

**TOWN PLANNING APPEAL
NO. 16 OF 2005**

IN THE MATTER of the
Town Planning Ordinance
(Cap. 131)

and

IN THE MATTER of an Appeal
under Section 17B by Fine Tower
Associates Limited

Dates of Hearing: 13, 14 & 18 June and 15-16 October & 10 December 2007
and 20 February 2008

Date of Decision: 8 September 2008

Panel: Ms Sylvia W Y Siu, Chairperson
Mr. Au Chi-yuen, Mr. Kenneth T H Chau, Ms Helen
P J Kwan and Mr. Yeung Pak-sing, Members

Appellant's Witnesses: Mr. Ian Thomas Brownlee, town planning
consultant, Mr. Brian Wong, architect; Mr.
Christopher Foot, landscape architect

TPB's Witnesses: Mr. Chiang Chui-wan; Mr. Yip Chi-kwai for the TPB

The Appellant was represented by Mr. Anthony Ismail, Counsel ("Mr. Ismail")
The Respondent was represented by Mr. Abraham Chan, Counsel ("Mr. Chan")

Ms Christine Pang, Secretary in attendance

DECISION

Background

1. This appeal arises from the Appellant's Planning Application No. A/H21/122 lodged on 14 August 2004 for planning permission to develop harbour tourism, entertainment and commercial facilities, including a hotel, on the appeal sites.
2. The Application was turned down by the Metro Planning Committee ("MPC") of the Town Planning Board ("TPB") on 28 January 2005. An application was made to the TPB for a review of the decision of the MPC. On 20 May 2005, TPB maintained the decision of the MPC and did not support the application.
3. On 1 August 2005, the Appellant filed its Notice of Appeal to the Town Planning Appeal Board under section 17B of Town Planning Ordinance ("TPO").

The appeal sites

4. The appeal sites are partly owned by the Appellant and mainly owned by the Government. The Appellant owns private lots of land known as IL No. 8590 RP and No. 8723RP ("Lots") to the north of Hoi Yu Street, in Quarry Bay with a total area of 2,477.4 m², which is partly zoned "OU(1)" and partly zoned "O". The total area of the appeal sites is much larger, with total area of 11,900 m². IL No. 8590 RP is held under

a lease of 999 years which will expire in 2881 and IL No. 8723RP is held under a lease which will expire on 30 June 2047. The Lots have been used by the Appellant as a temporary car park since 1999. The appeal sites consist of land zoned "OU(1)" and "OU(2)" annotated "Cultural and/or Commercial, Leisure and Tourism Related Uses" on the draft Quarry Bay OZP No. S/H21/20.

Preliminary Points

5. Before dealing with TPB's four reasons for declining planning permission, there are two preliminary points raised by the Town Planning Board ("TPB"), namely,
 - (1) the independent planning judgment of the Appeal Board must be exercised with due regard and respect given to the considered, collective and experienced views of the TPB's members and that the Appeal Board should not overturn the TPB merely because its members may have different opinions; and
 - (2) the harbour context of the proposed development demands that anything which cannot be clearly justified by reference to the OZP and the planning intention should not be permitted.

6. As to the first preliminary point, the Appellant submits that TPB's 1st assertion is inconsistent with the *de novo* appeal hearing under section 17B of the TPO and the Appeal Board's independent judgment, as it would render the Appeal Board's independent judgment meaningless and is contrary to the consistent approach that an appeal should be

allowed and planning permission granted unless there are good reasons for refusal.

7. As to the second preliminary point, the Appellant submits that the Protection of the Harbour Ordinance, Cap 531 has no relevance to land along the harbour. The Appellant asserts that the proposed development does not *"impact on the harbour environment"* or if it does, it impacts positively on the harbour environment. The Appellant says that the proposed development would improve the waterfront and would permanently stop a non-conforming and objectionable use of land by the Government and permanently replace it with a use which is conforming and not objectionable.
8. These points, having been highlighted, will be dealt with at appropriate places in later paragraphs.

TPB's Reasons of dismissal of the review

9. Four reasons have been stated for the dismissal by the TPB, namely:
 - (1) the scale and intensity of the proposed development is considered excessive in view of the prominent waterfront location of the site;
 - (2) the submission has not demonstrated that innovative design has been employed to minimize the wall effect of the proposed development along the waterfront;

- (3) the implementability of the proposed development is in doubt having regard to the uncertainty in the Appellant's acquisition of the high proportion of Government land involved; and
 - (4) the submission has not demonstrated that spacious environment is provided for the pedestrians.
10. These reasons are stated in the letter dated 3 June 2005 from the Secretary of the TPB to the Appellant (B/8001). The arguments put forth by the Appellant and the TPB in support of their respective positions in this appeal are set out in the Appellant's Opening submissions, the TPB's Closing submissions and the Appellant's Reply to TPB's Closing submissions which have all been read and carefully considered. Arguments of the Appellant and the TPB in gists are summed up under four headings below.

Scale and Intensity of the Proposed Development

11. The Appellant firstly argues that the proposed development and the uses to which the buildings will be put would be consistent with the planning intention, that is, for cultural, leisure, tourism (hotel) related uses and for entertainment. The Appellant points out that there was no office use in the revised proposal before the TPB.
12. The Appellant alleges that the TPB's decision to refuse planning permission was wrongly arrived at without any consideration of the factual matrix, in particular the following: -

- a. the TPB's decisions and deliberations on 3 January 2003, 6 June 2003, 5 September 2003 and 26 September 2003; and
- b. paragraph 5.5 of TPB Paper 6726,

with the consequence that its decision was made upon insufficient materials.

13. The factual matrix, the Appellant argues, shows that the TPB considered but decided not to impose any plot ratio and site coverage restrictions for the "OU(1)" and "OU(2)" sites but only imposes height restrictions of 35 mPD and 25 mPD on the "OU(1)" and "OU(2)" sites to safeguard or preserve public views from and to the harbour. The Appellant further says that (i) the TPB wanted to prohibit high-rise buildings but not to prohibit buildings with the plot ratio and site coverage within the First Schedule of the Building (Planning) Regulations applicable to such sites and (ii) the height restrictions show that the TPB has decided to implement the planning in a specific way, namely, by prohibiting "*pencil*" developments but permitting "*long and linear*" "*pancake*" developments instead.
14. The Appellant submits that the scale and intensity of the proposed development are not relevant planning considerations under the OZP; as the TPB had fixed the acceptable scale and intensity for developments on the "OU(1)" and "OU(2)" sites i.e. building profiles with varying building heights subject to a limit of 35 mPD and 25 mPD respectively, which by law carry with them the plot ratio and site coverage in the First Schedule of the Building (Planning) Regulations. The TPB thus sets the benchmarks (the "*planning and development parameters*") for acceptable development for "OU(1)" and "OU(2)".

