

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)
Date of Submission:	Appellant (28.6.2018)	
	Respondent (6.7.2018)	
Date of Supplementary		
Decision:	14.8.2018	

SUPPLEMENTARY DECISION

1. On 14 November 2017, the Appeal Board published its decision (“the Decision”) to allow the appeal from the Appellant, pursuant to section 17B(1) and (8)(b) of the Town Planning Ordinance (Cap 131) (“TPO”) against the decision of the Town Planning Board (“TPB”) made on 19 December 2014 upon a review under section 17 and to grant the planning permission sought with conditions¹.
2. 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”).
3. The approval condition (i) requires the Appellant to submit an updated Traffic Impact Assessment (“TIA”) report within 6 months from the date of the Decision to the satisfaction of all relevant government departments and parties affected, including but not limited to the Transport Department (“TD”), the Police, Planning Department (“PlanD”), Pok Oi Hospital (“POH”), Hospital Authority (“HA”) and TPB.
4. Subsequent to the Decision, the Yuen Long District Council (“YLDC”) expressed concerns on the adverse traffic impact of the proposed columbarium development and requested that the relevant Government departments should consult YLDC on the updated TIA Report.
5. Besides the Appellant has submitted an updated TIA report to the TD in March 2018 for consideration.
6. In view that a number of government departments/parties, including the TPB, are involved in considering the Appellant’s TIA submission for compliance with the approval condition (i), the TPB wrote to the Secretary of the Appeal Board on 15 March 2018 to seek clarifications on the following aspects:
 - (a) Who should be considered as “parties affected” by the proposed columbarium?

¹ Approval Conditions have been set out in paragraph 53 of the Decision

- (b) Given TPB and PlanD are two of the parties to consider the TIA, who should be in the coordination role in processing the approval condition (i)?
 - (c) Noting that the updated TIA report has to be satisfied by all the consulted parties in order to comply with the approval condition (i), in the event that the consulted parties have divergent views/comments on the submitted TIA report, who should assume the role of making the final decision on its compliance?
 - (d) Should the Appellant fail to comply with the approval condition within 6 months from the date of the Decision (i.e. on or before 13.5.2018), who would be responsible for notifying the Appellants that the planning permission has been revoked according to the approval condition (xx)? and
 - (e) Which party should be responsible for determining the Appellant's request for an extension of time for compliance with the approval condition (i), if submitted?
7. By letters dated 24 May, 6 June, 21 June and 3 July 2018, the Secretary of the Appeal Board invited the parties to submit their views on the questions raised in paragraph 6 above.
 8. On 28 June 2018, Messrs. Clyde & Co. submitted the Appellant's views on those questions raised in paragraph 6 above.
 9. On 6 July 2018, the TPB set out its view on each of the questions posed above.
 10. We note the Appellant's general view that the questions posed above are not matters of clarification and should not concern the Appeal Board.
 11. However, since questions have been raised with the Appeal Board and the parties have provided lengthy submissions, it would help the parties if we set out our views towards those questions.

Question (a) - Who should be considered as “parties affected” by the proposed columbarium?

12. The question which requires the Appeal Board to decide is whether the YLDC should be considered as one of the “parties affected” for the purpose of the approval condition (i).
13. We note that the parties are not disputing that the YLDC is NOT one of “*the relevant government departments and parties affected*” having regard to the language and context of approval condition (i).
14. Indeed, YLDC only requested the relevant Government departments, not the Appeal Board, to consult YLDC on the TIA Report. YLDC did not claim itself to have a right to be satisfied with the updated TIA report under approval condition (i).
15. Thus, the answer to Question (a) is that the parties affected under condition (i) do not include the YLDC.

Question (b) - Given TPB and PlanD are two of the parties to consider the TIA, who should be in the coordination role in processing the approval condition (i)?

