

# TOWN PLANNING IN HONG KONG

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A REVIEW OF PLANNING APPEAL DECISIONS

LAWRENCE WAI-CHUNG LAI



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35. 02/95(T15) DD 129, Lau Fau Shan, New Territories [**Charming City**] 352–362  
(Residential development in an ‘Unspecified Use’ Zone in a DPA Plan with a subsequent successful planning review for similar development under an OZP was rejected.)
36. 05/95 (L21) Various lots in DD 104, New Territories [**Planet Universal**] 363–391  
(Residential development in an ‘Unspecified Use’ Zone in a DPA Plan near Mai Po Nature Reserve was rejected; proposed planning conditions were unworkable.)
37. 07/95 (L22) A large site in Kam Tin North DPA, New Territories [**Delight World**] 391–401  
(Residential development in an ‘Unspecified Use’ Zone in a DPA Plan affected by government land resumption (for drainage channel and highway projects) was rejected; proposed ‘conditional approval’ was unworkable.)

- |     |             |   |                        |
|-----|-------------|---|------------------------|
| 38. | 08/95 (L23) | Various lots in DD 109, Kam Tin, New Territories [ <b>Yin Ning Savings</b> ]<br>(Residential development in an 'Unspecified Use' Zone in a DPA Plan affected by government land resumption (for drainage channel and highway projects) was rejected; proposed 'conditional approval' was unworkable.) | 401–412<br><br>412–417 |
| 39. | 16/95 (T16) | A site within draft Kam Tin OZP, New Territories [ <b>Arzignano Leather</b> ]<br>(Renewal of temporary planning permission for storage of gloves and office in two new 2-storey buildings was rejected.)  | 417–423                |
| 40. | 18/95 (T17) | Lot No. 465B in DD 92, Kwu Tung North, Sheung Shui, New Territories [ <b>Jetway Civil</b> ]<br>(Small house development in an Agricultural Zone in a DPA Plan was rejected.)  | 423–429                |
| 41. | 19/95 (T18) | Lots Nos. 1368A and 1368 RP in DD 82, Ping Che Road, Ta Kwu Ling, New Territories [ <b>Lo Kwok-wai</b> ]<br>(Open storage of steel materials in an 'Unspecified Use' Zone in a DPA Plan subject to planning enforcement was rejected.)  | 429–436                |
| 42. | 21/95(T19)  | Lot No. 987 in DD 106, Shek Kong, Yuen Long [ <b>Cheung Hing Lung</b> ]<br>(Proposed <i>in situ</i> redevelopment of warehouse in an 'Unspecified Use' Zone was rejected for involving relocation of buildings from adjoining lots to the subject lot.)   | 436–447                |
| 43. | 22/95(T20)  | Aberdeen Inland Lots 278 and 280, Hong Kong Island [ <b>Lucky Gain</b> ]<br>(Proposed Commercial/Office development at plot ratio 15 in an Industrial Zone with an I-O application already approved was rejected.)  | 447–453                |
| 44. | 26/95(T21)  | A site in draft Pat Heung DPA [ <b>Wong Yee Fai (2)</b> ]<br>(Continuation of a car repair workshop and open storage of spare parts subject to enforcement action in a Residential (Group D) (R(D)) Zone was rejected as a matter of principle.)  | 453–467                |
| 45. | 28/95(W1)   | Northern side of Hoi Tu Street, Quarry Bay, Hong Kong Island [ <b>Fine Tower</b> ]<br>(Office building in Industrial and G/IC Zones was rejected on the grounds of incompatibility  |                        |

- with a refuse dumping barging point, though a subsequent application for Industrial-Office (I-O) building was approved without reference to the barging point.) 467–472
46. 01/96(T22) Flats 4 and 5, 13th Floor, Yick Fat Industrial Building, Nos. 1048–1056 King’s Road and Nos. 2–32 Yau Man Street, Quarry Bay, Hong Kong Island [**Yolanda Fan**]  
(Appeal was allowed: two flats used as a temple were considered an existing use in one of the flats.) 472–480
47. 04/96(T23) Lots 1824 ARP, 1824 BRP, 1824 C and 1849 in DD 125 and government land in Ping Ha Road, Ha Tsuen, Yuen Long, New Territories [**Container System**]  
(Open storage of containers in an Undetermined (U) Zone with container storage as an existing use on part of the subject site was rejected.) 480–483
48. 08/96(T24) Lot 349 BRP (part) in DD 114, Kam Tin Road, Pat Heung, Yuen Long, New Territories [**Leung Wing-nin**]  
(A car repairing workshop in an Open Storage (OS) Zone was rejected for lack of justification.) 483–489
49. 12/96(T25) Rural Building Lot No. 691 RP, No.12, Headland Road, Hong Kong Island [**Rightlane Investment**]  
(Appeal was allowed: an application for a 10% minor relaxation of plot ratio in a Residential (Group C) 3 (RC 3) Zone using an ‘imaginative’ building design.) 489–493
50. 01/97(W2) Lot 1217 and adjacent government land in DD 119 in Pak Sha Tsuen, Yuen Long [**Connie Law Yuk Wah**]  
(Application of temporary open storage of building materials in an Agricultural (AGR) Zone in OZP was rejected for lack of substantiation.)

\* The letter and figure in brackets refer to the Chairman of the Panel and the number of the case decided by that panel under his Chairmanship.

# 2

## AN OVERVIEW OF THE PLANNING APPEAL CASES

### NATURE OF THE CASES

Planning appeals arise when an applicant is aggrieved by the decision of s. 17(1) review hearing that affirms rejections of his or her s. 16 application. The success and failure rates of s. 16 and s. 17(1) applications for the years 1990 to 1996 are presented respectively in Figures 2.1 and 2.2.

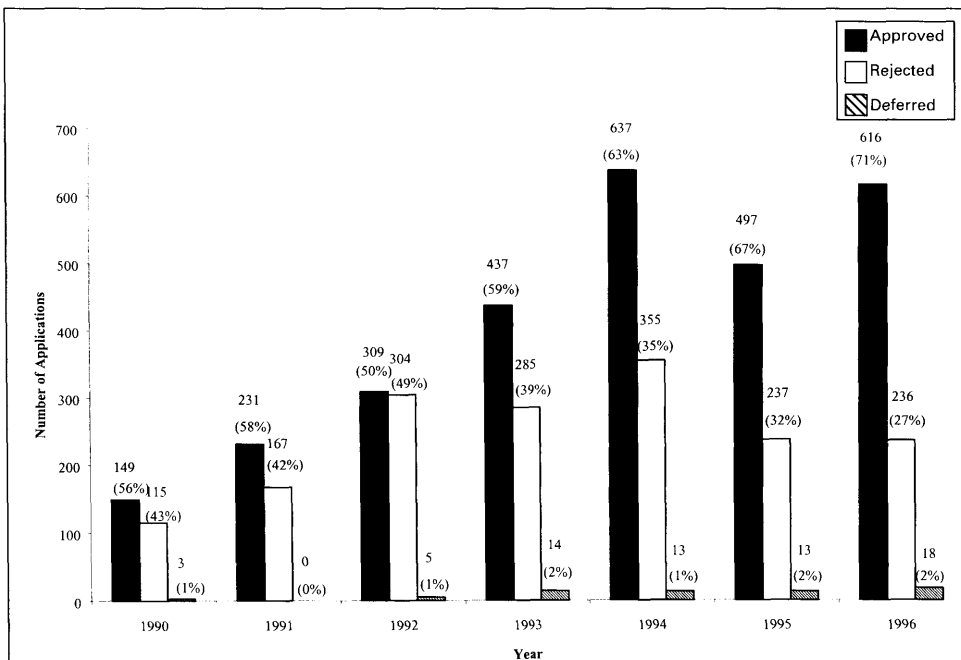


Figure 2.1 A Comparison of s. 16 Planning Applications Considered by the Town Planning Board in 1990–1996

