ATTHE

BUILDINGS APPEAL TRIBUNAL OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

FOR THE NATIONAL PEOPLE'S REPUBLIC OF CHINA

BUILDINGS DEPARTMENT LIST

NO. 146 & 503 OF 2007

BETWEEN

WELL SPREAD TRADING LIMITED Appellant

and

BUILDIING AUTHORITY Respondent

JUDGMENT OF THE APPEAL TRIBUNAL SITTING AT MURRAY HOUSE AND TAMAR

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Note on the Text:

Purple Text – Color by way of Emphasis
Brown Text – Color to indicate Legal Impressions
Black Text – Standard Reasons, or General Obiter Text
Green Text* - *Formula

Before this Judgment can Begin, we must see certain aspects of the case which were to occur prior to the end of the hearing in June 2011.

A First Impressions and Preliminary Matters

After reading all of the papers for the case, the Chairman made some "*General Impressions on the Case of the Mountain, & Low-Rise Oasis*", which are shared here, in the interests of complete transparency, or, *legal impressionism*. These comments are strictly obiter dicta, and do not form a part of the decision made in this case. It is a matter of fact that all judges and decision makers read the papers and factums first, and thus, this is a part of the hearing, almost as a part of the transcript of the proceedings. When those thoughts are shared, it is certainly in the interests of justice and public legal accountability.

This land, this neighborhood, has a thirty to forty year history.

The Building Authority has, for some twenty years, regarded the low rise flats in this area as a "neighborhood", for the purposes of planning applications. Twenty years is a significant period of time. Low rise developments are important as they create diversity within a neighborhood and city.

What is the relationship between diversity and congruity?

Such buildings as are herein debated upon between the developer and the Building Authority, have provided healthy housing which have met the requirements for those in a city who choose not to dwell in high rises, and it is for this reason, that the BA is reluctant to allow these buildings at Kai Yuen to pass by the by, because they have been of great value to Hong Kong and its people.

The land in question is located on top of a little hill. That hill is at the south end of a road which winds and rises as it extends in a southerly direction. A narrow road it is with pedestrian steps, branching off that main road, providing the only vehicular access to the land. Behind the land lies Braemar Hill to the south, with lovely tracts of lush greenery.

The buildings on the land are ½ century old. They are in need of repair. Redevelopment is necessary.

In recent years, high rise developments to the East of the site have been approved. They are some 23 stories high.

One impression of the land or site is that it is like a small enclave being surrounded by giants.

The question is, should those giants continue to expand into the enclave, or is it time to put a stop to this intrusive sort of development.

The values which are at stake are (i) New developments may disturb the existing communities and destroy the sense of social corporate responsibility (ii) Kontinuity, that is, continuity, with what has been is now at stake herein (iii)Long lasting traditions, and a quieter life against new development, increased development, increased housings (特首讲的说话，年度报告), more commercial and high rise sense to the development.

A.1 The Issue of Costs

Costs has played an important role in this appeal. The two sides herein made every effort to agree on as many aspects of the case as they could, without compromising their positions on the substantial issues in this appeal. For example, on two occasions, documents were handed across to the Tribunal, which clarified the position of the parties, and made it a matter of certainty that the parties were, as Mr. Yin said, counsel for the Building Authority, *ad idem* on the main issues. In fact, he was constantly attempting to narrow the gap between the parties on the main issues. As the ancient Celtic proverb states:

A friendly opponent in court is better than a purse w'a penny.

面法时敌为宜 尊如包装满米[2]

[1] 此十语的雅韵， 需用普语为朗诵法。

[2] Dr. K. F. Man, member of the Tribunal herein, commented on the inclusion of the Chinese language in this judgment as follows: "I consider that (*sic*) inclusion of Chinese in a predominantly English judgment (*sic*) inappropriate." The other 3 Tribunal Members agreed by vote, 3 – 1, to retain the Chinese text.

This is very commendable, and is in stride with the present legal spirit[3] and the move towards arbitration locally, being a very old tradition in the East, as old as the teaching of the leading teacher, 孔夫子.

Accordingly, as one counsel said in a written submission sent to this Tribunal, the "*event*" after which costs are to follow, may not be winning or losing the case. The event, in this case, is not that at all, but the main issue in this matter, as defined below, and the question of whether "the additional inverted L-shaped structure" would impinge on the character of this old neighborhood of *bird catchers, cheng fen makers, Indian children stakers, and sai fang renovation takers*,[4] and its immediacy.

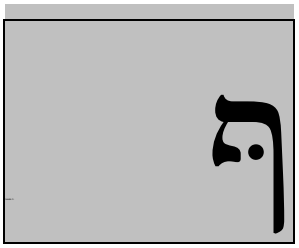
A.2 Issues

To writ, I would define that issue as follows. Since buildings in excess of 30 stories have been allowed since thirty years ago at North Point, is the

Figure L

[3]随同日的法律讲解的精神.

[44] Cheng Fen is 肠粉。 西方 means "of the West". "Takers" means to carry out.

Inverted-L 

proposed additional building or L-shaped additional space proposed by the developer, here, out of phase with the surrounding neighborhood.[5] After all, it is really this additional margin which creates the incongruity with what lies around the site.

We could put that issue in still another way. *Is the proposed building likely to result in a building differing in height, design, type or intended use from buildings in the immediate neighborhood or previously existing on the same site.*

It will be seen that the parties herein did not define "the immediate neighborhood" in such a grand manner as to include the whole of North Point within its ambit. Nonetheless, we must look at the whole picture so as to do justice with this multi billion dollar proposal.

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[5] See Drawing Exhibit AE-1 (Section E herein), where the additional marking of the Tribunal shows that it is an inverted L-shaped structure of building space, as additional space to that which already exists in the surrounding buildings, symbolically represented here in Figure L, as proposed by the Appellant, which lies in dispute herein.

It may very well be, when all of this matter comes to rest, that all that really lies in dispute between the parties is the question of costs, and the issue of who is to pay for all of the water under these bridges, for this matter has been in contention since 2007, some four years ago. The parties were in no hurry to bring this matter to hearing, and were content to let another year pass by before the hearing, though that changed, somewhat, as the parties responded to a ruling made by the Chairman herein on the 19th October 2010, when it was suggested that the parties should hurry up and bring the matter to trial on appeal so as to expedite the development, or the prevention of the development, all in the interests of efficiency, which has been the most absent reality from this case.

A.3 Two Preliminary Submissions

First, we must consider the two applications which were made by the parties to the Tribunal, during the course of the hearing.

A.3.1 Submission One

On 24th May 2011, a submission was passed over to the Tribunal signed by both parties which was an attempt to narrow down the issues between the parties. We summarize it thus, as three succinct propositions, or propandi.

Proposition 1: For four grounds, the building plans were rejected. The BA would drop three grounds, if the Appellant succeeded on one particular ground.

This was helpful. It meant that the Tribunal could focus on the one particular ground of refusal, and not be distracted by the other three, which were not paramount to the BA's refusal of the building plans.

The main ground was refusal if the building proposed would result in a building of different height, design type or intended use from other buildings in the immediate neighborhood, or refusal under s. 16(1)(g) of the Buildings Ordinance.

But then the parties sought to lead the Appeal Tribunal further along a path leading to frustration of the parties, frustration of the Tribunal, and frustration to the courts beyond this Tribunal. In a word, to lead this Tribunal to a no win, all lose situation.

It happened in this way.

Proposition 2: The parties were able to further agree that, in the event that this Tribunal were to find that the BA was *wrong* to reach the conclusion that the plans should be rejected under s. 16(1)(g), then the appeal should be allowed, with the caveat that minor amendments be allowed to be made to the plans.

Thus, the parties, of their own initiative, invited the Tribunal to make a finding on this matter of *wrongness*, or the *propriety* of the BA's decision.

What the parties could not agree on, was this.

Proposition 3: They could not agree as to what was to be done if this Tribunal were to find that the BA was wrong or some way in error to make the decision that it made to reject the plans, and then (this Tribunal) exercised its discretion afresh and reconsidered the plans now, as a current matter, making a decision, then on.

Under such a circumstance, the BA thought that the decision of this Tribunal would now be primed on the latest Draft Outline Zoning Plan, but that it would be better to remit the matter to the BA for them to consider the matter afresh, and with an order that the other grounds of disapproval, as they stand in this appeal, should not be raised by the BA. The Appellant on the other hand, thought that if this Tribunal found that the Government was wrong to reject the plans, then, it should exercise its discretion afresh, or de nova, and re-consider the matter as a new matter. Or, so it was said, on that day that these propositions were handed across to the Tribunal for consideration.

A.3.1.1 Who is to blame?

These three propandi, raise something common in government circles, called , "*the fault problem*". Or to put the matter more simply, was the BA *wrong* either

in law, fact, or by way of the procedures it adopted (ie wrong procedurally), to reach the decision that it reached.

There is a perennial danger in law, to want to pin the blame on some person, organization, or department, and to be sure, blame is noteworthy in the courts of torts and broken agreements.

Thus, there are times when it is necessary to consider the rightness of a decision, even in matters under s. 16 of the Buildings Ordinance. This is the case in all appeals from a lower court, to the appellate court. Judicial reviews, are also of a similar character, and the finding of a legally erroneous decision by a decision maker, or a decision which is procedurally at odds with precedents for administrative decision makers. Generally speaking, all appeals are primed on the premise that the court below erred as a point of law, stumbled on some legal tenure, erred in application of existing law, or did not develop the common law of the great nations, who belong to her loving embrace, in a stable manner so as to ensure that she remains on the solid pinnacles of her pristine foundations.

Occasionally, an appeal will be allowed if the fact finding exercise involved the inclination of the judge, to confuse the process of finding facts, with the resultant foundations of a judgment upon those facts, sometimes called the application of facts, in most law schools, internationally. For facts, are matters about which judges do not disagree, and a fact is a description of the physical attributes of the world, or some persons or matters within it, with a sufficient

degree of objective certainty so as to encase the fact found within a case cabinet of the historical annuls of facts which create transparency, likeliness and certitude in universal matter. After all, we do not argue about the measure of the weather, mathematical truths, and the essential adjectives of human nature such as sex, age and physical features. Such facts can be taken out of the cabinet, studied, handled but must be put back to that realm of wooden certainty from which they were taken, for a fact is a matter of reality about which there can be no change and no doubt, and thus, to be sure, facts are a valuable source of descriptive language which create measure of legal certainty in the universe.

The present matter, and the appeal before this Tribunal, is not a fault finding exercise. To this extent, this Tribunal cannot make a finding that the BA was wrong in its decision. The finding of absolute wrongness, can only be found in one way, and that is by way of an admission of wrongness by the decision maker. For there is no finding of fault which is so true, certain and reliable, as an admission of wrongness by the party involved, or a reliable confession of administrative impropriety.

Any other finding of wrongness, involves a comprehensive review of the entire process of the decision making, each step taken therein, each document relied on, each department involved, each internal memorandum generated, each and every minute of meetings through which men sit consider and reach a consensus on the handling of the matter brought to their attention and decision like execution of an administrative judgment.

When such decision makers do not state how the matter happened as a subjective certainty, it must then be handled by means of an objective assessment, and there will always be, without confessional real subjective evidence, a chance that the review board will take a wrong step and ere in its decision, even if the board be one of final appellate jurisdiction.

This Tribunal is not in a position to make any finding of wrongness, has not been charged with that duty under the provision of the Buildings Ordinance which govern this appeal, nor would that advance this matter in any event.

To making a finding of wrongness herein would simply be to pin the blame on one party rather than another, like a child's game, with which some people play out the rest of their professional lives, raising themselves professionally on the backs of the mistakes of others, which they find to be established by the witness of the fragile certainty of public comment.

Consider this real case. The Government here, is charged with the duty to consider the building plans, and if it finds that the plans would give birth to a re-development which is out of character with the character extant in the surrounding neighborhood, then it may, but not must, reject the plans. There may be very good reasons for the Government not to reject plans which are out of character with the surrounding neighborhood.

It may be that a very distinct neighborhood, say one generated in the late 70's, when a distinct method of piling of the foundations was used, a particular type and color of brick was plastered or layered on, with plumbing carried out using a new method for water conduction or disposal, and with the height surveying exercise having used an older methodology, say based on the then newly developed mean sea level concept (circa HK 1982 – See Appendix II) , and with a newly constructed road system having been put in place by means of the ancient obligations imposed on a lessee through the conditions of exchange or grant to build the local roads, all of which have created so many problems over the years through flooding, earth plate movements and tremors, water leakages, and the plain structural unsoundness of such "buildings", in the broad sense of the word, which were thrown up all over HK, based on such design features, and now antiquated after just a few years, such that such system of buildings, and such resultant immediate neighborhoods, through once popular, must be abandoned, even if it means destroying a distinctive neighborhood characteristic, since neighborhoods can be good and they can be bad, but not both simultaneously, as they will gravitate to the one pole or the other.

Sometimes, governments do know best, thus the discretions granted to them in the legislation of various lands.

In this real case, the parties to this appeal, through Propandi 2 and 3, seek to invite this Tribunal to find fault with the decision of the BA, and to decide whether the decision was wrong.

A.3.1.2 The triune nature of "wrongness" in private administrative matters

Now such a decision as this, can be *wrong* in three ways, and only three ways.

These three blunders of turpitude are as follows.

Firstly, the decision maker acted immorally in making the decision, by, for example, accepting a bribe by another interested commercial party, or interested foreign government, who threatened trouble if the decision was not reached in a certain way, and in such a case, the decision was thus reached by illegitimate external influence or pressure, rather than by the party, the BA here, charged with the administrative duty to make the decision.

Secondly, the decision maker would be wrong if he rejected or approved a plan, and failed to give any reasons for the decision. A party to a governmental application must always be made aware of the reasons for the decision, and not left to wonder what a government, charged with the duty of transparency, has decided, for such would be an arbitrary form of governmental power. Citizens of a state should never be saying of its government, "*oh, well, its just that way you know*", but rather, should always be told the reasons for such decisions, like a caring parent that disciplines a child, or a good teacher that fails a student, yet takes the time to explain the action taken so that there is room for improvement and change, and so that plans will be made better the next time, and so that there

will be progress in the state which reasons teaches and honors the laws to which it holds others accountable.

Arbitrary governments, on the contrary, however large they may appear, whether as a matter of self asserted plastic fact, or even in accordance with the journal records accounts and daily tributes of those who honor oppressive regimes by means of innocuous ink and grey-realm policies; those with a history of only several decades, perhaps, or even hundreds of years to their credits but never more than that; and no matter how solid the political philosophy they adopt for their manifesto, and no matter how super real and larger than life their steroidian images appear via satellite TV images where real *weight* counts for nothing, or no matter how surreal and sublime they appear as lands wealthy and advanced to weak seeking eyes, or no matter how sub real they appear on the stages of international diets and summits when their version of international morality ethics and governance seem to start to make sense to those rooted in other traditions with thousands of years to their political and social ledgers; and however much blackened water they manage to hide under the shadowy caverns of their shaky and crumbling bridges over troubled water bodies and highways of constant disaster, they will not nor have they nor do they answer their people, and thus time holds them to ransom for the advent of that date when the people will no longer fearfully turn a blind eye to those who will not explain but simply take to sustain their propped existences. Reasons are always the hallmark of “good governments” like those of Vienna, Canada, and certain parts of Australia.

Failing to explain, means there is no explanation, and subjects are left watching the political shrapnel fly over casualties who get in the way of the power of unreason.

Thirdly, a decision would be wrong if the decision maker failed to exercise his discretion, as he must do, and thereby take the risk which all good governments take that they might be wrong in some measure, but he rather attempted to reach a discretionary decision, not by means of a discretion, but by way of beurocracy, since it has been said that –

A discretion is, after all, a vague term for the manner in which a decision maker collates all of the facts to his attention, considers them in light of laws binding on his department or regiment, and then moves into that sphere where his reason, guided by the twin sentinels of commercial good sense and the propriety of necessity inherent in all decision making, decides on the rightness of a matter where the strict letter of the law cannot trespass, because it is only the free actors in good governments, and not autocratic pilots of policy who fly the state by determined and predictable policy controls, who, guided by healthy traditions, useful bureaucracy, and with a degree of the hierarchical temperament that ensures respect for accomplishments in government, can ponder the individual merits of a particular matter and can then decide the thing rightly properly and with the forces of pure conscience which move

governments forward rather than constricting them into political impotency and international uselessness.

Since we are degrading the second and third types of "*wrongness*", to a type of political immorality, clarification and elaboration will be needed herein. It is sincerely hoped that no reasons need be given as to why the first type of activity, or bribery, constitutes commercial political and financial immorality, as well as governmental fraud on the majority. But, in any event, we offer the following illustration of the first type of wrongness.

If the decision to reject the plans is not made by the director of the Building Authority, or by one of his authorized representatives, but is made by sociocrats[6] or westminiocrats[7], from the motherlands or otherwise, or from other parts of the world, including India or Pakistan, or from the former sovereign, for example, who, whoever they be, usurp local authority, or put unlawful pressure to bear on the Director of the Buildings Department, then this is a type of international immorality of the most serious nature. For one it is expressly contrary to the express words of the Joint Declaration of 1984, which was said to be an international treaty between two sovereign nations. Thus, People's Republic of China acts for the purposes which are not in keeping with

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[6] "Sociocrats" means beaurocrats from socialist states, who operate under such a system, rather than a common law system of law, and responsible government, as was intended for HK in 1984.

[7] "Westminiocrats" means beaurocrats from states which boast of a sovereign parliament, but who in fact are operated by institutional government, or in other words, beaurocratic welfare states, see the formula below for what constitutes institutional government.

the treaty, or should the UK do so, by sending representatives to act in a manner other than in keeping with what was agreed in the legislation of parliament, *it* or they, will have to answer for such to the international community, as a fraud on the international community, *and those myriads* of financial institutions banks companies law firms and merchants of trade and import who have set up office in HK glassen and high HK towers which lift men and women up and down in a fashion similar to the statistics on the charts of Wall Street and Bay Street which they represent through the days, which have acted and invested in HK on the weakness, disclarity and faith of Chinas HK's and Britain's undertakings, as international obligations or even domestic creeds owed to all of those who act in the international order.

But we cannot here explore the law of international treaty obligations, save in a general sort of way. If these obligations are not met, and since the central government is responsible for the actions of its people(')s, it will mean that these international organizations have been under the commercial understanding that they were investing in an independent HK, when in fact, their loans, funds, and capital have been siphoned over borders, and beyond, should this be the case, as it is. Enough, however, said about this self evident type of immorality, the first type of commercial immorality, or administrative wrongness, which we outline here, as we have been invited to find that the BA acted wrongly.

Turning to the second factor, there are good reasons why a good government will give cogent and clear reasons for its decisions. It must be stressed that this

will not disclose the secret operations of a government, for it is clear that if a government is to operate effectively, it must keep certain matters as issues of governmental secrecy, or as private government matters.

The question is, where is the line to be drawn, or when is it not proper for government to reveal its hand. In other words, how detailed are the reasons for a decision supposed to be.

When there is legislation, which grants the government a discretionary power to make a decision, it is clear that there is a certain degree to which such a "*discretion*", involves a degree of the personal judgment of government staff, based on the years of experience of the civil servant, and their skill in administration, and hopefully a motivation sprung from a genuine interest in preserving public confidence in the administration, whilst ensuring that each and every interest decision is made not necessarily in the best interest of the majority, but in the best interest of the state as a whole, if state there be, or at the very least, in a region of a state. For a state acts through its members. And there is a difference between the best interest of the state as a whole, and the interests of the majority.

Why this distinction between acting in the interests of the majority, and of the state as a whole. The interest of the majority, may not be for the best interest of the state. Let us say that in State "T", 90% of the population are property owners, and property tax is therefore a burden on them, and thus not in their

best financial interests, since it is somewhat of a burden to them. That may be, but it is clear that if a state is to function well, then it must have income or revenue, to support, for example, upkeep on public property and streets which connect one private property to another, unless the streets are all private property, as in some states of more ancient origin.

A right, proper and fair decision maker, will provide sufficient reasons for his decision so as to enable the interested party, to understand as a matter of certainty, how such a decision could be based on the laws publically available, and those laws which directly impinge upon the decision. The decision maker need not reveal each and every person who participated in the decision, or acted on it, but he must state what the decision is, and provide supporting inferences for the decision.

A "*supporting inference*" is a moral agreement between two or more decision makers, who decide what is beneficial for the state as a supporting part, with the state meaning the people governed in the state, and not for the best interests of the government as a separate entity reality or concern, nor the persons in government in their role as state administrators, for the state acts for the benefit of its citizenry, as revealed and reflected through its government, which must never be above the law. There will be times when it is not possible to give a reason for something, as reason has its limit[8], whereas good commercial

[8] See, for example, The Critique of Pure Reason, by Immanuel Kant, who demonstrated through his didactic critique of the boundaries of pure reason with what lies beyond reason, namely, certainty of evidence.

morality has no limits. Moral decisions are those of two or more members of the government who reach a decision based on supporting inference, being the inference of moral necessity which supports the good of the maximum members of the state together with the minorities, even though they might not see how a decision is in their interest in the short term.

In contrast, a decision by means of piles and piles of information, information which is descriptive in its tenor but not decisive of fresh problems or new situations; or policy research and guidance notes for confronting each and every permutation and combination of problem hithertobefore known to government and preserved in the annuls of government history; and information which decides nothing afresh, but merely seeks to enshrine the status quo in a permanent state of immobility, because such information decisions are in reality pre-decided as the checked boxes of a form into which all similar decisions are simply put as a matter of beaurocratic measure taking, other than in keeping with what was agreed in the legislation of parliament to be given to individual members of government, acting on the basis of public morality. Such a government, which refuses to decide and chooses rather to hide behind information made judicially or through policy makers acting in concert, can never advance and will only fall behind in direct proportion to its inertia driven policy making. But this says too much too early of the third type of immorality, the refusal to decide at all, to which we will come in more full measure in due course.

An example may help. In this present case, the government might have decided to approve the application because, they, the government and a part thereof, realized that middle class housing, which would sell for about 8 – 13 k[9] per square foot, when the units of the development were placed on the market, was necessary for future economic surety of the middle class, and the surety that those who take the time to obtain an education, and which class in general acts and lives in that sphere of influence where they know what government is about, and how to support good and effective governance, will be provided for, although there might not be any valid reasons presently, for taking such actions.

Or it might be that the new flats which hit the market, are always bought out by governmental and private speculators from over Hong Kong's northern border, who realize that international confidence in Hong Kong, is still, as at the date of this judgment, nominally greater in the HK Region, than in the Mainland, and thus seek to shore their assets in an internationally safe economy. Thus, to allow a development to proceed which does not help the citizens of the Region, but more rather their Northern neighbors, may seem illogical, save that the government and its top advisors, may have some internal information, not yet made public, that crackdowns are expected on this type of activity in the near future.

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[9] "K" means the number of 1,000, circa 1980 – 2011, based on the then value of gold plates, which are measured in karats, or in units of 1,000.

Thus, although the decision maker cannot give a rational reason for his decision, involving reasons which are logically derived from the rational parameters of the act or ordinance, nonetheless, the decision maker is able to assure the applicant that the decision is one which will inhere to the benefit of the citizens, when the next 年度报告[10] is issued. Many citizens, in states which are known to act in the best interests of their citizens, such as Canada and the United States, or even Australia, are content to wait on the acts of a benevolent government which has a proven track record of acting in their best interests, even if the reasons for doing so might not always be reasons which are capable of rational articulation, but are more by way of an ethical trust keep –sake, for the good of the rulings of party politics.

But when no reasons are given, and there is no foundation of ethical trust in the government, as is commonly the case with governments that operate more by means of autocratic power, or beaurocratic power and red tape[11], that is, citizens do what they are told, even when it does not seem fair, logical or proper to do so, then this compounds the existence of governance which is primarily for its own benefit, and not the benefit of its citizens.

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[10] This means "*Annual Report*" in the Cantonese language of Southern China, which sets out the major policies of the Hong Kong Government, as it was done between 1997 to 2011.

[11] "*Red tape*" means the actions of a government which seals all of its decisions on papers with red ink and heavy stone stamps which are so thick, heavy and opaque, that it is not possible to discern with any degree of certainty what the decision is, or why it is made, but that all that is left is an order. It is also a short-form for that state of activity where the state bullies its citizens, through the revenue, the police, or other public officials.

A.3.1.3 Transparence of State Actions.

The question of whether a state has reached this inexcusable state of autocracy and non transparence, can be determined as a matter of logical certainty by the following mathematical formula:

S(population of state) + G(public servants) = ⇀

Now if ⇀ is < or = to $1/10^{th}$ of the total population of S,

then the state is in good order, as a matter of mathematical proportion.

But if is > $1/10^{th}$ of the total population of S,

then the state is in need of serious reform, so as to restore the ratio of state members to a proper and regular proportion of the total population. This must include members of the legislature, executive and judiciary, and also includes semi-governmental bodies and interest groups which, though said to be private, receive more than 60% of their income from the government. [12]

Thus, having determined as a matter of census, as the tradition has been, whether the state operates as an autocracy or not, assuming that it is not, then the next step is to seek to provide reasons which will not expose more than $9/10^{th}$ of the activities of the government. Or in other words, the private

[12] From the Collected Works of James W. Campbell 2012.

activities of the state must always be equal to 1/10th of the amount of state policy *activity*. (Activity is measured by Campbell's law of human motion.)

W=T/E

where w = work, t = time and e = effort.

[13]

For these reasons, it is apparent that a government which does not give rational explanations, or moral interference supporting reasons, for its activities and decisions, does not act for the good of the state as a whole. *QED*.

We now move on to the third type of moral blameworthiness, and the problem of the state which does not make decisions at all, where required to do so. Starting from the specific and then moving to the general, it is apparent that s. 16 of the Buildings Ordinance provides the BA with many different grounds upon which they may refuse an application for building planning permission. But, in an unprecedented manner and legal tradition, the legislation does not impose any, whatsoever, positive obligation by means of words, the sole medium through which law is conferred, applied and enforced, and \or promulgated, on the BA, to consider the plans with respect to the parameters set out in s. 16 or elsewhere.

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[13] From the Unpublished Works of James W. Campbell, "James W. Campbell on the Relationship Between Natural Law and Physics, with some observations on the General and Special Theories of Relativity", Chapter 9.

This is odd legal drafting indeed in the extreme. S. 16 is in effect, a referent type of law only, is neither conscriptive nor prescriptive in its legal effect. It need not even be applied when plans are submitted to the BA, though if the BA does not "consider" the plans within the statutory time limit, then the plans will be deemed to be approved, as the relevant legislation in the Buildings Ordinance provides. In effect, the BA, as a matter of departmental policy, could in effect disapprove of the plans, for non stated reasons of governmental policy, and then simply apply one or more of the grounds of s. 16, as an official reasons, say the request for more information under s. 16(1)(i), and then send the matter back to the developer for further action or for an appeal.

The legislation provides the BA with a discretion to disapprove of the plans on many different bases. But it does not say, in so many words, that the BA is required to hold the plans up to these criterion and to consider the plans on these bases. Or, again, it appears that the BA can bypass s. 16 altogether and approve the plans any way they deem fit, and even if they do get around to s. 16, they have a further discretion as to whether or not to approve or disapprove on these alternate bases.

To re-iterate with more detail here, all that the BA is required to do, under the existing legislation, is to consider the plans within the statutory period, and either to reject or approve them. If they do not do so within that period, then the plans are deemed to be approved (s. 15(1)). Beyond that, there is no positive

obligation on the BA to consider the plans in any particular manner or in keeping with any statutory requirements: see s. 15(2) which provides that the grounds for refusal are not treated as exhaustive, and s. 16 which provides for (some non exhaustive) grounds on which the plans may be rejected.

Compare with legislation in the UK, which in s. 16 of the Buildings Act (1984)[14] imposes a positive duty on the authority to pass or to reject the plans in keeping with the regulations. The duty is mandatory, and not couched comfortably in language about the grounds on which the approval "*may*" be refused.

And compare with the elegant brevity of the Canadian legislation from the province of Ontario[15], which provides in the Buildings Code Act of 1992[16], that the Chief Building Officer shall issue a permit for plans submitted unless they contravene the legislation. Thus, there is a positive obligation to consider whether there is a contravention of the legislation, because without such, there is a mandatory obligation to issue a permit.

In Hong Kong, in wide contrast, there is no positive obligation in the legislation for the BA to do any review of the plans, save that the BA only has a certain time period to conduct its review.

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[14] See Appendix III.

[15] Canada has 10 provinces and 2 territories.

[16] See Appendix III.

In our view, this state of affairs shocks the democratic party conscience; a government that passes legislation without the very minimal duty imposed on the government to carry out an examination of the plans in keeping with the statute. The legislation is so loosely worded that one can hardly blame the government employees for not wanting to follow it precisely. The amount of leeway granted to the government in these provisions staggers the legal imagination, and all that need be said is that it is hoped that the legislature will soon amend this defective legislation, comfortably from its new offices, all grouped very close together at the Tamer site[17].

In relation to the third type of wrong, we thus see that the government through the BA is in a position not to exercise the discretion at all. There is no mandatory legal obligation to do so, and thus wide shots can be taken by government shooters, at moving building targets or developers who present in the detail the building plans to lay before the government - guided by this loosely worded legislation. It is now open to the government not only to decide to approve a non-conforming plan, but further, the government could decide not even to conduct the review at all in keeping with s. 16, and decide the matter under some other provision, or pursuant to some other government policy, so long as worship service is paid to s. 16 in some government correspondence with the applicant.

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[17] The Hong Kong Government's new offices, as at 2011, are located at the harbourfront in Admiralty, or at the Tamer site.

In our view, this is also a serious moral blunder on the part of the government. The government should be held accountable for what it does and should exercise discretionary powers, when they are given, for if they do not do so, but decide planning applications on the basis of established beaurocractic practices, then government planning becomes machine like, or like an automated press, or answering machine, equal treatment to all without a consideration of the careful details of each matter, which require individual attention.
Such government is the opposite of laissez fair government, and runs aground on the rock of "inverted L-shaped"[18] government.

When government fails to lawfully exercise its statutory discretions, the state becomes a policy driven state, rather than a state based on the rule of law. A policy driven state is a state where government's pre-determined policies operate to make more than 80% of the decisions within the state, with no real discretionary powers for the civil employees (servants) of the state to act other than in accordance with such policies. Such a state lapses into auto drive, and a state of fiscal affairs where debt will override the state's assets because there is an insufficient amount of discretionary powers being exercised for proper purposes of fiscal advancement.

[18] "inverted-L" shaped government means government which is too large, per capita, too beurocratic, and which is thus the opposite of free government, or "l-shaped" or laissez fair government, which elects by common vote, and in which the government are accountable to the people.

A.3.1.4 Disposition of the First Submission

Returning to the two applications herein, we hold that the first application was very improper. Whilst narrowing down the issues on the pleadings, for this Tribunal to consider, is laudable, the parties to an appeal before the Tribunal cannot circumscribe the decision making process by agreement of the parties.

Effectively, what counsel was seeking to do by means of this application, was to prepare a "*check the boxes form*", or to make the Tribunal "*follow counsel's flowchart*" of schematic steps to a correct Form 7[19] examination – like judgment. By thus delineating the manner in which my brothers and I exercise our discretion herein, and calling on the Tribunal to jump over the Olympic hurdles in sequence, or to follow the prescripted procedures and have all four Tribunal members join the dots, color in the shapes, pin the tale on the "*wrong*" donkey; a judgment of "*one to three, wee wee wee, agree with me*" type style. In summary, we do not accept that the question before this Tribunal is one of whether the BA was right or wrong. That is a matter for judicial review, but should the matter go down that road, it will no longer be by way of a question of whether the BA was right or wrong, but whether this Tribunal was right or wrong, as a matter of law, not a matter of fact.

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[19] Form 7 is the highest grade of high school, in HK, before students head off to university. Thus, form 7 examinations are critical, and can be likened to the ancient Imperial Examinations, during the 唐朝 and 宋朝 periods to select the highest scholars, or the 状元.

In particular, whether the ratio decidendi of this decision, embraces the correct matters, and leaves extraneous matters to the realm of helpful obiter comments, and thereby seeks to build on the solid blocks of Tribunal decisions of the past, and which will aid other Tribunals down the road, and thereby save the Government of Hong Kong billions of dollars on developments which are not sustainable based on the legislated principles of design and economic congruity.

Without going into such matters, raised through the manner in which counsel presented their cases herein, in the fullness of time, and millions of legal dollars later, the matter will then be shot back down to the Tribunal from the courts above, to re-decide the matter in keeping with a novel point of law, not now before the Tribunal, nor having been before the BA, but a *novel novel novel* and satellite of point of law – still to be determined, which ingenious counsel shall be able to spin out of the dicta to be stated herein on the main issue, and which can be extracted from this judgment, and which will then seem akin to finding a door to travel upwards and out of the legislative discretion presented firstly to the BA (subject to the comments above), and then to this Tribunal, but not to any court higher than this, for which reason the matter will eventually float back downwards to earth, and then be seen to be wafted back into the realm where all of these matters get decided in the final analysis, as mixed matters of fact and law, and not merely as matters of *pure law* which do so need consideration by those in higher places, for such cases as deserve such judicial care and are worthy of such judicial care. But what is for certain is that before this matter shall follow that path, it is for this Tribunal to create any such point of law

herein, for the courts above, and then by the time the matter returns *to the new us*, no doubt the new factual matrix will be such that it will be a matter of whether and how the dicta from above shall be applied to the new and unforeseen circumstances, and upon facts which, though presently unknown, will continue to evolve forward, in tandem with any developments in the law.

Further, we cannot see how, even if we were to decide the matter, how it can be said that the government was wrong based on any of the 3 ways in which a "*wrong*" decision can be made, or even unfair – in the "wrong" first type sense, as outlined above. There is no evidence that the BA was bribed, nor that the decision was really a decision from beyond the remit of the BA, nor that the BA failed to exercise its statutory discretion. All three ingredients, being present here, would seem to excuse the BA from any aspersions before her of any wrong sort of conduct.

Even if we were asked to find any, we cannot so find. Wrong conduct is not the same as a decision which is wrong in law. Wrong conduct is conduct suffering from some deprivation of morality, and not conduct by government staff who cannot be expected to have the same degree of expertise and the breadth of learning as exists on this special Tribunal, in matters of law, math, surveying, the property development business, and other commercial leasing matters.

Quite to the contrary. Despite the remarkably omissive language of the statute, the BA went ahead and did consider the plans in keeping with the criterion of s.

16, and gave proper reasons for rejection, after taking advice from their brothers in the other government departments.

In our view, even this was beyond that which the present statute requires government to do. And it is hoped that there will soon be JR proceedings, in one case or another, or even as a special interest case to rectify these laws which do not now bind government, and to correct legislation which suffers from the legal blemishes of circuity, vagueness, and excessive breadth of application, and as set out above hereinabove.

Therefore, since there is no evidence of "wrongness", but more to the point, since this is not a review of the manner in which the BA reached its decision, we are not prepared to accept counsel's *tick the box application* as to the manner in which this appeal is decided.

Accordingly, the following order is made on the joint application of 20th May 2011:

(i) The main issues in this appeal was whether the s. 16(1)(g) refusal should stand. That issue shall be approached not by a determination of the forensic fairness of the BA decision, but by approaching the matter de nova, with all the advantages, weaponry and armor with which this Tribunal has been equipped, by the gracious forces of this regional quasi-state.

(ii) This Tribunal will not embark on a mini trial of whether or not the BA was wrong to make the decision it did, and this approach to the appeal[20], as suggested by counsel, is rejected in its entirety.

However, and keeping before us what has been stated above, the Tribunal needed, at the very least, to consider whether or not it agreed with the Building Authority's decision. It could agree with the decision. It could disagree with the decision. If it affirmed the decision, then the appeal would be refused. If it disagreed with the decision, the appeal would be allowed, in some measure or another. In such a case, the Tribunal could vary or reverse the decision, or substitute the decision of the BA by its own new decision.

In the legislation, it is said that the Tribunal may confirm, vary, or reverse the BA's decision, or substitute its own decision for that of the BA.

A.3.1.5 Coming Here to the Tribunal: and Its Practical Effect on the Appeal

The process of coming to the Appeal Tribunal, is not to look at how the decision was made in depth and then invite adjudication on its correctness. In this sense,

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[20] It was suggested to the Tribunal by counsel that if the appellant can demonstrate that the government's rejection of the plans was wrong in 2007 under s. 16(1)(g), then the appeal should be allowed, with the minor amendments allowed. But if the appellant fails to demonstrate that the BA was wrong, then the BA takes the view that the matter should be remitted to them, whilst the appellant would want the Tribunal to consider the matter de nova (see Memo dated 20th day of May 2011).

the BA does not come here to defend its decision, like defending a PHD thesis. Nor does the appellant come to throw stones. There is no point at all even in showing that the decision was wrong, and in this sense, we are of the view that the approach of the appellant to this appeal was not correct, in its attempt to find fault with a decision which stands without fault before us, awaiting determination of the more important question of whether or not we happen to agree with the BA. But that is quite another matter.

Nor is the process like unto defending the reasoning given by a court below, which is in favor of one's position.

Once an appeal is lodged to the Tribunal, any number of things could happen. The legislature could amend the law. The project could dry up for lack of funding. The appellant could change its mind and withdraw the appeal. There could be changes to the subsidiary legislation as a result of policy changes in the Government. The lands department could increase land premiums making the project unprofitable. Other decisions of the other Appeal Tribunals could have a material impact on the decision of this Tribunal insofar as the issues canvassed herein receive different treatment by differently constituted Tribunals. Or, the higher courts of the land could reach decisions on points of statutory interpretation, which would affect the way that this Appeal Tribunal makes its decision.

All of these "*vicissitudes of the life of the law*"[21], mean that by the time the appeal is set down and actually heard, the Government and the Appellant find themselves in the very situation to that which existed when the decision was made by the BA. What is to happen in these situations, where circumstances beyond the for-see-ability of the parties, change the face of the circumstances surrounding the appeal.

When this situation occurs, the parties may decide amongst them that the proper course is that the appeal should not proceed. But then, the issues may arise as to costs which have been incurred. The Appellant might be of the view that at the time, given the surrounding circumstances, it was perfectly correct to launch the appeal, whilst the Government stands behind its decision on the facts. Either way, one of the parties demands the costs to be paid by the other.

Or, it is possible that the laws have changed the original factual or legal matrices in which the parties originally found themselves. In this case, the appeal is necessary, though the original issues which divided the parties may no longer exist. Again, the problem facing the parties is what to do in this situation, especially with respect to costs.

In any event, once an appeal has been lodged, it will be necessary for the Tribunal to re-examine the case and to decide whether or not it agrees with the decision that has been made.

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[21] (Reformed from what an earlier judge said in the context of tort law, and the "vicissitudes of life")

There may be many reasons why it does not agree, or many reasons why it does agree, but in any event, it must come to a decision on this first point, before giving reasons for its own decision. In reality, the Tribunal need not even state the reasons why it disagrees with the decision, though often it will do so, out of respect for the decision which has been made, though, as we have seen, it does not venture into that avenue of discussion where moral turpitude becomes the focus of the decision.

A.3.2 Submission Two

We now embark on a review of the second application which was made to us, again by way of a joint application by the parties, on 24th May 2011.

The application was made well into the hearing, after 3 days of hearing, and after the site visit by the Tribunal to North Point, with counsel, solicitors and the architects, and the bus driver who played a role in determining what was seen by the Tribunal on route by way of town planning patterns, or by controlling the flow of real evidence, to a certain degree.

A.3.2.1 A Question for the HK Court of Appeal

The application was brought pursuant to s. 53C of the Buildings Ordinance which empowers the Tribunal, to apply to the Court of Appeal for consideration

of any point of law which arises. There must be a point of law before the procedure can be engaged, and it is a reference which the Tribunal decides to make, not the parties to the appeal: see s. 53C(1).

Mr. Yin's stance was that the BA would not, and could not, so he stated in English free hand, reject the plans today, at the time of this decision, June 2011, given the change in the characteristics of the neighborhood around the site, and the OZP. Then it was said that both parties agreed that the design, type or intended use of the proposed building, or by simply carving out a part of s. 16(1)(g) by concentrating all attention on "height" alone as a ground of rejection unto its own without the remaining part of the section, would have no relevance to the Building Authority's discretion to approve or reject the plans.

Then, the parties joined hands and said, given the stance of the parties that s. 16(1)(g) is no longer relevant to the 2007 decision, due to their mutual agreement, should the matter be considered afresh today, they raise as a question of law whether or not the Tribunal should go out on its own and investigate whether the carrying out of the building would offend s. 16(1)(g), and whether doing so would be by way of "*life out on a limb*", without the contractually agreed support of the parties to this appeal.

