Appellants do not need to dedicate this area to the public as a street to overcome the problem of Building (Planning) Regulation 37, as it remains a street, and cannot be built upon.'

The Tribunal, however, pointed out that the situation was complicated by the fact that the appellants wished to obtain the site coverage and plot ration benefits of this 18.38-metre by -2.67 metre strip adjoining Nos. 8–10A Wing Fung Building by dedicating this area to the public for the purpose of passage. The appellants submitted that they could unilaterally dedicate this area and then included the area in the site area for the purposes of site coverage and plot ratio calculations. The Building Authority said, to the contrary, that any dedication had to be by agreement. The Authority did not agree to the dedication and hence did not accept that the area concerned could be included in the site area.

The Tribunal therefore had to decide whether the appellants could unilaterally dedicate this area to the public as a public street and thereby have this area included in the site area for site coverage and plot ratio calculations. The Tribunal came to the view that **the appellants were not able to dedicate this area without the consent of the Building Authority**. The Building Authority must have the opportunity to consider and agree upon the terms for any dedication to the public including, for example, the terms of maintenance of the newly created public street. If the terms of such dedication were not acceptable to the Building Authority, then they could refuse to accept such dedication. The Tribunal therefore:

(a) **rejected the contention of the appellants that they had the right to include the 18.38-metre long by 2.67-metre wide area adjoining Nos. 8–10A Wing Fung Building in the site area for the purposes of site coverage and plot ratio calculations**; and
(b) was not prepared to allow an exemption or modification under s. 42 to allow this area to be taken into account in the site area calculations.

The fourth objection: Wing Fung Street West and Star Street

As regards the objection by the Building Authority to the application of 13 January 1994 in relation to the quantity of light and air available to

window at No. 17 Wing Fung Street West and Nos. 12–16 Star Street, thus contravening *Building (Planning) Regulation 37*, the Tribunal was satisfied that **there would neither be reduction in light and air available nor contravention of *Building (Planning) Regulation 37* for the following reasons**:

(1) The ground floor premises of No. 17 Wing Fung Street West did not appear to contain any prescribed windows under Regulation 31; nor was there any window required to be provided for rooms containing a soil fitment or waste fitment under Regulation 36.
(2) The quantity of light and air available to the ground floor of No. 17 Wing Fung Street West would not be reduced by the podium roof proposed to be erected over the existing Scavenging Lane.
(3) The part of Nos. 12–16 Star Street facing the existing Scavenging Lane did not contain any prescribed windows under Regulation 31 except a small window required for the toilet facing the existing Scavenging Lane which, under Regulation 36(2)(b), had to be able to be opened directly into open air. 'Open air is defined in the Building (Planning) Regulations as a space which is vertically uncovered and unobstructed and is not less, in any horizontal dimension, than 1.5 metres. Under the development plans submitted on 13th January 1994, the Appellants will not build over the relevant portion of the existing Scavenging Lane facing the windows of the buildings at No. 17 Wing Fung Street West and Nos. 12 to 16 Star Street by reserving a void of 1.5 metres in width on the podium roof so that such windows can still be opened directly into a space which is vertically uncovered and unobstructed with a horizontal width of 1.5 metres.'

The fifth objection: Site coverage and plot ratio

The Building Authority objected to the appellants' application submitted on 13 January 1994 that the set-back area for lane widening at the Rear Lane should be excluded from the site area for the purposes of calculating site coverage and plot ratio. Regarding this objection, the Tribunal noted that it was also the decision of the Building Authority that no site coverage and plot ratio bonus should be granted under *Building (Planning) Regulation 22(1)* for widening the Rear Lane in the dedicated area.

The Tribunal ruled that no special circumstances existed to justify overturning the Building Authority's decision to exclude this area for site area calculations, and not to grant bonus site coverage and plot ratio for these set-back areas for the Rear Lane.

Summing up

The Tribunal summed up its decision:

(1) Tien Poa Street and the Scavenging Lane are private streets

and cannot be extinguished without the consent of the Building Authority under Section 14 of the Buildings Ordinance.

(2) The Appellants cannot build on Tien Poa Street or over the Scavenging Lane without the consent of the Building Authority under Section 31(1).

(3) The Appellants cannot take Tien Poa Street and the Scavenging Lane into account for site coverage and plot ratio calculations without the consent of the Building Authority under *Building (Planning) Regulation 23(2)(a)*.

(4) With regard to their application dated 13th January 1994, the appellants should be granted exemption under Section 42 of the Buildings Ordinance from Section 31(1) of the Buildings Ordinance to allow the Appellants to build upon the existing private street, Tien Poa Street (with the exception of the 18.38 metre by 2.67 metre strip of Tien Poa Street adjoining 8 to 10A Wing Fung Building) and over the existing Scavenging Lane adjacent to No. 17 Wing Fung Street West. The special circumstances which arise in this case are:

   (a) Tien Poa Street and the Scavenging Lane contain no public or private rights of passage.
   (b) The evidence given to the Tribunal was to the effect that Tien Poa Street does not serve any useful purpose to anyone other than the residents of Nos. 1 to 8 Tien Poa Street.
   (c) The building plans submitted by the Appellants on 13th January 1994 allow continued access to the Scavenging Lane by the public and continued access for existing utilities and escape routes.
   (d) The building plans submitted by the Appellants on 13th January 1994 would lead to a development which would significantly improve the area and thus would be in the public interest.
   (e) If the Appellants were unable to build on or over Tien Poa Street and the Scavenging Lane, the development potential of the site would be very significantly reduced.

(5) With regard to their application dated 13th January 1994, the Appellants should be granted exemption under Section 42 of the Buildings Ordinance from the provisions of Building (Planning) Regulation 23(2)(a) and should be allowed to include in the site area for the purposes of site coverage and plot ratio calculations the existing private street, Tien Poa Street [with the exception of the 18.38-metre by 2.67-metre strip of Tien Poa Street adjoining Nos. 8 to 10A Wing Fung Street which should not be taken into account for the purposes of site coverage and plot ratio calculations] and the Scavenging Lane [provided it continues to be a private street].

(6) The Building Authority's objection to the application dated 13th January 1994 under *Building (Planning) Regulation 37*, that the quantity of light and air available to the windows of Nos. 8 to 10A Wing Fung Street has been reduced is not valid.

(7) The Building Authority's objection to the application dated 13th January 1994 under *Building (Planning) Regulation 37* that the quantity of light and air available to the windows of No. 17 Wing Fung Street West and Nos. 12 to 16 Star Street has been reduced is not valid.
(8) The Rear Lane adjoining Nos. 12 to 16 Star Street should be excluded from the site area for the purposes of site coverage and plot ratio calculations under *Building (Planning) Regulation 23(2)(a)* and no site coverage and plot ratio bonus should be granted for this area.

Postcript

Before concluding, we feel compelled to observe that a frequent and almost universal judicial condemnation of the Building (Planning) Regulations over a number of years and in a number of different cases, no action has as yet been taken to provide clear and comprehensive regulations to deal with one of the most important aspects of the commercial life of Hong Kong, namely the construction of buildings. We can only repeat comments made by greater legal minds than ours that the Building (Planning) Regulations are extremely hard to interpret and this cannot be to the advantage of either the Building Authority or developers in Hong Kong. We would therefore urge the Authority to consider amending the current legislation at the earliest possible opportunity.

LEUNG'S FAMILY INVESTMENT

- **Building Appeal Case Name:** Nos. 37–41 Wellington Street, Hong Kong **[Leung's Family Investment]**
- **Building Appeal Case No. :** 83/92
- **Similar Case:** *No. 40 Fort Street* (39/93)
- **Nature of the Case:** practice notes; policy of the Building Authority
- **Date of Hearing:** 29 March 1993
- **Date of Decision:** 10 May 1993
- **Chairperson of Tribunal:** Mr Robin Somers Peard
- **Representation:**
  (a) Mr Robert Kotewall QC and Mr Benjamin Yu for the appellant
  (b) Mr Kwok Sui Hay for the respondent

- **Decision:** appeal allowed
- **Rules Laid down by the Decision:**

  (1) It is not legitimate for the Building Authority to apply Practice Note No. 15 automatically to any service lane which is still being used, thereby effectively excluding consideration of the special circumstances being put forward by the appellants.
  (2) There is no statutory definition of a service lane and any distinction between the rear lane and the side lane must be justified on the facts.
  (3) The Building Authority must consider the extent of the increase in size of the building if lanes are to be included when the Building Authority has to decide on an application for exemption under section 31.

- **Background:**

  The subject site

  The subject site was at Nos. 37–41 Wellington Street, Hong Kong. At the time of the appeal, the site was occupied by two commercial buildings. One building was located at Nos. 37–37B Wellington Street and was known as 'Red A Central Building', which had 7 storeys over 1 basement floor. It was owned by Leung's Family Investment Co. Ltd. The Occupation Permit for this building was granted on 19 January 1967. This building covered the following lots:

  (a) the remaining portion of Inland Lot No. 5969 (37 Wellington Street)
  (b) the remaining portion of Inland Lot No. 5970 (37A Wellington Street)
  (c) the remaining portion of Inland Lot No. 5971 (37B Wellington Street)

  The other building was at Nos. 39–41 Wellington Street. It was known as 'Lucky Building'. It had 6 storeys over 1 basement floor. It was owned by Yem Brothers Co. Ltd. The Occupation Permit was granted on 31 January 1967. This building covered the following lots:

  (a) the remaining portion of Inland Lot No. 5972 (39 Wellington Street)
  (b) the remaining portion of Inland Lot No. 5973 (39A Wellington Street)
  (c) the remaining portion of Section E of Inland Lot No. 34 (41 Wellington Street)

  The owners of these two buildings were the appellants of this case.

  A lane ran along the eastern boundary of the remaining portion of Inland Lot No. 5969 (37 Wellington Street). This lane ('the side lane') was the subject matter of this appeal. This side lane was approximately 1.57 metres wide. Another lane ('the rear lane') ran along the northern side of the whole of the site other than the remaining portion of Section E of Inland Lot No. 34. This rear lane was approximately 1.3 metres wide.

Building proposals

The Authorized Person (AP) of Leung's Family Investment Co. Ltd. applied for building permission in 1981 for commercial development on Lots 5969, 5970 and 5971. A letter dated 12 June 1981 from the Building Authority to the AP stated that 'the right of way at the rear and at the side of the above lots (those owned by Leung's Family Investment Co. Ltd.) could be included in the site area for the purposes of plot ratio and site coverage calculations, provided a non-domestic building is proposed'.

In August 1981, Practice Note No. 15 was issued in relation to *Building (Planning) Regulation 23(2)(a)*. On 30 April 1992, Mr Benjamin Hung, AP for the appellants, submitted building plans in respect of the subject site for a 27-storey commercial building. This submission was accompanied by a copy of the letter dated 12 June 1981.

On 23 June 1992, the 'Building Committee II' (BC II) met to consider the application in relation to the inclusions of the areas of the rear and side lanes in the site areas calculations. The plans were disapproved. The refusal was based on s. 16(1)(d) of the *Buildings Ordinance* on several grounds including contravention of the *Building (Planning) Regulations 23(2)(a)*. According to its interpretation of s. 23(2)(a), the Building Authority considered that the side lane and rear lane should not be included in the calculation of the site area. This decision was made known to the appellants by a letter dated 30 June 1992.

In a letter dated 9 July 1992, the solicitors for the appellants pointed out to the Building Authority that the appellants had relied on its letter of 12 June 1981 in making the building plan submission and pressed for an explanation.

The Building Authority advised the appellants' solicitors by a letter dated 18 July 1992 that:

(a) their AP had not applied on the prescribed form for modification of the provisions of the *Building (Planning) Regulation 23(2)(a)*;
(b) the disapproval of plans under *Section 16(1)(d) of the Buildings Ordinance* was correct; and
(c) the letter dated 12 June 1981 was written 11 years ago and the Building Authority had to consider each modification application on its merits, taking into account all relevant factors placed before it.

The AP resubmitted the building plans on 22 August 1992, together with an application in prescribed form for modification of *Building (Planning) Regulation 23(2)(a)* to permit the side and rear lanes to be included in the site area for the purposes of site coverage and plot ratio calculations. These plans and the application for modification were considered by Building Committee II on 15 September 1992.

The Building Authority decided to: (a) disapprove the resubmitted plans; (b) allow the rear lane to be included in the site area; but (c) disallow the absorption of the side lane.

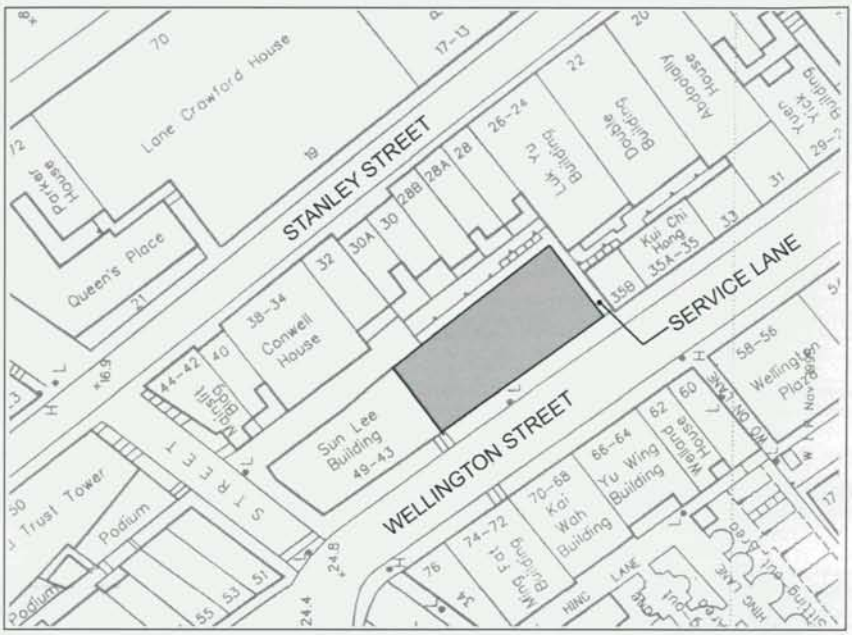


Figure 4.4 Site plan of Nos. 37–41 Wellington Street (the *Leung's Family Investment Case*), reproduced with permission of The Director of Lands, © Government of Hong Kong SAR Licence No. 40/1999

Photograph 4.4 Conditions of the service lane off Wellington Street

This decision was set out in a letter dated 17 September 1992 from the Building Authority to the AP. In this letter, the Building Authority stated that the appellants might 'wish to change the description of the rear lane into "yard" in your resubmission and you are advised to investigate the possibility of connecting such "yard" to the public lane at the rear of Nos. 43–49 Wellington Street'.

On 8 October 1992, the solicitors for the appellants gave the Notice of Appeal against the Building Authority's decision, namely refusing an application by the appellants under s. 42 of the *Buildings Ordinance* for the modification of or exemption from Regulation 23(2)(a) of the *Building (Planning) Regulations* to permit the side lane area of the site at Nos. 37–41 Wellington Street to be included for the purposes of site area calculations in connection with the appellants' redevelopment proposal.

- **Arguments:**

Special circumstances were put forward by the appellants in support of their application for modification

In the attachment to the prescribed form dated 12 August 1992, the AP set out the following special circumstances:

(1) The Building Authority had confirmed by letter of the 12th June, 1981 that for a commercial building the areas of the rear and side lanes can be included in the site area for the purposes of calculating plot ratio and site coverage. A copy of the letter from the Building Authority is attached hereto and forms part of the special circumstances in support of this application.
(2) There has been no change of the relevant circumstances in the neighbourhood since 1981 which might adversely affect this application.
(3) The rear and side lanes are private lanes which form part of the site on which the building, the subject of the current plans and application, is to be erected.
(4) The rear and side lanes will not be built over or built upon.
(5) The rear and side lanes will be maintained and continued to be used as lanes.
(6) The condition of the existing lanes will be improved in that the rear lane will be widened to 1.50 metre and the side lane to 2. 00 metres. The lanes will be resurfaced and finished with non-slip tiles which provide a safe and comfortable passage.

Grounds in the Notice of Appeal

The Notice of Appeal dated 8 October 1992 set out the following as grounds of appeal:

(1) The Building Authority had confirmed by letter of the 12th June 1981 that for a commercial building the areas of the side

lane can be included in the site area for the purposes of calculating plot ratio and site coverage.

(2) There has been no change of the relevant circumstances in the neighbourhood since 1981 which might adversely affect the application.

(3) The side lane is a private lane which forms part of the site on which the building, the subject of the application, is to be erected.

(4) The side lane will not be built over or built upon.

(5) The side lane will be maintained and continued to be used as a lane.

(6) The condition of the existing side lane will be improved and widened to 2.00 metres. The Lane will be resurfaced and finished with non-slip tiles which provide a safe and comfortable passage.

(7) The side lane was included for the purposes of calculating the plot ratio and site coverage of the existing building.

For the appeal hearing, the appellants called one witness Mr Benjamin Hung who was an architect and the AP. Mr Hung gave oral evidence and put in a statement by way of examination in chief.

The Building Authority called one witness Mr David McNeil Connell who was a Fellow of the Royal Institute of Chartered Surveyors and held the post of Chief Building Surveyor in the HK1 Section of the Development Division of the Buildings Ordinance Office. Mr Connell also gave oral evidence and put in a written statement by way of evidence in chief.

- **Reasons for Decision:**

The Appeal Tribunal allowed the appeal and noted the relevant legislation:

The relevant legislation

The *Building (Planning) Regulations* were made under section 38 of the *Buildings Ordinance*. Regulation 23(2)(a) reads as follows:

> In determining for the purposes of Regulations 20, 21 or 22 the area of the site on which a building is erected:
>
> (a) no account shall be taken of any part of any street or service lane;

Regulation 23(2)(b) provides that any area dedicated to the public for the purposes of passage shall be included for such purposes. Regulations 20, 21 and 22 govern permitted site coverage, permitted plot ratio and occasions when such permitted site coverage and plot ratio may be exceeded. The Building Authority has a general power of exemption under section 42 of the *Buildings Ordinance*, the relevant parts of which read as follows:

> (1) Where in the opinion of the Building Authority special circumstances render it desirable he may, on receipt of an application therefor and upon payment of the prescribed fee,

permit by notice in writing in the prescribed form modifications of the provisions of this Ordinance.

(2) Every application for an exemption under this section shall be in the prescribed form, and shall be considered on its own merits by the Building Authority who shall not be required to take account of exemptions granted in the past.

(3) A permit granted under this section may contain such conditions as the Building Authority shall deem necessary.

(4) No such permit shall be granted to the prejudice of the standard of structural stability and public health established from time to time by regulations.

Use of the side and rear lanes in the Crown Leases: Lanes were service lanes

The Tribunal inspected copies of the Crown Leases for each of the lots which comprised the site. Unfortunately, the Crown Lease for the remaining portion of Section E of Inland Lot No. 34 was granted in 1844 and was unreadable. The Building Authority made some further enquiries at the Tribunal's request and as a result of this the following had been established:

(a) With the exception of the remaining portion of Section E of Inland Lot No. 34 (where the position was not clear), the Crown Leases of the lots created a free and uninterrupted right to pass and repass over the rear lane and the side lane for the respective lessees, their tenants, servants, visitors, workmen and other persons authorized by the lessees from time to time and at all times during the continuance of the Crown Leases for all purposes connected with the proper use and enjoyment of the relevant premises. In other words, the Yem Brothers Co. Ltd. as Crown Lessees had such a right of way over the parts of the rear and side lanes not owned by them.

There was an exception and reservation in these Crown Leases in favour of the Crown and others the lessee or lessees of neighbouring lots licensed by the Crown their tenants, servants, visitors, workmen and other persons authorized by them in that behalf of a free and uninterrupted right to pass and repass over the side and rear lanes from time to time and at all times during the continuance of the Crown Lease for all purposes connected with the proper use and enjoyment of over the side lane to gain access to Wellington Street.

(b) The properties known as Nos. 28–30A Stanley Street inclusive (to the north of the site) had rights of way granted in the respective Crown Lease over the side lane to Wellington Street reached by steps leading up to the side lane. These steps were not apparently used at the time of the appeal.

(c) The Crown had authorized two exits from No. 35B Wellington Street onto the side lane. This arose under the approved building plans.

(d) There were steps leading up from the rear entrances of Nos. 20, 22 and 24/26 Stanley Street. These properties had, under their approved building plans, authorized means of escape leading from the rear of those properties to steps up the side lane.
(e) There was unauthorized access from a restaurant operated at Nos. 24 and 26 Stanley Street onto the northern part of the side lane.

The Tribunal noted from the above that the rights of way existed over the rear lane and the side lane. The Tribunal also noted that there was **no definition** in the *Buildings Ordinance* or in the *Building (Planning) Regulations* of the term 'service lane'.

In the Crown Lease plans, they were merely described as lanes although on the approved plan for the building at Nos. 39–41 Wellington Street, the lanes were described as 'scavenging lanes'. 'Scavenging lanes' indicate that historically, such lanes were used for removing garbage as well as other functions.

The Tribunal considered that **both the rear and side lanes were service lanes**. The Tribunal agreed with Mr Connell that service lanes could fulfil a number of functions including:

(a) provision of a secondary means of access to buildings from streets;
(b) means of escape;
(c) accommodation of services, drains or sewers;
(d) route for removal of refuse; and
(e) pedestrian ways.

Practice Note No. 15

The Tribunal noted the content of a Practice Note issued by the Buildings Ordinance Office (now Buildings Department) in August 1981 in relation to the *Building (Planning) Regulation* 23(2)(a). The Tribunal believed that this Practice Note had a considerable bearing upon how the Building Authority exercised its discretion in this case:

> Site area in relation to existing
>
> private service lanes and streets
>
> Building (Planning) Regulation 23(2)(a)
>
> > The working of the captioned regulation is quite clear and leaves no room for discretion in basic application. Despite this, however, there has been a tendency in recent years to adopt a somewhat optional approach and this is now considered to be incorrect. If there is to be any exercise of discretion in matters of this type the decision will be taken in BOO, in relation to an application of Form 29. In some instances such an application would be also linked to Buildings Ordinance Section 31.

2. Almost all existing private service lanes and streets will have been originally laid out in order to facilitate the development of a parcel of land that did not already have adequate internal access, and the width of those private streets would also have determined the maximum permissible height of buildings in many cases. In due course the general public may acquire a prescriptive right to the use of private streets and lanes, while other rights may be embodied in lease conditions and deals of mutual covenant. Quite apart from the considerations it is a matter of B.O.O. policy that no existing street or service lane, or even a part of such, may be extinguished unless it is clearly no longer required.

3. Where an existing private street or lane is no longer needed, in whole or part, for access, exit routes, site classification, the siting of services, light and air, or other relevant factors pertinent to the general neighbourhood (not necessarily for only one or more sites) conditions may then be ripe for the favourable exercise of discretion by BOC in relation to an application on Form 29. Except in the circumstances where such exemption is given the captioned regulation should be applied exactly as provided.

4. See also P.N. 3.

   According to Mr. Connell's evidence this Practice Note was not issued to authorised persons but was intended for internal purposes in the Buildings Ordinance Office. The Practice Note is somewhat difficult to understand. It seems to suggest that, unless a private service lane or street is no longer needed as such, there is no room for a grant of exemption from the provisions of Building (Planning) Regulation 23(2)(a). The circumstances in which a service lane is no longer needed are out in paragraph 3 of the Practice Note.

   We comment that, if this Practice Note is intended to prohibit the granting of exemption from Building (Planning) Regulation 23(2)(a) other than in a case where a private service lane or street is no longer needed and is capable of extinguishment, we consider such to be an improper fetter upon the discretion given to the Building Authority under Section 42 of the Buildings Ordinance. Under that section, each application for exemption shall be considered on its own merits; this Practice Note appears to eliminate the necessity of consideration for the merits of the application where a private service lane or street is still needed within the meaning of the Practice Note.

Consideration for the appellants' development proposal

The Tribunal had the following findings as regards the manner in which the appellants' application for exemption was dealt with by the Building Authority in conjunction with the consideration of the building plans.

(a) The original plans submitted in April 1992 were accompanied by a copy of the Building Authority's letter dated 12 June 1981. No formal application under section 42 of the *Buildings Ordinance* using the prescribed form 29 was initially made.

(b) Building Committee II met on 23 June 1992. Among those present were the signatory of the Building Authority's letter of 12 June 1981 (who was then GBS/C) and Mr H. K. Yuen who was then holding the position of Chief Building Surveyor/HK1. Mr Yuen's recommendation to the Committee was that the areas of both the rear and side lanes should be included for site area calculations. The use of the rear and side lanes were discussed and the terms of the letter dated 12 June 1991 were quoted. It was also stated that there had been no significant change in site conditions since that letter was written in 1981. However, it was recognized that such a letter was written 11 years ago and the minutes further stated that 'the policy regarding lanes had subsequently been reviewed and applied consistently to exclude lanes and site area calculations'. This was no doubt a reference to Practice Note No. 15. The members also noted that no formal application of Form 29 had been submitted and it would be premature to consider the issue at that stage. In the circumstances, Mr H. K. Yuen withdrew his recommendation.

(c) After the initial rejection of the plans and ensuing correspondence leading to resubmission with a formal exemption application. Building Committee II met again on 15 September 1992. Neither the signatory of the 12 June 1981 letter nor Mr H. K. Yuen was present at the meeting. Mr Connell had taken over the post of CBS/HK1 and reversed the earlier decision of Mr Yuen (i.e. the side and rear lanes were now recommended not to be included in the site area). After considering the circumstances described in the previous meeting and the application of Form 29, a majority of those present noted that the side lane provided means of access and escape to other adjoining premises, and therefore it was agreed that the area of the side lane should be excluded from the site area. Furthermore, since the rear lane served the new building only, those present agreed to permit the rear lane area to be included in the site area. Those present further opined that the Authorized Person should be invited to examine the possibility of opening up the dead-end street and situation of the rear lane to improve the general environment and means of escape from the proposed building.

(d) In the letter of 17 September 1992, the Building Authority set out its decision and stated in the last sentence of paragraph 10: **'You may wish to change the description of the rear lane into "yard" in your resubmission and you are advised to investigate the possibility of connecting such "yard" to the public lane at the rear of No. 43–49 Wellington Street.'**

(e) From the evidence of Mr Connell as to the reasoning behind this decision, it seemed that Practice Note No. 15 was taken to exclude the possibility of including the area of the side lane in the site area, but since the rear lane would merely be serving the rear of the proposed building and would be a dead end, it would be appropriate to include it in the site area. It was extremely difficult to understand how this reasoning was compatible with the terms of Practice Note No. 15 or with the suggestion of connecting the rear lane to the public lane at the rear of Nos. 43–49 Wellington Street which would allow persons from that property also to use the rear lane and therefore, presumably, to increase its use as a service lane. **The fact that the rear lane was only to be used in connection with the proposed new building did not prevent it from being a service lane.** It was suspected that **the suggestion which stated the rear lane should be redesignated as 'yard' was to disguise the fact that Practice Note No. 15 was not being strictly applied to the rear lane as a special concession in this case in view of the letter dated 12 June 1981.**

Conclusion

Having considered Practice Note No. 15 and the meeting of the Building Committee II on 15 September 1992, the Tribunal concluded that it was unable to agree with the decision of the Building Authority for the following reasons:

Practice Note No. 15 should not have been applied only to lanes still in use

It was not legitimate for the Building Authority to apply Practice Note No. 15 automatically to any service lane which was still being used, thereby effectively excluding consideration of the special circumstances being put forward by the appellants.

The distinction between rear and side lanes was artificial

The so-called distinction between the rear lane and the side lane was not justified on the facts. Both lanes would continue to be used as service lanes.

The Building Authority failed to consider the size of the proposed building as a result of the proposals

The Building Authority did not consider the extent of the increase in the size of the building if the two lanes were to be included. This was what should always be considered when the Building Authority had to decide on an application for exemption under section 31 as this had to be part of the consideration of the application 'on its merits'.

The determination

It is therefore our duty to reconsider the application by reference to the evidence which has been produced to us and by reference to the Appellants' grounds of appeal. We accept that it is the duty of the Appellants to satisfy us that there are special circumstances within the meaning of Section 42(1). However we are of the opinion that ground of appeal (1) and (2) combined with ground of appeal (6) do, in the particular circumstances of this case, amount to special circumstances rendering approval desirable. We reach this conclusion bearing in mind that the exclusion of the side lane would reduce the proposed gross floor area of 5,242.863 square metres by 311.23 square metres (i.e. by about 5.9%).

In regard to grounds of appeal (1) and (2), we have taken into account the fact that the Building Authority is not required under Section 42 (2) to take into account exemptions granted in the past. However since there have been no change in relevant circumstances in the neighbourhood since 1981 and since no one from the Building Authority has given us any convincing reason why the view expressed in the letter of 12th June 1981 is incorrect as a mater of exercise of the Building Committee's discretion, we consider that these two grounds of appeal are significant as special circumstances. If it had not been for Practice Note No. 15 (which we have noted is an improper fetter on the discretion of the Building Committee), we consider that there were no real grounds for reversing the view of the Building Authority given in 1981.

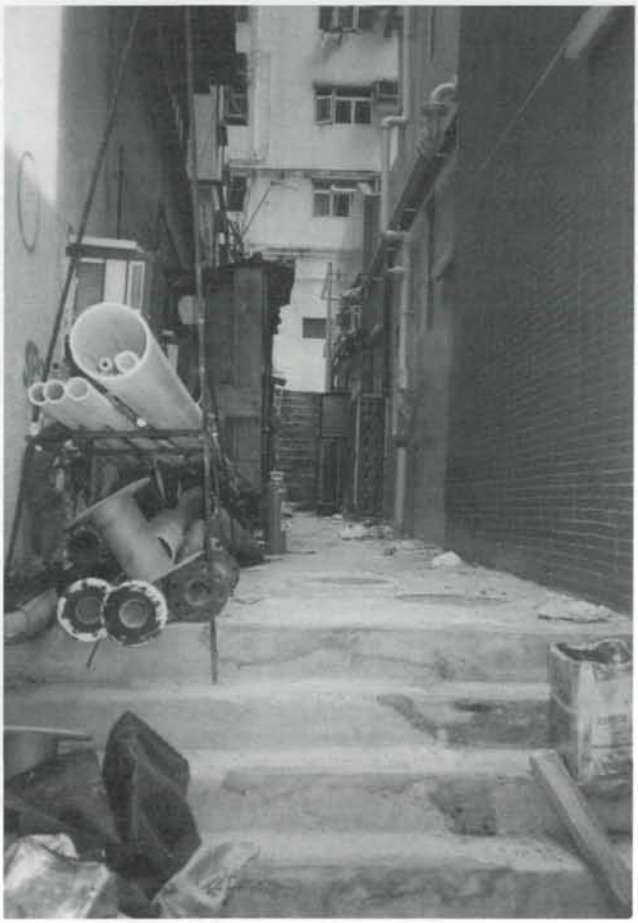
Coupled with this is ground of appeal (6). The Appellants are putting themselves to expense in improving and widening the side lane to make it easier to use and safer than it is at present. Having viewed the side lane, we must say that, particularly in wet weather, it is difficult for pedestrians to use and is cramped.

We do not consider that the other grounds put forward by the Appellants amount to special circumstances. We should however comment on ground (7). The approval of plans for the existing building took place at a time when the provisions for calculating the approved size of buildings were being changed. It is not entirely clear to us whether the existing building was approved by reference to the new regulations or by reference to the old regulations under which the question of whether or not the side lane was to be included in the site area would not have been relevant. In any event the side lane was so included but we do not consider this to be, on the evidence, a fact to which we can attach any significance. Our conclusion therefore is that the decision of the Building Authority refusing to include the area of the side lane for the purposes of site coverage and plot ratio calculations should be set aside and the application for exemption from Regulation 23(2)(a) of the Building (Planning) Regulations in respect of the side lane should be approved on condition that the Appellants comply with grounds of appeal (4), (5) and (6).

FORT STREET

- **Building Appeal Case Name:** No. 40 Fort Street, North Point, Hong Kong [**Fort Street**]
- **Building Appeal Case No. :** 39/93
- **Similar Cases:** *Nos. 54–60 Fort Street Case; Leung's Family Investment Case* (83/92)
- **Nature of the Case:** differences between 'lanes' and 'streets'; estoppel; modification under *Building (Planning) Regulation* 23(2)(a)
- **Dates of Hearing:** 4 October 1993 and 6 November 1993
- **Date of Decision:** 18 January 1994
- **Chairperson of Tribunal:** name cannot be verified

Figure 4.5 Site plan of No. 40 Fort Street (the *Fort Street Case*), reproduced with permission of The Director of Lands, © Government of Hong Kong SAR Licence No. 40/1999



Photograph 4.5 Conditions of the service lane off Fort Street

- **Representation:**

  (a) Mr Simon Chiu, counsel for the appellant
  (b) Mr Nicholas Cooney, Crown Counsel for the respondent

- **Decision:** appeal dismissed

- **Rules Laid down by the Judicial Review:**

  (1) Before relying on *Building (Planning) Regulation 23(2)(a)*, the Building Authority will have to determine whether the area in question is subject to any private or public rights of way.

Private right of way

The most obvious private right of way is that created by express grant. There may be a right of way by necessity as in the case of a 'land-locked' allotment with no other means of access. There can, however, be no private right of way by prescription, as held by Deputy Judge Chan in *Tang Tim-fat & Anor v Chan Fok Kei & Ors* [1973] 2 HKLR 273 (High Court).

Public right of way

Public right of way would be either by express dedication or assumed dedication. The latter arises through long and uninterrupted use of the land by the public for the purpose of passage with the apparent consent of the Crown. (Decision of judicial review of the *No. 40, Fort Street Case*, HCMP 600/94)

(2) The fact that an area of land has the physical characteristics of a street does not mean that it is a street for the purpose of building density control. (Decision of judicial review of the *No. 40, Fort Street Case*, HCMP 600/94)

- **Background:**

The subject site was No. 40, Fort Street, North Point, Hong Kong. The site was vacant; an original building on the site had been pulled down. There were a rear lane and a side lane by the site. The rear lane was 6.21 m wide. The side lane was 4.615 m wide from the outer surface of the eastern wall of the demolished building to the outer surface of the western wall of a building at Nos. 42–46 Fort Street. Of the 4.615 m, 0.9 m started from the western wall of the building at Nos. 42–46 Fort Street. The width of the remaining portion of the side lane was 3.715 m wide. For this portion of the lane, there was an express right of way which ran along the eastern boundary of the subject site from north to south. This right of way measured about 0.9 m. The right of way was set out in an assignment dated 30 June 1949, whereby the subject site was assigned to the predecessor of the existing owner.

There was a row of illegal structures erected on the side lane. These structures had been there for more than 10 years.

The appellant made 5 applications seeking modification under *Building (Planning) Regulation* 23(2)(a) for the inclusion of the side and rear lanes as part of the subject site. These applications were made on the following dates:

Applications	Dates
1st	10 December 1991
2nd	15 April 1992
3rd	3 July 1992
4th	12 February 1993
5th	8 April 1993

The appellant offered to surrender part of the existing side lane in return for a bonus under *Building (Planning) Regulation* 22(2)(b).

The Building Authority made the following decisions in respect of the applications:

(1) As regards the rear lane: The inclusion of the rear lane into the subject site was allowed, after deducting 1.5 m from the rear boundary of the site as an access for service purposes. This decision was made in accordance with the 1972 policy which stated that 'the rear lanes to all sites should be considered as lanes and not as streets whatever the width and after deducting 5'0" from the rear boundary for service lane purposes, the remainder of the rear lane might be included as site area for open space, site coverage and plot ratio calculations. No shadow area would be required for the rear façade'.

(2) As regards the side lane: The side lane fell within *Building (Planning) Regulation* 23(2)(a) and should be excluded for the purpose of site area calculation. There would not be any bonus under s. 22(2)(b) for the proposed surrender of the side lane.

The appellant filed a Notice of Appeal dated 20 May 1993. A hearing was held on 4 October 1993. Mr Cooney for the respondent applied for an adjournment on the grounds that (a) the respondent received the submission of the appellant on 2 October 1993, a Saturday; and (b) the grounds of appeal raised in the appellant's submission differed from those set out in the Notice of Appeal. An adjournment was granted and the hearing was scheduled on 6 November 1993. Members of the Tribunal visited the subject site on 4 October 1993 with both parties to the appeal.

- **Arguments:**

The respondent argued that:

(a) as rear lanes and side lanes were not service lanes, it was unnecessary for the Tribunal to consider the appellant's arguments on the service lane which formed a substantive part of the appellant's submission;

(b) the sole issue for the Tribunal was whether the rear and side lanes were 'streets' within the meaning of s. 23(2)(a).

The appellant argued that:

(a) the Building Authority stated in their 1972 policy that 'rear lanes' to all sites should be considered as 'lanes' and not 'streets', whatever the width was. Therefore, the Building Authority was estopped from contending that the side and rear lanes of the subject site in question were 'streets';
(b) the side and rear lanes could only be regarded as streets within s. 23(2)(a) if they had assumed the character of 'service' lanes prior to the demolition of the original building on the site.
(c) if the Tribunal should find that the side and rear lanes were streets within s. 23(2)(a), then only that part (being about 0.9 m (3')) in width of the lane over which there was an express right of way could be considered a street;
(d) the Building Authority had exercised its discretion in an arbitrary manner and without good reason. In particular, there was no justification for it to hold that the present case was not directly comparable to the *Nos. 54–60, Fort Street Case*. In that case, the whole area of the rear lane had been taken into account for the purposes of plot ratio and site coverage calculations; and
(e) the Building Authority was wrong in both refusing to accept the appellant's proposal to surrender part of the side lane and in the interpretation of s. 23(2)(b) of the *Building (Planning) Regulations*.

- **Reasons for Decision:**

Both the rear and side lanes were streets

Having considered the evidence and arguments, including submission on the case *Hinge Well Co Ltd v Attorney General* [1988] 1 HKLR 32, the Appeal Tribunal decided that both the rear and side lanes were 'streets' within the meaning of 23(2)(b) of the *Building (Planning) Regulations*. The Tribunal regarded the two lanes as 'streets' because of the following reasons:

(a) The lanes were used as *passageways* by the occupiers of the adjoining land.

The Tribunal referred to Lord Oliver in the *Hinge Well Case*:

> In their Lordships' view **an area of land (not being a service lane) over which there are private rights of passage in an adjoining occupier may nevertheless remain a street within regulation 23(2)(a)**. The statutory definition includes, for instance, a private footpath or private way and their Lordships can see no reason for treating the area of such a way as not comprehended in the word 'street' where it is used in the regulation. **Unless and until the rights of adjoining occupiers are surrendered or**

> **extinguished such an area remains as unavailable for building purposes as an area dedicated for passage by the general public**. There is no doubt that, prior to demolition of the houses on the site, the scavenging lane was a street within the statutory definition. Equally the existing passages of the east and west were and still are streets or parts of streets.
>
> Their Lordships can see no reason for saying that simply because the physical landmarks which delineated the previously existing street here it passed over the appellant's land have now disappeared that which was plainly a street before has ceased to be such. No doubt **if the position were that there was neither any physical delineation of a way on the ground nor any right of any person but the landowner himself to use it, the area could no longer be said to be a street in the statutory sense or indeed any sense**. But so long as the rights of passage of the adjoining occupiers subsist the area is apt to serve exactly the same purpose as it was serving before, that is to say, that of providing a communicating link between the passage on the west and that on the east, it continues to be built on and in their Lordships' view it remains a 'street' within the meaning of regulation 23(2)(a) and so has to be left out of account in computing the area of the site for the purposes of regulations 20 and 21 (emphasis added).

(b) The appellant had classified the subject site as a 'Class C' site, which meant that it was surrounded by three streets none of which was less than 4.5 m wide. Therefore, having made an application on the basis that the site was Class C, the appellant contradicted himself by arguing that they were not 'streets'. The word 'street' in s. 23(2)(a) should have the same meaning.

As both the rear and side lanes were streets, it followed that there could not be any dedication to the public for the purpose of passage under s. 23(2)(b).

Concession to other developers was a matter of policy

> The 1972 Policy is an administrative (document and the) decision on the part of the Building Authority to give some concessions to developments on (developer of) Inland Lot No. 2366 . . . The Building Authority is not and could not be estopped and precluded from contending that a lane was not a street within the meaning of s. 23(2)(a) by virtue of the said policy.

The decision in respect of Nos. 54–60 Fort Street depended on the facts of the particular case. Even if the Building Authority was wrong in that case, it did not alter the fact that the rear and side lanes were streets within the meaning of s. 23(2)(a).

The Hinge Well Case was not the authority for the appellant's proposition

The Tribunal did not accept the proposition that the side and rear lanes could only be streets if they had never assumed the character of services lane prior to the demolition of the original building on the site. The *Hinge Well Case* was not the authority for this proposition. The use of land changed continuously and the Tribunal did not see any reason for importing the proposed restrictive meaning of a street.

- **Judicial Review Decisions:**

After the decision of the Appeal Tribunal was made on 18 January 1994, the appellant applied for judicial review. The review was held on 19 and 20 September 1994 before Mr Justice Mayo and the decision was delivered on 20 January 1994.

Mr Mayo J allowed the application. He ordered that the decision of the Tribunal had no effect and declared that the **Tribunal erred in law in holding that the entire area of the subject rear and side lanes were streets** for the purpose of *Building (Planning) Regulation* 23(2)(a) and that only the express rights of way were streets.

In reaching his decision, Mr Mayo J applied what Mr Cooney described as the 'availability for building test', which was set out in the Privy Council judgement in the *Hinge Well Case*. The test concluded that, for the purpose of Regulation 23(2)(a), a portion of an allotment was a street if persons other than the owner had rights of way over that portion so that the owner could not build on that portion without infringing those rights.

The effects of the judicial review for future interpretation of Regulation 23(2)(a) were that:

(a) Before relying on *Building (Planning) Regulation 23(2)(a)*, the Building Authority would have to determine whether the area in question was subject to any private or public rights of way.

(i) Private right of way

The most obvious private right of way was that created by express grant. There might be a right of way by necessity as in the case of a 'land-locked' allotment with no other means of access. There could, however, be no private right of way by prescription, as held by Deputy Judge Chan in *Tang Tim-fat & Anor v Chan Fok Kei & Ors* [1973] 2 HKLR 273 (High Court).

(ii) Public right of way

Public rights of way would be either by express dedication or assumed dedication. The latter arose through long and uninterrupted use of the land by the public for the purpose of passage with the apparent consent of the Crown.

(b) That an area of land had the physical characteristics of a street did not mean that it was a street for the purpose of building density control.

ACCESS AND PARKING

SKILLAND DEVELOPMENT

- **Building Appeal Case Name:** Lot 1471 s.A in DD 189, Nos. 1–3 Shatin Heights Road, New Territories [**Skilland Development**]
- **Building Appeal Case No. :** 74/88
- **Nature of the Case:** a case that started in 1981 and determined in June 1989; s. 2, *Buildings Ordinance*; s. 16(1)(i), *Buildings Ordinance*; s. 29, *Buildings Ordinance*; s. 6(1) and 11(1), *Building (Private Street and Access Road) Regulations*; Columns A and B, Item 2, s. 7(1) *Buildings Ordinance*; provision of government land for construction and upgrading private road by private landowners
- **Date of Hearing:** 10 April 1989
- **Date of Decision:** 29 June 1989

Photograph 4.6 Junction between Shatin Heights Road and Tai Po Road

- **Chairperson of Tribunal:** Mr Donald Quintin Cheung
- **Representation:**

  (a) Mr A. B. Lawrence for the appellant
  (b) Mr S. P. O'Sullivan, Crown Counsel for the respondent

- **Decision:** appeal dismissed
- **Rule Laid down by the Decision:**

  (1) Section 29 of the *Buildings Ordinance* deals with the maintenance of private streets and access roads and not with improvements on access roads to the standards laid down by Regulations 6(1) and 11(1) of the *Building (Private Street and Access Road) Regulations.*

- **Background:**

In September 1987, Skilland Development Ltd. (the appellant) acquired Lot No. 1471 s.A in DD 189, 1–3 Shatin Heights Road (the subject site). There were then two buildings on the subject site. One was of 4-storey, the other of 2-storey.

Access to the subject site was provided by Shatin Heights Road. It was a cul-de-sac road which branched off Tai Po Road, i.e. the main road. From the evidence before the Tribunal, Shatin Heights Road was constructed on Crown land in the late 1950s or early 1960s to provide access to several land parcels under development in the vicinity. The last building erected in the catchment of Shatin Heights Road (the road) had been erected prior to 1980. There were 19 buildings along the road when the subject site was acquired by the appellant.

In November 1987, the Authorized Person (AP) of the appellant was instructed to submit building plans to the Building Authority for redeveloping the subject site.

On 2 January 1988, the AP submitted plans for the construction of two buildings with 4 storeys over carport. The two buildings would consist of 28 apartment units with a total Gross Floor Area (GFA) of 3678.35 square metres.

On 2 March 1988, the Building Authority wrote to the AP stating that under s. 16(1)(i) of the *Buildings Ordinance*, 'plans should be submitted for the improvement of the existing access road (i.e. Shatin Heights Road) from Tai Po Road to the captioned Site to the standards laid down under the Building (Private street and Access Road) Regulation'. The Building Authority drew attention of the AP to Column A and both conditions in Column B in item 2 of the Table in s. 17(1) of the *Buildings Ordinance*. [The transcript of the decision documented s. 16(1)(i) and s. 17(1) in paras. 4.3 to 4.4.]

On 6 April 1988, the AP replied to the Building Authority and stated

that having made some investigations as regards s. 16 (1)(i), he found that the road was beyond Lot 1471 s.A. On 21 April 1988, the AP wrote further to the Building Authority by a letter, amplifying his letter of 6 April 1988. The AP argued in his letter of 21 April 1988 that (para. 4.6):

(a) The Building Authority's request of the owner to improve the road from the junction of Tai Po Road to the subject site was '**unfair, unreasonable and ultra vires**' (emphasis added). The road was beyond the lot boundaries of the subject site and he would not recommend the owner to 'tamper with properties which he does not have interest'.
(b) The Building Authority's request of the owner to improve the road from the junction of Tai Po Road to the subject site was 'a result of an **internal policy**' (emphasis added) made by the BOO some time ago. The request was '**not a covenant** contained in the crown grant with which the grantee has to comply' (emphasis added).
(c) The redevelopment project had been dragged on for quite some time because of the unfair stipulation required by the BOO. The government could drag on the issue indefinitely with the view to force the owner to bend to the unreasonable request.
(d) If the government wished to improve the road, she had other means to do so herself instead of compelling a private developer to do her job.

On 31 May 1988, at a Building Committee Meeting, the Chief Building Surveyor/New Territories (CBS/NT) tabled the AP's letter of 21 April 1988. The Meeting considered the letter and endorsed two recommendations, (a) and (b), against the proposal on the following grounds:

(a) There was no change in the circumstances in respect of the existing access road since the case had been last presented in **1981**. The AP's explanation was not satisfactory as he did not demonstrate that the existing access road could support a more intensive development as proposed. Hence there was no justification to depart from the BOC's earlier decision. Members noted the comment of Chief Town Planner/ Statutory which stated that there was no restriction for development intensity under the statutory town plan. They also noted the comment of Senior Estate Surveyor/Project Management which stated that the maximum development stipulated under the lease was 2 storeys and 25 feet in height; the proposed development intensity would exceed the restrictions specified in the lease.
(b) The width of the section of the road within the lot did not comply with s. 6(1) of the *Building (Private Street and Access Road) Regulations*.

On 3 June 1988, the Building Authority replied to the AP's letters of 6 April 1988 and 21 April 1988, stating that the Authority had reviewed his case and resolved that there was no justification to change its previous position. The Authority reiterated its request contained in the letter of 2 March 1988 to the AP.

On 23 June 1989, the AP wrote to the Director of Building and Lands asking for a 'personal review' of the matter. On 13 July 1988, the Authority acknowledged the receipt of the AP's letter of 13 July 1988. On 8 September 1988, the Building Authority wrote a letter to the AP, informing him that having considered his request, the proposal was not acceptable under both the *Buildings Ordinance* and *Building (Private Street and Access Road) Regulations.*

The Building Authority's letter stated that any redevelopment of the subject site exceeding the existing plot ratio would require improvement on the road from the junction of Tai Po Road to the subject site. Such improvement should be to the standards under the *Building (Private Street and Access Road) Regulations* (the Regulations). It stated that even though the AP's proposal might comply with the *Building (Planning) Regulations*, it should also comply with 'other relevant legislation' and 'the conditions of the Government lease concerned'.

The Building Authority's letter also explained, for the first time, why it was necessary for the road to be improved according to the standards laid down by the Regulations. The reasons were twofold:

(a) it was a private road built by private lot owners in the 1950s over government land; and
(b) it had never been part of the Highways Department's road network.

Therefore, 'it is logical that an owner who wishes to redevelop and increase the density of his lot should contribute to the upgrading of the access road.' (para. 4.10)

On 25 October 1988, the AP resubmitted a new set of plans. The number of units was reduced from 28 to 24 with a GFA of 3499.73 square metres in this submission. In his submission, the AP made comments on the Authority's letter of 8 September 1988 and reiterated the main points of his previous letter dated 25 October 1988. He also advanced an additional argument on the width of the carriageway and footpath of the road.

The AP stated that as regards the Building Authority's remark about the improvement on the internal access road, his present proposal was only a low-rise development with 4 storeys over a carport. The access road would have lay-bys at about every 60 metres, and one-third of the carriageway was more than 5 metres wide; the remainder width varies from 2.9 to 3.5 metres, and a footpath of 1.5 metres wide throughout its entire length. This standard was above the standard requirements of an

access road for that number of flats (24 units) as prescribed under Regulation 6 of the *Building (Private Streets & Access Roads) Regulations*. The owner would be prepared to resurface the access road when the proposed development was built.