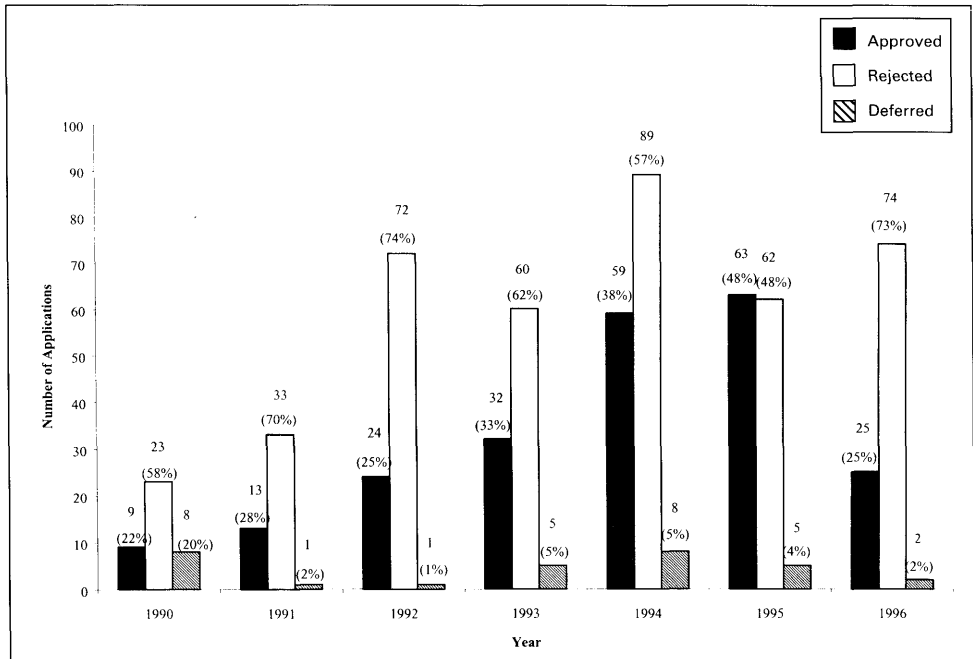


Figure 2.2 A Comparison of s. 17(1) Review Applications Considered by the Town Planning Board in 1990–1996

There are altogether **50 cases** covered in this book. The geographical distribution of the appeal cases is shown in Table 2.1. In terms of geographic coverage, the majority, i.e. 40 cases (80%), arose from the New Territories; 6 (12%) from Kowloon and 4 (6%) from Hong Kong Island. Of the 39 New Territories cases, 6 (15%) arose from new towns and 33 (85%) from the rural New Territories.

Zoning of the appeal sites concerned is depicted in Table 2.2. There were a total of 26 (52%) cases arising from Unspecified Use Zones; 7 (14%) cases arose from Industrial Zones; 3 (6%) from Residential (Group A) Zones; 2 (4%) from each of the following: Comprehensive Development Area (CDA), Residential (Group B), Residential (Group C), Government, Institution and Community and Agriculture Zones; and 1 (2%) each from Undetermined, Residential (Group D), Village Type Development, Open Storage, and Site of Special Scientific Interest Zones. One case dealt only with procedural matters and no land use issue was invoked.

The List of Cases gives an annotated summary of the nature of the use under appeal. In terms of their nature, 2 cases dealt with industrial plot ratios prescribed in OZP, 5 with office use within Industrial Zones, 1 with fast food shop in Industrial Zones, 2 with residential plot ratio prescribed in OZP, 2 involving building plans, 4 land resumption, 3 development on Crown

land, 2 CDA and master layout plans, 2 development in G/IC Zones, 4 small houses, 2 office/commercial development in R(A) Zones, 7 open storage uses, 1 conversion of parking spaces into retail uses, 1 parking space and columbarium uses, 10 residential development in 'Unspecified Use' Zones, 5 workshops in 'Unspecified Use' Zones, 5 warehouses in 'unspecified use' zones, 2 development in Green Belts, and 2 petrol filling stations.

Table 2.1 The Geographical Distribution of Planning Appeal Cases

| Case No. | Case Name | Location of Planning Appeal Sites |         |                      |            |            |            |            |          |     |
|----------|-----------|-----------------------------------|---------|----------------------|------------|------------|------------|------------|----------|-----|
|          |           | Hong Kong Island                  | Kowloon | New Territories (NT) |            |            |            |            | NT Total |     |
|          |           |                                   |         | New Towns            | Rural NWNT | Rural NENT | Rural SENT | Rural SWNT |          |     |
| 1991     | 1         | Alticosmic                        |         |                      | X          |            |            |            |          | X   |
| 1992     | 2         | Conduit Road                      | X       |                      |            |            |            |            |          |     |
|          | 3         | Wo Yi Hop Road                    |         |                      | X          |            |            |            |          | X   |
|          | 4         | Sung Dynasty City                 |         |                      | X          |            |            |            |          | X   |
|          | 5         | OTB                               |         |                      | X          |            |            |            |          | X   |
|          | 7         | Full Look                         |         |                      |            | X          |            |            |          | X   |
|          | 8         | Yuen To-shing                     |         |                      |            |            |            | X          |          | X   |
|          | 9         | Yuen Shu-ling                     |         |                      |            |            |            | X          |          | X   |
|          | 10        | Treasure Base                     |         |                      |            | X          |            |            |          | X   |
|          | 12        | Good Luck                         |         | X                    |            |            |            |            |          |     |
|          | 13        | Pak Kong                          |         |                      |            |            |            | X          |          | X   |
|          | 14        | On Luk Tong                       | X       |                      |            |            |            |            |          |     |
|          | 15        | Ultra Force                       |         |                      |            | X          |            |            |          | X   |
|          | 18        | Kingspeed Engineering             |         |                      |            |            | X          |            |          | X   |
|          | 19        | Kun Kee Motor                     |         |                      |            |            | X          |            |          | X   |
| 1993     | 2         | Bowen Road                        | X       |                      |            |            |            |            |          |     |
|          | 4         | Treasure Base                     |         |                      |            | X          |            |            |          | X   |
|          | 5         | Treasure Base                     |         |                      |            | X          |            |            |          | X   |
|          | 11        | Shell Hong Kong                   |         |                      |            | X          |            |            |          | X   |
|          | 12        | Yook Tong Estate                  |         | X                    |            |            |            |            |          |     |
|          | 13        | Henderson                         |         |                      |            | X          |            |            |          | X   |
|          | 14        | Yiu Cho Investment                | X       |                      |            |            |            |            |          |     |
|          | 16        | Naturaluck                        |         |                      |            |            | X          |            |          | X   |
|          | 17        | Shun Fat Container                |         |                      |            | X          |            |            |          | X   |
|          | 19        | Ever Need                         |         |                      |            | X          |            |            |          | X   |
| 1994     | 1         | Tang Sai Hung                     |         |                      |            | X          |            |            |          | X   |
|          | 2         | So Cho Cheung                     |         |                      | X          |            |            |            |          | X   |
|          | 5         | Tong Kam Wong                     |         |                      |            |            |            | X          |          | X   |
|          | 6         | Ng Siu Wing                       |         |                      | X          |            |            |            |          | X   |
|          | 9         | Lee Yiu Kam                       |         |                      |            |            |            | X          |          | X   |
|          | 10        | Sun Link Properties               |         |                      |            |            |            | X          |          | X   |
|          | 11        | Wong Yee Fai (1)                  |         |                      |            | X          |            |            |          | X   |
|          | 12        | Lai Sun Development               |         | X                    |            |            |            |            |          |     |
|          | 14        | Sanyear Investment                |         |                      |            |            |            | X          |          | X   |
| 1995     | 2         | Charming City                     |         |                      |            | X          |            |            |          | X   |
|          | 5         | Planet Universal                  |         |                      |            | X          |            |            |          | X   |
|          | 7         | Delight World                     |         |                      |            | X          |            |            |          | X   |
|          | 8         | Yin Ning Savings                  |         |                      |            | X          |            |            |          | X   |
|          | 16        | Arzghano Leather                  |         |                      |            | X          |            |            |          | X   |
|          | 18        | Jetway Civil                      |         |                      |            |            |            | X          |          | X   |
|          | 19        | Lo Kwok-wai                       |         |                      |            |            |            | X          |          | X   |
|          | 21        | Cheung Hing Lung                  |         |                      |            | X          |            |            |          | X   |
|          | 22        | Lucky Gain                        | X       |                      |            |            |            |            |          |     |
|          | 26        | Wong Yee Fai (2)                  |         |                      |            | X          |            |            |          | X   |
|          | 28        | Fine Tower                        | X       |                      |            |            |            |            |          |     |
| 1996     | 1         | Yolanda Fan                       | X       |                      |            |            |            |            |          |     |
|          | 4         | Container System                  |         |                      |            | X          |            |            |          | X   |
|          | 8         | Leung Wing-nin                    |         |                      |            | X          |            |            |          | X   |
|          | 12        | Rightlane Investment              | X       |                      |            |            |            |            |          |     |
| 1997     | 1         | Connie Law Yuk Wah                |         |                      |            | X          |            |            |          | X   |
| Total    | 50        |                                   | 8       | 3                    | 6          | 21         | 8          | 4          | 0        | 39  |
|          | 100%      |                                   | 16%     | 6%                   | 12%        | 42%        | 16%        | 8%         | 0%       | 78% |