15. Alternatively, the Appellant argues that if the scale and intensity of the proposed development in this appeal are relevant considerations, they are not excessive because (i) they do not exceed the plot ratio and site coverage for a Class A site in the First Schedule of the Building (Planning) Regulations, (ii) the development potential has not been maximized and (iii) the site coverage of OU(1) is 95% up to the ground floor and 76.3% above the ground floor which is less than the permissible site coverages of 100% and 85% respectively. The site coverage of OU(2) is 93.6% up to the ground floor and 88.6% above the ground floor which is also less than the permissible site coverages of 100% and 95% respectively.

16. TPB submits that the Appellant's argument that TPB is essentially limited to determining whether the proposed development exceeds the building height restrictions of respectively 35mPD and 25mPD for the OU(1) and OU(2) sites (as no other limits are expressly stated) is plainly wrong because:
 - a. There are other site requirements such as (i) innovative minimization of wall effect and (ii) provision of adequate pedestrian areas: it is obvious that only the maximum development height was fixed so as to allow applicants as much flexibility as possible in achieving such planning objectives for the sites.

 - b. The setting of the maximum height limits itself must be seen and understood in its proper context. All other dimensions were left open-ended so as to allow:
 - i. flexibility for developers to satisfy their positive planning requirements and any need for commercial viability; and

- ii. the proper discharge of the TPB's functions in assessing planning merit on a case by case basis.
- c. The scale and intensity of a structure are factors which may contribute to/ indicate a wall effect.
- d. The Appellant's reliance upon the Building (Planning) Regulations restrictions is misguided as these regulations are part of a connected but distinct regime falling under the purview of the Building Authority under the Buildings Ordinance (Cap 123). Town planning's concerns are necessarily wider in their scope as they relate to issues of health, safety and general welfare on a communal level.
- e. While some planning principles, e.g. minimization of wall effect and provision of more interesting and spacious pedestrian environment, are set out in the Explanatory Statement of the OZP, relevant considerations are in no way limited to those expressly mentioned in the OZP. TPB says that the Appellant's repeated assertion that the TPB or the Appeal Board should only have regard to matters expressly stated in the OZP or its Explanatory Statement is fundamentally wrong for this overlooks the requirement that the TPB makes its decision with due regard not only to the expressly stated provisions of the OZP as to building height restrictions but to "*all relevant planning considerations*" and the overall merits of the application.

Wall Effect

17. The Appellant argues that the proposed development would not lead to the creation of a wall effect and even if it has a wall effect, innovative design has been employed to minimize such wall effect.
18. Since the planning intent is for long and linear *"pancake"* developments, if a wall effect was created, it was only necessary to minimize it but not to avoid it.
19. The TPB submits that the four colonial styled buildings proposed by the Appellant at the s. 17 review have heights approaching the maximum permitted under the OZP, i.e. 34mPD and 25mPD (main roof), lengths up to 100m for each of the two proposed buildings for the "OU(1)" site and an overall site coverage of 94%. Together with the two screen walls proposed for the electricity substation and MTR ventilation building between the two OU zones, they form a continuous building mass along the entire waterfront between the two OU zones, with narrow gaps between individual buildings. The natural tendency of a continuous façade is to create a wall effect. That is what a continuous façade is—a continuous wall.
20. TPB says that there are no adequate mitigating features in the proposal: the proposal involves not only one but four long buildings tied closely together along a thin strip of harbourfront land. By way of comparison, the relocated Murray House, which the Appellant has referred to extensively in this appeal, is but 62.8 metres in length (shorter than all but one of the proposed buildings) and stands alone in a waterside setting.

21. The TPB further submits that the Appellant's contention that the "stepped height" of the buildings significantly reduces the wall effect of the proposal is weak: mere variations in building height are wholly insufficient as regards mitigation of the wall effect. As already noted, one of the problems with the proposed buildings is their substantial height and length. The fact the heights are varied to some degree does not remove the problem. Moreover, the more or less continuous imposing line of façades along the OU(1) and OU(2) sites (minus the negligible voids) remains a hard fact and its significant visual impact remains notwithstanding the height variations.

Implementability

22. The Appellant submits that the implementability of a planning proposal is not a relevant consideration because a proposed development which is desirable in the public interest is still desirable even if it cannot be implemented. The Appellant says that there is no question of fettering the discretion of the TPB and the Appeal Board as the TPB and the Appeal Board are not above the law. They must act in accordance with law.
23. The Appellant cites Town Planning Appeal No. 18 of 2005 and argues that there is the distinction in planning law between the grant of planning permission and its implementation.
24. Further, the ratio decidendi in Town Planning Appeal No. 18 of 2005 that an "applicant for ... planning permission must show that there is at least some possibility of his carrying out the development which is the subject of the application either at the time of the application or

- some time in the future" (paragraph 84 at page 28 of the Decision). The Appellant says that this is a low threshold which is clearly met on the facts of the present case.
25. The Appellant points out that the implementation issue is not referred to in the Notes or the Explanatory Statement. Even though the Appellant only owns a minor part of the Sites, TPB's witness Miss Chiang Chui-wan of the Lands Department confirmed that the Appellant would be able to be a prospective purchaser and submit a tender for the adjoining Government land.
 26. It has never been suggested that the Appellant does not have the financial ability to carry out the proposed development either alone or jointly with others. These facts distinguish the present case from Town Planning Appeal No. 18 of 2005 where the appellants ceased to have any proprietary interests in some of the properties within the application site (paragraph 81 at page 27 of the Decision), and were not able to *"realistically make or continue to press on with their proposal for development of the application site"* (paragraph 82 at page 27 of the Decision) and *"had not shown that they have any future prospect of acquiring such properties or that they will have the financial ability to carry out the proposed development by themselves or jointly with others"* (paragraph 85 at page 28 of the Decision).
 27. The Appellant submits that the factual matrix shows that the planning intention was that the issue of acquiring Government land was to be dealt with separately by the District Lands Office at the stage of implementation and the present appeal is for permission for development; this appeal is not the appropriate time or place for further investigation and discussion of the disposal of Government land.

28. The TPB does not suggest that questions of planning acceptability are principally or generally concerned with implementability. However, there may be circumstances where implementability is one factor which has clear relevance to the overall question of whether a proposal is in line with the planning intention and the public interest.
29. The TPB submits that the key commercial and financial realities are that:
- a. The Appellant does not own most of the appeal sites. The total area of its lots represents no more than about 11% of the appeal sites. The Appellant's land moreover falls within the OU(1) zone only.
 - b. In respect of the Appellant's request for land exchange, Lands Department is only prepared to consider this on a "foot for foot" basis, and any exchange would only take effect in the OU(1) zone. This would only represent about 21% of the appeal sites in terms of site area. Any land exchange would be subject to further conditions such as payment of land premium and administrative fee.
 - c. The rest of the land within the appeal sites is Government land and will be put up for sale by open auction or tender in accordance with Government land policy. There is no guarantee that The Appellant would be successful in this process.
30. Further, the TPB argues that there is grave uncertainty as to the Appellant's ability to acquire the necessary Government land within the appeal sites for the effective implementation of its Old Hong Kong proposal. This lack of certainty is unfortunately especially grave in

relation to the OU(2) site, which houses the key cultural elements of the development.

