IN THE TOWN PLANNING APPEAL BOARD

TOWN PLANNING APPEAL NO. 2 OF 2022 (2/22)

BETWEEN

	Take Harvest Limited	Appellant
	and	
	Town Planning Board	Respondent

Appeal Board:	Mr. CHUA Guan-hock, SC, JP	(Chairman)
	Dr. CHIU Sein-tuck	(Member)
	Dr. CHU Ching-wah, Teresa	(Member)
	Dr. LIU Chun-ho	(Member)
	Ir. Professor LO Man-chi, Irene, JP	(Member)
In Attendance:	Ms. Ivy LI	(Secretary)

Representation: Mr. Anthony Ismail
Counsel for the Appellant
instructed by Mayer Brown

Mr. Anthony Chan
Counsel for the Respondent
instructed by the Department of Justice

Dates of hearing: 10, 11, 12, 15 and 18 May 2023

Date of Decision: 22 November 2023

DECISION

I N D E X

A. Introduction

1. The Appellant appeals against the Town Planning Board's ("**TPB's**") Decision on review under s.17 Town Planning Ordinance, Cap. 131 ("**TPO**") made on 25 February 2022 ("**the Decision**") communicated by letter dated 15 March 2022 from the TPB to the Appellant's planning and development consultants, Toco Planning Consultants Ltd. ("**Toco**"). This followed a hearing by the TPB of the s.17 review on 25 February 2022 ("**the TPB Meeting**"). After considering the Appellant's review, the TPB refused the application (No. A/TM-LTYY/337-1) for a time extension of 2 years to commence development under s.16A TPO for an approved flat development and minor relaxation of building height restriction at Lots 464 S.A ss.1, 464 S.B, 465, 472 S.A RP and 472 S.B RP in D.D. 130, San Hing Road, Lam Tei, Tuen Mun, New Territories (collectively "**the Appeal Site**"), in a "Residential (Group E)" ("**the "R(E)" zone**") in the Approved Lam Tei and Yick Yuen OZP No. S/TM-LTYY/10 ("**Approved OZP 10**"). The reasons were:-

> "the application is not in line with Town Planning Board Guidelines on Extension of Time for Commencement of Development (TPB PG-No. 35C) in that there has been *a material change in planning circumstances* since the granting of last permission as there is a clear intention and plan for a public housing development covering the application site, and the applicant fails to demonstrate that there is *a good prospect to commence* the proposed development within the applied extension period and that genuine effort has been made in taking *reasonable actions* for the implementation of the approved development." (emphasis added)

2. The Appeal Site is about 3,832.4 m^2 and is:-

   (1) currently vacant and fenced-off;

   (2) generally flat and covered with concrete paving; and

   (3) accessible from San Hing Road via a public car park at the junction of San Hing Road and Ng Lau Road.

3. This appeal has not been an easy task for the Appeal Board and we are indebted to the industry of Counsel and their teams. The appeal was very well argued by both sides. Mr. Anthony Ismail led the Appellant's team, while Mr. Anthony Chan (now SC) led the team for the TPB and the Department of Justice. Various members of the Appeal Board have held different views at various times. This Decision is of the Chairman Mr. CHUA Guan-hock, Dr. CHIU Sein-Tuck, Dr. LIU Chun-ho and Ir. Professor LO Man-chi, Irene. The

Dissenting Opinion of Dr. CHU Ching-wah, Teresa will be provided in a separate document. Ultimately, for reasons below, we concluded that the TPB has with respect, misinterpreted and misapplied the relevant TPB Guidelines read as a whole, properly and purposively construed, for five reasons:-

(1) It is common ground that a question of interpretation is one of law, and there is only one correct answer. The question is not whether an interpretation is unreasonable.

(2) The *TPB Guidelines 35C/D* (*Extension of Time for Commencement of Development*) must be read together with *TPB Guidelines 20* (*Compliance of Approval Conditions*). However, the latter is not addressed in the TPB's written Opening and Closing Submissions. This omission has with great respect, affected the TPB's interpretation and led to error.

The Guidelines for time extension ("*TPBG 35C/D*") are on the premise that a time extension may be necessary or appropriate, rather than that development should necessarily have commenced in time.

(3) In fairness, the Guidelines should give clear or express guidance to members of the public, and developers. These must also be read in a practical, down to earth way, and not in a mechanistic way. And without adding, or taking away any words. For instance, that "or" means "and".

(4) In essence, for a site and project that are *hypothetical, without* a necessary lease modification or land grant agreed, neither TPB Guidelines have made express or clear that:-

a) One shall or should take "*parallel steps*", and incur substantial time and expense on these – for a *hypothetical* site and project, notwithstanding such issues are beyond an applicant's control;

b) One should *not* make an "*unreasonable choice*", when given a choice. In particular, in the circumstances above of a hypothetical site and project, by failing to: (i) apply for approval of building plans, and (ii) submit for approval conditions, assessments or reports concerning "*design and impact*", as opposed to implementation; and

c) The consequence of a) and/or b) above may have the consequence that a time extension is refused.

(5) The TPB may well wish after fair notice and public consultation, to amend the Guidelines above in any of the respects above – to give clear and express guidance to the public, and developers. Until then, neither the TPB nor this Appeal Board can rewrite or amend the TPB Guidelines.

For these reasons, and in the unusual circumstances of this appeal, we consider that the TPB erred in law, such that the Appeal Board is entitled and indeed bound to interfere.

As such, the appeal should be allowed in the interests of justice. Out of respect to Counsel, we also deal below with the arguments on each issue and sub-issue. We have considered all points made by both sides, and with the assistance of a detailed transcript (861 pages). Where we do not refer to a specific point, this does not mean that it has not been considered.

B. The Facts

B1. The parties

4. The Appellant is the registered owner of the Appeal Site, held under a Government Lease for a term up to 2047 for agricultural use.

5. The TPB has two key functions under the *TPO*. First, "with a view to the promotion of the health, safety, convenience and general welfare of the community", the TPB "shall undertake the systematic preparation of draft plans for the lay-out of such areas of Hong Kong as the Chief Executive may direct, as well as for the types of building suitable for erection therein" and "draft development permission area plans of such areas of Hong Kong as the Chief Executive may direct" (*s.3*, "the plan making function"). Second, the TPB may grant permission for planning approval to "the extent shown or provided for or specified in the plan", and consider on review its decisions, including on time extension for commencement of development (*s.16, s.17*).

B2. Agreed facts

6. The parties agreed certain facts which are helpfully set out in the Agreed Statement of Facts dated 13 April 2023 which we extract below:-

"**A. <u>The Appellant and the Appeal Site</u>**

1. The Appellant is the registered owner of the **"Appeal Site"** situated at Lots 464 S.A ss.1, 464 S.B, 465, 472 S.A RP and 472 S.B RP in D.D. 130, San Hing Road, Lam Tei, Tuen Mun, New Territories and the Appeal Site has an area of about 3,832.4 m^2 **[A2/16/279; B/25/403]**.

2. The Appeal Site is currently vacant and fenced-off, and is accessible from San Hing Road via a public car park at the junction of San Hing Road and Ng Lau Road.

3. The surrounding areas of the Appeal Site are characterised by the following **[A1/2/8; A2/16/285; B/25/407; C/43/545; C/57/564]**:

(a) to the north is San Hing Road, across which is the San Hing Tsuen Children's Playground;

(b) to the further south is an ice manufacturing plant; and

(c) to the west are covered by temporary structures.

4. The key details regarding the Appeal Site relied on (but not agreed) by the respective parties are as stated in §§14-17 of the Witness Statement of Chan Tat Choi, Ted **[WS-1/104/1019-1020]** and §3 of the Witness Statement of Mak Weng Yip, Alexander **[WS-2/108/1067-1068]**.

B. <u>The Planning Applications and the Planning Review Application</u>

5. On 23 June 2017, the Rural and New Town Planning Committee of the Town Planning Board ("**the RNTPC**") granted planning permission for the Appellant's proposed residential development with minor relaxation of building height restriction at the Appeal Site (Application No. A/TM-LTYY/337) under section 16 of the Town Planning Ordinance ("**the Ordinance**") ("**the s.16 Application**").

6. By a letter dated 14 July 2017, the approval of the s.16 Application was communicated from the Secretary of the Town Planning Board to John Hui & Associates (formerly known as John Hui & Associates Architects & Project Management Consultants Limited) ("**JHA**"), the Appellant's architect and agent **[A2/20/355-357]**. The letter states, inter alia, that the "*permission shall be valid until 23 June 2021…unless before the said date, the development permitted is commenced or the permission is renewed*". The letter also stated that *"The TPB also agreed to advise you to note the advisory clauses as set out at Appendix VI of the TPB Paper"* and that *"This permission by the TPB under section 16 of the Town Planning Ordinance should not be taken to indicate any other government approval which may be needed in connection with the development will be given. You should approach the appropriate government departments on any such matter."*

7. On 5 March 2021, JHA, on behalf of the Appellant, submitted the application (Application No. A/TM-LTYY/337-1) under section 16A of the Ordinance for an extension of time of an additional period of two years to commence the development approved under the s.16 Application ("**the s.16A Application**") **[B/21/358-388]**.

8. The RNTPC considered the s.16A Application at the 671st meeting of the RNTPC held on 14 May 2021 ("**the RNTPC Meeting**") and decided to reject the s.16A Application at the RNTPC Meeting ("**the RNTPC's Decision**") for the following reason:

> "*… the application is not in line with TPB Guidelines No. 35C in that you fail to demonstrate that genuine effort has been made in taking reasonable actions for implementation of the approved development, and that there is a good prospect to commence the proposed development within the applied extension period.*" **[B/28/474-475]**

9. On 28 May 2021, the Town Planning Board ("**the TPB**") wrote to JHA informing the RNTPC's Decision **[B/28/474-475]**.

10. On 16 June 2021, the Appellant, through its planning and development consultants, Toco Planning Consultants Limited, submitted an application under section 17(1) of the Ordinance **[C/29/476-478]** for a review of the RNTPC's Decision ("**the s.17 Review Application**").

11. The TPB considered the s.17 Review Application at the 1264th meeting of the TPB held on 25 February 2022 ("**the TPB Meeting**"). At the TPB Meeting, the TPB decided to reject the s.17 Review Application ("**the TPB's Decision**") for the following reason:

> "*the application is not in line with Town Planning Board Guidelines on Extension of Time for Commencement of Development (TPB PG-No. 35C) in that there has been a material change in planning circumstances since the granting of last permission as there is a clear intention and plan for a public housing development covering the application site, and that the application fails to demonstrate that there is a good prospect to commence the proposed development within the applied extension period and that genuine effort has been made in taking reasonable actions for the implementation of the approved development.*" **[C/65/712]**

12. On 15 March 2022, the Secretary of the TPB wrote to Toco informing them the TPB's Decision **[C/66/713-714]**.

13. On 12 May 2022, Mayer Brown, the Appellant's legal representative, filed a Notice of Appeal to the Appeal Board Panel (Town Planning) under section 17B of the Ordinance to appeal against the TPB's Decision **[E/79/996-1008]**.

C. <u>Status of Statutory Plans and Planning Intention</u>

14. The Appeal Site was zoned "Residential (Group E)" ("**R(E)**") on the Approved Lam Tei and Yick Yuen Outline Zoning Plan (OZP) No. S/TM-LTYY/10 ("**Approved OZP 10**") **[D1/69/818]**, which was approved by the Chief Executive in Council on 16 October 2018.

The draft LTYY OZP No. S/TM-LTYY/11 (**"Draft OZP 11"**), incorporating amendments of, among others, rezoning of a larger site which covered the Appeal Site from "R(E)" to "Residential (Group A)" (**"R(A)"**), was gazetted on 20 August 2021. The Appeal Site was zoned "R(A)" on Draft OZP 11, which was in force at the time the s.17

Review Application was considered by the TPB at the 1264th meeting of TPB held on 25 February 2022.

