Town Planning Appeal No. 5 of 2011

IN THE MATTER of the Town Planning Ordinance, Cap. 131

and

IN THE MATTER of an Appeal under section 17B of the Town Planning Ordinance, Cap. 131 by New Orient Development Limited

Appeal Board:	Mr Keith YEUNG Kar-hung, SC	(Chairman)
	Mr CHAN Chung	(Member)
	Mr Marvin CHEN	(Member)
	Professor Lawrence LAI Wai-chung	(Member)
	Ms LAW Yee-ki	(Member)
In Attendance:	Ms Suan MAN	(Secretary)

Representation: Mr Anthony ISMAIL for the Appellant

Mr Eugene FUNG, SC for the Respondent

Dates of Hearing: 26th, 27th, 28th February 2013

Date of Decision: 16th July 2013

DECISION

A. THE PARTIES

1. The Appellant is New Orient Development Limited. We shall call it the Appellant. The Respondent is the Town Planning Board ("**TPB**").

B. THE APPEAL

2. This is an appeal from the Appellant, pursuant to section 17B of the Town Planning Ordinance (Cap 131) ("**TPO**") against the decision of the TPB, on a review under section 17 dated 21st January 2011 ("**the S17 Review**").

C. THE RELEVANT FACTUAL BACKGROUND

3. There are few disputes on facts. We will deal with any relevant factual disputes below. We at this stage set out the undisputed factual background. The Town Planning Appeal Board ("**the Appeal Board**") is indebted to Mr. Ismail and Mr. Fung SC, counsel respectively for the Appellant and TPB for their detailed submissions. The facts summarised

below are primarily adopted from their submissions, and in particular those of Mr. Fung (which Mr. Ismail did not dispute).

C1. The Appeal Site

4. The site under appeal comprises Lots No. 1 s.C RP, 4 RP, 5 RP, 6 RP, 7 and 9 RP in D.D. 214, Lots No. 1023 RP (part), 1024 to 1027, 1028 s.A (part), 1196 (part), 1197 s.G (part), 1197 RP (part), 1208 s.A (part), 1209 s.A (part), 1209 RP, 1210 (part), 1211 to 1220, 1221 s.A (part), 1221 RP, 1224 RP (part), 1229 RP (part), 1293 RP (part) and 2192 (part) in D.D. 244 and adjoining Government land in Ho Chung, Sai Kung ("**the Appeal Site**").

5. The Appeal Site fell within an area zoned "Comprehensive Development Area" ("**CDA**") on the Approved Ho Chung Outline Zoning Plan (OZP) No. S/SK-HC/9 ("**the Plan**") which was in force at time of consideration of the relevant section 16 application ("**the S16 Application**") and the S17 Review. The Appeal Site is still zoned "CDA" on the prevailing OZP No. S/SK-HC/9. The Appeal Site covers the northern portion of the "CDA" zone.

6. Except for Lot 2192 in D.D. 244, the above-mentioned lots are old scheduled agricultural lots held under Block Crown Lease.

7. At the time of the S17 Review, the Appeal Site was vacant, flat and fenced off. The surrounding areas of the Appeal Site have the following characteristics: (1) to its east is Hiram's Highway; (2) to its north are Ho Chung River and Ho Chung Road; (3) to its west is Ho Chung New

Village; and (4) to its south are two vacant food and sauce processing factories namely, Lee Kum Kee (Hong Kong) Foods Ltd ("**LKK**") and Lee Seng Heng Fish's Gravy and Canning Factory Limited ("**LSH**"), which occupy the middle (about 21%) and southern portions (about 19%) of the same "CDA" zone respectively. There are 1-storey structures on the LKK site; the LSH site is currently vacant.

8. The owner of the LSH site is Menhill Limited ("**Menhill**"). Menhill and the Appellant are companies within the New Orient group of companies ("**New Orient Group**").

9. Menhill supports the S16 Application.

10. According to a valuation report dated 15th February 2011 prepared by Savills on the Appellant's instructions:-

    a. the Appeal Site is approximately 6,675.30 m^2;

    b. the LSH Site is approximately 2,521.00 m^2; and

    c. the LKK Site is approximately 2,810.40 m^2.

11. Accordingly, the Appeal Site occupies about 55.6% of the land in the 'CDA' zone. Together with the LSH Site, the New Orient Group owns and occupies about 77% of the land in the 'CDA' zone, whereas the owners of the LKK Site own and occupy 23%.

C2. The S16 Planning Application by the Appellant

12. On 9th June 2005, the Appellant submitted a planning application (No A/SK-HC/124) under Section 16 of the pre-amended TPO to seek

planning permission from the TPB for a proposed comprehensive residential development.

13. At the time of the submission of the S16 Application, the Plan had not been approved. The plan then in force was the Draft Ho Chung Outline Zoning Plan No. S/SK-HC/7**,** which was exhibited for public inspection under the pre-amended TPO s.7 on 1st April 2005 ("**the 2005 Draft OZP**").

14. At the time of the S16 Application, it was envisaged by the Appellant that there would be 2 phases of development: Phase 1 concerning the Appeal Site and Phase 2 concerning the middle portion of the "CDA" zone (i.e. the site occupied by LKK ("**the LKK Site**") and the southern portion of the "CDA" zone (i.e. the site occupied by LSH ("**the LSH Site**").

15. The Appellant considered it would be able to acquire both the LKK Site and the LSH Site within 12 months from the date of the application.

16. From the Master Layout Plan ("**MLP**") submitted by the Appellant in the S16 Application, the intended development in both Phases 1 and 2 was to be taken as a composite whole comprising a total of 50 dwelling units (28 would be at the Appeal Site (Phase 1) and 22 would be at the LKK and LSH Sites (Phase 2)).

17. In December 2006, the Appellant submitted a revised technical and accommodation schedule on the development proposal, a revised MLP and a revised landscape master plan to the TPB. The number of the dwelling units in Phase 2 was reduced to 12 (from 22). It was stated by

the Appellant that the information relating to Phase 2 was provided to the TPB "*to establish the 'comprehensiveness' of the proposals submitted by the [Appellant]*". The Appellant also said that it was "*still actively negotiating with the other land owners within the subject CDA zone with the intention of implementing the comprehensive scheme envisaged for the Site*".

18. After the S16 Application was made, the Appellant subsequently submitted several applications for deferment of the consideration of the application. The S16 Application was considered by the Rural and New Town Planning Committee ("**RNTPC**") of the TPB on 23rd January 2009.

19. Various Government departments provided comments to the TPB. In particular, the following can be seen from the RNTPC Paper No. A/SK-HC/124 submitted to the RNTPC:-

a. The District Lands Officer/Sai Kung of the Lands Department ("**LandsD**") commented, amongst other things, that:

> "*the short term waiver (SW316) for the Lee Kam Kee Factory is still valid. The waiver fee has been paid up to 31.3.2009. The said waiver is renewed quarterly in accordance with clause 2.7(a) of the waiver letter dated 14.5.1999*" [§10.1.1 (h)].

b. The Assistant Commissioner for Transport/New Territories of the Transport Department commented, amongst other things, that:

"regarding the ingress/egress point, he has no strong view on the creation of a temporary access via Hiram's Highway to/from the application site. This access is tolerated on a temporary basis but is considered unacceptable as a permanent provision. It should be terminated when the permanent access via Nam Pin Wai Road is in place…" [§10.1.3(b)].

c. The Director of Environment Protection ("**DEP**") commented, amongst other things, that:

"the sauce production factories to the south of the application site have ceased operation for years. Should the sauce factories resume operation in future, they could induce air quality impacts including chimney emissions and odour to the proposed development because of the close proximity of these sites. If such is the case, there would be industrial/residential interface issues" [§10.1.5(e)].

d. The Planning Department ("**PlanD**") raised the following planning considerations:

"However, the 'CDA' zone is intended for comprehensive development of the area for residential uses with the provision of open space and other supporting facilities. Although the applicant has submitted an indicative MLP covering the whole 'CDA' site, the application site for the subject Phase 1 development only involves the northern part of the 'CDA' zone and represents 52% of the total land area

with the whole 'CDA' zone. There is no guarantee that the MLP covering the entire 'CDA' zone will be implemented as submitted." [§12.3].