31. The TPB therefore submits that the considerable doubt as to the implementability of the proposal renders it unsafe and irresponsible for approval to be given and if the application is approved, there is a strong likelihood that the Appellant will proceed directly with the profit-making elements of the scheme at the OU(1) site, leaving the development of cultural elements which offer greater community gain at a much later stage.

Spacious Environment

32. The Appellant submits that this reason is bad because it is against the weight of the evidence. The buildings are set back by 3m which applies to all sides of the buildings and there is an additional set back provided along the Hoi Yu Street footpath. There are also a total of 6 piazzas along the waterfront between the buildings. The amount of set back space or open piazzas within the "OU(1)" and "OU(2)" sites is 3,230 m². It is more if the space in the "O" zone is included. It is spacious given that the area of the appeal sites is 11,900 m².
33. The Appellant adds that the factual matrix shows that the planning intention is to allow the developer to adopt a holistic approach and include the 10m promenade as an integrated part of its overall development or to integrate the buildings with the open space around it. In reality, the existence of the "O" zones cannot be excluded from the visual impact of the proposed development. The Appellant contends that TPB's submission that the "O" space adjacent to the

proposed sites is *“irrelevant”* and that the Appellant *“needs to show that the proposals are acceptable in terms of wall effect minimisation and overall planning merit within the OU(1) and OU(2) zones”* is factually and legally wrong as paragraph 7.7.3 of the Explanatory Statement states, inter alia, *“The design should also integrate with the proposed waterfront promenade...”*. In other words, the Appeal Board must look at the development as a whole (including 10m promenade) when considering if a spacious environment is provided for the pedestrians.

34. The Appellant says that the planning intention is to only “encourage” setting back at street level and the creation of piazzas *“to provide a more interesting and spacious pedestrian environment”* (paragraph 7.7.3 of Explanatory Statement): there is no mention of the number and sizes of the piazzas as compared with the planning intention for the ‘Commercial’ zone which states that public open space of not less than 2000 m² in “Sub-area (c)” and 3,900 m² in “Sub-area (d)” *“shall be provided upon development or redevelopment”*.
35. TPB on the other hand says that of the six areas labelled “piazza” in the Appellant’s scheme, only two are actually within the appeal sites, namely the “Gateway piazza” and the “Arts and Theatre piazza”: the “Arts and Theatre piazza” is in reality the space required by the gas pigging station in the OU(2) site for vehicular access and the “Gateway piazza” serves as the landing point for a proposed footbridge: it is a traffic-flow point and its length is only about 3% of the total waterfront between the OU(1) and OU(2) zones.
36. The TPB says that:

- a. The spaces in question achieve too little in terms of alleviating wall effect or providing a spacious environment for users.
- b. The harbourfront location of the sites demands that pedestrian access be generous. The provision within a proposal should not leave any room for doubt as to the adequacy of the space and access.

Public Interest

37. TPB says that public opinion was sought at the plan making stage of the OZP and while there was general support of a thematic development at the rezoning sites, some Members of the Eastern District Council (EDC) opined that there should be a development control mechanism to ensure adequate provision of thematic entertainment and cultural facilities in order to avoid the scheme from becoming predominantly a property development for hotel. The proposed development should benefit the public.
38. The Appellant says that public opinion should carry no or very little weight because it is unreliable since it changes from time to time. Further, members of the public who are against the Appellant's proposed development do not have the same quality and quantity of information that is presently before the Appeal Board. It is an open question whether they will still be against the Appellant's proposed development if they had such information. Further, there is a strong element of self interest in the views of members of the public. The Appellant says that the Appeal Board must consider this appeal in accordance with law and not public opinion as set out in the OZP, the

Notes thereto, the Explanatory Statement and the Urban Design Guidelines.

Jurisdiction of the Appeal Board

39. It is the submission of the Appellant at ¶21 of its opening submission ("A's Opening") citing Henderson Real Estate Agency Ltd. v Lo Chai Wan [1997] HKLRD 258 that the Appeal Board is entitled to disagree with the TPB and exercise an independent planning judgment.
40. The Appellant further submitted at ¶23 of A's Opening that it is the Appeal Board's duty to faithfully implement the OZP. More strongly, the Appellant went on to argue that "*the Appeal Board has no authority to deviate from OZP "however compelling other material considerations to the contrary might be"*". For this proposition, the Appellant cited §385.247 of Vol 25(2) of Halsbury's Laws of Hong Kong 2000.
41. If these propositions of law are correct, then firstly the Appeal Board is entitled to exercise its planning discretion de novo and not be limited or fettered to consider only what are said in TPB's and the Appellant's submissions in this appeal nor only the four reasons upon which the Appellant's application was dismissed.
42. As these propositions have not been seriously challenged, the Appeal Board will proceed on the basis that these propositions are correct in law and it is upon these propositions that the Appeal Board will consider the submissions and evidence before it afresh, knowing at all times it must faithfully implement the OZP.

43. It is the Appellant's position that the four corners of the OZP cannot be over-stepped.

Statutory Interpretation

44. The Appellant also placed heavy emphasis at ¶¶13-16 of its reply submission to TPB's closing submission ("A's Reply") on "the importance of the factual matrix".
45. The Appellant rightly said that "in any proceedings, each case depends on its own facts".
46. The Appellant argues that the Appeal Board should ascertain the planning intention of the land zoned "OU(1)" and "OU(2)" from a proper construction of the OZP including the Notes which form part of the OZP and the Explanatory Statement which does not form part of the OZP and the relevant factual matrix.
47. At ¶14 of its Reply, the Appellant wrote that the relevant legal principles for ascertaining the planning intention are set out in the recent judgment of the Hon. Mr. Justice A. Cheung in International Trader Limited v. Town Planning Appeal Board and Town Planning Board, unreported, HCAL 13 of 2007 ("International Trader Limited"):

" 27. Likewise, the Chief Justice observed in Town Planning Board v Society for the Protection of the Harbour Ltd (2004) 7 HKCFAR1, 13 (para 28) that in interpreting a statute, the function of the courts is to ascertain the intention of the legislature as expressed in the legislation. The statute must be considered as a whole. Any statutory provision must be understood in its context taking in its widest sense. In my view, the observations apply with equal force

to the proper construction of the OZP in ascertaining the relevant planning intention."