15. Draft OZP 11 was subsequently renamed as the approved Lam Tei and Yick Yuen Outline Zoning Plan No. S/TM/LTYY/12 ("**Approved OZP 12**") **[C/73/918]** and was gazetted on 18 November 2022.

16. According to the Notes of Draft OZP 11 and Approved OZP 12, the planning intention of the "R(A)" zone is as follows:

> "*The zone is intended primarily for high-density residential developments. Commercial uses are always permitted on the lowest three floors of a building or in the purpose-designed non-residential portion of an existing building.*" **[D1/72/880; D1/74/930]**

D. <u>The Relevant TPB's Guidelines</u>

17. It is agreed that TPB Guidelines No. 35C for "Town Planning Board Guidelines on Extension of Time for Commencement of Development" ("**TPB Guidelines No. 35C**") **[D1/75/968-971]** are relevant to the s.16A Application and the s.17 Review Application."

B3. <u>The objective facts, contemporaneous documents, and inherent probabilities</u>

7. In addition to the *TPB Guidelines*, we have carefully considered the objective facts, contemporaneous documents, and inherent probabilities to see whether and to what extent, these support or undermine either side's case. For context, we have considered all documents and events in chorological order, in the Agreed Chronology. We highlight the following contemporaneous documents and events including from various Annexes to witness statements and exhibits produced at the hearing:-

7.1 In June 2017, the Planning Department ("**the PlanD**") prepared RNTPC Paper No. A/TM-LTYY/337 (**"RNTPC June 2017 Paper"**) for consideration of Rural and New Town Planning Committee of the Town Planning Board ("**the RNTPC**") at the meeting on 23 June 2017.

That Paper stated (at §9.1.1(e)):-

> "(e) The actual area of the Site *will be subject to survey and verification by the LandsD* when application for land exchange is received. Comments on the Lot Boundary Survey Report in Attachment 3 of the Planning Statement (Appendix Ia) are reserved." (emphasis added)

And at §9.1.13 from the Chief Engineer/Housing Projects 2 Division, Civil Engineering and Development Department (CEDD):-

"'Agreement No. CE 56/2013 (CE) Engineering Study Review for Site Formation and Infrastructure Works at San Hing Road, Tuen Mun – Investigation' on *HD's proposed public housing development project at San Hing Road*. However *the exact site boundary*, phasing of development and *land requirement are still under refinement* yet to be agreed by THB, HD, LandsD, PlanD and other departments concerned. HD who is the end user of the public housing development site at San Hing Road should be consulted." (emphasis added)

7.2 On 23 June 2017, the RNTPC approved the s.16 Application and granted planning permission at its 582nd meeting ("**the Planning Permission**"), which should be valid until 23 June 2021. And after the date, the permission should cease to have effect unless before the said date the development permitted was commenced or the permission was renewed. The RNTPC also agreed to advise the Appellant to note the advisory clauses at Appendix VI of the RNTPC June 2017 Paper.

The meeting minutes stated (at §207):-

"A public housing development was under study in the subject "Residential (Group E)" zone … *the exact boundary and land requirement … would be subject to refinement …*". (emphasis added)

7.3 On 14 July 2017, the TPB wrote to John Hui & Associates ("**JHA**"), the Appellant's then planning consultant. The letter informed of the Planning Permission and reminding, amongst others, that (a) the advisory clauses set out in Appendix VI of the RNTPC June 2017 Paper should be noted and (b) the Planning Permission should not be taken to indicate that any other government approval which may be needed in connection with the development will be given. The letter stated:-

"The permission shall be valid until 23.6.2021, 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*. The permission is subject to the following conditions:

(a) the design and reprovision of the *existing public car park* (at the junction of San Hing Road and Ng Lau Road) at your own cost, as proposed by you, to the satisfaction of the Commissioner for Transport or of the TPB:

(b) the design and implementation of *vehicular access* connecting from San Hing Road to the site at your own cost, as proposed by you, to the satisfaction of the Commissioner for Transport or of the TPB;

(c) the provision of *vehicular access, parking, loading and unloading* facilities, and the details of the location of gate houses and drop bars, if any, to the satisfaction of the Commissioner for Transport or of the TPB;

(d) the submission of a *revised noise impact assessment* and implementation of noise mitigation measures identified therein to the satisfaction of Director of Environmental Protection or of the TPB;

(e) the submission of a *revised drainage impact assessment* and implementation of the mitigation measures identified therein to the satisfaction of the Director of Drainage Services or of the TPB; and

(f) the submission and implementation of *tree preservation and landscape* proposal to the satisfaction of the Director of Planning or of the TPB.

….

If you wish to seek an extension of the validity of this permission, you may submit an application to the TPB for renewal of the permission *no less than six weeks before its expiry*. This is to allow sufficient time for processing of the application in consultation with the concerned departments." (emphasis added)

7.4 On 27 July 2017, the Appellant wrote to the District Lands Office, Tuen Mun ("**DLO/TM**") to apply for a land exchange.

7.5 On 20 October 2017, JHA emailed DLO/TM enquiring on the status of the application for land exchange.

7.6 On 13 April 2018, DLO/TM wrote to JHA that *"matters in connection with [the Appellant's] application for land exchange are under consideration"*.

7.7 On 3 July 2018, the Appellant wrote to the Secretary for Development asking "the present situation so that [the Appellant] can *better plan to cope with the rising construction cost* and to *minimize our time and financial losses incurred* throughout this long application process". (emphasis added)

On 26 July 2018, DLO/TM wrote to the Appellant that "The subject site falls within the potential public housing development area under the feasibility study of the proposed public housing development at San Hing Road and Hong Po Road. As such, please be advised that the *processing of the captioned application has to be put on hold* pending for the results of the said feasibility study." (emphasis added)

7.8 On 16 October 2018, the Chief Executive in Council (**"CE in C"**) approved Draft OZP 9, renumbered as S/TM-LTYY/10 (**"Approved OZP 10"**).

On 26 October 2018, Approved OZP 10 was gazetted for public inspection under *s.9(5) TPO*.

7.9 On 16 April 2019, JHA responded to DLO/TM's letter of 26 July 2018 requesting to process and expedite the Appellant's application for land exchange.

On 17 May 2019, DLO/TM responded to JHA "The subject site falls within the potential public housing development area under the feasibility study of the proposed public housing development at San Hing Road and Hong Po Road. As such, please be advised that *the processing of the captioned application has to be put on hold pending for the results of the said feasibility study*." (emphasis added)

7.10 On 18 February 2020, JHA wrote to the Secretary for Development seeking to expedite the Appellant's application for land exchange. JHA also wrote to the Secretary for Transport and Housing seeking to expedite the Appellant's application for land exchange. That letter continued:

> "While our client and we are in support of the policy of pro-actively exploring land parcels for public housing to meet with community's acute demand, our client expressed grave concerns that *its development rights and potentials are seriously compromised* by such *open ended hindrances*. Above all, development process has been jeopardized for almost 3 years and financial difficulties are encountered." (emphasis added)

7.11 On 23 February 2021, JHA responded to the Secretary for Development and seeking to, amongst others, *"reactivate"* and *"expedite"* the Appellant's application for land exchange. That letter continued:

> "This is extremely unfair to our client in that *substantial financial burden has been incurred without knowing the possible prospect* of revenue return.
>
> We are therefore again instructed to write to you to strongly request for the following actions for bureaux and departments concerned:-
>
> 1. Re-activate and expedite the ***Land Exchange process*** since the technical study is still in progress, as told. Such Land Exchange, that is in line with the planning intention of the Outline Zoning Plan, should be *independent of the said study with respect to the rights and privileges of our client* to develop the site accordingly.
> 2. ***Exclude the subject site*** from including into public housing development in light of the *self-sufficient conditions of the site* with individual entrance and

utility supports to allow flexibility in provision of residential units to meet with market demand.

3. Consider to ***relax the plot ratio restriction*** of the subject site to relieve acute demand of mid-low income group to supplement the supply of public housing ahead of time." (emphasis added)

On 26 February 2021, JHA wrote to the Secretary for Transport and Housing asking the latter to (a) advise the Appellant on the outcome of the on-going engineering feasibility study, (b) advise the Appellant on the extent and boundary of the potential public housing development area and the programme of such development and the latest updated situation, and (c) exclude the subject site from the public housing development.

7.12 On 5 March 2021, JHA applied (on behalf of the Appellant) to the TPB for an extension of time of 2 years for the commencement of Planning Permission.

7.13 In May 2021, the PlanD prepared RNTPC Paper No. A/TM-LTYY/337-1 (**"RNTPC May 2021 Paper"**) for RNTPC's consideration at the meeting on 14 May 2021.

On 14 May 2021, the RNTPC decided to reject the *s.16A* Application at its 671st meeting under *s.16A(5) TPO*. The meeting minutes stated (at §8.1.2) with comments from the Chief Engineer/Housing Project 2, CEDD:-

> "The Study has been substantially completed. If the Board decides to grant the planning permission, it is suggested to include an advisory clause to inform the applicant that the Site *might be subject to land resumption* for the implementation of the San Hing Road and Hong Po Road Public Housing Development which might take place at any time within the validity period of the planning permission." (emphasis added)

On 28 May 2021, TPB wrote to the Appellant informing of the rejection of the *s.16A* application.

7.14 On 23 June 2021, Planning Permission lapsed.

On 30 June 2021, Secretary to the TPB informed Toco that the TPB would consider the *s.17* Review application on 3 September 2021.

7.15 On 20 August 2021, the Draft Lam Tei and Yick Yuen OZP No. S/TM-LTYY/11 ("**Draft OZP 11**") was gazetted and exhibited for public inspection under *s.5 TPO*.

7.16 In January 2022, the PlanD prepared TPB Paper No. 10804 (**"TPB Paper"**) for TPB's consideration at the meeting on 21 January 2022. The TPB Paper stated (at §3(d)):-

> "the Site is *at the fringe* of the proposed public housing development and its indicative layout *could be realigned in order to avoid encroaching onto the site*" (emphasis added).

And at §6.2 concerning Town Planning Appeal (TPA) No. 8 of 2018, an appeal by Join Smart Limited:

> "The applicant lodged an appeal to the Appeal Board Panel (Town Planning) (TPAB) (Appeal No. 8 of 2018) and TPAB allowed the appeal on 15.3.2021 and granted EOT for commencement for a period of 4 years for the proposed residential development (flat). TPAB allowed the appeal based on the following reasons:
>
> (a) there was no material change of planning circumstances that pertained to the appeal site and the proposed comprehensive public housing development *was always a planned project* since the approval of the original application in 2014;
>
> (b) there was *uncertainty for the Government to rezone the appeal site for public housing* development;
>
> (c) the Government could still implement the public housing development by either *increasing the plot ratios* in surroundings outside the appeal site or by *resuming the appeal site* even the EOT for commencement was allowed;
>
> (d) the appellant had worked hard to fulfil the approval conditions attached to the planning permission;
>
> (e) there was no adverse planning implications arising from the EOT;
>
> (f) the commencement of development had been *delayed due to problems which are beyond the control of the appellant.*" (emphasis added)

And at §8.5:-

> "Although the applicant claims that there would be cost implication on the submission of building plans and compliance with the approval conditions, it should be noted that *financial viability and cost implications are not justified grounds for not taking any action for compliance* with approval conditions and submission of building plans so as to take forward the approved development. Furthermore, it should be pointed out that approval conditions should be complied with by the applicant as far as practicable before the use applied for actually comes into place according to the Town Planning Board Guidelines on Compliance of Approval Conditions (TPB PG-No. 20)." (emphasis added)

On 25 February 2022, the TPB decided on review to reject the *s.17* Review application at its 1264th meeting, rescheduled from 21 January 2022 due to special work arrangement under COVID-19.

