



THE HONG KONG INSTITUTE OF SURVEYORS

29 September 2006

Mrs Ava Ng
Director of Planning
Planning Department
17/F North Point Government Offices
333 Java Road
Hong Kong

Dear Mrs Ng,

Practice Note for Professional Persons No.4/2006 dated 23 June 2006

We refer to the captioned Practice Note issued on 23 June 2006. The Hong Kong Institute of Surveyors ("HKIS") would like to express its concerns in that property rights of private owners would be undermined, and good planning and architectural principles compromised as a result of the practice stipulated in PN4. Details of background and rationale behind our concerns are elaborated further in the attached Paper.

We would be grateful if the Planning Department, in consultation with other relevant Government departments and market practitioners, could consider the implication brought about by PN4 and the recommendation proposed by us. We would be delighted to meet and discuss our concerns with the Administration such that the uncertainties associated with PN4 could be removed, and the deficiencies rectified.

Should you have any further queries, please do not hesitate to contact Mr. C K Chan, coordinator of the PN4 Working Group of the HKIS (Tel: 2301 1869) or the undersigned on 2526 3679.

Yours sincerely,

Wong Chung Hang
President

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香港測量師學會



**THE HONG KONG INSTITUTE OF SURVEYORS
COMMENTS UPON THE PRACTICE NOTE FOR PROFESSIONAL PERSONS
NO.4/2006 DATED 23 JUNE 2006 ISSUED BY THE PLANNING DEPARTMENT**

Preface

1. The Planning Department of the HKSAR Government issued the Practice Note No.4/2006 ("PN4") on 23 June 2006. **The Hong Kong Institute of Surveyors ("HKIS") is concerned that property rights of private owners would be undermined, and good planning and architectural principles compromised as a result of the practice stipulated in PN4.** This Paper elaborates the background and rationale of our concerns.

Key Issue of the Practice Note No.4/2006

2. PN4 stipulated that, in line with the recent decisions of the Appeal Tribunal (Buildings) and the Court of First Instance, "*... a building development situated at a site partly zoned "Residential (Group A)" ("R(A)", which is not subject to any PR restriction, and partly "R(C)", where a maximum PR of 5 is stipulated, the PR of the entire development.....should not exceed 5 even though the building which accounts for gross floor area falls entirely within the "R(A)" zone. Similarly, a development site partly zoned "R(B)" and partly "R(C)", which are respectively subject to a PR of 5 and 3 under the statutory plan, the PR of the whole development on the site should not exceed 3.*"

Implications brought by the Practice Note No.4/2006

3. HKIS presumed that Planning Department is referring to the case of the International Trader Limited ("ITL Case"). Using this case as an example, resultant gross floor areas generated by different methods of plot ratio calculation are summarized at **Table 1** for easy reference.

**Table 1:****Summary of the Different Methods adopted for Plot Ratio Calculation in the ITL Case**

	Method A: Method adopted by the Applicant in the ITL Case (rejected by the Court)	Method B: 2003 Submission approved by the Building Authority ⁽²⁾	Method C: Method adopted in PN 4
Site Area of R(C)7 Portion	764.40sm	764.40sm	764.40sm
Plot Ratio adopted ⁽¹⁾	9		5
GFA of R(C)7 Portion	6,879.60sm		3,822.00sm
Site Area of R(A) Portion	1,368.40sm	1,368.40sm	1,368.40sm
Plot Ratio adopted ⁽¹⁾	9		5
GFA of R(A) Portion	12,315.60sm		6,842.00sm
Total GFA i.e.	19,195.20sm	16,124sm	10,664.00sm
Overall Plot Ratio	9.00	7.56	5.00

Remarks

- (1) In the ITL Case, R(C)7 Portion and R(A) Portion are subject to plot ratio restrictions of 5 and 9 respectively.
- (2) With the exception of the resultant plot ratio, the details of the 2003 submission and approval have not been given within both the judgments of the Appeal Tribunal (Building) and the Court of First Instance.

