CACV 127 of 2012

IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF FIRST INSTANCE

CIVIL APPEAL NO 127 OF 2012
(ON APPEAL FROM HCAL 62 OF 2011,
HCAL 109 OF 2011 AND HCAL 34 OF 2012)

BETWEEN

TOWN PLANNING BOARD — Appellant

AND

ORIENTAL GENERATION LIMITED — Respondent

CACV 129 of 2012

IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF FIRST INSTANCE

CIVIL APPEAL NO 129 OF 2012
(ON APPEAL FROM HCAL 62 OF 2011,
HCAL 109 OF 2011 AND HCAL 34 OF 2012)

BETWEEN

ORIENTAL GENERATION LIMITED — Applicant

AND

TOWN PLANNING BOARD — Respondent

Before : Hon Lam VP, Barma JA and Poon J in Court
Dates of Hearing : 18 - 20 March 2014
Date of Judgment : 13 November 2014

J U D G M E N T

Hon Lam VP, Hon Barma JA and Hon Poon J :

A. INTRODUCTION

1. All members of this court have contributed to this judgment. Kai Tak Mansion ("KTM") sits on 4 lots of land abutting Kwun Tong Road, East Kowloon with a total area of 5,707 sq m ("the Site"). It consists of 7-storey residential buildings with 288 flats and 16 retail shops on the ground floor. More than 50 years old, KTM is in a crumbling state and badly in need of renovation. A majority of the unit-owners favour re-development as the best option. The redevelopment is intended to be carried out by Oriental Generation Limited ("OGL"), who had by agreements dated 15 July 2010 agreed to purchase over 80% of the undivided shares in KTM.

2. At that time, the Site fell within the "Residential (Group (A)) Zone" ("R(A) Zone") under the approved Ngau Tau Kok and Kowloon Bay Outline Zoning Plan No S/K13/25 ("OZP 25"). According to OZP 25, a redevelopment within the R(A) Zone was subject to a maximum plot ratio of 9 for a partly domestic and partly non-domestic building. On 30 September 2010, OGL submitted a redevelopment

proposal ("BP1") to the Building Authority, which consisted of 2 residential towers at 203mPD[1] (55 storeys including 10 levels of podium). Despite its towering height, BP1 had a plot ratio of 9, which meant that it was in compliance with OZP 25.

3. However, by draft Ngau Tau Kok and Kowloon Bay Outline Zoning Plans No S/K13/26 ("OZP 26"), gazetted on 19 November 2010, the Town Planning Board imposed 3 new restrictions on the Site ("3 Restrictions" collectively) :

(1) a 110mPD Building Height Restriction, subsequently raised to 130mPD on 1 June 2011("BHR")[2];

(2) a 10 m Non-Building Area ("NBA") requirement along the north-eastern and south-western boundaries of the Site; and

(3) a 20 m wide Building Gap ("BG") requirement for the middle of the Site.

4. BP1 was then rejected for, among other things, non-compliance with OZP 26 on 26 November 2010. Another redevelopment proposal submitted by OGL in May 2011 ("BP2") was likewise rejected on 24 June 2011 for non-compliance with OZP 26.

5. On 7 October 2011, draft Ngau Tau Kok and Kowloon Bay Outline Zoning Plan No S/K13/27 ("OZP 27") was gazetted. The 3 Restrictions were still there.

---

[1] XmPD stands for X metres above Principal Datum.

[2] As to which see §34 below.

6. OGL reckoned that their intended redevelopment of KTM was unjustifiably and adversely inhibited by the 3 Restrictions in that they imposed severe limitations in the form, disposition, design and configuration of the buildings, particularly given the size of the location of the Site, and forced the units of the redevelopment to face the internal court or adjourning buildings instead of the more desirable views of the harbor in the front or the hills at the back of the Site[3]. So OGL commenced HCAL 62/2011 to challenge OZP 26, HCAL 109/2011 to challenge OZP 27 and HCAL 34/2012 to challenge the Board's decision not to relax the 3 Restrictions apart from raising the BHR to 130mPD.

7. By a judgment dated 11 May 2012, Reyes J held in favour of OGL, finding that all the 3 Restrictions were arbitrary. However he rejected OGL's other complaints, that is, OZPs 26 and 27 were *ultra vires*; the 3 Restrictions were *ultra vires*; and there were procedural irregularities in the Board's decision process leading to the decisions under challenge. He quashed the 3 Restrictions and remitted the question whether (and if so what) restrictions should be placed on the Site back to the Board for reconsideration in accordance with his judgment.

B. MAIN ISSUES

8. The Board appeals[4], contending that the Judge erred in holding that the 3 Restrictions were arbitrary. In response, OGL have

---

[3] See the affirmation of Chan Cheung Tak, Clarence, a director of OGL's architects in relation to the KTM redevelopment, filed in HCAL 34/2012 on 27 April 2012, at §§5 and 6.

[4] CACV 127/2012.

filed a respondent notice and bring their own appeal[5], contending that the Judge should have accepted their arguments on the *vires* of OZPs 26 and 27, *vires* of the 3 Restrictions and procedural irregularities.

9. Arising from the parties' submissions are the following main issues :

(1) Whether OZP 26 and OZP 27 which impose the 3 Restrictions or alternatively the 3 Restrictions are *ultra vires* or unconstitutionally imposed (Issue 1);

(2) Whether the gazettal of OZP 27 is *ultra vires* (Issue 2);

(3) Whether the 3 Restrictions are irrational (Issue 3);

(4) Whether the Board took account of irrelevant consideration by reference to the provision for minor relaxation (Issue 4); and

(5) Whether there were procedural irregularities in the decision making process by which the Board came to its decisions under challenge (Issue 5).

C. WHY AND HOW THE 3 RESTRICTIONS WERE IMPOSED AND MAINTAINED BY THE BOARD

10. To put the discussion of the Issues in context, we need to set out in greater detail why and how the 3 Restrictions were imposed and maintained by the Board despite OGL's representations.

---

5 CACV 129/2012.

C1. The Scheme Area

11. The planning scheme area covered by OZPs 26 and 27 ("the Scheme Area") is located within the Kwun Tong District, East Kowloon. It is bounded by New Clear Water Bay Road and Clear Water Bay Road to the north, Kwun Tong Road By-pass to the west, Shun Yip Street and Chun Wah Road to the south, and Hong Ning Road, Sau Mau Ping Road and Lee On Road to the east. It covers 341.26 hectares of land.

12. The Scheme Area is divided by Kwun Tong Road into two distinct portions. The area to the west of Kwun Tong Road, including the Kowloon Bay Business Area ("KBBA"), is one of the major employment centres in the main urban area. The area to the east of Kwun Tong Road consists of the Ngau Tau Kok Area and the Choi Wan Road/Jordan Valley Area. It is hilly and dominated by residential development, particularly public housing estates located at the foothills. The Site is in the Ngau Tau Kok Area.

13. To control the use of the land in the Scheme Area, different land use zonings are designated. One of the land use zonings is the R(A) Zone with a total area of 62.35 hectares. The R(A) 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.

14. The first statutory plan covering the Scheme Area was gazetted in August 1986. The plan went through changes over the years and culminated in OZP 25, approved by the Chief Executive in Council

("CE in C") on 12 September 2006. Under OZP 25, the R(A) Zone was subject to a maximum plot ratio of 9 for a partly domestic and partly non-domestic building. The non-domestic part should not exceed a plot ratio of 7.5. For KBBA, building heights were imposed. But no similar height restrictions existed for land outside KBBA. Thus the Site was not subject to any building height restriction then.

C2. The Site

15. The Site is located at a mean street level of about 4.6mPD. It is surrounded by a number of historical buildings, schools, open spaces and medium rise public housing estates :

(1) To its immediate north and north-east are two 2-storey Grade 1 historical buildings of ex-RAF Officers' Quarters Compound (now occupied by the Hong Kong Baptist University Academy of Visual Arts), which is at site level of 27.7mPD and separated from KTM by a 10m wide retaining wall.

(2) To its immediate south-east is the 8-storey St Joseph Anglo-Chinese Primary School with an existing building separation from KTM of about 6m.

(3) To its north-west is a local open space and a 1-storey Grade 3 historical building of Sam Shan Kwok Wong Temple.

(4) To its west across Kwun Tong Road is another 2-storey Grade 1 historical building of ex-RAF Headquarters

Building, a proposed open space and Kai Yip Estate (of 59.6mPD).

16. As rightly observed by the Judge, KTM is not an easy re-development project because of its unique surroundings. Any redevelopment would have to be sensitive to the nearby environment and those low-lying structures, some of which are of historical significance[6].

C3. The MPC Paper

17. On 6 July 2010, the CE in C referred OZP 25 to the Board for amendment. The notice of reference was subsequently gazetted on 17 September 2010, about a fortnight before OGL submitted BP1.

18. On 12 November 2010, the Metro Planning Committee of the Board ("MPC") held a meeting to discuss proposed amendments to OZP 25 as set out in the MPC Paper No 25/10 ("MPC Paper") prepared by the Planning Department.

19. The MPC Paper discussed a wide range of proposed amendments to be made to OZP 25. They were quite comprehensive and relevantly covered[7] :

(1) Imposition of building height restrictions to development zones outside KBBA where no such restrictions hitherto existed, including the R(A) Zone and other zones as well.

---

[6] See also the MPC Paper, §5.8(f), which stated that "[the ex-RAF buildings] can be regarded as important remains of the history of ex-RAF Base in Kai Tak while [the Sam Shan Kwok Wong Temple] forms part of culture of the local community".

[7] See the MPC Paper, Part 4 – Scope of Review.

(2) Imposition of non-building areas and building gaps in accordance with the recommendations of the Expert Evaluation ("EE") on Air Ventilation Assessment ("the AVA Study") for the Scheme Area, so as to improve the permeability of sea breeze towards Kowloon Bay and the overall air ventilation in the Scheme Area[8].

20. The need to introduce building height control was explained in these terms[9] :

> " 3.1 In order to provide better planning control on the building height upon development/ redevelopment and to meet public aspirations for better living condition, better air ventilation, and greater certainty and transparency in the statutory planning system. Planning Department (PlanD) has been reviewing various OZPs with a view to incorporating building height (BH) restrictions for development zones to guide future development/ redevelopment. The stipulation of the BH restrictions on the OZPs is considered an effective measure to regulate the height profile of the built environment.
>
> …
>
> 3.3 Regarding the [Scheme Area], the BH restrictions had already been imposed on various development zones including 'Commercial' ('C'), 'Other Specified Uses' ('OU') annotated 'Business', 'Refuse Transfer Station', 'Commercial Uses with Public Transport Terminus' and 'Petrol Filling Station' and 'Government, Institution or Community (1)' ('G/IC (1)') in the Kowloon Bay Business Area (KBBA) in 2005 in order to preserve the views from the New Wing of Hong Kong Convention and Exhibition Centre (HKCEC) to the Kowloon Ridgelines.
>
> 3.4 In the absence of BH control, there could be a proliferation of high-rise buildings, which are out of context with the surrounding environment. Recently, a building plan

---

[8] The other proposed amendments concerned zoning amendments and minor adjustments to the zoning boundary of some sites and technical amendments to the Notes of the OZP to reflect the as-built situation or the latest circumstances as appropriate. They are immaterial for present purposes.

[9] See the MPC Paper, Part 3.

submission has been received for redevelopment of the old residential buildings at Kwun Tong Road, with a proposed BH of about 202.9 metres above Principal Datum (mPD) (55 storeys including 10 levels of podium)[10]. The proposed development is totally out-of-context against the surrounding environment. The building plan submission is under departmental circulation and is being processed by Buildings Department. As such, there is an urgent need to incorporate appropriate BH restriction for the remaining parts of the Area.

