

A. Introduction

In January 2001, a site at Sai Wan Ho, Hong Kong (the Site), with an area of about 12,200 square metres (m²), was sold by tender to a developer (the Developer) at a premium of \$2,430 million for a residential development. The lease conditions of the Site required the Developer to provide, on a reimbursement basis, Government Accommodation comprising of a marine police operational area (MPOA) with a net operational floor area of not less than 1,500 m², and a public transport terminus (PTT) which included a public transport interchange and a cross boundary coach terminus.

2. The Audit Commission (Audit) carried out a review on the above residential development with focus on the following areas:

- pre-tender enquiries on gross floor area (GFA) calculation;
- development intensity of the Site;
- provision of Government Accommodation;
- site classification;
- granting of exemption areas; and
- granting of bonus areas.

3. The Committee held six public hearings on 28 November and 1, 8, 9, 13 and 19 December 2005 to receive evidence on the findings and observations of the Director of Audit's Report (the Audit Report).

4. At the beginning of the Committee's first public hearing on 28 November 2005, Hon Abraham SHEK Lai-him, a member of the Committee, declared that as he represented the Real Estate and Construction constituency, he would not ask questions at the public hearings.

B. Summoning Mr LEUNG Chin-man, former Director of Buildings, to attend before the Committee to give evidence

5. As Mr LEUNG Chin-man was the Building Authority during part of the period covered by the Audit Report, the Committee decided at the outset to invite him to appear before it to provide information and explanations. Mr LEUNG was therefore invited to attend the public hearing on 28 November 2005 at 2:30 pm. However, on the morning of 28 November 2005, Mr LEUNG informed the Committee that as he was in the course of

filing an application to the High Court for leave to apply for a Judicial Review on the Audit Report, he would not be able to attend the public hearing that afternoon.

6. Having considered, at a special meeting convened that morning, Mr LEUNG's reason for declining to attend the hearing, the Committee decided that he could not be excused from attendance. The Committee reaffirmed its practice to invite the relevant former post holders to appear personally before it to assist it in its consideration of that report. The Committee agreed that should Mr LEUNG fail to attend the hearing, the Committee would consider issuing a summons under the Legislative Council (Powers and Privileges) Ordinance to order his attendance before it to give evidence. Later that morning, the Committee noted that the Secretary for Housing, Planning and Lands had directed Mr LEUNG to attend the hearing.

7. Subsequently, Mr LEUNG attended the hearing as scheduled. However, he refused to answer questions put to him by the Committee on the ground that he had filed an application to the court for leave to apply for a Judicial Review on the Audit Report. He said that, having taken legal advice, he considered it inappropriate to answer questions at the hearing.

8. In view of Mr LEUNG's refusal to answer questions at the hearing on 28 November 2005, the Committee exercised its power under the Legislative Council (Powers and Privileges) Ordinance to summons Mr LEUNG to appear before it to give evidence and to examine him on oath. A summons was served on Mr LEUNG on 29 November 2005.

9. On 1 December 2005, Mr LEUNG attended the second public hearing as summonsed and answered members' questions under oath. He also gave evidence at the subsequent hearings held on 8, 9, 13 and 19 December 2005.

10. Mr LEUNG provided written submissions to the Committee on 8 and 31 December 2005, in *Appendices 13 and 14* respectively. As requested by the Committee, the Administration provided, on 12 December 2005, a written response (in *Appendix 15*) to Mr LEUNG's first written submission.

C. Pre-tender enquiries on GFA calculation

11. The Committee learned from paragraphs 2.4 and 2.5 of the Audit Report that, in late November 2000, before the close of tendering of the Site, a prospective tenderer (not the successful tenderer) sought clarification from the Lands Department (Lands D) on whether the Government Accommodation would be excluded from the GFA calculation.

After consulting the Buildings Department (BD), the Lands D informed the prospective tenderer that the lease conditions did not specify a maximum GFA, and the Director of Buildings had advised that, under Building (Planning) Regulation (B(P)R) 23(3)(a), the Government Accommodation “shall be included” in the GFA calculation. While the Lands D recorded enquiries from, and its answers to, prospective tenderers on its file, Audit could not find records showing that the Lands D had publicised them.

12. The Committee asked why the Lands D consulted the BD before replying to the prospective tenderer and whether it agreed with the BD’s reply. **Mr Patrick LAU Lai-chiu, Director of Lands**, explained that:

- although the Lands D was responsible for drafting the lease conditions, it had to consult the BD for its expert advice on such technical matters as whether the Government Accommodation should be included in the GFA calculation; and
- as the BD, the professional department for such matter, had advised that the Government Accommodation should be included in the GFA calculation, the Lands D accepted its advice and replied to the prospective tenderer accordingly.

13. The Committee noted that the Lands D’s Lands Administration Office Instruction of 22 March 1999 (which was effective at the time of the tendering of the Site) stated that the Lands D should, before the close of the land sale, publicise the answers/clarifications given to prospective tenderers on enquiries relating to a basic ambiguity in the lease conditions. As the information on whether the Government Accommodation should be included in the GFA calculation was an important piece of information which would affect the tenderers’ assessment of the value of the Site, the Committee queried why the Lands D had not publicised the enquiries and answers in this regard and whether this was unfair.

14. The **Director of Lands** replied that:

- whether a piece of information should be publicised depended on whether it related to a basic ambiguity in the lease conditions. As the lease conditions did not specify a maximum GFA for the Site or whether the Government Accommodation would be included in the GFA calculation, enquiries concerning the inclusion or exclusion of the Government Accommodation in the GFA calculation did not relate to a basic ambiguity in the lease conditions. Moreover, it was commonly known in the industry that the Government’s normal practice was to include Government Accommodation in the GFA calculation. Therefore, the Lands D staff concerned judged that it was not necessary to inform other prospective tenderers of his answer in this regard; and

- there were nine tender returns in this case. Apart from the two lowest bids, the tender price offered by the other tenderers did not differ much. This reflected that the tenderers understood whether the Government Accommodation would be included in the GFA calculation and there was no question of unfairness to the tenderers.

15. The Committee further asked whether the Lands D could define more clearly the meaning of “fundamental ambiguity”.

16. The **Director of Lands** said that the Lands D accepted Audit’s recommendation in this regard. Although it was not possible to draw up a definitive list of “fundamental ambiguity”, the Lands D would clarify its meaning as far as possible so as to give clearer guidelines to staff. The latest Lands Administration Office Instruction now specified that “fundamental ambiguity” would cover any uncertainty regarding the development parameters such as GFA, site coverage, building height, carparking requirement and provision of government/institution/community (GIC) facilities requirement.

D. Development intensity of the Site

17. According to paragraphs 3.8 to 3.12 of the Audit Report, in November 1998, the Metro Planning Committee of the Town Planning Board had been informed that the Site would be able to produce about 1,000 residential flats. According to the Planning Department (Plan D)’s calculation, this was equivalent to a maximum permissible domestic GFA of 85,720 m². However, in November 1999, in response to the Lands D’s enquiry about the drafting of the lease conditions, the Plan D recommended a minimum GFA of 80,000 m² for residential purposes to produce about 1,000 residential flats with an average size of 80 m². It now transpired that the actual development of the Site turned out to be a development of five 61 to 64-storey blocks of 2,020 residential units, with a total domestic GFA of 135,451 m².

18. Against the above background, the Committee asked why the Plan D had changed the maximum permissible domestic GFA of the Site to a minimum domestic GFA, thereby allowing the domestic GFA of the Site to increase significantly.

19. **Mr Bosco FUNG Chee-keung, Director of Planning**, responded that a notional scheme of a mixed residential/commercial/GIC development for the Site was worked out by the Plan D in 1998 based on various planning assumptions. At that time, the domestic GFA and the non-domestic GFA were estimated to be about 85,720 m² and 39,116 m² respectively. But these did not represent the maximum GFA. Later, before the land sale, the Lands D asked the Plan D whether a minimum residential GFA for the Site could be included in the lease conditions. Taking into consideration the Government’s policy at that

time to increase the housing supply, the Plan D recommended a minimum domestic GFA of 80,000 m² for the Site to produce about 1,000 residential flats.

20. As regards the difference between the planned population density of the Site as estimated in July 1998 and at present, the **Secretary for Housing, Planning and Lands** advised, in his letter of 7 December 2005 in *Appendix 16*, that:

- in 1998, based on the estimated domestic GFA of the notional scheme (85,720 m²) and an assumed average flat size (85 m²) with reference to an adjacent residential development (i.e. Les Saisons) then under construction, the number of flats estimated in the notional scheme was 1,008 units. Taking into account the then estimated average of 3.5 persons per occupied flat (PPOF), the estimated planned population of the Site was 3,528;
- the notional scheme was only to provide a rough estimate based on a set of planning assumptions. A developer had the flexibility to determine the appropriate mix of residential and commercial GFA and the mix of flat sizes to meet the market demand. In the Sai Wan Ho development, the Developer had chosen not to provide commercial floor space within the Site and the average flat size had also turned out to be smaller (67 m²). With the increase in total domestic GFA, the number of flats provided on the Site had increased to 2,020 units; and
- with the continuing trend of declining household size, the estimated average PPOF had decreased over the years. The latest planning estimate was 2.58 persons per occupied flat for the subject development, resulting in a population of about 5,212. There was an increase of 1,684 persons compared to the original estimate of 3,528 in 1998. If the Developer had decided to build fewer but larger flats with the same domestic GFA, the population in the development would have been less.

21. The Committee enquired whether the increase in the development intensity of the Site had affected the development of, and led to a decrease in the GFA permissible in, the other areas of the district. The **Director of Planning** responded that:

- the increase in the GFA of the Site had not led to a reduction of GFA in other areas of the district. It was the Plan D's existing practice to update the assessment on the provision of public facilities in individual districts on a periodic basis to tie in with the preparation and revision of district plans. If there were additional GFA or new planning considerations which arose from the actual development of a site, the Plan D would deal with them when revising the district plans. If particular shortfalls were identified, the Administration could address them through other developments, such as that of government land, in the district; and

- the increased intensity of the Site did not have much impact on the overall provision of facilities in the district.

22. The Committee further asked about the impact on the provision of community and educational facilities in the district brought about by the increase in population density of the Site. In his letter of 7 December 2005, the **Secretary for Housing, Planning and Lands** stated that:

- while there was an increase in population on the Site as compared to the original estimated population in the notional scheme, there was a gradual reduction in the overall population in the Quarry Bay district. The district had a population of 133,522 in 2001 and the latest estimated planned population for the district was 125,200 by 2016, the major reason being that there was a trend of declining household size;
- based on the Hong Kong Planning Standards and Guidelines (HKPSG), the planned provision of community and educational facilities should be adequate to meet the HKPSG requirements with the exception of secondary schools and some youth and elderly facilities; and
- in terms of the provision of secondary schools, the shortfall of secondary schools could be met by the provision in other adjoining districts, such as North Point, and this was in line with the HKPSG. As regards the youth and elderly facilities, a GIC site of about 2,000 m², located in the vicinity of the Site, had been reserved for the provision of community facilities to meet the district's demand. Moreover, as these facilities were small scale and premises-based, they could be accommodated within private commercial or commercial/residential buildings.

23. In response to the Committee question, the **Director of Planning** clarified that, although the increased intensity of the Site did not have much impact on the overall provision of facilities in the Quarry Bay district, it did affect the density, surrounding environment and building height of the Site. It also caused additional visual impact in view of its waterfront location. These had been pointed out by the representative of the Plan D at the Building Authority Conference (BAC) of 22 October 2001.

E. Granting of exemption areas

E.1 Inconsistency of the Director of Buildings' advice and the Building Authority's decision

Evidence obtained at the public hearing on 1 December 2005

24. According to paragraphs 6.2 to 6.21 of the Audit Report, in November 1999, when the draft Special Conditions of the lease of the Site was being prepared, the BD had advised the Lands D that the Government Accommodation (i.e. the PTT and the MPOA) should be included in the GFA calculation. However, the information had not been incorporated into the lease conditions. At the expanded BAC on 1 August 2001 to determine the application of the Authorised Person (AP) for the Developer for excluding the Government Accommodation from the GFA calculation, there were diverse views on the issue. After seeking legal advice, the Building Authority decided in October 2001 that the PTT should be excluded from the GFA calculation while the MPOA should be included.

25. Noting that the Building Authority, who was also the Director of Buildings, decided in October 2001 to exclude the PTT from the GFA calculation while the BD had advised in November 1999 that both the PTT and the MPOA should be included, the Committee asked why there was inconsistency in the BD's advice before the sale of the lot and the Building Authority's decision after the sale was completed.

