

**Report of the
Independent Committee of
Inquiry on
the Sai Wan Ho Development on
Inland Lot No. 8955**

April 2006

西灣河內地段第8955號發展項目獨立調查小組
INDEPENDENT COMMITTEE OF INQUIRY ON THE
SAI WAN HO DEVELOPMENT ON INLAND LOT NO. 8955

18 April 2006

The Honourable Donald TSANG, GBM
The Chief Executive
Hong Kong Special Administrative Region
People's Republic of China
Government House
Hong Kong

Dear Chief Executive,

**Inquiry into the Sai Wan Ho Development
on Inland Lot No. 8955**

We, the Independent Committee of Inquiry into the Sai Wan Ho Development on Inland Lot No. 8955, have the honour to present our report.

Our central conclusion is that Mr C M Leung, the former Building Authority exercised his discretion to grant bonus plot ratio properly in accordance with the Buildings Ordinance and the regulations under it. Further, we find no basis for adverse criticism of his decision which permitted the Site to be developed as a Class C site.

As to his decision under Buildings (Planning) Regulation 23(3)(b) to exempt the gross floor area of the public transport terminus from calculation in the gross floor area of the Site we are of the opinion that this regulation was wrongly applied. However, this regulation had been relied upon to exempt public transport termini in the past and Mr Leung took legal advice before making his decision. He relied upon the previous cases, legal advice and advice of the Building Authority Conference when making his decision. Although others might have decided differently, he took the decision in accordance with advice and bears no blame for the error.

We compared the effect of the above decisions upon the height, bulk and density of the development with the scale of exemptions permitted under section 42 of the Buildings Ordinance following the policy of the Buildings, Lands and Planning Departments. This comparison led to our concern that the intended legislative control of development is being watered down.

We made recommendations for restoring this control as well as others.



(Mr Justice Barry Mortimer, GBS, NPJ)
Chairman



(Dr CHENG Hon-kwan, GBS, JP)
Member



(Mr Anthony CHAN Kin-keung, SC)
Member

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INTRODUCTION

The Membership

1. Chairman Mr Justice Barry MORTIMER, GBS, NPJ
Member Dr CHENG Hon-kwan, GBS, JP
Member Mr Anthony CHAN Kin-keung, SC

The Appointment of the Committee

2. The Committee was appointed by the Chief Executive on 16 November 2005 on the following terms of reference.

The Terms of Reference

3. (a) To examine the procedures in approving the site classification, Gross Floor Area (GFA) exemption for the Public Transport Terminus and bonus GFA for dedication of the reserved area for public passage in respect of the Sai Wan Ho building plans application, including how and under what circumstances the Building Authority's discretionary powers are exercised;
- (b) Having regard to the findings in (a), to review and advise on whether the Building Authority's discretionary powers have been exercised properly and how the concerned departments may better perform their functions in these areas in future; and
- (c) To submit a report with conclusions and recommendations to the Chief Executive in around three months' time.

The Location of Inland Lot No. 8955

4. The location of the Sai Wan Ho development on Inland Lot No. 8955 (the Site) is shown on the Control Drawing (extracted from the tender document) at **Annex 1**.

The Method of Work

5. The Committee drafted procedural guidelines for its inquiry. After describing its appointment and the terms of reference the guidelines follow :

- (a) The Committee is not appointed under statute. It will not take evidence on oath nor will it sit in public;
- (b) The Committee will accept and invite evidence relevant to its deliberations from interested parties. This evidence should initially be in writing;
- (c) The Committee may invite those who have provided written evidence and others to assist its work by attending to give oral evidence. Witnesses who give oral evidence may be asked questions by the Committee. At the end of any questions the witnesses will be given the opportunity to give further evidence in clarification or explanation;
- (d) Any person who gives oral evidence to the Committee may be accompanied by a legal or other adviser but may not be represented by an advocate;
- (e) Oral evidence given to the Committee will be recorded and transcribed. The Committee will not permit the use of any electric recorders by witnesses or those accompanying them;
- (f) Issues of fact will be decided by the Committee on the balance of probability; and
- (g) In the event that the Committee makes a finding or comment adverse to any person in its preliminary draft report such person will be allowed to consider the relevant extracts and the opportunity to make further representations to the Committee.

6. We publicly advertised for submissions (see **Annex 2**) and received in consequence a submission from the Real Estate Developers Association of

Hong Kong and a letter from one member of the public which was without address or means of contact.

7. We have received submissions from the Hong Kong Institute of Architects, the Hong Kong Institution of Engineers, the Hong Kong Institute of Planners and the Hong Kong Institute of Surveyors. These are concerned in particular with our task to advise on “how the concerned departments may better perform their functions in these areas in future” .

8. The evidence before us consists chiefly of departmental files relevant to the planning, tender and building development which followed. The statements and answers to written questions from the Committee to relevant government departments. Finally, we received oral evidence from present and/or former directors of relevant departments and those working with them. A list of the government departments from which we have sought assistance and those who came to give oral evidence is in **Annex 3**.

9. In consequence, we have before us a considerable bulk of departmental files, statements, written answers to specific questions and transcripts of oral evidence. It has been necessary for us to assume that when we have asked for all relevant documents we have received them. We have no reason to think otherwise.

10. Finally we have worked under considerable constraint of time exacerbated by public holidays (Christmas and Chinese New Year), previous commitments of members of the Committee and the availability of witnesses. However, at all times we have received the highest level of cooperation and assistance from every department and person from whom we have sought it. The speed with which we have received copies of documents and answers to written questions could only be achieved in Hong Kong.

SUMMARY OF REPORT

Introduction

1. This is not an executive summary. It is not a substitute for the text of the report. It is provided to assist the reader with a broad overview of events so that the detail may be more easily understood.

Identifying the Site for Residential Development

2. In 1998 under the Chief Executive's policy of building 85,000 flats each year Inland Lot No. 8955 (the Site) was identified as suitable for residential accommodation as well as for government and community use. It was zoned on the Quarry Bay Outline Zoning Plan (OZP) as "Government, Institution or Community" ("G/IC"). In due course the Site was rezoned "Other Specified Uses" ("OU") on the Quarry Bay OZP and annotated "Residential cum Public Transport Terminus, Commercial and Community Facilities".

Planning Intention

3. The Planning Department, the Lands Department and the Buildings Department are principally involved in the sale and control of the development of government land. From the outset the intention was to develop the Site to the maximum potential under the Buildings Ordinance (BO) and the regulations made under it.

Control of Development

4. There is a three tier control of the development of government land :

- (a) The Planning Department working with the Town Planning Board arranges for any planning intention or restrictions to appear on the relevant OZP. If there is a planning intention for a particular site the Planning Department arranges with the Lands Department to have that reflected in the Special Conditions;

- (b) The Lands Department sells the land as landlord and drafts the Special Conditions which become the conditions of the lease. Any lawful restriction may be imposed; and
- (c) The BO and the Building (Planning) Regulations (B(P)R) provide legislative control of the gross floor area (GFA) which may be built. This by implication controls the height, bulk and density of the development. This control is imposed by regulating site area, site coverage and plot ratio. Under B(P)R23(3)(b) specified parts of a building may be exempted from the maximum GFA. Also under B(P)R22(1) a developer may dedicate areas of his site for public passage but only if the Building Authority (BA) agrees to accept. In compensation the developer may be awarded bonus plot ratio of five times the GFA if the area dedicated is on the ground floor.

5. Section 42 of the BO is also relevant. If “special circumstances make it desirable” the BA may modify the provisions of the Ordinance and the regulations under it. By this means features not exempted under B(P)R23(3)(b) may be exempted. A Joint Practice Note (PN) of the three departments and other Practice Notes for Authorised Persons and Registered Structural Engineers (PNAPs) of the Buildings Department provide for certain green features, amenity features, recreational provisions and the like to be considered for exclusion from the maximum GFA of a building as a matter of policy.

Special Conditions

6. The Special Conditions for the tender drafted by the Lands Department provided for a minimum of 80,000m² for residential accommodation and 1,500 m² net operational floor area for the Marine Police Operational Area (MPOA). Otherwise the Special Conditions were silent upon maximum GFA for the development, the area to be occupied by the Public Transport Terminus (PTT) and the dimensions of areas on the ground floor reserved for lifts and other facilities to the upper floors. The Control Drawing provided a layout of the ground floor but was not to scale.

7. From the outset the Lands Department’s intention was that the Site should be developed as a Class C site to maximise its potential.

The Tender

8. The successful tenderer paid HK\$2,430 million. This was 31% higher than the reserve price or HK\$580 million. Later the developer paid a small premium of HK\$6 million for approval of the plans which did not comply with the Control Drawing to accommodate variations in the plans in respect of the PTT and the MPOA.

The Decision and Exercise of Discretion by the Building Authority - The Subject of this Inquiry

9. The developer put in plans which were disapproved by both the Buildings Department and the Lands Department.

10. The developer's Authorised Person (AP) made applications and the BA made the following relevant decisions upon them :

- (a) That the Site was a Class C site on the basis that a strip of government land over 4.5m wide designated as open space but also an emergency vehicular access (EVA) to Marine Fuelling Stations was a "street". This satisfied the requirements. The Lands Department's intention was that the Site should be developed as Class C but with the Pink Hatched Black Area as the necessary street;
- (b) That the "Reserved Areas" encroached upon by the PTT in the developer's plans should be accepted for dedication. The developer was compensated with bonus plot ratio. As designed the PTT was more environmentally friendly, more open and more pleasant for public use than it otherwise would have been. It was in the public interest to accept the dedication;
- (c) That part of the Pink Cross Hatched Black Area adjacent to a pedestrian access to the PTT should be accepted by the government and dedicated by the developer for public passage in return for bonus plot ratio. The public had no right-of-way over the Pink Cross Hatched Black Area;

- (d) That the PTT should be excluded from GFA calculation for the Site under B(P)R23(3)(b); and
- (e) That the MPOA should be included in the GFA calculation for the Site.

11. In taking these decisions the BA was advised initially by a Building Authority Conference (BAC) on 1 August 2001. This BAC was augmented. The AP and his team were invited to make a presentation of his applications and two independent advisers were invited to attend to increase the transparency of the process.

12. The BA adjourned his decision on the application for exemption of the PTT for the assistance of legal advice. The BAC was reconvened on 22 October 2001. He exempted the PTT after considering the legal advice and the advice of the meeting.

The Committee's Conclusion

13. Having examined these decisions and the reasons in some detail the Committee's opinion is that apart from the decision to exclude the PTT the remaining decisions were reasonably and properly taken both on the facts and in the exercise of discretion.

14. The application for exemption of the PTT caused difficulties to the BA because :

- (a) The treatment of PTTs in the past had been inconsistent;
- (b) The GFA of PTTs had been excluded from time to time under B(P)R23(3)(b); and
- (c) The legal advice which indicated that if he found as a fact that the PTT was constructed solely for the parking of motor vehicles, loading or unloading of motor vehicles B(P)R23(3)(b) applied.

15. Although the Committee thinks this decision was wrong Mr C M Leung as BA is neither to be blamed nor criticised in the particular circumstances. Others might have decided differently but from previous cases

and the legal advice it was open to him to apply B(P)R23(3)(b) to exclude the PTT. With this important background the decision was reasonable.

16. The Committee recognises that views can differ widely upon the interpretation of ordinances and regulations but considers that B(P)R23(3)(b) applies only when the relevant facility is provided (and not excessively provided) for the parent building or its occupants. Even if the decision was reasonable on the facts the PTT was not provided for the parent building or its occupants. A PTT is outside the scope of the regulation. In any event the provision was wholly excessive.

The Consequence

17. These decisions made 19,937m² additional GFA available to the developer. In practice this increased the bulk and density of the development by approximately eight floors on each of the five towers or roughly a total of 280 flats.

The Decision in Perspective

18. It is necessary to put these decisions of the BA into perspective. As one of the perceived detrimental effects of the decisions is to increase the height, bulk and density of the buildings it has been necessary for the Committee to look in a general way at whether there are other contributing factors. Apart from necessary exemptions under B(P)R23(3)(b) there were other exemptions granted by the BA under a joint policy of the Buildings, Lands and Planning Departments to encourage developers to provide “green and innovative buildings” by excluding from GFA balconies, wider common corridors, bigger lift lobbies, communal sky gardens, communal podium gardens and the like. Also, there was a policy to encourage other amenities, recreational areas such as clubhouse, play areas and so forth. These also were exempted from GFA. These features were exempted from GFA by the use of section 42 of the BO. Without question this is praiseworthy policy which will improve the lives of many who live in the buildings concerned. But there are consequences. The more exemptions are given the higher, the more bulky and the more dense the building will become.

19. In this case more GFA was exempted under the provisions of this policy than was granted or allowed by the BA in the decisions under review.

20. The relevant point under the Committee’s terms of reference is that the legislative control of the development was relaxed, not only by the

misapplication B(P)R23(3)(b) to the PTT by the BA, but also by the watering down of the control under section 42 for praiseworthy motives.

Recommendations

21. If the height, bulk and density of this development were too great then the reason was lack of legislative control. Control of the maximum GFA should be restored.

22. This may be done in several ways. One way would be to review the legislation and amend B(P)R23(3)(b) to include the green, amenity and similar features so that they can be excluded under the regulation. This would also have the effect of avoiding the use of section 42 of the BO in a routine way. The legislation could then be strictly applied.

23. Control should be imposed by the Planning Department in cooperation with the Town Planning Board so as to place appropriate restrictions on the OZP. Further, planning policy should be reflected in the Special Conditions of the lease. Close consultation and cooperation between the departments involved in the development of government land and its control is necessary. Imposing a cap on GFA exemptions, granting of bonus GFA and a maximum GFA in the lease conditions are measures being actively considered. We agree that this should be pursued.

24. The exercise of discretion by the BA would be considerably assisted by the drafting of Special Conditions which clearly set out what is required of the developer. If the intention is that the Site should be developed as a particular class this should be clearly stated. Also, if the intention is that Government Accommodation should be included or excluded in the GFA this should be clearly stated. The principle should be that the Special Conditions are drafted with as much certainty and clarity as possible.

25. The action already undertaken to examine the imposition of maximum GFA and capping the amount of GFA which may be exempted as means of control should be urgently pursued.

26. Finally, in controlling development of this kind increased coordination and cooperation between the departments involved should be promoted under the guidance of the Bureau. Steps are already being taken to this end.

REPORT

PART I

THE BACKGROUND

CHAPTER 1

THE ROLES OF THE DEPARTMENTS INVOLVED

Previous Reports

1.1 The sale and development of this Site have been subject of two earlier Reports. One by the Director of Audit and one by the Public Accounts Committee. The focus of these Reports was quite different from the Inquiry the Committee has undertaken as can be seen from our terms of reference. We make no mention of the conclusions reached by the Director of Audit or the Public Accounts Committee. This inquiry has been independent of them.

1.2 We have reached our own conclusions after careful and detailed consideration of informal oral evidence and more than 30 ring binders of statements and documents.

1.3 The Committee has examined the broad roles of the main departments of government involved in the planning, sale and development of government land. The discretion exercised by the BA when making the decisions which the Committee is tasked to examine was not carried out in a vacuum. The parameters within which he makes decisions within his discretion under the BO and the B(P)R are set either by the legislation itself or in the Special Conditions for the tender. The Lands Department drafts the Special Conditions for the tender under which the successful developer takes the lease. It takes into account the needs of other relevant departments. The planning intention for a site is reflected in the Special Conditions on the advice of the Planning Department. Further conditions may appear in the relevant OZP for which the Planning Department and the Town Planning Board have a responsibility.

1.4 We turn therefore to the four main government entities involved. These are the Housing, Planning and Lands Bureau (the Bureau), the Planning Department, the Lands Department, and the Buildings Department. We focus upon their roles in the sale of government land for development. In this they have quite separate functions.

The Housing, Planning and Lands Bureau

1.5 The Bureau determines the general policies for the Planning, Lands and Buildings Departments. The various departments implement these policies in accordance with their roles and the relevant legislation. For planning matters therefore the Bureau will determine the general policies and will propose amendments to the Town Planning Ordinance taking into account changing social circumstances and other broad relevant planning factors. Although it is the policy of the Bureau that the planning intention for the development of a particular site is achieved, it is for the Planning Department to determine the planning intention at this level.

1.6 The Lands Department draws up lists of government land sites to be offered for sale and development each year. This list must be endorsed by the Bureau. In such sales it is the government's established policy to obtain the highest price through public auction or tender.

1.7 The Bureau gives guidance to the departments on any issue involving policy implications and when implementing the policies of the Bureau the departments may consult the Bureau for guidance.

1.8 The Bureau has a role in resolving any issues raised by or involving the departments and it seeks to promote cooperation and coordination between them. It holds regular meetings between the departments to this end.

1.9 The Bureau establishes task forces and working groups to help coordination between the departments. These deal in particular with approval procedures and the general administration of development sites.

The Planning Department

1.10 The Planning Department is responsible, with the Town Planning Board which it supports, for town planning in the broad sense. The Town Planning Board prepares plans upon broad planning principles to guide and control the development and use of land.

1.11 Generally speaking the focus is not upon planning restrictions associated with a particular site, but if there are any, they are within the Planning Department's responsibility. Site coverage, bulk, density, height and the like are controlled under the BO and the B(P)R. These restrictions were, and are, regarded as sufficient for general control. It should be added that density is

controlled through zoning according to whether the site is in an area designated for high, medium or low density. The plot ratio is regulated according to the zone. The instant Site is in a high density zone.

The Lands Department

1.12 It is the government's established policy to obtain the highest possible price in a sale of government land for private development.

1.13 The role of the Lands Department is to control and arrange the sale of development sites so as to obtain the best possible price within the constraints of any planning intention advanced by the Planning Department, the relevant OZP, the needs of other relevant departments and the law (the BO and the B(P)R).

1.14 At the tender stage therefore the development of a site is controlled by :

- (a) The general conditions for the tender – which remain much the same in each case; and
- (b) The Special Conditions in the tender document which are drafted to meet any special requirements such as those to which we have referred.

1.15 From the evidence we have heard and seen the imperative to obtain the best price leads the Lands Department to avoid imposing restrictions in the Special Conditions if at all possible. The thinking is that the more “open” the Special Conditions the higher price a developer is likely to pay for the chance that it may benefit in obtaining increased GFA from the BA in the exercise of his powers under the legislation. Much will rest upon the design skill and the persuasive skill of the AP acting on its behalf and in some cases with the support of its legal advisor.

1.16 General control under the BO and the regulations is regarded as both sufficient and desirable. Sufficient, because the restrictions imposing limits on site coverage and plot ratio control the height, density and bulk of buildings even taking into account any additional GFA granted by the BA. Desirable, because the precise way in which each site is developed is left to the developer and in particular the AP. By this means more inventive ways of developing a site are put forward and a greater variety of building design is

achieved. The general view (with which we agree) is that Hong Kong has been well served by these provisions, unfocused though they are on any particular site and its needs.

1.17 The Special Conditions for the sale become the conditions of the lease. The Lands Department as landlord may impose such lawful restrictions in the lease as it chooses. Having done so it has the responsibility of ensuring that the conditions are fulfilled by the developer. If the developer later desires to have a modification of the conditions a “premium” to the government will be payable.