Then, the parties ask whether, given the stance of the parties, as stated above, it would be proper for the Tribunal to issue a summons and compel persons to

give evidence pursuant to the Tribunal's re-consideration work pursuant to s. 16(1)(g).

The application, nicely signed and dated by Mr. Edward Chan SC, and Mr. Michael Yin, seems to put the parties on the same plane of agreement. Is it not the case that they no longer believe that s. 16 is relevant, should the appeal go on.

A.3.2.2 The Essence of the Parties' Joint Application

One asks simply this question, have the parties agreed that there is no longer anything for this Tribunal to decide and that accordingly, the matter should first go up to the Court of Appeal for resolution of this point of law, and then back to the Tribunal on the issue for final settlement by way of application of the law so found out by the Court of Appeal in the fullness of time and costs.

Despite its apparent tenor of good will and further apparent simplification of the issues between the parties which it is for this Tribunal, whether sooner or in any event later to consider, this application is fraught with difficulties.

The question is, is the BA conceding the appeal in essence, and therefore wanting to withdraw their opposition to the planning application which can then proceed.

This is manifestly not the situation.

Firstly, although this Tribunal will not sit in judgment on the alleged wrongness of a decision made by the Building Authority, to determine whether that decision was correct or not, this Tribunal will look at the matter anew, now. Once that is done, it might transpire that this Tribunal agrees with the decision made by the BA, or perhaps it will not agree. But agreeing or not agreeing with what another person or body decides, is not to show that the other party is wrong, although, in the course of setting out the reasoning for the new decision, it might also transpire that the old decision was, by the by, patently wrong, in any event. That is a matter for a comparative jurist to consider.

So, whereas in a judicial review, the starting point is the decision made, and the process which led to that decision, in an appeal de nova on a building matter, the starting point is the ground of opposition which has been cited by the BA, by the route of which one then proceeds forward to determine whether or not that ground, or those grounds, of objection can still stand, looking at the application as it stands today, four years after the fact, for reasons which must then be fully explained.

Clearly, the parties are still not in agreement over the BA's decision in 2007.

The BA maintains that that decision was correct given the law as it then was. The appellant of course disagrees, and has therefore not only appealed the case,

but maintains the position that the 2007 decision was wrong. In fact, if the appellant were to withdraw its opposition to the 2007 decision, then this appeal would collapse, as the decision of the BA would stand unchallenged.

But what the parties to this appeal would like to do, is to sort of "*pretend*" that the 2007 decision did not take place at all, or that, given the change of circumstances since then, it would no longer be possible to decide the matter in that way. Thus, putting that decision aside for the moment, the parties in effect are saying that if the matter were decided afresh at the time of this appeal, then the matter could not, and would not be decided as it was in 2007.

That might well be, but an appellant does not have the opportunity to have a fresh determination of the case, without standing on the base of the BA's original decision and by therefore appealing it. One cannot simply agree away into the legal abyss the decision of 2007 by means of mutual agreement. One cannot treat the legislation as a sort of monkey bar apparatus for performance of mutually agreed tactics and legal stunts by way of which the parties agree step by step, climb by climb, maneuver by maneuver, to erase the original decision ab initio. That may work in contract law, but not in appellant procedures set forth in the Buildings Ordinance.

One cannot simply use the 2007 decision by way of a sort administrative leverage point, which it is not - given that it engages private law and the ownership of private property, or, as a platform to stand on by way of a locus

standi, and thereby pass through s. 53C to higher plains, by- passing the Tribunal in the process, which has been set firmly in place by legislation, and thereby engage in a sort of forum shopping because of counsel's apparent confidence of how a court of appeal might look at the matter, should the Tribunal entertain the application for rerouting the appeal.

There is no other path leading to the Murray House Appeal Tribunal, as it then was in June 2011, save by way of objection to the BA's decision. *It is a one way only street*. For the appellant must object to that decision of 2007, before it can even be heard by us in the first place.

But the appellant, seeing that this Tribunal will truly go on to consider the matter anew under s. 16(1)(g), suddenly grows cold in argument and legal stamina, and now seeks to say that both parties are of the view that the 2007 decision cannot stand given the now new situation which the parties, the appellant and the Government, find themselves, here in 2011.

And, herein, lies the wisdom of the Privy Council in the <<Attorney General v Firebird Ltd. [1983] 1 HKC 1>> case, which we will come to in due course. For their Lordships, with the inherited wisdom of the ages of the common laws, stretching backwards through Locke's Leviathan to the Norman Kings, and forward to the rein of the post-Stewart monarchs, and aided by the strong ones of history past and present who write the common law with their own blood and not merely with ink, they alone, Sir Thomas Moore being of their brotherhood

who taught us that the common law binds the King, and that discretions have limits and cannot ford streams of absolute law and prohibition, and until then when they rule and when legal shadows flee and morning stirs; and with the experience of seeing many such matters brought before them, in wave after wave of cases which challenge the authority of the State in sheep's clothing; they taught us with their stream lined, symmetric and classical judgment style that the law must always be applied, when a decision is made, and not at the hap and hazard will of the citizens of a state. It might seem more fair to force the BA to apply the law in effect at the time of the submission for building approval, but their Lordships stiffly rejected this stance, understanding that a matter will always be decided differently at a future time, then when the application was made, and that the page of the statute book must always be allowed to be turned, before a decision is made by the State, or the State will become a subject of the people of the state, rather than the State leading the people by its omnipresent example and as teacher, as one great American jurist put the matter.

At the resultant vector speaking, even if both parties agree that should the matter have been decided originally in 2011, rather than 2007, the matter would have been decided differently, that is everything *off the point*, all *off boar*d and all *directly into the cold sea*. A school boy will know that if he decides to run to school, it will be more tiring than if he walks; and, by the extrapolation of public school reasoning, therefore, his decision to run today in the rain, may differ from a decision to walk in the sunshine, three weeks hence.

For one fact, of course, the BA could not have known the state of law surrounding the factum composition of the site in 2011, when they rejected the application in 2007.

They might have had very good reasons to reject the application in 2007. We will never know, because the legislature has not seen proper to allow that course to be run, as we are not called to conduct a post mortem of their reasonings for rejection. The BA is shielded by the legislature from judicial review, a measure only available to attack this Appeal Tribunal, in cases where there is a point of law generated by us to roll down Cotton Tree Drive to the High Court Building of Admiralty which houses the Court of Appeal in its chapel.

One does not judicially review the decision of the BA in these matters – ever. Public law and administrative law concern public matters. Private law, and land law, concern private matters. The two are distinct categories with distinct remedies. But the less we say about this step forward now, today herein, at this peculiar time in *local judicial* decision making, the better. There will be time later for such discussion, in other forums, more suitable.

Being that it is only the decision of the Appeal Tribunal, which is open to judicial review, at the next step of this case, should the matter proceed along that tangential trajectory, into appellate cyberspace, as we have seen and said before. But more on that in the by, to repeat.

The parties then agreed in writing that since the matter would be decided differently now, in 2011, than in 2007, a proposition which could hardly be more true given that this is a Government appointed Tribunal of members who do not work for the Government and who trace their authority to the National People's Congress and beyond and through to the people of that state, they then question the election of this Tribunal, in seeking to have the parties provide new evidence which revolves around the law set out in s. 16(1)(g).

Coterminus but a priori with the application by the parties to state a question of law for the Court of Appeal, was a summons issued by the Tribunal, requesting the parties to provide financial information about the tenements in North Point, and their monetary value, all factual or evidential material, satellite to the question of law as to whether the proposed development would be out of character with the height, design, type or intended use of the buildings in the immediate neighborhood of the proposed development.

A.3.2.3 A First Look at s. 16(1)(G) of the Buildings Ordinance

Before we move to why this information was requested, a word needs to be added here about the scope of s. 16(1)(g). When an application is rejected under s. 16(1)(g), it is not done so by invoking a part of that subsection. For this subsection is not to be subdivided at will.

When the BA considers an application under s. 16(1)(g), it does not simply focus on some of those elements, or one of those elements, say height, or type, or design. The section is invoked as a whole and the rejection is by means of application of the whole of the subsection, and not a part of it.

There is no reason to read the section in part as a matter of proper statutory process and by applying the interpretive purpose. For as a building differs in height from another, then it also at the same time differs in design and type and intended use (emphasis, the author).

What is the reason for this. It is well known principle of statutory interpretation, that in construing a statute or part of it, a purposive approach should be adopted, that is, one does not focus on only a part of the statute, but one looks to its underlying purpose. In the case of s. 16, the purpose of the subsection is to be determined in construing the section as a whole, and not by seeking to isolate only a part of the subsection, by wrongly severing part of this subsection from the rest. In medicine, you do not understand the greater function of the arm, as a whole, by considering the fingers without reference to the wrist, forearm, thumb and armpit, which, as a whole unit, perform one function. Similarly in law, which, in its structure, parallels the scientific functioning of the body, one must construe a section as a whole, and not merely focus on a part of it, in isolation from the rest.

In <<IRC v McGuckian [1997] 1 WLR 991>>, Lord Cooke of Thorndon said at p.1005:

"The principle which your Lordships have been developing in W. T. Ramsay Ltd. v. Inland Revenue Commissioners [1982] A.C. 300, Inland Revenue Commissioners v. Burmah Oil Co. Ltd. (1981) 54 T.C. 200, and Furniss v. Dawson [1984] A.C. 474 is not uncommonly seen as special to the construction of taxing Acts. Perhaps more helpfully, however, it may be recognised as an application to taxing Acts of the general approach to statutory interpretation whereby, in determining the natural meaning of particular expressions in their context, weight is given to the purpose and spirit of the legislation."

Accordingly, "*height*" must be understood in its context, and cannot be understood when the other parts of s. 16(1)(g) are removed so as to make this appeal "*easier*" by only concentrating on height. As Mr. Edward Chan S. C. said in his orally delivered closing arguments, s. 16(1)(g) has three limbs, the immediate neighborhood concept, the incongruity issue, and it must be borne in mind that the section is addressed in the context of a society which has been developing for over 100 years, since the first building legislation was introduced in Hong Kong. Accordingly, this section "cannot mean that one can never build higher than what is there", as he said with experience and in-site.

We agree.

But if one simply focuses on one word in the section, or height, then this section will be nothing more than a restriction on building higher, which would not make any legislative nor commercial sense.

A.3.2.4 A Second Look at s. 16(1)(h) of the Buildings Ordinance.

In <<China Field Ltd. v Appeal Tribunal (Buildings) (No.)(2009) 12 HKCFAR 342>>, the HK Court of Final Appeal affirmed that the purposive approach to statutory interpretation is still the law, but that the court should not distort the plain meaning of the text of the statute so as to achieve what is believed to be the underlying purpose, by means of what cannot possibly be salvaged from the plain meaning of the words of the statute. In that case, at issue was the proper construction of s. 16(1)(h) of the Buildings Ordinance (of HK). A few words about the decision are mentioned here， insofar as it sheds light on the interpretation of s. 16(1)(g).

S. 16 (1)(h) - The BA may refuse to give his approval of any plans of building works where – “the building works consist of, or any part thereof involves, the construction formation or laying out of any means of access or other opening, not being a street or access road, to or from any street, and the place at or manner in which such means of access or other opening opens on to the street is, in his opinion, such as to be dangerous or likely to be dangerous or prejudicial to the safety or convenience of traffic using the street, or which may be expected to use the same.”

One has to think about s. 16(1)(h), and why it was enacted in the first place, as a section unique to HK. Building legislation is enacted primarily to ensure the safety of those using the building, by provision of at least two staircases leaving each floor, a factor which we found missing in the New World Development where the good fire-man's regulations are just met by the bare, and not in a generous way, as the fire department in Hong Kong is pretty good[22], or those using physical structures which connect to the building, or which are affected, spatially or causally, by the building. The purpose of the Building Ordinance is stated to be "*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"*. So, safety is paramount.

Now s. 16(1)(h) is a carefully worded section, where not a single word is wasted to express the law which lies sealed in its keepings. Its meaning is not so apparent merely from reading it as a grammatical structure, but first and foremost, one must keep in mind the nature and effect of Hong Kong's geography and the design of buildings in Hong Kong.

A.3.2.5 Statute and Land as a Statute

[22] See for example, the Code of Practice for The Provision of Means of Escape in Case of Fire (1996) issued by the BA.

The principle feature of Hong Kong's geography, and the structure of the buildings here, can be likened to a large mountain, rugged and throwing itself erect and upwards firmly and strong into the stratosphere. Very little building goes on atop Hong Kong's mountains, because it would not be sensible to do so. It would result in buildings "*up in the clouds*", necessitating long winding streets, mountain roads, leading up to the mountain estates. There are exceptions, one of which is the Peak, and the other of which is Wonderland Villas near Lai King. Both of these developments were made by destroying the top of rather "*flat*" peaked mountain ranges.

On the Hong Kong island, the landscape stretching from West to East consists of Pok Fu Lam Country Park, Aberdeen Country Park, to Tai Tam Country Park, Northwards to Mount Parker and South to Shek O Peak. Circling the mountain ranges in these country parks, are roads and highways. Buildings are then constructed by a rather unusual method. Rather than cutting into the side of the mountains, building structures are formed to equalize the height differential between two points on the mountain side, and thus creating a flat building surface structure[23].

This is a simple illustration: **Figure H-1 (see Section E)**.

Similarly, in the New Territories and Lantau, we see the Lantau Country Parks, with roads running through the middle, Tai Lam Country Park, Shing Mun Country Park, Ma On Shan Country Park, and Sai Kung Country Park, with Lam

[23] Tribunal Member, Andrew T. N. Chow, commented on figure H-1 saying that "*Often, in building projects in HK, the developers will cut into hill slopes to form platforms for buildings.*"

Tsuen to the North sided by Pat Sin Leung as a rough outline. One builds around these mountain ranges, like winding hilly sand roads are shoveled about sand castles on the beach by children.

Because of the unique features of the geography, when constructing buildings, formation works are crucial. They are generally of two types. Formation works of filling in seawater with a rock base, so buildings could be put upon a flat "sea-fill land". Or formative structures in the form of trusses and podiums are put in place, to allow buildings to be put on top of them, at mountain side locations.

So, we must keep this geography before us, as a feature of Hong Kong's landscape when we read s. 16(1)(h), in the same way that the HKCFA was at pains, through the judgment of Lord Millet in <<China Field>>, to set out the topography of the land in question, before moving to the question of how to interpret the statute.

A.3.2.6 How Land Affects the Land Law Enacted in a Region, "*Human Geography*".

Section of the Ordinance, s. 16(1)(h), refers to construction, formation and laying out. Essentially these are words which are aimed at the foundational structures of access or streets, but *actual structures* which allow one to access the buildings, or an opening to the street from the building. What this refers to is primarily:

(i) Staircases which lead from a podium, on which a building is erected, to the street, for pedestrians;

(ii) Buildings which abut onto the street, such that a car can turn directly from the street into a ground floor car entrance, or any other opening in the building, which allows cars to pass inside, like into a parking garage which abuts directly onto a busy street, for example, without a lane from the building to the road. One need only travel along Bonham Road near the University of Hong Kong, or in Prince Edward and Tsim Sha Tsui, for many examples of this structure type;

(iii) Footpaths which provide pedestrians access from the building, directly onto the road. This would be the most common type of structure being referred to here as the vast majority of the HK population do not drive, but rely on public transportation, and happily so for the environment[24].

Essentially, this section is aimed at hazards which occur to the way the 3 types of building structures connect to the main roads. The government is concerned that these building structures might cause excessive loading, whether in terms of weighted structures, pedestrian access, or vehicular access, which is dangerous at the point at which these structures meet the road.

A.3.2.7 Comparative Geography and Land Law.

[24] In contrast, according to the Encyclopedia Britanica, 2008, for 1000 people in Beijing, *around 250* drive cars.

In Western countries such as Scotland, England, Canada and the United states, where it is more common for citizens to live in houses, residential neighborhoods, or surveys, are created. A residential neighborhood is a cluster of side roads or streets, lanes, drives, courts, avenues or terraces, constructed between the main arteries of a city, to prevent houses from having direct access to the main streets, and the heavy traffic upon them:

Figure H-2 (See Section E):

Survey A, consisting of side streets, with no direct access to the busy main arteries of the city, and the heavy traffic thereon.

In HK, in contradistinction, s. 16(1)(h) is of paramount importance to prevent dangerous linkage of building structures, whether for pedestrians (more commonly) or for motor vehicles, to the road systems of HK. Its importance and breadth of application cannot be overstated. Its purpose could not be more foundational to the structure of Hong Kong's buildings and their safety.

Therefore, when it comes to interpreting s. 16(1)(g), as this case demands, and as the HKCFA pointed out, it is crucial to identify the physical characteristics which make up the section in the following manner.

Firstly, the building works which are to result from the plan must be "*legally imagined*", or, graphic diagrams & plans can be prepared by the architects to show what the building works will be like. Mr. Edward Chan S.C., in his opening submission, backed by years of experience at land law, said that the Building Authority must *look forward* at what would be the situation, if the development were to go ahead, with the logical aim to preserve congruity, and not simply deciding the matter based on what is there at the present time.

The congruity matter involves the following characteristics:

(i) Design

(ii) Type

(iii) Intended use.

(iv) Height

Some of these characteristics can best be understood graphically. For others, such as design and type, written descriptions will serve the process, best of all. "*Type*" for example, might be best exemplified by written descriptions of the characteristics of the immediate neighborhood.

Secondly, it is necessary, by means of a physical description, to identify what the immediate neighborhood is. This will be done in the final sections of this judgment.

Three factors will help define the ambit of the immediate neighborhood:

(i) Buildings which are physically in close proximity, or buildings which stand together;

(ii) Building which share common road systems, means of access, access arteries, or paths of transportation, first and foremost for pedestrians, and secondly for vehicular traffic; and

(iii) Buildings which share similar economic valuations, or which are placed within similar economic belt brackets.

For example, Cyber Port, HK, obviously belongs to a different economic zone than Wah Fu Estate, *immediately* adjacent to it. Certainly, residents of Cyber Port would not want to see their properties valued at the same level as those in Wah Fu. And residents of Wah Fu, acknowledge the price differential when they dress up and go to the beautiful theatre in Cyber Port, where the price of popcorn is the price of dinner back home, or the price of two movie tickets is the price of a week's groceries at Welcome or the *under the podium* market, back home in Wah Fu.

The last step in interpreting s. 16(1)(g), is a simple act of comparison. The BA must not isolate any one factor in prominence over other, nor must it leave any factors out. A comparison is carried out between the proposed building and the extant buildings, based on the above factors. Remember, the building proposed is compared on the basis of what it will be when it is finished, but the act of comparison is with what is already there. One does not, for example, compare the proposed building with what is in the pipeline by way of other planning applications, for to do so would be to distort the language of the statute, and a court cannot, as Lord Millet of the Court of Final Appeal reminds us in <<China Field>>, distort the plain language of the statute to achieve a purposive result.

Here, the comparison is between "*the building works shown (on the plans)*" and buildings "*in the immediate neighborhood*" of "*previously existing on the same site*", but not between the proposed building and "*buildings which are being, or are to be constructed on the site*".

To carry out the comparison in this way would be to entertain too many speculative matters, or issues which have not yet been resolved. By way of example, a building for which approval is granted to build 40 stories, may falter at the 35th floor because of unforeseen foundation problems, changes in the law, or newly discovered air wave interference from high buildings which disturb the proper exchange of communications between different centers. So, one waits until a building is up and standing, and when the occupation permit granted, or

the certificate of completion of works granted, at which time the building is a building with which comparisons can then be made.

Further, the clear language of the statute, contemplating comparison between "*building works shown on the plans*" and what buildings presently exist, does not admit a comparison with proposed buildings in the neighborhood. Therefore, even though a site visit in May 2011 revealed that building foundation works were underway, we need not consider these, as there were no building works standing at the time, by which to carry out a comparison with the proposed building plans.

By way of a further authority, the Canadian case of <<Verdun v. Toronto-Dominion Bank, [1996] 3 SCR 550>> states of statutory interpretation that:

> "*To state the obvious, the first step in a question of statutory interpretation is always an examination of the language of the statute itself. As E. A. Driedger wrote in his text, Construction of Statutes (2nd ed. 1983), at p. 87*:
>
> *Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.... Lord Atkinson in Victoria (City) v. Bishop of Vancouver Island [[1921] A.C. 384, at p. 387] put it this way:*

> *In the construction of statutes their words must be interpreted in their ordinary grammatical sense, unless there be something in the context, or in the object of the statute in which they occur, or in the circumstances with reference to which they are used, to show that they were used in a special sense different from their ordinary grammatical sense.*
>
> *This principle has been cited by our Court on numerous occasions: see, for example, Friesen v. Canada, 1995 CanLII 62 (SCC), [1995] 3 S.C.R. 103, Stubart Investments Ltd. v. The Queen, 1984 CanLII 20 (SCC), [1984] 1 S.C.R. 536, and Québec (Communauté urbaine) v. Corp. Notre-Dame de Bon-Secours, 1994 CanLII 58 (SCC), [1994] 3 S.C.R. 3. When I apply this principle to this case, I conclude that the appellant's arguments must fail, as I will now discuss.*

Herein, the Court of Final Appeal's judgment is not inconsonant with the words of Lord Atkinson above, which dicta, in any event, is already a part of the law of Hong Kong.

In the case of s. 16(1)(g), this has attracted much commentary over the years, and it is important, thus, to bear in mind its purpose, and its wide sphere of application in the context of land law in Hong Kong, as it has been known to be. In Hong Kong, speaking very narrowly for the time being, when a developer buys a plot of land from the government by auction, it does so by means of bidding. The auctioneer will repeat aloud the highest bid, and the bidders will

continue to bid, until they feel that the price at stake is too high for them to make a profit on the development.

A split second decision will need to be made by the developer, but they will have had their valuation department carry out some mathematical calculations, based on the long used residual method of valuation, perhaps, before the bid begins. Those calculations will be to the effect that given the size of the plot of land, and the useable area which can be converted to one plane of building space, increased by the number of floors of commercial space and residential space, how much debt do they dare to wager, given an ever inflating economy, where:

$$P = D \times R^{25}$$

P = price measured in American dollars, the standard for Hong Kong.

D = debt, the quantum of proposed or accrued or actual debt , calculated by reference to American legal tender, to which the United States carries the debt of its lenders.

[25] From the Collected Works of James W. Campbell. Formulae used by permission.

R = risk, the amount of Renminbi, which China generates to sustain the price of the Hong Kong property market, so that it can be pegged as a part of the international markets, as a derivative currency of the American dollar.

Clearly, the factor in the minds of all bidders will be gross cost divided by net price and then, calculation of the projected income. All financial factors.

The primary factorants, such as the size of the land, design of the flats, whether top class or middle class or sandwich class at the bottom, are merely necessary to calculate the dominant product, or profit scale of balanced debt and risk product.

After the land is purchased, and based on the formula, P = D x R, once the debt and risk are calculated, there will be an attempt, mathematically, to balance the equation by setting a price, which will maximize the profit potential of the land, once the plot ratio is calculated in relation to the factors set out in the Buildings Ordinance. The price will need to be high enough to overcome the product of the risk magnified exponentially by the amount of debt.

Plot ratio is basically the quotient of the total gross floor area and the site area, and by raising the top figure as high as possible without exceeding the plot ratio allowed for the land in question, the amount of allowable building space is

increased. Again, these are all numerical calculations, and the intention is to endeavor to ensure that the government land is developed to its actual potential, whist maximizing the profit on the development for the developer.

A.3.2.8 Counting the Costs in s. 16 (1)(g) and not simple Height Comparitology.

The point here, if it need be made, is that price/cost/financial/profit information, are all at the top of the developer's considerations, for no good property can be developed without a careful and charitable calculation of profit and cost margins.

Who builds without counting the cost? Who applies without counting the cost? Who legislates without counting the cost? Who decides without counting the cost?

Equally, what government approves building works without consideration of profit/loss to the state considerations?

But that is not just for the developer and government. When the real estate agents get involved, licensed property bodies in Hong Kong, they consider the market prices of the development, by careful consideration of related costs of other developments in Hong Kong. This takes great care and skill by companies such as Midland in HK, who prepare comparables for market comparison.

Finally, would be purchasers, need to calculate how much a bank will agree to forward, *to the first lender*, under the circular chain mortgage market of Hong Kong, where there is only one real actual loan, since mortgage moneys, at draw down, never pass into the borrower's account, such that he is never in possession of the "*loan monies*" from the bank. Banks do not have the good faith to forward such loans to borrowers, but chose rather to lend between themselves in a manner that is isolated from the actual market conditions, in a tight circuitous cycle of bank to bank transactions; and such that large money circulates between banks, but not to the real lenders, with the real result that all other "*loans",* after the first loan from bank C to bank H, for example, are really monthly advances by mortgagors to mortgagees, made on the basis of a flexible HIBOR rate, or in relation to the prime rate, and as determined by the market conditions, since the rate can never exceed the amount which is set by the Monetary Authority, in consultation with the American Treasury reports and statistics, made publically available from time to time. The system survives because no one dares to complain. Banks refuse to take funds on a monthly basis, unless it is deposited into their inter bank accounts, as "*mortgage accounts*" which are really bank to bank transactions only. And this mortgage system, by way of analogy, is very similar to the sale of flats in multi storey buildings, in the same sort of way that the first purchaser from the developer alone, and only him, will be named in the Deed of Mutual Covenant for the estate, with all of the other purchasers, buying their interest with reference to the first purchaser. Even so, to repeat, by parity of market schemes, stands the

residential loan market in Hong Kong. Thus, a purchaser has to consider whether he has the funds to loan the bank money over 20 – 30 years, month after month without exception, for if he fails to make a loan at any time, the bank will foreclose, which, in the local context means, that the bank which survives by monthly loans from the purchaser, sells the property at the highest or lowest rate that the market allows, and the mortgagor can say nothing so long as the mortgagee exercises reasonable care in the sale, in starting a new circular mortgage chain, whereby a new loan is made from one bank to another, involving derivative lenders, commonly known as mortgagors. The mortgagor's good faith feeds the system and keeps the banks afloat with capital to honor their other debt obligations.

The cost of a development, a flat, or a common areas, can hardly be omitted from a consideration of whether the proposed development will be an out of phase development with the buildings of similar or distinct height, design, type or intended use, from those other developments in the neighborhood.

A.3.2.9 ***Types*** of Development

The type of development, generally speaking embraces the following:

(i) whether the development is luxurious, ordinary – middle of the road, or a low budget project with inferior building materials;

(ii) whether the building development is of a type financed by any of the buildings schemes of the government or whether it is entirely private;

(iii) whether the development is commercial or residential;

(iv) whether the development involves land in the New Territories which is caught by the T'so land development projects and traditional customary Chinese law;

(v) and whether the type of building involves novel foundation works which are incompatible with those in the area due to the risk of flooding as when a plot of land is situated at a higher plane than another adjacent plot.

It is a matter of mathematical certainty, that the "*type*" of development, on the basis of any standard referent, cannot be determined without reference to the manner in which the development is appraised from a financial cost/ profit analysis perspective.

But the parties, in agreement the one with the other, and by way of this second application to the Tribunal, questioned whether it is right good proper and correct for this Tribunal, through the calling of evidence, to investigate whether the carrying out of the building plans, as proposed and if approved now, would

result in a building differing in design, type or intended use from those in the immediate neighborhood, and doing this by means of consideration of the economic factors of state, such as cost of the building and potential listing prices. And to repeat, this is all premised on the supposition that the parties both agree that if the matter was decided today, the plans could not be rejected on the basis of s. 16(1)(g).

The parties take the view that such evidence about the design, type, or intended use from the buildings in the immediate neighborhood is not necessary for the disposition of this appeal.

Rather, they invite this Tribunal to apply to the Court of Appeal, on the basis that they believe they have identified a point of law which needs resolution by the Court of Appeal, before this matter can proceed before this Tribunal again, and even though both of the parties are in agreement that should this matter be decided today, it would not be possible to decide the matter in the way it was decided in 2007 by the BA.

But, all that said, the fact remains that the appellant still wants to appeal the decision of 2007, as noted above in ss . A.3 – A. 3.2.4, and the respondent is not willing to simply approve the plans, for if they were of this mind, the parties would simply say that the appeal should be discontinued because the parties had decided, mutually to abandon the matter.

It is inconsistent, with the abandonment of this appeal, for the parties to take out an application to the Court of Appeal. The joint application is proof that there is still a lis between the parties, which they want resolved, one way or another.

Neither party is willing to call it a day, to put aside a 4 year conflict, and each go home with the matter resolved at a draw, compromise, or abandonment. The appellant still wants to build its building. The government still has its reservations, about s. 16(1)(d), or perhaps on some other ground. *And it would appear that the lis is this*. If the Tribunal decides that the government was wrong to decide the matter as they did on 2007, then, as noted above, both parties agree that the appeal should be allowed.

Or, if the Tribunal decides that the government was not wrong in 2007, that is, if the appellant "*fails to show that the government was wrong in 2007*", but considers the matter afresh, then the Government says it would consider the matter under s. 16(1)(d) and the proper course would be to remit the matter to the BA. But the appellant says that it would be proper, under such a circumstance, for the Tribunal to consider the appeal.

So here we are in a game of Russian Roulette. No one likes the 2007 decision. Things have changed since then, all parties agree.

The only point of law is, *perhaps there are two*, will the proposed plan result in a building of different height, design, type of intended use, from the buildings

which are there now. It is a question of law, because that is what the statute says. And the BA must apply the statute, subject to the comments made above on the odd nature of the buildings, to which the facts of this case relate.

A point of law is not an easy sort of matter to articulate clearly, but let us try. What a point of law is not, is the question of how to apply law to a set of facts. For application of the law to the facts, may be a great art and difficult to do as a matter of precision, but it is a type of legal art, or a type of legal practice. But what such an application of a statute, or common law rule, or judge made rule, to a set of facts is not, is a question of law.

At times, the facts of the case might be somewhat unclear. Inferences will need to be made about what the true facts are, and the finding of interferences always involves the carrying out of little judgments of nature, whether human or environmental, or of what a piece of literary literature says. But again, the making of inferences does not equal to the stating of a question of law.

A question of law arises when it is not clear what the law is. Law can basically be of two types, substantive, or those laws which regulate the conduct of men in society or in the physical world, and secondly, procedural laws, which are laws essentially of chronologies and which seeking to organize matter, legal literature, and the order of human conduct, so as to prepare a case for the application of the substantive laws. Procedural laws make substantive laws easier to apply, and

to operate more efficiently, and cannot exist independently of substantive laws. Substantive laws can, in effect, exist independently.

But there is no question of what the law is here.

No party has put in issue the question of how s. 16(1)(g) of the Buildings Ordinance is to be interpreted.

All that the parties are unsure about is a question of procedure.

That question is, is it proper for the Tribunal to undertake an investigation of whether the carrying out of the building works would result in a building differing in design, type of intended use from buildings in the immediate neighborhood.

The simple answer is, of course it must. It must apply the law of s. 16(1)(g) to the facts of this case. The facts are composed of a physical comparison of all of the buildings in the neighborhood, and factually comparing their height, design, type and intended use to see how they are distinct from one another and how they are alike, side by side, front to front, back to back, and adjacent to adjacent. And at the same time, the neighborhood must be considered by looking at the history of the land through the lease conditions, and looking at the different maps and pictures provided by the parties, whether the OZP, or the maps

attached to the lease, or whatever, and then attempt to set the boundaries of the immediate neighborhood.

The real legal art is then to take all of those myriad of factual pieces of data, and churn them in the drum of s.16(1)(g) through legal analysis and determine how the law applies to these facts. But that, again, is a question of application of the law, not a question of what the law is.

As to the propriety of the Tribunal's summons to seek further evidence of the valuations of the tenements, so as to engage in that comparison exercise mentioned above, that is a question of the procedure adopted by the Tribunal. We understand that that procedure has never been adopted before in these hearings.

The Buildings Ordinance provides[26] that the Tribunal may receive and consider any oral, documentary or other evidence, and even if the evidence would not be admissible in the courts of the region. For the Tribunal is not a court, but a branch of the executive arm of the government. Further, the Tribunal has the power to issue a summons[27] requiring any party to appear before it to give evidence or to produce any document. Although this is more akin to a civil law procedure, nonetheless, it is squarely founded on the wording of the statute.

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[26] See s. 50(1) (c) (i) of the Buildings Ordinance.

[27] See s. 50(1) (c) (ii) of the Buildings Ordinance.

This may be distasteful to counsel who are accustomed to controlling what evidence is brought before the court in civil proceedings, but that is by the by, over the ship's rail.

Further, the Chairman is granted the statutory duty, power and responsibility, as regards the hearings of the Tribunal, to determine the procedure of the proceedings, if there are no provisions for such.

In this case, the Tribunal, after hearing all the evidence presented by both sides, considered that it did not have sufficient evidence to decide the matter. In brief, as there was no information on the table whatsoever, as to how much the development would cost and how much the units would be sold for, there was simply no basis for the Tribunal to carry out the comparison exercise which it needed to do of all of the buildings in the neighborhood.

For as surely as buildings differ from neighborhood *Seneca*, to neighborhood *Mountbatten*, in like fashion, they differ in type, whether commercial or residential, high economic value, mean or low.

The Tribunal's summons was based on the need for more evidence.
The parties would like to highjack the Tribunal, and move across to the judiciary with the question they have formulated, a question of procedure only,

and not even a question of procedural law, and thereby prevent the Tribunal from determining the question before it, until further delays are called.

The request was rejected on 24th May 2011, and the parties were summoned to produce evidence as follows from this question:

"What are the likely sale prices/rental values, in per square foot terms or otherwise, of the tenements/flats, in the immediate neighborhood of the subject site."

Before we decide (give reasons) and leave this matter, and the proposed sojourn to the Court of Appeal, we make a brief comment here on the appellate procedures and the proper use thereof.

A.4 *Types* of Appeals

In seeking to reach the right decision, the system of justice in most jurisdictions is not a multi - level system through which a party need necessarily pass through at each level as a matter of procedure before justice can be done.
Yet there are many judges of foundational courts, who tend to think that they exist simply by way of a first base, in a three base and home plate game of legal baseball, where a batter who strikes the ball pitched to him, need run past 1st 2nd and 3rd bases on the diamond grass pitch, before running into home plate and striking up a point for his client.

For litigation is not a game of baseball and running around all the bases before justice can be done at the home plate. Justice at home plate may not be the best justice for the parties, though it may be, where the point of law involved is one which has never been decided before, and where there are conflicting decisions on the point to which a leading judgment from the most authoritative court is in order. For the final appellant court represents the highest level of authority, to which all of the other courts must have respect and regard. But its authority is often exercised by way of setting down principles on very general matters, then a forensic trial of what is fair, equitable and right between the actual parties.

And this is because there are fixed points of law and procedure as to the way in which appeals are brought before the final appellate court. For example, the final court will generally not hear arguments on matters which were not argued in the courts below, and the final appellate court does not operate by way of a rehearing of the entire matter, but only to resolve those thorny points of law which brook human intelligence and which often span away from law to matters of social economy, private ownership, closeness between two particles of matter in the universe where one harms the other, or the manner in which evidence is to be brought before the courts.

We welcome judgments from the highest level of appellate courts on points of law and important procedural matters, where arguments are presented in detail,

and where the law can undergo a refining process, on the assumption that refinement is sought after in a law abiding state.

Higher justice is often like a road made of the soils of the earth, which recedes into the stillness of a green of gold of browns delicately paginated forest, aflame in a subdued manner with Prussian trees of discriminating bark, as may summon the new-come elm'en beach and the ever aging rosen oak, side by side, two rows upon two, onward to its cradle land for judgment springing with pureness and crystal stillen waters. The road winds, meanders and with ev'ry slope it meets on its sojourn, deeper and deeper it finds its way into the silently whispering forest, alive to its calling to bring the soiled road into the eternal tomorrow of justice, where what is done and adjudged first will no longer stand after the testing through the furnaces of further justice, where layers of early brush are burnt through the flames of a refiner's quash of the thorns of mistaken stance, branches of wrong motive, and stems of improper case statement.

As parties proceed from courts of wood and leather of one judge only, to the higher realms of many justices seated in courts of stone and lace, the reported cases, tome by tome record the paths to higher justice, and display through their pages the ever fading clarity of the initial scope of the matters between two, as huge legal labyrinths of thitherto undefined unknown precedent take hold of the parties and spin them away from what sent them to the higher justices, three, five, seven or nine – for sorting out, in the original place.

The real nature of the precise intricacies of the fulcrum which divides the parties over the way and under the way, is often balanced more carefully when the little tales and stories of the parties are before the one justice, then when their dispute is abstracted to far reaching questions of law, which, practically they never thought about when they signed their deal as a matter of contract or drafted their plans for the authority to look at. For a point of law is not the same as a contractual negotiation where bargaining power and honest good judgment is paramount.

For a judge judges what has been by way of rejecting the untrue case and upholding the virtue of the correct economic position. But a business man does not know the position of his opponent, like the judge who sees both sides. He negotiates on the basis of his own judgment and his own sense of fair contract arrangement. And that may be much greater than the notional, common justice of men in an egalitarian society. But the judge cannot be partisan, and must never enter into the subjective state of the men who made the contract. Once breached, the contract forever loses it subjective two plane existence, and it is transformed by mathematical translation into the three tier state of justice.

And where a new plane is added, namely, improper decision making, this simply compounds the wrongness of the original complaint. Because in administrative proceedings, and administrative appeals, the appellant knows the case he must face, as it is given him by quoting of the statute. From this foundation of the law, he prepares his case. He argues why he thinks that he has

been wronged by the authority, or why his view of the matter is the correct one. So it is only a matter of his view, and the view of the authority, the two faces of justice to be decided on by the third, the judges' face.

But when an appeal leaves these simple precincts, and comes herein where justice comes equipped with judicial experts in matters of building economy, three of them sit on this Tribunal, and a justice who chairs the matter without any partiality of one view over the other, it does so by way of a propagation of further potential error, because one decision maker becomes four decision makers. The work of of this Tribunal, is to take this matter on board, and then to map out the axis of the spinning light ellipse of justice, which the authority below sought to set in motion. It should move in perfect uniform motion before the elliptical forces which regulate the steady motion of the justice of the universal planets, and any such a tilting of the axis which holds the parties on the opposite poles of the ellipse, and forces them to some new plane of rotation, will compound their lis by adding a new texture of wrongness to their dispute. One wrong becomes two. Two becomes three and so on and so on. And even in the Court of Appeal, where the laws which govern the rotation of the ellipse will be uncovered, it may well be that the ellipse is tilted yet further off its original course, so as to provide a corrective justice for the path of the ellipse, which is the justice sought herein – and which may be lost therein, because there may be no justice for the geometric foundational issues which divide the parties, pole to pole. For the courts above are more concerned with the paths of

the ellipse, than the location of the poles of its elliptical structure, where sit the parties still polls apart and justice not yet served.

Thus, justice is best done, perhaps, when first done is the true justice, for then it is the parties that shape their tomorrows and destinies. Save for when the justice of first, puts first his natural but not always helpful desire to be moved to the higher justices in the future, above his first calling to decide the justice before him, and thence must onward we be to the courts of stone and lace, for their rests final judgment, and their also rests the defeat of one, or even both of the parties, when law tells them what should have been, and what will be for the future of everyone, rather than what has been to him with the authority. For the lower courts operate on the basis of resolving what has been, whilst the higher justices operate on the basis of what will be, in tomorrow's justice.

Therefore, we cannot accede to this request to have this matter moved up to the Court of Appeal, as we are of the view that no step has been taken by the Tribunal, that it was not entitled to take. Further, we hope and trust that the strong language used above will enable the parties to sit down and map out their positions before further steps are taken by way of knee jerk reactions to the handing down of a judgment of first instance.

It is squarely and classically within the jurisdiction of this Tribunal, to determine the question of whether these plans, as before this Tribunal, should be approved or rejected under the relevant ground.

Had the parties put before this Tribunal, any other legal questions worthy of the time and expertise of the Court of Appeal, then the matter would certainly have been considered further.

A.4.1 Disposition of the Joint Statement Asking the Tribunal to Apply to the Court of Appeal by Way of Case Stated.

Accordingly, and as we stated at the hearing on the 24th May 2011, we do not allow this application to proceed to the Court of Appeal for further consideration at this juncture.

The matter having ended there, we are now in a position to proceed to a resolution of this appeal, and based very much on the many statements of principle which have been set out herein.