3.5 Past experience has indicated that it is insufficient to rely solely on administrative measures or the lease conditions to control development height to meet the aspirations of the community. The stipulation of BH restrictions on the OZP is a more effective measure to regulate the development profile of our built environment. Apart from providing a statutory planning mechanism to control the height of the development, the stipulation of BH restrictions on the OZP would set out the planning intention more clearly, making it more transparent and open to public scrutiny. The statutory planning system allows public representations to be heard and considered in accordance with the procedures set out under the Ordinance. The mechanism will ensure that all stakeholders have the chance to express their views on the rezoning proposals and the BH restrictions in the statutory plan making process.

3.6 According to the Study on 'Urban Design Guidelines for Hong Kong' completed in 2003 ['the 2003 Study'], it is necessary to protect the view corridor to the ridgelines from Quarry Bay Park and HKCEC New Wing. Other suitable view points in a more local context could also be considered on a case-by-case basis. [The Scheme Area] falls within the view fans of the vantage points at Quarry Bay Park and HKCEC New Wing for preservation of the ridgelines of the Lion Rock, Tsz Wan Shan and Kowloon Peak (Fei Ngo Shan). A local view corridor from the footbridge near Choi Ying Place towards the Lion Rock is also identified within the Area, which is a major pedestrian route serving the residents of the public housing estates in Jordan Valley including Choi Ying Estate and Choi Ha Estate (and Choi Tak Estate and Choi Ying Estate in future) to Kowloon Bay MTR Station. As such, BH restrictions in the Area are necessary to protect the important backdrop of Kowloon ridgelines as far as possible and to prevent out-of-context development during the process of development/ redevelopment."

---

[10] That was BP1.

21. In formulating the proposed building height restrictions, the MPC Paper identified 7 guiding principles[11] :

> " 7.1 The BH review for the [Scheme Area] has taken into account the existing topography, site formation level, existing land use zonings, the characteristics of existing BH profile, the existing BHs of adjoining areas including Ngau Chi Wan, Kai Tak and Kwun Tong as well as the broad urban design principles in Urban Design Guidelines in the Hong Kong Planning Standards and Guidelines. The following principles form the basis of formulating the BH restrictions for the [Scheme Area] :
>
> (a) Preserving the Kowloon ridgelines
>
> As identified under Urban Design Guidelines Study, the [Scheme Area] mainly falls within the view fans of the vantage points from Quarry Bay Park and HKCEC New Wing. Public views to the 20% building-free zone of the ridgelines of Kowloon Peak, Lion Rock and Tsz Wan Shan, which provides a green backdrop to the [Scheme Area], should be preserved.
>
> (b) Creating diversity to the BH profile
>
> The BH should enhance the district character of specific localities, retain characteristic mountain backdrop and respect the character of neighbourhood. The BH profile should be sympathetic and respect the surrounding developments, which has diversity in height and massing of developments in different localitites.
>
> (c) Compatibility with local character
>
> The proposed BH bands should be compatible with the character of the neighbourhood, avoiding development of out-of-context 'sore thumb' buildings, which might cause adverse visual impact on the surroundings.
>
> (d) Accommodating the permitted development intensity
>
> The proposed BH bands should ensure that the urban design principles will not be negated while still accommodating the development intensity as provided under the current OZP with allowance for building design flexibility.

---

[11] See the MPC Paper, Part 7.

(e) Creating a compatible setting for historical buildings

The proposed BH of developments should provide a compatible setting for the historical buildings to avoid overshadowing and dwarfing effects on the heritage features.

(f) Preserving/creating visual relief, breezeways and local view corridors

The 'G/IC' and 'OU' sites in various parts of the [Scheme Area] have been developed as relatively low-rise developments. The existing BHs of these sites will be kept to function as spatial and visual relief in this urban environment. Moreover, 'O' and 'GB' sites should be retained in order to preserve the existing greenery and open area as breathing space. Consideration would be given to create breezeways and view corridor by linking up the low-rise G/IC facilities, open spaces and the 'GB' in the [Scheme Area]. The local view corridor to the Lion Rock from the view point at the footbridge near Choi Ying Place, which is a pedestrian route linking up Kowloon Bay MTR Station to the public housing developments in Jordan Valley, needs to be preserved as far as possible….

(g) Preserving the openness of view from Clear Water Bay Road

In order to maintain an open vista along the southern side of the Clear Water Bay Road at the entrance of East Kowloon from Sai Kung and preserve the public view and amenity of the area as far as possible, the residential developments on the eastern side of the [Scheme Area] near the foothill of Kowloon Peak should be kept as medium-rise developments with height limits at similar level of Clear Water Bay Road (about 175mPD)…."

22. Underpinning the proposed building height restrictions was this important "stepped building height concept"[12] :

" 8.1 The current BH restriction on the developments in KBBA is to create a discernible towncape in the [Scheme Area] by forming a critical mass of office/ commercial uses at 170mPD as an identifiable business node. The proposed BH profile for

[12] See the MPC Paper, Part 8.

> the residential developments to the east of Kwun Tong Road mainly follows the topography by stepping up gradually eastward and northward towards the Jordan Valley and the foothill of Kowloon Peak with no intrusion of the Jordan Valley ridgeline at 190mPD.
>
> 8.2 The [Scheme Area] in general falls within the view fans of Quarry Bay Park and HKCEC New Wing vantage points (the contours are between 150mPD – 350mPD). As shown on Plan 4, the HKCEC New Wing view fan covers mainly the KBBA sub-area, whilst the Quarry Bay Park view fan covers the complete [Scheme Area] except part of the eastern fringe of estates in Shun Lee Tsuen Road. As such, the existing and proposed BH profiles of the [Scheme Area] has taken into account preserving the 20% building-free zone of the ridgelines of Kowloon Peak when viewing from both vantage points.
>
> 8.3 In general, height bands which commensurate with the planning intention of the various land use zones as well as reflecting the majority of the existing buildings/ committed developments is adopted."

23. The review of building height restrictions also took into account the wind performance of the existing conditions and the AVA's recommendations[13].

24. The AVA Study was commissioned to assess the likely impacts of the proposed building height restrictions of the developments of the Scheme Area on the pedestrian wind development. It highlighted the Site as an area of concern and made recommendations accordingly[14] :

> " (i) Another area of concern is the [site] upon redevelopment. Currently, the area where the site located is ventilated by some downdraft and the surrounding buildings have access to breeze. Redevelopment of the site for high-rise building would have adverse air ventilation impact on its neighbours. The AVA Study compares the wind performance of different development scenarios of Kai Tak Mansion : namely, the existing condition (ie 25.6mPD/ 7-storey buildings), baseline option (BH at 105mPD with no NBA and building gap restrictions) and

---

[13] See §7.2.

[14] See the MPC Paper, §5.9(i).

alternative option (BH at 105mPD with 10m-wide NBAs and building gap of 20m in the centre). The AVA Study concludes that the baseline option would cause significant negative impact on air ventilation as compared to the existing condition. The alternative option with building gap of 20m-wide with podium at BH of 13.6mPD) and NBAs of 10m would provide better air ventilation to the vicinity than the baseline option. The NBAs of the alternative option will encourage downdraft to reach the ground level and ventilate the area with easterlies. The introduction of a 20m building gap encourages the south-westerlies and north-easterlies to permeate, and the AVA Study recommends to widen the building gap to 24m ideally to further improve the ventilation…."

25. Based on the above considerations, the MPC Paper turned to KTM[15] :

" 10.7 Having considered the permissible development intensity of the [Site] (maximum PR of 9), there are concerns that redevelopment of the site for high-rise building would cause adverse impact on air ventilation, incompatibility with the historical building and low-rise setting and visual impacts on its neighbours. Two options of redevelopment have been formulated in order to assess the air ventilation impact[16] :

(a) a baseline option of PR 9 (domestic : 7.5 and non-domestic 1.5) with 3m-wide building separation from the adjoining school, and BH of 105mPD (30 storeys including 1.5 storeys of carpark, 1.5 storeys of retail facilities and 1 storey of clubhouse and entrance lobby); and

(b) an alternative option of PR 9 (domestic : 7.5 and non-domestic 1.5) with two 10m-wide NBAs serving as buffers from the adjoining Grade 1 historical building and school, a 20m-wide building gap between the two groups of domestic towers on podium level at 13.6mPD in the central part of the site, and BH of about 105mPD (30 storeys including 2 storeys of retail facilities, 1 storey

---

[15] See Part 10.

[16] The two redevelopment options are based on same site area (both excluding the slope area from PR calculation in accordance with paragraph 3.3 of the ES), same site coverage (ie about 32%), same storey height (ie 3.15m for residential floors), and same concessionary GFA (20% of total GFA). The two options are indicative schemes based on the existing lot boundary of the site.

of clubhouse and 1 storey of entrance lobby) assuming car park facilities are accommodated at basement level.

10.8 As mentioned in paragraph 5.9(i) above, the AVA Study has examined the wind performance of the two options. The Study indicates that the large-scale podium in the baseline option would reduce the downdraft attributed by the residential towers and hence minimize the ventilation on Kwun Tong Road. Also, the baseline option is insufficient to allow the south-westerlies to reach the ex-RAF Officers' Quarters Compound at the back. As a result, the ex-RAF Officers' Quarters Compound would lie in the wake region of the [KTM] with diminished air ventilation and part of Kwun Tong Road and St Joseph Anglo-Chinese Primary School in the area with little air movement.

10.9 In order to minimize the possible adverse impacts of the future redevelopment of [KTM] on the surrounding low-rise developments and taking into account the findings of the AVA Study, the following are proposed for the site :

(a) a maximum BH of 110mPD is imposed so as to minimize overshadowing/ dwarfing effect of proposed high-rise development on the adjoining low-rise buildings, as well as to maintain compatibility of the overall height profile (80mPD to 100mPD) in the surrounding area;

(b) two 10m-wide NBAs, one is along the north-eastern lot boundary currently occupied by retaining wall and another is along the south-eastern lot boundaries are designated, which are served to provide sufficient buffers for the neighbouring Grade 1 historical building and school. These NBAs, as supported by the AVA Study, would encourage the downdraft of wind and minimize adverse air ventilation impact on the surrounding low-rise buildings. They are also useful in reducing the possible wall effect; and

(c) a 20m-wide strip of land in the middle of the site is demarcated as a building gap where no building shall exceed the BH of 15mPD. This building gap would encourage the prevailing winds to permeate, reduce the adverse visual impact on the sensitive receivers at ex-RAF Officers' Quarters Compound and partially open up the visibility of Grade 1 historical building to the public at street level."

26. After deliberations, MPC agreed to the proposed amendments, including those relating to the Site.

C4. OZP 26

27. Subsequently OZP 26 was gazetted on 19 November 2010.

28. In imposing building height restrictions in the Scheme Area, the Notes of OZP 26 reiterated the general planning considerations discussed in the MPC Paper [17]. The Notes summed up those considerations in these terms :

> " 7.3 The [Scheme Area] falls within the view fan of Quarry Bay Park vantage point and partly within the view fan of Hong Kong Convention and Exhibition Centre (HKCEC) New Wing vantage point. In main, the building height restrictions are to preserve the views to the ridgelines of Lion Rock, Tsz Wan Shan and Kowloon Peak, taking into account the Urban Design Guidelines, natural topography, local area context and characteristics, local wind environment, the existing building height profile, the building height of the developments in the adjoining planning areas as well as visual compatibility of building masses in the wider setting. There are ten building height bands including 15 metres above Principal Datum (mPD), 40mPD, 60mPD, 80mPD, 100mPD, 120mPD, 140mPD, 160mPD, 170mPD and 180mPD adopted for the 'C', 'R(A)', 'R(B)', 'G/IC(1)', 'G/IC(3)' and 'OU' zones."