The Buildings Department

1.18 Through his wide statutory powers and duties under the BO and the regulations the BA (the Director of Buildings) regulates and controls all the technical aspects of any development. This includes the planning, design and construction of buildings and associated works. Compliance with the law and safety are the focus.

1.19 The Buildings Department is responsible for assisting the BA in performing his statutory duties under the legislation. Also, the BA has the assistance and advice of the BAC and if necessary legal advice from the Department of Justice.

1.20 The BA also has the duty to approve the building plans to ensure that they comply with the BO and the regulations.

1.21 The intended control of this development after tender was the application of the legislation and the discretion exercised and decisions made by the BA which we are required to examine. Mr Leung is the former Director of Buildings and the BA who took these discretionary decisions.

Summary of the Control

1.22 In summary therefore there are three levels of control of the development of government land :

- (a) The Planning Department working with the Town Planning Board may ask for restrictions in the OZP. These may include limits on the GFA and on the height of any buildings erected. Apart from this the Planning Department may ask for

restrictions in the Special Conditions for a tender to give effect to a planning intention.

- (b) The Lands Department as landlord may impose restrictions through the Special Conditions for the sale which become the conditions of the lease. In this respect the Lands Department, acting for the government, is the landlord and may impose such lawful conditions in the lease as it chooses.
- (c) The BO and the B(P)R together with any decisions or exercise of discretion under the legislation by the BA is the final level of control. This imposes limits on the development which we will describe.

1.23 For the Site under inquiry the relevant control was under the legislation. The planning intention was to develop the plot to its maximum potential under the legislation without further restriction so as to obtain the highest price in the tender.

The Legislation Summarised

1.24 The basis of the control is the site area. Usually this is the same as the area of the lot but a street constructed out of the lot will not count towards site area. This is the only point relevant to site area in this inquiry. The site area is determined under B(P)R23(2).

1.25 Site classification. Site coverage, height and plot ratio are regulated according to the classification of a site. In this instance the Site was developed as a Class C site. See paragraph 6.22 for a definition of a Class C site. The regulations relating to site coverage and plot ratio can be found in B(P)R19, 20 and 21 together with the First Schedule.

1.26 The permitted site coverage is the percentage of the site area which may be covered by buildings. The plot ratio is the GFA of the building divided by the site area.

1.27 These factors above provide the basic control. However by B(P)R22 the plot ratio may be exceeded if the developer offers areas of a site on the ground floor which are not built upon for dedication to the public for the purposes of passage. The decision whether to accept such an offer is made by the BA. If such an offer is accepted the developer is compensated for his loss

by the award of bonus plot ratio which is five times the GFA of that which has been dedicated if on the ground floor.

1.28 The GFA of a building is specified in B(P)R23(3)(a).

1.29 B(P)R23(3)(b) provides that the BA may disregard floor space for GFA calculation if he is satisfied that certain facilities are constructed or intended to be used solely for specified purposes. The parking of motor vehicles, loading or unloading of motor vehicles are examples.

1.30 In the opinion of the Committee sub-regulation (b) above permits the BA to exclude the specified facilities provided that they are constructed for the parent building or its occupants and are not excessive for the purpose. We consider this point in more detail later.

1.31 Finally, there is section 42 of the BO which gives the BA power to modify the provisions of the Ordinance and by this means provide an exemption from it. This power should be exercised only when there is an application and when in his opinion “special circumstances render it desirable.”

1.32 This provision is related to the control of development. It provides the BA in limited circumstances the power to give exemption from the provisions and therefore relax the control.

1.33 For the text of the legislation mentioned above see **Annex 4**.

CHAPTER 2

THE IDENTIFICATION OF INLAND LOT NO. 8955 FOR DEVELOPMENT

2.1 In 1997 the Chief Executive initiated government policy to construct 85,000 flats each year. This was an ambitious programme which led to a review of possible sites for development on Hong Kong Island as well as elsewhere.

2.2 At this time the Site was zoned on the OZP for Quarry Bay as “G/IC”. It was identified as suitable not only for Government Accommodation but also for residential development. Consequently, the Planning Department took steps to have the Site rezoned for “OU”.

2.3 The Planning Department put the proposal before the Metro Planning Committee on 27 November 1998. In paragraph 3.4.1(b) the department’s paper noted :

“It is now proposed to rezone the site from ‘G/IC’ to ‘OU’ annotated ‘Residential cum Public Transport Terminus, Commercial and Community Facilities’ to facilitate the re-development of the site for residential use with a public transport terminus, community hall, social welfare and educational facilities, commercial uses and public car park. The site will be able to produce about 1000 residential flats and is included in the Public Lands Sale Programme for disposal in the year 2000.”

2.4 The Metro Planning Committee agreed that the new draft Quarry Bay OZP with the proposed changes to the Site among others was suitable for public inspection together with a revised explanatory statement specifying the planning intentions and objectives of the Town Planning Board for land use on the draft OZP.

2.5 Following these statutory procedures there were many objections from local residents who appreciated (rightly) that the development of the Site would interrupt their views of the harbour, would reduce the value of their flats and would increase the density of population in the area with attendant consequences.

2.6 An Objection Hearing Committee was formed to cope with the large number of objectors. The hearings took place during the first half of 1999 but no objection was accepted. There was consensus that the proposed rezoning was appropriate and there was no strong justification to impose any statutory planning control on the disposition and height of the future buildings on the Site. In summary the reasons given for rejecting the objections were :

- (a) That the overall planning objectives for the benefit of the whole community had to be maintained over private interest;
- (b) The intensity of the development was controlled by the BO and the B(P)R to ensure that provision of daylight and spacing with existing adjoining buildings would not be unduly affected;
- (c) That the Site was previously “G/IC” with a plot ratio of 15 whereas the rezoning would reduce the residential plot ratio to between 8 and 10;
- (d) That any adverse impact on the environment, transport and community services was catered for in the proposed OZP; and
- (e) That in the context of Hong Kong with its rapid development it is not always possible to expect a right to a sea view.

2.7 The reasons for refusing the objections are relevant to our inquiry as they indicated a consistent planning intention to develop the instant site to the maximum permitted under the relevant legislation. But also that the development would be *controlled* under the BO and the regulations.

2.8 On 20 August 1999 the draft OZP was submitted to the Town Planning Board which agreed that it was suitable for submission to the Chief Executive in Council for approval under section 8 of the Town Planning Ordinance.

2.9 On 26 October 1999 the Chief Executive in Council approved the draft Quarry Bay OZP No. S/H21/11A under section 9(1)(a) of the Town Planning Ordinance. This decision was gazetted on 5 November 1999.

2.10 This new OZP zoned the Site “OU” with the annotation that it was to be developed for “Residential cum Public Transport Terminus, Commercial and Community Facilities”.

CHAPTER 3

PREPARATION FOR TENDER

3.1 On 14 July 1998 when preparing for amendments to the draft Quarry Bay OZP the District Planning Officer/Hong Kong of Planning Department (DPO/HK) distributed development parameters for the Site as follows :

“Development Parameter for the proposed development of the Sai Wan Ho Ferry Concourse Site (Item B)

Gross Site Area	103m x 112m = 11,536m ² (360m ² to be deducted to form an internal road)
Site Area	11,176m ²
Car park[#]	5,590m ²
G/F	Public Transport terminus (GFA) 3,800m ² Cross Link Transport Terminus with ancillary facilities (GFA) 4,000m ² Community Hall facilities (GFA) 1,260m ² Commercial
1/F	Commercial
2/F	Kindergarten/Nursery facilities Social welfare facilities (Residential Care Home for the Elderly and Children and Youth Centre cum study / reading room)
3/F and above	Residential
Maximum Non-domestic Plot ratio : 3.5	
Maximum permissible non-domestic GFA	39116m²
<u>Domestic Use</u>	
Maximum permissible domestic plot ratio : 7.67	
Maximum permissible domestic GFA	85,720m²
Number of units: 1008	(average flat size = 85m ²)
Planned population	3528

* Classification of site to be confirmed by Buildings Department.

GFA for basement for public car parking facilities and provision of 71 parking space for marine police only. Ancillary residential car parking space not GFA accountable.”

3.2 The District Lands Officer/Hong Kong East of Lands Department (DLO/HKE) in a memo to the Assistant Commissioner for Transport (Urban) (AC for T/U) on 14 November 1998 noted that the District Planning Conference on 9 November 1998 agreed that a public road 4.5 metres in width should be formed by the prospective purchaser on the south-eastern side of the Site. This would enable its development as a Class C site. The Transport Department was asked to revise their layout plan taking this provision into account.

3.3 The relevance of the proposed development parameters is the persistence of the figure for the GFA of domestic development and the approximate number of flats envisaged during the preparations for tender which followed. So far as we are aware these were never reconsidered after the decision that the Government Accommodation on the Site should be limited to the PTT and the MPOA on the ground floor only. The total GFA for the Government Accommodation was approximately what was later built on the ground floor but the figures overall were unreliable for comparison with the final development.

3.4 The planning intention for the Site was consistent throughout. The only restrictions were on use under the amended Quarry Bay OZP. Otherwise the intention was that the Site should be developed to its maximum under the BO and the regulations to ensure that the best possible price was achieved.

3.5 With this background the Lands Department was responsible for drafting the Special Conditions for the tender and the lease to establish the precise terms on which the Site was to be acquired and developed.

The Drafting of the Special Conditions

3.6 Many departments of government have an interest in a development. Each may seek to have Special Conditions inserted in the tender documents to satisfy its particular needs. We need examine only those Special Conditions which related to the discretion later exercised by Mr Leung as BA.

3.7 In December 1998 the Site had been “tentatively scheduled for disposal in March 2000”. In accordance with this constraint of time on 7 December 1998 the DLO/HKE circulated to relevant departments the proposal (later modified) that the Government Accommodation for the Site would include :

- (a) A public transport interchange;
- (b) A cross boundary coach terminus;
- (c) A Marine Police Operational Area;
- (d) Space for young people services;
- (e) A hostel for the moderately mentally handicapped;
- (f) Two residential care homes for the elderly;
- (g) A community hall; and
- (h) An education centre.

3.8 In the same memo DLO/HKE expressed the opinion that the inclusion of all the above Government Accommodation could cause delay in finalising the sale documents and possibly cause difficulty in achieving the estimated 1,000 flats.

3.9 Significantly he also raised the question (later pursued with vigour) whether a future developer could construct a road on the south-east boundary to give the Site "Class C" status and so increase the available plot ratio from times 9 to times 10.

3.10 On this last matter on 8 January 1999 the Chief Building Surveyor/Housing Development of Buildings Department (CBS/HD) wrote to DLO/HKE pointing out that the strip of land on the south-east waterfront was zoned as "Open Space" and therefore was not a street for the purpose of site classification. The Site therefore was a Class B site.

3.11 On 12 June 1999 DLO/HKE circulated the first draft Special Conditions to relevant departments asking for comments.

3.12 In summary this first draft stipulated :

- (a) A minimum GFA for all buildings erected on the Site. (Left blank for later completion);

- (b) That the Government Accommodation to be constructed was :
- (i) A PTT with a minimum GFA also to be completed;
 - (ii) An MPOA with a GFA of not less than 1,500m²;
 - (iii) A community hall with a net operational floor area of not less than 593m²;
 - (iv) A 50-place hostel with a net operational floor area of not less than 534m²; and
 - (v) Two 150-place residential care homes for the elderly with a minimum net operational floor area to be completed;
- (c) That the GFA of the Government Accommodation was not to be taken into account for the purpose of calculating the total GFA for the Site;
- (d) An obligation to surface a right-of-way on the south-east boundary, with associated street furniture, lighting and drains, marked pink hatched black on an annexed draft plan which was a forerunner of the Control Drawing; and
- (e) A provision that the obligation under (d) above should give rise to no claim for additional site coverage or plot ratio under B(P)R22(1) or otherwise.

3.13 The provisions for the Pink Hatched Black Area were included (it appears) with the intention of making it clear to an interested tenderer that the Site was to be developed as a Class C site. Indeed, in his above memo of 12 June 1999 DLO/HKE asked the Chief Building Surveyor/Hong Kong East of the Buildings Department (CBS/HKE) to “advise the classification of site after the formation of the Pink Hatched Black Area”.

[For the location of the Pink Hatched Black Area, please see [Annex 5](#).]

3.14 On 24 June 1999 CBS/HD replied that the area could be considered as a street if the following conditions were complied with :

- (a) It should be not less than 4.5 metres wide;
- (b) It should be vertically free of obstructions above (including building work);
- (c) Its area should be deducted from the site area in plot ratio and site coverage calculations;
- (d) It should be connected to a public street; and
- (e) There should be no objection from the Transport Department, the Highways Department and the Fire Services Department.

3.15 On 5 November 1999 the next version of the draft Special Conditions were circulated. There were significant changes which included :

- (a) An “avoidance of doubt” clause providing that the Pink Hatched Black Area should not be taken into account for the purpose of calculating site coverage and plot ratio. (No doubt this was intended to comply with the advice from CBS/HD of 24 June 1999);
- (b) An additional clause for a minimum GFA for private residential purposes with the amount to be completed; and
- (c) The Government Accommodation to be built was reduced to the PTT and the MPOA on the ground floor.

3.16 The provision that the Government Accommodation should not be taken into account for the purpose of calculating total GFA remained in this draft but CBS/HD, when asked to comment upon that Special Condition, replied on 18 November 1999 that :

“The Government Accommodation shall be included in GFA calculation under B(P)R 23(3)(a).”

3.17 At best this answer was incomplete because no mention was made of B(P)R 23(3)(b) nor of the provisions of section 42 of the BO. However, we return to consider this answer in Chapter 4.

3.18 The final draft Special Conditions were circulated before the District Lands Conferences of 3 and 17 December 1999 for the approval or otherwise of those interested departments. Further relevant changes had been made to the draft :

- (a) The minimum GFA for private residential accommodation of 80,000m² was included. This figure was provided by the Planning Department in its memo of 19 November 1999 :

“.....in order to produce about 1 000 flats with an average flat size of 80 m² which is similar to the adjoining ‘R(A)’ development on Tai On Street under construction. As you know, the site is within the HOUSCOM control list, the current proposal is to guarantee the flat production.”;

- (b) A minimum GFA for the PTT of 7,490m² was provided and included in the draft;
- (c) The provision for the non-accountability of Government Accommodation for GFA was omitted; and
- (d) The District Lands Conference Notes accompanying the draft Special Conditions noted that :

“To qualify for a ‘Class C’ site, the Pink Hatched Black Area should be deducted from the site area in site coverage and gross floor area calculation.”

The “avoidance of doubt” clause to this effect was still included.

3.19 No representative from the Buildings Department attended the District Lands Conference finalising this draft Special Conditions as prior to the District Lands Conference the Senior Building Surveyor/Hong Kong West wrote that the Buildings Department had no comment upon the draft under the BO.

The Draft Special Conditions following the District Lands Conferences

3.20 After the District Lands Conferences in December 1999 had approved the Special Conditions further changes to the approved draft were made before they were finally settled for the tender. The following clauses were considered :

- (a) The minimum GFA for the PTT was omitted. This omission was agreed between the Government Property Administrator, the Chief Highway Engineer/Hong Kong of Highways Department (CHE/HK) and DLO/HKE in exchanges of correspondence during July and August 2000. The reason for the omission was that the necessary specifications for bus berths etc within the PTT were included in the Technical Schedule and provided that these were complied with the developer would have greater freedom in his design;
- (b) The omission of the GFA exemption clause for the PTT was raised by the Government Property Administrator. He asked whether it was DLO/HKE's intention to include the Government Accommodation in the calculation of total GFA. The reply was that following advice from CBS/HD the Government Accommodation should be counted in the total GFA of the development under B(P)R23(3)(a) and no change was made;
- (c) A provision restricting the developer from dedicating or claiming any additional site coverage or plot ratio under B(P)R22(1) for the Pink Hatched Black and the Pink Cross Hatched Black Areas was approved. Also, an avoidance of doubt clause preventing the developer from taking the Pink Hatched Black Area into account for the purposes of calculating site coverage and GFA and requiring the Pink Cross Hatched Black Area to be taken into account for that purpose was approved; and

[For the location of the Pink Hatched Black Area and Pink Cross Hatched Black Area, please see **Annex 5.**]

- (d) Later, following exchanges between DLO/HKE and the Senior Solicitor/Hong Kong East, Legal Advisory and Conveyancing Office/Hong Kong of Lands Department (SS/LACO) it was decided to remove the clauses under (c) (save for the avoidance of doubt clause for the Pink Hatched Black Area) in order to give the purchaser a free hand in case he could justify a claim to the BA for additional site coverage or plot ratio under the B(P)R. However, on 14 September 2000 even the avoidance of doubt clause for the Pink Hatched Black Area was removed.

The site coverage calculation under the B(P)R was considered a BA matter and it was thought to be unnecessary to have it in the lease.

3.21 These omissions were relevant to the later exercise of discretion by the BA. Also, the omissions were consistent with the Lands Department's practice of having as few restrictions as possible in the Special Conditions in the hope of obtaining a higher price.

The Technical Schedules and Control Drawing

3.22 The Technical Schedules and the Control Drawing are part of the Special Conditions. Special Condition No. 12 (SC(12)) requires that the Government Accommodation is constructed in accordance with the relevant Technical Schedule. Each Technical Schedule requires the accommodation to be constructed in compliance with the Special Conditions, the Technical Schedule and the Control Drawing. See Annex 1. The original plan of the layout for Government Accommodation on the ground floor was annexed to the client project brief for the PTT produced by the Transport Department on 24 November 1998. Previously the draft brief had been circulated to the Lands Department and it incorporated the Lands Department requests dated 14 November 1998. These asked the Transport Department to note that apart from the Public Transport Interchange (PTI) and Cross Boundary Coach Terminus (CBCT), which in future we collectively describe as the Public Transport Terminus (PTT), the ground floor of the development would be reserved for entrance lobbies to the upper floors. The Lands Department pointed out that the upper floors would include at that time "residential elements, commercial elements and G/IC facilities such as community hall, kindergarten/nursery facilities, educational and social welfare facilities.....".

3.23 In the same memo the writer noted that the District Planning Conference on 9 November 1998 had agreed that a public road would be formed at the south-eastern side of the Site by the prospective purchaser so as to make the Site into a "Class C" site. The Transport Department was asked to revise the draft layout plan to take this into account.

3.24 When producing the layout plan drawing No. HT6554 following the Lands Department advice the areas next to Tai On Street were marked "space reserved for entrance lobbies and other facilities to upper floors." The drawing was to scale one in five hundred.

3.25 The Control Drawing annexed to the Technical Schedules for the tender was prepared by the Highways Department. The first, dated 21 June 2000, was based on drawing No. HT6554 from the Transport Department. Following the Transport Department's plan the areas near Tai On Street were now marked "proposed space reserved for entrance lobbies and other facilities to upper floors". By this time however the Government Accommodation was restricted to the ground floor with only the PTT and the MPOA. The reserved areas for entrance lobbies could now serve only the parent building. They were never redesignated, reconsidered or reduced.

