

IN THE TOWN PLANNING APPEAL BOARD

Town Planning Appeal No. 15 of 2011

BETWEEN

HIN TACK GEE LTD

Appellant

and

TOWN PLANNING BOARD

Respondent

Appeal Board:	Ms Linda CHAN Ching-fan, SC	(Chairman)
	Ms Rebecca CHAN Ching-chu	(Member)
	Miss CHUNG Ching-may	(Member)
	Dr LAM Ching-choi, BBS, JP	(Member)
	Dr LEE Ho-yin	(Member)
In Attendance:	Ms Suan MAN	(Secretary)

Representation: Mr Anthony ISMAIL, Counsel for the Appellant
Mr Eugene FUNG SC, Counsel for the Respondent

Dates of Hearing: 17th - 18th July 2013

Date of Decision: 27th February 2014

DECISION

1. This is an appeal by Hin Tack Gee Limited (“**Appellant**”) under section 17B of the Town Planning Ordinance (Cap. 131) (“**TPO**”) against the decision of the Town Planning Board (“**TPB**”) in refusing its application for planning permission for a proposed hotel development (“**Hotel**”) at nos. 10-12 Yat Fu Lane, Shek Tong Tsui, Hong Kong in I.L. 672 ss.B and C (“**Site**”).

Background Fact

2. The following fact and matters relevant to the appeal are not in dispute.
3. The Appellant is the registered owner of the Site. As stated in the assignment memorial, the Site was assigned together with a “free and uninterrupted right of way” (“**ROW**”) over the portion of private land at I.L. 672 RP and I.L. 672 s.H of Yat Fu Lane owned by I.L. 692 s.G (“**private land portion**”). This can be seen from Plan R-3 dated 20 September 2011 prepared by the Planning Department (“**PD**”), a copy of which is attached to this Decision (Annex A).
4. The Site is a small area of about 171.3m² and is triangular in shape. It is located at a narrow street leading from Queen’s Road West via Woo Hop Street and the junction at South Lane and Yat Fu Lane. Most of Yat Fu Lane, which is about 4.7m to 6.2m wide, is private land.
5. The Site falls within an area zoned “Residential (Group A)” (“**R(A)**”) on the Draft Kennedy Town & Mount Davis Outline Zoning Plan (“**OZP**”) No.

S/H1/19 (“**Draft Plan**”) that was in force when the s.17 review was considered by the TPB on 14 October 2011. According to the Notes of the Draft Plan, the R(A) zone is “intended primarily for high-density residential developments”.

6. The Site is currently vacant. The immediate neighbourhood of the Site, as shown in Plan AP-2 at Annex B, is predominantly residential in nature in that:-
 - 6.1. the Site is surrounded on four sides by medium to high-rise residential buildings with commercial uses/retail shops mainly on ground floors. The surrounding areas are predominantly occupied by residential buildings under R(A) zone;
 - 6.2. to the immediate south-west of the Site is The Belcher’s, a private residential development with 6 domestic towers up to 221mPD (metres above Principal Datum) high (62 storeys) and a shopping mall at the podium (61mPD); and
 - 6.3. the area is well served by public transport including buses, public light buses and trams.
7. On 19 February 2009, the Building Authority approved building plans for a 26-storey composite commercial/residential building on the Site with a height of 72.95m or 78.15mPD, shops on the G/F and M/F, 22 residential flats (with an average gross floor area and saleable area of 52.9 m² and 25 m² respectively), with a total plot ratio of 8.49 and domestic site coverage of 33.32% (above podium) (“**Approved Building**”).
8. On 29 November 2010, S.K. Pang Surveyors & Co. Ltd. (“**SKPS**”) on behalf of the Appellant submitted an application under s.16 of the TPO for

the proposed Hotel which comprises of 23 floors with 50 guestrooms, a reception cum administration office and some limited amenities and is described as mainly serving the “Individual Visit Scheme; visitors from the Mainland”. By letters dated 24 January 2011 and 3 March 2011, SKPS provided (a) a letter dated 20 January 2011 from CKM Asia Ltd (“CKM”), traffic and transportation planning consultants, to address the comments of the Commissioner of Police, and (b) further information and revised development particulars to address the comment from the Buildings Department (“BD”).

9. At the meeting of the Metro Planning Committee of the TPB (“MPC”) held on 6 May 2011, which was not attended by the Appellant or its representative, the MPC took into account the following planning considerations:

“The application site, with an area of 171.3m² and a net site area of 140.783m² only, is relatively small in size when compared with other sites within the planning scheme area with similar hotel applications approved (ranging from 310m² to 1,661m² except planning application A/H1/86). The small site area and its triangular configuration make the site not really conducive to a decent hotel development. Apart from the inclusion of a small reception counter cum administration office and some BOH [back-of-house] facilities, there is a lack of hotel amenities for the hotel guests. While the applicant has claimed that due to the small area, residential development on the site will result in small domestic floor plate and units with low efficiency ratio notwithstanding the fact that a set of building plans for a composite commercial/residential building has been approved by the Building Authority ..., the floor layout of the proposed hotel is also not very efficient.”

10. The MPC rejected the application on the following grounds:-

- 10.1. “the application site is not conducive to hotel development given its small site area and triangular configuration”; and
- 10.2. “there is no planning merit to justify the proposed hotel development”.
11. On 8 June 2011, SKPS on behalf of the Appellant applied for a review of the decision of the MPC under s.17 of the TPO. On 18 July 2011, SKPS submitted a written representation in response to the 2 reasons for rejection.
12. On 28 July 2011, the Secretary to the TPB (“**Secretary**”) informed SKPS that the hearing of the s. 17 review was tentatively scheduled for 14 October 2011. This was confirmed by another letter dated 30 September 2011 from the Secretary to SKPS.
13. By letter dated 6 October 2011, SKPS applied to the TPB for adjournment of the hearing to 25 November, 2 December or 16 December 2011. On 7 October 2011, the Secretary provided a copy of the paper prepared by the PD (TPB Paper No. 8927) (“**TPB Paper**”) to SPKS and informed SPKS that the s.17 review would be held on 14 October 2011 and that if the Appellant wished to defer the hearing, it should explain the reasons for the proposed deferment at the hearing.
14. At the hearing on 14 October 2011, Mr SK Pang, on behalf of the Appellant applied for an adjournment of the hearing on the ground that the Appellant’s counsel was not available. Upon refusal of the application, Mr SK Pang left the meeting and the application was considered by the TPB in the absence of the Appellant. The following 3 Government departments provided adverse comments on the application:-
- 14.1. The Commissioner for Transport (“**C for T**”) had reservation about the application and commented, amongst other things, that:

“as the existing private land at portions of carriageway and pavement of Yat Fu Lane is under virtually unrestricted without right-of-way requirement and falls within an area zoned “R(A)” on the OZP, possibility of building upon the private street could not be excluded. Should this situation occur, Yat Fu Lane would be blocked and a cul-de-sac would be resulted. In this regard, TD shares Commissioner of Police (“C of P”)’s concern that there are traffic management problems and safety concern at the said private land portions of Yat Fu Lane”

14.2. The C of P objected the application and commented, amongst other things, that:

“He had expressed reservation on the proposed hotel development in the previous application (No. A/H1/92) due to the adverse traffic impact on the narrow back street of Yat Fu Lane, on which all vehicles would need to negotiate three-point turn or even four-point turn for reversing at the end of the street. Based on the traffic impact assessment submitted by the applicant and the justification that the proposed hotel under application is not expected to attract coach or minibus to use the nearby access road, he had no in-principle objection to the current application at the s.16 stage. However, given a traffic accident caused by the “U” turn of a private car occurred recently, and the public objections received, he has critically reviewed the road condition of Yat Fu Lane. He objects to the review application from traffic management point of view due to the following reasons:

- (a) Yat Fu Lane is a narrow sloping street with portions of carriageway and pavement fall within private land. Given its private road nature, the Police might face difficulty in taking enforcement action against roadside illegal parking. The traffic management problems would be aggravated by the vehicular traffic induced by the proposed hotel; and

- (b) C of P has concern on large vehicles entering and leaving Yat Fu Lane since it is a narrow street at which vehicles are difficult to make a “U” turn in the limited area. Despite the applicant’s claim that the proposed hotel is not expected to attract coach or minibus, C of P has no authority to prevent coach or minibus from entering the private land portion of Yat Fu Lane.”

