

Report No. 45 of the Director of Audit – Chapter 3

DEVELOPMENT OF A SITE AT SAI WAN HO

Summary

1. 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. The lease conditions of the Site required the Developer to provide, on a reimbursement basis, Government Accommodation as follows: (a) a marine police operational area (MPOA), with a net operational floor area of not less than 1,500 m²; and (b) a public transport terminus (PTT) which included a public transport interchange and a cross boundary coach terminus.

Pre-tender enquiries on gross floor area calculation

2. *Pre-tender enquiries not publicised.* In late November 2000, before the close of the tender, 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 gross floor area (GFA) calculation. After consulting with the Buildings Department (BD), the Lands D informed the prospective tenderer that 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, the Audit Commission (Audit) could not find records showing that the Lands D had publicised them. *Audit has recommended that the Director of Lands should publicise all relevant enquiries and answers given to prospective tenderers relating to GFA calculation before the close of tendering of a land sale.*

Development intensity of the Site

3. *Original maximum domestic GFA of 85,720 m².* In November 1998, the Metro Planning Committee of the Town Planning Board was informed that the Site would be able to produce about 1,000 residential flats, when its agreement to the proposed amendments to the draft Quarry Bay Outline Zoning Plan No. S/H21/9 to rezone the Site from government/institution/community (GIC) to “Other Specified Uses” annotated “Residential cum Public Transport Terminus, Commercial and Community Facilities” was sought. According to the Planning Department (Plan D)’s calculation, this was equivalent to a

maximum permissible domestic GFA of 85,720 m². Later, 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 has 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. As the planned population of the Site has been increased, the provision of local open space per person would be reduced in the development. *Audit has recommended that the Director of Planning should, having regard to the need to achieve more effective land use planning and control over population density: (a) as far as practicable, stipulate in the relevant Outline Zoning Plan the maximum GFA that can be supported by the public facilities; and (b) update the Plan D's assessment on the provision of public facilities in the district before the sale of a site.*

Provision of Government Accommodation

4. *Extension of PTT to Reserved Areas.* In November 1998, during the planning of the MPOA, the Architectural Services Department (ArchSD) informed the relevant bureau/departments that, based on its assessment, the approximate area of the 71 parking bays of the MPOA was 3,200 m². The departments concerned considered that the ArchSD's assessment of 3,200 m² was excessive. In late November 1998, the Hong Kong Police Force accepted the proposed layout of the MPOA with 1,500 m² of space. The ArchSD also confirmed that "the expected project requirements are achievable". According to the Technical Schedule of the MPOA attached to the lease conditions, the MPOA, with a net operational area of not less than 1,500 m², should have 71 parking bays. After the sale of the Site, the Authorised Person (AP) for the Developer 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).

5. 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 had said that the amendments of the layout and the alleged extension into the Reserved Areas 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 was "not to scale". *Audit has recommended that the Director of Architectural Services should, before the sale of a site where GIC facilities are to be provided by the developer, ensure that the GIC design requirements are, where appropriate, properly drawn to scale in the layout drawings for incorporation into the lease conditions of the site.*

Site classification

6. ***Development intensity increased after change of site classification.*** 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 (4.5 metres in width along the south-eastern boundary of the Site) of about 194 m² would be demarcated as a non-building area and should be open to public passage at all times. In the circumstances, the Lands D and the prospective tenderers might have considered that the non-building area 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 Building Authority Conference (BAC) held on 1 August 2001, the Building Authority agreed that the Site was a Class C site without requiring the Developer to demarcate the non-building area within the Site boundary as a street. Consequently, the development intensity of the Site was increased due to the increase in the resultant GFA. *Audit has recommended that the Director of Buildings should, prior to the sale of a site, seek clarification from the relevant government departments to ascertain if there are factors affecting the site classification and consider seeking legal advice to clarify legal ambiguities about site classification before giving advice to other government departments.*

Granting of exemption areas

7. ***Lease conditions silent on whether Government Accommodation should be included in GFA calculation.*** In November 1999, when the draft Special Conditions of the lease of the Site was being prepared, the BD 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 (at which two university professors were invited to give their independent views) on 1 August 2001 to determine the AP's application 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. *Audit has recommended that the Director of Buildings should: (a) prior to the sale of a site, seek legal advice on issues (such as that relating to the exemption of GFA in this case) on which the legal basis is doubtful before giving advice to other government departments; and (b) establish a set of procedures and criteria for the appointment of external observers to attend the BAC. Audit has also recommended that the Director of Lands should, where appropriate, stipulate explicitly in the lease conditions of a site whether the government accommodation required would be included in the GFA calculation.*

Granting of bonus areas

8. *Decision to grant bonus areas.* At the BAC held on 1 August 2001 to discuss the AP's application for bonus areas in return for the dedication of areas for public use, the AP said that the PTT had to be extended to the Reserved Areas on the ground floor as extra space was required for constructing the MPOA. In addition, the Developer proposed to dedicate a strip of land along the south-eastern boundary for public passage to facilitate access to the PTT. Taking into account the views of the BAC members, the Building Authority agreed to grant bonus areas in return for: (a) dedicating a portion of the strip of land at the south-eastern boundary (i.e. Area D1 in Figure 3 in para. 7.2 in the Report), giving public passage to the PTT; and (b) dedicating areas (i.e. Areas D2 and D4 in Figure 3) in the Reserved Areas for use as the PTT. On 1 September 2001, the Building Authority approved the building plans, and granted the bonus areas in return for dedicating the areas for public use.

9. In March 2002, the Lands D expressed its surprise that the Building Authority had approved the dedication of the Reserved Areas. It considered that the grant of bonus areas was premature and should be withdrawn by the Government. At the BAC held on 23 April 2002, the Building Authority upheld his decision made on 1 August 2001. Around that time, the Lands D held further discussions with the relevant departments which opined that the Government did not require a larger MPOA and that the proposal of revising the MPOA layout came from the Developer. The Transport Department had also said that it was the AP's design that affected the size and the layout of the PTT. In June and November 2002, the Legal Advisory and Conveyancing Office of the Lands D considered it doubtful that the Government could charge premium for the full value of the bonus areas as there was no maximum GFA in the lease conditions and any bonus was a statutory matter under the Buildings Ordinance. Subsequently, the Lands D approved the revision of the layout of the Government Accommodation at a premium of \$6 million. *Audit has recommended that for developments involving GIC facilities, the Director of Buildings should, before granting bonus areas in return for dedicating areas for public use, consult and obtain consensus from the relevant government departments, in particular the Lands D. Audit has also recommended that the Director of Lands should, in order to protect the Government's interest arising from the Building Authority's granting of concessions not provided for in the lease conditions, where appropriate, incorporate a maximum GFA clause in the lease.*

Response from the Administration

10. The Administration has generally accepted the audit recommendations.

November 2005

CHAPTER 3

**Buildings Department
Lands Department
Planning Department
Architectural Services Department**

Development of a site at Sai Wan Ho

**Audit Commission
Hong Kong
22 October 2005**

This audit review was carried out under a set of guidelines tabled in the Provisional Legislative Council by the Chairman of the Public Accounts Committee on 11 February 1998. The guidelines were agreed between the Public Accounts Committee and the Director of Audit and accepted by the Government of the Hong Kong Special Administrative Region.

Report No. 45 of the Director of Audit contains 9 Chapters which are available on our website at <http://www.aud.gov.hk>.

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PART 1: INTRODUCTION

1.1 This PART describes the background to the audit and outlines the audit objectives and scope.

Background

1.2 In January 2001, a site for non-industrial use at Sai Wan Ho, Hong Kong (the Site — see Figure 1), 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 (Note 1). The lease conditions of the Site required the Developer to provide, on a reimbursement basis (Note 2), the following Government Accommodation:

- (a) a marine police operational area, with a net operational floor area of not less than 1,500 m²; and
- (b) a public transport terminus, including a public transport interchange, and a cross boundary coach terminus.

Audit review

1.3 The Audit Commission (Audit) recently carried out a review of the above residential development. The review focused on the following aspects:

Note 1: *The Site is zoned “Other Specified Uses” annotated “Residential cum Public Transport Terminus, Commercial and Community Facilities” on the Quarry Bay Outline Zoning Plan. It is intended for residential development with provision of public transport interchange, commercial, public carpark and government facilities. Flexibility is allowed for the developer to determine the development mix, i.e. the amount of residential and commercial gross floor area to meet the market demand.*

Note 2: *According to Special Condition 19(a), the Government would pay to the Developer \$29.3 million (or a sum equal to the actual construction cost, whichever was the lesser) for the public transport terminus and \$7.5 million (or a sum equal to the actual construction cost, whichever was the lesser) for the marine police operational area upon their completion.*

- (a) pre-tender enquiries on gross floor area (GFA — Note 3) calculation (PART 2);
- (b) development intensity of the Site (PART 3);
- (c) provision of Government Accommodation (PART 4);
- (d) site classification (PART 5);
- (e) granting of exemption areas (PART 6); and
- (f) granting of bonus areas (PART 7).

1.4 The audit has revealed that there is scope for improvement in administering land grant for large scale development requiring the provision of government accommodation.

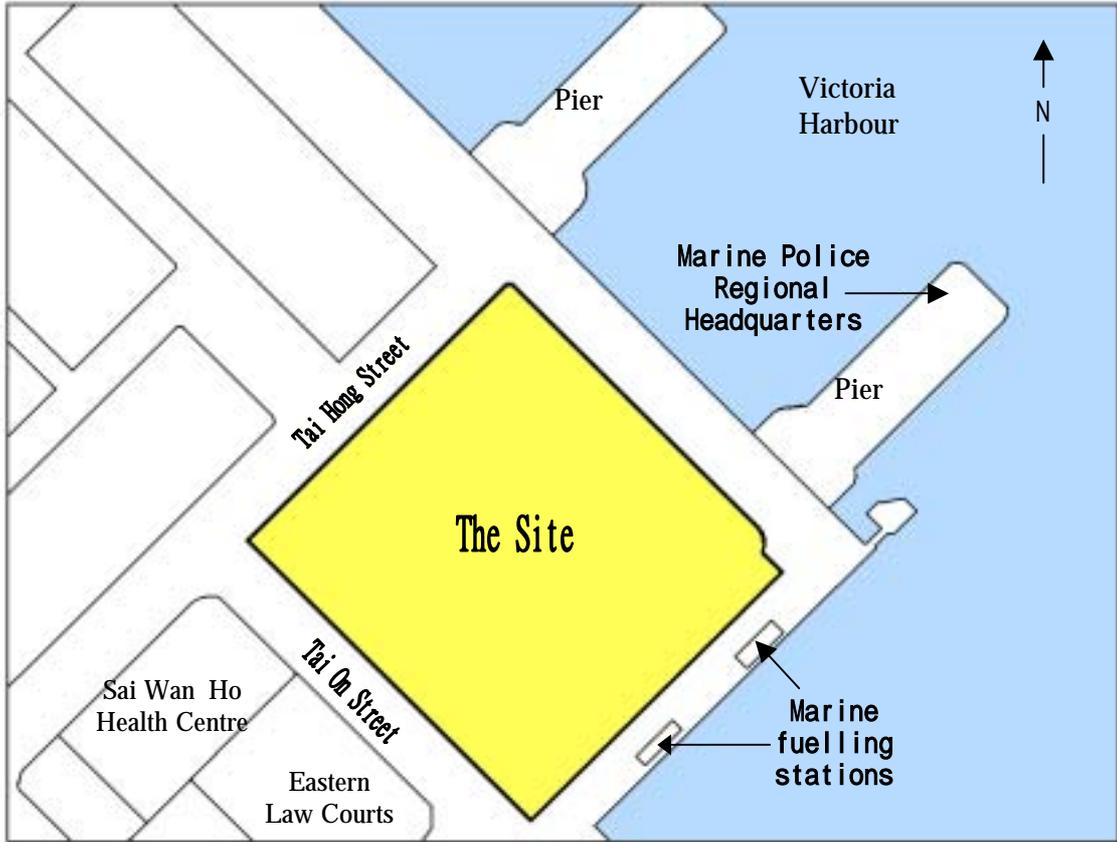
Acknowledgement

1.5 Audit would like to acknowledge with gratitude the full cooperation of the staff of the Buildings Department (BD), the Lands Department (Lands D), the Planning Department (Plan D) and the Architectural Services Department (ArchSD) during the audit.