"The proposed development under the current application is also not in line with the Town Planning Board Guidelines for 'CDA' zone as the applicant fails to demonstrate that the development could be self-contained in terms of transport and access arrangements. Although AC for T/NT, TD has no strong view on the proposed temporary access via Hiram's Highway, he opined that the interim access is unacceptable as a permanent provision. Moreover, the applicant has not obtained the consent from the landowners to its south on the use and design of the permanent access from the south. According to DLO/SK, if the subject development has to pass through adjoining private lots, there is no guarantee for such requirement under the lease conditions that the access would be available. The owners have to acquire their own right of access." [§12.4].

"The site is intended to be developed comprehensively so that the industrial/residential interface problem caused by obsolete industrial operations could be minimized. Given the application only covers the northern part of the 'CDA' zone, the soy sauce processing factory occupying the southern part, though ceased operation for some time, have not been included. If the two parts do not redevelop together and subsequently the factory resumes operation, the resultant development would be subject to

industrial/residential interface problem. Though a MLP is proposed, there is insufficient information to demonstrate that the southern part of the 'CDA' development would go ahead and the potential industrial/residential interface problem could be overcome." [§12.5].

20. At the meeting on 23rd January 2009, the RNTPC decided to reject the S16 Application for the following 3 reasons:-

a. The "CDA" zone was intended for comprehensive development of the area for residential uses with the provision of open space and other supporting facilities. There was no guarantee that the MLP covering the entire "CDA" zone would be implemented as submitted. There was insufficient information to demonstrate that the comprehensiveness of the proposed "CDA" development would not be adversely affected by the proposed phased development;

b. There was insufficient information in the submission to demonstrate that a permanent vehicular access from Nam Pin Wai Road could be provided; and

c. The site was intended to be developed comprehensively so that the industrial/residential interface problem caused by industrial operations could be minimized. There was insufficient information to demonstrate that potential industrial/residential interface problem could be addressed.

21. By a letter dated 13th February 2009, the RNTPC's decision to reject the application was conveyed to the Appellant by the Secretary of the TPB.

C3. The S17 Review by the Appellant

22. By a letter dated 6th March 2009, the Appellant applied under section 17(1) of the pre-amended TPO for a review of the RNTPC's decision to reject the S16 Application.

23. Between 20th October 2009 and 29th December 2010, the Appellant submitted several rounds of further information to the TPB in support of the S17 Review, including a revised MLP, a revised landscape master plan, a proposal to change the interim access leading to Hiram's Highway to a permanent access, two letters dated 13th October 2008 and 7th June 2010 demonstrating the previous unsuccessful negotiation efforts and initiative to re-commence discussions with the landowner of the LKK site, and updated its landholding plan.

24. The S17 Review was considered by the TPB on 21st January 2011.

25. The Appellant's proposal to have a permanent access point off the future service road to be provided alongside the future upgrade Hiram's Highway for the Appeal Site was approved by the Commissioner for Transport, subject to various conditions. The Commissioner for Transport therefore expressed no objection to the S17 Review and the previous objection in the S16 Application regarding the provision of permanent vehicular access from Nam Pin Wai Road was no longer applicable.

26. Other Government departments provided comments to the TPB and the following comments can be seen from the TPB Paper No. 8707 ("**the TPB Paper**") submitted to the TPB.

a. The DLO/SK of LandsD commented, amongst other things, that:

> *"[the short term waiver (SW316) for the Lee Kam Kee Factory], which is renewed quarterly in accordance with Clause 2.7(a) of the waiver letter dated 14.5.1999, is still valid with waiver fee paid up to 31.3.2011"* [§5.2.1 (e)].

b. The DEP commented, amongst other things, that:

> "*the applicant claimed in their submission that the concerned industrial activities have ceased and that there is no statutory planning provision for industrial operations to resume within the Site. There would be industrial/residential interface issues if the industrial operations were to resume*" [§5.2.5(a)].

c. The PlanD commented, amongst other things, that:

> "*The 'CDA' zoning is for comprehensive development of the area. The private land within this 'CDA' zone is owned by 3 private landowners. The land owned by the applicant is in Phase 1 development while 2 other landowners' land is covered by Phase 2 development … According to the current submission by the applicant, support has been obtained from the landowner of the southernmost part of the 'CDA' zone.*

However, there is no information or evidence to demonstrate that the landowner of the middle portion of the 'CDA' zone will redevelop his land. In the circumstance, there is no guarantee that comprehensiveness of the 'CDA' scheme would not be undermined, thus contravening the planning intention of the 'CDA' zone. The applicant fails to demonstrate that the comprehensiveness of the propose development will not be adversely affected as a result of the phased implementation in accordance with the TPB Guidelines PG-No. 17 for 'Designation of 'CDA' Zone and Monitoring the Progress of 'CDA' Developments'." [§7.1]

"*Under the 'CDA' zone, the landowner in the middle portion of the 'CDA' site has not shown its indication to redevelop the soy sauce processing factory to residential development. DLO/SK advises that the short term waiver for the factory is still valid. The proposed residential development would be subject to industrial/residential interface problem once the soy sauce processing factory resumes operation. The whole 'CDA' site is originally intended to be developed comprehensively so that the industrial/residential interface problem caused by obsolete industrial operations could be overcome. In the current submission, there is insufficient information to demonstrate that the middle part of the 'CDA' problem could be overcome. DEP advises that there would be industrial/residential interface issues if the industrial operation resumes operation. In view of the above, the application is not in line with the TPB Guidelines PG-No. 17 as the applicant fails to demonstrate the*

development would not have interface problem of incompatible land uses." [§7.2].

27. At the S17 Review hearing on 21st January 2011, the TPB decided to reject the application on review ("**the S17 Decision**") for the following two reasons:-

    a. The "CDA" zone was intended for comprehensive development of the area for residential uses with the provision of open space and other supporting facilities. The Appellant had not demonstrated that the comprehensiveness of the proposed "CDA" development would not be adversely affected by the proposed phased development; and

    b. The Appeal Site was intended to be developed comprehensively so that the industrial/residential interface problem caused by industrial operations could be minimized. The Appellant had not demonstrated that the potential industrial/residential interface problem could be addressed.

28. By a letter dated 11th February 2011, the TPB's decision to reject the S17 Review was conveyed to the Appellant issued by the Secretary of the TPB.

C4. Appeal to the Appeal Board Panel (Town Planning) by the Appellant

29. By a Notice of Appeal dated 12th April 2011, the Appellant pursuant to section 17B(1) of the pre-amended TPO appealed to the Appeal Board

Panel (Town Planning) against the TPB's S17 Decision.