14.3. The PD commented, amongst other things, that:

“7.1 ... The small site area and its triangular configuration make the site not really conducive to a decent hotel development. Apart from the inclusion of a small reception counter cum administration office and some BOH facilities, there is a lack of hotel amenities for the hotel guests. Having regard to this, the MPC rejected the application on the grounds that the application site is not conducive to hotel development given its small site area and triangular configuration, and there is no planning merit to justify the proposed hotel development. The applicant argues that the Board has not indicated what planning merit it is referring to. However, it should be noted that the proposed hotel development requires planning permission from the Board, and the onus of demonstrating the merits of the proposal is on the applicant. As a matter of fact, there is no particular planning merit demonstrated in the application to justify the proposed hotel development.

7.2 The applicant disagrees that the application site is not conducive to hotel development. He claims that five small hotels similar to the subject scheme have been approved on Hong Kong Island and Kowloon ... Plan D considers that the small site area and its triangular configuration make the site not really conducive to a decent hotel development ... Besides, as each site is different in terms of site characteristics and context, each application is to be considered based on its individual merits. It should be noted that only two of the quoted examples, i.e. the sites at Temple Street and Reclamation Street in Yau Ma Tei and Mong Kok require planning permission from the Board and they are rectangular in shape abutting a public street. ...

7.4 The applicant also claimed that the proposed setback

with a width of 1.71m for pavement should be considered as a planning gain ... As advised by CBS/HKW [the Chief Building Surveyor/Hong Kong West], the pavement terminates somewhere close to the application site and is not connected to the pavement of Queen's Road West. Currently, no pavement connection is available at the section of Yat Fu Lane between the application site and Queen's Road West. As the relevant portion of Yat Fu Lane is private land, there exists a possibility that Yat Fu Lane may be blocked by the landowners. Since a continuous pedestrian link to Queen's Road West cannot be guaranteed, the benefit of the proposed setback to the pedestrians is rather limited. ...

7.6 There are public comments received against the review application on grounds of land use compatibility, development intensity, adverse traffic, visual and environment impacts, blockage of air ventilation and natural lighting, affect operation of emergency vehicles and security etc. Amongst these, traffic management and traffic safety are particularly valid concerns ...”

15. After deliberation, the TPB rejected the s.17 review on the following grounds:-
 - 15.1. “the application site is not conducive to hotel development given its small site area and triangular configuration” (“**1st Reason**”);
 - 15.2. “there is no planning merit to justify the proposed hotel development” (“**2nd Reason**”); and
 - 15.3. “the proposed hotel development would aggravate the traffic management problems and safety concern at the private land portion of Yat Fu Lane” (“**3rd Reason**”).

16. By Notice of Appeal dated 1 December 2011, the Appellant appealed against the TPB's refusal to allow its application for review.

Applicable Principles

17. There is little difference between the parties on the legal principles applicable to the appeal. The following principles are largely taken from the Opening Submissions of Mr Anthony Ismail, counsel for the Appellant.
18. First, in considering an appeal against the decision of the TPB, the Town Planning Appeal Board (“**TPAB**”) must exercise an independent planning judgement and is entitled to disagree with the TPB (*Henderson Real Estate Agency Ltd v Lo Chai Wan* [1997] HKLRD 258 (PC) at 261, 266A). The TPAB could substitute its own decision for that of the TPB even if the TPB had not strictly committed any error on the materials before it, as the hearing before the TPAB would normally be much fuller and more substantial than a review hearing under TPO s.17 (*Town Planning Appeal No. 18 of 2005*, unreported, 12 April 2007).
19. Secondly, the TPB’s independent planning judgement (as with the TPAB’s discretion) to grant planning permission must be exercised within the parameters of the relevant approved plan:-
 - 19.1. S.16(4) of the TPO provides that “[the TPB] may grant permission under subsections (3) only to the extent shown or provided for or specified in the plan”.
 - 19.2. In *Henderson*, the Privy Council held that under s.16(4) of the TPO, the TPB may grant planning permission “only to the extent shown and provided for or specified in the plan” (at 261E-F).
 - 19.3. In *International Trader Limited v Town Planning Appeal Board & Anor* [2009] 3 HKLRD 339, the Court of Appeal considered the

wordings of s.13 of the TPO, which provides that “Approved plans shall be used by all public officers and bodies as standards for guidance in the exercise of any powers vested in them”, and held that the effect of s.13 is to “impose on all public officers and all public bodies the statutory duty to have reference to approved plans as the recognised measure by which they are to be guided; that is, directed, in the exercise of their powers.” (at §§31-33, 38-42, 47-51).

- 19.4. It is the duty of the TPB (and hence the TPAB) to see that the relevant town plan is faithfully implemented (*Town Planning Appeal No. 13 of 1993*, 26 August 1994 at §§5-7).
 - 19.5. The TPB (and the TPAB) has no authority to deviate from the plan “however compelling other material considerations to the contrary might be” (*Halsbury’s Laws of Hong Kong*, Vol. 48, at §385.270 at p.300).
 - 19.6. Planning permission can only be granted for a development which is in line with the planning intention (*Town Planning Appeal Nos. 13 of 2006 and 5 of 2008*, 5 October 2010, §29). This, Mr Fung SC submits, is a matter of law and, as such, admits of only one correct answer.
20. Thirdly, the OZP and the Notes are material documents to which the TPAB is bound to have regard in exercising its independent judgement and, indeed, they are the “most material documents”. Whilst the Explanatory Statement (“ES”) is expressly stated not to be part of the plan, it does not follow that it is not a material consideration for the TPAB to take into account. Similarly, the guidelines are also material considerations to be taken into account. The TPAB was not bound to follow the ES or the guidelines, but they could not

be disregarded (*Henderson*, at 267A-C; *Halsbury's Laws of Hong Kong*, Vol. 48, §[385.270]).

