

APPEAL TRIBUNAL (BUILDINGS)  
STATEMENT PURSUANT TO REGULATION 4 OF  
THE BUILDING (APPEAL) REGULATION  
CASE NO. 602/2004

26-30 Beach Road, Repulse Bay, RBL 368 RP, Hong Kong

BETWEEN

GOLDSHINE INVESTMENT LIMITED

Appellant

and

THE BUILDING AUTHORITY

Respondent

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**DECISION**  
**(Preliminary Hearing)**

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Introduction

- 1 This is the decision of the Appeal Tribunal in respect of the preliminary hearing held on 13<sup>th</sup> September 2005. The preliminary hearing was held in accordance with Section 49(1) of the Buildings Ordinance to determine whether good cause has been shown for holding a full hearing.
- 2 Leading Counsel for the Appellant and Counsel for the Respondent have provided detailed written and oral submissions both prior to and during the preliminary hearing. We have fully and carefully considered both parties' submissions before making the determination. As indicated to the parties at the conclusion of the preliminary hearing, the reasons for the determination in respect of the preliminary hearing will be given at the same time as the reasons for the determination of the appeal.

### Our Determination

- 3 In our view, the appeal is not wholly lacking in merit or frivolous and vexatious. The Appellant has therefore shown good cause for holding a full hearing.
- 4 The Respondent's application for an order dismissing the appeal is therefore refused. A full hearing of the appeal shall be held pursuant to Section 49(2) of the Buildings Ordinance.

### Directions

- 5 The following directions are given:-
  - (a) Leave be granted to the Appellant, if so advised, to amend the grounds of appeal contained in the Statement of Particulars dated 5<sup>th</sup> January 2005, in substantially the terms referred to in paragraph 6 of the Appellant's Skeleton Argument dated 9<sup>th</sup> September 2005. Any Amended Statement of Particulars shall be served on the Respondent and the Appeal Tribunal within 14 days from the date of service of this Decision on the parties;
  - (b) Leave be granted to the Respondent within 14 days thereafter, if so advised, to amend the Respondent's Representations dated 30<sup>th</sup> March 2005, limited to any amendments which are consequential upon the amendments referred to in paragraph 5(a) above. Any Amended Respondent's Representations shall be served on the Appellant and the Appeal Tribunal within the same period of 14 days;
  - (c) At least 21 days before the hearing, each party shall state in writing to the other party and the Appeal Tribunal what information contained in documents or amended documents (if any) specified in regulations 4 and 5 of the Building (Appeal) Regulation is agreed and what is not agreed;
  - (d) At least 14 days before the hearing, each party shall furnish the other party and the Appeal Tribunal with witness statements and/or expert reports;
  - (e) At least 7 days before the hearing, each party shall underline those matters stated in other party's witness statements and/or expert reports which are not

agreed and serve the marked up copies on the other party and the Appeal Tribunal;

- (f) At least 5 days before the hearing, each party shall furnish the other party and the Appeal Tribunal with:-
- (i) A written opening submission including a list of issues; and
  - (ii) A list of authorities with particulars of the extracts upon which the party relies;
- (g) The hearing of the appeal shall be fixed in consultation between the parties and the Appeal Tribunal with an estimated hearing duration of 4 days;
- (h) A site visit shall be arranged prior to the hearing in consultation between the parties and the Appeal Tribunal;
- (i) Liberty to apply; and
- (j) Costs of and occasioned by the amendments referred to in paragraph 5(a) and paragraph 5(b) above shall be to the Respondent in any event. Costs of the preliminary hearing shall be costs in the cause of the appeal.

Dated this 5th day of October 2005.

**[SIGNED]**

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Mr Wyn Hughes  
Chairman

**[SIGNED]**

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Prof. Huang Ju Chang, Howard  
Member

**[SIGNED]**

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Mr Lai Siu Kin, Rembert  
Member

**[SIGNED]**

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Mr Tam Chan Nin, Paul  
Member

Case No. 602-2004

APPEAL TRIBUNAL (BUILDINGS)

BUILDINGS ORDINANCE CAP 123

IN THE MATTER OF APPEAL CASE NO. 602-2004

26-30 BEACH ROAD, REPULSE BAY, RBL 368 RP, HONG KONG

BETWEEN:

GOLD SHINE INVESTMENT LIMITED

Appellant

and

BUILDING AUTHORITY

Respondent

Before: Mr. Wyn Hughes (Chairman), Professor Howard Huang Ju Chang, Mr. Rembert Lai Siu Kin, Mr. Paul Tam Chan Nin (Tribunal Members)

Dates of hearing: 22-24 March, 27 March 2006

Date of decision: 12th June 2006

Mr. Anthony Neoh SC and Ms. Barbara Wong instructed by Messrs. Bernard Wong & Co. for the Appellant

Mr. Russell Coleman and Ms. Yasmin Mahomed instructed by the Department of Justice for the Respondent

## DECISION

### **1. Introduction**

1. The Appellant is a property developer and a subsidiary of the Emperor group of companies. It proposes to build a commercial development at RBL 368 RP, 26 – 30 Beach Road, Repulse Bay, Hong Kong (“the Site”).

2. The Site abuts Beach Road and is adjacent to the Repulse Bay beach. It was formerly occupied by the Lido Complex which was demolished in late 2002. A site visit was carried out by the members of the Tribunal on 24 February 2006. The Site is at present vacant except for the excavated foundations of the Lido, recently executed piling works and some construction hoarding.
3. The greater part of the Site falls within an area zoned "Other Specified Uses" annotated "Beach Related Leisure Use" ("OU(BRLU)") on the relevant Outline Zoning Plan ("OZP"). A small part of the Site falls within an area zoned "Government, Institutional or Community" on the OZP.
4. The Notes to the OZP under "Remarks" for the OU(BRLU) zone contain the following statement: *"No new development, or addition, alteration and/or modification to or redevelopment of an existing building shall result in a total development and/or redevelopment in excess of a maximum building height of two storeys or the height of the existing building, whichever is the greater."*
5. After submitting various schemes for approval, the Appellant submitted plans to the respondent, the Building Authority for approval under section 14 of the Buildings Ordinance on 25 October 2004 ("the October 2004 Submission").
6. The Building Authority rejected the October 2004 Submission pursuant to section 16(1)(d) of the Buildings Ordinance on 25 November 2004. The reason for the disapproval, so far as it concerns this appeal, was stated in paragraph 7A(a) of the Building Authority's disapproval letter, as follows: *"Your proposal contravenes the draft Shouson Hill & Repulse Bay OZP No. S/H/17/8 in that the proposed 6-storey building exceeds the maximum 2-storey building height restriction as stipulated in the Notes to the OZP."*
7. The Appellant appeals to this Tribunal against the disapproval in relation to the above reason. Two other minor or technical reasons for disapproval were relied upon by the Building Authority and have not been appealed. It is common ground that the two minor or technical points can and should be dealt with by resubmission of compliant plans to the Building Authority.