The meeting minutes included (at §70(b) and (c)) comments from Toco's Mr. Chan:

> "(b) with approval of the *LEA pending*, *the site boundary of the approved scheme could not be finalized*. It was *not feasible to submit buildings plan nor conduct technical assessments* to fulfil the relevant approval conditions, such as finalisation of the location of the vehicular access, noise impact assessment, or submission of the drainage proposal;
>
> (c) a similar application (No. A/TM-LTYY/273-1) also fell within the planned comprehensive public housing development at San Hing Road and Hong Po Road. That applicant had *submitted general building plans for several times but all were rejected* by the Building Authority" (emphasis added)

The meeting minutes stated (at §74):

> "Members, in general, agreed that the EOT should not be approved. A member indicated that there should be sufficient time for the applicant to obtain approval of general building plans for the approved scheme and the reason given by the applicant for not doing so was not valid."

7.17 On 1 August 2022, there was a TPB meeting agreeing that Draft OZP 11, together with Notes and updated Explanatory Statement, were suitable for submission to the CE in C.

The meeting minutes included statements from the Deputy Director of Planning/District (at §11(b) and (c)):-

> "(b) The TPAB would continue to process and make a decision on the Appeal, despite the Board's decision on the OZP. *All valid planning permissions would be respected* under the planning regime *despite subsequent amendment to the zonings* of application sites;
>
> (c)… From statutory planning perspective, *the approved scheme was always permitted under the extant "R(A)"* zoning. Even though it was indicated in the Explanatory Statement (ES) that the "R(A)" site was intended for public housing, *the statutory planning control was under the Notes*" (emphasis added)

7.18 On 8 November 2022, the CE in C approved Draft OZP 11 which was renumbered as S/TM-LTYY/12 (**"Approved OZP 12"**).

B4. <u>What is undisputed or undisputable</u>

8. What is undisputed or undisputable from the contemporaneous documents and events includes:-

(1) The approval conditions for the planning permission included matters for the public benefit. For instance, design and reprovision of an existing public carpark, vehicle access, and revised assessments on noise, drainage, and tree preservation and landscape. Planning permission with conditions was granted when the TPB was aware of a potential public residential housing development on the same road and vicinity at the Appeal Site.

(2) The Appeal Site occupies a small fraction of the area for proposed public housing. The total area of the R(A) Zone is 21.52 hectare (ha), while the Appeal Site would occupy about 3,832.4 m^2 or *1.7%* of the total R(A) Zone area of 21.52 ha. The remaining and much larger area for public housing is 98.22% of the total area of the R(A) Zone, i.e. about 21.136 ha.

(3) The governing OZP at present is Approved OZP 12, approved on 8 November 2022.

(4) A land exchange is vital. The TPB's Counsel fairly stated in oral opening (Day 2, page 4 (21-23)):-

> "And of course, *the land exchange is vital*. Without the land exchange, *the plan cannot even get off the ground*" (emphasis added).

While Counsel subsequently changed his stance, and argued that the land exchange was a "*red herring*", we elaborate below on the significance of the land exchange.

B5. <u>The witnesses</u>

9. The Appellant called two witnesses:

(1) Mr. Ted Chan Tat Choi ("**Mr. Chan**"), Toco's Managing Director.
(2) Dr. John Hui Wing To ("**Dr. Hui**"), Chair Architect and Project Management Consultant of JHA specializing in development consultancy.

10. The TPB called two witnesses:-

(1) Mr. Alexander Mak Wing Yip ("**Mr. Mak**"), Senior Town Planner/Tuen Mun 2 of PlanD (Tuen Mun and Yuen Long West District Planning Office) who represented the PlanD at the TPB Meeting on 25 February 2022 which rejected the *s.17* review.

(2) Ms Karena Kwan Yee Lam ("**Ms. Kwan**"), Estate Surveyor/Central 2, District Lands Office/Tuen Mun of the Lands Department ("**LandsD**").

The witnesses were all witnesses of fact. The correct interpretation of the TPB Guidelines is a question of law for the Appeal Board.

C. TPB's decision and reasons

11. The TPB notified the Appellant's representatives by letter of 15 March 2022 of its decision refusing a time extension, for reasons at §1 above.

D. Issue

12. The issue on appeal is whether the Appellant should be granted a time extension of 2 years to commence a low-rise residential development with minor relaxation of building height restriction on its land for which it was granted planning permission on 23 June 2017.

E. TPO and TPB Guidelines – ascertaining the intention

E1. TPO

13. The key *TPO* provisions on appeal are:-

"s.13. **Approved plans to serve as standards**. Approved plans shall be used by all public officers and bodies *as standards for guidance* in the exercise of any powers vested in them" (emphasis added).

"s.16(4) **Applications for permission in respect of plans** … The Board may grant permission under subsection (3) *only to the extent shown or provided for or specified* in the plan" (emphasis is added).

*"*s.16(A)(2) **Amendments to permissions in respect of plans** … 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."

*"*s.16A(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*" (emphasis added).

The discretion under *s.16A(5)* is in general terms, and is not limited to specific factors only.

E2. Approach to interpretation of TPO and TPB Guidelines

14. It is trite that a key distinction is drawn between an OZP and its Notes on the one hand, and an OZPs' Explanatory Statement ("**ES**") and any TPB Guidelines on the other: see *Henderson Real Estate Agency Ltd v Lo Chai Wan* [1997] HKLRD 258 where the Privy Council advised (at 266 A, 267 A-C):-

    (1) The Appeal Board's function is to exercise independent planning judgment;
    (2) The Appeal Board is entitled to disagree with the TPB;
    (3) The plan and the Notes attached to the plan prepared by the TPB in its plan making capacity are material documents which are binding as "*the most material documents in the case*";
    (4) The Explanatory Statement is a material consideration which the Appeal Board must take into account but is not bound to follow;
    (5) Guidelines prepared by the TPB are a material consideration which the Appeal Board must take into account but is not bound to follow; and
    (6) A misunderstanding of the planning intention is an error of law.

15. A question of interpretation is a question of law, which admits of only one correct answer. The question is not whether an interpretation is unreasonable: see *Shiu Wing Steel Ltd v Director of Environmental Protection & Anor* (2006) 9 HKCFAR 478 at [28].

    There are many well-known criteria in interpreting a statute or legal document:

    (1) the actual words used and their ordinary and natural meaning, construed objectively;
    (2) the context of the document, read as a whole;
    (3) context and purpose in the first instance and not only if there is some ambiguity;
    (4) the relevant background; and
    (5) common sense.

    We will apply all these criteria.

Interpretation of planning documents

16. Nonetheless, the approach to interpreting a planning document is not identical to interpreting a statute. The Notes and ES should be approached in a *practical*, *down to earth* way, and in a broader and untechnical sense – rather than a strict, mechanistic, or

literalistic approach. In *HK Resort Company Limited v TPB*, CACV 432/2020, 10 September 2021 Kwan VP in giving the Court of Appeal's judgment said at [21]:-

> "Instead, the court should *evaluate the merits in a broad manner*, and be vigilant against excessive legalism creeping in as a planning decision is not akin to an adjudication made by a court …" (emphasis added).

We respectfully agree.

17. Therefore, an OZP's ES and the TPB Guidelines properly interpreted, must be taken into account. However, the Appeal Board is not bound to follow these if there is good or cogent reason.

E3. Approach to time extension

18. In general, as the Appeal Board's role is quasi-judicial, the purpose of a time extension is to do justice to both sides, or to avoid injustice or the risk of injustice:-

    (1) As a public body, we have a duty to act fairly. And to have regard to and weigh up, all relevant circumstances. While we construe the TPB Guidelines, our role is *not* limited or fettered to only considering whether there is "good justifications" under *TPBG 35C* (at §1.2). We note that the legislative intent under *s.16A(5) TPO* for a time extension is not intended to be penal or to punish any party.

    (2) The ultimate object of obtaining planning permission is for development proposals to "… be implemented within a reasonable period" (*TPBG 35C* at §1.2).

        This would refer to an *actual* site and implementation, rather than a site and implementation that are hypothetical.

Here, the *practical reality* is that unless and until the Appellant can obtain an agreed land exchange or lease modification, it is *not* entitled to build a residential development on agricultural land. Thus, the development proposal remains hypothetical, until LandsD's agreement is forthcoming. While LandsD to date has not given a clear yes or no, it has put the application on hold indefinitely, so the development remains hypothetical. If there was *no* prospect of land exchange or lease modification, one would fairly expect LandsD to inform the Appellant.

19. The LandsD's putting matters on hold, rather than actively considering the application, is for understandable and bona fide reasons. There is no application to date for judicial review against the LandsD. Thus, in practical terms, it appears futile and strictly unnecessary, to comply with planning conditions (Step 1) and submit general building plans (Step 2) - for a merely hypothetical development. Neither achieve the goal of actual implementation on an actual site.

The Appellant's arguments included that given the replies from the various different Government departments:-

(1) It was futile to give further information or a "roadmap". And in fairness, it was largely futile to comply with the approval conditions (Step 1) and/or submit building plans for approval (Step 2) – all while the application to the LandsD (Step 3) is on hold.

(2) Taking Steps 1 and 2 while Step 3 was put on hold indefinitely, would not achieve the ultimate goal of actual implementation of the approved development. It was sensible and practical, to await the land exchange application being considered on its merits and processed (Step 3) before starting Steps 1 and 2. It is *no* answer to say that Steps 1 and 2 involve different regimes and Step 3 is no hurdle to taking Steps 1 and 2. The correct question is whether it is *practical* to await LandsD's decision.

(3) It is unfair that while the LandsD puts matters on hold indefinitely, the Appellant is refused a time extension of only 2 years. If *unlimited* time is given to the LandsD to decide on land exchange, unlimited time to comply with Steps 1 and 2 should also be given to the Appellant. *A fortiori,* when the Appellant is not asking for unlimited time, but 2 years only.

There is some force in these submissions in these unusual circumstances.

F. General approach to town planning appeals

F1. Onus of proof and TPAB's role

20. An appellant has the onus of showing on a balance of probabilities, that an appeal should be allowed and there is no good reason to refuse planning permission, or a time extension.

21. As to the TPAB's role:

(1) Its role is to exercise independent planning judgment within the parameters of the approved plan. The Appeal Board is not bound by the TPB's decision and an appeal is *de novo*.

(2) It may substitute its own decision for the TPB's decision even if the TPB did not strictly commit an error on the materials before it. Hearings before the Appeal Board are normally much fuller and more substantial than before the TPB.

(3) The TPAB's role is not limited to those on judicial review as it is concerned with the merits. The TPAB should:-

(a) ask itself the right and relevant questions and take reasonable steps to acquaint itself with the relevant information to enable it to answer them correctly;

(b) take into account all relevant considerations and ignore irrelevant ones;

(c) decide whether a proposed development is desirable in the public interest, within the parameters of the relevant plan.

We will seek to apply these principles.

F2. Material considerations

22. The Appeal Board should consider all material considerations, although matters of materiality and weight are essentially matters for the Appeal Board:-

(1) TPB Guidelines: it is common ground that these properly interpreted, should be followed unless there is good or cogent reason.

(2) Distinction between plan making, and planning permission: this trite distinction appears in the cases. On appeal, the Appeal Board is concerned with the latter situation only.