26. **Mr LEUNG Chin-man** explained that:

- the lease for the sale of government land was a contract between the Government and a developer. The Building Authority should not favour either party that signed the lease;
- in exercising his discretionary powers conferred by the Buildings Ordinance, the Building Authority should take into account such relevant factors as merits of the case, public interest, special circumstances of the case, precedent cases, as well as internal or external guidelines available, etc.. The Building Authority should listen to as many opinions as possible before making a decision, but the final decision should not be made by a majority vote following such consultation. It should be made by the Building Authority alone. Otherwise, the Building Authority would be negligent of his duties;
- as the Director of Buildings, he was holding two positions. He was the head of the BD, an administrative department; and he was the Building Authority when exercising discretionary powers under B(P)R 23(3)(b). Before the lot was sold, the mechanism under B(P)R 23(3)(b) had not been triggered off. The BD staff advised the Lands D on the drafting of the lease in the capacity as the Director of Buildings. The advice was based on the information

available to the BD at that time. Under B(P)R 23(3)(a), the Government Accommodation should be included in the GFA calculation; and

- after the lot was sold, the Developer applied for exclusion of the Government Accommodation from the GFA calculation. The mechanism under B(P)R 23(3)(b) was triggered off and he was acting as the Building Authority when he considered the application. In examining a formal application with concrete details put before him, the Building Authority needed to consider the merits of the case afresh. When it was found after detailed verification that the advice given earlier by the BD was not entirely applicable, that advice should not be adhered to rigidly. On the contrary, the application should be considered according to the rules under the Buildings Ordinance. As a matter of fact, as the BD was an administrative department and was not dealing with an application for exemption when it gave its advice to the Lands D, the Building Authority's decision might or might not be consistent with the BD's advice.

27. In the light of Mr LEUNG's reply, the Committee asked:

- about the public interest that he had taken into account in considering the Developer's application; and
- whether, as a civil servant, he had considered that his decision might go against the public interest as it might reduce the revenue receivable by the Treasury, affect the fairness of the tendering exercise, and lead to inconsistency in the execution of the government policy.

28. **Mr LEUNG Chin-man** responded that:

- when he was the Building Authority, he was a law enforcer. He had to leave aside his identity as a civil servant holding the post of Director of Buildings. He should not consider the issue from a civil servant's perspective. The Building Authority should not favour the Government, which was one of the contracting parties, even though public revenue was involved;
- when considering the Developer's application, he had taken into account the Developer's obligation to provide the PTT under the lease. To exclude the PTT from the GFA calculation would not generate any additional benefit to the public. However, according to the legal advice of the Department of Justice (DoJ), the exercise of development control under the Buildings Ordinance was independent of the lease conditions. This meant that, in exercising his discretionary powers, the Building Authority should not consider the lease conditions. He had also made reference to some 20 past cases concerning the exclusion of PTT from the GFA calculation. In all

those cases, the lease required the provision of the PTT but the Building Authority's decisions were inconsistent. The PTT was included in the GFA calculation in some cases, but not so in other cases. This meant that whether or not the lease required the provision of a PTT did not have any relationship with the Building Authority's granting of exemption. Therefore, he decided that the lease conditions should be put aside and should not be considered;

- the research into the past cases also proved that the some BD staff's view that the PTT should be included in the GFA calculation according to past cases was not well grounded. In fact, the decisions in the past cases were inconsistent; and
- B(P)R 23(3)(b) did not require that there should be additional public interest before the Building Authority could disregard floor space from the GFA calculation. When deciding whether to exercise a discretion, the real test should be whether the PTT served the public interest and the answer was definitely "yes". Otherwise, the Government would not have required the provision of the PTT in the Site through the lease.

29. At the Committee's request, the Administration provided a copy of the memo dated 22 October 2001 from the DoJ to the Director of Buildings containing the legal advice referred to by Mr LEUNG.

30. On the question of public interest, the Committee referred to the minutes of the BAC held on 1 August 2001 (in *Appendix 17*) and 22 October 2001 (in *Appendix 18*). The Committee noted that the District Lands Office/Hong Kong East had said that the Lands D's assessment of the tender reserve price was on the basis that the Government Accommodation would be included in the GFA calculation. The District Planning Office/Hong Kong (DPO/HK) had said that if the PTT was to be excluded from the GFA calculation, the proposed building bulk/height would increase and cause additional visual impact in view of its waterfront location. As land premium and development intensity were matters of public interest, the Committee queried whether Mr LEUNG had taken these factors into account when considering the matter.

31. **Mr LEUNG Chin-man** responded that:

- the Building Authority made his determination on whether or not to exercise a discretion according to the law. In making his determination, the Building Authority should not consider the impact of his determination on government policies, land sale procedure or systems, and land premium. Otherwise, the Building Authority would be acting beyond his authority;

- although the DPO/HK had raised concerns about development intensity, there was no statutory town planning control over the GFA and the bulk of the development on the Site. If there was any planning intention to restrict the GFA or the building bulk, this should have been spelt out in the lease conditions before the lot was sold. There was also no restriction on the GFA in the relevant outline zoning plan (OZP). It was therefore not appropriate for the Building Authority to address the Plan D's concern after the lot had been sold; and
- as the then Building Authority, he had not taken the above into account when making his determination because they were irrelevant. Neither had he considered whether his determination would give an impression that it favoured one of the parties to the lease. As a law enforcer, what mattered was that he enforced the law fairly and impartially.

Evidence obtained at the public hearing on 8 December 2005 and thereafter

32. It appeared to the Committee that, according to Mr LEUNG, there was no limit to the discretionary powers that he possessed as the Building Authority. Although he was a civil servant, he could disregard the Government's interest. Despite the opposition of the Lands D and the Plan D at the BAC, he ignored their views. He also put aside development intensity, public revenue, visual impact, fairness of the tendering exercise, etc. which were normally considered as matters of public interest. The Committee queried whether, in deciding to approve the exemption of the PTT (with an area of 7,297 m²) from the GFA calculation of the Site, Mr LEUNG had adopted a too restrictive view on public interest, thereby inappropriately discounting other relevant factors.

33. **Mr LEUNG Chin-man** responded that:

- when he considered the Developer's application for exclusion of the Government Accommodation from the GFA calculation under the Buildings Ordinance, he was acting as the Building Authority, not a civil servant. There should always be a boundary in the consideration of public interest;
- the Building Authority was a law enforcement agent and he derived his power from the Buildings Ordinance. In exercising his statutory discretionary power, the Building Authority must exercise it fairly and in accordance with the prescribed limits of the Buildings Ordinance. He should not act in favour of either one of the contracting parties even though the Government was one of the contracting parties. If the other party was just an ordinary citizen, it would be extremely unfair to the latter if the Building Authority should act in favour of the Government merely because public money was involved. It was wrong to adopt an indiscriminate approach and conclude right away that, because public money was at stake, it was the public interest;

- in exercising his statutory discretion, the Building Authority could not go beyond this statutory perimeter to deal with matters falling outside the ambit of his power, such as land premium rights. As a matter of fact, land premium rights were handled by the Lands D, another administrative department. The Building Authority's function was to enforce the law while the Lands D's was to obtain revenue for the Government. They operated from different positions;
- the Plan D's concern over the visual impact also fell outside the ambit of the Building Authority's authority and so he should not consider it either. As pointed out at the BAC on 22 October 2001, the Plan D's concern was a matter that the Plan D should deal with under the lease conditions or prescribe under the OZP. The view at the meeting was that it was not appropriate to address, under the Buildings Ordinance, matters which should be dealt with by the Plan D; and
- lighting and ventilation were matters of public interest that should be dealt with by the BD under the Buildings Ordinance in the process of approving the plans.

34. In response to the Committee's questions on the distinction between the roles of the Building Authority and the Director of Buildings, **Mr LEUNG Chin-man** stated that:

- the roles the Building Authority and the Director of Buildings involved different responsibilities and powers and should therefore be strictly distinguished from each other;
- if the Building Authority determined a case in the capacity as the Director of Buildings, he would be acting as a civil servant. A civil servant had a duty to protect the interests of the Government as the vendor in a land lease (as it involved public funds) instead of processing the case in an impartial manner under the law. A civil servant had to obey the orders of his superior. But if the Building Authority made his determination purely in accordance with his superior's instructions, it would be tantamount to the Building Authority giving up his statutory discretionary power to his (i.e. the Director of Buildings') superior. This would mean that it was not the Building Authority who was making the determination; and
- the Building Authority should, however, listen to and take into account the views of his colleagues in the BD and other government departments. Those were for his reference only, and ultimately the Building Authority should act within the statutory perimeter of the Buildings Ordinance and make his determination accordingly.

E.2 Development control under the Buildings Ordinance was independent of lease conditions

Evidence obtained at the public hearing on 1 December 2005

35. Regarding Mr LEUNG's remarks that, according to the legal advice of the DoJ, he should not consider the lease conditions in exercising his discretionary powers, **Mr Raymond CHAN, Senior Assistant Law Officer (Civil Law), DoJ**, clarified that:

- the legal advice provided to the BD on 22 October 2001 pointed out that there were two controls of building development, i.e. control under the Buildings Ordinance and control under the lease conditions. These two controls operated independently and separately and were not mutually exclusive. The Building Authority's exercise of discretionary power should not be bound by the lease conditions. However, the legal advice did not mention that the lease conditions should not be considered; and
- according to the legal advice, the lease conditions were one of the relevant factors that should be taken into consideration. However, in the exercise of discretionary power under the Buildings Ordinance, the Building Authority should not be bound by the lease conditions.

Evidence obtained at the public hearings on 8 December 2005 and thereafter

36. It appeared to the Committee that there was a discrepancy between Mr LEUNG's and the DoJ's interpretation of the legal advice. In Mr LEUNG's opinion, the legal advice had suggested that the Building Authority should not consider the lease conditions when deciding on the Developer's application for exemption and he had subsequently made the decision on that basis. The Committee enquired:

- about Mr LEUNG's reason for seeking the legal advice in the first place; and
- whether he had sought clarification on the legal advice obtained or had only interpreted the advice by himself.

37. **Mr LEUNG Chin-man** responded that:

- it was a fact that the Developer was required to build the PTT according to the lease, no matter whether he approved the application for exemption or not. However, at the BAC of 1 August 2001, there were different views regarding whether this was a relevant factor for consideration in deciding on the application. He therefore asked for advice from the DoJ on this specific question. The reply given by the DoJ was that the control imposed by the Buildings Ordinance was independent of the lease conditions. Therefore, he considered that, in exercising his statutory discretion, the Building Authority

should not consider the fact that the requirement to build the PTT was already in the lease;

- the meaning of his statement, that the Building Authority should not “consider” the lease conditions, was that the Building Authority should not take the lease conditions per se as a relevant factor because they only defined the relationship of the contracting rights of the two contracting parties; they were not a key factor as suggested by Mr Raymond CHAN. This was the real difference between his and Mr CHAN’s views;
- as a matter of fact, he had made detailed reference to the lease conditions throughout the entire process with the aim of finding out if there were any facts that could turn out to be relevant factors. But whether such facts were relevant factors or not depended on the facts themselves and not because they originated from the lease conditions; and
- he had not invited the government counsel who gave the legal advice to explain the advice as it had already answered his question as to whether, in the exercise of discretionary power under B(P)R 23(3)(b), the lease conditions should be taken into consideration. He had a clear understanding of the meaning of “independent of the lease conditions”. As a matter of fact, the legal advice only provided a starting point and a basis for examining the case. The Building Authority still had to make a decision by himself, having regard to the merits of the case and the various relevant factors.

38. In response to the Committee’s question, **Mr LEUNG Chin-man** confirmed that “independent of the lease conditions” certainly did not mean that the lease conditions were to be ignored.

39. In reply to the Committee’s enquiry about the legal advice, **Mr CHEUNG Hau-wai, Director of Buildings**¹, and **Mr MO Kim-ming, Assistant Director/ New Buildings 1, BD**, who were present at the relevant BAC meetings, said that:

- when seeking the DoJ’s advice, the BD had provided the DoJ with the detailed background to the case, including the fact that the BD had advised the Lands D that the Government Accommodation should be included in the GFA calculation of the Site, and that the Lands D had informed some prospective tenderers of the same in response to their enquiries. Subsequent to the BD’s written request to the DoJ for legal advice, three meetings were held with the DoJ on 20 August 2001, 18 October 2001 and 19 October 2001.

¹ Mr CHEUNG Hau-wai succeeded Mr Marco WU Moon-hoi as the Director of Buildings on 9 December 2005.

The purpose of the meetings was to brief the DoJ on the background to the case and clarify with the DoJ the advice sought;

- before the BAC of 22 October 2001, the full text of the legal advice had been distributed to all the members and attendees of the meeting; and
- in their opinion, the legal advice had set out the legal principles on the application and interpretation of B(P)R 23(3)(b) as well as the factors for consideration in exercising the Building Authority's discretionary power. They had acted according to the legal principles.

40. In the light of Mr LEUNG's explanation of what he meant by saying that the Building Authority should not "consider" the lease conditions, the Committee asked the DoJ whether, in its view, there was any discrepancy between Mr LEUNG's and its interpretation of the legal advice. The **Senior Assistant Law Officer (Civil Law)** stated that:

- based on the evidence given by Mr LEUNG at the public hearing held on 1 December 2005, he had the impression that Mr LEUNG had formed the view that the Building Authority should not consider lease conditions as one of the relevant factors in exercising the discretionary power provided under B(P)R 23(3)(b). The DoJ disagreed with such a view. As pointed out in the legal advice of 22 October 2001, lease conditions were one of the relevant factors that should be taken into consideration. However, the Building Authority should not be bound by them in the exercise of discretionary power; and
- Mr LEUNG had subsequently confirmed that he did not consider that lease conditions should be ignored. Moreover, according to the minutes of the BAC held on 1 August 2001, the representative of the Lands D had explained the lease conditions to those present at the meeting and they had deliberated this point in detail. As such, he now had the impression that Mr LEUNG had taken the lease conditions into consideration when examining the matter.

