

IN THE TOWN PLANNING APPEAL BOARD

Town Planning Appeal No. 6 of 2015

BETWEEN

Joyous Cheer Limited

Appellant

and

TOWN PLANNING BOARD

Respondent

Appeal Board: Mr. YEUNG Ming-tai (Chairman)
 Ms. CHAN Pui-ying (Member)
 Miss Julia LAU Pui-g (Member)
 Mr. TSE Chi-ming (Member)
 Ir. Dr. Paul TSUI Hon-yan (Member)

In Attendance: Ms. Lesley LEUNG (Secretary)

Representation: For the Appellant: Mr. Anthony ISMAIL
 For the Respondent: Mr. Jenkin SUEN

Date of Hearing: 30-31 May 2016,
 1-3, 6-8, 10, 13, 14 June 2016,
 6, 8, 9, 14, 23 March 2017,
 18 April 2017

Date of Decision: 14 November 2017

DECISION

A. THE PARTIES

1. The Appellant in this appeal is Joyous Cheer 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(1) of the Town Planning Ordinance (Cap 131) (“**TPO**”) against the decision of the TPB made on 19 December 2014 upon a review under section 17.

C. THE RELEVANT FACTUAL BACKGROUND

3. There are few disputes on facts. We will deal with the relevant factual disputes in paragraphs below. At this stage, it may be opportune that we set out the undisputed factual background for ease of understanding. In this regard, the Town Planning Appeal Board (“**the Appeal Board**”) is indebted to Mr. Ismail (counsel for the Appellant) and Mr. Suen (counsel for the TPB) who have set out the factual background together with their detailed submissions on various issues. The facts summarised below are primarily extracted from these submissions.

C1. The Appeal Site

4. The Appeal Site, with an area of about 3,728 m², comprises various private lots (about 3,113 m²) owned by the Appellant, namely, Lots 879, 880 S.A ss1, 880 S.B ss1, 881 to 885, 889 RP (Part), 891 (Part), 1318, 1326, and 1344 (Part) in D.D. 115 and adjoining Government Land (“**GL**”) (about 615 m²) located at Au Tau, Nam Sang Wai, Yuen Long, New Territories (“**the Appeal Site**”).
5. The above private lots are of agricultural or building status held under Block Government Lease or Tai Po New Grant. The Appeal Site is predominantly unused land in the northern portion, and occupied by Pun Uk and a fengshui pond in the southern portion. Pun Uk is a traditional Hakka mansion built in about 1934 and has been classified as Grade 1 historic building since 1995. Pun Uk has been vacant for many years. The fengshui pond has been abandoned and covered with vegetation.
6. The Appeal Site falls within an area mainly zoned “Undetermined” (“**U**”) (85% or 3,168.8 m²) and partly zoned “Government, Institution or Community” (“**G/IC**”) (15% or 559.2 m²).
7. The Appeal Site is located in one of the three areas in Nam Sang Wai (“**NSW**”) which are zoned “U” on the approved NSW OZP No. S/YL-NSW/8 (“**Approved OZP**”). The Appeal Site is a “stand-alone” site segregated by the Yuen Long Highway and Castle Peak Road (Yuen Long).
8. The surrounding areas of the Appeal Site may be described as follows:
 - a) to the immediate north are a car repair workshop and a storage of food (egg products); to further north are the grade-separated MTR West Rail Line viaduct, which was constructed in 2003, and Small Traders New Village

(“STNV”); to further north of STNV is an area of GL of about 1.07 ha which is currently unused/undesignated with potential for development;

- b) to the immediate east are Pok Oi Hospital (“**POH**”) and POH Jockey Club Care and Attention Home (“**POH Home**”); to further east is the Yuen Long Bypass Floodway (“**YLB**”) which was constructed in 2006;
 - c) to the south are a refuse collection point; to further south and southwest across is an area for open storage for converted containers, Castle Peak Road and Pok Oi Interchange which has undergone improvement works which were completed in 2016; and
 - d) to the west is a pond and to further west across Siu Sheung Road is a strip of unused land and Yuen Long Highway which was constructed in 1998.
9. The Appeal Site is located right next to POH and they share the same access, namely Siu Sheung Road, which is branching off from Castle Peak Road.
10. The proposed development on the Appeal Site comprises a columbarium cum preservation and revitalization of Pun Uk for cultural museum and management office use (“**the Proposed Development**”). The proposed columbarium, in the northern portion of the Appeal Site, would be a 6-storey columbarium building (including two levels of basement and a lower ground floor) at a plot ratio of 0.74, a site coverage of 30% and a gross floor area of 2,140 m² to provide 20,000 niches.
11. If planning permission for the Proposed Development is not granted, the Appellant intends to demolish Pun Uk. A demolition application for Pun Uk was submitted by the Appellant and was approved by the Building Authority (“**BA**”) on 10 September 2015.

C2. Summary of Procedural History

12. In essence:

- a) The Appeal Site is the subject of 5 previous applications for residential development. The first 4 previous applications (No. A/YL-NSW/5, 7, 10, 15) were submitted by Year Best Enterprise Limited (“**YBEL**”), a company within the Appellant’s group, whilst the last application (No. A/YL-NSW/180) (which was later known as “**the 180 Application**”) was submitted by the Appellant. In each of these applications, the Appellant had submitted a Traffic Impact Assessment (“**TIA**”) report. Amongst them, the first 3 applications were rejected on, *inter alia*, the ground of adverse traffic impact by the proposed residential development and access arrangement.
- b) The 4th application was approved with conditions by the Rural and New Town Planning Committee (“**RNTPC**”) on 18 October 1996. The proposed residential development comprised 95 flats and 84 car parking spaces, and was of a lower density and/or provided more sufficient car parking space when compared with the first 3 applications. None of the planning conditions was complied with by YBEL and the planning permission (having been extended 6 times) eventually lapsed on 18 October 2007. The Appellant argued that the approval was prior to the completion of the major infrastructure projects surrounding the Appeal Site and when the Appeal Site was not subject to the current development constraints, which led to the approval of no value.
- c) The 5th application by the Appellant was similar to the 4th application by YBEL. The application was deferred pending the availability of the land use review finding. It was withdrawn by the Appellant on 18 June 2015. The

Appellant argued that Appellant's application did not show that a residential development was an optimum future land use for a number of reasons:

- i) This portion of the "U" zone is also subject to various development constraints including exposure to traffic noise impact from surrounding Yuen Long Highway, Castle Peak Road-Yuen Long section and the West Rail viaduct; as well as the interface with industrial activities to the north;
 - ii) The development constraints would result in totally unattractive flats to potential buyers;
 - iii) It would be a pure speculation whether the TPB would have approved it if this 5th application was not withdrawn;
 - iv) Even if the TPB would have approved this 5th application, this is irrelevant because the Appellant is not legally obliged to build it.
- d) There is a similar columbarium application No. A/YL-NSW/213 made by The Pok Oi Hospital Board of Directors, an entirely different entity to HA, for a proposed columbarium of 1,000 niches at portion of 1/F of a planned 3-storey administration building within POH. Such application was rejected by the RNTPC at its meeting on 16 August 2013 on the grounds that (amongst others) it would adversely affect the normal operation of the existing G/IC facilities (i.e. POH) and the implementability and enforceability of the proposed traffic management measures and traffic enhancement proposals were doubtful.
- e) On 1 December 2010, the Appellant submitted a planning application No. A/YL-NSW/204 ("**S16 Application**") to the TPB under section 16 of the

TPO to seek planning permission to use the Appeal Site for the Proposed Development, including a proposed columbarium with 20,000 niches.

- f) In response, the RNTPC Paper No. A/YL-NSW/204 (“**RNTPC Paper**”) was prepared.
- g) On 15 June 2012, the RNTPC rejected the Application. The Appellant was informed by the Secretariat of the TPB of the RNTPC’s decision on 6 July 2012 (“**S16 Decision**”).
- h) On 13 July 2012, the Appellant applied under section 17(1) of the TPO for a review of the S16 Decision (“**S17 Review**”).
- i) In response, the TPB paper No. 9791 (“**the TPB Paper**”) was issued on 21 November 2014.
- j) On 5 December 2014, having considered the presentation made by the Appellant and other relevant considerations, the TPB decided to reject the Application on review. The Appellant was informed by the Secretariat of the TPB of the TPB’s decision on 19 December 2014 (“**S17 Decision**”).
- k) On 13 February 2015, the Appellant lodged an appeal to the Appeal Board Panel (Town Planning) regarding the S17 Decision pursuant to section 17B(1) of the TPO in the Notice of Appeal (“**NOA**”).

C3. S16 Decision

13. RNTPC rejected the S16 Application with their reasons as follows:

- a) The proposed columbarium was located in an “Undetermined” zone which was being comprehensively reviewed. Approval of the columbarium would pose an undue constraint to the future land use in the area.
- b) The proposed columbarium would aggravate the overloaded Pok Oi Interchange and pose public safety concern. The applicant also failed to demonstrate that the emergency services of POH would not be affected.
- c) Since the implementability and enforceability of the proposed traffic management measures were doubtful, the applicant failed to demonstrate that the development would not cause adverse traffic impact on the area.
- d) The approval of the proposed development would set an undesirable precedent for similar applications in the area. The cumulative effect of approving such similar applications would result in adverse traffic impact in the area.

C4. S17 Decision

14. TPB decided to reject S17 Review for the following 3 reasons:

- a) The proposed columbarium was located in an “U” zone which was being comprehensively reviewed. Approval of the columbarium would unduly constrain optimization of the future land use in the area (the “**First Reason**”).
- b) The implementability of the proposed traffic management measures was doubtful. The applicant failed to demonstrate that the development would not cause adverse traffic impact to the area, in particular, that the emergency services of POH would not be affected (the “**Second Reason**”).

- c) The approval of the proposed development would set an undesirable precedent for similar applications (the “**Third Reason**”).

D. THE APPELLANT’S GROUNDS OF APPEALS

15. In the NOA, The Appellant set out the grounds of appeal against the S17 Decision. In gist, the Appellant advanced the following grounds of appeal:

- a) The First Reason is not a good reason because:
 - i) Traffic impact is not a relevant or weighty planning consideration (§11).
 - ii) The proposed columbarium is in line with the planning intention or guidance for development in the “U” zone and the “G/IC” zone (§14).
 - iii) There is no ongoing comprehensive review of the entire “U” zone (§15).
 - iv) There is no constraint on optimization of the future land use (§§16-17).
 - v) The TPB has approved applications in the “U” zone based on their individual merits (§18).
- b) The Second Reason is not a good reason for the following reasons:
 - i) The implementability of the proposed traffic management measures is irrelevant because a clear distinction in principle is normally drawn in planning law between the grant of planning permission and its implementation (§19).

