Development Control of Buildings in Hong Kong

Ch. 1 Introduction

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DEF: Development Control of Buildings

• Building Control authority vested in Buildings Ordinance,
• Planning Control authority vested in Town Planning Ordinance;
• Land Administration by land lease and covenants;
• Licensing authorities;
• Other relevant statutes such as the AMO, EPO,
• Other governance on building services installations, such as lifts, plumbing and drainage; and
• Common laws on land law, law of contract, law of tort, etc.
STATUTORY v. NON-STATUTORY CONTROL OF DEVELOPMENT

• Four Major Regimes of Development Control
• If Conflicts among the 4 Control Regimes, which prevails?
• What is Moratorium? Is it statutory?

Lease – a non-statutory (contractual) control of development
Development Control – 4 Major Regimes

- **Statutory Controls:**
  - Building Control (Buildings Ordinance, Cap. 123)
    - including Heritage Preservation (Antiquities and Monuments Ordinance, Cap. 53)
  - Planning Control (Town Planning Ordinance, Cap. 131)
  - Environmental Protection Control (Environmental Impact Assessment Ordinance, Cap. 499)

- **Contractual Control:**
  - Lease Administration
    - Apply on leasehold interests only
    - Non-statutory
    - Formalities and procedures are governed by Conveyancing and Property Ordinance (Cap. 219)
Statutory vs Contractual

- JPN 4 - Development Control Parameters, issued on 25 Nov. 2008

  - "...developers and their professional advisers should be aware that BD and PlanD are acting in accordance with their specific statutory powers and regulations, whereas in the case of LandsD, the actual wording adopted for a specific item of the development control parameters in the lease or grant conditions for the specific lot concerned will still need to be subject to legal interpretation to ascertain the precise effect of the provisions in the lease or grant conditions in the context of the development proposed."

- "Furthermore, it must be noted that LandsD acts in its role on behalf of Government as landlord. It reserves the right to interpret the legal meaning and effect of any particular lease or grant condition for a specific lot in relation to any of these development control parameters in accordance with the private law principles of landlord and tenant and any other relevant legal principles. It is not bound by the interpretations adopted by BD or PlanD in the context of their relevant statutes in any way."
Statutory vs Contractual (cont’d)

• Leases are contractual:
  – Not subject to judicial reviews;
  – Not necessarily to be reasonable;
  – Not amendable without the consent of both parties;
  – But can be overridden by another statute; and
  – Affected by moratoria.
– Protected by the Basic Law (Property Rights)
Cases Study: Conflicts among the 4 Regimes of Control

• Building height (Nina Tower case)
• Development intensity concessions (Island Resort case)
• Curtain wall gfa exemption
• Public space in private developments
• Linked Bridge (華人行 case)
Conflict in Building Height Control

- Nina Tower case;
- No statutory height control at the site;
- But an international airport is to be built and the proposed building height likely exceeds the maximum permissible height for airplane safety in the future;
- The government made use of the DDH clause of the land lease to reject the proposed building height;
- To be discussed in more details in part 2.
Conflict in Development Intensity Concessions

1. JPN1 allows green balcony to be exempted from gfa calculations;
   - But land premium may have to be paid,
   - See LAO 1/2009: Standard Rates for Balcony,…
2. Curtain wall 300mm perimeter area is exempted from gfa calculation by BD (PNAP 13);
   - But land premium had to be paid, until 1997.
3. Island Resort case
   - Lease does not address any maximum permissible gfa;
   - Site classification was upgraded from Class B to C;
   - Can LandsD ask for land premium for the increase of gfa?
   - To be discussed in details in Part 2.
Conflict in the provision of public facilities

• A building built in the 1970s;
• With 2,100 sm bonus in gfa in exchange for a provision of a linked bridge connecting other building for pedestrians;
• Bonus was given, but bridge was not built;
• Why?
• There is no written clause on this item in the lease.
Moratorium

• There are two moratoria still in force:
  – Mid-Levels Moratorium
  – Pokfulam Moratorium
• "dates back to 1972. It was introduced on traffic and transport grounds. In the light of the traffic assessment and the known extent of development then, it was concluded that for the Mid-Levels area, all further sales of Government land, and all further modifications of Government leases to permit more intensive development, should be deferred."
• The Moratorium does not "probit" developments/re-developments in the area, "but to restrict developments/redevelopments to what is permissible under the existing leases."