## 2. Background

8. A chronology of the main events relevant to the appeal is appended to this Decision.
9. The Appellant called three witnesses: Mr. Elwyn Chan, general manager of the property department; Mr. Kevin Shu Keung Ng, architect and authorized person; and Mr. Ian Brownlee, a planning consultant. The Building Authority also called three witnesses: Mr. Cheung Kwok Man, a chief building surveyor in the Buildings Department; Mr. Kevin Chu Pan Ng, a senior town planner in the Planning

Department and Ms. Brenda Kit Ying Au, a chief town planner in the Town Planning Board Section of Planning Department. All of the foregoing witnesses provided one or more written statements or expert reports and gave oral evidence. The Building Authority also provided a written statement of Ms. Alicia Tse, a building surveyor in the Buildings Department, whose oral evidence was not called for. It was agreed that Ms. Tse's statement would stand as her evidence.

10. A building or buildings existed on the Site prior to the 1970s. In late 1973 a company named Lido Development Limited acquired the Site. Plans for the alteration and amendment of the Lido building were prepared and were approved by the Building Authority in June 1976. The 1976 approved plans refer to 'Proposed "Lido" Renovation.' The Lido was originally designed for use and used as a private club.
11. The main part of the complex comprised three above ground storeys, namely ground floor, first floor and second floor. According to the 1976 plans, the 3-storey Lido structure comprised an absolute building height of 36.92 feet (equivalent to about 11.25m or 18.05mPD), measured from the lowest floor level to the main roof level. The building was stepped down towards the north western end to a height of a single storey. An elevated tower or turret with height of about 28.52mPD was constructed at the south eastern end of the complex. There was some disagreement as to whether the Lido comprised one or more than one building and the overall number of storeys, having regard to the height of the roof of the highest habitable room in the tower.
12. The Appellant acquired the Site including the Lido Complex in two stages. It purchased 93 equal undivided 100<sup>th</sup> shares from Hairich Enterprises Limited on 18 February 1994. It purchased the remaining shares from McDonald's Restaurants (HK) Limited on 30 November 2000.
13. During the period from 1994 to 2004, the Appellant made several applications for approval of various schemes to the Building Authority and Town Planning Board. Only two of these applications were approved, the remainder either having been rejected or withdrawn by the Appellant.
14. On 14 August 1995 the Appellant submitted plans for a 3-storey commercial complex without any basement, having a maximum building height of 17.95mPD, to the Building Authority. The plans were approved by the Building Authority on 26 September 1995. This approval is still valid however consent to commence building work would now be required, due to more than two years having passed since the date of the approval.
15. On 22 May 1998 the Town Planning Board (Metro Planning Committee) granted approval under section 16 of the Town Planning Ordinance, for a 5-storey commercial complex (including two storeys of basement car parks), with a maximum building height of 18.05mPD. This approval had a time limit of 22 May 2001 which was

subsequently extended to 22 May 2003. No application was made to the Building Authority for building plan approval in respect of this scheme and the planning approval has since time expired.

16. A site plan of the Lido complex prepared in 1998, in connection with the application to the Town Planning Board, is appended to this Decision.
17. After acquiring the remaining shares in the Site in November 2000, the Appellant submitted plans for demolition of the Lido in two phases to the Building Authority, in December 2000 and January 2001. The demolition plans were approved and the demolition of the Lido was completed in December 2002.
18. OZP S/H17/8, a draft plan, was exhibited for public inspection under the Town Planning Ordinance on 19 September 2003. This OZP contained some amendments which are relevant to issues arising in this appeal. The first version of the OZP for this area, OZP S/H17/1 was gazetted on 18 September 1987 and had undergone several previous revisions, culminating with version 7 (OZP S/H17/7), which was approved by the Chief Executive in Council on 17 December 2002 under section 9(1)(a) of the Town Planning Ordinance.
19. In January 2004 the Appellant applied to the Building Authority for approval of a similar scheme to the subject matter of this appeal. The application was disapproved on 15 March 2004 on the ground of contravention of section 16(1)(d) of the Buildings Ordinance. There was no appeal from the disapproval. Two similar applications were submitted to the Building Authority and withdrawn in August and September 2004, prior to the October 2004 Submission on 25 October 2004.
20. In the meantime, OZP S/H17/9, an approved plan, was approved by the Chief Executive in Council on 14 September 2004 (and exhibited for public inspection on 24 September 2004). The material terms of OZP S/H17/9 are accepted to be identical with OZP S/H17/8 so far as they concern this appeal. OZP S/H17/9 is however the applicable OZP (being the OZP in force when the October 2004 Submission was considered by the Building Authority).

### **3. The October 2004 Submission**

21. The October 2004 Submission comprises a 6-storey commercial development, including three storeys of basement and having the following characteristics:

Building height	18.05mPD
Site coverage	100%
Plot ratio	3.427

Proposed uses	Roof Floor	roof terrace
	1/F	recreation, terrace, shops
	UG/F	shops, loading and unloading
	LG/F	shops, E&M rooms
	B1/F	shops, restaurant
	B2/F	plant room, parking at voids
	B3/F	parking, E&M rooms

22. Mr. Kevin Shu Keung Ng, whose firm Simon Kwan & Associates prepared the October 2004 Submission, gave evidence to the effect that, in his view, the scheme included the following improvements, compared to the plans that were approved by the Building Authority in 1995:

(a) some architectural design enhancements

(b) access to Repulse Bay Beach for the public, in the form of two semi-covered staircases linking Beach Road to the Beach

(c) car parking provision for 97 vehicles, including 62 on grade and 35 mechanical or stacked car park spaces

#### 4. Issues

23. The central issues in this appeal are usefully summarized by Mr. Coleman, who appeared for the Building Authority:

A. whether the carrying out of the building works shown on the October 2004 Submission would contravene any approved or draft plan prepared under the Town Planning Ordinance; and

B. whether the Appellant had a legitimate expectation that approval to carry out the building works shown on the October 2004 submission would not be refused *merely* on the basis that the carrying out of those works would contravene any approved or draft plan prepared under the Town Planning Ordinance.

24. A subsidiary issue arises in relation to issue (A) and issue (B), namely whether the Building Authority should have exercised his discretion (and whether this Tribunal should now exercise the discretion), to approve the October 2004 Submission,

notwithstanding that the carrying out of those works would contravene any approved or draft plan prepared under the Town Planning Ordinance.