D. THE APPELLANT'S GROUNDS OF APPEAL

30. In the original Grounds of Appeal dated 12th April 2011 attached to its Notice of Appeal, the Appellant advanced 4 specific grounds of appeal against the S17 Decision, namely:-

    a. The S17 Decision was premised on an error of fact, or alternatively on a misrepresentation from the LandsD to the TPB, that the waiver at the LKK Site was still valid ("**Ground 1**").

    b. If Ground 1 is not made out, the TPB took into account irrelevant consideration, or alternatively gave undue weight to the fact that the sauce factory at the LKK Site would and could start operation in the future ("**Ground 2**").

    c. If Ground 2 is not made out, the TPB failed to taken into consideration or given due weight to the likelihood of LandsD terminating the waiver of the LKK Site ("**Ground 3**").

    d. The S17 Decision was substantively unfair and/or inconsistent because the TPB departed from previous applications of similar circumstances ("**Ground 4**").

31. On 18th January 2013, the Appellant introduced the following two additional grounds of appeal by amending its Grounds of Appeal:

a. TPB's first ground to reject the S17 Review was based on the absence of a residential development at the LKK Site and was not a good reason ("**New Ground 1**").

b. TPB's second ground to reject the S17 Review was premised on the resumption of the operation of the soy sauce processing factory on the LKK Site and was not a good reason ("**New Ground 2**").

32. In his Opening Submissions, Mr. Ismail focused primarily upon New Grounds 1 (§§33 to 42 of his Opening) and 2 (§§43 to 53 of his Opening). The other Grounds were not specifically opened upon. The Appeal Board will also focus upon the two new Grounds.

E. THE RELEVANT LEGAL PRINCIPLES

33. We state the relevant applicable legal principles that were submitted to us.

34. In an appeal under section 17B of the TPO, the Appeal Board may "*confirm, reverse or vary the decision appealed against*": section 17B(8)(b) of the TPO.

35. In deciding whether to confirm, reverse or vary the decision appealed against, the Appeal Board must, obviously, be entitled to disagree with the TPB. The Appeal Board's function is to exercise an independent planning judgment: see *Henderson Real Estate Agency Ltd v Lo Chai Wan* [1997] HKLRD 258 at 266A (Lord Lloyd).

36. Section 16(4) of the TPO provides that "*[the TPB] may grant permission under subsection (3) only to the extent shown or provided for or specified in the plan*". The Appeal Board is bound by this provision: see *Henderson Real Estate Agency* (above) at 261F (Lord Lloyd).

37. Accordingly, the Appeal Board can grant planning permission (effectively allowing an appeal) only to the extent shown or provided for or specified in the OZP. Put in another way, planning permission can only be granted for a development which is in line with the planning intention. See *TPA Nos 13 of 2006 & 5 of 2008* (5th October 2010) §29.

38. In respect of the burden of proof:-

    a. Mr. Fung submitted that the burden is on the Appellant to show that the TPB was wrong in making its review decision so that the Appeal Board should either reverse or vary that decision: see *TPA No 18 of 2005* (12th April 2007) §55.

    b. Mr. Ismail submitted that the appeal should be allowed and planning permission granted if there are no good reasons for refusal. He cited in support *Town Planning Appeal Nos. 4 and 5 of 1993* (22nd December 1993), *Town Planning Appeal No. 16 of 1993*, (21st April 1994), Town Planning Appeal No. 6 of 1994 (7th March 1995) and Volume 48 Halsbury's Laws of Hong Kong **(AA 7)** ("**48 Halsbury's**") at §385.270 (at page 302).

    c. The apparent difference between the parties ultimately came to nothing, as Mr. Ismail accepted the general principle that the burden of proof lies upon the party who asserts the affirmative of

the issue, and at the end of the end, the Appellant has the burden to show the absence of any good reasons for refusing planning permission on the materials presented in this appeal. He further accepted, since this case involves a CDA, that the Appellant has to demonstrate the matters referred to in Town Planning Board Guidelines For Designation of "Comprehensive Development Area" Zones and Monitoring the Progress of CDA Development ("**Guidelines 17**").

39. The following legal principles/approaches have also been submitted to us by Mr. Ismail, which are not subject to any specific dispute by Mr. Fung in his Closing Submissions. We accept and are guided by them. We recite them for completeness sake. We however will only recite some but not all the authorities cited by Mr. Ismail to us in support:-

a. The [Appeal Board] must exercise its independent planning judgment within the parameters of the Approved OZP;

b. The TPB's (and the [Appeal Board]'s) duty is to see that the Approved OZP is faithfully implemented;

c. The TPB (and the [Appeal Board]) has no authority to deviate from the plan "however compelling other material considerations to the contrary might be";

d. In respect of the status of the Notes, Explanatory Statement and Guidelines:-

i. In exercising its independent judgment, the relevant plan and the Notes are obviously material documents to which the [Appeal Board] is bound to have regard; indeed they are the most material documents;

ii. Whilst the Explanatory Statement is expressly stated not to be part of the plan, it does not follow that it is not a material consideration for the [Appeal Board] to take into account. Guidelines are also material considerations for the [Appeal Board] to take into account. Although the Explanatory Statement or the Guidelines cannot be disregarded, the [Appeal Board] is not bound to follow them; and

iii. Permission is never to be granted for a use which is neither in column 1 nor in column 2: see Secretary for Transport v Delight World Limited (2006) 9 HKCFAR 720 **(AA 12)** ("**Delight World**") where Bokhary PJ (as he then was) said at §30 as follows:-

> *" On this question, the initial difficulty which the Secretary faces is that you would not even be aware of any need for section 16 permission unless you had first taken zoning into account. This is because the TPO permission scheme only applies where a zoning plan provides for the grant of permission. And this requires one to know how the land in question has been zoned, for only then can one ascertain whether the proposed use comes within Column 1 (so that there is no need to seek permission) or comes within*

Column 2 (so that permission has to be sought) or falls outside both columns (so that permission is never to be granted).";

e. The fall-back position:-

A planning authority must have regard to the "fall-back" position of the applicant if the applications for planning permission were refused. The meaning of that approach is succinctly summarised at *48 Halsbury's* at §385.270 (page 304), that "*Where the application is for a use which is also a valid existing use, but in a more organized and desirable way, the planning authority may consider that to refuse the application would be to allow the land to be used in a less desirable way.*";

f. Planning permission and implementation:-

i. A clear distinction in principle is normally drawn in planning law between the grant of planning permission and its implementation. In this regard, ownership is normally considered an irrelevant fact; and

ii. We were referred to *Merritt v Secretary of State for the Environment, Transport and Regions and another* [2000] JPL 371 (Lexis) at page 10 of 12, that "….*the structure of planning legislation is such as to concern itself with the acceptability of the development of land in the public interest. It is not generally concerned with ownership of land interest or, for that matter, implementation.*";

g. Unavoidable or uncontrollable impacts:-

When considering any adverse impacts caused by a proposed development, the proper approach is to consider if such impacts are likely and if likely, that rejection of planning permission is justified only if such impacts are unavoidable or uncontrollable: see *Town Planning Appeal No. 2 of 2008* (25th February 2009) at §13, that: "*If there is a likelihood or 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 preventative or mitigation measures*". [Emphasis supplied.];

h. Statutory plans are only one aspect of development control:-

In *United Grand Limited v. Town Planning Board***,** Le Pichon JA, after referring to an identical annotation to §§ (2) of the Notes to the 2005 Draft OZP and the Approved OZP said in §20 (at page 624) as follows:-

> *" The significance of that annotation is that it shows that statutory plans constitute but one aspect of development control and that full compliance with all other aspects is necessary. Thus statutory plans interface or interact with 'other relevant legislation', for example, the Buildings Ordinance, and 'conditions of grant' under*

which Government land is held and 'any other Government requirements', those constituting other levels or layers of development control."; and

i. Consistency:-

In *North Wiltshire District Council v Secretary of State for the Environment and Clover* (1993) 65 P & CR 137, Mann LJ with whom Purchase LJ and Sir Michael Kerr agreed said at page 145 as follows:-

> " *In this case the asserted material consideration is a previous appeal decision. It was not disputed in argument that a previous appeal decision is capable of being a material consideration. The proposition is in my judgment indisputable. One important reason why previous decisions are capable of being material is that like cases should be decided in like manner so that there is consistency in the appellate process. Consistency is self-evidently important to both developers and development control authorities. But it is also important for the purpose of securing public confidence in the operation of the development control system. I do not suggest and it would be wrong to do so, that like cases must be decided alike. An inspector must always exercise his own judgment. He is therefore free upon consideration to disagree with the judgment of another but before doing so he ought to have regard to the*

importance of consistency and to give his reasons for departure from the previous decision.".

