

## TOWN PLANNING APPEAL NO. 13 OF 2006

and

## TOWN PLANNING APPEAL NO. 5 OF 2008

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### LIST OF DOCUMENTS REFERRED TO

1.	Plan showing S1, S2 and S3 portions	1 <sup>st</sup> MLP : [1/4/4127] 2 <sup>nd</sup> MLP : [2/10/10139]
2.	1 <sup>st</sup> joint rezoning application	3/19/19037-19269 [Block plan at 3/19/19061]
3.	RNTPC Paper No. 35/98 dated June 1998	3/19/19001-19017
4.	a letter dated 9 July 1998 rejecting 1 <sup>st</sup> joint rezoning application	3/21/21001-21002
5.	2 <sup>nd</sup> joint rezoning application	4/22/22029-22270 [Conceptual MLP at 4/22/22063] : 4/22/22057; §6.1.2 [Supplementary Planning Statement] : 4/22/22057-22080 : 4/22/22054; §5.8.2 : Block plan: 4/22/22064-20066
6.	RNTPC Paper No. 70/99 dated December 1999	4/22/22001-22021
7.	RNTPC Paper No. 26/2000 dated May 2000	4/24/24001-24027
8.	Letter dated 19 May 2000 approving 2 <sup>nd</sup> joint rezoning application	4/26/26001-26002
9.	1 <sup>st</sup> s.16 Application dated October 2005	1/4/4108-4437
10.	RNTPC Paper No. A/ST/630 dated November 2005	1/4/4055-4085
11.	Letter dated 9 December 2005 rejecting the 1 <sup>st</sup> s.16 application	1/4/4513-14
12.	1 <sup>st</sup> s.17 Review dated December 2005	1/4/4515-4701
13.	TPB Paper No. 7559 dated April 2006	1/4/4001-4034

14.	a letter dated 12 May 2006 rejecting 1 <sup>st</sup> s.17 review	1/7/7001-7002
15.	2 <sup>nd</sup> s.16 Application dated August 2007	2/10/10112-10644
16.	RNTPC Paper No. A/ST/658 dated October 2007	2/10/10077-10111
17.	Letter dated 5 November 2007 rejecting 2 <sup>nd</sup> s.16 applicaiton	2/10/10768-10769
18.	2 <sup>nd</sup> s.17 Review Application dated November 2007	2/10/10770-101025
19.	TPB Paper No. 8142 dated July 2008	2/10/10001-10037 : 2/10/10021 : 2/10/10030
20.	Letter dated 8 August 2008 rejecting 2 <sup>nd</sup> s.17 review	3/13/13001-13002
21.	<u>International Trader Limited v. Town Planning Appeal Board &amp; anor, [2009] 4 HKC 411</u>	List of authorities: AA7
22.	s.16(4) of TPO	List of authorities: AA1
23.	OZP No. S/ST/23  Notes which form part of the OZP	1/2/2048  1/2/2001-32 : [1/2/2036] - Paragraph 3.2 of the Notes : [1/2008] - paragraph (a)(vi) in the Remarks to CDA(1) under the Schedule of Uses : [1/2/2007] – Planning Intention
24.	Explanatory Statement	1/2/2033-47 :1/2/2035 – Note: ES doesn't form part of the plan :1/2/2038 – Para 7.2.2(ii) ES
25.	<u>Henderson Real Estate Agency Ltd v Lo Chai Wan [1997] HKLRD 258</u>	List of authorities: AA3
26.	Dairy Farm's rezoning application in 1997 (RNTPC Paper No. 3/97 dated January 1997)	3/16/16001-16222
27.	Town Planning Board's meetings	4/25/25001-25003 &

	concerning the 2 <sup>nd</sup> joint rezoning application	4/23/23001-23003
28.	Evidence of Mr. Wing Wing Chan	:Trans/23.22.09/476–478; 485 lines G–H :Trans/23/11/09/491 – 492 : Trans/23/11/09/475 : 7/36/36012§8.5(a)
29.	<u>International Trader Limited v. Town Planning Appeal Board &amp; Anor</u> , unreported, HCAL 13 of 2007	AA6
30.	Supplementary Planning Statement	4/22/22057-22080
31.	(§385.251, Vol. 25(2), Halsbury's Laws of Hong Kong (2009 Re-issue))	List of Authorities: AA 33
32.	Guidelines 17	1/3/3001-3005
33.	Guidelines 18A	5/28/28032-28040
34.	Guideline 27	AA 2
35.	Letter issued by KCRC dated 4 February 2009	5/28/28048-28049
36.	Letter issued by MTRC dated 9 April 2009	5/27/27252-27253
37.	Letter from TPB to Masterplan Ltd. approving the YOHO Town development dated 3 December 2004	5/28/28060-28065
38.	Evidence of Mr. Ian Brownie	:Trans/18.11.09/269, lines R–T; L–M :5/28/28015§31(a) and 28058
39.	<u>British Railways Board v The Secretary of State for the Environment</u> [1994] J.P.L. 32	List of Authorities: AA32
40.	Evidence of Mr. Alexis Wong	:5/29/29015§35(b) :5/29/29086 – pedestrian connection from Palazzo to footbridge :Trans/17.11.09/ 179H-L :Trans/17.11.09/ 196A – 197N :Trans/118-119/125 K-V/145 F-H/146 B-C)
41.	Evidence of Mr. Raymond Cook	3/16/16073; §3.4.1
42.	Supplementary Planning Statement:	4/22/22054

	§5.8.2 and Block plan:	4/22/22064-20066
43.	OHC Paper No. 107 for the “CDA(1) site at the Ma On Shan Rail Tai Wai Station and its Adjoining Area”	8/53/53005
44.	Plan showing pedestrian connection to the Palazzo via a footbridge	5/29/29086
45.	Plan of 2 <sup>nd</sup> rezoning scheme, 1 <sup>st</sup> MLP and 2 <sup>nd</sup> MLP showing the integration of the development	Exhibit A-11
46.	Town Planning Appeal No. 2 of 2008, unreported, 25 February 2009 §13	List of Authorities: AA 35
47.	photos provided by the Appellant showing the traffic at various times in the AM and PM peak periods	Exhibit A-4; 8/54/54001-54003
48.	Evidence of Mr. Cheung Yat-Wah	:Transcript: 27.11.2009/I–Q
49.	Evidence of Professor Ng	:Trans/26.11.09/656. Line N – S :Trans/26.11.2009/627A–H; 668K-M and 673F–M :Trans/26.11.09/ 691G
50.	Notice of Appeal dated 10 July 2006 §6	1/8/8006-8010
51.	Block Plan The View	1/4/4035 1/4/4044
52.	Evidence of Christopher Foot	:Trans/19.11.2009/352N-T :Trans/18.11.2009/353A-T
53.	Evidence of Mr. Ng Tak Wah	:Trans/27.11.2009/773I-M :Trans/27.11.2009/777D-778M; 780D-F
54.	Evidence of Mr. Berny Ng	:Trans/333
55.	Technical Guide on Air Ventilation Assessment and §10.1 in Chapter 11 of HKPSG	Exhibit A-13; pp.31
56.	Computational Fluid Dynamics (CFD) computer modelling	BC-1; 6/35/35007-35064
57.	Memo issued by EPD dated 21 September 2009	8/47/47008 §4.3(ix)
58.	A press release entitled “MTR Exits Freight Business to Focus on Passenger Service” issued by the MTRC dated 29	Exhibit A-8

	October 2009	
59.	Notes of Meeting with KCRC dated 7 September 2006	5/28/28046
60.	<u>Securities and Futures Commission v. Zou YiShang</u> [2007] 3 HKC 409	--
61.	Evidence of Benny Chow	Trans/21.11.2009/441M-442B
62.	Capital Rich Development Ltd. and Anor v Town Planning Board [2007]2 HKLRD 155	AA27

**TOWN PLANNING APPEAL NO. 13 OF 2006**

**and**

**TOWN PLANNING APPEAL NO. 5 OF 2008**

**IN THE MATTER** of the

Town Planning Ordinance (Cap. 131)

and

**IN THE MATTER** of an Appeal under

Section 17B by

Appellant (represented by Mr. Anthony Ismail and Mr. Abraham Chan instructed by Mayer Brown JSM for the Appellant)

Respondent (represented by Mr. Nicholas Cooney SC instructed by Secretary for Justice on fiat for the Respondent)

**Name of the Appellant :** AGP (Shatin) Limited

**Date of Hearing:** 12 & 14 October 2009, 16-19, 23, 26 & 27 November 2009 and 6 January 2010

**Date of Decision:** 5 October 2010

**Town Planning Appeal Board:**

Ms Teresa CHENG Yeuk-wah, BBS, SC, JP (Chairman)

Mr CHAN Chung (Member)

Mr Johnny FEE Chung-ming (Member)

Mr TSANG Man-biu (Member)

Mr WONG Lok-tak (Member)



## DECISION

### BACKGROUND

1. The Site in dispute (the “Site”) is located at the centre of the Fo Tan area within Sha Tin New Town. It occupies the entire Comprehensive Development Area(1) zone (“CDA(1)”) shown on the Approved Sha Tin Outline Zoning Plan S/ST/23 (“the Approved Plan”). It is elbow-shaped and is bounded by Lok King Street to the south-east, the Fo Tan Industrial Area to the north-west and the Fo Tan Road to the south-west. The Site area is approximately 49,708 sq.m. It is currently made up of three contiguous pieces of land:

(1) The Appellant’s land (“S1”) – It comprises land in STTL<sup>1</sup> 75 and Lot 744RP<sup>2</sup> in D.D.176<sup>3</sup>. It is located at the southern-most corner of the Fo Tan Industrial Area. It is being approximately 20,092 sq.m.

(2) Government Land (“S2”) – It comprises a small public transport terminus at Au Pui Wan Street and the adjoining road. It is being approximately 3,906 sq.m.

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<sup>1</sup> Shatin Town Lot

<sup>2</sup> Remaining Portion

<sup>3</sup> Demarcation District

(3) The KCRC's Land ("S3"), now under the ownership of MTRC<sup>4</sup> – It comprises the East Rail Fo Tan Station, the freight yard and the adjoining rail tracks. It is being approximately 25,709.982 sq.m. The station platforms, railway tracks and freight yard are located on embankment at about 7.00 mPD<sup>5</sup>. The station concourse is located at the Lok King Street level directly above the platforms and railway tracks.

2. In 2004, the Appellant, the AGP (Shatin) Limited ("AGP"), a subsidiary of the SEA Holdings Limited, acquired S1 from the Dairy Farm Corporation ("Dairy Farm"). S2 and S3 remain to be under the ownership of the Government and KCRC (currently MTRC) respectively.
3. There were two rezoning applications jointly lodged by the KCRC and Dairy Farm prior to the two section 16 applications, their respective review applications and the subject appeals by the Appellant.

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<sup>4</sup> Mass Transit Railway Corporation. This comes under the MTRC now as a result of the merger of KCRC and MTRC in December 2007.

<sup>5</sup> Principal Datum

4. The rezoning requests were seeking to change the original zonings “Other Specified Uses” annotated ‘Railway Depot Comprehensive Development Area’ (“OU (Railway Depot Comprehensive Development Area)”), “Industrial” (“I”), “Green Belt” (“GB”), “Road” and “River Channel” into “Comprehensive Development Area(1)” (“CDA(1)”). In or around 2000, the Town Planning Board agreed to rezone the Site to “CDA(1)”. Some history in relation to the Site is set out below.

*(a) 1<sup>st</sup> joint rezoning application – March 1998*

5. In or around March 1998, Dairy Farm and KCRC jointly submitted their first rezoning application. In this application, they proposed to build a comprehensive residential development consisting of eleven residential blocks with club house, retail use and recreational facilities (with a plot ratio of 6.13), coupled with the inclusion of a primary school together with some improvements to the KCR station, freight yard and public transport facilities on the Site. The application was to be considered by the Rural and New Town Planning Committee (“RNTPC”) on 19 June 1998.
6. By the RNTPC Paper No. 35/98 dated June 1998 produced by the Planning Department for the RNTPC’s consideration, the Planning

Department indicated that they did not support the rezoning application due to the following reasons:

- (1) the proposed development was of excessive intensity with an overall plot ratio of about 6.13;
- (2) it would create industrial/residential interface problems;
- (3) it fails to provide adequate Government, institution or community (GIC) facilities including primary school and secondary school to serve the neighbourhood developments including the Jubilee Garden, Royal Ascot and the then proposed Royal Ascot Phase II development;
- (4) it fails to address potential adverse environmental impacts over the Nullah, Sha Tin Sewage Treatment Works and the existing water supply system; and
- (5) the inclusion of part of Fo Tan Road and the area beneath Fo Tan Road into the proposed development site would set an undesirable precedent.

7. By a letter dated 9 July 1998, the Town Planning Board (the “Board”) rejected the rezoning application. The relevant parts of the letter are given below:

*“I refer to your rezoning request of 11.3.1998.*

*Please be informed that the Rural and New Town Planning Committee of the Town Planning Board at its meeting on 19.6.1998 decided to reject the request for rezoning the subject site from “Other Specified Uses” annotated “Railway Depot Comprehensive Development Area”, “Industrial”, “Green Belt”, “Road” and “River Channel” to “Comprehensive Development Area” on the approved Sha Tin Outline Zoning Plan No. S/ST/10 and the reasons are :*

*(a) due to the potential industrial/residential interface problem, the site is not suitable for residential development;*

*(b) the scale and the development intensity of the proposed development of the proposed “Comprehensive Development Area” (“CDA”) zone with an overall plot ratio of about 6.13 and a building height of 170.75 mPD are considered excessive and incongruous with the surrounding developments in the area;*

*(c) as the proposed residential development is in close proximity to the existing godowns and factories, you have not demonstrated in the*

*submission that the residents of the proposed development will not be affected by adverse environmental impacts;*

*(d) the proposed primary school is not acceptable as it has not demonstrated in the submission that the primary school will not be affected by adverse environmental impacts;*

*(e) the proposed school provision in the proposed development is not acceptable as no secondary school has been proposed in the development;*

*(f) the inclusion of part of the Fo Tan Road into the proposed "CDA" zone is considered not acceptable and would set an undesirable precedent for other similar requests;*

*(g) no hydraulic study has been provided in the submission to demonstrate that the proposed decking-over of part of the Fo Tan Nullah will not affect the capacity, hydraulic behavior and maintenance of the Nullah;*

*(h) the proposed development will further*

*overload the Sha Tin Sewage Treatment Works and insufficient information has been provided in the submission to address the problem; and*

*(i) the existing water supply system within Sha Tin North is fully committed and no proposal has been included in the submission to address the problem.”*

*(b) 2<sup>nd</sup> joint rezoning application – May 1999*

8. In or around May 1999, Dairy Farm and the KCRC lodged their second rezoning application. In this application, they proposed to build a development comprising eight high-rise residential blocks (above a 5-storey podium), one primary school, one secondary school, retail uses and recreation facilities. A conceptual master layout plan (“Conceptual MLP”) was submitted together with the application.
9. Originally, the application was to be considered by the RNTPC on 17 December 1999. However, the decision was deferred as the RNTPC required further information on the implementation of Road D15 and the provision of sewage facilities to serve the proposed development. The application was accordingly re-scheduled for RNTPC’s consideration on 5 May 2000.

10. Two RNTPC papers, namely, RNTPC No. 70/99 and RNTPC Paper No. 26/2000 dated in December 1999 and May 2000 respectively were produced by the Planning Department for RNTPC's consideration in connection with this rezoning request. In both papers, the Planning Department indicated that they had no objection to the rezoning application notwithstanding some outstanding technical issues were pending to be addressed by the Applicant stated at paragraph 6.2 of the RNTPC Paper No. 26/2000 dated in May 2000.
  
11. By a letter dated 19 May 2000, the Board agreed to rezone the site to its current CDA(1) zoning. The relevant parts of the letter are repeated below:

*"I refer to your rezoning request of 24.5.1999 and my letter dated 6.1.2000.*

*At its meeting on 5.5.2000, the Town Planning Board (the Board) agreed to rezone the subject site from "Other Specified Uses" annotated "Railway Depot Comprehensive Development Area", "Industrial" and "Green Belt" to "Comprehensive Development Area". Amendment to the draft Sha Tin OZP No. S/ST/13 would be submitted to the Committee for approval prior to gazetting under the*



*provision of the Town Planning Ordinance. ”*

*(c) 1<sup>st</sup> s.16 Application – October 2005 (Application no. A/ST/630)*

12. In or around October 2005, the Appellant, having acquired S1 from Dairy Farm in 2004, submitted their 1<sup>st</sup> s.16 application to develop the Site. A Master Layout Plan (“1st MLP”) was included in the application. As shown in the 1<sup>st</sup> MLP, the Appellant proposed to develop the whole CDA(1) in three phases with the Gross Floor Area (“GFA”) to be distributed on a pro-rata basis over Phases 1 and 3 i.e. S1 and S3 respectively. Phase 2 was solely for development of the mini Public Transport Interchange (PTI) which could be in conjunction with either Phase 1 or 3.
  
