

IN THE TOWN PLANNING APPEAL BOARD  
Town Planning Appeal No. 18 of 2005

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BETWEEN

WAN SHUET CHUN (溫雪珍)	1 <sup>st</sup> Appellant
CHAN WAI HING (陳惠興)	2 <sup>nd</sup> Appellant
LEE YUK PING (李玉萍)	3 <sup>rd</sup> Appellant
LAU WING YEE (劉穎而)	4 <sup>th</sup> Appellant
TAM KIN YEUNG (譚建陽)	5 <sup>th</sup> Appellant
YEUNG YUET YING (JANET)	6 <sup>th</sup> Appellant
CHAN TAK MING & TAM KWAN HING	7 <sup>th</sup> Appellant
TSANG SIM (曾嬋)	8 <sup>th</sup> Appellant
NG MAN SHING (伍萬成)	9 <sup>th</sup> Appellant
FOK LAI CHING	10 <sup>th</sup> Appellant
FREE WAVE CO. LTD.	11 <sup>th</sup> Appellant
RACO INVESTMENT LTD (偉恆昌)	12 <sup>th</sup> Appellant
WEI HUA DEVELOPMENT LTD (偉華發展)	13 <sup>th</sup> Appellant
IP TAK HING	14 <sup>th</sup> Appellant
CHAN NGO & YIP PUI (陳娥 & 葉培)	15 <sup>th</sup> Appellant
CHING KANG HOI (程鏡海)	16 <sup>th</sup> Appellant

TSE SAI KUI (謝世區) 17<sup>th</sup> Appellant

LEE KIT MAN (李潔雯) 18<sup>th</sup> Appellant

SUEN CHING TONG (孫政堂) 19<sup>th</sup> Appellant

and

THE TOWN PLANNING BOARD Respondent

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Appeal Board : Mr. Patrick FUNG Pak-tung, SC (Chairman)

Mr. KAM Man-kit (Member)  
Ms. Helen KWAN Po-jen (Member)  
Ms. Ivy TONG May-hing (Member)  
Mr. WONG Chun-wai (Member)

In Attendance : Miss Christine PANG (Secretary)

Representation : Mr. TO Lap-kee, Madam FOK Lai-ching & Others as  
representatives of the Appellants

Mr. Simon LAM (instructed by the Department of Justice)  
for the Respondent

Date of Hearing: 1<sup>st</sup>, 3<sup>rd</sup>, 14<sup>th</sup> November & 6<sup>th</sup> December 2006

Date of Decision: 12<sup>th</sup> April 2007

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**DECISION**

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## **The Constitution of the Appeal Board**

1. Before we go into the substance of this Appeal, we need to deal with the constitution of the Appeal Board.
2. As indicated by the formal part of this Decision above, this Appeal was originally heard by five members of the Appeal Board, including Mr. Kam Man-kit (“Mr. Kam”).
3. Mr. Kam was appointed by the Chief Executive onto the Appeal Board panel on 1<sup>st</sup> October 2004 pursuant to section 17A (1) of the Town Planning Ordinance Cap. 131 (“the TPO”). He was re-appointed in October 2006.
4. Shortly before 8<sup>th</sup> March 2007, in the course of other proceedings before a differently-constituted Appeal Board, it was discovered by the Government Counsel conducting those proceedings that Mr. Kam who was a member of that Appeal Board was at all material times a Government Counsel working in the Department of Justice. He was already working in such capacity at the time of his appointment and re-appointment to the Appeal Board panel.
5. Section 17A (2) of the TPO expressly provides that no ‘public officer’ should be appointed to the Appeal Board panel. Section 3 of the Interpretation and General Clauses Ordinance Cap. 1 defines “public officer” to mean “any person holding an office of emolument under the Government, whether such office be permanent or temporary”.
6. It is quite clear that Mr. Kam’s appointment to the Appeal Board panel was invalid and that any function performed by him in hearing any appeal to an Appeal Board pursuant to section 17B of the TPO was equally invalid.

7. Mr. Kam's appointment to the Appeal Board panel was duly revoked by the Chief Executive on 8<sup>th</sup> March 2007.
8. The question which has arisen is whether the remaining members of this Appeal Board can lawfully and validly continue to determine this Appeal the hearing of which was completed on 6<sup>th</sup> December 2006 or whether it can be said that, because of the original participation of Mr. Kam, the Appeal Board was unlawfully and invalidly constituted and the entire proceedings before the Appeal Board has been a complete nullity.
9. The TPO contains no provision which caters for the kind of situation which has arisen in the present case. Subsections (9), (12) and (15) of section 17A of the TPO provide as follows : -

*“(9) Subject to subsections (6), (8), (11) and (16), the Chairman or a Deputy Chairman and 4 other members of the Appeal Board panel shall constitute an Appeal Board to hear an appeal.*

*(12) At least 3 members, one of whom must be the Chairman of the Appeal Board, shall be present to hear and determine an appeal.*

*(15) A member shall not take part in determining the questions before the Appeal Board unless he has been present at all the Appeal Board meetings held in respect of the appeal concerned.”*

Section 17B (3) of the TPO provides as follows : -

*“(3) No decision of an Appeal Board shall be questioned by virtue of the absence of a member of the Appeal Board during the hearing of an appeal provided that member does not participate in the final decision of the Appeal Board.”*