B Judgment on the Question of whether the plans should be rejected under s. 16(1)(g), the sole remaining ground of rejection following agreement between the parties.

B.1 Geometrical Constraints

We now arrive at the main decision in this matter, and the question of whether this Tribunal will approve the general building plans, or reject them.

If you were to circumscribe a square with four reference points around the area which was said to be the immediate neighborhood by the BA, using the Northern point as Kai Yuen Street near Tanner Road; the Eastern tip as the old Kai Yuen Mansion, no longer there, the tip of the government slope land beneath the site on the plan for the Southern point, and with the Westerly block of Kai Yuen Street which stretches as far as it can to the West, you would have a square of 120 m x 120 m, or 14,400 m². One would say, that a walk from the top of Kai Yuen Street or the top of the square, down to the *cul de sac* or the bottom of the square, which is near the site, of about 120 m, would be a right reasonable and comfortable sort of walk on a hot day after alighting from a bus on Tanner Road, even for a lady or gentleman of age 70 years. We refer here to the old plan of the area, yellow with age, which the government attached to the rejection of the plans way back in 2007.

When the square is measured, any measurement unit will suffice as an absolute measurement, and not just as a measurement unit, and all that one need carry out is a 12 fold multiplication of any distance on the plan, or, in other words, distance is an absolute measurement, and not simply relative to the body from which the measurement is made. Distance carries its own internal regulation, scale, and proportion, which cannot be altered by the one carrying out the measurement or the unit used, since the unit is merely an incident of the

*distance, and not a separate metrical scale to regulate the distance measured. QED*JWC1967.

Before we leave this plan, it needs to be said is that we were informed during the hearing of this appeal that a company named New World, has caused the buildings which used to lie at Lower Kai Yuen Lane and Upper Kai Yuen Lane, to be brought down. What lies there now is a foundation, in the shape of a basin, a word used by Mr. Chan. Foundations are being laid for new buildings to replace the old. The evidence for this matter closed on the 30th May 2011, when the BA filed their final affirmation. It was clear during the site visit, that there were no new buildings there at the time of the site visit, but just a huge foundation pit where foundations for new structures are being laid in a terraced pit.

Since, as noted above, s. 16(1)(g) requires the decision maker to determine what the immediate neighborhood is, at the time of the decision, and then to determine whether it would destroy the characteristic height, design, type or intended use of the immediate neighborhood, to put up the intended building, we cannot have regard to what will be one day on the old Kai Yuen Lanes sites. We have some semi factual information about that matter from counsel, and a decision by another differently constituted Tribunal – which decided the matter of the New World Development partially in favor of the developer, after which the plans were put aside for newly drawn plans, but we put it aside for the purposes of this decision. The government does not need to collate all of the

plans which touch and concern a site and its surroundings, and then forecast what will be on the site if the building plans were to be approved and then constructed accordingly, for that would be an administrative nightmare, and would require the Government to be a speculator rather than administering what is before it within the boundaries of the state.

S. 16(1)(g), like time itself, contains three distinct time zones, all united into one time, being the time at which the decision maker makes the decision. He must have regard to what the proposed building will look like, in the context of what buildings are there at the time the decision is made, bearing in mind the buildings which were on the site previously, but for whatever reason, have ceased to be. The now of the decision thus captures both future prospects and past relics.

This well worded piece of legislation must not be stretched though to force the decision maker to consider what is not on the site at the time of the decision, but is only a potential building, assuming that all of the factors for completion are present, which allow it to be completed.

Of course, given the fact that the determination of the immediate neighborhood, requires the decision maker to decide what constitutes the immediate neighborhood, it is always open to the decision maker, as a matter of pure discretion, to exclude areas around the site which are not yet developed, or which have no buildings presently because they are being developed.

We believe that time might have been saved in these appeals going forward, if counsel would concentrate on building a case as to why the plans should not be rejected, or why the plans should be approved, rather then spending huge blocks of time in seeking to vitiate the decision of the BA. All that needs to be demonstrated is how the Tribunal should exercise its discretion afresh, and not, where the BA went wrong.

B.1.1 Local case <<International Trader>>

This is the way in which the appellant presented its case in its amended statement of particulars. Appellant argues that the BA was wrong to refuse permission. Well, the approved Outline Zoning Plan # 19 does not contain any height restrictions, and the approved OZP # 19 is the relevant plan in this appeal: <<International Trader Limited v Town Planning Appeal Board [2009] 3 HKLRD 339>>, so the appellant says.

Of course, <<International Trader Limited>> is a must read for understanding the present approach of the HKCA to the Town Planning Ordinance, one of the key pieces of legislation for planning control by the government in Hong Kong. Though, in the first place, once an OZP is approved, s. 13 of that ordinance directs that it shall be used by all public officers and bodies as standards for guidance in the exercise of any powers vested in them.

Certainly, the BA itself is a public body, and all members thereof with the power to approve building plans are public officers, and thus they must consider the approved OZP in the exercise of their duties. This is all right and proper, since we have seen that s. 16(1)(d) provides a discretion to the BA to refuse plans which contravene the approved OZP of draft OZPs.

B.2 <<Leading Decision of the Privy Council>>

This must be balanced with the ratio decidendi of <<Attorney General v Firebird Ltd. [1983] 1 HKC 1>>. Lord Fraser giving the decision of the Privy Council, the highest authority in the commonwealth, rejected the submission made by the applicant for planning permission that it had a right to have its plans approved once submitted, unless the BA could show there was a problem with the site classification. His Lordship declared: "*The only right accorded by this legislation is to have the plans considered within 60 days with the safeguard in s. 15 of deemed approval.*"

And that is all the Ordinance grants an applicant or, alternatively, on the other side of the coin, it is all that the Ordinance prescribes for the authority to do. As we noted above therefore, there is no absolute requirement for the BA to consider the plans in a particular manner, or, to put the matter another way, no accrued right to have the plans considered in a particular way, other than that it must be carried out within 60 days.

B.2.1 Distinguishing Public Bodies against Tribunals Which Adjudicate on Private Matters which Affect a Limited Range of Persons

In the second though, this Tribunal is not a public body for the purposes of the Interpretation and Clauses Ordinance (Cap. 1). Nor are any of the members of this Appeal Tribunal public officers for the purposes of the Interpretation and General Clauses Ordinance. Therefore, this Appeal Tribunal is under no obligation, whether through the Town Planning Ordinance, nor otherwise any at all, to consider the OZP as a mandatory requirement, when it considers s. 16(1)(g) afresh in this appeal. And, as a matter of contract, the parties to this appeal have agreed in writing, (submission #1 above), that the other grounds of appeal should be left out of this appeal, including s. 16(1)(d).

But let us elaborate on this point, should it be said that this is a point of law meriting a sojourn to the HKCA.

B.2.1.1 Question of Law: Which OZP Applies to this Appeal

And here we arrive at the second question of law which arose in this matter, with the first being the application and scope of s. 16(1)(g), about which enough has been said already. The question was identified with admiral clarity, by Mr. Yin, as, "*the narrow issue of whether when looking at the subject plans, the*

Tribunal should have regard to the only approved Outline Zoning Plans #19 (OZP), or should we have regard to the tabled new draft OZP #23."

Clearly this question does not arise at all in relation to a consideration of s. 16(1)(g), which is the sole issue in this appeal. That section says nothing at all about the OZP which should be applied in these matters. What is needed, for the purposes of s. 16(1)(g), is to have information about the height, design, type or intended use of the proposed buildings, and of the buildings in the immediate neighborhood, or which were previously on the site. There is no mention made in the statute as to where this information is to be obtained from for the purposes of the exercise, but certainly, the OZP is not even mentioned, much less being treated as the standard.

S. 16(1)(d) does refer to the OZP. It states that if the carrying out of the building works shown on the building plans would contravene any enactment, or, would contravene any approved or draft plan prepared under the Town Planning Ordinance, then the plans may be rejected, all at the discretion of the Building Authority.

In our view, this provision does not leave any room for ambiguity. The BA is entitled to take reference to the plans prepared by the Town Planning Board, but they are not binding on it. They are for reference, and if there is a contravention of those plans, then the plans may be rejected, but not necessarily so.

Thus, the question of which plans should apply if the matter were to be reconsidered by the BA does not arise at all. The simple answer is that the plans, both approved and draft, are there for consideration by the BA. He is not required to look at them and follow the guidelines, but if the BA does so, then this may be a reason to reject the building plans, should there be a contravention.

The Appeal Tribunal herein constituted, need no consider the plans herein as it is not a s. 16(1)(g) issue, and since the parties have agreed that the other grounds of refusal which were relied on by the BA, are no longer relevant as a result of the agreement of the parties.

B.3 S. 16(1)(g)….Aesthetic Value or Underlying Deeper Reasons.

Over the years, it has been said that the underlying purpose of s. 16(1)(g) is to preserve congruity, or to reject plans which will be incongruous with what is already in the immediate neighborhood.

The leading authority is an academic article embedded in the judgment of Mr. Justice Bokhary PJ of Hong Kong as his obiter dicta written in <<China Field>>.

He *says* this:

"*No. 12 Bowen Road is the site concerned in <<Attorney General v Mightystream Ltd. [1983] 1 WLR 980>>, a decision of the Privy Council cited to this Court in the present case. And the No. 12 Bowen Road Case arose when the Building Authority, having lost in the Privy Council, played his last (and unsuccessful) card, namely disapproval under s. 16(1)(g). By then the No. 12 Bowen Road Property proposal was for a 31 – storey building. In contending – successfully – that such a building would not result in incongruity, the developer was able to point to three existing high rise buildings in the immediate neighborhood: two of 17 storeys and one of 24 storeys*."

These comments demonstrate the futility, as a matter of appellate procedure, of seeking to resolve conflicts of building plans by means of the appellate procedure which was not intended to resolve factual questions such as (i) what is the immediate neighborhood, or (ii) is there a congruity problem. S. 16(1)(g) is, in a sense, "*the last card*" because, once played, will generally trigger a trip to the Appeal Tribunal for a fresh exercise of a discretion which, as a matter of statutory law, has only been given to the Appeal Tribunal, and not to the Court of Appeal. And the Tribunal is not fixed with a straightjacket which must decide the matter one way or another, as the statutory discretion given to the Tribunal is quite wide.

We build here on the foundations which were laid in the <<No. 12 Bowen Road>> case. Those foundations are 43 years old now, and are in need of some refinement, given the years that have passed by in between.

On the face of s. 16(1)(g), it would appear that what is of concern to the Government which passed the legislation is the issue of similarity of height, design, type, and intended use of buildings. That is, the BA must ask itself whether what the developer proposes to build, will be different from what is there now in such a significant way as to merit rejection of the buildings plans. One looks at the model of the proposed "*building*" in the plans, and physically compares it with what is already there.

Now, modern physics tells us that what our eyes see, and observe of the natural universe, cannot always be relied on, particularly when it comes to quantum mechanics, or the study of micro particles of matter. Such particles are sub atomic in comparison with normal objects in the world such as buildings or physical structures.

At first site, we might tend to think that this proposed site is not a matter of quantum mechanics, as this proposed building is a large thing. But then, when we look at the Outline Zoning Plan, which in itself dwarfs the look of the site provided by the Government plan attached in their rejection letter, and then we look at the map of Hong Kong, such as UP's Map of the HKSAR, and then we look at the world atlas, in which the whole of HK can only be represented by a small dot without any shape at all. And then we consider the breadth of the universe, with Pluto (ie, if we still consider it to be a planet, which some do not, thinking it to be a distant star) at the outer extreme, and the sun of some 864,000 miles in diameter at the centre, surely, North Point, and this site of 60 – 74 Kai

Yuen Street, pales significantly rather like comparing an electron to a globe, as used in school, which we sit upon a table.

We bear in mind the words of modern physicist Stephen Hawking in his recent work, "*The Great Design*":

Until the advent of modern physics it was generally thought that all knowledge of the world could be obtained through direct observation, that things are what they seem, as perceived through our senses. But the spectacular success of modern physics, which is based upon concepts such as Feynman's that clash with everyday experience, has shown that that is not the case. The naive view of reality therefore is not compatible with modern physics. To deal with such paradoxes we shall adopt an approach that we call model-dependent realism. It is based on the idea that our brains interpret the input from our sensory organs by making a model of the world. When such a model is successful at explaining events, we tend to attribute to it, and to the elements and concepts that constitute it, the quality of reality or absolute truth. But there may be different ways in which one could model the same physical situation, with each employing different fundamental elements and concepts. If two such physical theories or models accurately predict the same events, one cannot be said to be more real than the other; rather, we are free to use whichever model is most convenient.

We can see, of course, that the way that a modern physicist looks at the site here at appeal, and the way that a man of law looks at the site, are fundamentally different.

But this should not be so.

Whilst, during the course of the hearing, we were provided with many different measurements to measure the height of the proposed building, and buildings in the immediate neighborhood, modern physics tell us that this direct method of observation is not reliable. What is to be done, when we consider that many of the things we use to measure things, platinum light, for example, or tripods used by meteorologists, are in themselves products of modern physics. We cannot use these devices for measurement without, at the very least, seeking to understand what the physicists are saying about the way in which this world should be measured.

We cannot simply rely on outdated methods for observation of the physical universe, when the world we live in, and the world which is being created since 1911 - the advent of Relativity, both Specific and General, has caused a shift in the observation of the physical universe.

What is to be done indeed. In a word, law must be understood in a uniform manner, so that both judges, barristers , solicitors, and men of science, can

resolve to look at the laws which govern the universe, and the physical world, in a manner that reconciles one with the other.

B.4 A Third Look at S. 16(1)(g)

Let us begin looking at s. 16, of the Ordinance through the steady eyes of the judges of the second half of the last century, after the nations of the world signed peace treaties, and forever silenced those nations which seek hegemony over their neighbors and over other parts of the world by seeking to force economic constraints and military strength over those nations which simply pursue wealth, good governance and the well being of their citizens. Those judges judged matter, and not merely presented information upon information without ever coming down on one side of the law or the other by way of a real judgment.

B.4.1 Lord Denning in <<Padfield>> circa 1970 and the new court of appeal in England

In <<No. 12 Bowen Road>>, the case of <<Padfield v. Minister of Agriculture Fisheries and Food (1968) A.C. 997>> is cited. The case was decided by Lord Denning M. R. in the Court of Appeal, with the House of Lords affirming his decision, per Lord Reid, giving the main judgment, and Lord Hodson, at 1046, referring specifically to Lord Denning by name and by judgment to Lord Denning as well.

Essentially, all milk produced by farmers throughout England, was sold to a board, who was responsible for buying the milk from the farmers at a set price, and then selling it on to distributors and vendors of fresh milk in the cities and towns throughout England and Wales, including London. The milk producers in West England were further away from London than the farmers in South East England (Sussex). If there were no mandatory schemes, the farmers in the South East, or in Sussex, would transport the milk to London, at a lower cost than those farmers in Western England, since the close proximity of the South East to London would mean lower transportation costs. Lower transportation costs would in turn mean more money was left over for profit for these farmers in the South East. As a result, and to reflect this transportation cost differential, the farmers from the South East were paid at a higher fixed rate, by way of an incentive to be in the scheme.

However, these farmers were not happy with the scheme. They wanted the board to pay them more money than they were receiving at the time. They wanted the fact that transportation costs were lower for the board to collect their milk, than that required to collect the milk from the Western farmers, to be reflected in the price that they were paid.

Legislation was in place to operate this scheme. The legislation gave the Minister of Agriculture Fisheries and Food the power to direct that a complaint, such as that of the South Eastern farmers that their profits for sale of their milk to the board should be increased, should be considered by a committee of

investigation. If such a matter were to be referred to such a committee, then it would have to consider whether any aspect of the scheme was contrary to the interests of the farmers. It was to operate in a manner that is fair and impartial. It could hear witnesses, and it could call for accounts and information from the board. It could hear other witnesses not called by the party making the complaint. It was to hear both the complainant, and the side of the board before making a decision.

But the Minister would not refer the complaint to the committee, and so the farmers sought an order mandamus to direct him to do so, to force him to do so.

Before we look at the leading judgment, we comment here on forces and law. When members of parliament will not act on the laws which bind them, then members of the public will seek an order, such as an order mandamus, to force the government to act, even to act against its will. This case essentially raises the nature of the relationship between law and the forces which move the law forward, or advance the law. The government in this case simply wanted to have the status quo, and did not want to exercise their discretion so as to change the nature of the law, or the arrangements, even if their was a patent inequity. And this is quite common, for we can see from the discussion above that one of the types or moral wrong which a government can commit, is when it refuses to act even when it should act.

What is ironic here, is the fact that physicists tend to think about natural law as something which is always available to be observed, and forces which are always at work. They think that at any time of the year, at any time of the day, they can conduct their experiments on the particles of matter of which the universe is constituted, and they expect the particles to react, so that they can record the pattern of the particles, and thus learn something new about the nature of the universe. Of course, when it comes to certain movements and motions of the heavenly bodies, they expect these to be according to fixed patterns, and thus the nature and position of the rotating planets is known not to change.

B.4.2 Building Law and Modern Physics[28]

Ironically, physicists tend to think that whilst the motions of the heavenly bodies is something that is somewhat stable, and the elliptical patterns of the planets, which we spoke about above when we were discussing appellate procedures, they tend to think that quantum mechanics is different, and that small particles do not operate in the same way. The birth of this stream of thought derives from the "*uncertainty principle*".

[28] Dr. K. F. Man, member of the Tribunal herein, commented on this section of the judgment as follows: "It is inappropriate to link the natural law of Physics and human law in the judgment." The other 3 Tribunal Members agreed by vote, 3 – 1, to retain this obiter section of the judgment.

The case of the milk farmers, demonstrates the way that the post – war judges, decided the cases before them, by observing the system of law, the men who operated it, and the members of society who supported it from day to day by their actions or motions, and then by looking at the actual law to see how what is actually being done, was different from what the law actually legislated. That is, a very wise way to proceed, when we are discussing the relationship between the laws which a parliament enacts and the social models in place which are to be governed by those laws, but which are not always so.

Of course, these laws which are enacted by parliament, will have an effect on all of the particles which are in the universe. For example, if we consider the motion of fluids, such as milk in the case mentioned above, which are set in motion by the laws of parliament, when farmers sell their milk to the board, then we must not only consider the law of fluid mechanics, which will have an effect on the motion of the milk liquid which is sold in the stores, but we must also consider the laws of parliament, and how these laws affect the motions of the liquids, such as are found in the stores, shipped around the country by the men who operate the scheme, set in place by the government.

Similarly, in the case before this Tribunal, we see that this is very much a case about the motion of particles which are a part of the physical universe. The buildings which are built do very much have a physical nature, such as being made of stone, cement, and the minerals of the earth. Very much, in fact, the

very same sort of matter that the physical earth is composed of, and which forms the subject of quantum mechanics, when we come to speak of this matter.

In the premises, when we come to speak about the motion of matter, it must be born in mind that the time at which we observe such matter, will also, to a certain degree, be governed by the very same laws that we consider in this case, such as decisions by the BA on the basis of the legislation, and also the motion of this Tribunal as it exercises its power afresh in this appeal.

What then is the relationship between the laws of parliament, which govern the time and the manner in which buildings are put up, and the laws of quantum mechanics which govern the way in which particles move. Well of course this is a very huge topic which will need to be considered very carefully, but let us make a start to the topic here, rather than simply putting it off to a more convenient time.

Let us establish some basic concepts at this juncture. First of all, we can say that the laws of quantum mechanics, which govern tiny particles in the universe, such as the satellite dishes which are attached to the top of buildings, which emit tiny particles of matter, and receive tiny charged particles of matter, and which aid in satellite transmission, such as those which the appellant seeks to create in this case, or to lease out to telecommunications companies, after the building is constructed, are subject to the laws which parliament passes because these laws set in motion the primary motions of the societies in which the

parties of matter are put in motion. We would expect these particles to behave differently, in a society which did not have a parliament which enacted laws.

B.4.3 Building Law and Engineering (IRL).

After the building is put up, or if it is not put up, and the buildings which are there now continue to stand, then the motions of those sub atomic particles, which we have been speaking of, will be affected by the decision that is reached in this matter. That is, the sub atomic matter will continue to move in the way it moves now, but once this decision is made, that will be an outside force which affects the motion of those particles. This is because before the decision is made, there is nothing acting on the particles but the ordinary laws of parliament which were previously enacted.

Accordingly, when we speak about s. 16(1)(g), and its impact, when we speak about height differentials, when we speak about differences of design, we must bear in mind, that these differentials, will also have an effect on the very matter that is a subject matter in this appeal.

Thus, if this Tribunal were to say this the building of some 140 mPD is allowed to go up, or not permitted to be built, then the gross height of that new building, or, if refused, the height of the building which is preserved, will be effected and all of the sub atomic matter of which the height of the building is created, and which is in the immediate neighborhood of the building, will similarly be

effected, then it starts to show that there is an absolute relationship between length, or height, and the laws which govern length or height, and the matter which is affected by the laws which prescribe length and height.

What will then be required, is to create a model of the neighborhood, in accordance with what is decided in this case, so as to demonstrate exactly what that relationship really is. That model may have to be drafted several times, like all models, before the correct one is arrived at, but that model, once correctly constituted, will have an effect on all of the matter and sub atomic matter which is in this neighborhood. The laws of parliament which decide this case, will also have an effect on all of the sub atomic matter, within the parameters of the site that is in dispute in this case, and, of course beyond.

Secondly, we say this. "*Height*" is normally considered to be a measure which relates to something that is very tall, like a building proposed to be built of some 140 mPD, by way of example. But, in reality, height is simply an adjective, which we use to talk about extension of matter in into the universe, which is a concept known to both philosophers and physicists. And this case, as simple as it seems, is very much a case about *extension of matter*, and of modeling physical matter in accordance with height restrictions. All that we add here is that in restricting the height of this building, or in refusing to allow this extension, we bear in mind that such a decision, will have an effect on all sub atomic matter within this neighborhood.

We need not say any more about the matter here, as the scope of this theory of reality is beyond the scope of this decision, but we need to add here this additional point. In the deciding of this appeal, we take these factors into account, by way of the background matrix, which is a part of the facts leading up to the ratio decidendi herein.

B.4.4 Applied Physics and Engineering (IRL).

Let us speak more plainly here. We have been provided with a plan of the neighborhood which is provided by K & W Architects. We found this plan to be helpful to our decision herein. From that plan, we see that in the neighborhood of the proposed building, is the ICAC Headquarters (26 storeys) , and also the Customs Headquarters, (32 storeys).

Now based on this photo, it is difficult to say exactly where these buildings are located in relation to this site. We have not been provided with any more information about these buildings. It goes without say, that these buildings are of a fundamentally different nature or design than the domestic building which is proposed to be put up here.

But we cannot ignore the fact that two significant government departments, charged with carrying out investigations in relation to corruption, infringement of intellectual property rights, illegal imports, and general fraud, are located in the not too distant neighborhood. We have not been provided with any more

details about these buildings. But we take note of these buildings, and mention them within the scope of this judgment. We would say that these buildings are located in the very short distant between Tanner Road and the harbor.

We leave two observations here. If these government buildings in North Point, have within their precincts, "*equipment*" for visual observation, and for audio reception of images, sound waves, picture images through microscopic particles, or other modern equipment, for monitoring sound and for monitoring sites, and generally for data processing, then it needs to be said here that our decision in this matter, as we apply these laws of the Hong Kong legislature, will have an affect on the motions of these particles and waves of site and sound. Details of that effect are beyond the scope of this judgment, and preparation of a reality model to monitor their effect is not essential for the purposes of this judgment, as the ratio decidendi of this judgment does not depend on this matter, as we are not here deciding how the legislation affects the height of the buildings, but rather, how legislation prescribes, through discretionary powers, how these heights should be determined.

The second observation is that it is no longer possible, when considering such concepts as the "*height*" or "*design*" of buildings, which is nothing more than the amount of extension, whether of a subatomic particle, or of a huge building, though we do not normally, as a matter of language, speak about sub atomic particles by reference to "*height*", to disregard the effect which subatomic matter has when we consider height. It cannot be disregarded any longer for the

brief reasons given above. And with that, we return to the English case of the physical and parliamentary distribution of milk, for further analysis.

B.4.5 Lord Denning and what's next in the Law

Lord Denning's judgment begins by setting out the physical realities of the scheme which governs the marketing of milk in England. He handles such matters as how the milk is collected from the farmers, where it is taken to, how it is sold and the manner in which the profits are allocated amongst farmers. In a word, he does not omit observations of physical matter from his judgment, unlike most modern judges since his time.

What he does not do, and which has become more popular in recent years amongst judges, is to attempt to show how the scheme works *as a product* of the legislation. And it is here that we must refer back to what is referred to in the physical sciences as "*model dependant realism*". In any legislation enacted by parliament which seeks to proscribe how a minister/government is to operate a legislative mechanism, or how the government is to exercise its discretions, powers or responsibilities, there will always be a margin of differentiation between what the legislation says, and how the scheme actually works its self out in reality, when people operate it and when the physical world is a part of it, as it always is, whether that be *what* physical building should be constructed, or the nuts and bolts of how fresh milk was transported about England and Wales 43 some years ago.

What government officials do, those charged with implementing the scheme is to prepare a *model*, sometimes, unfortunately, referred to as a "scheme" or a "policy". Such models, represent the way that government implements the laws as passed by parliament. It will often be the case, that as a government body is up and running, having being created by the relevant legislation, many parts of the legislation will not be referred to very often, or even will never be referred to. Certain other parts of the legislation, will take on great significance, and will be referred to over and over again, such as, for example, s. 16(1)(g).

Even as there are physical laws, governing the way that the universe operates, in terms of the motions of the heavenly bodies, or the way objects move in relation to the surface of the earth, or in relation to other bodies on the earth, (the detailed discussion of which is, to repeat, beyond the scope of this judgment, but see James W. Campbell on The Relationship Between Natural Law and Physics, with Some Observations on the General and Special Theories of Relativity) which we then seek to describe in terms of physical laws of the universe, or models, such as the so called law of gravitational force, Plank's constant, or the equation governing the speed of light, in like manner, the laws passed by parliament, can only be implemented by government through policies, or secondary legislation such as policy statements or practice directions, which effectively *describe* the way that legislation operates in reality.

In the context of the judgment of Lord Denning, which is still in effect to this day as good law, some 43 years later, the good judge sets out his understanding

of the model of the Agricultural Marketing Act 1958, in the opening parts of his judgment. In the same way that the milk men who implement the scheme by acting out its prescriptions, through the delivery of milk throughout England and Wales without ever actually looking at the legislation, in like manner, the good judge does not refer to its contents in detail, for to do so would obfuscate the workings of the legislation, and even distort it. The practical working of legislation, will often be the subject of evidence during a trial or appeal.
The ratio decidendi of Lord Denning's judgment covers three matters, in relation to administrative appeals from the decisions of governmental bodies, as in the case of the Minister in the case before Lord Denning M.R., or in this case of the Building Appeals Tribunal, as appointed by the Secretary for Development, on behalf of the present CE of HK, as the legislation stands as at the date of the writing of this judgment.

Lord Denning says this at 1006 of the judgment:

"This case raises the question: How far can the Minister reject the complaint out of hand? Is the Minister at liberty in his unfettered discretion to withhold the matter from the committee of investigation and thus refuse the farmers a hearing by the committee….(it was contended) that the Minister need not consider the complaint at all. He could throw it into the waste paper basket without looking at it. (This is clearly untenable.) The Minister is under a duty to consider every complaint so as to see whether it should be referred to the committee of investigation. I can see quite well that he may reject some of the complaints without more ado. They may be frivolous or wrong-headed: or they may be repetitive of old complaints already disposed of. But there are others which he cannot reject. In my opinion every genuine complaint which is worthy of investigation by the

committee of investigation should be referred to that committee. The Minister is not at liberty to refuse it on grounds which are arbitrary or capricious. Nor because he has a personal antipathy to the complaint or does not like his political views. Nor on any other irrelevant ground.

It is said that the decision of the Minister is administrative and not judicial. But that does not mean that he can do as he likes, regardless of right or wrong. Nor does it mean that the courts are powerless to correct him. Good administration requires that complaints should be investigated and that grievances should be remedied. When parliament has set up machinery for that very purpose, it is not for the Minister to brush it to one side. He should not refuse to have a complaint investigated without good reason.

But it is said that the Minister is not bound to give any reason at all. And that, if he gives no reason, his refusal cannot be questioned. So why does it matter if he gives a bad reasons? I do not agree. This is the only remedy available to a person aggrieved…If the Minister is to deny the complainant a hearing – and a remedy – he should at least have good reasons for his refusal: and if asked, he should give them. If he does not do so, the court may infer that he has no good reason. If it appears to the court that that Minister has been, or must have been, influenced by extraneous considerations which ought not to have influenced him – or conversely, has failed to, or must have failed to take into account considerations which ought to have influenced him – the court has the power to interfere. It can issue an order mandamus to compel him to consider the complaint properly. That was laid down by two of my predecessors in this place: Lord Esher M.R. in <<Reg. v Vestry of St. Pancras (1890) 24 Q.B.D. 371>> said of a body that was entrusted with a discretion:

"…They must fairly consider the application and exercise their discretion on it fairly, and not take into account any reason for their discretion which is not a legal one. If people who have to exercise a public duty by

exercising their discretion take into account matters which the courts consider not to be proper for the guidance of their discretion, then in the eye of the law they have not exercised their discretion…"

Lord Greene M.R., in <<Associated Provincial Picture House Ltd. v Wednesbury Corporation [1948] 1 K.B. 223 >> said:

"…A person entrusted with a discretion must so to speak direct himself properly in law. He must call his own attention to the matters which are irrelevant to what he has to consider."

B.5 Discretions and one layer of Appeal: Finality in Private Matters

First of all, those charged with discretions under statutory law must carefully consider the matter brought before them, and unless the matter is clearly vexatious and frivolous, must always exercise their discretion is a way that is responsible, fair and forward looking, even if it means taking action to upset the status quo.

The key to fair exercise of a discretionary power is to act favorably on a matter and advance the causes which the matter raises. In the context of this appeal and s. 16(1)(g), the discretion given to this Tribunal is one which enables this Tribunal to call witnesses which the parties call, and not to be bound by the strict rules of evidence which bind the courts. Since it is clear that the main factor in favor if admissibility of evidence in the courts, arises in the context of considering whether the evidence is relevant, it is clear that this *relevancy test*

does not bind this Tribunal as it binds the court. Rather, evidence will be admitted if it enables the Tribunal to determine with greater clarity what the immediate neighborhood is, and then whether there is a congruity issue.

Secondly, even in administrative matters, such as this, there are issues of right and wrong in the decision making process. We have discussed wrongness above in relation to the first application. A decision will be wrong if it falls foul to any of the rules which have been set out above in relation to the problem of wrongness.

Further, a decision will be correct, or right and good, if it correctly measures the impact of the development on the immediate neighborhood so as to secure any advantages which might inure to preserving the congruity of the immediate neighborhood. Congruity is not something which is to be preserved at all costs, nor is it something which is to be preserved for its own sake. As was said by the Tribunal in the <<No. 12 Robinson Road>> case, if there is no congruity to preserve, then an exercise of discretion based on incongruity will be bad.

Similarly, if there is no benefit to be obtained by preserving the congruity of the immediate neighborhood, then there is no point in preserving the congruity. In overview, a good decision is one which secures the benefit to the immediate neighborhood which can arise when congruity is preserved rather than destroyed. A bad decision is one which merely preserved congruity for the sake

of congruity, without considering the Ordinance as a whole, and the reasons why s. 16(1)(g) was enacted in the first place.

Thirdly, when it comes to the exercise of a substantial discretion, then the decision maker must give reasons, for to fail to do so would be to make government non-transparent, arbitrary and not responsible to the people of the state. Those reasons must be adequate to lay a rational and sensible empirical foundation to justify the decision made. If the decision clearly does not flow from the reasons which are given, this would give the court the right to infer the fact that the decision maker's reasons are not within the confines of the rational choices available to him on the facts of the case.

In terms of s. 16(1)(g), the section must be understood for its wider purposes. S 16(1)(g) of the Ordinance must be read together within the context of the Ordinance as a whole, and s. 2 in particular.

B.5.1 A wider look at the Buildings Ordinance

When we come to read that the BA may refuse permission where the proposed building as designated on the building plans, will result in a "building" differing in height, design, type or intended use from "building" in the immediate neighborhood, we are prone to think of two high rises, side by side, to be compared in terms of the number of storeys, their physical shape or structure, classification or proposed usage.

But, the definition of "*buildings*" as set out in the Buildings Ordinance makes it clear that a far more expansive exercise is at stake here, so as to achieve the primary purpose of the legislation, which is "*to provide for the planning, design and construction of buildings and associated works; to make provisions for the rendering safe of dangerous buildings and land; and to make provision for matters connected therewith*".

We summarize the expanse of the legislation (s. 2 of the Ordinance under discussion) with the following points:

(I) Since "*buildings*" includes both buildings as a whole, and buildings in part, it is quite possible that only a part of what is proposed to be built, say the parking garage of 6 – 7 levels, or the utility areas of perhaps two storeys, or the podium which sits abreast 3 floors of commercial/ office space, will be compared with these parallel parts of existing buildings in the immediate neighborhood;

(II) Further, any arch, bridge, or cavern adapted or constructed to be used for the storage of petroleum products, are also open for comparison in terms of the height, use, & design differentials. One might then compare the height or design features of pedestrian walkway bridges which connect the podium of the new proposed estate to surrounding neighborhood facilities, so as to ensure that the new and the old are

compatible for safety reasons in terms of parity of congruity. What is of concern though is some safety feature, or planning feature, design or construction feature which will be enhanced by the congruity of the new with the old;

(III) But then, chimneys (say from a factory building) or cook houses, cowsheds, docks, factories , garages, hangars, hoardings, latrines (or toilets) matsheds, offices, oil storage, out-houses, piers, shelters, shops, stables, stairs, walls, warehouses, wharf, workshops, or towers; are all included for comparison here. There might be very good reasons why the BA should not desire, say for offices in a composite domestic commercial building to be constructed in a dissimilar fashion, as there may be a need to preserve a particular commercial image, say, for example, as can be seen in the region of Cyberport, where the buildings all have a sort of "*Star Wars*" or "*Star Trech*" type of presentation. Throwing up a brown brick office complex, circa 1960 bus station complexes, would destroy this unique design feature, and create an economic depreciation in the housing market, because there would be no top end housing to ensure that the bottom end housing remains stable.

(IV) Thus, the type of building concerned, relates to its economic features such as luxury, low end, or even some where in the middle. Economic

classification is a feature of the type of building as set out in the legislation at s. 16(1)(g) of the Buildings Ordinance.

(V) And for buildings and building works, which are close to bodies of water, it is to be remembered that sea-walls, break waters, jetties, moles, quays and cavers or any other underground spaces, adopted or constructed for occupation or use for any purpose, and including its associated access tunnels and access shafts, are also “buildings” for the sake of the Ordinance. The BA may also declare other structures, to be “buildings” for the sake of the Ordinance, by publishing such matters in the Government Gazette.

Thus, when a development for housing or commerce, will abut onto the water, it is clear that the BA must have regard to the safety of the development and how the development’s water features, such as foundation works will fit into the surrounding neighborhood. It may be that a height differential between the depth of the foundation works, and the neighboring land fill area (填海地), would cause excessive pressure on the foundations of the building so as to cause flooding. Or in may be that a jetty constructed as part of a new development, to control tidal variations, must be constructed in the same manner as other neighboring jetties so as to ensure that the surrounding tidal waters are controlled in a manner that is consistent. Or perhaps a quay constructed parallel to the shore, may need to be made of the same materials as the surrounding jetties, quays and break waters, so as to ensure that the particular ships which

dock at the new quay will not be docking at a quay which is less strong than the surrounding quays, and thus be the "*weak link in the chain*".

Clearly then, when we refer classically to "*congruity*" in relation to s. 16(1)(g), a useful sort of word that sums up what the sections intends to achieve, this is not a congruity for the sake of congruity. Nor is it a similarity of design for the sake of similarity of design.

Rather, it is congruity of one building to another, or one part of a building to another, so as to achieve the purposes for which the Ordinance was passed, namely the planning, design and construction of buildings.

Planning, and "*plans*", which is referred to in s. 16(1)(g), includes "*calculations*". One of the most important type of calculations in a plan will be for the Gross Floor Area (GFA), or the plot ratio (total area of the building divided by the area of the land), or permitted site coverage. That calculation in turn will have a denominator affect on how the building will be sold in terms of how much is available for sale. By refusing a "luxurious" condominium complex near Government housing, on the basis of a s. 16(1)(g) refusal, the Government may seek to retain the congruity of affordable housing, to give just a single example of the benefit of congruity, or the purpose of congruity, and not simply congruity for its own sake.

In summary then, s. 16(1)(g) is not a mere cosmetic provision which ensures that no unsightly buildings are put up, nor that building A cannot be higher than building B, but rather, is a pivotal provision to ensure economies of scale, to ensure consistency in planning.

Planning in turn covers the type of building which Government allows to occupy an area, since when buildings of different economic types, are placed side by side, this will affect the economy of the region. Thus, if Government allows too many residential buildings which sell at a high rate per square foot, this will drive property prices up, and create not only inflation, but also a demand for lower cost housing, and there may not be sufficient available land to build more economical buildings aimed at those with less disposable income.

In a word, building planning under the Buildings Ordinance, is one of the stated purposes of the Ordinance, and means the land use planning systems which Government uses to ensure that economic development, environmental quality, and provision of building space for commerce, residential and industrial usage, achieve a growth rate in economic terms which is commensurate with the actual building space that is created.

It is precisely because incongruity may mean that the pipes used to build an area some years ago, or the foundations laid in the immediate neighborhood 30 years ago, and the public facilities then available all being of one type, or the public infrastructure having being cast according to one particular dye, and

since changing all of this today would mean that other surrounding areas would have to be changed, thus, it may not be GNP effective to allow such changes to take place every 5 years or so. A building development, to be cost effective, should have a life of some 400 years, like the housing in Canada, or the US.

Housing which only lasts for 40 years can never be cost effective and will drive public debt higher, and even result in mortgage crises such as have been seen globally in the last 5 years.

A very simple example here will suffice. If there is an immediate neighborhood, which shares common drainage, common roads and walkways, then it may be in the interest of the state, to preserve that commonality, since, to allow a new style of building to go up, would mean that the older textured sewage ways, street levels and other "*building elements with common characteristics*" would be destroyed.

Destroying such would mean that the public utilities of the neighborhood would have to be restored.

We speak here, of course, with reference to the Building (Refuse Storage and Material Recovery Chambers and Refuse Chutes) Regulations of Cap. 123, which means the numeric calling of the Buildings Ordinance of 1st January 1985. To update the matter, basically put, there are chambers for the collection of garbage in Hong Kong, by way of sewers (downtown) and septic tanks (in the

country side or suburbs such as lovely Tai Po. But the sewage range differently, because in some cases there are differences in the pipes used (ie the diameter of pipes ect, or even the material used for the pipes, whether copper, PVC or even steel in some cases, overseas, where buildings are better made (particularly where houses costs even less and are far better made, in real money though not this). So there must be parity, or congruity of design and type of buildings materials, or one building will "*match 唔到*", [as the local people say, for things that do not match, and which you can hear at the wet markets, when you buy a piece of cloth which does not look good with the main pattern, for example], will not be congruous with other buildings, there must be congruity of design, of type or patterns of building, so a new building will fit into the neighborhood in which it is proposed to join it to, in the same way that a new lawyer must fit the culture of the firm he works for, potentially, or he will not be suitable to join that set of chambers, or architectural firm.

B.5.2 A Mathematical Approach to this Appeal: Ensuring Accuracy at Mathematics and Law

We can look at s. 16 (1)(g), and this question of the creation of additional space by the development of this building site, in mathematical terms. (See Figure L at A.2)

By studying the mathematical relationship of all the figures involved, to decide if this development should be approved or not. This analysis provides an

element of mathematical truth to this judgment. This relationship between space created, its value, and the value in terms of the entire planning economy can be represented in mathematically as follows:

Sn = [P x (1/10th)] x (Total GNP / Costs of total number of new units created) x (Total amount of land space / Total expansion of space)[29]

1. Sn means the total amount of actual new space created measured in m² or square feet.
2. [P x (1/10th)] = the Governmental Constant. The size of the Government must never exceed 1/10th of the population of the region. "P" here means total population of a region.
3. Total expansion of space means the total amount of building space created on a limited amount of land. One might, for example, refer to the "*inverted L*" shaped diagram presented above at A.2 Figure L to show the extension of this building, as a matter of extension into the ether. On the other hand, in this example, we measure the total expansion of space by taking the area of the proposed building, and then deducting the area of the land – *see below*.
4. Sn, measured as square meters, must never exceed the existing space measured in economic terms.