13. The proposed development consists of ten residential blocks (with a total of 2,268 flats) (i.e. 191,100 sq.m.) with three 42-storey blocks and two 17-storey blocks in S1 and five 40-storey blocks in S3. The proposed residential blocks will be positioned on podium structure where residents’ club house, car parking spaces, a large PTI and retail facilities are accommodated. A kindergarten, a primary school and a mini-transport interchange (MTI) will also be provided.

14. The application was to be heard by RNTPC on 25 November 2005. In this connection, the Planning Department produced the RNTPC Paper No. A/ST/630 dated November 2005 for the RNTPC's reference. The Planning Department stated that they did not support the application due to the following reasons:

- (1) the proposed development cannot achieve the objective of the "CDA(1)" zone which is to attain a comprehensive development for the whole site, together with integration of various land-uses and infrastructure development with due regard to the overall environmental, traffic and the urban design considerations. It also fails to overcome the site constraints and optimize the development potential of the site;
- (2) the application has not provided detailed development in the remaining portions of the site;
- (3) there is reservation on whether the proposed phased development would undermine the original planning intention to develop the whole CDA in a comprehensive manner;
- (4) there are doubts over the feasibility to implement the proposed MLP;
- (5) the proposed development cannot achieve comprehensiveness and integration in terms of overall layout, disposition of buildings, height profile, access arrangement/pedestrian

circulation and provision of GIC and transport facilities. In particular, the layout and dispositions of the residential towers are undesirable which will likely give rise to “wall effect” and the development constraints have not been addressed properly;

- (6) potential adverse impact on road traffic;
- (7) potential adverse impact on the operation of Fo Tan Station, rail tracks and freight yard; and
- (8) undesirable location of the primary school and secondary school and doubts on their implementation.

15. By a letter dated 9 December 2005, the Board rejected the application. Relevant parts of the letter are stated below:

*“I refer to my letter to you dated 13.10.2005.*

*After giving consideration to your application, the Town Planning Board (the TPB) decided to refuse the application and the reasons are :-*

- (a) the planning intention of the “Comprehensive Development Area(1)” is for comprehensive development/redevelopment of the whole area. There is inadequate information in the submission*

*to demonstrate that the proposed phased development is technically feasible, and would not undermine the original planning intention to develop the whole site in a comprehensive manner;*

*(b) the layout and dispositions of the residential towers are undesirable and the development constraints (particularly traffic noise and industrial/residential interface problem) have not been addressed properly;*

*(c) the proposed development may adversely affect the operation of the East Rail Fo Tan Station and the adjoining rail tracks and freight yard;*

*(d) the proposed scheme has excessive provision of residents' car parking spaces and the proposed ingress/egress points at Au Pui Wan Street and Lok King Street are unsatisfactory in location/design. The application fails to provide an effective pedestrian circulation system to facilitate safe and convenient pedestrian movements within different portions of the site and in connection to the surrounding developments;*

- (e) the subject site is subject to adverse traffic noise impact and there is insufficient information in the submission to demonstrate that adverse environmental impact on the proposed development is mitigated;*
  
- (f) there is insufficient information in the submission to demonstrate that the proposed development would not generate any adverse visual impact on the surrounding development; and*
  
- (g) the design, construction, funding, operation and maintenance responsibilities of the proposed Government, institution or community and public transport interchange facilities have not been confirmed. There is concern on the need and timely implementation of the Government, institution or community and public transport facilities within or in associated with the development scheme. ”*

*(d) 1<sup>st</sup> s.17 Review – December 2005*

16. In or around late December 2005, the Appellant submitted their 1<sup>st</sup> s.17 Review Application. Their review application was to be considered by the Board on 21 April 2006. In relation to this review application, the Planning Department had produced the TPB Paper No. 7559 dated April 2006 for the Board's reference. In the said Paper, the Planning Department indicated that they did not support the review application on the same grounds given in RNTPC Paper No. A/ST/630 (see above).
17. By a letter dated 12 May 2006, the Board refused the review application. Relevant paragraphs of the letter are stated below:

*"I refer to your attendance at the Town Planning Board (TPB) meeting held on 21.4.2006.*

*After giving consideration to your review submission, the TPB decided on review to refuse your application and the reasons are: -*

*(a) the planning intention of the "Comprehensive Development Area(1)" is for comprehensive development/redevelopment of the whole area. There is inadequate information in the submission to demonstrate that the proposed phased*

*development is technically feasible, and would not undermine the original planning intention to develop the whole site in a comprehensive manner;*

*(b) the layout and disposition of the residential towers are undesirable and the development constraints (particularly traffic noise and industrial/residential interface problem) have not been addressed properly;*

*(c) the proposed development may adversely affect the operation of the East Rail Fo Tan Station and the adjoining rail tracks and freight yard. There is inadequate information in the submission to demonstrate that the proposed phased development is technically feasible;*

*(d) there is insufficient information in the submission to demonstrate that the proposed development would not generate any adverse visual impacts to the surrounding developments; and*

*(e) the design, construction, funding, operation and maintenance responsibilities of the proposed Government, institution or community (GIC) and*

*public transport interchange facilities have not been confirmed. There is a concern on the need and timely implementation of the GIC and public transport facilities within or in associated with the development scheme.”*

18. On 10 July 2006, the Appellant filed a Notice of Appeal against the Board’s decision to reject their 1<sup>st</sup> s.17 review application. This appeal forms part of the subject matter of the present hearing.

*(e) 2<sup>nd</sup> s.16 Application – August 2007 (Application no. A/ST/658)*

19. In or around late August 2007, the Appellant lodged their 2<sup>nd</sup> s.16 Application to develop the Site. Similarly, a Master Layout Plan (2<sup>nd</sup> MLP) was submitted together with their application. In this application, they proposed to construct a comprehensive commercial/residential development with Government, institution or community (GIC) facilities and public transport interchange (PTI) on S1, S2 and S3 in phases corresponding to the land ownership pattern. Similar to their 1<sup>st</sup> s.16 Application, GFA would be distributed on a pro-rata basis.



20. The proposed development consists of eight residential blocks (with a total of 2,063 flats) (i.e. about 191,077 sq.m. in domestic GFA) with four 35 to 43-storey blocks in S1 and four 37 to 41-storey blocks in S2 and S3. The proposed residential blocks will be grouped in a cluster and positioned on podium structure where residents' clubhouse, car parking spaces, PTIs, retail facilities and a kindergarten are accommodated. A primary school, a secondary school and a MTI will also be provided.
21. The application was to be considered by the RNTPC on 12 October 2007. By the RNTPC Paper No. A/ST/658 dated October 2007 produced by the Planning Department for the RNTPC's reference in connection with this application, the Planning Department stated they did not support the proposed development due to the following reasons:
- (1) the proposed development cannot achieve the objective of the "CDA(1)" zone for comprehensive development of the whole site, with integration of various land-uses and infrastructure development to resolve the overall environmental, traffic and urban design considerations.
  - (2) the proposed phased development would undermine the original planning intention to develop the whole CDA in a comprehensive manner.

- (3) uncertainties of the implementation of the MLP.
- (4) suboptimal design and layout with potential “wall effect” and excessive building bulk.
- (5) potential adverse impact on the operation of Fo Tan Station, rail tracks and freight yard.
- (6) undesirable location for the kindergarten, primary school and secondary school.
- (7) potential adverse impacts on traffic, environment and visual aspects, as well as the provision of community and recreation facilities in the area.

22. By a letter dated 5 November 2007, the Board decided to refuse the 2<sup>nd</sup> s.16 Application. Relevant paragraphs of the letter are repeated below:

*“I refer to my letter to you dated 6.9.2007.*

*After giving consideration to your application, the Town Planning Board (the TPB) decided to refuse the application and the reasons are: -*

*(a) the planning intention of the “Comprehensive Development Area(1)” is for comprehensive development/redevelopment of the whole area.*

*There is inadequate information in the submission to demonstrate that the proposed phased development would not undermine the planning intention to develop the whole site in a comprehensive manner;*

*(b) the design and layout of the proposed development is unsatisfactory. There is inadequate information in the submission to demonstrate that the proposed development would achieve best integration in terms of overall layout, access arrangement/pedestrian circulation and provision of Government, institution or community (GIC) and transport facilities. The disposition of the residential towers is congested with excessive building bulk. There is inadequate information in the submission to demonstrate that the proposed development would not impose 'wall effect' in the area;*

*(c) there is inadequate information in the submission to demonstrate that the proposed development would not adversely affect the operation of the East Rail Fo Tan Station and the adjoining rail tracks and freight yard;*

*(d) there is insufficient information in the submission to demonstrate that the proposed development would not generate any adverse visual environmental, traffic, landscape and air ventilation impacts on the surrounding developments; and*

*(e) the design and location of the proposed GIC and public transport interchange facilities are not satisfactory. There are also concerns on the construction, funding, operation and maintenance responsibilities of the GIC and public transport facilities within or associated with the development scheme. There is insufficient information in the submission to demonstrate that the proposed GIC and public transport interchange facilities can be timely implemented as planned.”*

*(f) 2<sup>nd</sup> s.17 Review Application – November 2007*

23. In or around late November 2007, the Appellant submitted their 2<sup>nd</sup> Review Application against the Board’s decision to reject their 2<sup>nd</sup>

s.16 Application. The review was to be considered by the Board on 25 July 2008.

24. By a TPB Paper No. 8142 dated July 2008 produced by the Planning Department for the Board's consideration in connection with the present review application, the Planning Department stated they did not support the review application on the same grounds as appeared in the letter dated 5 November 2007 issued by the Board rejecting the Appellant's 2<sup>nd</sup> s.16 application (see above).

25. By a letter dated 8 August 2008, the Board refused the 2<sup>nd</sup> s.17 Review Application. Relevant paragraphs of the letter are stated below:

*"I refer to your attendance at the Town Planning Board (TPB) meeting held on 25.7.2008.*

*After giving consideration to your review submission, the TPB decided on review to refuse your application and the reasons are: -*

*(a) the planning intention of the "Comprehensive Development Area(1)" is for comprehensive development/redevelopment of the whole area. There is inadequate information in the submission*

*to demonstrate that the proposed phased development would not undermine the planning intention to develop the whole site in a comprehensive manner;*

*(b) the design and layout of the proposed development is unsatisfactory. There is inadequate information in the submission to demonstrate that the proposed development would achieve best integration in terms of overall layout, access arrangement/pedestrian circulation and provision of Government, institution or community (GIC) and transport facilities. The disposition of the residential towers is congested with excessive building bulk. There is inadequate information in the submission to demonstrate that the proposed development would not impose 'wall effect' in the area;*

*(c) there is inadequate information in the submission to demonstrate that the proposed development would not adversely affect the operation of the East Rail Fo Tan Station and the adjoining rail tracks and freight yard;*

*(d) there is insufficient information in the submission*

*to demonstrate that the proposed development would not generate any adverse visual environmental, traffic, landscape and air ventilation impacts on the surrounding developments; and*

*(e) the design and location of the proposed GIC and public transport interchange facilities are not satisfactory. There is insufficient information in the submission to demonstrate that the proposed GIC and public transport interchange facilities can be timely implemented as planned.”*

26. On 3 October 2008, the Appellant filed a Notice of Appeal against the Board’s decision to reject their 2<sup>nd</sup> s.17 Review Application. This appeal forms part of the subject matter of the present hearing.

### **THE TOWN PLANNING APPEAL BOARD’S POWER**

27. Mr. Nicholas Cooney S.C., Counsel for the Respondent, has rightly reminded that the Town Planning Appeal Board (the “Appeal Board”) must exercise an independent planning judgment when considering this appeal. This principle is stated expressly by Hartmann JA at paragraph 55 of **International Trader Limited v. Town Planning**

Appeal Board & anor [2009] 4 HKC 411. Paragraph 55 of International Trader says,

*“55. ... in determining what is or is not a relevant matter to take into account when an application is made pursuant to s 16, it is necessary to ascertain the planning intention behind an approved plan. This is a matter of interpretation which is itself a matter of law and, as such, admits of only one correct answer ...”*

28. In determining what is or is not a relevant matter to take into account, the Appeal Board is not carrying out a plan making exercise. It is bound by s. 16(4) of the Town Planning Ordinance (“TPO”):

*“The Board may grant permission under subsection (3) only to the extent shown or provided for or specified in the plan.”*

29. Pursuant to section 16(4), the Appeal Board can grant permission (which is the effect of allowing an appeal) only to the extent shown or provided for or specified in the outline zoning plan. In other words, permission can only be granted for a development which is in line with the planning intention.



30. In the premises, it is therefore necessary to first ascertain the planning intention for the Outline Zoning Plan (“OZP”) for the subject site.

### **PLANNING INTENTION**

31. It is common ground that the planning intention is to be ascertained from a proper construction of the Approved Plan including the Notes which form part of the OZP and the Explanatory Statement for the Approved Plan (which does not form part of the OZP).
32. It should be noted that, although the Explanatory Statement is expressly stated not to be part of the approved plan for the purposes of the TPO, it cannot be disregarded because it is a material consideration although the Board and the Appeal Board is not bound to follow it : **Henderson Real Estate Agency Ltd v Lo Chai Wan** [1997] HKLRD 258 at page 267, lines A – E.
33. The Approved Plan is attached hereto where the Site is under the zoning of ‘Comprehensive Development Area(1)’ (“CDA(1)”).
34. Planning Intention, as stated in the Notes, is this:

“Planning Intention

*This zone is intended for comprehensive development/redevelopment of the area for residential and/or commercial uses with the provision of open space and other supporting facilities. The zoning is to facilitate appropriate planning control over the development mix, scale, design and layout of development, taking account of various environmental, traffic, infrastructure and other constraints.”*

35. At Paragraph 7.2.2 (ii) of the Explanatory Statement for the Approved Plan, the following is stated in relation to Planning Intention:

*“7.2.2 This zoning comprises the following four sites:*

- (ii) *“CDA(1)” site at East Rail Fo Tan Station and its Adjoining Area : Total Area 5.13 ha*

*Development within this “CDA(1)” site is restricted to a maximum GFA of 208,600m<sup>2</sup>. The domestic GFA shall not exceed 191,100m<sup>2</sup>. One primary school and one secondary school will be provided in the development. Upon completion, about 2,800 flats will be provided.”*

36. Mr. Anthony Ismail, Counsel for the Appellant, submitted that the meaning of comprehensive development is to be derived from the Approved Plan, the Notes and the Explanatory Statement and the factual matrix. As a matter of principle, the Respondent raised no objection to it.
37. Parties however differ as to what amounts to the relevant factual matrix, and also the extent to which such factual matrix can be used in a s.16 application and hence these appeals.

### **Planning Intention - Factual Matrix**

38. It is not disputed that rezoning applications and the Conceptual MLP have been taken into account in **International Trader** (paragraphs 56, 57, 65 and 71 of the Judgment). Notwithstanding this, the Appeal Board still has to address the question on what forms the factual matrix in the present appeals and when it is necessary to consider such factual matrix. Paragraphs 56, 57, 65 and 71 of the Judgment are set out below:

*“56. In the present case, the identification of the planning intention was a relatively narrow issue as it required a determination only of why it was that R(C) 7 sites,*

*which before amendment of the OZP had been zoned as R(A) sites, had been rezoned.*

57. *On an examination of the relevant documents and a detailed study of the history of the matter, the judge concluded that R(C) 7 sites had been rezoned for the reason that they did not enjoy any direct vehicular access to a road. Neither the state of general traffic conditions in the area nor any question of visual impact lay behind the rezoning.*

65. *In seeking to ascertain the true planning intention contained in the OZP, Cheung J considered relevant history, taking note of a number of 'internal' papers. These included a report prepared by the Planning Department in 1995 in respect of an early application made by the respondent under s.16. That report said the following as to the planning intention behind the zoning of R(C) 7 sites:*

71. *This overview of Cheung J's reasoning is not exhaustive. Cheung J's analysis was more detailed and was, in my view, correct in its conclusions. In short, I am satisfied that he correctly identified the planning intention behind the zoning of R(C) 7 sites and, having done so, was correct also in defining the consequences."*

39. On this issue, we are of the view that, if we find the planning intention is clear, there is no need to look beyond the matters which both parties accept as relevant as summarized in paragraph 31 above. If we find that the planning intention is not that clear and if there is a need to look beyond the gazetted information, that is the Notes, the Approved Plan and the relevant part of the Explanatory Statement, then the question is what other information should one look at and what constitutes the factual matrix.
40. As will be seen in the discussions below, we find the planning intention is clear and can be discovered from the gazetted information. Notwithstanding this, as the relevant factual matrix is one of the contentious issues in this appeal and both parties had referred to the rezoning information, we will address this issue but it must be stressed that in determining what is the relevant factual matrix, we do not purport to decide as a matter of law as each case turns on its own facts. We are only concerned with the issues that are argued before us, namely the rezoning application, the Conceptual MLP and the discussions pertaining that.
41. Insofar as what constitutes the relevant factual matrix is concerned, the difference between the parties is whether the internal documents not available to the public as a matter of right should form the factual matrix. Both the Appellant and Respondent accept that the documents

which form part of the rezoning applications are not something that is available to the public. There is no right on the part of a s.16 application applicant, who can be any party (again a matter not in dispute), to have access to such documents.