F. WITNESSES

40. The Appellant called two witnesses:-

    a. Tsang Anne Lee Cindy, who was a director of the consultants company which was engaged by the Appellant to advise and assist in the S16 Application, the S17 Review and the present Appeal; and
    b. Wai Hing Wah, an Authorised Person who was engaged by the Appellant to express his opinion on a number of matters relevant to the LKK Site.

41. The Respondent called also two witnesses:-

    a. Alex Kiu Chung-yin, a Town Planner of the Sai Kung and Islands District Planning Office, PlanD; and
    b. Leung Kam Wing, a Senior Estate Surveyor of LandsD.

42. The evidence was subject to no substantial dispute. We will not recite them in full. We will mention the relevant evidence when we discuss the issues below.

G. THE GOVERNING PLAN, AND THE PLANNING INTENTION

G1. The Governing Plan

43. The parties differed as to which the governing plan should be.

44. Mr. Ismail submitted that the 2005 Draft OZP Plan should be the governing plan, as that was the plan in force when the S16 Application was submitted. He relied upon *Town Planning Appeal Nos. 5 and 7 of 2000* (14th June 2002), and s.20(6A) of the TPO.

45. Mr. Fung submitted that the Plan should be the governing plan, as it was the plan that was in force at the time when the S16 Application and S17 Review were heard.

46. We are of the view that, as a matter of statutory interpretation, the existence of s.20(6A) of the TPO is in fact against Mr. Ismail's submissions. S.20(6A) relates only to "Development permission area plans". The legislature sees the need to make specific provisions in that regard, that:-

> *"Notwithstanding that the plan referred to in subsection (1) ceases to be effective under subsection (6), sections 16, 17 and 17B shall continue to apply to applications for permission submitted under section 16 during the effective period of 3 years or the period of up to one additional year as extended by the Chief Executive in Council, as referred to in subsection (5) until the right to be*

considered under section 16, right of review under section 17 and right of appeal under section 17B have been exhausted, abandoned or have expired; and the Board or the Appeal Board, as the case may be, shall consider under section 16, review under section 17 or hear an appeal under section 17B in respect of the applications to the extent as shown or provided for or specified in the plan referred to in subsection (1)."

In contract, there is no similar provision in respect of other CDA Plans.

47. We also accept Mr. Fung's submissions on this issue. As a matter of statutory interpretation, it would make logical sense if the "*plan*" referred to in section 16(4) of the TPO is a reference to the latest plan in existence at the time when the application is heard. Further, *TPA Nos 5 and 7 of 2000* (14th June 2002) does not assist Mr. Ismail. The TPB in that case in fact adopted the only prevailing plan at the time of the hearing as the governing plan.

48. The Appeal Board is therefore of the view that the Plan should be the governing plan.

49. We note however that this point is one of principle only because the parties accepted that it makes no practical difference. The provisions of the 2005 Draft OZP Plan and the Plan are substantially the same.

G2. Legal Principles to Ascertain the Planning Intention

50. When ascertaining the planning intention, we are guided by the general

principles set out above, and further by the legal principles which Mr. Fung specifically submitted to us:-

a. Ascertaining the planning intention behind an approved plan is a matter of interpretation. It is a matter of law and, as such, admits of only one correct answer. See *International Trader Ltd v Town Planning Appeal Board* [2009] 3 HKLRD 339 at §55 (Hartmann JA); and

b. The plan and the Notes attached to the plan are obviously material documents to which the Appeal Board is bound to have regard. The Explanatory Statement and the Guidelines issued by the TPB are material considerations to be taken into account by the Appeal Board. See *Henderson Real Estate Agency* (above) at 267A-C (Lord Lloyd).

G3. The Notes to the Plan

51. We have studied the Notes to the Plan ("**the Notes**").

52. The following paragraphs of the Notes have specifically been highlighted to us:

a. Paragraph (2), that:-

> *"Any use or development which is always permitted or may be permitted in accordance with these Notes must also conform to any other relevant legislation, the conditions of the Government lease concerned, and any other Government requirements, as*

may be applicable";

b. Paragraph (3), that:-

"No action is required to make the use of any land or building which was in existence immediately before the first publication in the Gazette of the notice of the interim development permission area conform to this Plan, provided such use has continued since it came into existence. Any material change of such use or any other development (except minor alteration and/or modification to the development of the land or building in respect of such use which is always permitted) must be always permitted in terms of the Plan or in accordance with a permission granted by the Town Planning Board";

c. We note, relevant to paragraph 3 of the Notes, that:-

i. the CDA Zone contains no column 1, namely "Uses always permitted" uses; and

ii. "Industrial Use" is not a column 2, namely "Uses that may be permitted with or without conditions on application to the TPB" use;

d. The planning intention for the CDA Zone is set out in the Notes as follows:-

"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 the development, taking account of various environmental, traffic, infrastructure and other constraints."; and

e. Paragraph (a) of the Remarks section in the Notes provides that an applicant for permission for development on land designated "CDA" shall prepare a MLP for the approval of the TPB and include in the MLP certain information. Some of information that has to be provided relates to the information concerning the <u>entire</u> area of the zone:

i. *"the area of the proposed land uses, the nature, position, dimensions, and heights of all buildings to be erected in the area" [§(a)(i)];*

ii. *"the details and extent of Government, institution or community (GIC) and recreational facilities, public transport and parking facilities, and open space to be provided within the area" [§(a)(iii)];*

iii. *"the alignment, widths and levels of any roads proposed to be constructed within the area" [§(a)(iv)]; and*

iv. *"the landscape and urban design proposals within the area" [§(a)(v)].*

G4. The Explanatory Statement

53. We have studied the Explanatory Statement of the Plan ("**the ES**").

54. The following paragraphs of the ES have been specifically highlighted to us:-

a. §4.1 of the ES, that "…*The provision for application for planning permission under section 16 of the [TPO] allows greater flexibility in land-use planning and control of development to meeting changing needs.*";

b. §9.1 of the ES, which expressly deals with the "CDA" zone**;**

c. §9.1.1 of the ES, which states and repeats the planning intention, that:-

> *"The planning intention of this zone is to provide for comprehensive development/redevelopment of the area for low-rise and low-density residential and/or commercial uses with the provision of open space and other supporting facilities with the objective of improving the general environment. 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.";*

d. §9.1.2 of the ES, which specifically refers to the LKK and LSH Sites, and states, amongst other things:

> *"A site at Nam Pin Wai Road is zoned "CDA". It consists of two sauce production factories as well as a large tract of agricultural land, each under single ownership. Although the major production lines of the sauce production factories have been moved out, the remaining operations have caused environmental nuisance to the locality and are incompatible with the surrounding residential uses. The accessibility of the site will be greatly enhanced upon the full completion of the Hiram's Highway Improvement. Since the site is in juxtaposition with Hiram's Highway and partly falls within a floodplain, the "CDA" zone could ensure the corporation of necessary environmental mitigation measures and the provision of adequate drainage and sewerage facilities to minimise flooding hazard to the area. The "CDA" zoning is to provide incentive to encourage long-term comprehensive development of the area with a view to improving the quality of the general environment.";*

e. §9.1.3 of the ES, which, amongst other things, states:

> *"…Each proposal will be considered on its individual planning merits. The implementation of the "CDA" zone largely depends on private initiatives for land assembly. However, in view of the sizeable area of the site, phased development could be carried out provided that the intention for comprehensive redevelopment of the whole site would not be prejudiced.";* and

f. §9.1.4 of the ES, that:

> "*Pursuant to section 4A(1) of the Ordinance, any development/redevelopment proposal within this zone is subject to the approval of the Board by way of a planning application under section 16 of the Ordinance. A Master Layout Plan (MLP) should be submitted together with the relevant assessment reports and a landscape master plan as well as other materials as specified in the Notes of the Plan for the approval of the [TPB] under section 4A(2) of the Ordinance. Development/redevelopment will be in accordance with an approved MLP and it should be ensured that the nature and scale of new development will be in keeping with the surrounding natural landscape and land-uses and will not exert pressure on the limited road and other infrastructural provisions in the Area.*".

G5. Planning Intention of "CDA" Zone in this Appeal

55. From the above, Mr. Fung submitted that the planning intention of the "CDA" zone in this appeal is plain and obvious. The intention is to ensure that the entire "CDA" zone is to be developed or redeveloped in a comprehensive manner for residential and/or commercial uses consistent with the various criteria stipulated in the Notes and the ES. The intention that there must be consistency and uniformity within the entire "CDA" zone is clearly manifested from the Plan, the Notes and the ES.

56. Subject to the further matters we express in the paragraph immediately below, we accept the planning intention as analysed and ascertained. We

note that Mr. Fung's analysis has not been subject to any specific dispute by Mr. Ismail.

57. The further matters are these:-

a. We find that the planning intention also includes the provision of incentive and encouragement to long-term comprehensive development of the area with a view to improving the quality of the general environment. We see as significant the following words in paragraph 9.1.2 of the ES, that:-

> "*The 'CDA' zoning is to provide incentive to encourage long-term comprehensive development of the area with a view to improving the quality of the general environment.*"

b. The planning intention also plainly includes and permits phased development of the CDA zone. That is clear from paragraph 9.1.3 of the ES. We accept Mr. Ismail's submission in this regard that, in the case of phased development, whether "*the intention for comprehensive redevelopment of the whole site would not be prejudiced*" is a question of fact to be decided according to the evidence adduced; and

c. We will make further observation about the planning intention when we discuss below the Decision of the Appeal Board in *Town Planning Appeal No. 13 of 2006 and Town Planning Appeal No. 5 of 2008* (5th October 2010) ("***the Fo Tan Appeal***").

H. PHASED DEVELOPMENT – GUIDELINES 17

58. Phased development of CDA zone not under single ownership features prominently in this appeal.

59. The parties accept that Guidelines 17 are applicable to this appeal.

60. We have studied Guidelines 17. Mr. Ismail has highlighted to us the following terms:-

a. paragraphs 1.1 to 1.3 under the “Introduction” section of the Guidelines, that:-

> *“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…*
>
> *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 [TPB] 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.";

b. paragraph 3.1(b) under the "Planning Intention" section of the Guidelines, that:-

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

…

b. provide incentives for the restructuring of obsolete areas, including old industrial areas, and the phasing out of non-conforming uses, such as open storage and container back-up uses in the rural areas;";

c. paragraphs 3.4 and 3.5 of the "Land Status/Ownership/Tenure" section, that:-

"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.

3.5 In the designation of "CDA" zoning land ownership should only be one of the considerations weighed against many other factors, such as, the need to facilitate urban renewal and restructuring of land uses in the old urban areas and to provide incentives for phasing out of incompatible and non-conforming uses. Particularly, in the case of the LDC development schemes and the urban improvement schemes of the Hong Kong Housing Society, where the mechanisms for land acquisition are available, land ownership will not be an overriding factor."; and

d. paragraph 5.4, under the heading of "Allowance for Phased Development", that:-

"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.".

61. We will come back to Guidelines 17 when we consider the main issues below.

I. TPB'S CASE IN THIS APPEAL

62. Mr. Fung has helpfully summarised the TPB's case in this appeal, which is as follows.

a. The Appellant can only succeed in this appeal if it discharges its burden to show that its proposed development is in line with the planning intention.

b. The planning intention ascertained from the Plan, the Notes and the ES is to ensure that the entirety of the "CDA" zone is developed or redeveloped in a comprehensive manner for residential and/or commercial uses.

c. To demonstrate that its proposed development is in line with the planning intention in respect of the "CDA" zone, the Appellant must at least show that its own development intention vis-à-vis the Appeal Site and the LSH Site is consistent with LKK's intention vis-à-vis the LKK Site. However, no reliable evidence has been adduced by the Appellant as to what LKK currently intends to do with the LKK Site. Accordingly, the Appellant cannot discharge its burden and the appeal must be dismissed.

63. The first two propositions made by Mr. Fung are not particularly controversial. We refer to our discussions above. The main area of contest is the third proposition.

64. Mr. Fung has elaborated upon his third proposition. The gist was set out at paragraphs 48(11) and 50 of his Closing Submissions, that:-

> *"48(11) As there is no evidence as to what LKK currently intends to do with the LKK Site, no one can say whether or not the Appellant's proposed development is in line with the planning intention behind the Plan so that the entirety of the "CDA" zone is developed or redeveloped in a comprehensive manner for residential and/or commercial uses. The LKK Site occupies about 21% (§3.3(d) of Statement of Alex Kiu [S/3/37]) or 23% (§74 of Statement of Cindy Tsang [S/1/15.13]) of the*

entire "CDA" zone in question. If LKK decides to continue holding on to the LKK Site (as it has been doing for well over 10 years), or to sell the LKK Site to any third parties for profit, or to redevelop the land into something other than for residential or industrial purposes, it is self-evident that the entire "CDA" zone cannot be comprehensively developed or redeveloped for residential and/or commercial uses.

50. If the Appellant's argument is correct (that LKK's intention can be ignored for the purpose of deciding whether planning permission of the entire "CDA" zone should be granted), then the original purpose of designating the entire area to be "<u>Comprehensive</u> Development Area" would be defeated."

65. Whilst it is important to identify what the TPB is seeking to argue before this Appeal Board, it is also important, so as to properly understand the issues, to identify what TPB is *not* arguing.

66. We come back to Guidelines 17. According to its paragraph 5.4, it is a prerequisite for allowance for phased development of CDA sites not under single ownership that "*due effort has been made to acquire the remaining portion of the site for development but no agreement can be reached*". Once that has been shown, allowance for phased development *could* be considered.

67. The TPB is *not* seeking to argue that no such due effort has been made. We have considered the evidence, including the evidence of Ms Cindy

Tsang (in particular paragraphs 80-81 of her statement) and the correspondence between the Appellant and LKK. Whilst LKK's intention and attitude could not be ascertained from the correspondence, the evidence at least shows that "*due effort*" has been made. We therefore accept that the prerequisite for allowance for phased development in the present appeal has been satisfied, and phased development could be considered.