G. The planning intention

G1. Approach to interpretation

23. Under Approved OZP 12, the planning intention of the "R(A)" Zone is :

> "The zone is intended *primarily* for *high-density residential developments*. Commercial uses are always permitted on the lowest three floors of a building or in the purpose-designed non-residential portion of an existing building." (emphasis added)

24. It is noted:-

(1) It refers to the zone as "*primarily*" for such residential developments, rather than exclusively.

(2) It refers to "*high-density residential developments*", rather than "*public*" residential developments only. There are no specific sub-zones for specific types of residential developments, unlike some other OZPs.

(3) While the ES refers to public housing, this does not appear in the Plan and Notes as the most material documents. Again, there is inherent flexibility.

(4) While "flat" appears in Column 1 for which planning permission is unnecessary, Column 1 does not differentiate between public and private flats.

G2. <u>TPB Guidelines</u>

25. *TPBG 35C/D* – "*Guidelines on Extension of Time for Commencement of Development*" must be read together with *TPBG 20* – "*Guidelines on Compliance of Approval Conditions*". All these Guidelines state:-

"The guidelines are intended *for general reference only*" (emphasis added).

These are not intended for developers only, but any member of the public. The Guidelines do not refer to a notional "*reasonable developer*" or words to that effect.

(1) TPBG 20

26. The relevant extracts include:-

"**General Principles**

1. One of the fundamental principles regarding the compliance of approval conditions is that all conditions imposed by the [TPB], in particular those related to the development itself, *should* be complied with ***as far as practicable*** before the use applied for actually comes into place. This is because in granting the permission,

the Board has taken that the application would only be permissible subject to the complete fulfilment of all the imposed conditions.

Conditions To Be Complied with before Building Plan Approval

5. Since requirements for conditions in 4(b) and (c) above may not be reflected in general building plans, a separate submission to the relevant Government departments for consideration is necessary. However, some applicants may prefer to submit the landscape proposal and other required assessments together with the general building plans. This will be a matter of choice for the applicant.

Conditions To Be Complied with after Building Plan Approval

7. Some of the conditions *may not need to be complied with at building plan approval stage*, but are expected, to be complied with ***before the occupation*** of the development. Non-compliance of these conditions prior to the occupation of the development may cause serious adverse impacts to both the development itself and the surrounding area. These include:

    a. Conditions requiring the provision of on-site facilities such as vehicular *access, landscaping, drainage* and sewage treatment and disposal facilities;

    b. Conditions requiring the implementation of any proposed mitigation measures for the treatment of environmental, drainage and sewage impacts; ….

9. Since the above conditions have *no direct impact on the detailed design* of the development, they ***need not be complied with before building plan approval***. The exact timing for the compliance of these conditions would *depend on individual circumstances*. Nevertheless, in order to ensure timely provision of such facilities, it is *recommended* that the design of these facilities should be submitted well in advance to the relevant Government departments for consideration." (emphasis added)

27. It is noted on *TPBG 20*:-

(1) General Principles: compliance refers to "*should*", not "shall". And "*as far as practicable*". Compliance is not intended to be rigid and literalistic, mechanistic, or divorced from practical reality.

In practice, many people (especially in business) do not spend money and time without object – but for practical reasons and considering cost/benefit. What is "*practicable*" and "*as far*" must depend on the particular circumstances. And what is practicable for some may not be so for others. Not all members of the public and developers have the same resources.

(2) Building Plan Approval: a key distinction is drawn between compliance "*before*" and "*after*" building plan approval. For the former, these affect the "detailed design" (at §4) including for instance landscape, drainage, and may be submitted "together with" building plans or separately to relevant Government departments.

(3) Compliance *after* Building Plan Approval: i.e. "*before … occupation*". This includes provision of facilities such as vehicle access, landscape, drainage, and sewage treatment (at §7a).

Where proposals have "*no direct impact on the detailed design*" (at §9), it is *unnecessary* to submit these *before* building plan approval. Thus, timing depends on the particular circumstances. This undermines the argument that approval conditions shall or should be complied with "*in parallel*" with building plan approval – without properly considering the Guidelines, and timing under *TPBG 20*.

(4) Common sense: is necessary for practicality: a key question is whether there is a real prospect of an approved development proceeding. If so, one would expect more time, effort, and money to be spent. But if a site and project are *hypothetical*, one would naturally expect less time, effort, and money to be incurred.

28. On compliance with approval conditions, the TPB's arguments include:-

(1) It was reasonable to apply for compliance with planning conditions and building plan approval "*in parallel*", with the land exchange application.

(2) Requiring a developer to take other available steps cannot be futile or mere "paper approvals".

As to (1) above, having to make applications "*in parallel*" for a project that is *hypothetical* (without a land exchange/lease modification) is neither reflected in *TPBG 20* nor *TPBG 35C/D*, nor practical. It is also at odds with *TPBG 20* (at §§7, 9) which refer to various conditions to be complied with *after* building plan approval.

As to (2) above, for a *hypothetical* project (without necessary land exchange/lease modification), there is a real risk of mere paper approval.

(2) TPBG 35C/D

29. While there is no substantial change between *TPBG 35C* and *35D*, the relevant extracts include:-

"**1. Introduction**

1.2 The time-limited condition attached to planning permission imposed by the Board is to ensure that the approved development proposals *would be implemented within a reasonable period*. With *good justifications*, the Board may grant an extension of time for commencement of development under *s.16A of the Town Planning Ordinance*. However, should there be new planning circumstances governing the application, the Board is under no obligation to approve the application.

2. Commencement of Approved Development

The determination on whether an approved development has commenced should be considered on the *basis of the facts and circumstances of each case*. In general, the *approval of building plans* would constitute a commencement of development. *However*, *where* ***land grant*** (including small house grant) *or* ***modification of a lease is required*** to implement an approved development, the Board may consider that an approved development has commenced as at the ***date of execution*** of the land grant/lease modification.

3. Application Procedures

3.4 In support of an application for extension of time for commencement of development, the applicant is required to provide:

(a) *reasons* for the application;

(b) *time period* for which an extension of time is sought; and

(c) an account of *all actions* taken to implement the development since the granting of planning permission, including evidence and documentation on the submitted proposals and any works undertaken/completed to fulfil any approval conditions.

4. Assessment Criteria

The criteria for assessing applications for extension of time for commencement of development *include*:

(a) whether there has been *any material change in planning circumstances* since the original permission was granted (such as a change in the planning policy/land-use zoning for the area);

(b) whether there are any adverse planning implications arising from the extension of time;

(c) whether the commencement of development is ***delayed due to some technical/ practical problems which are beyond the control*** of the applicant, e.g. *delays in*

land administration procedures, technical issues in respect of vehicular access and drainage works or difficulties in land assembly;

(d) whether the applicant has demonstrated that *reasonable action(s)*, e.g. submission of building plans for approval ***or application for*** Small House/***land exchange***, have been taken for the implementation of the approved development;

(e) whether the applicant has demonstrated that reasonable action(s), e.g. submission and implementation of proposals, have been taken to the satisfaction of relevant Government departments in complying with any approval conditions;

(f) whether the applicant has demonstrated that there is a *good prospect to commence* the proposed development within the extended time limit;

(g) whether the extension period applied for is reasonable; and

(h) ***any other relevant considerations***. (emphasis added)

30. As stated, the Guidelines on extension of time are premised on no commencement of development within the specific period granted, so a time extension may be necessary or appropriate. The Guidelines do *not* proceed on the basis that within the specific period granted, an applicant necessarily could and should have commenced development – the whole point of seeking time extension is because the time period has expired, for whatever reason. The Guidelines do not specifically deal with the unusual situation where a development proposal is put on hold by Government indefinitely. These points are noted:-

(1) Introduction (at §1.2), the purpose of time conditions is that development proposals "would be *implemented within a reasonable period*" (emphasis added)

This envisages an approved development proposal and site being actual, rather than hypothetical. While *TPBG 35C/D* envisages a time extension may be granted for "good justifications", it is necessary to consider all relevant circumstances (§4(h)), and "all actions taken" (§3.4(c)).

(2) Commencement of approved development (at §2): this depends on "the facts and circumstances of each case". "In general" by "approval of building plans". An express distinction is made with other situations: "*However, where land grant ...* or *modification of a lease is required*", the Board may consider an approved development has commenced "*as at the date of execution ...*".

(3) Assessment criteria (at §4):

a) These are not comprehensive, but "inclusive" (§4).

b) The purpose of such criteria includes that commencement of development may be delayed "due to some *technical*/*practical problems* which are *beyond the control of the applicant*" (§4(c)) (emphasis added). So the reasons for delay are important.

For reasonable actions, these include "*submission of building plan*s" for approval "***or*** *application* for … ***land exchange***" (emphasis added) (§4(d)).

c) Commencement of development is not the only aim; the focus includes "reasonable action" short of commencement or Government approval. If commencement of development is delayed due to some problems "*beyond the control of the applicant*", the Guidelines do *not* provide that nonetheless, the applicant "shall" or "should" take specific steps, in parallel – such as applying for building plan approval "*and*" compliance with approval conditions, in whole or part.

"Reasonable action(s)" entails that reasonable people may reasonably disagree. The reference above to "**or**" (§4(d)) is clear and cannot be rewritten to mean "and".

There is *no* reference to making an "*unreasonable choice*", when a choice is available. Or applicant having to act "proactively and diligently" – even for a hypothetical development and site. Nor do the Guidelines refer to a "road map" on what steps should be taken and when, nor "contingency plan".

d) As to timing, the reference to "a good prospect to commence" within an extended time limit appears to refer a reasonable prospect, rather than likelihood.

(4) Approval conditions: while the TPB argued that not all 6 approval conditions need be complied with (Day 5 page 107 (25)), *TPBG 35C/D* do *not* make clear whether all or some (and if so, which?) should be complied with for an approved project that

is hypothetical. For instance, that in such a situation, one should still proceed with "*design and impact conditions*" only, rather than implementation.

(3) TPBG 33A – "Guidelines on Deferment of Decision on Representations"

31. Specifically §§1 and 3.2 state:

> "1. **Purpose**
>
> These Guidelines set out the general procedures and practices adopted by the [TPB] in considering *requests for deferment of a decision* …" (emphasis added)
>
> "3.2 **Request for deferment in respect of applications and reviews**
>
> Non-planning related reasons (such as the need to assess/re-assess the *financial or economic viability* of the proposal, or awaiting *a better "economic climate"*) should *normally* not be accepted." (emphasis added)

32. It is noted that the words above in *TPBG 33A* (at §3.2) do *not* appear in *TPBG 20* nor *35C/D*.

Factors such as reassessing financial/economic viability of a proposal, or awaiting a "better economic climate" arise in the context of deferment of a decision on representations – and not whether it is "*practicable*" to comply with approval conditions.

G3. <u>Buildings Department's position on approval of general building plans</u>

33. The Buildings Department ("**BD**")'s letter of 27 September 2021 is important. Relevant extracts include:

> "(a) The applicant has been authorised to submit plans by the owners currently registered in Land Registry (LR).
>
> (b) The applicant is one of the registered lot owners according to LR records and has been authorised to submit plans by all other owners.
>
> (c) The District Lands Conference of the Lands Department (LandsD) has in-principle *approved the land grant* or the like to the applicant.
>
> (e) The applicant has *accepted the basic terms* by LandsD for the land grant or has *settled the administrative fee* for land exchange being processed by LandsD." (emphasis added)

It is noted:

(1) The typical "acceptable situations" include approval of land grant ((c) above) or acceptance of basic terms by LandsD for the land grant, or payment of administrative fee for land exchange being processed by LandsD ((e) above).

(2) The aim is practical BD administration, without wasting time and resources by applicants or the BD.