3.26 Between 21 June 2000 and the final Control Drawing of 31 August 2000 a number of irrelevant minor amendments were incorporated on suggestions from other departments. The final drawing was "for information only" and "not to scale".

3.27 As no exact areas for the MPOA and the PTT were included in the Special Conditions, the Technical Schedules or the Control Drawing itself the areas marked "Proposed space reserved for entrance lobbies and other facilities to upper floors" (the Reserved Areas) were for the developer's use as the only occupier of the upper floors but the dimensions and size of the Reserved Areas were uncertain at the time of the tender.

3.28 The consequence was that the dimensions of the Reserved Areas was first ascertained by the AP on his building plans which were submitted to, and in due course approved by, the BA under the BO. Also, after amendment for which a HK\$6 million premium was paid, the Director of Lands approved these plans under the lease conditions.

CHAPTER 4

THE TENDER

4.1 The Special Conditions finally contained the following provisions :

- (a) That the total GFA of buildings to be used for private residential purposes should be not less than 80,000m². SC(9)(c);
- (b) That the PTT should be constructed in accordance with the Technical Schedules and the Control Drawing without specifying whether it should be accountable for GFA. SC(12)(a)(i);
- (c) That the MPOA should also be constructed in accordance with the Technical Schedules and the Control Drawing but that it should have a net operational floor area of not less than 1,500m² without specifying whether it should be accountable for GFA. SC(12)(a)(ii); and
- (d) The formation of a “Paved Way” on the Pink Hatched Black and the Pink Cross Hatched Black Areas was required but the earlier restrictions to which we have referred were omitted. SC(25)(a).

4.2 The lease conditions were silent upon some matters :

- (a) The maximum GFA for buildings to be constructed on the site;
- (b) The minimum GFA for the PTT;
- (c) Whether the PTT and the MPOA were to be included or excluded from the calculation of GFA;
- (d) Whether the Pink Hatched Black Area (which was to be constructed as a street to make the development a Class C site) was to be excluded from any calculation for site coverage and/or plot ratio; and

- (e) The dimensions of the “Reserved Areas” shown on the Control Drawing.

The Special Conditions for the Tender

4.3 The Special Conditions for the tender become the conditions upon which the lease is taken. These provisions are binding upon the government as landlord and the purchaser as developer. They provide the framework within which the developer may later apply to the BA to exercise discretion and make decisions under the BO and the B(P)R.

4.4 As we have already indicated, from 1998 when the Site was first considered for rezoning for private residential development as well as Government Accommodation the planning intention was to develop the Site to its maximum potential so that the maximum price would be obtained.

4.5 To this end provisions were inserted to ensure that the Pink Hatched Black Area on the plan were paved and not to be included in areas accountable for site coverage and plot ratio as well as a provision preventing the developer from applying to the BA under the B(P)R to obtain any further GFA or site coverage.

4.6 The aim was to make it clear to any potential tenderer that the Site was to be developed as a Class C site with the Paved Way forming a street along the south-east boundary to satisfy the necessary conditions.

4.7 It was in pursuance of the government policy to obtain the highest price by developing to the maximum potential that the restrictions concerning the Paved Way as well as the others to which we have referred were removed. As DLO/HKE wrote on 7 September 2000 :

“... there is no maximum GFA restriction under the lease and our intention is to permit the Purchaser to develop the lot up to the B(P)R limit and ... we would like to leave a free-hand to the Purchaser to formulate the design of the development in case he could justify a design to claim concession in respect of additional site coverage or plot ratio under B(P)R.”

Inquiry by a Prospective Tenderer

4.8 On 18 October 2000 a gazette notification was published and newspaper advertisements were made inviting tender submissions for the Site. The sale conditions, which were publicly available, were sent by post to a list of developers.

4.9 On 28 November 2000 a prospective tenderer wrote to the Lands Department pointing out that in the Special Conditions there was no explicit statement on the exemption of Government Accommodation (PTT, CBCT and the MPOA) from GFA calculation. Further, that in a number of other cases PTTs and coach termini had been exempted. It asked for confirmation that these facilities were exempted.

4.10 On 30 November 2000 the Director of Lands, relying on the written advice given by the Director of Buildings a year before on 18 November 1999, informed the prospective tenderer by letter that “The Director of Buildings advises me that the Government Accommodation shall be included in the GFA calculation, under B(P)R 23(3)(a).”

4.11 There was a further telephone conversation between the Lands Department and the prospective tenderer on 1 December 2000. No doubt the prospective tenderer had appreciated that the written answer was unsatisfactory. There was no question of the PTT being exempted under the regulation cited and no reference was made to B(P)R23(3)(b). Nor was any mention made of the far less likely use of the BA’s power of exemption under section 42 of the BO. According to the Lands Department file note the prospective tenderer’s representative asked whether there was any chance of the Government Accommodation being exempted under the regulations generally. The representative was asked whether that meant exemption under the BO. She affirmed and the Lands Department representative answered that he did not know because he was not the BA.

4.12 There are suggestions, but no Lands Department file note, that other developers may also have made similar enquiries. If they did no doubt the same answers were given.

4.13 In any event the answer was not made available to any prospective tenderer who did not inquire. We offer no comment on the proper procedure when there are queries of this kind. We are aware that the Lands Department

have considered their practice. It was not relevant to the exercise of discretion by the BA in this instance.

4.14 Whereas the Lands Department answer was incomplete and therefore unsatisfactory it is unlikely that any prospective tenderer was seriously misled. Any advisor in the industry and particularly any AP would be well aware that the answer was limited and unhelpful because of the failure to mention the other possible sections under which the Government Accommodation could be exempted after application to the BA.

4.15 The successful tenderer made no such inquiry. It is worth mentioning therefore that according to its AP the developer bid on the basis that the PTT would not be accountable for GFA.

The Reserve Price and the Sale Price

4.16 On 7 December 2000 (the day before the tender closing date) the Director of Lands chaired a valuation conference to approve the assessment of the market value of the Site so as to endorse the minimum price at which the government should dispose of the Site. The minimum price decided upon was HK\$1,850 million.

4.17 The basis upon which this valuation was calculated is of interest. The assessment of the open market value was done by a “work back analysis”.

4.18 We note that the following assumptions among others were made in this work back analysis :

- (a) That the Site would be developed as a Class C site on the basis that the Pink Hatched Black Area would be excluded from site coverage and plot ratio calculations;
- (b) That the Pink Hatched Black Area could be classified as a street and excluded from site area calculation;
- (c) That the development would be five blocks of 37 storey residential towers over ground floor retail shops and Government Accommodation, car parks, recreational facilities and open space;

- (d) There would be eight units per floor giving a total of 1,480 units of about 73m² each;
- (e) That the PTT and the MPOA would be accountable for GFA; and
- (f) That the total GFA was estimated at 126,116m² and that the total domestic GFA excluding the Government Accommodation and the public car park was 107,950m².

4.19 The successful bid was HK\$2,430 million. This was over 31% higher than the reserve price. Put another way it was HK\$580 million higher than the market price calculated with considerable care and comparables by the Lands Department.

4.20 Later the developer paid a small premium of HK\$6 million for the approval of plans which did not comply with the Control Drawing.

4.21 The fact remains however that the development later carried out was substantially more extensive than the development envisaged in the assessment of market value by the Lands Department the day before the tender expired. Whether the government in fact obtained the true value of what was later developed after the BA had made its decisions concerning the appropriate site classification, the accountability of the Government Accommodation and the granting of bonus plot ratio is a matter which we consider in Chapter 10.

PART II

**DECISIONS AND EXERCISE OF
DISCRETION BY
THE BUILDING AUTHORITY**

CHAPTER 5

THE DECISIONS AND EXERCISE OF DISCRETION BY THE BUILDING AUTHORITY

5.1 We now turn to consider the decisions by the BA. These were :

- (a) That the Site was a Class C site;
- (b) That the “Reserved Areas” marked “proposed space reserved for entrance lobbies and other facilities to upper floors” should be accepted by the government and dedicated by the developer to the public in return for bonus plot ratio but no further compensation;
- (c) That the Pink Cross Hatched Black Area forming the opening giving access to the PTT should be dedicated by the developer and accepted by the government for public passage in return for bonus plot ratio;
- (d) That the PTT should be excluded from the GFA calculation for the Site;
- (e) That the MPOA should be included in the GFA calculation for the Site; and
- (f) That the proposed public pathway on Level + 11m should be dedicated for public passage by the developer and accepted by the government in return for bonus plot ratio the amount of which was to be negotiated.

5.2 In the result the walkway on Level + 11m was not pursued. It is not necessary to refer to this decision further.

5.3 With the exception that the MPOA should be included in the GFA calculation, each of the above decisions was taken in the developer’s favour with the consequence that the developer gained GFA which otherwise would not have been available.

5.4 In summary the effect of these decisions on the development of the Site was as follows :

- (a) As a Class C site rather than a Class B site the GFA was calculated at times 10 rather than times 9. However, as we have described earlier, the planning intention always was that the Site should be developed as Class C but on the basis that the Pink Hatched Black Area was constructed as a street. However, if the Pink Hatched Black Area had been developed as a street it would not have been accountable for site area. The BA's ruling that the strip of government land on the south-east boundary was a "street" meant that the Pink Hatched Black Area remained in the Site and therefore accountable for site area. By implication this amounted to 1,940m² GFA;
- (b) The decision that the PTT should not be included in the GFA calculation added 7,297m²; and
- (c) The two areas dedicated for public passage, the Pink Cross Hatched Black Area was 108m² and the Reserved Areas for which bonus was granted amounted to 2,032m², making 2,140m² in all. For these dedicated areas the developer was compensated with times 5 bonus GFA making 10,700m² in all.

[The above figures are taken from the Final Building Plan, drawing No. 230, approved by the BA on 15 June 2004.]

5.5 On a conservative view therefore the additional GFA granted by the BA in these decisions was 19,937m².

5.6 These decisions increased the bulk by approximately eight floors on each of the five towers or put another way the equivalent of a 40-floor tower. The number of flats was increased by roughly 280. These figures are calculated from the size and number of flats actually constructed on each floor in each tower. We compare the effect of these decisions with the effect of other exemptions granted on the bulk and with the total bulk of the buildings constructed in Chapter 10.

5.7 We now turn to consider each decision of the BA which led to an addition of GFA in more detail.

5.8 The claims were considered by the BA at a BAC held on 1 August 2001.

Building Authority Conference - Composition

5.9 The composition and purpose of a BAC is contained in Buildings Department Handbook Instruction 2.3 on “Standing Committees and Conferences”. Paragraph 5 (February 1999) provides :

“Building Authority Conference (BAC)

5. Chaired by DB, this comprises DDB, AD/LM, AD of the case and one AD on rotation as members with TS/B as secretary. This provides a forum for the BA to take decisions or give advice on any contentious and major issues arising from the administration of the Buildings Ordinance which requires his personal direction.”

5.10 Translated the DB is the Director of Buildings; DDB is the Deputy Director of Buildings; AD/LM is the Assistant Director/Legal and Management; AD is an Assistant Director; and TS/B is the Technical Secretary/Buildings.

5.11 In practice representatives from other interested departments are invited to the BACs to proffer their advice.

The BAC Meeting on 1 August 2001

5.12 The BAC was augmented for this meeting. The reasons were the complexity and importance of the decisions to be taken by the BA. Consequently, the Buildings Department was represented by the Deputy Director, four Assistant Directors and four Chief Building Surveyors. The other departments represented were the Planning Department, the Lands Department, the Transport Department, the Highways Department and the Fire Services Department. Also, two professors were invited as external observers.

5.13 As Mr Leung explained at the beginning of the meeting, the role of the professors as observers was to tender their impartial and independent views. He said the purpose of enlarging the BAC on this occasion was the complexity of the case and to enhance the transparency of the decision making process. Apart from the above the others present were the AP and his team, the owner’s representatives and the representative of the owner’s consultant. 27 people and the secretary attended in all.

5.14 The augmented BAC met to consider a number of applications by the AP on behalf of the developer. The developer had successfully tendered for a lease which intentionally did not restrict its ability to take advantage of every avenue open to gain as much site coverage, plot ratio and bonus plot ratio (GFA) under the BO and the B(P)R as he could establish and persuade the BA to grant.

The Role of the Building Authority in Exercising his Discretion

5.15 Several isolated questions arose in the course of the inquiry concerning the role of the BA in exercising his discretion. It is convenient to deal with these separately.

Mr C M Leung's "Two Hats"

5.16 The two roles filled by Mr Leung as Director of Buildings and as BA require explanation. Under the legislation the Director of Buildings is also the BA. In his evidence he explained these two roles. As Director of Buildings he is head of a department, responsible for running the department, and as BA he carries out his responsibilities and duties under the BO and the regulations. He said,

“ I think a lot of the difficulty stems from the fact that I have two hats, working at that particular -- in that particular position at that time. On one hand, as a civil servant, as head of an executive department, I was the Director of Buildings.

Now, as the Director of Buildings, I have a duty to the government to protect the public purse, obviously, and also to follow the orders or directives from my superior. I'm obliged to do that under the Civil Service Regulations. As the Director of Buildings, I have the duty to -- I'm responsible for the administration, for the good administration of the Buildings Department and the efficient, effective organisation of its work. Now, that is as an administrator.

However, as the Building Authority, I have a duty to enforce the provisions, to apply, enforce and apply, the provisions of the Buildings Ordinance fairly, impartially and reasonably. The responsibility of the Building Authority is to apply the powers conferred to him by the Buildings Ordinance. He must act within the ambit of the Buildings Ordinance. He must make his determination in the light of the merits, the individual circumstances and facts of any -- of a specific application put in front of him.

There is no question of the Building Authority of taking order or directive from his superior. There is absolutely no question of that happening and, as Building Authority, he must not allow that to happen.

Of course, public fund is often a matter of public interest but when it comes to a question of public funds, the Building Authority must look at the matter in the context of the application put in front of him.”

5.17 The Committee is of the opinion that this is a correct description of his two roles. We have nothing to add.

Inconsistency between Buildings Department Advice and Building Authority Decisions

5.18 Mr Leung’s description of the two roles explains why he must, if necessary, differ from earlier advice given by his department. On two occasions described later in the report the decisions made by Mr Leung as the BA were inconsistent with earlier advice given by the Buildings Department.

5.19 The first concerned the accountability for GFA of the PTT. The Department advised the Lands Department that the PTT would be accountable under B(P)R23(3)(a). As we say elsewhere, this was an incomplete answer. The PTT was later exempted by Mr Leung as BA under B(P)R23(3)(b).

5.20 The second occasion concerned an issue on site classification. The question was whether a strip of government land zoned as “Open Space” on the south-east boundary of the Site was a street. The Buildings Department advised that it was not a street but later Mr Leung as the BA, with the help of advice from the BAC, held it was a street.

5.21 As Mr Leung said in his evidence there might be good reasons for the disparity. On the accountability of the PTT the advice of the Buildings Department was correct as far as it went but was potentially misleading because it was incomplete. When he decided the matter as BA under B(P)R23(3)(b) he was better informed. Further, he only took the decision after lengthy consideration of the issues and legal advice.

5.22 Mr Leung was much better informed on the status of the government land which he found to be a street. It was unknown to the Buildings Department when its advice was tendered that the government land

was an emergency vehicle access to the Marine Fuelling Stations. As he put it in part of his evidence,

“There is no question, absolutely no question that, because I am the Director of Buildings at the same time, that I should cover my back: ‘Hey, that is the advice we gave earlier and now, apparently, we are coming to a different conclusion. I’d better stick to that advice and adjust the -- and make the determination on that basis.’ That would be fundamentally wrong.”

This is correct. In exercising his duties as the BA under the Ordinance the decisions will usually be consistent but the BA cannot be inhibited in his duty by earlier decisions which may not be so well informed or argued.

The Lease Conditions and the Building Authority’s Discretion

5.23 As we have described earlier the Special Conditions for the tender which become the conditions of the lease regulate the contractual relationship between the government, as landlord, and the developer. When the BA considers applications for the exercise of his discretion he does so within his powers and responsibilities under the legislation.

5.24 In the exercise of his discretion the BA is not bound by the lease conditions. He is a stranger to the agreement. So, in this development, the developer applied to dedicate the “Reserved Areas” whereas the Lands Department acting as landlord, contended that the extension of the PTT into the “Reserved Areas” was unnecessary and in breach of the terms of the lease. It follows that the developer may obtain a decision in his favour which is contrary to the lease conditions. It must then return to the Lands Department for a modification of the lease or as in this case a modification of the Control Drawing. Section 14 of the BO provides that a decision of the BA does not alter the conditions of the lease.

5.25 Of course, in practice a developer will hesitate before seeking a decision from the BA contrary to the terms of the lease as it will be of no benefit. Also in practice the BA will have the conditions in mind as one of the background circumstances. This does not in any way indicate that he is bound by the lease – he is not.

CHAPTER 6

THE DECISION THAT THE SITE WAS A CLASS C SITE

Background

6.1 We now consider the drafting of the Special Conditions on this issue in more detail. For convenience we repeat some of the matters we have set out in Chapters 3 and 4.

6.2 As we have indicated, by implication the first time the classification of the Site was raised was on 9 November 1998 at a District Planning Conference where it was agreed that a public road should be constructed on the south-eastern side of the Site. This would make it a Class C site. On 7 December 1998 DLO/HKE raised the question again. In paragraph 2.1 of her memo to relevant departments, having pointed out that a 4.5 metre wide strip of land previously shown as a “Road” along the south-east site boundary would be included in the Site, she asked :

“..... AC for T/U, CHE/HK and DPO/HK are requested to consider and advise whether it is really necessary to construct this road along the south-eastern boundary, and whether the future developer could make his own decision to construct this road thus giving a ‘Class C ’ site status, or to re-design this road if he considers necessary from design point of view.”

6.3 At paragraph 2.3 she asked CBS/HKE to advise whether the Site can achieve “Class C” status without the formation of a road along the south-eastern site boundary.

6.4 On 8 January 1999 CBS/HD replied that as the strip of land along the waterfront on this site was zoned as “Open Space” it could not be accepted as a street for site classification and therefore the Site was a “Class B” site.

6.5 On 12 June 1999 DLO/HKE returned to the point. In his memo circulating draft Special Conditions for the tender he pointed out that on the south-east side of the Site the purchaser was required to surface a right-of-way on an area which was Pink Hatched Black. Further there was an “avoidance of doubt” clause to the effect that the obligation to construct the right-of-way should give rise to no claim for additional site coverage or plot ratio under

B(P)R22(1). These provisions were clearly intended to indicate to the developer that this area was to be developed as a street so that the Site would be a Class C site. As a street it would not be counted for site area under B(P)R23(2)(a) and therefore not for site coverage, plot ratio or bonus plot ratio either.

6.6 Following the same line of thought CBS/HKE was asked in the memo to advise upon the classification of the Site after the formation of the Pink Hatched Black Area.

6.7 The reply came on 24 June 1999. CBS/HD advised :

“The pink-hatched-black area may be considered as a street if the following conditions are complied with:

- It should not be less than 4.5 m wide.
- It should be vertically free of obstruction above (including building work).
- Its area should be deducted from the site area in plot ratio and site coverage calculations.
- It should be connected to a public street.
- No objection should be raised from Transport Department, Highways Department and Fire Services Department.”