21. Fourthly, it is relevant to consider whether the proposed development would result in an additional gain to the community (*Halsbury's Laws of Hong Kong*, Vol. 48, §[385.270]). The planning authority must have regard to the fall-back position of the applicant if the application for planning permission is refused (*Snowden v Secretary of State for the Environment and the City of Bradford Metropolitan Council*, 10 July 1980, Lexis transcript). Conversely, if the proposed development is likely to have adverse impacts on the vicinity, the applicant has to satisfy the TPB that it is able to take adequate preventive or mitigation measures to mitigate such impacts (*Town Planning Appeal No. 2 of 2008*, 25 February 2009).
22. Fifthly, in determining the merit of an appeal, the TPAB should have regard to the principle of consistency, always bearing in mind that its decision in granting or refusal to grant planning permission would become a precedent for similar applications in the future. The principle of consistency was explained by the English Court of Appeal in *North Wiltshire District Council v Secretary of State for the Environment and Clover* (1993) 65 P & CR 137 at 145¹ as follows:-

“In this case the asserted material consideration is a previous appeal decision. It was not disputed in argument that a previous appeal decision is capable of being a material consideration. The proposition is in my judgment indisputable. One important reason why previous decisions are capable of being material is that like cases should be decided in like manner so that there is consistency in the appellate process. Consistency is self-evidently important to both developers and development control authorities. But it is also important for the purpose of securing public confidence in the

¹ Cited in *Halsbury's Laws of Hong Kong*, Vol. 48, §385.270, footnote 47 (p.311)

operation of the development control system. I do not suggest and it would be wrong to do so, that like cases must be decided alike. An inspector must always exercise his own judgment. He is therefore free upon consideration to disagree with the judgment of another but before doing so he ought to have regard to the importance of consistency and to give his reasons for departure from the previous decision.” (Emphasis added)

23. Sixthly, the planning policy should be fairly administered. There would be situations where it would be proper to take into account the fact that a particular site had a planning history requiring the grant of planning permission to achieve fairness where all other things were equal (*Ynys Mon Isle of Anglesey Borough Council v Secretary of State for Wales* (1984) JPL 646, at p. 647).
24. Seventhly, there is a clear distinction in principle between the grant of planning permission and its implementation. In this regard, ownership is normally considered an irrelevant fact (*Town Planning Appeal No. 13 of 1993*, at §§80-81; *Town Planning Appeal Nos. 13 of 2006 and 5 of 2008*, at §§83(1) & 88; *Delight World Ltd v The Town Planning Appeal Board* [1997] HKLRD 1106, at 114H-115I and *Merritt v Secretary of State for the Environment, Transport and Regions and another* [2000] JPL 371, Lexis transcript, at p.10).
25. There is only one point which is in dispute. Mr Ismail submits that the TPAB should allow an appeal if there are no good reasons for refusing planning permission. Reliance is placed on *Town Planning Appeal Nos. 4 and 5 of 1993*, 22 December 1993, §20; *Town Planning Appeal No. 16 of 1993*, 21 April 1994, §12 *Town Planning Appeal No. 6 of 1994*, 7 March 1995, §12 and *Halsbury's Laws of Hong Kong*, Vol. 48, §[385.270]. Mr Fung SC on the other hand submits that the authorities cited by Mr Ismail do not support the Appellant's proposition, and the burden is on the Appellant to show that the TPB's decision was wrong so that the TPAB should either

reverse or vary that decision (*Town Planning Appeal No. 18 of 2005*, 12 April 2007, §55). Mr Fung SC further submits that the general principle governing burden of proof in civil cases apply, that is, it is for the party who asserts affirmatively as part of his case that a certain state of facts is present or is absent, or that a particular thing is insufficient for a particular purpose, to prove such averment positively (*Phipson on Evidence*, 17th ed, 2010, §§6-02 and 6-06; *Abrath v North Eastern Railway Co* (1883) 11 QBD 440 at 457).

26. In our view, the burden is on the Appellant to demonstrate to the TPAB that the TPB's decision was wrong and should be reversed or varied. It is also incumbent upon the Appellant to satisfy the TPAB that the proposed Hotel is in line with the planning intention of R(A) zone and that there is sufficient justification to warrant the TPAB granting planning permission for it.

Merits of the Appeal

27. In the Notice of Appeal, the Appellant advances the following grounds in support of its appeal:-

- 27.1. The reasons set out in the s17 Decision were not good reasons (**“Ground 1”**).

- 27.2. The TPB misunderstood or failed to have proper regard to the Draft Plan and consequently failed to take into account relevant considerations and took into account irrelevant considerations (**“Ground 2”**).

- 27.3. The TPB unlawfully exercised its plan making role (**“Ground 3”**).

27.4. The TPB ignored the well-settled distinction in planning law between grant of planning permission and its implementation (“**Ground 4**”).

27.5. The reasons set out in the s17 Decision are against the weight of the evidence (“**Ground 5**”).

27.6. The s17 Decision was unreasonable or irrational (“**Ground 6**”).

Planning Intention

28. Both counsels submit that in considering the merits of the appeal, it is necessary to ascertain the planning intention of the R(A) zone from the Draft Plan which includes the Notes to and the ES of the Draft Plan.

29. The planning intention of the R(A) zone was described in the Notes as follows:-

“This zone is intended primarily for high-density residential developments. Commercial uses are always permitted on the lowest three floors of a building or in the purpose-designed non-residential portion of an existing building.”

30. As the Appellant’s proposed development is not for the commercial uses on the lowest three floors of a building, nor is there an “existing building” at the Site, it seems to us that only the first sentence is relevant to this appeal.

31. The ES provides, amongst others, as follows:

31.1. “The object of the Plan is to indicate the broad land use zonings

and major transport networks so that development and redevelopment within the Planning Scheme Area can be subject to statutory planning control” (§3.1).

31.2. “The Plan is to illustrate the broad principles of development within the Planning Scheme Area. It is a small-scale plan and the transport alignments and boundaries between the land use zones may be subject to minor adjustments as detailed planning proceeds” (§3.2).

31.3. “... Development within residential zones should be restricted to building lots carrying development right in order to maintain the character and amenity of the Kennedy Town and Mount Davis areas and not to overload the road network in these areas.” (§3.3)

31.4. “This zone is intended primarily for high-density residential developments. Commercial uses such as shop and services and eating place are always permitted on the lowest three floors of a building or in the purpose-designed non-residential portion of an existing building. Commercial uses on any floor above the lowest three floors will require planning permission from the Board. Offices and hotel development may also be permitted upon application to the Board.” (§8.1.1)

31.5. §9 of the ES is concerned with “Communications” and refers to roads and transportation in the area.

31.6. “Planning applications to the Board will be assessed on individual merits. In general, the Board’s consideration of the planning

applications will take into account all relevant planning considerations which may include the departmental outline development plans/layout plans and the guidelines published by the Board ...” (§12.3)

32. In the Draft Plan, hotel use is listed in Column 2 and, therefore, requires planning permission.

Grounds 1-4

33. The 1st to 4th Grounds can be considered together.
34. Mr Ismail submits that the 1st, 2nd and 3rd Reasons are irrelevant considerations and should not have been taken into account by the TPB in deciding whether to grant planning permission for the proposed Hotel. He makes 3 points in support of the submission.
35. First, the size and triangular configuration of the Site, the condition of Yat Fu Lane, the fact that the Site abuts the private land portion, the traffic management and safety concerns (collectively “**the Factors**”) were matters which the TPB had already taken into account when carrying out its plan making role under ss.3 and 4 of the TPO. Having taken the Factors into consideration, the TPB decided that the Site should be zoned R(A) and that hotel use should be put under Column 2, thereby giving itself the power to grant planning permission for a hotel development on the Site.
36. Second, Mr Ismail relies on §§41-51 of *International Trader* and submits that when performing its planning permission function under s.17 of the TPO, it was not permissible for the TPB to take into account the Factors, as they relate to “health, safety, convenience and general welfare of the

community”, which are relevant to the plan making function of the TPB, but are irrelevant to the planning permission function of the TPB.