NWNT = Northwestern New Territories  
 NENT = Northeastern New Territories  
 SENT = Southeastern New Territories  
 SWNT = Southwestern New Territories

Table 2.2 The Zoning of Appeal Sites

| C     | Case No. | Case Name             | Zoning in IDPA / DPA Plans / OZPs |    |    |                            |     |     |      |      |      |      |     |    |    |     |    |    |      |           |    |
|-------|----------|-----------------------|-----------------------------------|----|----|----------------------------|-----|-----|------|------|------|------|-----|----|----|-----|----|----|------|-----------|----|
|       |          |                       | CDA                               | OU | U  | Unspecified use (IDPA/DPA) | C   | C/R | R(A) | R(B) | R(C) | R(D) | SIC | V  | OS | AGR | SB | O  | SSSI | Procedure |    |
| 1991  | 1        | Alicosome             |                                   |    |    | X                          |     |     |      |      |      |      |     |    |    |     |    |    |      |           |    |
| 1992  | 2        | Conduitt Road         |                                   |    |    |                            |     |     | X    |      |      |      |     |    |    |     |    |    |      |           |    |
|       | 3        | Wo Yi Ho Road         |                                   |    |    | X                          |     |     |      |      |      |      |     |    |    |     |    |    |      |           |    |
|       | 4        | Sung Dynasty City     | X                                 |    |    |                            |     |     |      |      |      |      |     |    |    |     |    |    |      |           |    |
|       | 5        | OTB                   |                                   |    |    | X                          |     |     |      |      |      |      |     |    |    |     |    |    |      |           |    |
|       | 7        | Full Look             |                                   |    |    |                            |     |     |      |      |      | X    |     |    |    |     |    |    |      |           |    |
|       | 8        | Yuen To-shing         |                                   |    |    | X                          |     |     |      |      |      |      |     |    |    |     |    |    |      |           |    |
|       | 9        | Yuen Shu-ling         |                                   |    |    | X                          |     |     |      |      |      |      |     |    |    |     |    |    |      |           |    |
|       | 10       | Treasure Base (1)     |                                   |    |    |                            |     |     |      |      |      |      |     |    |    |     |    |    |      | X         |    |
|       | 12       | Good Luck             |                                   |    |    |                            |     |     | X    |      |      |      |     |    |    |     |    |    |      |           |    |
|       | 13       | Pak Kong              |                                   |    |    | X                          |     |     |      |      |      |      |     |    |    |     |    |    |      |           |    |
|       | 14       | On Luk Tong           |                                   |    |    |                            |     |     | X    |      |      |      |     |    |    |     |    |    |      |           |    |
|       | 15       | Ultra Force           |                                   |    |    | X                          |     |     |      |      |      |      |     |    |    |     |    |    |      |           |    |
|       | 18       | Kingspeed Engineering |                                   |    |    | X                          |     |     |      |      |      |      |     |    |    |     |    |    |      |           |    |
|       | 19       | Kun Kee Motor         |                                   |    |    | X                          |     |     |      |      |      |      |     |    |    |     |    |    |      |           |    |
| 1993  | 2        | Bowen Road            |                                   |    |    |                            |     |     |      |      |      |      |     |    |    |     | X  |    |      |           |    |
|       | 4        | Treasure Base (2)     |                                   |    |    | X                          |     |     |      |      |      |      |     |    |    |     |    |    |      |           |    |
|       | 5        | Treasure Base (2)     |                                   |    |    | X                          |     |     |      |      |      |      |     |    |    |     |    |    |      |           |    |
|       | 11       | Shell Hong Kong       |                                   |    |    |                            |     |     |      |      |      |      | X   |    |    |     |    |    |      |           |    |
|       | 12       | Yook Tong Estate      | X                                 |    |    |                            |     |     |      |      |      |      |     |    |    |     |    |    |      |           |    |
|       | 13       | Henderson             |                                   |    |    | X                          |     |     |      |      |      |      |     |    |    |     |    |    |      | X         |    |
|       | 14       | Yiu Cho Investment    |                                   |    |    |                            |     |     | X    |      |      |      |     |    |    |     |    |    |      |           |    |
|       | 16       | Naturaluck            |                                   |    |    | X                          |     |     |      |      |      |      |     |    |    |     |    |    |      |           |    |
|       | 17       | Shun Fat Container    |                                   |    |    | X                          |     |     |      |      |      |      |     |    |    |     |    |    |      |           |    |
|       | 19       | Ever Need             |                                   |    |    | X                          |     |     |      |      |      |      |     |    |    |     |    |    |      |           |    |
| 1994  | 1        | Tang Sai Hung         |                                   |    |    | X                          |     |     |      |      |      |      |     |    |    |     |    |    |      |           |    |
|       | 2        | So Cho Cheung         |                                   |    |    | X                          | X   |     |      |      |      |      |     |    |    |     |    |    |      |           |    |
|       | 5        | Tong Kam Wong         |                                   |    |    | X                          |     |     |      |      |      |      |     |    |    |     |    |    |      |           |    |
|       | 6        | Ng Siu Wing           |                                   |    |    |                            |     |     |      |      |      |      | X   |    |    |     |    |    |      |           |    |
|       | 9        | Lee Yiu Kam           |                                   |    |    | X                          |     |     |      |      |      |      |     |    |    |     |    |    |      |           |    |
|       | 10       | Sun Link Properties   |                                   |    |    | X                          |     |     |      |      |      |      |     |    |    |     |    |    |      |           |    |
|       | 11       | Wong Yee Fai (1)      |                                   |    |    | X                          |     |     |      |      |      |      |     |    |    |     |    |    |      |           |    |
|       | 12       | Lai Sun Development   |                                   |    |    |                            | X   |     |      |      |      |      |     |    |    |     |    |    |      |           |    |
|       | 14       | Sanyear Investment    |                                   |    |    | X                          |     |     |      |      |      |      |     |    |    |     |    |    |      |           |    |
| 1995  | 2        | Charming City         |                                   |    |    | X                          |     |     |      |      |      |      |     |    |    |     |    |    |      |           |    |
|       | 5        | Planet Universal      |                                   |    |    | X                          |     |     |      |      |      |      |     |    |    |     |    |    |      |           |    |
|       | 7        | Delight World         |                                   |    |    | X                          |     |     |      |      |      |      |     |    |    |     |    |    |      |           |    |
|       | 8        | Yin Ning Savings      |                                   |    |    | X                          |     |     |      |      |      |      |     |    |    |     |    |    |      |           |    |
|       | 16       | Argentino Leather     |                                   |    |    |                            |     |     |      |      |      | X    |     |    |    |     |    |    |      |           |    |
|       | 18       | Jetway Civil          |                                   |    |    | X                          |     |     |      |      |      |      |     |    |    | X   |    |    |      |           |    |
|       | 19       | Lo Kwok-wai           |                                   |    |    | X                          |     |     |      |      |      |      |     |    |    |     |    |    |      |           |    |
|       | 21       | Cheung Hing Lung      |                                   |    |    |                            | X   |     |      |      |      |      |     |    |    |     |    |    |      |           |    |
|       | 22       | Lucky Gain            |                                   |    |    |                            |     |     |      |      |      |      |     |    |    |     |    |    |      |           |    |
|       | 26       | Wong Yee Fai (2)      |                                   |    |    | X                          |     |     |      |      |      |      |     |    |    |     |    |    |      |           |    |
|       | 28       | Fine Tower            |                                   |    |    |                            | X   |     |      |      |      |      |     |    |    |     |    |    |      |           |    |
| 1996  | 1        | Yolanda Fan           |                                   |    |    |                            |     |     |      | X    |      |      |     |    |    |     |    |    |      |           |    |
|       | 4        | Container System      |                                   |    |    | X                          |     |     |      |      |      |      |     |    |    |     |    |    |      |           |    |
|       | 8        | Leung Wing-nin        |                                   |    |    |                            |     |     |      |      |      |      |     |    | X  |     |    |    |      |           |    |
|       | 12       | Rightlane Investment  |                                   |    |    |                            |     |     |      |      | X    |      |     |    |    |     |    |    |      |           |    |
| 1997  | 1        | Connie Law Yuk Wah    |                                   |    |    |                            |     |     |      |      |      |      |     |    |    | X   |    |    |      |           |    |
| Total | 50       |                       | 2                                 | 0  | 1  | 26                         | 7   | 0   | 0    | 3    | 2    | 2    | 1   | 2  | 1  | 1   | 2  | 1  | 0    | 1         | 1  |
|       | 100%     |                       | 4%                                | 0% | 2% | 52%                        | 14% | 0%  | 0%   | 6%   | 4%   | 4%   | 2%  | 4% | 2% | 2%  | 4% | 2% | 0%   | 2%        | 2% |