- ii) Adverse traffic impact to the area is unlikely, avoidable or controllable and will be ameliorated by the proposed Traffic Improvement and Traffic Management Schemes, i.e. (i) widening of the access road, (ii) prohibition of all vehicles to the Appeal Site, (iii) local footpath widening, (iv) ambulance only lane and yellow box at the POH junction, and (v) extension of 24-hours no-stopping restrictions by marking the section of Siu Sheung Road outside the POH entrance and the access road to the Appeal Site with double yellow lines (§21).
- iii) The Traffic Improvement and Traffic Management Schemes are feasible (§22).
- c) The Third Reason is not a good reason. Planning applications will be assessed on individual merits. The approval of the Application will set a desirable precedent (§§23-25).
- d) The Proposed Development will result in real planning gains (§§26-27).
- e) The fallback position is that the Appellant is entitled to use the Appeal Site for as-of-right uses without any traffic improvement and management schemes whatsoever. Such use will produce even greater adverse traffic impacts (§§28-29).

E. The Applicable Principles

16. The parties have submitted to us what legal principles should be adopted in determining this appeal. It may be helpful if we set out our understanding of the relevant applicable legal principles in paragraphs below.

17. 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.
18. The appeal is a *de novo* hearing. The function of the Appeal Board is different from that of the Court of Appeal or the High Court, and could substitute its own decision for that of the TPB even if the TPB had not strictly committed any error on the material before it. See *Town Planning Appeal No 18 of 2005*.
19. In deciding whether to confirm, reverse or vary the decision appealed against, the Appeal Board must exercise an independent planning judgment, and is entitled to disagree with the TPB. The plan and the notes attached to the plan are material documents to which the Appeal Board is bound to have regard and the Explanatory Statement is a material consideration which the Appeal Board must take into account but is not bound to follow. See *Henderson Real Estate Agency Ltd v Lo Chai Wan* [1997] HKLRD 258.
20. The duty of the TPB and the Appeal Board is to see that the relevant town plan is faithfully implemented and not to deviate from it “however compelling other material considerations to the contrary might be”. See *Town Planning Appeal No 5 of 2011*, §39(b), (c).
21. The burden of proof lies upon the Appellant to show the absence of good reasons for refusing planning permission. See *Town Planning Appeal No 5 of 2011*, §38(c).
22. Further, the Appeal Board also takes into account of the following principles:
 - a) The Appeal Board must consider an appeal on its own merits with reference to the planning intention for the Appeal Site and prevailing circumstances. See *Town Planning Appeal No 5 of 2009*, §37, 42.

- b) The Appeal Board must exercise its independent planning judgment within the parameters of the relevant town plan. See *International Trader Limited v Town Planning Appeal Board & Anor* [2009] 3 HKLRD 339.
- c) A realistic approach must be adopted by the Appeal Board. See *Town Planning Appeal No 5 of 2003*, §3 and 12.
- d) 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.
- e) Permission is never to be granted for a use which is neither in column 1 nor column 2 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).
- f) 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 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.*” See *Halsbury’s Laws of Hong Kong*, Vol 48, §385.270 and *Town Planning Appeal No 5 of 2011*, §21, 43 and 44.
- g) Planning permission and implementation: A distinction is drawn between the grant of planning permission and its implementation.

- h) Additional gains: It is relevant to consider whether the proposed development would result in additional gain to the community. See *Halsbury's Laws of Hong Kong*, Vol 48, §385.270 and *Town Planning Appeal No 1 of 2014*, §11.
- i) 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* 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"*.
- j) Alternative uses: In the absence of conflict with planning policy and/or other planning harm, the relative advantages of alternative uses on the Appeal Site or of the same use on alternative sites are normally irrelevant in planning terms.
- k) Consistency: A previous appeal decision is capable of being a material consideration.

23. There are the following relevant factual disputes between the parties:

- a) Relevance of traffic impact:

- i) The Appellant relied on the decision of *International Trader Ltd v TPB* [2009] 3 HKLRD 339 and contended that traffic impact is not a relevant or weighty planning consideration.
 - ii) We note that the said case was decided on its unique fact that “R(C)7” had been rezoned for the specific purpose of limiting development so long as the sites within that zone did not enjoy direct access to a road. There is nothing in the draft Plan, the Notes or the Explanatory Statement in that case to show that the planning intention of “R(A)” zone is as narrow and specific as the planning intention of “R(C)7” zone.
 - iii) The Respondent argued that there is nothing in the Approved OZP, the Notes and the Explanatory Statement thereto to show that the planning intention of “U” zone and the “G/IC” zone on the Proposed Development is as narrow and specific as the planning intention of “R(C)7” in *International Trader* case. There are other cases consistent with the above that the Appeal Board considered that traffic condition in the locality of the appeal sites was a relevant and material consideration in a section 16 application. See *Town Planning Appeal No 12 of 1992* and *Town Planning Appeal No 14 of 1993*. It is also clear from the Guidance Notes published by the TPB dated May 2010 (on Application for Permission under Section 16) that the implications of a number of factors including traffic are relevant considerations in an application for planning permission.
 - iv) We agree with the Respondent and consider that traffic impact is a relevant factor to be taken into consideration.
- b) Impacts of proposed development and effectiveness of measures:

- i) If the proposed development is likely to have adverse impacts on the local area in the vicinity, the applicant bears the burden to demonstrate that it is able to take adequate preventive or mitigation measures to mitigate such impacts. See *Town Planning Appeal No 2 of 2008* and *Town Planning Appeal No 1 of 2014*.
- ii) An applicant can apply for planning permission, notwithstanding any natural or manmade barriers which are yet to be overcome for putting the proposed development in place, provided that there is a possibility for putting it through. See *Town Planning Appeal No 18 of 2005* and *Encyclopaedia of Planning Law and Practice Volume 2*, §72.11.
- iii) In these circumstances, planning permission can be granted subject to the satisfaction of “Grampian” conditions. These “Grampian” conditions are concerned with the state of affairs prior to the commencement of approved development. The focus here is on the adverse impacts which may follow after the commencement of a proposed development and the Effectiveness of Measures to mitigate such impacts.

F. WITNESSES

24. The Appellant has called six witnesses:-

- a) Mr. Philip TSUI Ho-chuen (“**Mr. Tsui**”);
- b) Ms. Karen Rose SEDDON (“**Ms. Seddon**”);
- c) Ms. Oliver CHEUNG Lai-yung (“**Ms. Cheung**”) of Ozzo Technology (HK) Ltd (“**Ozzo**”);

- d) Mr. Henry HO Ming-sun (“**Mr. Henry Ho**”);
- e) Mr. Joseph WONG Chung-chuen (“**Mr. Joseph Wong**”);
- f) Mr. Tinson LEUNG Tin-shing (“**Mr. Tinson Leung**”) of Ho Wang SPD Limited (“**Ho Wang**”); and

25. The Respondent has called three witnesses:-

- a) Ms. Maggie CHIN Man-yi (“**Ms. Chin**”);
- b) Dr. Deacons YEUNG Tai-kong (“**Dr. Yeung**”); and
- c) Mr. Clifford CHOW (“**Mr. Chow**”).

For the sake of clarity, we will not recite their evidence in full. We will only mention the relevant evidence adduced by these witnesses when we discuss the issues below.

G. THE GOVERNING PLAN, AND THE PLANNING INTENTION

- 26. As stated in paragraph 6 above, the Appeal Site falls within an area mainly zoned “U” (85%) and partly zoned “G/IC” (15%).
- 27. According to §13 of the covering Notes of the Approved OZP, all uses or developments in the “U” zone, except those specified at §§8 and 11(a), require permission from the TPB.

28. As explained in §9.8.1 of the Explanatory Statement of the Approved OZP, the areas zoned “U” are located in close proximity to the Yuen Long New Town and within a transitional location between the urban and rural areas. Development within the areas has to be comprehensively planned as piecemeal development or redevelopment would have the effect of degrading the environment and thus jeopardizing the long-term planning intention of the areas. While the alignments of WR and YLBF have been fixed, the areas zoned “U” are subject to future land use review.
29. Further, according to §9.8.2 of the Explanatory Statement of the Approved OZP, under the “U” zone, any private developments or redevelopments require planning permission from the TPB so as to ensure that the environment would not be adversely affected and that infrastructure, G/IC facilities, open space are adequately provided. The proposed development should also take into account the alignments of WR and the YLBF. To realize a built-form which represents a transition from the Yuen Long New Town to the rural area, the development intensity should take into account the urban type developments immediately to the west of the “U” zone and the rural characteristics of the area to its north.
30. According to the Notes for the “G/IC” zone of the Approved OZP, the “G/IC” zone is intended primarily for the provision of G/IC facilities serving the needs of the local residents and the district population. Further, “Columbarium” is a Column 2 use which requires planning permission of the TPB.
31. Similar planning intention for the “G/IC” zone of the Approved OZP has been stated in §9.5.1 of the Explanatory Statement of the Approved OZP.

H. FIRST REASON

The Appellant's submissions

32. The Appellant put forward the following arguments in his Closing Submissions and Appellant's Reply to the Closing Submissions for the Respondent:
- a) The Appeal Site has been excluded as a potential site for housing development in the 2017 Policy Address headed "Reviewing Land Use and Increasing Development Intensity" ("**the 2017 Policy Address**") and LegCo Paper headed "Overview of Land Supply" issued by the Development Bureau to the members of the Legislative Council Panel on Land Supply ("**the LegCo Paper**"). It was therefore not considered to be suitable, or having a high potential for residential development with preservation of Pun Uk.
 - b) The First Reason also suffers from a lack of particulars to show how approval in S17 Review would or may unduly constrain optimisation of the future land use in the area. Such particulars, if provided, would enable the Appellant to make an application in compliance.
 - c) Applications in the "U" zone are to be considered and approved on their merits and not put on hold pending the land use review. The Proposed Development is a comprehensively planned development which means a non-piecemeal development or redevelopment. The comprehensively planned development does not have to, and cannot, take into account the future land use in the area and optimization of such use.
 - d) Refusing the Appellant's application on the ground of prematurity is not justified because the land use review has still not been completed and it is not

known when it will be completed. Once planning permission is granted, the land use review will take this into account just as it takes into account of all existing approved developments in “U” zone.

- e) The Appellant’s previous application for a residential development cum preservation of Pun Uk on the Appeal Site in application A/YL-NSW/180 (the “**180 Application**”) (i.e. the 5th application) does not assist the Appeal Board in showing that a residential development is an optimum land use for a number of reasons:
 - i) The 180 Application lays bare the constraints on the Appeal Site for a residential development. Noise was in fact heard during the site visit to the Appeal Site on 31 May 2016.
 - ii) The development constraints will result in totally unattractive flats to potential buyers.
 - iii) The Board did not approve the 180 Application but deferred it. It was later withdrawn and so TPB would not need to consider its merits or demerits.
 - iv) Even if the TPB would have approved the 180 Applications, this is irrelevant because the Appellant is not legally obliged to build it.
- f) The residential development in the Appeal Site with the preservation of Pun Uk on 18 October 1996 (i.e. the 4th application), which lapsed on 19th October 2007, was approved prior to the completion of the major infrastructure projects surrounding the Appeal Site and when the Appeal Site was not subject to the current development constraints. This approval is of no value.

The Respondent's Submissions

33. The Respondent put forward the following arguments in their Closing Submissions:
- a) The land use of the subject “U” area is being comprehensively reviewed. The review must be taken into account in determining whether the Proposed Development would unduly constrain optimal future land use.
 - b) The advantages of alternative use of the Appeal Site are irrelevant in planning terms only in the absence of conflict with planning policy and/or planning harm. In the present case, the potential of the Appeal Site for residential development cannot be disregarded.
 - c) The TPB has approved applications in the subject “U” area based on their individual merits, and as such, it is arguable that a moratorium has been imposed in respect of the “U” zone.