37. Third, the only restriction imposed by the TPB on the R(A) zone is a maximum building height restriction of 120mPD or the height of the existing building, whichever is the greater. Such restriction was imposed to avoid negative impacts on the visual quality of the area, as can be seen from §§7.1-7.2 of ES. By contrast:

37.1. for the R(C)1 zone, development restrictions were imposed due to, *inter alia*, the traffic and infrastructural constraints; and

37.2. site constraints are relevant to applications for minor relaxation, see §§7.8 and 8.1.8 of the ES.

38. Mr Fung SC disagrees with the second and third points advanced by Mr Ismail and submits as follows:

38.1. Contrary to the Appellant’s argument, in §§45-47 of *International Trader*, the Court of Appeal held that in a s.16 application, the TPB must take into account the underlying purposes of the TPO, which are “with a view to the promotion of the health, safety, convenience and general welfare of the community” (as stated in s.3(1) of the TPO) as long as the relevant approved plan permits.

38.2. *International Trader* was decided on its unique fact in that R(C)7 had been re-zoned for the specific purpose of limiting development so long as the sites within that zone did not enjoy direct access to a road (see §§57-69). The Appellant cannot take the Court of Appeal’s statements in §§61-62 of *International Trader*, which were made in

the context of the specific reason for the rezoning of R(C)7 sites, and transpose them to R(A) zone in the present case.

- 38.3. The planning intention of R(A) zone was stated in the most general terms. There is nothing in the Draft Plan, the Notes or the ES to show that the planning intention of R(A) zone is as narrow and specific as the planning intention of R(C)7 zone in *International Trader*.
- 38.4. Thus analysed, *International Trader* does not support the Appellant's contentions that the physical characteristics of the site and the land in the vicinity of the site are irrelevant considerations, or that it is unlawful for the TPB to take into account the traffic management and safety concerns in a s.16 or s.17 application.
- 38.5. Consistent with the above, in *TPA No. 12 of 1992*, 15 January 1993 at §12 and *TPA 14 of 1993*, 8 April 1994, at §4, which concerned R(A) zone, the TPAB considered that the traffic condition in the locality of the appeal sites was a relevant and material consideration in a s.16 application.
- 38.6. It is also clear from the following extract from the Guidance Notes published by the TPB dated May 2010 (on Application for Permission under Section 16) ("**Guidance Notes**") that the implications of a number of factors including traffic are relevant considerations in an application for planning permission:

“For applications for any particular use or development that may have implications on the environment, drainage, traffic, infrastructure, landscape and topography, etc., technical assessments on the impacts of the proposed use or development may also be required.”

39. We agree with Mr Fung SC's submissions. We do not think the Court of Appeal in *International Trader* has laid down the general proposition as suggested by the Appellant. In our view, except in the cases where the planning intention of a specific zone was expressed in a very narrow and specific manner as R(C)7 zone in *International Trader*, as a matter of principle, it must be proper and legitimate for the TPB (and the TPAB) to consider the implications of the proposed use in a s.16 or s.17 application, including its implications on the environment, drainage, traffic, infrastructure, landscape and topography, in so far as the relevant plan permits. This is consistent with the underlying purposes of the TPO.
40. We therefore reject the 1st, 2nd, 3rd and 4th Grounds advanced by the Appellant.

Proposed Hotel consistent with planning intention of R(A)

41. Before dealing with the Appellant's contentions under Ground 5th and 6th, we would set out our views on the salient questions of (a) whether the proposed Hotel is in line with the planning intention of R(A) zone and (b) whether the proposed Hotel has any planning merit.
42. In our view, the proposed Hotel is in line with the planning intention of R(A) zone, which is "intended for high-density residential developments". This is reinforced by the fact that hotel use is listed under Column 2 of the Draft Plan, which is a permissible use subject to obtaining planning permission. This is reinforced by the fact that there is nothing in the Draft Plan, the Notes and the ES cited by the Appellant and the TPB which suggest that the development of a hotel on the Site is inconsistent with the planning intention of R(A) zone.

43. In the present case, the Appellant has already obtained the requisite approval to build the Approved Building on the Site. This in our view is a highly relevant and material consideration. As stated in §21 above, the fall-back position of the applicant is, as a matter of principle, a relevant consideration. This accords with common sense, as it is reasonable to assume that the owner would deploy the site to an alternative (permissible) use if planning permission of the proposed development were refused. It would be unreal and impractical for the planning authority to proceed on the assumption that if planning permission were refused, the site would be left idle, bearing in mind the substantial value of the site.
44. In light of the above conclusions, we consider that when assessing the merits of the application and the concerns and objections raised by the various Government departments and the public, it is necessary and appropriate to assess such merits, concerns and objections by comparing the use of the Site for the proposed Hotel against the use of the Site for the Approved Building to see if the proposed Hotel is likely to produce greater adverse impacts on the health, safety, convenience and general welfare of the vicinity.

Planning merits

45. The Appellant submits that the proposed Hotel has the following planning merits:
- 45.1. There are more than adequate nearby public transport facilities.

- 45.2. There is adequate fee paying parking and on street meter parking and loading/unloading spaces in the vicinity (see Plan R-2 at Annex C). Additional traffic can be absorbed and the possibility of illegal roadside parking is remote.
- 45.3. The proposed boutique hotel is compatible with the residential character of the area.
- 45.4. The proposed Hotel is better than the Approved Building.
- 45.5. The height of the proposed Hotel building is 81.2mPD (which is 3.05mPD taller than the Approved Building).
- 45.6. The proposed Hotel will have set back from (a) the northern boundary to create a 3 metre wide side lane; and (b) the eastern boundary of the Site to create a 1.71 metre wide pavement for the benefit and safety of pedestrians (“**Set Back**”).
- 45.7. CKM is of the opinion that the proposed Hotel is not expected to attract coaches as it only has 50 rooms and there are public transport services nearby, and the Hotel will target long-stay travellers and not tour groups.
46. As regards the 1st and 2nd factors, viz., no carparking facilities and loading/unloading facilities and adequate fee paying parking, Mr Fung SC submits that they are at best neutral factors. We agree.
47. In relation to the compatibility with the residential character of the area, Mr Fung SC says that this is a prerequisite to the application and cannot be categorised as a planning merit. In our view, this too is a neutral factor.

48. As for the 4th factor, namely, the proposed Hotel is better than the Approved Building, Mr Fung SC contends that planning merits are not to be assessed by a mere comparison between the proposed use and the approved use. For the reason stated in §44 above, we do not agree. However, as the Appellant has not advanced any detailed argument on why the proposed Hotel is better than the Approved Building, it is not necessary to consider this point further.
49. The 5th factor can hardly be said to be a planning merit, as the proposed Hotel is admittedly taller than the Approved Building. However, in light of the difference in height, which is immaterial, we do not consider this to be a factor adverse to the application.
50. In respect of the 3m wide lane and the Set Back (6th factor), Mr Fung SC does not dispute that they are planning merits but submits that their benefits are very limited in that:
- 50.1. As to the side lane, the proposed development involves the widening of the side lane by about 1.5 metre. The side lane does not lead anywhere and it is unclear how much benefit will be conferred on the members of the public if the side lane is widened as proposed.
- 50.2. The Set Back with the 1.71m pavement terminates somewhere close to the Site and is not connected to the pavement of Queen's Road West. There is a possibility that Yat Fu Lane may be blocked by the landowners and, as such, a continuous pedestrian link to Queen's Road West cannot be guaranteed.