## TIME INVOLVED

The time involved in a development application from lodging a s. 16 application to reaching an appeal decision is recorded in Table 2.3. Not all appeal decisions show the exact dates of the s. 16 applications or the date of the appeal hearing. A search of the Planning Department's records of Town Planning Board applications has identified all dates of s. 16 applications. The secretary of the Town Planning Appeal Board has provided dates of meetings not mentioned in the original decisions. From Table 2.3, it can be seen that an average of  $1\frac{1}{2}$  years (18.1 months) (the range was 3.5 to 36 months) is needed. Then it took an average of another month (33 calendar days; the range is 6 to 127 days) for the decision to be laid down.



Table 2.3 Time Involved from the Date of Planning Application and Appeal Hearing to the Date of Appeal Decision

| Case No | Case Name | Date of S 16 Application | Last Day of Appeal Hearing | Date of Appeal Decision | Time From S 16 Application | Time From Last Date of     |     |
|---------|-----------|--------------------------|----------------------------|-------------------------|----------------------------|----------------------------|-----|
|         |           |                          |                            |                         | To Appeal Decision         | Hearing to Appeal Decision |     |
|         |           |                          |                            |                         | Approx. (months)           | Approx. (days)             |     |
| 1991    | 1         | Allicomic                | 8/3/91                     | 5/3/1992                | 14/3/1992                  | 12                         | 9   |
| 1992    | 2         | Conduit Road             | 17/4/91                    | 29/6/1992               | 31/7/1992                  | 16                         | 32  |
|         | 3         | Wo Yi Hop Road           | 7/11/90                    | 10/7/1992               | 28/7/1992                  | 20                         | 18  |
|         | 4         | Sung Dynasty City        | 20/4/91                    | 21/7/1992               | 29/7/1992                  | 15                         | 39  |
|         | 5         | OTB                      | 26/6/91                    | 14/9/1992               | 25/9/1992                  | 16                         | 11  |
|         | 7         | Full Look                | 14/8/91                    | 16/10/1992              | 28/10/1992                 | 15                         | 12  |
|         | 8         | Yuen To-shing            | 23/8/91                    | 9/12/1992               | 16/1/1993                  | 17.5                       | 38  |
|         | 9         | Yuen Shu-ling            | 23/8/91                    | 9/12/1992               | 16/1/1993                  | 17.5                       | 38  |
|         | 10        | Treasure Base            | 1/11/91                    | 2/10/1992               | 13/10/1992                 | 12.5                       | 11  |
|         | 12        | Good Luck                | 1/10/92                    | 17/1/1993               | 15/1/1993                  | 3.5                        | 8   |
|         | 13        | Pak Kong                 | 12/12/91                   | 15/2/1993               | 24/2/1993                  | 14                         | 9   |
|         | 14        | On Luk Tong              | 4/12/91                    | 4/3/1993                | 14/3/1993                  | 15.5                       | 10  |
|         | 15        | Ultra Force              | 23/12/91                   | 24/3/1993               | 18/4/1993                  | 15.5                       | 25  |
|         | 18        | Kingspeed Engineering    | 21/2/92                    | 18/5/1993               | 28/6/1993                  | 16                         | 41  |
|         | 19        | Kun Kee Motor            | 2/3/92                     | 26/5/1993               | 28/6/1993                  | 16                         | 33  |
| 1993    | 2         | Bowen Road               | 23/3/92                    | 21/6/1993               | 29/6/1993                  | 15                         | 8   |
|         | 4         | Treasure Base            | 1/1/91                     | 7/12/1993               | 22/12/1993                 | 26                         | 15  |
|         | 5         | Treasure Base            | 8/5/92                     | 7/12/1993               | 22/12/1993                 | 20                         | 15  |
|         | 11        | Shell Hong Kong          | 5/2/92                     | 13/1/1994               | 21/3/1994                  | 14                         | 67  |
|         | 12        | Yook Tong Estate         | 9/10/92                    | 13/4/94                 | 9/5/1994                   | 19                         | 26  |
|         | 13        | Henderson                | 1/8/92                     | 23/5/94                 | 26/8/1994                  | 25                         | 95  |
|         | 14        | Yiu Cho Investment       | 8/10/92                    | 7/3/94                  | 21/4/1994                  | 17                         | 45  |
|         | 16        | Naturaluck               | 18/4/93                    | 9/3/94                  | 21/4/1994                  | 12                         | 43  |
|         | 17        | Shun Fat Container       | 25/11/92                   | 24/3/94                 | 9/5/1994                   | 17.5                       | 46  |
|         | 19        | Ever Need                | 5/3/93                     | 2/6/94                  | 29/6/1994                  | 16                         | 27  |
| 1994    | 1         | Tang Sai Hung            | 10/9/93                    | 17/11/94                | 11/12/1994                 | 14.5                       | 24  |
|         | 2         | So Cho Cheung            | 7/8/93                     | 19/8/94                 | 28/11/1994                 | 16                         | 101 |
|         | 5         | Tong Kam Wong            | 18/10/93                   | 12/7/95                 | 27/7/1995                  | 21                         | 12  |
|         | 6         | Ng Siu Wing              | 9/12/93                    | 18/1/95                 | 7/3/1995                   | 15                         | 48  |
|         | 9         | Lee Yiu Kam              | 15/11/93                   | 23/3/95                 | 10/4/1995                  | 17                         | 18  |
|         | 10        | Sun Link Properties      | 11/12/93                   | 16/5/95                 | 14/6/1995                  | 18                         | 29  |
|         | 11        | Wong Yee Fai (1)         | 21/10/93                   | 24/5/95                 | 14/6/1995                  | 20                         | 21  |
|         | 12        | Lai Sun Development      | 19/2/94                    | 9/6/95                  | 14/9/1995                  | 19                         | 36  |
|         | 14        | Sanyear Investment       | 24/2/94                    | 25/7/95                 | 21/8/1995                  | 18                         | 27  |
| 1995    | 2         | Charming City            | 30/4/94                    | 12/3/96                 | 29/3/1996                  | 23                         | 17  |
|         | 5         | Planet Universal         | 2/6/94                     | 13/10/95                | 26/10/1995                 | 17                         | 13  |
|         | 7         | Delight World            | 31/3/94                    | 12/10/95                | 18/10/1995                 | 16.5                       | 6   |
|         | 8         | Yin Ning Savings         | 28/2/94                    | 20/8/95                 | 27/10/1995                 | 19                         | 68  |
|         | 16        | Arzginano Leather        | 5/9/94                     | 21/3/96                 | 12/4/1996                  | 19                         | 22  |
|         | 18        | Jetway Civil             | 27/9/94                    | 26/6/96                 | 25/7/1996                  | 20                         | 29  |
|         | 19        | Lo Kwok-wai              | 15/7/94                    | 16/5/96                 | 4/6/1996                   | 24                         | 19  |
|         | 21        | Cheung Hing Lung         | 14/1/94                    | 4/6/96                  | 6/6/1996                   | 30.5                       | 63  |
|         | 22        | Lucky Gain               | 29/9/94                    | 31/8/96                 | 18/12/1996                 | 14.5                       | 127 |
|         | 26        | Wong Yee Fai (2)         | 12/10/94                   | 22/3/96                 | 12/4/1996                  | 18                         | 21  |
|         | 28        | Fine Tower               | 2/11/94                    | 26/4/1997               | 16/6/1997                  | 32                         | 51  |
| 1996    | 1         | Yolanda Fan              | 24/3/95                    | 17/7/96                 | 30/8/1996                  | 17                         | 44  |
|         | 4         | Container System         | 23/2/95                    | 4/10/96                 | 29/10/1996                 | 20                         | 25  |
|         | 8         | Leung Wing-nin           | 4/10/95                    | 12/6/97                 | 12/7/1997                  | 21.5                       | 30  |
|         | 12        | Rightlane Investment     | 26/11/94                   | 23/10/1997              | 12/11/1997                 | 35.5                       | 20  |
| 1997    | 1         | Connie Law Yuk Wah       | 11/3/96                    | 25/9/1997               | 3/11/1997                  | 17.5                       | 39  |
| Average |           |                          |                            |                         | 18.1                       | 32.6                       |     |