4. As illustrated in the above Table, particularly after comparing the plot ratio approved in the 2003 submission, PN4 would have the effect of reducing the plot ratio of the R(A) zone and hence decreasing the land value.
5. More importantly, PN4 does not appear to support amalgamation of sites to facilitate urban renewal and to promote comprehensive development. On the contrary, the method of plot ratio calculation stipulated in PN4 has left landowners with no alternative but to develop separate buildings upon differently zoned but adjoining sites. This is against all principles of good land-use planning (*ie comprehensive development and urban renewal through site amalgamation*), **environmental considerations** (*i.e. avoidance of wall effect through set back of buildings; share of common facilities to avoid wastage*), or the promotion of **innovative urban or architectural designs**.



6. There were suggestions that the Town Planning Board, through the process of application for minor relaxation pursuant to Section 16 of the Town Planning Ordinance, would give favorable consideration to cases where the total plot ratio will not exceed their original entitlement (i.e. a plot ratio of 7.56 in the ITL Case). Nevertheless, **the time taken and the uncertainties of this additional process will give rise to the same effect as illustrated in item 5 above.**
7. Furthermore, some members have expressed that PN4 might not be "in line" with the judgments of Appeal Tribunal (Buildings) and the Court of First Instance. Whilst HKIS has no intention to review the legal aspects of the two judgments and their relation with PN4, a summary of the issues raised by members is attached as **Appendix I** for reference.

The Way Forward

8. We would recommend the Planning Department, in consultation with other relevant Government departments and, in particular, the industry including all market practitioners, to re-consider the implications brought about by PN4.
9. During an informal discussion with the Planning Department, we were given to understand that the Planning Department has no intention to reduce the plot ratio in site amalgamation situations. HKIS supports this principle and supports the view that the plot ratio of one zone should not be applied to an adjoining zone so as to achieve a higher average plot ratio. In this connection, and in order to address the potential deficiencies of PN4, HKIS would recommend that a statutory note be inserted in all statutory Outline Zoning Plans, stipulating that the plot ratio permitted within a particular zone will not be reduced due to amalgamation of sites.
10. HKIS would be delighted to meet and discuss our concerns with the Administration such that the uncertainties associated with PN4 could be removed, and the deficiencies rectified.

Prepared by The Hong Kong Institute of Surveyors
29 September 2006

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APPENDIX I

SUMMARY OF POINTS EXPRESSED BY SOME HKIS MEMBERS UPON THE RELATION BETWEEN PLANNING DEPARTMENT'S PRACTICE NOTE NO.4 AND THE JUDGMENTS OF THE APPEAL TRIBUNAL (BUILDINGS) AND THE COURT OF FIRST INSTANCE

Extracts of Practice Note No.4

1. As stipulated within PN4, *"The method of PR Calculation is in line with the recent decisions of the Appeal Tribunal (Buildings) and the Court of First Instance in respect of a relevant case in the Mid-levels West area"*. It has been assumed that Planning Department is referring to the case heard by the "Appeal Tribunal (Buildings) – Buildings Ordinance Cap.123" on 6th and 7th of June 2005 in the Matter of Appeal Cases Nos. 275 & 476 of 2004, and subsequently heard by the Court of First Instance on 12 April 2006 relating to an application by International Trader Limited for leave to apply for Judicial Review ("ITL Case").

Key Issues of the International Trader Limited Case

2. The ITL Case involves a Site with two portions, namely "R(C)7 Portion" and "R(A) Portion", zoned "Residential (Group C) 7" and "Residential (Group A)" under the statutory Outline Zoning Plan respectively. Assuming that the Site is a "Class B Site"¹ pursuant to the Building (Planning) Regulations, plot ratios attributed to the portion of land zoned "Residential (Group C)7" and "Residential (Group A)" are 5 and 9 respectively under the Town Planning Ordinance.
3. Site Areas of R(C)7 Portion and R(A) Portion are 764.4 s.m. and 1,368.40 s.m. respectively. Amongst various issues, ITL argued that an overall plot ratio of 9 should be applicable to both portions, resulting in an overall Gross Floor Area of 19,195.20 s.m. Results of the different methods of plot ratio calculation adopted in the ITL Case have been summarized at Table 1 of this Paper.