A short word about the following elementary planning calculations, provided for the benefit of this planning exercise. New real space, which means the total

[29] This formula and all other formulae used herein, intellectual property of their author, James W. Campbell, barrister-at-law, Hong Kong. Used by permission of the author.

amount of new building space which is created, is already, to some extent governed by the Buildings Ordinance, since every area in Hong Kong has a restricted plot area and site coverage (see Schedule 1 of the Building (Planning) Regulations).

But in reality, "*new space*" is never created.

Take for example a 31 storey building. Before it is built, there is empty air or "*ether*"[30] occupying the space, or, more properly, the space "*is*" or has an independent existence. The new building merely "*encases space*", so as to make it livable by providing a floor, a roof, and four walls.

But there is a limit to how much space can be encased in a region. And that limit, is a factor of the relationship between the ideal government size (or $1/10^{th}$ of the population), since government activity such as building roads, approving building plans, will affect how much of the land will be used. If the government is too large, and drains too much of the resources of the state, then the strain on the environment will be such that there is no longer a sustainable development possible.

In Hong Kong, the available land area, or the total area of the site or plot, has traditionally been measured as the *denominator* of the plot ratio calculation, whilst the *numerator* is the total floor area of the building. The resulting

[30] A hypothetical assumption to explain observed phenomena or an empirical result.

calculation is the mathematical ratio of the total building space to the total land. We say that this is a method to control or to measure the density of the land. The denominator, for any particular site will be always be fixed, regardless of the size of the building which is to be built, since the plot of land is a set size, or a "*constant*", to express the matter mathematically. The size of the numerator, on the other hand, will be flexible, and will be a factor of the permitted plot ratio and site coverage percentage. A developer may apply to develop as much "*new space*" as he can.

In the case of this development:

(i) the site is 2,321.041 m²

(ii) the total expansion of the site is 18,563.957 m²– 2,231.041 m²;

(iii) the ideal government will be $1/10^{th}$ of the population in terms of the number involved in that work.

(iv) the GNP of HK, (2009 figure per Britannica Encyclopedia) is HK$1,620,906,000,000. [To take the half way benchmark between when this appeal was commenced in 2007, and the hearing in 2009].

(v) when we plug in all of these numbers, and convert the areas to meters square, we arrive at a figure of 95.49 square feet, per occupant, of "new space". This figure may seem small, but it is essential to keep in mind that what we are dealing with here is "*real space*" in terms of the macro economy.

We provide a word here about what this figure means and how it is arrived at. This figure provides an analysis of the relationship between the population, the costs of the development, and the ideal government size. "Sn", is the amount of real space that will actually be created for the state. We take a population of 7000 for HK, being 1/1000th of the actual population. *Then, we apply what is, in mathematical terms, known as the "Government* constant". Applied to the population, this means that the effect of government, on the population of the state, or of the model state, is 1/10. In size terms, this means that the state only has a 1 in 10 effect on the state in numeric terms, because its numbers are thus represented. This size of government, would also include the judiciary, unlike the present statistics provided by the HK Department of Census and Statistics.

The total GNP must be seen in terms of its ratio to the costs of the actual tenements in question. The higher the figure of the product of the division here, means that the development represents more and more of the GNP of the state. If it is too high, and overtakes the GNP, this is of course completely unacceptable. But in any event, as the figure rises, more and more of the GNP would be eaten up in property development. It is suggested that if the GNP is

100 units, the ratio of GNP to cost of new developments should be more than 50, or 100/2 is 50. If the GNP is 100, and the development costs 3 units, resulting in a ratio of 33.33, this would result in a disproportionate balance between the GNP and the cost of the new development.

Finally, the product of these elements must be multiplied by the result of total land space of the development divided by total expansion provided. This division results in the proportion of the whole site, to the amount by which, for this site, it is actually increased. We arrive at, 95.49 square feet per occupant of new space.

The product of the three components of this equation results in the relationship, in terms of real growth, or, in terms of the degree to which each component of the tripartite multiplicand will extend, as a product, the real space provided by the new development, per occupant. Or, the degree to which the ideal government, exercising its discretion by the strength of its numbers, can contribute to the growth of the state, through the percentage of the GNP to the cost of the development, extended by the real size value of the new development.

Let us consider this model, further, by way of an illustration and to conduct a comparison with the present HK and the past.

Take, for example, a square with an area of 1,000,000 m² (or 1 km²), where each side of the square is 1,000 m and let us suppose that this is the total area of HK[31]. When we speak of ½ the area of the square, we mean (1,000,000 m² x ½), or 500,000 m².

But then we must consider that not all of the space will be available for land development. For example, some of the 1,000,000 m² will be solid rock land of mountain regions where nothing can be built, or may represent marine space which is owned by the Mainland and for such coastal waters, wherein aid is provided by the mother country for defence. Let us say that in this state of 1,000,000 m², that 85% of the land is inhabitable, leaving only 150,000 m² for potential land development.

Let us then posit that the population of Hong Kong is reduced by the same scale, thus a population of 7,000,000[32], becomes 7,000,000 / 1,000, or 7,000 persons only. Now we know that in reality in HK, there are about 6,500 people living per available land of 1,000,000 m² or 1 km².[33] But, of course although the area of HK is 1,104 km², not all of this land is available for living. Only 15% is available land for building construction. Thus, for 1 km², only 15% of the land

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31 In fact HK has 1,104 km² of land, or 1,104,000,000 m²of land. So we have reduced the total area by 1,104 x. But let us simply say a scale of 1:1,000, or 1 actual units to 1,000 model units.

32 http://www.gov.hk/en/about/abouthk/factsheets/docs/population.pdf, where it is said that the population in 2009 was 7,000,000.

33 http://www.gov.hk/en/about/abouthk/factsheets/docs/population.pdf

is available to accommodate 7,000 people. Thus 7,000 people will live on about 0.15 km² of land. Thus, each person is entitled to 0.00002143 km² of land, or to 21.43 m². Thus, each person is entitled to 230 square feet of space (given that 1 m² equals 10.76 square feet).

But then, we recall that “space is need” (sic), for commercial buildings, for grocery marts, for banks, for highway buildings, for shopping centers and for government offices. So, we say that this will take about 65% further of the space of each person. So that leaves about 7.5 m² for each person, or 80 square feet. At present though, since building control in Hong Kong is strictly concerned with height restrictions, land area and plot ratio restrictions, there is no volume control to ensure that citizens of the region have adequate volume of space. Or, in other words, there is no longer any real direct control of volume of tenements.

B.5.3 Historical Mathematical Principles

One is reminded of the survey which was conducted by Mr. Osbert Chadwick of the Chinese tenements of the Tai Ping Shan area, a very populated area at the time, in 1886. The Chadwick report was first published in 1886. The contents of the report were integrated into the then extant building control and public health ordinances. The report recommended that the minimum space per occupant was to be 50 square feet, and 550 cubic feet per occupant. This was quite generous, as in ensured adequate space for tenants, both in terms of area and volume. One

notices of the tenements that were constructed in 1880, that each level was about the same height, as the height of a modern tram car. Such generous height allowances have long been abandoned, with ceiling at a much lower level, both in terms of actual height and the real value of the tenement.

In 1886, the population of HK was 181,720[34]. When one considers that the population of the same area is now 6.8 million more, for the very same space, one cannot help but comment that there has been a serious population explosion in Hong Kong which has drastically reduced the amount of space available for persons.

Thus, although persons in 1886, only had 50 square feet allotted to them, in comparison with the 80 square feet in the hypothetical, calculated above, and whereas in the model example based on the equation provided above, we see that the new development, will provided an amount of "new space", or "encased space" which is out of keeping with what is actually available, and which is more in the amount of 80 square feet per person.

One qualification is provided here. Of course, there are those who live in less, and there are those who live in more. Refinements could be carried out by dividing the population into classes in accordance to how much they should be entitled to based on their actual input rather than this egalitarian model.

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[34] Hong Kong: The Pearl made of British mastery and Chinese docile-diligence, pg. 136, Wei Bin Zhang

B.5.4 Resolution of the Mathematical Principles to this Appeal

The result here is that the new development will, from a strictly mathematical analysis, flood the market with excessive "*space encasement*" in the sum of 15 square feet per person extra. The result of this saturation of the market, is to create more empty space which cannot be taken up, not because there are not enough people, but because, based on the economy as it exists, and as it is reflected in the present GNP.

What would be needed first of all, would be real growth of the economy before there could ever be a need for such housing. Thus, as present, the economy can be divided as follows:

Structure of GDP	***HK$***
Agriculture	942,000,000
Mining	172,000,000
Manufacturing	51,560,000,000
Construction	47,611,000,000
Public Utilities	41,885,000,000
Transportation	167,997,000,000
Trade	451,310,000
Finance, Insurance, Real Estate	360,152,000,000
Public Administration	269,038,000,000
Other	230,239,000,000

Total	1,620,906,000,000

What is needed, and what is beyond the scope of this judgment, is real growth in the economy, and not mere an increase in capital, or economic GDP output.

Before we leave the mathematical aspect of this judgment, we comment on the new evidence which was provided by both of the parties here. Both the BA, and the appellant, provided mathematical information as to the costs of the tenements which are proposed herein by means of this appeal.

The purposes of this financial information, is to enable this Tribunal to decide whether this proposed development is in keeping with the developments in the immediate neighborhood, or out of keeping with the immediate neighborhood. Let us start with the information that was provided by the BA. The affirmation was that of Ho Kwok Hung, who is the Assistant Director/New Buildings 1, of the Buildings Department. Essentially what this man provided was information of the ratable value in 2006/2007 and 2010/2011 and saleable area of tenements of various buildings. This information will thus give us an indication as to how much all of this property in the immediate neighborhood is worth, statistically, though not in terms of real growth.

B.6 Summation of the Authorities

No authorities were provided by Mr. Yin other than a very old judgment on a point which does not assist us in the resolution of this appeal. In fact, Mr. Yin did not mention it the case, though, kindly, Mr. E Chan SC mentioned it peripherally.

The appellant provided the Building Appeal Tribunal 26 Authorities, which span over 170 years of post industrial age decision making by the jurists who have lived over 9 generations, commencing some 60 years into the age of post industrial tremor, when <<*Kruse v. Johnson*, (1898) 2 Q.B. 91>>, and as a matter of chronology, it is good to start not exactly at the beginning, but slightly up-stream on the ferry boat of which judicial fashion provides the waves, smoothed out by capilulations of currents in judicial time which really start nowhere, and lead nowhere, because not all decisions advance the common law, whereas in fact very few do beget an ancestor which is capable of sustaining the expansive edifice upon which the lawyers of statute law, executive law, and judge made laws are plinthed. All of these authorities are secured firmly within the shoulders of the pleadings upon which they stand, for pleadings are the photography of the law, chronologies, sequenced, affirmed as true, and arguing with the voice of the solicitors standing in front of their clients, siding them glances of confident assurance that their cases will be presented with the accuracy of the factual matrixes upon which they are constructed.

We know from Leonard J's tour de force judgment in <<*Singway Co. Ltd. v. Attorney General*>> reported in the Hong Kong Law Reports that the Town

Planning Board attempts in preparing draft plans, manages & strives to be flexible in its demarcation of the various zones which it establishes, whether residential or non residential, commercial or comprehensive development areas, to maintain a degree of discretionary absence of rigid plan making, where mere lines on a map are seen to divide hectares of land with no real distinction as between single site plots of block leased land, and thus severe reason from the paragraphs & notations on the maps which mean that maps are to be read as a whole with consideration of how each part relates to the "*OZP*" plan as a whole [see at pg. 283]. It is to this end that design manuals, which illustrate how congruity of design & height is essential for the maintenance of barrier free access regulations to new estates, such that access points which exist, and which connect older developments to newer ones and can be sustained, for it is relatively easy to correct new to new, without much trouble, but more of a challenge to connect old with new, so as to ensure congruity, and continuity, in a land with an ageing population, and where children are taught human geography in school, being the relationship between the people and the tenants they live in. Now in its opening[35], the appellant said in the course of the hearing that the BA did not consider now Bedford Gardens, Full Wealth Gardens, Tanner Court,

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35 [ie, see the Appellant's Opening submissions and List of Issues : D.2 (27.2) (d) and compare with B (B.1) (S.2) and (AB/1/1-13)with (C.1) 17.1 & 17.2 (AB/S/4?/32-45), and then with D.2(28), recalling case No.503 of 2007: at 5 of "TAOSALOI" where TAOSALOI stands for, unless otherwise stated, the Appellant's Opening Submissions and List of Issues, such that these was, in 23 March 2007, building plans submitted by K & W which were resubmitted for approval, but the compare TAOSALOI at 1 or A introduction 1.2.3.; & Comments of K & W (a) TAOSALOI (a) 2(6.) B.2 (7-9); and note that according to TAOSALOI (4)(10) – on 13.09.10, Tribunal heard argument on incongruity, but as at Dec 2011 – still no decision given, some 14 months later. And note AB/5/4/32-45 as at (RB/1st/18-19). In any extent, after considering the above passages, in reply, we are not concerned here, as was the BA there, with spatial causation, but only with height differentials.]

Yalford Building caused the issue of height to be ministerial to the immediate neighborhood of the site.

Similarly in *Singway*[36], the judge citing <<*Colonial Sugar Retining Co. Ltd. v Melbourne Harbor Trust Commissioners* (1927) A.C. 343>>,

"*In considering the construction and effect of this Act, the board is guided by the well known principle that a statute should not be held to take away private rights of property without compensation unless the contention to do so is expressed in clear and unambiguous words*."

These words of statutory construction speak for themselves.

Further, as like in *Singway Co Ltd*., the facts in this appeal are not in dispute, neither is the law in dispute. The sole question is how should the discretionary powers[37] in s.(16)(1)(g) be re-exercised in the present appeal. In that case, Queen's Council for the plaintiff and instructed by Woo, Kwan Lee & Lo (as they then were and who figured in the present appeal, sought to rely on the Latin maxim, "*expressio unis personae vel rei, est exclusio alterius*", which

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[36] Singway v AG [1974] HKLR 275

[37] We might say in a happy round about way that all discretions in the BOrdinance are subject to rules of practice that a discretion should not exceed the lateral scope of the way in which practitioners including designers and builders have applied the rules to their construction of real physical structures in the physical universe. See comments of Gladys Li S.C. in Case No. 28 of 1998 and learned counsel's comments at the top of page 6, for example).

according to the Eighth Edition of Osborn's Concise Law Dictionary, [The express mention of one person or thing is the exclusion of another] – being, apparently, a ruled statutory interpretation. Now the judge went on to follow a string of 17 some cases, including the eminent <<*Kruse v. Johnson* (1898) 2 Q.B. 91>> which was followed without comment. Compare holding 3 of the judge in <<*Singway* >> with the dicta of Reyes J. of the Philippines in Fortune Key Limited, and see also :<<Appeal Tribunal Buildings Case Nos.492-2010>> paragraph 76. It would appear that Reyes J. and Leonard J. appear on the same page to be indeed.

In like fashion, we say here that the express mention of "height, design, type or intended use" in the statute has the effect that the very fact that all 4 elements are expressly mentioned, precludes interpreting s.16(1)(g) as a unit, or "unis" or ("單字"), or with reference to height only, since one cannot exclude words which are expressly mentioned so as to achieve a particular reading of a section. As to the rest of the judgment, it is no longer good law to hold as it did on the enactment of s.98(1)(c) of the Buildings (Amendment) Ordinance 1959 (now s.16(1)(d)), draft plans and their effect.

Further, there is nothing in the ambit of s.16(1)(d), which, for the purposes of this appeal, is not relevant in any event, which makes it mandatory for the BA to refuse plans on the basis of the OZP, or draft plans. In a word, erudite though the judgment seems in *Singway*, we do not find it helpful for the purposes of this appeal.

In Nos. 16-18 MacDonnell Road, unreported, 9 June 1974, being around the same time as the *Singway* case was decided, though 2 months earlier, and in those days when Hong Kong University was producing its first law graduates, such as Patrick Chan PJ, and Audrey Yu S.C., there were apparently, looking at this rough beat up typed report with scribbling all over it such that we cannot read the file but, note that the words 16(1)(g) of the Buildings Ordinance appear clear enough, and perhaps junior counsel could prepare cleaner copies next time.

Many thanks to both.

It would also appear that the reason for the rejection of the plans in that case was because they created a problem for s.16(1)(g), as it has always been since about 1955 when it was enacted. The Crown did not want to approve the plans because they wished to preserve the congruity of land to the West of the Peak Tram, or at least to try to do so, such that visitors to HK would have an unobstructed view of the harbor, as it then was, rather than an unobstructed view of buildings which have grown up to the east and west of the Peak Tram, and which obstruct harbor views, save from the top of the peak and all the buildings. The appellant contended for a much larger area for the "immediate neighborhood. The Tribunal repeating its findings in Case No.1, Robinson Road, heard on 16th November 1973, that a neighborhood "Does have common features of identify, and is usually defined by roads, open spaces or other physical features." The Tribunal went on to find, contrary to the crown

submission that, the area marked in light purple on the plan, the area extending all the way along MacDonell Road, does have common features of identity, and thereby reversed the decision of the BA.

The case is significant in so far as it demonstrates the trend in building development, circa 1970 to treat long winding streets in the Mid-Levels, as "neighborhoods" or, in effect to look left or right, west or east, rather then up and down, North and South, for deciding the immediate neighborhood. However, whatsoever the situation may have been in 1955, the Mid-Levels now have layer after layer of vertically ascending developments, since the "Mountains" have been conjured up by the developers who fear their sovereign dark eyes of better worlds past.

The Decision of the Appeal Tribunal, dated 28th November 1978, regarding the application of s. 16(1)(g) to refuse a development at Kennedy Terrace, wherein it was decided that a building cannot be a neighborhood in itself, regardless of how many floors or units. There must be an element of "*standing shoulder to shoulder*" before a neighborhood relationship can exist in a city. We agree with that aspect of the decision, at paragraph 3. And, as the Appeal Tribunal said in the decision of 2A Mount Davis, every building has an immediate neighborhood, no matter how far the circle has to be drawn before that comes up. Mr. Turnbull so said, very ferociously.

Similarly, rather than planning development by vertical permissive ascent, now that the CFA rendered its decision in <<China Field>>, we can see that the matter is back before this Tribunal trying to decide exactly the ambit of what has been sent back to the Tribunal for final decision, as things go, as things are. That decision at case no.158/2001, between clearest of ways by mapping the flight of a planning application sparrow all the way from an application to the BA for planning; upwards by way of appeal de nova to the Buildings Appeal Tribunal, then detouring on a subsidiary question of law, such as whether the doctrine of modern lost grant applies to HK, then, by way of a steep ascent up to the Court, as it is known by the Court of Final Appeal Ordinance, its statutory father, and finally back to the Tribunal for reconsideration of all the issues, in light of the new authority granted as a matter of statute by the CFA, to the Tribunal, to decide the matters brought before her.

Which brings us, by intense chronology, to the medium step of the Court of Appeal, its good old days, when Godfrey JA was still with us, before he became VP, as did Rogers J sitting then with Justice Sears to whom we have addressed attention already, in speaking of s.50(2) of the Building Ordinance as it stood in 1993-94, just two years before <<*Wing On Co. Ltd. v. Building Authority* (1996) 6 HKPLR 432>>. That case held with emphatic clarity that, and contrary to what Leonard J. said two decades before and as discussed above, that the BA did have a discretion under s.16(1)(d) to approve plans which contravened the draft OZP, as summarized by the case reviewer, no doubt a member of the Bar Development Scheme for local young barristers. In a word, use of “may” in

the statue precluded an absolute rule of refusal for non-contravening plans since "may" does not mean "must", nor has it ever done so in the jurisprudence of the commonwealth nations. Rogers J's judgment encapsulates the ratio in a sweep without dwelling too long on points beyond His Lordship's consideration, according to what is reported, in any event. Godfrey JA carefully sets out and endorses the very words used by the BAT which His Lordship then reports and endorses with a triad characterisation of all the categories into which the Tribunal's words can be put. In those days, one at least knew with a relative degree of certainty, which side of the lance the judge's bench lay, and the judgment of Godfrey JA, we note also the able contributions by Crown Counsel, Mr. N. Cooney, now Cooney S.C., melted nicely into the dicta of the three eminent justices. Who, no doubt had been addressed many times by the equally eminent Michael Thomas QC (Presently SC as well), who with a clear head and good eye for an excellent strategic position and truthful summary of the overall situation, though with some degree of reserve at the lower level of detail, and detailed submissions, prepared by his many leading juniors over the years.

Plans were submitted and refused, 'only' on the ground of a height problem, as to which, see discussion above on the principle of statutory interpretation that words cannot be read into a statute which are omitted for the definite use of other words, nor can words, and unit words, be left out by simply concentrating all attention on one or two words of a provision. To overcome the singeing out of the "height" issue, a matter which has occupied the undeserved attention of this Tribunal from way back before Mr. Bokhary's (QC) article of 1991, and

before taking to the higher benches, back before Leonard J in 1974, even further back to the mid 50's, for example, judging by other parts of s.16(1)(….) besides section s.16(1)(g). In local parlance, Her Majesty's Counsel submitted that this Tribunal, in its former manifestation, had "*given an indication*" that a development of the height proposed by the appellant in that case, of only 12 storeys. And, it was precisely because of a potential estoppel issue, that is, whether Government had been bound by its own words, or premises, to act towards "ruin, her, it" in the way that one held one's self out as acting, when the act in question is one which binds the maker of the statement in law, as by promises, statements of intent, letters of intention or binding letters of intent. When a government makes representations to another that approval would be given, then, failing a radical change in the law by a popularly elected parliament which throws a huge amount of cubic space volume into the complexity of the common law, as compared with dictatorial requires, where law is more simple, being reduced clearly to the papers and scrolls upon which the words of His Eminence, are recorded, are recorded, and will be. Simply put, it is necessary to explore historical matters in planning applications when there is an issue of proprietary of estoppel, or estoppel by conduct. Governments must not act, as is trite law unlawfully, unfairly and unreasonably, or taking into account irrelevant considerations or ignoring relevant considerations or ignoring relevant considerations – we mean, who could doubt that each and every man and woman, with children, are under the dictates of natural laws to act thus.

Overdevelopment was an issue in those days. And so a practice direction was issued to combat this. That case was, <<In the matter of 11-13 Sands Street,

Hong Kong>>, which made it to the HKDCLR [1994] at page 7. The leading decisions are given as :

(a) Nos. 2-11 Hok Sz Terrace; February 27 1973;
(b) Nos. 29 and 31 Sands Street; Case File No.GR/AT/70;
(c) Sheung Shui S.S.I.L.5 – Case File GR/AT/14/79;
(d) 115 Caine Road – Case No.22/90;
(e) 4 Lam Terrace and being Case No.54/90 and
(f) 4-5 Knutsford Terrace – Case No.9/87;

from which we adopt the following three principles :

[1] The Building Authority is the proper authority to administer the Buildings Ordinance;

[II] In exercising his discretion under s.16(1)(g), he must do so faintly and properly so as to ensure that public health and safety is not compromised; and

[III] In applying s.16(1)(g), he must apply with care not to strain the meaning of some words so as to cover up other words which are those, or reduce their significance in a manner which will cause certain words to appear as it they are not these words such as “design, intended use or even type.” [And contrast here with the second submission of Counsel, set out herein,

in an attempt by counsel to collectively circumvent the other significant words of the statue by floating the matter up to the Court of Appeal from the Tribunal's new location as at 7th December 2011, at 17/F, West Wing, Central Government Office, 2 Tim Mei Avenue, Tamar, Hong Kong, with the apparent new name for this Tribunal, "Appeal Tribunals Buildings Ordinance (Cap. 123)", hereinafter so-called by the back room legal expert of Hong Kong, as he then was.]

The witness for the BA, in that case, Mr. Vinay, wisely, in our judgment, noted that in the application of s.16(1)(g), in cases where there are stepped streets, a feature which is very common in Hong Kong, including at the site under appeal when there are a great many stepped streets, particularly along the western side of Kai Yuen Street so as to allow easy access to the development and since, there are no vehicles at 11-13 Sands Street, at the time, as in this case, where only the New World Development is to have cars, and not the proposed new "60-74" Kai Yuen Street. These factors include : (i) refuse disposal considerations to ensure that all buildings can have rubbish disposed of in a manner of congruity, or parity of rubbish and savage disposal design, since it is important that a new development should be able to feed into existing sewage systems, which generally tend to be better, rather then attempting new designs, which lead to serious flooding issues when it rains, or even to water leakage in flats of over 20 years old, constructed on podiums with bus terminals inside, rather than shops of a commercial nature, as in the good old days, and as in this case, see for example, [Respondent's Hearing Bundle page 65 filed in the

present appeal] which shows all of the commercial shops below 60-74 Kai Yuen Street – and as it stands, which, though these shops appear shabby in need of some good paint, cleansing up of leaky old air conditioners, and perhaps a few additional new supporting beams, to hold up those rather good shape residential buildings, on top, at 60-74. Indeed, one tends to think that this development, though not perfect, has stood the test of time, with very few writs issued for water leakage at 60-74 Kai Yuen Street, none were exhibited in this case, as where they might have been, at TAOSALOI (the Appellant's Opening submissions and List of Issues, para 3); (ii) delivery of goods and effect; this must be considered when applying s.16(1)(g) to ensure that commercial vehicles car access sites to effect delivery, which will be inherently more difficult in a development without vehicle car access, as in the proposed development, save for emergency vehicle, which makes all sorts of home deliveries difficulties like now when cars can freely access 60-74 Kai Yuen Street and park there; (iii) access for elderly and disabled, being one of the underlying factors in congruity or parity of design and type. Buildings which are low rise, even if they have lifts, are more accessible to elderly and disabled persons who can access their flats more easily when they are closer to the earth and subject to less gravitational forces than unites further up; (iv) and access for time tightly vehicles. In the proposed development of Kai Yuen, vehicle access for AE vehicles will be at the rear side of the building, where it is moving difficult for A&E vehicles (emergency vehicles) to access the front of the development for time fighting and safety reasons.

In a word, there are many factors to consider, which underlay congruity, parity of height, design, intended use and type. These are not merely aesthetic factors of design, but matters which go to the root of building design, which is to ensure that the purposes of the statute are effected by safe buildings in which plans are carefully considered to ensure buildings in Hong Kong meet their three fold purposes : being a daily necessity, aesthetic value, and as economic units of value. [See <<Cases 492-2010 and 553-2010>> at paragraph one].

It would appear that in <<Case No. 571-2007 and Case 563-2007>>, New Town Management and Bestwin International Development, the sitting members of a totally differently constituted Buildings Tribunal (A), concentrated the entire decision on heights, which height would be greater, or more or less. As the New World Development superceded the plans considered by that Tribunal (BT). Thus, this decision remains as it was at 20th January 2009. We need say no more about it here.

In the <<*Building Authority v Head Step Ltd*. (1996) 6 HKPLR>>, the appeal was allowed by the Court of Appeal, who transferred the matter back to the BA, ordering it to reconsider the plans on the strength of what the Privy Council said in <<*A-G v Firebird Ltd* [1983] 1 HKC 1 at 94I-95B>>. To repeat, in *Firebird, the Privy Council made it law that the* BA must apply the "the relevant law (which) must be the law applicable at a date when the Building Authority performs its statutory duty of considering plans within the 60 days, and not sure other spent law." [at 7A-B]

Since the BA's discretion is couched with "may disapprove" language, rather then "must disapprove", in accordance with the laws of the English language on mandatory adverbs and binding adverbial descriptives, all three members of the Court of Appeal agreed that the BA does have a discretion to approve or disapprove plans under s.16(1)(g). It appears that the appeal to the Appeals Tribunal is still pending, having been adjourned sine die, that is, the third application, not the fourth, which we come to now.

It appears that Sears J, who was to decide <<*Wing On Co Ltd v BA* (1996) 6 HKPLR 432>> a year later when he sat in the Court of Appeal, made a decision in a judicial review proceeding brought before him, which managed to supercede the Tribunal because Sears J., said so in the "1994, MP No.2491" proceedings, which Your Lordship was brought to court to near, at a time when Hong Kong's legal system was in somewhat of an uproar pending examination of the efficacy of the common law, and whether it would survive the "through-train" established by the Provisional Legislative Council.

<<Head Step>> was decided in 1994 just after the amendments were made to the Buildings Ordinance, which effectuated the new section 50(2) of the Ordinance, and in which the discretions of the Appeal Tribunal (panel) were set out. This decision was very much a decision on the facts of the case, as was later confirmed by the Privy Council when the case came before them. Sears J. thought that it would be unfair if a developer should have bought a piece of land and then applied for building permission on the basis of a continuous plot ratio,

which then turned sour due a change in the plot ratio resulting from new changes to the legislation.

Certainly developers need to know for certain the site constraints for the land they purchase. To this end OZP's have been in use for some time. Thousands of submissions are made each year to the BA. Builders and architects have organized themselves into professional organizations in Hong Kong. Generally when changes are made to subsidiary legislation in HK, such changes are well announced within the circles affected. Web sites such as were not in wide use in 1994. Web based information, or information distributed to all reaches of the earth by means of linking home and office computers across the globe through data centers where huge quantities of information are stored and can be accessed by typing a certain address of a particular vender of information, and then accessing the "website" by linkage of information, were not in wide use until 1998/1999. Before that time government bodies were discrete about what they published over the internet.

In any event, in 1993-94 when <<Headstep> was decided by the Supreme Court, which became the High Court in 1997[38] on July 1st, plot ratios were well

[38] In the same year of 1997, the Design Manual for Barrier Free Access was issued, by the building authority. Its primary objective was to consider the scope of s. 16(1)(h) of the Buildings Ordinance, of which mention is made herein in details. It was a practice attempt to overcome the old shortcoming of the section by seeking to ensure that all access points were barrier free, unlike as is the case of even the newest developments, at Tamar Site, where there are barriers to the public accessing the development by popular shopping centres, which the public love, although on the high side, for most Hong Kong people own little more that property which can be contained in an average sized box, as local government propaganda shows, as at this date herein (December 22

advertised by OZPs, the gazette, crown correspondence letters, plans and maps publically unavailable in crown offices, the Supreme Court library, and government offices. Developers were without excuse. They became sloppy later on.

What was not clear when Sears J. heard the application for JR of the Headstep case, leave for which he also granted – presumably previously, is why His Lordship thought that he had jurisdiction to hear an appeal from the BA direct, without passing into the Appeal Tribunal (Building) as set out in ss.48 – 53E of the very same statute which he constituted in the "judicial review" application which His Lordship, no doubt out of benevolent motives to hear the case brought before him regardless of whether or not it was proper for him to sit in a judicial review of the nature of the land that that one was, in any event, of course. Perhaps it is a bye game era for judges of the courts in Hong Kong to consider, a privy whether they be fit, as a matter of proper statutory interpretation, judicial conduct and independence of the judiciary form, particularly the executive blanch, and the legislature, and all other quasi Governmental bodies, such as, for example, the Legal Aid Department, or the town Planning Board.

It seems that Mr. Justice Seagrott had his own doubts about the above matter. His Lordship states in his leading judgment in <<Building Authority v Head

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2011). We have been helped in our decision herein by s. 1.1, 1.2, 1.3, 1.4, 1.5, but not 1.6, and we found the rest of the document redundant because it is obligatory.

Step Ltd (1996) 6 HKPLR>>, that : "*In deciding that certiorari and mandamus lay to require the authority to consider the fourth application on the basis of the OZP which existed prior to the second refusal, Sears J was influenced by two decisions at first instance, one of Mayo J in June 1994 – the Super Mate application, and one of his own in October 1994 – the Hedland application*." According to Liu JA, those two cases should be overruled. But neither Ching JA, nor Seagrott J., (as they then were) seemed to join him on this limb of disapproval.

Now Ching JA, (as His Lordship there was), to repeat that again, and again (as they all do), seems to agree with what Sears J. decided, via the factual matrix that Sears J. found himself within, though Ching JA did not agree with what Sears J. decided as a matter of law, and on that matter, Ching JA sought to explain the Privy Council decision in *Firebird*. We need not consider those arguments, clearly stated, for the purposes of this appeal.

What is clear beyond the shadows of even any doubts, is the voice of the legislature, which has spoken with acrid clarity. When s.16(1)(g) was enacted, circa 1994, the law became that the BA had the choice as to whether or not to reject plans that contravened the approved or draft OZP. No room was left for any argument on this point, nor was there any need for any argument on this point, nor was there any need for any judicial interpretations of such a self evident point of law.

In our view, the decision of Sears, by which, will judicial review proceedings, His Lordship required the BA to consider the plans on the basis of the OZP as it was before being amended is and will always be wrong in law, and we follow the decision of *Firebird* on this point, namely, that the law to be applied by the BA is the law as it stands at the time the application is considered, with relevance to the site conditions extent at the time of the decision, and there is no reason why the Government should be cornered to consider the plans on any other basis. That law must be the law, as passed, though draft plans should also be considered as of persuasive force, bearing in mind the degree of flexibility of such plans as was considered by Leonard J and as noted above as distinct on a plan, will, in a sense, melt one into another in the same way that there is no absolute view of "democrat" ion on color spectrums where orange gradually, over space merges with yellow, but only when the time and condition are right.

And that brings us full square to a further very thorny issue in these building appeals. In the leading Hong Kong academic authority an judicial review, Judicial Review in Hong Kong, by Richard Gordon QC and Johnny Mok SC, there is not a single reference to the Buildings Ordinance, nor to the Appeal Tribunal Buildings, and no doubt for very good reasons. The forward to the text is by "*Geoffrey Ma, Chief Judge's Chambers, High Court, Hong Kong, 29th July 2009"*. Geoffrey Ma is now acting as the Chief Justice of the Hong Kong Special Administrative Region of the People's Republic of China.

He says this : "*Since July 1997, the judgments from this List (the Administrative and Constitutional Law List of the Court of First Instance is perhaps the most well known List among the public) and both the Court of Appeal and the Court of Final Appeal, have made a significant impact touching on many aspects considered in Hong Kong to be fundamental: human rights, immigration, the environment, economic rights, financial regulation, education, professional discipline and regulation, among many others*." Chief Justice in waiting, does not mention anything about building appeals, and his silence is troubling. Since buildings are the bread and butter of the private property market in Hong Kong, why should they be singled out and not mentioned by such an eminent judge as he, bearing in mind the principle of judicial interpretation set out above: "*expressio unis personae vel rei, est exclusio alterius*".

Now it is a trite proposition of international laws that citizens are to have a right of appeal, before the courts of the land. See for example, the International Convention on Civil and Political Rights, which has been siphoned into the local Hong Kong law by the Basic Law, and the Bill of Rights.

The Basic Law is the decree of the President of the People's Republic of China No 26 and is signed by the President, Yang Shangkun, President of the People's Republic of China, 4 April 1990.

[I] The Hong Kong Special Administrative Region shall protect the right of private ownership of property in accordance with law.

[II] The Hong Kong Special Administrative Region shall be vested with independent judicial power, including that of final adjudication.

[III] All Hong Kong residents shall be equal belong the law.

[IV] Hong Kong residents shall have the right to institute legal proceedings in courts against the acts of the executive authorities and their personnel.

[V] All Public servants serving in all government departments of the Hong Kong SAR must be permanent residents of the Region.

[VI] All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and impartial tribunal established by law.

This is the authority of the Basic Law and the ICCPR speaking by the oracle of the Bill of Rights, Hong Kong's domestic constitution and Hong Kong's domestic bill of rights. The right to appeal is unique to criminal charges, whereas in civil matters, the right of appeal is a matter for parliament. There are matters which are declared by parliament to be final, against which there is no right of appeal.

Now buildings in Hong Kong have been known to collapse causing death. Structural security of buildings in Hong Kong is thus of paramount importance. Structural security can only be ensured with those who are experts in technical matters of geography, geology, and geometrics. If experts are not consulted, with trial power of adjudication, then there is no guarantee that buildings will not be structurally sound. Just a few year ago, for example, an old woman, and many others likewise, was fatefully injured when a concrete slab fell on her. A legal question was posed by the court of final appeal to which the case went for a determination on the evidence and law. Speaking from an international perspective, many of the cases which go up to the court of final appeal have the same root in law, when all the myriad of facts are pulled away and the essentials are got into. Similarly, in an "immediate neighborhood" tort case, some 20 people were killed in Lan Kwai Fung at New Year's, just after happy Christmas in Hong Kong, because the exterior of the buildings provided no means of escape for them. So they all died. Or, in the Garley Fire, many were killed when a fire struck a building on the Kowloon side, and the neighboring buildings and the neighbors were affected, of course, as they should be by things that happen next door.

And so it is, primarily for safety reasons, that the Buildings Ordinance was passed, to be the rule of law for Hong Kong's building development, so that structures, with their billions of pipes, stone sheets, glass sheets, metallic braces, driveways, passenger ways, roof tops, connection lobbies, ancillary parts, parks for cars, open space garden, multiple stories up to thirty some, sewage ways,

gutters, skeptic tanks, toilets, tiles, gaps of 2 feet, foundations, drilled passages, empty halls and ghost spaces, will be safe for those who use them. And so those who approve plans must be sure of their security, in terms of building physics, structural mechanics, civil and chemical engineering, and only those who have experience in all of these matters can be trusted with the task of construing and approving plans.

It is for that reason that parliament takes care in creating a safe and secure mechanism for the approval of plans for new buildings, or repair of old buildings, whether through voluntary efforts, or through compulsion by the government of city's inspectors. Thus, plans are submitted to government officials, public servants and public officers, whether the "CE" or those who assist him in the bureau, departments and other such units. Those men, subject to what has been said above about the curious aspects of this peculiar legislation, which needs to be read carefully by the parties to this judgment. It is the Building Authority, and the Building Department which looks at the plans first of all. That is the government's role in the scheme. The fees are paid to them, the plans are submitted through the little window wickets to the little people inside who have steady hours to work each day, and a kind of mandatory provident fund for when they are too old to be helpful and need some kind of income, because there are fewer and fewer young people in Hong Kong who will be able to look after those in the future. Those plans are circulated to the supporting departments for comment. The process can take up to two months. For the major billion dollar developments, such as this are, there may only be

one in the works, because this one took over four years before it was brought before me and the three gentlemen of this panel.

In his discussion of ultra vires administrative action, that is, administrative acts which are carried out by what the Basic Law means by those who work for the government full time or mostly full time, say by election to the seat, appointment to their departments to serve the people full time in legco, where the executive and legislative merge into one efficient source, much like the decisions in other parts of the earth where governments only have two limbs; and to the illegal acts by administrators, these brief comments are made.

Second, the authority might, because of the misrepresentation of the law, fail to do what it should have done. An appeal tribunal, established under the Buildings Ordinance to hear appeals by persons prejudiced by decisions of the Building Authority in the exercise because the order complained of was not made in the exercise of a discretion. But the relevant section of the ordinance, held the Court of Appeal (contra the judges at first instance), did confer a discretion. The tribunal's decision was quashed and mandamus required the tribunal to hear the appeal.

That was the case of <<*Quebostock Ltd v Building Authority* [1986] HKLR 467>>, as cited by Mr. Peter Wesley Smith in his textbook for students at the University of Hong Kong in October 1993.

Now that case was quite unique. It was made back in 1986, when university was started, featuring engineering – torques, valences, bonds, set theory and game theory of Prof. J. Nash and the like. It happened in an age, now long past, just after the joint declaration was signed between a commonwealth state and China as the second party to the domestic treaty for the benefit of the city of Hong Kong.

In those days, all appeals from the Supreme Court of Hong Kong, as it then was, were taken to the Privy Council, for decision by one of the great, perhaps the greatest, as St. John would have asked through his mother, the Blessed Virgin adored by the Catholic Assemblies worldwide, for a ruling. The Privy Council would, as in the vast majority cases brought to then, the first being a criminal case in 1912 featuring the question of how a coerced confession should be dealt with, when it affects a foreign worker posted near the colony, for an overseas "bird watching" assignment. There was no Court of Final Appeal there to hear restricted appeals from the Court of Appeal, and the Court of Final Appeal's jurisdiction is derived strictly from the Court of Final Appeal Ordinance, since the basic law provides that final appellate jurisdiction is enjoyed by the Courts of Hong Kong. Thus, some cases start as low as the Small Claims Tribunal, may go to the District Court, with limited discretions say disputes of a million "Hong Kong Dollars" as HSBC bankers refer to the Hong Kong dollar with rich clientele. Some cases go no further than the District Court, such as appeals from a Master of the District Court.