51. In our view, although the pavement created by the Set Back does not cover the whole side of Yat Fu Lane, it is a relevant and significant gain as the pedestrians can use the pavement when walking pass the proposed Hotel, whereas if the Site is used for the Approved Building, there will not be any set back or pavement in front of the Approved Building. We therefore agree with the Appellant that the Set Back is a planning merit in favour of the proposed Hotel.
52. As for CKM's opinion that that the proposed Hotel is not expected to attract coaches as it only has 50 rooms and the Hotel will target long-stay travellers and not tour groups, we are unable to accept the opinion. We do not think it is appropriate to rely on the "target" presently stated by the Appellant, as the Appellant is free to change its target customers and it is not a matter which can be monitored or controlled by imposing conditions on the proposed Hotel. We do not accept that this factor provides a planning merit for the proposed Hotel.

Grounds 5-6

53. The Appellant contends that the reasons set out in the s17 Decision are against the weight of the evidence and the s17 Decision was unreasonable or irrational.
54. At the hearing, Mr Ismail contends that the 1st and 2nd Reasons lack particulars and are not good reasons for rejecting the Appellant's application. Mr Fung SC disputes this and submits that the TPB has given sufficient particulars as to why the s.17 review was rejected. In our view, the Appellant's criticism is unfounded. This is reinforced by the fact that the Appellant has been able to deal with the reasons given by the TPB in

refusing its application and advances detailed arguments against such reasons in this appeal.

55. Mr Ismail submits that it was wrong for the TPB to have accepted the views of the PD (set out in §9 above), which are not good reasons for refusing planning permission. He points out that the definition of “hotel” in the “Remarks” column of the “Definition of Terms (Revised Edition)” includes a boarding house, common lodging house, guesthouse, holiday house and hotel-like service apartment and, in light of such definition, a “decent” hotel (which the PD opined that the proposed Hotel would not be) is not be a relevant consideration or reason for refusing planning permission. We are inclined to agree with Mr Ismail. We do not consider the fact that the proposed Hotel could only accommodate a small reception counter cum administration office or that there would be a lack of hotel amenities for guests are relevant considerations or reasons for refusing planning permission.
56. We do not think it is necessary or helpful to consider the other 5 small hotels relied on by the Appellant in this appeal as (a) they are admittedly located in different areas and the physical characteristics of the sites and their vicinity are very different; (b) they are raised in support of a new argument that the TPB has been acting inconsistently in giving planning permission for other small hotels but not the proposed Hotel, which is not a ground mentioned in the Notice of Appeal; and (c) 3 out of the 5 hotels did not require planning permission and, therefore, cannot be used for comparison purpose.
57. We now turn to the concerns of the C of P and the C for T on what they consider to be the possible adverse impacts of the proposed Hotel on the traffic condition of the vicinity of the Site.

58. Mr Ismail points out that in the s.16 application, the C of P had taken into account CKM's traffic impact assessment, which concluded that the proposed Hotel is not expected to attract coach or minibuses, and stated that he had no in-principle objection to the proposed Hotel. It is only in the s.17 application that the C of P objected the application from a traffic management point of view, after taken into account a traffic accident on Yat Fu Lane on 3 August 2011 and the public objections received. While this is correct, it does not take the matter further as the Appellant still has to satisfy us that the concerns *now* raised by the C of P are invalid or can be addressed by imposing appropriate conditions.
59. There are 3 main aspects of the C of P's concerns.
60. First, part of Yat Fu Lane is a private road and, therefore, the Police might face difficulty in taking enforcement action against illegal roadside parking.
- 60.1. Mr Ismail submits that this is not a valid concern, as all major traffic offences under Part XIII of the Road Traffic Ordinance (Cap. 374) apply to private roads. Moreover, illegal roadside parking is unlikely as there is adequate parking in the vicinity.
- 60.2. Mr Fung SC contends that the Appellant's submission is misconceived as enforcement action against illegal parking is governed by Fixed Penalty (Traffic Contraventions) Ordinance (Cap. 237), and although s.3A provides (*inter alia*) that s.4 shall apply to private roads, it can only be invoked in cases where there is an "unnecessary obstructions of [the private] road or danger to other persons using the road".

- 60.3. In our view, this concern of the C of P is not a valid ground against the application, as the difficulty in taking enforcement action against illegal roadside parking on Yat Fu Lane exists even now when the Site is vacant. If and insofar as the C of P is concerned that the proposed Hotel will bring in more visitors and, therefore, increase the number of illegal roadside parking, the same can be said of the development of the Approved Building. Indeed, it is more likely that residents living in the Approved Building will park their cars on Yat Fu Lane than the tourists staying in the proposed Hotel.
61. Second, the C of P has concern about the “vehicular traffic induced by the proposed boutique hotel” and large vehicles entering and leaving Yat Fu Lane, as it is a narrow street with limited area for vehicles to make a “U” turn.
62. Third, the C of P shares the concern of the C for T about the possibility of the owners of Yat Fu Lane building upon their portions of land which, if happened, would block Yat Fu Lane and result in a cul-de-sac, thereby requiring vehicles to make a “U” turn on Yat Fu Lane (as there is no reason to think that the vehicles would opt for leaving Yat Fu Lane via South Lane, rather than leaving Yat Fu Lane via Queen’s Road West bearing in mind that Yat Fu Lane is a 2-way road).
63. The Appellant contends that the above concerns of the C of P (and the C for T) are not valid grounds for rejecting the application in that:
- 63.1. The vehicular traffic induced by the proposed Hotel would be minimal, in light of the small number of hotel rooms and the good public transport facilities nearby including the future MTR HKU station which will be about 400m away.

- 63.2. The limited traffic induced by the proposed Hotel would be mostly taxis, as shown by CKM's survey of similar hotels with similar number of rooms.
- 63.3. Taxis or private cars are able to go direct from Yat Fu Lane to Queen's Road West.
- 63.4. The concern about large vehicles entering and leaving Yat Fu Lane is exaggerated as drivers of large vehicles would know the difficulties of making a "U" turn in Yat Fu Lane and avoid entering or leaving Yat Fu Lane in the manner suggested.
- 63.5. The C for T can implement traffic management measures at Yat Fu Lane such as no stopping restriction zones to prevent coaches or minibuses from entering the private land portion of Yat Fu Lane.
64. As for the possibility of cul-de-sac, Mr Ismail submits that this is a remote possibility in light of the following matters:
- 64.1. The Appellant has a ROW over the private land portion.
- 64.2. I.L. 692 s. A also has a "free and uninterrupted right of way over" the private land portion.
- 64.3. Unless the Building Authority grants an exemption under s.42 of the Buildings Ordinance, Cap. 123 ("**BO**") (which requires special circumstances),

- (a) the owners of the private land portion cannot include it in the site area for redevelopment because it has the physical characteristics of a street and there are ROWs over it: *Building Authority v Appeal Tribunal (Buildings) and Estoree Limited*, HCAL 147 of 2002, 25 July 2003. For this purpose, a “street” includes a private street: see reg.2(1) of the Building (Planning) Regulations and s.2(1) of the BO; and
- (b) the owners of the private land portion cannot build over it because it is a street: see s.31(1)(b) of the BO.