## LEGAL REPRESENTATION

Many (at least 18 %) of the appellants were stated in the decisions to have been represented by lawyers. Others were represented by other types of experts or professionals such as architects, town planners (in at least 3 cases). Where the appellants were represented by lawyers or other professionals such as planners, surveyors, architects and ecologists, the Town Planning Board was also so represented. Professional planners represented the appellant or were asked to give evidence for the appellant in at least four decided cases.

## FAILURE RATES OF APPEALS

Of the 50 appeal cases investigated in this book, one (the *Treasure Base* case, case no. 10/92) was ruled ineffective, and only 5 were allowed. The rest were

all dismissed. Figure 2.3 shows the success and failure rates of reported cases for the years 1992–1997.

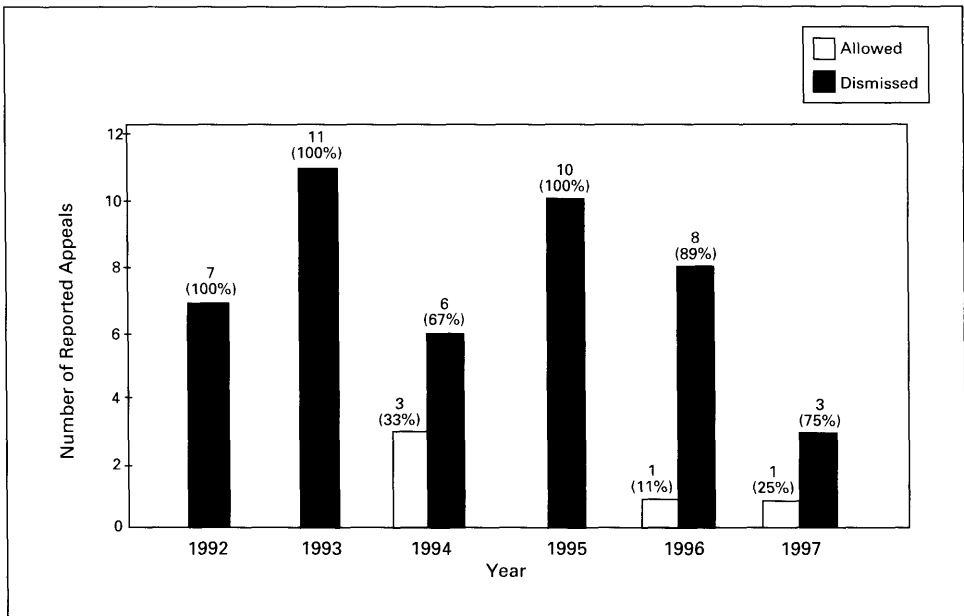


Figure 2.3 A Comparison of s. 17B Appeals Decided by the Town Planning Appeal Board in 1992–1997

The majority of the decided appeal cases came before Mr Justice Litton, OBE, as Chairman of Panel or Mr Robert C Tang, QC(SC), JP, as Chairman of Panel. Mr Justice Litton, now a Permanent Judge with the Court of Final Appeal, dealt with 22 cases. All except 1 were dismissed. Mr Robert Tang dealt with 25 cases. Since case no. 8/95, there has been no further decided case that came under a panel chaired by the former. All except 4 were dismissed. Two cases came before Mr Ronny F.H. Wong, SC. Both cases were dismissed.

The first successful case was the *Yiu Cho Investment* case (case no. 14/93), which was allowed on 8 April 1994 by the Appeal Board chaired by Mr Justice Litton. The case involved the application for an office development in a Residential Group (A) Zone in Leighton Road.

The second successful appeal was the *Naturaluck* case (case no. 16/93) which was decided by the Appeal Board chaired by Mr Robert Tang QC, JP, on 21 April 1994. This case dealt with a 572 m<sup>2</sup> petrol filling station in the New Territories.

The third successful appeal case was the famous *Henderson* case (case no. 13/93), which was allowed on 26 August 1994 by all Appeal Board members except Mr David C. DaSilva who dissented. The Appeal Board was again

chaired by Mr Robert Tang. This case dealt with a huge 98.3 ha residential-golf course-nature reserve project near the Mai Po Marshes, which is a designated Ramsar site. This case has remained the most important appeal case in terms of its legal and planning significance. (See sections below.)

The fourth successful case reported was the *So Cho Cheung* case (case no. 2/94) which was decided on 28 November 1994 by the Appeal Board chaired by Mr Justice Litton, OBE. This case dealt with an application for operating a fast food shop in a unit in Fo Tan, Shatin. The appeal was allowed with the condition that the planning permission would expire on 31 December 1997.

The fifth successful case reported was the *Yolanda Fan* case (case no. 1/96) decided on 30 August 1996 by the Appeal Board chaired by Mr Robert Tang. This case dealt with the use of a flat as a temple. In this case, it was reported that members of the Appeal Board had visited the site on request of involved parties before decision was made.

The sixth successful case was the *Rightlane Investment* case (case no. 12/96) which was the first reported to have been heard and decided after 1 July 1997 by the Appeal Board. This Board was chaired by Mr Robert Tang; it dealt with an application for a 'minor relaxation of plot ratio' for a Rural Building Lot at Headland Road.

