A court ruling that presents **difficulties for surveyors**

Kit M Yip

Sr C K Lau
Immediate Past President of the HKIS and Chairman of the HKIS Land Policy Panel

Sr C K Chan
Chairman of the HKIS Housing Policy Panel

Photo: SCMP/David Wong

The development of areas such as this one, in To Kwa Wan close to the former Kai Tak airport, could be affected by the Court of Final Appeal's decision.

In this issue, *Surveyors Times* will explore a court ruling and a subsequent Practice Note by the Lands Department which may have implications for surveyors' work in relation to redevelopment.

In 2013, the Director of Lands won a case brought by Fully Profit (Asia) Limited which sought to redevelop five lots of land at Nam Kok Road in Kowloon City. Fully Profit was looking to build a 26-storey composite building straddling the five lots with shops on the ground floor, utility, sports and function rooms on the first floor and residential units on the floors from the second to the 26th.

The history of the lots dates back to the last century. The five lots came into existence after the subdivision of one of two mother lots, both of which the former colonial government exchanged with a property owner in 1952 when the latter surrendered his own property on Kennedy Road through conditions of exchange. By the end of 1952, 20 five-storey houses were erected on the mother lot, each occupying about 1,143 sq ft. In the 1960s, individual government leases were entered into for each of the now 20 subdivided lots, all of which had one house built on them. The government leases provide restrictive covenants of the five lots, the subject matter of the appeal in the past decade. In 2006, redevelopment of five of the 20 lots prompted a court case which ran for years. Initially, the trial judge in the Court of First Instance dismissed the developer's application on the basis that a composite 26-storey building was not a "house" contemplated by the government leases, as "house" had to be considered in light of what the term meant at the time the leases were created, and it would require a leap of imagination for the proposed building to be described as a "house".

"Now that redevelopment is curbed, or allowed only with land premium, the cost of redevelopment is substantially greater. Developers need to readjust the compensation formula to keep up with expected economic gain."

The Court of Appeal however allowed the developer's appeal on the basis that "house" was synonymous with "building", and straddling several lots, caused no difficulties since a building or buildings could have occupied the whole of the mother lots under the original Conditions of Exchange.

Ultimately, in May 2013 the Court of Final Appeal (the "CFA ") restored the trial judge's orders. It rules that the government leases specified the lots not be used for industrial purposes, no factory building to be built, and no more than one "house" on each lot. Emphasising the overall importance of context and ascertaining the intention behind such covenants, the CFA held that the meaning of the word "house" in the restrictive covenants must have reference to those characteristics of the houses which were actually standing on the lots at the time the government leases were entered into. On proper construction, the only permitted redevelopment is the building of no more than one house on each lot with characteristics of the houses in existence at the time the government leases were entered into, and no other type of building.

As a result, the proposed redevelopment was prohibited. One year later in 2014, the Director of Lands issued a Practice Note (Issue No. 3/2000A) which states that any building proposal not in accordance with the type and characteristics of the house standing on the lot at the time the government lease was entered into, particularly the building height, is not permitted under the "house" restriction, and a lease modification subject to payment of premium and administrative fee would be required.

Surveyors have had varying responses to the case. Sr C K Chan, Chairman of the HKIS' Housing Policy Panel, says that industry practitioners were shocked and found the ruling difficult to comprehend. "I do not agree that redevelopment should be allowed only based on what already exists on the site. For instance, the conditions of sale may allow six storeys to be built on a given lot, though the developer may end up building five storeys due to shortage of financial resources. With the current ruling, redevelopment in this scenario would have to be limited to five storeys."

According to Chan, there were high hopes that when the old Kai Tak airport was closed, Kowloon City would see quick redevelopment. There were indeed various high-rises which sprung up on small lots during that period. Due to the court case however, a backlog of similar cases accumulated. Some developers were originally in the process of acquiring units from owners by giving compensation which took into account not only the five-storey buildings, but the air rights of what was above them — with the assumption that the redeveloped building would be way higher than the original building.

Now that redevelopment is curbed, or allowed only with land premium, the cost of redevelopment is substantially greater. Developers need to readjust the compensation formula to keep up with expected economic gain. With lowered compensation, owners become less interested in selling and redevelopment; many still reminisce about the high prices once offered by developers.