(3) The question is not whether an applicant is "*prevented*" from applying for BD's approval, but whether it is *practical* to apply for and obtain such approval. Here, a project and site are hypothetical, without the necessary land grant approval, acceptance of terms by LandsD, or payment of administrative fee for processing.

It follows that ownership of land is insufficient *if* the proposed development is for a different type of land than owned. For instance, to convert agricultural land to residential property.

34. The Appellant's arguments included:-

(1) It was practical for it to save substantial expense, effort, and time. The TPB's reference to "financial viability and costs implications are not justified grounds for not taking any action for compliance with approval conditions and submission of building plans so as to take forward the approved development" (§3.2 of TPBG 33A) is misplaced. These do not appear in *TPBG 35C/D* at all.

(2) It was also prudent to avoid unnecessary expenditure of public resources and time, on a site and project that are hypothetical. Reliance was placed on the CFA decision in *REDA* (2016) 19 HKCFAR 243 for the points that:-

a) it is prudent and sensible to not incur more public resources and administrative burdens in Steps 1 and 2 until Step 3 is not put on hold, i.e. until the LandsD decides to consider the land exchange application on its merits. *REDA* is relevant by analogy, and the principle includes that the purpose of any requirement of ownership or control concern the extent, position, and nature of the site: at §22:

"This is because ownership and realistic prospects of control are often *directly relevant* to ascertaining the ***extent, position and nature of the site*** as an essential

step in calculating the permitted parameters of the development." (emphasis added)

b) The rationale for buildings approval is to carry out building works, *not speculative* applications: at §35:

"As Tang PJ points out, the statutory scheme is not merely concerned with paper approvals of what may *only be speculative and academic applications* but with approvals as a necessary condition of carrying out building works. The whole point of obtaining approval is *to be permitted to carry out building works*." (emphasis added)

c) Thus, the focus is on an actual development, and "not a purely *hypothetical*, development project": at §37:

"The statutory intent therefore maintains its *focus on an actual, and not a purely hypothetical*, development project." (emphasis added)

(3) The fact that Join Smart applied and obtained for building plan approval was different from implementation, so it had mere paper approval.

(4) The BD has a discretion, whether to approve or refuse building approval – it is *not* obliged to grant approval for a hypothetical site and project.

35. The TPB's arguments included that it was "not impossible" to apply for building plan approval while a land exchange is pending and:-

(1) The Appellant's stance above was illogical and unreasonable. It is clear from both the planning permission and *TPBG 35C* that it was obliged to spend its own time and expense to progress the approved development, even though there was no guarantee that the project could be implemented or completed. Considerations such as preserving costs were irrelevant planning circumstances, and no excuse for not carrying on with progressing the approved development during the validity period of the planning permission.

(2) The applicant as developer must proceed at its own cost and risks as a developer "must proactively and diligently progress matters at its own cost even though there is a risk that all the work would come to nought".

(3) Cost / benefit is irrelevant, and not relevant planning circumstances or excuses for not carrying on with progressing an approved development during the validity period.

36. On balance, we prefer the Appellant's arguments above on the balance of probabilities. We would add:

(1) As approval conditions should be complied with "*as far as practicable*", the focus is on an actual, rather than hypothetical site or development. The purpose is to carry out an actual development, rather than merely obtain paper approval. Moreover, a land exchange/lease modification would directly impact on the site's "*extent, position and nature*" as referred to in *REDA* (at §22).

(2) Questions of practicality and saving time and expense are not irrational. Instead, these are legitimate practical concerns. The BD has a discretion, and is not obliged to process applications for a hypothetical site and development. Questions of cost/benefit also concern whether it is "practicable" to comply with an approval condition.

H. <u>Whether application for time extension should be granted</u>

H1. <u>Approach to time extension</u>

37. These points are noted:-

(1) On the contemporaneous documents, before applying for time, the Appellant sought to preserve its accrued rights. For instance, in the TPB meeting minutes of 1 August 2022 (at §11(b)) the Deputy Director of Planning/District stated that "*all valid* planning permission *would be respected*" (emphasis added) despite subsequent amendment to the zonings. And the approved scheme was always permitted under the "R(A)" zoning (§7.17 above). See also JHA's letter of 18 February 2020 to the Secretary for Development that the Appellant's "development rights ... are severely compromised by such open ended hindrances" (§7.10 above).

(2) The Appellant incurred substantial time, expense, and effort in assembling 5 lots of land; applying for and obtaining planning permission (after prior applications were rejected by the RNTPC on 14 December 2012 and 13 January 2017); liaising with

various Government departments (including the Development Bureau and Housing Bureau); securing funding and incurring financial expenses and losses. And with rising construction costs.

From 2017 to 2021, the Appellant was not "doing nothing", making "bare requests" to the LandsD, or being "dilatory and presumptuous".

(3) The reasons for the Applicant's request for time include that permission was *already* obtained for residential flats of low density; that much time, effort, and expense was already invested against the prospect of some return; and a 2-year extension was reasonable for a small project. While the TPB argued that under Column 1 "a flat" is always permitted, considerations of accrued rights under planning permission raised legitimate concerns.

(4) The TPB focused on whether there was "good justifications" under *TPBG 35C* (at §1.2). That criterion cannot be read in isolation, but together with *TPBG 20* and *35C/D* as a whole. The Appellant's wish or need to preserve limited resources for other projects, given this hypothetical project, was a practical concern.

(5) As to the balance of prejudice, the TPB argued that the question is not whether there is any harm in granting a time extension but whether there is good justification. However, the balance of prejudice is in the Appellant's favour. The TPB did *not* argue that it would be prejudiced if a time extension was granted.

38. The appeal largely involves statutory interpretation. Nonetheless, where there is any conflict of evidence, we prefer the Appellant's witness evidence as more consistent with the objective facts, contemporaneous documents, and inherent probabilities – and more practical with respect, than the somewhat mechanistic approach taken by the TPB on the Guidelines and their application. We would add that the Appellant's witnesses with their combined experience in both the public and private sectors, appear more experienced. We also had the benefit of hearing and seeing the witnesses give evidence.

H2. <u>Material change in planning circumstances?</u>

39. The Appellant argued that while there was a change in planning intention in Approved OZP 12, there was no change in planning circumstances:-

(1) There was no material change as public residential housing was always planned around the Appeal Site since at least the June 2017 RNTPC permission.

(2) There was no change in "planning" circumstances which is one that relates to the use and development of land.

(3) The planning intention under the Approved OZP 12 Plan and Notes was and is for residential use. The ES cannot override these. The planning intention is not only for high density public housing development covering the Appeal Site.

(4) Even if there is a material change in planning circumstances, this is a factor to consider and is not conclusive.

40. The TPB's arguments included:-

(1) There was a material change and progress in planning circumstances, and rezoning.

(2) A material change in planning circumstances is a particularly weighty consideration.

41. On balance, in the unusual circumstances of this appeal, we prefer the Appellant's arguments and add:-

(1) Public residential housing in the Site's vicinity was proposed and foreseen before planning approval. See for instance, the RNTPC June 2017 Paper (at §9.1.13). Nonetheless, the implementation of public housing affecting the Appeal Site is a real possibility that cannot be ignored.

(2) We respectfully agree with the Appeal Board's decision in *Join Smart* (TPA No. 8 of 2018):

a. The Appeal Board rejected the TPB's argument that a time extension after a change in the OZP was "*not in line*" with the TPB Guidelines: see §39:

> "With the greatest respect to the TPB and the RNTPC, this approach is incorrect. Properly understood, TPB's Guidelines 35C do not mandate that so long as there has been a material change in planning circumstances, an application for an extension of time must be rejected as being "*not in line*" with them. Instead, §1.2 of those Guidelines merely state that should there be new planning circumstances governing the application, the TPB is under *no obligation to approve the application* whilst §4 makes it clear that even if there has been any material change in planning circumstances since the original permission was

granted, this is *but one of the criteria* which the TPB is required to take into account in assessing the application for extension of time." (emphasis added)

b. A temporal restriction would not change *the nature* of the permitted development: at §60:

"… The extension of time sought would only change the temporal limitation imposed for the commencement of the permitted development. It would *not change the nature of the permitted development* in any way." (emphasis added)

c. The bulk of the land for public housing was from outside that particular site: at §80:

"… As noted above, the bulk of the increased area of the Public Housing Project which has rendered it a "designated project" will come from *land outside* of the Appeal Site." (emphasis added)

H3. Good prospect of commencement?

42. The Appellant argued:-

(1) *TPBG 35C* (at §4(f)) was inapplicable because the proposed development commenced when the Appellant made the Land Exchange application and took follow up action.

(2) It is *impossible* to satisfy this requirement given circumstances beyond the Appellant's control - LandsD has not even started to process the Land Exchange application which it continues to put on hold. The Guidelines do *not* require the impossible to be done and shown.

(3) Given (2) above, this is a good or cogent reason why §4(f) should be given less weight, or departed from.

43. The TPB argued:

(1) There is *no* evidence of any or good prospect that the project would commence within 2 years.

(2) The Appellant's position that it would belatedly seek to apply for building plan approval, and start complying with approval conditions was a conditional apology.

44. On balance, we prefer the Appellant's argument on this sub-issue. As LandsD has apparently not decided either way, but continues to put matters on hold, there is a chance it may grant a land exchange/lease modification. Thus, it is prudent to at least preserve the Appellant's position. On Dr. Hui's evidence, the fact the Appellant was belatedly prepared to take various steps was not strictly necessary, but to show commitment.

H4. Reasonable action and genuine effort?

45. The Appellant's arguments included:

(1) The words "**or**" in *TPBG 35C* (at §4(d)) are clear, and an example of reasonable action. The fact the Appellant did not take other actions such as submitting building plans and complying with approval conditions is irrelevant. The application for land exchange is sufficient reasonable action, and it tried hard in that respect.

(2) The Appellant's position in (1) above was reasonable, given the facts and circumstances. On Dr. Hui's evidence, he also believed that the Appellant would not obtain building plan approval, given the land's status. As the issue is fact sensitive, it does not assist the TPB to say the applicant in TPA No. 8 of 2018 (or any other case) took reasonable actions by submitting building plans, and complying with approval conditions. Moreover, the applicant in TPA No. 8 of 2018 was Sun Hung Kai Properties, a very large developer.

(3) The reference to "*genuine effort*" does *not* appear in *TPBG 35C*, but is the TPB adding, departing from, and qualifying its own Guidelines.

46. The TPB argued that the Appellant's choice to apply for land exchange only, without applying for building plan approval and compliance with conditions was an "*unreasonable choice*". They had "only themselves to blame". Specifically:

(1) The purpose of obtaining building plan approval is to implement and the Appellant's emphasis on "*or*" was unduly legalistic.

(2) It was unreasonable to do nothing within the validity period.

(3) The Appellant "could and should" have taken other steps "*in parallel*", i.e. apply for building plan approval and steps to comply with the 6 approval conditions. Indeed,

"any reasonable developer" would have done so and it was unreasonable not to follow professional advice.

(4) The application for land exchange was not of itself good reason, and was "*a red herring*".

(5) The Appellant failed to make "any genuine effort" to commence development such as by applying for and obtaining building plan approval.

(6) The Appellant's stance would only be valid if there were "*drastic changes*" to the area and boundary, when there was no such evidence.

47. We prefer the Appellant's arguments on the balance of probabilities. Compliance with approval conditions was not intended to be mechanistic, but "*as far as practicable*" – under *TPBG 20* (at §1):

(1) The Appellant's choice in reliance on the TPB Guidelines was reasonable. These do *not* provide for an "*unreasonable choice*", and its consequences. The fact it could have done more does not necessarily mean its stance was unreasonable – and reasonable people can reasonably disagree.