48. The Appellant then went on at ¶15 of its Reply quoting again from the Judgment of Cheung J. in International Trader Limited:

"...one must approach the Notes and Explanatory Statement on a down-to-earth, practical manner and the language used is not to be invested with more precision than it would naturally bear....It is written for developers and ordinary private landowners and citizens to read. Arguments that are based on fine semantic or linguistic distinctions...do not really help...".

49. The Appellant also relied upon what was said by Bohkary PJ. at ¶19 of The Secretary for Transport v. Delight World Ltd (2006) 9 HKCFAR 720 that: *"...It has been clear at least since our decision in Medical Council of Hong Kong v. Chow (2000) 3 HKCFAR 144 that statutory interpretation is holistic and purposive...Whether in one or more than one statute, all the relevant provisions must be construed together, in context and purposively."*

50. It is to be noted that *"holistic"* (Oxford Dictionary of English 2nd Edition Revised, Oxford University Press 2005) is defined *"characterized by the belief that the parts of something are intimately interconnected and explicable only by reference to the whole"*.

Relevant Factual Matrix

51. With these helpful citations, the Appellant then dived into the "Relevant Factual Matrix" at ¶¶ 17 to 67 of A's Reply setting out the background, the facts and the considerations that went into and led to

the amendment of the Draft Quarry Bay OZP No. S/H21/15 to what is to become the "OU(1)", "OU(2)" and "O" zones at the waterfront of Quarry Bay in front of Taikoo Shing.

52. The Appellant's Lots are situated at the far west corner of the proposed sites (A5184). These locations were granted to the Appellant as replacement site for the relocation of its oil depot in Quarry Bay. It was zoned "I" (i.e. Industrial") restricted to oil storage or general industrial use (transcript p.37 Q-U). It is now zoned partly "OU(1)" and partly "O". The rest of the "OU(1)" areas were Government land and were previously either zoned "I", "G/IC" (ie Government/Institution, Community) or "Road".
53. The area now zoned "OU(2)" was previously variously zoned "G/IC", "OU (EHC Ventilation Building)" (i.e. Other Specified Uses Eastern Harbour Crossing Ventilation Building) and "OU (Cargo Handling Area)" (i.e. Other Specified Uses Cargo Handling Area).
54. A number of rezoning proposals were floated by the Concord Property (Holdings) Ltd, the holding company of the Appellant since 2001 for theme development: "Old Hong Kong", "Old Central", "Old China Bank Building", "Old Standard Chartered Bank Building" and "Old Wanchai".
55. Revisiting the chronology of events (at Appendix 1 to the Statement of Mrs. Mak Wong Kit-fong at A/17-20) that led to rezoning, there were always concerns expressed by the Planning Department as to visual impact and development density (¶ 23 of A's Reply). There was also the continued concern that the Appellant owned only a small percentage of the proposed site (¶ 25 of A's Reply).
56. A formal public consultation (held on 18 March 2002) and a later consultation (held on 21 November 2002) were held with the Works

and Development Committee (“WDC”) of the EDC (¶ 26 and ¶30 of A’s Reply).

57. While the Planning Department had no in-principle objection to the proposed broad development concept of the subject sites for leisure and tourism-related development, EDC members opined that a development control mechanism should be in place to ensure and **avoid the scheme from becoming a predominately development scheme for hotel** (¶ 33 of A’s Reply).

58. The Planning Department also expressed concern as to visual impact and the “wall effect” (¶¶ 34-35 of A’s Reply). The consideration of the Planning Department was that “...Even the “*Old Hong Kong*” is assumed, many old colonial style commercial building in **the Old Central were 4 to 6 storeys in height with high ceiling. A proposed maximum building height of 35mPD would be generally adequate for recreation of a number of such old buildings.** With the provision for minor relaxation of building height restrictions upon planning application, there should be adequate flexibility to cater for...special roof top architectural features like domes and towers in order to create an interesting building profile....**Moreover, a proposed building height of 25 mPD would be adequate to cater for the 3 to 4 storeyed tenement buildings which were typical in the street scene of Old Wanchai...**” (¶36 (a) of A’s Reply).

59. In view of the above considerations, the Planning Department suggested that the rezoning proposal be modified as illustrated in Plan FZ-8 following the principles that:

- i. continuous waterfront promenade of 10m in width zoned "O" should be designated along the stretch of Quarry Bay waterfront to the north of Hoi Yu Street;
- ii. Sites 1 and 2 (except the water front promenade) should be rezoned to "OU(1)" and "OU(2)" (i.e. Cultural and/or Commercial, Leisure and Tourism Related Uses). *"Any development/redevelopment within the zone would require planning permission from the Board to ensure that the proposal would be compatible with **the waterfront setting** and with **the planning intention**" (¶36(d)(b) of A's Reply);*
- iii. maximum building height in "OU(1)" and "OU(2)" *"should be restricted to 35mPD and 25mPD respectively, with provision for minor relaxation of the stated building height restriction in order to allow flexibility for the creation of an interesting building profile" (¶36(d)(c) of A's Reply);*
- iv. *to allow flexibility to facilitate implementation of the proposed zoning, no pre-determined maximum GFA is imposed for the sub-areas" (¶36(d)(d) of A's Reply);*
- v. *no residential use would be permitted in both sub-areas..." (¶36(d)(e) of A's Reply); and*
- vi. *it should be stated in the Explanatory Statement of the OZP that innovative design approach should be employed to minimize the possible wall effect created by the building mass along the Hoi Yu Street waterfront" (¶36(d)(h) of A's Reply).*

60. The Building height of 35mPD for "OU(1)" is generous when compared to other waterfront sites (¶37(a)(iii) of A's Reply):
- i. the maximum building height at Oil Street waterfront is restricted not to exceed the mean level of IEC, which is equivalent to 15mPD;
 - ii. waterfront sites covered by Central District (Extension) OZP are restricted to 13mPD to 25 mPD; and
 - iii. those covered by Wanchai North OZP are restricted to 10mPD to 5mPD.
61. The Planning Department then submitted its proposed amendments in relation to the rezoning of the Hoi Yu Street waterfront to the MPC for agreement. It was agreed and on 4 April 2003, the draft Quarry Bay OZP No. S/H21/18 with the proposed amendments to limit the height of "OU(1)" and "OU(2)" to 35mPD and 25mPD respectively (incorporated in the Notes) was gazetted (¶¶ 40-41 of A's Reply).
62. The Appellant's land, situated in the more western location of the sites and upon which the tallest buildings were proposed to be sited, has been partly rezoned as "OU(1)" and partly rezoned "O" (i.e. Open space), with the existing government land rezoned either as "OU(1)", "OU(2)" or "O".
63. The Appellant then objected to the rezoning, it proposed an alternate scheme to rezone the sites to "OU(1)", "OU(2)", "OU(3)" and "OU(4)" with maximum height restriction of 35mPD, 25mPD, 85mPD and 50mPD respectively. The reason given was that the Appellant had Building Authority approval for an industrial building of 85mPD in height and a plot ratio of 15 (¶ 44 of A's Reply). It was argued by the

Appellant that the rezoning amounted to a deprivation of its property for which it was entitled to compensation. This was argued in Fine Tower Associates Ltd. v. The Town Planning Board [2006] 4 HKLRD 347 in which Reyes J. held that the restrictions imposed by the OZP did not constitute deprivation (¶17 of A's Opening).