10. The remaining members of the Appeal Board (other than Mr. Kam) take the view, though not without some doubt, that the statutory provisions set out in paragraph 9 above have the effect of permitting the remaining members of the Appeal Board to continue to consider and arrive at a decision on this Appeal. We take the view that those statutory provisions, though providing that an Appeal Board consisting of a Chairman and four members must be appointed to hear an appeal to begin with, do contemplate a member other than the Chairman dropping out in the course of the hearing of an appeal, for example, when it is suddenly discovered that that member is in a conflict of interest situation.
11. By a letter dated 16<sup>th</sup> March 2007, the Secretary to the Appeal Board informed the parties about the situation regarding Mr. Kam and asked them for submissions and an indication of their respective wishes as to the disposal of the Appeal.
12. By a letter from the representative of the Town Planning Board (“the TPB”) to the Secretary dated 21<sup>st</sup> March 2007, the TPB submitted that the remaining four members of the Appeal Board should carry on without a *de novo* hearing before another Appeal Board.
13. By a letter from the representative of the Appellants, Madam Fok Lai Ching, to the Secretary dated 22<sup>nd</sup> March 2007, it was said that the Appellants had no more time and energy to go through another appeal hearing and that they did not wish to have another hearing.
14. In all the circumstances, the remaining four members of the Appeal Board have decided to continue with their consideration of this Appeal and arrived at the present Decision without the participation of Mr. Kam. This Decision is therefore the decision of the remaining four members of the Appeal Board only.

## **Introduction**

15. This is an Appeal by a number of residents in the Wan Chai district (“the Appellants”) pursuant to section 17B of the TPO against a Decision of the TPB notified to the Appellants by letter dated 5<sup>th</sup> August 2005 whereby the Board refused an application by the Appellants (“the Review Application”) for review under section 17 of the TPO of an earlier decision by the Metro Planning Committee (“the MPC”) of the TPB rejecting an application by the Appellants for planning permission in respect of two areas in the Wan Chai district (“the Planning Application”).
  
16. In the course of the hearing of this Appeal, the Appellants did not call any witness to give evidence. A number of them together with some of their authorized representatives addressed the Appeal Board and made submissions in turn. This procedure is somewhat unusual. In view of the fact that there are some 19 Appellants in total, that they act as a united front and that the representatives of the Respondent, the TPB, raised no objection, the Appeal Board permitted the Appellants to conduct the Appeal in the way it was conducted.
  
17. On the side of the TPB, three witnesses were called to give evidence. They were duly cross-examined by one representative of the Appellants, namely, Mr. To Lap-kee (“Mr. To”), who is a surveyor and has been working as a voluntary worker for the Appellants in this matter.

## **Background and Events leading up to this Appeal**

18. The background leading up to the present Appeal is set out below.
  
19. The two areas in question fall within an area zoned “Comprehensive Development Area” (“CDA”) on the approved Land

Development Corporation (“LDC”) Lee Tung Street and McGregor Street Development Scheme Plan No. S/H5/LDC 2/2 (“DSP (H15)”). The Lee Tung Street area can be referred to as “Site A” and the McGregor Street area can be referred to as “Site B” (together “the application site”).

20. According to the Notes on DSP (H15), for development on land designated as “CDA”, an applicant shall prepare a Master Layout Plan with detailed land use proposals, development parameters, GIC and open space provisions, urban design and landscaping proposals and technical assessments and other matters for the approval of the TPB.
21. On 19<sup>th</sup> September 2003, a Planning Brief was endorsed by the MPC of the TPB to guide the future development of the CDA in question (“the 2003 Planning Brief”).
22. The Appellants were originally residents and registered owners either directly or indirectly of properties in or in the vicinity of Site A or Site B.
23. Subsequently, the Appellants made the Planning Application to the TPB pursuant to section 16 of the TPO (Application No. A/H5/349) for permission to develop Site A and Site B according to their proposal.
24. The development proposed by the Appellants involves the retention of 39 existing old buildings (including 36 existing tenement buildings which were subsequently reduced by the Appellants to 32 along Lee Tung Street (also known as “Wedding Card Street”) and 3 pre-war buildings at 186 – 190 Queen’s Road East), the construction of 5 new composite residential and commercial buildings of not more than 30 storeys (subsequently increased by the Appellants to 31 to 42 storeys), the provision of a residential care home for the elderly with a day-care unit and the provision of open spaces at ground and podium levels.

This will be elaborated upon below.

25. It has always been the Appellants' case that their development proposal is based on a "People - Centred" approach which emphasizes the preservation of social networks, the local character and buildings of historical, cultural and architectural values in the old district of Wan Chai.