Note 3: *The GFA of a building is the area contained within the external walls of the building measured at each floor level (including any floor below the ground level), together with the area of each balcony. The GFA should be calculated from the overall dimensions of the balcony (including the thickness of the sides), and the thickness of the external walls of the building.*

Figure 1

Location of the Site



- Legend:
-  The Site boundary
 -  The Site

Source: Lands D records

PART 2: PRE-TENDER ENQUIRIES ON GROSS FLOOR AREA CALCULATION

2.1 This PART examines the Lands D's handling of pre-tender enquiries on the GFA calculation during tendering of the Site in late 2000.

Lands Department's instructions

2.2 From time to time, prospective tenderers may seek clarifications from the Lands D about the lease conditions of a site before the close of a land sale. As stated in the Lands D's Lands Administration Office Instruction of 22 March 1999 (which was effective at the time of tendering of the Site), the Lands D should, before the close of the land sale:

- (a) publicise (e.g. advertise in newspapers) the answers/clarifications given to prospective tenderers on enquiries relating to a basic ambiguity in the lease conditions; and
- (b) fully record all verbal answers given on file irrespective of whether the enquiries are simple or relating to a basic ambiguity.

Pre-tender enquiries on gross floor area calculation not publicised

2.3 In November 1999, in response to an enquiry from the Lands D on whether the Government Accommodation at the Site (see para. 1.2) should be included in the GFA calculation, the BD advised that the Government Accommodation should be **included** in the GFA calculation under Building (Planning) Regulation (B(P)R) 23(3)(a) of the Buildings Ordinance (Cap. 123).

2.4 The sale of the Site by tender was gazetted on 27 October 2000. The tender closed on 8 December 2000. In late November 2000, a prospective tenderer (not the successful tenderer) sought clarification from the Lands D on whether the Government Accommodation would be **excluded** from the GFA calculation. After consulting with the BD, the Lands D informed the prospective tenderer that:

- (a) the lease conditions did not specify a maximum GFA; and
- (b) **according to the advice given by the BD, the Government Accommodation "shall be included" in the GFA calculation under B(P)R 23(3)(a).**

2.5 The Lands D recorded the above enquiry and answers on its file. In addition, the Lands D also recorded that it had provided similar answers to other prospective tenderers in response to their verbal enquiries. **However, Audit could not find records showing that the Lands D had publicised these enquiries and answers.**

Audit observations

2.6 Audit considers that the Lands D should have publicised the enquiries and answers in paragraphs 2.4 and 2.5 for the following reasons:

- (a) the information about whether the Government Accommodation should be included in the GFA calculation is an important piece of information affecting the tenderers' assessment of the value of the Site. If the Government Accommodation was to be included in the GFA calculation, this would reduce the domestic GFA of the development. This in turn would affect the tender price offered by the tenderers;
- (b) the publication of that information would help minimise future disputes on the issue. In this case, the Developer subsequently succeeded in asking the Building Authority to allow him to exclude a part of the Government Accommodation (the public transport terminus) from the GFA calculation (see PART 6); and
- (c) the provision of relevant information would help provide a level playing field for all prospective tenderers.

Revised Lands Administration Office Instruction

2.7 In 2002, in response to the audit observations and recommendations in Chapter 7 of the Director of Audit's Report No. 37 on "The administration of sale of land by public auction", the Lands D revised the Lands Administration Office Instruction to the effect that, if any fundamental ambiguity in the lease conditions is identified, the Lands D would publicise any necessary amendments in the Government Gazette and/or in selected newspapers, or by circulation to interested parties on the Lands D's mailing list, depending on the time available prior to the sale of a site, but in any event, before the tender closing date.

2.8 In order that essential information is provided to all prospective tenderers before a land sale, Audit considers that the Lands D should clearly define "fundamental ambiguity" in the Lands Administration Office Instruction.

Audit recommendations

- 2.9 **Audit has *recommended* that the Director of Lands should:**
- (a) **publicise all relevant enquiries and answers given to prospective tenderers relating to GFA calculation before the close of tendering of a land sale; and**
 - (b) **define clearly in the Lands D's Lands Administration Office Instruction the term "fundamental ambiguity", with reference to the information to be publicised for the benefit of all prospective tenderers.**

Response from the Administration

2.10 The **Director of Lands** generally agrees with the audit recommendations in paragraph 2.9. He has said that:

- (a) the Lands D will only respond to questions of a general nature. In the rather unlikely event that advice is given relating to GFA calculation (not already included in the lease conditions), he agrees to publicise such advice on the Lands D website and in the newspapers; and
- (b) he agrees to incorporate clarification into the Lands Administration Office Instruction guidelines to explain that "fundamental ambiguity" would cover any uncertainty regarding the development parameters such as GFA, site coverage, building height, car parking requirement and provision of government/institution/community (GIC) facilities requirement. However, each case has to be considered in its individual circumstances and it would not be possible to draw up a definitive list.

PART 3: DEVELOPMENT INTENSITY OF THE SITE

3.1 This PART examines the Government's planned development intensity for the development of the Site.

Background

3.2 The Site was originally used as a public transport terminus (PTT). In July 1992, the Government Property Agency (GPA) suggested that the Government should sell the Site for commercial or multi-storey carpark use and entrust the development of a new PTT and marine police parking facilities to the developer.

3.3 In August 1992, the District Lands Office/Hong Kong East (DLO/HKE) of the Lands D expressed its intention to sell the land for commercial/residential purposes. The District Planning Office/Hong Kong (DPO/HK) of the Plan D did not support the proposed residential development from a district planning point of view as such development would inject more population and further aggravate the deficiency in community and educational facilities in the area. It said that according to the then prevailing draft Quarry Bay Outline Zoning Plan (OZP — Note 4), the proposed residential development would require the permission of the Town Planning Board.

3.4 In August 1995, the DPO/HK did not support the DLO/HKE's proposal to sell the Site for commercial use as the Site was located in a predominantly residential neighbourhood and was not designated as a new office node. In February 1996, in response to the DLO/HKE's enquiry about commercial/residential use of the Site, the DPO/HK replied that, further to its views expressed in August 1995, a commercial development might have adverse traffic impact on the road network in the region.

Note 4: *An OZP is a statutory plan prepared and published by the Town Planning Board under the provisions of the Town Planning Ordinance (Cap. 131). It shows the proposed land uses and major road systems of individual planning scheme areas. Areas covered by an OZP are zoned for such uses as residential, commercial, industrial, open space, GIC uses, green belt and other specified purposes.*

3.5 In June 1996, the DLO/HKE suggested a residential development above a new PTT to maximise the development potential of the Site. The Transport Department (TD) said that the new PTT should be on the ground floor and the total GFA required was about 11,500 m².

3.6 **Rezoning of the Site.** In August 1997, in response to heavy housing demand and to increase the housing supply, the Government decided to include the Site in the list for housing development scheduled for disposal in 1999-2000. The Plan D therefore asked the DLO/HKE to comment on the proposal of rezoning the Site from GIC to “residential, public transport terminus, community facilities and commercial” uses to facilitate the housing development.

3.7 In April 1998, the DLO/HKE replied that it did not support the provision of community facilities as this would use up the GFA for residential development and might affect land sale revenue.

1,000 residential flats on the Site notified to Metro Planning Committee

3.8 **Original maximum domestic GFA of 85,720 m².** In July 1998, when the draft Quarry Bay OZP No. S/H21/9 was being amended, the DPO/HK said that the Site would produce 1,008 residential flats, with an average flat size of 85 m². According to the Plan D’s calculation, this was equivalent to a “**maximum permissible domestic GFA**” of 85,720 m² (Note 5). Assuming an average occupancy of 3.5 persons per flat, the planned population was estimated at 3,528.

Note 5: *The Plan D’s calculation had assumed that:*

(a) *the area of the Site was 11,536 m²; and*

(b) *the PTT, the marine police operational area and other commercial and community facilities (i.e. non-domestic GFA of 39,116 m²) would be **included** in the GFA calculation.*

*According to the latest approved building plans of April 2005, the area of the Site was 12,200 m² and the PTT had been **excluded** from the GFA calculation. In addition, the Building Authority had granted bonus areas and the development would not provide any commercial and community facilities. As a result, the domestic GFA was increased (see para. 3.12).*

3.9 In November 1998, the Metro Planning Committee of the Town Planning Board agreed to the proposed amendments to the draft Quarry Bay OZP No. S/H21/9 to rezone the Site from GIC to “Other Specified Uses” annotated “Residential cum Public Transport Terminus, Commercial and Community Facilities”. **The Metro Planning Committee was informed in the discussion paper that the Site would be able to produce “about 1,000 residential flats”.**

3.10 In November 1999, in response to the DLO/HKE’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.

3.11 ***Five 41-storey blocks with 107,950 m² domestic GFA assumed.*** In December 2000, the Valuation Conference (Note 6) of the Lands D assessed the reserve price of the Site on the basis that the development would comprise five 41-storey blocks (1,480 residential units with total domestic GFA of 107,950 m²).

3.12 ***Actual domestic GFA changed.*** According to the latest set of approved building plans of April 2005, 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 (see Photograph 1).

Note 6: *The Valuation Conference is responsible for assessing premium, where the premium exceeds \$50 million. It is chaired by the Deputy Director/Specialist of the Lands D. Its members include the Assistant Director/Valuation, the Chief Estate Surveyor and the Senior Estate Surveyor of the Valuation Section. If necessary, the subject Assistant Director/Regional and the Senior Estate Surveyor responsible for the case may be invited to join as members. The Valuation Conference also considers appeal cases, for which the Deputy Director of Lands/General may chair.*

Photograph 1

Development of the Site as at July 2005



Source: Photograph taken by Audit

Audit observations

Changes in development intensity of the Site

3.13 According to the latest approved building plans, the development of the Site would provide 2,020 residential units, with an average flat size of 67 m². **If calculated according to the Plan D's 1998 method of estimation (see para. 3.8), the planned population intake could reach 5,573 (Note 7), instead of the Plan D's estimation of 3,528 in July 1998 (see para. 3.8).**

3.14 In September 2005, in reply to Audit's enquiry about the increase in development intensity, the Plan D said that:

- (a) the increase in GFA was the result of a number of factors including the increase in the site area, change of classification of the Site (from Class B to Class C), exclusion of the PTT from the GFA calculation (see PART 6), and the granting of bonus areas (see PART 7); and
- (b) it should be noted that the estimated average number of persons per flat had decreased over the years. It is now assumed to be 2.58 persons per flat for the development. This would result in a population of about 5,212. In fact, if the Developer had decided to build fewer but larger flats with the same domestic GFA, the population in the development would be less.

Note 7: *According to the Plan D's 1998 method of estimation, Audit calculated the projected population, as follows:*

$$\begin{aligned}
 \text{Projected population} &= \frac{\text{persons per flat as assumed by the Plan D in July 1998}}{\text{average flat size as assumed by the Plan D in July 1998}} \times \frac{\text{average flat size as per latest approved building plans}}{\text{average flat size as per latest approved building plans}} \times \text{actual number of flats} \\
 &= \frac{3.5}{85 \text{ m}^2} \times 67 \text{ m}^2 \times 2,020 \\
 &= \underline{\underline{5,573}}
 \end{aligned}$$

Provision of open space per person reduced

3.15 According to the Hong Kong Planning Standards and Guidelines (HKPSG — Note 8):

- (a) residential density is a quantitative measure of the intensity with which land is occupied by either development or population; and
- (b) control of residential density is a fundamental component of effective land use planning.