On 15 November 1988, in a meeting of the Building Committee, CBS/NT tabled the AP's letter dated 25 October 1988. The minutes of the meeting recorded that members still felt that there was no justification for any change of the previous decision because:

(a) the latest proposal involved an increase in plot ratio; and
(b) there was no change in the circumstances in respect of the road since the case had been presented to BOC in **1981** or BC in May **1988**.

As the AP had requested the Building Authority's personal review of the decision, the meeting agreed that CBS/NT presented the case to the Authority in the Buildings and Lands Conference (BALC) meeting for his information and endorsement of the decision of the BC.

On 17 November 1988, CBS/NT tabled the matter at a BALC meeting. The decision of the meeting about the AP's latest proposal was:

> . . . the BA agreed in principle to re-affirm BC I's decision to disapprove the plans. On DBL's advice, GBS/D was requested to reply on his behalf, also opining and suggesting that the owners of other building lots flanking the road may wish to co-operate and upgrade the existing substandard Shatin Heights Road for future redevelopment of this area.

On 23 November 1998, the Building Authority replied to the AP's application of 25 October 1988. Once again, the Authority reiterated that plans should be submitted for the improvement on the existing section of the road from the junction of Tai Po Road to the subject site according to the standards laid down under the Regulations.

On 12 December 1988, the AP lodged a Notice of Appeal on behalf of the appellant, under s. 44 of the *Buildings Ordinance* against the decision of the BA in disapproving the amended plans. In the Notice, the appellant reserved his position as regards whether the road was an 'access road' under s. 2 of the *Buildings Ordinance*.

On 22 December 1988, the Building Authority wrote a letter to the AP stating that the matter would be referred to the Tribunal and further elaborated its letters of 8 September 1988 and 23 November 1988. The elaboration covered matters of 'responsibility' for upgrading the road; 'status' of the road; disapproval of plans; and application of s. 17 of the *Buildings Ordinance*:

(a) As regards the responsibility of upgrading the road, it was pointed out that Shatin Heights Road was originally constructed by private landowners prior to 1962 and in 1962 it was upgraded to its present

state by the owners of lot numbers 1476, 1471, 1473, 1474, 1469, 1494, 1470C and 1470B & RP. From available records, the consensus of various government offices was that this road was 'private' and this view would seem to be reinforced by the upgrading works previously undertaken by the owners.

(b) As regards land status, it was explained that the Authority had treated every developer in the locality on an equal basis since the 1960s. It was said that in **1962**, Authorized Person, Mr Carlos Y. F. WOO Esq., was appointed by the owners to carry out the upgrading works. He was advised by the BOO that 'this (Shatin Heights Road) is an access road as defined in Section 2 of the Buildings Ordinance of 1955 and not a private street as also defined therein'. Similar advice was given to another Authorized Person in 1981 when it was stated that 'the improvement of the existing access road (i.e. "Shatin Heights Road" from Tai Po to the above Site (DD 189 Lot 1471 S.A.) would need to be the full standards laid down for access roads in the Building (Private Streets and Access Road) Regulations'.

(c) As regards the disapproval of the AP's latest plans, it was explained that in order to fully consider the building proposals it was necessary for the Authority to consider the adequacy of the means of access to the proposed buildings. Under the circumstances prevailing at the time of construction, the road did not strictly conform to the Regulations; accordingly details should be provided by the AP to indicate how his proposals could remedy such shortcomings.

(d) As regards the application of s. 17 of the *Buildings Ordinance*, it was pointed out that the Authority appreciated that (i) the appellant might not have exclusive use of the road; and (ii) s. 17 might be applied singularly and several times to all the lots along the road on redevelopment and the Building Authority was not in a position to co-ordinate any concerted action on the part of lot owners as regard road improvements. However, regarding availability of land (if required) for the requisite road improvement works, the District Land Officer/Shatin (DLO/Shatin) had advised that the government land flanking both sides of the lower section of the road from Tai Po Road to the subject site 'could be made available for the owner to carry out road improvement work'.

- **Arguments:**

The grounds of appeal were as follows:

(a) Though the AP had provided much 'further clarification/information' since the Authority's letter dated 2 March 1988 to consistently dispute the propriety of invoking s. 17(1) of the *Buildings Ordinance*, the Authority never adequately answered his representations. Hence he had not been able to proceed much further with his plans in a constructive manner.

(b) From enquiries, it appeared that Shatin Heights Road was constructed, or reconstructed, according to plans and specifications under the *Buildings Ordinance* in 1962. The purpose was to serve a number of lots on which the (then) Superintendent of Crown Lands had permitted the erection of domestic buildings of up to 4 storeys. No buildings exceeding that height had been erected off this road since then. There was therefore no valid reason to change the basic specification of the road then, even if the prevailing requirements of the *Buildings Ordinance* might be slightly different from what they were in 1962. The situation might, without prejudice, possibly be somewhat different if the Lands Administration Office was prepared to allow modifications for higher buildings on the subject site.

(c) The precise nature of the required 'improvement' on the road was in fact unclear, since a part of the relevant portion of the road appeared to be much wider than what would be required under prevailing provisions in the *Buildings Ordinance*. Furthermore, some improvements were then in hand at the lower part of the road, apparently being undertaken by government contractors. The exact extent of the required road work was confusing.

(d) There were many other private lots and perhaps unallocated government land served by the road. Whether the Building Authority had powers on this road, it would be inappropriate for the Authority to single out any one lot or site owner in order to get limited road works carried out. It might well be the case that s. 17(1), though potentially relevant, should not have been invoked. It was in a situation where there were more than one lot or site owner. It was because it would be hard to fairly apportion the liabilities to various parties involved.

(e) Even if the road was really an 'access road' (a view that was disputed), any required improvement, whether according to the basic specification or of the maintenance condition, should only be dealt with under the provisions of s. 29 of the *Buildings Ordinance* in view of the number of parties involved. In that way, all parties would have to contribute to the costs according to the proportions specified under the *Ordinance*. To impose an imprecise construction task on the appellant was 'arbitrary and unfair'.

Mr A. B. Lawrence, consultant, presented the case for the appellant and only called one witness, the AP. Mr Lawrence submitted that the Building Authority had not acted fairly and had acted with impropriety:

(a) The building plans only called for the erection of two four-storey buildings over carports, with 24 flats and an aggregate gross floor area of 3499.73 square metres. Hence, the existing Shatin Heights Road leading from the junction of Tai Po Road to the subject site was

more than adequate and that Regulation 6(2), not 6(1), of the *Regulations* applied.

(b) As the Building Authority had previously (in 1962) granted to the then owners an exemption to construct/upgrade Shatin Heights Road to a lesser standard than those laid down by the *Regulations*, a similar exemption should have been granted to the appellant in his proposed redevelopment.

(c) Alternatively, if Regulation 6(1) applied to the proposed redevelopment and the discrepancy between the width of part of the carriageway and footpath, and part of the gradient of Shatin Heights Road leading from the junction of Tai Po Road to the site was insignificant, then the following criterion should apply. If the Building Authority insisted that the standards of this part of the access road should be improved to comply with Regulations 6(1) and 11(1), the Authority should proceed under s. 29 of the *Buildings Ordinance* to execute the requisite improvements and recover the costs from the owners concerned and in a manner prescribed by s. 29.

Crown Counsel, Mr S. P. O'Sullivan, represented the respondent and also called only one witness, namely Mr Lok Che-leung, Edward, CBS/NT.

Mr O'Sullivan contended that the Building Authority had acted fairly and reasonably in invoking the provisions contained in s. 7(1) as aforesaid:

(a) The amended buildings plans for the proposed redevelopment of the site would increase the existing plot ratio (i.e. greater density) of the subject site, therefore generating more traffic.

(b) Had the appellant submitted building plans to replace the former buildings existing on the site with other building or buildings **without an increase in plot ratio**, the Authority would grant to the appellant an exemption and permit or otherwise give its approval to such a redevelopment. Under such circumstance, the appellant would not be required to improve Shatin Heights Road from its junction with Tai Po Road to the subject site to the standards prescribed by Regulations 6(1) and 11(1).

- **Reasons for Decision:**

The Tribunal had the following findings:

(a) Shatin Heights Road was an 'access road' under s. 2 of the *Buildings Ordinance*. This was admitted by the AP under cross-examination that Shatin Heights Road was an 'access road' under s. 2 of the *Buildings Ordinance*.

(b) The road was built on Crown Land by landowners in the late 1950s. It was upgraded by private owners of Lot Numbers 1469, 1471, 1473, 1474, 1476, 1494, 1470C and 1470B & RP as an access road to their respective lots.

(c) The detailed cross-sectional measurements by the Authority of various segments of the carriageway and pedestrian paths along the road were correct. (See para. 5.4 of the transcript.) The main points were that the width of the carriageway of the road from the Tai Po Road junction varied between 4.5 m to 13.9 m, and that the width of the pedestrian path varied between 0.06 m to 1.5 m. Such widths did not satisfy Regulation 6(1) of the *Building (Private Street and Access Road) Regulations.*

(d) The longitudinal measurements of the road by the Building Authority were correct. It was shown that the road exceeded the gradient limit of 1 in 6 for private street, cul-de-sac or access road specified by Regulation 11(1) of the *Building (Private Street and Access Road) Regulations.*

The issue: Was the Building Authority acting fairly in invoking s. 17(1) of the Buildings Ordinance?

The Tribunal found that in this appeal, the only question that needed to be addressed was whether the Building Authority had acted fairly and reasonably in invoking section 17(1), column A and both conditions in column B in Item 2 of the Table, by refusing to approve the building plans submitted by the AP unless such building plans were accompanied by plans to improve Shatin Heights Road leading from the junction of Tai Po Road to the site according to the standards laid down under Regulations 6(1) and 11(1).

The Tribunal rejected all submissions of the AP on the following grounds:

The Building Authority had a consistent policy since 1981

From an enquiry made in 1981 by another AP acting for the predecessor in title of the appellant, it was known to the AP that if the site was redeveloped in increased plot ratio, that portion of Shatin Heights Road leading from Tai Po Road to the site had to be improved according to the standards laid down by the Regulations.

Subsequent to 1981, the site had been the subject of other redevelopment proposals and in each instance, the then owner or his AP was informed of the requirements regarding the improvement to Shatin Heights Road. Therefore, the Building Authority had been consistent since 1981 in its requirements regarding such improvements.

The appellant was not singled out and the requirements were unambiguous

The Tribunal found no merit in the allegations that the appellant had been 'singled out' or that the precise nature of the 'improvements' on Shatin Heights Road required were not 'clear' to the AP.

The Authorized Person of the development proposal must be aware of the 'improvements' on Shatin Heights Road that were required. Otherwise, why did he, in November 1987, conduct investigative works on the width of the carriageway and footpath of the relevant portion of Shatin Heights Road? If he was not aware of the 'improvements' that were required, he had been so informed by the Authority of such requirements by 8 September 1988.

S. 17(1) was properly invoked

The Tribunal also found no merit in the allegation that the Authority, in invoking section 17(1), had acted unfairly and with impropriety. Plainly, on 2 January 1988, when the AP first submitted his plans, the Building Committee had reviewed the building plans twice and once at a Buildings and Lands Conference meeting. After each of these meetings, the AP was informed of the decision that was made.

The Tribunal also rejected all submissions of Mr Lawrence on the following grounds:

Regulation 6 (2) did not apply

As to Mr Lawrence's argument that Regulation 6(2) of the *Regulations* applied to the proposed redevelopment, the Tribunal disagreed. The road from the Tai Po Road junction to the subject site served two lots, namely the subject site itself and 'Vista da Vale'. The amended building plans envisaged the erection of two buildings over carports, comprising 24 flats with a gross floor area of 3499.73 m^2. The proposed redevelopment, when completed, coupled with 'Vista da Vale' would exceed the limit of 'flats' and the gross floor areas prescribed by Regulation 6(2).

Section 29 did not apply

The Tribunal also disagreed with Mr Lawrence's alternative argument that if Regulation 6(1) applied, the Building Authority should use the powers conferred upon it by improving that portion of Shatin Heights Road from its junction at Tai Po Road leading to the site according to the standards laid down by Regulations 6(1) and 11(1) and, after apportionment, to recover the costs incurred from the persons benefited by such improvements and in the manner and proportions prescribed by s. 29 of the *Buildings Ordinance*.

The Tribunal was satisfied that s. 29 dealt with the maintenance of private streets and access roads and not with improvements on access roads to the standards laid down by Regulations 6(1) and 11(1).

The Building Authority, through its representative, Mr Lok Che-leung, in his evidence (which the Tribunal accepted) to the Tribunal stated that Shatin Heights Road, as it existed then, was '**an acceptable**

"access road" so long as there is no further increase in the density or plot ratio' (consequent upon any redevelopment) by any owner who utilized the road as an access.

It would be inequitable that the owners of 'Vista da Vale', not to mention the owners of the 16 remaining buildings upstream the road, be called upon to contribute towards the costs incurred by such 'improvements' necessitated by the appellant's project. This was in a context where the existing access road could adequately serve all the 17 lots in the absence of further intensive redevelopment.

The Tribunal accepted the contention of the Building Authority (as advanced by Mr O'Sullivan) that if the appellant was to proceed with the proposed redevelopment, he had to prepare and submit plans to the Building Authority to improve that section of the road from its junction at Tai Po Road leading to the subject site, according to the standards prescribed by the Regulations. The appeal was thus dismissed.

PERFECT CHANCE

- **Building Appeal Case Name:** No. 162 Tung Lo Wan Road, Hong Kong **[Perfect Chance]**
- **Building Appeal Case No. :** 52/90
- **Similar Cases:** *Nos. 29–31 Sands Street; No. 52 Kennedy Road*
- **Nature of the Case:** Who is the authority for 'means of escape'; approving authority for parking inside buildings; Regulation 5(2) of the *Building (Planning) Regulations*; Regulation 6(1) of the *Building (Private Streets and Access Roads) Regulations*
- **Date of Hearing:** 5 and 8 October 1990
- **Date of Decision:** 2 November 1990
- **Chairperson of Tribunal:** Mr Edmund Y. S. Cheung
- **Representation:**

  (a) Mr A. B. Lawrence for the appellant
  (b) Mr Kwok Sui Hay for the respondent

- **Decision:** appeal dismissed
- **Rules Laid down by the Decision:**

  (1) The Building Authority has a discretion in the matter of Regulations 5(2) and 6(1). The Tribunal finds that there has been an impressive consistency with which the Building Authority's policy has been followed over the years. It was said, 'we are not persuaded that the

policy is out of date nor do we see any compelling reason why it should not be followed in the instant case. Regulation 5(2) and Regulation 6(1) are there for a particular purpose: they are there to ensure the safety and well-being of the public in general and the residents of buildings in particular. Indeed, we would be failing in our duty if we, by a stroke of the pen, reversed that well-established policy overnight.'

(2) 'The duty of the Building Authority is to administer the Buildings Ordinance so as to have due regard to the safety of the occupants of buildings affected by planning proposals. As we said in the Hok Sz Terrace determination, in the final analysis the Building Authority is responsible for the due and proper administration of the Ordinance. Lack of access roads prevents firefighting vehicles from getting close to the buildings that are served in this area only by stepped streets. The problems of access extend also to ambulances and, to a lesser extent, garbage collection.' (*Nos. 29–31 Sands Street Case,* as cited in this case)

(3) If private cars are to be parked within a proposed building, then in accordance with *Building (Planning) Regulation 5(2)*, the Building Authority requires an access road to be provided within the site. By reference to *Building (Private Streets and Access Roads) Regulation 6(1)*, the width of the carriageway and footpath of such an access road should not be less than 5 metres and 1.6 metres respectively.

(4) It would be more effective to fight fire if fire engines were close to the location of a fire as possible rather than to operate from a distance, drawing water indirectly from a service inlet rather than directly from the hydrant of a fire engine.

(5) The Building Authority, not the Director of Fire Services, is 'the authority for means of escape'.

(6) The practice of the Director of Fire Services issuing letters of concern has now ceased.

(7) The Fire Services Department will not refuse a certificate (under section 16(1)(b) of the *Buildings Ordinance*) on the grounds that the means of access to the building is inadequate. The Director of Fire Services is obliged to issue a certificate under section 16(1)(b) once the prescribed requirements are met: he or she has no power to withhold such certificate.

(8) The Highways Department's role in a proposed building is to ensure that the traffic arrangements, or traffic flow, on access roads are not interfered with by the proposed development. However, the final decision as to whether carparking should be allowed *inside* the building and the arrangements of vehicles *within* the building area would be left to the Building Authority and would be dealt with under the *Buildings Ordinance*.

- **Background:**

The subject site was No. 162 Tung Lo Wan Road, Hong Kong. By a letter dated 11 April 1990, the Authorized Person (AP) of the appellant, Perfect Chance Ltd., submitted certain amended building plans to the Building Authority for approval. The plans related to a proposed 35-storey residential building including a podium of 5 storeys for 35 carparking spaces.

By a letter dated 7 May 1990, the Building Authority refused the approval of the plans. Paragraph 7 of the letter read, in part:

> Your plans are refused under Buildings Ordinance Section 16(1)(d) on the following grounds:–
>
> (i) The means of access for both private vehicles and emergency vehicles to the building from the street is unacceptable. Building (Planning) Regulation 5. In this connection, your letters dated 11th April 1990 and 26th April 1990 have been carefully considered.
> (ii) Carparking spaces on G/F to 4/F levels should included in the gross floor area for plot ratio calculation under Building (Planning) Regulation 23(3)(a). In this connection, the aforesaid cannot be excluded from gross floor area under Building (Planning) Regulation 23(3)(b) in view of item (i) above.

- **Arguments:**

Mr Clive Anthony Viney, witness for the respondent contended on the following grounds:

(a) The Building Authority, not the Director of Fire Services, was 'the authority for means of escape'.
(b) The practice of the Director of Fire Services issuing letters of concern had now ceased.
(c) The Fire Services Department would not refuse a certificate (under section 16(1)(b) of the *Buildings Ordinance*) on the grounds that the means of access to the building was inadequate.
(d) The Highways Department's role in a proposed building would be to ensure that the traffic arrangements, or traffic flow, on access roads were not interfered with by the proposed development. However, the final decision as to whether carparking should be allowed *inside* the building and the arrangements of vehicles *within* the building area would be left to the Building Authority and would be dealt with under the *Buildings Ordinance*.
(e) There was a spacious forecourt on the ground floor of No. 52, Kennedy Road so that the question of an access road did not arise and Regulation 6(1) did not apply.
(f) Mr Viney produced to the Tribunal a list of previous cases to show that discretion had been exercised consistently by the Building

Authority whose policy had been to adhere to the Regulations 5(2) and 6(1).

The appellant argued on the following grounds:

(a) The means of access for vehicles was not in any way 'unacceptable' as the Director of Fire Services had not voiced any concern at all, yet he would be expected to be the one person who would be most involved with any 'emergency vehicles'. Furthermore, in relation to access by private vehicles, the Director of Highways had not only raised no objections to the proposals but also had agreed to adjust the curbing in Tung Lo Wan Road in order to facilitate construction of the vehicular run-in. The detailed proposals for the run-in and for traffic flow were prepared by traffic consultants and agreed by the Director of Highways after discussions.

(b) The short paved area which was intended to provide vehicular and pedestrian access varied in width from about 4.8 metres to 6.0 metres, and was only about 22 metres long from the street to the nearest part of the building. It was quite adequate to take both vehicles and pedestrians. In a normal mode, i.e. when there were only a few vehicle movements per hour, there would be a segregation between the two usages which would be encouraged by the provision of a slightly raised 'footpath'. However, in any emergency mode, pedestrians could use the 'carriageway' as well as the 'footpath' if they so wished.

The proposed building was not a very large building and any necessary evacuation of occupants to Tung Lo Wan Road could easily be completed quite quickly, possibly even before any emergency vehicles reached the area. A fire hydrant would be provided near the building so it might not be necessary for large firefighting vehicles to get very close to the building, although they could do so if necessary. Even so, it was very unlikely that more than one emergency vehicle would approach close to the building, with any others remaining in Tung Lo Wan Road, and this should not cause any significant interface problems with pedestrians. An emergency vehicle, for example, would not be able to attain any sort of dangerous speed in such a short distance as 22 metres.

The paved area was wider than **many streets** in Hong Kong and that such streets generally catered for many buildings of widely different uses and heights, and not just one simple residential building as in this case.

(c) The proposed carparking spaces would be used for parking the vehicles belonging to the residents of the building, and there should not be any reason why the Building Authority was not 'satisfied' (in terms of *Building (Planning) Regulation 23(3)(b)*) that such would be the

case. Accordingly, the customary exclusion should be permitted in this case.

(d) In the case of *No. 52 Kennedy Road*, carparking spaces were allowed even though the approach road leading from the ground floor to the upper floors was narrower than the access in question. Mr Elton Chow for the appellant informed that the width of that road was 3.7 m.

(e) Mr Lawrence suggested that policy as regards provisions of Regulations 5(2) and 6(1) was out of date and should not be followed.

- **Reasons for Decision:**

The Appeal Tribunal dismissed the appeal. Before dealing with the merit of the appeal, the Tribunal noted the following relevant facts:

(1) The Building Authority was not objecting to the proposed development as a whole but was only objecting to the provision of parking spaces in the proposed building.

(2) The Building Authority had conceded that the second ground for refusal set out in paragraph 7(ii) of its letter dated 7 May 1990 stood or fell with the first ground set out in paragraph 7(i).

(3) The Building Authority had confirmed that it relied on Regulation 5 (2) of the *Building (Planning) Regulations* ('regulation 5(2)') and Regulation 6(1) of the *Building (Private Streets and Access Roads) Regulations* ('Regulation 6(1)') in refusing the approval of the building plans.

Regulations 5(2) read:

> The Building Authority may require the provision of an access lane or access road within the site of the new building.
>
> Regulation 6(1) reads:–
>
> Save as provided in paragraph (2), the width of the carriageway of every access road shall be not less than 5 m and the width of the footpath therein shall be not less than 1.6 m.

(4) Mr Lawrence for the appellant had suggested that the Building Authority could not introduce the requirements of Regulation 5(2) at the stage of appeal. The Tribunal decided that though it agreed that it would have been more desirable and better for all concerned to have spelled out the precise regulations relied upon by the Building Authority at the outset, it did not consider that the appellant had been prejudiced in any way. In any event, the Building Authority in its letter of 7 May 1990 had in fact referred to 'Building (Planning) Regulation 5' which included Regulation 5(2).

(5) At the hearing, the appellant agreed to amend the building plans by deleting the parking spaces on the ground floor of the proposed building.

The Tribunal decided that the issue for the appeal was that identified by Mr Kwok for the Building Authority: Was it necessary for the appellant to provide an access road pursuant to Regulation 5(2) in the proposed project? Mr Viney for the Building Authority put it thus:

> The matter now at issue, simply stated, is that if private cars are to be parked within the proposed building then, in accordance with Building (Planning) Regulation 5(2), the BA requires an access road to be provided within the site. By reference to Building (Private Streets and Access Roads) regulation 6(1), it can be seen that the width of the carriageway and footpath of such an access road should not be less than 5 metres and 1.6 metres respectively.

In the context of the above, the Tribunal dismissed the appeal on the following grounds:

Access was not wide enough in emergency situations

It was common ground that the width of the access ('the access') from Tung Lo Wan Road to the subject site — the 'short paved area' referred to in the grounds of appeal — measured from 4.6 m (rather than 4.8 m as stated in the grounds of appeal) to 6 m. The appellant contended that the access 'was quite adequate to take both vehicles and pedestrians'. However, though the Tribunal agreed with the appellant that 'in *normal circumstances* the access would present no problems'; such access was not adequate 'in the event of an emergency happening e.g. a fire, the access may be blocked by residents' vehicles coming out of or entering the building — which would not only prevent fire engines from getting close to the building but would also endanger the safety of well over 500 residents . . . While the traffic arrangements proposed by the Appellant would ease traffic flow in normal circumstances, we cannot but fear that they would be of little assistance during a chaos occasioned by an emergency . . . '

Firefighting water from pumps of fire engines was better than that from a fire hydrant

The Tribunal considered that in the absence of evidence from the Fire Services Department, it would be more effective to fight fire if fire engines were as close to the location of the fire accident as possible rather than to operate from a distance, having the need to water indirectly from a service inlet rather than directly from the hydrant of a fire engine. In the words of the Tribunal, 'the difference could be one of life or death'.

The Building Authority, not the Director of Fire Services, is the authority for means of escape

The Tribunal agreed entirely with Mr Viney's submission that the Building Authority, not the Director of Fire Services, was the authority for 'means of escape'. The Tribunal went further and suggested that the Director of Fire Services was obliged to issue a certificate under section 16(1)(b) once the prescribed requirements were met: he or she had no power to withhold such a certificate. Therefore, the fact that the Director of Fire Services did not object to the proposed building was immaterial.

The Building Authority, not the Highways Department, is the authority for traffic circulation and parking inside buildings

The Tribunal also accepted Mr Viney's submission that the Building Authority, not the Highways Department, was the authority for traffic circulation and parking inside buildings. Therefore, the fact that the Director of Highways did not object to the proposed building was immaterial.

The Building Authority had a consistent policy as regards the provisions of Regulations 5(2) and 6(1) and the rule in Nos. 29–31 Sands Street applied

As regards the debate about the *No. 52 Kennedy Road Case*, the Tribunal explained that the Building Authority had a discretion in the matter of Regulations 5(2) and 6(1). It stated that it was more than impressed by the consistency with which the Building Authority's policy had been followed over the years. It was said, 'With respect, we are not persuaded that the policy is out of date nor do we see any compelling reason why it should not be followed in the instant case. Regulation 5(2) and Regulation 6(1) are there for a particular purpose: they are there to ensure the safety and well-being of the public in general and the residents of buildings in particular. Indeed, we would be failing in our duty if we, by a stroke of the pen, reversed that well-established policy overnight.'

The Tribunal concluded that the rule in the case of *Nos. 29–31 Sands Street* applied to dismiss the appeal. In that case, the Tribunal had this to say:

> The duty of the Building Authority is to administer the Buildings Ordinance so as to have due regard to the safety of the occupants of buildings affected by planning proposals. As we said in the Hok Sz Terrace determination, in the final analysis the Building Authority is responsible for the due and proper administration of the Ordinance. Lack of access roads prevents firefighting vehicles from getting close to the buildings that are served in this area only by stepped streets. The problems of access extend also to ambulances and, to a lesser extent, garbage collection. (*Nos. 29–31 Sands Street Case*)

KENNEDY ROAD

- **Building Appeal Case Name:** Nos. 33–35 Kennedy Road, Hong Kong [**Kennedy Road**]
- **Building Appeal Case No. :** 74/91
- **Similar Cases:** *Phoenix Court; Wing Way Court; 101 Pokfulam Road Case*
- **Nature of the Case:** s. 16(1)(h) of the *Buildings Ordinance*; Regulation 6 (1) of the *Building (Private Street and Access Roads) Regulations*
- **Dates of Hearing:** 23 and 24 July 1992
- **Date of Decision:** 17 September 1992
- **Chairperson of Tribunal:** Mr Edmund Y. S. Cheung
- **Representation:**
  - (a) Mr A. B. Lawrence for the appellant
  - (b) Mr Kwok Sui Hay for the respondent

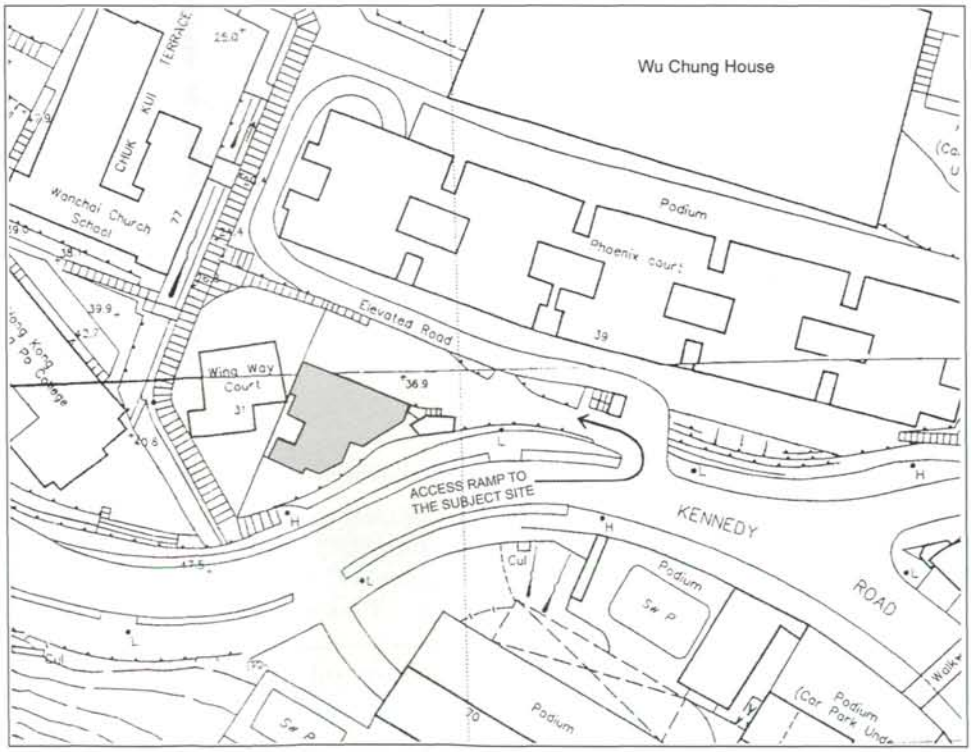
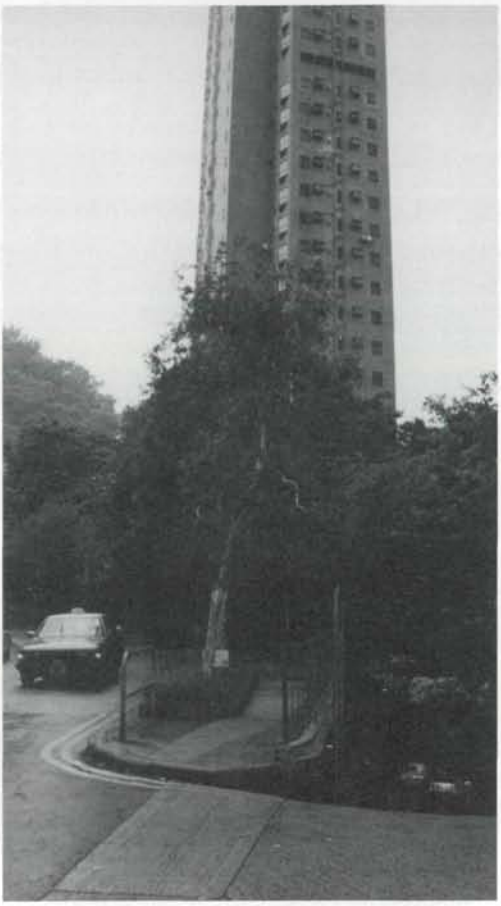


Figure 4.6 Site plan of Nos. 33–35 Kennedy Road (the *Kennedy Road Case*), reproduced with permission of The Director of Lands, © Government of Hong Kong SAR Licence No. 40/1999



Photograph 4.7 Junction of the access ramp and Kennedy Road which leads to the subject building

- **Decision:** appeal dismissed
- **Rule Laid down by the Decision:**

  (1) Section 16(1)(h) of the *Buildings Ordinance* should not be limited to a potential traffic hazard or inconvenience in the immediate vicinity of an access opening to or from a street. This position is adopted by the Tribunal in the *No. 101 Pokfulam Road Case* where the Tribunal held that section 16(1)(h) applied to a potential traffic hazard which might occur some distance away from the subject site.

- **Background:**

  This appeal was brought by Circumwealth Company Limited, the appellant, against the Building Authority's decision to disapprove building plans, submitted by their Authorized Person (AP), of a proposed 32-storey

residential building with 48 carparking spaces at Nos. 33–35, Kennedy Road, Hong Kong, i.e. the subject site.

The subject site abutted a right of way ('the right of way') leading to Kennedy Road. The right of way served two existing residential buildings, namely, Wing Way Court at Nos. 29–31 Kennedy Road, and Phoenix Court at Nos. 1–16 Fung Wong Terrace. Wing Way Court had 44 carparking spaces and Phoenix Court (which consisted of five 16-storey towers) had 3 levels of carparking.

It was common ground that the right of way was a 'street' within the ambit of section 16(1)(h). The western part of the right of way was held by the appellant while the eastern part belonged to the owners of Phoenix Court.

On 22 August 1991, the Building Authority sent a letter to the AP informing him that his plans had been rejected. In rejecting such plans, the Building Authority invoked, inter alia, section 16(1)(h) of the *Buildings Ordinance*. (Section 16(1)(d) was also invoked but the point had since been settled and the appeal in this respect withdrawn.)

Section 16(1)(h) of the *Buildings Ordinance* reads:

> 16.(1) The Building Authority may refuse to give his approval of any plans of building works where:
>
> . . .
>
> (h) the building works consist of, or any part thereof involves, the construction, formation or laying out of any means of access or other opening, not being a street or access road, to or from any street, and the place at or manner in which such means of access or other opening opens on to the street is, in his opinion, such as to be dangerous or likely to be dangerous or prejudicial to the safety or convenience of traffic using the street, or which may be expected to use the same.

The AP sent a letter dated 22 August 1991 to notify his intention to appeal against the Building Authority's decision. Members of the Tribunal paid a visit to the subject site before making its determination.

- **Arguments:**

The reasons for disapproving the appellant's proposal were set out in the Building Authority's letter of 5 August 1991 to the AP for the appellant. The following extracts from that letter were relevant:

> 7. I. . . .
>
> II. Under Building (sic) Ordinance Section 16(1)(h):
>
> The proposed vehicular access is considered not acceptable. . . .
>
> .....

10. The Chief Highways Engineer commented that:

    The proposed vehicular access arrangement is not acceptable — the existing right of way, which has a relatively steep gradient, is already too narrow for two-way traffic and is difficult for turn-around movement of vehicles. The present 31-storey development proposal with 48 carparking spaces will certainly attract more traffic and hence aggravate the present situation and might cause tail-back of vehicles which in turn will affect the access at Kennedy Road. In view of the above, the standard of the existing right of way, without any improvement in accordance with Building (Private Street & Access Road) Regulations, is considered inadequate.

11. The Assistant Commissioner for Transport has the following comment:

    a) The proposed vehicular access is considered unacceptable as the right of way is too narrow for two way traffic. The right of way should be increased to not less than 5 m carriageway with 1.6 m footpath on at least one side.
    b) The vehicular access arrangement within the site is unacceptable as vehicular movements are restricted and the access is too narrow for two way traffic. Also no waiting spaces are provided to serve the car lift. Any tailback would cause obstruction to the run in/out of the adjacent lot.

According to the Building Authority, there were a number of problems with regard to the right of way:

(1) Drivers in the outgoing traffic from Wing Way Court was unable to see outgoing traffic from Phoenix Court at the intersection because of the concrete wall standing between the two existing carriageways.
(2) It was unsafe and almost impossible for two vehicles from opposite directions to pass each other at the narrow section of the right of way, which was too narrow for two-way traffic.
(3) Drivers in income traffic from Kennedy Road could not see outgoing traffic from Phoenix Court and Wing Way Court because of the acute angle (180) between Kennedy Road and the right of way.
(4) The sharp drop of gradient at the junction of Kennedy Road and the right of way coupled with the inadequate width of the right of way would create a real risk of head-on collision of vehicles.
(5) The absence of a footpath at the narrow section of the right of way would force pedestrians to walk on the existing carriageway.
(6) The existing traffic condition at the junction of Kennedy Road and the right of way was already unsatisfactory and the proposed development with 48 carpark spaces would aggravate the situation.

The grounds of appeal were fully set out in the AP's letter of 22 August 1991 to the Building Authority (these grounds had been elaborated and expanded by Mr Lawrence for the appellant at the hearing):

(1) As suggested by the Assistant Commissioner for Transport, the appellant had agreed to build a carriageway of 5 m wide and a footpath of 1.6 m on the western part of the right of way. The appellant was not, however, in a position to extend the proposed carriageway and footpath to the eastern part of the right of way which did not belong to the appellant.
(2) There was no evidence to suggest that the western part of the right of way would be dangerous or prejudicial to the safety or convenience of traffic using the right of way.
(3) Section 16(1)(h) applied only to the western part of the right of way where the proposed access opening, a run-in/run-out, was made; it did not apply to conditions in the eastern part of the right of way which the appellant had no power to improve.
(4) The Building Authority had not correctly exercised its discretion in invoking section 16(1)(h).

Mr Lawrence put forward the following arguments on behalf of the appellant:

(1) The construction of the proposed access would not be hazardous to traffic **using the western part** of the right of way.
(2) It was wrong to relate an access on the western part of the right of way to conditions in the eastern part over which the appellant had no control because 'section 16(1)(h) was only concerned with a potential traffic hazard in the immediate vicinity of the point where an access opening is made to a street'.
(3) The Building Authority should have addressed the traffic problem in the eastern part of the right of way when the plans of Phoenix Court were approved.
(4) even if no carparking was provided in the proposed building, there would still be 'an equivalent traffic'.
(5) It was unfair to invoke section 16(1)(h) against the appellant but not the developer of Wing Way Court.

- **Reasons for Decision:**

Having considered the facts and findings noted, the Tribunal dismissed the appeal on the grounds that the proposed mode of access was dangerous from a transport point of view.

Facts and findings

The Tribunal noted the followings:

(a) Regulation 6(1) of the *Building (Private Street and Access Roads) Regulations* reads:

> Save as provided in paragraph (2), the width of the carriageway

> of every access road shall be not less than 5 m and the width of the footpath therein shall be not less than 1.6 m.

(b) The Tribunal believed that 'it is because of Regulation 6(1) of the *Building (Private Street and Access Roads) Regulations* that the Assistant Commissioner for Transport has required the Appellant to build a 5 m carriageway and a 1.6 m footpath on the right of way'.

(c) It was common ground that the eastern part of the right of way measured only 3.8 m at its narrowest section. The proposed carriageway to be built on the western part of the right of way would also measure less than 5 m at the section where it met the eastern part because of the existing concrete wall ('the concrete wall'), which stood at right angles to the right of way. The proposed footpath would stop short at the foot of the wall and no footpath would be provided in the eastern part of the right of way. Therefore, **both parts of the right of way would be less than 5 m wide.**

The proposed access arrangement was dangerous

The Tribunal stated that the existing access arrangement was unsatisfactory and the proposal would only exacerbate the problem:

> We have some sympathy for the Appellant in that if they had redeveloped before Phoenix Court or Wing Way Court, they might have had their building plans approved. The fact remains, however, that having visited the site ourselves, we are left in no doubt that the **existing traffic conditions both at the junction of Kennedy Road and the right of way and on the right of way itself are unsatisfactory, unsafe and dangerous**, and that **an additional 48 vehicles would certainly exacerbate the situation** (emphasis added).

Precedents of Phoenix Court and Wing Way Court were distinguished or criticized

The Tribunal distinguished the present case with that of Phoenix Court and Wing Way Court on the grounds that they were developed at a time when there was much less traffic. Besides, the two cases might have been wrongly decided. In the words of the Tribunal:

> Phoenix Court was the first development in the locality which was completed some 12 years ago. There was then less traffic using the right of way and there was no question of outgoing traffic from Phoenix Court being unable to see outgoing traffic from Wing Way Court which was then non-existent. The Building Authority, or anyone else for that matter, could not be expected to foresee the manner in which the site of 29–31, Kennedy Road (or which Wing Way Court now stands) would be redeveloped in 1989 and the traffic condition when Wing Way Court was completed. With the benefit of hindsight, perhaps the Building Authority should have invoked section 16(1)(h)

and rejected the building plans of Wing Way Court in the first place but two wrongs do not make a right.

Problems were created outside the access opening

The Tribunal agreed with the counsel for the respondent that the proposal would create traffic hazards outside the subject site:

> We agree with Mr. Kwok that **section 16(1)(h), *Buildings Ordinance* should not be limited to a potential traffic hazard or inconvenience in the immediate vicinity of an access opening to or from a street**. In this particular case, it would be unrealistic if one looks at only the western part of the right of way and shut one's eyes to what would happen to the eastern part or to the junction of Kennedy Road and the right of way. Whatever happens to those areas would certainly affect traffic conditions in the western part of the right of way. We also agree with Mr. Kwok that a pedestrian would be forced to walk on and share the carriageway with vehicles in the eastern part of the right of way where no footpath would be provided, thereby endangering his safety. We respectfully agree with and adopt the approach taken by the Tribunal in the *101 Pokfulam Road Case* where the Tribunal held that section 16(1)(h) applied to **a potential traffic hazard which might occur some distance away from the subject site**. (emphasis and italics added)

'Equivalent traffic' due to absence of on-site carparking was discounted

The Tribunal discounted Mr Lawrence's submission that there would be 'an equivalent traffic' on the grounds that taxi and mini-buses need not stop at the site:

> While we agree with Mr. Lawrence that the absence of carparking in the proposed building would generate additional traffic in any event, we cannot with respect agree that 'there would nevertheless still be an **equivalent** traffic flow comprising taxis and other form of traffic'. (emphasis added) First, **it is not necessary for every taxi bound for the proposed building to proceed as far as its main entrance to discharge passengers:** it may stop at the top of the right of way. Secondly, unlike outgoing private vehicles from the proposed building, there would be **few, if any, outgoing taxis** unless, of course, a special order is made. Thirdly, **other forms of traffic such as buses and mini-buses would not and cannot turn into and use the right of way**. We have not taken into account hire cars because these are far and few between nowadays (emphasis added).

It was dangerous or prejudicial to the safety or convenience of traffic using the right of way

The Tribunal concluded that the appeal had to be dismissed on the grounds of safety and convenience:

> For the foregoing reasons, we are firmly of the opinion that the construction of the run-in/run-out in the proposed building, and the place at or manner in which such run-in/run-out opens on to the right of way, is likely to be dangerous or prejudicial to the safety or convenience of traffic using the right of way. Accordingly, we hold that the Building Authority has correctly exercised his discretion in invoking section 16(1)(h). The appeal is dismissed.

- **Comments:**

  This case led to an unsuccessful judicial review application by the appellant: *Circumwealth Co. Ltd v Attorney General* [1993] 2 HKLR 193.

HOI YUEN ROAD

- **Building Appeal Case Name:** Hoi Yuen Road and Hing Yip Street, Kwun Tong, K.T.I.L. 53 and portion of K.T.I.L. [**Hoi Yuen Road**]
- **Building Appeal Case No. :** 17/82
- **Nature of the Case:** acceptable streets under s. 16 (1)(p) of the *Buildings Ordinance;* s. 31(1) of the *Buildings Ordinance;* s. 42 of the *Buildings Ordinance;* cul-de-sac; Regulation 5 of the *Buildings (Private Streets and Access Roads) Regulations; Building (Planning) Regulation 16; Building (Planning) Regulation 23 (2)(a);* building over streets
- **Date of Hearing:** 12 July 1983
- **Date of Decision:** cannot be vertified, likely in September 1983
- **Chairperson of Tribunal:** Mr William Turnbull
- **Representation:**

  (a) Mr Robert Kotewall and Mr K. R. Bagnall for the appellant
  (b) Mr R. Osborne for the respondent
- **Date of Hearing:** 12 July 1983
- **Date of Decision:** cannot be verified, likely in September 1983
- **Decision:** appeal dismissed
- **Rules Laid down by the Decision:**

  (1) The Tribunal is not bound by any internal practice memorandum of the government.
  (2) In deciding the provision of 'streets' on a site 'having adequate connection to public streets', the Tribunal will ask itself two questions: (a) whether or not it is correct for the Authority to consider that the site comes within s. 16(1)(p) of the *Buildings Ordinance*; and (b)

whether any proposed driveway is sufficient. The second question in turn depends on two sub-questions: (i) whether the site is provided with 'streets'; and (ii) if so, whether such streets are adequate connection to 'a public street'.

- **Background:**

Two pieces of land, K.T.I.L. 53 and K.T.I.L. 72, were acquired by one landowner. In 1978, the proprietor applied to the Building Authority for integrated redevelopment of the two sites by phase. Two factory blocks and internal streets included in plot ratio calculations were permitted on the combined site. Two permits were issued under s. 42 of the *Buildings Ordinance* which granted exemptions from *Building (Planning) Regulation 16, Building (Planning) Regulation 23 (2)(a)* and section 31(1) of the *Buildings Ordinance*.

The first phase involved the erection of two blocks in K.T.I.L. 72. Later, the proprietor decided not to proceed with the original plan and submitted plans for the redevelopment of K.T.I.L. 53. These were rejected. The Authority suggested that there should be only one access to the multiple factory building development which should be from Hing Yip Street having a 'clear width of 10 metres'.

The proprietor decided to redevelop the remaining portion of K.T.I.L. 72, which had not been redeveloped, and the whole of K.T.I.L. 53. There were T-shaped driveways on the combined site and building towers were on the podium covering the driveways. These plans were also rejected by the Building Authority. The decision was communicated in a letter dated 14 September 1982. The reasons for rejection were as follows:

(1) The subject site was a large site exceeding 3500 m^2 and should be provided with 'street having adequate connection to public streets'.
(2) A street complying with the *Buildings (Private Streets and Access Roads) Regulations* should be provided between the existing buildings of the first phase and the proposed blocks. ('The area of the street should be excluded from the site area for calculating site coverage and plot ratio purposes. *Building (Planning) Regulation 23 (2)(a).'*)

The proprietor lodged in an appeal notice by a letter dated 5 October 1982.

- **Arguments:**

The appellant's basis of appeal was as follows:

(a) It was not necessary to provide a street on the site.
(b) A street would not serve any purpose.
(c) Streets were not required on similar sites in the vicinity.

- **Reasons for Decision:**

The Tribunal dismissed the appeal having asked itself two questions: (1) whether or not it was correct for the Authority to consider that the site came within s. 16(1)(p) of the *Buildings Ordinance*; and (2) whether or not the T-shaped driveways proposed were sufficient. The second question in turn depended on two sub-questions: (1) whether the site was provided with 'streets'; and (2) if so, whether such streets were adequate connection to 'a public streets'. (The Tribunal noted that there was probably a printing error in having the word 'streets' expressed in plurals.) The grounds for rejecting the appeal were as follows:

The site came within s. 16(1)(p)

Though the Tribunal did not consider itself bound by an internal practice memorandum which specified that sites over 3500 m^2 should have internal streets, the Tribunal had no doubt that the subject site came within s. 16(1)(p). In other words, streets should be provided and they should have adequate connection to a public street. The reason was that, as pointed out by the counsel for the respondent, the magnitude and intensity of the proposed development were great. A total of 14 562 people would be accommodated in the proposed premises.

The T-shaped driveways were not sufficient

The Tribunal did not consider the proposed T-shaped driveways were adequate, though the site was provided with 'streets' under *Buildings (Private Streets and Access Roads) Regulation 5.* The Regulation stated:

> 5(1)(b) In every industrial area and in every area of mixed usage –
>
> ii. the width of a carriageway of any cul-de-sac shall not be less than 7.3 metres and the width of each footpath therein shall not be less than 2.75 metres.

Building (Private Streets and Access Roads) Regulation 4 specified that cul-de-sacs should have a footpath on each side of the driveway. The Tribunal found that the T-shaped driveways were cul-de-sacs which did not satisfy either Regulation 4 or 5. However, as the counsel for the respondent indicated that a carriageway of not less than 10 metres in width with no footpaths might be acceptable to the Building Authority, the Tribunal found that the proposed driveways satisfied the requirements of 'streets'. Nevertheless, the Tribunal did not consider that the 'streets' proposed were adequate. Though it agreed that the meaning of a street was a matter for a Court of Law, the Tribunal concluded that the streets proposed were not acceptable because:

(a) the cul-de-sac did not have the characteristics of a street but an internal driveway; and
(b) the cul-de-sac in the development as proposed would involve building

over streets contrary to s. 31 (1) of the *Buildings Ordinance*, which stated that 'no building or other structure shall be erected in, over or upon any portion of any street'.

NO. 3 BARKER ROAD

- **Building Appeal Case Name:** No. 3 Barker Road, R.B.L. 552, Hong Kong **[No. 3 Barker Road]**
- **Building Appeal Case No. :** 21/82
- **Nature of the Case:** jurisdiction of the Tribunal for a site owned by a foreign sovereign state (United States); access roads and pedestrian paths; *s. 42 Buildings Ordinance;* segregation of pedestrian and vehicular traffic; *Regulation 4, Building (Private Streets and Access Roads) Regulations; Regulation 6, Building (Private Streets and Access Roads) Regulations; Regulation 9, Building (Private Streets and Access Roads) Regulations; Regulation 12, Building (Private Streets and Access Roads) Regulations; Regulation 27, Building (Private Streets and Access Roads) Regulations*
- **Date of Hearing:** 3 September 1983
- **Date of Decision:** cannot be verified, likely in November 1983
- **Chairperson of Tribunal:** Mr William Turnbull
- **Representation:**

  (a) Mr Robert Kotewall for the appellant
  (b) Mr N. L. Strawbridge for the respondent
- **Decision:** appeal dismissed
- **Rules Laid down by the Decision:**

  (1) The Tribunal has jurisdiction over property owned by foreign sovereign states.
  (2) The purpose of the *Building (Private Streets and Access Roads) Regulations* is 'to lay down minimum requirements which the Government considers necessary to safeguard those using private streets and access roads. One fundamental part of these Regulations is that pedestrian traffic and vehicular traffic should be safely segregated from each other.'
- **Background:**

  The subject site was R.B.L. No. 522, No. 3, Barker Road. With one private house, the site was owned by the United States Consul General. The existing access road, which joined Barker Road below at an oblique angle of nearly 180 degree, had no pedestrian footpath. As the access road was

too narrow for two cars to drive in opposite directions at the same time, traffic lights had been installed to regulate traffic on the access road.