68. At Section K2 of his Closing Submissions, Mr. Fung has also made clear that he is *not* making the following submissions:-

a. an application lodged for a phased development in an area zoned CDA owned by different owners must be lodged by all the owners and not one owner in order to satisfy the conditions of comprehensiveness and definite implementation;

b. phased development is not permitted in case where land in a CDA site is under different ownerships; or

c. the [Appeal Board] must ask itself whether there is a real prospect that other owners of a CDA site would develop their site in line with the planning intention and whether if they do not, the planning intention will be undermined or comprehensiveness adversely affected.

69. We refer to paragraphs 5.4(a) to (d) of Guidelines 17. We note further that no issue has been raised in respect of paragraph 5.4(c) (self-contained nature of the resultant development) or 5.4(d) (non-absorption of the development potential of the unacquired lots within the CDA zone).

70. The main point raised by Mr. Fung is primarily the absence of evidence demonstrating the matters set out at paragraphs 5.4(a) and (b).

J. THE NEW GROUND 1

71. We make first of all two preliminary observations:-

a. "Planning intention" and "comprehensiveness" connected:-

i. We note first of all Mr. Ismail's submission that the first reason given by the TPB rejection the S17 Review was about failing to demonstrate that the comprehensiveness of the proposed CDA development would not be adversely affected, but *not* about the proposed development not being in line with the planning intention;

ii. The manner in which the TPB linked the two matters up can be gleaned from the TPB Paper No. 8707 §7.1 as follows:-

> "*According to the current submission by the Applicant, support has been obtained from the landowner of the southernmost part of "CDA" zone. However, there is no information or evidence to demonstrate that landowner of the middle portion of the "CDA" zone will redevelop his land. <u>In the circumstance, there is no guarantee that comprehensiveness of the "CDA" scheme would not be undermined, thus contravening</u>*

> *<u>the planning intention of the "CDA" zone.</u> The Applicant fails to demonstrate that the comprehensiveness of the proposed development will not be adversely affected as a result of the phased implementation in accordance with the TPB Guidelines PG-No. 17 for "Designation of "CDA" Zone and Monitoring the Progress of "CDA" Developments*". [Emphasis supplied.];

iii. We will come back to the relevance of this later.

b. Evidence demonstrating that "Planning intention will not be undermined" and "comprehensiveness":-

i. If it is Mr. Fung's submissions that there is no evidence demonstrating the matters required to be demonstrated under paragraph 5.4(a) and 5.4(b) of Guidelines 17, we do not agree; and

ii. Our view is that there *is* evidence relevant to those matters. The question is whether the evidence is sufficient to demonstrate the matters required to be demonstrated.

72. At the core of this appeal is **<u>the factual issue</u>** of the intention of the owners of LKK Site – whether they intend to re-develop the site for residential purposes (thus raising the questions of "comprehensiveness" and "undermining of the planning intention"), and whether they intend to

resume any industrial use on the site (thus raising the "industrial/residential interface" issue).

73. Relevant to the appropriate approach to be adopted to tackle that core issue, we have considered the Decision of the Appeal Board in the *Fo Tan Appeal*:-

a. The *Fo Tan Appeal* similarly concerned a CDA zone not under single ownership. One of those owners was the then Kowloon-Canton Railway Corporation (subsequently MTRC). One issue involved the intention of KCRC;

b. We acknowledge what Mr. Fung has submitted, that the *Fo Tan Appeal* is factually different from the present appeal, and that the intention of KCRC might be said to have been more readily ascertainable;

c. However, despite the possible factual differences, the findings and approach made and adopted by the Appeal Board at paragraphs 85 and 86 of its Decision are equally applicable to our present appeal:-

> "*85. On the issue of MTRC's involvement, we consider that it is one of 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.";

d. We find the above not just sensible but compelling; and

e. We adopt the same findings and approach. In particular, we make the same findings in respect of the planning intention.

74. Extensive submissions were made to us by both Mr. Ismail and Mr. Fung. Whilst we have considered them, we may be forgiven for not reciting them all here. After all, the Appeal Board's function is to exercise independent planning judgment. Whether the reasons given by TPB in dismissing the S17 Review are correct is at best just one of the many relevant considerations.

75. Having said that, we express the following views and make the following findings.

76. As discussed earlier, we adopt the same principle and approach as expressed by the Appeal Board of the *Fo Tan Appeal* in paragraphs 85 and 86 of its Decision.

77. As observed earlier, we do not accept any submissions to the effect that there is *no* evidence on the matters required to be demonstrated under paragraph 5.4(a) and 5.4(b) of Guidelines 17. There is some evidence relevant to those issues. The question is the sufficiency of the evidence.

78. We find the following evidence significant:-

a. on 29th June 1992, LKK intended to develop the LKK Site for residential use by applying for planning permission for low density residential development even before the LKK Site was placed within the "CDA" zone;

b. Mr. Fung commented that that took place some 20 years ago, and there is nothing to suggest that the intention remains valid today;

c. We evaluate this piece of evidence from a different angle. The owners of the LKK Site have previously evinced an intention to develop the site for residential use. That should be the starting point. There is no evidence showing that there is any change of intention. On the other hand, a newspaper article dated 6 October 1999 reported that:-

> "至於李錦記西貢蠔涌醬油廠, 申請重建住宅計劃早前被拒, 該消息表示集團目前仍在留意市況的發展, 再作進一步決定。"

The owners were reported to have been watching the market. No change of intention had been reported;

d. After LKK's application was rejected in 1992, the major production lines of the soy sauce production factory had been moved out of the LKK Site;

e. When an air impact assessment was conducted in 2005, LKK's manager said that "*there is no plan for the operation to move back to Ho Chung*";

f. According to the oral testimony of Ms Cindy Tsang, LKK was one of the 2 parties who objected to the development restrictions of the CDA zone, resulting in certain relaxation of the restrictions;

g. LKK has ceased operation completely of the soy sauce production factory at the LKK Site between 1996 and 1999. According to the photographs produced by Mr. Wai, and according to his evidence, the existing buildings on the LKK Site are all in a dilapidated state;

h. According to what Ms Cindy Tsang said to the TPB during the S17 Review, LKK's food factory licence has expired. Mr. Wai has made some enquires in this regard. According to a letter dated 29th November 2012 from the Food and Environmental Hygiene Department, the LKK Site was not covered by any valid Food Factory licence;

i. Mr. Fung pointed to the fact that over the last 16 years, LKK has been and still is regularly paying the relevant waiver fee to the Lands Department to use the LKK Site as a food factory and drying ground. But the waiver fees involved have been, in the full

scheme of things, relatively small. We are not inclined to read too much into this;

j. There has been meetings and correspondence between the Appellant and representatives of the owner of the LKK Site regarding the proposed development. Whilst details of the contacts are not clear, the fact is that the owners of the LKK Site have not been positively averse to the proposed development; and

k. Further, the owners of the LKK Site have been notified of the S16 Application. Had they wanted its intention known, and in particular if they had changed their intention after their s.16 application in 1992 and wanted the change known, they could easily have voiced it.

79. In the light of the evidence analysed above, we are inclined to agree with Mr. Ismail that the evidence suggests, or support an inference, on a balance of probabilities that "realistically", the LKK Site will not be resumed for industrial use but would be redeveloped as a residential site.