29. Turning more specifically to the preservation of the views to the ridgelines of Lion Rock by imposing building height restrictions, the Notes said :

> " 7.5 There is one local view corridor toward the Lion Rock in the [Scheme Area] from the view point at the pedestrian footbridge at Kwun Tong Road near Choi Ying Place. This view corridor opens up a mountainous vista of the Lion Rock in the far northwest via a belt of various 'R(A)', 'G/IC' and 'Open Space' ('O') uses on both sides of Kwun Tong Road. In order to preserve the local view corridor, medium-rise developments/ redevelopments are intended along both sides of the section of Kwun Tong Road from Ping Shek Estate to Choi Wan Road including Kai Yip Estate (maximum height bands of 80mPD and 100mPD), Kai Tai Court (a maximum height band of

[17] See §§7.1 to 7.2.

> 100mPD), Ping Shek Estate (maximum height bands of 80mPD and 100mPD) and Kai Tak Mansion (a maximum building height of 110mPD)."

30. The Notes then referred to the AVA Study and noted that the building height restrictions had taken the findings of the AVA Study into consideration [18]. Based on those findings, the Notes imposed non-building areas and building gap on the Site :

> " [8.6(h)] Two 10m-wide NBAs are designated along the north-eastern and south-eastern lot boundaries of the 'R(A)' zone of Kai Tak Mansion, which are currently occupied by retaining wall and vehicular access. A 20m-wide strip of land is also demarcated in the middle part of the site as a building gap where no building shall exceed a maximum building height of 15mPD. These NBAs and building gap help to encourage downdraft to reach the ground level and improve permeability of prevailing winds in the area upon future redevelopment of the site."

31. The Notes then summed up the 3 Restrictions :

> " 9.2.6 In regard to the existing low-rise residential development of [KTM], a maximum building height of 110mPD is imposed for the site. Two 10m-wide NBAs along the north-eastern and south-eastern lot boundaries are designated and a 20m-wide strip of land in the middle of the lot is also demarcated as a building gap where no building shall exceed a maximum building height of 15mPD. These measures are to encourage the prevailing winds to permeate, to minimize adverse air ventilation impact on the surrounding low-rise buildings, to reduce possible wall effect on its neighbourhood in particular the Grade 1 historical building and the nearby school as well as to partially open up the view of the Grade 1 historical building at its back to the public at street level."

32. Significantly, the Notes allowed minor relaxation in these terms :

> " 7.13 In general, a minor relaxation clause in respect of building height restrictions is incorporated into the Notes of the

---

[18] See §7.12.

Plan in order to provide incentive for developments/ redevelopments with planning and design merits. Each application for minor relaxation of building height restriction under section 16 of the Ordinance will be considered on its own merits and the relevant criteria for consideration of such relaxation are as follows :

(a) amalgamating smaller sites for achieving better urban design and local area improvement;

(b) accommodating the bonus plot ratio granted under the Buildings Ordinance in relation to surrender/ dedication of land/ area for use as public passage/ street widening;

(c) providing better streetscape/ good quality street level public urban space;

(d) providing separation between buildings to enhance air ventilation and visual permeability;

(e) accommodating building design to address specific site constraints in achieving the permissible plot ratio under the Plan; and

(f) other factors such as the need for tree preservation, innovative building design and planning merits that would bring about improvements to townscape and amenity of the locality, provided that no adverse landscape and visual impacts would be resulted from the innovative building design.

7.14 However, for existing buildings where the building height has already exceeded the maximum building height restrictions in terms of mPD and/or number of storeys as stipulated on the Plan, there is a general presumption against such application for minor relaxation unless under exceptional circumstances."

C5. Relaxing the BHR to 130mPD

33. In early 2011, OGL made representations to the Board for a relaxation of the 3 Restrictions. At the meetings held on 27 May and 1 June 2011 ("Representation Meeting"), after deliberations, the Board agreed to amend the BHR from 110 to 130mPD. We will look at the proceedings of the Representation Meeting more closely when we consider the question of procedural impropriety.

34. The reasons for not relaxing the 3 Restrictions other than raising the BHR from 110 to 130mPD can be found in the letter the Board wrote to OGL dated 20 June 2011. The Board stated :

> " (a) BHRS are imposed in the Area to provide better planning control on the building height (BH) upon development/ redevelopment and to meet public aspirations for greater certainty and transparency in the statutory planning system, to prevent excessively tall or out-of-context buildings, and to instigate control on the overall BH profile of the Area. In formulating the BHRs for the Area, all relevant factors including the Urban Design Guidelines, existing topography, stepped BH concept, local characteristics, existing BH profile, site formation level and site constraints, the zoned land uses of the site concerned, development intensity, the recommendations the Air Ventilation Assessment, have been taken into consideration. The BHRs have struck a balance between public aspirations for a better living environment and private development right;
>
> (b) The BHRs are formulated on the basis of reasonable assumptions with allowance for design flexibility to accommodate development intensity permissible under the Outline Zoning Plan (OZP). Blanket relaxation of the BHRs is not supported as it would result in proliferation of high-rise developments, which is not in line with the intended planning control. Deletion of BHR for Kai Tak Mansion would jeopardize the coherency of the stepped BH profile and can result in proliferation of high-rise developments;
>
> (c) The BHR for Kai Tak Mansion is intended to avoid developments with excessive height, and the development intensity of individual sites permitted under the OZP would not be affected. Appropriate BHR should be imposed to avoid resulting in excessively tall and out-of-context buildings, which are not in line with public aspirations;
>
> (d) The non-building areas (NBAs) and building gap for Kai Tak Mansion have taken into account the uniqueness of the site and the need for flexibility in design. These restrictions are reasonable and have struck a balance between public interest and private development right. The proposed 10 m wide NBAs at the north-eastern and south-eastern boundaries and the 20 m wide building gap at 15 mPD for Kai Tak Mansion are appropriate; and
>
> (e) To cater for site-specific circumstances and schemes with planning and design merits, there is provision for application for minor relaxation of the BHR(s), NBAs and building gap(s)

> under the OZP. Each application would be considered by the [Board] on its individual merits based on the set of criteria set out in the Explanatory Statement of the OZP."

35. The amendment to OZP 26 relating to BHR was then gazetted on 30 June 2011.

36. In the meantime, BP2 submitted in May 2011 was rejected on 24 June 2011 for non-compliance with OZP 26.

C6. Gazettal of OZP 27

37. On 7 October 2011, the Board gazetted OZP 27, which introduced amendments to OZP 26 unrelated to the Site. Although OZP 27 retained the 3 Restrictions as originally imposed by OZP 26, the Board assured OGL in correspondence that the amendment of BHR to 130mPD would take effect, subject only to a determination by the Board of further representations from interested parties.

C7. Refusal to further relax the BHR

38. The Board heard those further representations on 3 February 2012 ("Further Representation Meeting") and decided to uphold the amendment to 130m PD but no more. Likewise, we will look at the proceedings of the Further Representation Meeting more closely when we come to procedural impropriety.

39. The Board informed OGL of its decision on 27 February 2012, giving the reasons as follows :

> " -- The building height restriction (BHR) of 130 mPD for the Kai Tak Mansion site has taken into account the permissible development intensity of the Site, including the slope area at the back of the Kai Tak Mansion site. With the area along

> Kwun Tong Road subject to BHRs of 80 mPD and 100 mPD, the area further uphill subject to BHRs of 160 mPD and 170 mPD, the BHR for the Kai Tak Mansion site would still maintain a broad stepped height profile for the area.
>
> …
>
> -- (a) The original BHR of 110 mPD for the Site is formulated based on a host of relevant planning, visual and urban design considerations. Air ventilation is only one of them. The relaxation of BHR from 110 mPD to 130 mPD is to accommodate the permissible GFA allowed on site, ie to include the slope area for GFA calculation. The BHR for the Kai Tak Mansion site would still maintain a broad stepped height profile for the area. Further relaxation of the BHR would undermine the integrity of the building height profile and create 'out-of-context' buildings not in line with public aspirations;
>
> -- (b) The BHRs for the Site would not necessarily result in larger building bulk and would allow flexibility in the shape and form of the buildings. The BHR of 130 mPD does not preclude the incorporation of wider building gap within the Site, innovative architectural features and landscape treatment. Whilst a relaxed BHR would not guarantee the provision of wider building gaps, the non-building areas and building gap stipulated for the Kai Tak Mansion site would provide linkages to the adjacent heritage features by opening up wider views to and from these historical buildings, as well as avoiding development with typical long continuous facade; and
>
> -- (c) There is provision for application for minor relaxation of the BHRs, non-building area and building gap requirement under the Outline Zoning Plan (OZP) to cater for schemes with planning and design merits. Each application would be considered by the TPB on its individual merits based on the set of criteria set out in the Explanatory Statement of the OZP."

40. Having set out the relevant facts, we now turn to Issues 1 and 2, which can be conveniently dealt with together.

D. ISSUES 1 AND 2 – VIRES

41. There are two sub-issues under Issue 1 :

(1) Whether spot zoning is authorized under the Ordinance;

(2) Whether the 3 Restrictions infringed the constitutional rights of OGL.

D1. Whether spot zoning is authorized under the Ordinance

42. On the question whether spot zoning is within the power of the Board in the context of the Town Planning Ordinance, Cap 131 ("the Ordinance"), we respectfully agree with the judgment of the other division of this court in CACV 232 and 233 of 2012 (which we have read in draft) handed down on the same date as this judgment and we have nothing to add.

D2. Whether the 3 Restrictions infringed OGL's rights under Article 105 of the Basic Law

43. On the constitutional challenge based on Article 105 of the Basic Law, we are also in respectful agreement with that judgment. In support of his argument based on Article 105, in addition to the authorities already discussed in that judgment, Mr Pleming QC, for OGL, also referred to *Cusack v Harrow London Borough Council* [2013] 1 WLR 2022. With respect, *Cusack* does not drive us to different conclusions from those reached in CACV 232 and 233 of 2012 on the applicability of Article 105.

44. *Cusack* was a decision under the European Convention for the Protection of Human Rights and Fundamental Freedoms, and more precisely under the third limb of art 1 of the First Protocol. That limb prescribes certain parameters for state legislation controlling the use of property : "the right of a state to enforce such laws as it deems necessary to control the use of property in accordance with general interest …"

The UK Supreme Court, relying upon the decision of the European Court in *Bugajny v Poland* (Application No 22531/05) 6 Nov 2007 as applied in *Thomas v Bridgend County Borough Council* [2012] QB 512, held that all three limbs of art1 of the First Protocol have a requirement of proportionality which could be expanded into this question : "whether the interference with the applicants' right to peaceful enjoyment of their possessions struck the requisite fair balance between the demands of the general interest of the public and the requirements of the protection of the individual's fundamental rights, or whether it imposed a disproportionate and excessive burden on them." (see the discussion of Lord Carnwath JSC at paras 39 to 45 in *Cusack*).