42. The Respondent does not proffer specific legal arguments and analysis to say the documents not available to the public form part of the factual matrix but they submitted that, in **International Trader Limited v. Town Planning Appeal Board & Anor**, unreported, HCAL 13 of 2007, Cheung J had looked at a number of documents<sup>6</sup> and the background pertaining to the rezoning of the subject land (paragraphs 51 - 120 of Judgment) so the same should be followed. Accordingly, in respect of the present appeals, the relevant factual matrix should include Dairy Farm's rezoning application in 1997, the rezoning application by Dairy Farm and KCRC (the Supplementary Planning Statement submitted by KCRC and Dairy Farm), the TPB Papers concerning the rezoning application and the minutes of the Board's meetings concerning the rezoning application.

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<sup>6</sup> Documents and background that had been referred to in **International Trader** included (i) A letter of concern issued by the Fire Services Department to developers [§52]; (ii) Building Authority's policy restricting buildings to a maximum height of 6 storeys [§52]; (iii) a policy known as the "Mid-Levels Moratorium" dating back to 1972 [§53]; (iv) Government's Press Release dated 14 September 2006 [§54]; (v) A Study on "Redevelopment along Stepped Streets" prepared by the Planning Department dated December 1991 [§55]; (vi) Minutes of the Metro Planning Committee meeting held on 9 February 1996 [§86]; (vii) A letter from Swire to the Board dated 14 March 1996 concerning the length of the term (2 years) of planning permission granted for development on the subject site [§90]; (viii) TPB Paper No. 3683 prepared in March 1996 [§94]; (ix) The approval of the draft OZP by the Chief Executive in Council in 2002 [§123], which includes the contemporaneous understanding of the planning intention and the contrary view and; (v) the fact of approval of an earlier s.16 application [§124]

43. Further, the Respondent submitted that, whether the Appellant knew of the rezoning scheme is irrelevant to the proper construction of the planning intention, the Appeal Board in any event must consider the relevant factual matrix.
  
44. In short, the Respondent's case is that the planning intention and benefits as reflected in the rezoning application that was considered and accepted by the Board at the rezoning stage is highly relevant. It is so relevant to the extent that if the escalators of the proposed development linking the various levels of the development are not one above another (as was the case in the Conceptual MLP prepared at the rezoning stage) then the integration (vertical integration) as required by the planning intention would not be met. The same can also be said of the levels of the development. The difference in the levels if not met is a factor that the Respondent relies on in saying that the current application should be dismissed.
  
45. On the contrary, the Appellant submitted that, unless the documents are available to the public, those documents cannot be relevant in the form of a factual matrix in construing the plans and ascertaining the planning intention due to the following reasons:

- (1) The Conceptual MLP is not gazetted but the Approved Plan, the Notes and the Explanatory Statement are. The fact that the Conceptual MLP is not available to the public is an indication that it was not intended to be followed or even taken into account. The Appeal Board therefore cannot take into account the factors such as the layout and number of flats of the development proposal in the Conceptual MLP that found favour with the Board on 5 May 2000 in considering this application.
- (2) A series of events emerged following the acceptance of the Conceptual MLP by the Board. As a result of those events, changes were made to the then prevailing draft Sha Tin OZP where the Conceptual MLP was not always referred to. The Conceptual MLP was over taken by, inter alia, the preparation of the Approved Plan by the Board. Thus, only the Notes and the Explanatory Statement of the Approved Plan are relevant because they were so adopted. The other facts relied on by the Board are irrelevant.
- (3) The Notes and the Explanatory Statement of the Approved Plan do not refer to the Conceptual MLP but referred to the “CDA(1)” site instead. They also do not require an applicant for planning permission to refer to the Conceptual MLP.
- (4) There is nothing to the point that in **International Trader** not all the background and documents were available to the public as of right. What is vital is the key materials which the Board relied



upon as grounds for refusing planning permission should be available to developers or other applicants as of right at the time when they prepare their applications. The Appellant referred to paragraph 49 of **International Trader [2009] 4 HKC** to support their argument:

*“There is substance, I think, in the observations of the majority of the Town Planning Appeal Board in **Town Planning Appeal by Henderson Real Estate Agency Ltd.**, TPA No. 13 of 1993:*

*‘ ... we live in a world in which every citizen is entitled to regulate his affairs according to law. Just as the Town Planning Ordinance protects the Community, it protects property owners as well. An owner is just as entitled to rely on a DPA plan as the Government. That is the raison d’etre for the existence of the Board and the Appeal Board.’ ”*

- (5) A distinction is to be drawn to the situation in **International Trader** given that, firstly, in that case, both parties wanted to look at the documents which were not available to the public, secondly, the documents not available to the public were looked at in order to ascertain what the relevant matter is in determining what can be looked at.

46. The Appellant submitted their arguments still hold true notwithstanding they had access to the previous rezoning documents and so was able to comment and make submissions on them as a result of the participation of their consultants in the rezoning applications.
47. Most importantly, the Appellant submitted that if one is to look at factual matrix, the most important is the thinking behind the actual decision to gazette the plan which involves the consideration by Chief Executive in Council and the papers submitted to it.
48. In determining what the relevant factual matrix is, we consider that, as a matter of principle, it cannot be that every discussion leading to the formation of the OZP and something that is known only to one party can be relevant. It is trite that subjective intention is not relevant. This is not in dispute. The subjective intention of the then applicant, the Board or the Planning Department or indeed the Chief Executive in Council does not matter. The OZP is a public and statutory document. The relevant factual matrix should include only documents available to the public.
49. Mr. Wing Wing Chan, Senior Town Planner of the Planning Department for the Respondent, confirmed that the public has no

right to obtain information about the Conceptual MLP or its details. Mr. Wing Wing Chan added that, if asked, the Board would probably release the rezoning information to the public.

50. The discretion to release is not adequate to elevate discussions pertaining to the Conceptual MLP at the rezoning stage to a level of them forming part of the factual matrix for the OZP. Had the lots been under the title of another party, and an application has to be made, the applicant may not be privy to those documents so as to prepare their case or to consider whether an application or appeal should be made. As a result, we find the way that such internal documents may become available to the public inadequate. As a matter forming the factual matrix to the plan, it cannot be something that is not available to the public as of right. It cannot be merely at the discretion of Planning Department as to whether the information is available.
  
51. Importantly, if there are any matters that were considered to be important to the zoning and / or planning of the Site, they could be expressly stipulated in the OZP so that all interested persons including private citizens can have notice of that. In public instruments such as OZP and where matters can be made specific, it is possible and hence not unreasonable to expect those matters be

stipulated in the OZP for the sake of certainty, transparency and fairness.

52. In this instance, the Respondent relies a lot on what was discussed at the rezoning stage about the Conceptual MLP. The persons involved at that time are not all available for us to ascertain what happened and the thinking behind the statements or observations made. In this case, the consultants of the current applicant happen to be the same as those in the rezoning application. If the current applicant chose to engage a different team, they would not necessarily be privy to those matters. This sort of situation should not arise and will not arise in light of our holding as to what constitutes the factual matrix as set above.

53. As to the use of similar information in **International Trader** at the first instance level, Mr. Ismail, who happened to be the counsel for the Applicant in that case, explained that those information were first brought to the attention of the court by the Respondent there and the Applicant there did not object, so both parties referred to such information to the court. In the present appeals, Mr. Ismail accepted that, with respect to s.16(4) of the TPO, the proper course in ascertaining the planning intention should not include the consideration of those other documents. In light of the reasons stated above, we believe this is the proper approach.

54. Further, paragraph 3.2 of the Explanatory Statement says that the object of the Approved Plan is “to illustrate the broad principles of development”. It is therefore clearly not to illustrate the details of the development shown in the Conceptual MLP and this supports the view that the Conceptual MLP and its discussions at the rezoning application stage cannot be a factual matrix to be taken into account in ascertaining the planning intention given the various details contained therein. Paragraph 3.2 of the Explanatory Statement is repeated below:

*“The Plan is to illustrate the broad principles of development and planning control only. It is a small-scale plan and the road alignments and boundaries between the land-use zones may be subject to minor alterations as detailed planning proceeds.”*

55. More importantly, we agree with the Appellant’s submission that the most important is the thinking behind the actual decision to gazette the plan involves the consideration by Chief Executive in Council and the papers submitted to it. The rezoning scheme (Conceptual MLP) was only part of the background to the OZP. The draft OZP underwent a process whereby there were objections which was considered and then a recommendation to the Chief Executive in Council and presumably with views from the relevant departments set out in papers for the Chief Executive in Council’s consideration.

If factual matrix includes matters such as the Conceptual MLP and the consideration of that in the Board, it may well (but it was not fully argued before us) be said that it includes the consideration of the Chief Executive in Council and the papers submitted to him which are normally privileged and not available to the public as of right.

56. We therefore prefer the submission of the Appellant that information not available to the public as of right should not be a relevant factual matrix in ascertaining the planning intention.
57. However, both parties did refer to the rezoning application in this case. It cannot be disputed that it is a background but it is not part of the factual matrix for ascertaining the planning intention.
58. Further, there may be dispute as to what is or is not a relevant matter to take into account when considering these appeals. It may be necessary, as in **International Trader**, to consider these information before concluding if certain matters raised such as integration, the position of KCRC and MTRC are relevant to the present appeals. Suffice to note that insofar as the relevance of it in ascertaining the planning intention, we have concluded that they are not relevant.

59. We will deal with points raised nonetheless should our decision that such information does not form part of the factual matrix be incorrect in deciding the appeals (see below).

### **Planning Intention – Conclusion**

60. Given that the rezoning documents are not available to the public and the Appeal Board is not carrying out a plan making function by virtue of s.16(4) of TPO, we consider that the planning intention should be ascertained from the Approved Plan, the Notes to the Approved Plan and also not disregarding the Explanatory Statement to the Approved Plan.

### **IDENTITY OF THE APPLICANTS**

61. The parties also differ on the relevance as to the identity of the parties making the application at the rezoning stage and at the time of the s.16 application. As a background, when the plan was rezoned, the KCRC and the former owner of S1, Dairy Farm were the joint applicants. Here the Appellant, the current owner of S1, is making the s16 application on its own.

62. Although it is not disputed by the Respondent that, as a matter of law, under s. 16(2) of the TPO, any person can lodge a town planning application to the Board irrespective whether he has or has no proprietary interest over the land in question, the Respondent submitted the identity of the Applicants is material in this case as it is determinative in answering whether the proposed scheme is comprehensive and how likely the scheme would be implemented. The Respondent submitted an application lodged by the Appellant alone for the entire Site cannot satisfy both the conditions of comprehensiveness and definite implementation, given, in summary, the following:

- (1) The only way to obtain planning permission for a “CDA(1)” site is either by a joint application by all owners or by one or more owners which is supported by a commitment from all other owners to develop according to a specified timetable.
- (2) Planning intention will be undermined or comprehensiveness adversely affected if the KCRC and MTRC do not develop S3 in line with the planning intention.
- (3) This is not an issue which can be resolved by the imposition of a condition because there is no enforceable condition which could be imposed requiring the Government and MTRC to develop S2 and S3.



63. Further, the Respondent submitted that the Conceptual MLP jointly proposed by Dairy Farm and KCRC was comprehensive as there were detailed plans to resolve a number of long-standing and intrinsic problems in Fo Tan, such as the inadequacy in traffic capacity and turning facilities along Lok King Street, the shortfall in primary and secondary school provision, and accessibility to the station. Other features of comprehensiveness can also be found in the 2<sup>nd</sup> rezoning application documents. There was also a definite time frame for implementation where it had planned to complete the development in stages with construction commencing at the end of 2001 and completion in 2005. Most importantly, the joint submission by KCRC and Dairy Farm was consistent with the planning intention as their development concept was to deck over the whole site with a continuous podium over the station platforms, railway tracks, freight-yard, PTI and the private car parking and loading/unloading areas on ground level.
64. The Appellant did not agree. Whilst the Appellant accepted that the development scheme in the rezoning application was comprehensive, they submitted that a clear distinction in principle is normally drawn in planning law between the grant of planning permission and its implementation. They said that, by reference to a number of planning cases, ownership is normally considered an irrelevant fact at the stage of permission.

65. Further, the Appellant argued that the involvement or commitment to develop of the KCRC and MTRC is not relevant as its involvement is not referred to in the Approved Plan, the Notes and the Explanatory Statement. Moreover, neither section 4A nor section 16 of the TPO requires all owners to make a joint application. In Hong Kong planning law, as in English planning law, an applicant for planning permission need not even be the owner of the proposed development site or a person having any other proprietary interest in it (paragraph 385.251, Vol. 25(2), Halsbury's Laws of Hong Kong (2009 Re-issue)).
66. We agree with the Appellant and consider that the identity of the applicants is irrelevant. The OZP does not stipulate anywhere that any future development must be made jointly with KCRC or that a s.16 application would not be allowed unless it is made by way of a similar joint application. Indeed that was not so contended for by the Respondent. Yet the involvement or otherwise of KCRC (and MTRC after 2007) became a matter that featured in these appeals as will be seen below. The Appellant contends that the involvement of KCRC or MTRC is limited to a triggering point for the application of Planning Guidelines 17. The Respondent contends that the position of KCRC (and MTRC) is relevant to the appeals as their position affects whether the planning intention will be undermined, a factor to be considered when dealing with Planning Guidelines 17. We will return to this in more details below.