**5. Section 16(1)(d) of the Buildings Ordinance**

25. Section 16(1)(d) of the Buildings Ordinance provides that:

“The Building Authority may refuse to give his approval of any plans of building works where-... (d) the carrying out of the building works shown thereon would contravene the provisions of this Ordinance or of any other enactment, or would contravene any approved or draft plan prepared under the Town Planning Ordinance (Cap 131).”

26. Both Mr. Neoh SC, who appeared for the Appellant and Mr. Coleman, helpfully referred the Tribunal to numerous cases and other authorities, relating to the exercise of discretion. The question of discretion only arises in this case if the carrying out of the relevant works “would contravene any approved or draft plan prepared under the Town Planning Ordinance.”

27. The long title of the Buildings Ordinance states:

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

28. This may be compared with the long title of the Town Planning Ordinance which states:

“To promote the health, safety, convenience and general welfare of the community by making provision for the systematic preparation and approval of plans for the lay-out of areas of Hong Kong as well as for the types of building suitable for erection therein and for the preparation and approval of plans for areas within which permission is required for development.”

29. The Appellant submits that the object of the Buildings Ordinance is to protect public safety. The Building Authority considers that the object is broader than merely encompassing public safety.

30. While we accept that protection of public safety is one and, possibly, one of the most important objects of the Buildings Ordinance, we agree with the Building Authority’s submission. In our view, the objects of the Buildings Ordinance include the protection of public safety and public health, including public convenience and welfare, in relation to the planning, design and construction of buildings.

31. The overall object of the Building Ordinance is building control. The Building Authority and this Tribunal, as far as this appeal is concerned, must (or is expected to) effectively perform the functions and duties of a building control officer.

32. The function of the Town Planning Board differs from that of the Building Authority (and this Tribunal). The approaches to granting permission by both these bodies are different. Approval from one body does not constitute approval for the other. Town planning matters are but one of the considerations that the Building Authority has to take into account: *Re No. 2 Grampian Road* (Appeal Case No. 43 of 1995, unreported).
33. It is not however, in our view, the proper function of the Building Authority or this Tribunal to exercise an independent planning judgment, in the town planning or land use planning sense. That is a matter for consideration by the Town Planning Board and Town Planning Appeal Board. Subject to the discretion afforded by section 16(1)(d), the Building Authority must normally ensure that, where approval is sought for the carrying out of building works, the carrying out of those works would not contravene the provisions of an approved or draft plan prepared under the Town Planning Ordinance.

## 6. Interpretation of the OZP

34. Plans under the Town Planning Ordinance are to be regarded as a 'species of subsidiary legislation': *Auburntown Limited v. Town Planning Board* [1994] 2 HKLR 272.

35. Rhind J, giving judgment in *Auburntown*, said:

"Subsidiary legislation, I now recognize, can take many forms, examples being regulations, rules, orders, bylaws, directions and schemes: see *Wade's Constitutional And Administrative Law* (10<sup>th</sup> ed.) 610 and *Halsbury's Laws of England* (4<sup>th</sup> ed.), Vol 44, para 582" (page 287 lines 20-22)

...

"Overall, I am satisfied that approved plans under the T.P.O. are subordinate legislation, and the various steps along the way from promulgating draft plans under s. 3 up until the Governor in Council approving a plan under s. 9 are all part of a legislative process" (page 289 lines 41-43)

36. OZP S/H17/8 which was exhibited in September 2003 is a draft plan whereas OZP S/H17/9 which was issued a year later is an approved plan. However, in our view nothing turns on this distinction so far as this appeal is concerned.
37. Although the Explanatory Statement to the OZP is not part of the OZP and does not have the force of law, it is still necessary to have regard to it as a material consideration: *Henderson Real Estate Agency Limited v. Lo Chai Wan* [1997] 1 HKLRD 258, at 267.

38. OZP S/H17/8 contains the following Notes in relation to the OU(BRLU) zone containing the Site:

“Planning Intention

This zone is intended to enhance the role of Repulse Bay as a recreational and tourism district, as well as maintaining the existing beach related character of the developments. Future development/redevelopment should blend in harmoniously with the environment in terms of use and design.

Remarks

- (a) No new development, or addition, alteration and/or modification to or redevelopment of an existing building shall result in a total development and/or redevelopment in excess of a maximum building height of two storeys or the height of the existing building, whichever is the greater.
- (b) Based on the individual merits of a development or redevelopment proposal, minor relaxation of the building height restriction stated in paragraph (a) above may be considered by the Town Planning Board on application under section 16 of the Town Planning Ordinance.”

39. The Notes also contained amendments to the permitted uses columns, in which ‘Shops and Services’ were moved from Column 2 (Uses that may be permitted with or without conditions on application to the Town Planning Board) to Column 1 (Uses Always Permitted). ‘Hotel’ was added to Column 2 as a use that might be permitted on an application to the Town Planning Board.

40. The Notes to OZP S/H17/8 also contained, for the first time, a ‘definition of existing building’ in the following terms:

“In these Notes, “existing building” means a building, including a structure, which is physically existing and is in compliance with any relevant legislation, the conditions of the Government lease concerned, and any other Government requirements, as may be applicable.”

41. Paragraph 7.6.3 of the Explanatory Statement to OZP S/H17/8 stated as follows:

“Two prominent beach front sites at Repulse Bay, covering the Lido and the Seaview buildings are also under this zoning and annotated “Beach Related Leisure Use.” Given the tourism nature of Repulse Bay, provision for hotel use has been added to Column 2 of the Notes to compliment and enhance the Repulse bay area as a tourist district. Other than this, the existing beach related character of the developments will be maintained. This zone also ensures that future development/redevelopment will blend in harmoniously with the environment in terms of use and design.”