45. For reasons fully canvassed in the judgment in CACV 232 and 233 of 2012, there are material differences between our Art 105 and art 1 of the First Protocol. It is not appropriate to do a wholesale transplant of the European jurisprudence on art 1 of the First Protocol into our law without regard to such material differences. We do not accept Art 105 carries with it a requirement that planning control cannot be imposed if it is not shown to be proportionately justified by the public purpose or benefit in question as contended by Mr Pleming at para 26 of his written submissions.

46. We further note that even in *Bugajny v Poland*, *supra* and *Thomas v Bridgend County Borough Council*, *supra* the findings of disproportionality were based on the lack of provisions for compensation for the interference in question as opposed to an examination of the balancing of public and private interest on a micro-level as to the need or justification for the imposition of the interfering measures. Thus, even assuming there is room for incorporating an element of proportionality

into Art 105, we would adopt what is said at para 87(c) and (d) of the judgment in CACV 232 and 233 of 2012.

47. In terms of the actual decision in *Cusack v Harrow London Borough Council supra*, it demonstrates the broad judgment approach the court must adopt in considering the question of proportionality, see paras 44 and 49 of the judgment of Lord Carnwath JSC. It also illustrates the inappropriateness of putting too much emphasis on the existence of another means to achieve the same end as supporting a claim that the balance struck by the public authority is disproportionate. On the facts, the Supreme Court upheld the council's decision to proceed under s66 of the Highways Act as opposed to s80 (which provided for compensation to the person affected). In our view, to the extent that proportionality is applicable, *Cusack* shows that the reliance placed by counsel on *Hall and Co Ltd v Shoreham-by-sea UDC* [1964] 1 WLR 240 is misplaced.

D3. Whether the conduct of the proceedings infringed OGL's rights under Article 10 of the Hong Kong Bill of Rights

48. In the present appeal, counsel also addressed us briefly on the implications of Article 10 of the Hong Kong Bill of Rights. This is the article providing for a right to a fair and public hearing by a competent, independent and impartial tribunal in a suit at law and it is derived from Article 14 of the International Covenant on Civil and Political Rights which is constitutionally entrenched by Article 39 of the Basic Law. Though previously, in *Kwan Kong Co. Ltd v Town Planning Board* [1996] 2 HKLRD 363, the Court of Appeal held at p 373 to 375 that Article 10 was not applicable to proceedings under s6(6) of

the Ordinance, Mr Pleming submitted that there is scope for revisiting the question in view of the decision of the Court of Final Appeal in *Lam Siu Po v Commissioner of Police* (2009) 12 HKCFAR 237.

49. In *Lam Siu Po*, Ribeiro PJ discussed the development of the jurisprudence on similar provisions in international human rights instruments and the scope of "rights and obligations in a suit at law". At para 78, His Lordship referred to the decision of the European Court of Human Rights in *Ringeisen v Austria (No 1)* (1979-80) 1 EHRR 455 in which the court considered that this right is engaged in respect of an administrative decision which had effect on private law rights. Then, at para 79, Ribeiro PJ observed that this approach had been applied to planning cases, citing *Bryan v United Kingdom* (1995) 21 EHRR 342.

50. *Bryan v United Kingdom*, *supra*, was about a decision of a planning inspector on an appeal against an enforcement notice requiring the applicant to demolish two brick buildings erected in breach of planning control. The nature of the decision is not the same as the one made by the Board in the determination of objections to a draft outline zoning plan. United Kingdom actually did not contest that the decision involved the determination of civil rights (see para 31 of the judgment). Though there was no reference to this authority in *Kwan Kong*, it is by no means clear to us that the application of the ECHR approach would lead to the conclusion that Article 10 is engaged in respect of s6(6) proceedings. *Lam Siu Po*, *supra*, was not a case on s6(6) proceedings and we do not think Ribeiro PJ had s6(6) proceedings in mind when he made the reference to planning matters at para 79 of that judgment. As the authorities stand, we are still bound by *Kwan Kong*.

51. In *Kwan Kong*, *supra*, Litton VP (as he then was) approved the analysis of Leonard J in the earlier case of *R v Town Planning Board, Ex Parte The Real Estate Developers Association of Hong Kong* [1996] 2 HKLR 267 as to the nature of s6(6) proceedings. After referring to the proceedings as being an administrative consultative process for the purposes of facilitating the Board to take account all shades of opinion before making recommendations to the Governor in Council, Litton VP said at p 373I to 374A,

> "The function of the board, as stated in s3(1), is to promote the 'health, safety, convenience and general welfare of the community' by undertaking the systematic preparation of draft plans upon the direction of the Governor. It is difficult to see how that function can properly be discharged without the presence of at least some of the officials …
>
> And when a person affected by a draft plan lodges a written statement of objection, it is difficult to see how, on any view of the matter, he can be said to be entering into a 'suit at law', or seeking the determination of his rights or obligations in terms of art 10. There are no contesting parties before the Town Planning Board. All that the board is empowered to do is to entertain the objection in accordance with the provisions of s6 …"

52. His Lordship held that the administrative process under s6(6) was not a suit at law within the scope of art 10 at p 374C to J.

53. It is also of relevance to note what Godfrey JA said at p 378D to F,

> "One must have regard to the nature of the exercise which the board is called on to perform. As I have said, it is not called on to determine a dispute as to anybody's 'rights and obligations'; it is called on to approve or amend … a draft Outline Zoning Plan, after giving consideration to such objections to the draft as may be properly lodged. It is a positive advantage to the work of the board that its membership should include [public officers]. The law must allow for the departmental bias which such people are expected and indeed

> required to have … The relevant question is whether, when the members of the board come to make up their minds, they genuinely address themselves to the question with minds which are open to persuasion."

54. In the context of the present appeal, Mr Pleming submitted that he did not need to rely on art 10 in his challenge to the procedural fairness of the process in question. Counsel submitted that the common law requirements of fairness, as applied to an administrative process, are not met in this instance. We shall examine those submissions at a later part of this judgment. In light of the arguments advanced before us, the only significant difference between a challenge under art 10 and that under the common law appears to be the implications flowing from the fact that the reasons given by the Board were, to a large extent, a reproduction of the response prepared by the Planning Department. If art 10 were engaged, such a practice is probably unsustainable in view of the requirement of the decision-maker to be independent. In *Medical Council of Hong Kong v Helen Chan* (2010) 13 HKCFAR 248, Bokhary PJ said at para 62,

> "…What must be insisted upon when a legal adviser drafts for a tribunal is as follows. The tribunal must deliberate without any participation by the legal adviser apart from giving it legal advice. No drafting by the legal adviser may commence until after the tribunal --- having so deliberated --- has arrived at its decision and has made its decision, findings and reasoning known to the legal adviser. What the legal adviser drafts must embody the tribunal's findings and reasoning. The tribunal must scrutinize the draft. If necessary, the tribunal must modify the draft to ensure that it is the tribunal's product, not the legal adviser's, and that it says what the tribunal means…."

55. However, as we are bound by *Kwan Kong* in respect of the non-engagement of art 10, there is more flexibility in the application of the concept of fairness under the common law. The reproduction of the response of the Planning Department in the Board's reasons by itself

would not render the decision of the Board susceptible to be set aside. The crucial issue, as identified by Godfrey JA, is whether the members of the Board genuinely addressed themselves with open minds to the questions raised by the parties objecting.

56. This is in line with the more recent English authorities, in particular *R (Lewis) v Redcar & Cleveland BC* [2009] 1 WLR 83. In that case, the English Court of Appeal reviewed at some length the relevant authorities and concluded, in the context of the English statutory setting for the decision of a local council on planning matters, that councillors sitting in a planning committee were not acting in a judicial or quasi-judicial capacity and they were entitled to have some predispositions in accordance with their political views and policies. But the court had to made an assessment, putting itself in the shoes of a fair-minded and informed observer, having due regard to the statutory scheme in question, as to whether there was a real risk that the members' minds were closed by predetermination. It was also emphasized that in the context of the English statutory regime for decision by such planning committee, the importance of appearances is more limited than in a judicial context.

57. At the same time, the court also reiterated that the planning committee must have regard to relevant considerations and address the planning issues before them fairly and on their merits, see paras 62, 95, 99 of that judgment.

58. That approach had more recently been adopted in *R (Berky) v Newport City Council* [2012] EWCA Civ 378, 28 Feb 2012. In that case, the English Court of Appeal held that the public support exhibited by one

councillor (out of a majority decision of 8 votes to one) would not vitiate the decision of the whole planning committee. This can be contrasted with the decision of Richards J in *Georgiou v Enfield London BC* [2004] LGR 497 where the support expressed by a subcommittee (with overlapping memberships with the planning committee), together with other relevant circumstances led the court to set aside the decision of the planning committee.

59. It must be acknowledged that the nature of the proceedings before the Board in the present action (as explained in *Kwan Kong*) is different from those before the planning committee in the English authorities. However, we are of the view that the *Redcar* approach is equally applicable in the present context. On the other hand, we do not believe that an analogy can be made with the situation of an inspector dealing with a planning appeal and as such we do not derive much assistance from another authority cited by Mr Pleming, *R (Ortona) v Secretary of State for Communities and Local Government* [2009] EWCA Civ 863, 24 June 2009.

D4. The respective role of the Board and the Planning Department

60. In the present case, OGL complained about certain steps taken by the Planning Department in the meeting of the Board. It is convenient to examine briefly at this juncture the respective roles of the Planning Department (and the Director of Planning) and the Board in the statutory scheme of the Ordinance.

61. As observed in *Kwan Kong*, there is a legitimate need for the presence of public officers from the Planning Department at the meeting

of the Board. Section 2 of the Ordinance expressly contemplates the appointment of public officers as official members of the Board. It further provides that the secretary of the Board shall be a public officer. Having said that, it is equally plain that under the statutory scheme the functions in section 3 of the Ordinance shall be undertaken by the Board, not the Planning Department. Those functions include the making of such inquiries and arrangements as the Board may consider necessary for the preparation of draft plans. Likewise, the consideration of representations on a draft plan must be undertaken by the Board, see s6B. It is for the Board to decide whether there should be amendments to the draft plan after consideration of the representations, s6B(8).

62. In our statutory scheme, the role of the Director of Planning, as the Authority (defined in s2), is the enforcement of the planning controls imposed by the plans, see ss 22 and 23 of the Ordinance and in respect of the exercise of powers under s23(3) and (4), there is an avenue of seeking a review by the Secretary for Development under s24.

63. The Director of Planning is also empowered by s26 of the Ordinance to prepare plans for interim development areas. In respect of such plans, the Director plays a role similar to the Board under ss 4(1) and 4A. But that was an interim measure and for all practical purposes, its effect had been spent upon the commencement of the Town Planning (Amendment) Ordinance 1991, see s26(4).

64. Thus, in the context of the statutory function of ss 3 and 6B, though public officers from the Planning Department can be appointed (and were appointed) as members of the Board, and such officials may legitimately have some predispositions by reason of their earlier

involvements with the preparation of the draft plans in question or their association with their colleagues in the Planning Department who were so involved, they should not allow such predispositions to overwhelm the determination of the Board as a whole so as to pre-empt any real and meaningful and fair consideration of the planning issues raised in the objections and the representations.

65. We shall come back to the specific challenges advanced by Mr Pleming in the context of our discussion below on the common law requirement of procedural fairness.

D5. Issue 2 - OZP 27

66. We can now turn to a ground of appeal based on OZP 27. OZP 27 was gazetted on 7 October 2011 when the representation process for OZP 26 had not been completed. There was to be a further hearing in respect of OZP 26, which was originally scheduled for 30 October, but postponed on 12 September 2011 to a future date. In the meantime, OZP 27 was gazetted under Government Notice 6509. In that notice, it was stated that OZP 27 was made pursuant to s7(1) of the Ordinance as amendments to OZP 26 and it was exhibited for public inspection pursuant to s7(2).