(2) The argument that the Appellant "*could and should*" have taken specific steps is neither express nor clear from *TPBG 20* and *35C/D*, read together. Members of the public and developers will make practical commercial decisions, based on the TPB's Guidelines. It does not necessarily follow that professional advice *must* always be followed. Delayed commencement of development due to matters beyond one's control is very seldom, but does occur.

(3) The TPB's argument that a land exchange is a "*red herring*" flies in the face of its own acceptance that a land exchange is "*vital*". The TPB is *not* entitled to rewrite *TPBG 35C/D*.

(4) On the evidence, there would be a *substantial* change of some *7%* in land area compared to the survey as seen below, which is not *de minimis*.

(5) As to reasonable action, a change of use application can impact on actual area and boundary. The Appellant did not simply write letters, but kept pressing different

Government departments to activate and expedite the land exchange; to press on the outcome of the feasibility study; to seek to ascertain the boundary and extent of the potential public housing project and its progress; and to exclude the Appeal Site from public housing.

The survey report of **26 May 2015** showed a substantial difference of *7%* between the registered area (3,579 m^2) compared to the area by survey (3,832.4 m^2) – a difference of 253.4 m^2 which was unusual. Thus, the TPB's assertion that there is "no evidence" of any change (Day 2 page 38 (9)) is unsupported and contradicted by the evidence. A substantial difference in area could affect a project's design, in many aspects.

Moreover, a land grant or lease modification would involve terms and conditions from <u>all</u> relevant Government departments including BD, and those concerning environment, noise, landscape, and drainage. Thus, it would be premature and unnecessary duplication to submit various proposals or updated reports – when Government's requirements would be consolidated and coordinated, and with appropriate amendments, in the terms of any land grant or lease modification.

H5. <u>Merits</u>

48. These points are noted:

(1) The purpose of the planning permission obtained was to reflect demand for small to medium size housing and low-density residential development in the New Territories (see s.16 Executive Summary). This was coupled with phasing out industrial use in a "*R(E)*" zone to residential use.

(2) On the evidence, private housing can coexist by being next or adjacent to Public Rental Housing ("**PRH**"). For instance, Richland Garden and Butterfly Estate respectively. Public housing often requires land resumption with compensation, which can be extremely expensive, given high Hong Kong property prices. It is not clear at this stage, that land resumption of the Appeal Site would proceed in full.

(3) The Join Smart proposal is notable: an approved development could not commence even with building plan approval, when land exchange was still pending.

H6. Utility and purpose?

49. The TPB argues that given the Approved OZP 12, planning permission is unnecessary such that:

    (1) the time extension sought has no utility;

    (2) it would be a waste of time and expense to grant the time extension.

50. The Appellant argued that the Approved OZP 12 is relevant but not conclusive:-

    (1) It is possible that Government could carve out part or all of the Appeal Site, and not resume the entire Appeal Site – as resumption is notoriously expensive.

    (2) The Appellant should have a fair opportunity to persuade Government departments in any appropriate respect, including increasing the plot ratio, and for the Appeal Site to be smaller but built taller with the same gross floor area.

    (3) The Appellant's witnesses referred to a fallback if no time extension was granted. The Appellant was also prepared to start complying with approval conditions, and to apply for building plan approval as a condition of any time extension.

51. The TPB noted that on Dr. Hui's evidence, the Appellant may sell or mortgage the land, which has *a higher value* with the planning permission granted. It also argued that resumption was likely, so no reasonable person would develop the site or proceed.

52. In the unusual circumstances of this appeal, it appears that planning permission with time extension could serve some purpose and utility, for reasons above. Moreover, as land resumption is extremely expensive, Government may decide not to resume the entire Appeal Site, thereby saving money and limited resources - in return for some public benefits to be provided and paid for the Appellant's implementation of approval conditions.

I. Conclusion

Summary and Order

53. On the true and proper construction of *TPBG 20* and *35C/D*, and having considered and weighed up all relevant circumstances:-

(1) It is just and appropriate to grant a limited time extension to the Appellant to commence development, on the same terms and conditions as the approved development.

(2) We grant a time extension of 2 years as requested. On the safe side, this runs from 22 November 2023 to 22 November 2025 inclusive.

General

54. We reiterate our grateful thanks to Counsel and both teams for their assistance.

55. We grant liberty to apply to the Town Planning Appeal Board for directions on carrying the Order into effect.

56. We grant the usual costs order on TPAB appeals of no order as to costs. This order *nisi* becomes final 14 days from this Decision.

(Signed)

Mr. CHUA Guan-hock, S.C., JP
(Chairman)

(Signed)

Dr. CHIU Sein-tuck
(Member)

(Signed)

Dr. LIU Chun-ho
(Member)

(Signed)

Ir. Professor LO Man-chi, Irene, JP
(Member)

Town Planning Appeal No. 2 of 2022

Appeal under Section 17B of the Town Planning Ordinance by

Appellant: Take Harvest Limited

Dissenting Opinion

I N D E X

I have read the draft Majority Decision which was prepared by the Chairman of the Town Planning Appeal Board ("**TPAB**"), Mr. CHUA Guan-hock, SC, JP. Having considered the matters set out in the draft Majority Decision, I respectfully dissent.

A. Background

1. This appeal is concerned about an application for extension of time in respect of a conditional planning permission granted by the Town Planning Board ("**TPB**") in 2017 and lapsed in 2021 for a low-rise residential development.

2. The site in this appeal ("**Site**") is located at San Hing Road, Lam Tei, Tuen Mun, New Territories. It is held under a Government Lease for a term up to 2047 for agricultural purposes. Before the Appellant is able to commence its proposed development, it has to apply to the Lands Department ("**LandsD**") for a land exchange approval for converting the Site to residential purposes.

3. At the time the planning permission was applied, it was known that there was a proposed public housing development project of the Housing Department at San Hing Road. The Appellant knew its Site may overlap with a small portion of the proposed public housing development, which at time of the hearing of this appeal was still under study.

4. Since the public housing development was under study and the boundaries have not been ascertained, LandsD put on hold the Appellant's application for land exchange approval.

5. Since the planning permission was granted, the outline zoning plan applicable to the Site has been revised. The Site was rezoned from Residential (E) for a lower density development to Residential (A) ("**R(A)**") for a higher density development. The Appellant and the Respondent have debates on the interpretation of the revised plans (including the Notes and the Explanatory Statement) and the planning intention as to whether the Site is intended only for public housing.

6. I thank the Chairman for giving a helpful summary of the relevant facts and gave the details of the background. I do not intend to repeat them in this dissenting opinion but wish to note the following important facts:

(1) Back in 2017, even before the planning permission was granted, the Appellant knew the public housing development was under study and knew that it might affect its proposed development.

(2) To bring the land exchange approval issue to the Appellant's attention, the following paragraph was included in the Advisory Clauses, which were expressly referred to in the planning permission granted:

> *"(b) to note the comments of the District Lands Officer/Tuen Mun, LandsD that the Site comprises five old schedule agricultural lots held under Block Government Lease. The proposed residential development under application contravenes the lease conditions of the lots. The applicant will need to apply to LandsD for a land exchange to effect the proposal. The proposal will only be considered upon receipt of formal application from the owner of the lots. <u>There is no guarantee that the application, if received by LandsD, will be approved and he reserves his comment on such</u>. The application will be considered by LandsD acting in the capacity as the landlord at its sole discretion…… The actual area of the Site will be subject to survey and verification by the LandsD when application for land exchange is received. Parts of the lots may be being occupied by others. In the event that possession of any parts of the lots cannot be recovered by the applicant, the site boundary should be adjusted and revised."*

(3) From the time the Appellant made the land exchange application, over 6 years passed. It is still uncertain when LandsD would resume considering the Appellant's application, not to mention how likely LandsD would grant a land exchange approval.

(4) TPB's Guidelines 35C (which was revised in October 2022 and became Guidelines 35D) titled "Extension of Time for Commencement of Development" give guidelines as to what may constitute a commencement of development. By such guidelines, the Appellant's proposed development is considered to be not yet commenced.

(5) Since the planning permission was granted, the Appellant has neither submitted building plans to the Building Authority ("**BA**") for approval nor complied with the 6 approval conditions imposed in the planning permission.

B. Main Dissenting Reasons

7. My dissenting opinion is based on the following main reasons:

(1) The purpose of the planning permission regime is to impose control over development and use of land to promote the ***ultimate goal of having "the right development in the right place and at the right time"*** so as to bring about a better organized, efficient and desirable place to live and work. The regime, as well as the extension of time mechanism, are not for encouraging or facilitating any person to develop. Thus, it is not unfair or unjust to the Appellant if the appeal decision does not facilitate it to continue its proposed development.

(2) The time limit imposed in a planning permission is to ***ensure that the proposed development would be implemented within a reasonable period***. When an extension of time application is considered, this purpose and the ultimate goal of planning must be borne in mind.

(3) In exercising its approval powers, TPB should treat all applicants equally and apply the same approval standards in all applications. No regards shall be taken as to whether the applicant is a small or large land developer, or the financial tension faced by the applicant.

(4) The time condition imposed in a planning permission is to promote timely development. Therefore, an applicant for extension of time is expected to demonstrate that progress has been made for the implementation of the development since the planning permission was granted.

(5) ***The Site is not "hypothetical"*** and should not be treated differently from the so-called "real" site.

(6) Regarding assessment criterion 4(a) under Guidelines 35C/D, it is premature to conclude how the Site and the proposed development may be affected even if there is a material change of planning circumstances.

(7) Regarding assessment criterion 4(c), it is inappropriate to give more weight to this criterion unless the Appellant could demonstrate that the delay to the commencement of development is totally unforeseeable.

(8) Regarding assessment criteria 4(d) and (e), the Appellant has failed to demonstrate that reasonable actions have been taken for the implementation of the development and in complying with the approval conditions. ***Non action cannot be taken as reasonable actions***. As a whole, it cannot be said it was reasonable for the Appellant to wait for the land exchange application outcome before taking any other actions because it was reasonable only for maximizing the Appellant's private interests. The purpose of imposing time limit and public interest have not been taken into account by the Appellant.

(9) Regarding assessment criterion 4(f), more weight should be given to this criterion because it is important to ensure that the development would be implemented soon so as to meet the ultimate goal of having "the right development in the right place and at the right time". Besides, public resources should not be wasted on a project without a good prospect.

(10) Regarding assessment criterion 4(h), due consideration has been given to the unusual circumstance that the land exchange application was put on hold indefinitely. But leniency should not be given to the Appellant solely because of this unusual circumstance.

C. History of TPO and Purpose of the Planning Permission Regime

8. Before I elaborate each of the reasons for my dissenting opinion, I think it is necessary to clarify the objects of the Town Planning Ordinance ("**TPO**") and the history of planning control.

9. TPO was originally enacted in 1939. Major amendments were made in 1974 introducing the planning permission regime and in 1991 relating to planning enforcement and the setting up of planning committees and the TPAB.

10. The objects of TPO are reflected in the Long Title of the Ordinance, the existing version reads:

> "To promote the health, safety, convenience and general welfare of the community by making provision for the systematic preparation and approval of plans for the lay-out of areas of Hong Kong (as well as for the types of building suitable for erection in those areas) and for the preparation and approval of plans for areas within which permission is required for development, including making provision for the enforcement of this Ordinance and for related matters."

11. In *Kwan Kong Company v TPB,* HCMP 1675/1994, The Hon. Mr. Justice Waung explained the objects of Hong Kong's planning in simple words (at §20):

> "Planning is concerned with the use of land. Planning, as I have been given to understand, seeks to promote "the right development in the right place and at the right time" so as to bring about a better organised, more efficient and more pleasant place in which to live and to work. Planning is therefore a duty of the Government and it is an important duty and is an essential part of formulating public policies by the Government."