64. The Town Planning Board gave preliminary consideration to the Appellant's objections on 6 June 2003 and decided not to propose any amendments to meet these objections: the height limits were considered to be appropriate.
65. Further considerations were made upon TPB Paper No. 6804 and the Town Planning Board decided (on 5 September 2003) that 35mPD and 25 mPD struck the appropriate balance between the scale of development at a level compatible with the waterfront setting and provides incentives and necessary critical mass to convert the sites for leisure and tourism-related development (¶53 of A's Reply).
66. In TPB Paper 6804, the Senior Town Planner expressed the view that ***"a building profile with varying building heights of 35mPD and 25 mPD as maximum would be more compatible with the waterfront setting"***.
67. Further considerations were made upon another TPB Paper No. 6823. Again the TPB decided (on 26 September 2003) not to propose any amendments to the height restrictions.

The OZP

68. The draft Quarry Bay OZP No. S/H21/18 and the draft Quarry Bay OZP No. S/H21/20 with their Notes and Explanatory Statement are at A/2001-2033 and A/4001-4034 respectively.
69. It is to be noted that in relation to "OU(1)" and "OU(2)", the specified allowable uses are for "Cultural and/or Commercial, Leisure and Tourism Related Uses" (A/2017). There are no uses that are "always permitted" under Column 1 of the Schedule of Uses of the Notes. Under Column 2 are uses, which include various retail/commercial uses, hotel, office and place of recreation, sports and culture etc., that ***"may be permitted with or without conditions upon application to the Town Planning Board"***.
70. Under paragraph (1) of the Remarks of the Notes to the OZP (A/2018), the maximum building heights of 35m and 25m above Principal Datum (PD) for "OU(1)" and "OU(2)" are stipulated. It is stated that ***"no new development ...shall result in a total development ...in excess of a maximum building height for each sub-area as set out below."***
71. At paragraph (2) to the remarks, it is stated that:
- "Minor relaxation of the stated restrictions in paragraph (1) above, based on the merits of individual development or redevelopment proposals, may be considered by the Town Planning Board on application under section 16 of the Town Planning Ordinance"***.
72. In considering de novo to arrive at its own independent judgment, the Appeal Board must as a starting point be mindful of the Appellant's submission that ***"the function of the Appeal Board is strictly not that of a tribunal similar to that of the Court of Appeal of the High Court and***

that it can possibly substitute its own decision for that of the Board even if the Board has strictly not committed any error on the materials before it" (¶ 5(b) of A's Reply). For this proposition, the Appellant cited and referred to paragraph 51 of Town Planning Appeal No. 18 of 2005, unreported.

73. The Appellant also reminded the Appeal Board that the approach to interpreting the Notes and the Explanatory Statements on a *down to earth, practical manner and the language used is not to be invested with more precision than it would naturally bear* and upon *holistic and purposive* approach (at paragraphs 48 above and ¶¶15 & 16 of A's reply).
74. It is in this context and upon considering the factual matrix of this particular case that the adjective "**minor**" as applied to relaxation should be considered: using the meaning the adjective "**minor**" ordinarily and naturally bear.

Building Height

75. It has been stated by the Appellant at ¶11 of its Opening that MPC decided to delete the Planning Department's objection to the relaxation that it is not minor in nature.
76. However, as pointed out by the Appellant at ¶13 of its Opening, "*the Appeal Board is not in law bound to follow the MPC and the Board and can come to a different view*". The Appeal Board plainly can and must make its own independent judgment.

Proposed Height Relaxation

77. ¶22 of the Closing submission of the TPB ("TPB's Closing") records that the overall building heights of the proposed buildings in "OU(1)" would be 39.5 mPD to 43.5 mPD and those in "OU(2)" would be 30.5 mPD to 34.5 mPD. In the context of the maximum building heights of 35mPD and 25mPD for "OU(1)" and "OU(2)", the relaxation cannot be said to be minor in any sense of the word. For "OU(2)", what is asked for is a relaxation of 9.5m out of 25m: or for plain understanding, a permission to build 2.5 additional storeys as can be gathered from the section plans of the proposed buildings at A/5055.
78. It is also clear that the relaxation asked for is not just for isolated "architectural features", but in a large measure for the pitch roof in which the electrical and other machinery installations which should have been carried out within the maximum height limit imposed are installed(¶ 23 of TPB's Closing).
79. The Appeal Board was reminded by the Appellant that "*[it] has no authority to deviate from the OZP "however compelling other material considerations to the contrary might be"*". See paragraph 40 above.
80. Hence, even though the additional height may not be objectionable when looked at from perspective of the photomontage, the Appeal Board may not have authority to permit relaxation and to that extent.

Ground for exercise of discretion

81. Secondly, *minor relaxation* of the stated restrictions is based on the merits of individual development. So an issue is whether there are sufficient merits to justify relaxation: merits to satisfy the

requirements before the Appeal Board can correctly exercise its discretion.

The Proposal

82. The proposal is to recreate under the theme of “Old Hong Kong”, buildings with the façade of historic buildings to “refresh Hong Kong people’s collective memories”, to attract tourist and benefit the community (¶ 1 of A’s Opening).
83. It goes without saying that the mere label of “Old Hong Kong” and the buildings with a themed continuous façade cannot, by itself, be merit justifying height relaxation and that “recreated heritage” (transcript p.10 D-G) is not “heritage”.
84. Features of the Appellant’s application are set out in the Statement of Mrs. Mak Wong Kit-fong at A/1-15 at A/3:
 - a. the Appellant owns only 11% of the appeal sites of 11,900m² which are located north of Island Eastern Corridor (IEC) and Hoi Yu Street;
 - b. the proposed uses under the planning application include hotel accommodation, offices, retail shops, entertainment/leisure facilities and restaurants as well as a cultural and tourist center;
 - c. The Appellant applies for “**minor**” relaxation of building height restrictions ranging from 5.5m to 9.5 m for architectural features and to provide space to accommodate electrical and mechanical installations;

- d. According to the Appellant's scheme, the proposed buildings would set back 3m at G/F to form a colonnaded walkway; and
- e. A total of 6 piazzas are proposed with 2 within the appeal sites and the remaining 4 along the waterfront on the adjacent "O" zone (that is on Government land).