The Appeal Board's findings

34. The Appeal Board takes into consideration of the evidence of various witnesses and submissions from both sides. The Appeal Board comes to the following findings:
- a) It is beyond dispute that the land use review in respect of the “U” zone in NSW is still ongoing but it is not known when exactly this exercise will be completed. The Appeal Board is aware of the principle that “*the close it is to the completion stage of a land use review, the greater weight should be given to the land use review*”. However, the TPB was unable to provide particulars as to the progress of this land use review. Given that the land use review of

the subject “U” zone had been carried out for many years and it is not known of the progress and when this review would be completed, the Appeal Board would not be able to give weight to the land use review.

- b) Despite the preliminary view of the Planning Department that the subject “U” area has high potential for residential development of an appropriate scale as an extension of the Yuen Long New Town, the Appeal Site was nonetheless excluded as a potential site for housing development in the 2017 Policy Address and the LegCo Paper. As the evidence at present stand, we do not know whether the subject “U” area will be zoned for residential development in future. We also note the physical and environmental constraints on the Appeal Site for residential development (including those by the West Rail and the Yuen Long Highway), particularly after the site visit made on 31 May 2016 and hearing the evidence from witnesses.
- c) We further note that there is no moratorium imposed on the subject “U” area regarding the development therein. In this regard, we note that 10 of 22 planning applications to TPB between 1994 and 2015, involving 12 sites, within the subject “U” zone had been approved.
- d) The Appeal Site is a standalone site occupying a small portion of the subject “U” area, which is 0.68% or 1.2% of the subject “U” area (depending on the use of 46.4 hectare or 26.4 hectare as asserted by different parties). It is located in a small and discrete portion of the “U” zone and is cut off by major infrastructure (MTR West link viaduct, Yuen Long Highway, YLBF, POH).
- e) Regarding the issue of whether approving the columbarium at the Appeal Site would impose an undue constraint on the future optimal land use of the subject “U” area, due consideration must be given to the location of the

Appeal Site, which was located at the corner of the Subject “U” area. In our view, the Proposed Development should not adversely affect any potential future development at Tung Shing Lei; nor would any development at Tung Shing Lei adversely impact on any use at the Appeal Site.

- f) Further, the Proposed Development in the Appeal Site would require use of Siu Sheung Road. At present, Siu Sheung Road is shared by POH, POH Home, STNV and some residential dwellings nearby. Siu Sheung Road does not lead to Tung Shing Lei; nor is Siu Sheung Road an access road to other areas of the subject “U” area. It could not be said that the columbarium use at the Appeal Site would unduly constraint the residential development in the other parts of the subject “U” area. Regarding the traffic impact, this would be better addressed and considered under the Second Reason below.
- g) The Appeal Board has considered the compatibility with existing land use for the Proposed Development. We are unable to see the incompatibility.
- h) We have considered the extent and scale of the Proposed Development. It is akin to a “comprehensively planned development”. In any event, it is certainly not a “piecemeal” development or redevelopment which would have the effect of degrading the environment and thus jeopardizing the long-term planning intention of the subject “U” area.
- i) We note that the Appellant had made previous applications for use of the Appeal Site as residential development. However, we fail to see why it leads to the conclusion that the optimal use of the Appeal Site is for “residential development”. At most, “residential development” is only one of the alternative uses of the Appeal Site. The Appellant has the right to apply for other use so long if it is not in conflict with the planning policy or would not cause any planning harm. As the planning review of the subject “U” area is

still on-going and the Appeal Site was excluded from the 2017 Policy Address and the LegCo Paper for residential development, the use of the Appeal Site for the Proposed Development could not be regarded as in conflict with the planning intention. Further, the Proposed Development is compatible with its surrounding development including the POH. Furthermore, as Ms. Seddon rightly said, there is a high demand for niches.

35. In conclusion, we opine it unjust to hold back the Proposed Development on the basis that the land use review is still pending, given that it is not known when such review will be completed and the result is also unknown. Further, the Appeal Site is just a relatively small and standalone area of the Appeal Site and located at the corner of the subject “U” area. Allowing the Appeal Site to have the Proposed Development would not, in our judgment, impair the planning of future land use for the rest of the subject “U” area.

I. SECOND REASON

The Appellant’s submissions

36. The Appellant put forward the following arguments in its Closing Submissions and the Appellant’s Reply to the Closing Submissions for the Respondent:
- a) Implementation is irrelevant.
 - b) There are a couple of non-planning matters, including the need for permits for temporary uses of less than 2 months, land exchange, police manpower, less patients visiting POH now since opening of Tin Shui Wai Hospital (“**TSWH**”), alleged poor bus service to POH and residential flats above

YOHO Town Arcade North Wing under YOHO Town Phase 3 having impact on pedestrian/vehicular traffic and public transport facilities.

- c) The Appellant has demonstrated that the Proposed Development will not cause adverse traffic impact to the area, in particular, that the emergency services of POH. In the TPB paper No. 9791, the Commissioner for Transport (“**C for T**”) said that he had no objection to the Appellant’s application from “*a traffic point of view*”. In its letter to the Hospital Authority (“**HA**”) dated 14 August 2014, the Transport Department (“**TD**”) said that they considered the TIA report by Ho Wang “*acceptable from traffic engineering and transport perspectives*”. However, the TD said that they “*cannot confirm “unimpeded access” to POH can be maintained at all times because we cannot guarantee that abnormalities such as those listed above will not happen*”.
- d) The concern of HA is not a material planning consideration.
- e) Impacts would be altogether avoided or adequately mitigated by the traffic mitigation measures. Even if implementability is doubtful, it is not a good reason for refusing planning permission. The proper approach is to grant planning permission subject to conditions such as “Grampian” conditions, like subject to the condition that the operation of the columbarium should not commence until the C for T is satisfied about such implementation.
- f) Such traffic mitigation measures are absent in fall-back uses.
- g) The concern from the Chief Town Planner, Urban Design and Landscape and Planning Department can be dealt with by a condition that a revised Visual Impact Assessment be prepared to the satisfaction of the Director of Planning or of the TPB.

- h) The impact on the surrounding road network will be minimal because of the completion of the improvement work to the Pok Oi Interchange in October 2016. The annual average daily traffic on Castle Peak Road – Yuen Long from Yuen Long On Lok Road to Kam Tin Road had decreased by as much as 5.8% between 2014 and 2015 as stated in the Annual Traffic Census 2015 issued by the TD.
- i) There are, and will continue to be, fewer patients going to POH especially by ambulances because of the opening of A&E services in TSWH as from 15 March 2017. The number of emergency services to be effected at POH will be reduced.

The Respondent's submissions

37. The Respondent put forward the following arguments in their Closing Submissions:

- a) The Appellant failed to demonstrate that the proposed public lay-by has sufficient capacity to accommodate the number of private cars and taxis visiting the Proposed Development during Ching Ming Festival or peak days, leading to a queue to be developed along Siu Sheung Road thereby affecting the traffic at the Pok Oi junction and thus the access to A&E services at POH:-
 - i) A failure to take into account pick-up activities for both private cars and taxis in calculating the trip rate, leading to the estimate of private cars and taxis visiting the Proposed Development per hour be doubled (i.e. trip rate increased from 0.0619 to 0.1238).

ii) A failure to spot the differences between the Ching Chung Sin Yuen (“CCSY”) and the Proposed Development, leading to higher trip rate at 0.207 instead of 0.1238 by an upward adjustment of two thirds (i.e. number of visitors visiting the Proposed Development per hour – 20,000 times 0.207 equals to 4,140), in terms of:

- (1) The age of the two columbaria – trip rates to new niches at the Proposed Development are significantly higher than that to old niches at CCSY;
- (2) The size of the two columbaria – there are much fewer niches of 20,000 at the Proposed Development as compared to more niches (occupied) of 98,000 at CCSY;
- (3) Adjustment for data obtained from CCSY in 2015 when there were 5 consecutive public holidays during Ching Ming Festival.

iii) A failure to take into account the differences between CCSY and the Proposed Development in terms of the following transport characteristics, leading to higher modal split of 50% (i.e. number of visitors taking private cars and taxis – 4,140 times 50% equals to 2,070 and number of vehicles – 2,070 divided by average 3 persons per vehicle equals to 690) instead of 20%:

- (1) Public transport access – less easily accessible by Light Rail, MTR, green mini-buses and buses to the Proposed Development, as compared to the CCSY, encouraging fewer people taking public transport for access;

- (2) Distance to lay-bys – much closer to the Proposed Development, as compared to CCSY, encouraging more people taking private cars and taxis;
 - (3) Parking facilities – longer walking time from car parking spaces to the Proposed Development, as compared to the CCSY, encouraging more pick-up activities;
 - (4) Accessibility from other parts of Hong Kong – more convenient to drive to the Proposed Development because travel time is relatively short, encouraging more people taking private cars and taxis.
- iv) If the service time for each space in the layby is 60 seconds, the lay-by with 6 spaces can only serve 360 vehicles an hour. Even if the service time is only 30 seconds, a lay-by with 6 spaces can serve 720 vehicles an hour. There would still very likely be a queue, given the fact that the total number of vehicles (i.e. 690 vehicles, including estimate of 414 private cars and 276 taxis for two-way) exceeds 85% capacity of the lay-by (i.e. 612 vehicles).
- b) Background traffic in festival period is deficient in three aspects:
- i) Year of assessment – should adopt 3 years after full operation as the year of assessment, which should be 2029 or 2030 instead of 2024.
 - ii) Growth in background traffic at Pok Oi Interchange – per annum traffic growth rate of +1% being an underestimate.

- iii) Planned/committed development in vicinity – underestimate and flow assessment not done in weekday.
- c) Performance of key junctions affected by failure to assess correctly the ability of the proposed public lay-by to satisfy vehicular demands and the underestimation of background traffic during festival period is not adequately tested:
 - i) Application of the sensitivity test is not a complete answer for inaccuracies in base figures.
 - ii) The sensitivity test did not cover the scenarios on other days when traffic at Pok Oi Interchange is worse.
- d) Normal day traffic impact not negligible and not analysed:
 - i) Number of visitors to a columbarium on a normal weekday is not insignificant.
 - ii) Impact generated by the cultural museum on weekdays was not analysed.
- e) Failure to analyse the impact of the Proposed Development on the POH leading to access by ambulances, private cars and taxis to POH to be affected:
 - i) It will affect vehicles going into POH.
 - ii) It will affect ambulances going out of POH into the bus-only lane.