Then, some cases go up to the Court of First Instance, which has original jurisdiction and appellate jurisdiction. But both the Court of Appeal and the court of final appeal, have no original jurisdiction, only appellate jurisdiction. Some cases can go no further then the court of appeal, but no cases at all start there. Likewise no cases start in the court of final appeal, and as a matter of fact, there are cases which do not end there, as, even after a final determination, the "real dispute" continues. The case of Nina Wang is, just one example. The CFA decided her will was genuine and that she should get the money from the Chinachem estate. She then died for some reason. Now, her geomancer is seeking to get all the same money, and so on it goes. But we need not discuss more about the complication of the CFA for the purposes of this appeal.

Therefore, in <<China Field>>, we can see that it is really a matter for this Tribunal to decide how the decisions of the CFA are to be applied to the facts and other law before the Tribunal, even as Lord Millet caused that case to be returned to the Tribunal for final consideration, after settling matters of weighty importance, and as noted above.

So, with that brief overview of Hong Kong's tribunals and courts in mind, all trite law, what happened in *Quebostock* could not happen now. This is because the legislation has changed, as we have seen. It changed in 2004, by amendments to the Buildings Ordinance. A new structure was put in place.

Let us look at it.

It is in Part VI, section 43, with the interpretation set as at the 30th June 1997, no doubt set by the legislature which passed the law, under English law, just before Hong Kong was passed to China for keeps. It is entitled "APPEALS" and it stands as the ultimate say of the law on buildings, being a matter within the exclusive jurisdiction of Hong Kong, that is, buildings only, or parts of a building above the ground floor, or below it, since that land, according to the state, or the Basic law, belongs to the state, which includes the government of Hong Kong and of China, as the Basic Law goes on, for time to 2047.

A word about <<China Field>> and the irregular judicial review therein. That case was essentially about an access issue and structure which connect the building to the main road way. JR proceedings were brought on the grounds that the BA applied the wrong law, and the application did not succeed before the judge, but not on the basis that he applied the wrong law. By the time the case went up to the CFA, a step too far, in our opinion, which is beyond what parliament legislated, and as we know, parliament is supreme in pre-1997 Hong Kong, a system which was to be maintained, given those who work very hard to form new parties, so that they can be elected to legco. But, by the time the case went flying that high, a good question had been framed, a real question of law, worthy of the attention of that Court, though the same question could have been brought by a legitimate way, in keeping with the scheme of the Buildings Ordinance, but no more about that right now, save to say this. Mr. Warren Chan S.C., who argued the case for the appellant, primed his submissions on the fact that neither the BA, nor the Tribunal was vested with the jurisdiction to

determine that the gridlines form a legal right of way. We tend to agree with this submission, though not presented to us, because this was not a s. 16(1)(h) issue because whether the grid lines formed a right of way by modern legal grant or otherwise by estoppel, common usage or easement, was not related to the Ordinance, the Buildings Ordinance, under which the Tribunal is granted its jurisdiction. That was a question for the CA and then CFA. Where these questions arise, in building law, there is no need to trespass across the grounds of judicial review, applications for which plague the Department of Justice, but rather, miscellaneous proceedings can be commenced for the resolution by the higher courts of points of law which need the attention of a fully appraised bench of 5 just judges.

An "Appeal Tribunal" is constituted to hear appeals. The tribunal is constituted under s.48, and the "Chairman" in relation to the Appeal Tribunal means the person appointed under s. 48(1). When a notice of appeal is given, the Chief Executive must necessarily appoint a Chairman and at least 2 sitting members, "for the purpose of hearing and determining the appeal." (s.48(1)).

The Appeal Tribunal has, by rule of the law, the exclusive jurisdiction, to the exclusion of all other courts and tribunals, the jurisdiction granted by parliament to hear all appeals, which touch and concern building law. That is the law, and to try to change it could have serious consequences for the safety and stability of buildings in Hong Kong. This is because whereas courts of law are bound

by the strict rules of evidence, as set out, in the evidence ordinance, or even text books like those written by Mr. McCoy S.C. and his friend and associates. Or those rules on the admissibility of evidence in civil and criminal proceedings. But the Tribunal is not bound by such strict rules; s. (50). This is not because rules of evidence are not good rules, but for another reason. Generally speaking, in civil proceedings there is need for proof of a certain relationship between different parties. Cases in contract will be concerned with the question of what is the nature of that relationship, whereas cases in tort will be concerned with whether any relation at all exists, by keeping of "*the law*". In criminal proceedings, evidence expands to what one person says about the acts of another person. And it expands further then that, to "real" or physical evidence of historic events, things like bullets, cast away clothing, sweat traces or even arm and leg prints – and even finger prints. For where a crime is committed, traces of it remain in the physical universe, for inspectors and detectives, or international courts of justice to trace down.

But building law is very different. Its primary concern is the safety and security of buildings in Hong Kong, for if they are not absolutely safe, people will be hurt and even killed.

Therefore, since safety is paramount, the parliament stretches its safety wings, or nets, as far as they can go, such that anything by way of helpful evidence, such as but not limited to, and I mean "anything" in the anything sense, and not in the more limited sense as it is used by the Right Honorable Lord Hoffman on

a case about statutory interpretation, a second case, beyond the scope of this brief judgment, to continue, oral evidence – being anything said, or even breathed as the breaths of the world, the winds of the universe blow in keeping with the currents of the oceans causing tall buildings, even the CN Tower, in Canada, or the iron structure in Paris, to blow slightly, ever so slightly; documentary, or "other" (without restriction), and whether it would be admissible in a court. For, whereas a court, bound by the pleadings before it, settles disputes, or convicts a criminal, this Tribunal considers appeals on the safety of structures which will affect everyone and anyone in the state who may use those buildings.

Now if the Tribunal, which has legal layman on it, but who are experts in building law, engineering, and technical subjects, as set out hereinbefore, runs into a dangerous wall, for perhaps a question may arise which is commonly handled by the higher courts, such as the court of appeal, or court of final appeal in other cases; then this Tribunal has an open door to the Court of Appeal, for its input, and decision on any point of law. We have talked about, above, what a question of law is, so we need not repeat it here. What then happens, is the case is frozen in time, or adjourned sine die, and sent to the CA, not for final decision, which is a matter for this Tribunal. The Tribunal then waits until the decision of the Court of Appeal has been given. The jurisdiction for that is reserved, by statute for the Court of Appeal which relates to mathematics, algebra and probability but we need not go into that here.

Suffice it to say that, when the Court of Appeal given its opinion, the case is then sent back to the Tribunal, for final decision: s. 53C(3). The law is so clear that none can doubt it. Though, for some reason, building cases have ended up in the Court of First Instance by mistake of law, or even in the Court of Final Appeal before being sent back to the Tribunal for final determination of all law and facts. <<China Field>> and the judgment and directions of Lord Millet refer, who noted the irregularities of procedure in his precise, historic and binding judgment, illuminated by the subtlety his style.

Before we leave this topic, we need say only one other thing. The doctrine of separation of powers is important in all states with some form of representative government. In these cases, it arises in this way. The present Chief Justice of Hong Kong, as at the date of submission of this judgment into the hands from which it comes, ultimately, has said in correspondence that of course, jurisdiction of the Appeal Tribunal, is not a matter under him, since the Tribunal is a creation of the Executive Branch of government, and not under the jurisdiction of the judiciary, including, for example, the CFA, the CA, and the DC, respectively, the Court of Final Appeal, the Court of Appeal, and the Court of District Court. In this matter, *his* judgment cannot be questioned.

Which brings us to one last point.

The jurisdiction of the Tribunal is not limited by any monetary amount. It could hear an appeal concerning a trillion Hong Kong/American dollar appeal,

or even an appeal about a thousand dollar matter regarding the left of a lane or the closet of a business – yes, even that small so it may be, since safety, whether of 400 flats, 10 high storey buildings, or even an unauthorized structure, or an entire unauthorized basement, or 'man' in law, as commonly spoken of. To state what is plain from the legislation. There is no provision in the Buildings Ordinance (Cap. 123) which states that the Appeal Tribunal is bound by the question of law, although, such a Tribunal, which would need such assistance, would be Julian bound to apply such an interpretation as carefully as possible.

C. Ratio Decidendi Outline

In any appeal, there will be matters which need to be said, so that in the future, counsel can be more thorough in their presentation of the case to the Appeal Tribunal. We trust that those matters have been set out with an adequate degree of treatment above.

We now come to the reasons for disallowing these plans to be approved, and to state the reasons simply based on the principles established herein.

We have decided, unanimously, *not* to approve the plans, and thus not to allow this building project to proceed, as portrayed in the plans presented to the BA in 2007 for approval, for the proof of decision that now follows.

There are two appeals before the Tribunal. The appellant in both of the cases is the same, Well Spread Trading Ltd. The land in question is the same, being various pieces of land at Inland Lot No. 5044. On that lot, presently, is a development known as 60 – 74 Kai Yuen Street. The existing buildings, which, to the appearance of the eye, are in reasonable condition, consist of several buildings of 4 – 6 storeys high. There is lots of room to walk around at the site. And because the buildings are not too high, one has a larger perspective, or human eye view, when one looks around at the buildings in the immediate neighborhood, or, to put it another way, the moderate height of the buildings do not cause any veritigo when one is looking around[39].

On the 26th February 2007 by way of letter, the Building Authority rejected the general building plans of the appellant herein in relation to case 146 of 2007. On the 25th April 2007 by way of letter, the Building Authority rejected the general building plans of the appellant herein in relation to case 503 – 2007. The reason given for the rejection was based on s. 16(1)(g) of the Buildings Ordinance, in that it was said that the proposed building works would result in a building differing in height from the buildings in the immediate neighborhood.

(Other grounds were stated for the disapproval which are no longer relevant, given the concessions made by the parties, as outlined above, under the 1st submission, which was made to the Tribunal).

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[39] See for example, *A Short Treatise on the Problem of High Rise Buildings in HK, and other parts of the world*, James W. Campbell, unpublished.

The appellant appealed both of the cases in the spring of 2007, a very long time ago, and thus here I sit writing this judgment, six plus months in the making given the billion dollar nature of the development and that safety is paramount under the Buildings Ordinance.

Let us discuss the details of the development as proposed by the developer. Open spaces, as required bylaw, are a feature of the development, and such spaces would have been in the nature of some 376 square meters of open spaces.

There would be no parking of cars at the site in any event. Whereas at present, there are various cars which can park at the site, this would not be the case if the development was to proceed, in that there is no parking space or loading/ unloading facilities in the proposed development. In a word, no vehicle can turn in or out of the site, and thus the cars parked there now will have to find a new place to park. However, there is one ramp onto the site, which would be for emergency access only, similar to the emergency vehicle access which now lies at Bedford Garden, allowing access to the site from Kai Yuen, but only for cases of emergency. This emergency access is from Kai Yuen Street, and it bends into the site, cutting into the lower ground floor of the site at 90º, just to the east of where the *cul de sac* is now, twisting around in a south easterly direction, and then emerging at the North centre of the site. We add here, that North Point, as a matter of history and as a matter of fact, points due north, and thus has directional significance to Hong Kong, as a stable compass reference point,

for the purposes of universal (gravitation) and electro – magnetic image processing. Nonetheless, the plans for this development are premised on a block plan, which point due south, and thus uses south as its due referent. As a matter of international mapping practice, maps are always presented with North at the top of the map. Thus, to be given these plans where "down is up" is extremely odd, nonetheless, we are happy to work upside down with these developers for the purposes of this appeal.

From these plans which show the emergency access, certain other impressions are given of the land. No. 60 – 74 of Kai Yuen Street, is presently situated on the top of a little hill. That hill can only be accessed by a street from Kai Yuen Street, and it only provides vehicular and pedestrian access to the site. It does not provide access to the North Point View Mansion for example. From this, it is apparent that the South Western tip of Bedford Gardens, for example, is situated at a lower point than 60 – 74 Kai Yuen Street.

Since there is no real appreciable difference to the two appeals, we will treat them hereinafter as the same.

In terms of fiscal policy, and development residential prospect planning, it has been suggested above in the obiter dicta portion of this judgment that this development will not greatly increase space capacity for Hong Kong, over what was available in say 1888. Say more here. The development will be 31 storeys, of domestic space, at a total height of 142.1 m above the principal datum (see

Appendix II). *(We do not comment on the height figures given by way of metres above the mean street point of Kai Yuen Street, calculated by taking the height of Kai Yuen Street at three points and then dividing by 3, since we have not been told how the mean street calculations relate back to the principle datum calculation.)*

There will be about 29 floors of residence, judging by the plans we have been provided with. On each floor are 6 flats, A, B, C, D, E, and F. The largest flats, C and D, face North. *The largest flats are each 843 sq feet. The next largest flats face south and two of them are 719 sq feet each. The smallest flat faces west, flat b, weighing in at 590 sq feet, with its front door allowing people to enter from the east. And then, there is the flat facing east, flat e, which is 632 sq feet. Inconveniently, it only has a single washroom, facing the North.*

So there would have been about 174 flats to sell.

The average size would be 724 Sq. Ft.

The average price would be HK$7,240,000.

The largest flat would sell for more than HK$8.4 M.

Even the smallest flat would sell for more than HK$5.9 M.

Then, of course, we need to look at the type of developments which are being put up here. Most of these flats have 2 – 3 bedrooms. None of them are single person dwellings, which would attract young men and women who would want to have a large studio flat to live in so as to help them with their busy lives of work hard and play hard. More likely, families with two sources of income would be more interested in these flats, people who are attracted by North Point, but who would not have a car to worry about. This is factual speculation based on the evidence received, including a site visit where these visual observations were made.

Whatever the buyers be, in contrast with Bedford Gardens, which boasts of 387 parking spaces for its occupants, this new development would not support any type of lifestyles which are dependant on cars for transportation.

Then we look closer at the evidence which was provided by the Government in relation to this development. This was provided in the affirmation of Ho Kwok Hung, the Assistant Director/ New Buildings, as we noted hereinbefore above. Information and statistics has been provided by the Rating and Valuation Department.

The Domestic Gross Floor Area, a rough measurement for the amount of domestic space, for the whole building is 199, 748.177 Sq Ft. According to the affirmation of Ng Mei Yee, who gave evidence for the appellant as its business manager. In relation to the proposed building, the estimated cost of the

development is HK$8,500 per square feet. Thus, the cost of this development is HK$1,697, 850,000, or, in simple terms 1.697 billion. Then, we were informed that the developer plans to sell the property for about HK$10,000 per Sq.Ft. That would mean a total profit of about HK$299,622,265 for the developer.

But then, Ms. Ng provided other information about similar tenements in the neighborhood.

At Bedford Gardens, this year of 2011, prices averaged HK$6370 (ASP) for flats therein (per Sq. Ft). The flats range from 495 Sq. Ft. to 700 Sq. Ft.
At Kai Yuen Terrace, prices averaged HK$6815 (ASP) (per Sq. Ft). The flats ranged from 497 Sq. Ft. to 727 Sq. Ft.
In Tanner Garden, prices averaged HK$7840 (ASP) (per Sq. Ft). The flats ranged from 641 Sq. Ft. to 893 Sq. Ft.
At Healthy Garden, prices averaged HK$7152 (ASP) (per Sq. Ft). The flats ranged from 507 Sq. Ft. to 514 Sq. Ft.
At Yalford, prices averaged HK$5798 (per Sq. Ft). The flats ranged from 486 to 504 Sq. Ft.
At Island Place, prices averaged HK$7939 (per Sq. Ft). The flats ranged from 597 to 996 Sq. Ft.

But then, there are more expensive flats in North Point, for example, Java, where prices averaged HK$13,056 (per Sq. Ft.). The flats ranged from 956 to 958 Sq. Ft.

And Live Habitat, where prices averaged HK$9426 (per Sq. Ft.). The flats ranged from 375 Sq. Ft. to 720 Sq. Ft.

What is apparent is that the flats in the "*immediate neighborhood*" which the appellant says should be included in the calculation of the "*immediate neighborhood*", are all selling for lower prices than the proposed development at HK$10,000.

The difference is considerable.

The total average difference would be the difference between a flat selling at HK$6,985, and HK$10,000 per Sq. Ft. The stamp duty would be the same at 3.75%.

But, HK$7,000,000 for a flat is much less than HK$10,000,000 for a flat.

HK$10,000,000 would turn a lot of people away.

Attached to the letter, a plan was attached. That plan is a very rough sort of plan in black and white, with a jagged red line fencing off in ink a plot of land which the BA regards as the "*immediate neighborhood*" of the site. The site itself is in the shape of a tear drop falling downwards, but caught by an easterly wind mid air. Behind the site is a man made slope, which has been reinforced by concrete slope structures so as to retain the shape of the land platform. At the

bottom and back of the site (looking South towards Braemar Hill) of this re-enforced hill, one sees, even on this very rough line, contour lines on the plan leading one level by one level upwards. But at the very bottom of this platform on which the site sits, is a level plot of land which heads in an eastward direction, towards Bedford Gardens, which is situated to the East of the site. If you want to reach Bedford Gardens from the site, the only real way to do it is to drive or walk down the slope to the bottom, and then drive eastward over the Bedford Gardens which sits at the bottom of the site. At the very least, there is an immediate height differential between the site, at its base, and Bedford Gardens. One also notices that Bedford Gardens, each and every block of it, lies in a North West to South East direction, whereas the buildings on the site points in a North East to South Westerly direction.

Let us identify with clarity the area that is said to be the "*immediate neighborhood*" of the site, for the purposes of the Ordinance. It encompasses the site – itself located on a small platform, and then rotating upwards to the North East, encompasses the blocks which lie to the North and to the South of Kai Yuen Street, and then upwards to the North, the blocks at Kai Yuen Terrace are not included. That takes us up to Tanner Road. The immediate neighborhood then slopes downwards to embrace all of the old flats at Upper and Lower Kai Yuen Lane. It is marked that Bedford Gardens is not included in the immediate neighborhood. Nor is any part of Tanner Road. Similarly, the flats above Tanner Court are also excluded. In a few words, the immediate neighborhood covers the entire breadth of Kai Yuen Street south of Tanner Road, within its ambit.

Tanner Court cannot be accessed by means of Kai Yuen Street, save for emergency access at the southern tip of the street, or near the *cul de sac*, near the site at 60 – 74 Kai Yuen Street. One very immediate factor which all of the buildings share in common is that they were all built around the same time, say about 40 years ago, and all look somewhat the same in style.

Those features of the "*immediate neighborhood*" remain the same to this day, the time of this decision, which is June 2011. Save for one very important feature. As noted above, there are now no buildings at Upper and Lower Kai Yuen Lane as these buildings have been removed for the time being, as a New World site is supposed to be in the works. But these buildings are not there yet. We have not been provided with the building plans, but we were given one plan, The Respondents Exhibit 1 (RE-1). That plan shows a new development in the centre of Kai Yuen Street. At the centre, is an open park which looks very much like a sort of bottle shape used for chemical experiments. Surrounding that chemical bottle of open space, are three blocks, of which the new development is comprised.

The appellant raises the following complaint. It claims that the BA did not disapprove of the following developments: Bedford Gardens, of which we have spoken above, the blocks of which are 18 – 19 stories; Full Wealth Gardens, with its four red cross like buildings of 24- 25 storeys – and which encases to the North of the site the old Upper and Lower Kai Yuen Lane, before they were taken down to make way for the new development, of the New World

development, of which we know very little, and which was but a basin in the ground in June 2011, the date of this decision, and, also, which touches and lies to the south of Tanner Road; it says that Yalford Building which stands and abuts Tanner Road on one side, the busy commercial Tanner Road, that it is 25 storeys which was also allowed; then Tanner Court itself, says the appellant, which sits beside Yalford Court, and which also abuts onto Tanner Road and which is 26 storeys. So, says the appellant, none of these developments were rejected by the BA, and they are thus proof that the present development should be allowed.

One notes that for all of these developments, which it is said are proof that this development should be allowed, have the common feature that they either abut onto the busy Tanner Road, or, in the alternative, they cannot by accessed by normal traffic, by way of Kai Yuen Street. In this sense, they are not primarily accessible by way of Kai Yuen Street. Take Bedford Garden for example, this development is only accessible for vehicular traffic by way of Pak Fuk Road, which extends all the way back around to the East before cutting South to allow access to Bedford Garden. Or, in other words, none of these developments are served, essentially, by Kai Yuen Street. Simply put, the case of the BA is that the immediate neighborhood of the site is comprised of those developments which are primarily accessed by Kai Yuen Street by its southern extension, downwards towards the site, and all of those developments which link off of Kai Yuen Street.

We do not believe that in seeking to define the immediate neighborhood, height is all that needs to be considered. For example, simply looking beyond the four directions of the site and then deciding which blocks should be included. Rather, what is needed is to look for patterns of congruency, if any, around and about the site.

The appellant then refers to the approved OZP # 19, according to which, there is no height restriction for domestic buildings in the area. In our view, the approved OZP is a helpful referent, but, as noted above, it is not necessary that we follow it, for the reasons which have been provided above in the detailed discussions therein. Simply put, this is not an appeal in which we are concerned with the operation of s. 16(1)(d).

Looking at the OZP 19, and comparing it with the very rough sort of plan which was attached to the rejection letter of the BA, the area which the BA defined as the immediate neighborhood, is all in a small region.

We have had the opportunity to inspect the OZP#19. He is presented in a format such that one cm on the plan, equals 5,000 cm of city space. Thus, in other words, the OZP is 5000 times smaller than the city space it represents. To transverse 5000 mm or 500 cm or 50 m in city space, would be equal to 1 mm or 0.10 cm or 0.0010 m on the plan. If we ask, how big is 1/5000th or the ratio 1 to 5000, it is easier to think of the size of the OZP. The plan itself is 82.5 cm x 61.6 cm, or 5,082 cm^2, or 0.5082 m^2, about ½ square meter, or the

span of an average single door, from the handle in one side to the other side. There is also a bar graphic scale, which can be used to measure the distance between two points on the graph, and which "converts" the distance between such points to the corresponding distance of city space. The plan is also neatly divided into square ledger lines of 10 cm x 10 cm, or 100 cm^2. 100 cm^2 is 0.0100 m^2, or 0.1 m x 0.1 m, or $1/100^{th}$ of a m^2. Thus 1 cm^2 or the plan, is 1/10,000 m^2 in real city space.

But let us understand these special concepts, or conversion of city space to map space. We have all been to Happy Valley to watch the races of horses. Beautiful horses, which have been trained to run to delight us. The distance around that racing stadium, or the green pitch, is about 1.83 km. So, what the Planning Department has done is to shrink 1.83 km of city space, or, approximately two laps of the Happy Valley Track for horses, to the size of the print of a 1½ year old baby's foot. That gives us a sense of the scale of the plan.

Now, above we spoke about taking the rough plan provided by the BA, annexed to the rejection letter, and putting a square around it, the four sides of which would extend to the four extreme cardinal points of extreme North, South, East and West. That square would be 12 cm x 12 cm, on the rough BA plan. That square is about the same size as an apple i-phone[40], stretched so that it takes

[40] A derivation of the telephone invented by Graham Alexander Bell, and produced by the founder of apple corporation, now deceased as at 2011.

twice the hand grip size to hold it in the palm of your hand. On the OZP#19, that same square, appears much smaller than the size of an i-phone. On the more detailed, and larger, ½ m^2 OZP#19, say for example, that 120 m x 120 m square, or 14,400 m^2, appears much smaller, the same size as a real life small Thai egg, with a square circumscribed about it.

In real city space though that square Thai eggen shape on the OZP, which is 1/5,000th of its actual size, when it appears in real life, in city space, becomes the same size as the length of an American professional football field, or 120 yards.[41] (We can say, as a handy rule of equivalence of the Imperial System with the Metric System that 1 yard approximately equals 1 m, and thus a metre stick of wood is about the same length, but not exactly, as a yard stick).

Now, that square neighborhood contains Nos. 8-54 Kai Yuen Street, the site under appeal, the building site of the New World Development, which at the date of this decision, June 10th 2011, is a construction site, with a massive hole in the ground, and walled up with barricades that do not enable visitors to look at the site. But the residents of Bedford Gardens would be able to look at the construction, since they have a peek over the walls, from their 11th storey little flats, provided that they have western windows in their flats. Although no

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[41] 1 yard = 1 ft or 36 inches

1 m = 1.09361 yd or 1 yd and 0.28 (www.metric-conversions.org)

evidence was offered, (other than some plans exhibited as Annex 6 or Pg. 395 of the Appellant's Bundle).

As noted in the discussion above, the New World Development was under construction, the day this case was decided. Let us say a few things about that development. The site is in the shape of the head of a German shepherd dog, with the representative car, sticking up vertically along the entrance to the site from Kai Yuen Street just at the place where Wai On Court used to be. It is surrounded on the west side by a concrete walkway which bends upwards into the middle of the site from the southern tip. The development has three buildings, one by the shepherd's brain, one by its throat, and one by its mouth. In the middle of the shepherds head, where dog food goes down its mouth into its body, is an open space, ring shaped, a concrete ring, with room for some token green hedges and perhaps a few flowers staggering the concrete morass. The facade of the building will be of stone cladding, metals, glass, and some wood panel veneers in the insides, which can never be more than 30 x 30 x 30 m^3 – according to the fireman's tower measure, some 29 metres tall, presumably because the volume of water which could be piped out of their hoses, in the event of fire, can only be discharged with sufficient quantities if the volume of the rooms is kept under 28,000 m^3. It seems the plans were approved in January 2011, on the 28th in fact. From an areal view, the development looks like a chemical flask stranded in the throat of our German shepherd. Looking down on the actual buildings, they have no real shape other than that of a 46

sided polygon, but no doubt this artistic endeavor will be visually silenced by the flower planters, in cement blocks at the centre of the development.

Of course, in keeping with regulation 41 of the Building (Planning) Regulations, s. 41, means of escape are provided, and access staircases for fireman. There has been consideration given to facilities for the disabled in keeping with s. 72 of the same regulations. And it seems that the site coverage and plot ratio calculations, which are deemed to be plans in keeping with the definition of plans which has been given in s. 2 of the Buildings Ordinance.

Further, so as to keep pace with the Planning Department, and the Lands Department, Joint Practice Note, consideration has been given to promotion of the construction of green and innovate buildings so as to improve environmental performance. Thus, where a lease contains a condition restricting the number of storeys, as is no doubt the case here, or the height of the building to be erected on the lot and the feature will cause such restrictions to be breached, and then, of course, in keeping with practice directions, a lease modification will be required.

The development is flanked by Golden Cassia Court, Golden Cedar (no doubt of Shenzhen Origin for this species of the cedar); and gently forked from the eastern front by Pak Lee Court, Pak Tak Court, Pak Cheung Court – all of the family and lineage of Bedford Gardens, but of course fenced off safety, even from these neighbors, but a wall which will replace the wooden scaffolding

walls which are in place at the time of this judgment so as to prevent any pedestrian from falling inwards. The same concrete that surrounds the western joints of towers, abutting Kai Yuen Street, though separated by the concrete sidewalk, the divided shares of which, that is, jumbo undivided shares in the estate as a whole, will extend to this sidewalk such that the new residents of this development will have a propriety interest in the cemented side walk.

The development boasts of 30 stories, for 3 blocks, with 8, 7, 18 flats per floor, or about 660 new flats, here or there. The plans were prepared by Wong Tung & Partners, who, with continental wisdom see fit only to name "Fortune Building" & "North Point View Mansion", as neighbors to the left, whilst referring to the other buildings siding the western hemisphere of Kai Yuen as "26-24, 22-16, 14-12, 10, 36, 54", without massing the estates by name. This creates the artistic impression that these less prestigious buildings are white blocks of flats.

The lowest floor of the building is named "1st Floor", which Mr. Walter Hoftman reminds us in his official Map of the Hong Kong Association of Travel Agents, means ground floor, though the same map omits the I&Q Zones of the UTM reference system, no doubt to keep North Point securely off the tourist map, despite its breath taking harbor views for where the Hung Hom Ferry docks just north of New World Development, no doubt to allow a steady stream of visitors to New World Development, who disembark at North Point via

Hung Hom; and which will be docketed on the 2012 version of the A-O-A Street Map.

The ground floor shuttles cars of the new residents along the dropped curb entrance, immediately opposite the ascending steps carrying men and women of leisure from their flats further up south along Kai Yuen Street, guarded safely away from the corrugated graded concrete, Yai Yuen Street, which will need to be widened by "New World" so that there is more road of Kai Yuen, and no concrete hence to ensure that the plates of the earth so far below are held firmly in place for New World, though the risky curve of southbound east Kai Yuen does pose an obstacle for New World which will no doubt be overcome by simple digging deeper into the old upper Kai Yuen Lane to B level.

The graded access points for cars to New World Development make entry to the parking garage from Kai Yuen Street without too much trouble. The second hand cars will enter the parking garage at a height of 20.50 units of height, above the designated standard medium, as registered by the architect, Mr. Tang, and those who checked and drafted the plans for his signature. Outside, on Kai Yuen Street, it will continue to rise at a steady height of 2 units of height, say 21 units to 23 units. We are told by the architect that all heights are given in meters above the principal datum[42]. After the construction of New World, Kai Yuen Street will no longer be at its original height. The implications of this for

[42] (Appellant's Bundle, Pg. 395, Annex 6)

North Point are enormous, but this is not the place to discuss this larger matter as our concern is the immediate neighborhood only.

The plans provided for the proposed building on 60-74 Kai Yuen Street, the appellant's plan's,[43] give length as "height above the main street level". The only street is Kai Yuen Street curving North to South. Three levels are given for the street, and that street remains the same to this day which are 38.20 + 36.30 + 31.10, which, taking the average mean, works out to 35.20 m. That is the level of the street, above the principal datum, as at the date of judgment.

Apparently then, the plan for Kai Yuen Street is, should this development New World proceed, will be for Kai Yuen to be dropped some 10 feet.

Let us take, for the mean divisor of Kai Yuen Street, to be the place where the building at the former Kai Yuen Lane abuts onto Kai Yuen Street, being the point which is equa-distant from the cul de sac and to Tanner Road. Now let that mean distant point, represent the mean height of Kai Yuen Street, as at the date of this judgment. That will be 35.20 m above the principal datum. But in accordance with the plans for New World, at no point will Kai Yuen Street reach such a height as it presently averages, that of 35.20. With the road widening works which New World is to carryout prior to the granting of the occupation permit. Apparently[44] only the upper part of Kai Yuen Street will

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[43] Ibid Pg. 001

[44] See appellant's bundle, Pg. 396

be widened by New World, about 50%. That is quite a bit of widening, and it will be done by means of the surrender of land, the surrender of private land (see Appendix I). It is apparent from the plans of New World.

A large tract of land around New World, will not be touched, or will be unexcavated land.

Before we continue with a short discussion of New World, as noted below (Appendix I) there is a plan attached to the conditions of Exchange for Lot 5044[45]. According to that plan 1, the area now been excavated at the time of this judgment by New World, or the former upper & lower Kai Yuen Lane, belongs to the same Lot #5044 as #60-#74 Kai Yuen Street (the appeal site herein), but not to the same lot as what now holds Bedford Gardens (ie the former I.LO. #8430), nor what is now 10-54 Kai Yuen Street, on I.L. #2168. However, it would seem that what #10-54 Kai Yuen Street, and #60-74, had in common, at the time the plan of Inland Lot #8430 was prepared, was joint access to the Temple, which is located due south of #10-#54 Kai Yuen Street, I.L. 2168, and due east of I.L. (#5044) #60-74 Kai Yuen Street. There is a jig-jay flight of stairs leading down from Inland Lot 5044 at the location of where #60-#74 still stands. The original temple, 天后的龕卜辭南福堂[46],

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[45] At the hearing of this matter, we were provided with a copy of the "Conditions of Exchange". The proposed development is located at the postal address of 60-74 Kai Yuen Street. That land has been labeled as Lot 5044, by the Colonial Government of HK.

[46] Meaning "The Temple Beyond the Heavens, where lies hidden the Golden Box with the Enchanted Incantation of the Southern Monastery of Happiness". Translation, copyright JWC & Associates (HK). Used by permission.

dates from as early as 商代 (the Shang Dynasty- 1066 BC). The ancient temple, pre-Bronze Age which appears on Plan 1 attached to the Conditions of Exchange, and which appears in all 3 plans, no longer appears again in the approved OZP#19. The land is noted as Government, Institution or Community, and the area is now hidden gently behind the contour lines of 天后 hill. Tin Hau Temple Road is a winding road that makes its way behind the older temple. New World's lowest point, is the entrance to the car park. But there is another aspect of the lowest floor which puts the complexion perspective. A long trench, like the moats that used to be built around single family mediaeval castles, extends from the entrance to the parking garage, all the way along the rounded bottom side of the development to the southern 7 pm tip of the rounded side. Or, the building shoots up form this lowest point, some 27 floors. This is the footpath which skirts the newly widened road, on the east side. So, walkers can walk south along the east side of Kai Yuen Street from the entrance to the parking garage all the way to the 6 pm position of the development, on the south side. But as they walk, to their right, will be cars heading south to the 10-74, but not to 60-74, should it go ahead, since there is no parking there.

What is to happen, the plan is, for Kai Yuen Street to be widened at an expense to the New Development of the New World Development, at a cost of millions of dollars to lower the entire upon portion of the road, as noted, some 10 units, but for what ? Should this appeal go ahead, there will no longer be an increase in traffic along the southbound portion of the road, because the plans is for no

cars at 60-74. It is a huge 30 storey development, to be sold at $10,000 per square foot, but for parking, no room in the lot. So walkers will be able to walk all the way around New World, but no access points are provided, save at the car park entrance, and a very grand staircase from the 3rd floor to the 5th floor, which is the level flat podium area.

Basically, it takes 5 floors, from 1st floor to the 5th, to ascend to the lobby area. Parking spaces are provided between the 1st floor to the 4th floor, and emergency access to the site would be along Kai Yuen Street to the opening of the building on the southern side. Basically then, we can summarise the essential characteristics of New World as follows :

1) its very long footpath starting Kai Yuen Street does not provide access to the 3 new blocks save at the car park area and on the southern tip of the development;

2) a huge retaining wall will surround the development, fencing it off from the entire western portion of Kai Yuen Street, from Bedford Gardens, the proposed site and even Full Wealth Gardens to the North.

3) New World is constructed in such a way that it is virtually a self contained, walled off tower block which does not share any significant building characteristics with no.10-54 Kai Yuen or the present site;

4) it would be very difficult to argue that New World is part of the same neighborhood as 10-54, the existing site, or even Bedford Garden, access of which is which is from Pak Fuk Road at the far east.

Given all that has been put forward above, we are of the view, if we had to decide it, which, to stress the point, we do not, and do not do so herein, that New World is significantly different than the appeal site as it stands now. We would say that it, by virtue of its exclusive points of access, and particularly, low utilisations of Kai Yuen Street, make it of a very different type and design, than what is proposed. We emphasize again that it is not strictly necessary to decide this as we need only condition New World in the states it exists as at the day of this judgment, June 2011.

We need not carry out a detailed comparison of New World with the proposed development at #60-74 as this would be a distortion of the reading of s.16(1)(g), which does not require, as Mr. E Chan S.C. suggested, us to carry out a comparison with proposed developments, or even approved developments, but rather, with what is extant at the site at the time of the decision. In the same way that there is no accrued right to have building plans approved on the basis of the law as it stood at the time of the submission, by parity of reasoning, there is no accruing right to have the decision maker consider the proposed development with what may eventuate if all plans are carried out as proposed, but only with what exists at the time of this decision. To imagine what the current surrounding building works will look like if completed on schedule, would be to study the words of s.16(1)(g), which require a comparison with "the

buildings in the immediate neighborhood", and not "proposed buildings in the immediate neighborhood."

To read the section as proposed by Mr. Chan S.C., by looking at what may grow out of the current basin or cavern in the earth at the old Kai Yuen Lane, would result in an administrative nightmare. Decision makers would be comparing proposed developments with approved proposals, rather than a physical, empirical comparison of what exists at the present time. We repeat herein Lord Denning's approach in the judicial review proceedings analyzed in detail above in the <<Padfield>> case. Too many uncertainties would arise out of such an approach. We will not say any more about the massive hole in the earth, the construction site which existed at Kai Yuen, the old lower and upper terrace at the time of the visit. These comments are provided out of mere courtesy to the Tribunal that handled New World, and since it was in evidence, witness of its relevance in the eyes of barristers on each side.

C.1 Immediate Neighborhood

We come to the calculation and rational decision of the immediate neighborhood by way of the technique of legal impressionism. Our methodology is straightforward, sound, and has the advantage that it will inhere to the actual physical circumstances necessary for determination of such matters.

And so it is that the determination of neighborhood requires, *a priori pre-simultaneous a mori*, the consideration of this question first, that who is my neighbor first is he that is my neighborhood. For a neighborhood is not a matter of bricks and mortar in the first instance, but of he who lives in my neighborhood, who works shoulder to shoulder with me, rests in parallel chambers of sleep, sees the solar bodies rise and fall through the same windows though one unit of legal property away, and enjoys the recreation of his family, after and before the long hours through which he earns his keep for the state first, and then for his family and neighbors in the second, and for himself in the third instance. And this question has been before the courts of justice for some 2000 years, when they were first brought before the most noble, lean and gracious judge of all times, who did said that a neighborhood can be a very great size, in that sometimes one town is a neighbor to a second town. Or three men a neighbor to one. Or the one who works for another can be a neighbor.

When a man is born, his neighborhood is the flight from his mother's vagistic gate, to the hands of the father's doctor, and then back to his mother's outer heart chambers. It takes some time for the journey, sometimes as long as a day, sometimes, the neighborhood is short and it is but an hour or two. But in any event, the child will be brought to his father's home, and that will be his neighborhood for the next five years. He will be bound by the walls of his home, and the gardens which lie beyond. When he starts school, after ½ a decade, maybe less in eastern states where childhood is the last phase of one's life rather than the first, his neighborhood will increase, beyond the palaces of his

imagination, into the reality of the state of which he is one part as the whole. He will walk up a street to his school, and that will be his neighborhood for the next 10years of his life. It maybe that he does not have the privilege to live near to a good Ryckman school, and will need to take a bus to school. Either way, his neighborhood will increase in proportion to his actual attention span to the task at hand, *getting to school*. And, when the time comes for the young lad to leave school, for higher schools, he will leave his neighborhood, age 11 and enter society as a very young member. There, society will train him in its ways and prepare him to become a man, say age 18.

And so, when a boy is asked, who is my neighbor, he is the one who can answer properly, because he still lives in his own neighborhood, and thus he knows it well. He will say, all of the houses on my street. Or he will say units he sees on the school bus before he turns his attention away from what goes on outside the bus, to the tiny school politics within, as the bus leaves his survey, neighborhood, block, or immediate living context/compound.

But when, as a lad pressing towards early manhood, he is asked the same question, his answer must be that that school, and all that he sees on the way to it, is his neighborhood. And he will answer rightly. And so it is, only when the boy is a man that he will leave his neighborhood, whether physically, or mentally by leaving behind the thinking and young customs which he brought to even a school over seas which he is forced to attend by his parents or by his society, for some states cannot allow a child to learn from itself, and must send

its children away to learning from those better states into which these children are taken, and have been taken, since the life and times of J. Erye and the Brontes, or to noble Scotland, where all royalty must learn from those who makes great things appear small so they can be received into the world, like bank machines or like redden giant flowers which kneel at the foundations of clear water, or when a statesman bows at the rail of his church, a judge obeys his laws, or a captain lowers his telescope to see past the rail of his small ship to the might true Northern Bays which create the global neighborhoods of mankind.

In 1932, the House of Lords decided the case of <<Donoghue v Stevenson>>, which needs no reference it is so famous, even among merchants. The case is still important today. It changed the law of torts forever. Tort law governs the relationships between men which arise by the universal application of the invisible laws which all men know, because they are plainly visible to all men, unlike contract law, whereby men actually covenant with one another and thereby have a say in the very laws which bind them, though never to take even a sub quantum step beyond the laws of tort which are the greater laws, because they have not, and cannot ever be written down in their entirely. They are composed by the invisible ink and hands of the universals laws.

Before the case was heard, tort law was based on the concept of pre-existing relationships between parties before liability for a tort could be established. Relationships were established on a case by case basis, by intervals over the

years. It was necessary to show that party a had harmed party b in such a situation as to show that there was already a relationship between them which gave rise to a duty of care, or, because of the nature of their relationship, party a owed party b a duty not to harm him.