80. Alternative to our views expressed in the paragraph immediately above, we express the following additional, and perhaps more important, views:-

a. As we have observed above, the TPB has raised no issue in respect of the matters required to be demonstrated under paragraphs 5.4(c) and 5.4(d) of Guidelines 17. The emphasis is upon paragraphs 5.4(a) and 5.4(b);

b. We consider paragraphs 5.4(a) and 5.4(b) in fuller details here;

c. In respect of paragraph 5.4(a):-

i. as observed above, we adopt the same findings and approach made and adopted by the Appeal Board in the *Fo Tan Appeal*; and

ii. in particular, and with the necessary modifications in the light of the facts of this case, we find that "*If [LKK'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";*

d. In respect of paragraph 5.4(b):-

i. We find it important to repeat the wording of that sub-paragraph of Guidelines 17, which is:-

> "*…In deriving the phasing of the development, it should be demonstrated that:*
>
> *a.* …
>
> *b. the comprehensiveness of the proposed development will not be adversely affected* ***as a result*** *of the revised phasing."*;

ii. Importantly, to be within paragraph 5.4(b), the adverse effect on the comprehensiveness of the proposed development has to be "*as a result*" of the revised phasing;

iii. There has to be a causation between the "adverse effect" and the "revised phasing";

iv. Thus, the question is not whether there is any "*guarantee that comprehensiveness of the "CDA" scheme would not be undermined"* (see TPB Paper No. 8707 §7.1), but whether the comprehensiveness of the proposed development will be adversely affected ***as a result of*** the revised phasing;

v. If a landowner within a CDA zone is <u>in any event</u> reluctant to carry out re-development according to the plan, the adverse effect of his decision upon the comprehensiveness is the result of his decision, but *not* as a result of the revised phasing;

vi. Similarly, if a landowner chooses to play his cards close to his chest, which he is perfectly entitled to, any adverse effect of his decision upon the issue of comprehensiveness is again the result of the way he chooses to handle its affairs, but *not* as a result of the revised phasing;

vii. We are not saying that LKK is trying to hold any party to ransom. We are not. But, we find it unreasonable to understand paragraph 5.4(b) as bearing any meaning which can give an individual owner the chance to do that;

viii. The Appeal Board observes that prior to any CDA zoning, the lands concerned are often under multiple ownership. The interests of the minority owners are often at odds with

those of the majority owners who seek to re-develop. The mechanism of allowing phased development is there, we reckon, to address such practical difficulties. If TPB's position adopted in this appeal were correct, all phased development will be thwarted by an individual owner choosing deliberately not to make clear his intention. In our view, this can hardly be the meaning of paragraph 5.4(b);

ix. Whilst an individual can choose to play his cards close to his chest, other owners who intend to re-develop should not be held responsible for that owner's decision; and

x. We are glad to have reached the above views. They represent what we believe to be the plain meaning of paragraph 5.4(b). They are also consistent with our findings and the Appeal Board's findings in the *Fo Tan Appeal* on the planning intention. Any contrary view will set a very bad precedent, to the extent that an individual owner within a CDA zone can (for whatever reason known only to himself) thwart an attempted phased development by simply refusing to disclose his intention in respect of his property. That will not be consistent with the planning intention as we find it, and in particular the planning intention evinced in paragraph 9.1.2 of the ES, that "*The 'CDA' zone is to provide incentive to encourage long-term comprehensive development of the area with a view to improving the quality of the general environment*".

81. In the end, even if we were wrong about the sufficiency of the evidence in respect of the intention of LKK, so that there is insufficient evidence to show its intention, we are still not satisfied, on the facts of this case, that the absence of sufficient evidence on the intention of LKK is by itself a good reason for refusing the S17 Review.

82. For completeness sake, we state that we have considered Mr. Fung's submissions in reply before reaching our conclusions above. In particular:-

a. Mr. Fung submitted that the premise of the New Ground 1 is wrong, in the sense that the TPB did not reject the S17 Review solely on the ground that there was an "*absence of a residential development at the LKK Site*", but on the absence of evidence to demonstrate the comprehensiveness of the proposed development;

b. We understand Mr. Fung's submissions, and we have analysed TPB's reasons for refusing the S17 Review accordingly, as set out above;

c. We have considered above Mr. Fung's submissions on the *Fo Tan Appeal*. We are of the view that the findings and approach made and adopted by the Appeal Board in that case are equally applicable here;

d. In respect of the fair inference to be drawn from the facts, we have noted Mr. Fung's submissions at paragraph 48 of his Closing Submissions. We have made our findings above, and have given our reasons therefor; and

e. In reply to Mr. Ismail's argument that having the proposed development is better than no development, Mr. Fung submitted that the argument is unprincipled and superficial. He in effect referred us back to paragraphs 5.4(a) and 5.4(b) of Guidelines 17 and commented the matters required to be demonstrated have not been demonstrated. He commented further that "*…as LKK's intention as regards the LKK's Site is unknown, there is no guarantee that the proposed development of the Appellant would be implemented in accordance with the planning intention of the 'CDA' zone*". We have stated above our findings and observations on paragraphs 5.4(a) and 5.4(b) of Guidelines 17.

K. THE NEW GROUND 2

83. The New Ground 2 relates to the potential industrial/residential interface problem. We refer to paragraph 7.2 of the TPB Paper No. 8707 for a summary of the perceived "interface problem":-

> "*Under the 'CDA' zone, the landowner in the middle portion of the 'CDA' site has not shown its indication to redevelop the soy sauce processing factory to residential development. DLO/SK advises that the short term waiver for the factory is still valid. The proposed residential development would be subject to industrial/residential interface problem once the soy sauce processing factory resumes operation. The whole 'CDA' site is originally intended to be developed comprehensively so that the industrial/residential interface problem caused by obsolete industrial operations could be overcome. In the current*

submission, there is insufficient information to demonstrate that the middle part of the 'CDA' development would go ahead and the potential industrial/residential interface problem could be overcome. DEP advises that there would be industrial/residential interface issues if the industrial operation resumes operation. In view of the above, the application is not in line with the TPB Guidelines PG-No.17 as the applicant fails to demonstrate that the development would not have interface problem of incompatible land uses.".

We refer also to paragraph 161 of the Confirmed Minutes of the S17 Review, that:-

"161. ….The issue at stake for the subject application was not whether there could be phased development in 'CDA' sites, but <u>whether the development would be subject to industrial/residential interface problem given there was no concrete evidence that the adjacent factory would not resume operation</u>.…On the applicant's claim that the landowner of the middle portion of the 'CDA' would redevelop its land as there was a previous planning application No. A/DPA/SK-HC/26 for residential development on the Lee Kam Kee site, the Secretary [of TPB] said that the planning application was considered and rejected by the [TPB] in 1992, some 18 years ago. PlanD had requested the applicant to provide evidence, for example a letter, indicating that Lee Kam Kee had the intention to redevelop its land, but no such evidence had been submitted.".

84. As we see it, whilst the issue of industrial/residential interface may have a life of its own, it may also be regarded as one aspect of the comprehensiveness issue (subject matter of the New Ground 1).

85. Indeed, the focus of the TPB's case in this appeal, as Mr. Fung put it at Section F of his Closing Submissions, was upon the absence of evidence to demonstrate that the proposed development is in line with the planning intention.

86. We therefore repeat our discussions at Section J above.

87. Further, similar to the "comprehensiveness" issue discussed under the New Ground 1, the "interface issue" arises also as a result of the uncertainty surrounding LKK's intention in respect of the LKK Site. To this extent, our discussions at Section J above are also relevant.

88. Mr. Ismail and Mr. Fung have made diverse submissions to us relevant to the New Ground 2. We do not intend to repeat and deal with all the matters raised. The New Ground 2, except as an aspect of the New Ground 1, does not appear to be the main focus of the TPB's case as explained by Mr. Fung. Further, and as we have observed above, the Appeal Board's function is to exercise independent planning judgment. Whether the reasons given by TPB in dismissing the S17 Review are correct is at best just one of the many relevant considerations.