16. The TPB submits that the effect of the Decision is to reverse or vary the TPB’s refusals to grant the permission applied for under Section 16(3) of the TPO. According to Section 16(5) of the TPO, a permission granted under Section 16(3) may be subject to such condition as the TPB thinks fit. Thus, the permission granted by way of the Decision, which is in effect one granted under (or pursuant to the powers of) Section 16(3), can be made subject to conditions as provided for by Section 16(5), and is, in fact, made subject to such conditions as set out in paragraph 53 of the Decision. In view of the foregoing, the conditions set out in paragraph 53 of the Decision are, in effect, conditions imposed as per Section 16(5), and shall therefor be considered in the same way as the latter are.
17. We accept the TPB’s submission and find that this is a correct interpretation of the Decision and Sections 16(3) and (5).

18. Our attention has been drawn to what G Lam J said in *Town Planning Board v Town Planning Appeal Board* [2014] 1 HKLRD 1056 concerning the fulfilment of conditions imposed on planning permission under section 16 of the TPO as follows:

“61. S. 16 does not, whether before or after the 2004 amendments, specify the kind of conditions that may be imposed by the Board under s. 16(5) when planning permission is granted. S. 16(5) simply confers a power to grant permission subject to “such conditions as the Board thinks fit”.² For present purposes a distinction can be drawn between two types of conditions: those that require the further expression of approval or satisfaction by some authority (such as a government department or the Board) with respect to certain matters to be submitted and those that do not. For example, in the present case, condition (c), among others, is of the former kind, whereas conditions (f) and (g) are of the latter kind.

62. Conditions of the former kind envisage the relevant authority coming to a view as to whether the further matters submitted are satisfactory or not. The following general observations may be made about that process.

(1) The matters are submitted to the specified authority pursuant to the conditions imposed by the Board under s. 16(5) of the Ordinance when granting planning permission.

(2) What the authority does is to decide, in the context of those conditions, whether it is satisfied with, or in other words, approves of, the matters submitted.

(3) In doing so the authority does not, strictly speaking, make a decision as to whether the conditions (either individually or as a whole) have been fulfilled or not as such. Such a question may arise for the Building Authority under s. 16(1)(d) of the Buildings Ordinance (Cap. 123) in deciding whether to refuse to approve building plans, or for the Director of Planning or the court where a development permission plan is sought to be enforced against unauthorized developments under ss. 21 and 22 of the Ordinance.

² Despite the width of the language there may nevertheless be limits to the conditions that can properly be imposed: see *Pyx Granite Co. Ltd v Ministry of Housing and Local Government* [1958] 1 QB 544, 572; *Newbury District Council v Secretary of State for the Environment* [1981] AC 578, 607-8.

(4) *Where a condition requires submission of matters to the satisfaction of a government department or of the Board, the condition is fulfilled if either authority gives approval.*

(5) *If the matters submitted fail at first to satisfy the authority, there is in principle nothing to prevent the applicant from revising them and making repeated submissions so long as the planning permission which is subject to the condition in question has not expired.*

(6) *Where the requisite matters have been submitted to, but failed to satisfy, a government department (e.g. the Planning Department), there is no procedure in law whereby that department can be required to review its “decision”, or providing for an appeal against such “decision”. Such a “decision” would however ordinarily be amenable to judicial review.”*

19. Paragraph 8 of the TPB Guidelines for Class A and Class B Amendments to Approved Development Proposals (TPB-PG No. 36B) have similar provisions as follows:

“8. Under Section 16(5) of the Ordinance, the Board may grant planning permission subject to such conditions as the Board thinks fit. In general, the applicant is required to fulfil an approval condition to the satisfaction of the concerned government department or of the Board ... The applicant is advised to liaise with the concerned government department on the fulfilment of the approved condition.”

20. Thus, in our view, the Appellant is obliged to comply with the approval conditions and obtain the satisfaction of the relevant government departments and parties affected on the updated TIA report. Neither the TPB nor the PlanD is required to take up the coordination role in respect of the approved condition (i).
21. We note that the Appellant also holds the view that the TPB and PlanD must each be satisfied with the updated TIA report. Neither of them is required by law to play a coordination role in processing approval condition (a)(i).
22. The above has effectively disposed of question (b).