26. The Planning Application by the Appellants was considered by the MPC of the TPB on 18<sup>th</sup> March 2005. The MPC decided to reject the application on the following grounds : -

*“(a) there is insufficient information in the submission to demonstrate that the proposed development could achieve the planning intention to improve the environment of the area through comprehensive redevelopment and allow efficient land use within the application site;*

*(b) there is insufficient information in the submission to justify the preservation of the 36 old buildings on Lee Tung Street and to demonstrate how they can integrate with the new buildings within the application site;*

*(c) there is insufficient information to demonstrate that the proposed development would not generate adverse traffic impact on the surrounding road network;*

*(d) there is insufficient information in the submission to demonstrate that the proposed development would not generate adverse environmental and landscape impacts on the application site and the surrounding areas; and*

*(e) the implementability of the proposed development scheme is doubtful in view of the current land ownership situation and non-compliance with the Buildings Ordinance.”*



27. The abovementioned decision of the MPC was notified to the Appellants by a letter dated 15<sup>th</sup> April 2005 from the TPB.
28. The Appellants then made the Review Application to the Board pursuant to section 17(1) of the TPO for a review of the said decision by the MPC.
29. In the meantime, the TPB wrote a letter dated 27<sup>th</sup> April 2005 to the Urban Renewal Authority (“the URA”) (the successor to the LDC), referred to the Planning Application by the Appellants and said the following :

*“Please be advised that the Metro Planning Committee (the Committee) of the Town Planning Board at its meeting on 18.3.2005 considered the captioned planning application and decided to reject the planning application. The Committee recognized that there were technical problems with the proposal and could not be supported per se. Nevertheless, the effort of the local community in actively participating in the planning of the area and in preserving the local character, particularly that of Lee Tung Street, was very much appreciated. The Committee recognized that there were merits in the development scheme and agreed to recommend it to the Urban Renewal Authority (URA) for consideration, in particular the adoption of the “People-Centred” approach in urban renewal. The Committee also requested that the URA be advised to establish more dialogue and maintain liaison with the local community in working out the subject development scheme.”*

30. The Review Application was heard by the TPB on 22<sup>nd</sup> July 2005 with both written and oral submissions by the Appellants. It is to be noted that the Appellants had made some amendments to their original development proposal by the stage of the Review Application.

31. On 22<sup>nd</sup> July 2005, the TPB, having considered the further submissions by the Appellants and the comments from the various relevant Government departments and the public sector, decided to reject the Review Application on the following grounds:-

- “(a) there is insufficient information in the submission to demonstrate that the proposed development can achieve the planning intention to improve the environment of the area through comprehensive redevelopment and allow efficient land use within the application site;*
- (b) there is insufficient information in the submission to demonstrate that the existing old buildings in Lee Tung Street should be preserved and how the proposed new buildings can integrate with old buildings to be preserved within the application site;*
- (c) there is insufficient information in the submission to demonstrate that the proposed development is sustainable from traffic point of view;*
- (d) the proposed development may generate adverse environmental, landscape and visual impacts; and*
- (e) the implementability of the proposed development scheme is doubtful.”*

These grounds are by and large the same as those relied upon by the MPC in rejecting the Planning Application.

32. This decision of the TPB was notified to the Appellants by a letter dated 5<sup>th</sup> August 2005. In the letter, the TPB also said the following :-

*“The TPB were, however, in support of public involvement in the redevelopment process and agreed that the good elements of*

*the proposed development scheme should be incorporated into the Planning Brief for the URA Development Scheme at Lee Tung Street and McGregor Street (H15), Wan Chai. The revised Planning Brief should be submitted to the TPB for endorsement.”*

33. On 15<sup>th</sup> September 2005, the Appellants lodged the present Appeal to this Appeal Board pursuant to section 17B(1) of the TPO against the decision of the TPB in rejecting the Review Application.
34. It is common ground that by the end of the year 2005 all the Appellants had either reached agreement with the URA and assigned their respective interests in properties in the vicinity of Site A and Site B to the URA by private treaty or had the same resumed by Government. In other words, none of the Appellants had retained any property interests within Site A or Site B by the time of the hearing of this Appeal.

### **The LDC**

35. The LDC was a body corporate established by Government under the Land Development Corporation Ordinance Cap. 15 (“the LDCO”) which came into operation on 15<sup>th</sup> January 1988. The long title of it reads as follows : -
- “To establish a corporation for the purpose of urban renewal and matters incidental thereto”.
36. Section 4(a) of the LDCO provided that one of the purposes of the LDC was to “improve the standard of housing and the environment in Hong Kong by undertaking, encouraging, promoting and facilitating urban renewal”.
37. Under section 5(2)(b) of the LDCO, one of the powers of the

LDC was to “prepare development proposals and implement such proposals”.

38. Section 10(1) of the LDCO provided as follows : -

*“(1) The Corporation shall conduct its business according to prudent commercial principles, but with the approval of the Financial Secretary may engage in projects which are unlikely to be profitable.”*

39. Section 13(1) of the LDCO provided as follows : -

*“(1) The Corporation may with the approval of the Secretary [Secretary for Planning and Lands] either generally or in a particular case, prepare in accordance with this section, development schemes for any area within which the Corporation may acquire property.”*

40. Section 14(1) and (3) of the LDCO provided as follows : -

*“(1) The Secretary may, at the request of the Corporation made in writing to him in that behalf, submit any plan prepared under section 13(2)(a) to the Town Planning Board for approval under this section.*

*(3) A plan approved by the Town Planning Board under this section shall be deemed to be a draft plan prepared by the Town Planning Board for the purposes of the Town Planning Ordinance (Cap. 131) and the provisions of the Ordinance shall apply accordingly.”*

41. Section 15 of the LDCO gave power to the LDC to request the Secretary to recommend to the Governor in Council resumption of land in order to facilitate the implementation of a development proposal.

## **DSP (H15)**

42. The original draft of DSP (H15) was submitted to and approved by the TPB in 1998. It was deemed to be a draft plan prepared by the TPB under section 12(3) of the TPO. It was duly exhibited for public consultation. Eventually, DSP (H15) was approved by the Chief Executive in Council on 22<sup>nd</sup> June 1999. Such approval was notified in the Government Gazette and the approved plan was duly exhibited for public inspection.