41. The Committee further asked whether Mr LEUNG's view that the lease conditions were not a relevant factor was a reasonable conclusion drawn from the legal advice.

42. **Ms Grace CHAN Lai-yuk, Senior Government Counsel, DoJ**, responded that:

- she was specifically instructed by the BD to advise, inter alia, whether the lease conditions should be taken into consideration in the exercise of B(P)R 23(3)(b) discretionary power. Before she gave the legal advice, she had received a lot of documents from the BD, including the BAC minutes of

1 August 2001. Having read the documents, she formed a view that the Building Authority had taken lease conditions as one of the factors for consideration and lease conditions were in fact being considered. Hence, the focus of her advice was not whether the lease conditions were relevant or irrelevant consideration, but whether the Building Authority should be bound by the lease conditions after considering them;

- as stated in her memo of 22 October 2001, she concurred with the BD's response to the Developer's AP that the exercise of development control under the Buildings Ordinance was independent of the lease conditions in every case. It was undesirable that the Buildings Department should be compelled to follow the lease conditions in general. Her advice did not say, nor should it be understood as, that the Developer's obligation to construct the PTT should not be taken into consideration by the Building Authority; and
- after she had given the legal advice, she had not received any enquiry from the BD or other people regarding her advice. Nor did she have knowledge of the Building Authority's interpretation of her advice or the Building Authority's decision at that time. She did not know whether or not the Building Authority had misunderstood her advice.

43. As regards whether he had taken the lease conditions into consideration, **Mr LEUNG Chin-man** stated that:

- according to his understanding, a government land lease was like any private land sale contract. The duties and rights of the contracting parties were defined by the lease conditions. In exercising his statutory discretionary power, the Building Authority must not side with either of the contracting parties. He should not therefore consider the lease conditions as relevant or even key factors in order to protect the interests of the Government as one of the contracting parties. This was not equivalent to saying that the Building Authority did not need to make reference to the lease conditions. In fact, apart from the lease, the Building Authority should look at all the evidence, information and documents laid before him so as to aid the exercise of his discretionary power under the Buildings Ordinance. If he found some information or facts in the lease conditions, he should consider and decide whether or not those were relevant factors. Nonetheless, whether these facts were relevant or not had nothing to do with their source (i.e. the lease conditions in this case);
- as a matter of fact, he had referred to the lease condition requiring the construction of the PTT, i.e. according to the lease, whether he approved the application for exemption or not, the Developer still had to build the PTT. He had also considered the difficulty likely to be faced by the Lands D in charging additional premium as a result of the lack of a ceiling on the total

GFA to be developed under the lease. However, as the Building Authority could not lean in favour of the interests of the Government as one of the contracting parties, his conclusion was that this was an irrelevant factor; and

- in exercising his discretionary power, the Building Authority should look at the matter independently of the lease conditions themselves, i.e. there was no need to consider the contractual relationship as regards duties and rights between the two sides. Nonetheless, the Building Authority should consider whether any fact revealed by the lease conditions or any other document was a relevant factor in the exercise of his discretionary power.

44. Referring to the fact that under the lease conditions, the Developer had the obligation to construct the PTT regardless of whether or not it was exempted from the GFA calculation, the Committee queried why Mr LEUNG considered it justifiable to grant the exemption, which in effect gave the Developer additional GFA, giving cause for concern that he had leaned in favour of the interests of the Developer.

45. **Mr LEUNG Chin-man** responded that:

- under B(P)R 23(3)(b), the Building Authority had the discretionary power to disregard from GFA calculations any floor space that was constructed and intended to be used solely for private car spaces, refuse storage chambers or access facilities for telecommunications services, etc.. Even though all these facilities were required to be built under the lease, the Building Authority had invariably granted exemption in such cases in the past. This showed that the granting of exemption for these facilities was not because they would generate additional public interest but because they were regarded as beneficial to public interest;
- it was possible that the Building Authority had used the “additional public interest” test in processing applications for PTT exemption in some past cases, leading to an understanding within the BD (which, however, had not been conveyed to outsiders) that PTTs should not be exempted for GFA calculation. However, in the course of examining the present case, after detailed arguments amongst BD staff and according to the DoJ’s legal advice, the BAC arrived at the conclusion that the test of “additional public interest” was not appropriate. This standard was therefore not adopted in the present case. It would suffice as long as the Building Authority was satisfied that the provision of the PTT was in the public interest;
- there was another opinion that the test of public interest could be that, if the facility in question came within the scope of B(P)R 23(3)(b), the public interest test could be met if the facility did not go against public interest. He did not think that such an approach was appropriate. For example, some

developers sometimes applied for the provision of additional carparking spaces for commercial or letting purposes. These extra carparking spaces were merely commercial facilities. Although they caused no harm to public interest, they only satisfied and were confined to commercial interest and did not meet the above-mentioned positive test of public interest. Hence, exemption should not be granted; and

- based on the above, in exercising the discretionary power, the Building Authority should not use either the “additional public interest” test or the “not going against public interest” test, but should decide whether the facilities designated under B(P)R 23(3)(b) were beneficial to public interest. Obviously, in this case, the PTT provided the residents in the development as well as in the nearby district a public transport facility, bringing convenience to them. It was beneficial to public interest and should be granted exemption.

46. The Committee referred to Practice Note 23 (PN 23) on “Discretionary Approval – Factors for Consideration” issued by the BD in September 2000 (in *Appendix 19*) which listed out nine factors that the Building Authority should consider in exercising his discretion in approving or rejecting a submission. The factors included lease restrictions, views of other government departments, effect of the development on the adjoining sites and the district, and fairness. It appeared to the Committee that, in exercising his discretionary power to exclude the PTT from GFA calculation, the Building Authority had not considered these factors. The Committee asked whether this was the case.

47. **Mr LEUNG Chin-man** stated that:

- the guidelines set out in PN 23 were of a general nature. In exercising his discretion, the Building Authority had to determine each case on its merits; and
- he had duly respected the views of other departments. This was why their concerns, including those about lease restrictions, land premium and development intensity, were deliberated in detail at the BAC. However, after consideration, he concluded that their concerns should not be dealt with by the Building Authority as they fell outside the ambit of his power and hence were irrelevant. The bases for the Building Authority’s decision were recorded in detail in paragraph 5 of the BAC minutes of 22 October 2001.

48. The Committee pointed out that according to PN 23, all the nine factors should be taken into account in the exercise of discretionary powers by the Building Authority. The Committee queried why Mr LEUNG regarded them as irrelevant, particularly as PN 23 was issued at a time when he himself was the Building Authority.

49. In response to the Committee's enquiry, the **Senior Assistant Law Officer (Civil Law)** commented that as the nine factors were included in PN 23, they were relevant factors that the Building Authority should take into consideration. As to the importance of each relevant factor and the weight to be attached to each of them, they should be decided by Mr LEUNG as the Building Authority.

50. **Mr LEUNG Chin-man** stated that:

- in exercising discretionary powers, the Building Authority had to consider, which meant making reference to, all the facts and information before him. Then he had to decide by himself what were or were not relevant factors; and
- he had made reference to all the factors listed in PN 23. Although they were matters of public interest, the Building Authority could only deal with those that fell within the ambit of his power. For the reasons that he had explained above, after considering such factors as land premium, the Developer's obligation to build the PTT and visual impact, he attached zero weighting to them. The overriding factor that had influenced his decision was the positive test of public interest. By applying this test, he established that the provision of the PTT was in the public interest and hence should be granted exemption.

E.3 Fairness to tenderers

51. The Committee referred to the fact that the Building Authority's decision to exclude the PTT from the GFA calculation of the Site was contrary to the advice given by the BD, which had been relayed to some tenderers by the Lands D before the close of the land sale. As the Building Authority's decision had increased the value of the Site after the land sale, the Committee wondered whether the BD's advice and the Building Authority's decision had caused unfairness to other tenderers in the sale of the Site.

52. **Mr LEUNG Chin-man** responded that:

- in its reply to the Lands D in 1999 and November 2000, the BD clearly advised that the PTT would be counted for GFA calculation under B(P)R 23(3)(a), but did not mention that the Building Authority would include the PTT in the GFA calculation when exercising his discretion under B(P)R 23(3)(b). It was the belief of some BD staff that the BD's general practice was not to exempt PTTs from the calculation of GFA. However, in fact, in some past cases, PTTs had been exempted from the GFA calculation. Developers, therefore, did know that the Building Authority could exercise his discretion to exempt PTTs from the GFA calculation under B(P)R 23(3)(b);

- in the letter dated 28 November 2000 (in *Appendix 20*) from a developer to the Director of Lands before the bidding of the Site, enquiring about whether the PTT was exempted from the GFA calculation of the Site, it was clearly stated that “In a no. of other cases, the public transport interchange & coach terminus are often exempted from GFA calculation”. This clearly indicated that developers did understand that the Building Authority could use his discretion to approve exemption of PTTs under B(P)R 23(3)(b);
- it was a fact that the Lands D’s reply of 30 November 2000 (in *Appendix 21*) to that particular developer only mentioned that PTTs should be calculated for GFA under B(P)R 23(3)(a). It did not mention whether the Building Authority would grant exemption under B(P)R 23(3)(b). The letter also pointed out that the Conditions of Sale did not specify a maximum GFA. This implied that a successful bidder for the Site could make an application to the Building Authority afterwards to ask (under B(P)R 23(3)(b)) the Building Authority to exercise his discretion to approve an exemption. In fact, any successful tenderer could apply for exemption under B(P)R 23(3)(b). He understood that the Lands D had given the same verbal answer to other developers making similar enquiries; and
- based on the above, the BD had not misled other developers or potential bidders for the Site, causing unfairness to them.

53. The Committee noted that the prospective tenderer, after noting that there was no explicit statement on exemption of the Government Accommodation from the GFA calculation under the Land Grant Conditions and PTTs were often exempted from GFA calculation in a number of other cases, had sought confirmation that the Government Accommodation would be exempted from the GFA calculation of the Site. In response, the Lands D only informed the tenderer that the Conditions of Sale did not specify a maximum GFA and, as advised by the Director of Buildings, “the Government Accommodation shall be included in the GFA calculation, under (B(P)R) 23(3)(a)”. The reply did not mention the mechanism for GFA exemption under B(P)R 23(3)(b). The Committee asked:

- why the BD had omitted mentioning the mechanism under B(P)R 23(3)(b) when it advised the Lands D;
- whether the Lands D’s reply was misleading as it could be interpreted as that the PTT would be included in the GFA calculation; and
- whether the BD and the Lands D had been unfair to the tenderer who sought the confirmation as he might not have put forward the most competitive bid in the light of the reply.

54. **Mr LEUNG Chin-man** said that:

- the fact that the mechanism under B(P)R 23(3)(b) was not mentioned by the BD when it advised the Lands D was not an omission. Before B(P)R 23(3)(b) was triggered off, it was neither appropriate nor possible for the BD to speculate whether the Building Authority would approve or reject an application for exemption in future. According to his understanding, the BD had never done so. This was because the Building Authority would only make a decision after examining a formal application with concrete details put before him; and
- he believed that that tenderer was well aware of the mechanism under B(P)R 23(3)(b) as he had stated in his letter to the Director of Lands that there were precedent cases in which the PTTs were exempted from GFA calculation.

55. The **Director of Lands** said that:

- in its reply to the tenderer, the Lands D only reproduced the BD's response. It was not up to the Lands D to inform the tenderer that he could apply for GFA exemption under B(P)R 23(3)(b) because the exercise of discretion under the B(P)R was the Building Authority's statutory function. Nevertheless, he agreed that the tenderer, being an experienced developer in Hong Kong, should be very familiar with the provisions of B(P)R 23(3)(b);
- the Lands D's reply should not have prejudiced the interest of the tenderer. Although the tenderer had been informed that the PTT would be included in the GFA calculation, he still offered the second highest bid. It could therefore be inferred that the price offered by this tenderer, similar to that of the successful tenderer, had factored in the exclusion of the PTT. The tenderer had not been treated unfairly;
- as a matter of fact, the Lands D had all along objected to approving the Developer's application for PTT exemption. The Lands D's representative had reminded the BAC at 1 August 2001 that the Lands D had advised some prospective tenderers that the Government Accommodation should be included in the GFA calculation under B(P)R 23(3)(a). As it transpired, the Building Authority subsequently approved the exemption and the Lands D could only accept the decision; and
- PTT exemption was a matter dealt with under B(P)R 23(3)(b) and it was the Building Authority's statutory authority to make a decision on the matter. The Lands D could not challenge the decision through other administrative channels, such as by complaining to the Housing, Planning and Lands Bureau (HPLB).