He also pointed out that “Under Building (Planning) Regulation, a Class C site means a corner site that abuts on 3 streets none of which is less than 4.5 m wide, and at least 60% of the boundary of the site abuts on the streets.”

6.8 On 10 September 1999 DLO/HKE wrote to CBS/HD :

“2. In order to maximize the development potential of the above lot for flat production and land revenue generation, I am now trying to figure out the possible options to make the above lot to be a ‘Class C site’ under Building (Planning) Regulation (BPR) and should be obliged if you could advise me whether the following proposals could achieve the ‘Class C site’ target for the above lot.

- (i) Proposal 1
 - Can we classify the existing pavement/promenade area shown coloured cross hatched black on the attached plan I as a street under BPR.

- For your information, this area is outside the above lot boundary and its width is more than 6 m as measured from the above plan. Besides, this area will be connected to the proposed promenade in Aldrich Bay Reclamation area as shown on the attached plan II which is an extract copy of HyD's project of road works in Aldrich Bay Reclamation Area.
- (ii) Proposal 2
- Can we classify the area shown coloured cross hatched black with 4.5 m in width on the attached plan III as a street which forms part of the above lot. Please note that its length is to be determined so that at least 60% of the boundary of the above lot abuts on the streets.
 - This area should be deducted from the site area in plot ratio and site coverage calculations
 - ...
 - For your information, this is our intention to allow the developer to build over the area shown coloured hatched black on the attached plan III. This hatched black area forms part of the site area and is counted for plot ratio and site coverage calculations.
3. By copy of this memo, would AC for T/U, TD, CHE/HK, HyD and D of FS please advise me whether you will consider the above proposed cross hatched black area in Proposals 1 & 2 as a street under BPR. ...”

[The “area shown coloured cross hatched black” in Proposal 1 means the strip of government land adjacent to the Pink Hatched Black Area and the Pink Cross Hatched Black Area on the south-east boundary of the Site. The “area shown coloured cross hatched black with 4.5m in width” in Proposal 2 means the Pink Hatched Black Area. Please see [Annex 5](#).]

6.9 On 12 October 1999 CBS/HD replied saying that proposal 1 could not achieve the “Class C” status because the existing promenade area shown cross hatched black was not a street, but under proposal 2 the area cross hatched black of not less than 4.5m wide on plan III could be a street under the BO provided that :

- (a) Its area was deducted from the site area in site coverage and plot ratio calculations;

- (b) There was favourable support from other relevant departments;
- (c) No building works should be erected above and below the area;
and
- (d) It should be open to public passage (pedestrian and vehicular)
all the time.

He added that if the site boundary of the frontages forming the corner and this cross hatched area was up to 60% of the entire site boundary then the Site was a Class C site.

6.10 On 5 November 1999 DLO/HKE circulated new draft Special Conditions for the tender. A provision in this draft required the developer to service a right-of-way at ground level with associated street furniture on the Pink Hatched Black Area and on the Pink Cross Hatched Black Area with the proviso that there should be no dedication of these areas in exchange for additional site coverage or plot ratio. An avoidance of doubt clause provided that the Pink Hatched Black Area should not be taken into account for the purpose of calculating the site coverage and GFA of the lot.

6.11 Again, the clear intention was that these areas should be surfaced to become a street and so that the Site could be developed as a Class C site.

6.12 By a memo of 18 November 1999 to DLO/HKE, CBS/HD repeated his earlier views about the formation of a street and when the draft Special Conditions were circulated for the District Lands Conferences on 3 and 17 December 1999 the requirements for the purchaser to waive claims for any concession to additional site coverage or plot ratio under the B(P)R remained. Also, in this draft the provision that the Pink Hatched Black Area was not to be taken into account for the purposes of calculating site coverage and GFA of the lot remained, but by an addition the Pink Cross Hatched Black Area was to be taken into account for these purposes.

6.13 Thereafter discussions continued between SS/LACO and DLO/HKE. On 7 September 2000 DLO/HKE wrote to SS/LACO about the clauses waiving claims for concession for additional site coverage or plot ratio :

“I suggest to delete these two sub-clauses because there is no maximum GFA restriction under the lease and our intention is to permit the Purchaser to develop the lot up to the B(P)R limit and (ii) we would

like to leave a free-hand to the Purchaser to formulate the design of the development in case he could justify a design to claim concession in respect of additional site coverage or plot ratio under B(P)R.”

6.14 During a discussion which followed it was agreed between them that a further clause should be deleted. On 14 September 2000 DLO/HKE wrote to SS/LACO confirming the agreement :

“To delete this clause as whether or not to count the Pink Hatched Black Area for GFA and site coverage calculation under B(P)R is a Building Authority’s matter and no need to deal with under the lease.”

6.15 The consequence was that in the final Special Conditions the avoidance of doubt clauses dealing with the Pink Hatched Black Area and the Pink Cross Hatched Black Area were deleted as well as the provision preventing the purchaser from claiming site coverage and plot ratio under the provisions of the B(P)R.

6.16 After these clauses had been omitted they were not further circulated to the Buildings Department for their approval or comment. The clauses were inserted originally by the Lands Department having taken the Buildings Department advice. The aim was to ensure that the development was Class C in order to achieve a higher price. It seems that later it was thought that the maximum development potential and therefore the maximum price would be achieved if it was left to the developer to determine whether he could take any advantage under the B(P)R and claim for additional site coverage and plot ratio in respect of them.

6.17 The omission of these clauses probably enabled the successful developer to claim that the strip of land on the south-east of the two pink areas described above was a street rather than the pink areas themselves so that the Pink Hatched Black Area could be counted for site area.

6.18 Having succeeded in the tender the AP for the developer claimed that the area next to the Paved Way was a street so that the Site could be developed as a Class C site on this basis rather than the basis envisaged originally by the Lands Department.

The Classification of the Site

6.19 The building plans submitted by the AP on behalf of the developer were disapproved in June 2001.

6.20 One of the reasons was that the plans depicted a Class C site with the Pink Hatched Black Area counted in the site area. In these circumstances this area could not be developed as a street (streets could not be counted in site area) consequently the Buildings Department considered it a Class B site. The AP persisted in his contention that the Site was a Class C site as the government land on the south-east boundary was a street within the meaning of the legislation. His main point was that it was an emergency vehicle access (EVA) to the Marine Fuelling Stations. The Buildings Department PNAP suggested a “street” should have an element of “permanency”, this was satisfied he suggested because the vacant government land he claimed as a street was zoned as “Open Space” on the Quarry Bay OZP.

6.21 The immediate question the BA had to determine was whether this area on the south-eastern boundary was in fact a “street” within the wide definition of the legislation.

The Relevant Law

6.22 A Class C site is defined as a corner site, 60% of the boundary of which is abutted on three sides by a street at least 4.5 metres wide. (See BO section 2(1). B(P)R section 2(1) and section 2(1)(b).)

6.23 A street is defined in section 2(1) of the BO as :

“ ‘street’ (街道) includes the whole or any part of any square, court or alley, highway, lane, road, road-bridge, footpath, or passage whether a thoroughfare or not;”

and in B(P)R2(1) as :

“ ‘street’ (街道) includes any footpath and private and public street”.

Discussion and Making the Decision

6.24 According to the notes of the BAC meeting held on 1 August 2001 the AP contended as follows :

- (a) There was an “access road” of more than 4.5 metres wide on the south-east of the Site;

- (b) This already served as an emergency vehicle access to the Marine Fuelling Stations;
- (c) It provided access to the public landing area and the Marine Police Regional Headquarters;
- (d) This “access road” was zoned as “Open Space” on the OZP and therefore its permanency was certain; and
- (e) Therefore it fell within the definition of a “street” under the BO.

6.25 A number of points were made on behalf of the departments represented :

- (a) CBS/HKE having tabled a block plan pointed out that the existing partly paved area on the south-east was a vehicular access but was not subject to any right-of-way;
- (b) DPO/HK informed the meeting :
 - (i) That the so-called “access road” was zoned “Open Space” on the OZP with the exception of the Marine Fuelling Stations;
 - (ii) That the planning intention was to develop the “access road” into a continuous promenade connecting Aldrich Bay and Quarry Bay Park; and
 - (iii) That in the long term the piers occupied by the Marine Police were to become recreational areas and the “access road” would probably be required as an EVA to the piers;
- (c) The Estate Surveyor/Shaukiwan of Lands Department advised :
 - (i) That the strip of land on the south-eastern side was partly on land allocated to the Marine Police and partly on unleased and unallocated government land;

- (ii) That during the preparation of the Special Conditions for the tender the Buildings Department had informed DLO/HKE that the government land was not to be regarded as a “street” under section 2 of the BO and that to create a Class C site a strip of land 4.5 m wide was earmarked in the south-eastern corner of the Site as a non-building area as well as a public passage; and
 - (iii) That under the lease for the Marine Fuelling Stations vehicular access was not allowed; and
- (d) The Fire Services Department pointed out that the access road was an existing EVA to the fuelling stations although it was not indicated on the approved building plans for those stations.

6.26 There followed a general exchange of views for the assistance of the BA. In summary the points were made that the access road was an existing EVA to the fuelling stations and also an access to the public landing area. That notwithstanding the restriction on vehicular access employees of the fuelling stations would use the access road and that the approved plan showed a door opening onto the access road from the fuelling stations. The conclusion therefore was that the access road bore the characteristics of a “street” and would continue to serve the Marine Fuelling Stations and the public landing area.

6.27 It was also noted that the planning intention was to develop the access road into a waterfront promenade for public passage and that the access road was intended to serve as an EVA.

6.28 The permanency of the access road as a “street” could be accepted from the above.

6.29 After the discussion the majority of those present thought the access road was a “street” under the BO. Having heard all the views, Mr Leung, the BA, agreed and decided that the Site was a Class C site.

The Committee’s Conclusion on the Site Classification Issue

6.30 The purchaser probably assessed its bid on the basis that this would be a Class C site taking into account the chance that the Site could be developed as a Class C site with the strip of government land on the south-east boundary as

a “street”. In this way the Pink Hatched Black Area would not be dedicated as a street and could be counted for site area.

6.31 The draft Special Conditions at one stage made it abundantly clear that this was to be developed as a Class C site with the Pink Hatched Black Area as a street but later this deliberately was left unspecific when the clauses to which we have referred were omitted in pursuance of government policy to obtain the highest price.

6.32 The consequence was that the developer was able to successfully advance the argument that the adjacent government land on the south-east was a “street” and that both the Pink Hatched Black Area and the Pink Cross Hatched Black Area were part of the Site for site coverage, plot ratio and (as will be seen) bonus plot ratio purposes.

6.33 The planning intention to develop the Site to its maximum as a Class C site under the BO and the B(P)R was achieved, although not as envisaged during the drafting of the Special Conditions.

6.34 Although the decision of the BA was not consistent with the advice earlier tendered by the Buildings Department that the open space was not a street within the meaning of the BO the decision was taken after hearing the arguments and following a majority of those present at the BAC.

6.35 It is clear from the earlier correspondence between the Lands Department and the Buildings Department that the Lands Department preferred the Site to be a Class C development using the Pink Hatched Black Area as the necessary street. The advice given by the Buildings Department was not included in the final Special Conditions.

6.36 In our view Mr Leung as the BA is not open to adverse criticism for this decision. It was made following discussion and argument, it was not unreasonable, it followed the majority view and it was taken openly. He alone had the responsibility of making the decision under the legislation.

CHAPTER 7

THE DECISION TO ACCEPT THE DEDICATION OF MOST OF THE RESERVED AREAS

7.1 The general building plans resubmitted by the developer on 3 July 2001 showed a ground floor layout with only a small part of the Reserved Areas (334m²) used for lobbies and lifts as access to the development on the upper floors. The remainder was absorbed in the design for the PTT and the MPOA.

7.2 In his presentation to the BAC on 1 August 2001 the AP urged that the areas for the PTT and the MPOA shown on the Control Drawing were too small for the developer to comply with other provisions of the Technical Schedules. Included in his submission was a version of the Control Drawing suggesting that the total Reserved Areas zoned on it were 2,218m². Also he put forward a plan described as a “realistic G/F layout”. This showed that the MPOA occupied 2,203m² net operational floor area (NOFA) as the extra space was required to provide sufficient car parking under the Technical Schedule. The consequence was that the PTT extended into most of the Reserved Areas.

7.3 At the BAC meeting the proposed building plans were distributed by CBS/HKE and he briefed members on the background.

7.4 The Transport Department commented that the layout of the PTT zoned in the building plans submitted was the result of :

- (a) The enlargement of the MPOA to cope with the requirement of the Technical Schedule;
- (b) The conversion of the public footpaths outside the lot boundary into landscaped areas necessitating the re-provision of footpaths within the PTT; and
- (c) The provision of a larger PTT than was required in the Technical Schedules.

The representative conceded that if the second and third proposals were not included in the design the Reserved Areas in the Control Drawing might be

sufficient to serve their original purposes, but he agreed that the proposed PTT with a larger area would function better than the original one envisaged.

7.5 The Planning Department was also of the view that the proposed PTT was an improvement on the original one and the representative supported the dedication of the Reserved Areas in return for bonus plot ratio.

7.6 On the other hand the Lands Department pointed out that the Technical Schedules were provided by the departments involved and both the Technical Schedules and the Control Drawing were part of the Conditions of Sale. It followed that the purchaser had to obtain the approval from the Director of Lands who would consult the relevant government departments before any amendment or alteration to the Technical Schedule could be made.

7.7 In general discussion the views expressed were :

- (a) The area for the MPOA on the Control Drawing was not sufficient for the developer to adhere to the Technical Schedule so that the PTT had to be moved towards the south;
- (b) The redesigned PTT with a larger area was an improvement on the original one envisaged;
- (c) The provision of landscaped areas instead of the original footpaths and the repositioning of footpaths within the PTT should be encouraged; and
- (d) The developer should be compensated in return for the dedication of the ground floor areas which otherwise could be put to other use.

The Decision on Bonus for the “Reserved Areas” at the BAC on 1 August 2001

7.8 Mr Leung, the BA, having heard the views expressed including the points made by the Lands Department, considered the issues and decided that the dedication of the Reserved Areas for use as the PTT should be accepted in return for bonus plot ratio, provided that the developer gave an undertaking that it would not seek any further compensation from the government apart from the bonus given and that the layout of the PTT was acceptable to all relevant government departments.

7.9 On the following day the AP wrote to the Buildings Department recording the decision on the dedication of the Reserved Areas save for the area designed for the lobbies and lifts and claimed a five time bonus plot ratio in compensation.

7.10 We note that the plans, altered accordingly, were checked and approved by the Buildings Department on 1 September 2001 under the “curtailed check system”.

The Lands Department and the “Reserved Areas”

7.11 Pursuing its duty to enforce the lease conditions the Lands Department maintained that it had to approve any amendment to the Technical Schedules and the Control Drawing. On 4 December 2001 DLO/HKE wrote to all relevant departments pointing out that no amendment to the Technical Schedules could be made by a lot owner except with the prior written approval of the Director of Lands. Noting that the plans submitted showed a layout different from the Control Drawing addressees were asked to comment :

- (a) Whether the submission was in accordance with the Technical Schedules and the Control Drawing? and
- (b) Whether it was possible for the lot owner to construct the Government Accommodation in accordance with the Technical Schedules and the Control Drawing? If not, the departments were asked to advise whether there were any faults in the Technical Schedules finalised by relevant departments before the sale.

7.12 Also, the point was made in the memo that if the Government Accommodation could be constructed in accordance with the Technical Schedules they would have to be adhered to as the owner was asking for dedication of the Reserved Areas for public use in return for bonus plot ratio which could mean a loss of revenue to the government.

7.13 The replies received from the Architectural Services Department, the Transport Department, and the Highways Department all confirmed that it was possible to construct the MPOA and the PTT in accordance with the Technical Schedules and the Control Drawing and that the extension into the Reserved Areas was a consequence of the lot owner’s design.

7.14 On 7 February 2002 DLO/HKE wrote to the CBS/HKE summarising his consultation with other relevant government departments and adding that the department's legal advice was that the government could amend the layout of the Government Accommodation and/or Reserved Areas as shown on the Control Drawing and that such amendment would not result in compensation payable to the owner under the Conditions of Sale.

7.15 He ended as follows :

“In light of the above, we consider that the proposed dedication of the ‘reserved areas’ is not required. In the circumstances despite that the AP for the lot owner may produce a revised layout of the MPOA and PTT to the satisfaction of the concerned Departments, the so called ‘dedication of the reserved areas’ is not indeed necessary as Government has the discretionary power to amend the control drawing.”

7.16 DLO/HKE wrote again to CBS/HKE on 1 March 2002. He repeated much of what had been said before and ended :

“5. Based on the above considerations, it is the view of this office that the granting of bonus plot ratio in respect of this proposed ‘dedication’ was certainly premature and perhaps based on erroneously conceived considerations and as such should be withdrawn by Government, and the lot owner/AP be advised accordingly.

6. I look forward to being advised of your intended action in this respect, as soon as possible.”

7.17 On 27 March 2002 DLO/HKE wrote once again complaining that he had received no reply. He reminded CBS/HKE that he had proposed the granting of bonus plot ratio should be withdrawn by the government. And then :

“As the case now stands, it appears to me that Government as a whole could probably be criticized by the public for giving unjustified advantage to developers if the development is allowed to proceed in its present form without having the issue of bonus plot ratio resolved.”

He asked the Buildings Department to confirm its intended course of action before 12 April 2002.

The BAC Meeting on 23 April 2002

7.18 Under this pressure from the Lands Department a further BAC meeting was convened to reconsider the issue of the dedication of ground floor areas for the PTT. As well as the Buildings Department, the Planning Department, the Lands Department, the Transport Department and the Highways Department were represented.

7.19 CBS/HKE put before the conference the ground floor plan and the Control Drawing for the development. He then briefed the members on the background including the correspondence which had taken place.

7.20 The Lands Department repeated its concern on the granting of bonus plot ratio by the BA. It informed members that the developer had applied to the Lands Department for amendments to the Technical Schedules on the basis that they could not be complied with without using at least some of the Reserved Areas for the PTT. On the other hand, the Architectural Services Department maintained that the MPOA could be constructed in accordance with the Technical Schedules and that the deviation from the Control Drawing stemmed from the owner's design. Therefore, according to the Architectural Services Department, the developer was not entitled to any claim arising from deviations from the original Technical Schedules and the Control Drawing itself.

7.21 The Lands Department also pointed out that the Control Drawing was not to scale and therefore there were doubts as to how the area for bonus plot ratio had been, or was to be, determined.

7.22 The Transport Department contended that the PTT could be constructed in accordance with the Technical Schedules and produced a sketch showing surplus areas designated for planting and circulation purposes within the PTT. Its representative said that by deducting those surplus areas the resulting area of the PTT would be similar as that in the Technical Schedules.

7.23 The Highways Department agreed but had no objection to the proposed deviation from maintenance point of view provided that a physical demarcation between the PTT and the developer's areas could be clearly defined.

7.24 The Planning Department, however, confirmed its previous advice to the BAC of 1 August 2001 that from the planning point of view the proposed

PTT would be an improvement to the one shown on the Control Drawing both in terms of operation and environmentally friendly design. It supported the dedication of the Reserved Areas in return for bonus plot ratio.