## **The URA**

43. The URA is another body corporate established by Government under the Urban Renewal Authority Ordinance Cap. 563 (“the URAO”) which came into operation on 1<sup>st</sup> May 2001. Basically the URA was established to take over and continue the functions and unfinished projects of the LDC which then became defunct.

44. Section 5 of the URAO provides as follows : -

### ***“5. Purposes of Authority***

*The purposes of the Authority are to –*

- (a) replace the Land Development Corporation as the body corporate established by statute having the responsibility of improving the standard of housing and the built environment of Hong Kong by undertaking, encouraging, promoting and facilitating urban renewal;*
- (b) improve the standard of housing and the built environment of Hong Kong and the layout of built-up*

*areas by replacing old and dilapidated areas with new development which is properly planned and, where appropriate, provided with adequate transport and other infrastructure and community facilities;*

- (c) achieve better utilization of land in the dilapidated areas of the built environment of Hong Kong and to make land available to meet various development needs;*
- (d) prevent the decay of the built environment of Hong Kong by promoting the maintenance and improvement of individual buildings as regards their structural stability, integrity of external finishes and fire safety as well as the improvement of the physical appearance and conditions of that built environment;*
- (e) preserve buildings, sites and structures of historical, cultural or architectural interest; and*
- (f) engage in such other activities, and to perform such other duties, as the Chief Executive may, after consultation with the Authority, permit or assign to it by order published in the Gazette.”*

45. The provisions of the URAO are based on the LDCO (which was thereby repealed) but enlarged.

46. The URA is now, as the LDC was then, a statutory corporation entrusted with functions and duties to perform for the good of the public in respect of the improvement of the standard of housing and the built environment and other incidental or related matters in Hong Kong.

### **The Preliminary Point on Evidence**

47. Mr. Lam on behalf of the TPB took a preliminary point. He submitted that the Appellants should not be permitted to adduce new material, such as further amendments to their development proposal or supplementary reports, which were not placed before the TPB either at the stage of the Planning Application or the Review Application, in the present Appeal. We decided to admit everything *de bene esse* and to rule on the point in our Decision which we now do.

48. In support of his submission, Mr. Lam has referred us to a number of cases decided in the courts of England regarding immigration law, employment law and town - planning law :

**Regina V. Immigration Appeal Tribunal Ex Parte Kotecha** [1983] 1 WLR 487

**Regina V. Immigration Appeal Tribunal Ex Parte El Nashaiki** (The Times 17/10/85)

**National Graphic Association V. Howard** [1985] 1 CR 97

and **Sand and Gravel Association Ltd. V. Buckinghamshire County Council** [1984] JPL 798

Broadly speaking, in those cases it was held that the appeal tribunal should not admit new evidence which was not adduced or in existence when the matter was first considered by the responsible official. We take the view that those decisions do not really assist because they deal with the interpretation of specific statutory provisions where the issues were whether the respective original decision makers or tribunals could be said to be wrong.

49. Mr. Lam confessed that he was unable to find any decision on the point in the context of the TPB or town planning appeals in Hong Kong. He, however, referred us to a case in the Lands Tribunal in Hong Kong :

**China Light & Power Co. Ltd. V. Commissioner of Rating  
and Valuation (No. 2) [1997] 4 HKC 500**

In that case, the respondent made an assessment of rateable value against the appellant which disputed the same. The appellant appealed to the Lands Tribunal and lost. The appellant then lodged an appeal to the Court of Appeal. In the meantime, the appellant applied to the Lands Tribunal for a review of its own decision. In the review application, the appellant sought to adduce new evidence to deal with the findings of fact by the Lands Tribunal in its original decision. The respondent opposed the application to adduce new evidence. The Lands Tribunal sat on a preliminary hearing to decide this point. It was held, *inter alia* :

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- (i) Although the Tribunal recognized the principles in the case of *Ladd v Marshall* as a useful basis for it to approach applications to adduce new evidence, it would exercise its discretion more liberally in admitting new evidence. The liberal approach was justified by a number of distinctions between the process of review before the Tribunal and the process of appeal before the Court of Appeal. First, appeals from the Tribunal to the Court of Appeal were limited to points of law. Secondly, where the Tribunal admitted evidence at a review, there would be no new trial. The review evidence supplemented the evidence already adduced. At the conclusion of a review, the Tribunal considered the evidence adduced at both hearings.
- (ii) Whereas the Tribunal's more liberal approach had on occasion admitted new evidence which could have been adduced at the trial, less flexibility would be accorded in relation to the second *Ladd v Marshall* condition, namely, that the new evidence would probably have an important but not necessarily decisive influence on the result. Rarely would it be just to receive new evidence, which would not affect the outcome of the trial.

Three matters are to be noted about that decision : -



- (i) Proceedings in the Lands Tribunal are more akin to proceedings in the courts than are those before the Town Planning Appeal Board.
- (ii) There is a statutory provision dealing specifically with the point about evidence. Section 11A(4) of the Lands Tribunal Ordinance Cap. 17 reads as follows : -

*“(4) The Tribunal may, in any review, hear and receive any evidence it thinks fit for the purpose of determining the issue between the parties.”*

- (iii) In a review application before the Lands Tribunal, it would be reviewing its own decision rather than that of another body.