The relative distribution of population has major implications for the provision of community and educational facilities and transport.

3.16 The planning standards in the HKPSG have stipulated the minimum standards for the provision of various community facilities and infrastructure according to the size of population. **In this respect, Audit notes from the HKPSG that in the urban areas, the standard for the provision of local open space is that a minimum area of 1 m² per person should be provided. As the planned population of the Site has been increased, the provision of local open space per person would be reduced in the development (Note 9).**

3.17 ***Audit's enquiry about planning parameters for the Site.*** In May 2005, Audit asked the Plan D about the planning parameters for the Site.

3.18 ***Plan D's reply.*** In July and September 2005, the Plan D said that:

- (a) it had worked out the estimate of 1,000 flats from the area of the Site and an assumed plot ratio and average flat size. It made the estimate when the Site was included in the list of housing sites prepared under the Steering Committee on Land Supply for Housing. The estimate did not represent the maximum number of flats that would be developed on the Site (Note 10);

Note 8: *The HKPSG is a set of guidelines for application in planning studies, the preparation/revision of town plans and development control.*

Note 9: *In addition to local open space, the HKPSG also stipulates that a minimum area of 1 m² per person of **district** open space should be provided.*

Note 10: *However, Audit noted in the Plan D's calculation made in July 1998 that the 1,008 residential flats were derived from a maximum permissible domestic GFA of 85,720 m² (see para. 3.8) and non-domestic GFA of 39,116 m² for the Site.*

- (b) when a proposed amendment to the OZP was circulated for departmental comments before submission to the Town Planning Board, the Plan D would normally need to work out a notional scheme indicating the possible development mix and a set of parameters for other departments to assess its acceptability on various technical aspects;
- (c) the notional scheme was only to provide a rough estimate based on a set of planning assumptions. It did not in any way reflect a planning intention of a fixed number of flats. The developer had the flexibility to determine the appropriate development mix (mix of residential and commercial GFA) and range of flat sizes to meet market demand;
- (d) in planning comprehensive residential developments, it was not uncommon to require the provision of local open space according to the standard in the HKPSG;
- (e) it had worked out the open space requirement of 2,880 m² (a lease requirement) in December 1999 by basing on the standard of 1 m² per person and the estimated number of flats. As the actual number of flats provided was more than that estimated, this might result in a larger population with a bigger demand for local open space. The extra need from the additional population would be met by open space provided in the surrounding area;
- (f) according to the HKPSG, open space both at ground level and on podium provided in residential and commercial/residential developments, which was accessible to residents, was countable for open space calculation. In 1999, the open space calculation did not include the open space provided on the podium within the development. After taking into account such provision in the calculation of open space, which was in line with the HKPSG, there was adequate provision of open space in Quarry Bay for the planned population of the area; and
- (g) based on the Plan D's latest assessment, the need for community and educational facilities according to the HKPSG could be met by the existing or planned facilities in the district (Note 11).

Note 11: *Audit noted that, in December 1999, the Plan D said that there was a shortage of local open space in the surrounding area of the Site and the Site should be self-contained in terms of local open space provision.*

3.19 ***Improvement in planning land use.*** Audit notes that there may be a time gap between the planning of the land use of a site and its sale. **Audit considers that, to have better control over population density so as to ensure that adequate community facilities and infrastructure would be provided, the Plan D should reassess the need for public facilities at a time nearer to the sale of a site. The reassessment should take into account the adequacy of facilities in the district and not just for a particular development.**

Importance of implementing planned development intensity

3.20 In October 2003, the Plan D, together with the Department of Architecture of the Chinese University of Hong Kong and a team of local and international experts, commissioned a Feasibility Study for Establishment of Air Ventilation Assessment System. In May 2005, the Plan D published the report of the Study, which demonstrated the importance of implementing the planned development intensity of a site. The report identified that tall and “bulky” buildings closely packed together forming an “effective windbreak” was one of the problems facing urban Hong Kong. As one of its qualitative guidelines, the Study proposed that the obstruction of sea and land breezes should be avoided to help achieve better air ventilation.

3.21 The Plan D said that before the launch of the Study, various measures (such as introducing planning guidelines, revising OZPs, and setting restrictions on building height) had been adopted to improve air flow. It would revise the relevant sections on improving air flow in the HKPSG in 2005.

Incorporation of planned development intensity into lease conditions more effective

3.22 Audit welcomes the Government’s effort to implement its site development requirements in new developments. **However, having regard to the time and effort required for revising OZPs, it may be more effective to directly incorporate the development intensity, if the Government has planned one, into the lease conditions (Note 12).**

Note 12: *The importance of incorporating the Government’s planning intention into the lease conditions of a site for sale was raised in the Director of Audit’s Report No. 21 in October 1993. In that specific case, due to a loophole in the lease conditions of a site in Garden Road, the Government’s planning intention in respect of the development of the site was not met. In the event, the developer built a 31-storey building, instead of a 6 or 7-storey building that the Government had intended.*

3.23 ***Audit's enquiry.*** In June 2005, in reply to Audit's enquiry, the BD said that, in response to an application for modification or in the exercising of a discretionary power, the Building Authority would consider all relevant factors including the effect on density, building bulk and infrastructure. Reference to any promulgated planning intention would assist the Building Authority in making his decision after assessing the effects of density, building bulk and infrastructure.

3.24 The BD also said that the Building Authority could not disapprove a set of building plans merely on the grounds of contravention of the planning intention. The contravention of planning intention per se was not one of the grounds for disapproval. Contravention of any approved or draft plan prepared under the Town Planning Ordinance (which is an expression of planning intention) is one of the grounds for disapproval under section 16 of the Buildings Ordinance.

3.25 At a meeting in April 2005, the Housing, Planning and Lands Bureau, the BD, the Lands D and the Plan D agreed that:

- (a) "the planning intention under the town plan" was that PTTs should be included in GFA calculation unless there was an express provision in the OZP for the exemption, or such exemption was covered by a planning permission; and
- (b) the Building Authority would follow the planning intention in exercising his discretion "in granting GFA exemption for PTT".

Audit recommendations

3.26 ***Audit has recommended that the Director of Planning should:***

- (a) **having regard to the need to achieve more effective land use planning and control over population density so that there would be adequate community facilities and infrastructure:**
 - (i) **as far as practicable, stipulate in the relevant OZP the maximum GFA that can be supported by the public facilities; and**
 - (ii) **update the Plan D's assessment on the provision of public facilities in a district before the sale of a site and inform the relevant government departments if necessary; and**

- (b) **where appropriate, before the sale of a site, advise the Director of Lands on the maximum GFA that can be allowed for the development of the site.**

3.27 **Audit has recommended that the Director of Lands should, where appropriate, incorporate into the lease conditions the site development requirements of the HKPSG.**

Response from the Administration

3.28 The **Director of Planning** generally agrees with the audit recommendations in paragraph 3.26. He has said that:

- (a) it is the Plan D's existing practice to incorporate the maximum GFA or the maximum plot ratio for sites in different zones in the OZP where appropriate. If the planned maximum plot ratio or GFA is only stipulated in the adopted layout plan, it will be incorporated into the lease conditions as appropriate;
- (b) it is the Plan D's existing practice to update the assessment on the provision of public facilities in individual districts on a periodical basis to tie in with the preparation and revision of district plans. If particular shortfalls are identified, the Director of Lands will be advised before the finalisation of the Conditions of Sale; and
- (c) it is also the Plan D's general practice to advise the Director of Lands on the maximum GFA that can be allowed for the development of a site.

3.29 The **Director of Lands** agrees with the audit recommendation in paragraph 3.27. He has said that it is the Lands D's current practice to incorporate into the lease conditions the site development requirements of the HKPSG. However, if the site development requirements relate to the provision of GIC facilities but the relevant user departments cannot take up the facilities for maintenance and management due to the lack of a development programme, or funding approval, after consultation with the user departments concerned, the Lands D will not require provision of such facilities under the lease conditions.

PART 4: PROVISION OF GOVERNMENT ACCOMMODATION

4.1 This PART examines the provision of the Government Accommodation at the Site.

Provision of Government Accommodation

4.2 As mentioned in paragraph 1.2, Special Condition 12 of the lease conditions required the Developer to provide, on a reimbursement basis, the following Government Accommodation:

- (a) one marine police operational area (MPOA), with a net operational floor area of not less than 1,500 m²; and
- (b) one PTT, including a public transport interchange and a cross boundary coach terminus.

4.3 ***MPOA parking requirements.*** According to the Technical Schedule of the MPOA attached to the lease conditions:

- (a) there should be “71 parking bays or others” approved by the Commissioner of Police and the Director of Architectural Services; and
- (b) the design of the parking bays should allow vehicles to “stack, enter and exit the parking bays directly, safely and smoothly in forward gear, and also shall allow for use as vessel storage area if and when required” by the Hong Kong Police Force (HKPF).

Planning for marine police operational area

1,500 m² requested for MPOA

4.4 In September 1998, at a meeting in the GPA’s office (Note 13) to consider the funding and reprovisioning of the Marine Police Regional Headquarters facilities, the HKPF said that the marine police needed space for about 71 vehicles (including lorries, vans, saloon cars and motor cycles) as permanent operational space. The space requirement had been fully vetted and approved by the GPA.

Note 13: *The meeting was chaired by a Senior Property Manager of the GPA and attended by representatives from the then Finance Bureau, the DLO/HKE, the ArchSD and the HKPF.*

4.5 On 5 November 1998, at a meeting held among representatives from the GPA, the DLO/HKE, the DPO/HK, the ArchSD, the TD and the HKPF, it was concluded that the marine police preferred a square or rectangular space of about 1,500 m² usable area on the ground floor of the Site.

Sketch layout plan indicated that 3,200 m² was required

4.6 After the meeting on 5 November 1998, the ArchSD informed the relevant bureau/departments that, based on its assessment, the approximate area of the 71 parking bays was 3,200 m². The ArchSD also attached a sketch layout plan showing the position of the parking bays.

ArchSD's assessment of 3,200 m² considered excessive

4.7 Both the DLO/HKE and the GPA considered that the ArchSD's assessment of 3,200 m² was excessive. The DLO/HKE requested the ArchSD to explore the possibility of making use of the high headroom for a vehicle stacking arrangement.

4.8 In mid-November 1998, upon receipt of the TD's draft client project brief on the PTT, the ArchSD commented that:

- (a) the parking bay and turning area requirements were affected by the size of the large vans involved; and
- (b) at least one more parking floor was required to provide enough space for circulation and parking.

HKPF accepted 1,500 m² of space

4.9 In late November 1998, the HKPF accepted the proposed layout of the MPOA with 1,500 m² of space on the ground floor. The GPA said that it had no further comments. Accordingly, the client project brief included 1,500 m² for the MPOA. The client project brief showed that the ArchSD had confirmed that "the expected project requirements are achievable and will form the basis of the Preliminary Project Feasibility Study" (Note 14). The client project brief was attached to the "Preliminary Project

Note 14: *The Preliminary Project Feasibility Study procedure, which was introduced in 1994, helped define clearly the project scope and make realistic estimates on costs, the time and resources required. In this case, the Security Bureau and the then Transport Bureau, the Highways Department (HyD), the TD, the ArchSD, the HKPF and the Lands D were involved in the Preliminary Project Feasibility Study.*

Feasibility Study Report for Public Transport Interchange, Cross Boundary Coach Terminus and an Operational Area for the Marine Police in Sai Wan Ho” of September 1999.

Prospective tenderer considered 1,500 m² not feasible

4.10 Before the tender closed on 8 December 2000, in November 2000, a prospective tenderer (not the Developer) informed the Lands D that it was not feasible to accommodate all the facilities as required under the MPOA Technical Schedule within the minimum net operational floor area of 1,500 m², if the design of the parking bays layout was that it would allow vehicles to enter and exit the parking bays in “**forward gear only**” (see para. 4.3(b)).