- iii) It will affect vehicles going out of POH if the exit is stuck by private cars or taxis which want to turn right into Siu Sheung Road, which is itself congested.
 - iv) Private vehicles (including those visiting the Proposed Development) can leave and re-enter POH to locate a car parking space or otherwise circulate within it for as many times as they see fit, which would have an adverse impact on access to the POH.
 - v) Illegal parking along Siu Sheung Road can happen.
- f) Traffic impact of CCSY on Tuen Mun Hospital (“**TMH**”) is less as compared to that on POH:
- i) The POH has only one vehicular access while the TMH has 2 entrances (plus another entrance in the Rehabilitation Building which is connected to the TMH Main Campus).
 - ii) The Proposed Development shares the same access with the POH while the CCSY does not share the same access with TMH.
 - iii) Number of cars entering the public car park at TMH is 2.6 times that of a normal weekend and queues can be observed.
 - iv) Inability to close such common entrance since 83% visitors to the A&E services of POH take private cars or taxis.
 - v) Impracticability of conducting screening of visitors at the common entrance

- g) Pedestrian traffic might also have an adverse impact on access to POH due to vast number of visitors (estimated at 1,238 visitors) (Note: this number is hotly disputed as the Respondent considered it been substantially understated due to the adoption of low trip rate) arriving per hour, which exceeds 3 times the average daily A&E visitors of 335 patients.

- h) Traffic improvement schemes and traffic management measures would alleviate the situation to some extent though they have their own limitations and constraints. The traffic mitigation measures include:
 - i) Ambulance lane:-
 - (1) Limited assistance as on average 83% of A&E arrivals to POH were not by ambulance.

 - ii) Double yellow lines marking and yellow box marking:
 - (1) Not useful to prevent vehicles queueing back in the event of congestion;

 - (2) Illegal parking if not observed by drivers.

 - iii) Pick up and drop off at proposed public lay-by.

 - iv) Shuttle bus service for elderly and people with special needs:
 - (1) Little analysis of the impact generated by the shuttle bus service.

 - v) Widening the access road to 6m:

- (1) This measure would not ease the traffic as the access road will be shut during the festival periods
- vi) Widening footpaths to 2m and providing two cautionary or zebra-crossing points:
 - (1) Widening of all local footpaths would benefit the pedestrians and improve the level of service though the primary focus is still on impact of pedestrian traffic on the operation of the proposed lay-by and the impact of pedestrian traffic on access to POH.
- i) Administrative measures are of limited effect:
 - i) Temporary signs advising non-hospital users in using hospital facilities, like parking within POH, non-hospital users queuing for taxis or picked up by private cars within POH, would only be effective to the extent that visitors would comply with them.
 - ii) Mere act of screening would cause further delay to people who need to use the POH's service.
- j) House rules are not as efficacious as the Appellant would like to portray:
 - i) There is no deterrence to people driving or taking taxi to the columbarium onsite during non-festival period and via public layby during festival period.
 - ii) There is also no house rule to prohibit visitors from using POH for drop-off, pick-up or parking, other than saying that this is not encouraged.

- iii) There is no established mechanism to implement the House Rules.

- k) By way of fallback, the Appellant suggests that a contingency plan may be adopted to use the proposed Columbarium for drop-off and pick-up. This does not fully address the problems as there may be potential conflicts between pedestrian flow and traffic among other factors.

- l) It cannot be right to suggest that the presence of police could solve every traffic congestion, particularly as Commissioner of Police (“**C of P**”) had significant reservation.

The Appeal Board’s findings

- 38. In gist, the Appeal Board takes the view that adverse traffic impact can be avoided or adequately mitigated by the use of “Grampian” conditions for reasons stated below.

- 39. It may be opportune to look at the Consolidated Traffic Impact Assessment report (“**Consolidated TIA Reports**”) for the proposed Columbarium in May 2012 and other related studies, which had been submitted to the TD for their comment and consideration before the TD formed their view of “no adverse comment on the development of columbarium from traffic point of view”.

- 40. In the Appeal Board’s view, most of the comments or concerns by the Respondent have been addressed to in those TIA Reports. If there are still areas of further concerns, which are minor in nature in the Appeal Board’s view, a more updated report should be prepared by the Appellant with the assistance of its traffic consultant to the satisfaction of the TD. The updated report would need to address and provide solutions to the latest changes in planning and development, traffic forecast and trip demand for columbarium users/visitors, road and interchange

improvement in the nearby, new development in the vicinity (including the YOHO residential development and shopping arcade) and the like.

41. We propose to address the Respondent's concerns as follows:

a) *Whether the design of the proposed public lay-by would have sufficient capacity to accommodate the number of private cars and taxis visiting the proposed columbarium during Ching Ming Festival or peak days and not leading to a queue to be developed along Siu Sheung Road thereby affect the traffic at the Pok Oi junction and thus the access to A&E services at POH:*

i) Two sensitivity tests have been carried out respectively by Ho Wang and Ozzo, who were traffic consultants engaged by the Appellant in different period of time. The results were summarized in the letter from Toco Planning Consultants Ltd to The Secretary of TPB on 4 September 2014:

“(1) Key Junctions and Proposed Layby will have Adequate Capacity

- In the worst case that the proposed traffic management and administrative measures are absent and the house rules are totally broken, based on the modal split as stated in Consolidated TIA dated May 2012, it is assumed that 50% of the peak hour visitors will travel to the site by taxis and private cars.*
- The proposed layby at Siu Sheung Road is sufficient to provide 7 pick-up/drop-off spaces for car/taxi and the probability of having an over-flow queue is very low. No*

obstruction will be resulted at the junction near POH, which is about 100m away from the proposed layby.

- *With reference to the traffic conditions in 2014 and 2016 the two sensitivity tests have both indicated that the key junctions in the vicinity, including the Pok Oi Interchange and the priority junction at Siu Sheung Road, would be operating satisfactorily with Ratio of Flow to Capacity (RFC) at Pok Oi Interchange ranging from 0.64 (year 2014) to 0.675 (year 2016), which is well below the acceptable level of 0.85, even if the proposed columbarium is fully occupied.*

(2) Contingency Plan

- *In a highly unlikely situation that the proposed layby at Siu Sheung Road cannot handle the alighting and boarding activities, or drivers of stopped private cars and taxis insist on entering the site for dropping off passengers, a contingency plan will be activated to provide 15 pick-up/drop-off bays within the site, which is more than enough to ensure no queuing of vehicles outside the site under the worst case.*
- *The contingency plan is intended to respond to the above exceptional circumstances and must not be taken as a normal and regular practice for festival days. In fact, the contingency traffic demand for 7 pick-up/drop-off spaces will be further reduced by the proposed shuttle bus service for the elderly and their relatives/helpers. The proposed shuttle-bus layby has also been slightly relocated to fit in the*

contingency plan. The Master Layout Plan has been slightly revised to incorporate the pick-up/drop-off spaces as shown on the contingency plan and is attached for Town Planning Board members' information."

- ii) Further, in response to the Appeal Board's queries, Mr. Joseph Wong of Ho Wang in his witness statement dated 25 August 2016 referred to Appendix 3 to the updated supplementary traffic paper prepared by Ho Wang and summarized the queueing analysis of the proposed lay-by with 7 vehicles. According to Mr. Joseph Wong, the queueing assessment was carried out by a probability function assessment and a random traffic flow theory for a maximum number of 7 vehicles pick-up/drop-off at the proposed lay-by. Having carried out the said analysis, Mr. Joseph Wong opined that the probability of 7 vehicles arriving concurrently would be very low (4.1% probability of more than 7 vehicles arriving concurrently within the 1 minute servicing interval). Further, the lay-by would be about 40 m away from the entrance to POH and this could accommodate a maximum of 16 vehicles. Taking into account of the 7 vehicles in the lay-by, there would be about 23 spaces for vehicles waiting. This should be sufficient to avoid any possible impact on the POH entrance.

- iii) We have reservation on the accuracy and reliability of the aforesaid queueing analysis carried out by Ho Wang, in particular, on the operation modus of lay-bys. We are not satisfied that the effect of pedestrians crossing on the vehicular movement had been adequately addressed and hence on the adequacy of the 7 pick-up/drop-off spaces to cope with the visitors' traffic. We also have reservation on the reliability of using 213 vehicles as the estimated 2-way columbarium traffic generation. Nevertheless, we do not consider that these

inaccuracies or scepticism on reliabilities would make any traffic management scheme totally un-implementable.

- iv) We have reviewed the contingency plan proposed by the Appellant. We are aware of the Respondent's concern that any traffic using the pick-up/drop-off spaces at the Appeal Site would require some crossing activities at Siu Sheung Road. However, in our view, this increase in capacity with another 15 pick-up/drop-off spaces within the Proposed Development under the above mentioned Contingency Plan, which would be in addition to the 7 pick-up/drop-off spaces at the lay-by, should have alleviated the traffic queue-up (if any) and should have addressed partly (if not wholly) any possible under-estimation of trip rate and modal split as asserted by the Respondent.

- v) We also note that the traffic figures put forward by both parties are based on total number of niches for the proposed columbarium at 20,000 although the sales of niches would be put in phases with the Appellant's proposal of 3,000 niches to be sold per year. Since the Proposed Development would only be in full operation in 2024 (2026 or 2027 under the Respondent's case), it would take about 7 years for the number of visitors to build up to the final projected figure of 20,000 niches. During this interim period, the traffic conditions at the POH and in its vicinity could be closely monitored to see if the traffic management proposals would be effective and the assumptions would still be valid. Adjustments could then be made to the traffic management proposals to suit the updated figures. If the situation warrants, the Appellant may be required to implement improved traffic management proposal before the next phase of sale of niches could be proceeded. In our view, this should have safe guarded any concern that

the traffic data used in the TIA reports is not being accurate or reliable and the effective access to the POH is impeded.

- vi) Further, should it be required, the Appellant may be required to provide 7 lay-bys with sufficient gap between each space to ease the manoeuvring movement. This would address the Respondent's concern that the lay-by with 7 spaces could not serve 420 vehicles an hour. Alternatively, the number of lay-bys could be increased if the TD considers them necessary from the traffic point of view. There is about 40 m away from the proposed lay-by from the POH access and more lay-by spaces could be provided if deemed necessary by the TD.
- vii) We also take the view that the widening of the access road can be considered further beyond the ordinary two traffic lanes to allow kerb-side vehicle pick-up and drop-by activities. Instead of just widening from one traffic lane (4.5m) to two traffic lanes (6m), Siu Sheung Road could be widened to say 10.3m to allow for the kerbside activities. Again, this would depend on the TD.
- viii) Regarding the implementation of contingency measures by allowing pick-up and drop-off activities at the columbarium, the Appellant says that it will employ sufficient staff with law enforcement experience at the junction of the access road and Siu Sheung Road and along the route to assist visitors and ensure smooth pedestrian flow. Yellow boxes can also be used to ensure the smooth right-turn traffic going from the Northbound lane of Siu Sheung Road into the access road.
- ix) We further note that the TD had no adverse comment on the proposed traffic arrangement under the Consolidated TIA Reports. There is no evidence before us that the TD had changed their opinion. We take note

of the Respondent's concern that the TD had recently revised the trip rate from 0.2 to 0.4 for new columbaria. However, we have not seen any suggestion by the TD that by reason of this latest revision, the analysis in the previous TIA reports would become invalid and that the proposed traffic arrangement under the TIA reports should be rejected.

- x) We consider the Respondent's concern should be well addressed if there is a Grampian condition that the Appellant is required to produce an updated traffic management proposal/arrangement to the satisfaction of the TD. The TD could then have an opportunity to review the updated traffic figures submitted by the Appellant within the parameters and criteria acceptable to the TD. It would then be opened to the TD to form a view as to whether they would have any adverse comment on the updated traffic management plan from traffic point of view.