85. The MPC and the Town Planning Board had previously rejected the Appellant's applications. The Grounds of the Town Planning Board were (¶¶ 13-15 of the Statement of Mak Wong Kit-fong at A/3-4):

- a. the scale and intensity of the proposed development were considered excessive in view of the prominent waterfront location;
- b. the submission had not demonstrated that innovative design had been employed to minimize the wall effect;
- c. the implementability of the proposed development was in doubt having regard to the uncertainty in the Appellant's acquisition of the high proportion of Government land involved;
- d. the submission had not demonstrated that spacious environment was provided for pedestrians.

The scale and intensity

86. According to the Hong Kong Planning Standards and Guidelines (HKPSG), building bulk has fundamental visual impact and at

prominent waterfront locations, the appropriateness of plot ratio, building height should be assessed (transcript p. 8 O-Q).

87. It is further stated at ¶ 7.7.3 of the Explanatory statement at A/4029:

"In view of the waterfront location and the need to preserve public views to and from the harbour, development within these zones is restricted to a maximum building height of not exceeding 35mPD and 25mPD for the "OU(1)" and "OU(2)" sites respectively. Innovative design should be employed to minimize the possible wall effect...".

88. To the matter of scale and intensity, the Appellant says it is not excessive because *"they do not exceed the plot ratio and site coverage for a Class A site in the First Schedule of the Building (Planning) Regulations" and the development potential has not been maximized. The Appellant says that the site coverage is 95% up to the ground floor which is less than the permissible 100% for "OU(1)"*" (¶ 109 of A's Reply).

89. The Appellant says that the Board chose **only to impose height restrictions of 35mPD and 25mPD** and did not fix the maximum GFA or plot ratio to control building density and as such the plot ratio and site coverage restrictions in the First Schedule of the Building (Planning) Regulation applies (¶¶ 94-95 of A's Reply).

90. The Appellant says that the TPB decided to implement the planning intention to safeguard and preserve public views from and to the harbour by prohibiting "pencil" developments but permitting "long and linear" (¶¶ 96-98 of A's Reply). Hence if a wall effect was created, it was only necessary to *"minimize it"* but not to *"avoid"* it. Taking into account the factual matrix, this argument is not convincing.

91. The design in the "OU(1)" site comprised a hotel with a frontage of 100 meters and a commercial building again with a frontage of 100 meters. There is only a gap of 15 meters in between the two buildings (See A/5393- 5395 for the layout and A/5397 for the Elevation Plan). **It is noted that the Appellant was unable to identify any colonial era waterfront building with so long a façade.** Hence, in terms of the wall effect and in terms of site coverage, the Appellant used the "OU(1)" site in which the Appellant's lots are situated to the maximum. There is nothing innovative in the design to minimize the wall effect. Almost nothing in terms of planning gains and nothing has been conceded to merit height relaxation.
92. In terms of the proposal as a whole, the only features that ameliorate the intensity and scale are the varying architectural features. The patches "O" zoning which provide for visual breaks and the waterfront promenade which are on Government land are outside of the appeal sites and not part of the application. Of the six so called piazzas, only the "Gateway piazza" and the "Arts and Theatre piazzas, are within the appeal sites and only the "Gateway piazza" within "OU(1)" (¶¶ 42-44 of TPB's Closing).
93. It seems that the main thrust of the proposal is the hotel and the commercial development at the west end of the proposed sites within "OU(1)", which we may add, have by the proposal, been exploited to the practical maximum and there has not been serious thought as to the recreation, sports and cultural spaces, all proposed to situate within "OU(2)" (transcript p. 256M- p. 257H).
94. No or scant consideration had been given, it seems, to the matter of wall effect. Further, not all the facilities in the proposal form part of the application. An example is the public pier which, although is

mentioned in paragraph 9.17 of the planning statement, is stated to be a “completely separate matter to be considered at a later date” (transcript p.11 N to p. 12 D). The set back of 10 meters is on Government land and the three meters set back is not a true set back, it is a colonnaded with building form over it (transcript 247 L-R). Even the landscaping proposal shown on the plans is not what the Appellant undertakes to complete (transcript p. 250 E-I).

95. In the circumstances, upon a holistic consideration of the proposal, there does not seem to be sufficient justification for relaxation of the only imposed restriction, the height limits on “OU(1)” and “OU(2)”.

GFA and Site Coverage

96. As to the GFA and site coverage, in interpreting and implementing the OZP, the Appeal Board takes into account the factual matrix and interprets the Notes, “taking its widest sense” (See paragraph 47 above).
97. The TPB and, for that matter, the Appeal Board is entrusted with the task to interpret the planning intent upon a holistic and purposive approach and faithfully implement the OZP: it is not bound to mechanically approve any plan that complies with the stipulated GFA, site coverage and height restriction. If that be the case, there would not have been any need for the TPB or the Appeal Board.
98. Mr. Brownlee was questioned by Mr. Chan, counsel for the TPB, starting at transcript p.162 I to 164 E. Mr. Brownlee agreed that in his view, even when certain physical parameters such as height etc are met or not exceeded, the TPB is not bound to approve the application.

He agreed that there are “a whole series on boxes” to be ticked and there are boxes that relate “to the relationship with the waterfront”.

99. In the matter of the appeal sites, it had always been the planning intention that “any development/redevelopment within the zone **would require planning permission from the Board to ensure that the proposal would be compatible with the waterfront setting and with the planning intention**” (See paragraph 59ii above). It is to allow flexibility to implementation of the proposed zoning, and not for the reasons suggested by the Appellant, that no pre-determined GFA or site coverage was imposed
100. Reading in context, it must have been the planning intention for the TPB/Appeal Board to approve or disapprove any proposed plan to develop the appeal sites and it is for the TPB/Appeal Board to come to a conclusion whether the scale and intensity of the proposed development are appropriate or not appropriate in the context of harbourfront setting.
101. Further, to ensure any proposal would be compatible with the waterfront setting, there is no “always permitted” use item under Column 1 of the Schedule of Uses in the Notes to the OZP. Instead, under Column 2 is a list of uses that **“may be permitted with or without conditions upon application to Town Planning Board”**.
102. The TPB/Appeal Board is thus invested with jurisdiction and discretion to approve or disapprove proposed plans upon applications made to it, as admitted by Mr. Brownlee, upon overall consideration of the uses, including the scale and the intensity of the proposed development.