12. In TPB's words[1], "Town Planning in Hong Kong aims to promote the health, safety, convenience and general welfare of the community through the process of guiding and controlling the development and use of land, and to bring about a better organized, efficient and desirable place to live and work."

13. Chief Justice Ma explained in *TPB v Nam Sang Wai Development Company & Ors.*, CACV 25/2014 (at §§32-33) the circumstances in which the planning permission regime was introduced in1974. Before *Singway Ltd v Attorney General,* [1974] HKLR 275, there had been no challenge on the practice of annexing notes to draft plans prepared by TPB and the notes often made provision for the necessary of seeking permission to do certain things under the draft plan. Doubts were raised in *Singway* as to how such permission or approval was to be granted and by whom. Addressing to such doubts, amendments were made to

TPO in 1974 introducing for the first time statutory provisions regarding applications for permission in respect of plans. The new provision was s.16 of TPO.

14. Empowered under s.16(5) of TPO, TPB may impose conditions as it thinks fit to any planning permission granted.

15. Normally, a time limit for commencing the proposed development would be imposed in a planning permission. As explained in paragraph 1.2 of TPB's Guidelines 35C/D, the time-limited condition is **to "ensure that the approved development proposals would be implemented within a reasonable period"**. (emphasis added)

16. Despite the fact that Hong Kong faces a shortage of housing supply, from the Long Title of TPO and taking into account the purposes of planning in Hong Kong, it is clear that TPO, the planning permission regime as well as the time extension mechanism are not for encouraging or facilitating any person to develop. The true purposes should be to maintain a system to enable land development be undergone in an orderly manner in line with public interest.

17. It is not the role of TPB, by relaxing its approval standards or flexibly interpreting its guidelines, to increase the number of residential units. That is the Government's responsibility which may be implemented by, for example, putting more resources to various Government departments to speed up the process of approvals relevant to planning and building. In any event, approval standards should not be compromised for the sake of facilitating land developers on the disguise of "fairness" to them.

18. As a matter of principle and for good practice of public administration, the planning permission standards, including those for granting extension of time, should not be arbitrarily relaxed, varied or deviated to facilitate any developer, whether or not for taking care of their financial tension or return of investment.

19. In exercising any approval powers, the purpose of the planning permission regime must always be borne in mind.

D. Approach to TPB's Guidelines and Extension of Time

20. I thank for and agree with the Chairman's analysis on the approach to TPO and TPB's Guidelines – ascertaining the intention (at Part E of the Majority Decision), except the parts that considered the site in this appeal as a "hypothetical" site (at Part E3, §18).

21. I totally agree that the purpose of imposing time limit in a planning permission is for ensuring development proposals to "…be implemented within a reasonable period" (Guidelines 35C/D at §1.2). This purpose is of utmost important in assessing whether the circumstances and actions of the relevant parties are justified to grant an extension of time.

D1. Equal Treatment

22. The Appellant repeatedly claimed that it is a small company with limited budget. It cannot risk wasting money and time pursuing what may turn out to be a pointless exercise. This is one of the explanations given by the Appellant for not having done certain actions which the Respondent claimed to be "reasonable actions" for fulfilling the assessment criteria under Guidelines 35C/D.

23. I will leave the discussion on what are "reasonable actions" in Part E of this dissenting opinion.

24. As far as the approach to time extension is concerned, a question arises as to whether a small developer with limited resources may be treated differently than a large developer. Or all developers should be treated equally irrespective of their background.

25. In general, the success of an approval system of any Government department largely depends on transparency and consistency. Unless in the relevant statute, the class of applicants is clearly defined and how the approval process/considerations would be in favour of such class of applicants is clearly specified, any discretion favouring an applicant (or a class of applicants) over other applicants may easily attract criticism of unfairness and inconsistency, and eventually jeopardizing the credibility of the entire approval system. Needless to say, arbitrarily relaxing the approval standards is even more undesirable.

26. Therefore, as a general principle in administrative law, a Government department must treat every applicant equally and apply equal standards in considering all applications. An applicant's personal disadvantaged circumstances should only be used as a mitigating factor if penalty may be imposed under an approval system. Where discretion is expressly or impliedly empowered in an approval system, an applicant's personal disadvantaged circumstances may be considered, yet for good administrative practice, guidelines as to how the discretion should be exercised must be in place and transparent.

27. In this appeal, Guidelines 35C/D does not mention a small developer with limited resources may be treated differently, so irrespective of the Appellant's personal circumstances, the general principle that all applicants be treated the same and equal approving standards be applied to all applicants must be upheld.

28. This approach is in line with the planning permission approval process. In an application for planning permission, the applicant is only required to submit substantial information about the proposed development, including the plans/drawings and assessment reports. The applicant's background and personal circumstances, which may reflect whether the applicant is a small or large developer, its financial status and expected return of investment etc. are all irrelevant factors to consider in the application, so as in an application for extension of time.

29. I have to clarify that this does not mean I support the Respondent's assertion that the principle given in paragraph 3.2 of TPB's Guidelines 33A on deferment of decision on representations (which were updated in September 2023 to become Guidelines 33B) should naturally apply in an application for time extension. Paragraph 3.2 (which is the same in Guidelines 33A/B) reads as follows:

> "3.2 Non-planning related reasons (such as the need to assess/re-assess the financial or economic viability of the proposal, or awaiting a better "economic climate") should normally not be accepted."

30. I do not consider the applicant's personal circumstances should be totally neglected. However, in this appeal, the fact that the Appellant is a small developer with limited resources should only be treated in criterion 4(h) of Guidelines 35C/D as one of the relevant

considerations, and this consideration should not be given too much weight compared with other expressed criteria.

D2. Promotion of Timely Development

31. Given that the purpose of imposing time limit in a planning permission is for ensuring development proposals to "…be implemented within a reasonable period" (TPB's Guidelines 35C/D at §1.2), it gives two clear implications: (1) Time is an important factor in a planning permission. (2) The "reasonable period" to implement refers to the time limit imposed in the planning permission which is also the expected time by which the proposed development is expected to have commenced.

32. The importance of time is explained in the closing submissions of the Respondent (at §§14.1 and 14.2), which read:

> "14.1 TPB imposes time limitations to planning permissions (concerning specific projects) within which the developer must proactively and diligently get on with things.
>
> 14.2 The reason for imposing time limitations is that TPB wants the approved developments to be implemented within a reasonable period as planning considerations and circumstances are not static and change over time."

33. I reiterate The Hon. Mr. Justice Waung's explanation of the objects of Hong Kong's planning (at §20, *Kwan Kong Company*) that "Planning…seeks to promote ***the right development in the right place and at the right time***…" (emphasis added)

34. In Hong Kong, land is scarce resources and valuable. Considerations and circumstances relating to land development could be fast changing. Therefore, from a public interest perspective, to ensure that the right development is built in the right place and at the right time, which shall be the **ultimate goal** (emphasis added), it is necessary to impose a time limit in a planning permission, and the time limit is supposed to be strictly complied with. No developer should assume that extension of time approval is readily available.

35. Going back to Guidelines 35C/D, what is the "reasonable period" within which the proposed development is required to be implemented? The time limit specified in the

planning permission shall presume to be the reasonable period. For upholding the ultimate goal of having "the right development in the right place and at the right time", "reasonable time" connotes an undertaking to make progress for the proposed development, ensuring that self-inflicted delays will not occur to make the "reasonable period" be unduly extended.

36. Even having been granted a planning permission, a developer has no obligation to implement the development. The planning permission only gives an opportunity to the developer to develop, not to compel the developer to implement the development. Therefore, the connoted undertaking to make progress would not be relevant when the developer has already commenced implementing the development, or it genuinely intends to continue with the development and seeks an extension of time to implement.

37. If the developer has showed no genuine intention to continue with the development, there is no point to grant an extension of time. Making progress for the development is an important indicator that the developer genuinely intends to continue and that the development has not been made stagnant since the planning permission was granted. It also serves as an indicator that the developer has seized the time to implement, ensuring that the development is still in line with the contemporary land development considerations and circumstances. This relates to public interest.

38. Failing to demonstrate progress has been made since the grant of planning permission, and accordingly the developer may not intend to continue with the development, could be (but not necessarily be) a strong reason not to grant an extension of time. It is because after all, the ultimate goal of having "the right development in the right place and at the right time" must be secured for public interest. I do not agree that in this way public interest will unduly override the developer's private interest to develop, because the developer has been given an opportunity to develop within the original time limit but choose not to use it. Besides, rejection of an extension of time will not deprive the developer's right to apply for a new planning permission.

39. I agree that (at §18(1) of the Majority Decision) while we construe TPB's Guidelines, TPAB's role is not limited or fettered to only considering whether there are "good justifications" under *TPB 35C* (at §1.2). Public interest must also be taken into account.

40. Therefore, if a developer chooses not to make any progress or make very little progress to the development within the original time limit, TPAB has to scrutinize the circumstances. All assessment criteria under Guidelines 35C/D should be properly considered and weighted in line with the ultimate goal of having "the right development in the right place and at the right time".

41. TPAB should be mindful not to grant an extension of time in circumstances which may result in encouraging the developers to have a fluke mind that they will have a second chance (by seeking an extension of time) to make progress to the development to meet the ultimate goal of planning. Striving to meet the ultimate goal of planning should not be neglected in considering an extension of time application since it also promotes a balance of the private interests of the developer and the public interests in the context of planning in Hong Kong.

D3 "Hypothetical" Site?

42. Under TPO, "development（發展)" is defined as carrying out building, engineering, mining or other operations in, on, over or under land, or making a material change in the use of land or buildings. No distinction is drawn in TPO between a "real" or a "hypothetical" development.

43. Further, none of TPO or TPB's Guidelines 35C/D or Guidelines 20 makes any reference to the term or concept of "hypothetical" site or "hypothetical" implementation.

44. Therefore, I do not agree that the ultimate object of obtaining planning permission ensuring development proposals be implemented within a reasonable period should only refer to an actual site and implementation, rather than a site and implementation that are hypothetical (suggested at §18 of the Majority Decision).

45. Whether a proposed development can actually be commenced depends on satisfaction of a number of preconditions, some are legally/approval related like the requirement of obtaining a land exchange or lease modification in this appeal, some are resources related, and some are nature/climate related. It is inappropriate and might likely attract arbitrary decision if a site would be labelled as "hypothetical" whenever there is a precondition which is particularly difficult to satisfy in the circumstances.

46. On the other hand, in interpreting the purpose of time condition which is to ensure development proposals "*would be implemented within a reasonable period*" (at §1.2, TPB's Guidelines 35C/D), I do not agree this envisages an approved development proposal and site being actual, rather than hypothetical (suggested at §30(1) of the Majority Decision).

47. It is difficult to understand that while a developer has spent so much time, money and efforts in obtaining a planning permission, and TPB has allocated so much resources to consider the application, a proposed development which has been approved could ever be labelled as "hypothetical" extension of time is considered. It is also unconvincing that under the planning permission regime, TPB would approve any "hypothetical" development which has no real prospect or the applicant has intention to implement. If all other aspects show a good prospect, but there is a factor which would decisively prevent the commencement of development, it could only be said the development carries a risk. Existence of risks should not make a site become "hypothetical".

48. In reality, every site might encounter certain kinds of difficulties hindering the implementation of the proposed development or even making the proposed development unable to commence. These are expected risks that a developer must take. Hindrance in obtaining the required land exchange or lease modification is just one of the examples.

49. When risks inevitably involved in any proposed development, two questions arise. (1) Whether TPB (when considering a s.16 or 16A application) and TPAB (when considering an appeal) shall take into account the impact of such risks? (2) Whether it is appropriate to

label proposed developments facing higher risks as "hypothetical" projects and treat them differently from those with lower risks?