50. We now examine the procedure regarding applications for planning permission and appeals under the TPO. It is as follows : -

- (i) In an application for planning permission under section 16 of the TPO, there would be no hearing and everything would be done on paper. The application would usually be considered by only a committee of the TPB, such as the MPC or the RNTPC (Rural and New Town Planning Committee).
- (ii) In a review application under section 17 of the TPO, the TPB would be asked to review the decision made in the planning application (usually by one of the committees of the TPB). There would be a hearing and an applicant can either by himself or his representative make representations in addition to the written material at a short hearing before the TPB. There would be no evidence as such (either oral or written) from any party.
- (iii) In an appeal to the Town Planning Appeal Board, the matter would be governed by the procedure set out in section 17B of the TPO. Section 17B(6) of the TPO provides, inter alia, as follows : -

*“(6) Prior to or at the hearing of an appeal, an Appeal Board may –*

*(b) hear evidence on oath and administer any oath necessary to swear on a witness;*

*(c) admit or take into account any statement, document, information or matter whether or not it would be admissible as evidence in a court of law”.*

51. We take the view that the function of the Town Planning Appeal Board is not strictly that of a tribunal similar to the Court of Appeal of the High Court. In the latter, it can normally only find that the court below has been wrong in some respect before it can substitute the original decision with its own decision. The Town Planning Appeal Board can possibly substitute its own decision for that of the TPB in question even if the TPB has strictly not committed any error on the material before it. After all, the hearing before the Town Planning Appeal Board would normally be much fuller and more substantial than a review hearing under section 17 of the TPO. Our view is to a certain extent supported by a dictum of Lord Lloyd of Berwick in the Privy Council in the case of **Henderson Real Estate Agency Ltd. V. Lo Chai Wan (For and On behalf Of The Town Planning Board)** [1996] 7 HKPLR 1 where he said at page 11 F – G :

*“The Appeal Board were, of course, entitled to disagree with the Town Planning Board. Their function was to exercise an independent planning judgment.”*

52. We therefore rule that the Town Planning Appeal Board is entitled to admit and receive new material relevant to the issues before us provided that the same does not substantially change the nature of an appellant’s original applications for planning permission or review and provided that the same does not cause any undue or serious prejudice to the TPB. Each case must be decided on its own facts.

53. In the present case, we are of the view that the additional material and supplementary reports adduced by the Appellants are relevant to the issues before us and that the TPB has had a reasonable opportunity to deal with them before us. We therefore do not accede to Mr. Lam's application to exclude the same.

### **The Grounds For Rejection By The TPB**

54. We now deal with the five grounds of rejection of the Planning Application by the MPC of the TPB and of the Review Application by the TPB.

55. Although the function of the Appeal Board is to exercise an independent planning judgment (see paragraph 51 above), the burden is still on the Appellants to show that the MPC and the TPB were wrong and/or that in any event the Appeal Board should grant the Planning Application with or without modification or conditions.

### **The Planning Intention And The Integration Between Old And New**

56. First, both the MPC and the TPB came to the conclusion that the Appellants had failed to provide sufficient information to demonstrate that the development proposed by them could achieve the planning intention to improve the environment of the area through comprehensive redevelopment and allow efficient land use within the application site.

57. Secondly, both the MPC and the TPB took the view that the Appellants had failed to demonstrate how the old buildings on Lee Tung Street could be preserved and how the proposed new buildings could integrate with such preserved old buildings within the application site.

58. As their respective fourth reasons, the MPC and the TPB also concluded that the Appellants had failed to provide sufficient information to demonstrate that their proposed development would not generate adverse environmental and landscape impacts on the application site and the surrounding areas.
59. We propose to deal with all three points together.
60. The crux of the Planning Application involved the preservation of 30 odd old tenement buildings of not more than 7 storeys high on Lee Tung Street, the building of some massive tall buildings on one side of Lee Tung Street, two buildings on two small stretches along Spring Garden Lane and one building on a patch bounded by Tai Yuen Street, Cross Street and Sam Pan Street (i.e., Site B), and the provision of open space on various patches along or near Lee Tung Street with some being on the roof top of some of the old buildings proposed to be preserved.
61. As regards the buildings on Lee Tung Street proposed to be preserved, there is clear evidence that they are over 30 years old and in varying degrees of degradation or even dilapidation. The Appellants have not provided any information as to what work can or should be done to preserve them and, even assuming that they can be practically and effectively preserved, how the same can help to achieve the objective of improving the environment of the surrounding areas, whether from the point of view of utility or aesthetics. In our view, such buildings on Lee Tung Street lack character. There is nothing particular about their design. Although they are old, they are not so old as to be pre-war. Any historical value which exists lies in the fact that the street was full of printing shops (which caused it to be otherwise called “Wedding Card Street”) rather than in the buildings themselves individually or collectively. At the moment, we are unable to see why printing shops cannot be opened or re-opened on Lee Tung Street itself or in its vicinity once the area is redeveloped.

62. One of the proposals of the Appellants is that Lee Tung Street should be retained and converted into a pedestrian-only street. This point will be dealt with below in the context of impact on traffic. Even if the traffic problem can be solved, we still do not think that the mere preservation of most of the old tenement buildings on Lee Tung Street will assist or substantially assist in improving the environment of the surrounding areas. On the contrary, it may have the opposite effect, because it prevents or hinders the comprehensive renewal or redevelopment of the area in question and has the effect of tying the hands of any planner or developer for the area in question.