56. The Committee asked about the Administration's comments on the handling of the Sai Wan Ho case and whether there was a need to amend the relevant legislation with a view to regulating the Building Authority's exercise of discretionary powers. **Mr Michael SUEN Ming-yeung, Secretary for Housing, Planning and Lands**, responded that:

- the Administration had drawn on the experience of past cases, including the present one, to improve its mechanism for dealing with land and property development. At the time when the issues surrounding the Sai Wan Ho case took place, it was not clear how they should be addressed. Since then, the Administration had considered the issues in detail, with a view to clarifying matters;
- on whether PTTs should be included in GFA calculation, the HPLB, the BD, the Lands D and the Plan D agreed, at a meeting in April 2005, that the planning intention under the town plan was that PTTs should be included in GFA calculation unless otherwise specified in the relevant town plan or any specific planning approval for a site. Where the planning intention was clear, the relevant requirements would be stipulated in the lease conditions. The Building Authority would have to follow the planning intention, as embodied in the OZP, in exercising his discretion in granting GFA exemption for PTT;
- the Buildings Ordinance provided for the exercise of discretionary powers by the Building Authority in processing building plan applications, having regard to relevant considerations including interest of the community. In so far as the exercise of the statutory duties and powers of the Building Authority under the Buildings Ordinance was concerned, the Buildings Ordinance did not confer on the Secretary for Housing, Planning and Lands the power to monitor and/or oversee the exercise of such duties and powers. Any person aggrieved by the Building Authority's decision in the exercise of discretionary power might appeal to the Appeal Tribunal in accordance with the Buildings Ordinance; and
- the crux of the present case was whether the Building Authority's discretionary powers had been exercised properly. To further look into the matter and to alleviate any public anxiety in this regard, the Administration had set up an independent committee of inquiry to examine how and under what circumstances the Building Authority exercised his discretionary powers in this particular development, and whether such powers were exercised properly. The committee of inquiry would also advise on how the concerned departments might in future perform their functions better in this area.

E.4 Financial implications

57. According to paragraph 6.25 of the Audit Report, the financial implications of excluding the PTT from the GFA calculation of the Site amounted to \$125 million. The Committee queried why Mr LEUNG had not taken the financial implications of the exemption into account when exercising his discretionary power.

58. **Mr LEUNG Chin-man** responded that:

- in selling land, the Government always aimed at obtaining the highest sale price through the control mechanism of the land lease, for the benefit of the Treasury;
- if there were clear limitations laid down in the lease (e.g. the PTT should be counted for GFA, or any additional GFA or bonus GFA that the successful bidder might subsequently obtain from the Building Authority under the Buildings Ordinance should be counted for GFA under the lease, or there was a ceiling on the maximum GFA to be built at the site), then the bidding price for the site would be relatively lower. If the lease did not clearly spell out limitations on these items, such an “open” lease would provide an opportunity for the successful bidder to apply to the Building Authority for bonus GFA or exemption of GFA under the Buildings Ordinance in future. This would make the bidders offer a relatively higher premium for the site;
- the Lands D would take into account the different circumstances of each site and set the most appropriate strategy to maximise the land premium. The land lease strategy in the present case was to adopt the “open” strategy. In making the terms of the land lease, the Lands D had anticipated the possibility of the Building Authority’s granting the exemption of the PTT for GFA calculation etc., as mentioned in paragraph 6.24 of the Audit Report. There was therefore no question of the Building Authority’s decisions resulting in any loss of land premium. Conversely, if the lease had clearly specified the relevant limitations, the premium offered by the bidders would be relatively lower; and
- in the light of the above, the statement in the Audit Report that the exemption of the PTT from the GFA calculation had a financial implication of \$125 million was hypothetical.

59. In response to the Committee’s enquiry, **Mr Benjamin TANG, Director of Audit**, said, at the public hearings and in his letter of 12 December 2005 (in *Appendix 22*), that the figure of \$125 million was an estimated amount, in money terms, of the GFA concerned, and was derived from the Lands D’s reserve price assessment made before the award of the tender, as mentioned in Note 28 of paragraph 6.25 of the Audit Report.

60. The **Director of Lands** clarified that:

- the main objective and function of the Conditions of Sale, or what was commonly known as the lease, were to ensure that the grantee would develop the site in accordance with the stipulated use and provide certain facilities, and to bind the grantee not to undertake activities and build facilities not permitted under the lease. The lease itself was neither a mechanism nor an instrument for seeking the maximum premium in a land sale; and
- contrary to Mr LEUNG’s statement that the Lands D would formulate the most appropriate strategy to obtain the best land sale revenue taking into account the individual circumstances of each site, the process of formulating the land sale conditions by the Government did not involve a strategy. The Government would consider how to implement, through the land sale conditions, the prevailing planning intention embodied in the OZP in which a site was located. Within this established framework, the Lands D would try its best to realise the highest premium from the sale of a site. It was not up to the Lands D to take the initiative in determining whether the lease should be “open” or otherwise. The decision was based on planning intention.

61. According to paragraph 6.23 of the Audit Report, the lease conditions of the Site had not specified whether the Government Accommodation should be included in the GFA calculation. Prospective tenderers therefore could have doubts about this point. The Committee also noted that the lease conditions were silent on the site classification and the maximum GFA that could be allowed for the development of the Site. The Committee asked:

- given that the inclusion of the above information in the lease conditions would obviate the need for the Building Authority to exercise a discretion after the land sale, why such information had not been stipulated at the outset; and
- whether the tender price offered for the Site would have been higher if it had been clearly stated in the lease conditions that the Site was a Class C site and the PTT would be excluded from the GFA calculation.

62. The **Director of Lands** and **Mr John Corrigan, Deputy Director of Lands (General), Lands D**, responded that:

- the Lands D had not stipulated a maximum GFA clause in the lease conditions because there was no restrictions on the GFA in the OZP concerned;

- when a lease was silent on the maximum GFA, this meant that the landlord, i.e. the Government, was taking the view that the maximum GFA was not a matter for the land authority. It was a matter for the Building Authority under the Buildings Ordinance and the site should be built to a development intensity that could be achieved under the Buildings Ordinance. Moreover, the Building Authority had the discretion to make or change his decision as to whether government accommodation would be accountable under the Buildings Ordinance. In the circumstances, it was not appropriate for the Lands D to stipulate in the lease conditions what should or should not be counted for the GFA; and
- developers in Hong Kong were very experienced and knew clearly the provisions of B(P)R 23(3)(a) and 23(3)(b). They should have submitted their tenders based on their assessment of whether the Building Authority would grant exemption under B(P)R 23(3)(b). The reserve price of the Site assessed by the Lands D was only \$1,850 million, whereas the sale price was \$2,430 million. The difference of \$580 million was a reflection of the Developer's estimation of the amount of additional GFA that he might obtain under B(P)R 23(3)(b).

63. On the question of whether the silence of the lease conditions on the maximum GFA had any impact on the premium received from the sale of the site, the **Director of Lands** stated in his letter of 31 December 2005 (in *Appendix 23*), and the **Deputy Director of Lands (General)** said at the public hearings, that:

- any suggestion that there had been a loss of revenue was speculative. If the lease conditions had limited the GFA to that which could have been achieved under the First Schedule to the B(P)R with no PTT exemption and no bonus GFA, the sale price obtained for the lot would have been less than the \$2,430 million actually obtained. In those circumstances, the only way that further revenue could have been obtained would be for the following to have happened:
 - (a) the Developer would have applied for PTT exemption and bonus GFA. Since he would have to conclude a lease modification to enjoy any such exemption or bonuses if the Building Authority agreed to grant them (see (b) below), the time that this would take and the need to pay a premium would have been a considerable disincentive and he might well have decided not to pursue that;
 - (b) had he pursued that and applied to the Building Authority for exemption and bonuses, it was by no means certain that the Building Authority would have granted them, as the lease would have been quite different. The Building Authority might have rejected the application; and

(c) in the event that an application were made by the Developer and approved by the Building Authority, there would have been no certainty as to the subsequent application for lease modification being successfully completed. The Developer might have found the premium sought by the Lands D unacceptable;

- if the sale conditions had contained a restriction as to the GFA, the only way extra revenue could have been obtained above the reduced sale price that would have been paid, would have been for all three of the above hurdles to have been successfully crossed. Failure to cross any one of them would have resulted in less revenue than was actually collected;
- the Lands D took the view that where the planning intention was that development should not be less than what could be achieved under the Buildings Ordinance, it was better to obtain maximum value on the original sale by leaving the sale conditions silent as to the GFA rather than to limit the GFA and take a lower sum at that time in the hope that any potential for achieving a development with greater GFA and therefore greater value would be successfully pursued, and result in the payment of a premium on lease modification at some future date; and
- the fact that the Audit Report consistently used the phrase “where appropriate” on this issue was a clear acknowledgement that there were circumstances where it would not be appropriate to set a maximum GFA. Such circumstances arose in cases where the planning intention was, as at the subject site in Sai Wan Ho, that the lot should be developed up to the development intensity that could be attained under the Buildings Ordinance.

64. Noting the Lands D’s reply, the Committee enquired:

- whether the Administration had encouraged developers to look for ways to achieve greater GFA after purchasing a lot; and
- why the Lands D, the Plan D and the BD only minded their own business, as a result of which the Administration was unable to protect the interest of the public at large.

65. The **Secretary for Housing, Planning and Lands** responded that:

- B(P)R 23(3)(a) governed the areas to be included in GFA calculation and B(P)R 23(3)(b) provided for areas of certain types of use that might be disregarded in GFA calculation. Building heights, site coverage, plot ratio, etc. were also controlled under the B(P)R. These set the limits of the development intensity of a site which normally could not be exceeded.

However, in some circumstances, developers were given some flexibility in order to maximise the development potential of a site. This did not mean that there was no control of the maximum level of the GFA of a site;

- the three departments responsible for land and building development had different functions. The BD's primary concern was building safety while planning matters fell under the purview of the Plan D. The Conditions of Sale, as drawn up by the Lands D, aimed to ensure that planning intention was implemented; and
- the Administration was currently conducting a review on whether the maximum GFA of a site should be specified. It was a dilemma and the arguments for and against the arrangement were equally strong. If the maximum GFA of a site was clearly stated, no additional GFA would be allowed. This might discourage developers from putting forward innovative ideas for the development of a site which were beyond government officials' experience but in fact could benefit the public. The Administration would have to strike a fair balance having regard to all relevant considerations.

66. Regarding the mechanism for improving the communication and coordination among the BD, the Lands D and the Plan D, the **Secretary for Housing, Planning and Lands** advised in his letter of 7 December 2005 that:

- the HPLB recognised the importance of coordination and interface among the departments involved in the land and building development approval process. Mechanisms at various levels with different degree of involvement from the HPLB were in place for this purpose;
- the Task Force on Re-engineering the Development Process, set up in January 2002, was chaired by the Director of Buildings with participation of senior officials from the BD, the Lands D and the Plan D. It aimed to map out an implementation plan to streamline the process in obtaining planning, lands and building approvals; and
- the HPLB had set up the Working Group on Reviewing Property Development Approval Processes since October 2004. Its main function was to consider matters relating to the overall simplification and rationalisation of the property development approval procedures, particularly those requiring the HPLB's steer and coordination.

E.5 Appointment of external observers

67. According to paragraph 6.26 of the Audit Report, BAC members were usually government officials. It was unprecedented for the BD to invite two university professors to attend the expanded BAC on 1 August 2001 as observers. The BD did not have any file records on how the two observers were selected. There were also no written records indicating that the two observers were required to declare any conflict of interest at the BAC. In the circumstances, the Committee asked Mr LEUNG:

- about the reasons and criteria for selecting the observers;
- whether he had considered requiring the professors to declare their relationship with the Developer or the AP;
- whether he knew that Mr Alex LUI Chun-wan, one of the observers, had worked for an architectural firm before joining the university and the firm might have provided service to the Developer; and
- whether he had explained to the observers their role at the BAC.

68. **Mr LEUNG Chin-man** explained that:

- as the issues to be dealt with in the Sai Wai Ho case were very complicated, he considered that he should listen to the views of more people before making a decision. As such, apart from the two observers, all other BD staff who were responsible for approval of building plans and the representatives of relevant government departments were invited to the BAC on 1 August 2001 to give views on the issues. The purpose of inviting external observers to the BAC was to enhance the transparency of the BD's decision-making process and the BD's credibility. The two professors had been informed that their role as external observers was to tender to the Building Authority their impartial and independent views;
- on the procedure for appointing the observers, it was not true that the BD did not have any file records on how the two observers were selected. In fact, he had discussed the matter with Mr MO Kim-ming, Assistant Director/New Buildings 1 and there was such record in the BD (the relevant file minute dated 30 July 2001 from the Assistant Director/New Buildings 1 to the Director of Buildings was in *Appendix 24*). It was he himself who raised the idea of appointing external observers to sit in the BAC and suggested inviting Hon Patrick LAU Sau-shing. Mr Alex LUI Chun-wan was recommended by Mr MO. They were considered suitable because they were familiar with the legislation concerning building matters as well as the application and operation of the legislation. Moreover, they were not full-time architects and hence should be less likely to have worked for developers and have conflict of

interest. However, that was only his understanding and he had not investigated the professors' background nor consulted other government departments. He had no idea of Mr LUI's career history before he joined the university; and

- it was true that he had not asked the two professors to declare their interests at the BAC and this was not proper, although Mr LAU had taken the initiative to declare that he was the President of the Hong Kong Institute of Architects.

69. The **Director of Audit** clarified that, in response to Audit's enquiry, the BD informed Audit in writing that there was no record as to how the two observers were selected.

70. The **Assistant Director/New Buildings 1** confirmed that when Audit made the above enquiry, the BD could not find any file records concerning the appointment of the observers. However, very recently, the BD had found the file minute of 30 July 2001 recording the matter.