The owner proposed to replace the existing residence by 5 smaller ones, four at a lower level and one at a higher level. The proposal would leave the existing access road entirely in its existing form save that a footpath would be constructed along one side of the access road. This footpath was discontinued by a 'passing bay'. The owner made an application for modification and exemption under s. 42 of the *Buildings Ordinance* from both Regulations 4 and 6 of the *Building (Private Streets and Access Roads) Regulations.* Regulation 4(2) provides that every access road shall have a footpath on at least one side thereof. Regulation 6 provides that there is a basic requirement for every access road to have a carriageway of not less than 5 metres wide and a footpath of not less than 1.6 metres wide.

The above regulations are relaxed by Regulation 6(2) where three conditions precedent are present:

(1) the access road will provide access to not more than 12 separate buildings nor more than 24 flats;
(2) the aggregate area of all buildings or flats do not exceed 3500 m^2; and
(3) spaces to enable vehicles to pass are provided at distances not exceeding 60 m in length; and provided always that the carriageway of the access road may not be less than 2.75 m wide and the width of the footpath not less than 1.5 m wide.

In the application, the owner submitted an expert geotechnical report to show that the proposals were practical. The Building Authority rejected the application for modification and exemption on the grounds that (a) no special circumstances existed for the modification or exemption; and (b) the existing run-in to the existing access from Barker Road did not comply with Regulations 9 and 12 of the *Building (Private Streets and Access Roads) Regulations.*

Regulation 9 specifies that the junction of an access road with any street shall be made at right angles and the line of the carriageway shall continue at right angles for a distance not less than 7.5 metres. Regulation 12 provides that the radius of the horizontal curve shall not be less than 30 metres measured from the centre line of the carriageway.

The owner appealed and members of the Tribunal visited the site and an access road at Nos. 5–7 Magazine Gap Road.

- **Arguments:**

The counsel for the appellant submitted that the case was within the jurisdiction of the Tribunal. Attention of the Tribunal was drawn to Regulation 27 of the *Building (Private Streets and Access Roads) Regulations.*

Regulation 27 allows the Building Authority to waive the requirements of Regulations 9 and 12 if compliance is impracticable. The owner's expert presented a report saying that full compliance was impractical. Another expert witness invited members of the Tribunal to visit an access road at Nos. 5–7 Magazine Gap Road.

- **Reasons for Decision:**

Pedestrian safety

The Tribunal explained the purpose of the *Building (Private Streets and Access Roads) Regulations*. The purpose was 'to lay down minimum requirements which the Government considers necessary to safeguard those using private streets and access roads. One fundamental part of these Regulations is that pedestrian traffic and vehicular traffic should be safely segregated from each other.' Then it proceeded to dismiss the appeal on the following grounds:

(a) The proposal did not comply with Regulation 4 or 6 and no special circumstances existed for granting an exemption.
(b) The proposal did not comply with Regulation 9 or 12 and exemption under Regulation 27 on the grounds of impracticality could not be granted because that was not well substantiated by expert evidence or the site visit to Magazine Gap Road.

NOS. 1–9 BREEZY TERRACE

- **Building Appeal Case Name:** Nos. 1–9 Breezy Terrace, Nos. 4–6 Park Road and Nos. 1–3 Po Yuen Lane, Hong Kong [**Nos. 1–9 Breezy Terrace**]
- **Building Appeal Case No. :** 12/83
- **Nature of the Case:** parking standards in Zones 1 and 2
- **Dates of Hearing:** 22 March and 18 April 1984
- **Date of Decision:** 31 July 1984
- **Chairperson of Tribunal:** Mr Frank C. Y. Cheung
- **Representation:**

  (a) Mr Ronald Arculli
  (b) Mr J. Burdett for the respondent

- **Decision:** appeal dismissed by a majority (Chairman dissenting)
- **Rule Laid down by the Decision:**

  (1) Zone 1 parking standards should apply to a site which abutted both Zone 1 and Zone 2 roads.

- **Background:**

The subject site was Nos. 1–9 Breezy Terrace, Nos. 4–6 Park Road and Nos. 1–3 Po Yuen Lane (the Breezy site). The northern boundary of Breezy Terrace abutted Bonham Road and its southern boundary Park Road some 20 metres above. The Breezy Terrace site was situated immediately to the eastern boundary of Nos. 44–46 Bonham Road, a building site ('the Euston site') of comparable size and of similar development to the Breezy Terrace site.

In November 1982 , the appellant, through Mr Peter C.C. Mak (Mr Mak), Authorized Person, applied for a sizeable development of a commercial and residential building. The building plans submitted proposed shops, which would front on Bonham Road, and 220 domestic units ranging from 90 to 130 square metres. They were to be housed in two tower blocks on top of a four-storey carparking podium, which was designed to accommodate 310 motor cars. By the two towers, there would be a swimming pool.

It was not disputed by the Building Authority that the gross floor area within the 4-storey podium was intended to be used solely for the parking of motor vehicles.

Shortly before the Breezy Terrace site buildings plans were submitted, the Director of Building Development received enquiry in June 1982 from the Authorized Person for the Euston site regarding the schematic design drawings. It was for the Director's consideration of the carparking space to be exempted from gross floor area calculation, among other things. This enquiry was under study when the Breezy Terrace building plans were submitted in November 1982.

The Tribunal noted that logically, as the Breezy Terrace and Euston sites were similar in many respects, Mr Cheng of the Building Authority recommended that the extent of exclusion from gross floor area calculation eventually decided upon in the Euston site should also apply to the Breezy Terrace site.

When considering the plan application for the Euston site, the Director of Building Development sought the view of the Principal Government Town Planner who replied that carparking space at the rate of one per flat should be included in the plot ratio calculation in accordance with the current practice (memorandum dated 5 July 1982). In response to a similar enquiry, the Chief Engineer of Highways Department expressed the view that since the site was in Zone 1, the provision of parking space within the site was not essential. The Tribunal noted that it was on the basis of the replies received from these two departments that the Director advised the Authorized Person of the Euston site that his proposed development, based on one carparking space to one flat, would exceed the plot ratio.

By a letter dated 21 June 1983, Mr Cheng of the Building Authority advised Mr Mak, the Authorized Person, that the building plans submitted

by him were rejected on the grounds that the gross floor area (GFA) intended for the building exceeded the plot radio prescribed by *Regulation 21 of the Building (Planning) Regulations* and consequently in breach of s. 16(1)(d) of the *Buildings Ordinance*. Mr Cheng stated that he would be prepared to take no account of any floor space used for carparking which would not exceed the ratio of one carparking space for every five flats. The Tribunal noted that there was no suggestion that the building plans would be rejected for any other reasons.

The Authorized Person of the appellant requested the Director to review his decision. The Director reconsidered the matter by first referring it to the Buildings Ordinance Conference in January 1983 and later to the Lands and Works Conference (LWC) in February 1983. The Conference recommended that the matter should be finally resolved by the Development Progress Committee (DPC).

On 14 March 1983, the DPC resolved to advise the Building Authority that the carparking space calculation of the Euston site (Zone 1 standard) should apply to Breezy Terrace as well.

The draft minutes of the DPC meeting read in part as follows:

> 4.2
>
> (a) Where a Zone 1 site extended into Zone 2 boundaries, it was previously decided at LWC that Zone 2 parking standards should apply if the class of housing proposed was commensurate. PAS (T)4 asked for a reconsideration of this ruling. The decision had great significance now, following the recent revision of parking standards. As approved by ExCo, in Metropolitan Zone 1 areas should be determined by the Authority (which in respect of building plans referred to the Building Authority), taking advice from Transport and other departments where appropriate. In Zone 2 areas, no such discretion existed, the minimum standard being 1 space per flat or every 100 square-metre gross floor area, whichever was the fewer . . .
> (b) It would be consistent to apply, to new domestic buildings in Zone 1, the parking provision free of plot ratio which was accepted for HOS projects, namely, one space per 5 flats.

The meeting concluded as follows:

> 4.3
>
> After considerable discussion, it was agreed that the Building Authority should be advised along the following lines:–
>
> (a) Zone 1 standards should be applied to this case.
> (b) It was Government's current policy that parking provisions in Metropolitan Zone 1 areas should be determined on merit.
> (c) Allowing a visually intrusive building at this location would not be good planning practice.
> (d) The area was well served by public transport. Regard should be

given to this aspect when considering whether the number of carparks proposed was reasonably needed.

(e) Referring to standards currently used in HOS projects would suggest that carparking areas exceeding one space per five flats should be included in plot ratio calculations.

In the DPC meeting held on 14 April 1984, Mr Barden, the Principal Assistant Secretary for Transport, was invited to give his opinion.

On 8 July 1983 a notice was lodged on behalf of the appellant to appeal against the decision of the Building Authority and the grounds were as follows:

(a) The Building Authority had not exercised the discretion vested in it under Regulation 23(1)(b) of the *Building (Planning) Regulations* properly or at all.

(b) In purporting to exercise *such* discretion, the Building Authority *wrongfully* took into account non-statutory criteria set by the Building Authority in respect of carparking spaces within residential and/or other developments.

- **Arguments:**

Mr Mak's evidence for the appellant highlights the following points:

(a) The vehicular traffic, and presumably pedestrian traffic, from the proposed building would flow from and discharge onto Park Road.

(b) Park Road, a minor road in terms of carriage of traffic when compared with Bonham Road, separated the site in Zone 1 from Zone 2 which began from its southern kerb.

(c) Any kerb-side parking in the vicinity would cause unbearable obstruction.

(d) The mechanical application of the so-called Zone 1 standard could not bring down the desired number of carparking spaces in the proposed building if the appellant was so minded to provide.

Mr Barden for the respondent was of the opinion then that the Transport Branch's policy of providing carpark spaces was to keep the increase in traffic flow caused by the building development to a reasonable level and the advice of his branch, the Transport Branch, would be based on the following criteria:

(1) the proximity to high capacity public transport system;

(2) the road capacity and traffic volume in both the immediate vicinity and the wider district, particularly in areas threatened by unacceptable levels of road congestion; and

(3) feasibility of providing safe entry and exit points.

Mr Barden formed the view that Zone 1 standards should not be

relaxed in the Euston site and, consequently, the Breezy Terrace site as well even though both sites abutted the boundary of Zone 2.

- **Reasons for Decision:**

310 parking spaces were too many

Having regard to various decisions arrived in the pre-appeal meetings, the Tribunal resolved to dismiss the appeal by a majority on the following grounds:

> The decision on the strict adherence to Zone 1 standards for the Euston site took a long time to arrive at and after deliberations on various occasions. The provision of 310 carparking spaces (on the subject site) would far exceed the number that could reasonably be expected of a development such as the one contemplated (for Breezy Terrace).
>
> This Tribunal can see no special features which justify the interference with the refusal by the Building Authority to approve the building plans and consequently it is by majority that this Appeal must be dismissed. (brackets added)

- **Comments:**

Chairman's dissenting views

In this appeal, the Chairman dissented. His views are summarized below:

(a) The Tribunal should determine each case on its own merits.
(b) The Tribunal violated the above principle of using its discretionary power by deciding that the applications for the Breezy Terrace should stand or fall together with those of the Euston site.
(c) Though the Breezy Terrace and the Euston site were similar, they were not identical and the former could be properly regarded as Zone 2 site because of the nature of Park Road as the point of ingress/egress. The comparison of the subject site to typical Zone 1 HOS was inappropriate.

STEPPED STREETS

SUPER MATE (1)

- **Building Appeal Case Name:** 6–8 U Lam Terrace, Hong Kong, Inland Lot Nos. 2046 [**Super Mate (1)**]
- **Building Appeal Case No. :** 54/90
- **Similar Cases:** *Perfect Chance* as regards power of Director of Fire Services;

Nos. 2–11 Hok Sz Terrace; Nos. 29–31 Sands Street, and No. 115 Caine Road and Nos. 1–6 Po Wa Street as regards stepped access

- **Nature of the Case:** second limb of s. 16(1)(g) of the *Buildings Ordinance*; power of the Director of Fire Services; stepped access
- **Date of Hearing:** 13 July 1990
- **Date of Decision:** 13 July 1990
- **Chairperson of Tribunal:** Mr Edmund Y. S. Cheung
- **Representation:** no counsel representation for both parties
- **Decision:** appeal dismissed, no good cause shown for holding a full hearing
- **Rules Laid down by the Decision:**

(1) The Tribunal has said more than once that there are two alternative limbs to section 16(1)(g): the Building Authority may refuse to approve building plans where a proposed building would differ in height, design, type or intended use from buildings in the immediate neighbourhood, or from buildings previously existing on the same site. Where the Building Authority invokes the second limb rather than the first, namely the proposed building 'would result in a building differing in height from the building previously existing on the same site', whether the proposed building would differ from buildings in the immediate neighbourhood (a question falling within the first limb) is an irrelevant consideration. (*The U Lam Terrace Case*)

(2) 'We take the view that the instant case is on all fours with the 3 cases referred to above. In each case, the street was stepped and there was no vehicular access so that vehicles such as ambulances and fire engines would not be able to reach the premises. In each case, the BA invoked Section 16(1)(g) because he was concerned about the "safety of the occupants and the [sic] inadequate servicing for the proposed high-rise development". In our view, he is rightly so concerned: the safety of occupants in a high-rise building must weigh predominantly in deciding whether or not to approve the building plans.' (Comments of the Tribunal on the *Hok Sz Terrace*, *Sands Street* and *Caine Road Cases* in the *U Lam Terrace Case.*)

(3) 'When considering an appeal of this kind it is our duty to weigh very carefully the considerations which underlie the decision appealed against. On the one hand, developers should not be at the mercy of Government as to whether or not they will be able to develop sites to the maximum extent permitted by the schedules to the Building (Planning) Regulations. Intending purchasers make searches through architects and solicitors to ascertain whether or not the lease conditions contain restrictions on development, or whether the plans are subject to "special approval". If a developer is told that there are

no such provisions, and that his intentions do not contravene any approved or draft plan prepared under the Town Planning Ordinance, he will normally conclude that a full development of the lot will be permitted, if plans are presented which comply with the relevant regulations. On the other hand, there are exceptional cases where there is some overriding consideration relating to the particular proposals for development in which the Building Authority would be failing in his duty to ensure reasonable standards of safety if he passed plans which otherwise conformed, and in these few cases failing within the precise language of Section 16(1)(g) plans can be disapproved even though all other requirements of the Buildings Ordinance have been observed.' (*The Nos. 2–11 Hok Sz Terrace Case,* as cited in the *U Lam Terrace Case*)

(4) 'The duty of the Building Authority is to administer the Buildings Ordinance so as to have due regard to the safety of the occupants of buildings affected by planning proposals. As we said in the Hok Sz determination, in the final analysis the Building Authority is responsible for the due and proper administration of the Ordinance. Lack of access roads prevents firefighting vehicles from getting close to the buildings that are served in this area only by stepped streets. The problem of access extends also to ambulances and, to a lesser extent, garbage collection.' (*Nos. 29–31 Sands Street Case,* as cited in the *U Lam Terrace Case*)

- **Background:**

The appellant, Super Mate Ltd., was the owner of Nos. 6–8 U Lam Terrace, Hong Kong standing on Inland Lot No. 2046, the subject site.

By a letter dated 7 March 1990, the appellant's Authorized Person (AP) submitted to the Building Authority certain revised building plans for approval. These plans were related to the proposed building to be erected on the site.

By a letter dated 3 May 1990, the Building Authority informed the AP that such building plans were disapproved 'under Buildings Ordinance Section 16(1)(g) on the grounds that the carrying out of the works shown thereon would result in a building differing in height from the building previously existing on the same site'.

By a letter dated 24 May 1990, the AP gave the Building Authority a Notice of Appeal against its decision to disapprove the building plans.

- **Arguments:**

The grounds of the appellant in the Notice of Appeal were as follows:

(a) The proposal was for a domestic building of 24 storeys, but there were in fact several other buildings in the vicinity of similar or greater height. Therefore, there could not be any town planning or aesthetic reasons for opposing the construction of a building of 24 storeys high.

(b) The proposed building would not be of the same height as the one previously existing on this site, but a similar statement to that one could similarly be applied in respect of almost every other building erected on an old building site in Hong Kong. Except in some of the rural areas, most new building works in Hong Kong generally involved the demolition of a small old building and the construction of a new one, which was almost always larger.
(c) It was conceivably possible that the objection was raised by the Building Authority in the belief that the 24-storey building might represent a possible fire risk. However, the Director of Fire Services had not raised any adverse comment on the proposal. He had certified the project in terms of *Buildings Ordinance* section 16(1)(b). There was, in fact, a fire hydrant within only 30 metres of the site.
(d) The means of escape from the proposed building were excellent since there would be open paved areas of streets or lanes on three sides at ground floor level, allowing very easy evacuation and exit via U Lam Terrace and Ladder Street.
(e) As regards normal building servicing, the proposed building was adjacent to Ladder Street and only at a very short distance from Caine Road. Furthermore, a level pedestrian footbridge would be constructed to link the building directly to a footpath adjacent to Caine Road. This footbridge was the subject of a Modification Letter under negotiation with the Registrar General.

- **Reasons for Decision:**

Before coming to a decision, the Tribunal noted that U Lam Terrace was a stepped street with no vehicular access to the site. The Appeal Tribunal dismissed the appeal on the following grounds:

First Limb of s. 16(1)(g) of the Buildings Ordinance was irrelevant

As the Building Authority invoked the second limb rather than the first limb of s. 16(1)(g), (i.e. whether the proposed building 'would result in a building differing in height from the building previously existing on the same site'), whether the proposed building would differ from buildings in the immediate neighbourhood (a question that fell within the first limb) was irrelevant for the purpose of the appeal.

The rules in Nos. 2–11 Hok Sz Terrace, Nos. 29–31 Sands Street, and No. 115 Caine Road and Nos. 1–6 Po Wa Street applied against the appellant

The Tribunal considered three relevant cases, namely *Nos. 2–11 Hok Sz Terrace, Nos. 29–31 Sands Street*, and *No. 115 Caine Road and Nos. 1–6 Po Wa Street*. It concluded that the rules in these three cases went against the appellant.

> We take the view that the instant case is on all fours with the 3 cases referred to above. In each case, the street was stepped and there was no vehicular access so that vehicles such as ambulances and fire engines would not be able to reach the premises. In each case, the BA invoked Section 16(1)(g) because he was concerned about the 'safety of the occupants and the (sic) inadequate servicing for the proposed high-rise development'. In our view, he is rightly so concerned: the safety of occupants in a high-rise building must weigh predominantly in deciding whether or not to approve the building plans.

The former two cases were reproduced in the decision:

(a) In *Nos. 2–11 Hok Sz Terrace,* the site was also stepped, and had no vehicular access. The proposed buildings were of 21 storeys and 25 storeys. In dismissing the appeal in that case, the Appeal Tribunal had this to say:

> When considering an appeal of this kind it is our duty to weigh very carefully the considerations which underlie the decision appealed against. On the one hand, developers should not be at the mercy of Government as to whether or not they will be able to develop sites to the maximum extent permitted by the schedules to the Building (Planning) Regulations. Intending purchasers make searches through architects and solicitors to ascertain whether or not the lease conditions contain restrictions on development, or whether the plans are subject to 'special approval'. If a developer is told that there are no such provisions, and that his intentions do not contravene any approved or draft plan prepared under the Town Planning Ordinance, he will normally conclude that a full development of the lot will be permitted, if plans are presented which comply with the relevant regulations. On the other hand, there are exceptional cases where there is some overriding consideration relating to the particular proposals for development in which the Building Authority would be failing in his duty to ensure reasonable standards of safety if he passed plans which otherwise conformed, and in these few cases failing within the precise language of Section 16(1)(g) plans can be disapproved even though all other requirements of the Buildings Ordinance have been observed. (*Nos. 2–11 Hok Sz Terrace Case*)

(b) In *Nos. 29–31 Sands Street*, the situation was similar to the *Hok Sz Terrace Case*. It also lacked vehicular access and was stepped. In this case, however, only tentative plans had been submitted for approval and the Appeal Tribunal held that the Building Authority had no jurisdiction to approve such plans and dismissed the appeal. Having done that, the Appeal Tribunal went on to express its views as follows:

> The duty of the Building Authority is to administer the Buildings Ordinance so as to have due regard to the safety of the occupants of buildings affected by planning proposals. As we said in the Hok Sz (Terrace) determination, in the final analysis the Building Authority is responsible for the due and proper administration of the Ordinance. Lack of access roads prevents firefighting vehicles from getting close to the buildings that are served in this area only by stepped streets. The problem of access extends also to ambulances and, to a lesser extent, garbage collection. (*29–31 Sands Street Case*)

The Director of Fire Services had no power to withhold a certificate where the problem was lack of access

The Tribunal explained that under section 16(1)(b)(ii) of the *Buildings Ordinance*, the Director of Fire Services had no power to withhold a certificate where the problem was lack of access rather than failure to meet the Code of Practice published from time to time by the Director. It followed that the fact that the Director of Fire Services had issued a certificate pursuant to section 16(1)(b) was irrelevant for the purpose of the appeal.

Proposed footbridge to stepped Ladder Street was not helpful

Ladder Street, like U Lam Terrace, was also stepped. The proposed footbridge connecting the proposed building to Ladder Street would not provide any vehicular access to the site.

SUPER MATE (2)

- **Building Appeal Case Name:** Nos. 6–8 U Lam Terrace, Hong Kong, Inland Lot Nos. 2045–2046 [**Super Mate (2)**]
- **Building Appeal Case No. :** 60/91
- **Similar Cases:** *The China Engineers Case* (52/88)*; No. 1 Robinson Road Case; Nos. 11–13 Sands Street Case* (57/91);
- **Nature of the Case:** s. 16(1)(g) *Buildings Ordinance;* Outling Zoning Plans
- **Dates of Hearing:** 14, 15 and 16 October 1992
- **Date of Decision:** 10 November 1992
- **Chairperson of Tribunal:** Mr Robin Somers Peard
- **Representation:**

  (a) no counsel representation for the appellant
  (b) Mr Y. M. Liu for the respondent

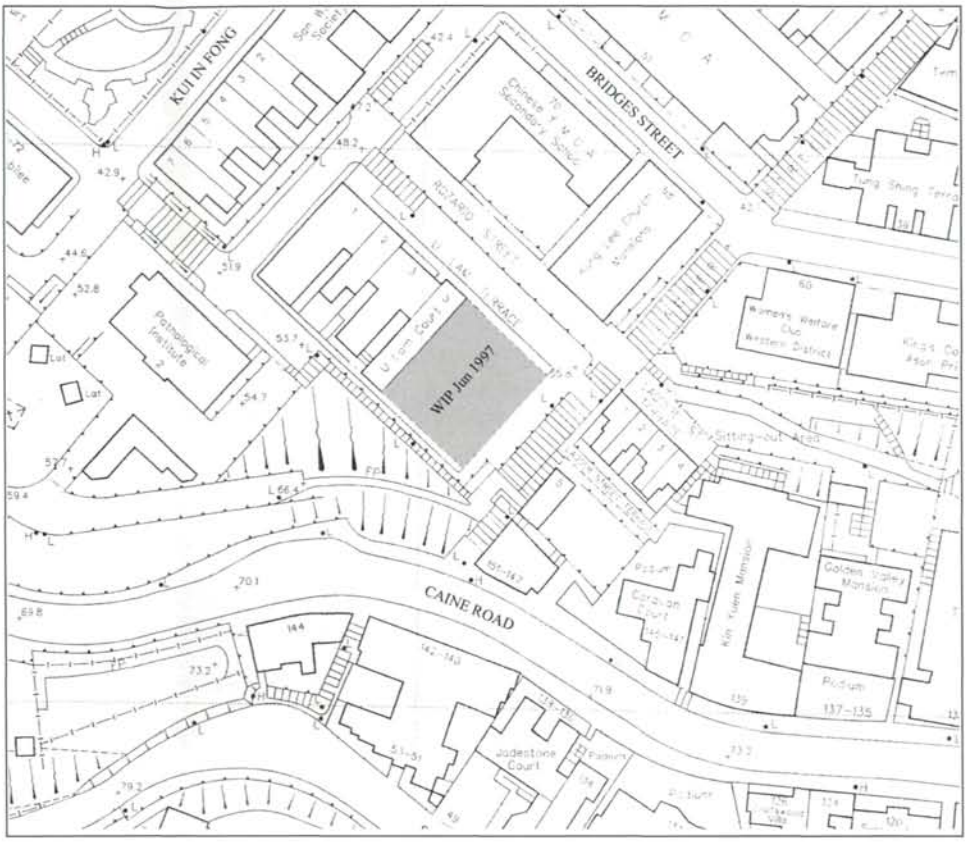


Figure 4.7 Site plan of U Lam Terrace (the *Super Mate (2) Case*), reproduced with permission of The Director of Lands, © Government of Hong Kong SAR Licence No. 40/1999

- **Decision:** appeal allowed
- **Rules Laid down by the Decision:**

  (1) The Building Authority has discretionary power in respect of s. 16(1)(g) of the *Buildings Ordinance*.

  (2) The manner in which discretionary power is exercised by the Building Authority is informed by Mr Justice Mayo in *Miscellaneous Proceedings 3896 of 1991* set out at pages 10 and 11:

> The principal matter that the Authority was concerned with was the safety of people in and around a building. S. 16(i)(g) related to the height of buildings and adjoining buildings in its vicinity. It was unrealistic to attempt to argue as Mr Li had that 16(i)(g) was primarily concerned with aesthetic factors such as the overall profile of the buildings. The height of buildings primarily dictated the number of occupants who would be using

Photograph 4.8 The subject building site in the *Super Mate (2) Case* as viewed from Caine Road

Photograph 4.9 The subject building in the *Super Mate (2) Case* was completed in September 1999 (view from Ladder Street)

> them and the Authority was undoubtedly under a duty to take into account such factors as the density of the development.
>
> I have no doubt that Miss Harstein's view of the matter is the correct one. It is evident from a perusal of the section that wide discretions are given to the Authority. I can see no difficulty if these powers and discretions are exercisable side by side with powers and discretions exercisable by such bodies as the Planning Board and the Fire Services Department. Each Body views the overall situation from a different perspective but it is the Building Authority's responsibility to ensure that all requirements are adhered to. The height of a building is very much the concern of the Building Authority and there is a definite duty imposed on it to ensure that such matters as access to the Building are sufficient. This would certainly impinge on the safety of the Building. I have no doubt that the Authority was not acting illegally when it made the determination it did in the present case.

(3) The evidence the Tribunal can admit: 'The Buildings Ordinance contains very little assistance as to what powers the Tribunal has except to the very limited extent set out in Section 44 of the Ordinance. It is clear that the Tribunal can require witnesses to attend and give evidence, they can compel production of documents, inspect premises and enter and view premises. Building Appeal Tribunals have in the past heard evidence on relevant matters and in this sense the appeal is by way of rehearing. However the question arises as to whether there is any limit to the evidence which can be put before the Tribunal, particularly in respect of events which have occurred since the decision of the Building Authority in question. We consider it to be right (and it has been accepted by previous Tribunals), that evidence of new circumstances arising after the decision of the Building Authority (such as the gazetting of an Outline Zoning Plan) is not relevant and should not be taken into account. Likewise we would think that the approval of plans for buildings in the immediate neighbourhood given after the decision of the Building Authority would also not be relevant. However any evidence which clarifies the circumstances ruling at the time of the Building Authority's decision is relevant and can be taken in account.' (*The China Engineers Case* as cited in this case)

(4) The proper approach the Building Authority should follow in exercising its discretion under the second limb of section 16(1)(g) was to ask itself what negative factors will result from the difference in height between the buildings previously on the site and the proposed building. After doing this, the Building Authority has to weigh both the positive factors resulting from redevelopment and negative factors in the balance and decide whether or not there is such a weight of negative factors resulting from the difference in height as to justify a refusal.

(5) In exercising its discretion under the second limb of section 16(1)(g), the Building Authority should attach some significantly greater weight in the resulting negative factors if a refusal was to be justified **because the use of the section limit a developer's right to develop his or her site to its full extent otherwise granted to him or her by the Crown Lease, the *Buildings Ordinance* and *Building (Planning) Regulations*.**

(6) In exercising its discretion under the second limb of Section 16(1)(g), when the Building Authority is evaluating resulting negative factors on policy considerations, such considerations must relate specifically to the site rather than simply a general policy for a wide area.

(7) Reports should not be produced in evidence in an appeal hearing unless the reports have been considered by the Building Authority.

(8) The correct approach for the government to restrict development generally in stepped street areas is not to use s. 6(1)(g) but to do so by way of an *Outline Zoning Plan* for the particular area. Under the OZP, the areas of limited access are defined and development restricted either by way of height limitation or limitation of plot ratio or both.

- **Background:**

The appellant was Super Mate Limited who proposed to build a 12-storey residential building at Inland Lot No. 2045 R.P. and 2046, Nos. 6–8 U Lam Terrace, Hong Kong, i.e. the subject site. The Building Committee discussed the plans on 28 May 1991. A Building and Lands Conference in which the Director of Building and Lands attended made a decision on 6 June 1991. The decision was communicated to Mr Richard K. H. Cheung, the Authorized Person of the appellant, by a letter from the Building Authority dated 8 June 1991. The refusal to give approval to the plans was based upon section 16(1)(g) of the *Buildings Ordinance*.

- **Arguments:**

Respondent's arguments

(1) Counsel for respondent

(a) No jurisdiction

The counsel for the respondent argued that the decision of the Building Authority appealed against was not, in fact, an exercise of discretion and therefore the Tribunal had no jurisdiction.

The reason was that when looking at building plans the Building Authority (so far as the relevant part of section 16(1)(g) of the *Buildings Ordinance* was concerned) was only involved in a fact-finding exercise to see whether the proposed new building was higher

than those previously on the site. Once it made the factual assessment that the proposed new building was higher, the Building Authority had no choice but to reject the plans. The word 'may' at the beginning of section 16(1) was mandatory and should be read as meaning 'must'.

Reference was made to the decision by Mr Justice Leonard in the *Singway Case (Singway Co. Ltd. v AG* [1974] HKLR 275). Although the decision did not turn on the interpretation of section 16(1)(g), Mr Justice Leonard gave a view as to whether the word 'may' at the beginning of section 16 was mandatory or permissive. The submission was that, in certain parts of section 16, the word was mandatory and in other parts it was permissive. On page 288, Mr Justice Leonard, in considering the unreported decision of Mr Justice Briggs in the *Crozet Case (Crozet Limited, Hill Development Limited, Dale Enterprise Limited v The Attorney General*, Miscellaneous Proceedings No. 409 of 1973) said:

> In that case the Building Authority refused approval under Section 16(1)(d) and also under Section 16(1)(g) (applied to which paragraph I should have regarded 'may' as permissive) on the ground that the carrying out of the building works shown on the plan would result in a building differing in height from other buildings in the immediate neighbourhood.

It therefore appeared that Mr Justice Leonard considered that section 16(1)(g) (at least in cases where the height of buildings was in issue) involved an exercise of discretion by the Building Authority.

Reference was also made to the recent unreported decision of Mr Justice Mayo in *Miscellaneous Proceedings* No. 3896 of 1991. This was an application for judicial review of the Building Authority decision that refused approval of plans relating to the redevelopment of land at *Nos. 15 and 17 Sands Street*, Kennedy Town. It was refused on the same grounds as in this appeal.

(b) Use of discretion

On the basis of certain cases, in particular *British Oxygen Company Limited v Minister of Technology* [1971] AC 610, it was quite legitimate for the government to take into account matters of policy when exercising discretion. Such matters of policy were presented by experts referred to below.

(2) Mr Clive Anthony Viney

Mr Viney was a Fellow of the Royal Institute of Chartered Surveyors. When he gave evidence, he was holding the post of Government Building Surveyor/Development and, at the time of the decision

appealed against, he held the position of Government Building Surveyor/Litigation. He explained that, for a long period, the Building Authority had been concerned in regard to development in areas where access for vehicles was restricted (such as stepped streets). U Lam Terrace was just such an area. In 1974, the Building Authority issued a Practice Note for Authorized Persons which announced the intention to restrict the height of building to 4 storeys in an area in Kennedy Town where access was restricted by the application of section 16(1)(g) of the *Buildings Ordinance*. Over the years this practice was applied to other areas with limited access, and Authorized Persons and developers became acquainted with it. In recent years, building up to 6 storeys in areas where access was restricted had been allowed and, very recently, the Building Authority decided to increase this to 7 storeys.

The motive of the Building Authority in doing this was concern as to public safety. They were very concerned because the Fire Services Department had no statutory authority to prevent redevelopment that had limited or no access to fire appliances or other emergency vehicles. It was upon the Building Authority to limit redevelopment in a manner appropriate to ensure that public safety was not adversely affected.

Mr Viney annexed to his written statement a press cutting in relation to a fire in Macao on 4 and 5 October 1992 when a man died because fire appliances could not be rapidly mobilized near the building to rescue him. He dealt with the minutes of the Building Committee on 28 May 1991. These minutes recorded that:

> After discussion members generally agreed that a residential building containing two staircases, which would provide an alternative means of escape, and a fireman's lift together with enhanced fire services installations, would obviously be a real improvement on a four or six-storey single staircase building from the safety point of view in the event of a fire. They therefore considered the main issue now was the possible adverse effects on the infrastructure of the stepped street areas, if taller buildings were now permitted, and agreed that under the circumstances **they would await the outcome of the Planning Department's review in this matter, before reaching a decision on specific cases, so as not to jeopardise the review in any way** (emphasis added).

(3) Mrs Ava Ng Tse Suk Ying

Mrs Ng was a member of the Hong Kong Institute of Planners and the Canadian Institute of Planners and held the post of Chief Town Planner/Town Planning Board in the Planning Department of the Hong Kong government. She attended the Building Committee on 28

May 1991 and was responsible for bringing to the attention of those present the fact that U Lam Street was the subject matter of the Stepped Street Study being undertaken by her department. She told the Building Committee that the increased population density resulting from the proposed building height in an area which was without direct vehicular access and subject to infrastructural constraints was unacceptable from a planning point of view. The infrastructural constraints were similar to those in the adjacent area to the south of Caine Road where there were problems with road capacity and sewage.

When questioned, Mrs Ng agreed that 33 extra people resulting from a 12-storey building as opposed to a 6-storey building might not make 'very realistic significant impact'. However as a planner, she was looking at a wider area and the cumulative effect on the environment.

(4) Mrs June Li Lai Bik Han

Mrs Li was a member of the Royal Town Planning Institute and held the post of Chief Town Planner/Metro Group. This Group took charge of the preparation of the study in regard to redevelopment along stepped streets. She intended in evidence to introduce the study in regard to redevelopment along stepped streets.

(5) Mr Victor McNally

Mr McNally was the Head of the Liquid Waste Projects Group with the Environmental Protection Department which was responsible for the strategic planning of the territory's sewage and sewage disposal facilities.

After the Sewage Master Plan Studies had been completed in 1990–1991, it became clear that the whole sewage system for the Central District of Hong Kong was overloaded. It was his department's view that until sewage improvements had taken place, any proposal for redevelopment which would increase sewage flows generated in the Central area should be objected to.

(6) Mr William Liew

Mr Liew was the Chief Traffic Engineer of the Traffic Engineering Division/Hong Kong of the Transport Department of the Hong Kong government. He dealt with the overall supervision and management of all traffic engineering matters on Hong Kong Island including the control of development in terms of parking provision and traffic flow.

A study was undertaken in 1988 of the Mid-Levels East-West Road Corridor by his department. This indicated that Caine Road

eastbound was overloaded in 1988 by 6% in the morning peak hours and was estimated to be overloaded by 39% in 1996. Any development proposal (such as that at U Lam Terrace) which increased the population using Caine Road was therefore considered unacceptable by the Transport Department.

The appellant's arguments

The appellant's submission was put forward by Mr Richard Cheung Kwok-ho, a Chartered Building Surveyor and the Authorized Person handling the submission of the plans to the Building Authority. He gave the following reasons in favour of the appellant:

(1) Before the appeal, he had a preliminary discussion with the Chief Building Surveyor (Hong Kong Island) who indicated, without any commitment on the part of the Building Authority, that he would not oppose an application for a 12-storey residential building. At the meeting of the Building Committee on 28 May 1991, CBS/HKI recommended approval of the plans but was persuaded to withdraw this recommendation.

(2) The proposed development would be in every respect superior to the previously existing building on the site. This consisted of ground floor shops and five floors of domestic accommodation built in the early 1960s. This building had only one staircase for escape purposes in an emergency. Access would be considerably improved because a pedestrian bridge would be built between the third floor of the proposed new building and Ladder Street which led up to Caine Road. This would also bring the nearest fire hydrant within 30 metres of the new building. The new building would have a fireman's lift and two staircases to be used in case of emergency. Garbage collection would be improved.

(3) By the normal calculation of occupancy, the difference in population between a 6-storey building (which the Building Authority would have allowed on the site) and the 12-storey building proposed was 33 persons. This number would be reduced if building was allowed up to seven storeys (as was then permitted).

The appellant's submission that the difference between a 6-storey and 12-storey building was 33 persons was not challenged.

- **Reasons for Decision:**

The Appeal Tribunal allowed the appeal. Before determining the appeal, the Tribunal first clarified issues regarding its jurisdiction as submitted by the counsel for the respondent.

Tribunal had jurisdiction

The Tribunal held that the Building Authority had discretionary power in respect of s. 16(1)(g) of the *Buildings Ordinance*. It considered the respondent's submission that the Building Authority had no discretion as 'startling' because if that was successful, it would mean that in all previous cases where Building Appeal Tribunals had considered cases under s. 16(1)(g) of the *Buildings Ordinance*, they would have been acting without jurisdiction. Furthermore, the authorities on the point, such as they were, did not support this submission.

In *Miscellaneous Proceedings* No. 3896 of 1991 and the judgment itself proceeded on the basis that the Building Authority was exercising a discretion which required it to take into account a number of factors resulting from the difference in height. The Tribunal therefore came to the clear view that this part of s. 16(1)(g) involved the exercise of discretion and accordingly it had jurisdiction in this appeal. It invited the counsel for the respondent to indicate speedily if he had instructions to take the matter further; the counsel did not do so.

Relevant evidence to consider

During the course of the hearing, there was some argument as to whether or not the facts which occurred and documents which came into existence after the Building Authority's decision on 6 June 1991 could be taken into account by the Tribunal in reaching a decision. The Tribunal then explained the relevant evidence that was to be considered in the appeal, which was essentially a rehearing.

(1) *The China Engineers Case* applied

The question of what evidence was relevant for the purposes of such an appeal as this was dealt with by the Appeal Tribunal in the *Tsing Lung Tau Case* (i.e. *The China Engineers Case* referred to in this book, No. 52 of 1988) and in their decision that Tribunal had the following to say with which the Tribunal agreed.

> The Buildings Ordinance contains very little assistance as to what powers the Tribunal has except to the very limited extent set out in Section 44 of the Ordinance. It is clear that the Tribunal can require witnesses to attend and give evidence, they can compel production of documents, inspect premises and enter and view premises. Building Appeal Tribunals have in the past heard evidence on relevant matters and in this sense the appeal is by way of rehearing. However the question arises as to whether there is any limit to the evidence which can be put before the Tribunal, particularly in respect of events which have occurred since the decision of the Building Authority in question. We consider it to be right (and it has been accepted by

> previous Tribunals), that evidence of new circumstances arising after the decision of the Building Authority (such as the gazetting of an Outline Zoning Plan) is not relevant and should not be taken into account. Likewise we would think that the approval of plans for buildings in the immediate neighbourhood given after the decision of the Building Authority would also not be relevant. However any evidence which clarifies the circumstances ruling at the time of the Building Authority's decision is relevant and can be taken in account.

The Tribunal indicated that it would follow the rule of the *China Engineers Case*.

The experts' evidence on 'policy' was either irrelevant or not directly relating to the subject site

The Tribunal had the following views as regards the submissions of the respondent's experts and counsel.

(1) Mr Viney's evidence confirmed that the Building Authority's decision was a 'holding decision'.

The Tribunal accepted Mr Viney's evidence regarding the fire in Macao. Although this incident occurred after the decision of the Building Authority was appealed against, the Tribunal agreed to take it into account. It was because the fire illustrated the fears which Mr Viney said were in the minds of himself and others in the government (including the Building Authority) when they were working to restrict development on sites to which there was limited access.

However, the Tribunal also noted that Mr Viney did not dissent from the view that the new building was an improvement in terms of fire safety. The concern at the time was in relation to any adverse effects on the infrastructure and where the line was to be drawn. The real concern was that giving permission for a 12-storey building on this site would have 'knock-on' consequences. Owners of sites in the neighbourhood would also apply to develop up to or beyond this height as this apparently had happened in the Sands Street area after the decision of the Building Appeal Tribunal in the *Nos. 11–13, Sands Street Case (57/1991)*.

The Tribunal found that Mr Viney was quite genuinely concerned with aspects of public safety in relation to high-rise developments in stepped street areas (which was the Building Authority's responsibility rather than the Fire Services Department). However, the Tribunal also found that the decision to recommend rejection of the plans (of which he was part) was in fact a 'holding' decision. This holding decision had been heavily motivated by the desire of those present to

await the outcome of the study by the Planning Department into stepped streets to see whether a definite recommendation would emerge.

(2) Mrs Ng's concern was about effects on other applications.

The Tribunal gathered from Mrs Ng's evidence that her concern was that a 12-storey building as opposed to a 6-storey building might not make 'very realistic significant impact'. However as a planner, she was looking at a wider area and the cumulative effect on the environment. The Tribunal also gathered from her evidence that her concern was that if a 12-storey building were allowed on this site, **other applications** for buildings of a similar height would follow, thereby increasing the pressure on the overloaded infrastructure.

(3) Mrs Li's accepted evidence indicated that the Fire Services Department did not consider that the development would pose operational problems for firefighting.

As regards Mrs Li's intention to produce the study on stepped streets, the Tribunal decided that it was not appropriate for it to look at the study itself. The reason was that neither the study nor conclusions were available to the Building Committee on 28 May 1991 or to the Building Authority at the Building and Lands Conference on 6 June 1991.

However, the Tribunal agreed to take into account data and conclusions accumulated for the study which were available by 6 June 1991. In fact, the findings for the study had become available by May 1991 and some departmental comments had been received.

Among such comments, Mrs Li produced the comments from the Fire Services Department. From the answers of the Fire Services Department, it was accepted that it was not essential, when considering redevelopment of areas with limited access, for heavy rescue appliances to have access to one major face of the building although such was desirable. The Fire Services Department considered that such deficiency could be compensated for by enhanced fire service installations. They went on to say that from a fire safety point of view, the provision of two staircases in a 6-storey domestic building (this, the Tribunal believed, should be a reference to a building of seven storeys or more where two staircases were compulsory) was certainly better than a single staircase situation as both the occupants and firefighters could have an alternative route for escape and firefighting in case of emergency.

(4) Mr McNally's concern was a general policy rather than a site-specific consideration.

The Tribunal found that Mr McNally's evidence clearly showed that

his department's concern was that although the population increase due to the proposal had little impact on total sewage flow, the cumulative effect of redeveloping the area to a higher population density area would have serious effect on the downstream sewage system. This would probably create a public health hazard.

(5) Mr Liew's concern was a general policy rather than a site-specific consideration.

Likewise, the Tribunal found that Mr Liew's evidence showed that the Transport Department's objection to development was a general one. It did not have particular reference to the population increase caused by the erection of a 12-storey building on the subject site rather than a 6-storey building.

The Tribunal could exercise discretion

As regards the counsel for the respondent's submission about the use of discretion, the Tribunal stated that (a) it was not dealing here with the exercise of a *general discretion*; (b) it would not make a decision by reference to any *particular policy grounds* since government policy was not yet finalized but was under review at the time of the appeal.

(1) The proper approach the Building Authority should have taken

The Tribunal considered that what the Building Authority had to do when considering the exercise of its discretion under this limb of section 16(1)(g) was to ask itself what negative factors would result from the difference in height between the buildings previously on the site and the proposed building. After doing this, the Building Authority had to weigh both the positive factors resulting from redevelopment and negative factors in the balance and decide whether or not there was such a weight of negative factors resulting from the difference in height as to justify a refusal.

The Tribunal believed that there had to be some significantly greater weight in the resulting negative factors if a refusal was to be justified **because the use of the section limited a developer's right to develop his or her site to its full extent otherwise granted to him or her by the Crown Lease, the *Buildings Ordinance* and the *Building (Planning)Regulations***. The Tribunal did not consider this to be inconsistent with the following views expressed by Mr Justice Mayo in *Miscellaneous Proceedings 3896 of 1991* set out at pages 10 and 11:

> The principal matter that the Authority was concerned with was the safety of people in and around a building. S. 16(i)(g) related to the height of buildings and adjoining buildings in its

> vicinity. It was unrealistic to attempt to argue as Mr Li had that 16(i)(g) was primarily concerned with aesthetic factors such as the overall profile of the buildings. The height of buildings primarily dictated the number of occupants who would be using them and the Authority was undoubtedly under a duty to take into account such factors as the density of the development.
>
> I have no doubt that Miss Harstein's view of the matter is the correct one. It is evident from a perusal of the section that wide discretions are given to the Authority. I can see no difficulty if these powers and discretions are exercisable side by side with power and discretions exercisable by such bodies as the Planning Board and the Fire Services Department. Each Body views the overall situation from a different perspective but it is the Building Authority's responsibility to ensure that all requirements are adhered to. The height of a building is very much the concern of the Building Authority and there is a definite duty imposed on it to ensure that such matters as access to the Building are sufficient. This would certainly impinge on the safety of the Building. I have no doubt that the Authority was not acting illegally when it made the determination it did in the present case.

(2) Decision of the Building Authority under section 16(1)(g) had to be on site-specific policy rather than general grounds

It followed from what the Tribunal said above that other **considerations which did not result from the difference in height (such as the possible effect of other development schemes which might come forward near the site in question) were not relevant**. Such considerations should not have been taken into account since they did not result from the difference in height between the buildings previously and proposed on the site, but resulted from differences in heights of quite different buildings. In other words, the Tribunal had the view that the decision of the Building Authority under section 16(1)(g) had to be on site-specific grounds.

(3) The Building Authority's should not have used s. 16(1)(g) to 'hold the line'

Furthermore, **it was not legitimate for the Building Authority to use section 16(1)(g) to 'hold the line' until a general government policy for stepped streets had emerged as a result of the Stepped Street Study**. However, this was clearly what the Building Committee and the Building Authority hoped would happen. This was the major reason for the recommendation made by the Building Committee on 28 May 1991 and the decision of the Building Authority which followed on 6 June 1991.

(4) There was no good ground for 'persuading' CBS/HK to change his views

The Tribunal was also troubled by the fact that at the Building Committee Meeting on 28 May 1991, the Chief Building Surveyor Hong Kong Island was persuaded to withdraw his recommendation to approve the plans after he had given a preliminary indication to the Authorized Person that a 12-storey building would not be opposed. There was plainly no proper justification put forward by those at the Building Committee for changing this view. Therefore, the decision of the Building Authority of 6 June 1991 could not stand by reference to its own reasoning.

(5) Proposed building had greater advantages

Hence, the Tribunal asked whether the evidence which had been heard separately justified the same decision to reject the building plans under the second limb of section 16(1)(g).

The Tribunal felt that, having looked at the evidence, there were substantial advantages (noted by the Building Committee) from a safety point of view (particularly in respect of firefighting emergencies) which the proposed new building had over the old one.

Besides, the Tribunal noted the improvement in refuse collection arrangements and the general advantages resulting from replacing an old building with a modern one. The Tribunal accepted that these advantages were greater than any minimal disadvantages caused to the general traffic and sewage situation in the area by a marginal addition of an extra 33 persons.

Postscript and suggestions

As a postscript to its determination, the Tribunal referred also to its 1973 decision in the *No.1 Robinson Road Case* and suggested the better approach taken by the government to deal with stepped streets.

(1) Precedent of the *No.1 Robinson Road Case*:

> Earlier in this Determination, we reached the conclusion that the primary purpose of Section 16(1)(g) is to give discretionary power to refuse plans for the erection of incongruous buildings, but that as in the Hok Sz Terrace case, there could be quite exceptional circumstances why development should be restricted in the interests of the safety of the occupants. The use of Section 16(1)(g) to plug a gap in town planning legislation, however laudable the motive, or pressing the considerations of general public policy, would not be a proper exercise of the discretion vested in the Building Authority under that provision, and indeed the use of 16(1)(g) is only a dozen cases (several of which related to the Hok Sz Terrace area) serve to indicate acceptance by the Building Authority of its unsuitability as an instrument of planning policy.

(2) The correct approach would be to impose an Outline Zoning Plan with plot ratio/building height control

The Tribunal acknowledged and fully appreciated the genuine concern of those involved in the Building Committee recommendation of 28 May 1991 and the Building and Lands Conference decision on 6 June 1991. The Tribunal stated that it believed that the members present were acting *bona fide* in what they considered to be the general interests of the public. They were of the view that it was essential for government policy for the redevelopment of stepped streets to become clear before they dealt positively with the redevelopment proposal for this site.

However, the Tribunal added that the correct approach, if the government intended to restrict development generally in stepped street areas, was for the government to do so by way of an *Outline Zoning Plan.* In the OZP, the areas of limited access were defined and development restricted either by way of height limitation or limitation of plot ratio, or both. This had already been done by limiting plot ratio in the area south of U Lam Terrace. The rationale was, in this way, developers and other affected parties would be able to know the redevelopment potential of sites and the Building Authority would not, hopefully, need to use section 16(1)(g) of the *Buildings Ordinance* with all its attendant uncertainties.