42. In fact, the Lido building had been demolished about nine months before OZP S/H17/8 was exhibited, although it was still referred to in the Explanatory Statement as if it were an existing building. It is not suggested and no evidence was given to the effect that this was due to an error on the part of Planning Department or the Town Planning Board.
43. The Planning Intention, Remarks and permitted and permissible uses Columns in the Notes to OZP S/H17/9, under OU(BRLU), remained unchanged.
44. The Explanatory Statement to OZP S/H17/9 (approved in September 2004) contained the following amended statement in paragraph 7.6.3:
- “Two prominent beach front sites at Repulse Bay, covering the Seaview building and the ex-Lido site are also under this zoning and annotated “Beach related Leisure Use.” To ensure the future development/redevelopment would blend in harmoniously with the surrounding environment, developments under this zoning are restricted to a maximum of two storeys or the height of the existing buildings, whichever is the greater. However, to provide flexibility for innovative design adapted to the characteristics of particular sites, minor relaxation of the building height restriction may be considered by the Board through the planning permission system. Each proposal will be considered on its individual planning merits. Given the tourism nature of Repulse Bay, provision for hotel use has been added to Column 2 of the Notes to compliment and enhance the Repulse bay area as a tourist district. Other than this, the existing beach related character of the developments will be maintained.”
45. Reference to the ‘Lido building’ has been changed to ‘ex-Lido site’ in the later Explanatory Statement. However, it is accepted that the material terms of the two OZPs are identical. It has not been suggested that there was any change of the planning intention in respect of this Site, between September 2003 and September 2004.
46. The question is whether it is appropriate to treat the former Lido building as an ‘existing building’, when construing the OZP in respect of this specific Site, as at the time of the October 2004 Submission.
47. The Building Authority relies on what he submits to be the ordinary meaning of the words used in the definition of ‘existing building’ in the Notes and; in particular, the use of the present tense “is physically existing and is in compliance...” (emphasis added).
48. Put simply, the Building Authority submits that, as the former Lido was demolished in December 2002 and the Site was vacant at the time of the October 2004 Submission, there was no ‘existing building’ on the Site at the material time, when the plans were considered. Accordingly, it is submitted by the Building Authority, the

height of the former Lido building is not a relevant factor for the Building Authority to take into consideration.

49. In support of his submission, the Building Authority relies on a decision of the Town Planning Appeal Board, in *Re Alticosmic Limited* (Town Planning Appeal Board decision dated 14 March 1982). The Town Planning Appeal Board in the *Alticosmic* case was chaired by Mr. Henry Litton QC (as he then was). The *Alticosmic* decision was also referred to by the Building Authority in its original representations filed pursuant to regulation 5 of the Building (Appeal) Regulation, on 30 March 2005.
50. *Alticosmic* is a very short decision (7 pages) concerning an application to the Town Planning Board, for a minor relaxation of plot ratio, from 14.77 to 15, in respect of an industrial godown building, which the appellant in that case (*Alticosmic*) wished to redevelop in the top seven floors to office use.
51. The applicable restriction in respect of plot ratio in that case was “...*any addition, alteration and/or modification to the existing building should not result in a total development or redevelopment in excess of the maximum plot ratio of 9.5 or the plot ratio of the existing building whichever is the greater...*”
52. *Alticosmic* had some two years prior to publication of the OZP in that case, obtained approval from the Building Authority in respect of plans for the redevelopment of the property. The approved plans as amended were for a 26-storey godown building, having a plot ratio of 14.77. At the time of *Alticosmic*'s application to the Town Planning Board under section 16 of the Town Planning Ordinance, however, no existing building had been constructed on the site.
53. The Town Planning Appeal Board stated (paragraph 10 of its decision):

“As regards the increase of plot ratio, the Appellant’s architect took the view that the permitted plot ratio was 15, so an increase from 14.77 to 15 represents an increase of only 0.27%. mathematically this is of course correct. But is this the right way of viewing the matter when the application went before the Town Planning Board? This argument might be right if, at the time when the section 16 application was made to the Town Planning Board, there was an existing building on site with a plot ratio of 15. But that clearly was not the case. Construction work had, by March 1991 (when the section 16 application was made) already started, but there was plainly no “existing building” on the site at that time. The fact that some time before the OZP was gazetted the Appellant had plans approved by the Building Authority showing a plot ratio of 15 was irrelevant to this matter.”
54. We do not believe, with respect, that the *Alticosmic* decision supports the Building Authority’s submission. There was, clearly, no (and never had been) an existing building having a plot ratio of 15 or 14.77 constructed on the *Alticosmic* site.

55. In our view, when construing the OZP in respect of the Site, the material parts of the OZP should be construed as a whole, including in relation to the definition of 'existing building', the phrases 'physically existing' (not merely being a building approved on paper) and 'in compliance.'
56. We were referred to another OZP by Mr. Coleman which does contain reference to both an 'existing building' and a building that 'was in existence' (the Draft Clear Water Bay Peninsula North OZP S/SK-CWBN/2).
57. In our view, comparison with another OZP, prepared for a different area and zoning in the rural area, for the purpose of construing the OZP for the Site, is of no assistance. For one thing, the OZPs that were produced at different times and for different planning zones and intentions.
58. Moreover, as Litton PJ stated in *Wah Yick Co Ltd v. Building Authority* [1999] 1 HKC 580, at 589F-G:
- "The Building Authority, in considering whether to reject plans under s 16(1)(d), must obviously have regard to the broad planning aims of the OZP before it. A 'town-house' development permissible in one 'V' zone does not necessarily mean that it would be permissible in another 'V' zone. But when there is a reasonable doubt, the developer must be given the benefit of the doubt. This is consistent with the principle that a statute should not be held to take away private rights of property without compensation unless the intention to do so is expressed in clear and unambiguous terms: see *Colonial Sugar Refining Co Ltd v Melbourne Harbour Trust Commissioners* [1927] AC 343 at 359. As always, in the exercise of discretion, the Building Authority must not only be guided by the planning objectives in the OZP but by common-sense."
59. The question or issue in *Wah Yick* was whether a 33-storey block of flats proposed to be developed in a 'V' or village type development zone, would qualify as a 'House' for the purpose of the OZP. There was no ambiguity in the OZP in that case. That is not the position here. In construing the OZP for the Site there must, in our view, be some elasticity in construing the expression 'existing building.'
60. The Building Authority further submits that the interpretation of the Building Authority and Planning Department is consistent with what is said to be the underlying purpose, which requires continuity.
61. Put shortly, the Building Authority argues that this reflects the principle of 'use it or lose it', by analogy with the concept of discontinuance of an established existing use.
62. The argument advanced on behalf of the Building Authority, is that continuity is necessary for both 'use' and for the continued existence of any 'building.' Essentially, Mr. Coleman submits, if the owner is to take advantage of the toleration of something not in accordance with the requirements of the OZP, he will only be allowed to do so

as long as he continues unbroken the tolerated position. The cessation of any tolerated use, he submits, will disable the owner from thereafter taking the benefit of that tolerated use. Similarly, he submits, the cessation of the existence of a building will bring to an end the toleration of its non-compliance or existence.