- b) *Whether background traffic analysis in festival period had been sufficiently accounted for:*
 - i) The Respondent said that the year of assessment should be 2029 or 2030, instead of 2024 which was the year of assessment adopted by the Appellant. It appears that the Respondent was contending that there would be further growth in traffic from 2024 to 2030 and hence the traffic figures used by the Appellant's consultants should be further increased. This may be so. However, the Annual Traffic Census 2015 showed that there was a decrease in the annual average daily traffic on Castle Peak Road – Yuen Long from Yuen Long Pok Oi Road to Kam Tin Road by as much as 5%. Even though there may be further growth in traffic from 2024 to 2030, it appears to us that, after the completion of the improvement work to the Pok Oi Interchange, an extra segregated left turn lane is provided in addition to the slip road from

Pok Oi Roundabout to Castle Peak Road – Yuen Long eastbound. This would substantially enhance the flow capacity of Pok Oi Roundabout. The purpose of this road improvement work was to “*improve the traffic capacity of Pok Oi Interchange to relieve the existing traffic pressure and meet future traffic demand*”.

- ii) By a letter dated 14 August 2014 to the HA addressing the HA’s concern that the Proposed Development might affect patient’s safety, the TD stated that:

“Thank you for your letter of 15 July 2014 on the above subject. We appreciate and understand the HA’s concern about patient’s safety and therefore have exercised due diligence professionally in examining the TIA submission to assess whether the proposed columbarium development will bring about an unacceptable impact on the public roads in the vicinity of POH from traffic engineering and transport perspectives. Our responses to the points you raised are provided below.

- (a) *In our memo of 9.5.2014 to the Planning Department, we indicated that we had no adverse comment on Appendix IV – Updating Supplementary Traffic Paper based on the findings and proposed improvement measures made by the traffic consultant to mitigate the associated traffic induced by the proposed columbarium development. Although we considered that the basic traffic and transport parameters adopted by the traffic consultant were reasonable based on the surveying results of a similar columbarium site operating in Tsing Shan Tsuen, Tuen Mun, we suggested that more surveys should be conducted for other relevant sites as supplementary*

information. In response, the traffic consultant produced additional survey data for further verification of the adopted parameters. Based on the estimated traffic parameters, Siu Sheung Road would basically be within its traffic capacity during weekdays and festival days with the proposed columbarium in place. Under normal situations, the proposed layby of 35m long should be able to cater for the intended pick-up/drop-off (pu/do) activities during festival days [with an estimated capacity of 420 pu/do activities (vehicles) hour – please refer to point (f) below for further details]. The chance that a traffic queue would be formed from the proposed layby on Siu Sheung Road and extend to Castle Peak Road, which is some 200m away, and affect vehicles (including ambulances) turning from Castle Peak Road – Yuen Long (CPR-YL) into the POH would be low. Moreover, provision of an extra “turning lane/pocket” was proposed at the CPR-YL/Siu Sheung Road junction leading to the entrance of POH. Hence, in case of any unforeseen incident around the layby that would lead to the formation of a traffic queue extending to the junction concerned, vehicular access to POH could still be maintained through the “turning lane/pocket”.

- (b) *TD has been handling TIA submissions for various kinds of development proposals led by other government departments or private sectors in the territory. Vetting of TIA submissions can sometimes be a long and iterative process involving updating/revision/rectification of the original submission. If necessary, for instances, when there are significant changes in the planning data or substantial change in traffic situation of the site, we will request for re-submission of a new TIA report.*

In most of the cases, supplementary papers can be submitted to cater for relatively minor changes. As regards the subject case, there is neither any change in the development scale nor significant change in the traffic situation of the site (Pun Uk). Hence, the basic planning data and projected visitors generation rate to be considered in the TIA analysis are still valid. Regarding the change of proposal to address the induced pedestrian/vehicular trips and associated traffic improvement measures, the traffic consultant may choose to submit a new TIA report or supplementary documents [“consolidated Planning Review Statement (CPRS”)] for updating their submitted TIA report as the case deemed appropriate and acceptable to this Department.

- (c) *The major change in the traffic consultant’s latest proposal involved the replacement of a ticketing system with multiple checkpoints by a new layby at Siu Sheung Road, and the CPRS was submitted by the developer to cater for such a change. Under the revised proposal, a total of 213 vehicles/hour would be generated during the peak hour in festival days as compared to the original proposal that would have zero trip generation. There were no noticeable developments along Siu Sheung Road in the past few years that would bring about additional traffic trips to the local area and the traffic condition of Siu Sheung Road remains fairly steady. Based on the consultant’s TIA report submitted in May 2012, related traffic count survey indicated that the peak hour traffic flow on a typical Sunday would be around 634 passenger car units (pcu) travelling through the relevant slip road of Pok Oi Roundabout onto the section of CRP-YL*

eastbound leading to POH. The resultant “ratio of flow to capacity” of Pok Oi Roundabout was 0.63, which indicated a very smooth traffic condition in general. Furthermore, after completion of the current improvement work at the Pok Oi Interchange in 2015, there would be another segregated left turn lane in addition to the slip road from Pok Oi Roundabout to CPR-YL eastbound. This would substantially enhance the flow capacity of Pok Oi Roundabout. Therefore, even with the additional traffic induced by the proposed development, the impact on the surrounding road network would be minimal and it would not cause unacceptable traffic congestion in the area.

- (d) Regarding your concern about the cumulative impact due to the proposed heritage site of Pun Uk Building (i.e. cultural museum), it was stated in the CPRS that the Pun Uk Building would be closed on festival days. Hence, the peak traffic demand induced by the two activities would not be cumulative on the festival days.*
- (e) According to the CPRS, the serviceability of the proposed layby for the anticipated pu/do activities during festival days would be adequate. Given Siu Sheung Road would have no traffic capacity problem and the chance that a traffic queue would be formed was minimal, access of vehicles (including ambulances) to POH should not be affected by the traffic generated by the proposed columbarium development.*
- (f) The traffic consultant has assessed the serviceability of the proposed layby with mathematical theories in a probabilistic*

approach. Such probabilistic approach is one of the many ways to demonstrate the adequacy of the layby but such a complicated analysis may not be readily understood by the general public. Based on a more simple and direct assessment, the layby can accommodate 7 vehicles [35m/5m (average length of a private car)] for a pu/do activity at the same time. Assume the duration of each pu/do activity will last for 1 minute (based on survey findings at Tsuen Wan Chinese Permanent Cemetery), the layby can handle the pu/do activities of 420 vehicles per hour. This is about 2 times greater than the expected peak arrival rate of 213 vehicles per hour. In this connection, we have reminded the traffic consultant to prepare a more straight-forward approach in the mathematical demonstration to concerned parties in layman terms as/when necessary.

- (g) Although the proposed layby on Siu Sheung Road should be able to cater for the loading/unloading or pick-up/drop-off demand of the visitors of the columbarium site, some visitors may park/stack their vehicles on the layby that may adversely affect its turnover rate. This can be addressed by implementation of relevant traffic management measures such as provision of suitable traffic signs and road markings.*
- (h) Given the provision of adequate loading and unloading area on Siu Sheung Road, it is unlikely that visitors heading for the columbarium will make use of the POH for picking-up/dropping-off. We note your concern that this might happen if Siu Sheung Road would be closed for vehicular traffic under extreme traffic situations. Under such situation, the Police*

officers, who will be posted on site for traffic enforcement, would ensure that access of emergency vehicles and patients arriving by various transport modes would be maintained. Separately, POH may consider implementing management measures to prevent unauthorized parking of vehicles to deter non-hospital visitors from using their facilities.

Based on objective data and analysis we have vetted the TIA submission for the proposed columbarium development, and considered it acceptable from traffic engineering and transport perspectives. However, there is always the factor of abnormal human behavior that may complicate matters. Human behavior is something beyond traffic engineering expertise and whether people will behave in certain ways is anybody's guess. Some abnormal behavior that can affect the traffic situation in the vicinity of the proposed columbarium development that we can think of are as follows:-

- *Visitors to the columbarium all concentrate on one to two weekends to visit the niches although the whole Ching Ming/Chung Yeung seasons may last for five weekends (the shadow periods to include 3 weekends before and 2 weekends after the festivals);*
- *Inconsiderate drivers choose to ignore traffic signs and road makings, even with Police's enforcement, and park/stack for prolonged stay on the layby at Siu Sheung Road;*
- *Police's manpower is stretched by unforeseen circumstances, to the extent that they cannot deploy officers to deal with the traffic situation at Siu Sheung Road. It may cause the layby not functioning properly resulting in visitors making use of the POH*

for pu/do activities and affecting the access of emergency vehicles and patients arriving by various transport modes.

There may be others. As in all cases requiring TIA and our examination of the report, we can only require the applicant to base his assessment on the normal situation and examine the TIA assuming that the situation will be normal. TD cannot confirm that “unimpeded access” to POH can be maintained at all times because we cannot guarantee that abnormalities such as those listed above will not happen.”

- iii) We take the trouble of setting out the aforesaid letter in full as they show that the TD had considered most of the concerns of the Respondent. We note that Respondent’s criticisms that TD had wrongly adopted the figure of 213 vehicles/hour in their assessment and higher numbers of vehicles/hour should be used. However, for the reasons set out in sub-paragraphs 40 and 41 a) above, we consider that these matters could well be looked after and taken into account by the TD in their assessment when updated TIA reports are submitted by the Appellant. Overall speaking, we do not see the TD’s rationale in the aforesaid letter flawed.

- iv) In fairness, what the TD could not give to the HA is a guarantee on the “unimpeded access” due to no control of the happening of the abnormalities. These abnormalities are related to abnormal human behaviours which are highly unpredictable. We do not consider it fair that the planning permission to the Proposed Development should be declined by reason that such abnormalities may be possible. We consider that a balance should be made.

- v) Further, the planning of the development in vicinity, apart from the existing development at Yoho Town Phase 3 and Yoho Mall, is an ongoing exercise and bound to affect the population growth rates in vicinity in future years. The population growth would have a direct impact to the surrounding traffic. Depending on the extent of population growth, the existing roads and interchanges may need to be upgraded whilst keeping access by the public to emergency services of POH. However, at the moment, the land use review had not yet been completed and it is not known when this would be completed. Thus, there is no reliable information to understand what traffic impact that would impinge on when the development in its vicinity would be embarked. In any event, this is within the compass and responsibility of the TD.

- vi) The Appeal Board takes the view that since the TD was satisfied with minimal impact be generated by the Proposed Development after the improvement works of the Pok Oi Interchange in October 2016, the other remaining concerns of the Respondent could be addressed to in the updated TIA reports to be prepared by the Appellant for the approval of the TD.

- c) *Whether the performance of key junctions had been affected by failure to assess correctly the ability of the proposed public lay-by to satisfy vehicular demands and the underestimation of background traffic during festival period:*
 - i) The main focus of concern is at Pok Oi Interchange and the junction near POH. As stated above, Pok Oi Interchange was improved in October 2016. The TD opined that after the completion of the Pok Oi Interchange which included another segregated left turn lane in addition

to the slip road from Pok Oi Roundabout to Castle Peak Road – Yuen Long eastbound, the flow capacity of the Pok Oi Roundabout would be substantially enhanced. Therefore, even with the additional traffic induced by the Proposed Development, the impact in the surrounding road network would be minimal and it would not cause unacceptable traffic congestion in the area.