4.11 In response to the Lands D’s enquiry, in early November 2000, the HKPF accepted that the “forward gear only” design of the parking bays was unnecessary on the understanding that it would not affect the MPOA entrance/exit.

Lands D’s views on responsibility

4.12 In November 2000, the Lands D said that:

- (a) the ArchSD needed to take note of the GIC requirements when drawing up the Special Conditions and Technical Schedules. In this case, the ArchSD should be responsible for ensuring that all the requirements in the Technical Schedules could be implemented (Note 15);
- (b) the size and appropriateness of the Government Accommodation was decided after the Preliminary Project Feasibility Study (see para. 4.9). The role of the Lands D would probably be limited to the confirmation of the delivery of the Site;
- (c) it might not be fair and appropriate for the District Lands Conference (Note 16) to question the validity of the Government Accommodation unless there was a

Note 15: *Audit noted that the DLO/HKE actually commented on the area requirement of the MPOA (see para. 4.7).*

Note 16: *The District Lands Conference is chaired by an Assistant Director of Lands/Regional. Its members include the responsible District Lands Officer, the case officers and representatives from other government departments concerned. The terms of reference include the consideration, in the light of overall land policy and land instructions, of the terms and conditions for the disposal of land.*

fundamental drawback (e.g. it could not be accommodated within the permissible plot ratio and site coverage) for its provision; and

- (d) in this regard, the Lands D would draw the ArchSD's attention to this incident of lack of warning to the District Lands Conference if it turned out to be an oversight by the ArchSD staff on the "forward gear only" design of the parking bays.

4.13 ***Statement issued to tenderers.*** On 20 November 2000, the Lands D issued a statement to the prospective tenderers informing them that it was not necessary to have the "forward gear only" design for the MPOA parking bays.

Change in design of Government Accommodation

Extension of PTT to Reserved Areas

4.14 On 4 January 2001, the Site was sold by tender. At a Building Authority Conference (BAC — Note 17) of 1 August 2001, the Authorised Person (AP — Note 18) for the Developer said that:

- (a) the areas allocated for the MPOA in the Control Drawing attached to the lease conditions were not realistic. Extra space was required to meet the MPOA requirements specified in the Technical Schedule; and
- (b) 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" (hereinafter referred to as the Reserved Areas) on the ground floor.

Note 17: *The BAC provides a forum for the Building Authority to take decisions or give advice on issues arising from the administration of the Buildings Ordinance. The Director of Buildings is the Building Authority. The issues include: (a) decisions of the Building Committee; (b) formal appeals to the Appeal Tribunal against the decisions of the Building Authority; and (c) appeals against or requests for review of the decisions of the Assistant Directors and Deputy Director of the BD. The BAC is chaired by the Director of Buildings. Its members include the Deputy Director, the Assistant Director/Support, the Assistant Director (case officer) and an Assistant Director of the BD.*

Note 18: *An Authorised Person is a person whose name is on the Authorised Persons' Register kept under section 3(1) of the Buildings Ordinance as an architect, an engineer or a surveyor.*

4.15 ***Building Authority granted bonus areas.*** 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.

4.16 At the BAC of 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 use as PTT (see PART 7).

Construction of Government Accommodation

4.17 After the BAC of 1 August 2001, the ArchSD, the TD and the HyD opined that the Government Accommodation could be constructed in accordance with the Control Drawings and the Technical Schedules. **They 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.** The Lands D did not agree to granting bonus areas.

No grounds to reject the proposed layout

4.18 On 6 June 2002, at a Building Committee III (BC III — Note 19) meeting to discuss the Government Accommodation, the AP said that it was not feasible to accommodate the requirements under the original design in the Control Drawings. He also said that his proposal would achieve better arrangement in terms of ventilation and vehicular and pedestrian traffic. The Chairman of BC III directed that the issue should be resolved within the Lands D as it involved purely lease matters.

4.19 ***AP's proposal deviated from Technical Schedule.*** After the BC III meeting, the Lands D stated that the AP's proposal deviated significantly from the Technical Schedule. The Lands D asked whether the ArchSD had any objection to requiring the AP to revert to the original MPOA layout. In late June 2002, the ArchSD responded that there were no grounds to reject the AP's proposal because:

- (a) the Control Drawing attached to the lease conditions was "for information only" and was "not to scale". The line shown on the Control Drawing should not be taken as a rigid boundary for the MPOA;

Note 19: *BC III is chaired by the Deputy Director of Lands/Specialist. Its members include representatives from the ArchSD, the BD, the HyD, the TD, the Plan D and the Senior Estate Surveyor/Building Plan of the Lands D. Its terms of reference are to consider building plans, master layout plans and routine building matters.*

- (b) the AP's proposed net operational floor area of 2,028 m² was not significantly in excess of the 1,500 m² required; and
- (c) if the Developer was required to design the MPOA within a narrow strip of area where double-loaded stacking arrangement of vehicles could not be applied efficiently, it might be necessary to reduce the number of parking bays. It would be up to the HKPF to decide on the number to be reduced, or to require the Developer to submit another proposal (e.g. stacking of vehicles).

Reduction in parking bays and vehicle stacking not pursued

4.20 As far as could be ascertained from the Lands D's records, the Lands D had not asked the HKPF and the ArchSD to study further the issue about the reduction in the number of parking bays and the practicality of vehicle stacking. In the statement issued to prospective tenderers (see para. 4.13), the Lands D had not stated that the Government would accept a reduction in the number of parking bays for the MPOA.

Lands D did not approve building plans of Government Accommodation

4.21 According to Special Condition 13 of the lease conditions, the building plans of the Government Accommodation should be approved by the Director of Lands. In July 2002, the Lands D did not approve the AP's building plans for the Government Accommodation because of non-compliance with the Control Drawings.

4.22 ***AP's argument.*** In early September 2002, the AP informed the Lands D that the original layout could not be followed if the lease conditions in relation to the provision of the Government Accommodation were to be complied with. The AP also mentioned that the revised layout of the Government Accommodation (with bonus areas) had been approved by the Building Authority on 1 September 2001.

4.23 In reply, the Lands D advised the AP that:

- (a) the government departments concerned had advised that the layout stipulated in the Control Drawing was feasible and achievable; and
- (b) the Building Authority's approval of building plans under the Buildings Ordinance was a separate issue. Such approval should not be construed to mean that separate approval from the Lands D in connection with the lease requirements was not needed.

Strict adherence to Control Drawing not possible

4.24 In November 2002, the Legal Advisory and Conveyancing Office of the Lands D advised that any amendments to the layout shown on the Control Drawing should be treated as an amendment to the Technical Schedule. Such an amendment required the prior approval of the Lands D, for which a premium might be charged (see PART 7). In January 2003, both the ArchSD and the TD confirmed to the Lands D that the new layout was acceptable. Furthermore the ArchSD acknowledged that strict adherence to the scheme according to the Control Drawing was not possible. The HKPF also said that it relied on the ArchSD's advice on technical issues. In September 2003, the Lands D approved the revision of the layout of the Control Drawings in the Technical Schedules after the Developer paid a premium of \$6 million (see paras. 7.26 and 7.27).

Audit observations

4.25 ***Audit's enquiry.*** In mid-May 2005, Audit asked the ArchSD why it considered a minimum area of 1,500 m² was sufficient and whether the Lands D had consulted it in respect of the AP's claim that it was not feasible to accommodate the MPOA facilities within the area allocated.

4.26 In May 2005, the ArchSD said that:

- (a) the minimum net operational floor area of 1,500 m² in the Technical Schedule of the MPOA was derived from the client project brief of the HKPF (see para. 4.9). Flexibility in achieving the HKPF's accommodation was further facilitated in the Technical Schedule by allowing vehicle stacking and the partial provision of parking bays, subject to the HKPF's acceptance; and
- (b) the Lands D had sought the ArchSD's comments. The ArchSD had said that, because of the flexibility built into the Technical Schedule, the AP's proposal met the minimum net operational floor area of 1,500 m². The Technical Schedule indicated the total number of parking bays required, but did not elaborate on how this was to be achieved. **The AP had the option of either providing a larger net operational floor area than the minimum, or reducing the number of parking bays (with the HKPF's agreement) and/or introducing vehicle stacking.** All these matters had been conveyed to the DLO/HKE and the HKPF.

Options of vehicle stacking and reduction in parking bays not pursued

4.27 ***Vehicle stacking.*** As far as could be ascertained from the Lands D's records, Audit could not find any study to explore the option of vehicle stacking, despite the ArchSD's comments on such a possibility (see para. 4.19(c)) and the fact that the lease conditions allowed for such an option (see para. 4.3(b)).

4.28 ***Reduction in number of parking bays.*** The Lands D had not asked the HKPF and the ArchSD to further study the option of reducing the number of parking bays (see para. 4.20) when:

- (a) the Lands D said that the ArchSD's assessment of 3,200 m² was excessive (see para. 4.7); and
- (b) the ArchSD said that it had no grounds to reject the MPOA layout (see para. 4.19).

As the Government had not pursued the matter, the statement issued by the Lands D to the prospective tenderers on 20 November 2000 did not include such an option.

Adequacy of MPOA area in lease conditions

4.29 The Lands D said that the checking of the design requirement of the Government Accommodation for drawing up the Special Conditions and Technical Schedules of the Site needed to be improved (see para. 4.12(a)). The Lands D said that such an incident could have been identified and avoided at an earlier stage if the District Lands Conference had been warned before it approved the lease conditions of the Site (see para. 4.12(d)). **Audit noted that, from the outset, the ArchSD said that 1,500 m² was not adequate (see paras. 4.6 to 4.8). However, the departments concerned 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.**

4.30 Audit noted that the ArchSD had seen the draft client project brief and confirmed that the expected project requirements were achievable (i.e. 1,500 m² for the MPOA — see para. 4.9). However, the ArchSD later said that there were no grounds to reject the AP's proposed MPOA layout because the Control Drawing was "not to scale" (see para. 4.19).

Audit recommendations

4.31 **Audit has recommended that the Director of Architectural Services should, before the sale of a site where GIC facilities are to be provided by the developer:**

- (a) **ensure that the GIC design requirements are, where appropriate, properly drawn to scale in the layout drawings for incorporation into the lease conditions of the site; and**
- (b) **notify the Lands D or the relevant government departments to make changes to and finalise the GIC design parameters to be included in the lease conditions, if the ArchSD considers that implementation of the original design parameters is not feasible.**

4.32 **Audit has also recommended that the Director of Lands should, where appropriate, pursue other feasible options with the relevant government departments to implement the GIC design requirements before the close of tendering if there are doubts about the original proposal.**

Response from the Administration

4.33 The **Director of Architectural Services** agrees with the audit recommendations in paragraph 4.31.

4.34 The **Director of Lands** generally agrees with the audit recommendation in paragraph 4.32. He has said that if doubts are raised by prospective tenderers on the feasibility of GIC design requirements, the Lands D will refer them to the user department. The pursuit of any feasible alternative designs is a matter for consideration and action by the user department. The Lands D will advise the prospective tenderers of the outcome of such relevant consideration and publish the relevant information before the sale of a site is successfully triggered (Note 20), so that all prospective tenderers will be aware of the matters affecting the originally proposed GIC design requirements.