- **Comments:**

There was a further application and appeal to the Appeal Tribunal which resulted in a successful judicial review application by the appellant. In *re: Super Mate Ltd.* [1995] 1 HKLR 287 HCMP No. 200 of 1994 (9 June 1994)

HEDLAND INVESTMENTS (1)

- **Building Appeal Case Name:** 11–13 Sands Street, Inland Lots Nos. 2392–2393, Hong Kong [**Hedland Investments (1)**]
- **Building Appeal Case No. :** 100/90
- **Similar Cases:** *Nos. 2–11 Hok Sz Terrace; Nos. 29–31 Sands Street; No. 115 Caine Road and Nos. 1–6 Po Wa Street* (22/90)*; No. 8 U Lam Terrace* (54/90) *and the Sheung Shui – S.S.I.L.5 Case*
- **Nature of the Case:** s. 16(1)(g) of the *Buildings Ordinance*
- **Date of Hearing:** 31 October 1990
- **Date of Decision**: cannot be verified, likely to be 4 December 1990
- **Chairperson of Tribunal:** name cannot be verified

- **Representation:** no counsel representation for both parties
- **Decision:** appeal dismissed, inquiry refused
- **Rules Laid down by the Decision:**

(1) It is well established that there are two limbs to section 16(1)(g). The Building Authority may refuse to approve building plans where a proposed building would differ in height, design, type or intended use from buildings in the immediate neighbourhood (first limb), or from buildings previously existing on the same site (second limb). The second limb covers situations in which a proposed building 'would result in a building differing in height from the building previously existing on the same site'.

(2) 'When considering an appeal of this kind it is our duty to weigh very carefully the considerations which underlie the decision appealed against. On the one hand, developers should not be at the mercy of

Figure 4.8 Site plan of Nos 11–13 Sands Street (the *Hedland Investments (1) Case*), reproduced with permission of The Director of Lands, © Government of Hong Kong SAR Licence No. 40/1999

Photograph 4.10 Sands Street continued as a stepped street uphill

Photograph 4.11 The site on Nos. 11–13 Sands Street is still vacant by 1999

Government as to whether or not they will be able to develop sites to the maximum extent permitted by the schedules to the *Building (Planning) Regulations*. Intending purchasers make searches through architects and solicitors to ascertain whether or not the lease conditions contain restrictions on development, or whether the plans are subject to "special approval". If a developer is told that there are no such provisions, and that his intentions do not contravene any approved or draft plan prepared under the *Town Planning Ordinance,* he will normally conclude that a full development of the lot will be permitted, if plans are presented which comply with the relevant regulations. On the other hand, there are exceptional cases where there is some overriding consideration relating to the particular proposals for development in which the Building Authority would be failing in his duty to ensure reasonable standards of safety if he passed plans which otherwise conformed, and in these few cases failing within the precise language of section 16(1)(g) plans can be disapproved even though all other requirements of the *Buildings Ordinance* have been observed.' (*Nos. 2–11 Hok Sz Terrace Case,* as cited in this case)

(3) 'The duty of the Building Authority is to administer the Buildings Ordinance so as to have due regard to the safety of the occupants of buildings affected by planning proposals. As we said in the Hok Sz determination, in the final analysis the Building Authority is responsible for the due and proper administration of the Ordinance. Lack of access roads prevents firefighting vehicles from getting close to the buildings that are served in this area only by stepped streets. The problem of access extends also to ambulances and, to a lesser extent, garbage collection.' (*Nos. 29–31 Sands Street Case,* as cited in this case)

(4) *No. 115 Caine Road and Nos. 1–6 Po Wa Street* (22/90) were also situated in a stepped street with no vehicular access. The proposed building was of 27 storeys in height with 6 units per floor making a total of 162 units. In dismissing the appeal, the Tribunal referred to the decisions of the *Nos. 2–11 Hok Sz Terrace* and *Nos. 29–31 Sands Street Cases*.

(5) *No. 8 U Lam Terrace* (54/90) was also a stepped street with no vehicular access. In dismissing the appeal, the Tribunal referred to the decisions of *Nos. 2–11 Hok Sz Terrace; Nos. 29–31 Sands Street;* and *No. 115 Caine Road and Nos. 1–6 Po Wa Street* (22/90) *Cases*.

(6) Although the *Sheung Shui – S.S.I.L.5 Case* did not relate to proposed developments adjacent to stepped streets, the following passage from the Tribunal's decision on the second limb of section 16(1)(g) of the *Buildings Ordinance* is relevant:

> How then are we to construe the discretion vested in the Building Authority under the second limb of 16(1)(g)?

> Counsel for the Appellants has submitted that the Building Authority should exercise a discretion under the second limb only in the context of safety and public health and Counsel relies upon the general nature and character of the Buildings Ordinance which by its short title indicates that it is to amend and consolidate the law relating to the construction of buildings.
>
> With some reluctance we have come to the conclusion that the Building Authority's discretion under the second limb should be for the general purposes of the Ordinance, i.e. safety and public health, and not for the preservation of particular areas so as to maintain the character of these areas, which would amount to the assumption by the Building Authority of powers in the nature of town planning powers. (*Sheung Shui – S.S.I.L.5 Case,* as cited in this case)

(7) From the decisions in the *Nos. 2–11 Hok Sz Terrace; Nos. 29–31 Sands Street; No. 115 Caine Road and Nos. 1–6 Po Wa Street* (22/90); *No. 8 U Lam Terrace* (54/90) and *Sheung Shui – S.S.I.L.5 Cases*, the Tribunal found that the Building Authority, in exercising his discretion under the second limb of section 16(1)(g), had to constantly bear in mind a reasonable standard of safety for occupants in a high-rise building. In deciding whether or not to approve the building plans, this safety factor had to weigh predominantly in the minds of those charged with the administration of the *Buildings Ordinance.*

(8) The Director of Fire Services has no power to withhold a certificate where the problem is lack of access rather than failure to meet the Code of Practice published from time to time by the Director. The fact that the Director of Fire Services has issued a certificate pursuant to section 16(1)(b) is irrelevant for the purposes of determining matters regarding means of escape.

- **Background:**

The appellant, Hedland Investments Ltd., was the owner of Nos. 11–13 Sands Street, Hong Kong, erected on Inland Lot Nos. 2392 and 2393, i.e. the subject site.

On 24 July 1990, the appellant's Authorized Person (AP) submitted certain building plans to the Building Authority for approval. These plans were related to a proposed building intended to be erected on the subject site.

By a letter dated 21 September 1990, the Building Authority informed the AP that the said building plans were disapproved 'under *Buildings Ordinance* Section 16(1)(g) on the ground that the carrying out of the works shown thereon would result in a building differing in height from the building previously existing on the same site'.

By a letter dated 25 September 1990, the AP, on behalf of the appellant, appealed against the Building Authority's decision to disapprove the said building plans.

- **Arguments:**

  The appellant argued on the following grounds:

  (a) The proposal was for a domestic building of 25 storeys to replace an existing, old 4-storey building in Sands Street. There were other buildings just a little further up Sands Street on the same side. They were 11, 12, 13 and 17 storeys high. Besides, a proposed building of 24 storeys had been recently approved for No. 3, Sands Street. Therefore, there was no aesthetic reason for refusing the construction of a 25-storey building.

  (b) Building plans were previously submitted and approved for a 6-storey building on the subject site with a site coverage of about 60%. The current proposal would have a site coverage of only 33.3%. This would provide for a better environment, with more space between the proposed building and the buildings in its vicinity.

  (c) Though the proposed building would not be of the same height as the one previously existing on this site, a similar description generally applied in respect of almost every other new building erected on an old building site in Hong Kong. Except in some of the rural areas, nearly all new building works in Hong Kong generally involved the demolition of an old, low building and the construction of a new building, which would almost always be taller than the building it replaced.

  (d) The Building Authority's objection was probably based on the belief that the 25-storey building would represent a possible fire risk. However, the Director of Fire Services had not made any adverse comment on the proposed building, and had in fact certified the building plans in terms of *Buildings Ordinance* section 16(1)(b) on 3 September 1990. Besides, there was a fire hydrant immediately outside the subject site on Sands Street.

  (e) The means of escape from the proposed building would be excellent since at ground floor level there would be no domestic accommodation, and two proposed staircases would discharge to open areas under the building to the rear and front. This would allow for easy dispersal and evacuation of residents in the event of fire. The staircases would be 'pressurized' in accordance with the latest upgraded fire services recommendations on practice.

  (f) As regards the other forms of building servicing, the proposed building would be adjacent to Sands Street which was 16 metres wide outside the site; vehicular access was possible quite nearby the lower part of this street. For the convenience of postal workers, a panel of letter boxes would be provided on a wall immediately adjacent to Sands Street.

  (g) The maintenance of the proposed 25-storey structure would present no problems. For other forms of building servicing such as the delivery

of goods and provisions, and the removal of refuse, the situation would indeed be considerably **better** for a flat on **any** floor of the proposed new building than for a flat at 1st, 2nd or 3rd floor level of the existing building on this site. The reason was that in the new building it would be possible to reach each floor by lift, whereas in the existing old building there was no lift and it was quite an effort to walk up several flights of stairs. The proposed new building would be provided with two lifts. As there would only be two flats per floor, the provision of two lifts should be adequate.

- **Reasons for Decision:**

The Appeal Tribunal dismissed the appeal and refused an inquiry.

Wrong limb of s. 16(1)(g)

Before determining the appeal application, the Tribunal pointed out that the appeal application had been based on the wrong limb of s. 16(1)(g):

> It is well established that there are two limbs to section 16(1)(g). The BA may refuse to approve building plans where a proposed building would differ in height, design, type or intended use (a) from buildings in the immediate neighbourhood (first limb) or (b) from buildings previously existing on the same site (second limb). In the present case, the BA by its letter dated 21 September 1990 rejected the building plans based on the second limb of Section 16(1)(g) i.e. the proposed building 'would result in a building differing in height from the building previously existing on the same site'.

The Tribunal then reviewed previous cases decided on the basis of the second limb of s. 16(1)(g) as the site abutted on to that part of Sands Street which was stepped and had no vehicular access.

Nos. 2–11 Hok Sz Terrace

Hok Sz Terrace was a stepped street with no vehicular access to the site. The proposed buildings were of 21 storeys and 25. In dismissing the appeal in that case, the Tribunal had this to say:

> When considering an appeal of this kind it is our duty to weigh very carefully the considerations which underlie the decision appealed against. On the one hand, developers should not be at the mercy of Government as to whether or not they will be able to develop sites to the maximum extent permitted by the schedules to the *Building (Planning) Regulations*. Intending purchasers make searches through architects and solicitors to ascertain whether or not the lease conditions contain restrictions on development, or whether the plans are subject to 'special approval'. If a developer is told that there are no such provisions, and that his intentions do not contravene any

> approved or draft plan prepared under the *Town Planning Ordinance*, he will normally conclude that a full development of the lot will be permitted, if plans are presented which comply with the relevant regulations. On the other hand, there are exceptional cases where there is some overriding consideration relating to the particular proposals for development in which the Building Authority would be failing in his duty to ensure reasonable standards of safety if he passed plans which otherwise conformed, and in these few cases failing within the precise language of section 16(1)(g) plans can be disapproved even though all other requirements of the Buildings Ordinance have been observed. (*Nos. 2–11 Hok Sz Terrace Case*, as cited in the *Hedland Investments (1) Case*) (italics and emphasis added)

Nos. 29–31 Sands Street

Nos. 29–31 Sands Street was further up Sands Street from the subject site. In that case, however, only **tentative plans** had been submitted for approval. The Tribunal held that the Building Authority had no jurisdiction to approve tentative plans and dismissed the appeal. Having done so, the Tribunal expressed its views in the following manner:

> The duty of the Building Authority is to administer the Buildings Ordinance so as to have due regard to the safety of the occupants of buildings affected by planning proposals. As we said in the Hok Sz Terrace determination, in the final analysis the Building Authority is responsible for the due and proper administration of the Ordinance. Lack of access roads prevents firefighting vehicles from getting close to the buildings that are served in this area only by stepped streets. The problem of access extends also to ambulances and, to a lesser extent, garbage collection. (*Nos. 29–31 Sands Street Case*, as cited in the *Hedland Investments (1) Case*)

No. 115 Caine Road and Nos. 1–6 Po Wa Street (22/90)

No. 115 Caine Road and Nos. 1–6 Po Wa Street was also situated in a stepped street with no vehicular access. The proposed building was of 27 storeys in height with 6 units per floor, making a total of 162 units. In dismissing the appeal, the Tribunal referred to the *Hok Sz Terrace* and *Sands Street* decisions.

No. 8 U Lam Terrace (54/90)

No. 8 U Lam Terrace was also a stepped street with no vehicular access. The proposed building was of 24 storeys in height. In dismissing the appeal, the Tribunal referred to the aforesaid three decisions of *Nos. 2–11 Hok Sz Terrace, Nos. 29–31 Sands Street* and *No. 115 Caine Road and Nos. 1–6 Po Wa Street* (22/90) *Cases*.

Sheung Shui – S.S.I.L. 5

The *Sheung Shui – S.S.I.L. 5 Case* was heard by the Tribunal on 9 April 1980. Although this case did not relate to the proposed developments adjacent to stepped streets, the following passage from the Tribunal's decision on the second limb of section 16(1)(g) was relevant.

> How then are we to construe the discretion vested in the Building Authority under the second limb of 16(1)(g)?
>
> Counsel for the Appellants has submitted that the Building Authority should exercise a discretion under the second limb only in the context of safety and public health and Counsel relies upon the general nature and character of the *Buildings Ordinance* which by its short title indicates that it is to amend and consolidate the law relating to the construction of buildings.
>
> With some reluctance we have come to the conclusion that the Building Authority's discretion under the second limb should be for the general purposes of the Ordinance, i.e. safety and public health, and not for the preservation of particular areas so as to maintain the character of these areas, which would amount to the assumption by the Building Authority of powers in the nature of town planning powers. (*Sheung Shui – S.S.I.L.5 Case,* as cited in the *Hedland Investments (1) Case*)

Safety was top priority and the proposed building was much taller than 17 storeys

From the above decisions, the Tribunal found that the Building Authority, in exercising its discretion under the second limb of section 16(1)(g), had to constantly bear in mind 'a reasonable standard of safety for occupants in a high-rise building'. In deciding whether or not to approve the building plans, this safety factor had to 'weigh predominantly in the minds of those charged with the administration of the *Buildings Ordinance*'.

Then the Tribunal considered the appellant's submission 'that a building of 24 storeys in height has been recently approved for No. 3 Sands Street and that there are other buildings just a little up Sands Street, on the same side, of 11, 12, 13 and 17 storeys'.

As regards *No. 3 Sands Street*, the Tribunal called for and inspected the approved plans for this development. In those plans, the Authorized Persons were able to demonstrate to the satisfaction of the BA that fire engines, ambulances, and so on, could have access to No. 3 Sands Street and Rock Hill Road. For the purpose of manoeuvring these vehicles, space had been provided in the proposed new building.

The Tribunal came to the view that though there might well be buildings of between 11 to 17 storeys in Sands Street, **there was a great difference between a 17-storey building and a proposed 25-**

storey building. As 'the instant case is on all fours with the first four decisions referred to . . . the appeal is dismissed and an inquiry will not be held'.

Director of Fire Services was not authority for means of escape

As regards the appellant's submission that the Director of Fire Services did not object to the proposal and had issued a certificate, the Tribunal pointed out that under section 16(1)(b)(ii) of the *Buildings Ordinance*, the Director of Fire Services had no power to withhold a certificate where the problem was lack of access rather than failure to meet the Code of Practice published from time to time by the Director. The fact that the Director of Fire Services had issued a certificate pursuant to section 16(1)(b) was therefore irrelevant for the purpose of this appeal.

Previously approved plans and encouragement for future submission

As regards the appellant's submission that building plans had been previously submitted and approved for a six-storey building on the site, the Tribunal stated that **if further revised plans were put in for a more modest development on the subject site, it was the Tribunal's hope that such revised plans would receive consideration even if the building height exceeded the height in the original approved plans**.

HEDLAND INVESTMENTS (2)

- **Building Appeal Case Name:** Inland Lots Nos. 2392 and 2393, 11–13 Sands Street, Hong Kong [**Hedland Investments (2)**] (Reported in HKLR [1994]: 7–19)
- **Building Appeal Case No. :** 57/91
- **Nature of the Case:** *'Practice Note No. 1974.1'* regarding stepped access; *Code of Practice on Provision of Means of Escape, 1986 Edition; Code of Practice for Minimum Fire Service Installations and Equipment and Inspection and Testing of Installations and Equipment;* Regulation 30(3) of the *Building (Administration) Regulations*
- **Dates of Hearing:** 8 and 9 July 1992
- **Date of Decision:** 27 July 1992
- **Chairperson of Tribunal:** Mr Donald Quintin Cheung
- **Representation:**

  (a) Mr Michael Thomas QC for the appellant
  (b) Mr Kwok Sai Hay for the respondent

- **Decision:** Appeal allowed
- **Rules Laid down by the Decision:**

(1) From the following leading appeal decisions,

(a) Nos. 2–11 Hok Sz Terrace, which was decided on 27 February 1973;
(b) Nos. 29–31 Sands Street, Case File No. GR/AT/70;
(c) Sheung Shui – S.S.I.L.5, Case File No. GR/AT/14/79;
(d) No. 115 Caine Road, Case No. 22/90;
(e) No. 8 U Lam Terrace, Case No. 54/90; and
(f) Nos. 4–5 Knutsford Terrace, Case No. 9/87,

two fundamental principles are established:

(a) the Building Authority is the proper authority to administer the *Buildings Ordinance*; and
(b) in exercising its discretion under section 16(1)(g) of the *Buildings Ordinance* and Regulation 19(2) of the *Buildings (Planning) Regulations*, the Building Authority must do so fairly and properly in order to ensure that public health and safety are not compromised.

(2) The Tribunal is bound by its earlier decisions. It should consistently apply the same principles to similar facts. To dismiss an appeal contrary to previous decisions will amount to condoning a double-standard practice.
(3) On the grounds of precedents alone, the Tribunal must allow or dismiss an appeal.
(4) Unless their authors are available for cross-examination in the hearing, reports should not be produced.

- **Background:**

This appeal was an aftermath of *Hedland Investments (1) Case*. The subject site, Inland Lot Nos. 2392 and 2393, was situated in Nos. 11–13 Sands Street, Kennedy Town. On the subject site were a couple of 3-storey buildings. Sands Street was a tree-lined stepped street, approximately 16 m in width. There was no vehicular access to that part of Sands Street where the site was situated.

The Tribunal visited the site and from inspection, the nearest point to which there was vehicular access was approximately 50 m from the site. The majority of the buildings on Sands Street were mainly 3 or 4-storey pre-war buildings or 6-storey post-war buildings. There were, however, four higher buildings on the same side (i.e. west of the site). They were respectively 11, 12, 13 and 17 storeys high. From the evidence before the Tribunal, the occupation permit of three of these four buildings were issued in 1964–1965 and the occupation permit in respect of the

fourth, i.e. 23–25 Sands Street (a 17-storey building), was issued in October 1974 on plans that were approved in September 1971.

In 1988, building plans were submitted by the appellant for the erection of a six-storey domestic building at No. 11 Sands Street and these plans were approved by the BA. In 1990, the appellant (Hedland Investments Ltd.), through his AP, submitted plans for the erection of a **25-storey** domestic building on the subject site. The Building Authority rejected these plans on the same ground that 'under *Buildings Ordinance* Section 16(1)(g) on the ground that the carrying out of the works shown thereon would result in **a building differing in height from the building previously existing on the same site**'.

The appellant had appealed against the earlier rejection. The Tribunal, without conducting a formal hearing and on the grounds stated in its decision dated 4 December 1990, dismissed the appeal. Paragraph 13 of the decision dated 4 December 1990 reads as follows:

> 13. In item (a) of the grounds of appeal, the Appellant mentioned that building plans were previously submitted and approved for a six storey building on the Site. If further revised plans are put in for a more modest development on the Site, it is the Tribunal's hope that such revised plans would receive consideration even if the building height exceeded the height in the original approved plans.

Encouraged by the Tribunal's recommendation, the appellant submitted plans to the Building Authority through his Authorized Person (AP), Mr T.K. Tsui, for the erection of a **13-storey** building on the site. These plans were subsequently amended to provide for a **12-storey** building. They were submitted to the Building Authority on 8 July 1991.

The 12-storey building would have two domestic apartments per floor. The building would be serviced by two lifts (one earmarked as a firefighters' lift, i.e. a lift reserved exclusively for members of the Fire Services Department in the event of fire on the upper floors where speedy access was required by firefighters to proceed from the ground to the upper floor in question) and two 'pressurized staircases'.

The revised plans were considered by the Building Authority on two occasions, namely at a 'Building Committee Meeting' on 28 May 1991 and at a 'Buildings and Lands Conference' on 6 June 1991.

By a letter dated 3 July 1991, the Building Authority informed the appellant that his application was refused. The reasons were as follows:

> I hereby REFUSE to give my approval to your building plans under the Buildings Ordinance Section 16(1)(g) on the ground that the carrying out of the works shown thereon would result in a building differing in height from the building previously existing on the same site.

On 23 July 1991, the appellant filed a Notice of Appeal against the Building Authority's decision in disapproving the revised plans for a 12-storey building. In a letter dated 23 July 1991 to the Building Authority, the AP set out the grounds of appeal:

> With reference to your (Building Authority's) letter of 3rd July, 1991, we appeal, on behalf of our Client, your rejection of our building plan, submitted on 8th July, 1991 on the reason that you (the Building Authority) **have not considered the recommendation of the Appeal Tribunal on 31st October that a lesser development at the above site may be allowed (now reduce from 25 storeys down to 12 storeys only)**. (emphasis and brackets added)

- **Arguments:**

The respondent's submissions were as follows:

(a) Mr Viney submitted that as a result of the Tribunal's last decision on the subject site made on 4 December 1990 and the 'hope' raised in paragraph 13 of that decision, a Committee (under the auspices of the Planning Department) had been set up to conduct an overall review as to the desirability of increasing the 6-storey height limit imposed on 'stepped-streets'.

(b) Mr S. H. Kwok, counsel for the respondent, informed the Tribunal that the Committee referred to in (a) above had completed a review and had compiled a preliminary report entitled 'Redevelopment along Stepped Streets' for discussion by the government departments concerned. Mr Kwok offered to produce a copy of this preliminary report to the Tribunal.

The appellant argued on the following grounds:

(a) The Building Authority had not considered the recommendation of the Appeal Tribunal on 31 October 1990 which stated that a lesser development on the above site might be allowed if the proposal had reduced the proposed redeveloped building height from 25 storeys down to 12 storeys only.

During the hearing, additional grounds were submitted by the counsel for the appellant, Mr Michael Thomas QC, as follows:

(a) the proposed development would be in every respect superior to the existing residential accommodation available on the site;

(b) the proposed development would be superior to a development of the site to 6 storeys only (a height that would be acceptable to the Authority);

(c) whatever the appropriate height for buildings along Sands Street, there was no good reason to restrict development to the height of the existing buildings;

(d) the proposed development would conform to all reasonable requirements of public safety and health; and
(e) the Building Appeal Tribunal ('the Tribunal') had previously given an indication that a development of the height now proposed would be favourably considered.

Mr Thomas objected to the production of a planning report by the Planning Department unless its authors were available for cross-examination.

- **Reasons for Decision:**

The Appeal Tribunal allowed the appeal.

Code of Practice and other facts

Before making its determination, the Tribunal noted the evidence adduced by the appellant and the respondent in relation to Codes of Practice and certificates:

(a) Consequent upon an overdevelopment of high-rise buildings on similar stepped streets, 'Practice Note No. 1974.1' was issued with a view to notifying Authorized Persons and others that thenceforth, any new building within the defined area 'will be limited to a height of 4 storeys, with domestic storeys 10 feet high'. The height limit was subsequently increased to 6 storeys and recently to 7 storeys.
(b) The said Practice Note, which had no statutory effect and used as a guideline, had been consistently applied to Sands Street and the surrounding area since 1974. According to Mr C. A. Viney, Government Building Surveyor/Development and head of the Development Division of the Buildings Ordinance Office, and the respondent's only witness in this appeal, the Practice Note had not been reissued for several years though the contents were still the policy of the Building Authority.
(c) In accordance with Table I of the *Code of Practice on Provision of Means of Escape, 1986 Edition* (Appendix 6 attached to the AP's proof of evidence), the maximum number of persons (calculated at 9 m^2 of usable floor area per person) permitted to occupy the proposed building was limited to 129 as compared to 115 persons in a six-storey building with four domestic flats per floor (served by one staircase and without the benefit of a lift) if such was erected on the subject site in accordance with the Practice Note. The Tribunal noted in addition that:

Note: (1) During the hearing of this appeal, Mr. Viney informed the Tribunal that the Practice Note, in so far as it affects Sands Street, has been relaxed to permit the erection of a 7-storey building.

(2) Based on a 7-storey building, Mr Edwin Wong of the Tribunal, having made the appropriate proportionment, informed his colleagues that the maximum number of permitted occupants of a 7-storey building is 134 persons.
(3) The 1986 Code of Practice is slightly more stringent than its predecessor, the 1968 Code of Practice (Appendix 7 attached to the AP's proof of evidence) where the maximum number of persons permitted to occupy a domestic building envisaged by the Revised Plans is calculated at the rate of 100 sq. ft. (9.23 sq. m.) of usable floor per person.
(4) In Case No. 89 of 1990 it was conceded by both the Appellant and the Respondent (BA) there that the Code of Practice is one of most stringent in the world and like the Practice Note, has no statutory effect.

(d) The Tribunal noted the meaning of 'pressurized staircases'; two of which were proposed: 'Pressurized staircases [referred to in another Code of Practice entitled "Codes of Practice for Minimum Fire Service Installations And Equipment And Inspection and Testing of Installations and Equipment" ("CSI")] are not prescribed for a domestic high-rise building envisaged by the Revised Plans. They are more expensive to install than conventional staircases for this type of building. Pressurized staircases are prescribed by CSI for high density buildings, e.g. low and high-rise hotels (paragraphs 4.28 and 4.29 of CSI) as well as high-rise industrial/godown buildings (paragraph 4. 31 of CSI).' 'Pressurized staircases are improvements on normal conventional staircases. It is defined under paragraph 2.2 of CSI as "A system designed to protect staircases against the ingress of smoke by maintaining the air within staircases at pressures higher than those in adjacent parts of the building" .'
(e) Pursuant to section 16(1)(b)(ii), the Director of Fire Services had issued to the AP his Certificate. The Tribunal was satisfied from the evidence given by Mr Tam Hon Cheung, the fire expert called by the appellant, that prior to the issue of the Certificate, the Director or a member of his staff, visited the site and took into consideration that the site was situated in a stepped-street where there was no vehicular access. The Tribunal also accepted Mr Tam's evidence that in that part of Sands Street where the site was situated, there were more fire hydrants than one would normally expect from a street with vehicular access.

Statutory provisions

The Tribunal then reviewed the relevant statutory provisions which involved the exercise of discretion by the Building Authority.

(a) Section 16(1)(g) of the *Buildings Ordinance* read:

> 16(1) The Building Authority may refuse to give his approval of any plans of building works where–
>
> > (g) the carrying out of the building works shown thereon would result in a building differing in height, design, type or intended use from buildings in the immediate neighbourhood or previously existing on the same Site;

(b) Regulation 19(2) of the *Buildings (Planning) Regulations* reads:

> 19(2) Where a site abuts on a street less than 4.5 m wide or does not abut on a street, the height of any building or buildings to be erected thereon and the maximum site coverage and plot ratio to be permitted in respect of such building of buildings shall be determined by the Building Authority.

Statutory interpretations

The Tribunal stated the following:

(1) 'It is well established that there are two limbs to Section 16(1)(g). This appeal is concerned with the second limb conferring a discretion on the BA to disapprove plans where a proposed building would differ in height, design, type or intended use from buildings previously existing on the same site.'
(2) 'Over the years there have been numerous decisions of the Tribunal relating to the second limb of Section 16(1)(g) and the exercise of a discretion by the BA in approving or disapproving plans either under Section 16(1)(g) (irrespective of whether the proposed buildings are to be erected on a stepped street) or Regulation 19(2).'

Relevant appeal decisions

Then, the Tribunal gave a list of leading appeal decisions:

(a) Nos. 2–11 Hok Sz Terrace, which was decided on 27 February 1973;
(b) Nos. 29–31 Sands Street, Case File No. GR/AT/70;
(c) Sheung Shui – S.S.I.L.5, Case File No. GR/AT/14/79;
(d) No. 115 Caine Road, Case No. 22/90;
(e) No. 8 U Lam Terrace, Case No. 54/90; and
(f) Nos. 4–5 Knutsford Terrace, Case No. 9/87.

The Tribunal stated that the aforesaid cases established the two fundamental principles:

(a) The Building Authority is the proper authority to administer the *Buildings Ordinance*.
(b) In exercising its discretion under section 16(1)(g) of the *Buildings*

Ordinance and Regulation 19(2) of the *Buildings (Planning) Regulations*, the Building Authority must do so fairly and properly in order to ensure that public health and safety is not compromised.

Determination in the Hok Sz Terrace Case

The Tribunal cited a passage of the Tribunal in the *Hok Sz Terrace Case*, namely:

> 2. Our first task is to decide whether or not the Building Authority has a discretion to exercise in deciding whether or not to refuse approval of the Subject Plans under Section 16(1)(g) of the Buildings Ordinance. If the building works shown in the Subject Plans were permitted, the result would clearly be a building differing in height from that previously existing on the same site. This single circumstance brings the present case within the possible exercise of discretion under Section 16(1)(g). Having determined that the Building Authority was vested with a discretion, it is now necessary for us to see whether that discretion has been properly exercised. We accept the law relied upon by Counsel for the Appellants. If we felt that the Building Authority had acted capriciously or had been influenced by extraneous considerations which ought not to have influenced him, or conversely had failed to take into account considerations which ought to have influenced him, then this would have a considerable bearing upon our decision in this Appeal. We accept that the discretion must be exercised fairly.

Considerations taken into account by the Building Authority in respect of stepped streets without vehicular access

Mr Viney, in the course of his evidence, informed the Tribunal that when the Building Authority received an application for redevelopment of a site which was situated on a stepped street with no vehicular access, it would, on individual merits of the application, take into account a number of considerations in the exercise of discretion under section 16(1)(g) of the *Buildings Ordinance*. The Tribunal assumed that (for the reasons stated below) these considerations also applied to Regulation 19 of the *Building (Planning) Regulations*. These considerations were:

(a) the proposed population density; and
(b) the extent to which the normal day-to-day servicing such as:
    (i) refuse disposal;
    (ii) delivery of goods and effects;
    (iii) access for the elderly and disabled;
    (iv) access for ambulances, and
    (v) access for firefighting and rescue appliances would be severely impeded.

Determination in the Nos. 4–5 Knutsford Terrace Case

Having referred to the *Hok Sz Terrace Case*, the Tribunal referred to the *Nos. 4–5 Knutsford Terrace Case* (09/87). Knutsford Terrace was a raised terrace with stepped access and, like Sands Street, there was no vehicular access. The Tribunal in the *Knutsford Terrace Case* found that the overall width of Knutsford Terrace was less than 4.5 m and consequently Regulation 19 applied to any redevelopment proposals. On the date of the appeal hearing, there were eight buildings erected on the north side of Knutsford Terrace. Of these eight buildings, two were used as schools; they were 6-storey and 13-storey high respectively. One was 12-storey and the remaining five were all 14-storey buildings. In that case, the appellant submitted plans to demolish the 13-storey school and replace it with a 14-storey domestic building. Pursuant to Regulation 19, the Building Authority rejected the appellant's proposal though the BA would not object to the redevelopment proposals if a 12-storey domestic building was erected on that site.

Having quoted part of the decision in *No. 2–11 Hok Sz Terrace* decision, the Tribunal in *Knutsford Terrace* had this to say:

> In his evidence, Mr Viney said that the reason for the Building Authority invoking regulation 19 to restrict the proposed building to 12 storeys is 'in the interests of public safety as emergency vehicles were unable to reach the site'. It is on this basis that the Building Authority has reviewed its policy to allow new buildings to 14(?) storeys.
>
> We entirely agree with both Mr Viney and the Building Authority that public safety is of paramount importance in deciding whether or not to invoke regulation 19. However, we also agree with Mr Barlow that the proposed building, which is of 14 storeys and for domestic use, would not have more intensive occupancy than its predecessor, which was a school. We do not consider that public safety would be endangered by the development of a 14-storey building for domestic use any more than by a 12-storey building used as a school. Firefighting hand appliances would not reach a building of 12 storeys on Knutsford Terrace in any event.

Minutes of the Building Authority's meetings

The revised plans submitted by the AP on 8 July 1991 had been considered by the Building Authority on two occasions, namely at a Building Committee Meeting on 28 May 1991 and at a Buildings and Lands Conference on 6 June 1991.

The Building Authority, as had been customary when appearing before the Tribunal, made full disclosure and in this instance produced the minutes of these two meetings to the Tribunal during the hearing. The Tribunal noted the relevant contents of the minutes.

[I] Extracts from the Minutes of Building Committee Meeting of 28 May 1991:

SECTION A CASE NOTES BY CBS

Recommendation	
BO s16(1)(g) (second leg)	That the proposal for a 12-storey residential building which is considered to be a more modest development than the previous proposal for a 25-storey building be accepted without invoking BO s16(1)(g)(second) leg).
Problem	No vehicular access to site.
Powers/Remedies	BO s16(1)(g)(second leg).

Background/Argument

(a) The subject site abuts on Sands Street which is stepped and no vehicular access to this site is available. Existing on site is a 3-storey domestic building.

(b) A redevelopment proposal for a 25-storey building, consisting of ground floor playground with domestic accommodation above was disapproved on 21 September 90 under BO s16(1)(g) (second leg).

(c) A formal appeal was lodged on 25 September 90 against the decision. The Appeal Tribunal delivered its decision on 11 December 90. It decided that no good cause had been shown why an inquiry should be held. Accordingly, the Tribunal dismissed the application and refused to hold an inquiry.

(d) In determining the appeal, the Tribunal held, inter alia that if further revised plans are put in for a more modest development on the site, it is the Tribunal's hope that such revised plans would receive consideration even if the building height exceeds the height in the original approved plans which is 6-storey.

(e) Subsequent to the appeal, a proposal for a 13-storey building was also rejected invoking BO s16(1)(g)(second leg). In making the decision, the BA noted 'should this case come to appeal and questions about the apparent lack of a response to the "hope" previously expressed in the Appeal Tribunal be raised, our position should rest on the desirability of awaiting the outcome of the overall investigation now being carried out. If appropriate, mention might also be made of thought being given to the possibility of allowing building development up to 12 storeys or 30 m whichever is less on the west side of Sands Street only (as discussed at BALC on 15 March 91).'

(f) The current proposal is only 12-storey high which is considered acceptable without invoking BO s16(1)(g). It is also considered that it may not be justifiable to await the outcome of the current review regarding permitting developments in excess of 6 storeys in stepped streets, before making a decision on this particular case which was the subject the appeal referred to in (c) & (d) above.

SECTION B PROCEEDINGS IN CONFERENCE

DISCUSSION/DECISION

Members noted the history of this case as outlined in the Background/Argument of the case notes and GBS/L's advice that BOO's internal review into the matter of raising the 6-storey standard in respect to such developments had been completed. In this regard GBS/L advised that the review had been unable to produce a positive conclusion regarding a general policy for the means of escape aspects, since every site was different and was affected by so many different factors.

Members also noted that the Planning Department's review of this matter, which was currently in progress and expected to be completed by August 1991, was trying to identify specific locations with a view to recommending development limits in such areas, rather than recommending a general increase to a particular building height level.

After discussion members generally agreed that a residential building containing 2 staircases, which would provide an alternative means of escape, and a fireman's lift together with enhanced fire services installations, would obviously be a real improvement on a 4 or 6-storey single staircase building from the safety point of view in the event of a fire.

They therefore considered that the main issue now was the possible adverse effects on the infrastructure of these stepped street areas, if taller buildings were now permitted, and AGREED that under the circumstances they should await the outcome of the Planning Department review in this matter, before reaching a decision on specific cases, so as not jeopardise the review in any way.

Noting the above, members AGREED to recommend to the BA in BALC to invoke BO s16(1)(g) (second leg) to disapprove the proposed re-development, on the grounds that the carrying out of the proposed building works would result in a building differing in height from the building previously existing on the same site.

Having heard member's views, CBS/HK1 revised his recommendation accordingly and members ENDORSED the revised recommendation.

In the light of the above, members also expressed a combined view that the Planning Department should adhere to

> the August 1991 date for the completion of its review and, if possible, give priority to the Sands Street/Hok Sze Terrace area with a view to reaching an earlier decision in this regard. CTP/TPB acknowledged these comments and agreed to relate them to her department. (emphasis added by the Tribunal's)
>
> and
>
> [II] Extracts from Minutes of the Buildings and Lands Conference Meeting of 6 June 1991:
>
> Section A CASE NOTES BY CBS
>
> Recommendation
>
> BO s16(1)(g) The BA endorsed BC's decision to (second leg) invoke BO s16(1)(g)(second leg) to disapprove the plans on the grounds that the carrying out of the works shown thereon would result in a building differing in height from that previously existing on the site.
>
> SECTION B PROCEEDINGS IN CONFERENCE
>
> DISCUSSION/DECISION
>
> Members noted the BC decision at MA I 2, 21/91 meeting (28.5.91) and agreed that they should await the outcome of the Planning Department review in this matter.
>
> Conference therefore advised and the BA AGREED to await the outcome of the Planning Department's review in August 1991 and in the meantime to ENDORSE the recommendation to invoke BO s16(1)(g) (second leg) to disapprove the proposed re-development, on the grounds that the carrying out of the proposed building works would result in a building differing in height from the building previously existing on the same site.
>
> PGTP noted BC members' view that the Planning Department should adhere to the August 1991 date for the completion of its review, and agreed to the request to give priority to the Sands Street/ Hok Sze Terrace area with a view to reaching an earlier decision, if possible, in this regard. (emphasis added by the Tribunal)

The appeal had to be allowed

Having noted the relevant facts, statutory provisions, early appeal decisions and the minutes of the Building Authority's meetings, the Tribunal proceeded to allow the appeal. This decision was based on two grounds: (1) the precedent in the *Nos. 4–5 Knutsford Terrace Case*; and (2) irrelevant consideration of proposed town planning principles.

(a) Precedent in the *Knutsford Terrace Case* should be followed.

The Tribunal stated categorically that as far as it was concerned, no distinction ought to be drawn between a 'stepped street' (as in this case) and a 'street' in the nature of a 'stepped terrace' (as in the *Nos. 4–5 Knutsford Terrace Case*), where in both instances there were no vehicular access. The Tribunal explained that in the *Nos. 4–5 Knutsford Terrace Case*, the Building Authority was prepared to allow the erection of a 12-storey domestic building on that site which the Building Authority considered would not endanger public safety. Therefore, there was no reason why the appellant in a similar case should have been prohibited from erecting a 12-storey building on the subject site.

The Tribunal added that it had to allow the appeal as **'to decide otherwise would be tantamount to condoning a double standard practice. What is sauce for the goose is sauce for the gander and *on this ground alone*, this Appeal must succeed'**. (emphasis added)

(b) The Building Authority had taken into account irrelevant planning considerations.

The Tribunal then dealt with the manner in which the Building Authority had dealt with the revised building plans submitted by the AP on 7 May 1991.

(i) The Planning Department's preliminary report should not be produced and was irrelevant.

The Tribunal stated that it did not know from the respondent's evidence what the terms of references of the Committee under the Planning Department were. However, if the review conducted by the Committee was restricted solely to 'stepped-streets', then that would be undesirable as, in the opinion of the Tribunal, the review should be extended to cover all streets with no vehicular access. The Tribunal agreed with Mr Thomas that the preliminary report compiled by the Planning Department should not be produced and on its part in reaching a decision, it would not wish to be influenced by the preliminary report one way or the other.

(ii) The minutes indicated that the Building Authority had wrongly awaited the outcome of the Planning Department's review and had been influenced by extraneous considerations, namely a proposed planning report.

The Tribunal pointed out that in the Building Committee Meeting held on 28 May 1991, the members of that Committee came to

the same conclusion as the Tribunal did, namely 'a residential building containing 2 staircases . . . would obviously be a real improvement on a 4 or 6 storey single staircase building from the safety point of view in the event of a fire'. However, notwithstanding this consensus of agreement and in lieu of implementing the same by approving the revised plans, the committee had opted to await the outcome of the Planning Department's review.

In the Building and Lands Conference Meeting held on 6 June 1991 attended by the Building Authority itself, it was agreed that the second limb of s. 16(1)(g) be invoked pending the outcome of the Planning Department's review.

When questioned by Mr Thomas of the necessity in invoking s. 16(1)(g) prior to the findings of the Planning Department's review, Mr Viney informed the Tribunal that unless a formal letter in the form of a refusal letter dated 3 July 1991 was sent to the AP, the revised plans would be 'deemed' to be approved under *Regulation 30(3)* of the *Building (Administration) Regulations*.

The Tribunal stated that one of the questions it had to decide was whether the revised plans were considered on their merits fairly and properly. Having considered both sets of the minutes, it formed the opinion that the revised plans had not been fairly and properly considered on its merits, and in invoking the second limb of s. 16(1)(g), **'the Building Authority was influenced by extraneous considerations, namely the proposed report by the Planning Department's review into "stepped-streets" '**.

No safety problem

Having considered Mr Viney's evidence about the factors which the Building Authority would consider when processing redevelopment proposals on stepped streets, the Tribunal came to the following opinion about issues of safety and convenience:

(a) The permitted occupants of the proposed 12 storey building contemplated by the Revised Plans is less than that of a 7 storey building and marginally over a 6 storey building and

(b) No severe impediment will affect the normal day to day servicing such as:

(i) Refuse Collection
Refuse is now normally collected from a central point in any given area and whether a 6, 7 or 12 storey building is erected on the Site is immaterial;

(ii) Delivery of Goods and Effects
This is an inconvenience and does not affect public health or safety;

(iii) Access for the elderly and disabled
There is no evidence before the Tribunal that the proposed building is intended exclusively for the elderly or infirmed and any intended occupiers of this building whether elderly, infirmed or otherwise will bear vehicular access in mind. For this class of person, a 12 storey building with lift services is preferred to a six storey building without a lift;

(iv) Access for ambulances
Irregardless of whether a 6 or 12 storey building is erected on the Site stretcher services etc only extend to 50 m or thereabouts from the Site to that part of Sands Street with vehicular access and

(v) Firefighting vehicles and rescue appliances
(a) In the course of his evidence, Mr. Tam Hon Cheung, by way of analogy, compared the buildings standing on Sands Street to the podium of a composite building consisting of shops/commercial and/or office accommodation beneath the podium and high residential blocks above the podium. This is a valid comparison as in many composite buildings in Hong Kong neither ambulances nor firefighting vehicles can be driven up to the podium.

(b) We also accept Mr. Tam's evidence that in the event of a fire in a high-rise building, the fire is fought within and not from outside a building and hence e.g. the installation and proper maintenance of pressurised staircases in a building is a safety factor in the evacuation of occupants from the upper floors of a building on fire. The key to firefighting is the availability of water and although firefighting vehicles cannot stop immediately in front of the Site in the event of a fire, there are sufficient fire hydrants in that part of Sands Street so as to enable members of the Fire Services Department to have access to water in the event of a fire.

RICH RESOURCES ENTERPRISES

- **Building Appeal Case Name:** Nos. 15 and 17 Sands Street, Hong Kong [**Rich Resources Enterprises**] (Reported in HKLR 1994: 21–30)
- **Building Appeal Case No.:** 85/92

- **Similar Cases:** *Nos. 6–8 U Lam Terrace (74/91); Nos. 11–13 Sands Street*
- **Nature of the Case:** Stepped Street
- **Dates of Hearing:** 2, 3, 5 March 1993
- **Date of Decision:** 14 April 1993
- **Chairperson of Tribunal:** Mr Edmund Y. S. Cheung
- **Representation:**

  (a) Mr Andrew Li, QC, for the appellant
  (b) Mr Stanley Lee for the respondent

- **Decision:** appeal allowed
- **Rules Laid down by the Decision:**

  (1) The proper comparison for evaluating the increase in population due to a proposal is to compare the estimated population of the proposal with that of an existing or previously existing building, not another proposed building on the subject site.
  (2) The *Nos. 6–9 U Lam Terrace Case* is the authority for stepped streets.
  (3) Safety is a major issue and it should not be overlooked in deciding applications for building in stepped accesses. However, where an Outline Zoning Plan is not present, the Tribunal has to rely on s. 16(1)(g) of the *Buildings Ordinance*.

- **Background:**

The subject site was Nos. 15–17 Sands Street, Hong Kong. There was previously existing on the subject site a building of **3 storeys**. Sands Street was a stepped street measuring some 16 m in width. There was no vehicular access to the subject site.

In 1974, the Building Authority issued a Practice Note to the effect that any new building within stepped streets or similar areas would be limited to a height of 4 storeys. This height restriction was subsequently revised to 6 storeys and to 7 storeys at the time of the appeal.

Since 1974, the Practice Note had been consistently applied to Sands Street so that no new buildings over 6 storeys, or until recently 7 storeys, had been approved except Nos. 11–13 Sands Street, the subject matter of the *Nos. 11–13 Sands Street Case* (No. 57/91).

In October 1991, Mr Darren B. Y. Lee, the Authorized Person (AP) of Rich Resources Enterprises Ltd. (the appellant) submitted building plans of a **26-storey** domestic building. This application was rejected by the Building Authority on the grounds that the carrying out of the works shown therein would result in a building differing in height from the building previously existing on the same site.

The appellant applied to the High court for a judicial review of the

Building Authority's refusal. The application was dismissed in April 1992. In May 1992, the AP submitted plans of a **7-storey** building. These were approved by the Building Authority. In August 1992, the AP submitted revised plans of a **12-storey** residential building on the subject site to the Building Authority for the approval.

On 24 September 1992, the application was considered in a meeting of the Buildings and Lands Conference. The decision of the meeting took into account a planning study conducted by the Planning Department regarding problems of stepped streets.

By a letter dated 9 October 1992, the Building Authority informed the AP that approval was refused under section 16(1)(g) of the *Buildings Ordinance* on 'the grounds that the carrying out of the works shown therein would result in a building differing in height from the building previously existing on the same site'.

In a letter dated 17 October 1992 from the solicitor of the appellant, the appellant lodged in a Notice of Appeal, setting out the grounds of the appeal.

The Tribunal visited the site and its vicinity.

- **Arguments:**

Grounds of appeal

The grounds of appeal as set out in the letter of 17 October 1992 were reported as follows:

(a) The Building Authority has on 20th August 1992 approved the developer's previous submission of plans for a proposed 7 storey redevelopment in place of the existing 3 storey building without invoking Section 16(1)(g) of the Building Ordinance.

(b) The proposed 12 storey development would be comparable to the previously proposed 7 storey development.

(c) The permitted occupants in case of the proposed 12 storey development (115) is only marginally over that in case of the previously proposed 7 storey development (107).

(d) The proposed 12 storey development would be in every respect superior to the existing 3 storey building.

(e) The proposed 12 storey development would conform to all reasonable considerations or requirements of public safety and health.

(f) Normal day to day servicing such as refuse collection, delivery of goods and effects, access for the elderly and disabled or emergency servicing such as access for ambulance, fire vehicles as well as fire fighting equipment vehicles and appliances will be similar for the 7 or 12 storey proposed development and will in any case be superior to that for the existing building.

(g) The Building Authority has adopted a double standard in approving on 26th August 1992 redevelopment plans for a 12

storey building on an adjacent site at Nos. 11–13 Sands Street and disapproving the plans for a similar 12 storey development on the site in question when the two proposed developments can be regarded as identical in safety, healthy standards and all other material circumstances.

(h) The permitted occupants of the proposed 12 storey development (115) is in fact less than that in case of the proposed 12 storey development on the adjacent site (129), the plans of which were approved by the Building Authority on 26th August 1992.

Mr Darren B. Y. Lee

Mr Lee, the AP, explained that the following fire service installations would be provided:

(a) 2 pressurized staircases with fire-resistant doors and protected lobbies [A pressurized staircase is defined as a 'system designed to protect staircases against the ingress of smoke by maintaining the air within staircases at pressures higher than those in adjacent parts of the building'.]
(b) a firefighters' lift to facilitate access to the upper floors by firefighters in case of fire
(c) emergency electricity supply for firefighting equipment including the firefighters' lift and emergency lighting
(d) fire extinguishers in all strategic locations
(e) a fire alarm system
(f) a storage tank of 9000 litres of water for firefighting before and after the arrival of firefighters
(g) hose reels and hydrants on each floor
(h) illuminated exit signs

Some of the above installations were there to compensate for the lack of vehicular access. There were also 6 fire hydrants within close proximity to the site.

Mr Lee also explained that nowadays good firefighting should be fought from within the building rather than from the outside and that in any event it was not always desirable to have a fire engine in front of a building affected by fire.

Mr Wilkie C. H. Lam

Mr Wilkie C. H. Lam, a chartered civil engineer, gave evidence for the appellant on sewage and traffic aspects:

(a) The extra liquid waste demand generated from an increased population in the proposed 12-storey building as compared to a 7-storey building was approximately 0.2 litre per second equivalent

to approximately 1% of the average capacity of the sewer and well within the buffer margin of any design standard.

(b) The extra traffic generated from a 12-storey building as compared to a 7-storey building was less than 4 vehicles per hour two-way during peak periods. This compared to some 1,800 vehicles per hour during peak periods.

Mr Andrew Li, QC

Mr Andrew Li, QC, for the appellant, had the following submissions:

(a) Though more people would live in the proposed 12-storey building than the previous 3-storey building (an increase of 65) or the approved 7-storey building (an increase of 21), the correct approach to evaluate the increase in population should be to consider the consequences of the proposed 12-storey building in comparison to the previous 3-storey building, rather than the approved 7-storey building.