67. Ms Eu SC (who argued this part of the case on behalf of OGL) accepted that the Board had the power of amendment under s7 and that this could be done in the course of the representation process. However, counsel submitted that such amendments should not be introduced by way of a new OZP bearing a new plan numbering. The amendments, counsel said, could be done by way of a schedule of

amendment to OZP 26. She further submitted that as a matter of law, OZP 27 superseded OZP 26, citing *Head Step Ltd v Building Authority* CACV 131 of 1995, 25 Oct 1995. She referred to the fact that there were a full set of MPC papers and MPC minutes for OZP 27 to support her contention that OZP 27 was a new plan. She contrasted that with the other mode of introducing amendments by the issue of Schedules of Amendments by way of OZP-26-A1 and OZP-26-A2. The significance, counsel submitted, is that the s6 proceedings related to OZP 26 and the decisions of the Board in those proceedings could not have effect on OZP 27. Though the Board had indicated in correspondence that decisions by the Board after considering the representations would be incorporated in the next version of the OZP to be gazetted, it also indicated in subsequent correspondence that such decisions would become effective immediately under s6H.

68. On the other hand, Mr Drabble QC, for the Board, submitted that OZP 27 took effect as an amendment of OZP 26 under s7(1) instead of being a new draft plan in the s5 sense. Counsel drew our attention to the notice under which OZP 26 was gazetted (GN 7151 of 2010), in which there was a recitation of the reference by the CE in C under s 12(1)(b)(ii) of the Ordinance instead of s7(1).

69. As mentioned above, the restrictions for the Site were exactly the same in respect of OZP 26 and OZP 27. In the course of counsel's oral submissions, we indicated that if we were with OGL on the substance of its challenge to the restrictions we would uphold the Judge's actual decision below, viz. quashing the specific restrictions under both sets of plans. In light of that, the question as to whether the Board had

proceeded by the right mode in making the amendments appears to be academic.

70. In any event, the court looks at substance rather than form. We do not find *Head Step Ltd v Building Authority*, *supra*, to be of much assistance because the court was not dealing with a situation like the present one. Here, OZP 27 was expressly stated to be made as an amendment pursuant to s7(1) and there is no reason why the court should treat it as something else. The fact that there were a set of MPC papers and minutes preceding its gazette does not mean that the Board was not exercising its power under s7(1). In the affidavit of Ophelia Wong of 26 March 2012 filed in HCAL 109 of 2011, she explained the different scenarios and modes adopted for s7 amendments at paras 14 to 28. She also explained the background leading to the gazettal of OZP 27. Thus, the fact that there could be some other mode for implementing amendments in other scenarios does not mean that the Board was not exercising its power under s7 when it gazetted OZP 27.

71. Once it is accepted that OZP 27 was a s7 amendment to OZP 26, the problem postulated by Ms Eu as to how decisions of the Board would take effect would not arise. The short answer is that they would take effect in accordance with s6H.

72. We therefore hold that it is within the power of the Board to issue OZP 27 pursuant to s7.

73. Even so, it is rather confusing to have an entirely new numbering for the amended version of the OZP. We can understand why OGL considered it necessary to commence a new application for

judicial review in respect of OZP 27 in the circumstances of the case. We do not see any good reason why the amended version could not have been numbered as OZP 26A or some other variant of OZP 26 instead of being assigned a new number altogether.

E. ISSUE 3 – IRRATIONALITY

E1. BHR

74. General planning considerations aside, the Board justified the BHR of 130mPD more specifically by[19] :

(1) the "stepped height building concept" as applied to the Scheme Area;

(2) the need to protect the ridgelines of Lion Rock from the perspective of a local view corridor near Choi Ying Estate;

(3) the need to minimize the visual obstruction to the views to and from the historic buildings at the ex-RAF site.

75. We will consider these justifications in turn.

E1.1 Stepped building height concept

76. According to the stepped building height concept, the proposed building height profile for the residential developments to the east of Kwun Tong Road (including the Site) mainly follows the topography by stepping up gradually eastward and northward towards the Jordan Valley and the foothill of Kowloon Peak with no obstruction of the Jordan Valley ridgeline at 190mPD. Applying the concept, the

[19] See the affidavit of Yue Chi Kin, District Planning Officer/Kowloon of the Planning Department filed in HCAL 62/2011 on 22 December 2011, at §17.

Board adopted progressive bands of maximum building heights, ranging from 80mPD to 180mPD moving eastwards and northwards from the Ngau Tau Kok Area to the Jordan Valley Area, which led to a planned scenario for the Scheme Area.

77. Mr Pleming accepted that the Board has the power to impose building height restrictions in a broad-brush manner for an area or zone and that the stepped height building concept can be one such example/attempt. Mr Pleming however complained, as was the case before the Judge, that the Board has irrationally applied the concept with random building heights. More specifically, Mr Pleming submitted that if as found by the Judge, the concept is for aesthetic reasons, then all buildings must be assessed from the same level for any aesthetic stepping to make sense. He also referred to the fact that within the Site's vicinity, the Government has approved the building of the Choi Tak Estate for public housing with 174mPD (41 storeys) and a nearby private housing development, 8 Clear Water Bay Road, with 184.3mPD (56 storeys).

78. The Judge rejected OGL's objections thus :

> " 47 Ms Audrey Eu SC (appearing for [OGL]) submits that the Board's justifications for the 130 mPD BHR are arbitrary given that the nearby Choi Tak Estate and 8 Clear Water Bay Road are significantly higher.
>
> 48. I am unable to accept this as a basis for striking down the BHR.
>
> 49. The Stepped Building Height Concept which the Board has endeavoured to apply can never be a matter of exact science. By its nature, the concept involves subjective evaluations of what are appropriate building heights as one progresses eastwards and northwards over bands of commercial and residential properties from the KBBA to the Jordan Valley ridgeline.

50. Different people may reasonably disagree over whether a particular band should have a somewhat higher or lower height restriction. Different people may reasonably disagree over whether a building B of height x within a given distance from site A means that one should permit buildings in A to be of height x. Some might plausibly argue that B belongs to a different sub-area from A. Others could possibly regard B as within the same sub-area as A, but view B as a tolerable variation in an otherwise smooth progression of skyline. There are bound to be many permutations and shades of opinion.

51. Given there will inevitably be judgment calls involved, the Court should accord the Board a wide margin of deference in its decisions as to building height. Lacking expertise in town-planning, the Court should hesitate to substitute its own opinions as to appropriate height for those of the Board. The Court should only interfere if there is compelling reason to do so.

52. Here the Board was plainly aware of the existence of Choi Tak Estate and 8 Clear Water Bay Road near to the KTM site. The Board fully realised that those developments were taller than 130 mPD. It seems to me that it was open to the Board to distinguish the Choi Tak Estate and 8 Clear Water Bay Road situations, because of the presence of medium and high-rise buildings in their immediate vicinity. I see nothing outlandish or glaring to criticise in the Board's decision in its treatment of Choi Tak Estate and 8 Clear Water Bay Road.

53. Ms Eu then suggests that the Board has applied the Stepped Building Height Concept in an irrational manner by determining bands of ever increasing building height from north-west to south-east, instead of from west to east. The Board (Ms Eu says) has applied the concept so that building heights are stepped along a line which is nearly perpendicular to a west to east axis.

54. Again I do not think that this complaint is well-founded.

55. As Mr Anderson Chow SC (appearing for the Board) explained, when one looks at the entire area covered by OZP 26 or 27 one notices that the stepped building heights converge on a number of focal points along the Jordan Valley ridgeline. One is not dealing with a monotonous progression of building heights running uniformly from west to east along rigid parallel grid-lines. Instead, there is variation. There are several (occasionally crisscrossing) lines of stepped-up building heights, all heading generally eastwards but to different points along the Jordan Valley ridgeline.

> 56. This seems to be largely a matter of aesthetic judgment, so that the Court should be reluctant to interfere. At most, there are only subjective differences of opinion. On the application of the Stepped Building Height Concept, I can find no manifest unreasonableness or arbitrariness."

79. In our view, the Judge's reasoning is unassailable. We agree with him entirely.

E1.2 Protecting the ridgelines of Lion Rock

80. As we have said, the Board adopted a local view corridor near Choi Ying Estate to assess the visual effects of the BHR. The Board's case is[20] :

> " The footbridge is the major corridor connecting the public housing estates in the Jordan Valley area, including Choi Tai Estate and Choi Ying Estate and the MTR Kowloon Bay Station. This view corridor opens up a mountainous vista of the Lion Rock in the far north-west via a belt of various 'R(A)', ['Government, Institution or Community'] and ['Open Space'] uses on both sides of Kwun Tong Road. In order to preserve the local view corridor, medium-rise developments/ redevelopments are intended along both sides of the section of Kwun Tong Road from Ping Shek Estate to Choi Wan Road including Kai Yip Estate (BHRs of 80mPD and 100mPD), Kai Tak Court (BHR of 100mPD), Ping Shek Estate (BHRs of 80mPD and 100mPD) and the Site (BHR 110mPD)."

81. Mr Pleming complained that the choice of that local view corridor is arbitrary and irrational. The random view is irrelevant to the precise building height imposed on the Site and provides no sensible justification. At the Representation Meeting, OGL repeatedly drew the Board's attention to this particular complaint but it was firmly rejected by the representatives of the Planning Department.

---

[20] Ibid.

82. The Judge did not deal with the need to protect the ridgelines of the Lion Rock from the local view corridor in his judgment.

83. We have gone through the representations made by and on behalf of OGL before the Board. We have also seen the view corridor from the footbridge as shown on a map and photomontage. Based on the photomontage, part of the ridgelines of the Lion Rock would be obstructed even if the proposed redevelopment were to be restricted by a 110mPD or 130mPD BHR. With a 203mPD BHR, the building would be thinner but much taller. The result is that a more imposing building would appear but a lesser part of the ridgelines would be obstructed. If one just focuses on the extent of the obstruction caused to the ridgelines attributable to BHR, a 110mPD or 130mPD BHR is less desirable than a 203mPD BHR. However, planning is a holistic process. The planning authority is entitled to exercise its aesthetic judgment and conclude that a towering building, with a height which is incompatible with the surrounding building heights and overall building height profile, would cause adverse visual impacts on the ridgelines as a whole.

84. What disturbs us is however this.

85. We live in a dynamic city with its citizens always moving around. Since the view of a particular object may vary dramatically at different viewpoints, the choice of a particular viewpoint for imposing building control to deal with possible visual impacts on the object needs to be made very carefully. Otherwise, given Hong Kong's crowded condition, drawing of view corridors from randomly or arbitrarily selected viewpoints for the purpose of imposing building height control

on buildings would easily lead to confusion and unfairness. In this respect, the 2003 Study relevantly provides :

> " 9.1.6 This question relates to the fact that height control is usually studied from a number of positions, whereas people actually move around the city and experience relationship in much more complexity. This provides something of a dilemma regarding whether it is appropriate to consider height impact from one position. While it is true that people do move around the city, there are still certain positions within the city that are of immense importance to locals and tourists alike. Provided such places are agreed as being very popular and important, it remains valid to consider views from these specific positions. The reason is that the same view is experienced by thousands of people from the same location, and it therefore becomes very significant. Three criteria should be applied to identify the significance that should be attached to a specific viewpoint:
>
> (i) The viewing location should be agreed as being important either by public consensus or as demonstrated by public attendance.
>
> (ii) The object of the view should be agreed as being intrinsically important.
>
> (iii) It should be agreed that it is important to have a view from the viewpoint to the object.
>
> 9.1.7 If these three criteria are satisfied, then the view is of immense significance and arguments about being able to move to other viewing locations do not reduce the relevance of considering the view from this point. Conversely, a well-travelled route, such as an expressway or railway, offers its changing view to thousands of people and therefore is also important.
>
> 9.1.8 While one viewpoint may be considered of greater importance, it is also important to identify as other, publicly accessible viewpoints, preferably from different directions."