Note 20: *Under the Reserve List of Sites Available for Application system, a developer interested in any site may offer a minimum price for the site. If the Government considers the offer acceptable, it will gazette the site for sale after the developer signs an undertaking to bid for the site at the minimum price and pays a deposit.*

PART 5: SITE CLASSIFICATION

5.1 This PART examines the classification of the Site under the Buildings Ordinance.

Site classification

Background

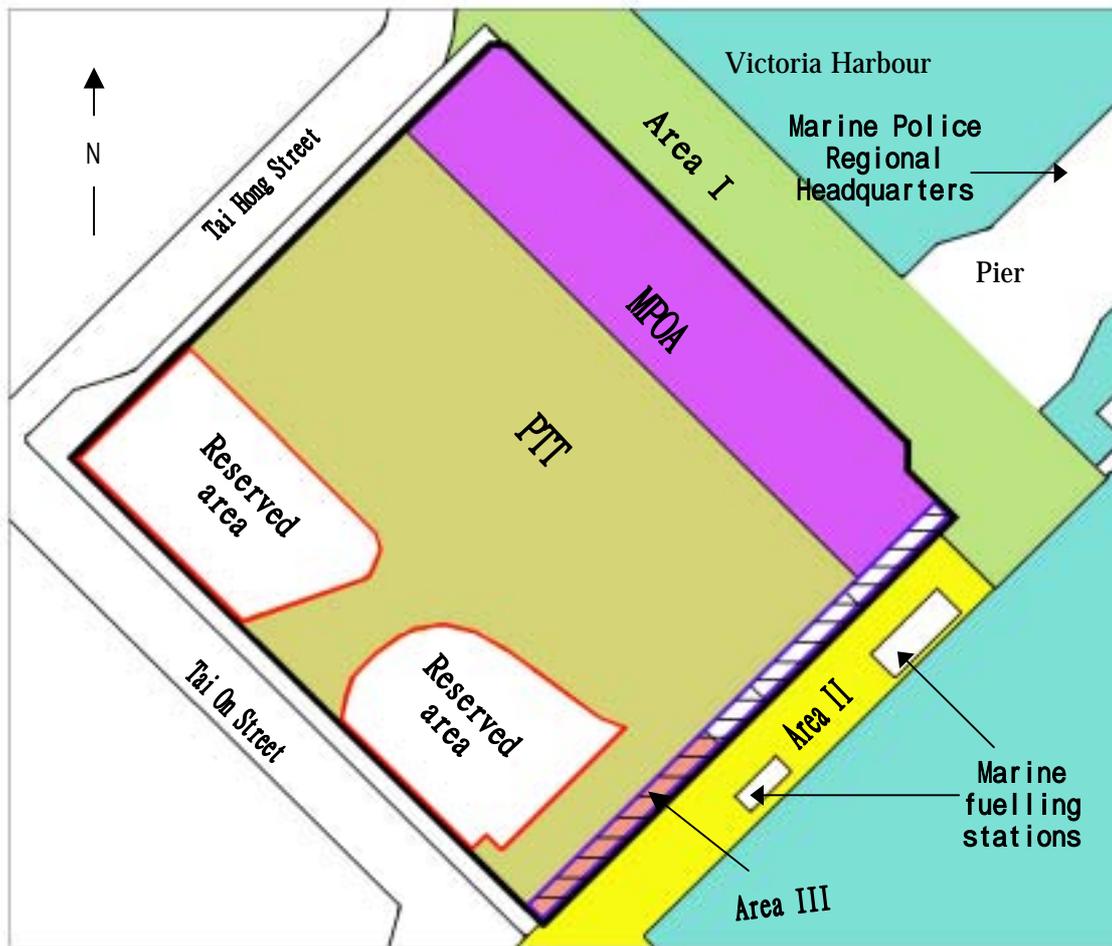
5.2 Figure 2 is a location map showing the streets abutting on the Site. In April 1998, the BD informed the Plan D that:

- (a) the Site was abutting on two streets forming a corner site. The Site could be developed to **Class B** density (Note 21) under the B(P)R;
- (b) if either one or both of the strips of land at the north-eastern boundary (i.e. Area I in Figure 2) and the south-eastern boundary (i.e. Area II in Figure 2) were constructed as public roads of not less than 4.5 metres wide and completed prior to the issuing of the occupation permit, the Site could be developed to **Class C** density (see Note 21); and
- (c) alternatively, in order to qualify as a **Class C** site, the developer might propose a 4.5 metres wide street along either the north-eastern or south-eastern boundary. **The area of the proposed street should be excluded from the site area.**

Note 21: *Regulation 2 of the B(P)R defines three different classes of sites. The First Schedule of the B(P)R specifies the maximum plot ratios permitted for domestic and non-domestic buildings under the three different classes of sites:*

- (a) *Class A* a site, not being a Class B site or a Class C site, that abuts on one street not less than 4.5 metres wide or on more than one such street. The maximum plot ratio permitted for a domestic building is 8, and that for a non-domestic building is 15;
- (b) *Class B* 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. The maximum plot ratio permitted for a domestic building is 9, and that for a non-domestic building is 15; and
- (c) *Class C* 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. The maximum plot ratio permitted for a domestic building is 10, and that for a non-domestic building is 15.

Figure 2
Location map showing streets abutting on the Site



- Legend:
-  The Site boundary
 -  MPOA Marine police operational area indicated in the Control Drawing
 -  PTT Public transport terminus indicated in the Control Drawing
 -  Area I Area I located at the north-eastern boundary of the Site
 -  Area II Area II located at the south-eastern boundary of the Site
 -  Area III Area III was an area of about 194 m² non-building area demarcated in the lease conditions
 -  Non-building area

Source: Lands D records

The Site considered as a Class B site

5.3 In January 1999, after conducting a site inspection, the Chief Building Surveyor of the BD advised the Lands D that the Site was a **Class B site**. The BD considered that it did not have the characteristic of a Class C site because:

- (a) **the draft OZP No. S/H21/10 had designated the north-eastern and south-eastern strips of land (i.e. Areas I and II in Figure 2) as “open space”. In the BD Manual, open space could not be accepted as street for site classification purpose under B(P)R 2;**
- (b) the proposed construction of a promenade (in Areas I and II) was not finalised. As the marine fuelling stations had not been removed, the area should not be regarded as a street under the Buildings Ordinance;
- (c) following the advice of the Department of Justice given in another development which also concerned site classification, the Building Authority should consider the facts and the circumstances of the case at the time and not the possibility of development in the future; and
- (d) it was not known whether a right of way over the future promenade in Areas I and II would be granted to the general public.

Demarcating non-building area to qualify as Class C site

5.4 In September 1999, to maximise the development potential, the DLO/HKE asked the BD whether the following proposals could change the Site into Class C:

- (a) ***Proposal 1:*** to classify a portion of Area II as a street under the B(P)R; and
- (b) ***Proposal 2:*** to classify an area (i.e. Area III in Figure 2) 4.5 metres in width as a street. Its length would be determined so that at least 60% of the boundary abutted on the street. It should be deducted from the site area in plot ratio and site coverage calculations.

5.5 In October 1999, the BD replied that:

- (a) Proposal 1 could not qualify the Site as Class C because Area II was not a street under section 2 of the Buildings Ordinance; and

- (b) concerning Proposal 2, it could consider Area III as a street under the Buildings Ordinance if:
- (i) **Area III was deducted from the site area in plot ratio and site coverage calculations;**
 - (ii) relevant government departments such as the TD and the HyD would give favourable support;
 - (iii) no building works should be constructed above and below Area III;
 - (iv) Area III should be open to public passage at all times; and
 - (v) the site boundary of the frontages was up to 60% of the entire site boundary.

5.6 ***Special Condition introduced.*** In December 1999, to qualify the Site as Class C, the Lands D incorporated a Special Condition in the lease. The Special Condition stated that Area III of about 194 m² would be demarcated as a non-building area and should be open to public passage at all times. In December 2000, in estimating the reserve price of the Site, the Lands D excluded Area III from the site area adopted for the GFA and plot ratio calculations.

Change of classification of the Site

5.7 The Lands D sold the Site by tender in January 2001. In March 2001, the AP informed the BD that Area III should not be excluded from the site area for plot ratio calculation as Area II should be considered as a street for site classification purpose.

5.8 ***Building plans disapproved.*** In April 2001, the AP submitted building plans on the basis of a Class C site. The Building Authority disapproved the plans and said that it was a Class B site. In July 2001, the AP re-submitted the building plans still on the basis of a Class C site. In view of the AP's claim, the BD asked the DLO/HKE to confirm the land status/use of Area II.

5.9 In July 2001, the DLO/HKE replied that:

- (a) Area II included two pieces of land granted to an oil company for use as marine fuelling stations for a term of 21 years (from 3 May 1991 to 2 May 2012). Under the Quarry Bay OZP No. S/H21/14 gazetted on 2 February 2001, the two sites were zoned “Other Uses” annotated “marine fuelling station”; and
- (b) the other parts of Area II were zoned “Open Space”.

Building Authority Conference accepted Class C classification

5.10 ***AP’s arguments.*** On 1 August 2001, the Building Authority convened a BAC (see Note 17 in para. 4.14) to consider the classification of the Site. At the BAC, the AP presented his case and said, among other things, that Area II:

- (a) was an access road of more than 4.5 metres wide. It served as the emergency vehicular access to the two marine fuelling stations, a public landing area and the Marine Police Regional Headquarters. It fell within the definition of street under the Buildings Ordinance; and
- (b) was zoned “Open Space” on the OZP No. S/H21/14 and its permanent use was certain.

5.11 ***Plan D’s views.*** At the BAC, the DPO/HK said that:

- (a) it was the planning intention to develop Area II into a promenade, connecting it with that planned in Aldrich Bay and the Quarry Bay Park;
- (b) it was intended that the piers occupied by the marine police would be used as recreational areas when the marine police no longer needed them, and Area II would become an emergency vehicular access to the piers; and
- (c) Area II was zoned “Open Space” on the OZP with the exception of the two marine fuelling stations.

5.12 **Lands D's views.** At the BAC, the Lands D representative said that during tender preparation in 1999, the DLO/HKE had sought clarification from the BD on whether Area II could be classified as a street. The BD had replied that it did not regard Area II as a street under section 2 of the Buildings Ordinance. To qualify the Site as Class C site, Area III of 4.5 metres wide had been earmarked as a non-building area for public passage (see para. 5.6).

5.13 **BAC members' views.** The BAC considered 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) 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.

5.14 Having considered the above views, the Building Authority agreed that Area II was a street under the Buildings Ordinance and the Site was a Class C site. On 1 September 2001, the Building Authority approved the building plans with the indication that the Site was a Class C site. **The Building Authority did not require the Developer to exclude Area III from the site area in the plot ratio and site coverage calculations.**

Audit observations

Development intensity increased after the land sale

5.15 **Audit's enquiry.** In May 2005, Audit sought the BD's views on the classification of the Site and the increase in development intensity. In June 2005, the BD said that:

- (a) based on photo records, the physical status of the access road (Area II) had remained more or less the same before and after the land sale;
- (b) the BAC decision on 1 August 2001:

- (i) ruled that the Site was a Class C site;
 - (ii) implied that the maximum development intensity was higher than that in the hypothetical case quoted (Note 22); and
 - (iii) was not a decision to increase the development intensity of the Site. The determination of site classification was a decision made in accordance with the provisions of the Buildings Ordinance. What followed from the determination, including the increased development intensity of the Site was a natural result from the BAC decision;
- (c) **it was factual that the BAC decision on 1 August 2001 overruled the decision made by the Chief Building Surveyor in January 1999 (see para. 5.3); and**
- (d) the BD would take into account all relevant factors when considering whether an emergency vehicular access, an access road or a public passage would constitute a street. The BD would consider the guidelines laid down in Practice Note for Authorised Persons and Registered Structural Engineers (PNAP) 263 (Note 23) for determining what constituted a street for the purpose of site classification.

5.16 ***Area III included in site area calculation.*** The site classification determines the permitted plot ratio of the Site under the B(P)R. The permitted plot ratio in turn determines the development potential (i.e. the total GFA) and the value of a site. Audit welcomes the Lands D's initiative to increase the development potential of the Site by proposing to provide a street within its boundary (i.e. Area III) so as to qualify it as Class C (see para. 5.5(b)). According to the lease, Area III should be demarcated as a non-building area open to public passage at all times. Hence, the Lands D and the prospective tenderers might consider that Area III had to be excluded from the site area for the purpose of Class C plot ratio and site coverage calculations. In fact, the Lands D had deducted Area III from the site area calculation when it carried out the reserve price valuation (see para. 5.6). **However, at the BAC on 1 August 2001 (i.e. after the sale of the Site), the Building Authority agreed that the Site was Class C without requiring the Developer to provide a street (i.e. Area III) within its boundary. Therefore, it was not necessary to exclude Area III from the site area calculation.** The development intensity of the Site was increased due to the increase in the resultant GFA.