71. In response to the Committee's request, the **Secretary for Housing, Planning and Lands** provided, in his letter of 7 December 2005, the career history of Mr Alex LUI Chun-wan.

72. To better understand the role played by the external observers at the BAC, the Committee invited Hon Patrick LAU Sau-shing and Mr Alex LUI Chun-wan to the public hearing on 19 December 2005. The Committee asked Messrs LAU and LUI whether they had been briefed by the BD on their role at the BAC and the background to the case prior to attending the BAC. It also asked whether they had declared any conflict of interest at the BAC.

73. **Hon Patrick LAU Sau-shing** said that:

- at the BAC on 1 August 2001, he had declared that he was the President of the Hong Kong Institute of Architects. As he had no relationship with the Developer or the AP, he had not declared other interests;
- prior to the BAC, he had been informed that his role was to observe the proceedings of the BAC and to offer his professional opinion on particular issues where necessary. However, he had not been briefed on the background to the case. He understood that he had no voting right at the BAC;

- Mr LEUNG Chin-man had made clear to all participants at the beginning of the BAC held on 1 August 2001 that the role of the two observers were to tender to the Building Authority their impartial and independent views. The presence of the observers would enhance the transparency of the decision-making process and the credibility of the BD; and
- the BAC on 1 August 2001 had been convened to consider the determination of classification of the Site, the proposed exclusion of the PTT from the GFA calculation, and the request for bonus areas in return for dedicated areas. His main role was to ascertain whether the AP's proposals were in compliance with the Buildings Ordinance and met such other requirements as those relating to town planning and land issues. The presentation made by the AP was impressive. The AP also distributed to the meeting a "Study Report on PTT", which revealed that past applications for exclusion of PTTs from the GFA calculation had been given different treatment. Hence, the AP's proposal to exclude the PTT from the GFA calculation had to be further examined. After considering the arguments put forward by the AP on the site classification, he shared the majority view of the BAC members that the Site was a Class C site. He then left in the middle of the meeting.

74. **Mr Alex LUI Chun-wan** said at the hearing and in his letter of 28 December 2005, in *Appendix 25*, that:

- he had been a full-time university professor in architecture from 1998 to 2002. During his prior employment with Simon Kwan & Associates Ltd from 1988 to 1998, the company had been commissioned by Henderson Land Development Company Limited on three projects, but he had not been personally involved in the running of these projects. He had no relationship or personal interest with the Developer or the AP, therefore he had not made any declaration at the BAC. With the benefit of hindsight, he should have done so although he had no interest to declare;
- prior to attending the BAC on 1 August 2001, he had been briefed by the BD that as an external observer, he was expected to observe the proceedings of the BAC based on his knowledge and experience as a professional architect. As he was not a member of the BAC, he had no voting right. The views expressed by him would only be advisory in nature. It was entirely up to the Government whether to accept them or not;
- prior to the BAC, he had neither received any document on the background to the case nor any internal guidelines of the BD on how the Building Authority should deal with exclusion of PTTs from the GFA calculation. Given such limitation, what he could do at the BAC was to listen carefully to the arguments and facts presented by the AP and the Government, and then make his own analysis and judgment in an objective manner based on his

professional knowledge and the information received at the meeting. The status of the lessee, regardless of whether it was a member of the public or a developer, had not been a key factor for considering the proposals. His prime considerations had been:

- (a) whether the proposals were in compliance with the requirements of the Buildings Ordinance as well as those stipulated in the lease of the Site; and
 - (b) whether, in approving or disapproving the proposals, the Government had exercised its powers in a fair and reasonable manner and in accordance with the Buildings Ordinance and the lease conditions; and
- he understood that in response to the enquiries of some tenderers, the Lands D had advised them that the Government Accommodation should be included in the GFA calculation. However, it had not publicised the enquiries and answers to all prospective tenderers. The Lands D had confirmed at the BAC on 1 August 2001 that the Developer had not made such an enquiry and therefore had not been provided with this piece of information. In his opinion, the Lands D should have provided the same information, especially that which might affect the tenderers' assessment of the value of the Site, to all prospective tenderers in order to provide a level playing field for all of them. As the Lands D had failed to do so, some of the prospective tenderers might be confused on whether the PTT should be included in the GFA calculation, resulting in unfairness in the tendering process. In the circumstances, he considered that the Developer should be given the benefit of the doubt and that the proposed exclusion of the PTT from the GFA calculation should be accepted.

75. The Committee noted that the prospective tenderer who had received the Lands D's written confirmation that the Government Accommodation would be included in the GFA calculation had subsequently offered the second highest bid. It appeared to the Committee that that tenderer might have put forward an even more competitive bid if he had been informed that the PTT would be excluded from the GFA calculation. In other words, the Lands D's confirmation might have adversely affected that tenderer's chance of making a successful bid. Following this logic, the Committee could not understand why the Developer, who had not been affected by the Lands D's confirmation, should be given the benefit of the doubt. The Committee also questioned whether the giving of the benefit of the doubt to the successful tenderer would create unfairness to other unsuccessful tenderers who might have been affected by the Lands D's confirmation.

76. **Mr Alex LUI Chun-wan** explained that:

- the lease of the Site had not specified whether the PTT should be included in the GFA calculation, and there was no restriction on the maximum GFA. While it could be argued that the Developer should take steps to clarify whether the PTT should be included in the GFA calculation as it had already been aware of the different treatments accorded to the various projects in the past, it could also be argued that the Government should also take steps to clarify the position before the tendering process. As there had been clear inconsistency in the Building Authority's rulings on the granting of exemption areas in previous cases, prospective tenderers could have doubts as to whether the PTT should be included in or excluded from the GFA calculation;
- he understood that the Lands D had raised objection to the exemption of the PTT. If it was the Lands D's firm view that the PTT should be included in the GFA calculation, he was puzzled why it had not incorporated such requirement in the lease conditions. He also doubted why the Lands D, upon confirming to some of the prospective tenderers that the Government Accommodation should be included in the GFA calculation, had not publicised the information to other tenderers. It appeared to him that there might have been negligence on the part of the Lands D. If the Lands D had done either of the above during the tendering process, the question would not have arisen; and
- in his view, it should be the Government's responsibility to produce clear and precise lease conditions, so as to give the prospective tenderers a full picture before assessing the value of the Site and submitting their bids. Since the Government's failure to produce clear and precise lease conditions had created ambiguity and unfairness to the tenderers, it was therefore reasonable to give the successful tenderer the benefit of the doubt.

77. In response to the Committee's enquiry, **Mr Alex LUI Chun-wan** said that from his experience as an architect, fairness in the tendering process was of utmost importance. In the tendering process of architectural projects, all prospective tenderers would be provided with the same set of information to ensure fairness. However, as he had had no experience in the bidding of land, he could not say with certainty that there must have been omission on the part of the Lands D. The Lands D might have good reasons for not publicising the relevant information to all prospective tenderers in the Sai Wan Ho case.

78. The **Director of Lands** said that:

- there had been no question of negligence or omission on the part of the Lands D. The rationale for not specifying the maximum GFA in the lease of the Site had already been explained to the Committee; and
- given that the Lands D, in response to enquiries, had confirmed to some of the tenderers during the tendering stage that the Government Accommodation should be included in the GFA calculation, it would be unfair to those tenderers if the PTT was subsequently excluded from the GFA calculation after the land sale. He could not see the basis for giving the benefit of the doubt to the Developer but not the unsuccessful tenderers.

79. The Committee enquired whether Mr LUI, apart from the Lands D's objection to the exclusion of the PTT from the GFA calculation, had also heard other departments' opposing views over this issue at the BAC. In response, **Mr Alex LUI Chun-wan** said that:

- a representative of the BD had informed the BAC that no clear guidelines on how the Building Authority would deal with the exclusion of PTTs from the GFA calculation had been issued both internally and to the industry. In his view, it should be the Government's responsibility to produce clear guidelines for reference by the industry. As the absence of clear guidelines might have put the prospective tenderers in a disadvantageous position, it would therefore be fair to give the Developer the benefit of the doubt; and
- he considered that the concern raised by a representative of the Plan D about the increase in the development density of the Site was only an expression of view. In his opinion, if there had been any planning intention to further restrict the GFA or the building bulk/height, this should have been spelt out in the lease conditions. Hence, it should be up to the Building Authority to decide whether or not to grant the exemption.

80. Although there had been quite a number of opposing views expressed at the BAC on the exclusion of the PTT from the GFA calculation, it appeared to the Committee that Mr LUI had played a very special role at the BAC and that his views had undue influence over the Building Authority's decision.

81. In his submission of 31 December 2005 (in *Appendix 14*), **Mr LEUNG Chin-man** clarified that, if it was the Committee's suggestion that the Building Authority had made his decision under the great influence of Mr LUI's views, it was factually incorrect. Mr LUI's views had merely been for the reference of the Building Authority. They had never been the determining factor for the Building Authority's decision in the Sai Wan Ho case.

E.6 Attendance of government officials at the BAC

82. The Committee noted from paragraph 14 of the minutes of the BAC held on 1 August 2001 and paragraphs 6.10 to 6.13 of the Audit Report that the representatives of the Plan D and the Lands D had objected to excluding the PTT from the GFA calculation. The Chief Building Surveyor/Hong Kong East (CBS/HKE) of the BD also said that the BD's normal practice was to require the PTT to be counted for GFA. Only Mr Alex LUI Chun-wan opined that developers might be confused on whether the PTT should be included in the GFA calculation and the Developer should be given the benefit of the doubt. The Committee asked why Mr LEUNG only listened to one side of the argument and ignored the views of other government departments.

83. **Mr LEUNG Chin-man** responded that:

- he had not listened to Mr LUI's views only and ignored others. As recorded in the BAC minutes, having noted the split views amongst BAC members on the issue, he directed that legal advice should be sought on the application of B(P)R 23(3)(b) before making a decision on the matter. The issue was subsequently discussed at another BAC on 22 October 2001;
- at the BAC on 1 August 2001, the AP gave a presentation of the Developer's case and highlighted that there had been different categories of precedents on the treatment of PTTs for the purpose of GFA calculation. The BD had also conducted a research into past cases and had similar findings; and
- the Building Authority had the responsibility to make a decision on the matter, after listening to the views of different parties. He should not make a decision simply according to the views of the majority of members, even if there was a majority view. As recorded in the minutes of the BAC of 22 October 2001, "Having considered all the relevant factors, members advised and the Chairman **agreed** to exclude the PTT in this case from GFA calculation."

84. The Committee asked about the identity of the BAC members who advised the Building Authority on 22 October 2001 to exclude the PTT from the GFA calculation and whether there was any discrepancy between the views of the members and those of the Building Authority. The **Director of Buildings** said that at the BAC of 22 October 2001, all participants at the meeting had expressed their views. Having considered the arguments put forward and the legal advice, all participants, including he himself, considered that the PTT should not be included in the GFA calculation.

85. In his letter of 7 December 2005, the **Secretary for Housing, Planning and Lands** supplemented that:

- the BAC operated as follows: the subject Chief Building Surveyor (CBS) presented the case; the Chairman, members and attendees gave their views on the matter; and the Chairman, as the Building Authority, made a decision on the matter. Therefore, in the Sai Wan Ho case, members including Mr CHEUNG Hau-wai gave their own views on the matter, and the Chairman, as the Building Authority, decided on the matter after considering views from members and attendees. No members would suggest or propose to the Building Authority as to what his decision should be;
- the basis of Mr CHEUNG's view to exclude the PTT from the GFA calculation, as was that of the other members in this case, was the legal advice and the considerations as recorded respectively in paragraphs 2 and 5 of the minutes of the BAC held on 22 October 2001. In addition, it was also noted that although the PTT of developments in the recent five years had all been required to be included in GFA calculation, other cases since 1980 had been inconsistent, and the Chairman had directed at the BAC of 1 August 2001 that legal advice be sought to clarify the matter; and
- there was no discrepancy between the views given by members and the Chairman during the meeting. After hearing the views given by members as well as those of the attendees, the Chairman then made the decision to exclude the PTT from the GFA calculation.

86. The Committee noted that representatives of the Plan D, the Lands D, the Transport Department (TD), the Highways Department (HyD) and the Fire Services Department were members at the BAC on 1 August 2001. However, at the BAC on 22 October 2001, apart from the Plan D's representative who became an attendee, the representatives of the other government departments were not present. The Committee asked Mr LEUNG why he did not invite those government officials, who had objected to the exemption of the PTT, to the BAC of 22 October 2001 at which he decided on the matter.

87. **Mr LEUNG Chin-man** stated that:

- the BAC was chaired by the Director of Buildings and comprised the Deputy Director of Buildings, the Assistant Director/Support, the subject Assistant Director and another Assistant Director on rotation as members. Representatives of relevant government departments and the subject CBS of the BD attended as attendees. The BAC held on 1 August 2001 was a meeting with expanded membership to give advice to the Building Authority;

- as the diverse views expressed at the BAC of 1 August 2001 regarding whether the PTT should be exempted were very clear, what mattered at the BAC of 22 October 2001 was the legal advice. Thus, the BAC of 22 October 2001 was held as a regular meeting with attendance by regular members. The representative of the Plan D was therefore only an attendee at that meeting. In fact, whether or not the government officials were members or attendees, he would still listen to their views. At that time, it did not occur to him that such an arrangement would give cause for concern; and
- at the BAC of 22 October 2001, he assumed that the representative of the Lands D, like the representative of the Plan D, had been invited by the BAC secretary to the meeting but had declined to attend. He had not specifically requested the presence of a Lands D representative because that was a regular BAC meeting.