**PLANNING GUIDELINES : TPB PG-NO. 17 (“Guidelines 17”) & TPB PG-NO. 18A (“Guidelines 18A”)**

67. It is not disputed that the Appeal Board is not at liberty to ignore, depart from or qualify the content of the provisions of Guidelines 17, Guidelines 18A and Guidelines 27 without “cogent reasons” with respect to paragraph 81(5) at **Capital Rich Development Ltd and Anor v Town Planning Board** [2007] 2 HKLRD 155 and paragraph 24 at **International Trader Limited v Town Planning Appeal Board & Anor**. In **Henderson Real Estate Agency Ltd v Lo Chai Wan** at page 267, lines A – C, the Privy Council placed the Explanatory Statement and Guidelines on the same footing.
68. The issue is our interpretation of such guidelines. On the issue of interpretation of the Notes, the Explanatory Statement and the Guidelines, A Cheung J. in **International Trader** paragraph 98 (page 39) says it must be read in :

*“a down-to-earth, practical manner, and the language used is not to be invested with more precision than it would naturally bear. One is not reading a judgment, and still less, construing a statute. One is reading an explanatory statement prepared by the Planning Department to help members of the general public to better understand the planning intention behind the OZP (including the Notes). It*

*is written for both developers and ordinary private landowners and citizens to read.”*

***(a) Guidelines 17 entitled “Guidelines for designation of Comprehensive Development Area (“CDA”) zones and monitoring the progress of “CDA” developments”***

69. Relevant parts of Guidelines 17 are stated in the following:

*“1. Introduction*

*1.1 The “Comprehensive Development Area” (“CDA”) zoning*

*(or the previous “Other Specified Uses” annotated Comprehensive Development/Redevelopment Area” zoning) was first introduced in Outline Zoning Plans (OZPs) in 1976 with the key objective to facilitate urban restructuring and to phase out incompatible development and non-conforming uses. The Town Planning Board (the Board) is empowered to designate an area as “CDA” under section 4(1)(f) of the Town Planning Ordinance (the Ordinance).*

*1.2 In general, “CDAs” are designated in the interest of*

*the wider public although individual property owner's right would be taken into consideration. They are designated after careful consideration of such factors as the planning intention for the area, land status, ownership and other development constraints, including the likely prospect for implementation. They will only be designated where there are no better alternative zoning mechanisms to achieve the desired planning objectives specified in Section 3.1 below.*

*1.3 To avoid planning blight caused by the withholding of piecemeal individual developments within a "CDA" zone, the Board recognizes that there is a need for close monitoring of the progress of "CDA" development. A proactive approach is taken to facilitate development and to keep track on the progress of implementation of "CDA" sites.*

### *3. Planning Intention*

*3.1 "CDAs" are intended to achieve such objectives as*

*to:*

*c. provide opportunities for site amalgamation and restructuring of road patterns and ensure*

*integration of various land-uses and infrastructure development, thereby optimizing the development potential of the site;*

*d. provide a means for achieving co-ordinated development in areas subject to traffic, environmental and infrastructure capacity constraints, and in areas with interface problems of compatible land-uses;*

*e. ensure adequate as well as timely provision of Government, institution or community (GIC), transport and public transport facilities and open space for the development and where possible, to address the shortfall in the district; and*

*f. ensure appropriate control on the overall scale and design of development in areas of high landscape and amenity values and in locations with special design or historical significance.”*

70. Guidelines 17 is intended to deal with situations as this, namely where the sites forming the CDA zone are subjected to different ownerships. Paragraph 3.4 of Guidelines 17 provides:

*“Land Status/Ownership/Tenure*

*3.4 Since fragmented land ownership will affect the prospect of implementation of “CDAs”, CDA sites involving private land, other than those of the LDC or the Housing Society, are normally expected to have a major portion of the private land under single ownership at the time of designation but each site will be considered on its individual merits. Since the designation may affect third party development/redevelopment right, the proponent would be required to indicate the land under his ownership and that he has plans to acquire the remaining portion for comprehensive development.”*

71. Phased development is provided for “CDA”. Paragraph 5.4 of the Guidelines says it would be triggered under the following circumstances:

*“Allowance for Phased Development*

*5.4 For “CDA” sites which are not under single ownership, if the developer can demonstrate with evidence that due effort has been made to acquire the remaining portion of the site for development but no agreement can be*

*reached with the landowner(s), allowance for phased development could be considered. In deriving the phasing of the development, it should be demonstrated that:*

- a. the planning intention of the "CDA" zone will not be undermined;*
- b. the comprehensiveness of the proposed development will not be adversely affected as a result of the revised phasing;*
- c. the resultant development should be self-contained in terms of layout design and provision of open space and appropriate GIC, transport and other infrastructure facilities; and*
- d. the development potential of the unacquired lots within the "CDA" zone should not be absorbed in the early phases of the development, access to these lots should be retained, and the individual lot owners' landed interest should not be adversely affected."*



72. We are of the view that phased development clearly has been triggered in this case as the Appellant has demonstrated with evidence that due effort has been made to liaise with KCRC and MTRC to jointly develop the Site but was in vain<sup>7</sup>. As to whether conditions set out in paragraphs 5.4(a)-(d) are met, it will be analyzed in details in the later parts of the decision.

*(b) Guidelines 18A entitled “Guidelines for submission of Master Layout Plan under Section 4A(2) of the Town Planning Ordinance”*

73. The Appellant also relied on Guidelines 18A in support of its contention that phased development is permitted where there is non-involvement of some of the owners of a CDA site. They submitted paragraph 3.2 is relevant. Paragraph 3.2 provides that:

*“3.2 If the “CDA” site is not under single consolidated ownership, the applicant should be required to demonstrate that the proposed phasing of development*

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<sup>7</sup> In June 2004, the Appellant acquired S1 Portion. They started negotiation with KCRC from June to December 2004 in the hope that some form of joint venture with KCRC could be reached to develop the Site but they were unable to agree on the issue of respective shareholdings and the control where KCRC wanted to have over the development. Following the breakdown of the 1<sup>st</sup> round negotiation, the parties again negotiated between December 2004 and June 2005 and the negotiation failed on the same grounds. Between June 2008 and May 2009, third round negotiation started. This time, the Appellant accepted the proposal of KCRC, however, because of the merger of KCRC and MTRC, MTRC entered into the scene and no agreement has been reached between the Appellant and the MTRC. The Respondent did not dispute the above events had taken place.

*has taken due consideration of the development potential of the lots which are not under his ownership. The corresponding GFA and flat number distribution as well as provision of GIC, open space and other public facilities in each phase should be clearly indicated.”*

74. We agree with the Appellant. We further add that, if we construe that phased development is not permitted in case where the land is under different ownerships, it would mean that, firstly, Guidelines 18A would simply be otiose; secondly, it is also unfair to the co-owners of any land as their right to develop their part of the land would be deprived of even if the conditions set out in the guidelines are met. We also consider that paragraph 49 of Hartmann JA’s ruling in **International Traders** (see above) is relevant here.

#### **RELATIONSHIP OF PLANNING GUIDELINES WITH PLANNING INTENTION**

75. As explained in the above, we consider that there is no dispute that phased development is permitted in CDA zone. In actual fact, the Respondent did not object this but they submitted that the question is whether the permission for that will undermine the planning intention (paragraph 5.4(a) of Guidelines 17) and whether such a phased development will adversely affect the comprehensiveness of the

proposed development (paragraph 5.4(b) of Guidelines 17). In this context they introduced what is described as the 'real prospect test'. The test is postulated by the Respondent as follows:

- (1) The first question the Appeal Board must ask itself is whether, if it grants permission, that permission will be for a development which will be in line with the planning intention.
- (2) In the context of the fact that neither the KCRC nor the MTRC have applied for planning permission, when determining whether the proposed development will be in line with the planning intention, the Appeal Board must ask itself whether there is a real prospect, on the facts as they are known today, that KCRC or MTRC will develop S2 and S3 in line with the planning intention and whether, if they do not, the planning intention will be undermined or comprehensiveness adversely affected.
- (3) The podium structure is the core of the development. It provides a comprehensive and integrated facility where the major activities are concentrated at the Lok King Street level. This comprehensive and integrated facility brings together the station, transport interchanges and retail shops for the use and benefit of not only the residents of the CDA(1) zone but also the students of the schools, workers in the Fo Tan

Industrial Area and the residents of the Palazzo, Royal Ascot and Jubilee Garden. Without the involvement of KCRC and MTRC there is no comprehensive development. Assuming all other necessary approvals are obtained and land exchanges and lease modifications are agreed, only 40% of the zone, i.e. S1, will be developed, less than half of the intended number of flats will be provided and there will be no secondary school or MTI.

- (4) In the absence of a real prospect that either the KCRC or the MTRC will develop S2 and S3 in such a manner as to include residential flats and a secondary school or, at least, land set aside for a secondary school and an MTI, the “phased development” is a fiction; a fiction which will undermine the planning intention for a comprehensive development of the entire zone to include about 2,800 flats and a secondary school or, at least, land set aside for secondary school and an MTI.
- (5) Even if the MTRC undertook a development on S3 some time in the indeterminate future, no one has a clue whether such development would be comprehensive or integrated with the Appellant’s development. All that the Appellant is putting up is a drawing, in the form of a Master Layout Plan, and not a plan for a comprehensive development.

76. We asked for legal authorities in support of the real prospect test. No cases were cited but it was explained that it could be derived from the guidelines and from fundamental principles generally.
77. To show that the real prospect test will not be satisfied, the Respondent then referred to the two letters from KCRC and MTRC dated 4 February 2009 and 9 April 2009 respectively. The relevant parts of the letters are given below:

*(a) 4 February 2009 Letter*

*“ We understand that it is your intention to seek Town Planning Board approval of a specific scheme for your area S1, not the general scheme approach within the overall development inside this CDA alongside the railway, referred to in our letter dated 24 July 2008. Accordingly we have no objection should you proceed with the development of site S1 such that the development interfaces with S3. We do not speak for MTR, and suggest you approach them directly should you require clarification of their position. We understand that any issues arising from the development interfaces with the railway land, and any other interfaces within the CDA, will be resolved prior to or at the latest during the detailed design stage of your development. This approach being similar to that taken with other existing or*

*new developments nearby, which also had similar interface issues.*

*We will be ready to review and offer comment where appropriate. It should be noted however that site S2 being Government land is outside the remit of ourselves, or MTR. Any interface issues involving S2 are a matter for the relevant Government authority with KCRC as owner of S3 being involved only as and when appropriate.”*

(emphasis added)

*(b) 9 April 2009 Letter*

*“Having evaluated the information provided by SEA and AGP, the Corporation has formed the following views in respect to the development of Site S1 which is to be developed independently of S3.*

*Whilst it is noted that Site S1 has no physical interface with S3, the Corporation wishes to place on record that it does not endorse or support the phased development proposal as envisaged in the MLP (see attachment) which shows Site S3 being developed as an extension of Site S1. The Corporation foresees that future operational demands will necessitate the re-development of the Fo Tan Station and adjacent railway*

land. Whilst such redevelopment is some way off the Corporation cannot endorse or support any non railway redevelopment of Site S3 until it has fully taken into account its future operational needs. ”

(emphasis added)

78. In summary, the Respondent submitted that the two letters show that neither the MTRC nor KCRC was committed to develop the Site within a definite time frame given that:

- (1) It is clear from the KCRC's letter dated 4 February 2009 that redevelopment of the station and railway land is now a matter for the MTRC; and the KCRC defers to the MTRC's position.
- (2) In the letter dated 9 April 2009, the MTRC has expressly stated that it cannot endorse or support any non-railway redevelopment of S3 until it has fully taken into account its future operational needs.

79. Based on the two letters, the Respondent argued that it could not be said that there was a real prospect that either the KCRC or the MTRC will develop S2 and S3 in such a manner as to include residential flats and a secondary school and an MTI as these are “non-railway development”.

80. In relation to the real prospect test, the Appellant made the following submissions:

- (1) There is no legal basis for the adoption of such test.
- (2) Even if there is legal basis for the adoption of such test, it bears no relevance as Guidelines 17 and 18A have been triggered. The involvement of KCRC and MTRC is the triggering mechanism of the application of Guidelines 17 and Guidelines 18A. Since Guidelines 17 paragraph 5.4 and Guidelines 18A paragraph 3.2 are premised on the non-involvement of some of the owners of a CDA site (the KCRC and MTRC in the present appeals), once that is triggered, their involvement no longer has any relevance.

81. Further, the Appellant relied on the example of YOHO Town Yuen Long comprehensive development as a real life example to show that it is not necessary for developers of unacquired land to be involved or to be committed before a development is comprehensive or is in line with the planning intention. Mr. Ian Brownlee, witness for the Appellant, gave evidence that the stated planning intention of the “CDA” zone in the OZP applicable to the YOHO Town Yuen Long development was exactly the same as the planning intention in the Approved Plan. It also illustrates the operation of Guidelines 17 paragraph 5.4 and Guidelines 18A paragraph 3.2 because Phase II



and Phase III (which involves building residential towers) remain without a developer or an implementation date or land grants.

82. More importantly, the Appellant reads the two letters differently from the Respondent. They submitted that there is no statement that MTRC will not develop but in fact it said it will so develop at an appropriate time:

(1) It is certain that S3 would eventually be developed: The third paragraph in the MTRC's letter dated 9 April 2009 says: "*The Corporation foresees that future operational demands will necessitate the re-development of the Fo Tan station and adjacent railway land*" and "*Whilst such redevelopment is some way off.*" The Respondent also agrees S3 would eventually be developed but the question really is when.

(2) MTRC has not stated in its letter dated 9 April 2009 that it will never under any circumstances endorse or support any non-railway redevelopment of S3 or integrate its development with the Appellant's development. It may well support such redevelopment after it has fully taken into account its future operational needs. The third paragraph says: "*Whilst such redevelopment is some way off the Corporation cannot endorse or support any non railway redevelopment of Site S3 until it has fully taken into account its future operational needs.*" It is thus

signally wrong for the Board to assert that there can be no real prospect of MTRC support.

- (3) The KCRC has not deferred to the MTRC's position. The KCRC's letter dated 4 February 2009 does not say so. On the contrary, the first paragraph of the letter shows that the KCRC came to its own independent view after very careful consideration and after it consulted the MTRC which formed its own view viz. *"I write to inform you that, after very careful consideration, KCRC, being the owner of Site S3 within the above Comprehensive Development Area (see Attachment) is now of the view there is no reason why any development on area S1 should not proceed independently of area S3. The latter area being within the same CDA and occupied for railway purposes. We have consulted MTR who have been granted the right of access and the use of KCRC land for the purposes of operating railway services for at least a 50 year service concession between the two Corporations, commencing 2 December 2007."*

83. Further, the Appellant submitted that the timing of implementation is irrelevant at this stage for the following reasons:

- (1) As submitted by the Appellant in the above, a clear distinction is normally drawn in planning law between the grant of planning permission and its implementation: **British Railways Board v**

**The Secretary of State for the Environment** [1994] J.P.L. 32.

In this regard, ownership is normally considered an irrelevant fact.

- (2) Guidelines 17 paragraph 5.4(a) refers to the “planning intention”. The planning intention does not refer to “implementation” or “likely prospect” of implementation of the proposed development and focuses on the development and not the developer(s).
- (3) Guidelines 17 paragraph 5.4(b) refers to the “comprehensiveness” and not the “implementation” or “likely prospect” of implementation of the proposed development.
- (4) In Guidelines 17, implementation is mainly referred to in the context of plan making: Guidelines 17 paragraphs 1.2 and 1.3, 3.6 and 5.2.
- (5) In the context of plan permitting, implementation is referred to after an MLP has been approved in a CDA zone : see Guidelines 17 paragraph 5.3
- (6) There is no mention of implementation in relation to the situation referred to in Guidelines 17 paragraph 5.4 which is headed “allowance for Phased Development”. On the contrary, Guidelines 17 paragraphs 5.4(c) and (d), require the phases to be ‘self-contained’ and for the unacquired lots not to be disadvantaged in terms of development potential and access. No timetable for the development of the unacquired lots is

mentioned in Guidelines 17. The Board recognized in Guidelines 17 that a phased development is better than no development at all.

(7) The more fundamental point is that it is wrong to allow the MTRC to control development in this way and to hold up development on S1 which also benefits the public because it is the Board and not the MTRC who is empowered to decide applications for planning permission. Guidelines 17 paragraph 5.4 requires the Board to prevent an uncooperative owner of land from holding up development.

(8) The proposed residential development in the rezoning scheme (which found favour with the Board) was intended to be implemented in stages. It was to begin at the end of 2001 and to be completed in about 2006. The completion of the primary and secondary schools would tie in with the occupation of the proposed residential development. It had to be developed in phases because of the individual characteristics of S1, S2 and S3. It was not to be developed in one package or one phase as alleged by Mr. Wing Wing Chan.

84. In response, the Respondent did not agree with the Appellant on the implementation point. They argued that the lack of involvement of the KCRC and the MTRC is not a simple matter of implementation; it is an issue which goes to the heart of the question whether the

Appellant's proposal is a comprehensive development and whether the proposal is integrated development. They said that involvement of the KCRC and the MTRC is critical to a comprehensive development because the CDA(1) zone was intended for a comprehensive development which included a public transport node bringing people in and distributing them in an integrated manner. The Appellant's proposal, without the involvement of MTRC or KCRC, is simply not comprehensive. The Respondent further said there are indications in the planning guidelines, the Notes and the Explanatory Statement which shows implementation is a relevant consideration: paragraph (a)(vi) in the Remarks to CDA(1) under the Schedule of Uses.

### ***Findings***

85. On the issue of MTRC's involvement, we consider that it is one of the many balancing factors. If MTRC's position is conclusive and determinative of another owner's s.16 application, it will mean that the owner of a site within an OZP for CDA development could be held to ransom by another owner of the CDA site. That cannot be the planning intention of a CDA site for otherwise Guidelines 17 and Guidelines 18A would not have been introduced.

86. Further, had the involvement of another owner (MTRC in this appeal) been crucial to the compliance of planning intention, the OZP, the Notes and the Explanatory Statement would have said so. We cannot see any difficulty for the planning authority to expressly state so in the relevant statutory documents.
87. The main concern of the Respondent is the lack of integration.
88. However, we agree with the Appellant that the applications are merely at their planning stage. When MTRC will participate is a matter that will have to be considered at the implementation stage and should not be considered at this stage or used as a reason to dismiss the appeals.
89. Moreover, notwithstanding we have concluded that the rezoning applications should not form part of the factual matrix of the OZP, we are of the view that the rezoning applications are relevant not in ascertaining the planning intention but in deciding the importance of certain matters such as integration in a particular way which is relevant to consider the position of the MTRC so as to see if the planning intention will be undermined by reason of a negative stance taken by one of the owners. This is similar to what the court in **International Trader** did.