(b) The statutory town plan for Mid-Levels was amended by prescribing a plot ratio of 5 in order to cope with infrastructural problems. The proposal was also based on a plot ratio of 5 though the legal maximum was 8. In other words, the appellant had voluntarily adopted a much lower plot ratio which was good in terms of town planning.

(c) A certificate had been issued by the Director of Fire Services under section 16(1)(b)(ii) of the *Buildings Ordinance*.

(d) Mr Li drew attention to the following passage from the determination in the *Nos. 6–8 U Lam Terrace Case* (60/91):

> It seems to us that what the Building Authority has to do when considering the exercise of his discretion under this limb of Section 16(1)(g) is to ask himself what negative factors will result from the difference in height between the buildings previously on the site and the proposed building. After doing this, the Building Authority has to weigh both the positive factors resulting from redevelopment and such negative factors in the balance and decide whether or not there is such a weight of negative factors resulting from the difference in height as to justify a refusal. We believe there must be some significantly greater weight in the resulting negative factors if a refusal is to be justified because the use of the section limits a developer's right to develop his site to the full extent otherwise granted to him by the Crown Lease and the Building Ordinance and Regulations.

(e) The proposed 12-storey building compared more favourably to the previous 3-storey building or a 7-storey building because:

  (i) The 12-storey building was far superior from a fire safety point of view.

(ii) It was better to have a modern building than an old one which, the Tribunal added, was not provided with any lift, let alone a firefighters' lift.
(iii) The 12-storey building compared to a 7-storey building would have a larger area of set-back and would enjoy better light and air.

The respondent had the benefit of the evidence from following experts:

Mr Cheung Ping Nang and Mr Richard Lo Ching Wai on water supply and pressure

Mr Cheung Ping Nang was Senior Engineer of the Water Supplies Department. He concluded his evidence by saying that: 'It may be considered that the existing water supplies systems at the Site are as a whole marginally inadequate for fire fighting purpose.'

Mr Li had pointed out also that the assessment of the Water Supplies Department as set out in the planning study was based on a maximum development of all sites abutting stepped streets within the areas covered by the study.

Mr Richard Lo Ching Wai, Deputy Chief Fire Officer, said that there was a standing arrangement between the Fire Services Department and the Water Supplies Department whereby the latter could, in case of a major fire, 'arrange for the diversion of more water to be supplied to the affected area by turn-cocks operating the valves of the supply network', and that the Fire Services Department 'is also equipped with portable fire pumps which can be brought into use on the stepped street level for pressurising the fire fighting water if needed. Hence, there is no problem on the availability of water and pressure for firefighting in this stepped street areas'.

Mr Tam Hon Cheung and Mr C. A. Viney on ambulance services

Mr Tam Hon Cheung gave evidence to the effect that in case of fire, the normal practice was for ambulance aids to wait at the ambulances and for the firefighters to carry injured persons there.

Mr C.A. Viney, Government Building Surveyor, offered the view that apart from the question of density, a 12-storey building compared unfavourably with a 7-storey building in that:

(a) rescue from a 7-storey building could be effected externally as well as internally; and
(b) it took longer time to run downstairs from a 12-storey building than a 7-storey building.

- **Reasons for Decision:**

Minutes of the Buildings and Lands Conference Meeting

The Tribunal noted the following extracts from the minutes of the Buildings and Lands Conference held on 24 September 1992 were relevant:

> Members noted the very substantial increase in density under the proposed 12-storey building. Members further noted that this site fell within Study Area No.1 of the document 'Redevelopment Along Stepped Street' prepared by the Planning Department and according to the recommendations therein that development of this site should be restricted to 7-storey. In determining the allowable development intensity of this site, members note the following information concerning Study Area No.1 from the document:–
>
> (i) the existing water pressure cannot meet FSD's requirement for firefighting purposes
> (ii) the existing down stream/sewer system would be overloaded
> (iii) without any road improvement works, the programme date of which is yet to be fixed, the existing road network would be unable to cope with further increased traffic demand
> (iv) the major part has unacceptable means of access, including access to emergency vehicles.
>
> Members further noted that the majority of the buildings on Sands Street are 3 or 4-storey pre-war buildings or 6 storeys post-war buildings and that most other buildings over 6-storeys along Sands Street were approved before the issue of the Practice Note in 1974 restricting development, except at Nos. 11–13 Sands Street which was subject to an appeal Tribunal's decision . . .

The Tribunal noted in particular that the meeting then made certain observations on the decision of the Appeal Tribunal in the *Nos. 11–13 Sands Street Case* (57/91) and decided that that decision did not preclude disapproval of the appellant's building plans under section 16(1)(g).

The statutory provision

The Tribunal noted the relevant part of section 16(1)(g):

> (1) The Building Authority may refuse to give his approval of any plans of building works where
>
> (g) the carrying out of the building works shown therein would result in a building differing in height, design, type or intended use from buildings . . . previously existing on the same site.

Calculation of increase in estimated population and plot ratio

According to the AP, the estimated population for a 7-storey building and the proposed 12-storey building was 111 and 138 respectively: a difference of 27. [NB: these figures were somewhat different from those stated in the appellant's letter of 17 October 1992, which was 107 and 115 respectively.]

According to the Building Authority, the basis on which the estimated population was computed should be 9 m^2 usable floor area per person. On that basis, which the appellant accepted, the estimated difference in population between the previous 3-storey building and the proposed 12-storey building was 65 and that between the approved 7-storey building and the proposed 12-storey building was 21, an increase of 23%. For the purpose of this appeal, the Tribunal adopted the statistics given by the Building Authority. It was also common ground that the maximum plot ratio for redevelopment of the subject site was 8 and the plot ratio of the proposed 12-storey building was 5.

The rule in the Nos. 11–13 Sands Street Case and recommendations of a Planning Study Report

In the *Nos. 11–13 Sands Street Case*, the Appeal Tribunal allowed the appeal against the Building Authority's refusal of building plans of a 12-storey building. The Tribunal noted that the facts in that case were 'almost on all fours with those in the present case' except for:

(a) the estimated number of occupants; and
(b) the fact that a relevant planning study on stepped access had not been completed at the time of that case.

In the *Nos. 11–13 Sands Street Case*, the maximum number of persons (calculated on the same basis as mentioned above) permitted to occupy the proposed 12-storey building was 129 as compared to 115 in a 6-storey building. 'Further, the building form . . . not to overload the local infrastructure, these areas are recommended to be rezoned on the respective statutory plans to residential use with a maximum building height of 7 storeys, or the existing height, whichever is the greater.'

In the present case, the planning study was produced and relied upon by the Building Authority. The following extracts from the Study under the heading 'Conclusion and Recommendation' were regarded by the Tribunal as relevant:

> A Summary
>
> 8.1.1
>
> In summary, redevelopment along stepped streets and similar location should warrant special consideration. Because of their 'typographical

constraints', satisfactory access can be compensated by enhanced fire service installations, there is still a concern on the potential risk to the safety of the residents, especially during emergency, since the existing water supply system in the areas concerned is confirmed to be unable to meet the fire fighting requirements. On the other hand, the infrastructural constraints of the districts in which these sites are located also justify the continuation of some control over the intensities of redevelopment in stepped street situations.

. . .

The Recommendation

8.2.2(3)

For Study Area Nos. 1 (Sands Street Area), 6 (U Lam Terrace Area), 7 (Wa In Fong & Wing Lee Street Area), 9 (Prince's Terrace Area) and 12 (Sau Wa Fong Area) :

Existing level of development should be maintained as the major part of these areas have inadequate means of access; and taking into account the potential adverse impact on the local road network imposed by redevelopment to higher intensities and the inadequacy in the infrastructure to cope. However, in order to induce some form of redevelopment but not to overload the local infrastructure, these areas are recommended to be rezoned on the respective statutory plans to residential use with a maximum building height of 7 storeys, or the existing height, whichever is the greater.

. . .

8.2.4

Last but not least, since it would take some time before the amendment and gazettal of the respective statutory plans could be completed, therefore for the time being the Building Authority should be requested to continue to invoke Buildings Ordinance S. 16(1)(g) for the control of the intensity of developments along stepped streets.

On the basis of the evidence, the Tribunal had the following findings about several aspects of the primary concern over a high-rise building, including density (which gave rise to problems of public safety), public health and infrastructure.

(1) Density

The Tribunal agreed with Mr Li's argument that the proper comparison should not be one between the population of the approved 7-storey building and that of the proposed 12-storey building — which would yield an increase in 21 persons, or an increase of 23%. The Tribunal would also bear in mind the plot ratio adopted by the appellant.

(2) Fire Safety

Tribunal accepted the submission of the AP as regards fire safety. It accepted that nowadays good firefighting should be fought from within the building rather than from the outside and that in any event it was not always desirable to have a fire engine in front of a building affected by fire.

As regards Mr Li's reference to the fact that a certificate had been issued by the Director of Fire Services under section 16(1)(b)(ii) of the *Buildings Ordinance*. The Tribunal said that:

> While the point may be irrelevant and academic in the instant case, we should perhaps point out that the Director has no power to withhold a certificate where the problem is lack of access rather than failure to meet the Code of Practice published by him from time to time.

(3) Water Supply and Pressure

As stated in paragraph 8.1.1 of the Study, the existing water supply system was unable to meet firefighting requirements in the area at which the site was situated.

However, having heard the evidence of Mr Cheung Ping Nang and Mr Richard Lo Ching Wai, the Tribunal were satisfied that water supply presented no problem to the proposed 12-storey building.

(4) Ambulance Services

The Tribunal accepted Mr Viney's view that it was held on the assumption that rescue from outside a building was necessary and that the firefighters' lift could not for some reason operate for rescue. However, the Tribunal also considered that the chances of that happening were quite small.

(5) Refuse Collection

The Tribunal noted that it was nowadays normal practice for refuse to be taken to a collection point. In any event, the Tribunal could see no difference between a 3-storey building (or a 7-storey building for that matter) and 12-storey building so far as refuse collection was concerned.

(6) Delivery of Goods

Again, the Tribunal could see no difference between a 3-storey building (or a 7-storey building) and a 12-storey building as far as delivery of goods was concerned. Indeed, the lift would facilitate delivery.

(7) Disabled and Elderly

The Tribunal agreed that lack of vehicular access to the subject site was inconvenient to the disabled and the elderly. Here again, however, the Tribunal saw no difference between a 3-storey building (or a 7-storey building) and a 12-storey building. Indeed, the lift would facilitate their movement to and from a 12-storey building.

(8) Sewage

The Tribunal agreed with Mr Li that the extra load for sewage was minimal.

(9) Traffic

The Tribunal noted that Mr Lam's evidence had not been challenged by the Building Authority. Again, the Tribunal agreed with Mr Li that the additional traffic was minimal.

The rule in the Nos. 6–8 U Lam Terrace Case (60/91) applied

The Tribunal agreed with and adopted the principle in the *Nos. 6–8 U Lam Terrace Case* (60/91).

The proposed building was superior to the previous 3-storey building

The Tribunal also agreed with Mr Li that the proposed 12-storey building compared more favourably to the previous 3-storey building or a 7-storey building because:

(1) The 12-storey building was far superior from a fire safety point of view.
(2) It was better to have a modern building than an old one which, was not provided with any lift, let alone a firefighters' lift.
(3) The 12-storey building compared to a 7-storey building would have a larger area of set-back and would enjoy better light and air.

No evidence of adverse factors

The Tribunal reckoned that the negative factors of the proposed 12-storey building compared to the previous 3-storey building were extra load for traffic and sewage. 'There is, however, no evidence before us as to the extent of such extra load.'

Same as the Nos. 11–13 Sands Street Case

The Tribunal stated that it was not bound by the Tribunal's decision in the *Nos.11–13 Sands Street Case*. However, it stated that it was persuaded by the case and agreed with the arguments and reasons for the decision. Furthermore, it could not find any distinction between that case and the

present case. It found that on balance, the positive factors of the proposed 12-storey building outweigh the negative factors.

The proposed building was not more than 12-storey

In his evidence, Mr Viney drew attention of the Tribunal to the fact that since the appeal in the *Nos. 11–13 Sands Street Case* was allowed, revised plans for a 17-storey building had been submitted but rejected and a further appeal had been lodged.

Without wishing to pre-empt the decision of the Tribunal hearing the forthcoming appeal, the Tribunal in this case mentioned that it would have taken a different view of the present case had the proposed development been higher than 12 storeys. A higher development would necessarily lead to greater density in population and impose greater strain on the infrastructure.

Safety was a major issue and an Outline Zoning Plan had not yet been in force

The Tribunal conceded that safety was a major issue that it should not be overlooked. However, as an Outline Zoning Plan had not been completed, the Tribunal had to rely on s. 16(1)(g) of the *Buildings Ordinance.*

The Tribunal referred to what Mayo J said in *Rich Resources Enterprises Ltd. v The Attorney General* [HCMP No. 3896 of 1991], at pages 10–11:

> The principal matter that the Authority was concerned with was the safety of people in and around a building . . . The height of buildings primarily dictated the number of occupants who would be using them and the Authority was undoubtedly under a duty to take into account such factors as the density of the development.

The Tribunal also agreed with what the Tribunal in the *Nos. 6–8 U Lam Terrace Case* (60/91) had said: 'the decision of the Building Authority under Section 16(1)(g) has to be on site specific grounds'.

However, the Tribunal also agreed with Mr Stephen Lee for the Building Authority that if, for instance, a 17-storey building were allowed on the subject site, it would inevitably trigger off developments of the same height in the neighbourhood. In other words, it would have a chain effect and the sum total of such effect would endanger the safety of people in and around a building, and impose constraint on the infrastructure. The Tribunal said that it should not be oblivious to such eventuality. The Tribunal concluded that:

> We are told that an Outlining Zoning Plan is now in the course of being prepared to restrict height or plot ratio in stepped streets including Sands Street. Until such plan is in force, the Building Authority has only section 16(1)(g) to rely on to control the height of

> developments in stepped streets. The Appeal Tribunal is duty bound to ensure that such developments would not endanger the safety of people in and around a building and/or impose constraint on the infrastructure.

What the Tribunal amounted to say was that, in the light of the above reasons, the appeal had to be allowed as the balance was in favour of the appellant.

Complaint of the appellant was well founded

At the outset of the hearing, Mr Li complained that despite the request made before the hearing, the Building Authority had persistently refused to supply the appellant's solicitors with a copy of the Planning Study Report until the hearing, thereby depriving Mr Li and the appellant's other professional advisers an opportunity to examine the report. The report was referred to at the meeting of the Building Committee on 15 September 1992 and the meeting of the Buildings and Lands Conference on 24 September 1991.

The Tribunal stated that when the Tribunal decided on 27 November 1992 that a good cause had been shown why an inquiry should be held, the Building Authority should have known by then that the study, hitherto classified as 'a restricted document', could no longer remain 'restricted' and had to be produced at the hearing.

In the circumstances, the Tribunal saw 'no reason why the Study was withheld from the appellant until the eleventh hour'.

YING FAI TERRACE

- **Building Appeal Case Name:** Nos. 4, 4A and 4B Ying Fai Terrace, Hong Kong [**Ying Fai Terrace**]
- **Building Appeal Case No. :** 28/92
- **Similar Case:** *Nos. 6–8 U Lam Terrace Case (60/91)*
- **Nature of the Case:** s. 16(1)(b) of the *Buildings Ordinance*; *Mid-Levels West Outline Zoning Plan 1990; Code of Practice on Means of Access for Firefighting and Rescue; Code of Practice on Fire Resisting Construction; Fire Services Ordinance;* Fire Services Department's *Letters of Concern; 'Engineering Feasibility Investigation for Improvements to the Mid-levels East-West Road Corridor'; 'Sewage Master Plan for the Central, Western and Wanchai West'*
- **Dates of Hearing:** 12 and 13 November 1992
- **Date of Decision:** 18 January 1993

- **Chairperson of Tribunal:** Mr Robin Somers Peard
- **Representation:**
  (a) Mr A. B. Lawrence for the appellant
  (b) Mr Y. M. Liu, Senior Crown Counsel for the respondent
- **Decision:** appeal allowed
- **Rules Laid down by the Decision:**
  (1) Where a proposed new building is superior than an existing one it replaces in terms of fire safety and its additional population would create negligible adverse impacts, then it is not appropriate to reject the proposal on general policy grounds concerning the adverse consequences under s. 16(1)(g) of the *Buildings Ordinance*.

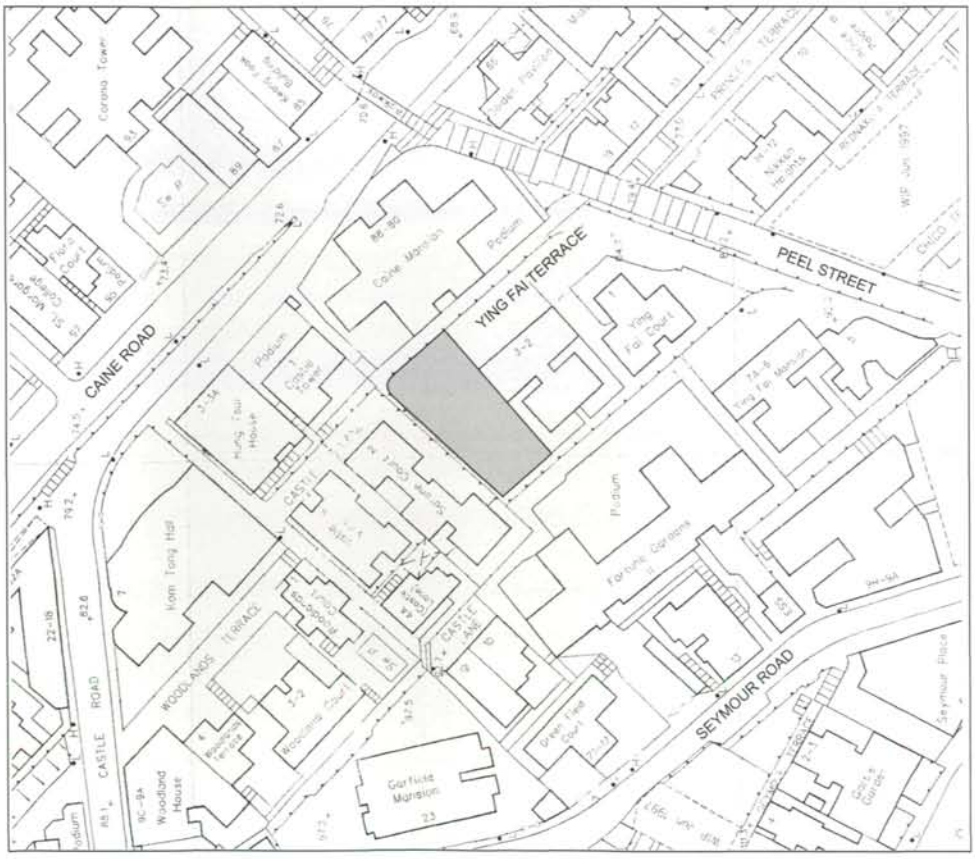
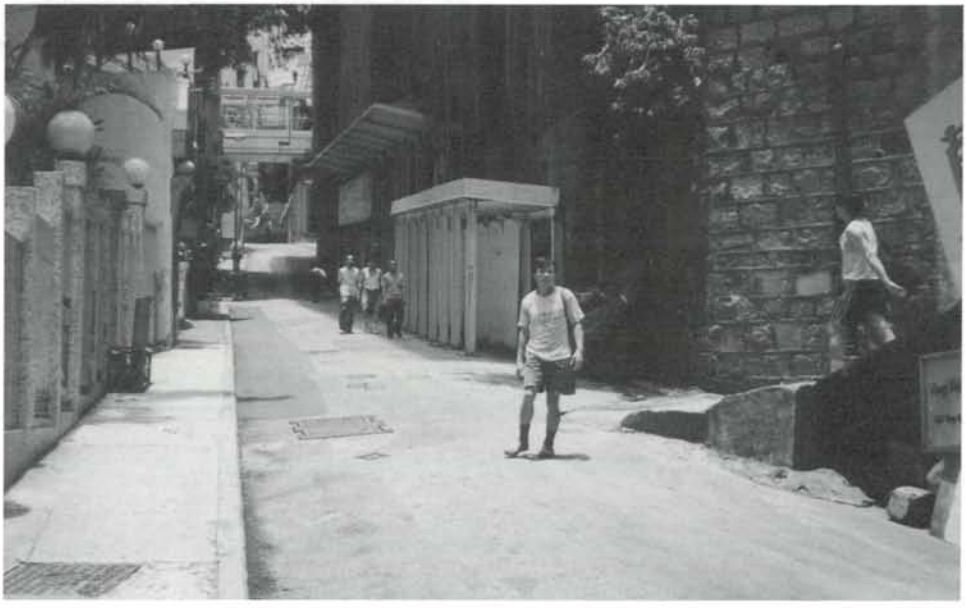


Figure 4.9 Site plan of Nos. 4, 4A and 4B Ying Fai Terrace (the *Ying Fai Terrace Case*), reproduced with permission of The Director of Lands, © Government of Hong Kong SAR Licence No. 40/1999

Photograph 4.12 The access ramp off Peel Street leading up to Ying Fai Terrace



Photograph 4.13 Peel Street looking uphill — the access ramp is on the right-hand side of the photograph

(2) 'It seems to us that what the Building Authority has to do when considering the exercise of his discretion under this limb of Section 16(1)(g) is to ask himself what negative factors will result from the difference in height between the buildings previously on the site and the proposed building. After doing this the Building Authority has to weigh both the positive factors resulting from redevelopment and such negative factors in the balance and decide whether or not there is such a weight of negative factors resulting from the difference in height as to justify a refusal. We believe there must be some significantly greater weight in the resulting negative factors if a refusal is to be justified because the use of the section limits a developer's right to develop his site to the full extent otherwise granted to him by the Crown Lease and the Buildings Ordinance and Regulations.' (*The U Lam Terrace Case,* as cited in this case)

- **Background:**

The subject site was Inland Lot No. 4617 Section A, Remaining Portion, Inland Lot No. 4617 Section A, Subsection 1 and Inland Lot No. 4617 Remaining Portion, 4, 4A and 4B Ying Fai Terrace, Hong Kong.

In 1988, Mr Elton S. Y. Chow was instructed to prepare plans for development of the subject site and in February 1989, despite an informal indication from the Building Authority that it was likely to reject the plans, Mr Chow submitted plans for a 28-storey residential building in February 1989.

In April 1989, these plans were refused on the same grounds. The decision was made by the Building Authority. At that time, despite the fact that the Director of Fire Services had issued a certificate under section 16(1)(b)(ii) of the *Buildings Ordinance*, the same Director had also issued a letter of concern in the following terms:

> I must advise you that the access for fire services emergency appliances and rescue equipment to the proposed building appears to be inadequate to the extent that it may reduce the effectiveness of rescue and firefighting operations to the building in the event of a fire or calamity.
>
> The lack of a direct vehicular access to the proposed building will mean that rescue and firefighting equipment will have to be carried by hand. Such delay would obviously result in increased danger to life and property.
>
> If the building is erected in accordance with the proposed plans, the effectiveness of rescue and firefighting services may be significantly impaired.
>
> It is therefore my duty to bring this deficiencies to your attention before you proceed with your building development.

In 1992, Mr Elton S. Y. Chow, Authorized Person (AP) of the appellant (Winbell Development Limited), submitted building plans for the subject site to the Building Authority again in February 1992. The proposed plans were for 28-storey residential building on the subject site.

The plans were originally discussed and a recommendation was made at a meeting of the Building Committee on 17 March 1992. The decision was made by Mr P. Lau Yiu-wah, on delegated authority from the Building Authority, to disapprove the plans. The decision was made on the basis of s. 16(1)(g) of the *Buildings Ordinance*.

During the hearing, a question arose as to which plans were, in fact, disapproved. It was eventually agreed between the parties that the plans disapproved were the amended plans filed by the AP with the Fire Services Department on 2 March 1992. These plans showed the enhanced fire protection measures described on the second page of the letter from the Fire Services Department to the AP, dated 5 March 1992.

The Building Authority's decision was communicated to the appellant by a letter dated 31 March 1992. It was signed by Mr P. Lau Yiu-wah on behalf of the Building Authority and sent to the AP.

- **Arguments:**

The appellant's arguments

The only witness for the appellant was Mr Elton Chow Sing Yuet, a Structural Engineer and an Authorized Person. Mr Chow had been in practice in Hong Kong since 1972. He had designed and supervised the construction of over 200 buildings. He pointed out that after his first proposals for the subject site were refused in 1989, two Codes of Practice were issued by the Building Authority. They were the *Code of Practice on Means of Access for Firefighting and Rescue*, and the *Code of Practice on Fire Resisting Construction*.

At about that time, it appeared to those in the building industry that the Director of Fire Services was adopting new policies for fighting fires and he would in future tend to make more use of protected access staircases and firefighters' lifts. The Director of Fire Services therefore would not be so concerned that he would not be able to get a turntable appliance (with a ladder) to the face of a building in case of fire.

After the refusal in 1989, the Director of Fire Services also discontinued the practice of issuing letters of concern. It seemed that the Director of Fire Services would accept enhancement of internal firefighting arrangements to overcome restricted access situations or situations where there was no access for vehicles at all (e.g. stepped streets).

Taking into account these changes and the fact that further high-rise development had taken place in the immediate vicinity, the appellant decided to submit a similar application to the Building Authority in January 1992.

After discussions with the Fire Services Department in early March 1992, Mr Chow agreed to amend the plans which he had submitted to provide for pressurized staircases (to provide a smoke-free means of escape from the building in case of fire) and the provision of an extra 9000-litre water tank for firefighting purposes. This would provide at least half an hour's water supply for firefighting in case the Fire Services Department vehicles were delayed in connecting the building's firefighting water system to a hydrant. Mr Chow said that the new building was safer in terms of fire services installations than the existing building. Mr Chow also pointed out that the new building would have a lower site coverage that the existing building and the ground floor would be open for easier access. No parking would be allowed at the building since it was designed for families who would not own a car but would use public transport or the escalator between Mid-Levels and Central. This escalator was under construction and would be within about 100 yards of the new building. Mr Chow gave it as his opinion that all the occupants in the new building could be evacuated within about five minutes after a fire alarm was sounded.

Using the normal calculations for population, the new building would have a population of 306 persons and the existing building had a population of 75 persons, an addition of 231 persons. Mr Chow did not agree that this would lead to increased traffic (private cars and taxis) coming to the new building.

The *Outline Zoning Plan* for the area had been amended in 1990 to restrict high-rise development but this had not affected the site.

The Building Authority's arguments

(1) Mr Clive Anthony Viney

Mr Viney was a Fellow of the Royal Institute of the Chartered Surveyors and held the post of Government Building Surveyor/ Development. He was the Head of the Development Division of the Building Office.

He confirmed that the original refusal of the AP's proposals in 1989 was based on the Building Authority's concern as to inadequate access; the motive of the Building Authority's policy in limiting development on sites where access by vehicles was difficult or impossible was primarily one of public safety.

Mr Viney drew a distinction between other high-rise buildings allowed in the vicinity and the proposed development on the grounds that a Fire Services Department pumping unit could not get within 30 metres of this site whereas, in the case of other high-rise buildings, it could.

When questioned in regard to the Building Authority's real concern when comparing the proposed new building with the existing building on site, Mr Viney said that higher density development

would generate a large number of people who would have to be evacuated via Ying Fai Terrace while, at the same time, the Fire Services Department and other emergency services would be trying to get to the site through restricted access. He was concerned that chaotic conditions would result.

In the meeting of the Building Committee on 17 March 1992, a reason was concluded for the refusal. It seemed that there were no change in site circumstances since 1989.

Mr Viney was questioned in regard to the proposals approved by the Fire Services Department to enhance the internal firefighting arrangements in the new building and the revocation of the letter of concern issued by the Fire Services Department. Mr Viney was of the view that the position was not an ideal one and the enhancement proposals approved by the Fire Services Department were a 'second best' solution. He stated that the recommendations of the Building Committee on 17 March 1992 were based primarily on the concern in regard to **access**. The effect of increased population upon water supply, sewage and the traffic situation were very much **secondary** concerns.

Mr Viney in his written statement drew attention to paragraph 8 of the Building Authority's refusal letter of 31 March 1992. It reads as follows:

> Please be advised that **I have no objection in principle to your application on Form 29 dated 31st January 1992** for modification of Building (Planning) Regulation 23(2)(a). In this connection, your attention is drawn to the contents in paragraph 2 of my letter dated 17th October 1988 (emphasis added).

(2) Mr Richard Lo Ching Wai

Mr Lo was the second-in-charge of the Fire Protection Bureau of the Fire Services Department and was a Deputy Chief Fire Officer. He had served with the Fire Services Department for 28 years. His duties concerned fire prevention and protection matters including the processing of building plans and stipulating the fire services requirements under s. 6(1)(b) of the *Buildings Ordinance*. Mr Lo's views represented those of his department.

The subject of reasonable emergency vehicular access to buildings had been of considerable concern to the Fire Services Department for many years. Before 1975, it refused to process plans for buildings with inadequate vehicular access for fire appliances. However, there was a conflict of opinion with the Building Authority as the Building Authority considered that this was not a statutory ground to refuse plans under the *Buildings Ordinance*.

In October 1975, the Attorney General's Chambers confirmed

the correctness of the Building Authority's view but instead suggested that 'letters of concern' (the text of which is quoted above) could be issued. The Fire Services Department might then regard the completed building as a fire hazard and act under the *Fire Services Ordinance* to achieve abatement of the hazard.

By 1990 it had become apparent that the Building Authority was still approving building plans where letters of concern had been issued due to restrictions on the Building Authority's discretionary powers. The Fire Services Department took the view that **the letter of concern had become nothing but a meaningless paper exercise**. Accordingly, the Director of Building and Lands was advised in August 1990 that no further letters of concern would be issued by the Fire Services Department. The Fire Services Department decided to stipulate enhanced fire protection requirements under s. 6(1)(b) of the *Buildings Ordinance* for buildings which had inadequate vehicular access.

Mr Lo was questioned in regard to the revocation of the letter of concern previously issued on 4 April 1989. He was of the opinion that since the Fire Services Department in March 1992 had prescribed the enhanced requirements which they felt were 'fit for the protection of the building', it was not appropriate for the letter of concern to remain outstanding.

Mr Lo made it clear that, although he did not consider the access for emergency vehicles to be ideal, he did not consider the proposed new building unsafe or a fire hazard. The Fire Services Department had prescribed what they thought was appropriate for the protection of the new building by way of internal firefighting arrangements.

Mr Lo described the firefighting system for the proposed new building on the subject site. It would have a firefighters' lift which could work on an emergency diesel generator if necessary. The diesel generator would also operate an emergency lighting system. It would have storage for a total of 18 000 litres of water for firefighting purposes which would give at least 20 minutes supply of water for firefighting and, if the hose in the building were used, that period of time would be extended by a substantial amount (he estimated that the hoses in the building would consume 9000 litres of water in half an hour). The building also had the pressurized staircase arrangements previously described with a smoke lobby on each floor. It would have its own internal firefighting equipment. The equipment was available with a dry riser system which would allow the building's firefighting system to be connected to the mains.

In comparison, the existing building had no firefighting facilities whatsoever. The occupants had only one staircase for escape purposes along which electric wiring most likely ran. If there was an electrical fire on the staircase, it would be extremely difficult for the occupants of the building to escape.

Mr Lo was firmly of the opinion that the new building was better than the existing building in terms of safety in an emergency situation. Mr Lo also described how the Fire Services Department would answer an alarm call from the site. They would send a major fire appliance with pumping capacity and quite sufficient hose length to connect with the proposed new building from the nearest hydrant in Peel Street. The major unit could not get into Ying Fai Terrace from Peel Street but it would not need to do so. A light rescue unit and ambulance would be able to proceed up Ying Fai Terrace to the entrance of the site. A firefighting team with breathing apparatus would then be able to get into the building and use their equipment as well as the new building's equipment for fighting the fire while the major unit would be connecting the building's firefighting system to the nearest hydrant. It would then pump water from the hydrant as necessary.

Mr Lo was of the opinion that the occupants of the proposed new building would be able to get out of the building in the case of an alarm without danger and the Fire Services would normally be able to get there within 6 minutes. However, as previously explained, the enhanced fire protection arrangements for the new building would enable a fire to be fought by the occupants for a substantial period before the major unit started pumping water into the building's system.

Of course the existing building did not have any internal firefighting system and, in case of fire, the Fire Services Department's own hoses would have to be deployed to fight fire once the major unit was connected to the nearest fire hydrant. For both the new building and the existing building, it would not be possible to get a ladder and turntable near the face of the building. This was not an ideal situation because the ladder could not be used for rescue and a jet could not be deployed from the ladder. However, such situation would continue until the access to Ying Fai Terrace was improved.

Mr Lo was not concerned that escaping occupants of the new building would cause difficulties for the emergency services attending a fire.

(3) Mr Chan Pun Chung

Mr Chan was a Member of the Royal Town Planning Institute and the Hong Kong Institute of Planners. He held the post of Government Town Planner/Board and Design. He was the Head of the Town Planning Board and Design Division of the Planning Department.

Mr Chan was present at the Building Committee meeting on 17 March 1992. He recalled that concern was expressed in regard to

restricted access as well as the increased strain on the overloaded infrastructure caused by the new building, in particular the burden on traffic. He explained that the amendment of plot ratios for 'Residential (Group B)' areas in the *Mid-Levels West Outline Zoning Plan 1990* was made by reason of infrastructure problems, particularly anticipated overloading of the roads.

However, **Ying Fai Terrace was in a 'Residential (Group A)' zone and was not affected by this amendment to the *Mid-Levels West Outline Zoning Plan*.** He also explained that **Ying Fai Terrace was not covered by the redevelopment along the 'Stepped Street Study' and was not directly affected by its recommendations although the study was mentioned at the Building Committee meeting on 17 March 1992.**

(4) Mr Cheung Ping Nang

Mr Cheung was a Senior Engineer/Planning (1) in the Water Supplies Department. One of his main duties was to monitor the adequacy of water supply for both new and existing developments on Hong Kong Island.

He referred to the main record plans of the fresh and salt water distribution network related to the site. Service reservoir storage of fresh water available for firefighting purposes was inadequate when compared with the Fire Services Department requirements. The service reservoir at Conduit Road serving the site had a storage provision of 1790 cubic metres but the firefighting requirement was 4950 cubic metres.

Furthermore, the available 'head' (i.e. the height to which water coming out of a fire hydrant could rise) was deficient in two out of the three fire hydrants within 100 metres of the site. Mr Cheung also gave evidence that the minimum residual head for the salt water flushing supply at peak demand was inadequate. In addition, the fresh water storage capacity available for domestic and general purposes was inadequate. There was also inadequate minimum residual head for the fresh water supply at the peak demand. Generally, the existing salt water and fresh water systems serving Ying Fai Terrace were overloaded. Mr Cheung said that the population increase caused by the new building **would not have significant impact on the water supply situation.**

(5) Mr Victor McNally

Mr McNally was Head of the Liquid Waste Projects Group within the Environmental Protection Department which was responsible for the strategic planning of the sewage disposal facilities for the territory of Hong Kong.

The 'Sewage Master Plan for the Central, Western and Wanchai West area' was undertaken during 1990 and 1991, and very significant hydraulic deficiencies were found to exist in the sewers throughout the study area.

Mr McNally produced a drawing which showed that sewage from the site could go in either of two directions into the Central area where 50% of all sewage flowed through the storm water drains. The sewers in this area were already severely overloaded. It was necessary to replace the Connaught Road trunk sewer and sewers in a number of other locations in the Central area before the deficiencies could be considered to have been rectified. The consultants concerned in the study recommended that no development which would increase sewage flows should be allowed in the area, including the site.

Mr McNally was not able to say when the deficiencies in the sewage system for the area would be rectified. He said that **the proposed development would only result in a nominal increase in sewage flow**. However, **his concern was with the cumulative effect of higher overall development in the area** which would have a serious effect on the sewage situation.

(6) Mr William Liew

Mr Liew was Chief Traffic Engineer of the Traffic Engineering Division/Hong Kong from the Transport Department. His duties were the overall supervision and management of all traffic engineering matters on Hong Kong Island, including the control of development in terms of parking provision and traffic flow.

Mr Liew said that the site was within the study area of the 'Engineering Feasibility Investigation for Improvements to the Mid-Levels East-West Road Corridor' in 1988. The results of that study showed that at present Robinson Road was used to its capacity during the morning peak hour. According to the study, by 1996 the eastbound carriageway of Robinson Road would be overloaded by 32% at peak hours. Any increased traffic generation in this area was not acceptable to the Traffic Department.

Mr Liew considered that vehicular access to the site would be through Robinson Road and the proposed development would result in some increase in private cars and taxis going to the site. However, people living in the proposed development would most likely go down to Caine Road to take public transport. He agreed that the escalator being built between Mid-Levels and Central (which was due to be completed in mid-1993) would be used by people living in the proposed new building. Overall, he considered that **an increase in population of 231 persons would not significantly increase traffic flows in the area**.

- **Reasons for Decision:**

The Appeal Tribunal allowed the appeal.

Approach to the exercise of discretion under section 16(1)(g)

The Tribunal in the *Nos. 6–8 U Lam Terrace Decision (74/91)* was of the opinion that the decision of the Building Authority under section 16(1)(g) had to be on site-specific grounds rather than general grounds. The Tribunal indicated that it would follow this opinion in the present case. In the *Nos. 6–8 U Lam Terrace Case*, the Tribunal expressed its view as follows:

> It seems to us that what the Building Authority has to do when considering the exercise of his discretion under this limb of Section 16(1)(g) is to ask himself what negative factors will result from the difference in height between the buildings previously on the site and the proposed building. After doing this the Building Authority has to weigh both the positive factors resulting from redevelopment and such negative factors in the balance and decide whether or not there is such a weight of negative factors resulting from the difference in height as to justify a refusal. We believe there must be some significantly greater weight in the resulting negative factors if a refusal is to be justified because the use of the section limits a developer's right to develop his site to the full extent otherwise granted to him by the Crown Lease and the Building Ordinance and Regulations. (*The Nos. 6–8 U Lam Terrace Case*, as cited in the *Ying Fai Terrace Case*)

The Tribunal's findings

(1) Mr Viney said in his statement that a concession was given in the letter of 31 March 1992 on the basis that a building of reasonable dimensions would be allowed upon the site (by this the Tribunal took it to mean a building of up to 7 storeys in height); therefore the concession might well be reconsidered if a 28-storey building was allowed to be built.

The appellant asked the Tribunal to give its views on this question but the Tribunal considered it inappropriate to do so.

However, the Tribunal was sure that **if the Building Authority had indicated twice in a period of 4 years that it would in principle make this concession, then it would only reverse its view on good and sufficient grounds.**

(2) As highlighted above, Mr Lo was

(a) firmly of the opinion that the new building was better than the existing building in terms of safety in an emergency situation;
(b) of the view that the existing building did not have any internal firefighting system; and

(c) not concerned that escaping occupants of the new building would cause difficulties for the emergency services attending a fire.

(3) As highlighted above, Mr Chan explained that

(a) Ying Fai Terrace was in a 'Residential (Group A)' zone and was not affected by the amendment to the *Mid-Levels West Outline Zoning Plan*; and

(b) Ying Fai Terrace was not covered by the redevelopment along the 'Stepped Street Study' and was not directly affected by its recommendations, although the study was mentioned at the Building Committee meeting on 17 March 1992.

(4) As highlighted above, Mr Cheung explained that the population increase caused by the new building would not have a significant impact on the water supply situation.

(5) As highlighted above, Mr McNally

(a) was not able to say when the deficiencies in the sewage system for the area would be rectified;

(b) explained that the proposed development would only result in a nominal increase in sewage flow; and

(c) explained that his concern was with the cumulative effect of higher overall development in the area which would have a serious effect on the sewage situation.

(6) As highlighted above, Mr Liew explained that **overall, he considered that an increase in population of 231 persons would not significantly increase traffic flows in the area.**

The Tribunal's conclusion

In conclusion, the Tribunal allowed the appeal on the following grounds:

(1) the Building Authority had not considered changes in circumstances;
(2) the proposed building was superior than the existing one in terms of safety; and
(3) the adverse impact due to a net increase in population was negligible.

In the words of the Tribunal:

> The recommendations of the Building Committee at its meeting on 17th March 1992 which were followed by the Building Authority in his decision were based upon the view that there had been no change in the site circumstances since the previous rejection of plans in 1989. Although it is true that access to the site continued to be inadequate, the Building Committee seems to have ignored the fact that the Fire Services Department had prescribed enhanced fire protection measures in the proposed new building (as compared with

the requirements in 1989) and this had enabled the Fire Services Department specifically to revoke the letter of concern which it had issued in 1989. We therefore find that **there had been a change of circumstances in regard to the proposed new development which the Building Committee ought to have taken into account.**

We therefore consider that we should look at the position afresh by reference to the evidence which we have heard using the approach which we have set out . . .

We cannot ignore the fact that Mr Lo, who is a Senior Fire Officer and was speaking on behalf of his Department, was clearly of the view that **the proposed new building was better from a fire safety point of view than the existing building.** We have already set out his evidence in this respect which we think was compelling. To this must be added the general advantage of replacing an old building with a new one built to higher standards.

Against these advantages there must be set the disadvantages described in the evidence of the extra strain placed on the infrastructure (water, sewage and traffic) by **the population increase of 231 persons** caused by the new building. In all cases, the effect, according to the evidence, **was not significant.** It is worth mentioning in passing that the inadequate water supply for firefighting purposes is probably of more potential danger for the existing building than for the proposed new building because the proposed new building will have the firefighting reserve of 18,000 litres of water available in its tanks before the water available from hydrants near the site needs to be used.

In summary we consider that the disadvantages revealed by the evidence are not significant enough when compared with the advantages already described to enable us to uphold the decision of the Building Authority. Our decision is therefore that this appeal should be allowed and the refusal on the Section 16(1)(g) ground set aside (emphasis added).

Postscript

The Tribunal suggested after its determination that s. 6(1)(d) of the *Buildings Ordinance* be amended to enable the Fire Services Department to better control building development on fire safety grounds.

Crown Counsel appearing for the Building Authority very properly led evidence from the Fire Services Department which did not assist the Building Authority's case. He expressed to us his concern at the difficulties facing the Building Authority because the Fire Services Department now merely certifies the adequacy of the internal firefighting arrangements by giving a certificate under Section 16(1)(b) of the Buildings Ordinance without specifically dealing with access

to the site in question. This leaves the Building Authority with the responsibility for the final decision on the approval of building plans but with no clear or adequate powers to ensure that access to the site for emergency vehicles is satisfactory. **The simple solution seems to us to be that Section 16(1)(b) of the Buildings Ordinance should be amended** so that the Fire Services Department, as the department of Government with expertise in the particular field, should certify that a proposed new building has adequate provision for firefighting in emergency situations both as to the internal arrangements of the building and any external factors such as access. This will enable the Fire Services Department, who will be aware of any changes in thinking and practice in its field, to deal with these aspects on a continuing basis. The Building Authority will only be concerned to see that a certificate has been issued by the Fire Services Department (emphasis added).

The Tribunal in its decision in the 6–8 U Lam Terrace Appeal mentioned how it thought Government's concerns as to the overloaded infrastructure in Central/Mid-Levels could be met. In planning terms, there may well be a case for pinpointing areas where development should be restricted in height to preserve the special atmosphere created by stepped streets or restricted access. U Lam Terrace could well be such an area. However we think that **the high-rise development which has already been allowed has gone a long way to destroy such atmosphere in the area around Ying Fai Terrace**.

MEANS OF ESCAPE (MOE)

HONG KONG TRADE MART

- **Building Appeal Case Name:** Hong Kong Trade Mart, New Kowloon Inland Lot No. 6032, Kowloon Bay Reclamation [**Hong Kong Trade Mart**]
- **Building Appeal Case No. :** 89/90
- **Nature of the Case:** definition of a trade mart building; capacity factor of a trade mart building; s. 16 (1)(d) of the *Buildings Ordinance; Building (Planning) Regulation 41(1); Code of Practice on Provision of Means of Escape in Case of Fire and Allied Requirements 1986*; presumption of compliance with lease conditions
- **Date of Hearing:** 3 December 1990
- **Date of Decision:** 17 December 1990
- **Chairperson of Triunal:** Mr Donald Quintin Cheung

- **Representation:** no counsel representation for both parties
- **Decision:** appeal allowed
- **Rules Laid down by the Decision:**

(1) There should be a presumption that an applicant in a building application who is a lessee and/or his or her successors in title and assignment would observe the lease conditions.

(2) Other than Regulation 41(1), there is no other legislation defining what provisions under which a building need incorporate 'means of escape' in case of an emergency, save and except several codes of practice published by the Building Authority. The *Code of Practice for the Provision of Means of Escape in Case of Fire 1996* is the most commonly used code. After the fatal Hong Kong Bank (Shek Kip Mei Branch) fire accident, a new *Fire Safety (Commercial Premises) Ordinance* has been enacted.

(3) The Tribunal accepts this definition of a 'trade mart building':

> A trade mart building has two different functions; one is for use for specific trade exhibitions by multiple exhibitors and the other is for specific use types of product display and trade discussion by individual exhibitors and manufacturers, both in connection with wholesale trade in manufactured goods . . .

(4) A trade mart building is not an ordinary commercial office building for the purpose of designing and evaluating means of escape.

(5) For the purpose of designing and evaluating means of escape in a trade mart building, it should be presumed that only specialists rather than ordinary members of the public would visit the building.

(6) For the purpose of designing and evaluating means of escape in a trade mart building, it should not be presumed that all escalators intended to be installed would become inoperable in the event of fire.

- **Background:**

The subject site was New Kowloon Inland Lot No. 6032, Kowloon Bay Reclamation. The appellant was Hong Kong Trade Mart Company Ltd.

Pursuant to Special Condition 46 of the Grant, the appellant opted to use the subject site for the purpose of a trade mart building. The Authorized Person (AP) of the appellant submitted from time to time plans to the Building Authority since 15 March 1990. Such plans contemplated exhibition halls and 'display areas'.

The AP submitted certain revised building plans to the Building Authority on 23 June 1990. In the revised plans and earlier amended plans submitted since 15 March 1990 and in assessing the requirements for means of escape (paragraph 5 above) and the 'display areas' depicted

on such plans, the AP used a capacity factor of 7 square metres of usable floor per person.

In the revised plans, the AP made provisions for 9 staircases for the upper floors (i.e. 4/F to 13/F). In addition thereto, from the fourth to the thirteenth floors, each floor was served by 3 pairs of escalators. There were 4 pairs of escalators on the fourth floor, 5 pairs on the second floor and 3 pairs each on the ground floor and basement. The height of each floor is as follows:

Basement Level 1	6 m
G/F to 2/F	4.45 m
2/F to 3/F	4.2 m
3/F to 4/F	3.65 m
4/F to 13/F	3.5 m

For firefighting purposes, the proposed Trade Mart Building would have (inter alia) a sprinkler system as well as a smoke extraction system.

On 8 May 1990, a Building Committee was convened to consider the AP's capacity factor of 7 square metres per person. Mr Michael David Green was a member of the Committee.

The Building Authority refused approval of the building plans under s. 16(1)(d) of the *Buildings Ordinance*. This decision was made known to the appellant by a letter dated 21 July 1990. In this letter, the following reasons were given for the decision in relation to s. 16(1)(d):

> The proposed capacity factor 7 square metres per assessment of accommodation in 'Display Area' is considered not acceptable. In this connection, the Discharge Value Calculation, Schedule of Exit Doors and Sanitary Fitment are incorrect, Building (Planning Regulation) 41(1) refers.

Building (Planning) Regulation 41(1) reads as follows:

> 41(1) Every building shall be provided with such means of escape in case of emergency as may be required by the intended use of the building.

- **Arguments:**

The respondent had the following arguments as arrived in the Building Committee, testified by Mr Green:

(a) The display areas were in fact 'showrooms' and hence fell within sub-paragraph (e) of Table 1 of Paragraph 7 of the Code of Practice and the proper capacity factor to use was 4.5 square metres per person.
(b) Visitors to showroom premises would be less familiar with their surroundings than employees in offices and would be exposed to a more varied fire content in the nature of goods displayed.

(c) When categorizing a designated use which might not be listed in Table 1, it was usual for the determination to be made by analogy and not by interpolation.
(d) Showrooms were wide-ranging and in practice population density in such showrooms varied from one building to another. It was not the practice of the Building Authority to subdivide this category as to the type of goods displayed or mode of disposal.
(e) The Building Authority had never taken into consideration, as a mean of escape in the event of fire, the 'plus' or 'minus' factor of locked escalators.

The appellant argued on the following grounds:

(a) The exhibition areas in the building were planned with an occupation factor of 4.5 square metres per person, while in the display areas a lower factor of 7.0 square metres per person was planned. The two types of areas had quite different functions and the density of occupation in the display areas would be considerably lower than that in the exhibition areas.
(b) The display areas would not be in use at the same time since they would serve as a meeting area for different types of sellers and buyers, often at different times. Even if they were all occupied at the same time, a factor of 7.0 square metres per person should be more than adequate.
(c) The display areas were not general showrooms and the function of them was quite similar to that of an office, although the revised proposals adopted the factor which would be applicable for an office (i.e. 9.0 square metres per person) under the Code of Practice.
(d) The proposed factor of 7.0 could also be roughly compared to the result of adding 4.5 (i.e. the factor for shops) to 9.0 (the factor for offices), and dividing the total by 2 in order to arrive at a mean occupation factor. That method of calculation would suggest an occupation factor of approximately 6.75 (say 7.0) square metres per person for display areas since these areas were neither shops nor purely offices.
(e) According to the Special Conditions to the Lease, the premises might only be used for industrial or godown purposes (including ancillary offices) or for a Trade Mart to display and exhibit manufactured goods or wholesale trade. Retail trade was not permitted under Special Condition 46(b)(3)(b). Therefore, there should not have been any comparison with 'shops' for which the *Code of Practice on Provision of Means of Escape in Case of Fire and Allied Requirements 1986* (Code of Practice) required an occupancy factor of 4.5. The actual exhibition areas, however, could perhaps be compared with 'showrooms' which were also referred to in the Code of Practice.