Lord Buckmaster dissented. He did not want the law to change. He and Lord Tomlin sought to keep the law as it had been. And that was to make tort law small enough to be encased merely in the incremental decisions which the former judges had churned out since <<Dixon v. Bell (1816, 5M. & S. 198).>>He cited many cases, all of which turned on their facts in his judgment. This is because, he was troubled in his spirit with the dicta of Parke B., from the 1837 case of <<Langridge v. Levy (1837) 2M & W 519>>, who said this:

"*We should pause before we made a precedent by our decision which would be an authority for an action against the vendors, even of such instruments and articles as are dangerous in themselves, at the suit of any person whomsoever into whose hands they might happen to pass and who should be injured thereby*".

Before quoting from the decision of Lord Atkin, all that needs to be said here is that prior to Lord Buckmaster's helpful dissenting judgment, which explains the law as it stood still before Lord Park's dicta noted above, there were no generally recognized principles upon which liability in tort would be imposed on a person for damage to a person who came into no direct contact with the

maker of the object. There was, also, in the 19th century, no recognition at a social level that certain objects are dangerous in themselves, for that was a very rich society, a utilitarian society in which all things made, by the industrial process, were made for a purpose. Lord Park was the first to set down such a general principle, against vendors generally in Victorian society, where goods were sold down supply chains, and where the end user may not know the vendor – the full judgment of Lord Park above refers.

These principles of tort law formed the foundation for judicial review in the early part of the 20th century. At one time, before the glorious revolution and Lord Cooke, judges held their positions by good favor. Straight up to the 20th century, no real action was available against a decision maker who had a erred in his decision. The change was made possible with changes at Whitehall with the advent of Lloyd George and the Welfare State, circa 1912, where the power and decision making authority of the state for the case and stewardship of the citizens expanded greatly. Legislation was amended to give more discretions, such as the one in this case, which owes its complete origin to its English parent, to decision makers.

Even as in tort law, where the courts are concerned with pre-existing relationships, and duties owed, and the scope to which these relationships extend, and this, essentially with the mathematical principles which govern the square of torts law, with the four sides being, (i) the relationship between the parties (ii) the scope of duties owed, (iii) the nearness of the parties or proximity

between them, and (iv) and what remedies are then available, whether direct or vicarious et al. But the law of statutes does not lay this down. Tort remains a common law action as it must for all times, for to legislate on it would be to shut the doors forever on those who are injured without precedent and who come to court for a remedy without being able to cite a single similar case.

In like fashion, and by legal analogy, when, by a piece of legislation, this Tribunal is to determine, (i) the scope and breath of the relationship between owners of the undivided shares in different sized buildings; (ii) the extent of the neighborhood, in terms of square feet or block by block sketch definitions, which arises from the relationship of peoples in different buildings, whether by height, design, intended purpose or whatever; (iii) whether the buildings beyond the proposed one, as the subject of the planning permission application or appeal, have sufficient proximity to qualify them as deserving of the appellation, *immediate neighborhood*; (iv) whether this Tribunal should exercise its discretion afresh, either directly by approving the plan, or by remitting the matter back to the BA with directions for further conduct.

The fore-square Hydinian parity could not be any more striking.

The real question is, what is the immediate neighborhood, with proximity as the real test, and then whether the proposed building is sufficiently similar by way of height, design, type of intended use, and whether any at all.

Lord Atkin said this in his judgment which is still the case which started the Olympic timer for the past century and even in this one, if not for the answer he gives, for the question he posed, which is the same today as then, the tort feasor must inquire whether he owed the defendant a duty and if so, what is the scope of that duty: "*You must take reasonable care to avoid acts or omissions which you can reasonably forsee would be likely to injure you neighbor. Who, then is my neighbor?.....The answer seems to be – persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called into question*."

And so it is that we now ask not "*who is my neighbor*", for that question has been answered.

C.2 Conclusion on Parity of Design, Style, and Type (*Congruity*)

And so it is, we come to the conclusion of this judgment.

There are two final points.

The immediate neighborhood, point one. And secondly, whether the submitted plans should be approved.

We have said they should not.

We do not approve the plans.

The Government filed a bulky affirmation. It is a computer printout which took about 1 minute to produce. It is just a standard list with no value added by way of work. I re-read it in its entirety, last June, about the 6th June, in fact. It shows the ratable value of the tenements in Bedford Gardens, including all the parking spaces there, and Healthy Gardens, and Fortune Gardens and others. We can see that, in general, those tenements sell for about HK$4,000 - HK$6,000 per square ft. Whereas, we have seen that the new development will sell for about HK$10,000 per square ft. Therefore, comparing square unit with square unit, and given the conclusions above on length calculation, we see a substantial difference between the type or design of the proposed building, with what is already there. The older buildings, say 60 - 74, or 10 - 54 Kai Yuen Street, are going for even less, say HK$4,000 per square foot.

In any event, we hold the immediate neighborhood to be 60 - 74, and 10 - 54, Kai Yuen Street. These buildings have a 50 year history. They were built after the second world war. We accept the evidence of the Building Authority, given during the evidence, of which I have taken a full written record and re-read twice, given the evidence of the substantial economic value of this development. Those tenements have a similar economic value as seen by the bulky affirmation filed by the Government, the Building Authority/Department.

Those tenements are all 4 - 6 stories. They have shops underneath them, meaning the area was once more commercial. But now the shops have gone out of business judging by the deserted look of the place. Business has moved out beyond Tanner Street, to King's Road, towards the flanking MTR Stations.

All of these tenements lie to the West of Kai Yuen Street, or at its southern tip.

To the East of Kai Yuen Street, new inflated buildings have been put up, judging by the Government's evidence on the ratable value.

Bedford Gardens is choked from access by Kai Yuen Street. At the date of this judgment, (see above), the old Kai Yuen Lane was blocked up with construction boards, something is going on there, of which we have seen a few plans, and had some rough comments from Mr. E. Chan. We cannot consider a construction site to be part of the neighborhood. Construction sites, are a sign of what is to come, not what is, and this Tribunal will only make its decisions based on the plans of what is to be, if the application were approved, and what exists there now.

We can see that we have considered the broader issues of design, type of building, and other such matters, and have concluded that there is no parity with the proposed building, particularly, when safety is paramount. We find that the proposed 140 mPD, or 31 odd stories building would be very much out of keeping with the immediate neighborhood's characteristics, or, as Ebeneezer

Scrooge's tea lady said after his transformation, "*if it is not out of keeping with the situation*" (by Charles Dickens[47], A Christmas Carol) , and we say, the new sole fish shaped building is absolutely and firmly out of keeping with the situation, of the immediate neighborhood.

If the point is not clear, and by way of an obiter conclusion based on the obiter comments above and below, we do not regard the proposed building as a sound structure, and for the reasons given above, consider it unsound from a construction of the ordinance angle.

That leaves the questions of costs.

We order that costs should follow the general rule. Unfortunately, for the Appellant, that means that they must bear the costs of the appeal.

The plans were refused in 2007. This hearing was in May – June 2012, four years later. This appellant was not in a hurry to bring this old matter before the Tribunal.

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[47] This judgment was passed down in 2012, and we note in passing the 200th bicentenary of the birth of Charles Dickens in 2012, who no doubt, made some contributions to the theory of how law is embedded in language, and the distortionary theory of skewed fact, "Bleak House", his novel refers. Certainly his wife Catherine, who had a great legal mind, would have seen things otherwise.

Presumably, costs have been incurred since 2007. For the benefit of clarity, we order that the costs of and occasioned by this appeal, be to the Building Authority, in any event.

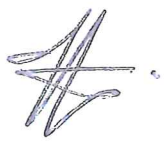
C.3 Disposition and Directions

This judgment, in its entirety will be a judgment nisi, including the costs order, for 14 days from the time it is passed down. For the avoidance of doubt, it will be a pending judgment only, waiting for the passage of time for it to become final.

During that 14 day period, should the parties have any questions of law, which arise for determination out of the ratio decidendi of this judgment, then, before the judgment becomes absolute after the passage of 14 days, they may cause any question of law to be written down and submitted to the Tribunal. Should this Tribunal see fit to direct such a question to the Court of Appeal, under the s. 53C procedure, then it will do so within 7 days of the question being put before the Tribunal.

After 14 days from the passing down of this judgment, and unless, such a question of law is raised, this judgment and the order on costs will become final.

James W. Campbell
Chairman
Buildings Appeal Tribunal.



Member_____(Mr. CHI Wuh Cherng, Daniel), I agree with the judgment of the Chairman.

Member_____(Dr. MAN King Fai), I agree with the judgment of the Chairman.

Member_____(Ir CHOW Ting Ngok, Andrew), I agree with the judgment of the Chairman.

D. Appendices

Appendix I: A Creative Look at the Immediate Neighborhood

Our story in this case begins with a lease in the year 1937. That was the same year that the Hobbit by J.R. Tolkien was published with its moral commentary on the land law and geography of England; salon music could be heard over the newly invented grammaphone – having spoken of sound waves and particles and its relation to height differentials hereinbefore, and a King sat on the throne of England, ruling to far dominions such as Hong Kong, through his trusted representative, the Governor in Council.

And it was a period of recovery, after that great depression had caused havoc on the newly emerging international stages. But there was anticipation in the air, for it was the rise of globalization, birthed out of the First World War, as the nations of the earth had recognized that all peoples had a role to play in the establishment of global peace, and constraining the nations who sought unjust expansion of their extant already generously nationalistic boundaries, products of the century before, or the century to come, after the century before.

It is a matter of error, that students in law schools in Hong Kong, who were acquainted with the principles of conveyancing in the area of Hong Kong, through text books made for that purpose; that instruction was to the effect that the Crown, or King, would never grant an actual lease of lands to citizens within

the precincts, but rather, that He would provide the lessee with a plot of land, upon certain conditions precedent, or conditions, and that once those conditions should be fulfilled by the lessee, that he would at that point in time, not, by the grantor be given a Crown lease, an actual lease of the land, but that the document originally provided, the “conditions of exchange”, would simply be endorsed by the grantor, so as to signify that all conditions had been complied with, and , thereby, he would be deemed to be in possession of the lot, under the terms of the lease.

And so it was, that over time, and after Hong Kong came under the care of His Majesty’s Dominions, that there came to be known a parcel of land known as Lot 5044.

That is the lot which is in dispute in this appeal.

Let me describe the shape of the lot as follows, since a description can help us to imagine what the neighborhood is - which we are dealing with herein. If you stand, along the boundary of the lot on Tanner Road, then it looks rather like an old fashioned cash machine, cash register like device: (as a matter of first impressions, viewing the plans).

Figure One (Section E).

That is, the land looked, from an areal view, very much like the type of cash registers that were in operation at the time of the land grant, in the 30's. But then, if the great lot 5044 was subdivided, it could readily be divided into three sections.

Figure Two (Section E). Three partite division.

That will do for the physical characteristics of the land.

It is often helpful to provide a designation to land. Sometimes this is done by saying who the land belongs to, whilst in other cases, it is done by providing the land with a name or a number, of distinctive characteristics.

And so, let us start with another plot of land, which was called inland lot #8430. The owner of that land, simply put, is a company named Wynyard Investment Company Limited. Wynyard Investment limited is the owner of Inland Lot No. 8430, commencing from a term of 75 years, or three generations, (renewable without limit) from the 20th September 1937 to 19th September 2012. That is to say, the ownership will be renewed on 19th September 2012. If the Crown; Government, Crown on the lease, government by the Interpretation of Clauses Ordinance, wishes to use the land or to have it used, and Wynyard Investment Company Limited agrees, then *they* may do so for a rent of $1,900 per year.

Wynyard Investment Limited paid a premium of $3,000,000[48] for inland I.L. # 8430. Those were the essential "*Conditions of Exchange*" upon which Inland Lot No. 8430 was purchased by Wynyard Investment Limited.

Now this Inland Lot No. 8430 is a rather large lot in size. Imagine an Olympic size pool, 50 m long, but also, 50 m wide, or as wide as it is long. Thus, the pool would be 2500 square meters. It would take 75 of such pools of dimensions, 50 x 50 m², to fill 14,957 square meters. Sixty odd such Olympic square swimming pools to fill the area. And that is just the surface of the land, without considering the depth and land-air space above the pool, or the volume of the pool, as it used to be referred to back in the 19th century.

Now it is now universally recognised that 107,639 square feet, equal to 1 hectare. This is necessarily known because at the time of acquiring Inland Lot No. 8430, Wynford Investment Company Limited, was the owner of another lot of land, adjacent to inland lot 8430, and that was Inland Lot No. 5044. The size of Inland Lot No. 5044 is 161,067 square feet. This is the essential relationship between the two lots.

In the result:

a) Since 107, 639 square feet = 1 hectare;

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[48] That premium of $3,000,000, a huge sum of money in 1937 and even now, was paid by Wynyard Investment Company Limited on 20th September 1978.

b) And since we want to convert square meters to hectares;

c) Thus, 161, 067 sq. feet = (how many hectares?);

d) Therefore we arrive at the following double equation:

107,639 Square feet = x hectares

161,067 square feet = y hectares

e) However, we know from above that in the above double equation, x =1. We thus arrive at:

(square feet) 107,639 = 1 hectare

(square feet) 161,067 = y hectares.

f) We carry out cross multiplication, based on solidly established mathematically accurate mathematical principles. We arrive at (square feet) 107,639 x Y hectares = 161,067 (square feet) x 1 hectare.

g) We then divide both sides by “Y hectares”

h) (square feet) 107,639 x Y hectares/Y hectares = 161,067 / Y hectares x 1 hectare.

i) Thus, 107,639 sq. feet = 161,067/ Y sq. feet.

j) Y x (107,639 sq. feet) / (107,639) = 161,067 sq. feet/ 107,639 sq. feet.

k) Y = 1.496 (hectares).

In conclusion, 107,639 sq. feet = 1.496 hectares,

= 14,960 sq. meters.

We can see that “Wynford”, owner of Inland Lot 8430, correctly stated to be 14, 957 square meters, was granted the right to exchange lot 8430 meters squared or square meters. The difference in the size of the lots was:

14,960
-14,957

= 3 square meters only.

What happened was this. Wynford owned lot 5044 in the first place, and acquired lot 8430 in 1937, and was granted the right to exchange lot 5044 by way of renewing lot 8430. That might seem like a very strange sort of arrangement, but such exchanges are common, and benefits flow both ways. The owner of the land is able to own a lot for a period of time, exploit the land, build on it for a season, then exchange that lot with the right to renew another

lot. But let us speak in a manner that is mathematically accurate, as we sought to do in the obiter dicta hereinbefore.

In 1937, when the conditions of exchange were entered between the King in Council, or Governor, and the company, "Wynyard Investment Company Limited", the term of the agreement was 75 years renewable. The term commenced from 20th September 1937. That grant contained particulars and conditions. Once those conditions were fulfilled, Wynyard, the owner of the inland lot no. 8430, would have fulfilled all the conditions pertinent to his ownership, of lot no. 8430.

There were special conditions, pertinent to Wynyard's ownership. Such as, Wynyard needed to re-construct Kai Yuen Street, as shown on Plan I, as attached to the Conditions. That was a huge contractual obligation. It required Wynford to build a new Kai Yuen Street, *and provide new sewers*.

But, it is quite clear, that Kai Yuen Street, lies only on inland lot no. 5044, as one drives south on Kai Yuen Street, from Tanner Road, towards the *cul de sac*, at the Pak Fook extension, or the most south eat corner of Kai Yuen Street.

Clearly Wynyard had to be in control of inland lot no. 5044, so as to carry out those works, that road work, and could not have done so, had it surrendered the land on the same day as the grant, in 1937.

Special Condition #2, provides that Wynyard is to surrender lot 5044, for lot 8430, at a contemporary time with that of signing the Conditions of Exchange. How then could Wynyard carry out the specified works, after 1937, at 5044, without the land below their feet?

And the answer is as follows. Simply put, the contractual conditions of the exchange document, do not, and cannot, reflect what actually happened in the history of the land since 1937. The land laws in effect will not tell us what happened, nor will a simply reading of the contracts which were drawn up out of those pieces of legislation. The events which took place can only be understood as a sort of fiction, which embraces all of the legal posts set out in the conditions of exchange, and joins them together by lines which are not simply lines of justice, nor lines of parliament, but rather, lines which can be seen ever so faintly on the imprint of the land, when one looks at it carefully, like the sort of legal model which we talked about above in relation to Lord Denning and <<Padfield>>.

So here we say this. The way that law is administered, the way it is applied by those charged with implementation, bailiffs, or clerks, or managers, or practical people, will leave its imprint on the surface of the land. And that surface is a kind of history, is a kind of record. What is required, is to accurately read the surface of the earth which has been affected by the law, and to understand its features by reference to the laws which have been carried out to govern its principle features.

Let us go back to the layout of the land in 1937, when the Conditions of Exchange were agreed. This can be seen as Plan I, attached to the conditions. In those early years, winds would blow up the *nullah* hills of the Crown Lands, prayerfully rising upwards towards the flattened highlands, with children of the police guardians running along the straight block of flats to primary school, proudly looking over onto the waters of the harbor. Winds could move freely in those days, because they were not obstructed, and their forceful movements are still inscribed on the surface of the land to this day, because buildings could not be put up without a consideration of wind motions. Thus, generally speaking, buildings will not be erected facing directly into the wind, which would, as all workmen know, causes a great deal of hardship to those who would live on the land once the building was constructed.

A generous yard of green grasses grew in front of the school allowing ample room for the children to play at hop scotch and British Bulldog, the games they were taught in those days.

And that was not all.

A huge field lay to the four blocked flats which housed the families of these noble civil servants. Some of the more brave children would run past the school, their houses and open fair field of greens to the Crowned Hills of gorgeous spalling rocklands, down the gentle slopes, like the fjords of Norway, made of stone and Medieval brick. And at the bottom, the youth would explore the

valley lands of rights to the way, granted by His Majesty. All in generous quantities to allow Saturday afternoon explorations to take place. Walking up along the foothills of the Crown's land, "*own land*", a huge hinterland of forest, stream and greened sky was a favorite spot for deer chasing, turtle pushing and hide and seek through the forest land of Wyn's Yard. And those hinterlands of Braemar still remain to this day, though roads have circumscribed them, in more recent times.

Walking in a Northerly direction of Wyn's Yard, to its end, by the noonday sun, having commenced the journey under the pristine morning glory, dandelion sun-scape, that would bring one out onto the 9 platform bricks of Kai Yuen podium. Along that podium, sweetened *tou fou* maple pudding could be purchased for two and ten cents, whist fragrant leather shoes could be repaired, and even a fortune teller or two on guard to help out with the telling of tomorrow's woes, written down on paper for the fortune seeker onto wooden planks of paper, 8 letters to 8 letters per page.

And here we see the history of the ownership of the land. For even these prophets of the crystal ball will have their way, and make things that are not happen in the way that they say things that are will be. For Wynland is essentially #8430. That was the land that they had first in time, in 1937, before the #5044, which was very much a huge space situated beside a reservoir of land. The reason why the exchange was necessary, was because the government did not want Wyn to hold on to land in perpetuity. The wisdom at that time, was

that it was better to exchange land for other land, rather than granting new land to a tenant. So, in essence, this is what the government would say.

"*Here are two plots which lie side by side, and which, as we will see, are very much the same size, in a governmental way of thinking. You, Wyn, do not really want to have two plots of land, because that would be too much for you. But on the other hand, we the authorities are of the view that you private developers are better at creating land developments than government, which we maintain should be the one who hold land and releases it in sections to the developers. And so, now that you have created such an enjoyable space on the plot of land here at #8430, we would like to express our gratitude and offer you new land in exchange for the old, since you have already turned a profit on the old, and since you have complied with the conditions, you are deemed to be the lessee of the land. But there is an issue here. The exchange will not be instantaneous. But rather, it will take place over a matter of time. That amount of time will depend on the amount of time that it takes you to put the basic infrastructure into place in the land. Now at this juncture of 1937, we know that you cannot development the land until you own it. One the other hand you cannot own the land until you have complied with the conditions. Therefore, what we are prepared to do is to offer you a period of time during which you will occupy both lands, but in law, you will not be the owner of either. This is rather than letting you be the legal owner of the land, the conditions of which you have carried out, or allowing you to be the owner of the other land, the conditions of which you have not yet carried out. During this period, you can more over either #5044, or #8430, and*

when the conditions at #5044 are completed, then at that time you can call that land your own, and you will be the owner of it. In this nether time, we will not granted a lease of the other land to any other party. So that is the deal. Double the land, double occupancy, and, after say 40 years, you will only be the owner of plot #5044."

We continue here our survey, of the physical topography of these two plots of land. Kai Yuen Terrace had four blocks of apartment flats, and upwards along the elevated platforms, the rising middle class could be housed in the sloping blocks. Those Kai Yuen Terrace blocks were true blocks, square as they were rectangular, with a courtyard in the stepped middle. Walking south to Kai Yuen Mansion, bamboo groves could weave in and out of the semi-tropical orange flower gardens which graced the courtyards of Kai Yuen Terrace.

Further West, was the elevated platform leading to "*Man Yi Sheng*" Flat Blocks, whose ancestors still fight for their preservation. This great L-shaped and butted residence was reserved for the new professional class; graduates of the Hong Kong Medical College and School of Geographical Surveying – by way of example.

Kai Yuen Terrace was rebuilt in the 70's, but that "*Man Yi Sheng*" block has been standing there, housing generations of professional men and women since 1937.

Then, taking to a late afternoon teashop, in the tea shops of Tanner Road, replent with skins of duck waxed sausages and fish dried by coiling rungs of chestnuts, and dried fragrant mushrooms ready to be bedded in *bak choi*. The tea careened upwards in great jetties of steam, out of the brass urns in which it was medicinally cajelled into blackened teas or, licorice jellies, and even whitened teas. What delicious teas and scamperant sauces of joy.

But one must not dally for too long along this road, for the meandering Kai Yuen Street must be descended to reach back home by dawn's pinkering lights or autumn brown warmth. Walking back towards Bramer Hill South, as it then will be, after a sojourn of an afternoon, at the old speed before you had to arrive in less than ½ hour and could not enjoy the journey to the destination, one could see Kai Yuen Terrace struggling against the newer Fortune Buildings at Kai Yuen Street, newer with laced cement, and rising slightly lower than the terraced and mansion flats, and closer to the clouds by means of a further raised platform, meaning that Fortune was the more affluent building, though many locals hesitated to live there for some time due to poor ratings by the geomancers of the wind water schools of philosophy. In the mean time, immigrants from the UK moved in, pushing prices up and causing some local discontent, as competition between the classes became a new word in the streets.

Then, finally, curving along Kai Yuen Street to the South East, one had to throw one's head higher and higher to catch a further glimpse of the elite 60-74

elevated towards of upper class, gentry dwelling. These were the great flats of North Point, backed onto the hill lands, and gently cupped in the cradle of the original hinterland of the Wyn Yard Development Park, from which our journey began.

And thus, scientifically speaking, the Wyn Yard Park was *not* developed in those early years of 1937, and the neighborhood was composed of terraced open garden flats; lanes, Mansions of Fortune peacefully generated and the lower Kai Yeun Lane, straddled on the east by King's Court, and to the North East by the Opening Terraced Gardens. But in those days, Kai Yuen Terrace could not be regarded as a part of this enclave neighborhood since it had the commercial advantage of fronting Tanner Road – and in those days, a man's hard fought for home was to be distinct from his office or working and writing table.

How then do we characterize this Kane neighborhood. We must say, that the land of the Northern Harbour, but gently tucked away from the sea, save for the rising blocks windowing onto the harbor from great heights, is its own type of place, separate from the rest, because this place was more commercial. We could call it the Big Dipper of Kaine Street, or the whip lanced growth of a middle class in a newly emerging neighborhood. Perhaps it should be known as the stable lands, since the hands of its decorated boundaries were to remain untarnished, into the late 70's. But all of these appellations would not do justice to this land. For ties is the land of the 5th generation of the new Hong Kong.

Their literary heroes had been to Europe to learn painting, science, literature, and chemistry from their European parents. These were men who were to be debased and insulted by Japanese soldiers, who raised the 100 container crate grocery stores just a decade and a half later.

This was a neighborhood where privacy from unnecessary government interference was paramount amongst the ethos of the lands. The virtue of receding into the parindian enclave of raised terraces, at the end of each day, to rest beside Wyn Land Development Park, and await the coming of new immigrants from the Crowned parent, who would bring work, funds and culture to those delicate caged bird watchers, and streamed sowing, tannery and butchery masters, who had a craft, needed support of a responsive and building government, who would preserve this Kaienane enclave for open growth in a terraced economy for some 30 odd ten years to come.

Appendix II: Measuring Heights

This is a matter which touches and concerns the height of the buildings, the Mean Sea Level, the height of surrounding land, and, of course, the standards which are used to make those measurements. These international referents, standards constants are a necessary foundation for this judgment. These standard constants were mentioned in argument by counsel, though not in a mathematical way, as one would expect, in a case about whether a building should proceed or not due to height issues.

Hong Kong is famous for its tall buildings. The Bank of China Tower is 70 floors high, built on reclaimed land. The filling in of water with land causes the water to rise, in the same way that in scientific experiment, carried out in geographical labs, where soil or more heavy set land fill, is placed on an artificial land incubator, and then water, salt water, is pumped in, the salt clings or bonds with the soil deposits, or magnesium contents, causing the water to expand, and thus, it appears that the water will rise.

Similarly, when one stands at the HK Cultural Centre at night, and looks across the water, one can see the lights of the San Miguel Tower, or the Korena Air Lines Building, or the Phillips Tower, or even the Panasonic, Toshiba or Olympus Buildings Reflected in the harbor waters (see for example the official map of the Hong Kong Association of Travel Agents, compiled by Walter Hoffman). Those buildings, on the Hong Kong Island, are about 1.5 km from

the Cultural Centre. When photographed, a dopling effect is produced in the water, which reveals the altered level of the water in the harbor. One can discern, on the photos provided in the aforesaid map, three distinct levels, and then, a rather indefinite blurring effect. By traversing these three lands, and comparing it with a map of the Southern Tip of Kowloon, and the Northern tip of the Hong Kong Island, (scale: 1 rectangle of map space = 100m x $1/8^{th}$ mile longitude first, then latitude), one can observe this doppling effect over about 100 meters of water space. This reveals the seriousness of the degree to which the water has risen in the last 30 years, namely, some 100 metres, 10,000 mm or 1000 cm. This is a significant rise in the level of this water, since the century before last.

Another way to arrive at the same figures without consideration of the doppling effect, is to calculate, in m^2, the amount of land that has been adopted from the harbor, to land. Let us call this figure "*x*". Then, the amount of harbor water which was originally displaced, let us call this "*y*". Therefore, if the amount of water displaced is "*y*", we appreciate that "*y*" must be measured, as volume of water, in m^3. On the other hand, the land acquired is only beneficial as a square measure (m^2), since the rising of the water, is a prime cause of global warming. Or, to put it another way, as the water rises, it exerts pressure on the air above, and causes the atmospheric pressure, and the ozone layer, to contract, and accordingly, to rise in temperature.

Therefore:

$xm^2 = y^3 - j$ (degrees) where j = universal constant for global warming.

But for the purposes of this case, all that need be remembered is how land fill in Hong Kong has effected Hong Kong's international position. For example, Hong Kong Island has been extended some 11 x 100 = 1,100 metres, say, at the Central Pier, as in now stands. It is at this point that the artificial extension is the most severe.

Since 1965, and for some 18 years to follow, up to 1983, (that is 1983 – 1965 = 18), North Point has been used as the reference point to measure tidal variations. It should be noted, that the 19 years reported by the Survey & Mapping Office of the Lands Department in their currently extant 1995 version of "*Explanatory Notes on Geodetic Datums in Hong Kong*" (Pg. A4), and which is a matter of common knowledge, and, where the number of years for the experiment is falsely stated as 19, which should, by international mathematical standards, be stated as 18.

We then arrive at the following diagram:

Figure D-1 (Section E).

Thus, the Mean Sea Level = [(MS-1) + (MSL -2) + (MSL-3)] / 3.

The sea is measured at the most reliable waters on the surface of the globe, namely, by taking three points, of reference at Iceland, the global standard.

For the purpose of Hong Kong, based on the 18years of tidal readings taken at Northpoint, and factoring the fact that the publication of Survey & Mapping Office of the Lands Department is 45 years out of date:

(i) Last tidal observations made were 1983, that this made & used for the purposes of updating the HKPD, thus 2011-1983 = 28 years;

(ii) The last publication on geodetic datums was 1995, despite the fact that the HK International Airport, filled up and by 1997, resulting in a massive loss of seawater; the land used by the airport, for example, is about 1/5th the land area of HK Island, and caused the lossage of billions of tons of water from the Pearl River Estuary. Thus 2011-1995 = 16.

(iii) Error in the 1995 report = 1 year (ie should be 18 years, not 19, see above). Thus 28 + 16 + 1 = 45 years behind, in terms of calibration of the HKPD.

As a result of this 45 year period of inactivity, 2011 – 45 = 1966, being the year that really counts for the purposes of the calculation of the Hon Kong Principal Datum. In 1966, when the North Point Observations were just underway, thus we must now make use of the HKPD applied in 1966, which was 1.125 m beneath the Mean Sea Level. This 1966 HKPD was based on bolt calculations

made in 1887 – 1888 by Dr. Doberk. It was updated 95 years later in 1983 to 1.23.

When Dr. Doberck made his calculation in 1887 – 1888, he calculated the HKPD to be 1.125 below the Mean Sea Level, and this was based on the then assumption that Hong Kong enjoyed access & the benefit of the territorial waters of the Empire of Great Britain. Of course this changed after 1884, when the Joint Declaration was signed, and Hong Kong could only enjoy the territorial waters of its Motherland.

The problem in 2011, of calculation of the HKPD, can be stated thus:

(i) Waters about Hong Kong have been rising. At the very least, this can be seen by contrasting the 1888 figure of the HKPD of 1.25 below Mean Sea Level. In contrast, the figure now used by the Government is 1.23 m, that is, in 1983, it was opined that "Mean Sea Level" is approximately 1.23 m above HKPD. Since, at 1983, the HKPD was already 1.25 m below Mean Sea Level, we arrive at the following:

Figure D-1 and D-2. Section E.

(ii) The alternative to this is that, the Mean Sea Level is a matter of international negotiation, treaty making, and that it is not for the HK government to unilaterally declare that, as a result of "*observation*"

records of the Automatic Tide Gage situated at North Point, Victoria Harbour, when it was determined that the "Mean Sea Level" is approximately 1.25 m above HKPD (see page A4 of the publication mentioned above).

(iii) We thus treat the MSL as a constant, and arrive at a principal datum which is 1.23 m above MSL, demonstrating that the total rise in waters is 1.25 + 1.23 = 2.48.

2.48 m x (total area of HK tidal waters, per agreement in the Basic Law) = $\int x^3$,

where $\int$. = the constant rise in waters, calculated as a derivative function since 1888, and $\int x^3$ = total volume of rise in tidal waters.

(iv) One point remains to be said, how does one explain the loss of waters from the Pearl River Estuary during land fill operations, and reconcile that with the obvious, and significant rise in the HK Principal Datum? It is a very simple way herein. As the waters are displaced first into the South China Sea, and then into the Two Great Oceans of the earth, by rock pilings and steel cylindrical cullenders, those concrete, stone, & metallic structures replace, not the displaced water, for those elements are the space which causes the displacement, not that which fills the displaced water. Therefore, the process is threefold; and has two keepature points, at the commencement, and at the end. At the start of

the process, concrete and steel pilings are driven into the seabed of the area. This cause is a spatial cause. It takes the space of water to cause the waters to be displaced.

Thus, water space causes the displacement. It is not the physical presence of the concrete and steel piling which causes the displacement. After this water displacement takes place, it is replaced by the concrete and steel. The resultant effect is that there is still a void caused by the cause space – water displacement. To fill the space of the actual waters displaced, the waters from beyond the local water territories, the waters of the great oceans, then flows in, to fill the displaced water. We arrive at Campbell's First Law of Fluid Mechanics, thus,

"Only water can replace, displaced water".

Figure W1 Section E.

Figure W2 Section E.

Note on Figure W²: concrete and steel spallature. These elements are spatial, and thus, they cause a spatial displacement of matter, & not a water displacement, since matter cannot displace water. (the Greek law of buoyancy questioned here in part). The space in the water, is displaced by the concrete pillars. This leaves displaced water, after the

causal space displacement takes place. That displaced water, can only be replaced by other water. Water, salt water, from the oceans of the earth has the same mass, as the displaced water.

Finally, these are the conclusions on the Hong Kong Principal Datum. Synthesizing all of the above, we conclude that whereas in 1888, the HKPD was calculated as 1.250 below the Mean Sea Level.

Based on the 18 years of data taken from Victoria, North Point, the most updated amendment to the original HKPD, or HKPD(I), is now that of 1.23 m below the Mean Sea Level, as a result of billions and trillions of cubic metres of displaced water, replaced by invasive international waters, and using those international waters, without the consent of a majority of the members of the UN. This rise in the HKPD is alarming and is a direct cause of the warming of the stratosphere.

Therefore, we define HKPD(2) as:

MSL – 1.25 m = HKPD(2).

Appendix III: Legislation from other Common Law Jurisdictions.

Legislation from the United Kingdom

Buildings Act 1984, UK

Passing of plans

16 Passing or rejection of plans.

(1) Where plans of any proposed work are, in accordance with building regulations, deposited with a local authority, it is the duty of the local authority, subject to any other section of this Act that expressly requires or authorises them in certain cases to reject plans, to pass the plans unless—

(a)they are defective, or

(b)they show that the proposed work would contravene any of the building regulations.

(2)If the plans—

(a)are defective, or

(b)show that the proposed work would contravene any of the building regulations,

the local authority may—

(i)reject the plans, or

(ii)subject to subsection (4) below, pass them subject to either or both of the conditions set out in subsection (3) below.

(3)The conditions mentioned in subsection (2) above are—

(a)that such modifications as the local authority may specify shall be made in the deposited plans, and

(b)that such further plans as they may specify shall be deposited.

(4)A local authority may only pass plans subject to a condition such as is specified in subsection (3) above if the person by whom or on whose behalf they were deposited—

(a)has requested them to do so, or

(b)has consented to their doing so.

(5)A request or consent under subsection (4) above shall be in writing.

(6)The authority shall within the relevant period from the deposit of the plans give notice to the person by whom or on whose behalf they were deposited whether they have been passed or rejected.

(7)A notice that plans have been rejected shall specify the defects on account of which, or the regulation or section of this Act for non-conformity with which, or under the authority of which, they have been rejected.

(8)A notice that plans have been passed shall—

(a)specify any condition subject to which they have been passed, and

(b)state that the passing of the plans operates as an approval of them only for the purposes of the requirements of—

(i)the building regulations, and

(ii)any section of this Act (other than this section) that expressly requires or authorises the local authority in certain cases to reject plans.

(9)Where the deposited plans are accompanied by—

(a)a certificate given by a person approved for the purposes of this subsection to the effect that the proposed work, if carried out in accordance with the deposited plans, will comply with such provisions of the regulations prescribed for the purposes of this subsection as may be specified in the certificate, and

(b)such evidence as may be prescribed that an approved scheme applies, or the prescribed insurance cover has been or will be provided, in relation to the certificate,

the local authority may not, except in prescribed circumstances, reject the plans on the ground that—

(i)they are defective with respect to any provisions of the building regulations that are so specified, or

(ii)they show that the proposed work would contravene any of those provisions.

(10)In any case where a question arises under this section between a local authority and a person who proposes to carry out any work—

(a)whether plans of the proposed work are in conformity with building regulations, or

(b)whether the local authority are prohibited from rejecting plans of the proposed work by virtue of subsection (9) above,

that person may refer the question to the Secretary of State for his determination; and an application for a reference under this subsection shall be accompanied by such fee as may be prescribed.

(11)Where—

(a)deposited plans accompanied by such a certificate and such evidence as are mentioned in subsection (9) above are passed by the local authority, or

(b)notice of the rejection of deposited plans so accompanied is not given within the relevant period from the deposit of the plans,

the authority may not institute proceedings under section 35 below for a contravention of building regulations that—

(i)arises out of the carrying out of the proposed work in accordance with the plans, and

(ii)is a contravention of any of the provisions of the regulations specified in the certificate.

(12)For the purposes of this Part of this Act, “the relevant period”, in relation to the passing or rejection of plans, means five weeks or such extended period (expiring not later than two months from the deposit of the plans) as may before the expiration of the five weeks be agreed in writing between the person depositing the plans and the local authority.

Canadian Legislation

Buildings Code Act, Ontario 1992, Effective June 2011

CONSTRUCTION AND DEMOLITION

Building permits

8. (1) No person shall construct or demolish a building or cause a building to be constructed or demolished unless a permit has been issued therefore by the chief building official. 1992, c. 23, s. 8 (1); 1997, c. 30, Sched. B, s. 7 (1).

Application for permit

(1.1) An application for a permit to construct or demolish a building may be made by a person specified by regulation and the prescribed form or the form approved by the Minister must be used and be accompanied by the documents and information specified by regulation. 2002, c. 9, s. 14 (1); 2006, c. 21, Sched. F, s. 104 (5).

Issuance of permits

(2) The chief building official shall issue a permit referred to in subsection (1) unless,

(a) the proposed building, construction or demolition will contravene this Act, the building code or any other applicable law;

(b) the applicant is a builder or vendor as defined in the *Ontario New Home Warranties Plan Act* and is not registered under that Act;

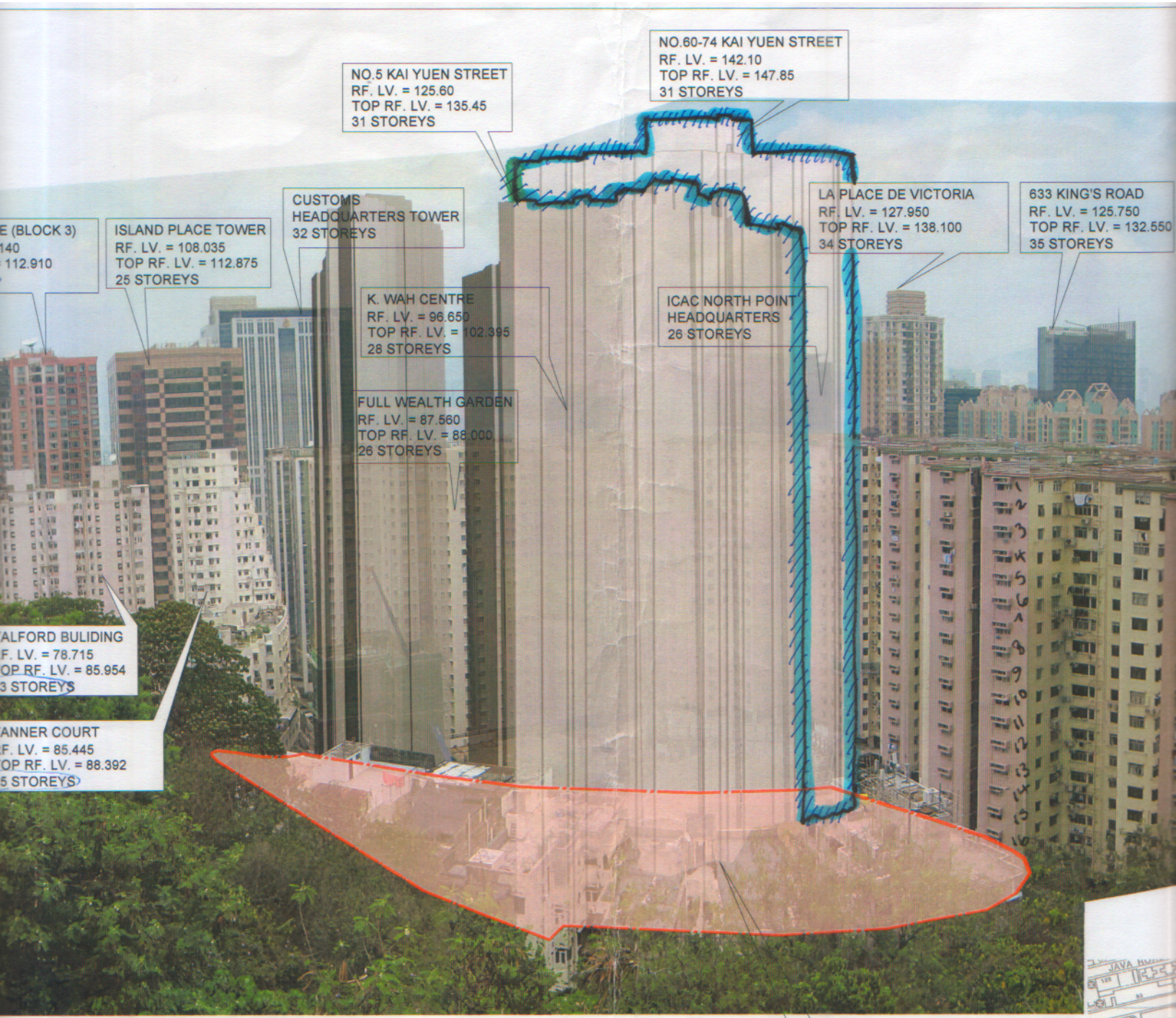
(c) a person who prepared drawings, plans, specifications or other documents or gave an opinion concerning the compliance of the proposed building or construction with the building code does not have the applicable qualifications, if any, set out in the building code or does not have the insurance, if any, required by the building code;

(d) the plans review certificate, if any, required for the application does not contain the prescribed information;

(e) the application for the permit is not complete; or

(f) any fees due have not been paid. 2002, c. 9, s. 14 (2).

