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A. How the role of the Building Authority (BA) being different from that of the Director of Buildings (D of B)?

(1) If the BA determined a case in the capacity as the D of B, I would be acting as a civil servant. Obviously, a civil servant had a duty to protect the interests of the Government as the Vendor in a land lease (as it involved public funds) instead of processing the case in an impartial manner under the laws. If the buyer i.e. the other contracting party were an ordinary citizen, do we really consider it fair that the BA should lean in favour of the interests of the Government in exercising his statutory discretion?

(2) A civil servant has to obey the orders of one's superior. But if the BA made his determination purely in accordance with his superior's instructions, it would be tantamount to the BA giving up his statutory discretionary power to his (i.e. D of B's) superior. This would mean that it was not the BA who was making the determination . As a matter of fact, the Building Ordinance does not empower the BA, in exercising his statutory discretion, to follow the instructions of the then Secretary for Planning, Environment and Lands!

(3) It should, however, be noted that the BA should listen and take into account the views of his colleagues in the Buildings Department and other departments in the government. Those were for his reference only and ultimately the BA should act within the statutory perimeter of the Buildings Ordinance and make his determination accordingly.

(4) As can be seen from the above, there should not be any confusion between the role of the BA and that of the D of B. Put it in another way, the two roles involve different responsibilities and powers and should therefore be strictly distinguished from each other.

B. Did the BA's decision result in any loss of land premium?

(1) In essence, in selling land, the Government always aims at obtaining the highest sale price through the control mechanism of the land lease for the benefit of the Treasury.

(2) If there are clear cut limitations laid down in the lease, for example: the site is classified as a Class A or B site, the clear designation of which strip of land as a street, the Public Traffic Terminus (PTT) should be counted for GFA, or any additional GFA or bonus GFA that the successful bidder may subsequently obtain from the BA under the Buildings Ordinance should be counted for GFA under the lease, or there is a ceiling on the maximum GFA to be built at the site, then owing to these specified limitations, the bidding price for the site would be relatively lower.

(3) Conversely, if the lease does not clearly spell out limitations on the above-mentioned items (i.e. no specification of the ceiling of the GFA to be developed, no indication that the PTT should be counted for GFA nor any expression as to whether the exempted area that may be granted by the BA in future would be charged for additional premium etc.), this would mean that such an "open-ended" lease would provide an opportunity for the successful bidder to apply to the BA for bonus GFA or exemption of GFA under the Buildings Ordinance in future. This would make the bidders offer a relatively higher premium for the site.

(4) According to my understanding, the Lands Department would take into account the different circumstances of each site and set the most appropriate strategy so as to maximise the receivable land premium.

(5) The land lease strategy in the present case was to adopt the latter (i.e. "open-ended") strategy. In making the terms of the land lease in this case, the Lands Department had anticipated the possibility of the BA's granting the exemption of the PTT for GFA calculation etc. (see para. 6.24 of the Director of Audit's report). There is therefore no question of the BA's decisions resulting in any loss of land premium. Conversely, if the lease clearly specified the relevant limitations, the premium offered by the bidders would be relatively lower.

(6) In the light of the above, the statement in para. 6.25 of the Director of Audit's report that the exemption of the PTT for GFA calculation under the Buildings Ordinance has a financial implication of $125 million is a hypothetical statement.

C. On the question of the boundary of public interest

(1) Members of the PAC said that public funds must be a matter of public interest and why not someone as the BA or what take that into account.

(2) Firstly, I would like to point out that the BA is a law enforcement agent. In enforcing the law, it is neither possible nor right for the BA to act in favour of the government whenever the works involve the government and hence public money. If the other party is just an ordinary citizen, it would be extremely unfair to the latter if the BA should act in favour of the government merely because public money is involved!

(3) The BA is a law enforcement agent. His power is derived from the Buildings Ordinance. In exercising his statutory discretion, he can only make his determination on individual cases within the perimeter prescribed by the Buildings Ordinance. He cannot go beyond this statutory perimeter to deal with matters falling outside the ambit of his power as the BA (such as land premium rights). As a matter of fact, land premium rights are handled by another department i.e. the Lands Department. This is the prescribed boundary within which the BA considers in the matter of public interest.

(4) I therefore consider that there should always be a boundary in the consideration of public interest. In exercising his statutory discretionary power, he must exercise his power fairly and in accordance with the prescribed limits of the Buildings Ordinance and should not act in favour of either one of the contracting parties even though the government happens to

be one of the contracting parties and public money is involved. This is another matter falling outside the prescribed boundary of the Buildings Ordinance (So it is wrong to and one cannot take an indiscriminate approach and conclude right away that it is public interest since public money is at stake). The function of the BA is to enforce the law while the Lands Department has the function to obtain revenue for the government. They operate from different positions.