However, the proposal did in fact use a factor of 4.5 square metres per person for those areas.

(f) The Code of Practice reflected a flexible approach to the discretion contained in *Building (Planning) Regulation 41*. There did appear to be a good case for revising Table 1, in due course, so as to include further building uses including display areas (which could be defined), and also cinema foyers and storerooms (although not relevant in this case).

(g) As a more general comparison, it should be noted that many industrial buildings were sometimes permitted to have ancillary offices, often up to 30% of the total floor space. That tended to pull down the average factor for occupation, resulting in a significantly lower density than that of pure industrial buildings.

(h) In established and successful Trade Mart buildings in other countries, the display areas were permitted to be assessed at occupation factors even lower than those being proposed here. Factors of 8.8 and 8.1 square metres per person were being adopted in the USA, and 10 in Taiwan. In comparison with overseas practice, the proposed factor of 7.0 was quite safe and conservative.

(i) Buildings of this type were new to Hong Kong; there had been no precedent. Therefore, this proposal should have been given special consideration. It should not be simply classified as one of an existing use category. However, the Building Authority had ignored this relevant consideration.

(j) The reasons for disapproving the plans clearly involved the exercise of discretion since *Building (Planning) Regulation 41(1)* did not contain any specific provision or requirement. The appellant had been prejudiced because he would need to provide additional staircases to comply with such decisions. These staircases were not necessary and would also involve a loss of usable floor space.

(k) With all respect, the Building Authority did appear to have taken into account the unique factors about a trade mart or the background material which the appellant had provided. This meant that the Building Authority had not exercised its discretion in a 'progressive and constructive manner'. Simply to comment that the proposals were 'not acceptable' without any convincing reason could not win full confidence about the proper exercise of discretionary powers.

- **Reasons for Decision:**

Matter noted by the Tribunal

(1) What was a trade mart?

The Tribunal accepted the definition of 'trade mart' offered by the AP in evidence during the hearing:

> A trade mart building has two different functions; one is for use for specific trade exhibitions by multiple exhibitors and the other is for specific use for types of product display and trade discussion by individual exhibitors and manufacturers, both in connection with wholesale trade in manufactured goods . . .

The Tribunal noted that a 'Trade Mart Building' was a purpose-built building. It was the first of its kind to be erected in Hong Kong. Others were in existence, particularly in the USA (where a capacity factor of 8. 15 to 8.8 square metres was used) and Taipei (where a capacity factor of 10 square metres was used).

(2) Status of the Code of Practice

Before determining the appeal, the Tribunal noted the common ground for the appeal, namely that other than Regulation 41(1), there was no other legislation defining what provisions under which a building need incorporate means of escape in case of an emergency, save and except an administrative guideline published by the Building Authority. The guideline was the 'Code of Practice on Provision of Means of Escape in Case of Fire and Allied Requirements 1986' referred to above. It was also conceded by both parties that the Code of Practice was one of the most stringent in the world; it had been last updated in 1986 and was to be further revised in the near future.

(3) The issue: 'Display areas' or, really, 'showrooms'?

The Tribunal noted the issue for the appeal as a dispute whether the 'display areas' proposed by the appellant were in fact 'showrooms' as interpreted by the Building Authority and hence falling within sub-paragraph (e) of Table 1 of Paragraph 7 of the Code of Practice. This would imply that the proper capacity factor to use should be 4.5 square metres per person.

The Tribunal recognized that if the Building Authority's contention of a capacity factor of 4.5 square metres was upheld, then the appellant would have to provide 4 additional staircases (as compared with 9 in the revised plans) as well as an additional 110 toilets in the Trade Mart Building. This would mean that an additional area 27 000 square feet of space could not be commercially used by the appellant.

The approach to determining the appeal

The Tribunal stated that members would like to deal with this case in the same manner that the Building Authority had dealt with the plans for the Trade Mart Building since 15 March 1990, i.e. when the AP used a capacity factor of 7 square metres per person.

Grounds for allowing the appeal

The Appeal Tribunal allowed the appeal on the following grounds:

(1) The possibility that the appellant would be in breach of lease conditions was an irrelevant consideration.

The Tribunal ruled that the possibility that the appellant would be in breach of lease conditions was an irrelevant consideration taken into account by the Building Authority in rejecting the capacity factor of 7. In the words of the Tribunal:

> This, in our opinion, was an incorrect approach when the Revised Plans were processed by the BA. The Revised Plans should have been processed on the basis that the Appellant will ensure that the lease conditions will be observed by the Appellant and its successors in title and assigns.

In other words, the 'display area' should not have been evaluated as 'showrooms'.

(2) Escalators in any one floor would unlikely be totally inoperable in the event of fire; proposed escalators were not the Kingscross Station types.

The Tribunal did not believe that in the event of fire, all escalators would become inoperable. It also did not accept the distinction made by Mr Viney between the proposed escalators and those destroyed by fire at Kingscross Station in London. The reason was that the old escalators at Kingscross were far too long and steep.

(3) Visitors and users of the display area would unlikely be ordinary members of the public.

Having accepted the evidence of the AP as to what a trade mart building was, the Tribunal addressed the question as regards who or what type of persons would use or visit the display area in the Trade Mart Building. It came to the view that:

> Besides the staff of manufacturers whose wares are displayed in the display area, we would expect local and international wholesale buyers. Unless retail trade is permitted, other members of the public is [sic] unlikely to be attracted to this building. The display areas are unlike showrooms situated in other commercial buildings where shops also exist. These latter buildings will be more densely populated because of the retail element.

(4) The Code of Practice was no more than a guide for conventional buildings.

Accepting that the Code of Practice as no more than a guide for Authorized Persons in preparing plans for new buildings, the Tribunal also accepted the AP's evidence that the Code was intended for 'conventional buildings' rather than a 'specialized building' like the proposed Trade Mart Building. In other words, the existing Code of Practice was of little help and was irrelevant for controlling the design of a specialized building.

(5) Irrelevant considerations were taken into account whereas relevant considerations were omitted.

The Tribunal concluded that the following factors considered by the Building Authority were irrelevant:

(a) the assumption that the appellant and/or his or her successors in title and assignment would not observe the lease conditions
(b) the consideration, as regards means of escape, of the 'plus' factor of locked escalators to be installed in the Trade Mart Building
(c) the consideration of a high population density of the Trade Mart Building due to visits by members of the public
(d) the distinction between a visitor to an office building and a visitor to a showroom within an office building or the Trade Mart Building

The Tribunal concluded that the following relevant factors were not considered by the Building Authority:

(a) the presumption that the appellant and/or his or her successors in title and assignment would observe the lease conditions
(b) the consideration that not all escalators intended to be installed would become inoperable in the event of fire
(c) the consideration that only specialists rather than ordinary members of the public would visit the building
(d) the fact that a trade mart building was not an ordinary commercial office building

(6) Conclusion: There was danger to public safety.

The Tribunal concluded that:

> We are of the opinion that in proposing a capacity factor of 7 square metres per person and coupled with the proposed installation of escalators to the Trade Mart Building, the AP has not compromised public safety.

UNAUTHORIZED STRUCTURES AND ENFORCEMENT ORDERS

PAK ON BUILDING

- **Building Appeal Case Name:** Roof and 10/F, Pak On Building, No. 105 Austin Road, Kowloon [**Pak On Building**]
- **Building Appeal Case No. :** 06/87
- **Nature of the Case:** relevant and irrelevant considerations in the exercise of discretionary powers; *Wednesbury* unreasonableness; unauthorized structures; s. 24(1) and retrospective approval of building plans; s. 14(1); s. 16(1)(d) of the *Buildings Ordinance*
- **Date of Hearing:** 29 April 1987
- **Date of Decision:** 22 May 1987
- **Chairperson of Tribunal:** Mr B. S. McEleny
- **Representation:**

  (a) Mr Barry A. Sceats for the appellant
  (b) Mr D Hinchen for the respondent

- **Decision:** appeal allowed
- **Rule Laid down by the Decision:**

  (1) Considerations were taken into account in the exercise of discretion powers:

> As is well-known discretionary powers must all be exercised in good faith for the purpose for which they are granted and within the limits of the Ordinance or other instruments conferring the discretion. The discretion must also be exercised fairly and in accordance with proper legal principles and these standards imply that all relevant considerations must be taken into account and that extraneous considerations be disregarded by the person or body, in this case the Building Authority, exercising that power. The exercise of a discretion is invalidated if the way it was exercised was significantly influenced by the improper regard or disregard of the factors in issue (*see Associated Provincial Picture Houses Limited v Wednesbury Corporation* [1947] 2 AER 685)' (*The Pak On Building Case*)

- **Background:**

The subject site property was 10/F, Pak On Building, No. 105 Austin Road, Kowloon. The Building Authority issued a demolition order in January 1985 requiring the appellant to demolish some illegal structures

erected on the roof of the subject property, or 'to carry out some works as were necessary to comply with the provisions of the Building Ordinance' (lines 7–8, para. 1, p. 1).

The demolition order was made on the basis that the erections had been erected without plans approved and were in breach of the loading requirements contained in Regulation 5 of the *Building (Construction) Regulations*. The order required the owner to demolish or to remove or to carry out such alteration of the building works as might be necessary to cause the same to comply with the provisions of the Ordinance. It also required the owner to reinstate the part of the building affected so that the building complied with the plans approved by the Building Authority.

The structural engineer of the appellant made an application on 9 February 1987 to carry out remedial works on the roof of the subject property in his attempt to comply with the demolition order in respect of the excessive loading issue. In a letter dated 19 February 1987, the Building Authority rejected the application.

The applicant appealed to the Appeal Tribunal on 29 April 1987 purportedly under section 16(1)(d) of the *Buildings Ordinance* on the grounds that the proposals accompanying the application were made 'on the presumption that the provisions of Section 14(1) of the Buildings Ordinance will be exempted when there has not been and will not be any such exemption' (lines 10–12, para. 1, p. 2).

- **Arguments:**

The appellant had the following grounds for appeal:

(a) The Building Authority misdirected itself in that the application was not an application under s. 42 for exemption from the provisions of s. 14(1) of the *Buildings Ordinance*. Rather, it was an application under s. 14(1) for the approval of plans for specific works to be carried out.
(b) The Building Authority in deciding the application had taken into account factors, namely the history of its dealings with the appellant, which were irrelevant to deciding whether the plans submitted should be approved.
(c) The Building Authority in deciding the application had failed to consider the application on its own merits.
(d) The Building Authority in deciding the application had failed to consider whether the proposals, if approved and implemented, would result in works which would comply with the provisions of the Ordinance or any other enactment.

- **Reasons for Decision:**

The Tribunal allowed the appeal. The Tribunal noted the provision of the relevant sections of the *Buildings Ordinance* and explained that the

Building Authority had taken into account irrelevant consideration in rejecting the application by reference to the administrative law principle of '*Wednesbury* unreasonableness'.

Provisions in s. 21(1), s. 14(1) and s. 16 (1) of the Buildings Ordinance

The Tribunal noted that the wording of s. 21(1) of the *Buildings Ordinance* seemed to contemplate retrospective approval of plans in certain circumstances.

The Tribunal noted that s. 14(1) of the *Buildings Ordinance* was the section requiring that no person shall commence or carry out any building works without his or her plans having first been approved and consent given for the commencement of the building works in question.

The Tribunal also noted that s. 16(1) of the *Buildings Ordinance* 'sets out the grounds on which the Building Authority may refuse to approve plans for building works and such grounds are the only grounds on which approval of plans may be refused. Each of the various sub-paragraphs of Section 16(1) are in very general terms and import numerous requirements contained elsewhere in the Ordinance and Regulations.' (See paragraph 3.)

The Tribunal stated that: 'If the Building Authority in refusing to give approval has relied on anything extraneous to Section 16 (1), such a consideration would be irrelevant and the appeal will have to be allowed and the matter sent back to the Building Authority to be dealt with on its own merits in accordance with the provisions of Section 16 (1)' (para. 3).

The Tribunal explained the law as regards the proper exercise of discretionary powers by reference to *Associated Provincial Picture Houses Limited v Wednesbury Corporation* [1947] 2 AER 685:

> As is well-known discretionary powers must all be exercised in good faith for the purpose for which they are granted and within the limits of the Ordinance or other instruments conferring the discretion. The discretion must also be exercised fairly and in accordance with proper legal principles and these standards imply that all relevant considerations must be taken into account and that extraneous considerations be disregarded by the person or body, in this case the Building Authority, exercising that power. The exercise of a discretion is invalidated if the way it was exercised was significantly influenced by the improper regard or disregard of the factors in issue (see *Associated Provincial Picture Houses Limited v Wednesbury Corporation* [1947] 2 AER 685)

Applying the law to the facts, the Tribunal allowed the appeal 'with some regret' on the following grounds:

The Building Authority failed to consider plans submitted on their own merits

The Building Authority had not considered the plans submitted on their own merits. The relevant question that the Building Authority had failed to ask in determining the application was: whether the proposals, if approved, would comply with the provisions of the Ordinance or any other enactment.

The Building Authority took into account irrelevant considerations

The Building Authority took into account irrelevant considerations, namely the history of the structure and the Building Authority's dealing with the appellant. The fact that the original structure (part of which would remain if the new plans were approved) had never been approved by the Building Authority was an irrelevant consideration. It had been wrongly taken into account by the Authority in rejecting the building application. The only relevant considerations were those stated in s. 16(1).

- **Comments:**

This case led ultimately to a closure order by the District Court: *Building Authority v Owners of the Illegal Structures on the Roof of 9/F, and Roof above Flats A1 & A2 on 10/F, 105 Austin Road*, MP No. 275 and 512 of 1987 (30 October) [1988] HKLY 61.

WYLIE ROAD

- **Building Appeal Case Name:** No. 10 Wylie Road, King's Park, Kowloon **[Wylie Road]**
- **Building Appeal Case No.:** 35/94
- **Similar Case:** *Pak On Building Case* (06/87)
- **Nature of the Case:** Regulation 51 of the *Building (Planning) Regulations*; s. 14(1) of the *Buildings Ordinance*; demolition and removal under s. 24(1) of the *Buildings Ordinance*; ss. 24(1)(a) and 24(1)(c) of the *Buildings Ordinance*; s. 24(3) of the *Buildings Ordinance*; s. 42(5) of the *Buildings Ordinance*; Regulation 5 of the *Building (Construction) Regulations*; April 1988 Practice Note; retrospective approvals
- **Date of Hearing:** 7 January 1995
- **Date of Decision:** 28 February 1995

- **Chairperson of Tribunal:** Mr Philip Nunn
- **Representation:**

  (a) Mr Brumen Li for the appellant
  (b) Mr Nicholas Cooney for the respondent

- **Decision:** appeal dismissed
- **Rules Laid down by the Decision:**

  (1) The Tribunal attaches great significance to the decision of Mr Justice Godfrey in *Yeung Pui Yee v Building Authority* in respect of the April 1988 Practice Note issued by the Building Authority. The full terms of the Practice Note are set out on pages 2 and 3 of Mr Justice Godfrey's decision. Mr Justice Godfrey stated at page 3 of the judgment that the Practice Note applied, on its true construction, to the commencement carrying out or completion of any building works whether unauthorized alterations and additions or not. On page 5 of the judgment, Mr Justice Godfrey stated as follows:

  > As it seems to me, the April 1988 Practice Note is concerned only with the problem to which it in terms relates . . . **It has the effect of reminding authorised persons that no building works can be effected without first obtaining such approval and consent**. Despite the heading, it seems to me irrelevant whether the building works are new building works or works of alteration and addition. To **all** such building works, Section 14(1) of the Buildings Ordinance applies.
  >
  > The provisions of Section 42 of the Buildings Ordinance (which relate to modification of requirements under the Buildings Ordinance) are not applicable to applications to dispense with the requirements of Section 14 and authorised persons are reminded of this also.
  >
  > When the Building Authority states as it does:
  >
  > It is therefore abundantly clear that I have no powers to give retrospective approval or consent in respect of building works which have already been commenced, carried out or completed.'
  >
  > The Building Authority states the law correctly. It states it correctly both in respect of new building works and in respect of unauthorised alterations and additions to existing building works, whether those existing building works were themselves originally authorised under Section 14 or not.

  (2) The Tribunal is bound by *Yeung Pui Yee v The Building Authority* in rejecting an application for approval of plans for a temporary structure

which has already been erected in a substantially similar although not identical form to the temporary structure shown in the application.

(3) It would be quite wrong for the Building Authority to be put in the position of having to approve plans under s. 16 of the *Buildings Ordinance* in isolation of the surrounding circumstances. If a structure had been erected without the necessary consent of the Building Authority under s. 14 of the *Buildings Ordinance*, the Building Authority would be correct in refusing to process plans submitted. Section 42(5) of the *Buildings Ordinance* gives the Building Authority no powers of exemption in these circumstances.

(4) The *Pak On Building Case* relates to remedial works to existing unapproved structures. This is not a case of approval being sought for plans relating to existing unapproved structures.

(5) The principle of the *Pak On Building Case* is that where the Building Authority is requested to consider plans for the construction of **remedial work to existing buildings**, it is irrelevant that the plans for the existing building have not been approved.

- **Background:**

The appeal involved an appellant who appealed against the Building Authority's rejection of his application. It was made on behalf of the Filipino Club, under Regulation 51 of the *Building (Planning) Regulations* for permission to erect a temporary building at No. 10 Wylie Road, King's Park, Kowloon (the subject site).

On 23 May 1994, the appellant made his application. On 20 July 1994, the Building Authority rejected the application on the grounds that the temporary building for which approval was sought had already been erected on the site without the consent of the Building Authority. As a result, the subject of an order by the Building Authority under s. 24(1) of the *Buildings Ordinance* required demolition and removal.

In a letter dated 20 July 1994 to Mr Choy, the Building Authority indicated the following:

(a) Section 14(1) of the *Buildings Ordinance* provided that no person should commence or carry out any building works without having first obtained the approval and consent of the Building Authority.

(b) There was no power under s. 42(5) of the *Buildings Ordinance* to exempt any person from the provisions of s. 14.

(c) As a consequence, the Building Authority had no power to give retrospective approval to plans for building works which had already been completed.

On 21 July 1994, the appellant registered his appeal.

- **Arguments:**

Grounds of appeal

The grounds of appeal were as follows:

(a) The Building Authority had failed to consider the provisions of the *Buildings Ordinance* with regard to approval of building plans. In particular, according to s. 16(1) of the *Buildings Ordinance*, consideration of plans should be based on the merits of the plans themselves and other considerations should not be taken into account. This was confirmed in a decision of the Building Appeal Tribunal of 22 May 1987 regarding premises at 19/F, Pak On Building, 105 Austin Road, Kowloon (the *Pak On Building Case*).

(b) Failure to comply with s. 14(1) of the *Buildings Ordinance* was a totally separate issue from the approval of plans under s. 16 of the *Ordinance*. Failure to comply with s. 14(1) should not disqualify the applicant from having his or her building plans approved if the plans were properly prepared and complied with all other provisions of the Ordinance.

Mr Li's submission

Mr Li, in presenting the appellant's case, made the following submission:

(a) The plans submitted by Mr B. W. Choy to the Building Authority on 23 May 1994 on behalf of the appellant should have been approved because the Building Authority had no grounds for refusal of those plans under s. 16 of the *Buildings Ordinance*.

(b) The Tribunal should follow the decision of the Tribunal in the *Pak On Building Case*, which supported the appellant's case.

(c) The judgment of Mr Justice Godfrey in the unreported case of *Yeung Pui Yee v The Building Authority* delivered on 4 October 1988 was irrelevant but the Building Authority relied upon this decision in support of its refusal to consider the plans submitted by the appellant. This case had little bearing on the present matter and dealt only with a Building Authority Practice Note. The Tribunal should follow the *Buildings Ordinance* and previous decisions of the Building Appeal Tribunal, rather than a court decision on a Building Authority Practice Note which was of no statutory significance.

(d) He would call evidence from Mr Choy to the effect that there were some additions and alterations shown on the plans submitted to the Building Authority for approval from the works which actually existed on the site.

(e) If the plans submitted were approved then the appellant would still require the Building Authority's consent for the commencement of works under s. 14(1) of the *Buildings Ordinance*.

(f) The provisions of s. 24(1)(c) of the *Buildings Ordinance* gave the Building Authority a discretionary power to approve plans for alterations to any building or building works as might be necessary to cause the same to comply with the provisions of the *Ordinance*. The Building Authority was incorrect in issuing a demolition order under s. 24(1)(a) for the existing works. The Building Authority could have elected not to issue such an order, and instead issued an order demanding rectification of the existing building works under s. 24(1)(c). He argued that the key concern should be the safety of the structure actually constructed and there was no argument by the Building Authority in this case that the existing structure was unsafe or was in any way a danger to the public.

The appellants

Mr Li called the appellant to give evidence. He produced a copy of the plans submitted to the Building Authority for approval. He gave evidence that there were certain aspects of the plans submitted which were not similar to aspects of the existing structure on the site.

Mr Cooney, on behalf of the respondent, made the following submissions:

(a) The application before the Tribunal was for approval of the whole of the plans submitted with the application of 23 May 1994.
(b) While he accepted that there were minor differences between the plan submitted and the existing structure, these differences were immaterial in the context of an application for approval for the whole of the plans.
(c) The decision of Mr Justice Godfrey in the *Yeung Pui Yee Case* was exactly on point and should therefore be followed by the Tribunal.
(d) The Building Authority had no power to retrospectively approve plans. This was made clear by s. 42(5) of the *Buildings Ordinance* which provided that the Building Authority had no power of exemption in relation to s. 14 of the Ordinance. The result was that the Building Authority could not approve plans for existing works which had been constructed without consent.
(e) This was not a case where s. 24(1)(c) of the *Buildings Ordinance* could be applied because that subsection only dealt with alterations to buildings and this was not a case of alterations to buildings but an application for approval of plans for a new structure.
(f) The Appeal Tribunal decision in the *Pak On Building Case* relied upon by the appellant was distinguishable. In that case, a s. 24 Notice served by the Building Authority specified two contraventions. The first was that the structure had been erected without approval and the second was that there was a breach of the loading requirements contained in Regulation 5 of the *Building (Construction)*

Regulations. The plans submitted by the appellant in that case addressed the breach of the loading requirements and were plans for remedial works to existing structures. They were not plans which purported to address the first contravention namely the erection of structures without consent. The Appeal Tribunal had correctly decided that the Building Authority in that situation must only consider the works shown on the alteration plans and could not reject the plans on the basis that the existing works had not obtained approval.

(g) Approval of plans was not a separate exercise from approval of commencement of works. It could not be correct for the Building Authority to look at plans in isolation of the existence of structures on the site. It would be absurd if the Authority was compelled to approve plans for an existing structure and at the same time empowered to demolish the existing structure in accordance with its powers under s. 24(3) of the *Buildings Ordinance* because that structure had been erected without consent.

(h) In the judgment of *Yeung Pui Yee Case*, Mr Justice Godfrey stated that the Building Authority had stated the law correctly when it said in its April 1988 Practice Note that **'it have no power to give retrospective approval or consent in respect of building works which have already been commenced, carried out or completed'** (emphasis added). Mr Justice Godfrey went on to say as follows:

> When the Building Authority gives the following guidance to authorised persons:
>
> > 'In the circumstances, applications for approval of any plan or consent for the commencement of building works, for which works have been commenced, carried out or completed will not therefore be processed; they will be returned to you with a note referring to the limitations in my power as described herein.'
>
> it does no more than state what the consequences will be of a failure by the authorised person to take any notice of the Ordinance or of the guidance about it which the April 1988 Practice Note is intended to give.

Therefore Mr Cooney argued that Mr Justice Godfrey had decided that **the April 1988 Practice Note did correctly state the law** and that **'there cannot be retrospective approval of plans in respect of building works which have already been commenced or completed'** (emphasis added).

Mr Tong Kin Hong's evidence

Mr Tong was a Building Surveyor in the Buildings Department. Mr Tong told the Tribunal that:

(a) he had inspected the site of the proposed building works shown in the plans submitted by the appellant;
(b) he had noticed that the building works shown on the plans had already been carried out and completed on site. The building works comprised of a steel platform and staircase which appeared to be of the dimensions shown on the plans submitted for approval.

Mr Tong Kam Man's evidence

Mr Tong Kam Man was a Senior Building Surveyor in the Buildings Department. He was the officer responsible for processing the appellant's application. Having heard from his building surveyor, Mr Tong Kin Hong, that a temporary steel platform had already been erected on the site, he considered that it was inappropriate for him to process the application further under the *Buildings Ordinance* as he had no power under the *Buildings Ordinance* to give retrospective approval or consent in respect of building works which had already been completed.

- **Reasons for Decision:**

Having carefully considered the submissions of the parties, the relevant provisions of the *Buildings Ordinance* and the authorities cited, the Tribunal concluded that the Building Authority was correct in refusing to process the plans submitted by the appellant. The reasons were as follows:

(a) The Tribunal attached great significance to the decision of Mr Justice Godfrey in the *Yeung Pui Yee Case*. It believed that the case was directly applicable to this case and disagreed with the appellant's contention that the case was of limited relevance to the appeal. 'Mr Justice Godfrey was dealing with an April 1988 Practice Note issued by the Building Authority. The full terms of the Practice Note are set out on pages 2 and 3 of Mr Justice Godfrey's decision. Mr justice Godfrey then states at page 3 of the judgment that the Practice Note applies, on its true construction, to the commencement, carrying out or completion of any building works whether unauthorised alterations and additions or not. On page 5 of the judgment, Mr Justice Godfrey states as follows:

> "As it seems to me, the April 1988 Practice Note is concerned only with the problem to which it in terms relates . . . **It has the**

> **effect of reminding authorised persons that no building works can be effected without first obtaining such approval and consent**. Despite the heading, it seems to me irrelevant whether the building works are new building works or works of alteration and addition. To **all** such building works, Section 14(1) of the Buildings Ordinance applies." (emphasis added)

The provisions of Section 42 of the *Buildings Ordinance* (which relate to modification of requirements under the Buildings Ordinance) are not applicable to applications to dispense with the requirements of Section 14 and authorised persons are reminded of this also.

When the Building Authority states as it does:

> "It is therefore abundantly clear that I have no powers to give retrospective approval or consent in respect of building works which have already been commenced, carried out or completed."

the Building Authority states the law correctly. It states it correctly both in respect of new building works and in respect of unauthorised alterations and additions to existing building works, whether those existing building works were themselves originally authorised under Section 14 or not.'

(b) This was an application for approval of plans for a temporary structure which had already been erected in a substantially although not identical form to the temporary structure shown on the appellant's plans submitted for approval. In that situation, the Tribunal considered itself bound to follow the decision of Mr Justice Godfrey.

(c) Even if it was not so bound, the Tribunal generally agreed with the Building Authority's interpretation of the *Buildings Ordinance* in cases of this nature. It would be quite wrong for the Building Authority to be put in the position, as suggested by the appellant, of having to approve plans under s. 16 of the *Buildings Ordinance* in isolation of the surrounding circumstances. If a structure had been erected without the necessary consent of the Building Authority under s. 14 of the *Buildings Ordinance*, it appeared to the Tribunal that the Building Authority was quite correct in refusing to process plans submitted. Section 42(5) of the *Buildings Ordinance* gave the Building Authority no powers of exemption in these circumstances.

(d) As regards the previous decision of the Tribunal in the *Pak On Building Case*, the Tribunal agreed with the view of the Building Authority that this case could be distinguished from the current case in that approval had been sought for plans relating to remedial works to existing unapproved structures. This was not a case of approval being sought for plans relating to existing unapproved structures.

(e) However, the Tribunal also accepted the view in the *Pak On Building Case* that where the Building Authority was requested to consider plans for the construction of **remedial work to existing buildings**, it was irrelevant that the plans for the existing building had not been approved.

DISCOVERY BAY

- **Building Appeal Case Name:** No. 42 Headland Drive, Headland Village, Discovery Bay, Lantau Island [**Discovery Bay**]
- **Building Appeal Case No.:** 38/94
- **Nature of the Case:** illegal structures; enforcement under s. 24 of the *Buildings Ordinance*; effective notice of enforcement actions; costs to respondent
- **Date of Hearing:** 6 June 1995
- **Date of Decision:** 6 June 1995
- **Chairperson of Tribunal:** Mr Au Fun Kuen
- **Representation:**

  (a) Mr Malcolm Lim for the appellant
  (b) Ms Susanna Sit, Crown Counsel for the respondent

- **Decision:** appeal partly allowed, partly dismissed
- **Rules Laid down by the Decision:**

  (1) If building plans are not submitted to the Building Authority for the building works, there is no way the Building Authority can check and satisfy itself as to whether the building works, when completed according to the approved plans, would be safe. The Building Authority is legally entitled to issue an order under s. 24 of the *Buildings Ordinance* (unless the building works are exempted works), if plans for the works have not been submitted for its approval and approved by it, or its consent has not been obtained for the commencement of the works. **There is no basis for the suggestion that the unauthorized building works should be demonstrated to be unsafe before the Building Authority should consider issuing an order under s. 24.**

  (2) Section 24 of the *Buildings Ordinance* provides that where any building works have been or are being carried out in contravention of any of the provisions of the Ordinance, 'the Building Authority **may** (emphasis added) by order require the demolition of the same'. Therefore, the Building Authority has a discretion to take action to

enforce or not to take action to enforce against the illegal works involved.

(3) 'The word "significant" used in the 1988 press release qualifies the word "works" rather than the word "new". If the intention was that the word "significant" should qualify the word "new", the statement should have read "significantly new". It is also fair and reasonable that unauthorised building works, if not significant, although new, should not merit priority treatment. Irrespective of whether the works are old or new, if the works are not significant, the Building Authority should, in his discretion, consider whether enforcement action should be taken at all.'

- **Background:**

The appellant was the registered owner of House No. 42, Headland Drive, Headland Village, Discovery Bay. On 30 April 1993, as a result of a complaint made to the Buildings Department, an inspection of the property was carried out by officers of the Building Authority. The officers discovered that certain works were being carried out at the property. The same officers again inspected the property on 27 August 1993.

On 6 May 1994, an order was issued by the Building Authority under s. 24(1) of the *Buildings Ordinance* requiring the appellant to demolish and remove the building works set out in the order and to reinstate the property in accordance with the approved building plans. The appellant appealed against the order to the Tribunal.

- **Arguments:**

The appellant did not dispute the existence of the building works, nor did the appellant seek to argue that they were not 'building works' within the meaning of the *Buildings Ordinance*. It was also accepted that the appellant did not apply to the Building Authority for approval of building plans for the building works.

However, the appellant argued on the following grounds:

(a) It had taken a long time for the Building Authority to issue the order; as a result of this delay, the appellant was prejudiced. The Building Authority first inspected the property on 30 April 1993. It was not until 6 May 1994 that an order was issued. The property was let out to a tenant in March 1994 for a term expiring in March 1996. Had the order been issued earlier, the property would not have been let in the then state and condition.

Under s. 40 (8) of the *Buildings Ordinance*, prosecution under the provisions of the *Ordinance* might be commenced within 6 months of the commission of the offence, or within 6 months of the same being discovered by or coming to the notice of the Building Authority. It was therefore unfair for the Building Authority to issue the order when the time limit for prosecution had expired.

(b) The appellant received no communication from the Building Authority between the time when the inspection was made in April 1993, and May 1994 when the order was issued.
(c) The purpose of the Ordinance, as stated in the preamble to the Ordinance, was to make provision for rendering safety of dangerous building. The Building Authority had not demonstrated that the building works were unsafe. The appellant produced an engineer's report at the hearing. The effect of the report was that the works appeared to be safe.

The respondent argued as follows:

(a) To contradict the assertion that there was no communication to the appellant, the Building Authority called the building surveyor who conducted the inspections in April and August 1994 to give evidence.

At the time of the inspection, a letter was handed to a lady at the property who admitted to the building surveyor that she represented the owner. The letter was to the effect that the building works contravened the Ordinance and were therefore illegal.

Another letter was inserted in the letterbox of the property requesting the owner to contact the building surveyor in connection with the building works. A similar letter was also left in the letterbox of the property when the property was again inspected in August 1993.

The delay in the issue of the order, explained the building surveyor, was due to the lack of resources within the Buildings Department.

(b) The building works were all unauthorized and new. The Building Authority was right in issuing the order, notwithstanding the delay in the issue of the order. The fact that no prosecution was brought against the appellant was not relevant.
(c) Since no plans had been submitted to the Building Authority for the building works, there was no way the Building Authority could check and satisfy itself as to whether the building works as completed would be safe. Furthermore, most of the building works had plot ratio and site coverage implications.
(d) The Building Authority did not have any discretion as to whether or not to issue an order under s. 24 of the *Buildings Ordinance*. It was said that the only discretion was exercised as to the priority of enforcement.
(e) Chief Building Surveyor/Control of the Buildings Department gave evidence on behalf of the respondent. The Buildings Department had taken the view that the word 'significant' used in the 1988 press release qualified the word 'new' and not the word 'works' so that if the unauthorized building works were 'significant new', enforcement action would be taken as a matter of priority. The internal guidelines

of the department was that something was 'significant new' if it was no more than 12 months old. The word 'significant' should be interpreted as qualifying the word 'works'. However, it was admitted by the witness that the retractable canvas canopies would not be significant.

- **Reasons for Decision:**

The Appeal Tribunal dismissed the appeal on the following grounds:

The evidence of the Building Surveyor of the Buildings Department was accepted

The Tribunal accepted the evidence given by the Building Surveyor of Buildings Department.

The evidence of the engineer was not given weight

The Tribunal attached little weight to the report of the engineer because his opinion relied on either his visual inspection/estimation or information supplied by the appellant in coming to the conclusion reached in the report. He did not carry out any tests or open up any of the structures. He was not called to give evidence.

Section 24 conferred discretion

The Tribunal explained that it was established under the *Buildings Ordinance* to determine appeals of persons aggrieved by any decision made by the Building Authority in the exercise of the power of discretion conferred on it under the *Ordinance*.

Section 24 of the *Buildings Ordinance* provided that where any building works had been or were being carried out in contravention of any of the provisions of the Ordinance, 'the Building Authority **may** (emphasis added) by order require the demolition of the same'. It was noted by the Tribunal that the word 'may' was used in the section. The Tribunal had no doubt therefore that the **power of discretion was conferred by the section on the Building Authority as to whether an order was to be issued under the section or not. That discretion was not limited to the priority of enforcement**.

Significant works, not significantly new works

The Tribunal was of the clear view that:

> . . . the word 'significant' used in the 1988 press release qualified the word 'works' rather than the word 'new'. If the intention was that the word 'significant' should qualify the word 'new', the statement should have read 'significantly new'. It is also fair and reasonable that unauthorised building works, if not significant, although new,

> should not merit priority treatment. Irrespective of whether the works are old or new, if the works are not significant, the Building Authority should, in his discretion, consider whether enforcement action should be taken at all.

Retractable canvas canopies insignificant

The retractable canvas canopies on the ground floor facing the rear garden and at the rear terrace on the 1st floor were considered insignificant works. The Building Authority, in the exercise of its discretion, should not have issued the order in respect of them. Accordingly, the Tribunal allowed the appeal in relation to these two items.

Communication was effective

The appellant was aware that the building works contravened the *Ordinance* and were therefore illegal. The Tribunal was satisfied that:

(a) the letter which was handed to the lady at the property, as well as the letter which was inserted in the letterbox of the property on the occasion of the first inspection in April 1993, did come to the notice of the appellant;
(b) the letter which was left in the letterbox of the property when the property was again inspected in August 1993 also came to the notice of the appellant. There was a delay in the issue of the order but it did not follow from this that the order should not have been issued, or that the Building Authority, in issuing the order, had wrongfully exercised his discretion.

Delay in prosecution and safety of works immaterial

The Tribunal dismissed the appeal as any delay in prosecution was immaterial. Nor was the fact that the works were safe relevant:

> The fact that the Building Authority did not prosecute the Appellant is of little relevance. Apart from the fact that no plans were submitted for approval by the Building Authority for the building works, some of the works would have contravened provisions of the ordinance and the regulations made thereunder relating to, among others, plot ratio and site coverage. The Appellant should be aware that if plans are not submitted to the Building Authority for the building works, there is no way the Building Authority can check and satisfy himself as to whether the building works, when completed according to the approved plans, would be safe. The Building Authority is legally entitled, unless the building works are exempted works, to issue an order under Section 24, if plans for the works have not been submitted for his approval and approved by him, or his consent has not been obtained for the commencement of the works. **There is no basis for the suggestion that the unauthorised building works should**

> **be demonstrated to be unsafe before the Building Authority should consider issuing an order**, although safety must be one of the many factors that the Building Authority should take into account in the exercise of his discretion. We would accordingly dismiss the appeal in respect of all the other items (emphasis added).

Postscript

The Tribunal added that it would:

(a) **it would recommend to the Building Authority that no enforcement action would need to be taken in respect of the metal frame** at the front of the property covering the void and the see-through glass panels replacement of the balustrade at the rear terrace of the 1st floor. The proviso was that the appellant could subsequently demonstrate to the Building Authority that these works would have been approved had the relevant plans been properly submitted in compliance with the relevant regulations. The reason was that these were common features which, if properly constructed, should be acceptable;
(b) it would order that the appeal be allowed in respect of the items described in paragraph 2(a)(v) and 2(b)(iv) of the list annexed to the Order No. C0160/94/NT.
(c) it would order that the appeal be dismissed in respect of all the other items described in that list; and
(d) order that the appellant had to also pay costs of the respondent and the Tribunal.

MIRADOR MANSION

- **Building Appeal Case Name:** 16/F Mirador Mansion, No. 54 Nathan Road, Kowloon, Hong Kong [**Mirador Mansion**]
- **Building Appeal Case No. :** 48/94
- **Nature of the Case:** section 24 (1) of the *Buildings Ordinance*; s. 3.1.17 of the *Licensing Authority Manual*
- **Date of Hearing:** 24 May 1995
- **Date of Decision:** 20 July 1995
- **Chairperson of Tribunal:** Mr Peter Graham
- **Representation:**

  (a) Mr Samuel Ip for the appellant
  (b) Mr Anthony Wu for the respondent

- **Decision:** appeal dismissed
- **Rules Laid down by the Decision:**

(1) Toleration on the basis that there is no immediate danger to the public does not imply that there is also the power to grant retrospective approval. Section 42, which empowers the Building Authority to permit modification, expressly excludes s. 14. The latter requires approval and consent before building works could be carried out. This was affirmed by the case *Yeung Pui Yee v the Building Authority* (MP 930 of 1988).

(2) The submission that the Building Authority needs to allow alteration or rectification of unauthorized works has no legal or rational basis.

- **Background:**

This was an appeal against an order under s. 24 (1) of the *Buildings Ordinance* to demolish works at Flat 3, Block F, 16/F, Mirador Mansion, 54 Nathan Road, Kowloon, Hong Kong (the premises).

The order was made by Mr R. S. Howes on behalf of the Building Authority. It was made on the basis that certain building works had been carried out in and at the premises without having first been obtained the approval of the building plans and consent for commencement of the building works.

The building works were described as 'the addition of structures built over the balconies on 16/F'. The 'structures' in question were illustrated in the form of a section sketch which was prepared by one of the members of the Tribunal and referred to by all parties at the hearing.

The appeal was heard on 24 May 1995.

With the leave of the Tribunal, the Grounds of Appeal were amended and the only points with which the Tribunal was concerned at the hearing of this appeal were as follows:

(1) Was the canopy above the 16th floor balcony an approved structure having regard to the approved plans?

(2) Assuming the canopy in question was not an approved structure, was it against the rules of natural justice or an abuse of the powers of the Building Authority to order demolition in view of the alleged fact that there were other similar illegal structures in the same building, the demolition of which had not been ordered?

(3) Again, assuming the canopy was not an approved structure, was it against the rules of natural justice or an abuse of the statutory powers of the Building Authority to require it to be demolished under s. 24(1)(a) without first asking that the structure be altered or rectified?

- **Arguments:**

The appellant, through his expert witness, Mr B. W. Choy, a Registered Structural Engineer, took issue with the word 'canopy' as describing the horizontal structure shown in the sketch by the broken lines:

(a) According to Regulation 2 of the *Building (Planning) Regulations*, a 'canopy' was defined as a structure projecting more than 500 mm from any wall of any building to provide protection from rain or sun and not carrying any floor load, either cantilevered or supported by brackets.
(b) The structure in question was not cantilevered and did not project from the building. The structure was merely an extension of the roof slab parallel to the slab of the 16th floor.

Mr Samuel Ip, the solicitor representing the appellant, submitted that the single line on the western or left-hand extremity of the approved plan, together with the words 'RC canopy', indicated that the structure in question was actually shown on the approved plans.

The appellant also advanced the following arguments:

(a) There was an unauthorized rooftop structure on a nearby building occupied by the Astor Hotel. Hence, the Building Authority was in breach of the rules of natural justice or in abuse of its statutory powers in ordering removal of the unauthorized structure in question but leaving alone other illegal structures.
(b) The illegal structures presented no immediate danger to the public.

Mr Howes for the respondent explained history of the order. He, who made the order for the demolition and removal of the structure on behalf of the Building Authority, was an Authorized Person and Chief Officer of the Office of the Licensing Authority, City and New Territories Administration (CNAA).

The premises, occupied by the appellant, had been used for a licensed hotel or guest-house. The practical effect of the demolition order would be that the appellant would lose all of one room (room 1) and a proportion of rooms 2, 3, 4 and 5.

A policy paper drawn up in December 1990 written in anticipation of a new hotel licensing legislation explained how the relevant authority might properly discharge its statutory duties in the case of licence applications made in respect of unauthorized buildings.

The policy paper outlined a two-pronged approach to the question of unauthorized building works used by way of hotel or guest-house accommodation. It proposed that unauthorized building works used for hotels and guest-houses should be removed by making use of licensing

conditions within a period of 3 to 5 years. This period would give licensees time to make suitable preparations.

Ensuing from that policy paper were: (a) the formulation of a policy on unauthorized building works as contained in s. 3.1.17 of the *Licensing Authority Manual*; and (b) a system of Certificates of Exemption was established.

The effect of these innovations was that a degree of 'tolerance' would be extended to the proprietors of licensed hotels and guest-houses, exempting them from the need for a full licence until such time as the conditions required for a full licence could be complied with. These conditions might include the removal of unauthorized structures.

On 12 November 1991, the Licensing Authority issued a Certificate of Exemption in respect of the subject premises (known as the 'Seaview Hostel') which was valid until 18 August 1992.

By a letter dated 4 September 1992, the Certificate of Exemption was renewed from 1 September 1992 to 31 August 1993. Every time a Certificate of Exemption was granted or renewed, it was made clear that the licensee was required to carry out all necessary structural and other works in order to make the premises comply in every way with all relevant laws and safety regulations.

In the letter dated 4 September 1992, it was expressly stated that certain special conditions must be complied with before the issue of a licence under s. 8 and not later than 31 August 1993. One of these conditions was that 'the unauthorized reinforced concrete canopy erected over the open balcony/roof area is to be demolished and the building reinstated to that shown on the approved plans'.

On 6 August 1993, Mr Samuel K. S. Lau, who appeared as representative of the appellant (the proprietor of 7 hostels including the Seaview Hostel), wrote to Mr Howes of the Licensing Authority. Mr Lau stated that he was prepared to carry out further works to his hostels to meet the new requirements of the Licensing Authority. Mr Lau also said that:

> the works in the hostels in Mirador Mansion [i.e. the Seaview] will also commence as soon as instructions are given by your officer and I believe they will not take too long to complete.

Mr Howes explained in his evidence that in response to the promise contained in the letter of Mr Lau dated 6 August 1993, a conditional licence was issued on 1 September 1993. One condition of this licence was that the illegal structure had to be removed by 31 December 1993.

Consequent upon failure to comply with the condition by 31 December 1993, a Section 24 order was issued on 12 August 1994. Mr Howes explained that there were no other licensed hotel or guest-house on the 16th floor similarly making use of the unauthorized canopy. The 16th

floor was the only floor affected by the unauthorized canopy. There was no base for invoking an argument based upon breach of the rules of natural justice or abuse of statutory powers founded upon unfair disparities in the treatment of like cases.

Mr Howes allowed that there might be unlicensed guest-houses operating unlawfully on the 16th floor but said he was not aware of any.

As regards Astor Hotel, Mr Howes explained that Astor Hotel had been ordered as a condition of its licence to carry out many other remedial works which were regarded as a higher priority and, in due course, enforcement action would be taken, if necessary, in respect of the unauthorized rooftop structure.

- **Reasons for Decision:**

The Tribunal dismissed the appeal on the following grounds.

The canopy was an unauthorized structure

Having noted Mr Choy's point, the Tribunal did not see the matter as one involving a decision as to whether the structure in question should be technically described as a canopy or not. 'In the end, much turned upon the examination and interpretation of the amended approved plans which were in evidence. Most important of these were the plans were not in evidence.' There are two main grounds behind the Tribunal's view:

(a) The argument about the canopy as an approved structure was not supported by the appellant's expert witness. Mr Choy in the end fairly acknowledged that the approved drawings did not show the structure in question (whether it be called a canopy or something else). Though he said he thought that the structural drawings might have included the structure in question, he acknowledged that he had not seen the structural drawings.

(b) The premises was located at the north-west corner of the building and the upper roof plan showed what was described as 'new RCC [reinforced concrete] canopy' extending along the western side of the building. This was delineated by a solid double line which, according to conventional drawing standards, was the way of delineating building work shown on the level the plan depicted. By way of contrast, according to the conventional drawing standards, anything on a lower level of the building was depicted by a single line. The plans themselves made it obvious that the conventional drawing standards were being used by the draughtsman. The Tribunal had no doubt that a reading of the plans, according to the conventional drawing standards, informed that the 'new RCC canopy' shown on the upper roof plan terminated some way short of the north-west corner of the building. Therefore, the structure in question could not be regarded

as having been approved as part of these plans. The Tribunal believed that disposed of the first point.

There was no breach of natural justice or an abuse of power

The Tribunal did not find the Building Authority having been in breach of natural justice or abusing its power:

(a) The licensing history of the premises as described by Mr Howes satisfied the Tribunal that the appellant had been treated reasonably and even generously 'by what is in effect the combined action of the Building Authority and the Licensing Authority'.
(b) The argument from Astor Hotel on a nearby building, even assuming that it was an unauthorized rooftop structure, fell 'a long way short establishing that the Building Authority, through Mr howes, acted in breach of the rules of natural justice or in abuse of its statutory powers in ordering removal of the unauthorised structure in question'.

There was no breach of the rules of natural justice or an abuse of statutory power in ordering demolition and removal of the unauthorized structure rather than merely 'asking for the structure to be altered or rectified'

The Tribunal was not impressed by the appellant's submission that the order under s. 24(1) for demolition should have been replaced an order for alteration or rectification because of the following:

(a) Toleration on the basis that there was no immediate danger to the public did not imply that there was also the power to grant retrospective approval. Section 42, which empowered the Building Authority to permit modification, expressly excluded s. 14. The latter required approval and consent before building works could be carried out. This was affirmed by the case *Yeung Pui Yee v the Building Authority* (MP 930 of 1988).
(b) The submission that the Building Authority needed to allow alteration or rectification of unauthorized works had 'no legal or rational basis'.

> It was not altogether easy to grasp what was intended to be embraced by this appeal point. In the first place, we must say we find that there is no substance to any point based upon breach of the rules of natural justice or abuse of statutory powers. The appellant's expert, Mr. B. W. Choy, said in evidence that there had been many many cases where he had prepared calculations for the Building Authority to show that unauthorised structures were safe and might therefore be approved. This seemed to represent a misunderstanding on his part. It was explained to the Tribunal by Mr. Howes that although there may be cases where a Registered Structural Engineer might

make submissions with the intention of satisfying the Building Authority that unauthorised building works did not present an immediate danger to the public and therefore might be tolerated for a period, there was no power to retrospectively approve an unauthorised building works. This is clear from section 42 of the Buildings Ordinance which empowers the Building Authority to permit modifications of the provisions of the Ordinance. That section expressly exempts section 14, which is the section which requires approval and consent before building works are carried out. That this is the law is affirmed in the unreported judgment of Godfrey J. (as he then was) in M. P. No. 930 of 1988. *Yeung Pui Yee v The Building Authority*, date of judgment 4th October, 1988. On the basis (as we have found) that the canopy in question was an unauthorised structure, reinstatement could only be achieved by demolition. There is no way in which the unauthorised structure could be altered or rectified short of demolition and removal. We believe the Appellant has been given every opportunity to take such remedial measures, as it thought appropriate to ensure the premises complied with the law before demolition was ordered. We hope we have done justice to this point which was presented to the Tribunal in a most unclear way. The Appellant's solicitors submitted a written submission dated 10th June 1995 to the Tribunal which we agree to consider. We reject the argument that the approval of plans for commencement of unauthorised building works already completed would not be to give retrospective approval of unauthorised works. What else would it be? There is no legal or rational basis suggested for the submission that unless there are strong reasons to the contrary the Building Authority ought to allow 'alteration/rectification' of unauthorised works so as 'to put an end to the contravention'. We can think of a number of reasons why that would be a most unwise policy.