86. In our view, the approach proposed by the 2003 Study is sensible. It ensures that the choice of the viewing location is made only after proper consideration of the views of community concerned, thus

preventing, as far as reasonably practicable, any random or arbitrary choice. We think the above approach should be adopted to determine the viewing location unless there are good reasons not to do so. For example, if the viewing location is well known and generally accepted by the community at large as important, a public consultation which will most probably yield the same result will not be necessary.

87. Here, the evidence before us shows that the choice of the view corridor from the footbridge is controversial. For example, at the Representation Hearing, a Legco member queried if the choice of only one single view point from the footbridge was justified. A representative of OGL also pointed out that the view corridor from the footbridge was not a pleasant one as it overlooked the MTR rail track. However, the Board had not justified the choice with sufficient reasons, for example, by explaining the pedestrian flow on the footbridge, the angle and direction selected for the view corridor. Neither the Planning Department nor the Board had carried out any public consultation to support the choice of the footbridge. Nor had the Board explained why no public consultation, as suggested by the 2003 Study which it purported to follow, was conducted.

88. In the circumstances, we think the choice of the view corridor from the footbridge is arbitrary. The justification of the 130mPD based on the need to protect the view of the ridgelines of the Lion Rock from the footbridge cannot stand.

E1.3 Minimizing the view obstruction to ex-RAF buildings

89. The Judge did not deal with this point in his Judgment. It can be disposed of shortly.

90. As noted above, the Site is located in a unique setting including the ex-RAF buildings at its back. A sound urban design consideration requires building height of neighbouring developments to respect the heritage features. The scale and proportion of the new development should also be compatible with the features in order to create a harmonious setting. The Site should respect the character of its neighbourhood with heritage features and the low-rise setting of the area and avoid overshadowing and dwarfing effect on the heritage features. The Board is entirely justified to have regard to the need to minimize the view obstruction to the ex-RAF buildings in imposing the 130mPD BHR.

91. This leads us to the reason why the Judge found the 130mPD arbitrary.

E1.4 Failure to achieve the plot ratio in full

92. The Board and OGL had all along proceeded on the basis that a BHR should not prevent a developer from making full use of plot ratio and gross floor areas available to a site. The expert evidence presented by OGL before the Board showed unequivocally that the emergency vehicular access and road set back as required for the site would entitle OGL to extra gross floor areas equivalent to about 3 storeys, giving an additional height of about 10mPD. The Board had not adduced any evidence in rebuttal.

93. As the Judge said :

> " 58. The evidence before the Court is that an EVA and road setback would entitle [OGL] to extra GFA equivalent to about 3 storeys. That would mean additional height of approximately 10 mPD (that is, roughly 3.15 m per storey).
>
> 59. It may be that Planning Department's indicative schemes assumed a height of 105 mPD instead of 110 mPD. But that would only leave an allowance of 5 mPD. That would not be enough to cover the additional 10 mPD required to accommodate the EVA and road setback.
>
> 60. There was some suggestion at the hearing that Oriental could always accommodate the extra GFA from the EVA and road setback by building bulkier residential blocks covering a larger area than those in the Planning Department's indicative schemes. But the practical feasibility of doing that, while still (say) maintaining the two NBA strips of 10 m and the central BG of 20 m, has not been demonstrated in the evidence. Nor does that appear to have been demonstrated to the Board. Instead, it seems to have been merely assumed by the Board that the 5 mPD tolerance in the indicative schemes was sufficient to cater for GFA generated by the EVA and road setback.
>
> 61. The Board's refusal to raise the BHR beyond 130 mPD must consequently be treated as arbitrary. Given the accepted principle that a BHR should not prevent a developer from making full use of plot ratio and GFA available to a site, the Board could not have been satisfied on the material before it that the development rights associated with the KTM site could be fully utilised at a BHR of 130 mPD."

94. We agree with the Judge. We should also add that before us, Mr Drabble suggested that the Judge erred in holding the Board's decision to maintain the BHR at 130mPD to be arbitrary on the basis that the sufficiency of the 5mPD tolerance, in the indicative schemes prepared by the Planning Department, to cater for GFA generated by the EVA and road setback, was no more than an "assumption" by the Board which was not justified by the evidence before it. Mr Drabble submitted that the Planning Department had in fact done calculations (albeit these were not made available to the Board) that justified the sufficiency of the 5mPD

tolerance for that purpose, and that it was therefore not right to characterise this as a mere "assumption". With respect, we do not agree. Given that the calculations were never actually revealed to the Board, there was no evidence available to the Board to enable it to conclude that the 5mPD tolerance would suffice to cater for the additional GFA generated by the EVA and road setback, and it was thus appropriate for the Judge to describe that view, so far as the Board was concerned, as no more than an "assumption". Further, had the calculations been revealed to the Board in answer to OGL's calculations, but not revealed to OGL, there would have been an obvious problem in terms of procedural fairness in placing before the Board materials on which OGL had no opportunity to comment, see *Caltex Oil Hong Kong Ltd v Governor in Council* [1995] 1 HKC 80 at p 85A to C.

95. In May 2013, Kwan JA gave leave to the parties to adduce new evidence to argue whether full plot ratio could be achieved with a BHR of 130mPD. The parties then filed conflicting expert evidence.

96. Mr Drabble argued that according to the Board's expert, Professor Lim Wan Fung, even with a BHR of 130mPD, the Site can still be developed to its full plot ratio and available gross floor areas. He submitted that at most OGL's evidence shows a conflict of expert views. In judicial reviews, it is not the court's role to prefer the option of one expert over another or to determine differences of technical opinion absent the clearest ground. Once it is accepted that a conflict of expert views exists, it cannot be said that the Board's position on the accommodation of gross floor areas and the imposition of the 130mPD BHR is arbitrary. See the discussion in *R (Lynch) v General Dental*

Council [2004] 1 All ER 1159 as to the proper scope for expert evidence in judicial review.

97. We are unable to accept the Mr Drabble's argument. As rightly submitted by Mr Pleming, this round of new conflicting expert evidence was simply not before the Board at either the Representation Hearing or the Further Representation Hearing. The new evidence has to be carefully evaluated by the Board before it can safely come to the conclusion that the Site can be fully developed to its plot ratio and available gross floor areas in full even with the 130mPD BHR. Absent such process, the Board cannot now rely on Professor Lim's evidence to overcome OGL's objection in this respect.

E1.5 BHR arbitrary and failure to make necessary inquiry

98. For the above reasons, we agree with the Judge's conclusion that the 130mPD is arbitrary. In addition, we also respectfully agree with the analysis at Section B1 of the judgment in CACV 232 and 233 of 2012 which is applicable, *mutatis mutandis*, in the present context. The BHR is liable to be set aside on that basis as well.

99. We next turn to NBA.

E2. NBA

E2.1 The Judge's reasoning

100. The Judge dealt with the 10m NBA thus :

> " 64. The 10 m NBA strip corresponding to the slope between the RAF premises and KTM was not subject to much challenge

by Ms Eu. Since that NBA is over a slope, there is little (if anything) that can be built on the strip in any event.

65. The main focus of Ms Eu's attack was instead the 10 m NBA strip on the boundary with the primary school.

66. It will be noticed on this that there has been no real justification given for an NBA of 10 m as opposed to something else.

67. CO2's[21] baseline option itself had an NBA of 3 m with a further gap of 2.3 m between the NBA and any building on the KTM site. Those dimensions appear to have been stipulated from the outset as a given by the Planning Department.

68. CO2's alternative option took the 10 m NBA as a given from the Planning Department. CO2 did not explore any other options (including options, such as a permeable gap, not involving an NBA along the school boundary) for improving air ventilation impacts.

69. Both the 3 m and 10 m NBAs in the indicative schemes used by CO2 were found insufficient to ventilate the surrounding area. But both NBAs were considered of 'help to receive downdraft to ventilate the area with easterlies'. How much 'help' is unknown as CO2 attempted no quantification of the degrees to which NBAs of different widths might be of 'help'.

70. One asks rhetorically why the 10 m NBA of CO2's alternative option is an optimum or even appropriate way of addressing ventilation impacts at the school and RAF premises? The alternative option is only one of many possibilities. But CO2 did not consider other possibilities. It only evaluated the 2 options which the Planning Department gave to it. It has consequently not been demonstrated that an NBA of 10 m would provide significantly better ventilation when compared against (a) a gap of any particular width, (b) some other permeable structure, or (c) an NBA of lesser width.

71. The Board, on the other hand, appears to have decided on a 10 m NBA along the boundary of the primary school, because that was the NBA in the CO2 Final Report's alternative option. Otherwise, there is no explanation why the Board thought the existing gap of 6 m had to be retained or why the existing had to be widened to 10 m (as opposed to some other width).

72. Consequently, the Board's decision to maintain a 10 m NBA along the school boundary strikes me as arbitrary. In

---

[21] CO2 is the AVA consultant.

> particular, the Board's reliance on the CO2 Final Report in support of the NBA imposed seems unwarranted.
>
> 73. It was suggested in argument that the CO2 Report was only one of many factors that led the Board to impose an NBA of 10 m. The Board (it was submitted) also had regard to enhancing visual impacts.
>
> 74. Assume that was the case. Nonetheless, the CO2 Report was undoubtedly a major factor in the Board's deliberation, especially as far as improving air ventilation was concerned. I doubt that the Board would have reached the same conclusion as it did, if it had appreciated that the CO2 Report was an inadequate basis for justifying the imposition of a 10 m NBA from an air ventilation perspective. It is entirely likely that the Board would not have considered the need for a 'visual buffer' alone as validating the imposition of the 10 m NBA along the boundary with the primary school.
>
> 75. I therefore conclude that the decision to impose a 10 m NBA at the KTM site (especially at the boundary of the primary school) was arbitrary. The restriction should accordingly be quashed.
>
> 76. If the Board is to impose the burden of a 10 m NBA or other restriction on a site, such decision must be backed up by cogent evidence that the measure can reasonably be regarded as necessary for achieving a particular planning objective. Obviously, in the assessment of what is reasonably necessary, a wide margin of appreciation must be afforded to the Board. Nonetheless, the greater the restriction of property rights being proposed, the greater must be the cogency of the evidence required to justify the Board's decision.
>
> 77. Here, at most, the AVA indicated that a 10 m NBA has some possible effect in ameliorating adverse ventilation impacts. But it has not been sufficiently demonstrated that the NBA is no more than what might be regarded as reasonably necessary to mitigate adverse ventilation impacts."