## REASONS FOR DECISIONS

The incidence of typical reasons for dismissing appeals are summarized in **Table 2.4**. A list of key reasons and relevant cases are given below:

- absence of any justification for the applied uses (*the Wong Yee Fai (1) and Leung Wing-nin cases*)
- being ad hoc development (*the Sung Dynasty City, Full Look, Yuen To-shing and Yuen Shu-ling cases*)
- against planning intention (*expressly so: the OTB, Full Look, Pak Kong, Treasure Base (1 & 2), Shell Hong Kong, Shun Fat Container, Ever Need, Tang Sai Hung, Tong Kam Wong, Ng Siu Wing, Lee Yiu Kam, Wong Yee Fai (1), Lai Sun Development, Charming City, Planet Universal, Delight World, Yin Ning Savings, Jetway Civil, Lo Kwok-wai, Cheung Hing Lung, and Connie Law Yuk Wah cases; impliedly so: the Alticosmic, Conduit Road, Wo Yi Hop Road, Sung Dynasty City, Yuen To-shing, Yuen Shu-ling, Kingspeed Engineering, Kun Kee Motor, Bowen Road and Yook Tong Estate; not considered so in the Henderson, Naturaluck, So Cho Cheung, Sun Link Properties, Sanyear Investment, Fine Tower cases*)
- unauthorized development (*the Pak Kong, Kingspeed Engineering, Kun Kee Motor and Shun Fat Container Terminal, Wong Yee Fai (1), Lo Kwok-wai, Wong Yee Fai (2) cases*)
- causing traffic congestion (*the Alticosmic, Wo Yi Hop Road, and Shell Hong Kong cases*)

- inadequate on-site loading and unloading facilities (*the Good Luck Case*)
- causing parking problems (*the On Luk Tong Case*)
- affected by possible land resumption (*the Ultra Force, the Delight World and Yin Ning Savings cases*)
- mitigation measures requiring land resumption (*the Shell Hong Kong case*)
- Emergency Vehicular Access (EVA) inadequate (*the Ultra Force case*)
- 400kV power pylons (*the Ultra Force case*)
- unsatisfactory impact assessment (*the Ultra Force and Fine Tower cases*)
- cumulative environmental impacts (*the Kingspeed Engineering Case; not considered in the Yiu Cho Investment case*)
- development on Green Belt land with little public interest (*the Bowen Road case*)
- development on Crown land with little public interest (*the Bowen Road case*)
- A large-scale columbarium run on a commercial basis in an agricultural setting (*the Treasure Base case(2)*)
- being incompatible with the rural environment (*the Lee Yiu Kam, Wong Yee Fai (1) cases*)
- being incompatible with a G/IC use (*the Lucky Gain and Fine Tower cases*)
- exceeding carrying capacity of external link (*the Sun Link Properties case*)
- no future market for the proposed use (*the Lai Sun Investment case*)
- planning conditions unworkable (*the Planet Universal, Delight World and Yin Ning Savings cases*)

Of all the major reasons against the appellants, the most interesting and important is that of ‘planning intention’ or ‘planning objectives’. Table 2.5 shows the location of the ‘planning intention’.

### **RELEVANCE OF CROWN (GOVERNMENT) LEASES**

The Appeal Board occasionally derived its decisions by reference to the conditions of the Crown lease (*the OTB case*). However, this is rare (*the On Luk Tong case*).

### **ECONOMIC CONSIDERATIONS: CONTEMPT WITH THE MARKET OR MARKET PHOBIA?**

The notion of planning intention is often expressed by the Appeal Board strongly against its perception of the market as an inevitable antithesis of planning or the environment.

An indication of this mentality was first reported in the decision for the *OTB* case in which it was stated that permitting the application would set a bad precedent and amount to ‘throwing planning out of the window’.

Another example is the reference to 'self-interest' to an application for a small metal workshop in the *Kingspeed Engineering* case with the appellant, being a supplier contractor for the government.

In the *Treasure Base (2)* case, a commercially run and large-scale columbarium is considered not compatible with surrounding agricultural uses.

In the *Bowen Road* case, it was ruled that an application which benefits private individuals without demonstrating social benefits should not be approved.

However, the Appeal Board ran into a 180-degree turn in the subsequent *Henderson* case. Allowing the appeal, it stated that 'the *raison d'être* for the existence of the Board and the Appeal Board' was: 'Just as the Town Planning Ordinance protects the Community, it protects private owners as well. An owner is just entitled to rely on a DPA Plan/OZP as the Government.' Yet, the Appeal Board backtracked very soon on this point.

In the *Lai Sun Investment* case, it was ruled that a use should not be approved if its future market was doubtful, but there was no need for the appellant to establish that the proposed use would produce any planning gain. Similar logic was applied in the *Lucky Gain* and *Fine Tower* cases where the Appeal Board relied on its own market assessment to conclude that there was unlikely to be a market for the applied use and accordingly dismissed the appeal.

## MODE OF REASONING

### The Dilemma Confronting the Appeal Board

A major problem confronting the Appeal Board is that statutory planning is largely a matter of the exercise of discretionary power while there are few substantial or procedural rules that help applying such power. Most planning policies, standards, guidelines, definitions and statements are administrative documents. No systematic attempts have been made to consolidate or codify these documents on a statutory basis. The Town Planning Regulations, unlike Building Regulations or environmental protection circulars, have remained underdeveloped. Yet the Appeal Board has been pressed to discover both categorical principles, such as 'presumption in favour of development' (or otherwise) and 'planning intention' as well as concrete technical concepts, such as 'transport capacity' from such messy materials. Due probably to the legal background of its leaders, the Appeal Board tends to adopt an adversarial rather than inquisitorial approach to hearing the appeals. Thus, the Appeal Board has to construct a logical system of principles and interpretation of the materials available whenever they are invoked by either the respondent or the appellant in an adversarial manner. Sometimes, as shown in individual reported cases in Chapter 4, the reasoning is hardly consistent with or amenable to the development of a coherent body of rules, which are intelligible

in terms of the ideology of a capitalist market economy, such as the one in Hong Kong.

### **The ‘Action and Reaction’ Principle**

It seems that the Appeal Board has adopted a rather passive and reactionary stance towards the appellant. When he or she is represented by advocates, the Appeal Board tends to address all submissions. When he or she is not represented, the Appeal Board tends to make fewer and shorter comments, though the reasons for decisions are not much different. Where the advocate defends the appellant’s position vehemently, the Appeal Board also reacts rigorously. Where the appellant’s submissions are casual, the Appeal Board also tends to be more relaxed.

### **Is There a ‘Presumption in Favour of Development’?**

The position is utterly unsatisfactory. It was rejected in the *Treasure Base* case while in the *Ultra Force* case, it was ruled that there was no presumption in favour of development for private projects. However, the *presumption was accepted in Henderson* and more recent cases, such as *Natural Luck*, *Ng Siu Wing* and *Fine Tower* cases.

By large, it seems that there is no such presumption. The major problem area is with Unspecified Use Zones in IDPA or DPA Plans, which have been by now almost completely replaced by OZPs. However, even in OZPs, explicit policy clarification, preferably made on a statutory basis, is desirable. Such clarification will reduce the costs of abortive applications. See Chapter 3 for details of the rules that emerge in this area.

### **Is the Burden of Proof on the Appellant?**

The position is unclear, but the overall picture is that the burden is on the appellant, especially where the relevant guidelines so dictate. (*The On Lok Tong*, *Ultra Force cases v the Henderson*, *Wong Yee Fai (1)* and *Leung Wing-nin cases*, and most importantly, the *Connie Law Yuk Wah cases*.)

### **Zero Nuisance**

The general position is that if the appellant cannot prove zero nuisance in key areas considered by the respondent as being significant, the appeal will hardly be allowed. (*See the Ultra Force and Kingspeed Engineering Company cases; but compare with the Yiu Cho Investment and Yolanda Fan cases.*)

### **Cumulative Impact**

Sometimes, the Appeal Board is concerned with the cumulative impact of a

proposed development and other similar proposals in a given planning unit or area, rather than just the impact of an individual proposal. (See the *On Luk Tong*, *Kingspeed Engineering* and *Kun Kee Motor* cases; but compare with the logic therein with the *Yiu Cho Investment* case.) A problem is that there seems to be little guidance regarding the objective calibration of the 'environmental' or 'carrying' capacity of the relevant planning unit or area. Hence, this concern tends to be intuitive and conjectural.