LAGUNA CITY

- **Building Appeal Case Name:** Roof E, Block 38, Laguna City, Kwun Tong, Kowloon [**Laguna City**]
- **Building Appeal Case No. :** 08/95
- **Nature of the Case:** s. 24 of the *Buildings Ordinance*; distinction between 'structures' and 'cabinets'; award of costs
- **Date of Hearing:** 10 May 1995
- **Date of Decision:** 31 May 1995
- **Chairperson of Tribunal:** Mr Peter Graham

- **Representation:**

  (a) Miss Kitty Kong for the appellant
  (b) Mr P. Y. Ho for the respondent

- **Decision:** appeal dismissed by a majority

- **Rules Laid down by the Decision:**

  (1) Whether a cabinet on the roof becomes a 'structure' depends on its size and if it is fixed to the roof. Its loading implications or the reason for fixing should be irrelevant.
  (2) The party which loses its case but is not represented when costs are asked for by the winning party may be given specific time to explain why costs should not be paid.

- **Background:**

  This was an appeal against an order under s. 24(1) of the *Buildings Ordinance* to demolish and remove 'building works' on the Roof E, Block 38, Laguna City, Kowloon, Hong Kong (the premises).

  The order in question was made on 31 October 1994 by Mr J. R. Dobbing, Chief Building Surveyor. The subject of the order was a storage facility of metal sheet construction, the approximate size of which was 3300 cm x 2650 cm x 2500 cm. The height was 2500 cm.

  The facility was used for storing barbecue equipment, folding chairs and items of that kind. An electric light was installed inside for the purpose of putting things away and taking them out at night. 'It seemed that the unit had been bought as some kind of kit set and then re-assembled on the roof. Mr Dobbing was of the view that this constituted "building works".'

  The appeal was heard on 10 May 1995.

- **Arguments:**

  The appellant was represented by his wife. She argued on behalf of the appellant that:

  (a) the object on the roof was neither 'built' nor 'erected'. It was not a 'structure', but merely a moveable cabinet assembled and placed on some bricks on a corner of the roof; and
  (b) the cabinet did not create any loading problems on the roof.

  Mr Dobbing for the respondent was of the following views:

  (a) The **assembly of the object** in question in this case did constitute building works.
  (b) The **size and construction** of the object had to be considered along with other matters such as **fixings or attachments** to the roof.

- **Reasons for Decision:**

  The Tribunal noted the following:

  (a) Not in dispute, the facility (to use a neutral word) was fixed to the roof by guy-wires and lightly bolted to the main structure of the building by means of thin metal strips. The purpose of these attachments was to make the cabinet less likely to be blown away in a typhoon. A member of the Tribunal was of the view that in a severe typhoon the roof was liable to be blown off notwithstanding these fixings, but that was not the basis of its decision.
  (b) A distinction had to be drawn between mere cabinets or boxes sitting on the roof and 'structures' that involved 'building' or 'building works'.

  The Tribunal dismissed the appeal because it agreed with Mr Dobbing's arguments.

  Decision regarding award of costs pending explanation of the appellant

  The Tribunal was minded to let costs follow the event and make an order for costs in favour of the Building Authority. However, as the appellant's representative had left the hearing by the time the Tribunal announced the decision, the Tribunal did not have the opportunity to hear her submissions on the question of costs.

  The Tribunal decided to give the appellant a period of ten days from the date of these reasons to address the Tribunal by letter on the question of costs. The Tribunal specified that if it did not receive any such submission or was persuaded by the appellant on the question of costs, an order for costs would be made in favour of the Building Authority.

  Dissenting Views

  The Tribunal recorded that its decision was by a majority, one member having taken the view that the appeal should have been allowed.

YIN HING BUILDING

- **Building Appeal Case Name:** B2 and B3, Yin Hing Building, Nos. 58–82 Choi Hung Road, Nos. 34–58 Yin Hing Street, Kowloon [**Yin Hing Building**]
- **Building Appeal Case No. :** 9/95
- **Nature of the Case:** s. 14 of the *Buildings Ordinance*
- **Date of Hearing:** 10 May 1995
- **Date of Decision:** 31 May 1995

- **Chairperson of Tribunal:** Mr Peter Graham
- **Representation:**

  (a) The appellant in person
  (b) Mr P. Y. Ho and Mr E. J. White for the respondent

- **Decision:** appeal allowed
- **Rule Laid down by the Decision:**

  (1) The guidelines contained in *C and E Division Manual — Section 3, Instruction No. 70* do not prevent a programme of replacement or repair being carried out in stages over a period of time. Although the permitted repairs may be described in the guidelines as 'cosmetic', **the guidelines do apparently allow quite substantial rebuilding in the interests of safety or the comfort of the occupants, whether or not such repairs involve entirely new materials or a percentage of the old materials.**

- **Background:**

This was an appeal against an order under s. 24(1) of the *Buildings Ordinance* to demolish and remove 'rooftop structures' at B2 and B3 Yin Hing Building, Nos. 58–82 Choi Hung Road, Nos. 34–58 Ying Hing Street, Kowloon, Hong Kong (the premises).

The order was made on 20 December 1994. Mr Cheung Man Pin was ordered to remove certain rooftop structures and reinstate the parts of the building affected by the building works in accordance with the approved plans.

- **Reasons for Decision:**

The Tribunal allowed the appeal on the grounds that there was no convincing reason for high priority in enforcing against the unauthorized structure. The reason was substantiated by evidence.

The only reason for giving high priority was a complaint

It was acknowledged by the Building Authority that the order was only made because in the opinion of the Chief Building Surveyor, the case fell into a high-priority removal category.

It was accepted by the Building Authority, and indeed was obvious from photographs produced in evidence, that the rooftop structure in question was surrounded by a sea of other similar structures, in respect of which no removal orders had been made. Some of these other structures appeared to have been recently re-roofed.

Mr Kenneth K. W. Lai, the Chief Building Surveyor, gave evidence for the Building Authority and acknowledged that there were 'millions' of

such unlawful rooftop structures used as family dwellings in Hong Kong. Mr Lai informed the Tribunal that it was not possible to order the demolition of all such illegal structures. Among other factors, he believed it would cause social unrest if the government attempted to do so.

In the opinion of the Building Authority, the reason that caused this case to be put into a high priority category for demolition was the fact that **a complaint had been made by some unknown person and because renovation works had been carried out in about May or June of 1994.**

No evidence of complete reconstruction was given

The Tribunal was shown photographs of the works in question. There was no dispute that the walls and basic structure of the building had not been altered although:

(a) substantial re-roofing had been done and new aluminium window frames had been installed;
(b) internal partitioning had also been replaced and a new false wooden ceiling had been installed;
(c) the appellant was adamant that he had neither paid nor contracted for entirely new roofing materials; and
(d) with the exception of some new angle iron supports it was not suggested that structural elements such as walls, beams, columns or floors had been replaced.

No evidence of new materials was used

There was an area of dispute as to precisely what materials had been used for the roof:

(a) It was evident from photographs that although most of the roof, which was of corrugated metal sheets, was concealed by cement or some other sealant on top and not visible from underneath because of the false ceiling, the corrugated metal exposed was new.
(b) It was also admitted by the appellant that some new angle iron supports had been put in place. It was insisted by the appellant that old corrugated metal sheets had been used on parts of the roof that could not be seen. In short, there was an argument as to whether the roof had been replaced in its entirety or whether it had been substantially rebuilt but retaining some old materials.
(c) However, Mr Lai did not inspect the premises himself but relied upon a report, dated 22 June 1994, which recorded 'renovation works to the existing rooftop structure' including '100% replacement of CMS roofing'.
(d) There was other evidence that, in one of the inspections, representatives of the Building Authority had asked the occupier to

remove part of the false ceiling so that the roof metal could be more closely inspected. That suggested the Building Authority **inspectors were not sure what the extent of new materials was.** The occupant did not agree to do this because it could not be done without damaging the new wooden false ceiling.

Guidelines in C and E division manual were relied upon

In making the decision to regard this as a high priority case for removal, Mr Lai explained that reliance was upon guidelines contained in *C and E Division Manual – Section 3, Instruction No. 70.*

These guidelines distinguished between 'cosmetic repairs' and 'complete rebuilding' of unauthorized building works; the description embraced repairs that exceeded the limits acceptable to such extent that they should be regarded as 'new unauthorized building works'.

Mr Lai accepted that these were guidelines only and not to be applied in a rigid and binding way. He also said that he understood the broad policy of the Building Authority as containing the problem of unauthorized rooftop structures by, in effect, letting them in the course of time become dilapidated.

Mr Lai's view was that if such structures became so dilapidated that they posed a risk to the safety of the occupants or members of the public, then the owners or occupants ought to demolish them.

The majority of the Tribunal considered that such a policy (an interpretation of the guidelines) was problematic and hard to justify because of the following reasons:

(a) It would practically force people to allow their homes to become dangerously dilapidated or run the risk of having to demolish them altogether.
(b) The policy, as expounded by Mr Lai, was not consistent with the guidelines in question. For instance, the guidelines allowed up to 25% of structural elements such as beams, columns, floors, walls, and reinforced concrete roofs to be replaced, and up to 60% of non-structural elements such as roof sheeting, doors, and windows to be replaced without the structure being regarded as 'new unauthorized building works'.
(c) The guidelines did not appear to prevent a programme of replacement or repair being carried out in stages over a period of time. Although the permitted repairs were described in the guidelines as 'cosmetic', **the guidelines did apparently allow quite substantial rebuilding in the interests of safety or the comfort of the occupants.**
(d) Whether or not the roof, as rebuilt, was composed entirely of new materials or a percentage of the old material retained was difficult

for the Tribunal to decide. In any case, the Tribunal did not think that it was a crucial point. The majority of the Tribunal held that even assuming that all new corrugated roofing had been used, the **renovations were not so extensive that the building could be classified as 'new unauthorized building works'** by reference to the guidelines. The Tribunal thought this case was close to the limit of building works that ought not reasonably be regarded as 'new unauthorized building works'.

The Tribunal made no order as to costs. One member did not agree with the majority of the Tribunal.

MARINA COVE

- **Building Appeal Case Name:** House No. F10, Marina Cove Stage II, Sai Kung, New Territories [**Marina Cove**]
- **Building Appeal Case No. :** 15/96
- **Nature of the Case:** s. 14(1) of the *Buildings Ordinance*; s. 24 of the *Buildings Ordinance*; priority of enforcement against illegal structures
- **Date of Hearing:** 17 December 1996
- **Date of Decision:** 14 March 1997
- **Chairperson of Tribunal:** Mr Francis Ip Tak Kong
- **Representation:**

  (a) Ms Chen An Hung and Mr Chan Cheung-lam for the appellant
  (b) Messrs P. Y. Ho and Warren Pau for the respondent

- **Decision:** appeal allowed
- **Rule Laid down by the Decision:**

  (1) The Building Authority must seek to justify the priority given to the demolition of the illegal building works on the grounds that they constitute 'an imminently dangerous situation' by means that go beyond visual inspection. If no justification is provided, then the only question for the Tribunal to decide is whether on the evidence the Building Authority has made good its case based on the grounds that the subject building works are significant and new at the material times.

- **Background:**

  The subject premises was House No. F10, Marina Cove. The Building Authority ordered the appellant to demolish or remove the following building works at the subject premises:

(a) a 3-storey structure in the courtyard;
(b) a structure on the front flat roof at 2/F; and
(c) a structure on the rear main roof.

The appellant appealed. The grounds of appeal were set out in the appellant's letter to the Building Authority dated 7 November 1995 and subsequently repeated in the appellant's letters written to the Secretary to the Appeal Tribunal dated 12 February 1996 and 10 July 1996.

A preliminary hearing for the appeal took place on 18 September 1996. In the hearing, the appellant's representative repeated the grounds specified in his letter written to the Secretary to the Appeal Tribunal dated 10 July 1996. It was stated that the subject building works were not new and therefore the subject order was not given in accordance with the Building Authority's publicized policy on the system of priorities on enforcement actions to be taken on unauthorized building works. It was on this basis that the Tribunal was satisfied that good cause had been shown for a full hearing to be held.

At the full hearing, the appellant was represented by Ms Chen An Hung and Mr Chan Cheung-lam. Mr Kwok Chi-fook was called by the appellant to give evidence.

The respondent was represented by Messrs P. Y. Ho and Warren Pau. They called Miss Ng Mee-chi and Mr Leung Shiu-hong to give evidence on behalf of the Building Authority.

- **Arguments:**

The arguments or evidence given for the respondent were as follows:

(a) The subject building works were, at the material times, significant and new.
(b) Miss Ng was suspicious of the structural stability of the 3-storey structure.
(c) Miss Ng explained that so far as the structure on the rear main roof was concerned, what the appellant was required to demolish were the window frame and the glass of the window and so far as the structure on the front flat roof at 2/F was concerned, in addition to the frame and glass of the window, the appellant was also required to demolish the flat roof cover.
(d) Miss Ng observed that during her inspection, the mosaic tiles on the external wall of the 3-storey structure in question were very new and clean whereas the mosaic tiles on the walls in the vicinity were markedly different: the latter had stains left by rain particularly at the joints of the mosaic tiles.
(e) When Miss Ng was specifically asked whether the white cement cleaning as described by Mr Kwok (see below) was compatible with what she observed during her inspection, she said that it did not look like that the external wall in question had been cleaned by white cement as described by Mr Kwok.

(f) Miss Ng explained that it would take at least 2 to 3 months to build the 3-storey structure in question. However, no such work in progress was observed during Miss Ng's inspection.

The arguments and evidence given for the appellant were as follows:

(a) Mr Kwok carried out decoration works on the subject premises in or about December 1994 or January 1995.
(b) As regards the windows, Mr Kwok confirmed that he was asked by the appellant to replace two pieces of window glass and did so.
(c) Mr Kwok said that in carrying out the decoration works for the appellant, the external wall of the 3-storey structure in question was cleaned with white cement.

- **Reasons for Decision:**

The Tribunal agreed with the submission of the Building Authority that the crux of the appeal in this case was whether the Building Authority exercised its discretion fairly in accordance with the policy on priorities. The Tribunal concluded that it was not satisfied on balance of probability that the subject building works which the appellant was ordered to demolish or remove were, at the material times, new within the meaning of the Building Authority's policy on priorities.

Accordingly, the Tribunal allowed the appeal and set aside the Building Authority's order. However, the Tribunal also added that this determination did not preclude the Building Authority from issuing an order in future as it considered fit in relation to the subject building works on *other grounds* in accordance with its policy. The grounds of the Tribunal's decision were as follows.

The Building Authority did not justify the priority for the demolition of the subject building works

Although evidence was led by Mr Ho from Miss Ng as to her suspicion on the structural stability of the 3-storey structure, the Building Authority did not seek to justify the priority given to the demolition of the subject building works on the grounds that they constituted 'an imminently dangerous situation'. Hence, the only question for the Tribunal to decide was whether the Building Authority made good its case based on the grounds that the subject building works were significant and new at the material times. However, the respondent failed to do so.

(a) As regards the structure on the rear main roof, Miss Ng acknowledged in her evidence that during her inspection, because she could not gain entry to the subject premises, she could not in fact see the flat roof cover. It was difficult to see how Miss Ng could have formed any view as to whether or not the flat roof cover was a new structure when she could not even see the structure during her inspection.

(b) As regards the windows said to have been replaced by Mr Kwok, the Building Authority did not seem to have contended that such replacement by itself would require approval and consent under s. 14(1) of the *Buildings Ordinance*.
(c) As regards the 3-storey structure in the courtyard, Miss Ng's conclusion that this was a new structure was again based on her visual inspection. The incompatibility of external appearance of the wall described by Mr Kwok and Miss Ng was 'not impossible'.

Mr Kwok's evidence was reliable

Mr Kwok's evidence was straightforward and there was no reason to think that he was not telling the Tribunal the truth when he described the cleaning to the external wall of the 3-storey structure in question. Mr Kwok's evidence was corroborated by the evidence given by Miss Ng that it would take at least two to three months to build the 3-storey structure in question. If the 3-storey structure in question were built by Mr Kwok, one would expect that when Miss Ng inspected the premises, she would have observed works being in progress. However, no such work in progress was observed during Miss Ng's inspection.

SHEK O VILLAGE

- **Building Appeal Case Name:** Shek O Village Lot No. 1141 (part thereof) House No. 720, Shek O Village, Shek O, Hong Kong **[Shek O Village]**
- **Building Appeal Case No. :** 20/96
- **Nature of the Case:** s. 24 of the *Buildings Ordinance; Unauthorized Building Works Policy*; renovation works and rebuilding works
- **Dates of Hearing:** 19 October and 7 November 1996
- **Date of Decision:** 11 March 1997
- **Chairperson of Tribunal:** Mr Wilfred Lee Chi Wah
- **Representation:**

  (a) Mr Charles C. Wong for the appellant
  (b) H. T. Leung and Mr John White for the respondent

- **Decision:** appeal allowed by a majority
- **Rules Laid down by the Decision:**

  (1) For the purpose of an appeal against an order under s. 24, the Tribunal does not think it necessary to ascertain the legal title to the property and proceed to hear the appeal.

(2) Although costs would normally follow the event, the Tribunal, where much of the time is wasted by the appellant in pondering over irrelevant matters, may issue an order of half costs in favour of the successful party.

- **Background:**

The subject site was House No. 720 Shek O Village, Shek O, Hong Kong, Shek O Lot Not 1141. It was an existing single-storey building (the subject property). An anonymous complaint letter dated 23 January 1995 was addressed to the Squatter Control Unit of the Housing Department complaining that a one-storey wooden house was being converted into a two-storey concrete building on the subject site.

On 27 January 1995, Mr Wong of the Squatter Control Unit of the Housing Department visited the property. He was the first government officer to visit the property. Mr Wong's concern was not with 'Unauthorized Building Works' (UBW) per se but rather with UBW on crown land.

On 21 April 1995, the Building Authority's other witnesses visited the property. By that time, the building works had already been completed. She did not obtain entry to the first floor. On 12 October 1995, a Building Authority representative again visited the subject site and took some photographs.

Based on the inspections of its staff, the Building Authority considered that a structure was newly erected on top of the existing property, and no approval or consent was given by the Building Authority for such structure. Hence, the structure was 'Unauthorized Building Works' (UBW) and therefore actionable under section 24(1) of the *Buildings Ordinance*.

The Building Authority made an order dated 11 January 1996, under section 24(1) of the *Buildings Ordinance* to Mr Lui Kwai Yau and Lui Kwai Hing, the registered owners of the property. The order required the demolition or removal of UBW comprising structure on and over the roof of the ground floor of the subject property. Mr Lee Sui Kwan, who claimed that he was the de facto owner of the property, appealed.

For the purpose of the appeal, the Tribunal did not think it necessary to ascertain the legal title to the property and proceeded to hear the appeal. The appellant was represented by his friend, Mr Charles Wong.

- **Arguments:**

The main ground of the respondent was that there was a first floor on the subject property, but the first floor was demolished and rebuilt. Since the first floor was newly rebuilt, it attracted high priority standard for action under the control of *Unauthorized Building Works Policy* published in 1988 ('the 1988 Policy').

The main ground of the appellant was that the works were *renovation works* and not *rebuilding works* which did not warrant the issue of the order.

- **Reasons for Decision:**

With one member dissenting, the Tribunal allowed the appeal. Although costs would normally follow the event, the Tribunal felt that much of the time had been wasted by the appellant in pondering over irrelevant matters. It therefore made an order nisi that the Building Authority paid the costs of the hearing including the preliminary hearing and of the Tribunal but at half the assessed costs only. The order would be made absolute if no representations were received from either party within 14 days of the date of the order.

The reason for decision was that there was not enough evidence produced by the Building Authority to prove that a structure was added on and over the roof of the ground floor of the property as alleged in the order. The basis for this decision was as follows:

(a) Despite the fact that works had been carried out on the first floor of the property, they were not as extensive as described by the inspectors from the Building Authority and not so extensive as to justify the exercise of its power under s. 24 of the *Buildings Ordinance*.

(b) The evidence given by Mr Wong of the Housing Department was not specific enough to conclude that the property was 'in the process of heightening' or that walls were added to enclose the first-floor structure. He could not remember what the workers were doing on the first floor except that they were mixing cement. He did not take any pictures of the work in progress on the first floor. There was therefore not enough evidence produced by the Building Authority to prove that a structure was added on and over the roof of the ground floor of the property as alleged in the order. As the first person to arrive at the scene when work was carried out, he was unable to say categorically the extent of work being carried out at the property.

(c) Subsequent inspectors were all preoccupied with the initial allegation of the addition of one floor above the property, thus losing impartial judgment on the extent of renovation or remedial works that were carried out on the first floor.

(d) The observation of the Building Authority staff on 21 April 1995 from the outside of the property was insufficient to conclude that a new solid structure was created on the existing canopy.

(e) As regards evidence collected by the Building Authority staff on 12 October 1995, the first floor appeared to be quite new but again his visual observation on the fittings did not justify him to conclude that the first floor was newly built.

SAM PEI SQUARE

- **Building Appeal Case Name:** Flat E, 2/F, Nos. 14–18 Sam Pei Square, Tsuen Wan [**Sam Pei Square**]
- **Building Appeal Case No. :** 79/96
- **Nature of the Case:** s. 24 of the *Buildings Ordinance*
- **Date of Hearing:** 18 February 1997
- **Date of Decision:** 28 February 1997
- **Chairperson of Tribunal:** Mr Au Fun Kuen
- **Representation:** no counsel representation for both parties
- **Decision:** appeal allowed
- **Rule Laid down by the Decision:**

  (1) In establishing that an order for enforcing against unauthorized structures poses an immediate danger to life or property, the Building Authority must have evidence as to the danger.

- **Background:**

On 28 June 1995, Mr Wong Yan Wai, a Survey Officer of the Control and Enforcement Division of the Buildings Department, together with his colleague, inspected the building at Nos. 14–18 Sam Pei Square.

Subsequent to the inspection, Mr Wong prepared a report setting out seven unauthorized structures. Of these structures, five were metal cages, one was a structure erected on the flat roof of the first floor ('the Flat Roof Structure'), and the remaining one was a structure belonging to the appellant erected at a position over the Flat Roof Structure.

In his report, Mr Wong remarked, in relation to all structures other than the Flat Roof Structure, in the following terms: 'highly rusty sign envisaged'.

Mr Wong recommended that orders for their removal under s. 24 of the *Buildings Ordinance* should be issued. In relation to the Flat Roof Structure, his recommendation was that no further action be taken as it posed no imminent danger. However, he recommended that the projections from the Flat Roof Structure be removed.

Mr Cheung Chi Kuen, a Senior Building Surveyor of the Buildings Department, considered the report. Acting on Mr Wong's recommendation, Mr Cheung issued orders under section 24 requiring the removal of each of the structures other than the Flat Roof Structure. He also issued another order requiring the removal of the projections from the Flat Roof Structure.

The appellant appealed against the order against his structure.

The Tribunal noted that unauthorized structures were common in Hong Kong and that the Building Authority had only limited resources to deal with them. It also noted that in 1988, after extensive consultation, the government published a policy statement on the control of unauthorized building works. Under this policy, unauthorized building works were classified into a high priority group for which enforcement action should be taken as a matter of priority and a low priority group for which enforcement action might be deferred.

Works not covered by the high priority group would fall into the low priority group for which no enforcement action would be taken for the time being. Cases in this group would, however, be upgraded when it was considered appropriate to do so. Unauthorized building works would fall within the high priority group if they constituted an 'imminently dangerous situation' where there was 'an obvious danger to life or property'.

- **Arguments:**

The evidence for the respondent was as follows:

(a) In issuing the order against the appellant's structure, Mr Chung was following the 1988 policy. No action was taken against the flat roof structure as, according to the recommendation of Mr Wong (the Surveyor Officer), it posed no imminent danger.

(b) Mr Cheung took a different view regarding the appellant's structure. After discussing the matter with Mr Wong, Mr Cheung's understanding was that the appellant's structure was supported by steel joists cantilevered from the external wall. Mr Cheung considered the 'highly rusty sign envisaged' remark in Mr Wong's report and came to the view that such a cantilevered structure, if it was highly rusty, would pose an imminent danger. Accordingly, he issued an order against the appellant's structure.

(c) Some photographs were taken during the inspection. One photograph that might be relevant was taken from an angle below the Flat Roof Structure. It showed only a portion of the upper part of the appellant's structure.

(d) Mr Wong, the Survey Officer, did not enter the appellant's structure. He made an external inspection of the unauthorized structures of the building. In relation to the appellant's structure, Mr Wong stated that he did not examine how it was supported. His view was that it should have been supported by steel joists cantilevered from the external wall, as was the case with the cages. Although he saw rust stains on the wall, he did not actually see any rusting on any supports of the appellant's structure.

The appellant himself gave evidence as follows:

(a) When he purchased the property, the structure in question was already there.
(b) However, nothing was erected then on the flat roof below.
(c) Subsequently, the owner of the flat roof erected a structure below the appellant's structure and included in the structure below a support for the appellant's structure.
(d) The appellant suggested that his structure was supported by steel beams. However, he frankly admitted that he knew no more than that.

- **Reasons for Decision:**

The Tribunal allowed the appeal with costs to the appellant. However, the Tribunal also made it quite clear that the appellant's structure, being an unauthorized structure, was potentially dangerous. It recommended that the Building Authority should make a further inspection immediately and if the appellant's structure was found to be imminently dangerous, the Building Authority would be fully justified in taking immediate enforcement action. The basis of the Tribunal's decision was as follows.

There was no assessment or evidence of the mode of support of the structures

In issuing the section 24 order against the appellant's structure, the Building Authority was purportedly acting in accordance with the 1988 policy on the grounds that the structure constituted an *imminently dangerous situation* where there was an *obvious danger to life or property*. This decision was made on the basis that the appellant's structure was supported by steel joists cantilevered from the external wall and that highly rusty signs were seen. However, no assessment had in fact been made as to the mode of support of the appellant's structure nor was rust actually seen.

DEMOLITION

TRUE DRAGON PROPERTIES

- **Building Appeal Case Name:** Kowloon Inland Lot 2252, Nos. 276–280, Portland Street, Kowloon [**True Dragon Properties**]
- **Building Appeal Case No. :** 76/90
- **Nature of the Case:** appeal against the Building Authority's issued order under s. 24(A) of the *Buildings Ordinance*; demolition of buildings; ss. 4(3) and 14(1) of the *Buildings Ordinance*; s. 16(3)(a) and s. 16(5) of

the *Buildings Ordinance*; order under s. 24(A) of the *Buildings Ordinance*; *Form 13 and Building (Administration) Regulation 31*

- **Date of Hearing:** 31 October 1990
- **Date of Decision:** 17 December 1990
- **Chairperson of Tribunal:** name cannot be verified
- **Representation:** no counsel representation for both parties
- **Decision:** appeal dismissed, inquiry refused
- **Rules Laid down by the Decision:**

(1) The owner, not the Authorized Person, is the proper person to whom an order under s. 24(A) of the *Buildings Ordinance* be served.
(2) Removal of precautionary works required to support adjoining buildings in demolition works triggers an order under s. 24(A) of the *Buildings Ordinance*.

- **Background:**

True Dragon Properties Ltd. was the appellant. It was the owner of Nos. 276–280 Portland Street – KIL 2252, the subject site. The Authorized Person (AP) applied on behalf of the appellant to demolish the existing buildings approved in 1947 on the subject site for the purpose of redevelopment.

This appeal was concerned solely with the demolition of such buildings. On 13 June 1989, the Building Authority approved the AP's plans for redevelopment. On 29 September 1989, the AP submitted Form 13 (accompanied by a Hoarding Plan marked 10189 HA1/1) to the Building Authority for consent to commence demolition works on the subject site.

On 26 October 1989, the Building Authority informed the AP by letter that it refused to give its consent for demolition works to be commenced. The reason was that a plan showing the extent of the proposed demolition and details of adjoining buildings together with precautionary measures as necessary to ensure the stability of the adjoining buildings for consideration had not been submitted. This plan was required under s. 16(3)(a) and s. 16(5) of the *Buildings Ordinance*.

On 30 October 1989, the AP submitted revised plans (H1/B1) to the Building Authority. In Plan H1B/1, the AP had the following notation thereon:

> THAT [The AP] DOES NOT CONSIDER TEMPORARY SHORING WORKS REQUIRED TO SUPPORT STAIRCASE TO PROVIDE RIGHT OF WAY TO ADJOINING NO. 282. SUBMISSION OF THIS PLAN IS FOR THE ISSUE OF DEMOLITION CONSENT BY BUILDING AUTHORITY TO AVOID DELAY

On 14 November 1989, the Building Authority rejected these revised plans for the same reason set forth in its letter dated 26 October 1989.

On 31 November 1989, the AP wrote an additional letter to the Building Authority. On 5 December 1989, the Building Authority wrote a reply to the AP. The reply stated the following:

(a) The Building Authority was surprised to learn that the AP had blamed its office for the delay caused by refusing demolition consent on 26 October 1989 under ss. 16(3)(a) and 16(5) of the *Buildings Ordinance* because on the plans submitted by the AP and approved on 13 June 1989, the AP had indicated that precautionary measures as necessary to ensure the stability of the adjoining building would be submitted. In the absence of any justification as to why such proposals were omitted in the consent application, there was no alternative for the Building Authority other than invoking s. 16(5)(a) of the *Buildings Ordinance* to reject the AP's application.

(b) The AP should appreciate that the government's prime concern in any demolition case would be public safety. Due to the uncertain structural condition, it was felt that demolition should not proceed in this instance without adequate precautionary measures to safeguard the stability of the retained common staircase and the adjoining building, i.e., No. 282 Portland Street. These measures should be provided prior to demolition of the captioned buildings. It was also noted that the supports to the common staircase at No. 280/282 Portland Street mentioned in the AP's letter dated 30 October 1989 did not agree with the government's office record. It was likely that the said staircase would become unstable if demolition proceeded without any shoring provided. Furthermore, the dilapidated conditions of the masonry party wall and the form of construction of No. 282 Portland Street, i.e. single-bay RC floors on load bearing walls, implied that the stability of No. 282 Portland Street might become susceptible to lateral loads after the removal of No. 280 Portland Street.

(c) As regards the AP's request in his another letter dated 30 November 1989 for an explanation as to why another Form 13 was required, application for consent to commence any building work must be made in the prescribed forms as stipulated in *Building (Administration) Regulation 31*. Its omission would cause unnecessary delay in handling one's application.

On 27 December 1989, the Building Authority again refused to give consent to commence demolition works in respect of the AP's Plan H1B/1. The reason was as follows:

> Proposal of precautionary measures to safeguard the stability of the adjoining building at No. 282 Portland Street have not been submitted for consideration. Buildings Ordinance Section 16(3)(a) and 16(5) refer.

On 27 December 1989, a meeting was held between the representatives of the Building Authority and the AP. On 28 December 1989, the AP resubmitted Form 13 and a shoring plan 10189/H1B/1B ('the Plan') which once again contained a notation with the same wording referred to above in respect of Plan H1B/1.

In his letter dated 28 December 1989, the AP was found by the Tribunal to have 'grudgingly withdrew the notation'. Paragraph 3 of the letter read:

> 3/ Now I accept your requirement to delete the note in order to seek your earliest approval of my consent application as shown in attached plan.

On 29 December 1989, the Building Authority informed the AP by letter that the plan, with the deletion of the notation, was acceptable and requested a joint site-visit inspection after the shoring works had been completed.

On 10 January 1990, the AP requested a joint site inspection of the shoring works and at the same time submitted two further shoring plans respectively marked SK1/2 and SK2/2 for the Building Authority's consideration. These two plans were never approved by the Building Authority.

Subsequently, two joint inspections took place. The first was on 18 January 1990 at 9.30 a.m. and the second on 22 January 1990. A memorandum (AD) of the joint site inspections was maintained by the Building Authority for the first meeting. The memorandum recorded that shoring to safeguard the stability of the adjoining building at No. 282 Portland Street had been erected and Mr K. S. Law of the Building Authority had no objection in principle to the shoring. Additional propping had been provided and details were submitted. However, the blocking of existing door openings had not completed and Mr B. Choy agreed to have another joint inspection for the above work on 18 January 1990 at 9.30 a.m. It also recorded that the government received a telephone call from Mr B. Choy on 17 January 1990 (p.m.) which said that the blocking work had not been completed. He suggested to postpone the site inspection and it was agreed the inspection would take place on 22 January 1990 at 9.30 a.m.

The memorandum for the second site visit recorded that precautionary works (i.e. blocking of door openings) were completed and generally found in order.

On 24 January 1990, the Building Authority by letter and by endorsement on Form 14 gave its consent to the AP to commence demolition works. Shortly thereafter demolition works commenced on the site.

On 6 April 1990, Form 21 (certificate on completion of building works) was delivered to the BA by the AP.

As was customary with demolition works, the Building Authority closely monitored the subject site when the former buildings erected thereon were being demolished by the appellant. On 14 March 1990 and 26 March 1990, the Building Authority's representatives visited the subject site and on each occasion took a set of photographs. The photographs taken on 14 March 1990 showed that the agreed shoring erected prior to the demolition were left free standing. The photographs taken on 26 March 1990 showed that it would appear that the steel 'I' Beams and columns, which had previously been found erected and present on 14 March 1990, were removed. What remained were the dead shores propping up the staircase.

On 30 March 1990, the Building Authority wrote to the AP requiring the latter to submit a written explanation within 14 days as to the reason why the demolition works were not carried out in accordance with the plan. The Building Authority at the same time drew the AP's attention to ss. 4(3) and 14(1) of the *Buildings Ordinance*.

On 10 April 1990, the AP duly replied to the Building Authority's letter dated 30 March 1990 and provided the following explanation:

> It is my duty to carry the demolition works in the way I see fit as the A.P. & R.S.E. The additional details of the completed demolition works was made known to you in accordance with Section 4(3) in my letter dd 10/1/90 prior to the consent under Section 14(1) of the Buildings Ordinance issued to me on 24/1/90 and the demolition works has since been satisfactorily completed in the manners made known to you.
>
> I wish to draw your attention again to paragraph 4 of my letter dd 11/12/89 and paragraph 2 of my letter dd 13/12/89, copy each attached for your easy reference that information may be altered as required at any stage of the works and made known to the Building Authority later and that no prior approval is required for demolition works. Basing on these two facts and that I had consent, I do not see why you bother to require me to re-explain to you over and over again wasting your time and my time.

On 20 June 1990, pursuant to s. 24A of the *Buildings Ordinance*, the Building Authority served an order on the appellant in the form of a letter. It ordered the appellant 'to carry out the following works in the manner specified to ensure that the works cease to constitute such a risks':

> Provide adequate precautionary measures in the form of lateral bracing to safeguard the stability of the adjoining building at No. 282, Portland Street including the party wall at Nos. 280/282, Portland Street; . . . All works mentioned in (a) above shall be commenced forthwith and be completed on or before 4 July 90.

On 21 July 1990, the appellant, through the AP, lodged in an appeal against the order dated 20 June 1990.

The grounds of appeal were contained in two letters, one dated 21 July 1990 and the other dated 24 July 1990.

8. From time to time it has been said by the Tribunal that the duty of the Building Authority is to administer the Buildings Ordinance so as to have due regard to the safety of occupants by planning proposals. (Nos. 2–11 Hok Sz Terrace) (Nos. 29–31 Sands Street). The same standard of safety extends to the public at large.

9.1 The Plan submitted by the AP on 28 December 1989 to and approved by the BA on 29 December 1989 indicated precautionary works that were necessary and to be executed prior to the demolition of the buildings previously existing on the Site so as to ensure the stability of the adjoining building i. e. 282 Portland Street during and after the demolition of the said buildings.

9.2 Having executed the building works described in the Plan and subsequently removing parts thereof i.e. the steel I. Beams and columns respectively described in 4.15 without the consent of the BA, the AP had breached Sections 4(3) and 14(1) of the Buildings Ordinance.

9.3 By the removal of the works described in the preceding paragraph, the demolition works that had been carried out on the Site had been executed in such a manner as is likely to cause a risk of injury to the occupants (as well as the public) of the buildings erected on 282 Portland Street and the stability of which had been affected.

9.4 As at 20th June 1990, the demolition of the buildings previously existing on the Site had been fully completed and the Appellant is the proper person on whom the Order issued under S24(A) is to be served (S24(A)(b)(i));

9.5 For the reasons as aforesaid, the BA had exercised its discretion properly and not capriciously when the Order appealed against was issued.

10. The Appeal is dismissed and an inquiry will not be held.

Dated 17 December, 1990.

- **Arguments:**

The grounds of appeal in the letter of 21 July 1990 were as follows:

(a) The order in question required the owner to provide lateral support to adjoining building to remedy dangerous works due to the manner the demolition works had been carried out. The order was served on the owner and not served on the contractor or the AP, the agent under section 24A(2)(b)(i) 'because the works is in its completed form and not in its being carried out form'.

(b) During the demolition works, there had been no sign of distress 'due to the manner the demolition works was carried out by China Harbours Eng. Co. According to Oxford Illustrated Dictionary, part copy attached, I find nothing wrong with my understanding of the word "manner". It is a noun and it means way a thing is done. I do not see anything wrong with the method/manner my contractor, China Harbours Eng. Co., has carried out the demolition works. My observation in the last four months after the completion of the demolition works confirms my engineering judgement that my Contractor, China Harbours Eng. Co. has carried out the demolition works in a very careful and safe manner.'

Further grounds of appeal contained in the letter dated 24 July 1990 were:

(a) There had been no building works carried out on the site which would cause or be likely to cause a risk of injury to persons or damage to property. The building works to demolish the 1947 approved building works for the redevelopment had been safely completed in late March 1990.
(b) Section 24A entitled the Building Authority by order in writing to require such works as he might specify in the order to be carried out to ensure that the works on the site ceased to constitute a risk. The works on the site had not constituted a risk and hence there was no remedy work required to be carried out to remove any risk.
(c) There was no structural continuity between No. 282 and the redeveloped lot as shown in the 1947 approved plans. Hence, the demolition of the building works (approved in 1947) did not affect the stability of the adjoining building structure. The 1947 plans did not provide lateral support to the adjoining building.
(d) In the professional judgment of the AP, the adjoining building was and would be stable on its own. There was no need for lateral support because there was no change in the condition it was designed and constructed.
(e) The AP could find nothing wrong with the manner of which the demolition works had been carried out and completed. The Building Authority had not explained what was wrong with the works that had been carried out to justify the order issued.
(f) It was a fact that there had been no distress on site.

- **Reasons for Decision:**

The Tribunal had the following findings about the AP's letters of 10 April 1990:

(a) The so-called 'additional details' referred to plans SK1/2 and SK2/2. These plans were never approved by the Building Authority.

(b) The AP's letters dated 11 December 1989 and 13 December 1989 had not been included in one of the many bundles of documents to the Tribunal. The Tribunal had not called for its production as these two letters, whatever their contents, would be immaterial and superseded by the events which occurred between 27 and 29 December 1989.

The Tribunal dismissed the appeal on the following grounds:

Safety to the public was at stake and there was an obvious breach of the Ordinance

The Tribunal stressed that from time to time it had been said by the Tribunal that the duty of the Building Authority was to administer the *Buildings Ordinance* so as to have due regard to the safety of occupants by planning proposals. Reference was made to the *Nos. 2–11 Hok Sz Terrace and Nos. 29–31 Sands Street Cases*. The same standard of safety extended to the public at large.

The Tribunal found that the plan submitted by the AP on 28 December 1989 to and approved by the Building Authority on 29 December 1989 indicated precautionary works that were necessary. These were to be executed prior to the demolition of the buildings previously existing on the subject site so as to ensure the stability of the adjoining building, i.e., No. 282, Portland Street, during and after the demolition of the said buildings.

Having executed the building works described in the plan and subsequently removing parts thereof (i.e. the steel I. beams and columns respectively) without the consent of the Building Authority, the AP had breached ss. 4(3) and 14(1) of the *Buildings Ordinance*.

By removing such building works, the demolition works that had been carried out on the subject site were executed in such a manner that it would likely cause a risk of injury to the occupants (and the public) of the buildings erected on No. 282, Portland Street as well as the stability of those buildings.

The owner was the proper person to receive the order

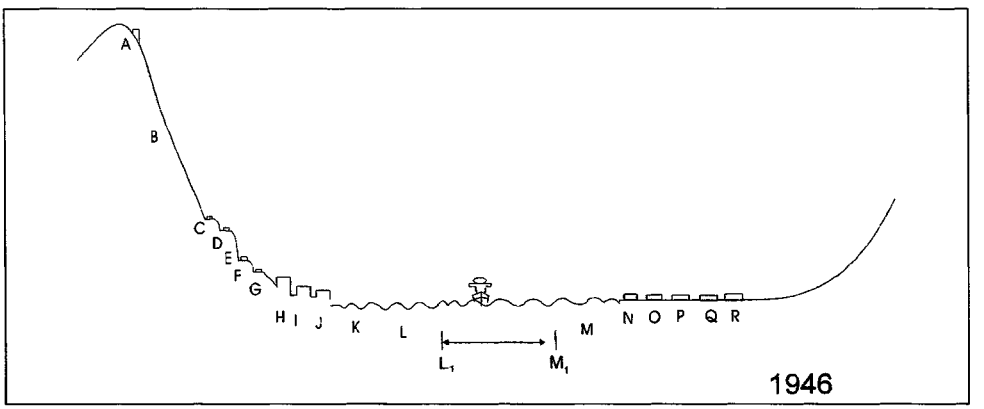
As at 20 June 1990, the demolition of the buildings previously existing on the subject site was fully completed. The appellant was the proper person to whom the order should be issued under s. 24(A).

The Building Authority had exercised discretion properly

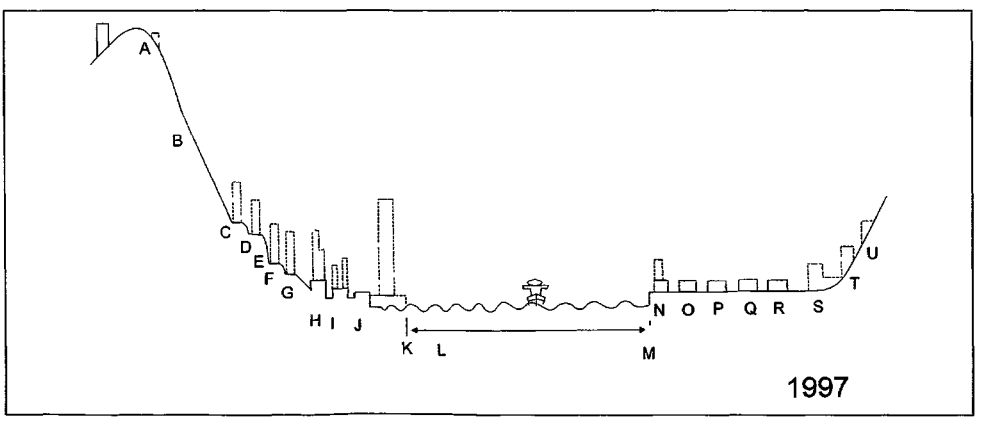
On the basis of the facts and reasons above, the Building Authority had exercised its discretion properly and not capriciously when the order appealed against was issued.

APPENDIX 1

CROSS-SECTIONAL PROFILES OF VICTORIA HARBOUR AND SYDNEY HARBOUR

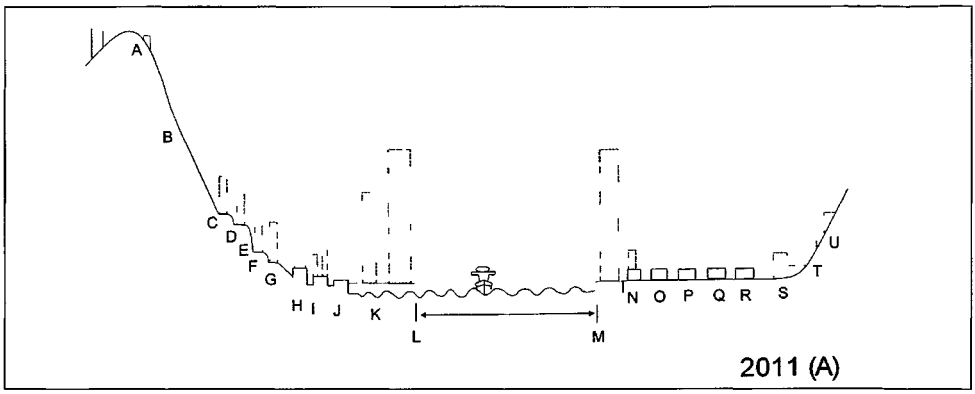


(i)

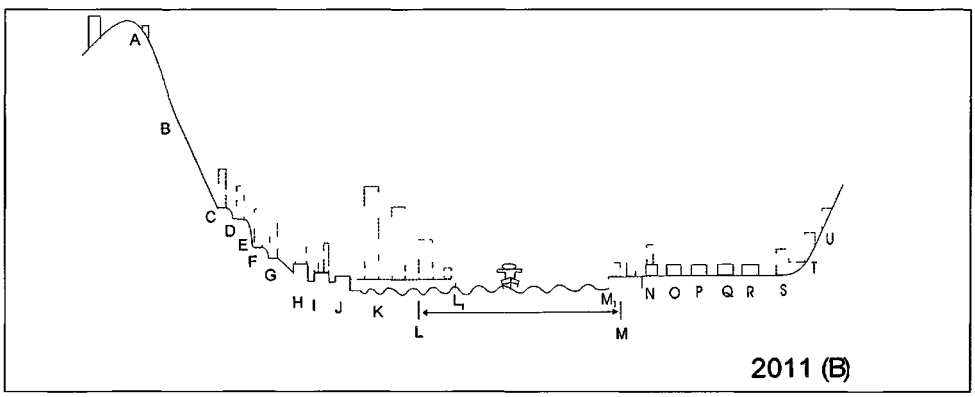


(ii)

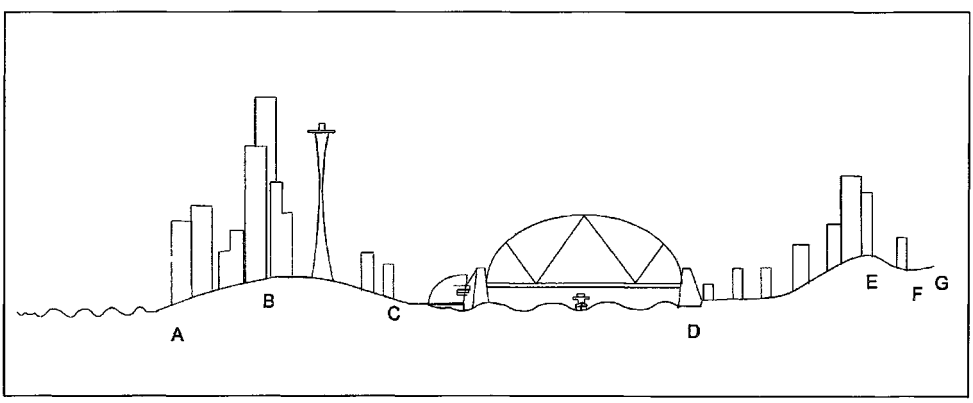
Figures (i) and (ii) show the cross-sectional profile of Victoria Harbour in various years.



(iii)



(iv)



(v)

Figures (iii) and (iv) show two alternative modes of further reclamations in Victoria Harbour. Compare these options with the controls over development around Sydney Harbour in (v) which have apparently paid more respect to the protection of harbour views.