63. It is important, in our view, not to confuse the concept of existing use, whether it is used to refer to existing use of land or a building, with the concept of the existence of a building. They are separate concepts. An existing use requires land or a building although the opposite is not necessarily always the case.
64. Demolition of a building which results in the discontinuance of the use to which the building was put, may result in the owner losing the benefit of an existing use. Thereafter, the owner would have to use any new building constructed on the land for a permitted purpose. The concept of existing use does not, however, mean that the owner loses the right to reconstruct his building or another permitted building, in accordance with the existing statutory controls.
65. Ms. Brenda Kit Ying Au, a chief town planner in the Town Planning Board Section of Planning Department, gave detailed and precise evidence both in her written statement and oral evidence. We can find nothing in Ms. Au's evidence to support Mr. Coleman's theory of a regression policy in respect of the built environment, in relation to this Site.
66. The planning intention is expressed in terms of 'maintaining the existing beach related character' and 'blend in harmoniously with the environment in terms of use and design.'
67. The environment, including the built environment, is changing. This is particularly so in relation to the environment in the Repulse Bay vicinity of the Site. If the planning intention were that any new development or redevelopment should normally be restricted to two storeys, the second limb of the restriction which refers to the height of the existing building, would be redundant.
68. Mr. Coleman quite properly cautioned against placing undue reliance on artists' renditions and other visual aids that were produced, which represent snapshots of time and obviously part of development and redevelopment, which is a continuing development process in accordance with an OZP. We agree. The same can however be said, in the context of this appeal, of whether it is correct to disregard the recent existence of a building that has been recently demolished for the purpose of redevelopment in accordance with the OZP.
69. In our view, it is necessary when construing the broad planning aims of the OZP in relation to this Site, to have regard to the former Lido building as existing.

70. A further argument was advanced by the Appellant, that as a matter of general construction of the OZP, the term 'existing building' refers to the building in existence at the time when the first OZP comes into effect.
71. It is not necessary for this Tribunal to decide this question in order to determine the appeal and we therefore do not propose to do so. However, in view of the submissions and evidence that was given by both parties in relation to this question, we propose to give our views.
72. As a matter of fact, the Lido building was in existence when the first OZP for this Site came into effect (OZP S/H17/1, gazetted 18 September 1987). That may be a coincidence as far as this Site is concerned. If the Lido building had already been redeveloped in accordance with the OZP, would the redeveloped building have to be disregarded and regard had only to the Lido building existing in 1987, for the purpose of any further redevelopment? We think not. We doubt whether such an interpretation can be regarded as correct as a matter of general construction of the OZP.

## 7. Discretion

73. At this stage, it is convenient to digress slightly from the question of construction of the OZP. Connected with the question of construction of the OZP is the exercise of the discretion afforded by section 16(1)(d) of the Buildings Ordinance.
74. The Appellant relies on the following general legal propositions in relation to the exercise of discretion:
- (a) a public authority must exercise its discretion independently and not fetter its discretion either by rigid policies or the decisions of others;
  - (b) a public authority must in exercising its discretion take into account and promote the statutory objects for which it is constituted; in the case of the Building Authority the objects which it must have regard to are the objects of the Buildings Ordinance;
  - (c) the exercise of a discretion by a public authority must not be based on an error of law;
  - (d) the exercise of a discretion by a public authority must be based on the consideration of the individual merits of each application, including any legitimate expectation of the applicant, against the statutory objects of the constituting statute of the authority;
  - (e) the Tribunal is bound to consider the merits of the application *de novo*.

75. The Building Authority does not dispute the general accuracy of these propositions, but differs with the Appellant as to how they should be applied in the context of this case.

76. The Building Authority relies on the following propositions:

- (a) the word “may” in section 16(1)(d) of the Buildings Ordinance identifies that the Building Authority has a discretion to permit the carrying out of the building works, even if that would contravene any approved plan or draft plan prepared under the Town Planning Ordinance.
- (b) however, in exercising that discretion the Building Authority is bound to act fairly, reasonably and consistently, taking into account the merits of each individual case and the public interest.
- (c) what section 16(1)(d) is contemplating is that developers should recognize that if they contravene the OZP, then it is probable that a refusal will be given.
- (d) in the exercise of its discretion, the Building Authority (and this Tribunal) has no reason to strain the ordinary use of language when deciding whether or not to reject plans under section 16(1)(d). The Building Authority ought to be guided as much by planning objectives as by common sense.

77. The Appellant does not argue substantially with any of the propositions advanced by the Building Authority, although Mr. Neoh SC invited the Tribunal to take the view that proposition (c) should not be invoked as a reason for disapproving the plans in this case.

78. In our respectful view, what proposition (c) is contemplating are cases where the building works shown in the plans submitted for approval are in clear contravention of the OZP. This is not a case where, in our view, the building works shown on the October 2004 Submission have been shown to be clearly in contravention of the OZP, so that the plans should be disapproved for that reason alone.

79. Having heard submissions for several days, we accept that an argument can be mounted that the building works are in contravention of the OZP, because the Lido building had been demolished prior to the date of submission of the plans. For the above reasons, we have concluded that there is in fact no contravention of the OZP.

80. If the Tribunal had come to the view that the building works were technically in contravention of the OZP at the time of the October 2004 Submission, as the Lido complex had already been demolished, the Tribunal would nevertheless not have disapproved the plans for that reason alone, for the following reasons.

81. The Tribunal is satisfied having heard the evidence of Mr. Chan, that the intention of the Appellant, both in the period before and after complete demolition of the Lido building in December 2002, was to redevelop a substantial commercial building on the Site in accordance with the OZP.
82. We do not believe, as the Building Authority suggested, that the Appellant allowed the 1998 approval from the Town Planning Board, which had been extended until May 2003, to lapse due to a mistake on its part, in failing to apply for another extension.
83. Regard must be had to the time and planning on the part of any owner that would normally be required, for a demolition and redevelopment cycle for a building of this size. Demolition plans were first submitted for approval in December 2000, some two years prior to completion of the demolition work.
84. Application for approval of foundation works was first made in April 2003 and consent was given by the Building Authority on 27 November 2003 for commencement of the foundation works. Piling works have been completed for a 6-storey building including basements.
85. The Appellant has not, in our view, been guilty of unreasonable delay in submitting redevelopment plans for approval. The year 2003 was a difficult and uncertain period for many individuals and businesses in Hong Kong. The OZP was also amended on three occasions between December 2002 and September 2004. Shops were moved from Column 2 (Town Planning Board consent required) to Column 1 (consent not required), when OZP S/H1 7/8 was gazetted in September 2003.
86. The Tribunal also considers that the October 2004 Submission incorporates some worthwhile improvements compared to the 1995 approved plans, in particular the provision for public access to the beach and the provision of underground car park spaces.
87. The Tribunal would therefore exercise its discretion under section 16(1)(d) to approve the plans.
88. In passing, the Tribunal notes that it was contended by the Appellant during submissions, that the Building Authority had not exercised a discretion at all in this case. Given the nature of the appeal to this Tribunal that may not be a relevant issue.
89. Having considered Mr. Cheung's evidence and had the benefit of reading Ms. Tse, statement, however, the Tribunal does not agree with the Appellant's submission. While it is no doubt true that both Mr. Cheung and Ms. Tse accepted and acted upon the advice of the Planning Department, which was given in rather stark and unequivocal terms, they cannot in our view be criticized for doing so.