E2.2 The Board's arguments

101. Mr Drabble argued that the Board's decision to impose a NBA for the Site was based on a proper regard to the specific situation of both the Site and the adjacent school and in particular the need to address the on-site adverse impact which would or might be generated by redevelopment of the Site. As a matter of fact, there is already a

building separation of 6m between existing school building and Block 4 of KTM, and this separation is entirely within the Site. The NBA along the south-eastern boundary of the Site would widen the separation from 6m to 10m and is also intended to minimize the visual obstruction to the views to and from historic buildings at the ex-RAF site and provide a reasonable buffer between any redevelopment of the Site and the school to avoid a long continuous building façade facing Kwun Tong Road. Once it is shown that an NBA of some dimension is justified, the question becomes one of degree. The assessment of the exact degree of restriction appropriate to the overall context is necessarily a matter of broad discretionary judgment for the Board.

102. Mr Drabble further argued that although other solutions may have been available it does not render the solution chosen arbitrary or otherwise unjustified. The relevant question is whether the chosen solution itself is manifestly without reasonable foundation. Given the absence of any prescribed standard or formulae for the calculation of NBA dimensions, the setting of a 10m NBA is no more "arbitrary" than NBAs of (say) 8m or 11m. The Board's decision was one of planning judgment taking account of a host of factors including unquantifiable considerations such as site context and circumstances.

103. We are unable to accept the Mr Drabble's submissions.

104. First, the Board imposed all the 10m NBA on the Site along its boundary with the adjacent school. It was intended to be a buffer between the Site and the School. As OGL rightly questioned at the Representation Hearing : why was it the case that the buffer had to be designated within the Site entirely; and why was it not to be shared

between the two sites? These questions were not satisfactorily answered. The Board however took the view that should the school redevelop in future, additional NBA could be considered on the school site to provide for a larger buffer. We do not think that really answered OGL's objections.

105. Second, the Board said that the NBA was intended to minimize the visual obstruction to the views to and from the historical buildings at the ex-RAF site. However, no visual impact assessment was done or presented to the Board for its consideration. As rightly submitted by Mr Pleming, it is not clear at which point and to what extent visual impact is minimized.

106. In light of these deficiencies, the Board manifestly failed to give due consideration to relevant matters before it reached its conclusion on the NBA.

E2.3 NBA arbitrary not properly considered

107. We agree with the Judge that the Board did not give proper consideration to the matter before it imposed the NBA.

E3. BG

E3.1 The Judge's reasoning

108. The Judge held that the 20m BG suffered from a similar deficiency as that discussed in relation to the 10m NBA. He said :

> " 79. CO2 did not explore and compare the beneficial effects of other gap widths or other permeable structures. Instead, it simply compared the baseline option (with a slanted central gap

> of 5.3 m) against the alternative option (with a straight-oriented (non-slanted) central gap of 20 m). It recommended a straight-oriented central gap of 24 m as better. But it did not explain how such conclusion could be justified by its limited methodology. No quantification of the effects of a 20 or 24 m gap appears to have been attempted by CO2.
>
> 80. In those circumstances, I do not think that the Board could have determined that a 20 m gap was an appropriate restriction. There was insufficient evidence on which to come to such a conclusion.
>
> 81. In stipulating a gap of 20 m, the Board also took into account the visual impact of glimpsing the RAF premises from the street and vice versa. But again I am not satisfied on the evidence that, had the Board appreciated the inadequacies of the CO2 Report as a basis for reaching any conclusions on air ventilation impacts, the Board would have still imposed a 20 m BG on the basis of visual impact alone. On the contrary, the CO2 Report must have played a significant part in the Board's deliberations in connection with the 20 m BG.
>
> 82. Consequently, it seems to me that the 20 m BG should be quashed as arbitrary."

E3.2 The Board's arguments

109. Mr Drabble argued that the Board's decision to impose the 10m BG for the Site was based on a proper regard to the Site and its surroundings. He basically relied on his submissions on NBA to say that the Judge's reason was flawed. With respect, we disagree.

110. As rightly submitted by Mr Pleming, the Board adopted CO2 Report's recommended BG (which was formulated from an air ventilation perspective) as a visual corridor. At the Representation Hearing, conflicting views were given as to why the BG was imposed, that is, whether it was for ventilation or for visual. In any event, the Board never conducted a visual impact/ permeability study when it was supposed to make sufficient inquiries in preparing OZPs. It is therefore not demonstrated how the BG can improve visual impact/ permeability

given the height of the podium. Nor did the Board identify what was the view to be preserved, and from where, and how the imposed BG (and only the imposed BG) would achieve the identified result.

111. Mr Pleming's other submission, which we agree, is this. In the explanatory statement to OZP 26, it was stated that the BG is intended to "partially open up the view of Grade 1 historic building at its back to the public at street level". However, it is not demonstrated, nor was there any attempt to demonstrate, which part of the historic building can be seen from which part of street level when there is a podium of 15mPD high. While the Board never performed a visual impact assessment study, OGL did a comprehensive one as part of its Representation Statement submitted to the Board. OGL's study shows that the imposition of a long and narrow BG above 15mPD is a poor visual corridor. And from the relevant photographs the Grade 1 historic building can hardly be seen, if at all, at street level. There was no mention of OGL's study in the Board's reasons for either hearing.

E3.3 BG not properly considered

112. Like the Judge, we find that the 20m BG had not been properly considered as the evidence before the Board was manifestly insufficient.

E4. Answer to Issue 3

113. For the above reasons, we hold that the 3 Restrictions are all liable to be quashed.

114. We now come to Issue 4.

F. ISSUE 4 – MINOR RELAXATION : IRRELEVANT CONSIDERATION

115. We have alluded to the provision for minor relaxation in the Notes. In the reasons given by the Board for its decision, there was also a reference to such provision. At para 174(c) of the minutes of the meeting, one of the reason given for rejecting OGL's representations was:

> "(c) there was provision for application for minor relaxation of the BHRs, NBA and building gap requirements under the OZP to cater for schemes with planning and design merits. Each application would be considered by the Board on its individual merits based on the set of criteria set out in the Explanatory Statement of the OZP."

116. This was reproduced in the formal letter of 27 February 2012 from the Board to the consultant acting for OGL.

117. In the course of deliberation, the vice-chairman of the Board referred to the provision for minor relaxation as the proper channel under which OGL's proposal should be considered : see para 159 of the minutes. The secretary also referred to minor relaxation for NBA and BG at para 163. Though there was a reminder by the secretary that it is unlikely that minor relaxation would lead to a relaxation from 130mPD to 203mPD, minor relaxation was still referred to in the final version of the reasons for decision.

118. Mr Drabble contended that the Board did not rely on minor relaxation at para 170.

119. However, as it can be seen above, the Board referred to it again at para 174(c).

120. In the judgment in CACV 232 and 233 of 2012, the other division of this court considered the same question at Section B4. We respectfully agree with the analysis in that judgment and respectfully disagree with the Judge's conclusion in this respect at para 87 of his judgment below.

121. The decision of the Board is therefore liable to be set aside on this ground as well.

G. ISSUE 5 – PROCEDURAL IMPROPRIETY

G1. OGL's Complaints

122. As we noted in paragraph 54 above, Mr Pleming also submitted that the common law requirements of fairness, as applied to the administrative process constituted by the determination of the Board in respect of the objections and representations made in respect of OZP 26, were not met in respect of OGL's objections and representations. In other words, he contended that the procedure adopted for dealing with OGL's objections and representations was such that an informed observer would conclude that their objections and representations had not been fully and fairly considered.

123. This complaint had a number of facets, which may be summarised as follows :-

(1) The length of the hearing and the number of representations that had to be considered and dealt with was such that the hearings were excessively long. In this regard, particular reference was made to the representation hearing on 27 May

2011, which lasted from 9 am until 12:30 am the following morning. This would cast doubt on whether or not proper consideration had been given to the representations that had been made.

(2) Members of the Board were free to leave and join the meeting as they wished, resulting in some members who heard OGL's representations not participating in the deliberations on them, while other members who did participate in the deliberations had not been present for the whole or part of the representations.

(3) A fair-minded and informed observer would have concluded that there was a real possibility that the Board was biased, because :-

(a) a number of members of the Board were closely associated with the Planning Department;

(b) OGL (and other persons making representations at the meetings) were excluded from the parts of the meeting when the Board deliberated on their representations, whereas the Planning Department related members of the Board participated in the deliberations and answered questions raised by other Board members; and

(c) the adoption by the Board of reasons that were identical to suggested reasons provided by the Planning Department prior to the meetings, and thus prior to hearing OGL's representations, suggested that

the Board had not considered such representations with minds that were open to persuasion.

(4) The reasons given for the Board's decision were inadequate, in that they did no more than repeat the proposed reasons provided by the Planning Department prior to the meetings.

G2. The Judge's reasoning

124. The Judge rejected these complaints. Having already concluded that the BHR, NBA and BG restrictions should be quashed on the grounds that they were arbitrary, he dealt with these complaints briefly between paragraphs 92 and 94 of his judgment, saying that he saw "nothing in the procedures followed here to suggest that the Board acted in any way which might be considered unfair or biased", and pointing out that while the reasons given for the Board's decisions did track the suggested wording provided by the Planning Department prior to the meeting, it appeared from the minutes of the meetings that the Board had actively discussed and considered the representations that had been made to it, such that it could not be said that the Board had been biased, or had failed to approach the representations with an open mind.

G3. Failure of members to be present for all parts of the meeting

125. Although we agree with the Judge that most of OGL's complaints of procedural impropriety are not well founded, we have come to the conclusion that, in one respect, namely the complaint about the disconnect between the attendance of Board members during the hearing of OGL's representations and the deliberation upon them, OGL

have, in this case, valid cause for complaint. We therefore deal first with this point.

126. The issue of the incomplete participation of those Board members who attended meetings to be present for all those parts of the meeting relating to the representations made by a particular party was fully considered in the judgment in CACV 232 and 233 of 2012, at paragraphs 174 to 186. We respectfully agree with and adopt the principles there stated.

127. For present purposes, it suffices to note that, in the context of the administrative process constituted by meetings of the Board for the purpose of hearing, deliberating on and determining objections and representations in respect of draft plans prepared by the Board, it is not necessary for all Board members who participate in the Board's deliberation and decision on a particular party's representations to be present throughout the making of the representation by that party. What is, however, essential, is that all Board members involved in making the decision should be adequately informed of the contents of such representations by the time that they come to deliberate and decide upon them. Where there are Board members who take part in the deliberations and decision who have not personally heard the whole of the representation in question, it will be necessary for the Board to demonstrate by appropriate evidence that such members have been made aware of the contents of the representation.

128. In CACV 232 and 233 of 2012, there were in fact no members who participated in the deliberation and decision who were not present during the presentations that were relevant to that case. The

decision there turned on the fact that it was not possible for the court to be satisfied that all the members participating in the decision there had a full understanding of the materials put before the Board in support of Hysan's representations, owing to the lack of time for them to read and properly absorb such materials.

129. The position here, however, is different, in that it appears that there was at least one member of the Board (Mr Laurence Li) who was not present for any part of OGL's representations on 27 May 2011, or the deliberation session that took place that evening, but who is recorded as having been present for the adjourned deliberation session on 1 June 2011.

130. The minutes of the representation hearing record that Mr Li was in attendance for the afternoon session of 27 May 2011, but that he left the meeting when it was decided that he should not take part in the hearing and consideration of representation relating to another planning matter owing to a potential conflict of interest. There is no record of Mr Li having subsequently returned at any time on 27 May 2011, and it would therefore seem that he was absent during the hearing of the representations in relation to the Kai Tak Mansions site, including those by OGL, and for the deliberations on such representations that commenced at about 10:30 that evening, going on until about 12:30 am. According to the minutes, Mr Li did, however, attend the resumed deliberation session on 1 June 2012.