88. The Committee specifically asked why there was no representative from the Lands D at the BAC meeting of 22 October 2001 and if the Lands D's representative had been present, whether he would have been a member or an attendee. The **Secretary for Housing, Planning and Lands** informed the Committee, in his letter of 7 December 2005, that:

- the secretary to the BAC had conducted a search but could not identify any written records on the invitation of the Lands D to the BAC on 22 October 2001. The secretary at the time could not recall if the Lands D's representative had been invited or if the representative had declined the invitation in this particular case. In this regard, invitation of representatives of outside departments had been and was usually made by telephone calls followed by memo or email confirming the date and venue of the BAC;
- if a representative of the Lands D had been invited to the BAC meeting of 22 October 2001, he would have been in attendance and would not have been a member, similar to the Plan D representative; and
- the Lands D had checked its file records and there was no record to show that it had been invited to attend the BAC meeting held on 22 October 2001. All relevant officers responsible for handling of the case at the time had been contacted and had advised that they did not recall having received invitation in any form from the BD to attend that meeting.

89. Given that the decision to exclude the PTT from the GFA calculation was made by the Building Authority at the BAC of 22 October 2001 in the absence of those government officials who had expressed objection at the BAC of 1 August 2001, the Committee wondered whether Mr LEUNG had tried to exclude opposition from the October meeting.

90. **Mr LEUNG Chin-man** responded that as the Building Authority, he had to make a judgement after considering all the different opinions. As there were already detailed deliberations of the issue at the BAC of 1 August 2001, he should make a decision on 22 October 2001 after listening to the legal advice. The Building Authority did not make a decision based on the majority view. There was no need to exclude those whose views were different from his own.

91. The Committee noted that at the BAC on 1 August 2001, Mr H K TANG was the CBS/HKE. At that meeting, Mr TANG had offered the view that it was the BD's normal practice to require PTTs to be included in the GFA calculation. However, at the BAC on 22 October 2001, Mr TANG was not present and Mr K P CHOW was the CBS/HKE. The Committee asked whether Mr TANG was excluded from the latter meeting because he had held a different opinion.

92. The **Assistant Director/New Buildings 1** explained that the change arose from the BD's internal staff redeployment. Mr TANG was the CBS/HKE from May 1998 to September 2001. In September 2001, Mr CHOW was due to be transferred back to the BD after working in the HPLB. As Mr TANG had been the CBS/HKE for more than three years, it was the appropriate time for him to take up another area of work. Also, there was another BD staff who was due for posting at that time. Therefore, Mr TANG was transferred to the Office of the Licensing Authority of the Home Affairs Department whereas Mr CHOW succeeded him as the CBS/HKE.

93. The Committee asked whether the Administration would consider regulating the attendance of government officials at the BAC, with a view to ensuring that its membership would be consistent and would match its functions and terms of reference.

94. The **Secretary for Housing, Planning and Lands** responded that the arrangement for the BAC of 1 August 2001 was special. So far, there had not been any request for changing the BAC's mode of operation. However, as problems had been revealed, the Administration would review the matter.

E.7 Precedent cases concerning the exemption of PTTs from GFA calculation

95. As Mr LEUNG said that he had made reference to past cases concerning the exclusion of PTT from GFA calculation and found that the decisions were inconsistent, the Committee asked about the details of the precedent cases the situation of which was comparable to the present case and which had been approved or rejected by the Building Authority, the basis for the Building Authority's decision, as well as the official who made the decision.

96. In his letters of 16 December 2005 (in *Appendix 26*) and 31 December 2005 (in *Appendix 27*), the **Director of Buildings** provided details of four precedent cases, which were summarised in the table below. He also informed the Committee that the BD had taken the situation comparable to the Sai Wan Ho Site as follows:

- the lease conditions required the construction of a PTT in the development;
- the lease conditions did not specify whether the PTT should or should not be included in GFA calculation; and
- the relevant OZP did not specify whether the PTT should be included in GFA calculation.

**The four precedent cases
the situation of which was comparable to the Sai Wan Ho site**

<i>A. Cases for which the Building Authority <u>approved</u> the exclusion of PTT from the GFA calculation</i>			
	Location of the PTT	Year of Occupation Permit issued and method of disposal	Reasons for GFA exclusion and details of the decision-making process ^{Note (1)}
1.	United Centre, Admiralty ^{Note (2)}	1981, By auction	<p><u>Reasons for excluding the PTT from the GFA calculation</u></p> <p>The Public Works Department (PWD) Conference in 1978 was of the view that the PTT was similar to MTR station entrances etc. of which bonus plot ratio was usually granted. The PWD Conference agreed that bonus plot ratio should be granted for the surrender of the PTT to be completed on the lot in order to make the sale of land more attractive and hence increase the chance of getting the PTT.</p> <p><u>The official who made the decision</u></p> <p>The decision to exclude the PTT from the GFA calculation was made by the then Director of Public Works, who was the Building Authority.</p>
2.	China Hong Kong City, Tsimshatsui	1988, By tender	<p><u>Reasons for excluding the PTT from the GFA calculation</u></p> <p>The CBS was of the view that the PTT could be discounted from GFA calculation under the then B(P)R 23(3), i.e. the existing B(P)R 23(3)(b), which provided that floor space constructed or intended to be used solely for the parking, or for the loading or unloading of motor vehicles might be excluded from GFA calculation.</p>

Development of a site at Sai Wan Ho

			<p><u>The official who made the decision</u></p> <p>The decision to exclude the PTT from the GFA calculation was made by the CBS as Head of the Kowloon Section.</p>
3.	Scout Association, Austin Road, Tsimshatsui	1993, By private treaty grant	<p><u>Reasons for excluding the PTT from the GFA calculation</u></p> <p>It was considered that the PTT was a facility required by the Government.</p> <p><u>The official who made the decision</u></p> <p>The decision to exclude the PTT from the GFA calculation was made by the Chairman of the Building Committee, who was the then Principal Government Building Surveyor (PGBS).</p>
<p><i>B. Cases for which the Building Authority <u>did not approve</u> the exclusion of PTT from the GFA calculation</i></p>			
	Development	Year of Occupation Permit issued and method of disposal	Reasons for GFA inclusion and details of the decision-making process ^{Note (1)}
4.	Cheung Sha Wan Plaza	1989, By tender	<p><u>Reasons for not approving the exclusion of the PTT from the GFA calculation</u></p> <p>The Building Committee was of the view that the PTT was not a use ancillary to the main office/shop use of the development.</p> <p><u>The official who made the decision</u></p> <p>The decision not to approve the exclusion of the PTT from the GFA calculation was made by the Chairman of the Building Committee, who was the then PGBS.</p>

Note

- (1) CBSs and the Principal Government Building Surveyor (PGBS) were authorised among other officers by the Building Authority to carry out the duties and exercise the powers under the Buildings Ordinance, including the approval of building plans and the exclusion/inclusion of the PTT from the GFA calculation under B(P)R 23(3). In case of doubt or where complicated issues or appeals were involved, the CBS concerned would refer the case to the Building Committee, the BAC, or the Building Authority personally to seek a decision.
- (2) This case was different from the other three cases and the Sai Wan Ho case in that its lease conditions had specified that the maximum plot ratio should not exceed 18 and that bonus GFA of an amount not exceeding five times of the area of the PTT would be granted.

97. The Committee further asked whether, in any of the above three cases for which the Building Authority approved the exclusion of the PTT from GFA calculation:

- the building bulk and/or building height had increased due to the exclusion of the PTT from the GFA calculation, and whether the developer was required to pay a premium to the Government as a result; and
- there were any prospective tenderers who were informed during tendering of the site concerned that the PTT would be included in the GFA calculation, as in the case of the Sai Wan Ho Site; if so, what the details were and whether the answers given to the prospective tenderers had been publicised.

98. In his letter of 31 December 2005, the **Director of Lands** advised that:

- the bulk and/or height of a building with a PTT exempted from GFA calculation would inevitably be greater than if the PTT were not exempted, provided the developer was able to enjoy the exemption as he was in the subject cases. The developer/grantee was not required to pay a premium to the Government as a result of the reasons stated below:
 - (a) for the PTT at the United Centre, the lease allowed for possible exemption of the PTT from the GFA calculation as it specified that “the maximum plot ratio (as defined in B(P)R 21(3)) of any building erected or to be erected on the lot shall not exceed 18”;
 - (b) for the PTT at China Hong Kong City, the lease did not contain a maximum GFA clause and therefore possible exemption of the PTT from the GFA calculation was acceptable under the lease; and
 - (c) for the PTT at the Scout Association, the lease did not contain a maximum GFA clause and therefore possible exemption of the PTT from the GFA calculation was acceptable under the lease. In any case, the grantee was a non-profit-making organisation and the lot was granted to it by private treaty grant at nominal premium; and
- for items (a) and (b), there was no enquiry from any prospective tenderers as to whether the PTT would be included in the GFA calculation. For item (c), the question did not arise as the lot was granted by way of private treaty grant.

E.8 Submission of building plans by the AP

99. According to paragraph 6.15 of the Audit Report, on 1 August 2001, the BD received the AP’s letter dated 1 August 2001 withdrawing the building plans submitting on 3 July 2001. On 2 August 2001, the AP resubmitted the same building plans, with the

Government Accommodation included in the GFA calculation. It appeared to the Committee that the AP had accepted the inclusion of the Government Accommodation in the GFA calculation. The Committee wondered why the Building Authority still held a BAC on 22 October 2001 to consider whether the PTT could be excluded from the GFA calculation.

100. **Mr LEUNG Chin-man** said that the AP had submitted amendment plans on 22 September 2001 with the PTT excluded from the GFA calculation. The **Assistant Director/New Buildings 1** added that this was a normal procedure. Under the Buildings Ordinance, after an applicant had submitted building plans for the BD's consideration, the BD had to approve or disapprove them by the statutory due date. The AP's purpose of withdrawing the building plans submitted on 3 July 2001 and then resubmitting the same building plans, with the Government Accommodation included in the GFA calculation, on 2 August 2001 was to extend the statutory due date.

101. The Committee asked why the AP submitted building plans based on different treatments of the Government Accommodation in the GFA calculation within a short period of time.

102. In response, the **Secretary for Housing, Planning and Lands** provided a summary of the events relating to the submission history of building plans from 4 July 2001 to 23 October 2001 by the AP in Annex E of his letter of 7 December 2005. He stated in the same letter, and the **Assistant Director/New Buildings 1** supplemented at the public hearing on 8 December 2005, that:

- the AP was at liberty to submit different schemes of building proposal for the BD's consideration at any time he thought fit. Since the BAC of 1 August 2001 deferred making a decision on the treatment of the PTT, Submission A with the PTT excluded from the GFA calculation should have been disapproved by the statutory due date. However, on 3 August 2001, the BD received the AP's letter dated 1 August 2001 withdrawing Submission A and resubmitting Submission B which was identical with Submission A so that, in effect, the due date could be extended. The AP subsequently amended Submission B by including the PTT in the GFA calculation. The amendment of plans was a normal practice which did not affect the status of Submission B; and
- the AP was aware that the BAC of 1 August 2001 had not decided on the question of exclusion of the PTT from the GFA calculation. Thereafter, the BD received Submission C on 24 September 2001 and supplementary information on 26 September 2001 which were the initiative of the AP to pursue the outstanding issue of the PTT that had arisen from the BAC of 1 August 2001.

F. Provision of Government Accommodation and granting of bonus areas

103. According to paragraphs 4.4 to 4.24 of the Audit Report, in November 1998, during the planning of the MPOA, the Architectural Services Department (ArchSD) assessed that the approximate area for the 71 parking bays of the MPOA was 3,200 m². The departments concerned considered that the ArchSD's assessment was excessive. In late November 1998, the Hong Kong Police Force (HKPF) had accepted the proposed layout of the MPOA with 1,500 m² of space. The ArchSD also confirmed that the expected project requirements were achievable. However, after the sale of the Site, the AP claimed that extra space was required to meet the MPOA requirements specified in the Technical Schedule, and that the PTT had to be extended to "encroach" on areas designated on the Control Drawing as "Proposed Space Reserved for Entrance Lobbies and Other Facilities to Upper Floor" (the Reserved Areas).

104. In view of the need to extend the PTT into the Reserved Areas, in July 2001, the AP asked for bonus areas in return for the dedication of part of the Reserved Areas for public use. On 1 August 2001, the Building Authority agreed to grant bonus areas to the Developer in return for the dedication of part of the Reserved Areas for PTT use. Although the relevant departments considered that the amendments of the layout and the alleged extension into the Reserved Areas had stemmed from the AP's own design, the ArchSD said that there were no grounds to reject the AP's proposal because, among other things, the Control Drawing attached to the lease conditions was "for information only" and was "not to scale".

105. Against the above background, the Committee enquired whether the ArchSD had been mistaken in advising that 1,500 m² was adequate for the MPOA and that the expected project requirements were achievable.