63. The proposal by the Appellants for the retention of most of the old tenement buildings on Lee Tung Street has the effect of contradicting or undermining the planning intention expressed in the Explanatory Statement attached to DSP (H15). In paragraph 6.3 thereof, it is said :

*“6.3 The Area has also been sub-divided into many small parcels of land under private ownership. This will likely be conducive to piecemeal and pencil-type development which will perpetuate the inefficient landuse layout and unsatisfactory street pattern of the Area. Comprehensive redevelopment is therefore necessary in order to facilitate restructuring of the landuse layout and street pattern.”*

(The effect of an Explanatory Statement attached to a draft or approved outline zoning plan is dealt with below.)

64. As regards the proposed new buildings, we have been shown a model prepared by the Appellants. We agree with the observation of Ms. Tam Yin-Ping, Donna, a Senior Town Planner, who gave evidence for the TPB, that they are designed in a very odd shape and they can form a massive screen blocking the views of the buildings in the surrounding areas and will likely affect both penetration of daylight and natural ventilation. In short, we take the view that they simply cannot

blend in with the old tenement buildings proposed to be preserved either architecturally or visually, especially within the relatively narrow confines of Site A. In fact, we feel that if the proposed new buildings are to be allowed to stand side by side with the old tenement buildings in the manner suggested by the Appellants, a visitor to Hong Kong looking at the end product might well be forgiven for thinking that the town planning system in Hong Kong is still as undeveloped as that in a number of underdeveloped countries in South-East Asia.

65. Furthermore, we have heard the evidence of Mr. Fung Man-fai, Ronald, a Senior Building Surveyor, who gave evidence for the TPB. His main duties and responsibilities include the administration of the Buildings Ordinance and its allied regulations over the private buildings within areas including the Wan Chai district.

66. According to the witness, in the Planning Application, the Appellants have in effect treated Site A as a single Class C site for redevelopment, thus ignoring the fact that Lee Tung Street is still a public street. There is of course a difference between a Class C site on the one hand and a Class B or Class A site on the other hand for the purpose of calculating site coverage and plot ratio under the Buildings (Planning) Regulations made under the Buildings Ordinance. The law is quite clear on this : see the case of **Attorney General V. Cheng Yick Chi** [1983] 1 HKC 14. On this basis, the proposal for development put forward by the Appellants do not comply with the requirements under the Buildings Ordinance. The Appellants have not put forward any expert or factual evidence to refute the evidence of Mr. Fung.

67. We accept the evidence of Mr. Fung.

68. The Appellants have suggested that the problem can be solved by arranging for a surrender and re-grant of properties on Lee Tung Street with Government. We do not agree for two reasons : -

- (i) The Appellants are not the registered owners of any property on Lee Tung Street. They are not in a position to make any surrender to Government.
- (ii) In a surrender and re-grant exercise, negotiations will have to be carried out between the registered owner of the property to be surrendered and Government to work out the detailed terms of the surrender and re-grant, including the payment of premium. The Appellants simply have no status to carry on such negotiations with Government or to force the URA or Government to proceed with an application for surrender and re-grant according to their proposal.

69. Furthermore, according to the Remarks at the end of the Notes attached to DSP (H15) which expressly forms part of the plan, “an applicant for permission for development on land designated “Comprehensive Development Area” (CDA) shall prepare a Master Layout Plan for the approval of the Town Planning Board and include therein the following information : -

*“g. an environmental impact assessment report to examine any possible environmental problems that may be caused to or by the proposed development and the proposed mitigation measures to tackle them;”*

The Appellants have failed to produce such a report.

70. In all the circumstances, we cannot find anything wrong with the said three reasons relied upon by the MPC in rejecting the Planning Application and by the TPB in rejecting the Review Application.

### **The Traffic Problem**

71. According to the said Remarks at the end of the Notes attached to DSP (H15), an applicant should also include the following

information in the Master Layout Plan : -

*“h. a traffic impact assessment report to demonstrate that the development mix/intensity is sustainable by the capacity of the transport and road proposals and to propose mitigation measures to tackle any possible traffic problems that may be generated by the proposed development”.*

72. According to the Explanatory Statement attached to DSP (H15) which reflects the planning intentions and objectives of the TPB for the area covered by the plan, there should be adequate measures to cater for vehicular circulation. It states as follows : -

*“7.7 Upon implementation of the development, Lee Tung Street will be extinguished and integrated into the Area. Amoy Street, which runs parallel to Lee Tung Street, will be widened and extended to connect Johnston Road to Queen’s Road East to provide an alternative through road to replace Lee Tung Street.*

*7.8 McGregor Street will be partially closed to allow for comprehensive redevelopment of the Area. The southern part of McGregor Street will remain open to allow vehicular access to the existing remaining buildings thereat.*

*7.9 Adequate off-street parking spaces and loading/unloading facilities will be provided within the Area so as to improve local traffic flow.”*

73. Although the Explanatory Statement is not part of DSP (H15), it is something which nevertheless has to be taken into consideration. In the case of **Henderson Real Estate Agency Ltd. V. Lo Chai Wan** (supra), Lord Lloyd of Berwick also said at 12I – 13D as follows : -

*“Then what about the other documents on which the Town Planning Board rely? At this point a preliminary question arises. The plan and the Notes attached to the plan are obviously material*