103. The Appellant asserts that by not specifying the plot ratio and site coverage, the TPB "*clearly intended that the scale and intensity on the "OU(1)" and "OU(2)" sites should be that achievable under the Buildings Ordinance Cap 123 and the First Schedule of the Building (Planning) Regulations*" (§29 of A's Opening).
104. This, as said earlier, cannot be correct and the TPB/Appeal Board is entitled to come to a conclusion that the scale and intensity of the development is excessive, even though it is within what is achievable under the Buildings Ordinance Cap 123 and the First Schedule of the Building (Planning) Regulations.
105. When Mr. Brownlee was questioned by Mr. Chan as to Building (Planning) Regulations 20(3), he conceded that site coverage maximum for "OU(1)" and for "OU(2)" for the portion of the building that is above 15 meters are respectively 95% and 89% and for the purpose the Building Planning Regulations, one cannot "accumulate both sites" (transcript p. 205Q- p. 207C). As the proposed buildings are vertical upwards without set back for those floors above 15 meters, the same site coverage maximum therefore should be applicable in respect of the proposed buildings as a whole.
106. In paragraphs 25 and 31 of the Supplemental Statement of Brian Wong, site coverage for the OU(1)" site and the "OU(2)" site up to the ground floor are stated as of 95.5% and 93.6%: it is excessive.

Implementability

107. Aside from the height restrictions and the scale and intensity of the proposed development, another issue is implementability.

108. On this, it is the Appellant's case that there is distinction in planning law between the grant of planning permission and its implementation and that *"the Board was wrong in law to take the view that implementation was one of the considerations in assessing any development proposal"* (¶ 40.1 of A's Opening). The Appellant submits that *"the implementability of a planning proposal is not a relevant consideration because a proposed development which is desirable in the public interest is still desirable even if it cannot be implemented"* (¶128 of A's Reply).
109. Hong Kong cases cited by the Appellant in reliance (¶ 40 of A's Opening) are:
- a. Delight World Ltd v. The Town Planning Board [1997] HKLRD 1106 ("Delight World");
 - b. Town Planning Appeal No. 13 of 1993 ("TPA 13"); and
 - c. Town Planning Appeal No. 5 of 2003 ("TPA 5").
110. In relation to planning cases, each case depends on its own facts (¶13(a) of A's Reply) and what was said in relation to those cases may have no direct application when it comes to consider this case.
111. One issue is that the Appellant only owns 11% of the appeal sites of 11,900 m² in "OU(1)". The District Lands Officer/Hong Kong East (DLO/HKE) of the Lands Department had indicated to the Appellant that it can commence an application to surrender the lots it owns for a re-grant of lots within "OU(1)" on a foot by foot basis. Even with the exchange and a re-grant, the Appellant would only have 21% of the appeal sites (paragraphs 3, 5 and 6 of the Statement of Chiang Chui-wan, Senior Estate Surveyor of the Lands Department).

112. As the rest of the required appeal sites are Government land, doubts are expressed as to whether the Appellant can successfully acquire the rest of the lots required for implementing the proposed development from Government by tender or auction. Counsel for the Appellant admits that the appeal is a first step and “it’s going to be a long process” (transcript p. 29 H-M) **There is no assurance that the Appellant can acquire such lots put up for sale by open auction or tender in accordance with Government land policy (¶81(1) to (3) of TPB’s closing).**
113. Hence, the question whether the development as an integrated project is likely to be implemented is something which the TPB and the Appeal Board are bound to consider, for it impacts on whether the planning intention for the appeal sites is going to be fulfilled.
114. This is totally different from the circumstances of either the Delight World or TPA 13:
- a. In Delight World, D was the owner of various lots of land in Kam Tin in the New Territories. D proposed to develop the site to consist of residential low rise flats, a number of houses, car park spaces and a club house with swimming pool. D applied to TPB for planning approval and approval was refused by the TPB and upheld by the Appeal Board on the ground that “the proposal could not go ahead so long as there exist a real possibility that the [Kam Tin] Bypass might in fact cut across the site”. On appeal to the Court of First Instance, it was held by Keith J. that:

" (5) ...Uncertainty as to whether a subsequent event would render it impossible for a particular

development to proceed was not in law a valid ground for refusing planning permission for that development altogether"

The issue in Delight World is that of a possible subsequent Government action, which may or may not happen: not that of unrealistic future prospect in acquiring all the sites necessary to implement this proposed development. Delight World owned the sites.

115. In TPA 13 concerning the **Nam Sang Wai development** which was proposed to comprise a 18 hole golf course and 2,550 residential units. The appellant owned 76.4 ha in Nam Sang Wai and hopes to exchange 21.9 ha it owned in Lut Chau with 21.9 ha owned by the Government in Nam Sang Wai. Hence the issue of implementability is not one of lack of ownership or substantial ownership of the appeal sites. In TPA 13, the Explanatory Statement for Nam Sang Wai DPA envisages land exchange or lease modification. Paragraph 6.2.5(b) provides: "*There may be areas where private initiative may wish to provide comprehensive low-rise, low density residential development mainly through land exchange or lease modification*". The Appeal Board at paragraphs 80-81 of its Decision wrote:

"80 *Of course, planning permission alone will not secure the appellant's objective but the appellant also requires Government's cooperation, e.g. on lease modification and exchange of land.*

81. *Whether such cooperation will be forthcoming is beyond our control. Nor does it concern us. Our task is to determine purely from a planning point of view whether the Appellant's proposal should be*

permitted. This approach is consistent with the view expressed in British Railways Board v Secretary of State for Environment, The Times, 29th October 1993..."

Comments made by the Appeal Board at paragraphs 80-81 were made in relation to reason (e) of the TPB in review, declining planning permission to the Nam Sang Wai Development which reads: "*the proposed grant of land in Nam Sang Wai in exchange for land in Lut Chau for development is not wholly consistent with the policy of conservation of the area*". It is clear that the aforesaid comments were only made in obiter. The difficulties faced by the appellant in TPA 13 was not that of assembly of sites it did not own, but that of an exchange foot by foot of the site it owned in Lut Chau for contiguous land in Nam Sang Wai.

116. Plainly, the facts of Delight World and TPA 13 are distinguished from the present case; the comments made therein and the difficulties in implementation are of a different kind and may not have direct relevance to this case. There are no relevant points on implementability in TPA 5.