65. The TPB on the other hand contends that the Appellant’s assertions should not be accepted for the following reasons:

65.1. Apart from vehicles for the tourists, there will inevitably be vehicles going to and leaving the proposed Hotel in relation to the operations of the Hotel.

65.2. It is conceivable for minibus to come to the proposed Hotel to pick up the guests, which may have to make a U-turn to leave Yat Fu Lane via South Lane.

65.3. CKM’s surveys are hardly reliable or conclusive as they (a) merely involved someone counting the number of vehicles at each of 4 surveyed hotels for 12 hours on one or possibly 2 days; (b) only gave an average of the results on 2 different days, (c) did not state which dates the surveys were carried out and whether they were taken during a “high” season or “low” season for visitors, (d) did not state the occupancy rate of each of the 4 surveyed hotels, and (e)

did not state whether there are traffic restrictions imposed near the 4 surveyed hotels. It is not clear whether the methodology adopted by CKM was an established methodology.

65.4. Drivers may enter Yat Fu Lane from Wo Hop Street via South Lane and therefore will not know about the difficulties making a “U” turn on Yat Fu Lane.

66. As to the possibility of cul-de-sac, Mr Fung SC submits that:

66.1. The ROW is only a private arrangement between the Appellant and the land owners in respect of the private land portions. There is no right of way requirement under the relevant Government Lease. This means that the private owners do not need to give any right of way over their land to the Government or the public. This feature distinguishes the present case from *Building Authority v Appeal Tribunal (Buildings) and Estoree Ltd*, HCAL 147/22, 25 July 2003, §§36-37.

66.2. As the Appellant recognises, the possibility of an exemption being granted under s.42 of the BO to redevelop the private land portions of Yat Fu Lane cannot be ruled out.

66.3. In any event, as the private land portions are not subject to any right of way in the Government Lease, the owners can use such land for their own use, for eg. by putting large planters there for aesthetic reasons, or reserving a large skip for their own use, or allowing stalls to be set up there. If these were to happen, Yat Fu Lane would effectively be turned into a cul-de-sac.

- 66.4. Although it is correct that the Government Lease (dated 16th June 1886) pre-dated the assignment under which the ROW was conferred, the land owners can use the land for their own use which may result in the blocking of Yat Fu Lane.
67. In our view, the above concerns of the C of P (and the C for T) are not valid grounds for refusing the Appellant's application.
68. First, on the materials before us, we do not think it can be said that the proposed Hotel would attract more large vehicles entering into and leaving Yat Fu Lane as compared to the development of the Approved Building on the Site.
69. Second, the possibility of large vehicles entering into Yat Fu Lane via South Lane and making a "U" turn on Yat Fu Lane, though cannot be ruled out, is remote, as it is predicated on the owners of the private land portion building upon or using their land in the manner suggested by the TPB. It is not suggested that this has ever happened or that it will happen in the near future. In fact, it is clear from the photos shown to us that the entire Yat Fu Lane is clear and all pedestrians and vehicles can pass through it without any problem or hindrance.
70. Third, in respect of the possibility of cul-de-sac, we are inclined to accept Mr Ismail's submissions. In light of the ROW and the ROW enjoyed by the owner of I.L. 692 s. A, which remain binding on the owners of the private land portions, we consider that the possibility of the owners building upon the private land portions is remote. While it is possible for the owners of the private land portions to apply for exemption under s.42 of the BO, in light of

the requirements for obtaining such exemption, we do not consider that the possibility of the Building Authority granting such exemption to be sufficiently real so as to justify the concern of the C of P (and the C for T).

Evidence presented by the public

71. Various members of the public have expressed objections to the application. The Appellant contends that excessive weight was placed by the TPB on the objections from members of the public. However, as Mr Fung SC rightly points out, the TPB did not refer to the objections from members of the public as a ground for rejecting the s.17 review. Nevertheless, Mr Fung SC submits that the TPAB should in the exercise of independent planning judgement in this appeal, consider the following evidence presented by the public on the traffic management and traffic safety problems, which it is said will be aggravated if the proposed Hotel is built on the Site:

71.1. There are two nursing homes for elderly people near the Site. Some elderly people from one of the homes exit onto Yat Fu Lane in a wheelchair through a ramp.

71.2. Yat Fu Lane is a busy access street for both elderly people and students. Yet, most parts of Yat Fu Lane do not have pavements. Pedestrians tend to walk in the middle of Yat Fu Lane.

71.3. There are already existing illegal parking problems on Yat Fu Lane.

72. It seems to us that the above objections were raised by the members of the public against *any* development on the Site, rather than objections directed against the proposed Hotel. For the same reasons stated in §44

above, we do not consider that these matters are proper grounds for refusing the application as the same problems would exist even if the Site were used to develop the Approved Building.

73. In any event, we consider that the appropriate response to the above problems lies in the hands of C for T, who can implement appropriate traffic measures on South Lane (which is a public road) to restrict the types of vehicles which can enter into Yat Fu Lane. In light of the traffic accident in August 2011 and the concerns expressed by members of the public, it seems to us that there are merits for the C for T to re-assess the traffic condition to see if the previous proposed traffic measures should be implemented.
74. That said, we consider that it is necessary to impose conditions on the proposed Hotel to ensure that the traffic condition on Yat Fu Lane would not be aggravated by its development, as described in the next paragraph.
75. For the above reasons, we allow the appeal of the Appellant and set aside the s.17 Decision of the TPB. We grant planning permission to the proposed Hotel. The permission is subject to and upon the following conditions and shall be valid until 27th February 2018, and after the said date, the permission shall cease to have effect unless before the said date, the development permitted is commenced or the permission is renewed:
 - 75.1. There should be appropriate infrastructure or design at the proposed Hotel to ensure that no vehicle can stop at the entrance of the Hotel, including for the purpose of loading and unloading passengers and goods.

- 75.2. The Set Back shall be designated as a public green space and no vehicle stopping area.
- 75.3. The conditions suggested by the PD as set out in Annex D, which were stated in §8.2 of the TPB Paper No. 8927 at [BD/3015-3016].
76. We understand that the Appellant has no objection to the above conditions.
77. We also advise the Appellant of the same matters as per the Advisory Clauses set out in the TPB Paper, which are also set out in Annex D.
78. We shall leave the parties to agree on the other terms of the order and give liberty to the parties to apply to the TPAB in the event that they are unable to agree on any terms.
79. Lastly, we thank Counsel for their very helpful submissions and assistance rendered to us.