Note 22: *When the Lands D carried out the reserve price valuation in December 2000, an area of 194 m² was deducted from the site area in the assumed development (see para. 5.6) to qualify the Site as Class C.*

Note 23: *PNAP 263, which was issued in October 2001, states that the nature of a street (i.e. a private or public street) would affect the site classification of a site.*

5.17 **Audit considers that:**

- (a) **in deciding the site classification before the land sale, the BD should have sought clarification from other government departments to ascertain if there were relevant factors that would affect the site classification.** For example, the BD should have clarified with the Plan D about the planned use of the land adjacent to the Site before deciding the site classification (see paras. 5.11 and 5.13); and
- (b) **it might be unfair to other tenderers in the sale of the Site as the BD had subsequently changed its decision on the site classification, i.e. Area III would be included in the site area calculation. This has increased the development intensity of the Site after the land sale.**

5.18 ***Recent developments.*** With regard to the criteria of street that needs to be satisfied for the purpose of site classification under the Buildings Ordinance (Note 24), **Audit notes that the BD has refined the criteria of “street” for site classification purposes in the Building (Planning) (Amendment) Regulation 2005 published in the Gazette on 30 June 2005 and tabled in the Legislative Council on 6 July 2005 for negative vetting (Note 25). The amendment regulation will come into effect on 31 December 2005.**

Audit recommendations

5.19 **Audit has *recommended* that the Director of Buildings should:**

- (a) **prior to the sale of a site, seek clarification from the relevant government departments to ascertain if there are factors affecting the site classification;**

Note 24: *The problem of site classification was also raised in the Director of Audit’s Report No. 37 in October 2001. In response, the BD agreed to refine the definition of street under the B(P)R.*

Note 25: *Subsidiary legislation may go through negative vetting procedure by which it is first published in the Gazette and then laid on the table of the Legislative Council at its meetings. The Legislative Council may amend a piece of subsidiary legislation by a resolution passed at a Legislative Council meeting held not later than 28 days after the meeting at which it was so laid. This period for scrutinising and amending subsidiary legislation is called the vetting period. Unless otherwise provided for in the subsidiary legislation concerned, a piece of subsidiary legislation comes into operation on the day it is published in the Gazette. It continues to operate unless a resolution to amend it has been passed and until the date of publication in the Gazette of such a resolution.*

- (b) **in connection with the sale of land, consider seeking legal advice to clarify legal ambiguities about site classification before giving advice to other government departments; and**
- (c) **take into account the criteria of street which needs to be satisfied for the purpose of site classification under the Building (Planning) (Amendment) Regulation 2005 so as to determine, beyond doubt, the development intensity of a site before sale.**

Response from the Administration

5.20 The **Director of Buildings** agrees with the audit recommendations in paragraph 5.19. He has said that:

- (a) the BD has already adopted a new procedure whereby advice on site classification for sale sites, land exchange or lease modification cases is given by the BAC only; and
- (b) the BD will take into account the criteria of street which needs to be satisfied for the purpose of site classification under the Building (Planning) (Amendment) Regulation 2005 so as to determine, beyond doubt, the development intensity of a site before sale.

PART 6: GRANTING OF EXEMPTION AREAS

6.1 This PART examines the granting of exemption areas under the Buildings Ordinance in the development of the Site.

Background

6.2 ***Government Accommodation to be included in the GFA calculation.*** In November 1999, when the Lands D circulated the draft Special Conditions of the Site to various government departments for comments, the BD advised the Lands D that the Government Accommodation (i.e. the PTT and the MPOA — see para. 1.2) should be **included** in the GFA calculation under B(P)R 23(3)(a) (see also para. 6.22).

6.3 Section 42 of the Buildings Ordinance authorises the Building Authority to permit, where special circumstances render it desirable, by notice in writing modifications of the provisions of the Buildings Ordinance. The Building Authority is empowered to:

- (a) grant bonus areas by approving building plans that exceed the permitted plot ratio (hereinafter referred to as the bonus area); and
- (b) exempt areas dedicated for public use from GFA calculation.

6.4 In February and March 2001, the AP asked the BD whether the Government Accommodation could be excluded from the GFA calculation under the Buildings Ordinance.

6.5 ***BD's view.*** In March 2001, a Senior Building Surveyor of the BD commented that:

- (a) **the general approach adopted by the BD was that the PTT should be included in GFA calculation;** and
- (b) in exercising the discretionary powers of the Building Authority on modifications and exemptions, the Building Authority should look for special circumstances justifying the application, such as:
 - (i) public interest;

- (ii) protection or enhancement of standards of health, safety and of the environment;
- (iii) improvement of the quality of life for occupants or nearby residents; and
- (iv) justice consideration, including rules of law and equity, i.e. precedent case or court ruling.

In mid-March 2001, a Chief Building Surveyor said that, for GFA exemption under section 42 of the Buildings Ordinance, only special circumstances or design would be considered. In general, government accommodation should be included in the GFA calculation.

6.6 ***First submission of building plans.*** In June 2001, the Building Authority disapproved the building plans submitted by the AP which had excluded the Government Accommodation from the GFA calculation. The Building Authority considered that the Government Accommodation should have been included in the GFA calculation under B(P)R 23(3)(a).

6.7 ***Building plans resubmitted.*** On 3 July 2001, the AP resubmitted building plans, which again excluded the Government Accommodation from the GFA calculation on the following grounds:

- (a) the area was solely for car parking and loading and unloading purposes. According to B(P)R 23(3)(b) (Note 26), the area could be disregarded in the GFA calculation;
- (b) the area was solely for public and government use. The Developer could not generate any profit from such uses. The Developer was deprived of the most valuable ground floor space which could have brought in revenue if used as shops or other rental purposes; and
- (c) **the lease conditions had not stipulated that the PTT should be included in the GFA calculation.**

Note 26: *B(P)R 23(3)(b) states that, in determining the GFA of a development, the Building Authority may disregard any floor space that he is satisfied is constructed or intended to be used solely for, among others, parking motor vehicles and loading or unloading of motor vehicles.*

Diverse views in Building Authority Conference

6.8 On 1 August 2001, the AP's building plans submitted on 3 July 2001 were discussed by an expanded BAC (Note 27) to determine whether the Government Accommodation should be excluded from the GFA calculation. Two university professors were invited to attend the BAC as observers to give their independent views.

6.9 At the BAC of 1 August 2001, in addition to the grounds listed in paragraph 6.7 above, the AP said that:

- (a) the lease of the Site only specified a minimum GFA. There was no restriction on the maximum GFA. The Developer should be entitled to the development potential allowable under the B(P)R;
- (b) when submitting his tender, it was the genuine understanding of the Developer that the PTT **would not be included** in the GFA calculation under B(P)R 23(3)(b);
- (c) although the provision of the PTT was a known obligation under the lease, it did not necessarily mean that entitlement to full development potential under the Buildings Ordinance had to be taken away in fulfilling the obligation; and
- (d) the carparking area in the MPOA was ancillary to the function of the Marine Police Regional Headquarters.

6.10 ***BD's normal practice.*** The Chief Building Surveyor/Hong Kong East of the BD said at the BAC that the BD's normal practice was to **include** the PTT in the GFA calculation.

6.11 ***Concern about increase in development intensity.*** At the BAC, the DPO/HK said that as the lease required the provision of the PTT, excluding it from the GFA calculation would not generate any benefit to the public. **The DPO/HK was concerned about the increase in the development intensity if the PTT was excluded from the GFA calculation.**

Note 27: *The expanded BAC included all Chief Building Surveyors of the New Buildings 1 Division of the BD and representatives of relevant government departments. The AP and the Developer's representatives made a presentation and responded to BAC members' enquiries at the BAC meeting on 1 August 2001. After the presentation, the AP's team left the meeting before the BAC members deliberated on the case.*

- 6.12 ***Lands D's view.*** At the same BAC, the DLO/HKE said that:
- (a) the lease conditions only specified the minimum residential GFA. The plot ratio control of the development was left to the BD in accordance with the Buildings Ordinance;
 - (b) **during the preparation of the lease conditions, the BD had confirmed in writing that the Government Accommodation should be included in the GFA calculation under the B(P)R;**
 - (c) **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;** and
 - (d) the Lands D had advised, in response to enquiries from some prospective tenderers, that the Government Accommodation should be **included** in the GFA calculation under B(P)R 23(3)(a). However, the Developer had not made such an enquiry.

6.13 ***Professor's view.*** One of the professors in attendance opined that developers (tenderers of the Site) might be confused on whether the PTT should be included in the GFA calculation. He said that the Developer should be given the benefit of doubt.

6.14 ***BAC decision deferred.*** Because of the diverse views expressed by the BAC members, the Building Authority, as the chairman of the BAC, directed that legal advice should be sought on the application of B(P)R 23(3)(b) before making a decision on the matter.

6.15 On 1 August 2001, the AP withdrew the building plans submitted on 3 July 2001. On the following day, he resubmitted the same building plans, with the Government Accommodation **included** in the GFA calculation.

6.16 ***Legal advice on GFA exemption.*** In mid-August 2001, the BD sought the Department of Justice's advice on the issue according to B(P)R 23(3)(a) and (b). Based on the legal advice received in October 2001, the BD considered that the PTT fell within the meaning of the term of "parking motor vehicles, loading and unloading of motor vehicles" in B(P)R 23(3)(b). The gist of the legal advice is as follows:

- (a) the Building Authority should first be satisfied that any floor space was constructed or intended to be used solely for parking, and loading and unloading of motor vehicles. This was a question of fact and could be established and supported by documentary submission of plans or designs;
- (b) the Building Authority should then consider whether or not to disregard such floor space from the GFA calculation. In the exercise of this discretionary power, the Building Authority should consider each case on its own merits and decide each case as the public interest requires at the time;
- (c) in the application of B(P)R 23(3)(b), the Building Authority would take section 16 of the Buildings Ordinance into account. There was no reference to any consideration of lease restrictions in refusing approval of the building plans under section 16 of the Buildings Ordinance; and
- (d) the Building Authority should consider the circumstances of the case and exercise his discretion according to his guidelines and policy. However, he should not pursue consistency at the expense of the merits of the individual case.

PTT excluded from GFA calculation

6.17 ***Plan D's concern.*** Upon receipt of the legal advice, another BAC was held on 22 October 2001 to address the issue of excluding the Government Accommodation from the GFA calculation. At the meeting, the DPO/HK said that:

- (a) **as the PTT had to be provided under the lease, the exclusion of the PTT from the GFA calculation would not generate any additional benefit to the public; and**
- (b) **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.**

6.18 ***Other BAC members' views.*** At the same meeting, other BAC members expressed the following views:

- (a) having regard to the Department of Justice's advice, the BD considered that the PTT fell within the ambit of floor space for parking and loading or unloading of motor vehicles;

- (b) when exercising his discretionary power, the Building Authority should examine if it would be against the public interest to disregard such floor space from the GFA calculation;
- (c) **the provision of the PTT was definitely in the public interest. Otherwise, the TD and the Plan D would not have recommended its provision. The exclusion of the PTT from the GFA calculation would not have any adverse effect on the public interest;**
- (d) **according to the Department of Justice's advice, the exercise of development control via the Buildings Ordinance was independent of the lease conditions. Therefore, it might be unreasonable to consider it as not serving the public interest to allow the exclusion of the PTT from the GFA calculation simply because the Developer had contracted to provide the PTT;**
- (e) **there was no statutory town planning control over the GFA and the bulk of the development on the Site. The control over GFA was left to the B(P)R. If there was any planning intention to further restrict the GFA or the bulk of the development, this should have been spelt out in the lease.** In the circumstances, it was not appropriate to address the Plan D's concern under the Buildings Ordinance; and
- (f) no clear guidelines on how the Building Authority would deal with the exclusion of PTT had been issued internally or to the industry, although there were internal guidelines dealing with the exclusion of car parking spaces from the GFA calculation.