23. In passing, we note that the Appellant suggests that it has no objection to the TPB plays a coordination role as it is only logical and practical for the TPB to do so since the TPB was the Respondent in the appeal and it played a coordination role under TPO section 16 and the review under the TPO section 17.
24. While the Appellant's suggestion accords with commercial sense, we do not have power to make such directions.

Question (c) - Noting that the updated TIA report has to be satisfied by all the consulted parties in order to comply with the approval condition (i), in the event that the consulted parties have divergent views/comments on the submitted TIA report, who should assume the role of making the final decision on its compliance?

25. Following the same rationale as in question (b), none of the consulted parties should assume the role of making the final decision on its compliance. The consulted parties should consider the updated TIA report and act reasonably and legitimately when replying to the Appellant on whether they are satisfied with the updated TIA report.
26. The Appellant is responsible for obtaining the satisfaction of all relevant government departments and parties affected, including but not limited to TD, the Police, PlanD, POH, HA and TPB on the updated TIA report within 6 months from the date of the Decision.

Question (d) - Should the Appellant fail to comply with the approval condition within 6 months from the date of the Decision (i.e. on or before 13.5.2018), who would be responsible for notifying the Appellants that the planning permission has been revoked according to the approval condition (xx)?

27. Approval condition (xx) provided the following:

“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.”

28. In our view, the meaning of condition (xx) is clear. No notification to the Appellant of non-compliance of conditions i), ii), iii), iv), vi), vii), ix), x), xii), xiv), xvi), xviii) or xix) is required. The Appellant is responsible for satisfying the above conditions. If any of the planning conditions listed above is not complied with by the specified date, the permission granted by way of the Decision would be revoked without further notice.
29. We note that TPB indicated that, where appropriate, the TPB may notify the Appellant of a revocation pursuant to the approval condition (xx) as a matter of administrative procedures. Nevertheless, such a notification is merely administrative and shall not affect how approval condition (xx) is being operated. We agree.

Question (e) - Which party should be responsible for determining the Appellant's request for an extension of time for compliance with the approval condition (i), if submitted?

30. The TPB submits that an application for extension of time shall be processed according to the usual procedures adopted for the conditions imposed under Section 16(5) of the TPO. We agree.
31. Section 16A of the TPO concerning amendment to provisions in respect of plans provided the following:

“(2) Where any permission is granted under section 16, the person to whom the permission is granted may apply to the Board for acceptance of any amendments which are Class B amendments in relation to the permission for the purposes of this section.

(5) The Board shall within 2 months after the receipt of an application made under subsection (2) consider the application and may accept or refuse the application.

(10) The Board may by notice published in the Gazette—

(b) specify any class or description of relevant amendments for the purposes of the definition of “Class B amendments” in subsection (12).

(12) In this section -

“Class B amendments means relevant amendments of a class or description specified by the Board under subsection (10)(b);

“relevant amendments” means amendments to any permission granted under section 16.”

32. By a notice published in the Gazette dated 2 March 2018, the TPB specified various Class A and Class B amendments, which include in Category 19 one Class B amendment known as “Extension of time for compliance with approval conditions”. Therefore, the TPB submits that for the present permission granted under Section 16(3) by way of the Decision, the Appellant may apply to the TPB and the TPB may approve or not approve an extension of time for compliance with approval conditions as a Class B amendment in relation to the said application. Indeed, the Appellant’s consultant submitted an application under Section 16A(2) of the TPO for an extension of time for compliance with condition (i) and other approval conditions from 6 months to 12 months until 14 November 2018. The application was approved by the TPB on 4 May 2018.
33. We accept the TPB’s submission.
34. The short answer to question (e) is the TPB, who may approve or not approve an extension of time for compliance with approval conditions as a Class B amendment in relation to the said application.

(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)