7.25 An exchange of views followed in which was said that the Control Drawing was only a preliminary sketch indicating the disposition of different parts of the Government Accommodation on the ground floor. Taken with the Technical Schedules only the minimum requirements of the Government Accommodation were shown. However it was also pointed out that the Technical Schedules and Control Drawing were part of the lease and legally binding between the owner and the government. The Lands Department agreed that it was a matter for the Lands Department to decide whether the developer was entitled to any compensation under the lease, whereas it was for the BA to decide whether any concessions should be given in the form of bonus plot ratio.

7.26 The surplus areas of the proposed PTT referred to by the Transport Department were designated either as a landscaped area or circulation space. These served to improve the environment as well as the vehicular and pedestrian traffic flow. The Planning Department repeated its earlier view and it was noted that the proposed PTT was technically acceptable to all concerned departments.

7.27 Members agreed that the provision of the landscaped areas and the larger area for PTT would benefit the public. It would serve the public interest to accept the dedication of Reserved Areas as proposed by the AP. Furthermore the developer should be entitled to bonus plot ratio under B(P)R22(1) in return for the dedication of such areas which could otherwise be put to other purposes.

The Decision Affirmed

7.28 Mr Leung as the BA considered the relevant issues again and the conference advised that the previous decision should be upheld. In these circumstances Mr Leung agreed and upheld his previous decision in accepting the proposed dedication of the Reserved Areas for use as a PTT and granting the bonus plot ratio subject to the undertaking from the owner that he would not seek further compensation from the government.

The Aftermath

7.29 After the decision had been confirmed by the BA the Lands Department still had to determine the developer's application for a variation of the Control Drawing. These matters are outside our terms of reference so it suffices to say that the departments generally maintained their stands that it was possible to build the Government Accommodation within the provisions of the Technical Schedules and the Control Drawing.

7.30 It is however relevant to the BA's decision to note that difficulties arose because the Control Drawing was not to scale and on the question whether under the lease the Reserved Areas not used for lift lobbies for the upper floors had been bought for the developer's own use.

7.31 On 29 June 2002 the Chief Technical Adviser/Subvented Project of Architectural Services Department (CTA/SP) wrote to the Lands Department about the MPOA in these terms :

- “(a) For the MPOA, what are being shown on the Control Drawing are the position and the points of ingress/egress of the MPOA. The Control Drawing is ‘for information only’ and ‘not to scale’. Our view is the line shown on the Control Drawing should not be a rigid boundary beyond which the MPOA cannot be planned since the Control Drawing is marked ‘not to scale’. As long as the Developer's proposal could follow the position of the MPOA and points of ingress/egress, we have no ground to reject the layout for the MPOA based on the Control Drawing. Therefore, design options are open to the Developer within these constraints based on the Control Drawing.

- (b) The Technical Schedule of the MPOA requires a minimum NOFA of 1,500m². The area is based on the most efficient double-loaded arrangement of vehicles exclusive of any structural constraints and other design constraints. Such arrangement takes no account of the site or the shape of the area reserved for the MPOA on the Control Drawing. This 1,500m² is only the sum of the net areas of the required parking spaces plus storage cages and excludes any areas arising from structural constraints and other design constraints. The NOFA proposed by the Developer is not significantly in excess of the required NOFA of 1,500m², if areas that cannot be [sic] used due to structural constraints and other design constraints are excluded. Since the Technical Schedule requires only a minimum NOFA,

we have no ground to reject the Developer's layout for excessive NOFA.

- (c) If the Developer is required to design within a narrow strip of area where the efficient double-loaded arrangement of vehicles cannot be applied, there may be a reduction of number of parking spaces. It will be up to C of P to decide how much reduction he is prepared to accept, or to require proposals from the Developer, e.g. stacking of vehicles, to compensate the shortfall. Both such options are allowed in the Technical Schedule para. 1(a)(i). As the Developer's layout satisfies the minimum NOFA and the number of vehicles required in the Technical Schedule, we have no ground to reject the layout based on the Technical Schedule."

7.32 Thereafter there were negotiations which were concluded on 19 March 2003 when the Lands Department accepted the developer's offer of HK\$6 million for approval of the plans which were not consistent with the Control Drawing.

The Committee's Conclusion on the Dedication of the Reserved Areas

7.33 If the Control Drawing was intended to delineate a rectangular block of 1,500m² for the MPOA it was certain to occupy more than that rectangular block as the requirement was that it should have at least 1,500m² NOFA. This accords with the evidence of the Architectural Services Department. NOFA will increase the footprint of a design. The amount depends on the particular structure and layout but it may be substantial. We accept the views expressed by CTA/SP in his memo of 29 June 2002 to which we have referred above.

7.34 We accept therefore that the MPOA designed by the developer was drawn according to the Technical Schedule and the Control Drawing. In consequence of the area it necessarily took the PTT had to occupy more of the Site towards the south and into the Reserved Areas.

7.35 As was demonstrated by the Transport Department at the BAC meeting on 23 April 2002, the PTT could have been designed to take up a smaller space than shown on the submitted plan if the areas designated for planting and circulation within the PTT were deducted. However, given that sufficient space is available for the construction of a PTT with these beneficial features which enhanced the environment and improved circulation for

pedestrians and vehicles, it is difficult to say that the public should not have the benefit of these features.

7.36 This leaves two intractable issues :

- (a) In the tender and under the lease were the Reserved Areas for the developer's use?
- (b) In any event, what was the size of the Reserved Areas dedicated by the developer and accepted by the government?

7.37 We have outlined the history of the Control Drawing and the areas delineated "proposed space reserved for entrance lobbies and other facilities to upper floors". These areas and annotations appeared on the plan when it was intended that extensive Government Accommodation was to be built on the upper floors. At that time the "Reserved Areas" would have been required for separate lobbies and lifts for the Government Accommodation and for the residential accommodation of the developer. Once the Government Accommodation was limited to the ground floor all the upper floors belonged to the developer. Whatever arguments may be advanced about the earlier plans to build more Government Accommodation the Control Drawing was not revised to take account of the change. The developer could argue with some force that it purchased the Reserved Areas and bid for the tender accordingly.

7.38 Obviously, when the Control Drawing was not to scale and no dimensions were given for the Reserved Areas it must follow that the Reserved Areas were of such size as remained on the ground floor after the construction of the MPOA and the PTT. The MPOA and the PTT had to be designed according to the Technical Schedules but they were of little assistance when no maximum size was specified and the detailed design was intentionally left to the developer. The consequence was that the size of the Reserved Areas was ascertained by the developer when it drew its plans. In any event the BA had little alternative but to accept the developer's plans in the absence of some good reason for saying that the delineation of the Reserved Areas was wrong. We are not aware of any such reasons.

7.39 In these circumstances there can be little doubt that the Reserved Areas were purchased by the developer and the decision of the BA to accept their dedication for public use was a reasonable exercise of discretion. It follows that the developer was entitled to compensation under B(P)R22(1).

7.40 We can only speculate on what may have happened if the Control Drawing had been reconsidered after the decision to build Government Accommodation on the ground floor only had been taken. The presence of the Reserved Areas without dimensions on a “not to scale” drawing without fixed areas for the MPOA and the PTT may have been seen as a possible opportunity for a developer to plan attractively and claim bonus for dedication. Enterprising developers have this approach. It also follows that this “chance” may have been reflected in the price paid. This will never be known.

7.41 We consider what lessons, if any, may be learned from these events later in our report.

CHAPTER 8

THE DEDICATION OF PART OF THE PINK CROSS HATCHED BLACK AREA

8.1 The AP also applied at the BAC meeting on 1 August 2001 to dedicate the Pink Hatched Black and the Pink Cross Hatched Black Areas for public passage to facilitate access to the PTT. These areas also provide access to the MPOA and the Marine Police Complex. In the lease conditions the Pink Hatched Black Area was subject to a pedestrian public right-of-way (not vehicles). The public had no right-of-way over the Pink Cross Hatched Black Area. But, both Pink areas (the Paved Way) were subject to an unrestricted vehicular right-of-way limited to the Commissioner of Police and his officers together with other tenants, occupiers or licensees approved by the Director of Lands.

8.2 When the Special Conditions were considered by the District Lands Conferences the intention was that the public should have a pedestrian right-of-way over the full length of the Paved Way but this was changed in about September 2000 after DLO/HKE's memo of 7 September 2000 to SS/LACO to which we have already referred. Under paragraph 2(c) he noted that this clause had been amended because it was not the intention that the public should use the Pink Cross Hatched Black Area at all times during the lease.

8.3 There was pedestrian entrance to the PTT from the Pink Cross Hatched Black Area over which the public had no right-of-way.

8.4 The AP's application was to dedicate the whole of the Paved Way in return for bonus but the Lands Department pointed out to the BAC that the Pink Hatched Black Area was designated as a non-building area with a pedestrian right-of-way under the Conditions of Sale, so the proposal to dedicate the Pink Hatched Black Area was out of the question and should be rejected. The representative of the Lands Department reminded the conference of the limited access permitted under the Conditions of Sale over the Pink Cross Hatched Black Area.

8.5 In discussion reference was made to the "access road" on the south-east boundary of the Paved Way which the BA had already decided was a street. There had been long-term planning intention to develop that "street"

into a seafront promenade. Under these circumstances only the portion of the Pink Cross Hatched Black Area in front of the pedestrian opening to the PTT would be required as access to the PTT. The developer's plan showed that if the public were to have access to the PTT at this place public right of access over part of the Pink Cross Hatched Black Area from the "street" was necessary.

The Building Authority's Decision

8.6 Having considered the submissions and issues before the conference Mr Leung, the BA, decided that it was in the public interest to accept the dedication of the portion of Pink Cross Hatched Black Area in front of the opening to the PTT in return for bonus plot ratio.

The Committee's Conclusion on the Dedication of Part of the Pink Cross Hatched Black Area

8.7 In the Committee's view this decision is beyond reproach. The BA correctly rejected the AP's application to dedicate the whole of the Paved Way in return for bonus plot ratio. It was an excessive and unreasonable claim. However, as the public had no right-of-way over the Pink Cross Hatched Black Area the pedestrian access to the PTT at this place would have been denied in the absence of amendments to the lease or dedication of the limited area between the access to the PTT and the "street".

CHAPTER 9

THE APPLICATION TO EXCLUDE THE GOVERNMENT ACCOMMODATION (PUBLIC TRANSPORT TERMINUS AND MARINE POLICE OPERATIONAL AREA) FROM THE GROSS FLOOR AREA CALCULATION

9.1 The developer's AP applied to the BA to exclude both the PTT and the MPOA from the calculation of GFA.

9.2 As the Special Conditions were silent upon whether the Government Accommodation was to be included or excluded in the calculations and there was no specified maximum GFA for the development, the issue had to be decided under the legislation by the BA. The requirement for a minimum GFA of residential accommodation had no practical impact on this question.

The Authorised Person's Submission Summarised

9.3 The focus of the submission was that this was to be "An Environmentally Conscious Development". By way of background the AP pointed out that the PTT was required under the lease and the lease conditions usually state whether a PTT was to be included or excluded for GFA calculations but that there were cases where the lease conditions were silent on the issue. He then referred to B(P)R23(3)(b) and pointed out that there had been cases where the BA had allowed its exclusion. He continued :

"As such, it is obvious that inconsistencies did exist regarding the requirements as to whether the PTT is GFA countable or not, making the issue confused and uncertain to the developers, architects and other practitioners of the industry. In the case of I.L. 8955, Sai Wan Ho, PTT is required to be provided for the development under the lease but the lease conditions are silent as to whether the PTT is GFA countable or not."

9.4 This was correct. The AP then submitted that the developer had tendered on the understanding that the GFA of the PTT was not accountable because :

- (a) B(P)R23(3)(b) should be interpreted liberally;

- (b) In a previous case undertaken by the same developer the PTT had not been accountable for GFA under the BO and the conditions of grant;
- (c) Precedent cases known to other architects; and
- (d) The lease conditions were silent on GFA accountability, implying that “the interpretation under the Buildings Ordinance should prevail.”

9.5 The AP then identified ten previous cases in which PTTs had not been counted towards GFA and noted that from these cases it would appear that the government had the intention of allowing the PTT to be excluded. On some occasions an incentive had been given by granting bonus GFA as well.

9.6 He analysed other cases in which the GFA of the PTT had been included in the calculations but for various reasons the AP had obtained full entitlement on the development potential without applying under the BO.

9.7 He concluded his submission as follows :

“VI. CONCLUSION”

1. In the case of this development (I.L. 8955, Sai Wan Ho Ferry Concourse), the Conditions of Sale are silent on whether the GFA of the required PTT is to be included or excluded from calculations. As such, the developer and the authorised person envisage that Building (Planning) Regulations 23(3)(b) shall prevail in this case and the required PTT should be non-accountable for GFA calculation.
2. Following liberal interpretation of Building (Planning) Regulations 23(3)(b), the precedent cases as mentioned under Development/PTT Nos. 1 to 6 of Part III above (with asterisks) are actually most relevant to our case as far as lease requirements are concerned. From these cases, we can see that Building Authority has been permitting the PTT to be excluded from GFA calculation while the lease is silent on the issue, whether or not a more stringent control on GFA has been specified under the lease.
3. Since the Conditions of Sale in this case are also silent on the maximum GFA, the developer is entitled to the development

potential provided under the First Schedule of Building (Planning) Regulations. In view of the various precedent cases, the requirement for including the PTT under GFA calculation would be seen as cutting down the full entitlement of the developer and is therefore unfair.

4. Although the provision of PTT is a known obligation under the Conditions of Sale, it does not necessarily mean the development entitlement has to be taken away in fulfilling the obligation.
5. Last but not least, we have further reviewed the Conditions of Sale and the Tender Notice in hand and considered that the Government did intend to give developers (or tenderers) more flexibility in the interpretation of development potential so that a higher market price might be fetched for this site. Otherwise, the Government should have specified under Tender Document that the required PTT should be taken into account for GFA calculation as in the case of the recent Island Resort Development at Siu Sai Wan.

Based on the above, the developer and the authorised person trust that the exclusion of the PTT from GFA calculation is justifiable and the full and fair entitlement to the developer can be maintained.”

9.8 The Buildings Department provided a paper for the BA’s assistance commenting upon the AP’s argument. The writer noted that the exercise of development control under the BO was independent of the lease conditions in every case. He noted that in cases when no maximum GFA was imposed under the lease the development was controlled under the BO and the regulations.

9.9 On the exclusion of GFA under B(P)R 23(3)(b) he said :

“4. As regards the exclusion of GFA under B(P)R 23(3)(b), it is important to note that to ‘park’ a car has the meaning that ‘you move the vehicle into a position where it can stay for a period of time, and usually leave it.’ as revealed in Collins Cobuild English Language Dictionary. Hence, it is clear that a bus terminus/PTT should not be similarly treated as normal carparking areas under B(P)R 23(3)(a). Moreover, the BD staff have acted consistently in this aspect and will only allow the carparking areas serving the users and occupants of the parent building only to be discounted from GFA calculation.”

9.10 His careful analysis of some past PTTs again demonstrated no pattern. On some occasions the PTT was included and on others excluded, and on some the inclusion or exclusion had no bearing upon the total permissible GFA.

9.11 The AP summarised these arguments in his presentation to the BAC on 1 August 2001. This application was then discussed between the members. The main points made are summarised in the record :

“14. Exclusion of the PTT from GFA calculation”

- (a) CBS/HKE said that the normal practice of this department was to require PTT to be counted for GFA except in some cases where (a) the lease had expressly allowed for its exclusion; or (b) the lease had specified the maximum GFA; or (c) GFA exemption under the BO had been endorsed prior to the sale of the site to cater for special circumstances.
- (b) DPO/HK opined that as the PTT was required to be provided under the lease, the exclusion of the PTT from GFA calculation would not generate any benefit to the public. He was a bit concerned about the increase in the development intensity if the PTT was allowed to be excluded from GFA calculation.
- (c) ES/SKW, LandsD said that the Conditions of Sale had only specified the minimum residential GFA for the development. The plot ratio control of the development would be left to BD under the BO. He added that during the stage of preparing the Conditions of Sale, BD confirmed in writing that the Government Accommodation should be included in the GFA calculation under B(P)R. Based on BD’s advice, LandsD assessed the tender reserve price on the basis that the Government Accommodation would be included in the calculation of GFA. In the circumstances, the PTT as a Government Accommodation should be accountable for GFA. He further said that LandsD had advised, in response to enquiries of some tenderers, that the Government Accommodation was accountable for GFA calculation under B(P)R 23(3)(a). In response to Chairman’s enquiries, he further clarified that the purchaser of this site had not made an enquiry on the issue during the tendering stage.

- (d) Members exchanged view [sic] on the issue and had the following observations:
- i) For the 4 quoted cases at Laguna City, Telford Plaza, Whampoa Garden and Nam Fung Centre, the maximum GFA was capped under the leases. As the permissible GFA under the BO would not be exceeded whether the PTT was counted or not counted for GFA calculation under the BO, BD did not address the issue directly in those cases.
 - ii) The site at United Centre was subject to a maximum PR of 18 and a bonus GFA of 5 times of the area of the PTT under the lease after the endorsement of the former PWD Conference.
 - iii) The PTT at China Hong Kong City was a closest case comparable to the subject PTT among the cases mentioned in the AP Team's Report, in that in both cases the lease had not mentioned whether the PTT was countable for GFA and the lease had only specified the minimum GFA for the development. The PTT at China Hong Kong City was allowed to be excluded from GFA calculation under B(P)R 23(3)(b) on the ground that the PTT was ancillary to the use of the ferry pier in Concourse Building within the site. Some members considered that for the case under consideration, it was arguable that the PTT was a use ancillary to the principal use of the development.
 - iv) Some members opined that the subject PTT was not different from that at China Hong Kong City, and there was no reason why BA should not grant similar exemption under B(P)R 23(3)(b).
 - v) Some members were of the view that the Cross Boundary Coach Terminus (CBCT) within the subject PTT was similar in nature to the ferry pier of the Concourse Building at China Hong Kong City. As such, some members opined that the CBCT should be counted for GFA as in the case of the Concourse Building and that the remaining part of the PTT could be treated as ancillary to the function of the CBCT and hence could be

exempted from GFA calculation under B(P)R 23(3)(b).

- vi) SE/E&G, TD said that the use of the local PTT was not a use ancillary to the function of the CBCT.
 - vii) Government Accommodation should not be treated differently from private accommodation when assessing the accountability for GFA calculation.
 - viii) The developer had knowledge of some of the precedent cases before the submission of tender.
 - ix) Whether PTT was accountable for GFA under leases varied from case to case.
- (e) Prof. Alex C W LUI noted that while it could be argued that the developer should take steps to clarify if the PTT should be counted for GFA as he was aware of the different treatments accorded to the various projects, it could also be argued that the administration should also take steps to clarify the position before tender. There was clear inconsistency on whether PTT was accountable for GFA as reflected by BD's rulings in previous cases. He was of the view that developers might be confused on whether PTT was accountable for GFA as there was inconsistency on the treatment of PTT under the lease as well as under the BO. On this basis, he opined that the developer should be given the benefit of doubt. He also recommended that the inconsistency be clarified between the departments and guidelines be issued to the industry.
- (f) The Chairman noted the spilt [sic] views amongst members on this issue. He **directed** that legal advice should be sought on the application of B(P)R 23(3)(b) in this case before making a decision on the matter."