106. **Mr YUE Chi-hang, Director of Architectural Services**, responded that originally, the ArchSD assessed that an area of 3,200 m² was required for accommodating the 71 parking bays required by the HKPF. However, having regard to the views of the other departments concerned, the ArchSD pointed out that an area of 1,500 m² would be adequate provided that it was net operational floor area (NOFA) and that flexibility in achieving the HKPF's accommodation be built in the Technical Schedule by allowing vehicle stacking and the partial provision of parking bays, subject to the HKPF's acceptance. Based on these considerations, the ArchSD advised the Lands D to include an area of 1,500 m² in the Technical Schedule of the MPOA.

107. The Committee further asked why the Control Drawing attached to the lease conditions was "for information only" and was "not to scale". The **Director of Architectural Services** said that according to the ArchSD's assessment, the area of 1,500 m² could accommodate the 71 parking bays. However, it was considered that the

Developer should be given the flexibility to design how to accommodate the parking bays. The line shown on the Control Drawing should not be taken as a rigid boundary for the MPOA. The ArchSD agreed with the Lands D that it would be more appropriate if the Control Drawing was not drawn to scale.

108. The **Director of Lands** and **Mr Gary CHEUNG Yiu-king, District Lands Officer (District Lands Office, Hong Kong East), Lands D**, supplemented that:

- the lease conditions did not restrict the NOFA of the MPOA to 1,500 m². In fact, the lease conditions only specified a minimum NOFA of 1,500 m², which meant that the Developer was allowed to build a larger MPOA. The purpose of the Control Drawing was to provide a reference for the Developer. If the Developer considered that an area bigger than 1,500 m² was required from a technical point of view, the Lands D was prepared to consider his proposal; and
- in January 2003, both the ArchSD and the TD confirmed to the Lands D that the new layout of the Control Drawing was acceptable. The ArchSD had also acknowledged that strict adherence to the scheme according to the Control Drawing was not possible. As such, the Lands D considered that there were no grounds to reject the Developer's proposal. Moreover, the Developer was willing to amend the Control Drawing and pay a premium. Therefore, the Lands D agreed to amend the Control Drawing and allow the Developer to build a larger MPOA and PTT in return for a premium of \$6 million.

109. In the light of the Lands D's reply, the Committee asked:

- about the basis for approving the revised layout of the Control Drawings;
- how the figure of \$6 million was arrived at and whether there were any precedent cases in which the premium was calculated in the same way; and
- the reason why the premium was not calculated according to value of the bonus areas of 10,700 m² granted to the Developer based on the sale price of the Site.

110. The **Director of Lands** explained, at the public hearings and in his letter of 15 December 2005 in (*Appendix 28*), that:

- after consulting the relevant government departments, i.e. the ArchSD, the HyD, the TD and the HKPF, the Lands D considered the revised layout of the Control Drawing acceptable and approved it;

- the premium of \$6 million was arrived at by assessing the current value of the lot with (“after” value) and without (“before” value) the benefit of the consent to amend the Control Drawing to reflect the encroachment of the PTT into the Reserved Areas. The “After Value” was valued at \$2,708.4 million and the “Before Value” was valued at \$2,702.43 million. The premium was thus \$5.97 million. As an offer of \$6 million had been made by the Developer, it was accepted;
- the Lands D was not aware of any precedent cases involving payment of fees for consent to amend a control drawing attached to the Conditions of Sale. The basis for the assessment, i.e. the difference between the current values of the lot with and without the benefit of the consent, accorded with the basis for calculating premium for lease modifications; and
- the premium was not calculated according to the value of the floor area involved based on the sale price of the Site because the established principle in calculating premium for lease modification was to assess the increase in current values.

111. The Committee further asked the Lands D, when assessing the “After Value” of the lot, whether the value was assumed to have increased or decreased as compared to 2001 when the Site was sold, and the percentage of the change.

112. In his letter of 31 December 2005, the **Director of Lands** advised that:

- when assessing the “After Value” of the lot (in the \$5.97 million premium assessment), whether the value of the lot had increased or decreased after its sale in 2001 was not a relevant factor for consideration. The only matter for consideration was the increase in the then current (i.e. 2003) value attributable to the consent to amend the Control Drawing. The value of the lot increased because of the certainty of the exemption of the PTT and the availability of bonus GFA having been established by 2003; and
- as a matter of fact, land values generally declined between the time of sale of the lot in January 2001 and the time of assessment of premium for consent to amend the Control Drawing in January 2003. As regards percentages, the increase in value from \$2,430 million to \$2,708.4 million was an 11% increase.

113. As requested by the Committee, the **Director of Lands** provided, in his letter of 31 December 2005, the Site Valuation Framework adopted in arriving at the premium of \$5.97 million.

114. In response to the Committee's question as to why the Lands D had not pursued the options of vehicle stacking or reduction in parking bays, the **Deputy Director of Lands (General)** and the **District Lands Officer (District Lands Office, Hong Kong East)** explained that:

- the Lands D had not pursued the options because, as stated in paragraph 4.19 of the Audit Report, the ArchSD had informed the Lands D that there were no valid grounds to reject the AP's proposal. Therefore, the question of putting alternatives to the AP did not arise; and
- under the circumstances, the Lands D negotiated with the Developer on the revision of the layout of the Control Drawings for which a premium could be charged.

115. The Committee queried whether, in approving the NOFA of 2,028 m² for the MPOA proposed by the Developer, the Lands D had considered the financial implication as the Developer was eventually granted bonus areas because of the enlargement of the MPOA.

116. The **Deputy Director of Lands (General)** responded that:

- the Lands D accepted that the enlargement of the MPOA meant that the PTT had to be shifted into the Reserved Areas, but the Lands D was not responsible for any question of dedication. The lease conditions were silent as to the maximum GFA. The planning intention was that the lot be developed according to the Buildings Ordinance. The bonus areas were granted by the Building Authority in accordance with the B(P)R and were not a matter for the Lands D; and
- as far as the Lands D was concerned, the Developer's proposal had a financial implication in that in giving consent for the Developer to amend the Control Drawing, the Lands D was in a position to charge a fee, which it did.

117. In view of the Lands D's reply, the Committee asked whether the BD had considered:

- the necessity of the extra space of 528 m² (2,028 m² - 1,500 m²) for the MPOA proposed by the Developer and whether it had consulted the HKPF; and
- requesting the Developer to adhere to the 1,500 m² provided for in the original Control Drawing, so as to protect government revenue.

118. The **Director of Buildings** stated that a BAC was convened on 1 August 2001 to consider the Developer's application for bonus areas. The then Building Authority considered that the redesigned PTT, with a larger area, was an improvement on the original design and the provision of landscaped areas, which resulted in the repositioning of the public footpaths within the PTT, should be encouraged. There was also the view that the enlarged MPOA would better serve its purpose. Hence, the BAC approved the granting of five times bonus plot ratio to the Developer.

119. The **Secretary for Housing, Planning and Lands** and the **Director of Lands** added that:

- the extension of the MPOA by 528 m² did not have a direct relationship with the extension of the PTT into the Reserved Areas. It was not necessary for the PTT to be so big as to encroach on the Reserved Areas, although there was a view that it would be better if the PTT was bigger;
- regarding the need for the PTT to be extended, the ArchSD, the TD and the HyD considered that the Government Accommodation could be constructed in accordance with the Control Drawings and the Technical Schedules. They also said that the amendments of the layout and the alleged extension into the Reserved Areas stemmed from the AP's own design, not from the lease requirements; and
- the relevant government departments had been consulted on the extended MPOA. Both the ArchSD and the TD confirmed that the new layout of the Control Drawing was acceptable and the HKPF had said that it relied on the ArchSD's advice on technical issues.

120. **Mr LEUNG Chin-man** said that:

- at the BAC of 1 August 2001, he had consulted the relevant government departments on the desirability of a larger PTT. The representative of the TD stated that the proposed PTT, with a larger area, would function better than the original one. The Plan D's representative also considered that the proposed PTT was an improvement on the original design in terms of operation and environmentally friendly design. The two departments' views matched his advocacy that the design of public facilities should be as environmentally friendly as possible;
- in view of the above, he approved the granting of bonus areas subject to the Developer undertaking not to seek any further compensation from the Government, and the layout of the PTT being acceptable to all relevant government departments. On 11 August 2001, the BD sent the minutes of the BAC to the departments concerned and no departments responded as to

whether they agreed or objected to the layout of the PTT. A letter was then sent to the Developer conveying the Building Authority's approval of the granting of bonus areas. As it transpired, in February 2002, the Lands D informed the BD that the proposed dedication of the Reserved Areas was neither required nor necessary and it objected to the granting of bonus areas to the Developer;

- another BAC was convened on 23 April 2002 (a copy of the minutes is in **Appendix 29**) to discuss the matter. At the meeting, it was agreed that while it would be a matter for the Lands D to decide whether the Developer would be entitled to any compensation under the lease, it would be another matter for the Building Authority to decide whether he would give any concessions in the form of bonus areas under the Buildings Ordinance. It was also confirmed that the layout of the proposed PTT was technically acceptable to all departments concerned, and the proposed provision of landscaped areas and a larger PTT area would benefit the public; and
- although the relevant government departments had confirmed that the PTT could be constructed according to the Control Drawings and the Technical Schedules, this was not a matter to be dealt with by the Building Authority. What mattered was whether the bigger PTT proposed by the Developer merited support from the operational and environmental point of view. In view of the merits of the Developer's proposal and the relevant departments' agreement, he upheld the decision made on 1 August 2001.

121. In response to the Committee's enquiry, the **Director of Lands** said that it was the Lands D's view that the proposed dedication of the Reserved Areas was neither required nor necessary. However, the Lands D was only responsible for the grant of land and was not the professional department for deciding the appropriate size of a PTT. It only relayed to the Building Authority the opinion of the ArchSD, the TD and the HyD that the PTT could be constructed according to the Control Drawings and the Technical Schedules. Notwithstanding this, the departments also considered that a bigger PTT was a good design and saw no reason to reject it.

122. The Committee further asked the Lands D whether the government departments concerned had evaluated the financial implications when considering the Developer's request for bonus areas. The **Director of Lands** replied that there were no records in the Lands D which showed that the departments concerned had considered the question of land premium.

123. The Committee noted from paragraphs 3.10 and 3.12 of the Audit Report that eventually the number of the residential units at the Site had increased from about 1,000 to 2,020. The Committee asked about the number of additional carparking spaces provided

as a result of the increase and whether the increase had led to the granting of bonus area to the Developer.

124. In his letter of 31 December 2005, the **Director of Buildings** replied that:

- the figure of around 1,000 residential flats represented the number of flats estimated in the notional scheme worked out by the Plan D in 1998. The notional scheme was only to provide a rough estimate based on a set of planning assumptions. As there had been no submission of building plans in the present case which proposed 1,000 residential units, there was no carparking proposal based on such number of residential units; and
- the number of residential units proposed by the Developer in the first and the latest submission of building plans for approval in 2001 and 2005 was 1,912 and 2,020 respectively. The number of carparking spaces for motor vehicles proposed in the two building plan submissions mentioned above was 478 and 505 respectively, representing an increase of 27 carparking spaces. These carparking spaces were located on L1/F, L2/F and L3/F of the development i.e. on floors above the PTT on G/F. Since the provision of the carparking spaces was found acceptable by the TD in the various submissions of building plans, they were disregarded from GFA calculation under regulation B(P)R 23(3)(b). The increase in the number of carparking spaces had not led to any granting of bonus area to the Developer.

G. Site Classification

125. According to Note 21 in paragraph 5.2 of the Audit Report, a Class B site is a corner site that abuts on two streets neither of which is less than 4.5 metres wide. The corner site is not regarded as abutting on two streets unless at least 40 percent of the boundary of the site abuts on the streets. For a Class B site, the maximum plot ratio permitted for a domestic building is 9, and that for a non-domestic building is 15. A Class C site is a corner site that abuts on three streets none of which is less than 4.5 metres wide. The corner site is not regarded as abutting on three streets unless at least 60 percent of the boundary of the site abuts on the streets. For a Class C site, the maximum plot ratio permitted for a domestic building is 10, and that for a non-domestic building is 15.

126. The Committee noted from paragraphs 5.2 to 5.14 of the Audit Report that in January 1999, the BD advised the Lands D that the Site was a Class B site under the Buildings Ordinance. In December 1999, to qualify the Site as a Class C site, the Lands D incorporated a Special Condition in the lease stating that an area of about 194 m² (i.e. Area III) would be demarcated as a non-building area and should be open for public passage at all times. In the circumstances, the Lands D and the prospective tenderers might have considered that Area III would have to be excluded from the site area in plot

ratio and site coverage calculations. Indeed, the Lands D had excluded this area from the site area calculation when it carried out the reserve price valuation. However, after the sale of the Site, at the BAC held on 1 August 2001, the Building Authority agreed that the Site was a Class C site without requiring the Developer to demarcate Area III as a street.

127. Against the above background, the Committee asked why:

- the Building Authority agreed that the Site was a Class C site after the lot had been sold while the BD had advised, prior to the land sale, that it was a Class B site; and
- the Developer was not required to exclude Area III from the site area calculation subsequently.