E. DRAWINGS



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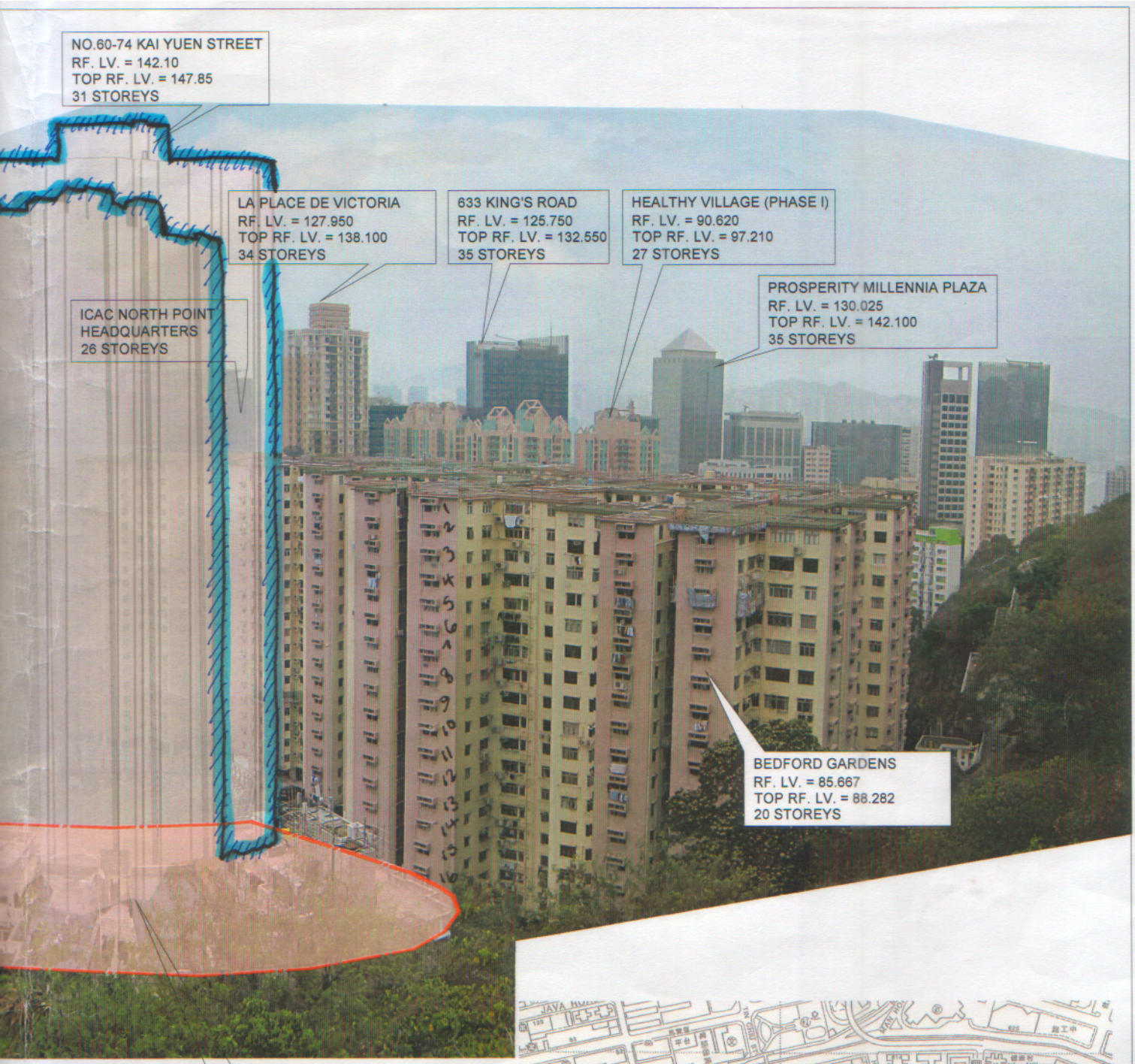

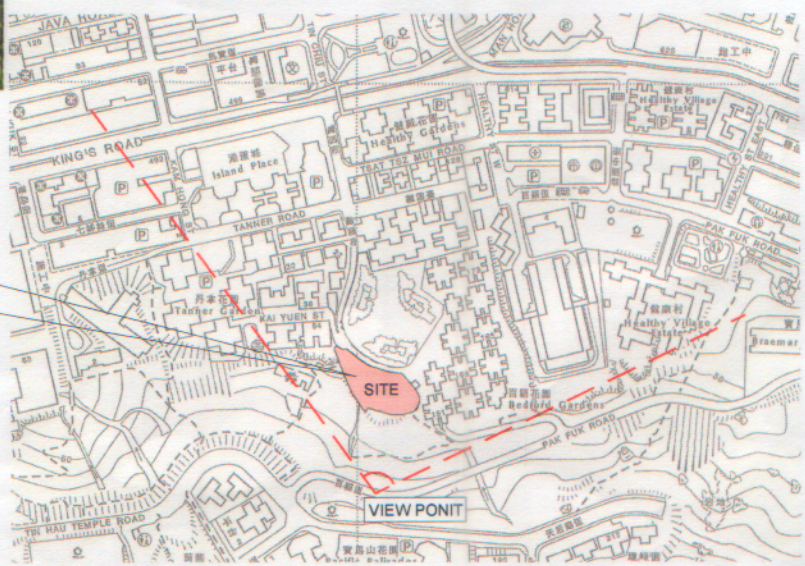

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Figure H-1

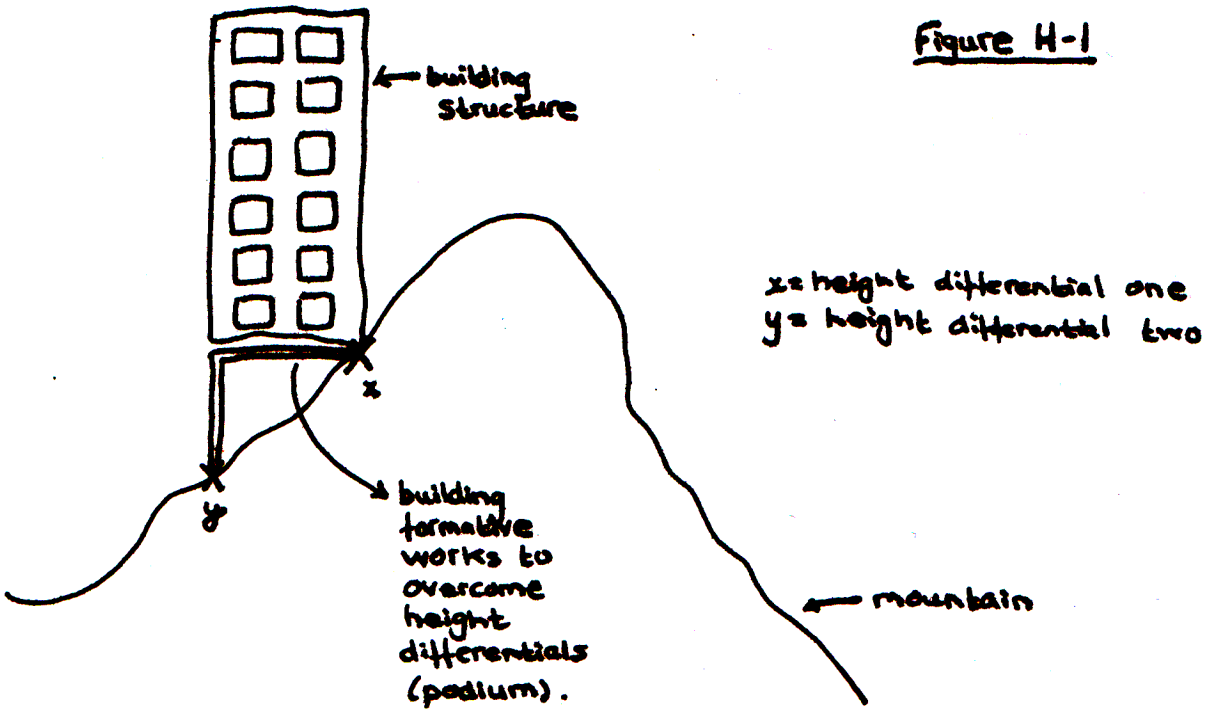


Figure H-2

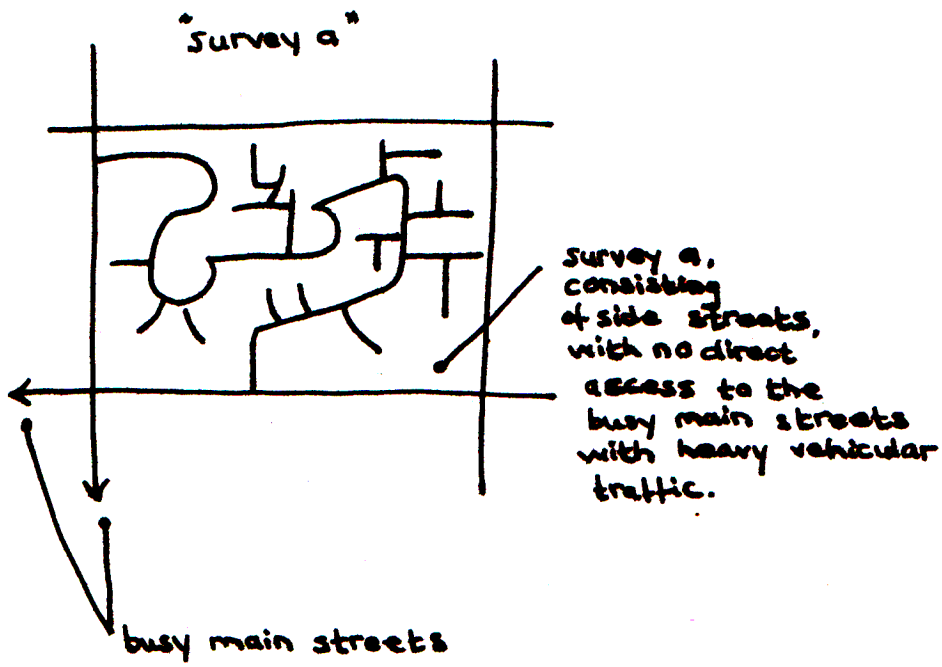


Figure One : Appendix I

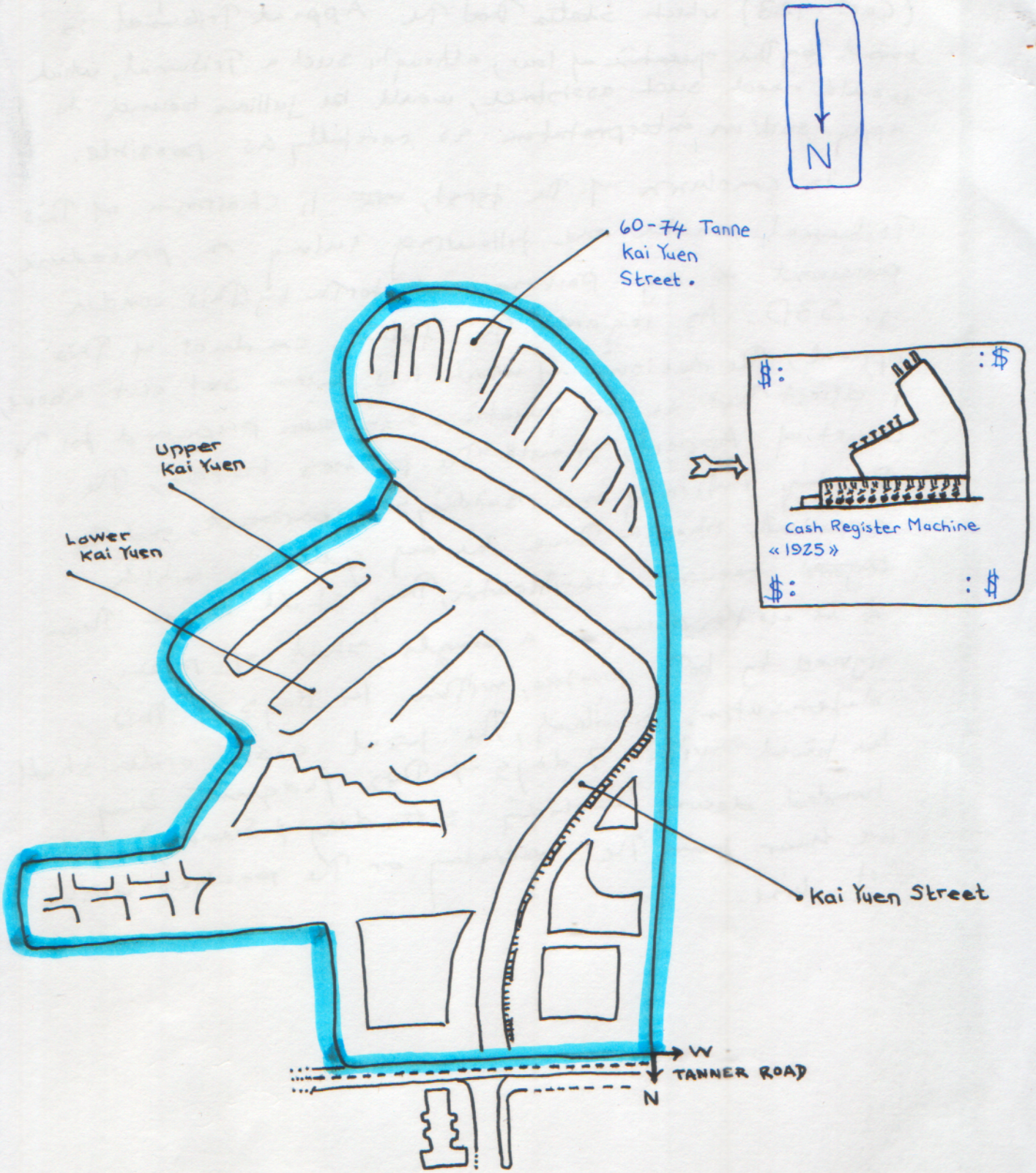


Figure Two: Appendix I

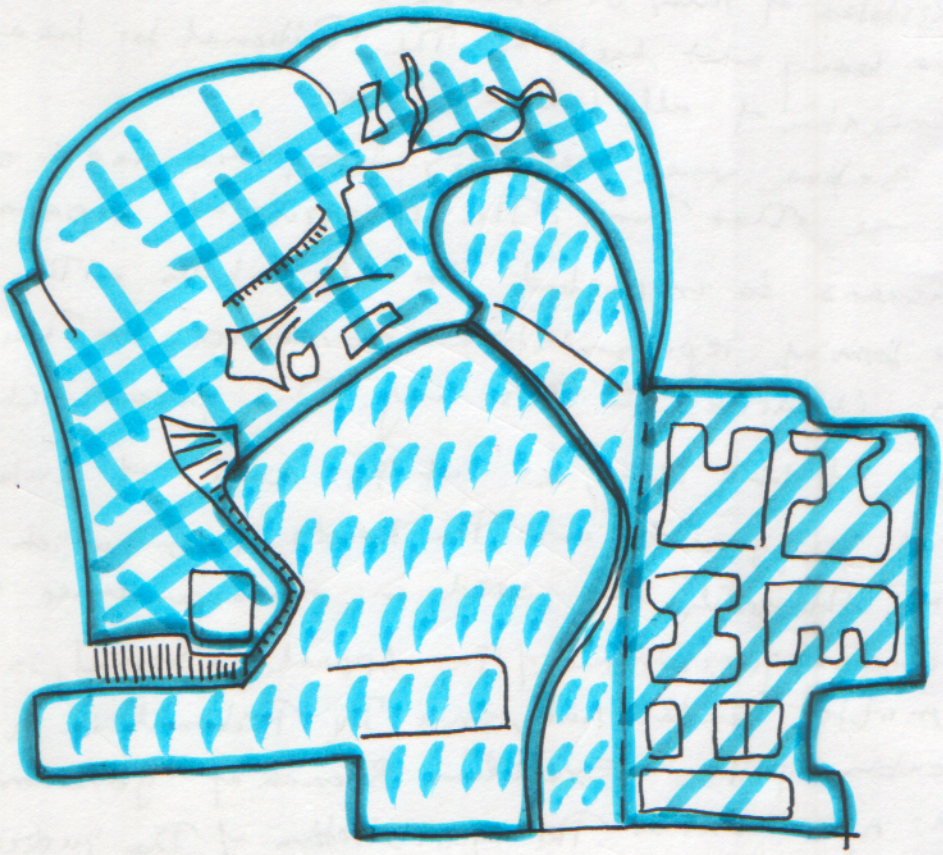


Figure D-1

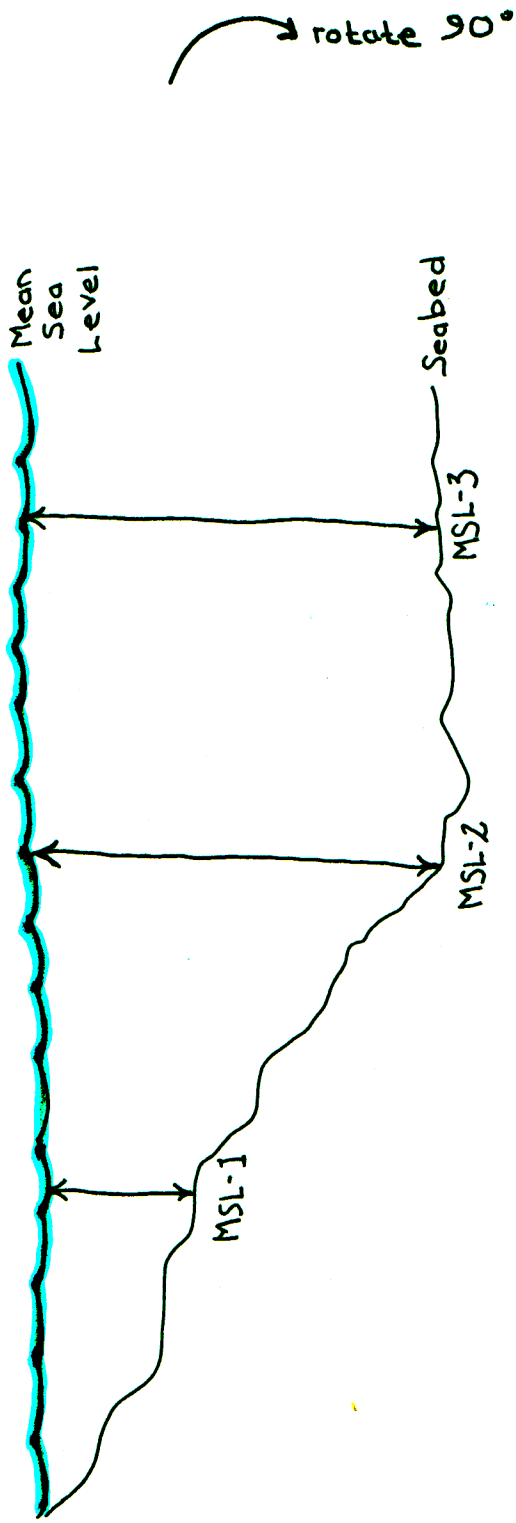
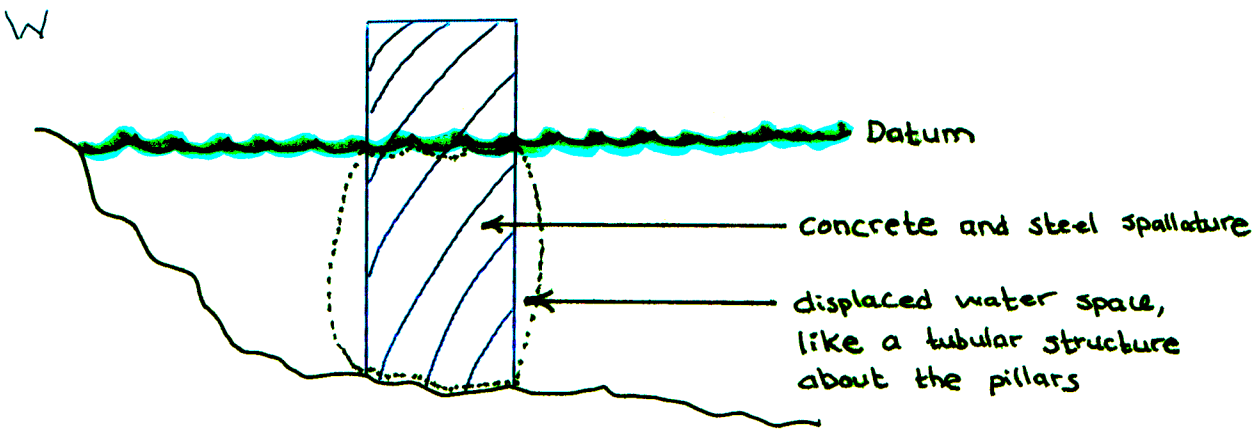
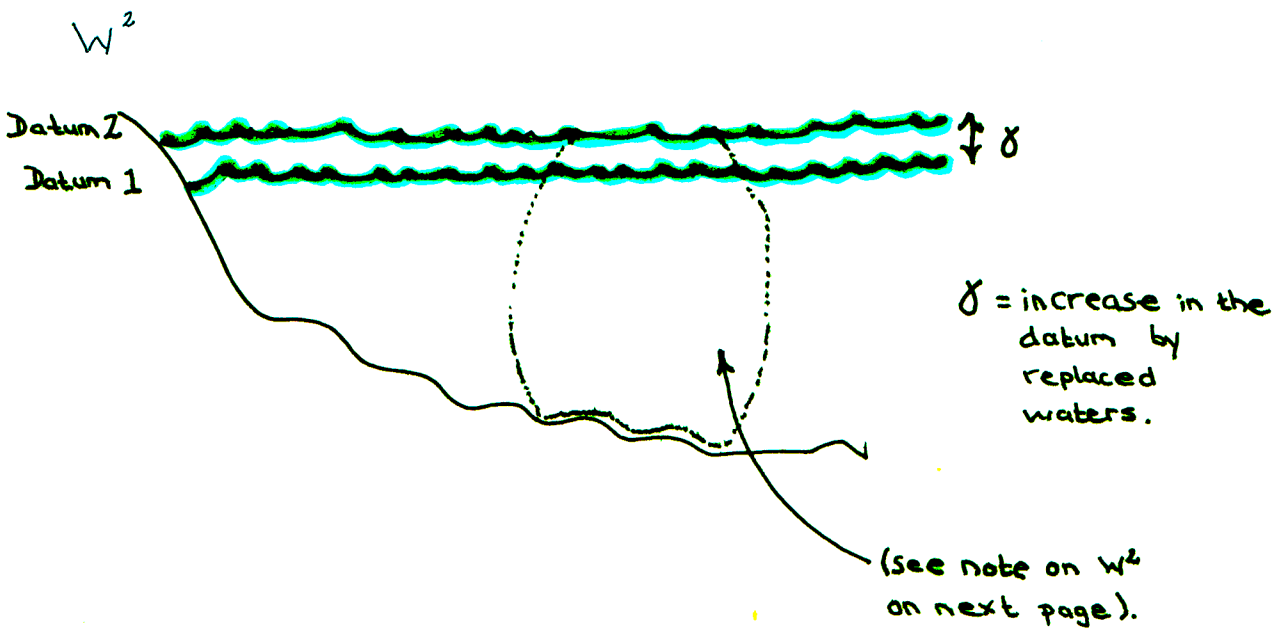


Figure D-2

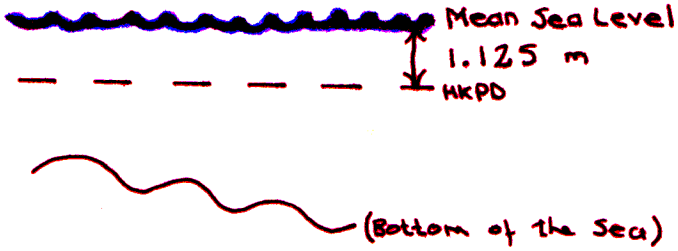
Figure W & Figure W^2





Notes of Historical Interest to Appendix 2

1.



circa 1887 - 1888

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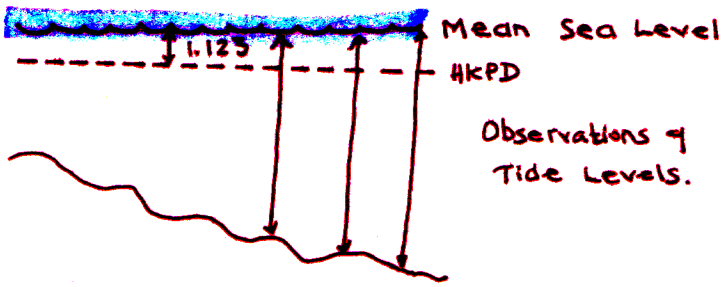

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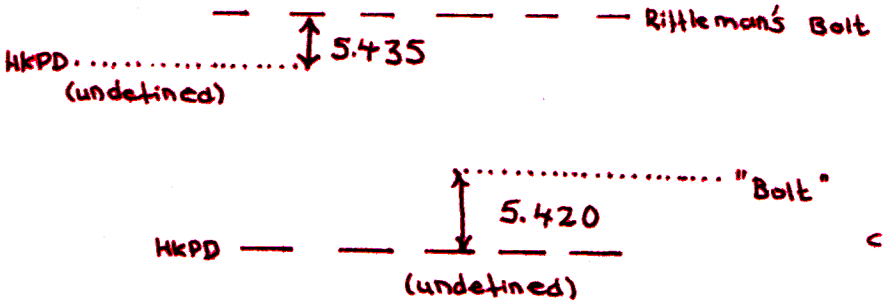

circa 1866

circa May 1984

Only for Historical evidence.

THE END

Buildings Appeal Case Nos.

146-2007 and 503-2007

60-74 Kai Yuen Street, Hong Kong

Well Spread Trading Limited Appellant

And

Building Authority Respondent

D E C I S I O N

Hearing: 20th to 23rd June 2017

This is an appeal by Well Spread Trading Limited ("the Appellant") against the decisions of the Building Authority ("BA") to disapprove the two general building plans ("GBPs") submitted by Kwan Wing Hong Dominic, authorized person, on behalf of the Appellant and received by BA on 22nd December 2006 and 26th March 2007 respectively. The GBPs were disapproved on 15th February 2007 and 25th April 2007 respectively ("the material times"). The Appellant gave notices of appeal against the two decisions on 1st March 2007 and on 9th May 2007 respectively which gave rise to the present appeals viz. Appeal Case No.

146 of 2007 and Appeal case No. 503 of 2007 ("the 1st Appeal" and "the 2nd Appeal" respectively) .

2. The Appeal Cases were first heard before this Appeal Tribunal (Buildings), differently constituted, in May 2011. The decision of the Tribunal was delivered on 24th April 2012 dismissing the Appellant's appeals. The Appellant sought leave of the Court of First Instance for judicial review. On 24th September 2012 upon the joint application and upon hearing the counsel for the Appellant and the counsel for the BA, Au J in court ordered, inter alia:

a. The decision of the Tribunal be quashed ;
b. Leave be granted for an order of mandamus to require a differently constituted Appeal Tribunal (Buildings) to consider the Appellant's Appeals in accordance with the law.

3. For reasons unknown, this differently constituted Tribunal was not appointed until the 2nd quarter of 2016. After its formation, the Tribunal issued its directions on 13th September 2016. These appeals were fixed for hearing on a date about half a year later in order to accommodate counsel diaries.

4. The chequered past of this case explains the exceptional delay in hearing of the above appeals; it is not a short delay, but a delay for more than a decade since the disapproval of the GBPs at the material times. The delay has caused difficulty in three different ways:

a. That it is difficult for the Tribunal to assess the situation, the environment and circumstances of the subject site, 60-74 Kai Yuen Street ("the subject site") at the material times as many of the buildings in the neighbourhood have since then been demolished and the character of the settlement in the area has been changed.
b. That the zoning has been changed from R(A) to CDA(2); and

c. That the important witnesses of facts, i.e. the original decision-makers, are unavailable to attend the hearing.

5. This newly constituted Tribunal originally consisted of a chairman and 3 other members. One of the members discovered that he might have a potential conflict of interests, and decided to recuse himself from hearing. To avoid further delay the parties have sensibly raised no objection that the chairman with the two remaining members continues with the proceeding to hear and to determine the appeals.

Hearing de novo

6. The Tribunal is reminded by the parties that though the Tribunal bears the name of "Appeal Tribunal", it does not exercise any appellate jurisdiction in a manner as the Court of Appeal in High Court does. The parties can call witnesses to testify and present information and material afresh. With all the evidence, information and material, the Tribunal shall consider and decide the case on its own merits as the BA did at the material times.

7. In this case hearing de novo carries another meaning. The Tribunal will disregard the decision made by the previous Tribunal and will hear the case anew as if the previous hearing had never been held before.

The Appeals

8. The Appellant appeals against the BA's refusal to approve its GBPs on 15th February 2007 and on 25th April 2007 respectively with reasons as set out in the two letters ("the 1st Disapproval Letter" and "the

2nd Disapproval Letter" respectively). In the two Disapproval Letters the BA set out various grounds of disapproval that include Sections 16(1)(g), 16(1)(i), 16(1)(d) and 16(1)(j) of the Buildings Ordinance. The BA also expressly reserved their right to make further comments under Sections 16(1)(h) and (p).

9. At the hearing by the previous Tribunal the parties agreed to limit the issues by entering into an Agreement dated 20th May 2011 ("the 2011 Agreement"). The parties have assured this Tribunal that the 2011 Agreement is binding and remains in full force and that no amendment is needed. The terms of that Agreement were further distilled into a List of Issues dated 9th June 2017 ("the List of Issues") and agreed by counsel of both parties, Mr. Wong Yan Lung SC (with Mr. Anthony Ismail) for the Appellant and Mr. Michael Yin (with Mr. Leu Lap-yau, Brian) for the BA.

10. The first and most important issue is set out in the 1st paragraph of the List as follows:

> "Whether or not section 16(1)(g) of the Buildings Ordinance, Cap. 123 ("BO s.16(1)(g)") afforded any or any sufficient ground for the decisions of the BA to disapprove the 1st and 2nd General Building Plans ("GBPs") in the 1st and 2nd Appeals respectively having regard to the circumstances existing at the dates of the decisions under appeal i.e. on 15 February 2007 and 25 April 2007 respectively."

11. This issue arises from paragraph 7A of the two Disapproval Letters where the BA stated that:

> "Your plans are disapproved under Building Ordinance section 16(1)(g) since the carrying out of the building works shown thereon would result in a building differing in height from buildings in the immediate neighbourhood……"

12. The main bone of contention is the construction of s.16(1)(g) with regard to the 2011 Agreement. S.16(1)(g) states:

> "16(1) The Building Authority may refuse to give his approval of any plans of building works where ---
>
> ……..
>
> (g) the carrying out of the building works shown thereon would result in a building differing in height, design, type or intended use from buildings in the immediate neighbourhood…….;"

13. The BA contends that certain traffic related concern (which will be described in later paragraphs) should be taken into consideration in the construction while the Appellant considers that all the traffic related concerns have been taken care of by a procedure known as "the Minor Amendments Procedure" and the only issue left is whether the height of the proposed new building is in congruous with those in the immediate neighbourhood.

14. In the Disapproval Letters the BA has annexed a plan to define the area of immediate neighbourhood with a boundary drawn setting out which buildings are included and which are not.

Topography of the Area

15. On the first day of this hearing the Tribunal conducted a site visit in the presence of the parties.

16. Kai Yuen Street where the subject site is located is not a long street. It begins at the junction of 4 streets, viz. Tin Chiu Street, Tanner Road. Kai Yuen Terrace and Kai Yuen Street itself, running from north to south against the hill slope of Tanner Hill at North Point. The subject site Nos. 60 – 74 Kai Yuen Street is situate at the highest point of all

settlements on that street. From that highest point the street meanders downward along the valley-shape topography towards the seafront with buildings and settlements on both sides.

17. To its east immediate adjacent to the subject site is Bedford Gardens with 12 tall buildings, each 20-storey high.

18. Further down the street is a large construction site; at the time of our visit the construction reached 25th floor level or higher. According to the plans supplied by the Appellant and the photographs by the BA, the building site was originally occupied by the buildings of 5 to 7 storeys at Lower Kai Yuen Lane and Upper Kai Yuen Lane and also by No. 5 Kai Yuen Street, i.e. Wai Oi Mansion of 16 storeys high. These buildings were demolished to give place for the redevelopment.

19. Directly opposite to the building site across the street is a terrace with a cluster of buildings which was referred to as "the Five Buildings" in the previous hearing. Cars can only have access to the terrace by an elevated vehicular road with a hairpin turn. Pedestrians can reach there with an alternative route, by a flight of rather steep steps on the side of the terrace. The buildings there are 6 to 7 storeys high except King's Court which has 11 storeys.

20. At the junction on the east side of the street is Full Wealth Gardens with several buildings of 26 storeys.

Immediate Neighbourhood

21. The Tribunal has not heard much argument from Mr. Yin on point of law relating to this subject. We accept the view of Mr. Wong who adopts the principle in the decision concerning *No. 1 Robinson Road* as follows:

> "…. A neighbourhood does have common features of identity, and is usually defined by roads, open spaces or other physical features. When the word "immediate" precedes the word "neighbourhood", it indicates a smaller more compact unit having identifiable common features."

22. The BA does not dispute that immediate neighbourhood should bear common features like road. In this case Kai Yuen Street is like a river flowing along the valley with tributaries serving all the buildings and settlements on both sides mentioned above.

23. The BA boundary of immediate neighbourhood excludes three main settlements viz. Bedford Gardens, Wai Oi Mansion and Full Wealth Gardens. The Appellant objects to these exclusions.

24. Bedford Gardens is directly adjacent to the subject site, only a few steps away, resting on the same rock stratum. The reason for exclusion as explained by Mr. Yin is that the buildings are "*relatively modern development*" and do not depend on Kai Yuen Street as their primary means of access (paragraph 28 of Mr. Yin's Opening Submission).

25. The Tribunal thinks it unreasonable to use the age of a development as a factor of defining immediate neighbourhood; otherwise, an old building in a new town has no neighbour.

26. The Tribunal also cannot accept that road as primary access is a determining factor. A road is a natural feature defining where the neighbourhood goes. The fact that whether the residents use it as a primary means of access has no relevance. Even if we were wrong, we find that the residents in Bedford Gardens use Kai Yuen Street at least for 3 essential purposes:

(a) By delivery trucks after 9.00 a.m. each day;

(b) By pedestrians with access cards at any time. This route proves to be a shortcut to North Point MTR Station and King's Road; and

(c) By emergency vehicles in case of misfortune.

Clearly Kai Yuen Street well serves Bedford residents.

27. We find it unreasonable to exclude Bedford Gardens as a part of immediate neighbourhood.

28. For Wai Oi Mansion, Mr. Yin describes it as "*anomalous in that it is a single 14-storey building of intermediate age with direct access from….. Kai Yuen Street*". The BA excludes it "*because it does not share the same characteristics with the older terrace-style buildings*". The BA has used the two processes as one: defining immediate neighbourhood and assessing congruity. Age and style of a building cannot be a factor in defining neighbourhood. Wai Oi Mansion is immediate next to the buildings at Upper and Lower Kai Yuen Lane; they all rest on the same stratum. We see no reason that Wai Oi Mansion is not included in the immediate neighbourhood of the subject site.

29. As to Full Wealth Gardens, the BA deals with it together with Bedford Gardens and gives the same reasons: the age of the building and Kai Yuen Street not being the primary access. The Tribunal rejects age of a building as a factor for defining the boundary.

30. During the site visit the Tribunal paid special attention to Full Wealth Gardens and walked along Kai Yuen Terrace. Kai Yuen Terrace is a relatively short street and comes to a dead end after passing Full Wealth Gardens and two other buildings next to it. The other end of the street joins Kai Yuen Street. Kai Yuen Terrace can be treated as an internal private street serving the residents of the buildings on that

terrace to have access to Kai Yuen Street and to the outside world. The Tribunal fails to understand why the BA regards Kai Yuen Street is not a primary means of access.

31. Full Wealth Gardens is also situated on a raised platform in form of a terrace. We cannot accept that it should be excluded.

32. For the above decisions, the Tribunal extends the boundary of immediate neighbourhood to include Bedford Gardens, Wai Oi Mansion and Full Wealth Gardens.

Traffic Related Concern

33. The traffic related concern is another point of dispute in the present proceedings. The BA considers that this concern is the underlying reason for invoking s.16(1)(g) to reject the GBPs. The Appellant holds a different view. The Appellant claims that in this case s.16(1)(g) relates purely to height and the congruity with the buildings in its immediate neighbourhood.

34. It is important to consider what the traffic related concern is, how serious the concern is and how the parties conceive it. The Appellant's scope of traffic related concern is much narrower than the BA's.

35. In paragraph 7C of the 1st Disapproval Letter, the BA identified the following deficiencies of the GBPs and requested the Appellant to supply further particulars under s.16(1)(i) for the BA to consider:

(i) The existing right of ways and service lane are not subject to third party right;

(ii) (a) to supply swept path analysis to demonstrate the adequacy of the space for vehicles turning in/out from the subject site;
(b) to clarify the intended use of the vehicular access ramp and of the loading/unloading space; and
(c) to demonstrate the servicing strategy for the whole development.

36. At the end of those concerns the BA expressively reserves its right to make further comments under s.16(1)(h) and (p). It also draws the Appellant's attention to paragraph 10 of the Letter where the Assistant Commissioner for Transportation set out his concern as follows:

(i) Request for explanation for the proposed vehicular access arrangement and swept path analysis;
(ii) About the proposed dedication of land to the public to widen the carriageway and the pedestrian pavement;
(iii) Even with the proposed dedication, Kai Yuen Street is still substandard and may not sustain the increase in traffic generation and attraction; and
(iv) The proposed development should provide car parking spaces and loading/unloading facilities in accordance with the Hong Kong Planning Standards and Guidelines.

37. The 2nd Disapproval Letter expressed the same traffic related concerns by the BA and the Transport Department.

38. In construction of the 2011 Agreement the Appellant submits that these are the only traffic related concerns and no more. They can be overcome by way of "the Minor Amendments Procedure" as described in the 2011 Agreement and the List of Issues. The BA thinks of it as a much wider issue.

BA Traffic Related Concerns

39. On the 3rd day of this hearing, Mr. Yin caused his witness to produce the minutes of the Building Authority Conference ("the Minutes") held on 13th February 2007 where Mr. K. H. Ho attended. Mr. Ho had testified in the previous hearing as a witness but not in the present proceedings. He did not produce the Minutes or mention anything about its contents in that hearing.

40. In the Conference he described the proposed development on the subject site as a 31-storey building on a Class A site abutted on Kai Yuen Street. The development proposed to remove the hairpin access ramp and re-provide a 6-meter wide drive way with direct access to/from Kai Yuen Street. It also proposed to dedicate a 3.8 meter setback to widen the carriageway and footpath of the street.

41. He further pointed out that the proposed setback would not improve the bottleneck situation at lower portion of Kai Yuen Street up to the junction with Tanner Road. The chairman of the Conference echoed this view and said that the traffic situation would worsen by the proposed development as taxis and private mini-buses might pick up or drop off passengers along Kai Yuen Street.

42. According to the Minutes the representative from Transport Department said he had considered the existing situation of Kai Yuen Street in terms of its width, curvature and gradient. He commented that despite the proposed dedication, the street would still be substandard and the proposed development would give rise to concern on safety of pedestrians in view of the expected increase in both vehicle and pedestrian traffic.