*documents to which the Appeal Board were bound to have regard; indeed they are the most material documents in the case. But what about the Explanatory Statement, and the subsequent guidelines? The Explanatory Statement is expressly stated not to be part of the plan. But it does not follow that it was not a material consideration for the Appeal Board to take into account, .....*

*By the same token, the 1992 and 1993 guidelines are also material considerations to be taken into account. The Appeal Board was not bound to follow the Explanatory Statement or the guidelines. But they could not be disregarded.”*

74. The third witness who gave evidence for the TPB was a Mr. Chan Kam-shun, who is a Senior Engineer/Wan Chai in the Transport Department. His main duties and responsibilities are to oversee all matters relating to traffic engineering and traffic management in the Wan Chai and Causeway Bay areas.

75. According to Mr. Chan, he had studied all the submissions and reports submitted by the Appellants at the Planning Application and Review Application stages. He found the same to be unacceptable for the following reasons : -

- (i) The Traffic Impact Assessment Report submitted by the Appellants (“the TIA Report”) covered only a relatively small assessment area.
- (ii) The TIA Report had not taken into account the traffic and transport impact of other major developments in the area.
- (iii) The TIA Report did not contain an analysis of all the initial road junctions within the assessment area to deal with the possibility of overloading of such junctions.
- (iv) The junctions analyses included in the TIA Report did not

reflect the actual traffic situation.

76. At the hearing of the Appeal, the Appellants did not adduce any evidence to refute the evidence of Mr. Chan; they did not do much more than referring to a report compiled by an observer regarding the traffic flow and car-parking situation within the car park in Hopewell Centre opposite the entrance to Lee Tung Street. In this regard, it is to be borne in mind that the only access to the Hopewell Centre car park is via Kennedy Road.

77. In all the circumstances, we accept the evidence of Mr. Chan. We agree with the third reason relied upon by the MPC and the TPB that the Appellants had failed to provide sufficient information to demonstrate that the proposed development would not generate adverse traffic impact on the surrounding road network.

78. In this regard, we should make the following observations from our own experience and local knowledge as Hong Kong residents : -

- (i) Queen's Road East is always a very busy thoroughfare during daytime.
- (ii) Johnston Road is almost always congested because of the trams.
- (iii) Hennessy Road is always very congested because of the buses.
- (iv) The junctions at Arsenal Street, Queen's Road East and Queensway, Queen's Road East and Kennedy Road, Queen's Road East and Stubbs Road and Morrison Road and Canal Road (including the entries to the flyover leading to the old cross-harbour tunnel) are bottle-neck areas and can be extremely congested during different times of the day and night.

In the event of serious traffic jams on these roads and at these junctions, the entire traffic system on Hong Kong Island can be affected. Traffic flow is therefore a crucial factor to be taken into account in the consideration of any development or redevelopment in the area in question. It must be investigated, handled and planned with meticulous care.

### **The Implementability Question**

79. The last reason of the MPC for rejecting the Planning Application was its doubtful implementability in view of “the current land ownership situation and non-compliance with the Buildings Ordinance”. The last reason of the TPB for rejecting the Review Application was “the implementability of the proposed development scheme is doubtful”.
80. We are of the view that this is the greatest hurdle for the Appellants to get over and they have not succeeded.
81. As pointed out above, although when the Planning Application was made the Appellants did have proprietary interests in some of the properties within the application site, by the end of 2005, they had ceased to have such interests. All the properties within the application site have been either acquired by the URA or resumed by Government.
82. It is also in evidence that over a fairly long period of time there were many discussions between the Appellants and/or other persons and the URA regarding the mode of development of the application site, but nothing came of it.
83. In the above circumstances, we fail to see how the Appellants can realistically make or continue to press on with their proposal for development of the application site.

84. Although it is possible for practically any person (including a non-owner of property) to make an objection to the zoning by the TPB of an area or areas which form the subject of a draft outline zoning plan published under the TPO, the same is not true in relation to an application for planning permission under section 16 of the TPO. An applicant for such 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. In other words, such an application cannot simply be an academic exercise which plainly leads to nowhere. This was so under section 16 of the TPO before it was amended in 2004 and this is made even more plain by the new provisions added by the 2004 amendment, e.g., the provisions requiring the consent of a current land owner to be obtained and those requiring an applicant to verify certain matters or particulars by statutory declaration or otherwise.

85. In the present case, there is simply no possibility of the Appellants carrying out the proposed development without the co-operation and consent of the URA, the present registered owner of most, if not all, of the properties within the application site. Furthermore, the Appellants have 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.