(5) I would like to respond clearly here to the question made by two Council members Mr. Jeffrey Lam and Mr. Cheng Kar-foo regarding the concerns raised by the Planning Department's representatives at the BAC meeting on 22 October 2001 over the visual impact that would be caused by the increase in the bulk and height of the development as a result of the decision of exemption of the PTT for GFA calculation. This was also another matter falling outside the ambit of the BA's authority and so the BA should not consider it either. As pointed out at the BAC meeting on 22 October (para. 5(f)), this was a matter that the Planning Department should deal with under the lease conditions or prescribe under the Outline Zoning Plan. The view at the meeting was that it was not appropriate to address matters which should be dealt with by the Planning Department under the Buildings Ordinance. This is, therefore, another boundary issue, that is, the BA cannot go beyond the powers conferred to him under the Buildings Ordinance.

(6) I would like to supplement one other point. Lighting and ventilation are matters of public interest that should be dealt with under the Buildings Ordinance. But these questions should be addressed by the Buildings Department in the process of the approval of the plans and if they were not up to the prescribed requirements, the case would not have been referred to the BA for determination at all.

D. Independent of lease conditions

(1) When I meant by saying that one should not "consider" the lease conditions, is actually very clear i.e. one should not take the lease conditions (which only define the relationship of the contracting rights of the two contracting parties) themselves as a relevant factor, not to mention as a key factor as said by Mr. Chan. This is the real difference of views between me and Mr. Chan.

(2) As a matter of fact, I did, throughout the entire process, make detailed reference to the lease conditions with the aim of finding out if there were any facts that could turn out to be relevant factors. But whether such facts were relevant factors or not depended on the facts themselves and not because they originated from the lease conditions.

(3) I submit attached to this note a speaking note on this matter for record purpose.

D. On the understanding of "Independent of lease conditions"

(1) A government land lease is just like any private land sale contract. The duties and rights of the contracting parties are defined by the lease conditions. In exercising his statutory discretionary power, the BA must not side with either of the contracting party. He should not therefore consider the lease conditions as relevant or even key factors in order to protect the interests of the government as one of the contracting parties.

(2) However, the above is not equivalent to saying: the BA needs not make reference to the lease conditions. In fact, apart from the lease, he should look at all the evidence, information and documents laid before him so as to aid the exercise of his discretionary power under the Buildings Ordinance. If he finds some information or facts in the lease conditions, he should of course consider and decide whether those are relevant factors or not. Nonetheless, we should bear in mind that whether these facts are relevant or not has nothing to do with their source (i.e. the lease conditions in this case).

(3) The fact is that at my testimony at the PAC meeting on 1 December, I already explained how I made detailed reference to the lease condition concerning the requirement for the construction of the PTT. According to the lease, the developer was required to build the PTT. This is a fact. That is to say whether I approved the application for exemption or not, the developer was still required to build the PTT. Was this fact a relevant factor of consideration to grant exemption or not? There were different views

expressed at the BAC meeting. I therefore asked for advice from the Department of Justice on this specific question. The reply given to me by the D of J was: "The control imposed by the Buildings Ordinance is independent of the lease conditions" (para. 6.18 of the Chinese version of the Director of Audit's report translated "independent of" as "unrelated"). Therefore, (I said) in exercising his statutory discretion, the BA needed not "consider" the fact that the requirement for the PTT to be built was already in the lease. What I meant by saying this at the testimony was exactly the same as I explained in the above paragraphs.

(4) I had also carefully considered the difficulty likely to be faced by the Lands Department in charging additional premium as a result of the lack of a ceiling on the total GFA to be developed under the lease. However, as the BA cannot lean in favour of the interests of the government as one of the contracting parties, my conclusion was that this was an irrelevant factor.

(5) In simple terms, in exercising his discretionary power, the BA should look at the matter independently of the lease conditions themselves, that is, there is no need to consider the contractual relationship as regards duties and rights between the two sides. Nonetheless, the BA should consider whether any fact revealed by the lease conditions or any other document is a relevant factor in the exercise of his discretionary power.

E. On the suggestion of the decision being unfair to other developers

(1) Firstly, in its reply to the Lands Department in 1999 and November 2000, the Buildings Department (BD) clearly advised that the PTT would be counted for GFA calculation under section 23(3)(a) of the Building (Planning) Regulations (B(P)R), but did not say the BA would include the PTT in the GFA calculation when exercising his discretion under section 23(3)(b) .