### **Cost Benefit Reasoning Wanting**

As the Appeal Board tends to adopt the zero nuisance rule, it ignores the net benefits or costs of an application to the planning area. The only exception is the *Henderson* case. (Compare the *Good Luck* and *On Lok Tong* cases with the *Henderson* case.)

### **Precedents**

Unlike the Building Appeal Tribunal, the Town Planning Appeal Board has not expressly developed the practice of following the rules of its own earlier decisions. In this sense, the Planning Appeal Board has not developed its own precedents. However, it has been keen to deal with the arguments of 'precedents' advanced by the respondent.

Two problems are apparent with the use of 'precedents' in this respect.

#### (a) Interpretation of precedents

At law, precedents have values in their *ratios* for identical or similar facts, not expressly just for the results of litigation (other than sentences or award of damages). The precedents in many cases (e.g. the *On Lok Tong* case) should have been investigated as regards their substantive technical aspects, such as traffic implications. Yet, the Appeal Board was often only advised to pay attention to the success and failure counts, rather than to the nature of the successful or rejected cases.

In the *On Lok Tong* case, for instance, it can be seen from the decisions that the Appeal Board was not mentioned to have been advised of even the outline nature of the eight cases rejected by the Town Planning Board. That being the case, the concept of 'bad precedent' could have been unreasonably employed for relevant considerations; the rules and basic facts for rejecting those eight cases had not been considered — even though the merit of the decision for these eight cases and the present appeal could be entirely correct.

#### (b) The idea of bad precedents in planning applications

This is always used as a reason for rejecting a s. 16 application in the first instance or in a subsequent s. 17 review. As the Town Planning Board is to

decide every application on its own merits, it is doubtful what 'a bad precedent' means.

Where the notion of 'bad precedent' is used as a reason rejecting s. 16 or s. 17(1) applications/reviews, one finds it hard to understand the logic behind. Where a case is a good case and approved, no problem of bad precedent will arise. Where the case is a bad case and rejected, no problem of bad precedent will arise either. It is only where (a) a bad case is approved or (b) a good case is rejected will the problem of 'bad precedent', as *an evaluative description by a third party* (other than the Planning Boards), will really arise.

The Planning Boards cannot possibly invoke the notion of bad precedents as a reason against an application or dismissing an appeal, as they cannot logically give a 'third party' view when *explaining their own decisions*. As an independent third party, the Appeal Board may, however, in allowing an appeal, criticize the respondent for not having approved the application in the first instance and hence having set a bad precedent. The Appeal Board may also praise the respondent for having rejected an application where the former chooses to dismiss the appeal.

However, the Town Planning Board cannot use the reason of 'bad precedent' in rejecting an application, because that argument is no explanation at all.

It is a welcome sign that in more recent cases (such as the *Rightlane Investment* case), the Appeal Board tends to accept that where a case can be supported, no problem with 'bad precedent' will arise.

### **What Is the Role of the Appeal Board: Procedural or Substantive Planning Matters?**

Should the Appeal Board restrict itself to the arguments raised by the Town Planning Board and the appellant? Should the Appeal Board amend the reason advanced by the Town Planning Board? The *Ultra Force* case sheds some light on these questions.

### **The Use of Statutory and Administrative Provisions**

The Town Planning Board Guidelines are sometimes used as if they were laws. The classic case is the suggestion by the Lands Department, in their warning letters to those who have allegedly been in breach of the industrial user clause, ('ancillary office' use needs planning permission). The point is that such a use is not a Column 2 use for Industrial Zones.

Should applications involving enforcement actions be rejected as a matter of principle? The answer was yes in a string of cases commencing with the *Kingspeed Engineering* and *Kun Kee Motor* cases. It is submitted that this rule is wrong.



## **The Strange Absence of Reference to the Hong Kong Planning Standards and Guidelines (HKPSG) in Evaluating Environmental Impact**

The Hong Kong Planning Standards and Guidelines (HKPSG) are seldom referred to in assessing the environmental impact of a proposal. The first reported case to have made such reference was *the Naturaluck* case concerning the application of a petrol filling station (PFS). In the *Shell Hong Kong* case which also involved a PFS, no such reference had been made.

### **Expert Evidence**

Expert evidence is considered mainly in connection with agriculture, traffic and environmental impact. The Appeal Board tends to accept more readily the expert witnesses for the respondent. The opinion of the appellant's experts was accepted only in a few cases such as the *Bowen Road* (appeal dismissed) and *Henderson* cases, but it was often rejected as in the *Yiu Cho Investment* and *Sanyear Investment* cases.

In some cases, expert opinions influence the decisions but even where such opinions concerning the key issue were flawed, as in the case of *Yiu Cho Investment*, the Appeal Board would not be deterred to form its own views about allowing or dismissing an appeal by reference to other relevant considerations.

In the *Leung Wing-nin* case, the Appeal Board expressed the opinion that it was advisable for an applicant to seek professional help in making a planning application if there were needs to demonstrate that the application would have no adverse environmental or traffic impact.

The Appeal Board might ignore the views of the expert for the respondent even if their views were not contested by a relevant expert department of the government. The classic cases are the *Lucky Gain* and *Fine Tower* cases, both dealing with applications for office use.

### **Mitigation Measures Proposed by Appellants**

Sometimes, the appellant's proposal for mitigation measures or accepting planning is self-incriminating as it is taken to imply that the proposed uses are unsuitable (the *Shell Hong Kong* case).

However, this approach was clearly ruled out in the *Henderson* case, where it was stated that in considering an application, the Town Planning Board should not assume that the applicant would not keep his or her promises made by planning or lease, or that the government would not enforce conditions of grant. The *Henderson* rule was not consistently followed.

## **The Use of Planning Conditions to Overcome Potential Environmental Problems**

The Appeal Board tends not to accept proposed planning conditions to overcome potential environmental problems. This is exemplified in the *Ultra Force* case where the appellant's proposal for a conditional approval subject to an impact assessment was rejected. However, in the *Henderson, Yiu Cho Investment* and *Naturaluck* cases where the Appeal Board allowed the appeals, planning conditions were stipulated as conditions for approving the applications. In all these cases, there was either expert or departmental opinion in favour of the conditions involved.

## **CONFLICTING VIEWS BETWEEN THE DISTRICT PLANNING OFFICE AND OTHER GOVERNMENT BODIES**

In some appeal cases allowed, there were conflicting views between the District Planning Office and other government bodies. In the *Yiu Cho Investment* case, the Environmental Protection Department (EPD) supported the application on the grounds of traffic noise. In *Naturaluck*, neither the Water Supplies Department nor the EPD expressed objection to the proposal.

In the *Lucky Gain* case, the Lands Department supported the application but the Planning Department did not. In this case as well as the *Fine Tower* case, the EPD had no objection on the grounds of environment protection, but the Planning Department did. In the latter case, it was ruled that an Office Building was incompatible with a bargaining point whereas a mixed Industrial-Office Building of more or less the same size was not.

## **OBJECTIONS TO PLANS AND OBJECTIONS TO EXPLANATORY STATEMENTS**

The Appeal Board often discovers the 'planning intention' from both the explanatory statements and statutory plans. It is sometimes uncertain whether such administrative statements, produced by the Planning Department, are predictive, descriptive or prescriptive. Although such statements sometimes explicitly define the planning intention, it is not obvious whether they are 'advisory' or 'mandatory' or for how long they are considered valid. However, one fact is certain. They are not a statutory part of the plan prepared by the Town Planning Board and cannot be objected to in the statutory plan-making or revision process. **As the Appeal Board attaches so much weight to such statements in interpreting planning applications, reviews and appeals, it is desirable that they can be put on a statutory basis so that they become guidelines for plan interpretation and public participation (objection) in planning.**

## JUDICIAL REVIEW OF APPEAL BOARD DECISIONS

The first judicial review applied for against the Appeal Board was the case of *Mutual Luck Investment v Attorney General and Mr Justice Henry Litton* [HCMP No. 2065 of 1995]. This unsuccessful application is concerned with the fairness of appointing a Justice of Appeal to the Town Planning Appeal Board. The second was *Delight World Limited v The Town Planning Appeal Board* [MP No. 197 of 1996].