- ii) The other concerns are related to the proposed lay-by to satisfy vehicular demand and underestimation of background traffic during festival period. These had been addressed under Paragraphs 41 a) and 41 b) above.
 - iii) The Appeal Board further takes the view that this concern could be well taken care of in the updated TIA report. The TD may require more sensitivity tests be carried out after updated traffic data is in hand upon completion of the improvement works at Pok Oi Interchange in October 2016.
- d) *Whether normal day traffic impact was not negligible and not analysed:*
- i) Prior to the improvement works, the Pok Oi Interchange might have capacity problem during weekday PM peak with RFC of 0.97. However, this problem was relieved after the improvement works at the interchange in October 2016.
 - ii) The Appeal Board notes that the Respondent just laid their concern and there is no evidence to show that this might pose any real problem.
 - iii) The Appeal Board takes the view that weekday visits to the Proposed Development should not pose a major problem in light of the following:

- (1) Administrative control can be put in place to limit the number of visitors through advance booking, particularly those coming via private cars and taxis, during the PM peak in the weekdays for both the columbarium and the cultural museum.
 - (2) Administrative control can also be put in place to allow tour groups to visit the cultural museum, including the transportation arrangement.
- e) *Whether there was a failure to analyse the impact of the Proposed Development on the POH leading to access by ambulances, private cars and taxis to POH to be affected, and*
- f) *Whether traffic impact on POH would be more comparable with that of CCSY on TMH:*
- i) The impact is mainly caused by the possible congestion at the lay-by, which in turn leads a car queue developing from the lay-by area along Siu Sheung Road. This car queue will further affect the access by ambulances, private cars and taxis to POH.
 - ii) If the capacity issue of the lay-by is resolved by the contingency plan as discussed under Paragraph 41 a) above, the possibility of the blockage is low.
 - iii) The Appeal Board also takes the view that the new junction improvement scheme proposed by the Appellant is useful in providing an exclusive “Ambulance Only Lane” and Yellow Box at the POH junction, even if the car queue exists. They would help provide a direct and free access of emergency vehicles from Castle Peak Road to POH.

- iv) Administrative control can also be considered to be put in place to restrict vehicles from accessing to Siu Sheung Road if there is already a car queue developing there. Vehicles would be directed by the Police to turn left and leave the area through the existing bus lane back to Yuen Long Highway.
- v) Moreover, there will be a 24-hour no-stopping restrictions along the section of Siu Sheung Road outside the POH entrance and access road near the site with double yellow line markings. The double yellow line markings are legal and self-enforcing. The additional double yellow line markings will deter illegally parking and waiting along the kerbside of the road, and should give a clear message to drivers that this zone is restricted and is not intended for parking and waiting.
- vi) The Appellant avers that niche purchasers are required to accept a set of House Rules at time of purchase. These House Rules are legally binding on the purchasers in their use of the niches, and are effective in controlling their conduct. This requirement is identical to the provision contained in the columbarium licensing and regulating consultation paper issued by the Secretary for Health & Welfare. Should breaches proliferate, purchasers' contracts will be terminated. The Appeal Board takes the view that these rules could not eliminate but at least help relieve the concerns of the Respondent of columbarium visitors' private cars obstructing the access to POH and occupying certain car parking spaces within POH.
- vii) The Appeal Board notes that there are four particular house rules dealing with the use of private cars during festival days and carparking or pick-up/drop-off visitors at POH, with details as follows:

“(ii) The following measures will be implemented during the Ching Ming and Chung Yeung Festivals and their Shadow Periods (3 weekends before and 2 weekends after the Ching Ming and Chung Yeung Festivals).

(a) The vehicular access to the site will be closed and all vehicles are prohibited from entering the site; and

(b) Visitors will be required to use public transport services, e.g. MTR, franchised buses and GMB, or to park their vehicles near Sun Yuen Long Centre and walk to the site.

(iii) Purchasers of the niches will be notified and explained in detail the site location and access arrangement. The Conditions of Sale will advise the mode of travel (including MTR, franchised buses and GMB) and car parking locations to be used by the niche purchasers and visitors to the site during the Ching Ming and Chung Yeung Festivals and their Shadow Periods.

(iv) Use of private cars to the site is strictly prohibited during festival days. Violators will constitute trespassing into a private premise. The respective contract will be cancelled if they break the house rules.

(v) No parking or pick-up/drop-off the visitors near the site or POH will be encouraged so as to avoid traffic congestion near POH. Violators will be denied entry into the site.”

- viii) With the proper implementation of the House Rules, purchasers of the niches will be aware of the site location and access arrangement that no vehicles will be allowed to enter the Appeal Site and no car park will be provided. All visitors will have to use public transport facilities to visit the Appeal Site. The public transport facilities have sufficient capacities to handle the visitors to the Proposed Development. The MTR West Rail and Light Rail Stations are within walking distance. Bus stops are located nearby. Visitors are advised to use the public car parks in Yuen Long Town, and are advised not to use the POH car park and pick-up/drop-off area. Sufficient staff should be deployed to monitor if there are any visitors breaching the Conditions of Sales.

- ix) The Appeal Board notes the Respondent's concern that there is higher usage of public car park at POH during festival days as compared to a normal weekend with the experience seen at TMH and queues can be observed as well. There is also the impracticality of conducting screening of visitors at the common entrance and inability to close such common entrance as a lot of visitors to the A&E services of POH take private cars or taxis. We trust that this impact could be partly reduced with the implementations of the house rules on the niche purchasers. Further, cars can be asked to go without forming a queue when the carpark is full and no waiting rule can be implemented within POH's area to avoid congestion and to ensure smooth traffic within the area.

- g) *Whether pedestrian traffic might have an adverse impact on access to POH due to vast number of visitors estimated arriving per hour:*
 - i) The Appeal Board notes that the Appellant's traffic consultant had carried out pedestrian impact assessment in their Consolidated TIA

Reports. However, the focus then was on the width of footpath, whether it be sufficient wide to take the pedestrian flow.

- ii) We note that for those walking from the MTR West Rail and Light Rail, there are 2 routes for them to walk to and from the columbarium. The route along Long Wo Road does not pass by POH and does not involve using Castle Peak Road (Yuen Long). Indeed, this route has been experienced by us during the site visit with the parties.
- iii) Two pedestrian crossing points (with one of them close to the lay-bys discouraging drop-off near the entrance to the access road and with another one allowing pedestrians from Castle Peak Road to use more conveniently, with a cautionary crossing and drop-kerbs together with suitable railings) will be installed along the pedestrian routes to the columbarium to safeguard the safety of all pedestrians.
- iv) Moreover, all the existing local footpaths leading to the proposed columbarium will be widened by the Appellant to 2m to provide an even better level of service than existing for the columbarium visitors. Suitable railings will be installed along the proposed pedestrian route to guide the pedestrians to use the two crossing points. There should be no mixed use of roadway facilities by vehicles and pedestrians. These proposed railings can also prevent vehicles parking on the footpath.
- v) Although the Appeal Site and POH share the same access, visitors to the POH do not need to pass by the Appeal Site to get to POH. They could use alternative access via Castle Peak Road as well.

- vi) The emergency services to POH will be considerably improved by the modified junction. Emergency vehicles can use both traffic lanes, including “Ambulance Only Lane”, to access the POH.
- vii) Further, there is one particular house rule dealing with number of visitors during festival days, with details as follows:

“(vi) Pre-booking with the operator is required for visitors visiting the site during the Ching Ming and Chung Yeung Festivals and their Shadow Periods. Visitors will only be allowed to visit the site at the pre-assigned visiting date and time.”

- viii) According to the Appellant, telephone booking can also be made in advance to confirm the preferred time slots. Each time slot will last for about one-hour duration and with a maximum of 500 tickets/hour to control the visitor arrival rate. Management and staff of the Appellant will exercise strict control of the number of visitors inside the Proposed Development at any one time. This measure would help to control the number of visitors to an acceptable level.
- ix) The Appeal Board takes the view that the proposed measures by the Appellant regarding registration of all pedestrian visitors to the Proposed Development during Ching Ming and Chung Yeung festivals at the booking centre/counter at Yuen Long Station for ticket issuing/collection by person would help reduce the number of visitors.
- x) The Appeal Board concludes that this matter could be addressed to by a proper traffic management scheme with the assistance of House Rules.

h) *Whether traffic improvement schemes and traffic management measures would alleviate the situation to some extent though they have their own limitations and constraints:*

i) Ambulance lane:

- (1) If there is no car queue in place as discussed under Paragraph 41 a) above, 83% of A&E arrivals to POH albeit not by ambulance should not create any problem.
- (2) In the Appeal Board's view, the ambulance lane should be reserved for more urgent cases.

ii) Double yellow lines marking and yellow box marking:

- (1) If there is no car queue in place as discussed under Paragraph 41 a) above, there should not be queuing back leading to congestion of traffic entering Siu Sheung Road.
- (2) The Appeal Board takes the view that management of the Proposed Development should be able to deploy resources to patrol the area and to report to the Police for illegal parking along the road, and niche purchases should adhere to the house rules discussed earlier.
- (3) Further, if this unsatisfactory situation persists in the initial stages of the development, further sale of niches in the phases to be followed could be put in abeyance pending satisfactory traffic management proposal received from the Appellant.

iii) Proposed public lay-by:

- (1) This has been discussed in details under Paragraph 41 a) above.

- iv) Shuttle bus service:
 - (1) The Appeal Board opines that this service could assist the elderly and their accompanying family members, and this would reduce the demand for the use of non-public transportation.

- v) Widening access road to 6m:
 - (1) In the Appeal Board's view, the widening access road to 6m or more would assist the smooth operation of the public lay-by if there is a need to have the contingency plan in place, as discussed under Paragraph 41 a) above.

- vi) Widening all local footpaths to 2m and two cautionary or zebra-crossing points:
 - (1) In the Appeal Board's view, the widening all local footpaths to 2m and two cautionary or zebra-crossing points would assist the smooth operation of the public lay-by and access to POH, as discussed under Paragraph 41 f) above.

- i) *Whether administrative measures are of limited effect:*
 - i) The Appeal Board takes the view that the Respondent's concern can be addressed and monitored after the commencement of sale of niches by the Appellant for the first few phases. There is always room for strengthening or improving the administrative measures.

- j) *Whether House Rules are of limited effect:*
- i) The Appeal Board takes the view that the House Rules as suggested by the Appellant would encourage niche purchasers to use public transport to reach the Appeal Site. Only for those who are really in need, they would take private transport to Siu Sheung Road for dropping off at the public lay-by.
 - ii) The number of visitors can be controlled via advance booking so as to balance the visitors throughout the whole festival days as well as the shadow periods.
 - iii) That said, the Appeal Board appreciates that the House Rules could not be a guarantee that visitors would not use private cars or taxis to drop off at the POH. The House Rules could only serve to reduce the number of visitors.
 - iv) Nevertheless, for the reasons explained in paragraphs above, we do not consider that the Appellant needs to rely wholly on the House Rules for deterring visitors to go to the columbarium by private transport. There are also transport management measures to deal with those who wish to use private transport to access to the columbarium.
- k) *The contingency plan to allow the proposed columbarium for drop-off and pick-up may have potential conflicts between pedestrian flow and traffic among other factors:*
- i) Our view has been set out in paragraph 41 a) and g) above and will not repeat them.