6.19 **At the BAC of 22 October 2001, the Building Authority decided to exclude the PTT from the GFA calculation. He also directed that the BD's internal guidelines and the PNAP dealing with the issue (i.e. whether PTTs should be included in GFA calculation) should be reviewed and re-issued to the industry as soon as possible.**

MPOA should be included in GFA calculation

6.20 As for the MPOA, the BAC members noted that it was not ancillary to the principal use of the development of the Site. The Building Authority decided that the MPOA should be included in the GFA calculation.

Promulgation of revised PNAP 13

6.21 On 1 August 2005, the BD promulgated a revised PNAP 13. The revised PNAP 13 stated that the planning intention of the Plan D was that PTTs should be **included** in GFA calculation unless otherwise specified in the town plan or planning approval.

Audit observations***Lease conditions silent on whether Government Accommodation should be included in GFA calculation***

6.22 In November 1999, when the draft Special Conditions of the lease of the Site was being prepared, the BD advised the Lands D that the Government Accommodation (i.e. the PTT and the MPOA) should be **included** in the GFA calculation under B(P)R 23(3)(a) (see para. 6.2). However, the information **had not been** incorporated into the lease conditions of the Site.

6.23 In October 2001, the Building Authority decided that the PTT should be excluded from the GFA calculation, while the MPOA should be included (see paras. 6.19 and 6.20). **Audit considers it unsatisfactory that 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.** In fact, some prospective tenderers were told during tendering in November 2000 that the Government Accommodation (both the PTT and the MPOA) would be included in the GFA calculation (see paras. 2.4 and 2.5).

6.24 In September 2005, in reply to Audit's enquiry, the Lands D said that in cases where there was no maximum GFA clause in the lease conditions, as the Building Authority had the discretion to make or change his decision as to whether such government accommodation would be accountable under the Buildings Ordinance if considered warranted, 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.

Financial implications

6.25 Audit estimated that the financial implications of excluding the PTT from the GFA calculation of the Site amounted to \$125 million (Note 28).

Appointment of external observers

6.26 The BAC members are usually government officials (see Note 17 to para. 4.14). They are required to make declaration and abstain from deliberation when there is a conflict of interest. Upon Audit's enquiry, the BD said that it was within a short period of time that the idea of appointing external observers to sit in the BAC held on 1 August 2001 was raised and arranged. As this was an unprecedented arrangement, the BD did not have any established procedure nor criteria for appointing observers. The BD did not have any file records on how the two observers were selected. While no written records indicated that the two observers were required to declare any conflict of interest at the BAC, one of them did make a declaration that he was the President of the Hong Kong Institute of Architects.

Audit recommendations

- 6.27 **Audit has recommended that the Director of Buildings should:**
- (a) **prior to the sale of a site, seek legal advice on issues (such as that relating to the exemption of GFA in this case) on which the legal basis is doubtful before giving advice to other government departments;**
 - (b) **establish a set of procedures and criteria for the appointment of external observers to attend the BAC; and**
 - (c) **require the external observers to declare whether they have any conflict of interest.**

Note 28: *The reserve price of the Site as assessed by the Lands D before the tender was \$1,850 million, with an overall accommodation value of \$17,138 per m². Using the latter figure, Audit estimated that the accommodation value of the PTT (with an estimated area of 7,297 m² according to the latest approved building plans) was about \$125 million.*

6.28 **Audit has also *recommended* that the Director of Lands should, where appropriate, stipulate explicitly in the lease conditions of a site whether the government accommodation required would be included in the GFA calculation so that prospective tenderers can take this information into account when bidding for a site.**

Response from the Administration

6.29 The **Director of Buildings** agrees with the audit recommendations in paragraph 6.27. He has said that:

- (a) the BD will seek advice from the Department of Justice where uncertainties on legal issues are identified prior to giving advice to other departments;
- (b) the appointment of external observers in this case was an unprecedented arrangement. The BD believes that such observers may only be appointed in future on very rare occasions. Notwithstanding this, the BD has established procedures and criteria for the appointment of external observers; and
- (c) the BD has issued instructions requiring that external observers should declare any conflict of interest and that such declarations will be recorded.

6.30 The **Director of Lands** generally agrees with the audit recommendation in paragraph 6.28. He has said that if the lease conditions contain a maximum GFA clause, it is the Lands D's current practice to stipulate in the lease conditions whether the government accommodation required would be GFA accountable in order that prospective tenderers can take this information into account when bidding for a site.

PART 7: GRANTING OF BONUS AREAS

7.1 This PART examines the granting of bonus areas under the Buildings Ordinance in the development of the Site.

Background

7.2 Figure 3 shows the dedicated areas within the Site for which the Building Authority granted bonus areas (Note 29). A summary of the dedicated areas is shown in Table 1.

Table 1
Dedicated areas within the Site

Location	Dedicated area (m ²)	Bonus areas granted (m ²)	
Area D1: at the south-eastern boundary of the Site	108	540	
Area D2: at the Reserved Areas (Note 1) of the Site	625	3,125	
Area D3: at the Reserved Areas of the Site	24	—	
Area D4: at the Reserved Areas of the Site	1,407	7,035	
Total	<u>2,164</u>	<u>10,700</u>	(Note 2)

Source: BD records

Note 1: Reserved Areas are the areas designated on the Control Drawing as “Proposed Space Reserved for Entrance Lobbies and Other Facilities to Upper Floor” on the ground floor of the Site (see para. 4.14(b)).

Note 2: The calculation is as follows: (2,164 m² – 24 m²) × 5 (see Note 29) = 10,700 m².

Note 29: *Section 42 of the Buildings Ordinance authorises the Building Authority to grant five times bonus areas (calculated in accordance with B(P)R 22(1)) for areas dedicated for public use at ground level.*

Figure 3
Dedicated areas of the Site



Legend:		Area D1		Area D2
		Area D3		Area D4
		Reserved Areas indicated in the Control Drawing		
		MPOA Marine police operational area		
		PTT Public transport terminus		
		The Site boundary		

Source: Lands D records

Request for bonus areas in return for dedicated areas

7.3 In July 2001, the AP applied for bonus areas in return for the dedication of areas for public use (see para. 4.15).

BAC convened to consider whether bonus areas should be granted

7.4 At the expanded BAC held on 1 August 2001 (see paras. 5.10 and 6.9), the AP said that:

- (a) **as extra space was required for constructing the MPOA (see PART 4), the PTT had to be extended to the Reserved Areas on the ground floor. It was reasonable to dedicate the Reserved Areas for public use in return for bonus areas; and**
- (b) for the strip of land along the south-eastern boundary (the non-building area in Figure 2 in para. 5.2), the Developer proposed to dedicate it for public passage to facilitate access to the PTT. Although the lease conditions had designated the land as a right-of-way, the Developer should have the right to dedicate the land for public passage in return for bonus areas.

7.5 ***TD's views.*** At that BAC, the TD representative said that:

- (a) the proposed PTT layout in the building plans was due to:
 - (i) the enlargement of the MPOA to cope with the requirements in the Technical Schedule;
 - (ii) the provision of a larger PTT than that required; and
 - (iii) the re-provision of footpaths within the PTT as the public footpaths outside the site boundary would be converted into landscaped areas;
- (b) if the proposals referred to in (a)(ii) and (a)(iii) were not included in the redesign of the PTT, the Reserved Areas in the Control Drawing (see Note 1 of Table 1 in para. 7.2) might be sufficient to serve the original purposes intended under the lease; and
- (c) the proposed PTT, with a larger area, would function better than the original one.

7.6 ***Plan D's views.*** At that meeting, the DPO/HK supported the dedication of the Reserved Areas by the Developer in return for bonus areas as the proposed PTT was an improvement on the original design.

7.7 ***Lands D's views.*** At that meeting, the Lands D representative said that the Developer had to obtain prior approval from the Lands D before amending the Technical Schedule. The Lands D would consult relevant government departments before giving its approval. As regards the dedication of the strip of land at the south-eastern boundary (i.e. the non-building area in Figure 2 in para. 5.2) for public passage, and of the vehicular egress from the MPOA, the Lands D representative said that:

- (a) the AP's proposal should be rejected. The lease designated the concerned area as non-building area and required the Developer to permit public passage at all times; and
- (b) the lease also required the Developer to permit unrestricted vehicular access at all times by the HKPF and persons authorised by the Director of Lands.

7.8 ***BAC members' views.*** The BAC members at the meeting had the following observations:

- (a) only a portion of the strip of land at the south-eastern boundary (Area D1 — see Figure 3 in para. 7.2) fronting the proposed access to the PTT was required for public passage;
- (b) **the MPOA as indicated on the Control Drawing could not cope with the requirements set out in the Technical Schedule. As a result, the PTT had to be shifted southward;**
- (c) the redesigned PTT, with a larger area, was an improvement on the original design;
- (d) the provision of landscaped areas, which resulted in repositioning the public footpaths within the PTT (Area D2 — see Figure 3), should be encouraged; and
- (e) **the Developer should be compensated in return for the dedication of the ground floor areas for public use.**

Decision to grant bonus areas

7.9 On 1 August 2001, taking into account the views of the BAC members, the Building Authority agreed:

- (a) to grant bonus areas in return for the dedication of the portion of strip of land at the south-eastern boundary (i.e. Area D1 in Figure 3 in para. 7.2), giving public passage to the PTT;
- (b) to accept the proposed dedication of Area D2 and Area D4 (see Figure 3) in the Reserved Areas for use as the PTT; and
- (c) to grant bonus areas subject to:
 - (i) the Developer undertaking not to seek any further compensation from the Government; and
 - (ii) the layout of the PTT being acceptable to all relevant government departments.

According to the latest approved building plans as at May 2005, the total bonus area granted to the Developer in return for the dedication of Areas D1, D2 and D4 was 10,700 m² (see Table 1 in para. 7.2).

7.10 ***Building plans approved by BD.*** On 1 September 2001, the Building Authority approved the building plans, and granted the above bonus areas in return for dedicating the areas for public use.

7.11 ***Building plans not approved by Lands D.*** In October 2001, the Lands D disapproved the building plans because the Government Accommodation did not accord with the Technical Schedules in the lease.

7.12 In early December 2001, the DLO/HKE said that **the AP's request for bonus areas "could mean a loss of revenue" to the Government.** It asked the ArchSD and the TD to advise whether the Developer could be asked to construct the Government Accommodation in accordance with the Technical Schedules. It said that if the Government Accommodation could be constructed according to the Technical Schedules, then the Developer should follow them.

- 7.13 **ArchSD's reply.** In a reply in late December 2001, the ArchSD said that:
- (a) the AP's plans had deviated from the Control Drawing and the Technical Schedule. Such deviation and the extension into the Reserved Areas stemmed from the Developer's design and not from a requirement of the MPOA; and
 - (b) the ArchSD did not have any view on whether the Developer was entitled to bonus areas.

7.14 **TD's reply.** In February 2002, the TD also said that the PTT could be constructed in accordance with the Technical Schedule. The inability of the AP to utilise the Reserved Areas was entirely a result of his planning.

Lands D considered dedication neither required nor necessary

7.15 In February 2002, the DLO/HKE informed the BD that the MPOA, as indicated on the Control Drawing, could cope with the requirements in the Technical Schedule. According to legal advice, the Government could amend the layout of the Government Accommodation and/or Reserved Areas, and such amendment would not result in compensation payable to the Developer under the lease conditions. **The DLO/HKE considered that the proposed dedication of the Reserved Areas was neither required nor necessary.**

7.16 ***Building plans already approved by BD.*** In February 2002, the BD informed the DLO/HKE that the Building Authority had already approved the building plans and the dedication of the Reserved Areas for PTT use on 1 September 2001 (see para. 7.10). The DLO/HKE should liaise with the AP direct on concerns regarding lease matters.