(Signed)

Ms Linda CHAN Ching-fan, SC

(Chairman)

(Signed)

Ms Rebecca CHAN Ching-chu

(Member)

(Signed)

Miss CHUNG Ching-may

(Member)

(Signed)

Dr LAM Ching-choi, BBS, JP

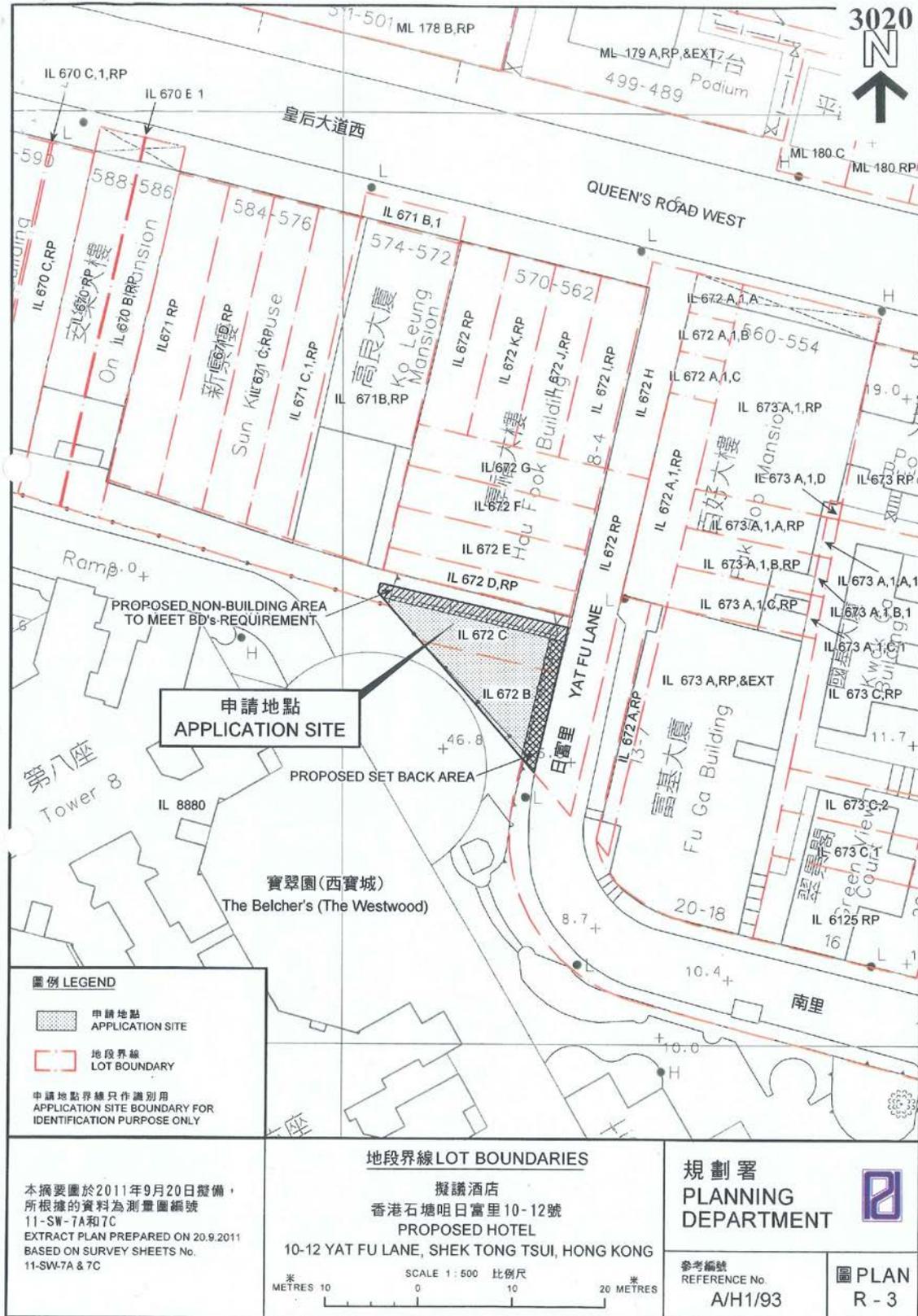
(Member)

(Signed)

Dr LEE Ho-yin

(Member)

Town Planning Appeal No. 15 of 2011 – Decision



圖例 LEGEND

- 申請地點 APPLICATION SITE
- 地段界線 LOT BOUNDARY

申請地點界線只作識別用
APPLICATION SITE BOUNDARY FOR IDENTIFICATION PURPOSE ONLY

本摘要圖於2011年9月20日擬備，
所根據的資料為測量圖編號
11-SW-7A和7C
EXTRACT PLAN PREPARED ON 20.9.2011
BASED ON SURVEY SHEETS No.
11-SW-7A & 7C