"Now owners and developers are adopting a wait-and-see attitude; this affects the pace of redevelopment in most parts of Kowloon City," said Chan. So far the known cases are mainly confined to Kowloon City.

This CFA judgment has a knock-on effect on leases that require the Director's consent for redevelopment or addition of buildings to the existing development. Even though there is no restriction on development parameters, the Lands Department may charge a premium if the new development is considered to be more valuable than the existing one.

"For scenarios that fall outside the Practice Note, it becomes difficult for us to give advice to developers. They may have to submit building plans to try things out, or ask Lands Department directly in the hope that the questions will be answered," Chan remarked.

Sr C K Lau, Chairman of the Land Policy Panel and Immediate Past President of the HKIS, also expresses concern that the ruling has created uncertainty for similar or related cases in the market. "This is not beneficial to Hong Kong; it may lead to developers and owners shying away from redevelopment. Yet those buildings that are old (like more than 50 years) require substantial repair and maintenance. If such buildings have not got proper repairs and maintenance, the physical structures may threaten the safety of their occupants."

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Lau continued: "development of such lots is severely hindered now subject to the implementation of the Lands Department's practice note". When the said lots were granted to the first developer in the 1950s, the government preferred that the developer build buildings which were not too small on the mother lot, which was over 22,000 sq ft. When the subsequent owners applied for government leases in the 1960s for the sub-divided lots, however, the drafting had been changed – now no more than one house could be built on each of the five sub-divided lots, which were only just 1,143 sq ft each.

"When the lot is too small, land resources cannot be fully utilised at an economic rate, resulting in land potential being locked up. Too many restrictions lead to a conundrum," said Lau.

Lau thinks the key lesson learned is developers have to follow Lands Department's practices and review its Practice Notes carefully. Surveyors should be extremely careful when faced with similar cases in future: conduct research, seek necessary advice; "caution" is the word.

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「現時樓宇重建面對不少限制，某些項目要在補地價後才獲批，變相大幅增加了重建成本。發展商亦需要調整收購計劃才可維持利潤。」

為測量師帶來難題的法院裁決

Kit M Yip

今期《測量師時代》將探討近年一項法院裁決及一份地政總署作業備考，如何影響測量師參與樓宇重建發展的工作。

裕昌（亞洲）有限公司（下稱裕昌）就申請重建發展五個位於九龍城南角道的地段提出訴訟，法院在 2013 年判地政總署一方勝訴。案情指，裕昌有意在涉案的五個相連地段進行重建，興建一座橫跨五個地段的 26 層高的綜合用途建築物：在地下開設商舖；一樓提供公用設施、運動室及活動室；2 樓至 26 樓則為住宅單位。

案中所涉地段的發展歷史可追溯到上世紀。當時一位業主和前殖民政府訂立一份換地契約，交還其位於堅尼地道的私人土地，以換取在南角道的兩個主地段。其中一個主地段後來分割成包括涉案的五個地段。業主在 1952 年年底興建了 20 座五層高各佔約 1,143 平方呎土地的房屋。政府在 1960 年代為這 20 個分割地段發出租契，每個地段當時建有一間房屋。涉案地段的租契均載有限制性契諾，而這正是引發訟案的關鍵。發展商在 2006 年計劃在 20 個地段中的五個地段發展重建計劃，因而引起這宗歷時多年的訴訟。原訟法庭的主審法官最初駁回發展商興建 26 層高樓宇的申請，理由是一幢 26 層的綜合用途建築物並非政府租契所預期建造的「房屋」。由於「房屋」的涵義應考慮有關政府租契訂立時該詞所包含的涵義，因此該綜合用途建築物不能被視為等同於租契所指的「房屋」。

但上訴法庭其後接納發展商的上訴，理由是「房屋」和「樓宇」兩詞意義相同，即使橫跨數個地段也不構成任何問題。因為根據原本的換地契約，業主可在整個主地段範圍興建一幢或多於一幢樓宇。