Lands D surprised that dedication of Reserved Areas approved

- 7.17 **In March 2002, the DLO/HKE expressed its surprise that the Building Authority had approved the dedication of the Reserved Areas.** The DLO/HKE said that:
- (a) on 1 August 2001, the BAC decided 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.** In this regard, the DLO/HKE had not made any confirmation to the proposal;

- (b) the BD was invited to confirm whether it had obtained endorsement from the relevant government departments **prior to** granting the bonus areas; and
- (c) **the grant of bonus areas in respect of the proposed dedication was premature and perhaps based on erroneously conceived consideration and, as such, should be withdrawn by the Government.**

BAC upheld its decision on granting bonus areas

7.18 On 23 April 2002, a BAC was convened to discuss the dedication of ground floor areas for the PTT at the Site. The BAC advised and the Building Authority decided to uphold the decision made on 1 August 2001, after considering the following:

- (a) the Control Drawing was only a preliminary sketch indicating the disposition of the different accommodation on the ground floor. Together with the Technical Schedules, they set out the minimum requirements of the Government Accommodation;
- (b) both the Control Drawings and the Technical Schedules formed part of the lease (a legally binding agreement between the Government and the Developer);
- (c) the Lands D's representative's comments 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;
- (d) the Plan D's representative's confirmation that the proposed layout would be an improvement from a planning point of view;
- (e) **the layout of the proposed PTT was technically acceptable to all departments concerned;** and
- (f) the proposed provision of landscaped areas and a larger PTT area would benefit the public. It would serve the public interest to accept the proposed dedication of the Reserved Areas for public use.

7.19 In April 2002, in reply to the DLO/HKE's question about the legal capacity of the Control Drawing, the Legal Advisory and Conveyancing Office of the Lands D said that the Developer was not entitled to the exclusive use of the Reserved Areas demarcated on the

Control Drawing. The Legal Advisory and Conveyancing Office confirmed that the Government was free to approve the design and layout of the Government Accommodation as submitted by the Developer, which in turn might cause variation in the area used for entrance lobbies and access to upper floors without any compensation from the Government.

BC III considered the amended Control Drawing

7.20 In June 2002, the DLO/HKE referred the case to BC III (Note 30). The BC III noted the points mentioned in paragraphs 7.15 and 7.18(d) above. The BC III also noted that:

- (a) upon implementing the dedication of the Reserved Areas, the Government was obliged by law to avail the Government Accommodation to the public for passage purposes. The question of maintenance responsibility and the possibility of a change in use of the dedicated area might arise in future; and
- (b) the proposed dedication was considered as a re-arrangement of the ground floor layout, shifting more space for the Government Accommodation. This proposal and the original layout on the Control Drawing were both acceptable to the departments concerned.

7.21 At the BC III meeting, the AP reiterated that the original design in the Control Drawing was not feasible to accommodate the requirements under the Technical Schedule. The current proposal would achieve better arrangement in terms of vehicular and pedestrian traffic, and ventilation.

BC III considered amendments of Control Drawing purely lease matters

7.22 On 6 June 2002, having regard to the fact that there were no strong views from the members, the chairman of the BC III directed that the issue involved was purely lease matters and would be resolved within the Lands D.

7.23 Around that time, the Lands D held further discussions with the relevant departments which opined that:

Note 30: *The AP was also invited to attend this BC III meeting (see Note 19 to para. 4.18 regarding the composition of BC III).*

- (a) the AP's argument that the Developer had to allow extra space for the MPOA was "ungrounded";
- (b) **the Government did not require a larger MPOA. The proposal came from the Developer. The TD had confirmed that it was the AP's design that affected the size and the layout of the PTT;** and
- (c) under the lease conditions, the Government had the absolute discretion to amend the Technical Schedule and the Developer had agreed to abide by the Government's final decision. There was no room for complaint unless the new requirements imposed by the Government were such that they were disproportionate to the original requirements.

Negotiation on building plans of Government Accommodation

7.24 The Lands D then negotiated with the Developer and the AP on the building plans of the Government Accommodation. In November 2002, the Legal Advisory and Conveyancing Office opined that:

- (a) the redesign of the Government Accommodation enabled the Developer to achieve a better design and layout for the residential towers. **The Developer could gain valuable additional plot ratio by reducing the space reserved for lift lobby and other facilities in the Control Drawing, which might otherwise be non-productive.** However, neither the lease conditions nor the Technical Schedule appeared to provide any restriction on the other facilities;
- (b) the Control Drawing, on its own, had no particular legal effect except as part of the Technical Schedule. The Technical Schedule was the document that carried the weight; and
- (c) any amendment to the layout shown on the Control Drawing should be treated as an amendment to the Technical Schedule. Under Special Condition 14(b) (Note 31) of the lease conditions, such amendment required the prior approval of the Lands D for which a premium might be charged under Special Condition 57(b) (Note 32).

Note 31: *Special Condition 14(b) states that no amendment, variation, alteration, modification or substitution to the Technical Schedules shall be made by the Developer except with the prior written approval of the Lands D.*

Note 32: *Special Condition 57(b) states that wherever in the lease conditions it is provided that the prior approval or consent in writing of the Government is required, the Government may give the approval or consent on such terms and conditions as it sees fit or may refuse it at its absolute discretion.*

Confirmation on whether original layout could be achieved

7.25 In November 2002, in response to the DLO/HKE's request, the ArchSD, the TD and the HyD reconfirmed their views that the Government Accommodation could be constructed in accordance with the Control Drawings and the Technical Schedules. In addition, the HyD said that the change of the PTT layout was solely due to the Developer's development plan. Notwithstanding the above, the ArchSD said that the Developer's MPOA proposal could be regarded as having generally satisfied the Control Drawing and the Technical Schedule.

Premium assessment for approving a revised layout

7.26 On 27 January 2003, a Valuation Conference of the Lands D assessed the premium to be charged for approving changes to the layout of the Government Accommodation at \$5.97 million. In March 2003, the Lands D accepted the Developer's offer of \$6 million.

7.27 In April 2003, the Developer paid the premium. In September 2003, the Lands D approved the revision of the layout of the Control Drawings.

Audit observations***Room for improvement in approval of dedication of Reserved Areas***

7.28 **Audit considers that there is room for improvement in the Building Authority's approval on 1 September 2001 (see para. 7.10) to grant the bonus areas because:**

- (a) consensus had not been obtained from the departments concerned on the granting of bonus areas as of 1 September 2001 (see para. 7.17(a) and (b));
- (b) the Lands D had objected to the proposal (see paras. 7.15 and 7.17); and
- (c) the TD said that the PTT could be built in accordance with the Technical Schedule (see para. 7.14).

Protection of government interest

7.29 In June and November 2002, the Legal Advisory and Conveyancing Office considered it doubtful that the Government could charge premium for the full value of the bonus areas as there was no maximum GFA in the lease conditions and any bonus was a statutory matter under the Buildings Ordinance. In the event, the Lands D approved the revised design of Government Accommodation at a premium of \$6 million (see para. 7.26).

7.30 **Audit considers that there is scope for improvement in the lease terms adopted in the sale of the Site. The Lands D should take measures to protect the Government's interest arising from the Building Authority's granting of concessions not provided for in the lease conditions.**

Audit recommendations

7.31 **Audit has recommended that for developments involving GIC facilities, the Director of Buildings should, before granting bonus areas in return for dedicating areas for public use, consult and obtain consensus from the relevant government departments, in particular the Lands D.**

7.32 **Audit has recommended that the Director of Lands should, in order to protect the Government's interest arising from the Building Authority's granting of concessions not provided for in the lease conditions, where appropriate, incorporate a maximum GFA clause in the lease.**

Response from the Administration

7.33 The **Director of Buildings** agrees with the audit recommendation in paragraph 7.31. He has said that, prior to the granting of bonus areas in return for dedicating areas for public use, the BD will consult relevant departments including the Lands D. The BD will take into consideration factors relevant to the Buildings Ordinance and will obtain consensus from relevant departments on such factors for applications involving GIC facilities.

7.34 The **Director of Lands** generally agrees with the audit recommendation in paragraph 7.32. He has said that where a site has restrictions on the GFA in the relevant OZP or an Outline Development Plan or layout plan approved by the Committee on Planning and Land Development, it is the Lands D's practice to incorporate the restrictions into the lease conditions.

Chronology of key events

July 1998	The DPO/HK said that the Site would produce 1,008 residential flats, with an average flat size of 85 m ² . The maximum permissible domestic GFA was 85,720 m ² .
November 1998	The marine police preferred a square or rectangular space of about 1,500 m ² usable area on the ground floor of the Site.
November 1998	The ArchSD assessed that the approximate area of the 71 parking bays was 3,200 m ² .
November 1998	The Metro Planning Committee of the Town Planning Board agreed to the proposed amendments to the draft Quarry Bay OZP No. S/H21/9 to rezone the Site from GIC uses to “Other Specified Uses” annotated “Residential cum Public Transport Terminus, Commercial and Community Facilities”.
January and October 1999	The BD said that the Site was a Class B site.
November 1999	The BD advised the Lands D that the Government Accommodation should be included in the GFA calculation under B(P)R 23(3)(a).
October 2000	The sale of the Site by tender was gazetted.
November 2000	A prospective tenderer informed the Lands D that it was not feasible to accommodate all the facilities required under the Technical Schedule within the minimum net operational floor area of 1,500 m ² if the parking bay design was in “forward gear only”.
November 2000	The Lands D issued statements to the prospective tenderers informing them that it was not necessary to have the “forward gear only” design for the parking bays of the MPOA.
November 2000	A prospective tenderer (not the successful tenderer) sought clarification from the Lands D on whether the Government Accommodation would be excluded from the GFA calculation.
November 2000	The Lands D advised the tenderer that, according to the advice given by the BD, the Government Accommodation “shall be included” in the GFA calculation under B(P)R 23(3)(a).

Appendix A
(Cont'd)

January 2001	The Site was sold by tender at a premium of \$2,430 million.
August 2001	At the BAC, the Building Authority agreed that the Site was Class C and that bonus areas should be granted in return for dedicating areas for public use.
September 2001	The Building Authority approved the building plans of the Site.
October 2001	At the BAC, the Building Authority decided to exclude the PTT from the GFA calculation.
April 2002	The BAC decided to uphold the Building Authority's 1 August 2001 decision on granting bonus areas.
March 2003	The Lands D agreed to the Developer's offer of \$6 million for the revision of the layout of the Control Drawings in the Technical Schedules.
September 2003	The Lands D approved the revision of the layout of the Control Drawings in the Technical Schedules.
April 2005	The Administration agreed that the planning intention under the town plan was that PTTs should be included in GFA calculation.
April 2005	The actual development of the Site comprised five 61 to 64-storey blocks (2,020 residential units with a total domestic GFA of 135,451 m ²).
July 2005	The BD has refined the criteria of "street" for site classification purposes in the Building (Planning) (Amendment) Regulation 2005.

Acronyms and abbreviations

AP	Authorised Person for the Developer
ArchSD	Architectural Services Department
Audit	Audit Commission
BAC	Building Authority Conference
BC III	Building Committee III
BD	Buildings Department
B(P)R	Building (Planning) Regulation
DLO/HKE	District Lands Office/Hong Kong East
DPO/HK	District Planning Office/Hong Kong
GFA	gross floor area
GIC	government/institution/community
GPA	Government Property Agency
HKPF	Hong Kong Police Force
HKPSG	Hong Kong Planning Standards and Guidelines
HyD	Highways Department
Lands D	Lands Department
m ²	square metres
MPOA	marine police operational area
OZP	Outline Zoning Plan
Plan D	Planning Department
PNAP	Practice Note for Authorised Persons and Registered Structural Engineers
PTT	public transport terminus
TD	Transport Department