43. The bottleneck, the traffic jam and the pedestrian safety issue --- these are the traffic related concerns ("the BA Traffic Related Concerns"), to which the BA refers, cannot be cured through "the Minor Amendments Procedure".

The BA Traffic Related Concerns and the Disapproval Letters

44. Mr. Fung Man-fai, Ronald in the witness box claimed that the BA had the BA Traffic Related Concerns in mind when s.16(1)(g) was invoked as the Conference had devoted so much time in discussion on that issue.

45. He said that at that time it was the common practice that the Concerns were not mentioned in the Disapproval Letters but were understood to be covered by s.16(1)(g). If the architect in charge had approached the BA to make enquiry, he would have been told of the problem, the underlying reasons for rejection.

46. As comparison we find the other paragraphs of the Disapproval Letters set out quite fully the grounds of refusal. As an example, in paragraph 7C(ii), the BA told the architect to use a swept path analysis to demonstrate the adequacy of the space for vehicles turning in/out from the site. Again, in paragraph 7B, the BA told the architect that the plans were in contravention of s.16(1)(d) i.e. Building (Planning) Regulations and also informed him what the exact contraventions were as well as which parts of MOE code were applicable.

47. Returning to paragraph 7A which contains s.16(1)(g) as a ground for rejecting GBPs, it states "the carrying out of the building works shown thereon would result in a building differing in height from buildings in the immediate neighbourhood…." It further refers to a plan

annexed to the Disapproval Letters showing the boundary of immediate neigbourhood. The BA has taken great pain to elaborate every detail of every ground in the Letters. It is rather difficult for us to believe that there is a practice not to mention the BA Traffic Related Concerns when such Concerns form the main reason for rejection but hidden as an underlying reason of invoking s.16(1)(g).

48. Mr. Fung insisted that such practice did exist. At the material times he had been in the post of Senior Building Surveyor of Hong Kong East Section for three years. He could not explain why there was such practice and why it was only applicable to s.16(1)(g). He confirmed that such practice was not depicted in writing. He was not forthcoming in answering Mr. Wong's questions e.g. on the use of s.16(1)(h) and on bottleneck issue. We are unable to say that he is a reliable witness.

49. The Appellant called Mr. Kwan Wing Hong Dominic, the architect, as its witness. He has had more than 40 years of experience of practicing as authorized person and the material time over 30 years. He said that he did not know of such practice and did not have ever heard of such practice. He doubted that such practice ever existed. As the Appellant lodged the Notices of Appeal on 1st March 2007 and 9th May 2007 respectively, Mr. Kwan found that it was inappropriate to approach the BA to ask further question after the appeals had been lodged. He gave very elaborate answers to questions asked, though in Cantonese as he is not proficient in English. He is a more reliable witness and honestly told us what he knew. We accept his evidence.

50. Before the Court of Final Appeal decision relating to the first set of *China Field* proceedings (Note 1) in October 2009, the BA had been using s.16(1)(h) to cover traffic related matters. In that case the BA had been successful in the judicial review in the Court of First Instance in

July 2007 and in the Court of Appeal in August 2008 in arguing s.16(1)(h) could be used as a ground to disapprove building plans for general traffic related concerns. In 2009 the Court of Final Appeal reversed the lower court decisions. It is difficult for us to believe that as the disapproval of the GBPs was in 2007 the BA would use s.16(1)(g) instead of s.16(1)(h) which, it maintained, could be used all the way to the Court of Final Appeal.

51. It is also noted that before the Court of Final Appeal decision relating to the second set of *China Field* proceedings (Note 2) in 2015 the ambit of s.16(1)(g) application was unclear. The Tribunal doubts that the decision maker in 2007 had s.16(1)(g) in mind to cover the BA Traffic Related Concerns including the pedestrian safety concern and other traffic related concerns.

Construction of 2011 Agreement

52. Mr. Yin in his Opening Speech emphasized the importance of s.16(1)(g). It is a powerful section "for the purpose of control of building and not for the preservation of congruity within a neighbourhood for its own sake". If any "change would throw the ability of the infrastructures to support the redevelopment", the BA can invoke s.16(1)(g) to reject the plans.

53. Undoubtedly, it is the BA stance as of today. However, we are asked to construe the 2011 Agreement whether parties had s.16(1)(g) in mind to cover the BA Traffic Related Concerns.

54. It is Mr. Yin's argument that the BA concession in the 2011 Agreement was limited to those traffic related matters covered by s.16(1)(i), s.16(1)(h) and s.16(1)(p). They could be resolved through the

Minor Amendments Procedure as agreed. Mr. Yin further submits that it did not mean that these were the only traffic related matters. There were other traffic related concerns, like pedestrian safety concern, the standard of Kai Yuen Street and the loading capacity of the rest of the street, that could not be dealt with by means of the Minor Amendments Procedure. He vehemently asserted that the BA had not conceded these Concerns should not be dealt with when entering into the 2011 Agreement.

55. The Appellant's case is totally different from that of the BA. The Appellant alleged that the BA has made a "sea change" from the case it ran in the previous hearing.

56. Having heard the submissions from both parties and considered the evidence, the Tribunal accepts the view of the Appellant. Throughout the years from the filing of the BA's Representations on 6th July 2007, a decade ago, until the filing of the Witness Statement of Fung Man-fai, Ronald on 31st May 2017, the only issue was on "incongruity in height with the buildings in the immediate neighbourhood", no mention about any of the BA Traffic Related Concerns.

57. The first time the Tribunal could find among all the papers about the BA Traffic Related Concern as an underlying reason for s.16(1)(g) was in paragraph 8 of Mr. Fung's Witness Statement dated 31st May 2017 in which he said (emphasis provided):

> *"8. Considerations were given to the comments made by the Transport Department which advised the road was substandard and its reservation on the Kai Yuen Street being capable of sustaining the increased traffic load. The proposed development will give rise to concern on safety of pedestrians in view of the expected increase in both vehicular and pedestrian traffic. Having*

considered all relevant factors, I recommended disapproval of the building plans under BO section 16(1)(g) since the carrying out of the building works shown thereon would result in a building differing in height from buildings in the immediate neighbourhood."

58. This paragraph 8 differs from paragraph 8 of statement of Mr. Ho Kwok-hung dated 10th December 2010 made for the previous hearing which stated:

"8. Mr. Fung recommended disapproval of the building plans under BO section 16(1)(g) on the ground that the carrying out of the building works shown thereon would result in a building differing in height from buildings in the immediate neighbourhood."

59. Mr. Ho in his statement said that the reason for Mr. Fung's recommendation for rejecting the GBPs was incongruity in height. He made no reference to any of the BA Traffic Related Concerns. We do not know whether Mr. Fung had made the recommendation based on the BA Traffic Related Concerns.

60. It would have been a great surprise to us if the recommendation was not in writing. Why does the BA not produce the written recommendation at this hearing? Instead, Mr. Fung produced the Minutes of the Building Authority Conference which Mr. Fung did not attend.

61. Another reason why the Tribunal considers that the BA did not use s.16(1)(g) to cover the BA Traffic Related Concerns is that at the previous hearing no mention or reference was made to any of such Concerns.

62. The evidences given by Mr. Ho and Mr. Fung in the two respective hearings are at great variance in the reasons for invoking

s.16(1)(g). Mr. Ho in his testimony in the previous hearing had not mentioned a word about any of the BA Traffic Related Concerns and his evidence only concentrated on the height incongruity issue.

63. Mr. Fung at this hearing took a completely different turn. He seemed to follow very closely the CFA *China Field 2015* decision and jumped onto the band wagon in using height as a causal connection that generated traffic related issue i.e. the increase in both car and pedestrian traffic causing pedestrian safety concern.

64. This contrast is also reflected in the arguments of Mr. Yin who appeared for the BA on both occasions. In the previous hearing, as Mr. Wong pointed out in his Closing Submission, Mr. Yin's submission was mainly on one issue which both parties regarded as a common ground – the height congruity issue. The dispute between the parties was on the neighbourhood boundary issue whether Bedford Gardens should be included. Mr. Yin even ventured to say that if the Appellant won on that issue, the Appellant won all the way.

65. At this hearing he made a twist and asked the Tribunal to decide whether the BA invoked s.16(1)(g) was for the reason that the redevelopment, "not for preservation of congruity within its immediate neighbourhood for its own sake", but for the whole immediate neighbourhood, would create the question of inadequate infrastructure to support the whole immediate community to function in the future. In this case the infrastructure he referred to was the road system. The increase in traffic was generated by the increase in height of the proposed building incongruous with the surrounding buildings.

66. Mr. Yin never attempted to explain why he had made such a twist in his reasoning. He owes us an explanation. It is trite to say that counsel takes instructions from his client and follow the instructions.

Mr. Fung in his testimony admitted that Mr. Ho was in charge at the material times and was the decision maker. He also conceded that he did not know why Mr. Ho had not mentioned any of the BA Traffic Related Concerns in the Disapproval Letter or in the previous hearing.

67. The Tribunal does not wish to speculate his reason. It was put to Mr. Fung and was reluctantly agreed by him that Mr. Ho was the final decision maker who did not have to follow what had been discussed in the Building Authority Conference. One example was subject to legal opinion.

68. Professor Chao, a member of this Tribunal, rightly asked at the hearing for evidence to support the pedestrian safety concern. He pointed out that the bottleneck traffic jam and the pedestrian safety are two different issues. How does the first issue lead to the second, the danger to pedestrians? Mr. Fung admitted that he was not an expert in traffic affairs and he approached the matter by way of common sense.

69. As the Tribunal gathers even up to today's date, no evidence has been produced to show how serious the pedestrian safety concern was. Both experts from Transport Department were not called in the two hearings. Even if they were called, we doubt what they would say on pedestrian safety issue. In their witness statements, which are almost identical, they talked about the proposed dedication which would widen the carriageway to 6 meters and footpath to 2 meters. They were of the opinion that Kai Yuen Street still remained substandard. They also talked about that the proposed redevelopment "should be provided with its own car parking spaces and loading/unloading facilities as prescribed by the Hong Kong Planning Standards and Guidelines (HKPSG)". It is not unreasonable to expect that the senior traffic engineers, as they were, would have expressed their opinions on the BA Traffic Related

Concerns, particularly the pedestrian safety issue, if there were serious concerns. However, they did not mention a word about it.

70. It is the judgment of this Tribunal that the BA did not use the BA Traffic Related Concerns in invoking s.16(1)(g) at the material times and that it did not have the intention of using that section to cover the BA Traffic Concerns in the 2011 Agreement.

71. The Master Layout Plan produced by the BA is not a relevant issue at this stage. It represents an ideal way of traffic planning. As the Tribunal finds, the decisions to reject the GBPs had been made long before the Master Layout Plan came into existence. It may also take a long time for the Master Layout Plan to be implemented even if all the ownerships of the various units could be unified. We believe that the dedication of land in the proposed redevelopment to widen the road will definitely ease the traffic problem.

72. It is this Tribunal's decision that in 2007 when the GBPs were rejected, the only reason for invoking s.16(1)(g) was the height incongruity issue.

Height Congruity Issue

73. Having reached the above decision the Tribunal refused to take the simple approach as suggested by Mr. Yin in the previous hearing: if the Appellant wins in the immediate neighbourhood boundary to include Bedford Gardens, the Appellant wins all the way.

74. The Tribunal has clearly stated at the beginning of the hearing and agreed with Mr. Wong's view that it is a two-step process in construing s.16(1)(g). We have not heard Mr. Yin spoken against this view. We have decided that Bedford Gardens, Wai Oi Mansion and Full Wealth

Gardens should be included in the immediate neighbourhood of the subject site but we have not considered the problem of incongruity. The Tribunal first examines the BA's stance.

The BA Stance

75. Mr. Yin for the BA has not elaborated much on the height congruity issue in this hearing. We find that Mr. Ho and Mr. Fung have raised and made the following submissions in paragraphs 10 and 11 of their witness statements. We take Mr. Fung's as follows:

> *"10. The "immediate neighbourhood "……..…….did have common features of identity and was usually defined by physical features such as road and open spaces. The word "immediate" indicated a small, more compact unit having identifiable common features. In this case, the unifying feature common to all of the existing buildings within the "immediate neighbourhood" of the subject site is that they are all low-rise buildings of a similar height erected on elevated platforms in the form of terraces branching off from Kai Yuen Street. This was considered by the BA as the determining factor."*
>
> *"11. The BA defined the boundary of "immediate neighbourhood" in which the buildings were 5 to 11 storeys high and all served by Kai Yuen Street, which were congruous in building height. Access by the same means i.e. Kai Yuen Street was considered by the BA as the determining factor……."*

76. From the above we gather the BA uses 3 factors to decide on the two issues of immediate neighbourhood and congruity:

1. The proposed buildings must be low-rise buildings of 5 to 11 storeys high;
2. These buildings have to be erected on the elevated platform;
3. They use Kai Yuen Street as a means of access.

77. We could not accept the BA stance for the following reasons:

a. The BA combines the two processes of defining immediate neighbourhood and assessing the height congruity as one procedure;
b. The height of the buildings should not be a determining factor for defining immediate neighbourhood for the reason we have explained earlier; and
c. The BA is not consistent in applying factor 2 above. As the buildings at Lower and Upper Kai Yuen Lane were erected at a lower than street level, they were not on elevated platform. Why are they included?

Discussion

78. The Tribunal should not fall into the fallacy that if the BA is wrong the Appellant must be right. We have to examine the situation in accordance with the law whether the height of the building in the proposed development is not incongruous with the buildings in its immediate neighbourhood.

79. In determining the congruity issue it is not an arithmetical exercise of counting how many low rise houses are against the number of tall buildings in the area. Neither is it right to consider that the existence of one single 16-storey building amongst many low rise buildings destroys the congruity in that area and to conclude that no congruity needs to be

preserved. Every case turns on its own facts. The congruity test is a test of fact and degree. The decision maker has to exercise his discretion in accordance with fact and law (Note 3).

80. In this case the subject site is situated at the apex of Kai Yuen Street overlooking the whole surroundings, both the east and the west. The existing structures built on the site can be divided into two parts.

81. The lower part is a number of retail shops with one or two upper storeys above. They were built on the same Inland Lots as the upper part but are differently numbered as 56, 56A, 56B, 56C, 58, 58A, 58B etc….

82. The upper part is an elevated platform in form of a terrace upon which eight blocks of 6-storey buildings were erected. The Appellant intended to demolish all the structures, both lower and upper parts, and to erect thereon a 31-storey building (with the 2 floors for main entrance and the remaining 29 floors for residential use).

83. Immediate adjacent to the subject site on its eastern side is Bedford Gardens with 12 towers of building each 20 storeys high which at the material times surrounded the low-rise 6-storey houses at Upper and Lower Kai Yuen Lane. The northern edge of the Lanes was lined with tall buildings: Wai Oi Mansion of 16 storeys and also the tall towers of 26 storeys each in Full Wealth Gardens.

84. Directly opposite to the settlement at Upper and Lower Kai Yuen Lane across Kai Yuen Street, i.e. on the west side of the subject site, is a raised platform in form of a terrace. The buildings there are of 6 to 7 storeys high except King's Court in the south west corner of the terrace which has 11 storeys. The buildings there were collectively called "the Five Buildings" in the previous hearing by our predecessors. We find

that the character and the nature of this place have not been subject to much change for the last 10 years ago.

85. Some of the ground floor units of the buildings are used as garage, car repair shop and old age home. The settlement on that terrace forms itself into a small secluded community of its own. It is segregated from the rest of settlements at Kai Yuen Street. The terrace is mainly linked with the main part of Kai Yuen Street by an elevated vehicular road with a hairpin turn.

86. The subject site and the Five Buildings terrace are not connected with each other. There is a gap between them. On the side of the subject site a stone wall was built to support the structure there. On the other side of the gap we find the walls of North Point View and the 11-storey King's Court forming a screen-like structure hiding the Five-Building Terrace.

87. From the above observation the subject site commanded a dominating position at the highest point with the greenery slope as its southern background. Kai Yuen Street running downhill bisecting the settlements into two: the east and the west. On the east at the material times was a group of tall buildings surrounding the low-rise houses at upper and Lower Kai Yuen Street. On its west was the raised terrace with buildings mostly 6 to 7 storeys segregated from the rest of other settlements at Kai Yuen Street.

88. It is the finding of this Tribunal that the proposed building of a 31 storeys on the subject site would not change the nature of the Five Buildings as the latter were at the material time and still are situated on a separate terrace forming a secluded place of its own and screened away from the rest of the other settlements along the main part of Kai Yuen

Street. The Five-Building terrace will not be affected by the proposed tall building.

89. On the east side, the area where the low-rise buildings at Upper and Lower Kai Yuen Lane were once located, at the material times already had many tall buildings surrounding the low-rise buildings. It was not the case of one particular tall building in the area but many. The congruity, if there were any, had been destroyed.

Conclusion

90. We conclude that the proposed new 31-storey building would not be incongruous in height with the surrounding buildings in the immediate neighbourhood at the material times.

91. For the above reasons the Tribunal finds that Section 16(1)(g) of the Buildings Ordinance, Cap. 123, ("B.O. S.16(1)(g)") did not afford any or any sufficient ground for the decisions of the BA to disapprove the 1st and 2nd General Building Plans ("GBPs") in the 1st and 2nd Appeals respectively having regard to the circumstances existing at the dates of decisions under appeal i.e. 15th February 2007 and 25th April 2007 respectively.

92. In accordance with paragraph 2 of the 2011 Agreement and the List of Issues, the Tribunal makes the following orders:

(a) The 1st and 2nd Appeals be allowed; and
(b) The BA shall approve the 2nd GBPs subject to the resolution by Mr. Kwan Wing Hong Dominic of K & W Architects Limited, Architects, the Authorized Person acting for Well Spread Trading Limited, the Appellant, and the BA of the matters identified in paragraphs 7B(i) and (ii) and paragraphs 7C(i), (ii),

(iii) and (iv) of the 2nd Disapproval Letter in respect of the 2nd GBPs ("the minor amendments") under the procedure laid down in Practice Note for Authorized Persons, Registered Structural Engineers and Registered Geotechnical Engineers ADM-14 entitled "Minor Amendments to Plans and Specified Forms" (formerly Practice Note for Authorized Persons and Registered Structural Engineers 190) ("the minor amendments procedure").

Costs

93. The usual practice is that costs follow the event i.e. the successful party should have its costs paid by the other party. But, the parties have invited this Tribunal to decide whether the costs should be separately argued. In view of the chequered past of these appeals the Tribunal will definitely benefit from counsel submissions. Accordingly, this Tribunal makes the following directions relating to costs:

a. The Appellant shall make a written submission to this Tribunal and serve a copy on the BA within 14 days from the date of this Decision;
b. The BA shall make a written submission to this Tribunal and serve a copy on the Appellant within 14 days thereafter;
c. The Appellant shall make its response, if any, to b above and serve a copy on the BA within 7 days thereafter;
d. The parties shall within the above total period of 35 days agree on the time required for the hearing and make their suggestions on available dates for hearing;
e. The Tribunal reserves all its right to make decision on the matters contained in d above and to make further directions; and
f. The parties shall have liberty to apply.

94. Finally, it leaves us to thank the counsel of both sides and their legal teams for their helpful assistance and thorough submissions.

Dated this 17 th day of August 2017.

[SIGNED]

Chan Cheuk, Christopher

Chairman

[SIGNED]

Chan Ka-man, Margaret

Member

[SIGNED]

Chao Yu-hang, Christopher

Member

Mr. Wong Yan-lung SC and Mr. Anthony Ismail instructed by Kao, Lee & Yip for Well Spread Trading Limited, the Appellant

Mr. Michael Yin and Mr. Leu Lap-yau, Brian for the Building Authority, the Respondent

Note 1: "the 1st set of China Field Proceedings" means HCAL 2/2007, HCAL 3/2007, CACV 299/2007, CACV 300/2007 and FACV 2&3/2009.

Note 2: "the 2nd set of China Field Proceedings" means HCAL 60/2011, CACV 277/2012 and FACV 7/2014.

Note 3: The gist of paragraph 79 is taken from paragraphs 52 to 56 of the Judgment of Cheung CJHC in CACV 277/2012.

Buildings Appeal Case No. 146 of 2007

Buildings Appeal Case No. 503 of 2007

60-74 Kai Yuen Street, Hong Kong

Well Spread Trading Limited Appellant

And

Building Authority Respondent

Hearing: 23rd January 2018

Decision on Costs

At last these two Appeals come to the final stage of the long protracted litigation: determination on costs. Section 51(1) of the Buildings Ordinance (Cap 123) empowers the Appeal Tribunal to deal with the costs of the proceedings. It states: "Upon making an order under section 49(2) or 50(2) the Appeal Tribunal may make such order as to costs as it thinks fit."

2. As the two Appeals have gone through a tortuous path of three different stages: the First Hearing by a differently-constituted Appeal Tribunal ("the First Hearing"), the Judicial Review Hearing before Au J and the Rehearing before this Appeal Tribunal ("the Rehearing"), we can identify the following appurtenant issues:

A. Costs of the First Hearing,
B. Basis of Assessment for First Hearing,
C. Costs of the Rehearing,
D. Basis of Assessment for the Rehearing,

E. Scale of Costs,
F. Certificate for Two Counsel,
G. Costs of the Costs Proceeding, and
H. Taxation or Assessment.

3. Not all the above issues are in dispute. The Appeal Tribunal will deal with them one after another in the order as they appear.

The First Hearing Costs

4. This issue is hotly contested. The Appellant submits that it is appropriate to follow the usual practice that the costs should follow the event i.e. the BA should pay the costs of and occasioned by the First Hearing. The Appellant maintains that as the key issues have been agreed by the parties to be "Immediate Neighborhood" and "Height Congruity" in both hearings, following the principle that costs follow the event the Appellant should have the costs. Secondly, in the First Hearing the counsel for the BA asserted and emphasized that if the Appellant won the "Immediate Neighborhood" issue, it would win all the way. Impliedly, it included the costs of the First Hearing. Thirdly, the Tribunal held in favor of the Appellant on the two key issues on the basis of the same evidence in the First Hearing. It means that the Appellant wins not only the Rehearing but also the First Hearing. And lastly, the Previous Tribunal adopted the general principle that costs follow the event. As the Appellant is successful at the end the same principle should apply to the costs of the First Hearing.

5. In response, the BA says that since the same key issues and the same evidence were placed before the two Tribunals, the BA doubts whether the BA should be responsible for the duplication in costs. Further, as the decisions of the Previous Tribunal as described by the Appellant are "irrational", all the results in the First Hearing could not stand. The BA raised no objection to such comment. The decisions were quashed by Au J. It means that the costs of the First Hearing were thrown away. As these are wasted costs, there is no reason why the BA,

which has committed no wrong, should bear all the costs of the First Hearing.

6. The Appellant in reply cited 7 cases and one quotation from Hong Kong Civil Procedure 2018 ("the White Book") in support of the general rule that save in special circumstances, where there is a new trial, the costs of the original trial are to abide the result of the new trial.

7. The quotation from paragraph 62/4/4 of the White Book relies on a decision of the Court of Appeal in England, Brotherton v Metropolitan District by Joint Committee [1894] 1 QB 666. That case offers not much assistance to our present situation. In that case, when the Court of Appeal ordered the retrial, it specifically directed "the costs of the former trial to abide the result of the new trial". In our case, the costs order made by consent before Au J is that "there be no order as to costs of this proceedings (i.e. the judicial proceedings)" and "the issue of costs of the Appeals be remitted to the differently constituted Respondent (i.e. this Appeal Tribunal) for consideration." That means this Tribunal has to consider afresh what costs order in respect of these Appeals should be made.

8. The two English cases cited by the Appellant in Tabs 12 and 13 of the Appellant's List of Authorities, i.e. Creen v Wright (1877) 2 CPD 354 and Field v The Great Northern Railway Company (1878) 3 Ex D 261, were cases tried by jury in the 19th Century. The costs order had to follow the then Order LV of the Civil Procedure, in which its proviso stated: "where any action is tried by jury, the costs shall follow the event, unless the judge or court otherwise orders". It was a mandatory rule that if a case was tried by jury, costs should follow the event. In both cases they had a retrial by jury, the court primarily considered what was the meaning of the phrase "costs follow the event". In our case we have to decide whether the costs of the First Hearing should follow the result of the Rehearing before we think of what is the event.

9. In Hong Kong we do not have a mandatory rule that costs must follow the event. For the Appeal Tribunal we have the empowering section 51(1) that the Appeal Tribunal "may make such order as it thinks

fit". Even though it seems to give the Appeal Tribunal a plenary discretion, however on exercise its discretion it must direct itself properly in law, the principle of fairness and also the relevant matters which it is bound to consider. The relevant matters we have to consider are as follows.

10. The present two Appeals were a result of the disapproval of two sets of general plans relating to the subject development on 15th February 2007 and 25th April 2007 respectively. The Appellant exercised its right of appeal. About five years later the Appeals were heard by the Previous Tribunal which gave its decision dismissing the Appeals on 24th April 2012 and awarded costs to the BA against the Appellant. Subsequently, the Appellant applied for leave to have judicial review of the decisions. On 24th September 2012 after hearing the counsel for the Appellant and the BA respectively, Au J quashed the decisions of the Previous Tribunal and ordered a differently constituted Appeal Tribunal to consider the Appeals in accordance with the law. Hence we have this Appeal Tribunal, the Rehearing and its decision on 17th August 2017. These are the salient points which we have to consider in this case.

11. The Appellant calls upon the aid of two different Australian cases. The first one is Brittain v The Commonwealth of Australia [2004] NSWCS 427. In that case McColl JA traced the history of the general rule in Australia that save in special circumstance, where there is a new trial the costs of the first trial abide the event of the second trial. He just gave us the history but did not explain why there was such rule in the first place.

12. The other one is Electrolytic Zinc Co. of Australasia v Cieslak [1969] Tas SR 50 which follows the general rule established by the Full Court of Victoria mentioned in the NSW case in the preceding paragraph.

13. Hong Kong does not have such established general rule. We have to consider each and every case what is fair and reasonable. We must say the BA's argument is not without merit. Mr. Yin, counsel for the

BA, makes his submission that through no fault of BA the First Hearing was aborted. He considers that these are costs thrown away.

14. Costs thrown away usually happen when one party has to unnecessarily waste the costs incurred due to an event caused by the other party, e.g. a last minute substantial amendment of pleadings shortly before trial resulting in an adjournment of the case. In such case the costs thrown away have to be borne by the party causing the adjournment to compensate the innocent party. There are rare occasions where costs are thrown away through no fault of the parties, for example, a trial being brought to an abrupt stop because of illness or death of the judge, parties usually agree to leave the costs in the cause.

15. In the present case the Previous Tribunal reached a decision which both parties did not support. We do not agree to describe it as "irrational" but the Previous Tribunal had taken into consideration matters not relevant in the eyes of the law. The termination of the trial is not attributable to any mistake or any act committed by any of the parties. The abortion is beyond the control of the parties. If it were the intention of the parties, or at least that of the BA that each party should pay its own costs in respect of the First Hearing, it should have been brought up before Au J to make such an order and put an end to the matters relating to the First Trial. The order as it stands is to let this Appeal Tribunal to decide and the First Trial is revived in that respect.

16. Another reason that the BA relies on is that as the key issues and the evidence in both hearings i.e. the First Hearing and the Rehearing are almost the same there is certain amount of duplication works as well as costs incurred. The Tribunal does not look at it in that way. We agree that there may be certain amount of duplication in work but one cannot deny that the Appellant still had to do the preparation works again and thus incurred costs.

17. We consider that the abortion of the First Trial was a misfortune similar to a case where the trial judge became ill or passed away before handing down the judgment. We have to accept the incident as a natural consequence. The whole proceeding of these two Appeals begin with

the two Notices of Appeal and end with our decision on 17th August 2017. No one would dispute the general principle that costs should follow the event. It cannot be denied that the aborted hearing is part and parcel of the whole process of the Appeals and should be regarded just as a stage of the whole process. Our decision on costs of the First Hearing can well be explained by a quotation taken from Mellor J's judgment in the case Field v The Great Northern Railway Company (1878) 3 Ex D 261 at 262 in which he said:

> "The costs are to follow the event, and the event is the result of the entire litigation. In this case the first trial was not like an interlocutory application, nor was it an abortive issue; it was one of the stages in the whole proceeding, which ended in the judgment in favor of the Plaintiff. The Plaintiff is therefore entitled to the natural consequences of his judgment, and they include the costs of the whole case. All the proceedings here were but stages of one litigation, which has finally ended in a verdict in favour of the Plaintiff."

18. For the above reasons we decide that the Appellant's costs of and incidental to the First Hearing should be borne by the BA.

Basis of Assessment for First Hearing

19. Having decided which party should bear the Appellant's costs relating to the First Hearing, we come to decide on what basis the costs should be assessed. In paragraph 22 of the Appellant's Submission on Costs dated 31st August 2017 the Appellant suggested the normal party and party basis. The BA by letter dated 19th December 2017 replied that it would be appropriate to assess costs on the usual (i.e. party and party) basis. As parties are consensus on this point, we would not disturb the consensus view that the costs relating to the First Hearing shall be assessed on party and party basis.

Costs of the Rehearing

20. In paragraph 93 of the Decision dated 17th August 2017, the

Tribunal mentioned that the usual practice is costs to follow the event. Both parties do not have different views. As the Appellant has been successful in these Appeals, the BA should bear the costs of and incidental to the Rehearing.

Basis of Assessment for the Rehearing

21. The Appellant asks for indemnity basis for assessment of the costs for the Rehearing. The BA resists and considers that the usual party and party basis is appropriate. The difference between the two bases is significant: "On a taxation on indemnity all costs shall be allowed except in so far as they are of unreasonable amount or have been unreasonably incurred" (Order 62 r.28(4A)) while for party and party basis only costs "necessary or proper for the attainment of justice" are allowed (O.62 r.28(2)).

22. Parties do not have much dispute about the law on awarding indemnity costs. The basic principles have been well established in a Court of Final Appeal case, The Town Planning Board v Society for Protection of the Harbour Ltd. (2004) 7 HKCFAR 114. The basic principles can be briefly summarized as follows:

a. The court has a broad discretion to determine how costs should be paid and whether indemnity costs should be ordered.
b. The successful party should show that the case has special or unusual features for such costs to be made.
c. An award of indemnity costs was not confined to cases brought with ulterior motive, for improper purpose, or where there was some deception or underhand conduct on the part of the losing party.
d. The grounds for making such order must be connected with the case and might extend to any matter relating to the litigation and the parties' conduct in it and also the circumstances leading to the litigation, but no further.

23. We have to follow the above principles to consider whether to grant indemnity costs.

24. The Appellant's main complaint is the way that the BA conducted the Rehearing. The BA suddenly introduced a new issue i.e. the BA Traffic Concerns only shortly before the Rehearing making a "sea change" of the case the BA had used to run. The new issue was first mentioned in the Statement of Mr. Fung Man-fai dated 31st May 2017, about 20 days before the Rehearing. On the 3rd day of the four days hearing Mr. Fung without forewarning produced as an exhibit the Minutes of the Building Authority Conference which was held on 13th February 2007, a few days before the rejection of the Appellants' plans for redevelopment. In other words, the BA had the Minutes all along during the 10 years before the Rehearing without disclosing to the Appellant. It cannot be disputed that the contents of the Minutes had direct bearing on the BA Traffic Concerns issue in the Appeals.

25. The BA response to this complaint is that due to long lapse of time from Notices of Appeal to the Rehearing the original decision makers had left services with the BA and were not available to explain why in the First Hearing this new issue was not brought up for the Previous Tribunal to consider. The Appellant argued that the BA should have taken precautionary measures like asking the decision makers to make written statements and/or summonsing them to appear before the Tribunal.

26. In litigation it is always true to say to get prepared as early as possible. But, it is understandable that the BA being the respondent in these appeals would like to let the sleeping dog lie and would not take any proactive steps to push the case ahead. We believe that the BA did not do any preparation until the case was reactivated by this Tribunal in the autumn 2016. By that time all the former decision makers had left when the BA had to start preparation anew. A new team took over including Mr. Fung. He uncovered the Minutes which contained real traffic concerns in the Kai Yuen Street area. It is proper for the BA to bring out this traffic concern for this Tribunal to decide as it relates to

public interest. In tribunal proceedings the rules governing introduction of new issue and evidence are not as stringent as the court rules.

27. It is admitted that the BA had not touched upon this new issue in the Previous Hearing. At that time the BA decision makers must have their good reason for it which we do not know. We agree that the introduction of this new issue had added a new dimension to the case. No sufficient notice was given to the Appellant. If the Appellant felt that it could not handle such new issue in such short notice, the Appellant could always request for an adjournment and in view of the sudden popping up of an important new issue the Tribunal was willing to accommodate. Of course, the Tribunal does not encourage this way that the BA had handled the case.

28. In paragraph 22 of its Reply dated 21st September 2017 the Appellant summarized the Tribunal's reasons for Decision. This does not give much support to the Appellant's present application. In each case there is bound to have winner and loser. There are many reasons why a case is lost. For example, witnesses giving evidence do not live up to proof or their explanations are not accepted by court for being unreliable or unreasonable etc.. These are not unusual feature that merits an indemnity costs order.

29. We are of the view that this is not a case where the BA had set up an unfounded or totally unmeritorious argument wasting time and resources of the Tribunal. We cannot find that the BA had conducted its case "with ulterior motive or improper conduct". Neither do we find that the BA had misled the Tribunal in any way.

30. In considering whether to award indemnity costs we have to bear in mind the guidance given by Mr. McWalters J (as he then was) in paragraph 6 of his judgment in an unreported case HCAL 69/2011 Real Gold Mining Limited v Securities and Futures Commission:

> 6. Further definition of what constitutes a "special or unusual feature" is not possible. However I think it is apparent from the case law that the award of costs on indemnity basis is regarded as an exceptional one for court to make and in making such awards courts are quite often viewed as acting robustly

> in response to the circumstances before them. Usually the award is prompted by a desire of the court to benefit the successful party, perhaps because the special or unusual feature causes the judge to conclude that the justice of the case demands it, or by a desire of the court to mark its disapproval of the conduct of the unsuccessful party – conduct that is sometimes described as an affront to the court and which so disturbs it that it evokes this strong response from it….."

31. We find that the BA's conduct does not fall into the category of an affront to the Tribunal and does not constitute "special or unusual feature" to merit an award of indemnity costs against it. For the aforesaid reasons we find that the costs of and incidental to the Rehearing should be assessed on the usual party and party basis.

32. Having said that, we must warn the BA that we do not approve and look with displeasure at the way that the BA handled the case --- not seeking any amendment, last minute introducing new issue and taking the other side by surprise with sudden production of new evidence. We accept that the rules of the Tribunal are not as stringent as the Court rules but the BA should not stretch them to their extreme limits. The other tribunals may consider such way of conducting the case totally unacceptable and unsatisfactory.

Scale of Costs

33. Section 51(1) of the Ordinance does not give any indication on what scale of costs the costs of the proceedings of this type should be calculated: the District Court Scale or the High Court Scale. The main difference between the two is in certain respects the amount of costs in District Court Scale is only two-third of its counterpart in High Court.

34. Mr. Yin submits that as Section 51(1) does not specify or state High Court or District Court scale, it is necessary to look at the figure before deciding the scale. It seems to us that his method is to find the figure first before we decide what the scale should be. Then, how do we find the figure if there is no scale or principle to guide us? We find that

it is necessary to decide all the basic principles first governing the way to find the right amount of costs.

35. For recovery of land and land title dispute, the dividing line whether the District Court or the High Court should have jurisdiction is the annual value of the land in dispute: any land exceeding the annual value of $240,000 should go to the High Court (s.35 and s.36 of the District Ordinance Cap 336).

36. By analogy, such demarcation between jurisdictions should apply to appeal tribunal cases. We believe that the subject property has an annual value well exceeding $240,000 but we do not have evidence to that effect. We have to rely on other factors like complexities in law and fact. The fact that the hearing lasted for 4 days and the 26-page Decision resolving different complicated issues of fact and law is a clear proof that the matter is beyond the jurisdiction of the District Court. We order that the costs of the proceedings in these two Appeals be assessed in the High Court Scale.

Certificate for Two Counsel

37. The First Schedule to Order 62 of the Rules of High Court (Cap. 4A) on this subject is the starting point for our discussion. It states that no costs shall be allowed of no more than one counsel before the Court of Appeal unless the Court has certified the attendance being proper in the circumstances of the case. As we have ruled that the costs of the First Hearing and the Rehearing shall be assessed on party and party basis, it means that we have to consider whether the engagement of two counsel is “necessary or proper for the attainment of justice”.

38. It cannot be denied that the two Appeals are not straightforward and cannot be easily dealt with. It involves loads of authorities and references which express different divergent views. The matter cannot be resolved without applying the right interpretation of law to the facts before the Tribunal. That requires expertise and skill of counsel of high caliber.

39. The project concerned is about the proposed redevelopment of 8 houses together each of 6-storey high into a large residential block of 31 storeys. Should the Appellant fail in its appeals on the two issues of height incongruity and immediate neighbourhood, the new building would have to be in line with its nearby buildings of about 11 storeys. In today's property value it means a loss of billions of dollars.

40. On exercising the discretion the Tribunal should have regard to all relevant circumstances and in particular to the complexity of the matter, the difficulty of law involved, the skill, specialized knowledge of counsel, the money or property involved and the importance of the matter to client.

41. We have no doubt that Mr. Anthony Ismail has the relevant experience and skill in handling such Tribunal matter. He was called to the bar in UK in 1978 and in HK in 1979. His frequent appearance before different Appeal Tribunals is a very good indicative of his experience in this type of cases. There is no question that Mr. Ismail could have conducted the case all by himself. The question is not whether the junior could have been capable of conducting the case. The right question is: by looking at all circumstances of the case is it proper to involve a senior counsel? Our answer is the affirmative.

42. Our ruling is that it is proper to engage Mr. Edward Chan, SC in the First Hearing and Mr. Wong Yan Lung, SC in the Rehearing and in both cases assisted by Mr. Ismail.

Costs of the Costs Proceeding

43. In this Costs Proceeding there are only two main issues in hot dispute: the costs of the First Hearing and Indemnity Costs for the Rehearing. The other issues are either agreed or left at the discretion of the Tribunal. Of the two main issues each party has won one and lost the other. Following the general principle that costs should follow the event, it is only fair that each party pay its own costs.

Taxation or Assessment

44. There are two ways of fixing the costs: taxation and assessment. Taxation will be conducted by a master of the High Court who is a total stranger to the case. Its elaborate procedure is very time consuming and it will take about one or two years before it is completed. This Tribunal is very familiar with the case and is capable of assessing what is a fair and reasonable amount as costs for this case in a matter of months.

Conclusion

45. To recap and conclude we make the following order:

1. The Appellant's costs of and incidental to the First Hearing and also the Rehearing shall be paid by the Building Authority, if not agreed, to be assessed by this Tribunal on party and party basis on High Court scale with a certificate for two counsel.
2. The assessment, if it is so required, shall mutatis mutandis follow the Rules of High Court, its Orders and High Court Practice Directions (in particular, P.D. 14.3 and Appendix A) and the following directions shall apply:
   (a) The Appellant shall file with this Tribunal and serve on the BA a statement of costs in the format of Appendix A,
   (b) The BA shall file with this Tribunal and serve on the Appellant its statement of objections within 21 days thereafter,
   (c) Unless within 7 days thereafter either of the parties requests for an oral hearing and giving reasons for the same, this Tribunal will conduct the assessment on paper without a hearing, and
   (d) With liberty to apply.
3. Each party shall pay its own costs of and incidental to this costs proceeding.

Other Matters

46. For the purpose of record, at the beginning of this hearing the Appellant brought along a draft order for the Tribunal's approval. After the parties making their respective submissions, the Appellant expressed it was satisfied to leave the matter as it was on record for future references. The BA raised no objection to leave the matter at this stage. The Tribunal has not approved the draft order and the matter rests at that juncture.

47. At last, it leaves us to thank counsel for their assistance in this proceeding.

Dated this 14 th day of March 2018

[SIGNED]

Chan Cheuk, Christopher

Chairman

[SIGNED]

Chan Ka-man, Margaret

Member

[SIGNED]

Chao Yu-hang, Christopher

Member

Mr. Wong Yan-lung SC and Mr. Anthony Ismail instructed by Kao, Lee & Yip for Well Spread Trading Limited, the Appellant

Mr. Michael Yin and Mr. Leu Lap-yau, Brian for the Building Authority, the Respondent