117. Here, the question is whether the proposed development of the scheme "Old Hong Kong" is an academic exercise which plainly leads to nowhere or alternatively, **the unspoken objective of the Appellant and the expressed concern is that if the application is approved, the Appellant will proceed with the hotel and the commercial block at "OU(1)", leaving or putting off the less or unprofitable cultural and other elements at "OU(2)" which offer community gain to a back burner.**

118. The Appellant had repeated in its submissions (at ¶132(d) of A's Reply and Minutes of 797th Meeting of the TPB held on 5 .9.2003) that "*the Vice Chairman of the MPC supplemented that as the sites were zoned "OU" and not "CDA", the development could be **implemented incrementally** according to the development concept set out in the OZP*".
119. As all of the lots which comprise "OU(2)" and the balance of the lots (not owned by the Appellant) which comprise "OU(1)" are Government land to be put up for tender or auction at dates unknown, implementability is not an idle concern. The DLO/HKE had maintained that direct grant of development rights of the Government land without going through the process of open competition is not acceptable (¶ 132(b) of A's Reply). As with all tenders or auction, there is no assurance that a realistic bid would be put up for all the lots and even if put up, whether the Appellant would succeed.
120. When questioned, Mr. Brownlee confirmed that there are several ways by which the scheme can be implemented, including areas not part of the appellant's portion or fund the construction of the cultural and tourist center (transcript p. 157 E-I). He said: "...whatever happens in the land negotiations through the next four years, some parts may be developed by the applicant, some parts may be available for the government to sell off in any form..." (transcript p. 157 S-V). He further said: "The developer –or the applicant- has land within the site. There – he is the only non-government body which has some- if you want to call it- rights of development, and **with the approval of an application like this, he could commence negotiation with the government over the OU(1) site**. Now, **the government, obviously, is the landowner of the OU(2) site**, and it could develop it in either ways: it could sell the combination as we've got here with the cultural building and the commercial building together-

and that could be sold as a combined project- or they could just take off the commercial building, and they could sell that separately, and fund the cultural building...and we've said in our submission that **if the government decided that it had to put out to tender or for sale...any of the other sites that weren't the applicant's land, that would then put him in a position where he [the appellant] could decide whether he wished to tender or bid for those sites as well...**".

121. What is said by Mr. Brownlee in the above paragraph contradicts his assertion that this is a "**coherent development**", a package designed to meet the requirements of the holistic approach (transcript p.218 M-V). Given what was said by Mr. Brownlee in paragraph 120 above, once approval is given, the proposed "Old Hong Kong" may be a wisp in the wind, with questionable intent on the part of the Appellant, without any assurance to implement it as an integrated project. As has been said by Mr. Brownlee, should the Appellant be unable to acquire the OU(2) site, its own planning intention would be critically compromised (transcript 219 A-D).
122. In relation to Town Planning Appeal No. 18 of 2005, while the Appellant submits that this case was decided per incuriam, the Appellant said that the ratio decidendi is that an "*applicant for...planning permission must show that there is at least some possibility of his carrying out the development which is the subject of the application either at the time of the application or at some time in the future*" (¶¶ 129-131 of A's Reply). The Appellant said that the threshold is low.

123. Even though the threshold is low, implementability of the package cannot be excluded as one of many factors in the equation for consideration of permission for a “coherent development”.

TPB’s reasons for refusing permission

1st Reason: *The scale and intensity of the proposed development is considered excessive in view of the prominent waterfront location of the site.*

124. We agree that the site coverage for the OU(1)” site of 95% and the “OU(2)” site of 93.6% up to the ground floor (transcript p.179 F-G) is excessive. This can be a reason for refusal of planning permission.

2nd Reason: *The submission has not demonstrated that innovative design has been employed to minimize the wall effect of the proposed development along the waterfront.*

125. Mr. Brownlee himself gave evidence on another occasion before the TPB that 35 mPD would create wall effect (transcript p.168 A-J). Mr. Brownlee also confirmed that “innovative design” in the context of the Plan or the Explanatory Statement is a reference to the wall effect or potential wall effect and is not a general requirement (transcript p. 211 G-K).

126. It is Mr. Brownlee’s evidence that it is conceivable, within his professional opinion, that the Appellant could have one (proposal) imaginatively and appropriately uses cultural or other themes which involves smaller buildings and spaced further apart (transcript 186 F-J).

127. Mr. Brownlee was also questioned on “visual dominance” the closer one gets to the proposed buildings, say for example walking along the promenade (transcript p. 209 G- p. 210G).
128. Even though the Appellant has proposed façade treatment to the GIC and OU sites and a proposed pedestrian walkway from “OU(1)” across IEC, which are design gains, we agree that there had not been innovative design employed to minimize the wall effect. The mere addition of the architectural features at the roof does not minimize the wall effect: though it makes the wall effect more tolerable, permeability or public permeability is not improved. Even counsel for the Appellant admitted that “...a few larger open spaces should be considered for public gatherings or hosting cultural and social events” (transcript p.19 R-U). The provision of a mere 15m for the landing/the Gateway piazza in between the hotel block (of 100m) and the commercial block (also of 100m) is inadequate to say the least. This can be a reason for refusal of planning permission.
129. Mr. Brownlee also agreed that in speaking about the gaps between the buildings and the wall effect (the visual impact), whether spaces provided are sufficient is a matter of judgment; it’s a matter of weighing all the factors, height, width, the setting, the particular theme and façade treatment (transcript p. 127Q – p.173E).
130. Mr. Brownlee agreed it is legitimate to refuse planning permission on the ground that wall effect has not been properly dealt with: he said: “Yes, I mean obviously...” (transcript p.163 S to p.164 E).
131. As the lack of innovative design to minimize the wall effect militates against the relaxation of the height restrictions, it is a reason that goes directly to the refusal of planning permission.

3rd Reason: *Implementability of the proposed development is in doubt having regard to the uncertainty in the acquisition of the high proportion of the Government land involved.*

132. We agree that implementability is a factor to be considered, though it may or may not by itself, be sufficient reason to decline planning permission. In this case, it can be a sufficient reason for Grampian conditions to be imposed, if planning permission is contemplated to be granted (*Grampian Regional Council v Aberdeen District Council (1984) 47 P. & C.R. 633*).

4th Reason: *the submission has not demonstrated that spacious environment is provided for pedestrians.*

133. We do not agree with this reason. Whether the environment is spacious is subjective, a matter of degree and the narrow shape of the appeal sites makes it difficult to enlarge pedestrian walkways except that the Gateway piazza obviously could be enlarged for public use.

Conclusion

134. We are of the opinion that there are sufficient good reasons for the TPB to refuse planning permission, even though we are not with the TPB in respect of its 4th reason.

135. In exercise of our independent planning judgment, quite simply there are insufficient merits to warrant relaxation of the height restrictions to the extent on the plans for approval to "OU(1)" and "OU(2)". This alone would have been sufficient to dispose of this appeal, for we are duty bound to faithfully implement the OZP.

136. For completeness, the rest of the points as to the scale and intensity of development and the implementability have also been dealt with in the paragraphs above.
137. **This appeal is dismissed.**
138. We wish to thank Counsels for the parties and the parties for their careful and thorough preparation of their respective cases which are helpful to us.
139. We must apologise for the length of time it has taken us to arrive at and deliver our Decision. Due to the complexity and the voluminous documents, we have taken more time to carefully revisit and consider all the arguments of the parties and all the evidence adduced, including statements of Ian Thomas Brownlee, Brian Wong and Christopher Foot for the Appellant and Mak Wong Kit-fong, Chiang Chui-wan and Yip Chi-kwai for the TPB. Because of the busy schedule of the Appeal Board members, it has taken longer time than expected for all members to finalize the decision.