90. The Appellant and its advisors would have realized before October 2004 that the Planning Department's view was that the building works shown on the plans constituted a contravention of the OZP. However, the Appellants did not (despite making three separate applications to the Building Authority during 2004), take any step prior to this appeal to put forward its own interpretation of the OZP or set out the grounds on which it sought the exercise of the discretion, for consideration by the Building Authority.

## **8. Height of the Lido building**

91. This matter turns in our view on an issue or issues of fact. However two other questions in relation to height were raised by Mr. Neoh SC and propounded in the evidence of Mr. Brownlee, when addressing the construction of the OZP. We propose to deal with these two questions first.

92. First, the Appellant submits, the existing building height may be determined in terms of number of storeys and height in mPD. Secondly, he submits, in the case of a building of non-uniform height, the height of the roof of the highest habitable room should be applied uniformly over the entire site.

93. According to the evidence contained in Mr. Brownlee's statement:

“32 As long as the number of storeys was complied with, then the requirement of the Notes must also be considered to have been met. Based on the design of the Lido building, it can be concluded that the new building on the Site could have a height of 6 storeys and this would apply to the 'total development.' The existing height of 6 storeys of the Lido should therefore have a wider interpretation as applying to the total site and not just to that portion of the site on which it was located. The new building height was not required to follow the profile of the existing building but should relate to the highest point of the existing building.

33 The interpretation of the maximum building height should therefore be a 6 storey building over the whole site without reference to any height in mPD. However, if a height in mPD was to be applied then the correct limit is the roof of the highest habitable room in the tower, or 28.52mPD. Any building which is within those limits is a complying building and should be approved.”

94. It was at times being suggested on behalf of the Appellant that for the purpose of determining height in storeys, the height of a tall-storied building, such as a badminton court (7.6m), could be applied. Thus, it was suggested, the two storey restriction could be as great as 15.2m and, if the existing building were properly to be regarded as a six storey building, a very tall building indeed would be permitted.

95. That is, with respect, a bold submission and one that the Tribunal has no hesitation in rejecting. We are not dealing with a proposal to build a two storey badminton court

building. If we were there might possibly be some force in the comparison, although we express no concluded view on the question.

96. The height restriction in the OZP is expressed in terms of 'two storeys or the height of the existing building, whichever is the greater.' (emphasis added by us)
97. The use of the disjunctive is in our view intentional. There are two separate alternative restrictions, the former (two storeys) being an objective standard and the latter (height of existing building) being a more subjective or factual standard. In the case of a green field site only the objective restriction would apply. In the case of a developed or brown field site, the applicable restriction would be the greater of the two.
98. We agree with Mr. Coleman's submission that the two alternative restrictions must be read together to give proper sense to the intended restriction. However they also serve different purposes. Both play a restrictive function, although the latter also recognizes and preserves an owner's right to redevelop an existing building to the same height as before.
99. The October 2004 Submission clearly exceeds a two storey building in respect of the number of storeys. Therefore the former standard does not apply. The appropriate comparison, assuming that it produces a greater height, is between the actual height of the Lido building and the height of the building comprised in the October 2004 Submission.
100. We therefore disagree with the Appellant's first submission on height.
101. The Appellant's second submission on height is that in the case of a building of non-uniform height, the height of the roof of the highest habitable room should be applied uniformly over the entire site.
102. There was also a dispute as to whether Block C of the Lido building, which included the tower, should be regarded a three or four or five or six storey building.
103. The Building Authority characterizes the Lido as a collection of three detached blocks ranging from one storey to three storeys (and a tower) with a non-uniform height profile. He submits that the proposed six storey building (the October 2004 Submission) has an absolute building height of 21.8 metres, which would exceed the number of storeys (which he submits to be three) and the absolute height of the tallest building (11.25 metres excluding the tower) of the former Lido.
104. Mr. Neoh SC's submitted that:

- (a) the former Lido complex was used as one complete complex on one single site; the 1976 alteration plans were submitted as a complete development on a single site;
- (b) planning permission, deals with the development as a total development having a height of 18.05mPD. According to Building (Planning) Regulation 23(1), height is determined by reference to the mean height of the roof over the highest usable floor space in the building.

105. For the purpose of construing the building height restriction in the OZP, the Tribunal considers that the Lido complex comprised a single building, albeit a building made up of more than one structure or a complex structure.
106. The Tribunal does not find Building (Planning) Regulation 23(1), which contains a definition of the height of a building solely for the purposes of regulations 20,21 and 22, to be of any real assistance in its determination of this appeal.
107. There was considerable discussion regarding the letter written by Simon Kwan & Associates, the authorized person, to the Buildings Authority dated 2 January 2001 and subsequent correspondence between July 2001 and January 2002. The purpose of the authorized person's letter was to try and persuade the Buildings Authority to agree on the height of the existing Lido building, as 28.52mPD instead of 18.05mPD.
108. We agree with the Building Authority's submission that the Appellant's argument, viewed in relation to the totality of the correspondence, is counter-productive. The inescapable inference from reading the complete correspondence, is that Buildings Authority was not prepared to be drawn into defining or determining the height of the building, in the context of hypothetical correspondence of that nature. It is in our view significant that there is no evidence of the Appellant having taken up the suggestion made in the Building Authority's letter dated 9 July 2001, to take the matter up with the Planning Department.
109. In our view, the appropriate standard of measurement, for the purpose of determining height of the existing building in relation to the OZP for this Site, is actual height in mPD (or height above ground), measured to the podium roof level of the main block. It may be possible to measure the height of a building in more than one way. However, having regard to the planning intention, we consider that for the purpose of determining whether there is a contravention of the OZP in relation to this Site, height measured in mPD is the most appropriate height to compare.
110. The height of the October 2004 Submission is 18.05mPD to roof level.
111. Mr. Kevin Chu Pan Ng accepted in his evidence that 18.05mPD is approximately equivalent to an absolute building height of 11.25 metres (or 36.93 feet), which was

also the height of the three storey block of the Lido, measuring from the lowest ground floor up to the main roof level.

112. Evidence of the height of the Lido building is also found in a previous disapproval letter from the Buildings Authority to the Appellant's former authorized person, dated 14 July 1995. The letter states in paragraph 7(a)(i):

“Your proposal contravenes the approved Shouson Hill and Repulse Bay Outline Zoning Plan (OZP) No. s/H17/3. In this connection, your attention is drawn to District Planning Officer/HK's comments at paragraph 8 below.”