89. Having said that, we state that we find and accept, based on the evidence, that on a balance of probabilities, and realistically, the LKK Site will not be resumed for industrial use. We repeat the evidence we have discussed

in Section J above. We also refer to the facts and evidence discussed in paragraph 91 below, which are also relevant.

90. For the reasons advanced by Mr. Fung, we do not accept Mr. Ismail's submission that any impact of the proposed Comprehensive Residential Development must be upon the existing use of and existing activities upon the LKK Site. In particular, we accept Mr. Fung's submissions that as the Appeal Board's function is to exercise independent planning judgment to consider whether the Appellant has discharged its burden to show that the proposed development is in line with the planning intention, the Appeal Board must be allowed to take into account all matters that it considers appropriate in determining this question, including the possible use of and activities upon the neighbouring land.

91. Mr. Ismail submitted that there will be no industrial/residential interface problem because the soy sauce production factory on the LKK Site (which is an industrial use) cannot lawfully resume operation as it would be in contravention of the Plan. We accept the submissions, upon the basis of the following observations and findings:-

a. We note and repeat our observations on the Notes above, that the CDA Zone contains no column 1 (namely "Uses always permitted" uses), and that "Industrial Use" is not a column 2 use;

b. We note and repeat paragraph (3) of the Notes cited above, and in particular these words: "*No action is required to make the use of any land or building which was in existence immediately before the first publication in the Gazette of the notice of the interim*

development permission area conform to the Plan, ***provided such use has continued*** *since it came into existence*" (emphasis added);

c. By a letter dated 21st March 1980, the Lands Department issued a Temporary Waiver of the terms of the Block Crown Lease which allowed the LKK Site to be used for the purpose of a food factory and drying ground for one year. The Temporary Waiver would be automatically extended for one year upon payment of a fee. Since then, a number of waivers have been cancelled but replaced by new ones. That was necessary every time the Site changed hand. The current one was issued in 1999. The waiver fees have all along been paid up, and the waiver has remained valid in that sense;

d. Paragraph 2.5(b)(iii) of the current Waiver prohibits any use of the Site or any part thereof "*which does not in all respects comply with the requirements of the Town Planning Ordinance and any amending legislation";*

e. We accept Mr. Fung's submissions that the Ho Chung Interim Development Permission Area Plan was published on 17th August 1990, and that the LKK Site was within the Ho Chung Development Permission Area. Therefore, according to the statutory definition of the term "*existing use*", the use of the LKK Site that was in existence immediately before 17th August 1990 would be the "existing use" of the land;

f. We are however not with Mr. Fung when he submitted that the evidence was not sufficient to enable the Appeal Board to make

any finding as to whether there was any ceasing of LKK's industrial use on the Site after 1996;

g. We have considered the evidence. The Plan itself suggested that the "*the major production lines of the sauce production factories have been moved out.*" The photographs of the Site show that the Site was in disrepair in 2011 and 2012. According to the photographs taken by Mr. Wai, the structures on it were empty. There were cracks on them. Doors and windows were missing. Moss and grass were found growing on the floors inside. All these, coupled with the fact that there has not been any valid Food Factory Licence covering the LKK Site, suggest on the balance of probabilities that the "existing use" has not continued;

h. We add that we are not concerned with the concept of "cessation" as the case of *Hartley v Minister of Housing and Local Government* [1970] 1 QB 413 cited to us was. We are only concerned with the factual issue as to whether any existing use "*has continued*". On the evidence, it has not. It has been put to no use;

i. In the light of our findings, the *proviso* at paragraph 3 of the Notes bites. Mr. Fung accepted (at paragraph 111(1) of his Closing Submissions) that the effects of paragraph 3 of the Notes are as follows, that:-

> *"According to §(3) of the Notes, no action is required to take (i.e. no planning permission needs to be made) if:*
>
> *(a) the use under consideration is an existing use (i.e. a use that was in existence immediately*

*before the first publication in the Gazette of the notice of the interim development permission area plans); **and***

(b) *such use **has continued** since the first publication in the Gazette of the notice of the interim development permission area plans.*" (emphasis added);

j. We repeat that the CDA Zone contains no column 1 (namely "Uses always permitted" uses), and that "Industrial Use" is not a column 2 use; and

k. We have also noted the evidence from Mr. Wai that the structures on the LKK Site are unauthorised and that no food factory licence would be granted. We find the suggestion that LKK might use the Site merely as a drying ground unconvincing.

92. By reason of the above, we are of the view that the perceived industrial/residential interface problem was also not a good ground for refusing the S17 Review.

L. OUR INDEPENDENT PLANNING JUDGMENT

93. We repeat everything set out and discussed above.

94. As we have concluded above, we are not satisfied that the reasons given by the TPB for refusing the S17 Review are good ones.

95. We have noted the TPB's case. No issue has been raised in respect of the matters dealt with in paragraph 5.4(c) and 5.4(d) of Guidelines 17.

96. We note that apart from the comments from the DEP and the PlanD, other departments and authorities had no in-principle objection to the Appellant's revised MLP.

97. We have ourselves studied the revised MLP. We see nothing which causes us concern. Quite the contrary, we note that the Appellant has allocated 6 houses to the LKK Site. Those 6 houses are in good disposition. The Appellant has not tried to shift all Open Space or G/IC facilities onto that Site.

98. Further, we are attracted by the following submissions by Mr. Ismail, that:-

a. allowing the development would discourage or not encourage the return of the polluting industrial use on the LKK Site; and

b. the proposed development is better than the "fall-back" position of leaving the Application Site "vacant, flat and fenced off" and the LKK Site and the LSH Site in a "derelict state".

99. Exercising our own independent planning judgment, we have decided to allow the appeal.

100. At paragraph 126 of his Closing Submissions, Mr. Fung said that "*in the event that the Appeal Board is minded to allow the appeal, the TPB asks for the conditions suggested in §8.2 of the TPB Paper to be imposed*".

We note that the Appellant has no objection to the imposition of those conditions. We note however that in that paragraph, the validity of the permission was suggested to be valid until 21st January 2015, which was four years from the S17 Review. Given the time lapsed, we propose to adopt the same four-year validity period, and order that the permission be valid until 16th July 2017. Subject to that, we adopt the same terms and impose the same Approval Conditions as set out at paragraph 8.2 of the TPB Paper. For the avoidance of doubt, we advise the Appellant of the same matters as per the Advisory Clauses set out therein.

M. CONCLUSION

101. We accordingly allow the appeal and grant the planning permission sought. We also impose those conditions suggested in paragraph 8.2 of the TPB Paper No. 8707.

102. On the issue of costs, we note the normal rule under section 17B(8)(c) is that there should not be an award of costs in favour of the "successful party" save in exceptional circumstances. We refer to Town Planning Appeal No. 10 of 2010 (16th December 2011). At this stage, we see no exceptional circumstances which justify any award of costs in this appeal. We make an order *nisi* that there be no order as to costs. Should any party seek to vary the order *nisi*, we give the following directions: (1) the party seeking to vary the order *nisi* should within 7 calendar days from receipt of this Decision serve and file its submissions setting out the order it seeks and the reasons therefor; (2) the other party may within 7 calendar days upon receipt of the same, and if it wants to, file and serve its

response; and (3) the applying party may within 5 calendar days upon receipt of the response file its reply.

103. We thank counsel for their assistance.

(Signed)

Mr Keith YEUNG Kar-hung, SC

(Chairman)

(Signed)

Mr CHAN Chung

(Member)

(Signed)

Mr Marvin CHEN

(Member)

(Signed)

Professor Lawrence LAI Wai-chung

(Member)

(Signed)

Ms LAW Yee-ki

(Member)