APPENDIX 2

A LIST OF PRACTICE NOTES FOR AUTHORIZED PERSONS AND REGISTERED STRUCTURAL ENGINEERS (REVISED AUGUST 2001)

Reference	Title	Date of Current Issue
PNAP 1	Practice Notes in Force	August 2001
PNAP 11	Landlord and Tenant (Consolidation) Ordinance, Cap. 7, Demolished Buildings (Re-development of Sites) Ordinance, Cap. 337	March 1994
PNAP 13	Calculation of Gross Floor Area and Non-Accountable Gross Floor Area — Building (Planning) Regulation 23(3)(a) and (b)	April 2001
PNAP 14	Nomination of an Authorized Person or Registered Structural Engineer to act in stead — Form BA21	September 2000
PNAP 17	Water Supply and Wells	March 1994
PNAP 25	Transformer Rooms — Building (Planning) Regulation 15	May 1994
PNAP 27	Height of Storeys — Building (Planning) Regulations 3(3) and 24	May 1994
PNAP 30	Centralized Processing of Building Plans	September 2000
PNAP 34	Emergency Situations — Telephone Numbers for Use Outside Office Hours	April 1994
PNAP 40	Priority	June 1991
PNAP 41	Shops and Department Stores — Building (Standards of Sanitary Fitments, Plumbing, Drainage Works and Latrines) Regulation 5	January 1990

Reference	Title	Date of Current Issue
PNAP 43	Guidance on Professional Interviews for Applicants for Registration under Buildings Ordinance Section 3	July 1994
PNAP 45	Chimneys and Flues	July 1994
PNAP 47	Country Parks Ordinance, Cap. 208 — Buildings Ordinance section 16(1)(d)	January 1990
PNAP 48	Oil Storage Installations — Building (Oil Storage Installations) Regulations	May 1996
PNAP 49	Street Improvement Schemes — Submission of Building Plans in Respect of Lots Affected Thereby	January 1990
PNAP 50	Prestressed Ground Anchors in Building Works	January 1999
PNAP 53	Application for Occupation Permit (OP) and Submission of Record Plans and Information	August 2001
PNAP 54	Cinemas in Composite Buildings — Places of Public Entertainment Regulations	May 1994
PNAP 55	Site Formation — Temporary or Permanent Filling Work	June 1994
PNAP 58	Submissions to the Buildings Department	April 1999
PNAP 59	Cladding	May 1994
PNAP 61	Rock Faces — Building (Planning) Regulations 27 and 47	December 1996
PNAP 66	Pile Foundations	June 2000
PNAP 68	Projections in Relation to Site Coverage and Plot Ratio — Building (Planning) Regulations 20 and 21	March 2000
PNAP 70	Building Proposals Affected by Street Widening — Building (Planning) Regulation 22(2)	January 1990
PNAP 71	Demolition Works — Measures for Public Safety	November 1999
PNAP 74	Dewatering in Foundation and Basement Excavation Works	May 1994
PNAP 75	Hoardings, Covered Walkways and Gantries (Including Temporary Access for Construction Traffic) — Building (Planning) Regulations Part IX	December 1998
PNAP 77	Mass Transit Railway Protection — Mass Transit Railway (Land Resumption and Related Provisions) Ordinance, Buildings Ordinance Scheduled Area No. 3	March 1998
PNAP 78	Requirements for a Geotechnical Assessment at General Building Plan Stage — Building (Administration) Regulation 8(1)(ba)	October 1991
PNAP 79	Computer Programmes for Use in Structural and Geotechnical Designs	June 1999

Reference	Title	Date of Current Issue
PNAP 81	Pouring of Concrete against Walls of Adjoining Buildings	May 1994
PNAP 82	Gas Water Heaters — Building (Planning) Regulation 35A	December 1998
PNAP 83	Requirements for Qualified Supervision of Site Formation Works, Excavation Works, Foundation Works on Sloping Ground, and Ground Investigation Works in the Scheduled Areas — Buildings Ordinance Section 17	December 1997
PNAP 84	Lift and Escalator Installations	March 1994
PNAP 85	Development in Mid-Levels Scheduled Area — Buildings Ordinance Section 2(1), Building (Administration) Regulation 8(1)(bb)(vii) and 8(1)(1)	April 1998
PNAP 87	Permanent Water Supply to Fire Service Installations — Buildings Ordinance Section 21(6)(d)	May 1994
PNAP 88	Hong Kong Airport (Control of Obstructions) Ordinance, Cap 301	July 1998
PNAP 90	Pulverized Fuel Ash in Concrete	May 1994
PNAP 92	Structural Design of Bridges and Associated Highway Structures	May 1995
PNAP 98	Refuse Storage and Collection — Building (Refuse Storage and Material Recovery Chambers and Refuse Chutes) Regulations	September 2000
PNAP 99	Checking New Building Plans	April 1998
PNAP 100	Industrial Buildings — Occupancy and Related Matters — Determinations by the Commissioner for Labour — Building (Standards of Sanitary Fitments, Plumbing, Drainage Works and Latrines) Regulation 5(5)	February 1993
PNAP 104	Geotechnical Information Unit	May 1995
PNAP 106	Curtain Wall Systems	October 1999
PNAP 107	Bridges over Streets — Buildings Ordinance Section 31(1)	September 1994
PNAP 110	Viewing and Copying of Plans and Documents	February 1994
PNAP 111	Hotel Development	August 2000
PNAP 112	Buildings to be Planned for Use by Persons with Disabilities — Building (Planning) Regulation 72	March 2000
PNAP 113	Exemptions and Modifications under Buildings Ordinance Section 42	May 1994
PNAP 114	Asbestos	January 1996

Reference	Title	Date of Current Issue
PNAP 115	Legislation and Publications Affecting the Building Industry	February 2000
PNAP 116	Amenity Features	September 2000
PNAP 117	Licensing of Child Care Centres, Kindergartens and Restaurants	August 1996
PNAP 118	Streets in Relation to Site Area — Building (Planning) Regulation 23(2)(a)	January 1990
PNAP 121	Structural Design Information	April 1995
PNAP 122	Testing of Reinforcement for Concrete	March 1996
PNAP 124	Pollution from Industrial Buildings — Building (Standards of Sanitary Fitments, Plumbing, Drainage Works and Latrines) Regulation 90	March 1992
PNAP 125	Unauthorized Alterations and Additions — Buildings Ordinance Section 14	January 1996
PNAP 127	Colouring of Plans — Building (Administration) Regulation 14(3)	January 1990
PNAP 128	Standardization of Floor Numbering	July 1998
PNAP 130	Electrically Operated Gates, Glass Doors and Rolling Shutters	April 1990
PNAP 131	Requirements for Qualified Supervision of Structural Works, Foundation Works and Excavation Works — Buildings Ordinance Section 17	May 1994
PNAP 132	Site Investigation and Ground Investigation	June 2000
PNAP 133	Temporary Buildings — Building (Planning) Regulations 50–52	March 1994
PNAP 135	Microfilming Standards for Plans	April 1994
PNAP 137	Monitoring and Maintenance of Horizontal Drains	November 1990
PNAP 138	Granular and Geotextile Filter Design Criteria	November 1990
PNAP 139	Supply of Plans to Registered Contractors — Building (Administration) Regulation 36	May 1994
PNAP 140	Building (Construction) Regulations 1990	August 1994
PNAP 141	Foundation Design — Building (Construction) Regulations 1990 — Part VI	October 1995
PNAP 142	Retaining Walls — Building (Construction) Regulations 1992 — Part XIII	April 1998
PNAP 143	Procedure for Payment of Fees on Submission of Plans Building (Administration) Regulation 42	December 2000
PNAP 144	Control of Environmental Nuisance from Construction Sites	August 1997
PNAP 145	Testing Concrete — Construction Standard CS 1:1990	May 1991

Reference	Title	Date of Current Issue
PNAP 147	Exemption Criteria for Site Formation Works Associated with Exempted Building Works in the New Territories	February 1997
PNAP 148	Requirements for an Excavation and Lateral Support Plan — Building (Administration) Regulation 8(1)(bc)	November 1993
PNAP 149	The Safe Use of Cranes	November 1991
PNAP 150	Wind Tunnel Testing of Buildings	June 1994
PNAP 152	Change of Address	March 1997
PNAP 153	Tropical Hardwood Timber	July 1992
PNAP 154	Submission of Record Plans for Alteration and Addition Works — Building (Administration) Regulation 46	March 1998
PNAP 155	Marine Disposal of Dredged Mud	February 1993
PNAP 156	Lightning Protection for Buildings	May 1994
PNAP 157	Testing of Drainage Works — Building (Standards of Sanitary Fitments, Plumbing, Drainage Works & Latrines) Regulation 73	April 1993
PNAP 158	Ban on Hand-Dug Caissons	February 1995
PNAP 159	Buildings Ordinance, Cap 123 — Specified Forms	November 1994
PNAP 160	Code of Practice for the Structural Use of Steel	October 1993
PNAP 161	Development in the Area Numbers 2 & 4 of Scheduled Areas	November 1993
PNAP 162	Quality Scheme for the Production and Supply of Concrete	January 1994
PNAP 164	Gas Supply Installations	February 1994
PNAP 165	Sewage Tunnel Works — Sewage Tunnels (Statutory Easements) Ordinance Section 17A and Scheduled Area Number 5, Buildings Ordinance, Cap 123	May 1995
PNAP 166	GEOGUIDE 1 (Second Edition) — Guide to Retaining Wall Design	June 1995
PNAP 167	Methods for Testing Hong Kong Soils — Soil Testing Standard (Phase 1 Tests)	February 1996
PNAP 168	Registration of Slopes and Retaining Walls	June 2001
PNAP 169	Natural Lighting to Staircases — Building (Planning) Regulation 40	November 1994
PNAP 170	Metal Refuse Chutes at Construction Sites	August 1994
PNAP 172	Energy Efficiency of Buildings — Building (Energy Efficiency) Regulation	June 2000
PNAP 173	Safe Design and Construction of Cantilevered Projecting Structures	January 1998
PNAP 174	Submission of Development Progress	September 1998

Reference	Title	Date of Current Issue
PNAP 175	Antiquities and Monuments — Antiquities and Monuments Ordinance, Cap 53	January 1995
PNAP 176	Use of Plastic Sheet to Cover Scaffolding Outside Buildings	May 1995
PNAP 177	Underground Cavern Development	April 1995
PNAP 178	Control of Blasting	June 1995
PNAP 179	Service Lanes	November 1995
PNAP 180	Alkali-Aggregate Reaction in Reinforced Concrete Structures	April 1995
PNAP 181	Temporary Wall-Supported Platforms inside Lift Shafts	October 1995
PNAP 182	Building (Planning) Regulations 41A, 41B and 41C — Means of Access for Firefighting and Rescue in Buildings	May 1995
PNAP 183	Keeping Buried Services out of Slopes	June 1995
PNAP 184	Code of Practice for Scaffolding Safety	October 1995
PNAP 185	Suspended Working Platforms	October 1995
PNAP 186	Monitoring for Site Safety	October 1995
PNAP 187	Code of Practice for the Structural Use of Concrete 1987	October 1995
PNAP 188	Occupation of New Buildings — Buildings Ordinance Section 21	August 1996
PNAP 189	GEOGUIDE 5 — Guide to Slope Maintenance	April 1999
PNAP 190	Minor Amendments to Plans and Specified Forms	April 1999
PNAP 191	Posting of Names on Building Sites	February 1996
PNAP 192	Code of Practice for Fire Resisting Construction 1996	April 1996
PNAP 193	Fire Resisting Construction — Fire Shutters	August 1996
PNAP 194	Places of Public Entertainment (Amendment) Regulation 1996 and Associated Legislative Amendments	June 1996
PNAP 195	Code of Practice for the Provision of Means of Escape in Case of Fire 1996	June 1996
PNAP 197	Application for Excavation Permit for Ground Investigation Works on Public Road — Circulation of Proposal to Utility Undertakers	August 1996
PNAP 198	Access to Records of Certain Advisory and Statutory Committees	November 2000
PNAP 199	Amendments and Clarification to Code of Practice for Fire Resisting Construction 1996	August 1999
PNAP 200	Submission of Site Formation Proposals	October 1996
PNAP 201	Access Facilities for Telecommunications and Broadcasting Services	September 2000

Reference	Title	Date of Current Issue
PNAP 202	Application of the Revised Fire Safety Codes	October 1996
PNAP 203	Non-Loadbearing Partition Walls	October 1996
PNAP 204	Guide to Fire Engineering Approach	March 1998
PNAP 205	Code of Practice on Inspection and Maintenance of Water Carrying Services Affecting Slopes	November 1996
PNAP 207	Provision of Better Lift Service	September 2000
PNAP 208	Buildings Ordinance Section 18(6) — Authority to Enter Buildings	June 1997
PNAP 209	Maintenance and Replacement Works of Lift Installations	July 1997
PNAP 210	Amendments and Clarification to Code of Practice for the Provision of Means of Escape in Case of Fire 1996	August 1997
PNAP 211	Planning and Design of Drainage Works	June 1999
PNAP 212	Fire Safety (Commercial Premises) Ordinance	August 1997
PNAP 213	Sale Offices and Show Flats on Construction Sites	August 1997
PNAP 214	New Contractor Registration System and the Contractors Registration Committee	April 1998
PNAP 215	Consent Procedures for Building Works	November 1997
PNAP 218	Facilities for External Maintenance of Buildings	April 1998
PNAP 219	Lighting and Ventilation for Bathrooms and Lavatories in Domestic Buildings	March 2000
PNAP 220	Flushing Volume for Flushing Cisterns	May 2000
PNAP 221	Fixing of Reinforcement for Concrete Works	March 1998
PNAP 222	Structural Plans of Glass Reinforced Polyester (GRP) Water Tanks	March 1998
PNAP 223	Podium Height Restriction under Building (Planning) Regulation 20(3)	April 1998
PNAP 224	Superstructure Works Measures for Public Safety	November 1999
PNAP 225	Ground Investigation Works in Scheduled Areas — Approval and Consent	July 1998
PNAP 226	Street Name and Building Number	July 1998
PNAP 227	Structures on Grade on Newly Reclaimed Land	April 1999
PNAP 228	Noise Annoyance Prevention — Design of Pump Room and Ventilation System	September 1998
PNAP 229	Exclusion of Floor Areas for Recreational Use	September 2000
PNAP 230	Water Seepage	March 2000
PNAP 231	Fire Resisting Construction — Kitchens in Restaurants	October 1998
PNAP 232	Precautionary Measures for Construction Sites	December 1998

Reference	Title	Date of Current Issue
PNAP 233	Dedication of Land for Use as Public Passage	November 1999
PNAP 234	Geotechnical Manual for Slopes — Guidance on Interpretation and Updating	June 1999
PNAP 235	Protective Barriers	September 2000
PNAP 236	Design of Car Parks and Loading/Unloading Facilities	March 2000
PNAP 237	Corruption Prevention	July 1999
PNAP 238	Disposal of Condensation from Air-Conditioning Units	March 2000
PNAP 239	Window and Window Wall	September 2000
PNAP 240	Submission of Documents in Electronic Format	May 2000
PNAP 241	Lighting and Ventilation of Rooms Used for Habitation or as an Office or Kitchen	November 2000
PNAP 242	Quality Supervison Requirements for Foundation Works	June 2000
PNAP 243	Construction and Demolition Waste	June 2000
PNAP 244	Designation of Ground Investigation Field Works as a Category of Specialized Works under the Buildings Ordinance	June 2000
PNAP 245	Waste Minimization — Provison of Fitments & Fittings in New Buildings	December 2000
PNAP 246	Performance of Review — Item 6(g)(ii) in Column B, Section 17(1) of the Buildings Ordinance	September 2000
PNAP 247	Design Manual — Barrier Free Access 1997	February 2001
PNAP 248	Aluminium Windows	July 2001
PNAP 249	Structural Requirements for Alteration and Addition Works in Existing Buildings	December 2000
PNAP 250	Planning Application for Minor Amendments to Approved Development Proposals	April 2001
PNAP 252	Management Framework for Disposal of Dredged/ Excavated Sediment	May 2001
PNAP 253	Stair-well and Open Wells in School and Other Buildings Used by Youngsters	May 2001
PNAP 254	Site Auditing for Building Works	April 2001
PNAP 257	Amendment to Code of Practice for Provison of Means of Escape in Case of Fire 1996 (MOE Code)	June 2001

JOINT PRACTICE NOTE

No. 1	Green and Innovative Building	February 2001
No. 2	Second Package of Incentives to Promote Green and Innovative Buildings	February 2002

APPENDIX 3

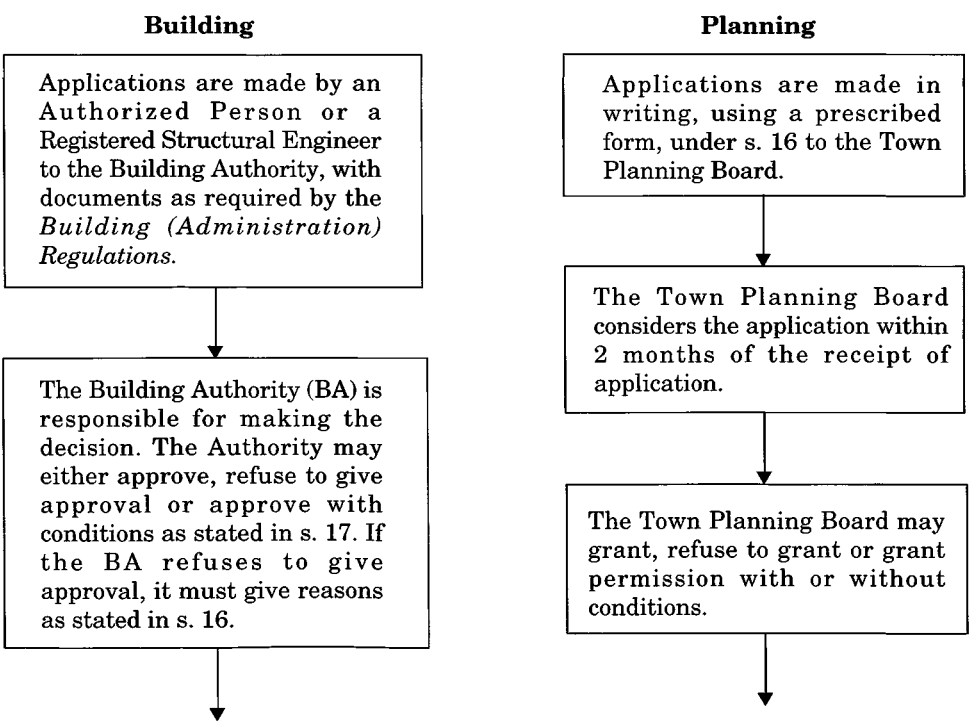
A COMPARISON OF THE BUILDING (PLAN) APPLICATION AND PLANNING APPLICATION SYSTEMS

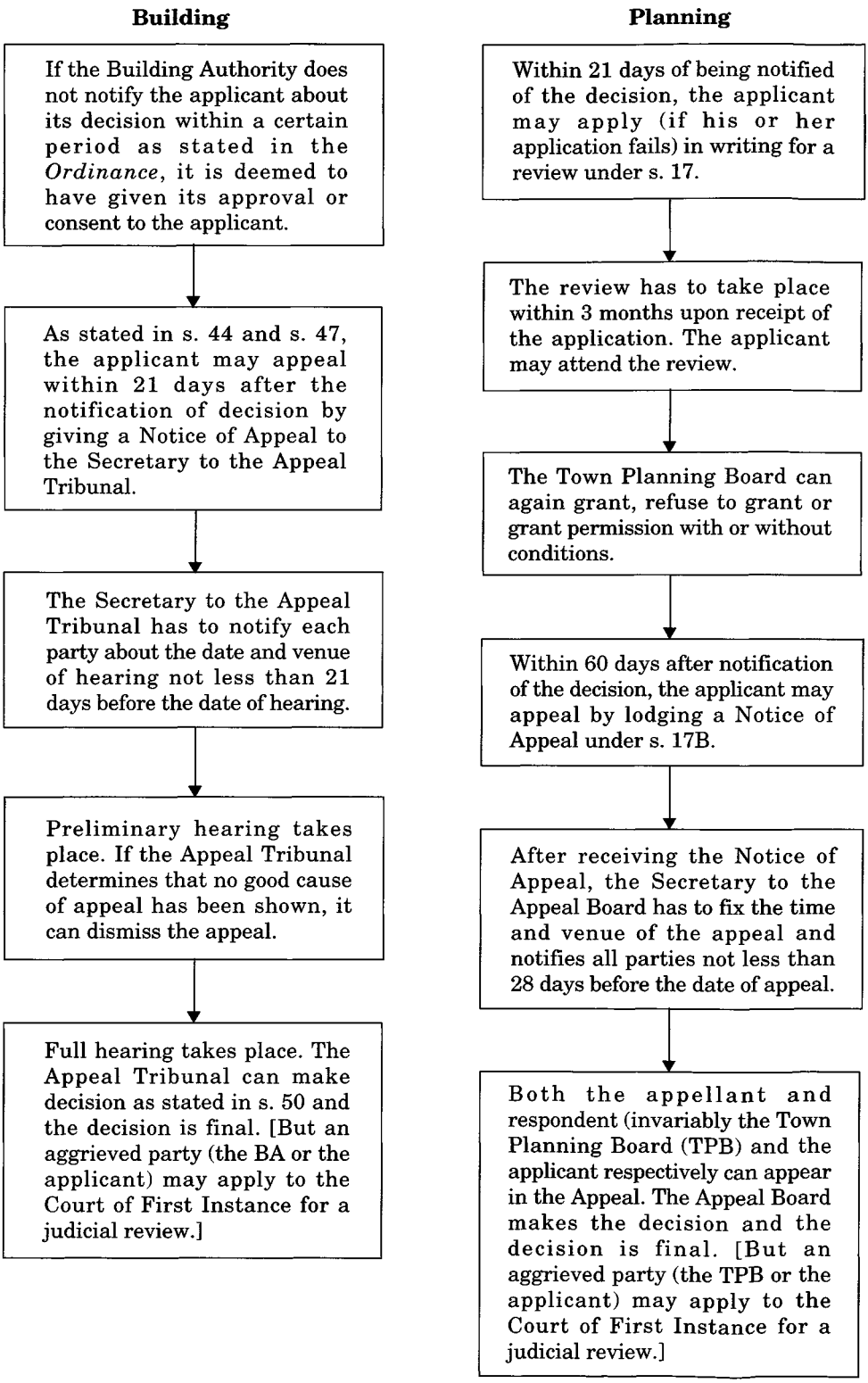
	Building	Planning
Why needs application?	The *Ordinance* requires building works to be approved by the Building Authority [s. 14 (1)], subject to a few exempted cases [s. 41]. The carrying out of building works without approval is an offence [s. 40].	For developments in areas once covered by the IDPA plan [s. 20(7), being a linkage clause to s. 3(1)(a), as stated in the *Ordinance*, no person can undertake development in the DPA area or area covered by the OZP unless certain conditions are fulfilled, otherwise he or she commits an offence [s. 21]. One of the conditions is an approval by the Town Planning Board [s. 16] or the Appeal Board [s. 17B].
Who is eligible to make the application?	Either an Authorized Person or a Registered Structural Engineer can make the application, depending on the types of plan submitted [Regulation 12 of *Building (Administration) Regulations*].	The term 'applicant' is used. However, the *Ordinance* does not impose any requirement or qualification of the person to be an 'applicant'.

	Building	**Planning**
Are there any guidelines for the applicants?	Yes, Practice Notes for Authorized Persons and Registered Structural Engineers published by the Buildings Department are available.	Yes, Town Planning Board Guidelines are available to the applicants as references in making an s. 16 application.
Who makes the decision regarding an application?	The Building Authority does [s. 14 (1)].	The Town Planning Board does [s. 16].
On what grounds are approvals to be refused?	Specific grounds of rejection are stated in the *Ordinance* [s. 16].	No specified grounds of rejection are given in the *Ordinance*. Rejection is purely based on the decision of the Town Planning Board as a matter of discretion [s. 16 (3)].
On what grounds are approvals with conditions imposed?	The *Ordinance* states the situations in which the Building Authority may impose conditions [s. 17].	No specified grounds are given under the *Ordinance*. Decision made is also based on the discretion of the Town Planning Board [s. 16 (5)].
Is there any right to review ?	No right of review is provided by the *Ordinance*.	The applicant has a right to a review [s. 17].
Is there any right to appeal?	Yes, the applicant has a right of appeal after the plan is rejected [s. 44 (1)].	Yes, the applicant has a right to appeal after the review [s. 17B].
Who makes the decision as regard the appeal?	The Appeal Tribunal, which is formed from the Appeal Tribunal Panel, does [s. 48].	The Appeal Board [s. 17A] does. The decision of the Appeal Board is final [s. 17B (9)].
Can there be any award of costs?	Yes, the Appeal Tribunal has the right to order award of costs [s. 51].	Yes, the Appeal Board has the right to order award of costs [s. 17B (8) (c)].
Notes	The *Ordinance* refers to the *Buildings Ordinance*.	The *Ordiance* refers to the *Town Planning Ordinance*.

APPENDIX 4

THE BUILDING AND PLANNING APPLICATION APPEAL PROCEDURES




Building
If the Building Authority does not notify the applicant about its decision within a certain period as stated in the *Ordinance*, it is deemed to have given its approval or consent to the applicant.
As stated in s. 44 and s. 47, the applicant may appeal within 21 days after the notification of decision by giving a Notice of Appeal to the Secretary to the Appeal Tribunal.
The Secretary to the Appeal Tribunal has to notify each party about the date and venue of hearing not less than 21 days before the date of hearing.
Preliminary hearing takes place. If the Appeal Tribunal determines that no good cause of appeal has been shown, it can dismiss the appeal.
Full hearing takes place. The Appeal Tribunal can make decision as stated in s. 50 and the decision is final. [But an aggrieved party (the BA or the applicant) may apply to the Court of First Instance for a judicial review.]
Planning
Within 21 days of being notified of the decision, the applicant may apply (if his or her application fails) in writing for a review under s. 17.
The review has to take place within 3 months upon receipt of the application. The applicant may attend the review.
The Town Planning Board can again grant, refuse to grant or grant permission with or without conditions.
Within 60 days after notification of the decision, the applicant may appeal by lodging a Notice of Appeal under s. 17B.
After receiving the Notice of Appeal, the Secretary to the Appeal Board has to fix the time and venue of the appeal and notifies all parties not less than 28 days before the date of appeal.
Both the appellant and respondent (invariably the Town Planning Board (TPB) and the applicant respectively can appear in the Appeal. The Appeal Board makes the decision and the decision is final. [But an aggrieved party (the TPB or the applicant) may apply to the Court of First Instance for a judicial review.]

APPENDIX 5

BUILDINGS AND RELATED ORDINANCES, POLICIES AND EVENTS

1845 Enactment of *Summary Offences Ordinance*
1856 Enactment of the *Buildings and Nuisances Ordinance*
1882 Osbert Chadwick's first report on sanitary conditions in Hong Kong
1888 *Enactment of European District Reservation Ordinance* (which discriminated against Chinese residents)
1889 Enactment of *Public Health Ordinance* (plan approval by the Surveyor General)
1894 Enactment of *Closed Houses and Insanity Dwelling Ordinance* and *Tai Ping Shan Resumption Ordinance*
1899 Enactment of *Insanitary Property Ordinance*
1902 Osbert Chadwick's second report on sanitary conditions in Hong Kong
1903 Enactment of the *Public Health and Buildings Ordinance* (which introduced the system of Authorized Architects)
1904 Enactment of the *Hill District Reservation Ordinance* (which discriminated against Chinese residents)
1908 Enactment of the *Public Health and Buildings Amendment Ordinance*
1918 Enactment of the *Peak District (Residence) Ordinance* (which discriminated against Chinese residents)
1923 Report of the Housing Commission
1924 Gazette Notice 570 ('GN 570')
1927 Enactment of the *Public Health and Buildings Amendment Ordinance*
1930 *Hill District Reservation Ordinance* repealed
1931 Gazette Notice 470 ('GN 470')
1934 Gazette Notice 364 ('GN 364')
1935 Splitting of 1903 *Public Health and Buildings Ordinance* into *Public Health Ordinance and Buildings Ordinance* (concrete construction stipulated for housing)

1941 Hong Kong overrun by Japanese forces in December
1945 The British Administration returned in August following the surrender of Japan to the Allies
1946 Building Reconstruction Advisory Committee Final Report
Peak District Reservation Ordinance repealed (end of tacit racial segregation) (see Lai and Yu, 2001)
1951 Housing Society established: introduction of cheap-rent public rental housing
1952 Hong Kong Settlers' Housing Corporation
1954 Housing Authority established: introduction of cheap-rent rental housing by another housing body
1955 Enactment of a new *Buildings Ordinance*
1956 Relaxation of control on building volume in *Building Regulations*
1960 Enactment of *Buildings Ordinance (Application to the New Territories) Ordinance* (effective on 1 January 1961)
1962 Amendment to the *Building (Planning) Regulations* (which introduced controls over plot ratio and site coverage)
1967 Enactment of *Buildings Ordinance (Application to the New Territories) Regulations*
1972 October: Ten-Year Housing Programme and new town programme announced
1973 Enactment of the *Housing Ordinance* on 1 April; enactment of the *Building (Administration) Regulations* (which extended the statutory period for plans to be rejected)
1974 The introduction of the title Authorized Person (AP)
1976 Introduction of Home Ownership Scheme (HOS) and Private Sector Participation Scheme (PSPS) housing; buildings plans to be submitted required to be in metric units; introduction of a centralized checking system for processing building plans submission
1987 Amendment to the *Buildings Ordinance (Application to the New Territories) Ordinance*
1999 The new Director of Building announced the commitment of Building Department to clear all unauthorized structures in Hong Kong.
1999 Enactment of *Land (Compulsory Sale for Redevelopment) Ordinance*
2001 The issue of the first Joint Practice Note, 'Green and Innovative Buildings', by the Lands Department, Planning Department and Buildings Department (see Appendix 2)

APPENDIX 6

A COMPARISON OF INTERPRETATION OF LEASE CONDITIONS RELATING TO BUILDING CONTROL BETWEEN THE LANDS DEPARTMENT AND THE BUILDINGS DEPARTMENT

Item	Lands Department's Policy	Buildings Department's Policy	Remarks
bay windows	They are excluded from GFA but included in SC calculation, if satisfied para. 6 of PNAP 68.		consistent
canopies and projections	They may be exempted from SC/GFA calculation as stated in PNAP 68.		consistent
ceiling height	It is acceptable up to 6 m if justified. G/F shop: 4–4.5 m Carpark: 2.4–4.5 m (clear headroom)	Domestic – normally up to 4 m Common area in domestic building – up to 6 m G/F shop – up to 5 m Office/shops – normally up to 4 m Carpark – 2.4–4.5 m (clear headroom)	commonly acceptable standards needed

Item	Lands Department's Policy	Buildings Department's Policy	Remarks
cocklofts	Countable for GFA calculation but void areas in front may be exempted subject to criteria set out in DDM PN: 17		consistent
covered walkways and passage ways	Open-sided covered walkway connecting tower blocks may be discounted for SC & GFA calculation.		consistent
	Walkway and passage within podium may be exempted from GFA calculation.	Bonus for SC and PR may be granted under B(P)R 22(1) and exempt from GFA for passage dedicated to the public.	
flat roofs	Those used as private areas accessible directly from adjacent units are countable for SC & GFA calculation.	Uncovered flat roofs are not countable for GFA but for SC calculation.	Both departments agree to follow the BD's practice for uncovered garden, flat roof and yards: they are excluded from GFA calculation.
garden areas and terraces	Garden decks (cantilevered or on stilt) are countable for SC calculation.	Open garden decks (cantilevered or on stilt) are not countable for SC and GFA calculation.	Both departments agree to follow the BD's practice for uncovered garden, flat roof and yards: they are excluded from GFA calculation.
height restriction/ height of buildings	Building height measures from lowest formation floor level up to the rooftop including railings/parapets for absolute height restriction cases, or up to main roof level for other cases.	Building height measures from mean street level of the lowest street up to the height of the roof over the highest usable floor.	Neither department has any objection to differences in interpretation.

Item	Lands Department's Policy	Buildings Department's Policy	Remarks
pagodas	Open-sided pagodas may be excluded from SC and GFA calculation.	Open-sided pagodas should be included in SC but may be exempted from GFA.	The BD may permit to exempt from SC if justified.
recreational facilities	They may be excluded from GFA under the recreational facilities clause contained in the lease, if such facilities are compatible with the proposed development in terms of the number of occupants, types and location, etc.	Recreational facilities designated as common areas for the sole use of the residents under the DMC (of area up to 5% of the total domestic GFA) may be exempted from GFA calculation. Reference is made to the 'guidelines' issued by the Lands Department on the accepted active recreational facilities.	Recreational facilities to be designated as common area for the sole use of residents governed by the DMC are exempted from GFA calculation. Library/study room as active use is permitted.
site coverage and plot ratio	Transformer room, plant rooms, RCPs and so on are not countable for GFA but may be exempted from SC calculation by the Lands Department.	All such provisions are countable for SC, but exempted from GFA calculation under B(P)R 23(3)(b).	
	Elevated structures including driveway and garden deck are countable for SC calculation.	Elevated open driveway, open garden, uncovered swimming pools and so on are exempted from SC calculation.	Neither department has any objection to differences in interpretation.

Item	Lands Department's Policy	Buildings Department's Policy	Remarks
	Carports **directly** under are not countable for SC & GFA calculation.	Covered carports and driveway are countable for SC but exempted from GFA calculation.	Neither department has any objection to difference in interpretation.
	Excessive carparking area are countable for SC and GFA calculation		consistent
staircases, lift lobbies and entrances to domestic towers	Provision solely serving domestic floors is countable for domestic GFA calculation. Provision serving non-GFA countable floor may be exempted from GFA calculation.		consistent
storey and storey height	Storey counts from lowest formation level including basement. Every spilt-level counts as a storey.	Storey counts from street level excluding basement. Split-level with difference in level of less than 1 m, counts as same floor.	Neither department has any objection to differences in interpretation.
swimming pools	Open swimming pool is countable for SC calculation unless on grade. Only communal swimming pools may be exempted from SC and GFA calculation under the standard Recreational Facilities clause.	All open swimming pool is not countable for SC and GFA calculation.	The Lands Department may consider to disregard **all** open swimming pools from SC and GFA.
transfer plates	Additional space outside domestic unit may be counted for GFA calculation.	Area outside external wall is not countable for GFA.	Both departments agree to follow the Buildings Department's practice.

Item	Lands Department's Policy	Buildings Department's Policy	Remarks
void areas underneath domestic units built on sloping sites	They should be filled with soil/concrete to avoid conversion.		consistent
void areas within domestic units	They are countable for SC but may be exempted from GFA calculation for A/C plants, etc.	They are countable for SC calculation.	clarification needed
yards	Enclosed yards may be countable for GFA calculation.	Open yards are not countable for GFA calculation.	Both departments agree to follow the Buildings Department's practice for uncovered garden, flat roof and yards: they are excluded from GFA calculation.

Abbreviations:

GFA : Gross Floor Area
SC : Site Coverage
BD : Buildings Department
B(P)R : Building (Planning) Regulations
DMC : Deeds of Mutual Covenant
A/C : Air-Conditioning
PNAP : Practice Note for Authorized Persons and Registered Structural Engineers

Note:

This table must be read in connection with 'Practice Note for Authorized Persons, Surveyors and Registered Structural Engineers', Land Administration Office, Lands Department (issue No. APSRSE 1/98) (Nissim 1998).

BIBLIOGRAPHY

Abercromie, P. (1948) *Hong Kong: Preliminary Planning Report*. Hong Kong: Government Printer.

Baldwin, G.R. (1994) 'Property management in Hong Kong: An overview', *Property Management*, Vol. 12, No. 4, 18–23.

Birch, Alan (1991) *Hong Kong: The Colony That Never Was*. Hong Kong: Odyssey.

Bokhary, K. (1989) 'Section 16(1)(g) of the Buildings Ordinance (Cap 123) – a shooters' guide', *Hong Kong Law Journal*, **19**, 314–330.

Branson, Richard and Vittachi, Nury (1997) *Over Hong Kong*. Hong Kong: Odyssey.

Briggs, T. and C. Crissell (1977) *The Vanishing City*. Hong Kong: South China Morning Post.

Bristow, R. (1984) *Land Use Planning in Hong Kong: History, Policies and Procedures*. Hong Kong: Oxford University Press.

Bristow, R. (1989) *Hong Kong's New Towns: A Selective Review*. Hong Kong: Oxford University Press.

Building Ordinance Office (1991) *Building Control in Hong Kong*. Hong Kong: Buildings and Lands Department.

Buildings and Lands Department (1991) *Building a Village House under the Buildings Ordinance (Application to the New Territories) Ordinance*. Hong Kong: Hong Kong Government.

Buildings and Lands Department (1988) 'The control of unauthorised building works', press release dated 30 March 1988. Hong Kong: Hong Kong Government.

Buildings Department (1996) 'Enforcement policy on unauthorised building works', leaflet, Hong Kong Government.

Cameron, Nigel. (1991) *An Illustrated History of Hong Kong*. Hong Kong: Oxford University Press.

Chan, A.P.C. (1998) 'The Town Planning Appeal Board in Hong Kong: A historical perspective', *Planning and Development*, Vol. 14, No. 2, 32–37.

Chan, Edward and Wong, Horace (1998) Notes to Seminar on Recent Development in the Law relating to Title Requisition, held by the Hong Kong Bar Associations on 13 November 1998, unpublished monography.

Chan, Chik (1999) Hong Kong on the Record: 1950s–1980s. Hong Kong: Joint Publishing Ltd.

Chau, Kai Wing (ed.) (1997) *Pictures of Hong Kong and Its People 1950s – 1970s.* Hong Kong: Joint Publishing (Hong Kong) Ltd. (Chinese publication)

Cheung, Po Hung (ed.) (1997) *Hong Kong Through Postcards 1940s – 1970s.* Hong Kong: Joint Publishing (Hong Kong) Ltd. (Chinese publication)

Cheung, S.N.S. (1974) 'A theory of price control', *Journal of Law and Economics*, **17**, 53–71.

Cheung, S.N.S. (ed.) (1993) *Gone Are the Days: A Memoir of Four Photographers.* Hong Kong: Next Publications. (Chinese publication)

Chu, Wai Tak (1998) *Hong Kong: Past and Present.* Hong Kong: Ming Pao Publishing. (Chinese publication)

Chu, Wai Tak (1997) *Old Hong Kong.* Hong Kong: Cosmos Books. (Chinese publication)

Chung, H.K.B. (1982) *An Overview of the Building Control Policy in the First Century of the History of Hong Kong.* Unpublished M. Soc. Sc. (Public Administration) dissertation, The University of Hong Kong.

Chung, Wah Nam. (1989) *Contemporary Architecture in Hong Kong.* Hong Kong: Joint Publishing Ltd.

Courtauld, Caroline and Hadsworth, May. (1997) *The Hong Kong Story.* Hong Kong: Oxford University Press.

Cupperleditch, David (1997) *Old Photographs of Hong Kong.* London: Sutton Publishing.

Davies, S. and E. Roberts (1990) *Political Dictionary for Hong Kong.* Hong Kong: Macmillan.

Drakakis-Smith, D.W. (1979) *High Society, Housing Provision in Metropolitan Hong Kong.* Hong Kong: Centre of Asian Studies, The University of Hong Kong.

Drakakis-Smith, D. (1980) *Urbanisation, Housing and the Development Process.* New York: St. Martin Press.

Eastern District Board (1984) *Eastern District Monuments and Legends.* Hong Kong: Eastern District Board. (Chinese publication)

Fong, Peter and Chik Chan (1993) *Home of Yesterday.* Hong Kong: Joint Publishing (Hong Kong) Ltd. (Chinese publication)

FormAsia (1996) *Postcard from Hong Kong.* Hong Kong: FormAsia.

Glofcheski, R.A. (2000) 'Defective buildings and defective law: The duty of care in negligence', *Hong Kong Law Journal*, Vol. 30, Part II, 206–222.

Graham, S. and S. Marvin (1999) 'Planning cybercities: Integrating telecommunications into urban planning', *Town Planning Review*, **70**, 89–114.

Hacker, Arthur (1997) *Hong Kong: A Rare Photographic Record of the 1860s.* Hong Kong: Wattis Fine Art.

Hacker, Arthur (1997) *Wanchai.* Hong Kong: Odyssey Publications.

Hadland, B.J. (1978) 'Land policies in Hong Kong', in L.S.K. Wong (ed.) *Housing in Hong Kong: A Multidisciplinary Study.* Hong Kong: Heinemann, pp. 72–90, 88–89 particularly.

Halkyard, A. and J.P. Vanderwolk (1997) *Hong Kong Tax Law: Cases and Materials.* Singapore: Butterworths Asia.

Hase, P.H. (ed.) (1999) *In the Heart of the Metropolis: Yaumatei and its People.* Hong Kong: The Royal Asiatic Society, Hong Kong Branch, Joint Publishing (HK) Co. Ltd.

Hase, P.H. and E. Sinn (1995) *Beyond the Metropolis: Villages in Hong Kong.* Hong Kong: Joint Publishing (Hong Kong) Limited.

Ho, D. (1993) 'Maintenance management of ageing buildings in Hong Kong', *Property Management*, Vol. 11, No. 3, 240–253.

Ho, T. (1985) 'The land tenure system in Hong Kong and its implications on valuation', *The Hong Kong Surveyor,* **1**, 3–5.

Hong Kong Government Information Services (1979) *Rural Architecture in Hong Kong.* Hong Kong: Government Printer.

Hong Kong Government Information Services (undefined) *The Port of Hong Kong.* Hong Kong: Government Printer.

Hong Kong Housing Authority (1984) *The First Two Million.* Hong Kong: Hong Kong Housing Authority.

International Covenant on Civil and Political Rights.

Joint Publishing (Hong Kong) (1997) *Illustrated Chronicle of Hong Kong. Vol. 1 Pre-historic – 1959.* Hong Kong: Joint Publishing (Hong Kong) Ltd. (Chinese publication)

Joint Publishing (Hong Kong) (1997) *Illustrated Chronicle of Hong Kong. Vol. 2 1960 – 1997.* Hong Kong: Joint Publishing (Hong Kong) Ltd. (Chinese publication)

Jones, G.W.E. (1978) 'Rural housing in Hong Kong', in L.S.K. Wong (ed.) *Housing in Hong Kong: A Multidisciplinary Study.* Hong Kong: Heinemann, Ch. 12, 287–307, 296–298 particularly.

Ko, Tim Keung (1994) *Hong Kong: Past and Present.* Hong Kong: Joint Publishing (Hong Kong) Ltd. (Chinese publication)

Ko, Tim Keung (1995) *A Guide to the Relics of the Battle of Hong Kong 1941.* Hong Kong: Joint Publishing (Hong Kong) Ltd. (Chinese publication)

Ko, Tim Keung and Jason Wordie (1996) *Ruins of War: A Guide to Hong Kong's Battlefields and Wartime Sites.* Hong Kong: Joint Publishing (Hong Kong) Ltd.

Lai, L.W.C. (1985) 'The formation of squatters and slums in Hong Kong: From slump market to boom market', *Habitat International*, Vol. 9, No. 3/4, 251–260.

Lai, L.W.C. (1993) 'Hong Kong's density policy towards public housing in Hong Kong', *Third World Planning Review*, Vol. 15, No. 1, 63–85.

Lai, L.W.C. (1998a) 'The leasehold system as a means of planning by contract: The case of Hong Kong', *Town Planning Review*, Vol. 69, No. 3, 249–276.
Lai, L.W.C. (1998b) *Zoning and Property Rights*. Hong Kong: Hong Kong University Press. Appendix 1.
Lai, L.W.C. (1998c) 'Hong Kong planning appeal rules (1991–1997)', *Planning and Development*, Vol. 14, No. 2, 38–61.
Lai, L.W.C. (1999a) *Town Planning in Hong Kong: A Review of Planning Appeal Decisions*. Hong Kong: Hong Kong University Press.
Lai, L.W.C. (1999b) *Town Planning in Hong Kong: A Critical Review*. Second edition. Hong Kong: City University of Hong Kong Press.
Lai, L.W.C. (1999c) 'Reflections on the Abercrombie Report 1948: A strategic plan for colonial Hong Kong', *Town Planning Review,* **70**, 61–88.
Lai, L.W.C. (1999d) 'Housing "indigenous villagers" in a modern society: An examination of the Hong Kong "small house" policy', research monograph presented in CPD lectures for HKIS members on 11 September 1999, The University of Hong Kong.
Lai, L.W.C. (2000a) *A Town Planning Practice: Context, Procedures and Statistics for Hong Kong*. Hong Kong: Hong Kong University Press.
Lai, L.W.C. (2000b) 'Housing "indigenous villagers" in a modern society: An examination of the Hong Kong "small house" policy', *Third World Planning Review*, 22, 207–230.
Lai, L.W.C. and Ho, D.C.W. (2001) 'Unauthorised structures in a high-rise high-density environment: The case of Hong Kong.' *Property Management*, Vol. 19, No. 2, 112–123.
Lai, L.W.C. and Yu, M.K.W. (2001) 'The rise and fall of discriminating zoning in Hong Kong', *Environment and Planning b: Planning and Design*, 28, 295–314.
Lai, L.W.C. (2002) 'Fifty years no change: Land use planning and development in Hong Kong under constitutional capitalism', in Ming Chan and Alvin So (eds.) *China's Hong Kong into 21st Century: Transformations in the Hong Kong Special Administrative Region*. Armonk, M.E. Sharpe, pp. 404–447.
Lampugnani, Vittorio Magnago (1993) *The Aesthetics of Density*. London: Prestel-Verlag.
Lands Department (1998) *The Purchase of a Village House in the New Territories*. Hong Kong: Hong Kong Government.
Lau, Y.W. (1999) *A Brief History of the New Territories*. Hong Kong: Joint Publishing (Hong Kong) Ltd.
MacGregor, Keith. (2000) *An Eye on Hong Kong*. Hong Kong: Odyssey.
Mak, Fung (1997) *Hong Kong Once Was*. Hong Kong: Photo Pictorial Publishing Ltd.
Mau, Stephen (1996) *Building Law in Hong Kong*. Hong Kong: Longman.
Miners, N. (1977) *The Government and Politics of Hong Kong*. Hong Kong: Oxford University Press. Second edition.
New Territories Development Department (undefined) *Hong Kong's New Town: Shatin*. Hong Kong: Government Printer.

New Territories Development Department (undefined) *Market Towns*. Hong Kong: Government Printer.

Nield, S. (1997) *Hong Kong Land Law*. Hong Kong: Addison Wesley Longman China Ltd.

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

Owen, N., W. Roberts, D. Lung and S. Cheng (1999) *The Heritage of Hong Kong: Its History, Architecture and Culture*. Hong Kong: FormAsia Books.

Planning Department (various years) *Hong Kong Planning Standards and Guidelines*.

Poon, T.N.T. and E.H.W. Chan (eds.) (1998) *Real Estate Development in Hong Kong*. Hong Kong: PACE Publishing.

Pryor, E.G. and S.H. Pau (1993a) 'The growth of the city – a historical review', in V.M. Lampugnani (ed.) *Hong Kong Architecture: The Aesthetics of Density*. London: Prestel, 97–110.

Pryor E.G. and S.H. Pau (1993b) 'The new city emerges', in V.M. Lampugnani (ed.) *Hong Kong Architecture: The Aesthetics of Density*. London: Prestel, pp. 111–140.

Pryor, E.G. (1983) *Housing in Hong Kong*. Second edition. Hong Kong: Oxford University Press.

Renaud, B., F. Pretorius and B. Pasadilla (1997) *Markets at Work: Dynamics of the Residential Real Estate Market in Hong Kong*. Hong Kong University Press, Hong Kong.

Roberts, P.J. (1975) *Valuation of Development Land in Hong Kong*. Hong Kong: Hong Kong University Press.

Roberts, P.J. and Siu, J.C.P. (2001) *Valuation of Development Land in Hong Kong*. Second Edition. Hong Kong: Empire Publications International Ltd.

Rollo, Denis. (1992) *The Guns and Gunners of Hong Kong*. Hong Kong: Gunners' Roll of Hong Kong.

Shulman, F.J. and Shulman, A.L. (2001) *Doctoral Dissertations on Hong Kong 1900–1997: An Annotated Bibliography*. Hong Kong: Hong Kong University Press.

Sihombing, J. and M. Wilkinson (1997) *The Hong Kong Conveyancing Law and Practice*. Singapore: Butterworths Asia.

Sihombing J. and M. Wilkinson (1999) *A Student's Guide to Hong Kong Conveyancing*, 3rd edition, Singapore: Buttermorth Asia.

Smith, Lloyd. (1962) *Hong Kong*. Hong Kong: Longmans, Green and Co. Ltd.

The Constitution of the People's Republic of China (1982) Adopted on 4 December 1982 by the Fifth National People's Congress of the People's Republic of China at its Fifth Session. Beijing: Foreign Languages Press.

Tong, Cheuk Man; David P.M. Toong, Alan S.K. Cheung and Yu Kai Mo (eds.) (1993) *A Selective Collection of Hong Kong Historic Postcards*. Hong Kong: Joint Publishing (Hong Kong) Ltd. (Chinese publication)

Urban Council of Hong Kong (1970) *Hong Kong in 1870*. Hong Kong: City Museum and Art Gallery.

Urban Council of Hong Kong (1982) *The Hong Kong Album: A Selection of the Museum's Historical Photographs.* Hong Kong: Hong Kong Museum of History.

Urban Council of Hong Kong (1984) *History Around Us.* Hong Kong: Hong Kong Museum of History.

Urban Council of Hong Kong (1994) *City of Victoria: A Selection of the Museum's Historical Photographs.* Hong Kong: Museum of History.

Walker, A.W., K.W. Chau and L.W.C. Lai (1995) *Hong Kong in China: Real Estate in the Economy.* Hong Kong: Brooke Hillier Parker.

Walters, M. and E.M. Hastings (1998a) 'But is fire the issue ...? The problems of managing multiple ownership buildings in Hong Kong', *Property Management*, Vol. 16, No. 4, 229–235.

Walters, M. and E.M. Hastings (1998b) 'Fire safety legislation in Hong Kong', *Facilities*, Vol. 16, No. 9/10, 246–253.

Wan Chai District Board (1983) *Wan Chai District: Its Relics and Legends.* Hong Kong: Wan Chai District Board. (Chinese publication)

Wiltshire, Trea (1995) *Old Hong Kong Vol. 1 1860–1900.* Hong Kong: FormAsia.

Wiltshire, Trea (1995) *Old Hong Kong Vol. 2 1901–1945.* Hong Kong: FormAsia.

Wiltshire, Trea (1997) *Old Hong Kong Vol. 1 1950–30 June 199.* Hong Kong: FormAsia.

Wise, Donald. (1996) *Above the Barren Rock: Spectacular Hong Kong From the Air.* Hong Kong: Form Asia.

Wong, Tsz Choi (1999) *The Building and Planning Application Systems: A Comparative Study.* Unpublished B.Sc. (Surveying) dissertation, Department of Real Estate and Construction, The University of Hong Kong.

Wong, Wah Sang and Chan, Hon-wen (eds.) (1997) *Professional Practice for Architects.* Hong Kong: Hong Kong Pace Publication.

Wong, Y.C.R. (1998) *On Privatizing Public Housing.* Hong Kong: City University of Hong Kong Press.

Wordie, Jason (2002) *Streets: Exploring Hong Kong Island.* Hong Kong: Hong Kong University Press.

Yau, Leung (1996) *Photo Hong Kong 1950s–1970s.* Hong Kong: Joint Publishing (Hong Kong) Ltd. (Chinese publication)

Yau, Leung. (1997) *Pictorial History of Hong Kong.* Hong Kong: Lee Man Publishing. (Chinese publication)

Yau, Leung. (1997) *City Vibrance: Hong Kong*, (Part 1). Hong Kong: Joint Publishing Ltd.

Yau, Leung (1999) *Images of Hong Kong, 1960s–1970s. A Collection of Photographs by Yau Leung.* Hong Kong: Joint Publishing Ltd. (Chinese publication)

INDEX

BUILDING APPEAL CASES

LAW CASES

CODES OF PRACTICE

GAZETTE NOTICES

GUIDELINES

ORDINANCES

PRACTICE NOTES

REGULATIONS

NAMES

PLACES

TERMS