(2) Although it was the belief of some colleagues of the BD that the general practice was not to exempt PTTs from the calculation of GFA, is it really true that those developers intending to bid for the site had such an understanding "in their minds"? The fact is that in some past cases, PTTs had been exempted from GFA calculation. Developers, therefore, do know that the BA can exercise his discretion to exempt PTTs from GFA calculation under section 23(3)(b). I have evidence in saying this. I have here a letter enquiring about this question from a certain big developer addressed to the Director of Lands before the bidding of the site. This letter clearly mentioned: "In a no. of other cases, the public transport interchange & coach terminus are often exempted from GFA calculation". This clearly indicated that developers do understand that the BA can use his discretion to approve exemption of PTTs under section 23(3)(b).

(3) The fact of the matter is that in his reply to that particular developer, a colleague of BD (Post meeting note: it should be Lands Department) only mentioned that PTTs should be calculated for GFA under section 23(3)(a) of

the Building (Planning) Regulations without mentioning whether the BA would grant exemption under section 23(3)(b). The letter further pointed out that the conditions of sale do not specify a maximum GFA. This implied that a successful bidder for the site could make an application to the BA afterwards to see if after the triggering of section 23(3)(b), the BA would exercise his discretion to approve an exemption. According to my information, BD (Post meeting note: it should be Lands Department) gave the same verbal answer to other developers making similar enquiries.

(4) It can be seen from the above that the BD had not misled other developers or potential bidders for the site, causing unfairness to them or leading to potential litigation.

F. On the question of inconsistency

(1) I would still like to point out that the advice given by the BD before the sale of land was based on the information provided to the BD at that time but after the sale of land, the BA, in examining a formal application with concrete details put before him, would need to consider the merits of the case afresh. Even if it was found after detailed verification that the advice earlier given by the BD was not entirely applicable, that advice should not be adhered to rigidly. Quite the contrary, the application should be considered according to the rules under the Buildings Ordinance.

(2) On the question as to how I applied the principle of "public interest" under section 23(3)(b) of the Building (Planning) Regulations in exercising my discretionary power

(a) All of us would want to ask the question: Since the PTT concerned would be built as required by the lease, that would already meet the requirement of public interest. If we were to grant exemption of the PTT for calculation of GFA, should we not ask the question: Would such exemption generate "additional" public interest so as to meet the principle of public interest in this case? But let us look at the facilities which the BA may grant exemption from GFA calculation under section 23(3)(b) of the Building (Planning) Regulations, such as private car spaces refuse storage chambers, telecommunication facilities for the building etc. Even though all these facilities were required to be built

under the lease, the BA would invariably grant exemption in these cases in the past. This shows that the granting of exemption for these facilities was not because they would generate additional public interest but because they were regarded as beneficial to public interest. But it was possible that the BA had used this "additional public interest" test in processing applications for PTT exemption in some past cases, leading to an understanding within the BD (which, however, has not been conveyed to outsiders) that PTTs should not be exempted for GFA calculation. However, in the course of examining this case, after detailed arguments amongst BD colleagues and according to the above-mentioned advice of the Department of Justice (i.e. the requirement for the PTT to be built under the lease was not a relevant consideration), the conclusion we arrived at was that the test of "additional public interest" was not really appropriate. This standard was therefore not adopted in the present case.

(b) Apart from the above, there was another opinion that the test of public interest could be: If the facility in question came within the scope of section 23(3)(b), the public interest test could be met if the facility did not go against public interest? But I did not think this approach was appropriate. For example, some developers sometimes applied for the provision of additional car parking spaces for commercial or letting purposes. These extra car park spaces were merely commercial facilities (subject of course to the approval of the Transport Department). They

caused no harm to public interest. But I considered that they only satisfied and were confined to commercial interest and did not meet the above-mentioned positive test of public interest per se. That was why we should not grant exemption (for such extra commercial carparking spaces).

(c) The conclusion of the above comparative study was that we should not use either the "additional public interest test" or the "not going against public interest" test but whether the facilities designated under section 23(3)(b) were beneficial to public interest. Obviously, in this particular case, the PTT provides the residents in the development as well as in the nearby district a public transport facility, bringing convenience to them. It is beneficial to public interest and should be granted exemption.

(3) Therefore, the actual situation, as explained above, is that it is an over-simplification to say that there is inconsistency between the advice given by the BD before the sale of land and the BA's determination on an actual application after the sale of land. The suggestion that there has been an "inconsistency of views on the part of the BA before and after the land sale" is therefore incorrect.