1) *The presence of police could solve some traffic congestion problems, but not all problems in a given time:*

i) C of P made the following comments under Paragraph 5.2.5 in the TPB Paper No. 9791 :

“(a) He is concerned about the traffic flow of Siu Sheung Road even after the restricted zone (double yellow lines) is imposed. With the large number of niche proposed at the Columbarium, it is anticipated that the vehicles using Siu Sheung Road will be quite substantial during Ching Ming and Chung Yeung Festivals.

(b) Given the limited capacity of Siu Sheung Road, it is anticipated that police would have to commit heavily in regulating traffic on the road during Ching Ming and Chung Yeung. Moreover, restricted zone by drawing double yellow lines on the road is NOT ‘self-enforcing’ as stated by the applicant. The measure will discourage driver from stopping on the road but illegal stopping by individual driver cannot be completely ruled out.

(c) The proposed layby is intended for passengers pick up and drop off. However, in the absence of any police officers on location, driver might use the layby for waiting or parking.

(d) The Road Traffic Ordinance Chapter 374G Regulation 28 gave the C of P the power to close any road for any period not exceeding 72 hours. Unlike what was suggested by the applicant in the proposed Contingency Plan, the Applicant does not have any legal power to close Siu Sheung Road to all vehicles.

- (e) *Police would not normally close any public road unless it is absolutely necessary. If the Applicant consider that the traffic condition on Siu Sheung Road would deteriorate to a point where temporary road closure is required, then they should notify TD and police well in advance for possible traffic diversion.*
- (f) *Police noted that the applicant is planning to sell the niches by phase with 3,000 per year. This will allow adjustment time for the sudden change of traffic volume and the associated problems. However, he is concerned that the set of ‘House Rules’ has no legal binding effect. Therefore, he has reservation on how the traffic management by columbarium staff could take enforcement actions in an effective manner.*
- (g) *The current arrangements relied heavily on police’s enforcement. However, due to limitation of manpower resources, there is no guarantee that police can provide sufficient manpower to regulate traffic flow and enforce traffic regulation at the location.*
- (h) *During Ching Ming and Chung Yeung Festivals, traffic congestion at Siu Sheung Road will easily cause tailback effect to the Pok Oi Interchange and Yuen Long Highway.”*
- ii) The Appeal Board notes the Police reservation. However, the Police has duty and responsibility for law enforcement. Traffic regulatory measures on public roads such as no stopping restriction zones, stop lines and a yellow box should be within the compass of the Police. Daily experience tells us that any serious breaches, particularly in the vicinity of important public places like hospitals, will be attended to by the Police swiftly. With the Police enforcement and the necessary help

or assistance from the staff of the Proposed Development, illegal waiting or parking could be put well under control.

- iii) Further, since the Appellant will sell niches at a rate of not more than 3,000 niches per year, there will be adjustment time to the traffic volume. The Police will have a better idea of the problem associated with the Proposed Development and give advice or suggestion on what improvement should be made to the traffic management measures for implementation by the Appellant.

42. The Appeal Board comes to the conclusion that the Respondent's concern over adverse traffic impact can be addressed by "Grampian" conditions, including a condition for an updated TIA report to be prepared and to the satisfaction of the TD in light of the lapse of time since the submission of the Consolidated TIA Reports and the Updated Supplementary Report and various changes since then, including but not limited to the following:

- a) The impact on traffic in the surrounding road network and the use of Siu Sheung Road after the completion of the improvement work to the Pok Oi Interchange in October 2016. Such impact should also take into account of the latest guideline by the TD on trip generation for new columbarium and other requirements that may be imposed by the TD.
- b) Estimate of use of A&E services in POH after the opening of A&E services in TSWH.
- c) The sale of niches would be done phase by phase and could only be proceeded when an updated traffic assessment report is prepared by the Appellant to the satisfaction of the TD and the Police and that the proposed traffic management measures (including improvement) is implemented.

43. The Appeal Board also takes account of the possible traffic arrangement for the fall-back uses if the present Proposed Development is not approved.
44. On balance, the Appeal Board considers that the Second Reason is not a good reason to refuse the application.

J. THIRD REASON

The Appellant's submissions

45. The Appellant put forward the following arguments in its Closing Submissions and the Appellant's Reply to the Closing Submissions for the Respondent:
 - a) Approving the Appellant's application will not set any precedent for similar applications because of the number of special features of the Proposed Development and/or it is rather unique as it was partly on 2 zones. The Appellant cites in support of *Town Planning Appeal No 24 of 2003*, §26.
 - b) Approving the Appellant's application will set a desirable precedent because of the major public planning gains it will bring.

The Respondent's submissions

46. The Respondent put forward the following arguments in their Closing Submissions:
 - a) High degree of uncertainty over an application in view of the on-going land use review in respect of the subject "U" area.

- b) Arbitrariness of the zoning boundaries is an issue to look into and amalgamation of the Appeal Site is the result of a conscious and deliberate choice by the Appellant. Bulk of the Appeal Site (85%) falls within the subject “U” area.
- c) It is more than probable that the subject “U” area would be rezoned for residential development of an appropriate scale, which would satisfy the strong local demand for housing and result in planning gain.
- d) Residential use and the preservation of Pun Uk are not mutually exclusive. There is no reason why the revenue generated from future residential development cannot be set aside and suitably invested so as to fund the preservation of Pun Uk. It is not at all clear why a residential development must necessarily be incompatible with a cultural museum.

The Appeal Board’s findings

47. The Appeal Board has considered the parties’ submissions and comes to the following findings:

- a) The location of the Appeal Site is unique in that it is a standalone site and separate from the rest of the “U” zone by various infrastructures. As we have explained before, the Appeal Site is separated from Tung Shing Lei and the developments thereat would not affect each other.
- b) The Appellant has undertaken to preserve Pun Uk, which was located within the Appeal Site and classified as Grade 1 historic building in 1995, and to turn it into a cultural museum for open to public without the need for public funding.

- c) The use of the Appeal Site as a columbarium is also a public gain since there is a high demand for niches by the public.
 - d) The Appeal Site has not been included in the recent 2017 Policy Address and the LegCo Paper for residential purpose and whether it will be so remains a question.
 - e) There is no moratorium for development within the Appeal Site and it would not benefit anybody by leaving the Appeal Site vacant for an indefinite period of time.
 - f) Each case has to be considered on its own merits.
48. The Appeal Board comes to a conclusion that allowing the present appeal would not set any undesirable precedent and the Third Reason is not a good reason to refuse the application.

K. OUR INDEPENDENT PLANNING JUDGMENT

49. For the reasons set out above, we are not satisfied that the reasons given by TPB for refusing S17 Review are good ones.
50. In the course of delivering our judgment, we have set out reasons why we consider that planning permission should be granted to the Appellant for the Proposed Development at the Appeal Site subject to the Grampian conditions which we would set out herein. In case, we have not set out our reasons in full, we wish to add the following:

- a) To hold back the decision to allow the Proposed Development (which in our view will have public gains in providing niches in demand and in preservation of Pun Uk at no costs to public), pending the land use review by the Government, would not serve the public interest since the land use review started in 2008 and yet there is no time table as to when such review will be finalized. More importantly, there is no concrete indication that the Appeal Site would be identified as residential development. In the circumstances, it would be unfair to the Appellant that the Proposed Development be refused on this ground.
- b) The new road improvement scheme and the recent traffic statistics of major roads and junctions near the Appeal Site has helped reduce the fear that the traffic figures used by the Appellant's consultants were significantly low. Further, the demand for emergency services of POH has been alleviated to some degree with the opening of A&E services in TSWH. Regarding any doubt on the implementability of the proposed traffic management measures, new studies and measures would be put up by the Appellant with reference to the Appellant's proposal under the Appellant's Supplemental Opening Submissions §36:

“(c) the implementation of the traffic improvement schemes, as proposed by the applicant, prior to the commencement of operation of the columbarium to the satisfaction of the C for T or of the Town Planning Board.

(d) the submission of an implementation programme, with phasing proposals to tie in with the completion of the traffic improvement measures and the submission of a traffic review report at the end of each phase, as proposed by the applicant, to the satisfaction of the C for T or of the Town Planning Board.”

- c) The uniqueness of facts and background of the present application should not set a precedent to future applications.

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

L. CONCLUSION

52. We accordingly allow the appeal and grant the planning permission sought.

53. The permission should be valid until 4 years from the date of this Decision, and after the said date, the permission shall cease to have effect unless before the said date, the development permitted is commenced or the permission is renewed.

a) Approval Conditions

- i) the submission of an updated TIA report within 6 months from the date of this Decision to the satisfaction of all relevant government departments and parties affected, including but not limited to TD, the Police, Planning Department, POH, HA and TPB;
- ii) the maximum number of niches within the Appeal Site should not exceed 20,000;
- iii) no furnace and no burning of ritual papers and joss sticks are allowed within the Appeal Site;

- iv) the implementation of the traffic improvement schemes, as proposed by the Appellant, prior to the commencement of operation of the columbarium to the satisfaction of the C for T, the C of P or of the TPB;
- v) the submission of an implementation programme with phasing proposals (with niche sales not exceeding 3,000 niches per year) to tie in with the completion of the traffic improvement measures and the submission of a traffic review report at the end of each phase, as proposed by the Appellant, to the satisfaction of the C for T, the C of P or of the TPB;
- vi) the Appellant shall not proceed to the niche sales in the next phase unless the traffic management measures, as proposed by the Appellant, have been implemented to the satisfaction of the C for T, the C of P or of the TPB;
- vii) the in-situ preservation of Pun Uk in its entirety, including the feng shui pond in front of Pun Uk, as proposed by the Appellant, to the satisfaction of the Director of Leisure and Cultural Services or of the TPB;
- viii) the submission and implementation of conservation management plan (“CMP”), prior to the commencement of any building works on the Appeal Site to the satisfaction of the Director of Leisure and Cultural Services or of the TPB;
- ix) the submission of a revised Environmental Assessment within 6 months from the date of this Decision to the satisfaction of the Director of Environmental Protection or of the TPB;