113. Paragraph 8 of the same letter states:

“The proposed 3-storey development (excluding swimming pool on the roof level) with building height of 19.95mPD exceeds the existing building height of 18.05mPD as advised by DSO/HK E vide memo ref. (38A) in LD/SVY/178CXXII dated 15.12.94. As such the proposed building height is considered in contravention with the OZP restrictions. I recommend s.16(1)(d) of the Buildings Ordinance be invoked to reject the set of building plans.”

114. A copy of the memorandum dated 15 December 1994 from the District Survey Office, Hong Kong East to the District Lands Officer, Hong Kong South (copied to the District Planning Officer, Hong Kong), was produced. Attached to the memorandum is a sketch showing “..the respective heights of structure in Block C, Lido, 26-30 Beach Road..” The sketch depicts a lateral view from the beach, with various heights shown in mPD. The height of the main roof is shown as 18.5mPD, with various protrusions between 21.0mPD and 23.3mPD. The tower is shown with three staged sections above roof level, having heights of 24.7mPD, 29.6mPD and 32.8mPD.

115. On 26 September 1995, the Building Authority approved plans for a 3-storey development having a relatively uniform height of 17.95mPD across the entire length of the Site. The approved plans were a resubmission of the plans which had been disapproved in July 1995, for a building having a uniform height of 19.95mPD.

116. Relatively little was said in submissions or evidence regarding the actual height of the lowest part of the Lido complex. A plan that (appended to this Decision) was prepared in connection with the 1998 application to the Town Planning Board, shows a comparatively long 2-storey part of the structure (Block B) extending in a north-westerly direction from Block C, with a short length of 1-storey structure (Block A) at the extreme north-west end.

117. A paper prepared by the Planning Department for the consideration of the Metro Planning Committee of the Town Planning Board, in May 1998, states that the Site:

- “(a) is currently occupied by 3 detached blocks: a one-storey fast food bazaar (Block A), a 2-storey building with retail stalls, restaurants and an estate agent (Block B), and a 3-storey building with restaurants, BBQ area and retail shops (Block C);
- (b) is long and narrow with Beach Road to the east and a public open space to the west; and
- (c) rises gently south-eastwards along Beach Road from about 6.8mPD to 10.9mPD.”

118. The Planning Department paper also states that the surrounding area has the following characteristics:

- “(a) The area is seaside recreational and tourist attraction of territorial significance. The Tin Hau Temple, with its traditional Chinese architectural features, is situated to the south of the site. A range of Urban Council facilities (including a refuse collection point, a public latrine, a changing room, and a public car park), the new USD Beach Administration Building which is under construction and a shopping centre are situated in the vicinity.
- (b) Low-density and low-rise residential developments in the “R(C)3” zone are located to the east.
- (c) The area is well-served by public transport and the vehicular access to the site is via Beach Road.”

119. It was suggested that possibly the height of the main roof of Block C might have been incorrectly stated as 18.5mPD in the memorandum from the District Survey Office dated 15 December 1994, instead of 18.05mPD as stated in the District Planning Officer’s comments, due to a typographical or similar error. We are not convinced that speculation is correct. All the survey measurements in the memorandum dated 15 December 1994 are stated to three significant figures. The District Planning Officer’s figures are given to four significant figures. In our view it is more probable that the District Survey Office or District Planning Officer arrived at the figure of 18.05mPD by some mathematical or empirical process, to determine an overall height of the Lido complex over the entire Site.

120. It is unnecessary, in our view, to determine this issue conclusively. We are satisfied that the Building Authority, after receiving advice from the Planning Department, determined the height of the Lido complex in 1995, for the purpose of the development height restriction, to be 18.05mPD. This Tribunal considers that it is reasonable to approach the determination of height in this case in a consistent manner.

121. The Building Authority further submits that the Appellant should not be permitted to redevelop the Site so that it is covered in its entirety by a 6-storey building of uniform height (including three storeys of basements). The thrust of this submission is that the extent of an existing development, for the purpose of determining the

applicable height restriction, is not delineated merely by the actual height of a building above ground (or in mPD) but by absolute building height, including the height of the underground part of the building. Hence, it is submitted, the concept of 'existing building' relates mainly to the determination of building bulk.

122. Ms. Au gave evidence in relation to the concept of existing building bulk, as part of her evidence relating to the OZPs for the rural and urban new town areas. Ms. Au accepted that the rural and urban new town areas were subject to a different statutory planning control system, from that which applies to this urban area Site.
123. The concept of building bulk has a slightly elusive character, although Ms. Au illustrated the matter to the Tribunal, with reference to the draft Clear Water Bay Peninsula North OZP No. S/SK-CWBN/2. Building bulk concept encompasses not only maximum permitted building height but also, maximum gross floor area, maximum plot ratio and maximum site coverage limits.
124. In that particular draft OZP, the maximum building height restriction, measured in terms of number of storeys or building height in metres, happens to be expressed as "(excluding basement(s))", although in other OZPs there is no express reference to basements.
125. In our view, the concept of building bulk is not relevant to the determination of height of a building in respect of this Site.
126. In the case of the OZP applicable to this Site there is no mention of basements. It would of course be possible to define building height in the OZP as including basements, if that were the planning intention. We can find no such intention expressed or to be implied in the OZP relating to this Site.
127. According to Ms. Au's evidence, the rejection of the October 2004 Submission was on the ground that the Lido complex was no longer in existence. That formed the basis of the view the Planning Department took in 2004, that redevelopment to the height of the former Lido complex was no longer permitted.
128. In our view, it is not a matter for this Tribunal or the Building Authority to base its decision on any subjective perception, as to whether the proposed building is or is not one which is 'bulky', any more than it is not the proper function of these bodies to attempt to apply any other subjective planning considerations to its decision making.
129. We uphold the Appellant's submission that it is entitled to redevelop the Site in accordance with the OZP up to a height of 18.05mPD.