9.12 After the conference was adjourned for the BA to take legal advice on the application of B(P)R23(3)(b) DLO/HKE took the opportunity to write to CBS/HKE to reiterate all the points he had put forward at the meeting in spite of the decisions already made. He also reminded the Buildings Department of its earlier advice that the government land on the south-east boundary was not a street and that the PTT was accountable for GFA under B(P)R 23(3)(a).

9.13 On 26 September 2001 the AP also put before the Buildings Department supplementary materials “to facilitate your approval of the said submission”.

9.14 These supplementary materials were :

- (a) A paper to the Director of Buildings;
- (b) A legal opinion from leading counsel;
- (c) 7 editions of PNAP 13 on “Building (Planning) Regulation 23(3) non-accountable gross floor area”; and
- (d) A further study report on PTT being non-accountable for GFA calculation.

9.15 In his paper to the Director of Buildings with the supplementary materials the AP expressed great appreciation for the “very open and transparent approach” at the augmented BAC which he believed to be a big step forward in the development of the system of building control for Hong Kong. He referred to the latest edition of the PNAP and included a further analysis focussed on whether PTTs had previously been accountable for GFA.

9.16 He relied on the following passage in the relevant PNAP of 2001 on the exclusion of GFA used solely for parking or for the loading or unloading of motor vehicles,

“Each case needs to be determined on its merits and with particular relevance to the location of the building, the planned occupancy, and any reasoned justification for the facilities proposed.”

9.17 He focused on the three matters :

- (a) The location of the building;
- (b) The planned occupancy; and
- (c) Any reasoned justification put forward for the facilities proposed.

9.18 He made impressive submissions putting his own interpretation on these words from the PNAP. He pointed out that the suitability and desirability of the location of the building incorporating the PTT and the MPOA must have satisfied all the departments and was an ideal location for residential development. Further, he argued that the location of the building must have been considered suitable for incorporation of the PTT and the MPOA as well as the other uses.

9.19 As for “planned occupancy” this had been determined by the Planning Department after careful study. The occupancy was compatible with the zoning and the other uses specified on the OZP.

9.20 He took much the same approach to “reasoned justification for the facilities provided” noting that the facilities provided by the Government Accommodation were desirable and satisfied a public need which must have been compatible with the environment, the neighbourhood, the traffic and the infrastructure.

9.21 The further analysis of the history of PTTs demonstrated little save an inconsistency of approach. The only point which could safely be made was that on occasions PTTs had been excluded for GFA calculation by the BA exercising his discretion under B(P)R 23(3)(b).

9.22 The opinion of leading counsel was put forward without comment. It needed none. It was a clear legal opinion that “as a matter of language” the GFA of both the PTT and the MPOA were “capable of falling within ... regulation 23(3)(b).” It was also impressive advocacy for the exclusion of the Government Accommodation on “public benefit” grounds. It ended “this is a non-standard case where the discretionary answer is virtually predetermined”.

The Advice from the Department of Justice

9.23 On 16 August 2001 the Buildings Department wrote to the Department of Justice seeking its advice. The instructions were an impressive summary of the background, the problem, the AP’s submissions and the advice sought.

9.24 The central question asked was :

“(a) Are we right, according to BPR 23(3)(a) and 23(3)(b), to require the PTT and MPOA to be included in GFA calculations?”

9.25 On 19 October 2001 a meeting was held between the Buildings Department and the Department of Justice. The Buildings Department file note reads :

“SGC advised that B(P)R 23(3)(b) was applicable to the PTT and BA should exercise his discretion in whether or not to disregard it from GFA calculation.”

9.26 On 22 October 2001 the Department of Justice advised the Buildings Department in writing. The advice was summarised at the beginning of the meeting.

The BAC Meeting on 22 October 2001

9.27 Having received the legal advice for which the BAC on 1 August 2001 had been adjourned and having received many more documents from the Buildings Department, the Lands Department and the AP for his assistance, or perhaps in some instances his confusion, the BA reconvened the BAC on 22 October 2001. It was a regular meeting with the Chairman, Secretary and others including one of the external observers and a representative of the Planning Department.

9.28 The Lands Department was not represented. As an external observer was present and the Lands Department had expressed firm views on the issue at the earlier meeting this is surprising. When Mr Leung gave evidence he answered the Committee’s questions on this matter. In summary he said :

- (a) He thought it unthinkable that the Lands Department had not been invited;
- (b) He noticed that it was not represented and assumed that the representative was unable to attend;
- (c) That the Lands department had made its position clear at the earlier meeting. It had referred to the advice of the Buildings Department and the fact that the reserve price had been calculated with the GFA of the PTT included;
- (d) The time limit for the decision was close so the meeting had to be held;

- (e) The Lands Department never raised the PTT exemption later and never expressed any concern or objection;
- (f) He was very surprised the Secretary had said that he had no memory of inviting the Lands Department; and
- (g) That the first time any question was raised about the absence of the Lands Department at the meeting was in 2005, four years later.

9.29 We took this no further. It was difficult for Mr Leung to recall detail after such a lapse of time. The points made by the Lands Department at the earlier meeting were unlikely to influence the decision. There is no basis upon which we can find anything sinister in the absence of the Lands Department at the meeting.

9.30 The meeting began with CBS/HKE summarising the legal advice received for the assistance of those present. It is important to have in mind that the notes are recollection of things said which may not be entirely accurate. It may reflect the gist of matters taken into account by those at the meeting. According to the notes he said :

- “(a) Public transport terminus fell within the meaning of the term ‘parking motor vehicles, loading and unloading of motor vehicles’ in B(P)R 23(3)(b). *
- (b) BA must first be satisfied that any floor space was constructed or intended to be used solely for parking motor vehicles, loading and unloading of motor vehicles. This was a question of fact and could be established and supported by documentary submission of plans or designs.
- (c) BA should then consider whether or not to disregard such floor space from GFA calculation. In the exercise of this discretionary power, each case must be considered on its own merits and be decided as the public interest required at the time.
- (d) There was no reference of any consideration of lease restrictions in refusing approval of plan under the BO.
- (e) The exercise of development control under the BO was independent of the lease conditions in every case.

- (f) BA should consider the circumstances of the case and exercise his discretion according to his guidelines and policy. However, consistency should not be pursued at the expense of the merits of the individual cases.”

* Note: This may not accurately reflect the true effect of the legal advice which left it open to Mr Leung to apply the regulation if he decided the facts under (b).

9.31 CBS/HKE then briefed members on past cases pointing out that previously the BA had allowed some PTTs to be excluded from GFA calculation but required some others to be included. The meeting continued and according to the notes the following discussion took place on the PTT :

- “4. DPO/HK opined that as the PTT was required to be provided under the lease, the exclusion of the PTT from GFA calculation would not generate any additional benefit to the public. Whilst the planning intention for this site was to leave the control of the building bulk to B(P)R, he was concerned that if the PTT was allowed to be excluded from GFA calculation, the proposed building bulk/height would be increased causing additional visual impact in view of its waterfront location. This might also set a precedent having implication on the calculation of GFA for other public facilities required by the Government.
- 5. Having noted the additional information given by CBS/HKE, members had the following observations :
 - (a) According to legal advice PTT fell within the ambit of floor space for parking motor vehicles, loading or unloading of motor vehicles.
 - (b) Members were satisfied that the proposed PTT as shown on the plans submitted was constructed or intended to be used solely for parking motor vehicles, loading or unloading of motor vehicles.
 - (c) B(P)R 23(3)(b) provided an explicit discretionary power for the BA to disregard such floor space from GFA calculation. In the circumstances, when exercising the discretion, the BA should examine if it would be against the public interest to exclude the PTT in question from GFA calculations.

- (d) The provision of a PTT in this case was definitely in the public interest. The exclusion of the PTT in the case from GFA calculation would also not have adverse effect on the public interest. Otherwise, Transport Department and Planning Department would not have recommended the provision of a PTT in this site in the first place.
 - (e) As advised by D of J, the exercise of the discretionary power under B(P)R 23(3)(b) should be independent of the lease conditions. Therefore, when considering the question of public interest, it might be unreasonable to consider it as not serving public interest to allow the PTT to be excluded from GFA calculation simply because the developer had contracted to provide a PTT in the lease.
 - (f) There was at present no statutory town planning control over the GFA and bulk of the development on this site. In the case of GFA, the control was left to the provisions of the B(P)R. In the circumstances, the permissible GFA should follow that allowed by the First schedule to the B(P)R and the area which might be included should be dealt with under B(P)R 23(3)(b). If there was any planning intention to further restrict the GFA or the bulk, this should have been spelt out in the lease conditions when the land was granted to the developer. In the circumstances, it was not appropriate now to address PlanD's concern under the BO.
 - (g) Although there were internal guidelines dealing with the exclusion of car parking spaces from GFA calculation, no clear guidelines on how BA would deal with exclusion of PTT had been issued both internally and to the industry.
 - (h) The past cases dealing with the exclusion of PTT from GFA calculations were inconsistent and thus no guidelines nor policy had been or could be established.
6. Prof. Alex C W LUI was of the view that developers might be confused on whether PTT could be excluded from GFA calculation as there was inconsistency in the treatment of PTT under the lease and under the BO. He was inclined to give the developer the benefit of the doubt.”

The Decision on the Public Transport Terminus

9.32 The notes continue :

- “7. Having considered all the relevant factors, members advised and the Chairman **agreed** to exclude the PTT in this case from GFA calculation.
8. The Chairman directed that in the light of the current legal advice and the principles established in this case for considering the exclusion of carpark and loading and unloading areas from GFA calculations under B(P)R 23(3)(b), the present internal guidelines and PNAP dealing with the subject should be reviewed and re-issued as soon as possible.”

The Decision on the Marine Police Operational Area

9.33 The meeting then turned to consider the MPOA and whether it should be accountable for GFA. The notes are brief and to the point. They read :

- “9. Members noted that the MPOA was not ancillary to the principal use of the proposed development.
10. There were already clear guidelines that car parking spaces provided other than for the occupants of a building should be included in GFA calculations. Therefore, in line with the present guidelines which were known to the industry and applied consistently, members advised and the Chairman **agreed** that the MPOA should be counted for GFA.”

The Committee’s Conclusion on the Public Transport Terminus Decision

9.34 In our opinion the decision that the PTT should not be accountable for GFA was wrong. There are two related reasons :

- (a) B(P)R23(3)(b) applies only to any floor space that the BA is satisfied is constructed or intended to be used solely for a number of listed features. A reading of the whole section indicates that these features must be for the benefit of the parent building or its occupants. The regulation reads :

“(b) In determining the gross floor area for the purposes of regulations 20, 21 and 22, the Building Authority may disregard any floor space that he is satisfied is constructed or intended to be used solely for parking motor vehicles, loading or unloading of motor vehicles, or for refuse storage chambers, refuse storage and material recovery chambers, material recovery chambers,

refuse storage and material recovery rooms, refuse chutes, refuse hopper rooms and other types of facilities provided to facilitate the separation of refuse to the satisfaction of the Building Authority, or for access facilities for telecommunications and broadcasting services, or occupied solely by machinery or equipment for any lift, air-conditioning or heating system or any similar service.”

If the whole section is read we think anything constructed other than for the benefit of the parent building or its occupants falls outside the scope of the section. Whereas a PTT may come within the terms “solely for parking motor vehicles, loading or unloading of motor vehicles” “as a matter of language”, it strains the meaning beyond breaking point to suggest that a PTT is a provision for the parent building or its occupants even if some of them use the terminus.

In expressing this view on the meaning of the regulation we enter a *caveat*. Views may differ widely and with good reason upon the interpretation of legislation and we have heard no independent submissions or argument upon the proper meaning of the regulation. Nevertheless, we consider that the BA’s predecessors who had applied the regulation to PTTs in the past were wrong so to do; and

- (b) In any event, the last review of the relevant PNAP signed by Mr Leung in April 2001 provided in paragraphs 10 and 12 sound guidance for applying the regulation when parking, loading and unloading of motor vehicles is under consideration. The PNAP reads :

“In each case, the size of any such feature and its location should be appropriate to the layout and size of the main building.”

and

“The exclusion from accountable gross floor area of any floor space used solely for parking, or for loading and unloading, of motor vehicles is affected by many related factors. It is not possible to issue a comprehensive guide on provisions for these purposes. Each case needs to be determined on its merits and with particular relevance to the location of the building, the planned occupancy and any reasoned justification for the facilities proposed.”

As we understand the PNAP this provided guidance on “provisions” to determine whether they are excessive.

9.35 The BA must be guided primarily by the legislation but a PNAP will be of great assistance if it accords with its true meaning. In our view, this PNAP gives proper guidance on the application of the regulation. Any excessive provision is not provided for the parent building and is therefore outside the scope of the regulation.

9.36 We turn to consider the reasons why Mr Leung as BA exercised his discretion to exclude the PTT for GFA calculation.

9.37 The first was the way such decisions had been previously dealt with. In his impressive presentations the AP relied upon some previous cases. The Buildings Department invited the BA to consider others. As we have explained, these were so inconsistent as to provide no reliable guidance save that B(P)R23(3)(b) had been applied to them. In only one exceptional case it was suggested that the PTT was provided for the benefit of the parent building. Further as relevant previous versions of the PNAP also indicated that excessive provision must be excluded the PTTs were dealt with as if in a special category to which the PNAP did not apply.

9.38 The AP focussed on the last sentence of the PNAP and made submissions on the “location” of the building, the “planned occupancy”, and “any reasoned justification” for the facilities. On each he put forward general arguments. For example under “location” he urged the nature of the waterfront site and under “reasoned justification” he referred to the public benefit of having a PTT. These arguments were impressive but, in our opinion, misleading. The relevance of the three matters is not general but particular as factors which may assist a decision upon whether any provision is excessive.

9.39 The real problem however was the fact that PTTs had previously been considered within the scope of the regulation.

9.40 Mr Leung told the Committee that he found these previous cases of little assistance but he noted that PTTs had received widely differing treatment and that B(P)R 23(3)(b) had been applied in similar circumstances.

9.41 With this background Mr Leung had before him the submission that the “reasoned justification for the facility” was satisfied by the fact that the

government had specified a PTT in the building and that almost by definition it was for public benefit.

9.42 He was persuaded that this was a valid argument even though the developer was required to construct the PTT under the lease. Further, the AP urged that to deprive the developer of the usual potential by including the GFA of the PTT was unfair because the developer had assumed that the PTT would be excluded when bidding for the Site.

9.43 The differing views expressed at the first BAC meeting concerned Mr Leung to the extent that he adjourned his decision to seek legal advice on the applicability of B(P)R23(3)(b).

9.44 Having received the advice Mr Leung's evidence was that neither he nor any other person present at the meetings had any doubt that B(P)R23(3)(b) was applicable to a PTT. The history of previous cases confirmed this view.

9.45 He said,

“One of the reasons I did not doubt or we did not doubt that the PTT should -- will fall within the ambit of section 23(3)(b) was that there were so many precedent cases before us that the PTT question was considered in that context, under section 23(3)(b).”

9.46 When asked about the level of provision and whether it was not in any event excessive he said,

“If you look at the facility and ask the question, if one looks at the facility and asks the question, ‘Is it an ancillary facility that serves exclusively the residents of that building for the purpose of making it inhabitable, reasonably inhabitable and functional’, as I explained earlier on, the answer is, ‘No.’ No, it doesn't fall into that category.”

9.47 After further questions he continued,

“The approach that I took in that respect is that section 23(3)(b) covers not just facilities that would serve as an ancillary facility to serve the residents of the buildings exclusively. That is my starting point. I take section 23(3)(b) as having a wider remit, that there are facilities that the Building Authority could use his discretion to exempt from the calculation of GFA, full-stop. And..... on what basis he will grant it as an exemption.”

9.48 The legal advice which the BAC and Mr Leung as BA had received left it open for him to decide on the facts that B(P)R23(3)(b) was applicable, and, confirmed by the way in which previous PTT had been approached, it was open in the exercise of his discretion to decide that the GFA of the PTT should be excluded. In other words PTTs were approached as though they were in a special category.

9.49 Mr Leung was pressed by the Committee on the question that the PTT was not provided for the parent building and in any event must have been an excessive provision so that it could not be excluded from the GFA. His answers make it clear that he and others advising him at the BAC did treat the PTT as though it was in a category of its own. As he said when pressed on excessive provision,

“Then, in every case, the PTT – in all the cases examined and dealt with in the past, the PTT, by definition, by your definition, Mr Chairman, will be excessive in relation to the parent building.”

9.50 Against this background he decided that the public benefit of the PTT was such that he would exempt the GFA of the PTT.

9.51 Giving weight to the legal advice he considered, the past cases he examined, and all the factors urged for and against by the AP, the Buildings Department and others present at the meeting that he took into account, Mr Leung’s decision as BA was reasonable and not open to sound adverse criticism. We note (as did Mr Leung at the time) that the lease was silent upon the accountability of the PTT and that it specified no maximum GFA. Of course, others in Mr Leung’s position may have reached a different conclusion but this adds nothing to the point.

The Committee’s Conclusion on the Marine Police Operational Area Decision

9.52 Compared with the decision on the PTT both the BAC and Mr Leung found that the decision on the MPOA presented no difficulty. Unencumbered by previous cases and legal advice the BAC advised and Mr Leung accepted that the MPOA was unconnected with the parent building and was in any event a completely excessive provision. On principle he decided it was to be counted for GFA.

9.53 This decision was quite inconsistent with the decision he took on the PTT. This demonstrates that consciously or unconsciously Mr Leung treated the PTT in a special category and not subject to the relevant PNAP. In his evidence Mr Leung drew a distinction between the PTT as being of obvious and general benefit to the residents of the area whereas the MPOA was of less obvious, less immediate and more remote public benefit. For the reasons we have explained we do not accept such a distinction as the MPOA, like the PTT, is outside the scope of the regulation altogether. His decision was correct.

CHAPTER 10

A REVIEW OF THE BUILDING AUTHORITY'S DECISIONS AND THE SPECIAL CONDITIONS

10.1 When the Site was identified in 1998 as suitable for residential development steps were taken to amend the Quarry Bay OZP to enable its development for "OU" and no other restriction was placed upon it. The planning intention from the outset was that the Site should be developed to its maximum potential under the legislation.

10.2 In drafting the Special Conditions for the tender the Lands Department sought to reflect in them this planning intention. It presented no difficulty because it accorded entirely with the stated government policy of obtaining the best price for the development of government land. The Lands Department believes that in order to achieve the best price the fewer restrictions in the Special Conditions the higher the price. APs are astute in identifying opportunities to obtain increases in site area, site coverage, plot ratio and bonus plot ratio. The more open the Special Conditions the more highly the prospective tenderer is likely to rate the chances of obtaining such benefits. This is reflected in the price paid. It probably happened in this case.