86. In the recent case of **Capital Rich Development Limited And Another V. Town Planning Board** (CACV 386/2005 Judgment handed down by Court of Appeal on 18/1/07), there was an objection lodged by the Applicants on a draft Development Scheme Plan for a project by the URA known as H19. The Applicants were trying to persuade the TPB not to include their property within the boundaries of the Development Scheme Plan. The TPB did not amend the Plan according to the objection and the Applicants applied for judicial review against the TPB. The matter reached the Court of Appeal. One of the issues which the Court of Appeal had to consider was whether it was proper for the TPB

to take into account the financial viability of the Development Scheme into account. The question there concerned the financial viability from the point of view of the URA. In the Judgment of Cheung J. A., he said as follows :-

“53. *To answer this question it is necessary to understand the unique role of URA in urban renewal. For the purpose of large scale urban renewal one of the means is by way of CDA zoning. While there does not appear to have any restriction on a private developer seeking the approval of the TPB to introduce a CDA zone, realistically any large scale urban renewal scheme, like the present CDA zoning application, can only be introduced and implemented by the URA either by itself or together with joint venture partners. Apart from providing for the housing needs of the population, the CDA will provide for community services and facilities as well.*

54. *Once this role of the URA is recognized, then it becomes clear that it is not appropriate to compare the URA as a private developer. The financial viability of a particular urban renewal project by the URA clearly has a direct bearing on planning issues which have to be considered by the TPB.*

.....  
57. *With this background, in my view, it is proper for the TPB when considering planning issues to take into consideration the financial viability of the Development Scheme to be implemented by the URA. This does not mean that TPB has preferred the financial interest of URA to other private property developer.*

58. *As Kerr LJ observed in R. V. Westminster City Council, Ex. p. Monahan and another [1990] 1 Q.B. 87 :*

*‘Financial constraints on the economic viability of a*

*desirable planning development are unavoidable facts of life in an imperfect world. It would be unreal and contrary to common sense to insist that they must be excluded from the range of considerations which may properly be regarded as material in determining planning applications. Where they are shown to exist they may call for compromises or even sacrifices in what would otherwise be regarded as the optimum from the point of view of the public interest. Virtually all planning decision involve some kind of balancing exercise. A commonplace illustration is the problem of having to decide whether or not to accept compromises or sacrifices in granting permission for developments which could, or would in practice, otherwise not be carried out for financial reasons. Another, no doubt rarer, illustration would be a similar balancing exercise concerning composite or related developments, i.e, related in the sense that they can and should properly be considered in combination, where the realization of the main objective may depend on the financial implications or consequences of others. However, provided that the ultimate determination is based on planning grounds and not on some ulterior motive, and that it is not irrational, there would be no basis for holding it to be invalid in law solely on the ground that it has taken account of and adjusted itself to, the financial realities of the overall situation.'"*

87. It is quite clear that the TPB as well as the Appeal Board in considering planning issues, especially applications for planning permission under section 16 of the TPO, must take into account the commercial and financial realities of the overall situation and not just deal with them *in vacuo*.

88. In these circumstances, we agree with the ‘doubtful implementability’ reason relied upon by both the MPC and the TPB in rejecting the applications by the Appellants.

### **Dismissal Of Appeal**

89. In all the circumstances, we have no alternative but to dismiss the present appeal.

### **Conclusion**

90. In view of the fact that this appeal has raised considerable public interest, we feel that it is appropriate to make a number of observations.

91. First, during the appeal, the Appellants made no bones about the fact that their original applications and the appeal have been initiated and driven forward by a social concern group (including themselves) who are motivated by their concern for, inter alia, the possible break-up of the social network, the need for old residents to disperse and re-locate and the possible destruction or diminution of buildings or objects forming part of our heritage in the course of any development within the old district of Wan Chai.

92. The members of this Appeal Board, being also long time residents of Hong Kong, can well appreciate such feelings on the part of the Appellants and have much sympathy for them. We are indeed most impressed by the time and effort which the Appellants and those assisting them have obviously put in in pursuing their objective.

93. We are also happy to note that the efforts of the Appellants have

received recognition by the TPB in that the TPB wrote the two letters referred to in paragraphs 29 and 32 above.

94. Further, the 2003 Planning Brief was actually revised in June 2006 which came to include the following statement for the guidance of the URA in its plan to carry out the development covered by DSP (H15) :

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*“To accord with the “people-centred” approach in the Urban Renewal Strategy, the URA should ensure that :*

- *affected owners are equitably compensated;*
- *affected tenants are provided with proper rehousing assistance;*
- *the community at large benefits from the project; and*
- *affected residents and the community at large are given the opportunity to express their views on the project.*

*In particular, in the process of preparing the development scheme, views and participation of local community are encouraged so that the local character, community spirit and social network of the area can be preserved as far as practicable.”*

95. As at the time of the conclusion of the hearing of the appeal, no Master Layout Plan had been submitted by the URA to the TPB for approval. Hence, no Master Layout Plan was placed before us for our consideration.

96. It appears from media reports that subsequently a Master Layout Plan was produced by the URA and that there seemed to be public consultation on it. We do not know the details of it. It was not produced to us nor have we heard argument on it. It is something which is not relevant for the purposes of the present appeal.

97. Our only observation on this is that it is possible that the Master



Layout Plan produced by the URA may already have addressed or will address all or some of the concerns expressed by the Appellants in the present appeal. In any event, it seems to us that the more appropriate time for the Appellants to advance the points made in the present appeal in the appropriate forum or forums is after the Master Layout Plan has been produced by the URA rather than before.

98. We hope and we have no doubt that the URA, being a statutory corporation entrusted with functions and duties to perform for the good of the public at large (not just the local residents in Wan Chai) and under the guidance provided in the Revised Planning Brief referred to in paragraph 94 above, will do its best to take into consideration the proposals and suggestions made by the Appellants and other local residents as much as possible, whilst at the same time maintaining a practical and balanced approach in its plan to redevelop parts of the Wan Chai district with the ultimate aim of improving the overall standard of housing and the built environment.
99. We should add, of course, that what we say above does not have any binding effect on the URA.