90. KCRC was one of the applicants in the rezoning exercise such that the CDA zoning was obtained. MTRC must still want to develop the Site as it has never sought to rezone which it can. The same observation can be said of the Government, owner of S2. Yet, when the Respondent asked the Appellant as to why they did not apply to rezone the Site, Mr. Ian Brownlee for the Appellant boldly replied there was no such need as their proposals had already satisfied all the requirements under the OZP, the Notes and the Explanatory Statement. We prefer Mr. Brownlee's stance.
91. We further think that the YOHO Town development suggests that unacquired lots should not pose a problem. This can be seen from paragraph (d) on p. 3 of the MLP approval letter dated 3 December 2004 issued by the Town Planning Board to the Applicant of the YOHO Town development where the Board advised the Applicant *"to make genuine effort to acquire the outstanding lots in order to develop the development in a more comprehensive manner"*.
92. More importantly, notwithstanding there is no information before us suggesting there is a legal basis for the application of the real prospect test, if we have to apply the real prospect test, we find that, it is more likely than not that the MTRC will develop and will participate in the development of the land at some stage. In construing the two letters above, we agree with the Appellant's

observation that they do not show that there is no real prospect that MTRC will develop. It is merely a matter of the timing of implementation.

93. Accordingly, we find that the planning intention of the CDA zone will not be undermined and the comprehensiveness of the proposed development will not be adversely affected as a result of the phasing. The positions of KCRC and MTRC are that they will develop the site at an appropriate time. The appeals cannot be dismissed even if the real prospect test is applicable.

#### **THE TWO MASTER LAYOUT PLANS – 1<sup>st</sup> MLP and 2<sup>nd</sup> MLP**

94. Having found that it is more likely than not that the MTRC will develop the Site at one point of time, we now turn to analyze if the Appellant's 1<sup>st</sup> and 2<sup>nd</sup> MLPs are capable to satisfy the criteria as set out in Guidelines 17 and 18A (see above).

#### **1<sup>st</sup> MLP (attached hereto) submitted under the 1<sup>st</sup> s.16 Application**

95. The development of the whole CDA would be carried out in three phases. The GFA of the proposed development was to be distributed



on a pro-rata basis over Phases 1 and 3 (involving S1 and S3). Phase 2 is solely for development of the mini PTI which could be in conjunction with either Phase 1 or 3.

96. The proposed development consists of ten residential blocks (with a total of 2,268 flats) at an overall domestic plot ratio of 3.844 (i.e. 191,100 m<sup>2</sup>.) The proposed buildings would be evenly distributed with S1 and S3, with three 42-storey blocks (162.8 mPD) and two 17-storey blocks (80.55 mPD) in S1 portion and five 40-storey blocks (162.8 mPD) in S3.
97. The residential blocks would be positioned on podium structure where resident's club house, car parking spaces, PTI and retail facilities are accommodated. A kindergarten (of six classrooms) and a primary school (of twenty-four classrooms) would also be provided at the podium of S1 development and a secondary school (of thirty classrooms) will be provided at that of S3.
98. A large PTI accommodating the bus terminus will be provided at S1 to replace the existing open-air bus terminus at Au Pui Wan Street. A mini PTI will also be provided at Lok King Street level to enable off street drop-off for mini buses, taxis and private cars.

99. A summary of the development is provided in the table below:

	<b>Phase 1 (S1)</b>	<b>Phase 2 (S2)</b>	<b>Phase 3 (S3)</b>	<b>Total</b>
<b>Site area (about) (m<sup>2</sup>)</b>	20,092	3,906	25,710	49,708
<b>GFA (about) (m<sup>2</sup>)</b>				
<b>-Total GFA</b>	91,506	0	117,094	208,600
<b>-Domestic</b>	83,830	0	107,270	191,100
<b>-Non-domestic</b>	7,676	0	9,824	17,500
<b>Plot ratio</b>				
<b>-Domestic</b>	4.172	0	4.172	3.844
<b>-Non-domestic</b>	0.382	0	0.382	0.352
<b>No. of flats</b>	1,068	0	1,200	2,268
<b>Average flat size (m<sup>2</sup>)</b>	78.5	-	89.4	84.2
<b>No. of blocks</b>	5	0	5	10
<b>No. of domestic storeys</b>	17-42	0	40	17-42
<b>Building height (mPD)</b>	80.55-162.8	0	162.8	80.55-162.8
<b>GIC facilities</b>	-1 kinder- garten -1 primary school -1 bus terminus	-1 mini PTI	-1 secondary school	-1 kinder- garten -1 primary school -1 secondary school -1 bus terminus -1 mini PTI

2nd MLP (attached hereto) submitted under the 2<sup>nd</sup> s.16 Application

100. The proposed development consists of 3 phases: Phase 1 (S1) is self-contained and can be proceeded independent of Phase 2 (S2+S3). The proposed domestic and non-domestic GFA have been distributed on a pro-rata basis at a plot ratio of about 3.84 and 0.35 respectively over the two phases.
101. It consists of eight residential blocks (with a total of 2,061 flats) at an overall domestic plot ratio of 3.844 (i.e. about 191,077 m<sup>2</sup> in domestic GFA). The proposed buildings will be evenly distributed over S1 and S2 + S3, with four 35 to 42-storey blocks (138.25-163.45 mPD) in S1 and four 37 to 41-storey blocks (147.8-162.8 mPD) in S2 + S3 portions.
102. The proposed residential blocks would be grouped in a cluster and positioned on podium structure where residents' clubhouse, car parking spaces, PTIs, retail facilities and a kindergarten (of 6 classrooms) are accommodated.

103. A primary school (of 24 classrooms) with a site area of 4,700 m<sup>2</sup> would be provided at the ground level near Au Pui Wan Street at S1 and a secondary school (of 24 classrooms) with a site area of not less than 6,950 m<sup>2</sup> would be provided at the podium above the freight yard at S2 + S3. A separate vehicular access to the secondary school would be provided directly from Lok King Street.
104. A PTI would be provided under the podium of S1 to replace the existing open-air bus terminus at Au Pui Wan Street. It would be implemented at the Appellant's cost with future management to be discussed with the Government. A MTI will be provided at Lok King Street level to accommodate off-street facilities for the existing on-street bus and taxis services.
105. The East Rail Fo Tan Station concourse is proposed to be re-built as part of the Phase 2 development and integrated into the shopping facilities at the podium.
106. A summary of the development is provided in the table below:

	<b>Phase 1 (S1)</b>	<b>Phase 2 (S2+S3)</b>	<b>Total</b>
<b>Site area (about) (m<sup>2</sup>)</b>	20,092	29,615.9	49,707.9

<b>GFA (about) (m<sup>2</sup>)</b>			
<b>-Total GFA</b>	84,306.03	124,268.32	208,574.35
<b>-Domestic</b>	77,233.65	113,843.52	191,077.17
<b>-Non-domestic</b>	7,072.38	10,424.80	17,497.18 <sup>#</sup>
<b>Plot ratio</b>			
<b>-Domestic</b>	3.844	3.844	3.844
<b>-Non-domestic</b>	0.352	0.352	0.352
<b>No. of flats</b>	914	1,147	2,061
<b>Average flat size (m<sup>2</sup>)</b>	84	99.6	N/A
<b>No. of blocks</b>	4	4	8
<b>No. of domestic storeys</b>	35-42 domestic storeys over a podium structure of 4-6 storeys	37-41 domestic storeys over a podium structure of 4-6 storeys	-
<b>Building height (mPD)</b>	138.25-163.45	147.8-162.8	-
<b>GIC facilities<sup>#</sup></b>	-1 kindergarten -1 primary school (free standing at ground level) -1 PTI	-1 secondary school on podium -1 mini-transport interchange (MTI) -Fo Tan Station -freight yard	-1 kindergarten -1 primary school -1 secondary school -1 PTI -1 MTI - Fo Tan Station - freight yard

Note #: The proposed GFA has not counted the floor area of the proposed kindergarten, primary school, secondary school, two public transport interchanges and the covered area of Fo Tan Station and that of the freight yard which is in line with the Remarks in the Notes for the “CDA(1)” zone of the OZP, except for the proposed kindergarten which should be included in non-domestic GFA calculation.

Changes made to the 2<sup>nd</sup> MLP from the 1<sup>st</sup> MLP

107. As a result of the comments from different government departments and KCRC to the 1<sup>st</sup> MLP as reflected in both RNTPC Paper No. A/ST/630 dated November 2005 and TPB Paper No. 7559 dated April 2006, the Appellant has made various changes to the 2<sup>nd</sup> MLP. Details of the major ones are summarized below:

Item	1 <sup>st</sup> MLP	Comments	2 <sup>nd</sup> MLP
(a) <i>Primary School</i>	Located on a deck of about 10 m above ground level.	<p><u>Secretary for Education and Manpower:</u></p> <ul style="list-style-type: none"> <li>- Pedestrian access to the school should be stated.</li> <li>- Height limit should be observed.</li> <li>- Development of Phases 2 and 3 may affect the operation of the primary school as it is in Phase 2.</li> </ul> <p><u>Chief Architect/Advisory and Statutory Compliance, ASD:</u></p> <ul style="list-style-type: none"> <li>- Not appropriate for schools to be built on a podium as all loading of school buses and taxis must be within the school site</li> <li>- the maximum height of school above the EVA</li> </ul>	<ul style="list-style-type: none"> <li>- To build the primary school at grade. Mr. Wing Wing Chan of the Planning Department indicated that a school at grade was the ideal situation.</li> <li>- Size of school is increased to meet the minimum standard (24 classrooms and a site area of approx. 4,700 sq.m.).</li> </ul> <p>The school site is set back by a</p>

		should be 24m in accordance with the Education Ordinance	driveway, in compliance with the suggestion in the HKPSG.
<i>(b) Secondary School</i>	Located at about 6m above ground level.	<u>Secretary for Education and Manpower:</u> <ul style="list-style-type: none"> <li>- Size of school sites should be indicated</li> <li>- Site too narrow and not in good shape for this development</li> <li>- Classroom no. to be specified</li> <li>- Problem with access</li> <li>- Height limit should be observed</li> </ul>	<ul style="list-style-type: none"> <li>- A secondary school (of 24 classrooms) with a site area of not less than 6,950 m<sup>2</sup> will be provided at the low podium above the freight yard at S2 + S3.</li> <li>- A separate vehicular access to the secondary school will be provided directly from the Lok King Street.</li> </ul>
<i>(c) Kindergarten (not required under the Approved Plan)</i>	Included but no specific number of classroom was provided	<u>Secretary for Education and Manpower:</u> <ul style="list-style-type: none"> <li>- Number of classrooms should be specified</li> <li>- Need to observe the requirements stated in the “Manual of Kindergarten Practice”</li> </ul>	<ul style="list-style-type: none"> <li>- Included within Phase 1 podium.</li> <li>- Increase in size to meet the minimum standards.</li> <li>- Would be built and funded by the Appellant as</li> </ul>

			part of the development and it would include 4 classrooms as per the Education Bureau's standard.
<i>(d) Layout of residential towers</i>	5 residential towers located above the freight yard and railway lines.	<p><u>KCRC:</u></p> <ul style="list-style-type: none"> <li>- The proposed development will deck over part of Fo Tan Station and the adjacent freight yard. It will have major impacts on the track works if columns have to be erected adjacent to the East Rail mainlines. The application has not provided any feasible deck over scheme and demonstrated how and why there will be no impact on the operation and structure of the existing station and freight yard.</li> <li>- Any works above the overhead line and track areas with running trains have potential hazard to train operations and it will directly affect the public safety. Construction safety issues should be addressed.</li> </ul>	<ul style="list-style-type: none"> <li>- No residential towers will be located above the freight yard and railway lines.</li> <li>- Residential blocks are to be clustered to address the problem of "wall effect". The low-rise nature of the development above the freight yard has created a more spacious environment. The VIA suggests that the proposed development would have some slightly/moderately adverse</li> </ul>



		<p><u>Chief Town Planner/Urban Design and Landscape, Planning Department:</u></p> <ul style="list-style-type: none"> <li>- Building blocks in S3 portion of the site would exhibit ‘wall effect’ due to lacking of height variation and gaps between blocks. It would be desirable if building height variation and gaps could be incorporated in the design. More ‘green’ features in the building design could be considered.</li> </ul>	<p>visual impacts locally but these impacts would be mitigated by the proposed architectural and landscape schemes, including the introduction of landscape piazzas, streetscape enhancement works and planting.</p>
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108. Notwithstanding we find that the Conceptual MLP is irrelevant in the above, the Conceptual MLP, which was in favour to the Board, the main features of it are stated below for reference:

	<b>Conceptual MLP</b>
<b>Site area (about) (m<sup>2</sup>)</b>	49,700
<b>GFA (about) (m<sup>2</sup>)</b>	
-Total GFA	223,530
-Domestic	191,100
-Non-domestic	17,500

<b>Plot ratio</b>	
-Domestic	3.84
-Non-domestic	0.65
<b>No. of flats</b>	2,768
<b>Average flat size (m<sup>2</sup>)</b>	69.04
<b>No. of blocks</b>	8
<b>No. of domestic storeys</b>	38-39 (excluding one storey of refuge floor) over a 5-storey podium
<b>Building height (mPD)</b>	142.4 - 145.3 mPD
<b>GIC facilities</b>	-1 primary school -1 secondary school -1PTI -1 MTI - Fo Tan Station - Freight yard

## PLANNING DECISION

109. Having found the planning intention is clear and determined the relevant factual matrix, in deciding whether the 1<sup>st</sup> MLP and the 2<sup>nd</sup> MLP are in line with the planning intention, each of the important elements will be studied in greater details below.

### *(a) Comprehensiveness*

110. Planning intention, as stated in the above, is intended for comprehensive development/redevelopment of the area for

residential and/or commercial uses with the provision of open space and other supporting facilities. The zoning is to facilitate appropriate planning control over the development mix, scale, design and layout of development, taking account of various environmental, traffic, infrastructure and other constraints.

111. By reference to the residential components, the number of flats, the retail element and other ancillary provisions including the G/IC and transport facilities under both the 1<sup>st</sup> and 2<sup>nd</sup> MLPs, we are of the view that the proposed developments under the two MLPs are both comprehensive. Notwithstanding that the Conceptual MLP does not form part of the factual matrix, for the purposes of reference only, we find that the parameters of the developments proposed under the 1<sup>st</sup> MLP and 2<sup>nd</sup> MLP are no worse than that under the Rezoning Scheme which can be seen below:

	<b>Rezoning Scheme</b>	<b>1<sup>st</sup> s.16 Scheme</b>	<b>2<sup>nd</sup> s.16 Scheme</b>
<b>Site Area</b>	49,707.9 s.m.	49,708 s.m.	49,707.9 s.m.
<b>Residential GFA</b>	191,100 s.m.	191,100 s.m.	191,077 s.m.
<b>Residential PR</b>	3.844	3.844	3.844
<b>Retail GFA</b>	17,500 s.m.	17,500 s.m.	17,497 s.m.
<b>No. of Flats</b>	2,768	2,268	2,061
<b>Average Flat Size</b>	69.04 s.m.	84.2 s.m.	84 – 99.6 s.m.

<b>No. of Residential Blocks</b>	8 (mainly in S1 and partly in S2)	10 (5 blocks in S1 and 5 blocks in S3)	8 (4 blocks in S1 and 4 blocks in S2+S3)
<b>No. of Residential Storeys Per Block</b>	38-39	17-42	35-42
<b>Car Parking Residents Visitors Retail</b>	554 (1/5 Flats) 40 73 (1/240 s.m.)	804 50 89	727 40 89 (1/200 s.m.)
<b>G/IC Provision</b>			
<b>Primary School</b>	1 (on podium of S2)	1 (on podium of S1)	1 (at grade of S1)
<b>Secondary School</b>	1 (on podium of S2)	1 (on podium of S3)	1 (on podium of S3)
<b>Kindergarten</b>	0	1	1
<b>Footbridge across Lok King Street</b>	0	1	2

112. Further, the Appeal Board considered that phased development will not undermine the planning intention and comprehensiveness of the development. As seen from the above, phased development is specifically provided under paragraph 5.4 of Guideline 17 and the

Appeal Board has already found that the phased development had effectively been ‘triggered’ (see above for details).