終審法院於 2013 年 5 月恢復主審法官的判決，認為政府租契列明有關地段不可作工業用途或建造工廠，及每個地段不可興建超過一間「房屋」。在考慮案件的核心問題及有關契諾背後的意圖後，終審法院認為「房屋」一詞在限制性契諾的涵義必須包含在訂立有關的政府租契時實際已豎立在有關地段上的房屋的特性。同時，政府租契所准許的重建方案只限於在每個地段上建造不超過一間房屋，而所建房屋須具有在訂立有關的政府租契時已存在的房屋的特性，任何其他類型的建築物均不准興建。

有關重建計劃最後被擱置。地政總署一年後（即 2014 年）發布作業備考（編號 3/2000A），當中指明根據「房屋」限制，任何樓宇建築方案如不符合在訂立有關政府租契時已存在的房屋的特性，特別是涉及高度的特性，將不獲准興建，除非發展商申請修改契約，並支付相關補地價金額及行政費。

測量師對案件判決有不同看法。香港測量師學會房屋政策小組主席陳昌傑測量師表示業界普遍對判決感到震驚及難以理解：「我不同意重建發展項目需符合已存在的房屋特性才能獲批。例如賣地條件容許某個地段興建六層高樓宇，但發展商當時可能由於資金不足而只興建五層高的建築物。根據有關判決，在這種情況下，該地段則只可重建不高於五層的建築物。」

陳昌傑表示，舊啟德機場關閉後，業界預期九龍城區將可加快重建步伐。事實上，當時已有不少發展商在細面積地段興建高樓。但有關訴訟引發了很多類似的待決案件。部分發展商原本已開始向業主收購物業單位，收購價除包括物業本身層數（五層）外，亦有將物業的上空的發展權納入計算範圍。這是因為發展商預計重建樓宇的高度會比原建築物高。

現時樓宇重建面對不少限制，某些項目要在補地價後才獲批，變相大幅增加了重建成本。發展商亦需要調整收購計劃才可維持目標利潤。但調低收購價後，業主未必願意出售物業進行重建，有一些業主則仍懷緬著發展商曾經出過的高價。

陳昌傑說：「現時業主和發展商均採取『靜觀其變』的態度，這影響了九龍城區大部分土地的重建速度。」目前大部分已知的待決案例均涉及九龍城區。

針對需要得到地政總署批核，才能在現有發展項目增建新建築物或進行重建的租契，有關裁決將引發連鎖反應。雖然發展參數未設有限制，但如新發展項目的價值較現有建築物高，地政總署可能會就此收取補地價費用。

陳昌傑表示：「對於作業備考無列明的情況，我們較難向發展商提供意見。發展商可能需要先提交建築圖則，嘗試請地政總署直接解答其疑問。」

香港測量師學會上任會長及土地政策小組主席劉振江測量師關注有關裁決對市場上類似或相關個案所造成的影響。他說：「有關裁決對香港沒有好處，發展商或業主可能因此不願進行重建工程。但事實上不少舊樓（如樓齡超過 50 年的建築物）有進行維修的迫切性。這些樓宇若無適當維修保養，其結構問題將威脅住客安全。」

劉振江續指：「地政總署編訂作業備考後，增加了發展這類土地的困難。當涉案地段在 1950 年代批給發展商後，政府預期發展商能夠在佔地超過 22,000 平方呎的土地段上興建一定數目的樓宇。當業主在 1960 年代就分割地段申請政府租契時，租契內容已被修改成在涉案的五個地段上分別只可興建不超過一間房屋，而當時每個地段面積只有 1,143 平方呎。」

劉振江表示：「當地段面積太小，我們便無法以符合經濟效益的方式善用土地資源，亦無法全面釋放土地潛力。太多限制只會帶來更多問題。」

劉振江認為這宗案件提醒發展商必須遵從地政總署的作業方式和作業備考。測量師也必須小心處理類似情況，研究和尋求合適建議，謹慎行事方為上策。

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啟德發展計劃有望帶旺九龍城發展，但終審法院的判決有可能影響日後的重建項目

相片提供 : SCMP/FELIX WONG

「政府租契所准許的重建方案只限於在每個地段上建造不超過一間房屋，而所建房屋須具有在訂立有關的政府租契時已存在的房屋的特性，任何其他類型的建築物均不准興建。」