地段界線 LOT BOUNDARIES

擬議酒店
香港石塘咀日富里10-12號
PROPOSED HOTEL
10-12 YAT FU LANE, SHEK TONG TSUI, HONG KONG

SCALE 1:500 比例尺

METRES 10 0 10 20 METRES

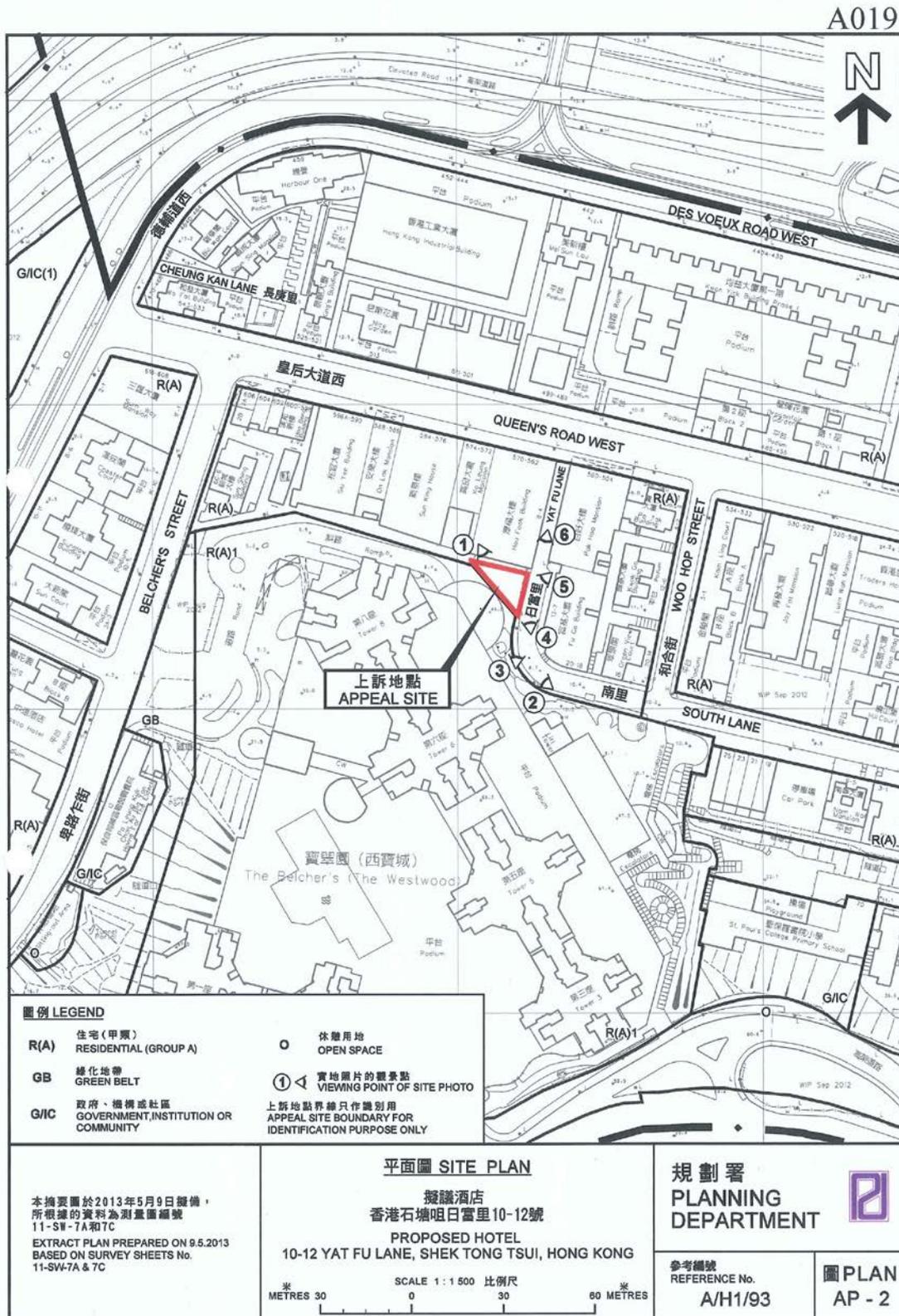
規劃署
PLANNING DEPARTMENT



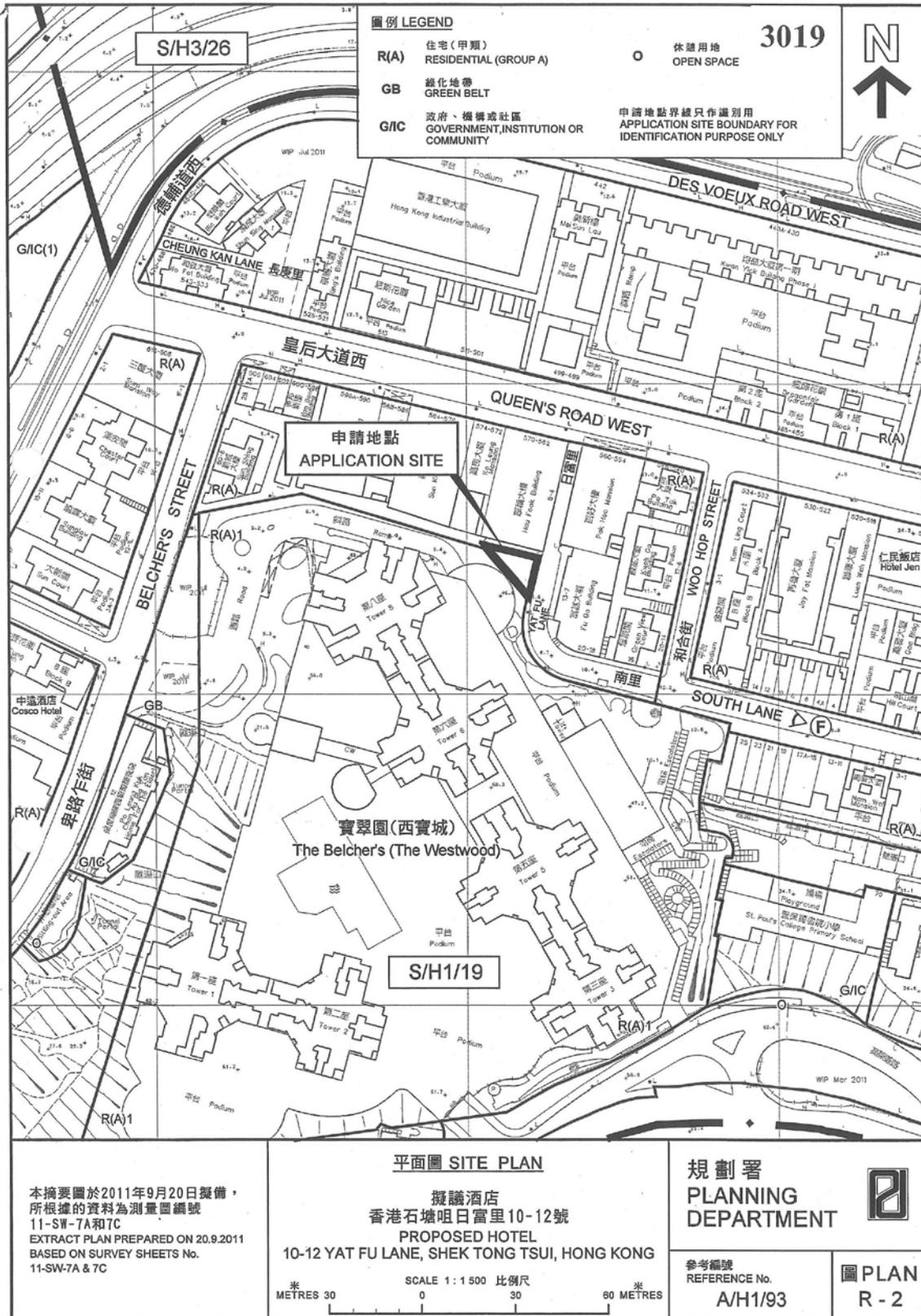
參考編號
REFERENCE No.
A/H1/93

圖 PLAN
R - 3

Town Planning Appeal No. 15 of 2011 – Decision



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Paragraph 75.3: Approval Conditions^(Note)

- (a) Set back at Yat Fu Lane from the lot boundary by 1.71m, as proposed by the applicant, to the satisfaction of the Director of Planning or of the Town Planning Board;
- (b) The provision of fire service installations and water supplies for fire fighting to the satisfaction of the Director of Fire Services or of the Town Planning Board;
- (c) The submission of a Sewerage Impact Assessment to the satisfaction of the Director of Environmental Protection or of the Town Planning Board;
- (d) The implementation of local sewerage upgrading/sewerage connection works identified in the Sewerage Impact Assessment to the satisfaction of the Director of Drainage Services or of the Town Planning Board;
- (e) The provision of drainage connections from the development to the public systems to the satisfaction of Director of Drainage Services or of the Town Planning Board; and
- (f) The submission and implementation of a landscaping proposal to the satisfaction of the Director of Planning or of the Town Planning Board.

^(Note) Other approval conditions pertaining to the planning permission in question are set out in paragraphs 75.1 and 75.2 of the Decision.

Paragraph 77: Advisory Clauses

- (a) The approval of the application does not imply that any proposal on building design elements to fulfill the requirements under the Sustainable Building Design Guidelines, and any proposal on bonus plot ratio (PR) and/or gross floor area (GFA) concession for the proposed development will be approved/granted by the Building Authority. The applicant should approach the Buildings Department direct to obtain the necessary approval. If the building design elements, bonus PR and GFA concession are no approved/granted by the Building Authority and major changes to the current scheme are required, a fresh planning application to the Town Planning Board may be required;
- (b) To note the comments of the Commissioner for Transport that the Government may implement traffic management measures at Yat Fu Lane including prohibition of long vehicles from entering Yat Fu Lane cul-de-sac and restricted zone as and when necessary;
- (c) To note the comment of the Chief Town Planner/Urban Design and Landscape, Planning Department that landscape planting should be incorporated for enhancing the local greenery and amenity value; and a minimum of 20% greening coverage of the entire site should be provided and at least half of which should be at-grade;
- (d) To apply to the District Lands Officer/Hong Kong West & South, Lands Department for licence or lease modification to remove the offensive trade clause of the subject lots if catering facilities such as bar or restaurant are provided;

- (e) To note the comments of Director of Fire Services that detailed fire service requirements will be formulated upon receipt of formal submission of general building plans or referral from the licensing authority and the arrangement of emergency vehicular access should comply with Part VI of the Code of Practice for Means of Access for Fire Fighting and Rescue;

- (f) To note the comments of the Director of Environmental Protection that all requirements in all relevant pollution control ordinances, including Air Pollution Control Ordinance and Noise Control Ordinance, should be strictly observed; and

- (g) To note the comments of the Director of Drainage Services to check the land status of the proposed drainage connection pipe alignment.