113. Furthermore, by applying the GFA on a pro-rata basis, the requirement laid down in paragraph 5.4(d) is satisfied too as the individual lot owners’ landed interest, namely, MTRC’s interest over S3, is not adversely affected.

*(b) Integration*

114. The Appellant and the Respondent differ on whether ‘integration’ is a requirement of planning intention.

115. To answer this question, it is first necessary to see if ‘integration’ is a specific factor in the Approved Plan, the Notes and the Explanatory Statement. The following paragraphs that have been referred to in the Explanatory Statement are helpful to shed light on this:

“1. INTRODUCTION

*This Explanatory Statement is intended to assist an understanding of the approved Sha Tin Outline*

*Zoning Plan (OZP) No. S/ST/23. It reflects the planning intention and objectives of the Town Planning Board (the Board) for various land-use zonings of the plan.*

7.2 *Comprehensive Development Area (“CDA”): Total Area 17.21 ha*

7.2.1 *This zone is intended for comprehensive development/redevelopment of the “CDA” area for residential use, and the “CDA(1)” area for commercial and/or residential uses, both with the provision of open space and other supporting facilities. The zoning is to facilitate appropriate planning control over the development mix, scale, design and layout of the development, taking account of various environmental, traffic, infrastructure and other constraints.*

7.2.2 (ii) *“CDA(1)” site at East Rail Fo Tan Station and its Adjoining Area : Total Area 5.13 ha*

*Development within this “CDA(1)” site is restricted to a maximum GFA of*

208,600m<sup>2</sup>. The domestic GFA shall not exceed 191,100m<sup>2</sup>. One primary school and one secondary school will be provided in the development. Upon completion, about 2,800 flats will be provided.

(iii) “CDA(1)” site at the Ma On Shan Rail Tai Wai Station and its Adjoining Area :  
Total Area 5.48 ha

Development within this “CDA(1)” site is restricted to a maximum GFA of 253,590m<sup>2</sup>. The domestic GFA shall not exceed 219,090m<sup>2</sup>. A post-secondary college and a kindergarten will be provided in the development. Upon completion, about 2,900 flats will be provided. The proposed developments at this “CDA(1)” site and the Tai Wai Maintenance Centre site should be planned comprehensively to ensure a coherent and integrated development at both sites, which would be compatible with the existing and planned developments in the area.”

7.2.3 Pursuant to section 4A(2) of the Ordinance, and except as otherwise expressly provided that it is not required by the Board, an applicant for permission for development on land designated "CDA" shall prepare a Master Layout Plan for the approval of the Board. The Master Layout Plan should be supported by an explanatory statement which contains an adequate explanation of the development proposal, including such information as land tenure, relevant lease conditions, existing conditions of the site, the character of the site in relation to the surrounding areas, principles of layout design, major development parameters, design population, types of Government, institution or community (GIC) facilities, and recreational and open space facilities.

## 11. IMPLEMENTATION

11.3 Planning applications to the Board will be assessed on individual merits. In general, the Board, in



*considering the planning applications, will take into account all relevant planning considerations which may include the departmental outline development plans/layout plans, and guidelines published by the Board. The outline development plans and layout plans are available for public inspection at the Planning Department. Guidelines published by the Board are available from the Board's website, the Secretariat of the Board and the Technical Services Division of the Planning Department. Application forms and guidance notes for planning application can be downloaded from the Board's website and are available from the Secretariat of the Board, and the Technical Services Division and the relevant District Planning Office of the Planning Department. Applications should be supported by such materials as the Board thinks appropriate to enable it to consider the applications."*

116. The Respondent contended that integration is crucial. Their main concern is the direct vertical integration between the floors. Instead of drawing reference to the Approved Plan, the Notes and the Explanatory Statement, the Respondent's arguments are based on the following observations:

- (1) The development concept behind the rezoning to CDA in 1999 was to deck over the whole site to form a continuous podium structure over the station platforms, railway tracks, the freight yard, the PTI/MTI and the private car parking and loading/unloading areas at ground level as well as part of the Fo Tan Nullah.
- (2) The development concept proposed by KCRC and Dairy Farm has an L-shape, continuous podium structure decking over the entire CDA (1) site within which are two-levels of retail arcade. The unpaid station concourse and the retail arcade would be connected and form an “integration point” where pedestrian connections would be made from there to the MTI, the PTI and the adjacent residential developments. A primary and a secondary school would also be provided along Lok King Street integrating with the podium structure. In essence, the podium structure is the core of the development. It provides a comprehensive and integrated facility where the major activities are concentrated at the Lok King Street level. This comprehensive and integrated facility brings together the station, transport interchanges and retail shops for the use and benefit of not only the residents of the CDA(1) zone but also students of the schools, workers in the Fo Tan Industrial Area and the residents of the Palazzo, Royal Ascot and Jubilee Garden.
- (3) The planning intention includes a comprehensive and integrated development of the Fo Tan Station can be derived from the clear

expression of KCRC's and Dairy Farm's development concept (see above) and the Planning Department's agreement to rezone the site, which agreement is clearly based on that concept. It is relevant to note that an earlier rezoning proposal by Dairy Farm to rezone S1, without Fo Tan Station, was rejected by the Board.

- (4) Unlike under the 1<sup>st</sup> and 2<sup>nd</sup> MLPs where the PTI is located further away from the integration point than the MTI (it is at a lower level), KCRC and Dairy Farm, in their 2<sup>nd</sup> rezoning scheme, specifically stressed the following in relation to public transport interchange: *“it has therefore been one of the main objectives of the proposed development to improve the traffic situation. Upon redevelopment, there will be an integrated station transport terminus within the site boundary, providing taxi and feeder bus services at the station concourse / Lok King Street level. At Au Pui Wan Street level, an enlarged bus terminus will be reprovioned within the proposed development to accommodate bus services to more distant destinations. Direct and efficient escalator facilities will be provided from the bus terminus to the station concourse level. Overall, these proposed public transport facilities would result in more integrated services, and improved provisions of bus lane, minibus stand, taxi stand and private car lay-by”*. In the circumstances, it is not a question of whether there would be any connection or connection through a different route between the PTI and the station concourse. The question is whether the PTI is integrated

with the station concourse in the way that is intended by the rezoning scheme.

117. The Appellant argued that there is no requirement of ‘integration’ due to the following reasons:

- (1) This issue, firstly, should be determined by reference to the Approved Plan, the Notes and the Explanatory statement. Although it may not be determinative, the Board cannot point to anything in the Approved Plan, the Notes and Explanatory Statement requiring an integrated development within the site. Mr. Wing Wing Chan for the Respondent confirmed that neither the Notes nor the Explanatory Statement says there should be integration as far as the Site is concerned.
- (2) If the Board wanted a “public transport node bringing people in and distributing them in an integrated manner” at the “CDA(1) site at the Fo Tan East Rail Station and its Adjoining Area”, it would have said so in the Approved Plan or the Notes or the Explanatory Statement. It did not do so.
- (3) It is irrelevant that paragraph 7.2.2(iii) of the Explanatory Statement was referring to integration of the “CDA(1)” as that was about the Ma On Shan Rail Tai Wai Station and its Adjoining Area. If the Board wanted to ensure a “coherent and

integrated development” at the Site in Fotan, it would have said so but it did not.

- (4) There is no mention that the “CDA(1)” at East Rail Fo Tan Station and the Adjoining Area” must be decked over to form a continuous podium structure over the station platforms, railway tracks, freight yard, PTI and the private car parking and loading areas.
- (5) There is no mention of any integration of the primary school with the podium or any integration at all. One can compare and contrast as follows:

(a) paragraph 7.2.2(iii) of the Explanatory Statement stated that *“the proposed developments at this “CDA(1)” site and the Tai Wai Maintenance Centre site should be planned comprehensively to ensure a coherent and integrated development at both sites, which would be compatible with the existing and planned developments in the area.”*

(b) paragraph 4.5 of the OHC Paper No. 107 for the CDA(1) site at the Ma On Shan Rail Tai Wai Station and its Adjoining Area which says : *“the proposed developments at the Tai Wai Station and Tai Wai Depot sites would be planned comprehensively to ensure a coherent and integrated development at both sites, which would be compatible with the existing and planned developments in the Tai Wai area.”*

- (6) There is no mention of the specific location of the primary school and in particular, that it must have a direct connection to the station concourse and/or that the secondary and the primary schools must be integrated in the podium structure and have a weatherproof link directly to the Fo Tan Station by a set of stairs. The station concourse is included in “Fo Tan Station” shown in the Approved Plan and in the “Fo Tan Station and its Adjoining Area” mentioned in the ‘Remarks’ and the Explanatory Statement: see paragraph (c) of the ‘Remarks’ and paragraph 7.2.2(ii) of the Explanatory Statement. If the Board wanted to integrate the secondary and primary schools in the podium structure or have any integration at all it would have said so;
- (7) There is no mention of access at all and in particular, that access to both the residences at S1 and the primary school cannot be through the Fo Tan Industrial Area or that there must be “convenient access from the station concourse the MTI and the PTI via a pair of escalators”;
- (8) There is no mention of the location of the various components and in particular, that the station concourse, retail arcade and MTI should be located at Lok King Street level or “continuous podium structure” or that the retail facilities must not be separated and must not be at different levels or that the MTI the PTI must not be separated. Lok King Street is not even referred to in the Approved Plan or the Notes or the Explanatory Statement. The GIC facilities, MTI and PTI are only referred to

as “supporting facilities” in the “Planning Intention” and paragraph 7.2.1 of the Explanatory Statement. The manner in which they should provide support is not laid out;

(9) There is no mention about the pedestrian connections and in particular, that pedestrian connections from the retail areas to the MTI and the PTI must not be via the use of separate sets of escalators or that there must be pedestrian connections to the Palazzo, Royal Ascot and Jubilee Gardens. Only Royal Ascot is shown in the Plan (in fact there will be a pedestrian connection to the Palazzo via a footbridge).

(10) There is no mention that any master layout plan must be submitted or supported by all owners of the “CDA(1)” site and that the KCRC must be involved. The KCRC or MTRC is not mentioned at all in the Approved Plan.

118. As stated in the beginning, the answer to this question lies in the Approved Plan, the Notes and the Explanatory Statement. If one is to look at the difference in the content of the Notes for the Site and the other notes in the Explanatory Statement, the answer may be apparent given that these Notes and the OZP were prepared at the same time.

119. We are of the view that the integration in the manner and mode contended for by the Respondent was not a requirement nor did they

form part of the planning intention. In any event, the Respondent's arguments are not justified:

- (1) The current appeals are at a planning stage. There will be further and detailed design in the future. Any comments about the location of the escalators can be further dealt with.
- (2) There is a lack of evidence to support the reliability of the Respondent's concern. The Respondent's emphasis appears to be the need of "vertical" integration in the sense that the escalators have to be one above the other. It cannot be a matter of preference and it cannot be a ground for dismissing the appeals when there is no proper evidence to justify the concerns (whatever that may be) of the Respondent. The importance of the particular way / mode of integration was not explained satisfactorily. There is no pedestrian flow analysis, for instance, to show the inadequacy of the elevators layout such as the waiting time, the separation of pedestrian flow to avoid over-crowding and effect of disorientation etc. We are not proffering experts' view but suffice to note that a complaint about integration in the way the Respondent did would need more justification.
- (3) Upon clarification of the Respondent's case, we are given to understand that neither party is suggesting that the Conceptual MLP had to be followed. We are satisfied, at this planning stage,



that the elevators layout in the 2 applications can ensure integration of the various levels and parts of the Site. If the layouts in these appeals are not acceptable, it has to be established either by arguments or experts analysis.

- (4) The arguments whether on the basis of planning intention or the explanations proffered was not accepted. There is no empirical data analysis to supplement either. We note of course the burden is on the Appellant to establish integration. We find that burden has been discharged and if the Respondent contends otherwise, we cannot be so satisfied on the basis of the information, analysis or arguments now before us.

120. We must say that, if one looks at, compare and contrast the plans showing the integration of the transport facilities under the rezoning scheme, 1<sup>st</sup> s.16 application scheme and 2<sup>nd</sup> s.16 application scheme, the latter two are both acceptable even if integration is a factor in the planning intention.

121. Moreover, as stated above, the applications are merely at its planning stage. All these details can clearly be addressed at the Master Layout Plan submission stage and the design stage in due course.

122. Accordingly, we do not find integration a ground to dismiss the appeals.

*(c) Transport*

123. The Respondent submitted that there would be potential traffic problems under both MLPs on the following grounds:

- (1) Part of the access and egress would be obtained and through Au Pui Wan Street without the formation of the roundabout at Lok King Street whereas in the Conceptual MLP, access to the development is off Lok King Street and go through a roundabout. Movement in Au Pui Wan Street is impaired by kerbside activities, particularly the on-street loading/unloading activities, on-street stopping, and vehicular movements at run ins/outs etc.
- (2) The photos provided by the Appellant do not reflect the real situation at Fo Tan Industrial area because Mr. Cook, the Appellant's consultant, took the photos at peak periods for most residential, commercial and retail facilities. He admitted that the peak periods for industrial estate could be different.
- (3) Fo Tan Road is the principal road serving Fo Tan Industrial area. Access into and out of the industrial area in emergency situations can be severely hampered by these ambient traffic conditions.

This issue is of concern to Fire Services Department and the Police.

- (4) There would be mix of the industrial and residential traffic. In the 1<sup>st</sup> and 2<sup>nd</sup> MLP, the Appellant proposes to route traffic for S1 through the Fo Tan Industrial Area whereas in the rezoning proposal, all traffic for the CDA(1) zone would enter and depart from Lok King Street. This arrangement is not satisfactory as it is not simply to traffic volume but also traffic mix. The evidence of the Appellant's traffic consultant, MVA Asia Limited, also supported their view. In 1997, when writing the rezoning application, MVA Asia Limited had expressed the opinion that it would not be appropriate for non-industrial traffic to gain access to the CDA(1) zone through the Fo Tan Industrial area. Since today Fo Tan Industrial area's road network is the same as it was when the rezoning plan was submitted in 1999, accordingly, if routing the CDA(1) zone traffic was not appropriate in 1999, it is still not appropriate today.

124. The Appellant contended that, when considering this issue (or for that matter any adverse impacts), the proper approach is that rejection of planning permission is justified only if such impacts are unavoidable or uncontrollable. Their proposition is based on Town Planning Appeal No. 2 of 2008, unreported, 25 February 2009 paragraph 13 where it provides:

*“If there is a likelihood of such impacts which seriously militate against the grant of planning permission, the Town Planning Board must consider whether such impacts can be altogether avoided or adequately mitigated. It is only where such impacts are unavoidable or uncontrollable that rejection of planning permission is justified ... the applicant has the responsibility ... of satisfying the Town Planning Board that he is able to take adequate preventive or mitigation measures.”*

125. In relation to the Respondent’s four grounds of complaint, our views are as follows:

(1) Regarding their first ground of complaint, we find it was too narrow an approach due to the following reasons:

(a) Notwithstanding the conditions of the roads in Fo Tan is clearly a relevant factor and Mr. Cheung Yat-Wah, Senior Engineer of the Transport Department for the Respondent, gave evidence that there are a lot of on-street parking and there are heavy loading and unloading activities in the daytime on the roads, we take the view that the issue is not a question of insufficient parking spaces but a matter of road enforcement which can be handled by the relevant authorities.

