

PLANNING BUILDINGS FOR A HIGH-RISE ENVIRONMENT IN HONG KONG

A REVIEW OF BUILDING APPEAL DECISIONS

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1 INTRODUCTION

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

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

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

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

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

THE GENERIC MEANING OF ‘PLANNING’ AND ‘DEVELOPMENT Control’

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

BUILDING APPEALS IN PLANNING AND DEVELOPMENT CONTROL CONCERNS IN HONG KONG

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

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

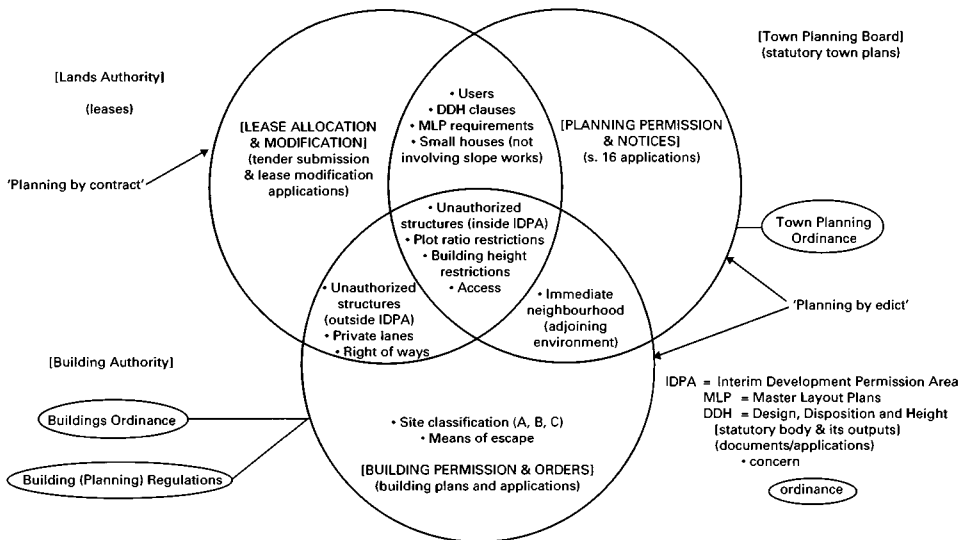


Figure 1.1 Some overlapping planning and development control functions of the Building Authority, the Lands Authority and the Town Planning Board [NB. The Lands, Building and Planning Departments have started issuing 'joint practice notes' since February 2001.]

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

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

Common Concerns of the Building Authority and the Town Planning Board

Development Control

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

Common Concerns of the Building Authority and the Lands Authority

Planning

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

Development Control

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

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

Planning and Development Control

- (4) **Building heights restrictions** can be imposed as:
- (a) a forward planning parameter — a **mandatory ceiling** in conditions of sale/lease conditions and/or statutory town plans; and/or
 - (b) a development control consideration or 'condition' — a matter of **discretion** of the Building Authority in considering building plans

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

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

Planning and Development Control

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

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

The common concerns connected with plot ratios are:

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

Planning and Development Control

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

The common concerns are convenience and safety.

BUILDING APPEALS IN THE PLANNING AND DEVELOPMENT PROCESS

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

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

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

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

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

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

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

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

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

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

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

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

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

THE BUILDING AUTHORITY AND LEGISLATION

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

ORGANIZATION OF THE BUILDINGS DEPARTMENT

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

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

BUILDING DEVELOPMENT APPROVAL

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

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

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

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

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

case of fire, fire resistance and compartmentation, geotechnical assessment of potential landslip hazard;

- health and environment — lighting, ventilation, open space; and
- fundamental issues under allied legislation — fire safety, Outline Zoning Plans, access for persons with disability, airport height restrictions and railway reserve protection.

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

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

GROUNDINGS FOR REFUSAL OF PLANS

Refusal of plans of building works, street works and consent to commence work shall be made in accordance with s. 16 of the *Buildings Ordinance*. The followings are common grounds for refusal:

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

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

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

MODIFICATIONS OF BUILDING PLANS

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

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

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

THE BUILDING APPEAL TRIBUNAL

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

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

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

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

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

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

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

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

PROCEDURES OF THE BUILDING APPEAL TRIBUNAL

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

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

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

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

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

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

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

CONDUCT OF THE BUILDING APPEAL TRIBUNAL

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

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

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

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

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

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

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

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



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