131. In relation to the further representation hearing on 3 February 2012, a number of Board members (Ms Annie Tam, Mr Timothy Lee and Mr Fletch Chan) were absent for part or all of

OGL's submissions, but nonetheless took part in the deliberation session at the end of that hearing. There does not appear to be anything in the minutes to indicate that they were apprised of the submissions which were made while they were absent from the meeting – indeed, the meeting simply carried on, while members left and joined (or re-joined) it from time to time.

132. For the Board, our attention has been drawn to the internal guidance provided to members of the Board in relation to situations in which a member may not have been present for the whole of a representation. That guidance indicates that it is for the member concerned to satisfy himself that he is in a position to fairly consider the matter, and, if not so satisfied, not to take part in the deliberations and decision of the Board upon it. However, the minutes dealing with the deliberation session on 1 June 2011 do not state that Mr Li took no part in the deliberations and decision making process, and it is not possible to say from the minutes whether or not he did, as (with the exception of office holders, such as the vice-chairman, and official members) members who raise points or comments for discussion are not identified by name. We must therefore proceed on the basis that he did, or at least that it is not shown that he did not. Further, there is nothing in the minutes to indicate what steps were taken to apprise Mr Li of the representations made by OGL, or of the earlier discussion and deliberation on the evening of 27 May 2011. Nor does it appear that minutes or other records of such matters were made available to Mr Li (or the other members of the Board) before the deliberation session on 1 June 2011.

133. So far as the further representation hearing of 3 February 2012 is concerned, the position is no different.

134. On the evidence available, therefore, it does not seem to us to be possible to say that all members of the Board who participated in the decision making process in respect of OGL's representations had heard or were otherwise adequately apprised of those representations. In this respect, therefore, the process for the consideration of OGL's representations was, in our view, procedurally unfair, and the decisions reached as a result of that process are accordingly liable to be quashed on this basis also.

135. We wish, however, to make it clear that none of this is intended as a criticism of Mr Li, or the other Board members at the further representation meeting who acted in a similar way. To the extent that they participated in the decisions taken, they no doubt genuinely considered that they were in a position to do so, having regard to the practice that has been adopted in relation to meetings of the Board. Rather, our concern is directed towards that practice.

136. Although a number of other complaints were made by Mr Pleming under this head, we do not find them to be justified. The suggestion that certain other members of the Board were absent for parts of OGL's representation at the hearings on 27 May and 1 June 2011 is not made out on the evidence, having regard to the Board's evidence that such members were in fact present throughout OGL's representation. Nor does the fact that yet other members heard all or part of the representation but did not take part in deliberations or the decision making part of the meeting give rise to procedural unfairness – what is important is that those who are involved in the decision making should be fully aware of the substance of the representation with which they are dealing.

G4. Length of meeting

137. In paragraphs 169 to 172 of the judgment in CACV 232 and 233 of 2012, this court (differently constituted) held that it would not be appropriate to seek to adopt a rigid or mechanistic approach to the question of the length of meetings of the Board. Long hearings are, it seems to us, to a large extent inevitable, having regard to the size and composition of the Board, which consists of a large number of busy professional and business persons, who make their time available to assist in the despatch of the Board's business.

138. In that case, the length of the hearing (which was similar to that on 27 May 2011 in this case) was, particularly viewed in conjunction with the volume of complex information placed before the Board at the outset of the hearing, which the Board had not had the opportunity to read and digest beforehand, regarded as problematic.

139. In this case, however, while the meeting on 27 May 2011 was an extremely long one, it does not seem to us that the representations made were of the like complexity as in that case. Nor does it appear that there were as much in the way of additional materials put forward before the Board in this case. Most pertinently (although this was to lead to the problem which we discussed in the preceding section of this judgment), the Board did not seek to push through to a determination on the same day, but instead broke off the deliberation session and resumed it a few days later, when further consideration and discussion of the representations and objections took place before the Board made its decision. While every case will be different, we do not think that in this

case the length of the hearing on 27 May 2011 was such as to make the process one which could be said to be unfair.

G5. Whether there was a real possibility of bias

140. As was stated in *Porter v Magill* [2002] 2 AC 357 at paragraph 103, the test for apparent bias is "whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased".

141. As we have noted in paragraph 53 above, in the context of meetings of the Board for the purpose of considering representations and objections in respect of plans prepared by the Board, the test has been described by Godfrey JA in *Kwan Kong Co. Ltd v Town Planning Board* [1996] 2 HKLRD 363 at 378F as follows :-

> " The relevant question is whether, when the members of the board come to make up their minds, they genuinely address themselves to the question with minds which are open to persuasion."

G5.1 Planning Department members of the Board

142. Mr Pleming complained that the presence of officers of the Planning Department as members of the Board meant that the Board could not have minds that were genuinely open to persuasion. He pointed out that Ms Ophelia Wong was present as a Board member at the meetings on 27 May and 1 June 2011, acting as Director of Planning on 27 May 2011, and Deputy Director of Planning on 1 June 2011, and that Mr T.K. Lee attended the meeting on 27 May 2011 as a Board member, acting as Deputy Director of Planning. Mr Pleming also pointed out that they were both the superiors of Mr Eric Yue, who was the Planning

Department's representative at the meetings, making a presentation to the meeting of the Planning Department's views, and responding to the representations made by OGL and others, but that they did not declare their relationship with Mr Yue, either at the representation hearing on 27 May and 1 June 2011, or the further representation hearing on 3 February 2012.

143. Mr Pleming suggested that while s2(1) of the TPO provides that the Board may consist of "official and unofficial members", it was not made clear whether official members could include members of the Planning Department, and if so, what role they could properly play in meetings of the Board. He also pointed out that whereas other members were expected to declare any relationship which might lead the public to believe that their advice might have been influenced by their relationship with the representer or commenter, there was no similar guidance in relation to members of the Planning Department who were members of the Board.

144. The presence of official members on the Board has been considered in *Kwan Kong*. In paragraphs 51 to 64 of this judgment, we have explained why it is entirely legitimate for there to be official members of the Board who are public officers from the Planning Department, and that it is equally legitimate for them to have some predispositions by reason of this. What is important is that they should not allow such predispositions to overwhelm the determination of the Board as a whole, and that the Board should, notwithstanding their presence and predispositions, approach the planning issues before it with an open mind towards the arguments raised by representers such as OGL.

145. So far as the relationship of Ms Wong and Mr Lee to Mr Yue is concerned, given that public officers in the Planning Department may be members of the Board, it seems to us to be quite unnecessary for them to disclose their relationship to other public officers from the same department who appear before the Board in order to inform the Board of the Planning Department's views, and its responses to the representations made at the meeting. Their relationship with those other officers is obvious and does not require to be stated.

146. We therefore do not consider that the mere presence of Planning Department officials such as Ms Wong and Mr Lee was a matter which of itself rendered the process of determining OGL's representations unfair. It is necessary to consider whether, on the evidence available, their presence and actual involvement was such as to turn an otherwise fair process into one which was, viewed objectively, unfair. This takes us to the second complaint under this head.

G5.2 Deliberation with Planning Department members only, without OGL

147. Mr Pleming next contended that whereas OGL (and the other representers) were not permitted to be present for the deliberation session, Ms Wong was. He also submitted that Ms Wong's involvement in the deliberation process was very active, as she answered questions raised by members of the Board during the deliberation phase. Mr Pleming went so far as to suggest that she dominated much of the decision-making process, thereby overwhelming the Board so that it could not be said that the Board dealt with OGL's representation in an open-minded way.

148. With respect, we are unable to agree with this submission. It does not appear to us from the minutes of the meetings that this criticism is justified. While it is true that Ms Wong answered a number of questions raised by board Members in the deliberation phase, some of which involved a restatement by her of the Planning Department's views (which had been made in its position papers for the meeting and at the meeting itself), this is, we think, unexceptional. The minutes do not, to our mind, suggest that the other members of the Board were unduly influenced by Ms Wong, or that they did anything other than exercise their own independent judgment in coming to a consensus as to how the representations should be dealt with.

G5.3 Adoption of Planning Department reasoning

149. This leaves the third aspect of this complaint. This is that by the wholesale adoption of the draft reasons suggested by the Planning Department in its position paper for the Board prepared prior to the meeting (and hence prior to having heard the representation of OGL), it was demonstrated that the Board had not in fact approached the matter in an open-minded way, genuinely open to persuasion, but had instead been biased, or had abdicated its responsibility to make the decision itself.

150. The practice of the Board in adopting (usually without modification) the reasons suggested by the Planning Department has been the subject of comment in a number of cases, which are discussed in paragraphs 198 to 203 of the judgment in CACV 232 and 233 of 2012, which we would adopt for present purposes. While the reproduction of reasons drafted by the Planning Department is not conclusive, it does give rise to concerns as to whether or not the Board has independently

addressed its mind to the questions before it, and in particular, whether it has addressed its mind at all to the representations that have been made to it.

151. In the present case, the Judge expressed the view that it was apparent from the minutes of the meetings of the Board that the Board had in fact considered and discussed the representations before coming to its decision. Our review of the minutes leads us to the same conclusion. Indeed, it is apparent from the minutes in relation to the 1 June 2011 deliberation session that the Board was conscious of the desirability of stating its reasons for determining OGL's representation and objections as it did, noting that the reasons prepared by the Planning Department should be amended in accordance with the Board discussion and consideration. Notwithstanding this, the reasons recorded in those minutes did not in fact do so, and simply repeated (virtually verbatim) the draft reasons that had been provided. Although this is unfortunate, it does seem to us that the evidence discloses that the Board did give independent and genuine consideration to the representations at both meetings (even though, for the reasons we have given in section E above, such consideration was flawed), so that the adoption of the draft reasons in the minutes is not, in this case, reflective of any bias or lack of independent consideration on the Board's part.

152. For all of these reasons, we do not consider that the suggestion of apparent bias is made out.

G6. Inadequacy of Reasons

153. For the reasons given in paragraphs 147 to 150 above, we do not consider that this complaint is well-founded.

G7. Conclusions on Procedural Fairness

154. As will be apparent from the foregoing, we are of the view that the procedure adopted in dealing with OGL's representation and objections was unfair in the respects explained in section G3, and that the decision on the representation falls to be quashed for this reason also. However, for the reasons explained above, we do not consider that OGL's other complaints of procedural impropriety are made out.

H. DISPOSITIONS

155. For these reasons, we dismiss the appeal by the Board in CACV 127 of 2012. We also make an order *nisi* that the Board shall pay the costs of OGL in this appeal, such costs to be taxed if not agreed, with certificate for 3 counsel. In respect of CACV 129 of 2012, in light of our decision in CACV 127 of 2012 and what we said at para 69 above, we do not think it is necessary to grant the relief prayed for in OGL's Notice of Appeal in that appeal. In terms of costs, it appears to us that more costs were incurred on OGL's grounds rejected by us than those accepted by us. Thus, we would make an order *nisi* that the Board shall pay ¼ of OGL's costs in that appeal, also with certificate for 3 counsel.

156. Last but not least, we want to thank counsel for their valuable assistance.

(M H Lam) Vice President	(Aarif Barma) Justice of Appeal	(Jeremy Poon) Judge of the Court of First Instance

Mr Nigel Pleming QC, Ms Audrey Eu SC and Mr Jonathan Lee, instructed by Messrs Philip TF Wong & Co, for the respondent in CACV 127/2012 and the applicant in CACV 129/2012

Mr Richard Drabble QC, Mr Anderson Chow SC and Mr Abraham Chan, of Department of Justice, for the appellant in CACV 127/2012 and the respondent in CACV 129/2012