The Classification of the Site

10.3 From the outset the intention of the Lands Department was that the Site should be developed as a Class C site but with the Pink Hatched Black Area as a necessary street. Streets could not be included in a site area and there was a draft clause making this clear. All this was done on the Buildings Department's advice. When the advice was given the Buildings Department was not aware that the government land on the south-east was an EVA which was significant in deciding whether it was a street. As we have described the draft clause excluding the Pink Hatched Black Area from site area was omitted from the final tender conditions. This left it open to the AP to make the successful application that the government land on the south-east was a street. In consequence he was able to include the Pink Hatched Black Area in the calculation of site area.

The Reserved Areas

10.4 The government does not plan a development. This is left to the developer and more innovative treatment often results. The Control Drawing was intentionally “not to scale” and no dimensions were provided for the “Reserved Areas”. These tender documents also gave the developer an opportunity to benefit by dedicating the “Reserved Areas” and be compensated by bonus plot ratio. We have described earlier how this came about. In fact the developer benefited considerably but only by dedicating areas which it had purchased in the tender. The legislation provides for compensation in these circumstances. However, the public also benefited from a better PTT which was more open, more pleasant, better designed and probably safer.

The Dedication of Part of the Pink Cross Hatched Black Area

10.5 At one stage in the drafting of the Special Conditions a public right-of-way was to be given over this area. This was later limited so the public had no right of access. This variation had nothing to do with access to the PTT. At the time it had not been designed. However, the consequence was that the developer was able to take advantage by dedicating the area to give access to the PTT. Having dedicated this part he was also entitled to bonus.

The Exclusion of the Gross Floor Area of the Public Transport Terminus

10.6 A similar situation arose in relation to the PTT. As we have described at an early stage the draft Special Conditions contained a clause excluding the GFA of the Government Accommodation including the PTT from being counted. Following advice from the Buildings Department that under B(P)R23(3)(a) that the GFA of the PTT would be counted the clause was removed and the final Special Conditions were silent upon the issue.

10.7 Of course this background was unknown to any tenderer and the point was left open. Having regard to the inconsistent manner in which PTTs had been dealt with in the past it was inevitable that an application to exclude the GFA of the PTT would be made.

10.8 Leaving this point open in the lease was thought to be consistent with the policy to obtain the highest price. When assessing price bidders would take into account the opportunity to apply to the BA for exclusion and the chance of success. If one accepts the successful tenderer’s contention that it

bid on the basis that the GFA of the PTT would not be accountable, the policy was on one view successful.

The Financial Implication

10.9 We summarise the relevant points which we have made earlier in this report.

10.10 From the government's point of view this Tender and Sale appear to have been successful. The Site was identified and suitable for mixed development including Government Accommodation, commercial accommodation and residential accommodation. To this end the Quarry Bay OZP was amended. The intention from the outset and throughout was that the Site should be developed to its maximum potential under the BO and the B(P)R so that the highest possible price would be obtained. The Special Conditions for the tender were drafted with care and with these two aims in mind.

10.11 In order to obtain the highest price the lease conditions had few restrictions and the Control Drawing was not to scale. This gave the successful tenderer the scope to plan the development to maximum advantage and the opportunity to the AP to take such benefit as he could of increased GFA under the legislation.

10.12 As expected the AP was astute enough to take full advantage of the opportunities available. It is impossible to judge how the successful bid was calculated. However, the price paid was considerably more than the reserve price. In an open market situation in a highly sophisticated industry such as in Hong Kong the assumption is that all the factors were taken into account and the best market price was obtained.

10.13 There was hardly any financial implication for the government in what was done following the tender. Certainly there was none for the government in any of the decisions made by the BA. By this time, the Site had been sold. His decisions had no impact on revenue.

10.14 There are financial implications for the government if any modification to the lease is required or any amendments to the building plans are approved. These applications are made to the Lands Department which represents the government as landlord. In this case an amendment was applied for but there were difficulties partly caused by the absence of dimensions for the "Reserved Areas". These difficulties were not resolved until early in 2003.

10.15 It is worthy noting that during the drafting of the Special Conditions it was the intention that the GFA of the PTT should be included in the calculation. If a Special Condition had provided for this rather than leaving it open it is likely that the price offered at tender would have been lower. The developer later contended that at the time of the tender it understood that the PTT would be exempted. If so, this understanding would have been reflected to a limited extent in the price bid.

10.16 There is a question as to whether the government obtained full value for the lease when compared with the size of the buildings actually constructed. This is outside our terms of reference except for the comparison we make between the effect of the decisions we are tasked to consider and the total exemptions granted as a matter of policy under section 42 of the BO.

10.17 The exemptions available under section 42 of the BO and known to the developer at the time of the tender would be reflected to some extent in the price. However, we note that the Joint PN of the Buildings, Lands and Planning Departments offering exemptions under section 42 of the BO for balconies, sky gardens and the like was not issued until February 2001 which was after the tender. A second Joint PN was issued in February 2002 offering more exemptions under the “green” policy for features such as non-structural pre-fabricated external walls, utility platforms and mail delivery rooms. The developer obtained exemptions for these features. As the timing of these Joint PNs was after the tender it is unlikely that they were reflected in the price. However, the policy of exempting amenity, recreational features and the like under PNAP 116 was known and presumably was reflected in the successful bid.

10.18 These are general matters. We adhere to our view that there was no financial implication for the government in the decisions which we have been asked to examine.

Were the Building Authority’s Discretionary Powers Exercised Properly?

10.19 We have reviewed the BA’s decision on site classification and his exercise of discretion in the other cases. The one instance in which we think the discretion was wrongly exercised was in the decision to exclude the GFA of the PTT from calculation. This is primarily because we take a different view of the meaning of B(P)R23(3)(b) than that accepted and applied over many years by the BA. It was the meaning applied by the BAC and Mr Leung on legal advice. The only logical way in which the relevant PNAP could be

thought not to apply was on the basis that PTTs fell into a special category because of public benefit considerations.

10.20 Although the discretion was wrongly exercised no blame rests upon Mr Leung or upon those advising him at the BAC. They all considered this matter with the greatest care. They thought it right to seek legal advice on the point. We repeat that we have received no legal argument on the point and note in passing the remark by Lord Oliver when considering regulation 23(2)(a) in *Hinge Well Co. Ltd v Attorney General* [1988] 1 HKLR 32 at 43:

“The philosophy which underlines regulation 23 is effectively concealed by the Delphic obscurity with which the regulation is expressed....”

It applies equally to regulation 23(3)(b).

10.21 We will consider whether any lessons are to be learned from the BA’s decisions and whether “the concerned departments may better perform their functions in future” but first we have asked ourselves the following question.

Did Anything Go Wrong with this Development?

10.22 One of the perceived problems was that height, bulk and density of the completed development were too great and not sufficiently controlled. These factors should be controlled by the legislation. Indeed, this was the planning intention for this development. But as we have explained, the legislation necessarily allows both exclusions by “disregarding the floor space ” [B(P)R23(3)(b)], additions to the maximum GFA [B(P)R22] and, if “special circumstances render it desirable”, exclusions by modifications to the Ordinance under section 42 of the BO. When these provisions are applied the effect is to increase the GFA as well as the bulk, density and even the height of the buildings.

10.23 In this context the proper application of B(P)R23(3)(b) and of section 42 of the BO are essential. Otherwise the legislative control may be defeated.

10.24 In this case the total GFA permitted under the legislation was increased by factors other than the BA’s decisions we are tasked to examine. We report on these factors briefly because it is necessary to put the effect of the BA’s decisions we have reviewed into perspective.

10.25 The relevant factors to which we refer are:

- (a) The joint “Green and Innovative Buildings” policy of the Buildings, Lands and Planning Departments. Exemptions were granted under Joint PN No.1 for the balconies, wider corridors and lift lobbies, sky gardens and non-structural prefabricated walls;
- (b) Amenity features were exempted under PNAP 116. These included, a mail room, children’s play areas, a small swimming pool filtration plant, and some minor management facilities;
- (c) Lift concessions under PNAP 207; and
- (d) Other modifications of section 42 of the BO after application.

10.26 In the case of each of the above features exemption was granted by a modification of the regulations which otherwise would require the GFA to be included.

Gross Floor Area Exemptions Compared

10.27 The plans show that the Total Actual Domestic GFA was 135,451m². This does not reflect the total GFA constructed and the final bulk of the buildings. So that we may compare the effect which the BA’s decisions had upon the bulk with the total bulk constructed and with the effect of the other exemptions granted we have asked for broad figures. As the figures are peripheral to our main focus we have rounded them down. They are not to be taken as precise and we use them for general comparison only.

10.28 These figures show that the total GFA constructed was about 200,000m². This figure is reached by adding the exempted areas to the 135,451m² Total Actual Domestic GFA. Not including the PTT over 35,000m² were exempted under B(P)R23(3)(b). This figure is the result of normal application of the regulation. The PTT was also exempted under the same regulation. This amounted to 7,297m². In addition over 31,000m² were exempted by the use of section 42 of the BO under the policies we have earlier described.

10.29 These figures speak for themselves when compared with the bonus GFA of 10,700m² granted as compensation for areas dedicated for public

passage, the 1,940m² for the inclusion of the Pink Hatched Black space in the Site area and the 7,297m² exempted for the PTT in the decisions we have considered.

Concern about the Legislative Control

10.30 When this comparison has been made our concern is that the provisions of the BO and the regulations which are intended to control the height, bulk and density of buildings are being watered down by the way in which the legislation is being applied. We have already explained why we are of the opinion that B(P)R23(3)(b) was wrongly applied to exempt the PTT.

10.31 We make it clear that nothing we say is intended to criticise the policy jointly agreed by the Planning, Lands and Buildings Departments for encouraging green and innovative buildings. Nor do we criticise the aim to encourage more amenities, facilities and public space. These policies are entirely praiseworthy and to be encouraged in themselves. They improve people's lives.

10.32 We accept that in order to achieve these aims advantages have to be given to developers otherwise few will include these features in their plans. In this development the policy may be said to be successful. Our concern is whether in order to achieve the policies the legislative control is being eroded.

10.33 The misapplication of the regulation to the PTT is put into perspective by the 31,000m² or so which were exempted under section 42 of the BO. Most of these exemptions were for green, recreational amenity features and the like. This indicates a dilution of the intended legislative control.

10.34 With this in mind we note that section 42(1) of the BO reads :

“Where in the opinion of the Building Authority *special circumstances render it desirable* he may, on receipt of an application therefor ... permit by notice in writing modifications of the provisions of this Ordinance.” (Emphasis added)

10.35 There must be serious doubt whether this section can properly be applied within its true meaning for routine exemptions specified in PNAPs which “render it desirable” to modify the Ordinance, rather than “special circumstances which render it desirable”. But beyond making the comparison above this is not within the Committee's terms.

10.36 Had the control under the legislation been imposed strictly by applying B(P)R23(3)(b) as we suggested, and had only “special circumstances” being exempted under section 42 of the BO the bulk of the buildings in the development would have been substantially reduced.

10.37 The cumulative effect of the exemptions was to reduce the control so that the height, bulk and density of the buildings (on a subjective view) became too great. The few decisions and exercise of discretion with which the Committee is concerned had a comparatively limited effect.

10.38 We return to this in our recommendations.

PART III

VIEWS AND RECOMMENDATIONS

CHAPTER 11

RECOMMENDATIONS ON HOW CONCERNED DEPARTMENTS MAY BETTER PERFORM THEIR FUNCTIONS

11.1 The Committee's recommendations concern the following:

- (a) Assisting the BA's task by ensuring that the lease conditions are clear upon what is required, certain upon what the tenderer is paying for and specific about the development which is to be permitted;
- (b) Ensuring that control of development – particularly relating to height, bulk and density – is maintained. Under legislation by its proper application and amendment if necessary. Through Planning, the OZP and the lease conditions by early and thorough consultation between the three departments mainly concerned;
- (c) That action already undertaken to examine the imposition of maximum GFA and capping exemptions and bonus GFA as means of control be urgently pursued; and
- (d) Encouraging measures already in place to increase cooperation and coordination between the departments and the Bureau.

11.2 The suggestions we have received from both the relevant government departments and the professional institutions and associations in the industry relevant to our inquiry fall into two general categories :

- (a) Suggestions for the better control of height, bulk and density; and
- (b) Suggestions for improving the procedures followed by the Planning, Lands and Buildings Departments.

11.3 These suggestions and our recommendations all have an effect upon the exercise of discretion by the BA.

Control of Height, Bulk and Density

11.4 For the reasons which we have outlined in various parts of this report if the planning intention is to allow the maximum development potential under the legislation it does not always prove a sufficiently effective control of height, bulk and density. Where exemptions are granted even from laudable motives the ordinary limits provided for maximum GFA may be exceeded with undesirable results.

Legislative Control

11.5 Development is controlled through the legislation. This provides a reasonably understandable and workable system. This control has served Hong Kong well. But our inquiry leads us to think that this is being eroded and becoming uncertain. This may be the result of misapplication of B(P)R23(3)(b) as in the case of the PTT. Also it may be caused by routine use of section 42 of the BO to exempt desirable facilities instead of for resolving difficulties in special circumstances.

11.6 As the development of government land is of such importance to the revenue in Hong Kong we recommend that the use of these powers should be examined. The aim should be to amend provisions if necessary and in any event to ensure that its provisions are properly applied. Any expression of opinion on the law is with the reservations we have made earlier in this report.

11.7 The establishment of control by other means should not be used to avoid this examination and application of the legislation.

Control in Other Ways

11.8 We recommend also that control of height, bulk and density should be considered by the Planning Department and the Town Planning Board. The control may be by imposing a maximum GFA where appropriate and if necessary a height restriction as well. We accept that imposing a maximum for GFA may not be entirely without complication. Any control would need careful drafting. We are aware that the imposition of maximum GFA in the lease conditions is already being considered by the Bureau.

11.9 Any imposition of maximum GFA will not be effective if the BA later allows the exemptions so that the maximum is exceeded. It would be

necessary for any Special Conditions to be drafted so that the developer could not take advantage in this way.

11.10 The Director of Planning informed the Committee that consideration is being given to imposing a cap on the exemptions from counting GFA and bonus GFA which may be granted. This is another way in which control may be restored. The Joint PN of the Buildings, Lands and Planning Departments caps the exemptions for green facilities at 8% of the total GFA but sky and podium gardens are excluded from this cap.

The Special Conditions

11.11 We have noted that the draft Special Conditions were varied after they had been approved at the District Lands Conferences without informing the relevant departments. One such variation was the omission of clauses concerning the Pink Hatched Black Area relevant to the BA's decision on site classification. It seems to the Committee that the relevant departments should consider whether this practice needs review.

11.12 Any height restriction or maximum GFA limitation should be reflected in the Special Conditions for the sale.

11.13 We consider it would assist the exercise of discretion by the BA if in relation to major developments the Planning Department, the Lands Department and the Buildings Department under the guidance of the Bureau give careful attention to the provisions of the Special Conditions which may impinge upon this discretion. Even before June 1973 an Appeal Tribunal constituted under section 43 of the BO said :

“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 land can be developed since the purchase price will reflect this development potential.”

11.14 This ought to remain the standard aim for the drafting of the Special Conditions. If a particular result is required then the Special Conditions should be drafted so as to achieve the result, even if clauses are inserted for the avoidance of doubt and even the developer is prevented from applying for some benefit from the BA. We recognise this may involve compromising the policy of achieving the highest possible price. In the present case, for example, the Special Conditions could have plainly required the Pink Hatched Black Area to be constructed as a street and not counted for site area to make the Site Class C.

Some of the difficulties concerned with the dedication of the Reserved Areas could have been avoided with the inclusion of dimensions. Also, if it was the intention that the PTT should be counted in the calculation of GFA, a provision to this effect could have been included. We accept that in these circumstances the price paid may have been lower. If height, bulk and density need further control this may be a consequence.

11.15 In short the aim should be to ensure that the lease conditions are clear upon what is required, certain upon what the tenderer is paying for and specific about the development which is to be permitted.

The Public Transport Terminus

11.16 We note that since July 2005 PNAP 13 includes specific provisions for a PTT in paragraph 12,

“The BA generally accepts that public and private car parks, and public transport termini provided in buildings are space for parking or loading and unloading of motor vehicles falling within the meaning of B(P)R 23(3)(b).”

Paragraph 12(ii) specifically deals with a PTT in these terms :

“Public Transport Terminus (PTT)

The BA would take the advice of the Planning Department in determining the effect of excluding PTT from GFA calculation on the infrastructure, density and building bulk. As Planning Department has advised that the town planning intention is that all PTT should count for GFA calculation unless otherwise provided for in the relevant town plan, hence as a general rule, unless otherwise specified in the relevant town plan or any specific planning approval for the site, all PTT should be accountable for GFA.”

11.17 We have expressed our view about the applicability of the regulation which we maintain. We note that the PTT continues to be considered a special case under the regulation.

More Guidelines?

11.18 We have received some suggestions that the guidelines for the exercise of discretion by the BA should be made more precise and provided to all professionals. The point is that the exercise of discretion should be more

open and the process transparent which was Mr Leung's aim in the augmented BAC on 1 August 2001.

11.19 We agree with this aim but doubt whether increasing the rigidity of the guidelines and PNAPs would achieve the desired result. The consequence may simply be increased difficulty for the BA. The problem which Mr Leung faced in dealing with the PTT may have been removed. However, the difficulty in applying "public benefit" test in those circumstances was highlighted. Exercising discretion in the public interest is necessarily uncertain and difficult. However, once B(P)R23(3)(b) is properly understood and is applied strictly to provisions which serve the parent building or its occupants these difficulties evaporate.

Should the Building Authority have Power to Amend the Lease?

11.20 Finally, on the exercise of discretion one suggestion has been that the discretion exercised by the BA should be effective against other departments. In other words the lease conditions could be varied by his ruling. Whereas this is an attractive and practical answer it is not acceptable. A third party cannot vary a contract made between others. Further, this is inconsistent with the three tier control over land development. This point raises the next matter which we consider.

Procedural Recommendations

11.21 We have received suggestions that there should be increased coordination and cooperation between Departments.

11.22 As the three departments concerned with the planning, sale and development of government land have quite different responsibilities and functions increasing coordination and cooperation between them and streamlining the procedures involved is not easy. Much responsibility in this respect rests with the Bureau and meetings are held under its leadership to find practical means in which they can work together better.

11.23 One practical result has been the issue of Joint PNs by the Buildings, Lands and Planning Departments to encourage the inclusion of desirable facilities in a development. The Joint PNs ensure that the lease conditions and the exercise of powers by the BA are coordinated.

11.24 We note also that the Bureau seeks to resolve any difficulties which may arise between the departments. This is a function which it should readily undertake when necessary.

11.25 If more control is imposed at the planning stage and during the drafting of the Special Conditions close cooperation between the three departments will be necessary. Obviously if this is to be achieved some administrative structure will be necessary but we cannot express any useful opinion on this. With the same line of thought one of the professional bodies suggested that the BAC should include a representative from the Planning Department and one from the Lands Department as part of its establishment. This suggestion is worth considering.