## 9. Legitimate Expectation

130. A considerable amount of evidence and submissions was deployed in relation to the contention that the Appellant had a legitimate expectation. The legitimate expectation claimed by the Appellant was that approval to carry out the building works shown on the October 2004 Submission would not be refused, *merely* on the basis that the carrying out of those works would contravene any approved or draft plan prepared under the Town Planning Ordinance.
131. In support of this contention Mr. Neoh SC relied on the following ‘Seven Stages of History’:
- a) Resolution of the building height issue;
  - b) Approval of the 1995 general building plans, 17.95mPD, 3 above ground storeys;
  - c) Section 16 planning permission from the Town Planning Board in 1998 (18.05mPD, three above ground storeys and two basement floors, with one for car park);
  - d) Extension of the planning permission from 2001 to May 2003;
  - e) Demolition of the Lido complex in 2002;
  - f) Gazettal of OZP S/H17/8 in September 2003 with ‘Shops’ moved from Column 2 to Column 1 of Remarks to Notes;
  - g) Completion of excavation and foundation works in 2004.
132. These submissions were refined by Mr. Neoh SC in his closing submissions:
- a) At all times prior to submission of the plan in 2004, the Building Authority had indicated that a building height of 18.05mPD to roof level was acceptable and the 1995 general building plans were approved on this basis. Apart from the District Survey Officer’s memorandum of December 1994, the authorized person had since 2001 been in correspondence with the Buildings Department about the height of the building;
  - b) Until May 2003, when the section 16 planning permission was no longer applicable, the Town Planning Board was content with a total development of 18.05mPD to roof level throughout the length of the Site;
  - c) Prior to September 2003, when OZP S/H17/8 was gazetted, the meaning of ‘existing building’ was never in issue and, because of this, the Appellant had demolished the Lido complex in order to proceed with redevelopment; and, prior

to October 2004 had completed not only the demolition but sheet piling for the foundations;

- d) Apart from widening the types of always-permitted uses in the Remarks to the Notes, OZP S/H17/8 made no material changes to the height restriction, which therefore has continued since OZP S/H17/1. An owner of the Site would reasonably expect that since the first OZP preserved the right of his predecessor in title to redevelopment to the height of the existing building, then his right would be similarly preserved;
  - e) The above history must be relevant to the exercise of a discretion to invoke section 16(1)(d) which is dependent upon a definition of 'existing building' in OZP S/H17/8, which itself only appeared first in September 2003;
  - f) The Building Authority's Practice Notes adopt a policy of preserving a developer's accrued rights to approved plans notwithstanding subsequent changes to the OZP. The same principle applies here. The Building Authority has approved plans in 1995 based on a building height with three above-ground storeys, to a roof level of 18.05mPD. The subsequent change in the OZP here is not directed to height at all but, whether the building is considered to be 'in existence.' Even if the Planning Department is right (which Mr. Neoh SC submits is clearly not the case), the Building Authority should approve the plans in accordance with the spirit of the foregoing policy.
133. Some of the above matters have already been considered and taken into account by the Tribunal, in relation to interpretation of the OZP, exercise of discretion and building height, as stated above.
134. We accept Mr. Coleman's submission that what the Appellants are in fact contending for is a substantive legitimate expectation. In order to establish a substantive legitimate expectation, is generally necessary to establish that such expectation arose as a result of a promise, representation, practice or policy, adopted or announced on behalf of government or a public body.
135. While the Tribunal would not necessarily adopt Mr. Coleman's submission that evidence of reliance on the promise or representation is in all cases a strict requirement, it is in our view incumbent on the person seeking to establish a legitimate expectation by implication from the facts, to show that the promise or representation is one that can reasonably be implied from the facts including the conduct of the public body concerned.
136. The 1998 section 16 planning permission granted by the Town Planning Board states:

“The approval by the Board under section 16 of the Town planning Ordinance should not be taken to indicate that any other government approval which may be needed in connection with the development, will be given. You should approach the appropriate government departments on any such matter.”

137. The Tribunal considers that the issue is whether any promise or representation said to have been made by the Building Authority can, on a reasonable construction, have given rise to the legitimate expectation claimed by the Appellant.
138. The 1995 approval can only give rise to a legitimate expectation that the Appellant could carry out the building works shown on those approved plans (subject to compliance with current legislation other than changes to the statutory town plan).
139. The Tribunal has carefully considered all the evidence and submissions relied on by the Appellants in support of its claim that a legitimate expectation has arisen, that approval to carry out the building works shown on the October 2004 Submission would not be refused, merely on the basis that the carrying out of those works would contravene any approved or draft plan prepared under the Town Planning Ordinance. We find no evidence whatsoever of any promise or representation made by the Building Authority, which on any reasonable construction, could give rise to such expectation on the part of the Appellants or any predecessor in title.
140. The Appellants’ argument based on legitimate expectation therefore fails.

#### **10. Determination**

141. The appeal is therefore allowed. The Tribunal reverses the decision of the Building Authority, contained in paragraph 7A(a) of the disapproval letter dated 25 November 2004.
142. No order is made in respect of the grounds of disapproval contained in paragraphs 7A(b) and 7A(c) of the disapproval letter dated 25 November 2004, which do not form the subject matter of this appeal. The Tribunal leaves it to the parties to resolve those matters, by resubmission or otherwise, in accordance with the Buildings Ordinance.

#### **11. Costs**

143. The Appellant has been successful in its appeal but has not succeeded on all issues raised.
144. We make an order nisi that the Building Authority pay two thirds of the Appellant’s costs, such costs to be taxed on a party and party basis if not agreed. If either party wishes to apply to vary the costs order nisi application must be made to the Tribunal within 14 days from the date of delivery of the Decision to the parties.

Dated the 12<sup>th</sup> day of June 2006

**[SIGNED]**

Mr. Wyn Hughes

Chairman

**[SIGNED]**

Professor Howard Huang Ju Chang

Member

**[SIGNED]**

Mr. Rembert Lai Siu Kin

Member

**[SIGNED]**

Mr. Paul Tam Chan Nin

Member

## Chronology

Renovation of Lido	1976 - 1977
OZP S/H17/1 gazetted	18 September 1987
OZP S/H17/3 approved	4 December 1990
Appellant purchases 93/100 shares of Lot RBL 368 RP	18 February 1994
Town Planning Board rejection (3 storey, 24.5mPD)	16 December 1994
Building Authority rejection (3 storey, 19.95mPD)	14 July 1995
Building Authority approval (3 storey, 17.95mPD)	26 September 1995
Town Planning Board approval (5 storey, 18.05mPD)	22 May 1998
Building Authority rejection (4 storey, 17.50mPD)	12 June 1998
Building Authority rejection (4 storey, 17.50mPD)	4 August 1998
Appellant purchases remaining 7/100 shares	30 November 2000
Plans for demolition of Lido submitted	Dec 2000 – Jan 2001
OZP S/H17/7 approved	17 December 2002
Demolition of Lido completed	December 2002
OZP S/H17/8 exhibited	19 September 2003
Building Authority rejection (6 storey, 18.05mPD)	15 March 2004
Two similar applications to BA submitted/withdrawn	Aug - Sept 2004
OZP S/H17/9 approved	14 September 2004
Appellant submits October 2004 Submission	25 October 2004
Building Authority rejects October 2004 Submission	25 November 2004