¹ The ITL Case also includes disputes as to whether the Site should be defined as Class B Site or Class C Site pursuant to the Building (Planning) Regulations. For simplicity, we have followed the Court's decision to classify the Site as Class B within the Paper.



Decision of the Appeal Tribunal (Buildings)

4. The Appeal Tribunal (Buildings) considered that *"...Whether or not the OZP would be contravened by the proposed developments depends on the proper interpretation of the OZP itself and, in particular, to the words in paragraph (1) of the Remarks relating to Zone R(C)7... On this basis, we are satisfied that the proposed development would contravene the OZP"*².
5. In reviewing whether a building plan approved in 2003 for a similar development on a site which was substantially the same as the Site which had an overall plot ratio of 7.56 for the whole site, the Tribunal considered that *"...we are of the view that the approach of treating the Site as 2 separate sites, each with a different permitted plot ratio, is wrong. ..."*. Nevertheless, and without going into details of the building plan submitted and approved in 2003, the Tribunal stipulated that *"...this (i.e. treating the Site as 2 separate sites) was not the approach adopted in the submission or in the approval."*

Decision of the Court of First Instance

6. At the Court of First Instance, the Court considered that *"...The Tribunal disapproved the developments proposed ...for the simple reason that part of each proposed building stood within an R(C)7 zone. That does not amount to applying the R(C)7 restriction beyond its proper zone. It is only a consequence of applying the rigour of the R(C)7 designation to its own zone"*³.
7. The Court therefore rejected ITL's proposal in that *"...ITL cannot take advantage of the entire site area (combining the R(A) and R(C)7 portions) to support the plot ratio of its tower on the R(A) part of the site."*⁴

Provisions within Practice Note No.4/2006

8. PN4 stipulated that *"The method of PR calculation is in line with the recent decisions of the Appeal Tribunal and the Court of First Instance. " Accordingly, "...for a development site partly zoned "R(B)" and partly "R(C)", which are respectively*

² P.11, 1st paragraph, Judgment of the Appeal Tribunal (Buildings) – Buildings Ordinance Cap.123 (Date of Hearing: 6th and 7th of June 2005)

³ Paragraph 55, page 11, Judgment of the ITL Case

⁴ Paragraph 56, page 11, Judgment of the ITL Case



subject to a PR of 5 and 3 under the statutory plan, the PR of the whole development on the site should not exceed 3."

9. Whilst both the Appeal Tribunal (Buildings) and the Court of First Instance have indicated clearly that the Applicant's claim for an overall plot ratio of 9 should be rejected, **neither the Tribunal nor the Court would appear to propose adopting an overall plot ratio of 5 (i.e. the lower plot ratio of the two portion of land under different zoning) within their respective judgments.**
10. The Appeal Tribunal (Buildings), for instance, did not interpret further the 2003 approval as right or wrong. It merely pointed out the fact that *"...this (i.e. treating the Site as 2 separate sites – an approach considered to be wrong by the Tribunal) was not the approach adopted in the (2003) submission or in the approval."*
11. Similarly, and whilst **judgment of the IFL Case does not support extending benefit of the R(A) Portion to the R(C)7 Portion, the Court does not appear to be in favor of "...applying the R(C)7 restriction beyond its proper zone⁵ "**
12. As such, **the claim that the method of plot ratio calculation adopted in PN4 to be "...in line with the recent decisions of the Appeal Tribunal (Buildings) and the Court of First Instance in respect of a relevant case in the Mid-levels West area" is in doubt.**
13. More importantly, the Appeal Tribunal (Buildings) has provided its judgment based on *"... the words in paragraph (1) of the Remarks relating to Zone R(C)7..."*. **It would not therefore appear to be logical for the Planning Department to claim that PN4 has followed the judgment of the Tribunal – given that the Tribunal has followed and interpreted the Ordinance in accordance with the notes of the OZP in deriving its decision in the first place.**

⁵ Paragraph 55, page 11, Judgment of the IFL Case