11.26 Cooperation and coordination are particularly important in a major development such as this.

The Ultimate Aim

11.27 The aim should be to ensure that planning intentions and lease conditions are open, certain and fair. The departments concerned should have a concept of what they wish to achieve in a development and ensure that the lease conditions achieve that result. A tenderer should know exactly what it is bidding for and the successful developer must know what it has bought. This will assist the BA's exercise of discretion even though he acts independently of the lease. Also the tendency will be to reduce the number of applications.

11.28 The consequence of greater certainty and less scope for a developer to apply to the BA for benefits may lower the price. On the other hand the competition may be keener when those bidding are aware with certainty of the development potential. These are policy matters. We recommend this approach under our terms of reference to assist the BA in his task.

Acknowledgements

Acknowledgements

The Committee expresses particular gratitude to all those who have assisted in its inquiry. They are individually listed below.

Especially we thank Mrs Hedy Chu and each member of her staff. The report could not have been produced without their dedication and hard work over weekends, long and late hours. Only in Hong Kong is such dedication to public service demonstrated.

The Translation Units, Official Languages Division, Civil Service Bureau and Official Languages Section, Central Administration Unit, Housing Planning and Lands Bureau require a separate acknowledgment for their hard work over long hours and weekends to provide the translation on time.

The Professional Institutes and Associations listed each made particularly valuable suggestions for improvements. We are grateful to them. We would also like to thank the member of public who wrote to us.

Each Government Department that we approached gave the Committee their special help and cooperation. We asked for replies in unreasonably short spaces of time which were complied with meticulously.

Finally, we thank those who agreed to assist by giving oral evidence and answering our written questions. Some did so at considerable personal inconvenience. Not one person declined our invitation to attend.

We therefore acknowledge our gratitude to each of the following :-

The Hong Kong Institute of Architects

The Hong Kong Institution of Engineers

The Hong Kong Institute of Planners

The Hong Kong Institute of Surveyors

The Real Estate Developers Association of Hong Kong

Housing, Planning and Lands Bureau

The Hon Michael SUEN, GBS, JP Secretary for Housing, Planning and Lands

Architectural Services Department

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Mr NG Siu-chai	Senior Architect

Buildings Department

Mr CHEUNG Hau-wai, JP	Director of Buildings
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Highways Department

Mr Mak Chai-kwong, JP	Director of Highways
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Lands Department

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Former Directors

Mr LEUNG Chin-man, JP	Former Director of Buildings
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The Secretariat of the Committee

Mrs Hedy CHU	Mr Benedict LI	Mr Paul WONG
Ms Iris NGAN	Ms Sarina WONG	Ms Elisa LEUNG

APPENDIX

Acronyms and Abbreviations

AC for T/U	Assistant Commissioner for Transport (Urban)
AP	Authorised Person
BA	Building Authority
BAC	Building Authority Conference
BD	Buildings Department
BO	Buildings Ordinance
B(P)R	Building (Planning) Regulations
CBCT	Cross Boundary Coach Terminus
CBS	Chief Building Surveyor
CBS/HD	Chief Building Surveyor/Housing Development
CBS/HKE	Chief Building Surveyor/Hong Kong East
CHE/HK	Chief Highway Engineer/Hong Kong
CTA/SP	Chief Technical Advisor/Subvented Project
DLO/HKE	District Lands Officer/Hong Kong East
D of FS	Director of Fire Services
D of J	Department of Justice
DPO/HK	District Planning Officer/Hong Kong

EVA	Emergency vehicle access
GFA	gross floor area
“G/IC”	“Government, Institution or Community”
HOUSCOM	Steering Committee on Land Supply for Housing
The Bureau	Housing, Planning and Lands Bureau
HyD	Highways Department
I.L.	Inland Lot
m²	square metres
MPOA	Marine Police Operational Area
NOFA	net operational floor area
“O”	“Open Space”
“OU”	“Other Specified Uses”
OZP	Outline Zoning Plan
PlanD	Planning Department
PN	Practice Note
PNAP	Practice Notes for Authorised Persons and Registered Structural Engineers
PR	Plot Ratio
PTT	Public Transport Terminus

PWD	Public Works Department
SCs	Special Conditions
SE/E&G, TD	Senior Engineer/Eastern & General, Transport Department
SGC	Senior Government Counsel
SS/LACO	Senior Solicitor/Hong Kong East, Legal Advisory and Conveyancing Office/Hong Kong of Lands Department
TD	Transport Department

ANNEXES

Advertisement placed by the Committee

Independent Committee of Inquiry on the Sai Wan Ho Development on Inland Lot No. 8955

The Chief Executive of the Hong Kong Special Administrative Region Government has appointed an Independent Committee of Inquiry (the Committee) to look into the Sai Wan Ho Development on Inland Lot No. 8955. The terms of reference of the Committee are as follows:

- (a) to examine the procedures in approving the site classification, Gross Floor Area (GFA) exemption for the Public Transport Terminus and bonus GFA for dedication of the reserved area for public passage in respect of the Sai Wan Ho building plans application, including how and under what circumstances the Building Authority's discretionary powers are exercised;
- (b) having regard to the findings in (a), to review and advise on whether the Building Authority's discretionary powers have been exercised properly and how the concerned departments may better perform their functions in these areas in future; and
- (c) to submit a report with conclusions and recommendations to the Chief Executive in around three months' time.

Organizations, interested parties and members of the public are invited to provide information and views in writing on issues relevant to the terms of reference of the Committee. Written submissions (in Chinese or English) should be sent to the Committee Secretariat. The address and contact numbers are as follows:

**Address - The Secretariat of the Independent Committee
of Inquiry on the Sai Wan Ho Development
on Inland Lot No. 8955
Room 1711, 17/F, Murray Building,
Garden Road,
Hong Kong**

**Fax - 2186 8301
E-mail - irisogan@ici.org.hk
Enquiry - 2186 7667**

Submissions received will be made available to the Committee for consideration. Submissions should be marked "Confidential" if necessary. The closing date for submission is 16 January 2006.

Government Bureaux/Departments from which the Committee sought assistance

Housing, Planning and Lands Bureau
 Architectural Services Department
 Buildings Department
 Highways Department
 Lands Department
 Planning Department

Witnesses who appeared before the Committee to give oral evidence***Architectural Services Department***

Mr YUE Chi-hang, JP	Director of Architectural Services
Mr NG Siu-chai	Senior Architect

Buildings Department

Mr CHEUNG Hau-wai, JP	Director of Buildings
Mr HUI Siu-wai	Chief Buildings Surveyor (Hong Kong East)

Lands Department

Mr LAU Lai-chiu, Patrick, JP	Director of Lands
Mr John CORRIGALL, JP	Deputy Director of Lands (General)
Mr CHEUNG Yiu-king, Gary	District Lands Officer/Hong Kong East

Planning Department

Mr FUNG Chee Keung, Bosco, JP	Director of Planning
Ms WONG Yuen Sheung, Ophelia	Deputy Director of Planning (District)
Ms TSE kin-ching, Christine	District Planning Officer (Hong Kong)

Former Directors

Mr LEUNG Chin-man, JP	Former Director of Buildings
Mr Robert D POPE, SBS	Former Director of Lands

Extracts of Relevant Legislation

Buildings Ordinance

Chapter 123

42. Building Authority's powers of exemption

(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 modifications of the provisions of this Ordinance. (*Amended 44 of 1959 s. 22; 68 of 1993 s. 20*)

(2) Every application for an exemption under this section shall be in the specified 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. (*Amended 44 of 1959 s. 22; 68 of 1993 s. 20*)

(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.

(5) This section shall not apply to section 14. (*Replaced 44 of 1959 s. 22*)

(6) The breach of or failure to perform or to consent to any condition attached to a modification or exemption granted under this section shall render such modification or exemption invalid, and thereupon the purported grant of such modification or exemption shall be no defence to any proceedings for non-compliance with the provisions of this Ordinance.

Building (Planning) Regulations
Chapter 123
Subsidiary Legislation

**19. General provisions concerning
site coverage and plot ratio**

(1) Where a site abuts on a street not less than 4.5 m wide or on more than one such street the maximum site coverage permitted in respect of a building or buildings to be erected thereon shall be determined in accordance with regulation 20 and the permitted plot ratio of such building or buildings shall be determined in accordance with regulation 21.

(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 or buildings shall be determined by the Building Authority.

(L.N. 406 of 1987)

19A. (Repealed L.N. 406 of 1987)

20. Permitted site coverage

(1) Subject to regulation 22 and depending on the height of the building— *(L.N. 78 of 1970; L.N. 406 of 1987)*

- (a) the site coverage for a domestic building, or for the domestic part of a composite building, on a class A site shall not exceed that percentage of the area of the site specified in the second column of the First Schedule;
- (b) the site coverage for a domestic building, or for the domestic part of a composite building, on a class B site shall not exceed that percentage of the area of the site specified in the third column of the First Schedule; and
- (c) the site coverage for a domestic building, or for the domestic part of a composite building, on a class C site shall not exceed that percentage of the area of the site specified in the fourth column of the First Schedule.

(2) Subject to regulation 22 and paragraph (3) and depending on the height of the building— *(L.N. 78 of 1970; L.N. 406 of 1987)*

- (a) the site coverage for a non-domestic building, or for the non-domestic part of a composite building, on a class A site shall not exceed that percentage of the area of the site specified in the eighth column of the First Schedule;
- (b) the site coverage for a non-domestic building, or for the non-domestic part of a composite building, on a class B site shall not exceed that percentage of the area of the site specified in the ninth column of the First Schedule; and
- (c) the site coverage for a non-domestic building, or for the non-domestic part of a composite building, on a class C site shall not exceed that percentage of the area of the site specified in the tenth column of the First Schedule.

(3) Subject to the provisions of paragraph (4), the site coverage for a non-domestic building, or for the non-domestic part of a composite building, on a class A, B or C site may, whatever the height of the building, exceed the permitted percentage site coverage to a height not exceeding 15 m above ground level. (*L.N. 294 of 1976*)

(4) For the avoidance of doubt, it is hereby declared that, where pursuant to paragraph (3) the permitted percentage site coverage is exceeded—

(a) above the level to which the permitted percentage site coverage is exceeded, the site coverage for the building or any part thereof shall not, subject to regulation 22, exceed the site coverage permitted under paragraph (1) or (2), as the case may be; and (*L.N. 406 of 1987*)

(b) the plot ratio for the whole building shall not, subject to regulation 22, exceed the permitted plot ratio. (*L.N. 406 of 1987*)

(5) In this regulation, the expression "permitted percentage site coverage" (准許上蓋面積百分率) means the maximum site coverage permitted under paragraph (2).

(*G.N.A. 97 of 1962*)

21. Permitted plot ratio

(1) Subject to regulation 22 and depending on the height of the building— (*L.N. 78 of 1970; L.N. 406 of 1987*)

(a) the plot ratio for a domestic building on a class A site shall not exceed the plot ratio specified in the fifth column of the First Schedule;

(b) the plot ratio for a domestic building on a class B site shall not exceed the plot ratio specified in the sixth column of the First Schedule;

(c) the plot ratio for a domestic building on a class C site shall not exceed the plot ratio specified in the seventh column of the First Schedule;

(d) the plot ratio for a non-domestic building on a class A site shall not exceed the plot ratio specified in the eleventh column of the First Schedule;

(e) the plot ratio for a non-domestic building on a class B site shall not exceed the plot ratio specified in the twelfth column of the First Schedule; and

(f) the plot ratio for a non-domestic building on a class C site shall not exceed the plot ratio specified in the thirteenth column of the First Schedule.

(2) Subject to regulation 22, the plot ratio for the domestic part of a composite building shall not exceed the product of the difference between the permitted plot ratio for the building if it were a non-domestic building and the actual plot ratio of the non-domestic part of the building and the permitted plot ratio for the building if it were a domestic building divided by the permitted plot ratio for the building if it were a non-domestic building. (*L.N. 78 of 1970; L.N. 406 of 1987*)

(3) For the purposes of this regulation and of regulations 19, 20 and 22, the plot ratio of a building shall be obtained by dividing the gross floor area of the building by the area of the site on which the building is erected.

(*G.N.A. 97 of 1962*)

**22. Permitted site coverage and plot ratio
may be exceeded in certain cases**

(1) Where, between ground level and a height of not less than 5.5 m or, where the Building Authority is satisfied that there will be no obstruction to vehicular traffic using the street, 3.3 m above ground level, a building on a class A, B or C site is set back from a boundary of the lot on which it is erected, being a boundary that abuts on a street, and, with the consent of the Government, the part of the lot that is thereby not built upon is dedicated to the public for the purposes of passage— (*L.N. 406 of 1987; L.N. 57 of 1988*)

- (a) the site coverage for the building or for any one part of the building may exceed the permitted percentage site coverage, so, however, that the site coverage therefor does not exceed that percentage of the area of the site equal to the sum of the permitted percentage site coverage for the building or for that part of the building, as the case may be, and the figure obtained by dividing the product of 1500 and the area of the lot so dedicated to the public by the product of the area of the site and the height of the building; and
- (b) the plot ratio for the building or, if the building is a composite building, for the domestic part of the building may exceed the permitted plot ratio, so, however, that the plot ratio therefor is not greater than the permitted plot ratio for the building or for that part of the building, as the case may be, by more than 20 per centum or does not exceed the sum of the permitted plot ratio for the building or for that part of the building, as the case may be, and the figure obtained by dividing the product of 5 and the area of the lot so dedicated to the public by the area of the site on which the building is erected, whichever is the less. (*L.N. 294 of 1976*)

(2) Where part of a lot, being a part that abuts on a street, is acquired by the Government, either by agreement or by resumption under the Lands Resumption Ordinance (Cap. 124), for the purpose of street widening, the Building Authority may permit—

- (a) the site coverage for a building erected on that lot, being a class A, B or C site, or for any one part of the building to exceed the permitted percentage site coverage, so, however, that the site coverage therefor does not exceed that percentage of the area of the site equal to the sum of the permitted percentage site coverage for the building or for that part of the building, as the case may be, and the figure obtained by dividing the product of 1 500 and the area of the part of the lot so acquired by the Government by the product of the area of the site and the height of the building; and (*L.N. 294 of 1976*)
- (b) the permitted plot ratio for the building or, if the building is a composite building, for the domestic part of the building to exceed the permitted plot ratio, so, however, that the plot ratio therefor is not greater than the permitted plot ratio for the building or for that part of the building, as the case may be, by more than 20 per centum or does not exceed the sum of the permitted plot ratio for the building or for that part of the building, as the case may be, and the figure obtained by dividing the product of 5 and the area of the part of the lot so acquired by the Government by the area of the site on which the building is erected, whichever is the less. (*29 of 1998 s. 27*)

- (3) For the avoidance of doubt, it is hereby declared that—
- (a) where under paragraph (1) or (2) the permitted percentage site coverage is exceeded in relation to a part of a building, the site coverage for any other part of the building shall not exceed the permitted percentage site coverage;
 - (b) nothing in this regulation shall be taken or construed as derogating from the provisions of regulation 25 as to the amount of open space to be provided about a domestic building.
- (4) In this regulation, the expression “permitted percentage site coverage” (准許上蓋面積百分率) means the maximum site coverage permitted under paragraph (1) or (2), as the case may be, of regulation 20.
- (G.N.A. 97 of 1962)*

**23. Provision supplementary to regulations
19, 20, 21 and 22**

(1) For the purposes of regulations 20, 21 and 22, the height of a building shall be measured from the mean level of the street or streets on which it fronts or abuts being a street or streets not less than 4.5 m wide, or where the building abuts on streets not less than 4.5 m wide having different levels, from the mean level of the lower or lowest of such streets, to the mean height of the roof over the highest usable floor space in the building. *(L.N. 406 of 1987)*

(2) In determining for the purposes of regulation 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; and
 - (b) there shall be included any area dedicated to the public for the purposes of passage.
- (3) (a) Subject to sub-paragraph (b), for the purposes of regulations 19, 20, 21 and 22, the gross floor area of a building shall be the area contained within the external walls of the building measured at each floor level (including any floor below the level of the ground), together with the area of each balcony in the building, which shall be calculated from the overall dimensions of the balcony (including the thickness of the sides thereof), and the thickness of the external walls of the building.

(b) In determining the gross floor area for the purposes of regulations 20, 21 and 22, the Building Authority may disregard any floor space that he is satisfied is constructed or intended to be used solely for parking motor vehicles, loading or unloading of motor vehicles, or for refuse storage chambers, refuse storage and material recovery chambers, material recovery rooms, refuse storage and material recovery rooms, refuse chutes, refuse hopper rooms and other types of facilities provided to facilitate the separation of refuse to the satisfaction of the Building Authority, or for access facilities for telecommunications and broadcasting services, or occupied solely by machinery or equipment for any lift, air-conditioning or heating system or any similar service. *(L.N. 406 of 1987; 39 of 2000 s. 7)*

(4) For the purposes of regulations 19, 20, 21 and 22, the Building Authority may treat as a non-domestic building a composite building in which the only domestic part of the building is a place of residence, not having more than 50 m² of usable floor space, for a caretaker or other person employed in connexion with the building or a service provided therefor or a residence comprising the top storey of the building, or both. *(L.N. 294 of 1976)*

(G.N.A. 97 of 1962; L.N. 54 of 1969)

FIRST SCHEDULE

[regs. 20 & 21]

PERCENTAGE SITE COVERAGES AND PLOT RATIOS

Height of building in metres	Domestic buildings						Non-domestic buildings					
	Percentage site coverage			Plot ratio			Percentage site coverage			Plot ratio		
	Class A site	Class B site	Class C site	Class A site	Class B site	Class C site	Class A site	Class B site	Class C site	Class A site	Class B site	Class C site
Not exceeding 15 m	66.6	75	80	3.3	3.75	4.0	100	100	100	5	5	5
Over 15 m but not exceeding 18 m	60	67	72	3.6	4.0	4.3	97.5	97.5	97.5	5.8	5.8	5.8
Over 18 m but not exceeding 21 m	56	62	67	3.9	4.3	4.7	95	95	95	6.7	6.7	6.7
Over 21 m but not exceeding 24 m	52	58	63	4.2	4.6	5.0	92	92	92	7.4	7.4	7.4
Over 24 m but not exceeding 27 m	49	55	59	4.4	4.9	5.3	89	90	90	8.0	8.1	8.1
Over 27 m but not exceeding 30 m	46	52	55	4.6	5.2	5.5	85	87	88	8.5	8.7	8.8
Over 30 m but not exceeding 36 m	42	47.5	50	5.0	5.7	6.0	80	82.5	85	9.5	9.9	10.2
Over 36 m but not exceeding 43 m	39	44	47	5.4	6.1	6.5	75	77.5	80	10.5	10.8	11.2
Over 43 m but not exceeding 49 m	37	41	44	5.9	6.5	7.0	69	72.5	75	11.0	11.6	12.0
Over 49 m but not exceeding 55 m	35	39	42	6.3	7.0	7.5	64	67.5	70	11.5	12.1	12.6
Over 55 m but not exceeding 61 m	34	38	41	6.8	7.6	8.0	60	62.5	65	12.2	12.5	13.0
Over 61 m	33.33	37.5	40	8.0	9.0	10.0	60	62.5	65	15	15	15

(L.N. 294 of 1976)

**Diagram showing the Location of
Pink Hatched Black Area and Pink Cross Hatched Black Area**