(b) Importantly, the analysis the Respondent relied on to support that Lok King Street entrance is to be preferred had been completed for quite some time. In answer to a question raised by us, the Respondent said that the traffic study did not take into account the traffic arising from the Palazzo. We consider that the traffic from Palazzo is crucial. It is not possible to say whether the study is still valid if that had not been taken into account. Indeed, the study is most probably no longer valid given the size of the population that Palazzo accommodates. In passing, we note the comment of the Assistant Commissioner for Transport/New Territories, Transport Department at paragraph 4.1.4(d)(iii) of TPB Paper No. 7559 echoes our view:

*“the existing Lok King Street is a two-lane two-way road. Upon population in-take from the adjacent residential development at STTL 470 (Ho Tung Lau (Site A)), this road will reach its capacity. It is not desirable to establish a primary vehicular ingress/egress point at Lok King Street roundabout as that will overload the traffic situation and will cause traffic congestion.”*

(STTL 470 is where Palazzo situates at)

- (c) The historical basis that supports the contention that it is better to have the access to the development off Lok King Street and go through a roundabout is not necessarily valid any longer. This can also be reflected in some of the RNTPC or TPB papers. The relevant paragraphs are given below:

*RNTPC Paper No. 35/98 dated June 1998 – 1<sup>st</sup> rezoning proposal*

*“5.5.3 Project Manager//New Territories East (PM/NTE) comments that the proponent should widen the entire section of Lok King Street and Lok Shun Path together with the roundabout facility.”*

*RNTPC Paper No. 70/99 dated December 1999 – 2<sup>nd</sup> rezoning proposal*

*“4.4.4 DLO/ST, Lands D has the following comments:*

*The proposed roundabout at Lok King Street is presumably to be designed and*

*constructed under the Ho Tung Lau Site A Development (i.e. proposed STTL 470). Its design should therefore take into account the requirements from these two proposed developments.”*

*TPB Paper No. 7559 dated April 2006 – 1<sup>st</sup> s.16  
application review*

*“4.1.4 Comments of the Assistant Commissioner for  
Transport/New Territories, Transport  
Department (AC for T/NT, TD):*

*(d) the proposed development will be connected to public road via an ingress/egress point at Aui Pui Wan Street and a proposed road linking to Lok King Street. According to the MLP, the former ingress/egress point is mainly used by vehicles entering into the residents’ carpark and school buses picking up and dropping off students, while the latter is the primary access road designated for public transport vehicles. Such arrangement is*

*considered acceptable for the following reasons:*

- iii. *the existing Lok King Street is a two-lane two-way road. Upon population in-take from the adjacent residential development at STTL 470 (Ho Tung Lau (Site A)), this road will reach its capacity. It is not desirable to establish a primary vehicular ingress/egress point at Lok King Street roundabout as that will overload the traffic situation and will cause traffic congestion."*

- (2) Regarding their 2<sup>nd</sup> ground of complaint, by reference to the photos provided by the Appellant showing the traffic at various times in the AM and PM peak periods at the neighbourhood, it appears that the traffic is not too heavy. The indisputable fact that residential, commercial and retail activities have different peak hours from the industrial activities tends to reinforce this view.



- (3) Regarding their 3<sup>rd</sup> ground of complaint, it is worth noting that, as a matter of fact, the requirement of emergency vehicular access for industrial areas is more stringent than residential districts. Accordingly, this is not really a concern.
- (4) Regarding their 4<sup>th</sup> ground of complaint, we find that if the Site is to be developed in phases, there would inevitably be a residential/industrial interface. Such interface may be undesirable and not ideal but it is not of adequate strength for the appeals to be dismissed. If the illegal parking situation is addressed by proper enforcement measures, the kerbside activities would be significantly reduced. Further, as noted above the difference in time of the peak traffic will alleviate such undesirabilities. Moreover, we notice that when all S1 to S3 are developed, there will be two routes rather than one as under the rezoning scheme. We take the view that, as a matter of common sense, it is always better to have two routes than one only.

126. Further, as a matter of reference, notwithstanding the Conceptual MLP was not in the form of the factual matrix, insofar as the Respondent's submission on industrial/residential interface is concerned, the following comments in relation to the Conceptual MLP appearing in paragraphs 6.1 of the RNTPC Paper No. 70/99 and 26/2000 dated December 1999 and May 2000 respectively may be noteworthy:

“

*6.1 Having taken into account the revised completion date of the proposed development and the comments of PM/NTE, TDD and DEP on the issues related to the implementation of Road D15 and sewage treatment facilities respectively, for the following reasons, Planning Department has no objection to the request for amendment to the draft Sha Tin Outline Zoning Plan No. S/ST/13:*

*(a) Regarding the issues on industrial/residential interface and environmental aspect, Director of Environmental Protection has no objection to the proposed zoning amendment as the assessment submitted by the proponents has confirmed the environmental acceptability of the proposed development.”*

127. In the premises, in light of our findings that the kerbside activities are merely an enforcement issue, that the traffic study under the rezoning scheme is no longer applicable, that the Transport Department in effect rules against having a primary ingress/egress point at Lok King Street as a result of the existence of the Palazzo, we consider that, notwithstanding the existence of a potential residential/industrial traffic interface (which we note in reality is unavoidable in many parts of Hong Kong given the size and layout of the territory), the

proposed traffic arrangement under both the 1<sup>st</sup> and 2<sup>nd</sup> MLPs (see also the comments of the Transport Department in TPB Paper No. 7559 dated April 2006), have already provided an acceptable traffic arrangement.

128. Accordingly, potential adverse traffic impact is not a ground of rejection.

*(d) Primary School*

129. The Respondent made the following submissions in relation to the location of the primary school under the 1<sup>st</sup> and the 2<sup>nd</sup> MLP respectively:

(1) 1st MLP: As stated in the above, the Chief Architect/Advisory and Statutory Compliance, ASD commented it was not appropriate for schools to be built on a podium as all loading of school buses and taxis must be within the school site.

(2) 2<sup>nd</sup> MLP: There are two limbs of opposition:

(a) In the approved rezoning scheme, the primary school was integrated into the podium structure. Mr. Alexis Wong, witness for the Appellant, acknowledged the primary school

would not be integrated into the podium structure. The Respondent argued that the primary school has to be integrated into the podium structure as the effect of not integrating the primary school within the podium structure means that the students would have to walk along Au Pui Wan Street among the traffic from the industrial area in order to reach the MTI/PTI.

- (b) The proposed location (at grade) is not suitable in that it is enclosed by a ramp and car park in the form of a podium from the south-east to south-west. As pointed out by Professor Ng, their witness on air ventilation, the primary school will have air ventilation problems given that when the wind comes from the south, i.e. mostly during summer, the tall residential towers located on the sizeable podium will create a very large wind wake which covers almost the entire industrial area. Therefore, the entire area will have weaker wind and in particular the primary school. Also, by the fact that it being enclosed by 40-odd storey residential towers, the primary school will have limited access to daylight.

- 130. The Appellant submitted that, in relation to the 1<sup>st</sup> MLP location, the Planning Department has no adverse comments regarding the design of the school but there they were merely concerned with the time of implementation. In relation to the 2<sup>nd</sup> MLP location, they submitted

that firstly, the change in location is a result of the comments of the ASD (see above); secondly, putting the school at grade is conceived to be better. Mr. Wing Wing Chan for the Respondent, also agreed that a school at grade was the ideal situation though under the Hong Kong Planning Standards and Guidelines (“HKPSG”), a school site at podium may be acceptable because of site constraints. It effectively depended on the circumstances. Further, Professor Ng was also of the opinion that the location of the primary school in the 2<sup>nd</sup> s.16 application is relatively better than in the rezoning scheme and the 1<sup>st</sup> s.16 application, in terms of air ventilation to the school and the surrounding area.

131. With respect to the above, we find that the location of the school under both the 1<sup>st</sup> and 2<sup>nd</sup> MLPs acceptable, in particular, we consider that it is better to have the school at grade. Regarding the 1<sup>st</sup> MLP, as seen above, a school located on podium is acceptable if there is site constraint and in actual fact, the Planning Department raised no adverse comments on the design of the school whereas regarding the 2<sup>nd</sup> MLP, the location of the primary school was subsequently moved to the ground level as a result of the comment of some government departments.

*(e) Secondary School*

132. The Respondent has two grounds of objection in relation to the proposed secondary school development:

(1) Safety of students. Under the 1<sup>st</sup> and 2<sup>nd</sup> MLPs, students coming from Fo Tan Station would have to walk through the retail arcade, the podium and cross over a vehicular access before they can reach the school entrance. The Respondent submitted that, insofar as safety is concerned, the development concept is entirely different from that of the rezoning scheme. In the rezoning scheme, students are not exposed to road traffic and can walk safely out of Fo Tan station, through the retail and then under a covered pathway into the schools via integrated staircases.

(2) MTRC's position. In the 2<sup>nd</sup> MLP, the Appellant has squeezed the secondary school into the northern end of S3 (MTRC's land). The Respondent argued that there is an issue of implementation as the MTRC has expressly stated it did not agree to endorse the proposal.

133. As concluded in the above, in relation to the Respondent's first contention, suffice it to say that students may have to cross a

vehicular entrance in order to reach the school entrance, we do not find this a concern. These are secondary school students. They are not crossing a busy road. They are merely crossing the school's entrance so as to walk up the ramp.

134. Regarding the Respondent's second contention, we are of the view that firstly, as concluded in the above, there is no evidence saying the MTRC will not develop S3 and secondly, the precise location of the secondary school can always be further discussed with the MTRC at a later stage. Accordingly, the proposed locations of the school under the 1<sup>st</sup> MLP and the 2<sup>nd</sup> MLP are both acceptable.

*(f) Wall Effect*

135. Counsel for both sides made substantial submissions on this issue. In summary, there are two types of wall effect that are of their concern: (1) visual and (2) ventilation.

Visual

136. The Respondent argued that both the 1<sup>st</sup> and 2<sup>nd</sup> MLP would give rise to substantial adverse visual effect by the reason that:

- (1) 1<sup>st</sup> MLP: The failure to consolidate the ownership of the land within the CDA(1) zone has put constraints on the design and layout of the residential towers. They submitted that this constraint is recognized by the Appellant at paragraph 6 of their Notice of Appeal. This constraint has led to the “wall effect” and the congestion. The “wall effect” is caused by placing a wall of five towers opposite Jubilee Garden. The congestion is caused by placing the primary school in S1, instead of S3, thereby reducing the amount of area available for the layout of the residential towers and also caused by the pro rata distribution of GFA limiting flexibility in design and layout. This has a significant visual impact on Jubilee Garden opposite (illustrated by the Block Plan and the view and explained by Mr. Ng Tak Wah in his Statement and Supplementary Statement). The Respondent added that substantial reference to the adverse visual impact can also be found at paragraphs 8.2(c), 8.4, 9(f) and (g) of Mr. Wing Wing Chan’s Witness Statement and RNTPC Paper No. A/ST/630 and TPB Paper No. 7559 therein.
- (2) 2<sup>nd</sup> MLP: Notwithstanding there are no longer five residential towers on S3 affecting Jubilee Gardens but four towers on S2 and part of S3, the “wall effect” here concerns the visual impact of the towers on the Palazzo opposite along Lok King Street, the other residential towers on S1 and the visual impact of the podium as viewed from street level.



137. In short, the Respondent argued the Appellant's proposals is problematic in that, by assigning a fixed amount of GFA to different parcels of land within the site on a pro-rata basis instead of spreading the GFA over the whole site, the Appellant has limited the area available for disposition of the towers, created a row of buildings and reduced the scope for mitigating the wall effect. The narrow configuration of S2 means there is little space for the residential blocks to be spread out with clear building separation. Mr. Christopher Foot, Appellant's landscape and visual impact consultant, accepted that there would be an impact and he agreed with the Respondent's submission that there would be more scope to introduce effective mitigation if the whole site was available for the disposition of the towers. Further, the Respondent submitted, Mr. Alexis Wong for the Appellant also agreed that, in terms of wall effect, looking from Lok King Street, the rezoning scheme offers a better aspect when compared to the 2<sup>nd</sup> s.16 application.

138. In counteracting the Respondent's arguments, the Appellant made the following submissions:

- (1) It is questionable if "wall effect" should be a relevant factor to start with. There is no established definition of "wall effect". It is a highly subjective, amorphous and contextual concept. There is no standard.

(2) Even if “wall effect” is relevant, they submitted that mitigation of the “wall effect” is not insurmountable and there are well-established measures to mitigate it. Examples given by Mr. Christopher Foot during the course of hearing include the following:

- (a) Disposition of building blocks.
- (b) Create a development that is visually permeable by creating visual corridors between blocks or cluster the blocks to create less of a visual mass or reduce the visual mass of the development. In other words, reduce the footprint.
- (c) Create stepped building height, i.e. adjusting the height of the buildings to create a relationship between the various blocks. The arrangement can be in terms of descending or ascending height or random arrangement.
- (d) Adopt colour blocking system on the façade of the buildings, which helps to break-up the visual mass.
- (e) Create sky garden, which helps to create break ups of visual mass and create an element of greenery within the visible façade.
- (f) Create set-backs for the podium structure at street level and introduce street tree planting and shrub planting at pedestrian level.

(g) Incorporate terraced effect on the edge of the podium, to break down that visual mass and increase the area of visual greenery on the building façade.

(3) In any event, the Board can make mitigation or further mitigation of the “wall effect” a condition of approval as in the case of YOHO Town.

(4) More importantly, the Planning Department has recognized that there are limits to the steps that can be taken to minimize the “wall effect” at paragraph 7.3(g) of TPB Paper No. 8142 by saying that: *“Given the odd shape of the site, it would be difficult to improve the layout and disposition of building blocks to minimize the ‘wall effect ...”*.

139. Concerning the “visual wall effect”, we see that the question really is to what extent visual effect is a planning parameter and which government department has the decisive say over this issue. To answer this question, one has to know what ‘wall effect’ effectively means.

140. Mr. Christopher Foot says that he understands “wall effect” as involving developments which fill the main parts – almost the entirety – of one’s available view. It creates a consistent façade. Any development which falls short of that does not constitute a wall-effect.

Where there is wall effect, the buildings are typically of a similar height, similar appearance and no view corridors.

141. Mr. Ng Tak Wah, Senior Town Planner/Urban Design and Landscape Section of the Planning Department, Respondent's witness on visual impact, considers the term is a matter of subjective judgment. He says that there is a certain level of subjective element, just like in situations where the majority of people will have some kind of similar feeling or sentiment towards certain building orientation. He describes the feeling as one which when the buildings are brought closer and closer together, then people will feel there's a "wall" so that people will call the situation "less permeable" and then people will feel less comfortable.

142. Despite the assistance of both Mr. Foot and Mr. Ng, regrettably, we cannot find a clear and uniform definition. We have no information that can assist us in deciding what a wall effect is (not to mention whether it concerns with the visual, ventilation or any other aspects), and importantly the criteria by which to conclude that the wall effect is not acceptable. The subjective preference of an officer cannot be the determinative factor for that would not accord with practices of a transparent and fair government of HKSAR. An applicant with the necessary expertise should be aware of the criteria by which their application is to be judged. As the evidence revealed, the practice

now is subjective and arbitrary, depending on the personal preference of the officer in charge. This is not intended to be a criticism of Mr. Ng, far from it. It is intended to identify the unsatisfactory situation facing an applicant as a result of the subjective view. There is no standard, no law nor guideline. A judgement has to be made on some basis. We have none here. We do not agree that we can subjectively say this is not acceptable if another panel may come to a different view. That is exactly the position here. Mr. Foot and Mr. Ng differ.

143. It is simply not right for the Appeal Board to dismiss the appeals based on something subjective and arbitrary. Any criteria must be something based on some objective standards with clear guidelines on when a development gives rise to “wall effect” and when it is not acceptable. Therefore, we cannot agree with the Respondent’s submission that it is the subjective view of the relevant officer, as Mr Ng has commented, that determines the question (i.e. whether he likes the visual effect or not). There must be some objective standards by which one can judge whether such “wall effect” is such that a permission should be granted or rejected.

144. Notwithstanding the above, as said, we see that “wall effect” is a question of extent. We agree with the Appellant’s expert that there are ways to mitigate the visual wall effect. As a matter of fact, we consider that, given the size and layout of the Site as well as the

layout and elevation of the Palazzo opposite to the Site, The impediments created by the “visual wall effect” primarily comes from the Palazzo anyway. Along Fo Tan Road, the layout cannot realistically be different by reason of the requirement of noise abatement.

145. Moreover, we find that, unless the plot ratio is not to be fully utilized by the owner, of which we have to bear in mind the need to balance the planning needs and property rights (paragraph 55 of Hartmann JA’s ruling in **International Trader**), some “visual wall effects” at the Site is inevitable. The appeals cannot be dismissed on this ground in light of the circumstances of this case and the location of the Site including the structures in its proximity.

146. Further, we accept that the Appellant’s submission that they have tried to incorporate mitigation measures into the 1<sup>st</sup> and 2<sup>nd</sup> MLP wherever possible. In summary, the following mitigation measures have been incorporated under the 1<sup>st</sup> and 2<sup>nd</sup> MLPs respectively:

1<sup>st</sup> MLP

- (1) Height variation of the residential towers.

- (2) Introduction of sky gardens.
- (3) Incorporating faced design such as adopting different colour schemes for the solid wall proportion.
- (4) Gaps between the blocks.

## 2<sup>nd</sup> MLP

- (1) Changed disposition of towers by allocating some GFA to S2 thereby preventing the potential “wall effect” due to the linear arrangement of blocks at the elongated S3.
- (2) Introduction of sky gardens.
- (3) Gaps between the blocks.
- (4) Incorporating faced design such as adopting different colour schemes for the solid wall proportion.