- x) the submission of a revised Ecological Impact Assessment (“**EcoIA**”) within 6 months from the date of this Decision to the satisfaction of the Director of Agriculture, Fisheries and Conservation or of the TPB;
- xi) in relation to x) above, the implementation of mitigation measures identified in the EcoIA prior to the commencement of operation of the columbarium (including sale/allocation of niches of any purpose and conducting any memorial ceremony at the site) to the satisfaction of the Director of Agriculture, Fisheries and Conservation or of the TPB;
- xii) the submission of a revised Landscape Master Plan (“**LMP**”) including tree preservation scheme within 6 months from the date of this Decision to the satisfaction of the Director of Planning or of the TPB;
- xiii) in relation to xii) above, the implementation of a revised LMP including tree preservation scheme prior to the commencement of operation of the columbarium (including sale/allocation of niches of any purpose and conducting any memorial ceremony at the site) to the satisfaction of the Director of Planning or of the TPB;
- xiv) the submission of a revised Visual Impact Assessment (“**VIA**”) within 6 months from the date of this Decision to the satisfaction of the Director of Planning or of the TPB;
- xv) in relation to xiv) above, the implementation of mitigation measures identified in the VIA prior to the commencement of operation of the columbarium (including sale/allocation of niches of any purpose and conducting any memorial ceremony at the Appeal Site) to the satisfaction of the Director of Planning or of the TPB;

- xvi) the submission of drainage proposal within 6 months from the date of this Decision to the satisfaction of the Director of Drainage Services or of the TPB;
- xvii) in relation to xvi) above, the implementation of drainage proposal prior to the commencement of operation of the columbarium (including sale/allocation of niches of any purpose and conducting any memorial ceremony at the site) to the satisfaction of the Director of Drainage Services or of the TPB;
- xviii) the submission of emergency vehicular access (“EVA”), water supply for fire fighting and fire services installations (“FSIs”) within 6 months from the date of this Decision prior to the commencement of operation of the columbarium to the satisfaction of the Director of Fire Services or of the TPB;
- xix) in relation to xviii) above, the provision of EVA, water supply for the fire fighting and FSIs proposed prior to the commencement of operation of the columbarium (including sale/allocation of niches of any purpose and conducting any memorial ceremony at the Appeal Site) to the satisfaction of the Director of Fire Services or of the TPB;
- xx) if any of the above planning conditions i), ii), iii), iv), vi), vii), ix), x), xii), xiv), xvi), xviii) or xix) is not complied with, the approval hereby given shall cease to have effect and shall be revoked immediately without further notice; and
- xxi) if any of the above planning conditions i), ix), x), xii), xiv), xvi) or xviii) is not complied with by the specified date, the approval hereby given

shall cease to have effect and shall on the same date be revoked without further notice.

xxii) the planning permission and the conditions attached thereto (“**the Conditions**”) for the proposed development was undertaken and should continue to have effect as long as the completed development or any part of it was in existence and the Conditions were fully complied with.

b) Additional Conditions

i) The Appeal Site involves various private lots in D.D. 115 which are of agricultural or building status held under Block Government Lease or Tai Po New Grant, and adjoining GL. The Appellant will need to apply to Lands Department (“**LandsD**”) for a land exchange. It is noted that the Appellant has included a land exchange to effect the Proposed Development. Such application will be considered by LandsD acting in the capacity as a landlord at its sole discretion and there is no guarantee that the land exchange, including the granting of additional GL, for the Proposed Development will be approved. In the event that land exchange is approved, it would be subject to such terms and conditions, including, among other things, the payment of premium and administrative fee, as may be imposed by LandsD at its sole discretion. The actual site area and building entitlement of the private lots involved would be subject to verification at the land exchange stage if any land exchange is applied for by the Appellant to LandsD. For the proposed traffic improvement proposals, unless the proposed works are contingent upon the Proposed Development, any of the proposed road works should not be incorporated as part of the terms and conditions of any land exchange proposal, if applied for. LandsD will consider the land exchange application, if received, in the landlord capacity at his

sole discretion and there is no guarantee that the land exchange will be approved. As regards the proposed traffic management schemes, including the management of vehicular and pedestrian traffic flow, and administrative measures, e.g. House rules, pre-sale arrangement and sale conditions, they should be enforced by the relevant departments and would not be incorporated as part of the terms and conditions of any land exchange proposal, if applied for the approved by LandsD acting in the landlord capacity at its sole discretion. Lots 880 s.A and 880 s.B in D.D. 115 will become land-locked if the proposed redevelopment is pursued. It is noted that the Appellant has proposed that a right of way (“**ROW**”) will be reserved for the two lots in the land exchange stage. According to the relevant deposit plan, Pun Uk, being a Grade 1 historic building, is located within the Appeal Site. He does not consider the costs or expense for preservation and revitalization of Pun Uk, which is proposed to be converted into a cultural museum, will be regarded as premium deductible for any future land grant or regrant is applied for and approval by LandsD acting in the landlord capacity at its sole discretion. The Appeal Site falls partly within the West Rail Protection Boundary. The Appellant has in its submission dated 6 June 2014 that the proposed road widening works would not encroach onto Lot Nos. 888 RP and 892 in D.D. 115. The Appellant also confirmed that Lot No. 889 RP and 891 RP in D.D. 115 are under his ownership. Nevertheless, LandsD is not prepared to recommend invoking the relevant Ordinance for the resumption of any private lots for implementation of the Proposed Development.

- ii) The Appellant should step up environmental hygiene measures in the day-to-day operation to the satisfaction of the Director of Food, Environment and Hygiene given that the proposed development is nearby POH.

- iii) Since Siu Sheung Road after widening by the Appellant will only serve the Proposed Development and local villagers, Highways Department is not/shall not be responsible for maintaining Siu Sheung Road and the said road should be maintained by the Appellant to the satisfaction of the Highways Department. Further, the proposed works fall within the West Rail Railway Protection Boundary, MTRCL should be consulted prior to commencement of works.

- iv) The Appellant should preserve Pun Uk in-situ in its entirety, including the fengshui pond in front of Pun Uk. The fengshui pond, including its location, shape and size, is an integral part of Pun Uk and should be preserved. The Appellant should submit a CMP after obtaining the approval for the planning application. The CMP should state clearly any possible risks to Pun Uk as a result of the works proposed to be carried out, the risk mitigation measures to be implemented during the works period, as well as the management plan and protective measures for preserving Pun Uk after completion of the works. The CMP should be agreed with the Commissioner for Heritage's Office ("CHO") and of the Development Bureau Antiquities & Monuments Office ("AMO") prior to the commencement of works, the design of all proposed structures in the vicinity of Pun Uk should be compatible with the historic Pun Uk. The detailed design, including the colour scheme and building materials, is to be agreed with the departments concerned, including the CHO and AMO. There should be a reasonable degree of public access to Pun Uk with detailed arrangement of the public visits, including the frequency of the visits, to the satisfaction of CHO. The structural integrity of Pun Uk should not be compromised by the proposed excavation and construction works, and necessary precautionary measures should be drawn up. For the proposed cultural museum, some works will have to be done to meet relevant statutory

requirements, such as provision of barrier free access, FSIs and means of escape, etc. The Appellant should be advised to address these issues fully in the CMP and seek AMO's comments in an early stage. As mentioned in the report that Pun Uk is already in a dilapidated state which requires urgent restoration, the Appellant should conduct urgent repairs to prevent further deterioration.

- v) Detailed fire safety requirements shall be formulated upon receipt of formal submission of general building plans and referral from relevant licensing authority to the satisfaction of the Director of Fire Services.

- vi) If the Appeal Site does not abut on a specified street having a width of not less than 4.5m, the development intensity including the height of a building, the maximum site coverage (“SC”) and maximum plot ratio (“PR”) permitted for such a building shall be determined by the BA under Building (Planning) Regulations (“B(P)R”) 19(3) at building plan submission stage. It appears that there is a land-locked site within the Appeal Site. If affirmative, ROW to the land-locked site should be provided within the application site and the area of such ROW should be deducted from the site area for the purpose of PR and SC calculation under Buildings Ordinance. In accordance with the Government's committed policy to implement building design to foster a quality and sustainable built environment, the sustainable building design (“SBD”) requirements (including building separation, building setback and greenery coverage) should be included, where possible. Based on the information provided in the CPRS, it is not sure if the SBD requirements will be fully complied with. The Appellant should provide more details in the later stage, should the application be approved by the TPB. The Appellant should observe the design requirements for columbarium facilities stipulated in PNAP APP-154. The provisions of

means of escape, means of access and fire resisting construction should comply with the B(P)R 41(1), B(P)R 41A-41C, Building (Construction) Regulation 90 and the prescriptive requirements under the Code of Practice for Fire Safety in Buildings 2011 (“**FS Code**”), especially for the two basement floors and Pun Uk which will be used as a cultural museum. The Appeal Site should be provided with an EVA in accordance with B(P)R 41D and Section 6 of Part D of the FS Code. Access and facilities for persons with a disability (including but not limited to initial access, barrier free access route, accessible unisex toilet, etc.) should be provided in accordance with B(P)R 72 and Design Manual Barrier Free Access 2008. Detailed comments on compliance with the Building Ordinance would be given by the Chief Building Surveyor/Hong Kong East and Heritage Section, Buildings Department (“**BD**”) upon formal building plans submission.

- vii) The Appellant should submit the proposed works to BD for approval as required under the provisions of the Buildings Ordinance.
- viii) On the aspects of electricity safety, the Appellant shall approach the electricity supplier for the requisition of cable plans to find out whether there is any underground cable (and/or overhead line) within or in the vicinity of the Appeal Site. Based on the cable plans obtained, if there is underground cable (and/or overhead line) within or in the vicinity of the Appeal Site, the Appellant shall carry out the following measures: Prior to establishing any structure within the Appeal Site, the Appellant and/or its contractors shall liaise with the electricity supplier and, if necessary, as the electricity supplier to divert the underground cable (an/or overhead line) away from the vicinity of the proposed structure. The “Code of Practice on Working near Electricity Supply Lines” established under the Electricity Supply Lines (Protection) Regulation

shall be observed by the Appellant and its contractors when carrying out works in the vicinity of the electricity supply lines. As regards town gas safety, there is a high pressure town gas pipeline running along Castle Peak Road – Yuen Long. Based on the proposed layouts and the Visit-by-Appointment System to limit the number of visitors as set out in the CPRS. The Appellant should maintain liaison/coordination with the Hong Kong and China Gas Company Limited in respect of the exact location of existing or planned gas pipe routes/gas installations in the vicinity of the proposed works area and the minimum set back distance away from the gas pipes/gas installations if any excavation works are required during the design and construction stages of the development. The Appellant shall also note the requirements of the Electrical and Mechanical Services Department’s Code of Practice on Avoiding Danger from Gas Pipes.

ix) The Appellant shall liaise with the local residents to address their concerns on the Proposed Development.

54. On the issue of costs, the Appeal Board notes the normal rule under section 17B(8)(c) of the Town Planning Ordinance that there should not be an award of costs in favour of the “successful party” save in exceptional circumstances: *Town Planning Appeal No. 10 of 2010*.

55. At this stage, we see no exceptional circumstances which justify any award of costs in this appeal. The Appeal Board makes an order *nisi* that there be no order as to costs. Should any party seek to vary the order *nisi*, the Appeal Board gives 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 wishes to, file and serve its

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

56. The Appeal Board wishes to express our wholehearted thanks to both counsels and the parties' legal teams for their very helpful and able assistance.

(Signed)

Mr. YEUNG Ming-tai
(Chairman)

(Signed)

Ms. CHAN Pui-ying
(Member)

(Signed)

Miss Julia LAU Pui-g
(Member)

(Signed)

Mr. TSE Chi-ming
(Member)

(Signed)

Ir. Dr. Paul TSUI Hon-yan
(Member)