128. The **Director of Buildings** responded that:

- prior to the sale of the lot, the BD considered that Area II was not a street under the Buildings Ordinance. To qualify the Site as Class C, it was necessary to demarcate Area III as a street and, under the Buildings Ordinance, it would have to be deducted from the site area in plot ratio and site coverage calculations;
- in April 2001, the AP submitted building plans on the basis that Area II was a street and the Site was a Class C site. In view of the AP's claim, the BD asked the District Lands Office/Hong Kong East to confirm the land status and use of Area II; and
- when the BAC considered the classification of the Site on 1 August 2001, for the reasons as recorded in the minutes of that meeting, the Building Authority agreed that Area II was a street under the Buildings Ordinance and the Site was a Class C site. As such, the Developer was not required to demarcate Area III as a street and, under the Buildings Ordinance, there was no need to exclude it in the plot ratio and site coverage calculations.

129. The Committee further asked why the Lands D had not sold the land on the basis of a Class C site so as to attract a higher premium.

130. The **Director of Lands** and the **Deputy Director of Lands (General)** said that:

- the Lands D had not made any statement as to the site classification publicly or in the lease conditions. The Lands D needed to know the classification for evaluation purposes. Upon the Lands D's enquiry, the BD informed the

Lands D that the Site was a Class B site. The advice accorded with the Lands D's opinion and it proceeded on that basis. That was why the Lands D made provision for Area III of about 194 m² to be demarcated as a non-building area in order that Class C status could be achieved, thereby achieving the maximum GFA and the maximum value; and

- it should be clear to developers that the purpose of requiring Area III to be demarcated was to qualify the Site as a Class C site.

131. The Committee referred to paragraph 5.15 of the Audit Report which stated that, according to the BD, in August 2001, the BAC ruled that the Site was a Class C site and overruled the decision made by the CBS in January 1999. Noting that the physical status of the area affecting the site classification had remained more or less the same before and after the land sale, the Committee asked why the Building Authority agreed in August 2001 that the Site was a Class C site, thereby enhancing the development potential and value of the Site after the land sale.

132. **Mr LEUNG Chin-man** explained that:

- the lease conditions had not mentioned whether the Site was Class B or Class C, but they did state that Area III would be demarcated as a non-building area and should be open for public passage at all times. Given that the lease was also silent as to the maximum GFA, all developers had the opportunity to put forward their case to argue that Area II was a street and they would have taken this factor into account when bidding for the Site. Thus, there was no question of the Government having lost any land premium;
- paragraph 5.15(c) of the Audit Report stated that the BAC decision on 1 August 2001 “overruled the decision” made by the CBS in January 1999. This was in fact not the case. The CBS's view on site classification was only an advice but not a decision, as it was given before the land sale. Upon the receipt of the AP's application after the land sale, the Building Authority would consider all the relevant facts and information before him and make a determination. In this case, the decision was made by the Building Authority at the BAC of 1 August 2001;
- when giving his advice in January 1999, the CBS focused on the fact that Areas I and II in Figure 2 of the Audit Report had been designated as “open space” on the draft OZP No. S/H21/10. According to the BD Manual, open space could not be accepted as street for site classification purpose under B(P)R 2. At the BAC on 1 August 2001, having factored in all relevant facts and information, as well as the actual circumstances of the case, it was agreed that:

- (a) Area II was an existing emergency vehicular access to the marine fuelling stations and an access to the public landing area. It bore the characteristics of a street and would continue to serve the marine fuelling stations and the public landing area;
 - (b) as informed by the Plan D, it was the planning intention to develop Area II into a waterfront promenade. The piers would be used as a recreational area. Area II would serve as an emergency vehicular access to the piers; and
 - (c) apart from having the characteristics of a street, the permanency of Area II under the Buildings Ordinance could be ascertained in view of (a) and (b) above; and
- in view of the above, he accepted the AP's submission that the Site was Class C without the need to exclude Area III from the site area in the plot ratio and site coverage calculations.

133. In response to Mr LEUNG's remarks, the **Director of Audit** responded that the information contained in paragraph 5.15(c) of the Audit Report was reproduced from the reply of the BD to Audit.

134. **Conclusions and recommendations** The Committee:

Pre-tender enquiries on gross floor area (GFA) calculation

- expresses great dissatisfaction that:
- (a) the Lands Department (Lands D) had not publicised pre-tender enquiries and answers on GFA calculation before the close of tendering of the land sale of the Site; and
 - (b) when a prospective tenderer sought, after noting that there was no explicit statement on exemption of the Government Accommodation from the GFA calculation under the Land Grant Conditions and that public transport termini (PTTs) were often exempted from GFA calculation in a number of other cases, confirmation that the Government Accommodation (i.e. the PTT and the marine police operational area (MPOA)) would be exempted from the GFA calculation of the Site, the Lands D only informed the tenderer that the Conditions of Sale did not specify a maximum GFA and, as advised by the Director of Buildings, "the Government Accommodation shall be included in the GFA calculation, under B(P)R 23(3)(a)". The response could have been interpreted as that the PTT would be included in the GFA calculation;

- notes that the Director of Lands has agreed to implement the audit recommendations mentioned in paragraph 2.9 of the Director of Audit's Report (the Audit Report);

Development intensity of the Site

- expresses concern that, before recommending a minimum domestic GFA of 80,000 square metres (m²) for the Site in November 1999, the Planning Department (Plan D) had not reassessed the need for and the adequacy of public facilities in the district with a view to ensuring that adequate facilities and infrastructure would be provided;
- notes that:
 - (a) the Director of Planning has agreed to implement the audit recommendations mentioned in paragraph 3.26 of the Audit Report; and
 - (b) the Director of Lands has agreed to implement the audit recommendation mentioned in paragraph 3.27 of the Audit Report;
- recommends that the Secretary for Housing, Planning and Lands should improve the communication and coordination among the Buildings Department (BD), the Lands D and the Plan D to ensure that planning intentions are achieved when a site is developed;

Provision of Government Accommodation

- expresses great dissatisfaction that from the outset, when the Architectural Services Department (ArchSD) said that the net operational floor area of the MPOA of 1,500 m² was not adequate, the Lands D and the ArchSD did not take any action to resolve the problem by either revising the area of the MPOA, or by reducing the number of parking bays;
- expresses serious disappointment that the Control Drawing attached to the lease conditions was “for information only” and was “not to scale”. As a result, the ArchSD considered that there were no grounds to reject the Authorised Person (AP)'s proposed layout of the MPOA although it deviated from the original design in the Control Drawing;
- notes that:
 - (a) the Director of Architectural Services has agreed to implement the audit recommendations mentioned in paragraph 4.31 of the Audit Report; and
 - (b) the Director of Lands has agreed to implement the audit recommendation mentioned in paragraph 4.32 of the Audit Report;

Site classification

- expresses grave concern that, in deciding the site classification before the land sale, the BD had not sought clarification from the Plan D about the planned use of Area II, on which the Building Authority had subsequently relied as one of the considerations for accepting the AP's submission that the Site was a Class C site without the need to exclude Area III from the site area calculation;
- expresses dissatisfaction that it might have been unfair to other tenderers in the sale of the Site as the Building Authority had subsequently accepted that the Site was a Class C site and this increased the development potential of the Site after the land sale;
- notes that the Director of Buildings has agreed to implement the audit recommendations mentioned in paragraph 5.19 of the Audit Report;

Granting of exemption areas

- finds it unacceptable that:
 - (a) although the BD had advised the Lands D, when the draft Special Conditions of the lease of the Site were being prepared, that the Government Accommodation should be included in the GFA calculation, the information had not been incorporated into the lease conditions of the Site;
 - (b) the lease conditions of the Site had not specified whether the Government Accommodation should be included in the GFA calculation. Prospective tenderers therefore could have doubts about this point;
 - (c) for cases where there was no maximum GFA clause in the lease conditions, the Lands D did not consider it appropriate to stipulate in the lease conditions whether the government accommodation required would be included in GFA calculation; and
 - (d) the BD did not, in the absence of established procedures, devise any criteria for appointing external observers when the two observers were invited to attend the Building Authority Conference (BAC), and they had not been required to declare whether they had any conflict of interest;
- expresses alarm and strong resentment, and finds it unacceptable that, in deciding to exercise his discretionary power to exclude the PTT from the GFA calculation, the Building Authority:

- (a) had not attached due weight to the factors for consideration listed in the guidelines on exercising discretionary approval (i.e. Practice Note 23 issued by the BD in September 2000), including lease restrictions, views of other government departments, effect of the development on the adjoining sites and the district, and fairness;
 - (b) had adopted a very restrictive view on public interest, by confining himself to the question of whether the provision of the PTT was in the public interest, without due regard to other factors that might be relevant, e.g. the lease had already required the Developer to provide the PTT, the difficulty likely to be faced by the Lands D in charging additional premium, and the visual impact, increased development intensity and obstruction to air flow resulting from increased building bulk/height;
 - (c) had viewed the role of the Building Authority as distinct from that of a civil servant holding the post of Director of Buildings. As such, he had not adequately taken into consideration such public interest and government policies that might be relevant;
 - (d) had not attached due weight to the views of other government departments which had raised objection to the exclusion of the PTT from the GFA calculation because, apart from the Plan D, representatives of the other relevant government departments (i.e. the Lands D, the Transport Department (TD), the Highways Department (HyD) and the Fire Services Department), had not been invited to the BAC held on 22 October 2001 at which the Building Authority decided on the matter; and
 - (e) had not sought clarification on the legal advice given by the Department of Justice, on which he had relied in discounting considerations that might be relevant although the advice did not make specific suggestion in that respect;
- expresses grave dismay at the Building Authority's decision to exclude the PTT from the GFA calculation of the Site and finds it unacceptable, as it:
- (a) had negative financial implications, in that:
 - (i) the value of the Site would be affected by whether any of the Government Accommodation would be included in or excluded from the GFA calculation. The tender price offered might have been higher if the PTT had been excluded from the GFA calculation at the outset;

- (ii) the Lands D's assessment of the tender reserve price of the Site was on the basis that the Government Accommodation would be included in the GFA calculation. The reserve price could have been higher if it had been decided before the land sale that the PTT with an area of 7,297 m² would be excluded from the GFA calculation; and
 - (iii) the prospective tenderer who received written confirmation that the Government Accommodation "shall be included in the GFA calculation" subsequently offered the second highest bid. That tenderer might have put forward an even more competitive bid if he had been informed that the PTT would be excluded from the GFA calculation; and
- (b) might be unfair to other tenderers in the sale of the Site as it was contrary to the advice given to some tenderers before the close of the land sale that the Government Accommodation would be included in the GFA calculation, and this decision increased the value of the Site after the land sale;
- notes that:
- (a) the Director of Buildings has agreed to implement the audit recommendations mentioned in paragraph 6.27 of the Audit Report;
 - (b) the Director of Lands has agreed to implement the audit recommendation mentioned in paragraph 6.28 of the Audit Report; and
 - (c) the Administration has agreed in April 2005 that the planning intention is that PTTs should be included in GFA calculation unless otherwise specified in the relevant town plan or any specific planning approval for a site, and the Building Authority will follow the planning intention in exercising his discretion in granting GFA exemption for PTTs;
- strongly urges:
- (a) the Building Authority to ensure that, when exercising his discretionary power, he will include in his consideration of an application the factors listed in any applicable Practice Note issued by the BD; and
 - (b) the Administration to review the criteria for deciding whether or not the maximum GFA of a site should be specified, with a view to removing any ambiguities about the development potential of the site;

Granting of bonus areas

- expresses grave dismay that:
 - (a) although no Lands D's endorsement had been obtained after the BAC's decision on 1 August 2001 that the Developer's proposed dedication of the Reserved Areas in return for bonus areas should be approved subject to the layout of the PTT being acceptable to all relevant government departments, the Building Authority approved the granting of bonus areas on 1 September 2001 without giving any explanation; and
 - (b) the Building Authority approved the granting of bonus areas to the Developer on the basis that the proposed provision of landscaped areas and a larger PTT would benefit the public although the ArchSD, TD and HyD considered that the Government Accommodation could be constructed according to the Control Drawings and the Technical Schedules and the extension of the PTT into the Reserved Areas stemmed from the Developer's design and not from a requirement of the MPOA;
- expresses serious dismay that, when considering the AP's application for bonus plot ratio as a result of the Developer's revised design of the Government Accommodation, the relevant government departments had not evaluated the implications of the proposal on government revenue and development intensity against the benefits;
- notes that:
 - (a) the Director of Buildings has agreed to implement the audit recommendation mentioned in paragraph 7.31 of the Audit Report; and
 - (b) the Director of Lands has agreed to implement the audit recommendation mentioned in paragraph 7.32 of the Audit Report; and

Follow-up actions

- wishes to be kept informed of:
 - (a) the actions taken by the Secretary for Housing, Planning and Lands to improve the communication and coordination among the BD, the Lands D and the Plan D to ensure that planning intentions are achieved when a site is developed;
 - (b) any action taken to ensure that the Building Authority, when exercising his discretionary power, will include in his consideration of an application the factors listed in any applicable Practice Note issued by the BD;

- (c) the progress of any review on the criteria for deciding whether the maximum GFA of a site should be specified, with a view to removing any ambiguities about the development potential of the site; and
- (d) the progress made in implementing the various audit recommendations.