147. We note that, despite “wall effect” was explicitly stated as a concern in the 2<sup>nd</sup> rezoning application, the application was not rejected on this ground. The following comments stated in RNTPC Paper No. 70/99 dated December 1999 insofar as “visual wall effect” is concerned are worth noting:

## *“4.8 Urban Design and Visual Aspects*

*4.8.1 Senior Town Planner/Urban Design, Planning Department (STP/UD, PD) has the following comments:*

*(a) he has reservation on the proposed rezoning;*

*(c) the proposed height for the residential development is very high in Sha Tin New Town. It is even higher than the existing residential developments above the depot, including Jubilee Garden (+124 mPD) and Royal Ascot (+ 143 mPD). With such a large building height, the proposed development would be visually very intrusive and not harmonious with the surrounding industrial and village developments to the north and west, not to mention the potential cumulative visual impacts with the proposed residential developments at Ho Tung Lau Site A development;*



*(d) the rezoning of the subject site to a “CDA” for residential development would lead to industrial/residential interface problems. In addition, it is considered very undesirable to provide a primary school and a secondary school immediately next to industrial buildings; and*

*(e) the previous rejection reasons of the Town Planning Board on industrial/residential interface and excessive scale and development intensity still remain unresolved as the proposed building height is excessive in that context.*

4.8.2 *Chief Town Planner/Housing and Land Supply, Planning Department (CTP/HLS, Plan D) has the following comments:*

*The proposed 38 to 39-storey towers (plus 5-storey podium) could be on the high side from the urban design viewpoint, particularly some of them are intended to be single-aspect*

*buildings. There is scope for reducing building height of these towers for achieving a more compatible built-environment, particularly by providing a more open view respectively towards a medium-rise industrial buildings and low / medium-rise residential buildings to the northern part of the subject site.”*

*6.2 However, there are still some outstanding issues which need to be addressed:*

*(a) Although the building height (maximum +145.3 mPD) of the proposed blocks (38 to 39 storeys) is similar to the existing residential developments above the Fo Tan Depot, including Jubilee Garden (+124 mPD) and Royal Ascot (+123 mPD) (**Plan Z-3**), the proposed residential development, together with the existing and committed developments along Lok King Street would create a “wall” effect in the area and this is not desirable;*

*6.3 Although the above outstanding issues are required to be addressed, they are not insurmountable problems and could be dealt with by more detailed studies to be undertaken at the Master Layout Plan submission stage should the Committee agree to the rezoning request.”*

148. Importantly, any concerns can be dealt with by a condition requiring the “wall effect” to be mitigated at the design stage. The YOHO Town development provides a useful illustration that it remains possible to have all the concerns looked at in detail and conditions be imposed to alleviate the potential “visual wall effect” by way of advisory comments and approval conditions after the MLP is approved and being implemented. In the case of the YOHO Town development, an advisory comment at paragraph (f) on p. 3 of the MLP approval letter dated 3 December 2004 says:

*“to note the Senior Town Planner/Urban Design, Planning Department’s comments that consideration should be given to maximizing the spacing between Towers 5 and 6 in order to keep a wider view corridor when viewed west from Castle Peak Road-Yuen Long. Moreover, spacing between blocks should be increased and attention should be paid to the façade design and disposition of domestic blocks to minimize the wall effect”.*

149. Accordingly, in light of the aforesaid, we find that this is not a ground to dismiss the appeals. Nevertheless, we would add as a condition that measures should be taken to minimize the wall effect.

The exact measures cannot be stipulated now and is a matter that has to be considered further by the consultant and hopefully in sensible discussion with the relevant government personnel.

### Ventilation

150. There is no Planning Guidelines on Air Impact Assessment. There is also no requirement on the need to submit air ventilation assessment for s.16 application or s.17 review.
  
151. Notwithstanding the above, the Respondent submitted that the effect of a development on ventilation is a relevant consideration as an element of facilitating appropriate planning control over the development scale, design and layout taking account of ventilation as an environmental constraint. The relevance is established by the planning intention expressed in the “Notes of the OZP” for Comprehensive Development Area (1). They submitted this being so also in light of the Technical Guide on Air Ventilation Assessment and paragraph 10.1 in Chapter 11 of HKPSG where it states that “*air ventilation assessment is not required for private projects, however private projects are encouraged to have regard to the qualitative guidelines when formulating a planning and design proposal, but this is on a voluntary basis.*”

152. It should be noted that the Appellant had made no submission to challenge the relevance of ventilation wall effect. In actual fact, RMJM Hong Kong Limited, consultant on air ventilation for the Appellant, has conducted a quantitative AVA comparing the impact of the design scheme approved under the Rezoning Application, the 1<sup>st</sup> s.16 scheme and the 2<sup>nd</sup> s.16 Scheme by using Computational Fluid Dynamics (CFD) computer modelling. The RMJM analysis seeks to assess the manner in which the forms of development proposed on the Site will impact the flow of air, both through the Site and in relation to the neighbouring areas.
153. The conclusion of RMJM's analysis is that all the three design schemes demonstrated insignificant differences in air ventilation performance in the vicinity of the proposed development but the 2<sup>nd</sup> MLP scheme presented additional design merits of maintaining the breezeway, reducing the podium coverage, as well as air ventilation improvement on Au Pui Wan Street.
154. The Respondent disputed the conclusion drawn in the RMJM analysis. They have called Professor Ng with a view to showing the methodology adopted by RMJM in the CFD model was faulty.

155. The Appellant called Mr. Benny Chow who conducted the analysis. They also tried to undermine Professor Ng's evidence by attacking Professor Ng's impartiality on basis of his term contract with the Planning Department. The relevant term contract started in 2005, which expired and renewed until 2011. The Respondent responded by saying that if that were right, all expert witnesses would be partial.
156. In the hearing, it was emerged that Professor Ng had not done any analysis on the possible ventilation effect. He merely reviewed RMJM's method and did a critique on the method used.
157. In relation to the Appellant's complaint about Professor Ng's impartiality, we come to the view that there is no question of bias given that:

(1) As a matter of fact, any expert witness must disclose any potential conflict of interest. Professor Ng has made the relevant disclosure upfront.

(2) Test for bias as laid down in **Deacons v. White & Case Ltd** [2003] 3 HKC 374, affirmed by the Court of Appeal in **Securities and Futures Commission v. Zou YiShang** [2007] 3 HKC 409 is this: "being dependant in the circumstances of a particular case on whether those circumstances would lead

a fair-minded and informed observer to conclude that there was a real possibility that the tribunal was biased.”.

- (3) We do not consider this is a case where the circumstances is one that would lead a fair-minded and informed observer to conclude that there was a real possibility that Professor Ng was biased.

158. In relation to whether there is a “ventilation wall effect”, we consider that this cannot be a ground to dismiss the appeals due to the following reasons:

- (1) The applicant is not required to submit any air ventilation assessment for s.16 application or s.17 review. As a matter of principle, the appeals cannot be rejected on something that is not required. The preference of the Planning Department to have such assessments done cannot justify a dismissal if they were not content with what was provided when there is no obligatory requirement.
- (2) Again, as elaborated above, there is no objective standard or any guidelines or anything at all that could assist us in determining what a “wall effect” is (not to mention whether it concerns with the ventilation aspect or any other aspects.) and to what extent the effect cannot be accepted. It is therefore entirely improper

and unfair for the Appeal Board to dismiss the appeals based on some unknown arbitrary standard.

159. We find that neither Professor Ng nor Mr. Chow's evidence help shed light on this issue as:

(1) Professor Ng was not able to show why and how the analysis would be unacceptable except with one bold assertion that by virtue of his experience, the figure of 20% blockage flow rate is not possible and therefore the method must be wrong. This is unsatisfactory. In fact the Respondent could have conducted an analysis and assisted us to see which is more reliable. They did not.

(2) Mr. Chow attempted to assist us by showing all three designs are similar in terms of ventilation effect. Nonetheless, given there is no guidelines, we do not know and cannot say whether that is acceptable or not. They are merely comparable.

160. We are not writing a thesis on the proper method to do such analysis. Our task is to see if there will be a "wall effect" that allows us to dismiss the appeals. To do this, we need to know the kind of methodology that is acceptable in the industry. There has to be an



authority provided by the parties to tell us what is acceptable. Nonetheless, we do not see evidence for that. We have evidence of the standards from other parts of the world such as the “AIJ guidelines for practical applications of CED to pedestrian wind environment around buildings” produced by the Architectural Institute of Japan and the European guidelines: “COST Action C14 (Recommendations on the use of CFD in predicting pedestrian wind environment)”. The explanations given on their meaning, interpretation do not fundamentally differ. The main diversity between the parties and their experts are the applicability of these standards to Hong Kong and this Site. The boundary conditions to be applied in a real world as compared to the theoretical model was an area of debate; the way in which the wind data (wind rose) is used was disputed; the number of cases (wind directions) by which an assessment had to be carried out was not agreed. Whilst we can express our preference of one’s evidence to another, it does not dispose of the case before us as we find that an application ought not be dismissed on some arbitrary, subjective and non-transparent criteria. Our preference would not be something by which an applicant or his consultants would not have notice of in advance of our decision. As a result, it is not something, we opine, that can constitute a ground for dismissal for the reasons dealt with earlier.

161. We could have expressed our views on the technical issues before us so as to form a guideline for future applications but we ultimately

conclude that it be best left to the consultant team and the industry to derive a standard that best suit Hong Kong's special situation. We note in passing that any such guidelines which, we are told, are being studied and prepared should take on board the views of the industry who are knowledgeable in this area so that it is not theoretical (as we have noticed it can be in this case) but practical, clear and objective.

162. Further, even if we accept that Professor Ng's criticisms on Mr. Chow's methodology are theoretically correct, on balance, we would still find the Appellant's analysis acceptable by the reason that the Appellant's model has been applied in many other cases in Hong Kong before, including in more than 15 projects for the housing design for the Housing Department and the Respondent did not challenge this fact.
  
163. Lastly, whilst the Conceptual MLP is irrelevant, but as the ventilation analysis of the Appellant was intended to show to us that the three layouts give rise to a similar effect, that has been established. Accordingly, if the conceptual MLP is acceptable to the Respondent, then clearly the 1<sup>st</sup> and 2<sup>nd</sup> MLPs would be as well so far as the ventilation analysis is concerned.

164. By reason of the aforesaid, “ventilation wall effect” is not a ground to dismiss the appeals.

*(g)Noise Impact*

165. The Respondent and the Appellant differ over the adverse noise impact from (a) the freight yard and (b) road and rail traffic.

Freight Yard

166. The Respondent submitted that the noise impact assessment from the freight yard conducted by the Appellant’s consultant, Westwood Hong & Associates Ltd, was unreliable as it was done without the cooperation from MTRC. It therefore could not obtain the worst case noise scenario within the freight yard. The Respondent argued that MTRC’s involvement in conducting the analysis was crucial in light of paragraph 4.3 (ix) of an internal memo issued by Environmental Protection Department (“EPD”) to the District Planning Office dated 21 September 2009 which says that:

*“... For planning purpose, the worstcase scenario should be considered and the Consultant should liaise with the MTRC*

*(the then KCRC), [the owner/operator of the freight yard] on the operation mode of the freight yard while also taking into account the potential capacity of the freight yard. Without proper noise mitigation measures, the S1 portion development alone would impose unnecessary constraints on the operation of the freight yard and might not be acceptable to MTRC.”*

167. The Appellant contended that their consultant’s assessment, based on observations of freight yard noise at the site, is reasonable and reliable. Further, they relied on a press release entitled “MTR Exits Freight Business to Focus on Passenger Service” issued by the MTRC dated 29 October 2009 to support their argument that since freight noise would be eliminated or reduced, the noise mitigation measures proposed under the 1<sup>st</sup> and 2<sup>nd</sup> MLPs would thus be more effective. The relevant paragraphs of the press release are stated below:

*“ “After careful study, the Corporation has decided to wind down its freight business over the next several months to better utilize train paths currently being used for the freight business to provide greater flexibility for passenger train service,”*

*“At present, about 60 staff work in the MTR Freight business. Arrangements will be made to transfer them to other posts within the Corporation and, it is expected, most will be doing jobs of a similar nature ...”*”

168. We agree with the Appellant and do not find noise impact to the freight yard operation a concern. The statement in the press release became fact now. The freight business has been wound down.

#### Road and Rail Traffic Noise

169. There is in general no dispute on this issue. The Respondent did not dispute that the noise impact from roads and from the rail is within Environmental Protection Department’s limits, even in the scenario where S2 and S3 are not covered by a podium.
170. For the sake of the record, we note there was a change in policy of the EPD in relation to the compliance of road traffic noise for residential flats. By the time of the 1<sup>st</sup> s.16 application, 86% compliance was required under EPD’s policy whereas in around 2007, 100% compliance was required. In actual fact, both the 1<sup>st</sup> MLP and the 2<sup>nd</sup> MLP satisfied the compliance requirement. The major difference is that, in the 1<sup>st</sup> MLP, only 89% compliance was attained

(notwithstanding the Appellant had incorporated various noise mitigation measures including to adopt proper building layout, tall podium, residential setback distance, purpose-built noise canopy, noise tolerant to reduce the noise impact on the development). As a result of the said policy change, the layout of towers under the 2<sup>nd</sup> MLP was revised to “single aspect” of “self-protecting” design. Coupled with other noise mitigation measures, 100% compliance was attained.

171. In light of the aforesaid, noise impact do not stand as a valid ground of rejection.

*(h) Impact on Fo Tan Station and Freight Yard*

172. The Respondent submitted there would be adverse impact on Fo Tan Station and freight yard under the 1<sup>st</sup> and 2<sup>nd</sup> MLPs:

- (1) 1<sup>st</sup> MLP: There are concerns over the impacts of the construction of columns, foundations and podium deck on the operations of the railway and freight yard. In particular, KCRC doubted whether the proposed podium layout for the freight yard area could sustain the loading imposed by five 40-storey residential towers without affecting the vehicle flows and cargo handling

operations at the freight yard. The Respondent submitted that KCRC must have some practical concerns over the construction of high rise within the freight yard as shown in the Notes of a KCRC meeting dated 7 September 2006. The relevant parts are stated below:

*“6.KCRC explained in some detail that the basic layout of their rezoning conceptual MLP was the only acceptable layout as there were no residential towers over the freight yard or operating line, and therefore there was little impact on the railway operations.”*

(2) 2<sup>nd</sup> MLP – Without the input or coordination of KCRC and the operators of the freight yard, it is still questionable how the construction would affect the operation of Fo Tan Station and the freight yard.

173. The Appellant submitted there would not be adverse impact on the freight yard and Fo Tan Station under both 1<sup>st</sup> MLP and 2<sup>nd</sup> MLPs:

(1) 1<sup>st</sup> MLP: Mr. Berny Ng of Ove Arup & Partners (OAP), their engineering expert, who was also contracted to carry out a constructability study within the freight yard during the rezoning

stage, gave the evidence that it was technically feasible to have large bored piles over the freight yard. Also, bored piles are used to support high-rise.

(2) 2<sup>nd</sup> MLP: As evidenced in the MTRC's press release dated 29 November 2009 (see above), the MTRC stated that it has decided to "wind down its freight business". This shows that MTRC's involvement or co-ordination is not crucial.

174. We agree with the Appellant. Concerning the 1<sup>st</sup> MLP, we accept the evidence of Mr. Berny Ng of OAP, a structural engineering consultant. We believe that the constructability on the operation of Fo Tan Station is not a fatal concern to KCRC reason being that if it were not technically feasible, the KCRC would not have allowed the rezoning to go on as in any event, the development would require the construction of a deck to cover the freight yard area and the whole Fo Tan Station. Concerning the 2<sup>nd</sup> MLP, as a result of the varied design, given that large bored piles are no longer needed within the freight yard and also that MTRC has decided to reduce its freight business, we do not find the Respondent's arguments a concern.



## CONCLUSION

175. In view of the above, we consider that the proposed development under both the 1<sup>st</sup> s.16 and 2<sup>nd</sup> s.16 applications are in line with the planning intention and all the requirements in the relevant guidelines. We also consider none of the matters raised by the Respondent is sufficient to justify a dismissal. The only matter we wish to raise is to request the Appellant to consider and adopt measures to reduce the adverse impact of the “wall effect” through sensible discussions with relevant government personnel.
176. To conclude, the two appeals are allowed.

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Ms Teresa CHENG Yeuk-wah, BBS, SC, JP  
(Chairman)

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Mr CHAN Chung  
(Member)

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Mr Johnny FEE Chung-ming  
(Member)

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Mr WONG Lok-tak  
(Member)

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Mr TSANG Man-biu  
(Member)