The most famous and important case where an Appeal Board decision was followed by judicial review is the *Henderson* case. This case is interesting as it was the Town Planning Board who made the application for judicial review; the case has remained to be the most important because it ended up being decided by the Judicial Committee of the Privy Council. The application was successful in the High Court [Judicial Review No. 3357 of 1994] but the decision was reversed by the Court of Appeal [Court of Appeal No. 150 of 1995]. However, the Privy Council agreed with the decision of the Appeal Board.

## COSTS

The Appeal Board has been reluctant to award costs to the successful party in the appeal, though it can do so under s. 17 B (8)(c). It was reported that the Appeal Board had been asked to award costs on several occasions. The first instance was the *Wo Yip Hop Road* case (case no. 03/92) in which the successful party, the Town Planning Board, asked for awards. The Appeal Board declined to entertain the application as, generally, the appellant was exercising a statutory right and, specifically, the appellant had attended the appeal with 'dignity and restraint'. The effect of awarding costs would deter future appellants from pursuing what, on its fact, is an unfettered right of an aggrieved party. In the *Yook Tong Estate* case (case no. 12/93), the Appeal Board was prepared to have a hearing for costs as the appeal was regarded as being 'doomed to failure' and that it 'bordered on frivolous'. However, the position stating that 'the normal practice of the Appeal Board is not to make orders as to costs' was reiterated in the *Henderson* case (case no. 13/93). Here the Appeal Board was recorded to have expressed disapproval of the respondent's fair attempt to 'move the goalpost' between the time when the grounds of appeal were given and the time when the hearing began. It also criticized an expert of the respondent's for being too negative towards an applicant for a planning permission. In the *Container System* case (case no. 04/96), the successful party, the Town Planning Board, asked for costs. The Appeal Board's position was: 'It has not been the practice of the Appeal Board to award costs to a successful party. This practice is ripe for review. But until a new policy has been adopted, we believe, in the circumstances, we should not order costs against the appellant.'

# 6

## POSTSCRIPT

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'I may be wrong and you may be right, and by an effort, we may get nearer to the truth' (Popper 1994: xii)<sup>1</sup>

This book has a special meaning to me as a professional town planner and an academic active in research on town planning. I am privileged to have been formally trained in planning, economics and law. I find it very sad that many practitioners in these disciplines seldom pay much respect to the knowledge of each other. This is surely a result of intensive division of labour for a modern society. This book is a tribute to those who have educated me in both academic and professional disciplines; it is also an attempt to offer a multi-disciplinary perspective for planning in practice.

The planning profession in the civil service<sup>2</sup> of Hong Kong proudly celebrated its 50th Anniversary in 1997 (Planning Department, 1998). As an ex-member of the service and a member of the profession, I hope that there will be more self-critical examination of the profession's 'terms of art' regarding development control through the statutory planning process.

With all due respect to the tremendous contribution of the local planning profession in shaping our built environment (Pryor and Pau 1993), there has not been much progress in the science of planning in Hong Kong, notwithstanding the establishment of some formal bodies and elaborated procedures since Sir Patrick Abercrombie completed his planning report for

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1. Popper, Karl R. *The Myth of the Framework: In Defence of Science and Rationality*. London & New York: Routledge, 1994.

2. The planning profession in Hong Kong has been dominated by the majority of its civil servant members.

the territory in 1948 (Lai, 1999). This critical view is based on the fact that there has not been any codification and systematic documentation of decision-making rules for interpreting development applications. Such codification and documentation will help planning bodies make discretionary decision in a more consistent and predictable manner. It will also help make the decisions more amenable to informed debates and public scrutiny. The Town Planning Appeal Board has, in this context, benefited the planning profession and our society by making all decisions available to the public. I take a few steps further to distil the 'rules' pertaining to the reported decisions and offer my opinion on the application of these 'rules' to individual cases. My opinion on certain appeal cases may be contentious to some. However, in an open society, the value of a contentious issue is to be judged by the extent of constructive criticism, discussion and debates it can generate. It is hoped that this book will be able to encourage other people to publish more critical thoughts from the same or a competing perspective.

When I was a Town Planner in the Town Planning Office, I discovered that there was once an attempt initiated by Mr Kervin Yan, who retired as Chief Town Planner, to compile a set of rules for development control. Unfortunately, there has not been any official attempt to capitalize on this good idea since then. I was fortunate to have learnt about the existence and value of the Town Planning Appeal Board decisions, and was urged to consult them by Mr Robert Lee shortly before he retired as Government Town Planner. His advice is taken and this book is a result.

The planning profession tends to ignore the rights of proprietors obtained in their lease and their land contract with the government (Lai, 1997e; 1997g). It tends to ignore both the property rights and the significance of 'planning by contract' (Lai, 1998) based on the leasehold system when 'public purpose' or 'planning intention' is exalted. The Basic Law expressly protects a market economy and private property rights. Its existence is useless unless professional planners in the government understand its importance and ensure that relevant provisions of the law protecting the market economy is enforced. It is my opinion that, in this context, any uncompensated infringement of private property rights, including those imposed by statutory planning, has become constitutionally questionable since 1 July 1997. This bold assertion, which is based on the view that the Basic Law explicitly protects private property (Chen 1993), is however beyond the scope of this book.

It must be pointed out that the tendency of those in control of government decision making to cherish a 'clean' environment without considering the employment and economic contribution of uses rejected is morally indefensible. After all, our comfortable modern life has been accomplished through a lot of 'dirty' and 'unsightful' activities of many hardworking people in Hong Kong. It is also irresponsible of the Town Planning Board to neglect 'convenience' and 'general welfare' when promoting 'health' and 'safety'. 'Convenience' and 'general welfare' should definitely include economic efficiency and wealth creation.

Planning decisions should be made on the merits of the proposals, not on the excellence of advocacy. Despite occasional references to the principle which states that one should not take planning too technically, decisions affecting both the business of the appellant and the interests of society are sometimes based on dubious concepts such as 'planning intention', which have never been systematically or clearly stated in the statutory or administrative components to all zoning plans. For a fair consideration of the appellant's case, the Town Planning Board should not be represented by government departments because they should remain neutral and be prepared to support an appellant from their professional point of view. Where the appellant is not represented by a counsel or professionals, the Appeal Board should appoint an independent advocate, perhaps a member of the Board, to help put forward the appellant's case.

It is often said that land use zoning in a market economy can only frustrate, delay or prohibit developments, but not encourage or facilitate them. This statement inevitably provokes endless debates. As far as the planning appeal cases reviewed in this book are concerned, the photographs testify two interesting points that lend support to the critic of planning: many dismissed proposals somehow became realized in forms that the Appeal Board would not approve of, while almost all proposals in allowed appeals have not been implemented or have run out of their limited lives. Furthermore, the mere prevention or delaying of development may not necessarily lead to satisfactory betterment or sustainment of ecologically valuable areas. Sometimes, the government unintentionally creates huge ecological plunders, as evidenced in Photographs 19 and 20. It is incumbent on the planning profession to ensure that statutory planning system as a whole is not a mere forum for advocacy. Neither should it be paper work that wastes the talents and commitment of paid and voluntary decision makers. Planning should rest upon the solid foundation of facts and clear principles rather than mere assertions or intentions. The meaning of these facts and principles must be spelled out clearly when a zoning plan published and should not be argued about when an application goes on an appeal. Documentation is, therefore, the first step to help advance planning in this regard. This book is an attempt towards this first step.



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