50. In answering these two questions, the role of TPB must be considered. Under TPO, TPB has two principal functions. The first is to make provision for the systematic preparation and approvals of plans, and the second is to consider applications by persons who seek the required permission under a plan. In performing these functions, TPB must act for the following two ultimate purposes:

    (1) the ultimate purpose of TPO (at s.3), which is *to promote the health, safety, convenience and general welfare of the community*; and

    (2) the purpose of imposing time condition in a planning permission, which is *to ensure the implementation of the proposed development within a reasonable period*.

51. Although a land developer is part of the community, compared with the vast majority of other stakeholders in the community, it would be inappropriate to take an approach which over facilitates a land developer by taking care of their risk assessment and readily to grant an extension of time if they face a high risk.

52. TPB has no obligation to assess the impact of the risks faced by an applicant. Thus, it should not base on the level of risks faced by the applicant, label any site as "hypothetical" or "real". All sites should be treated the same, regardless the existence of risks and their impact to the applicant.

53. More reasons for not treating the site in this appeal as "hypothetical" will be elaborated when the acceptable situations for submitting a building plans application is discussed below in Part E4 of this dissenting opinion.

E. Assessment Criteria under TPB's Guidelines 35C/D

54. I agree with the Chairman's analysis on the general approach to town planning appeals (at Part F of the Majority Decision) and note that regarding TPB's Guidelines, "it is common

ground that these properly interpreted, should be followed unless there is good or cogent reason" (at §22(1)).

55. I would like to add that in considering the assessment criteria in Guidelines 35C/D, the modern approach is to adopt a purposive interpretation[2] i.e. the purpose of imposing time limit must be borne in mind.

56. I will therefore follow Guidelines 35C/D and analyze each of the assessment criterion.

E1. Criterion 4(a) – material change in planning circumstances

57. I appreciate and agree with the Chairman's interpretation of Approved OZP 12 and the points to be noted regarding the planning intention (at §§23 and 24 of the Majority Decision).

58. Having considered the evidence given by the witnesses and the arguments of both parties, on balance, I prefer the Appellant's arguments.

59. Regarding the analysis of criterion 4(a), I wish to add:

    (1) In my view, the material change in planning circumstances must be one that relates to the use and development of land ***and***, on a balance of probability, would affect the approved development. Besides, the material change cannot just be a "potential" change.

    (2) Even if it is not just a planning intention but the Government actually decides to go ahead with the public housing development (in fact, the Government has not yet decided and announced), there are still too many uncertainties. For example, what are the boundaries? Whether part of the area for the public housing development would overlap with the Appellant's Site? Whether the Government might agree to carving out the Appellant's Site from R(A) and rezoned it for private residential development? Whether the Government may resume the Appellant's Site for the public housing development? While the outcome is quite uncertain, even if the

circumstances constitute "a material change in planning circumstances", it is premature to conclude that the change will indeed affect the Appellant's proposed development and such change can be used as a ground to reject the extension of time application.

(3) Occurrence of a material change in planning circumstances does not necessarily mean an extension of time application must be rejected or must be approved. A party which makes a claim shall have the burden to prove it.

In this appeal, the Appellant did not claim that criterion 4(a) may support its application for an extension of time. On the other hand, the Respondent asserted that if it is held that the rezoning, the change of planning intention and the proposed public housing development etc. constitute a material change of planning circumstances, criteria 4(a) would become a weighty consideration opposing to an extension of time.

In my view, to support the Respondent's assertion, the Respondent has to take a further step by demonstrating in detail how the material change relates to the use and development of land, how the material change will affect the approved development (including the timing of its implementation), and accordingly why the application for extension of time should be rejected.

(4) Even if it is concluded that the material change of planning circumstances cannot be used as a reason to reject an extension of time application, it does not necessarily mean the material change supports an approval. The impact should only be that the material change is neutral to the consideration of the application, and no weight will be given to criterion 4(a) in balancing with other criteria.

E2. Criterion 4(b) – adverse planning implications

60. In this appeal, neither party discussed much about whether there are any adverse planning implications arising from the extension of time. So, I will take there is no adverse planning implication.

61. Following the natural implication, if an adverse planning implication exists, it opposes to an extension of time application. But non-existence of any adverse planning implications should not be treated as a factor favouring an extension of time approval. Therefore, no weight will be given to criterion 4(b) in balancing with other criteria.

E3. Criterion 4(c) – technical/practical problems beyond control

62. Criterion 4(c) is the major criterion relied on by the Appellant in this appeal. The relevant fact is that delay which is beyond the control of the Appellant occurs in the Appellant's application for a land exchange or lease modification since the application has been put on hold by LandsD for an indefinite period. By law, the Appellant cannot implement the development without the land exchange or lease modification. The delay falls within the delays contemplated under criteria 4(c).

63. The Appellant asserted in its Technical Planning Letter submitted together with the extension of time application that fulfilling criterion 4(c) alone is a good reason and justification for an extension of time approval. However, no authority or reasoning was given in support of this assertion.

64. Counsel for the Appellant argued that criterion 4(c) should be given the most weight compared with other relevant criteria for the following reasons:

    (1) the delay is continuing with no indication on when it will end; and

    (2) it is an unusual circumstance that LandsD has put an application on hold indefinitely given that a public housing development which may affect the Appellant's Site is under study. The Appellant asserted that LandsD should have commenced processing the application within a reasonable period, yet it failed to do so in over 6 years' time.

65. Having duly considered the delaying circumstances that criterion 4(c) envisages and the circumstances in this appeal (including the time and efforts given by the Appellant in

pursuing the land exchange or lease modification), I do not agree to give more weight or even most weight to criterion 4(c) in support of the Appellant's extension of time application for the following reasons:

(1) More weight may be given to criterion 4(c) if the circumstances are those where other assessment criteria in Guidelines 35C/D have no relevance or little relevance in properly considering an extension of time application. The circumstances in this appeal are certainly not the case. Criteria 4(d) to (f) have high relevance.

(2) The type of delay encountered by the Appellant is not so peculiar that special weight should be given. In fact, the delay is "a delay in land administration procedures" which is an example of delays normally contemplated under criterion 4(c).

(3) Even though the indefinite delay suffered by the Appellant may be unusual, the delay itself is not unforeseeable.

In this appeal, there is ample of evidence showing that as early as the planning permission application was processed, both the Appellant and TPB were well aware that the site might fall within the area of a proposed private housing development under study. It is thus not unforeseeable that the land exchange application may be delayed or even rejected, though the Appellant might not subjectively expect the delay would occur.

On Dr. John Hui's evidence, the Appellant was an experienced developer for small developments. It knew there is a risk that LandsD may not grant the land exchange and it accepted such risk as a development risk that it must take.

(4) The Appellant was first informed in writing by LandsD on 26 July 2018 that the land exchange application had been put on hold, that is over 2 years before the time limit in the planning permission expired. If the delay is foreseeable, the Appellant should have sufficient time to re-consider its position and take appropriate actions to make progress in implementing the development within the time limit, rather than relying solely on criterion 4(c) to seek extension of time. After all, the impact of the delay is not to the extent that making any progress to the development be impossible.

(5) Since the delay caused by LandsD is not arbitrary or neglectful but for a good cause, the delay should not be treated as a grievance factor which may rationalize more weight be given to criterion 4(c), giving extra favour to the Appellant.

66. In short, no extra weight should be given to criterion 4(c) by the mere fact that LandsD caused an indefinite delay. The proper weight given to criterion 4(c) will be discussed in Part E10 below.

E4. Criteria 4(d) & (e) – what are "reasonable action(s)" and "practicable"?

"reasonable action(s)"

67. Both criteria 4(d) and 4(e) refer to "whether…reasonable action(s)…have been taken". Following the well-known criteria in interpreting a statute or legal documents (at §15 of the Majority Decision), I consider criteria 4(d) and 4(e) should be interpreted as follows:

(1) The reasonable action(s) must be ***for a particular purpose***. In criteria 4(d), the particular purpose is specified as "for the implementation of the approved development", and in criteria 4(e), it is specified as "in complying with any approval conditions". In considering how criteria 4(d) and (e) are relevant to the considerations for granting an extension of time, the ultimate purpose should be for upholding Hong Kong planning's ***ultimate goal of having "the right development in the right place and at the right time"***.

(2) Since the applicant is required to provide an account of all actions taken to implement the development since the granting of planning permission (at §3.4(c) of Guidelines 35C/D), for the purpose of criteria 4(d) and 4(e), actions which may be taken into account should mainly be ***actions taken after the planning permission*** was granted rather than before.

(3) In view of the context and purpose of Guidelines 35C/D, the criteria should be substantively rather than nominally fulfilled. Therefore, in considering whether a criterion has been fulfilled, the applicant should demonstrate that the reasonable

action(s) in question are cumulatively ***sufficient to make a notable progress for the particular purpose***.

As a comparison, criteria 4(d) and (e) were not phrased to read "whether any reasonable action (*singular form*) has been taken". Therefore, if only one reasonable action is taken and such action is trivial to make a progress in achieving the particular purpose, it would be erroneous to treat the criterion is still fulfilled. In other words, impact of the actions is a more relevant factor to consider than the applicant's efforts (including what the Respondent described as "genuine efforts").

(4) In certain context, like the tort law, non action could be treated as an action because non action actually describes the fact that when a person takes no action, that person is in fact taking an action by making a choice. But this implication shall not apply to the circumstances where proactive actions are required to achieve a particular goal.

For the interpretation of criteria 4(d) and 4(e), it is common sense that non action will definitely not be able to achieve the specified purpose of "implementation of the approved development" or "complying with approval conditions". Therefore, the only sensible interpretation is "whether reasonable ***proactive*** action(s) have been taken". Non action shall not be taken as "reasonable action(s)".

"practicable"

68. There is no dispute that TPB's Guidelines should be read in a practical, down to earth way, and not in a mechanistic way.

69. It follows that a "reasonable action" should be interpreted as an action which is "practicable" to be taken in the circumstances for the particular purpose.

70. What is "practicable"? First, in making an assessment, objective standard rather than subjective standard shall apply, otherwise TPB would be unable to exercise its statutory powers fairly by treating every applicant the same and applies the same standards.

71. By dictionary meaning, objective standard is based on conduct and perspective external to a particular person, and subjective standard is peculiar to a particular person and based on the person's individual views and experiences.[3]

72. It is important for TPB to adopt an objective standard in considering an extension of time application with a view to maintaining the consistency and credibility of the approval system, and to avoid any unnecessary suspicion that TPB is in favour of small developers than large developers, or vice versa.

73. In this appeal, the issue of practicability was debated. The parties made reference to "what a reasonable developer should have done" in trying to define what is practicable and accordingly to assess whether criteria 4(d) and 4(e) are fulfilled.

74. In my view, it is undesirable to make reference to "what a reasonable developer should have done" because in the present context, there is virtually no "reasonable developer". In reality, many people (especially in business) will not spend money and time pursuing what may turn out to be in vain. People will make their own assessment whether and how much money and time would be spent on an uncertain circumstance. There is no general standard for such assessment by individuals. Some people may be more greedy, some people may be willing to take more risks and to spend more.

75. Accordingly, if other developers were facing the same set of circumstances as in this appeal, they would probably make different decisions as to what actions to take, based on their own views and experiences. There will be no objective standard, only their subjective standard.

76. So, in considering criteria 4(d) and 4(e), an objective standard should be adopted to determine what is practicable, this is to assess what actions should be taken for the ultimate purpose of making progress for ensuring the development be implemented within a reasonable period. Factors such as whether the applicant is a small developer with limited resources and the applicant's subjective views shall be disregarded.

77. Considering "what is practicable" from another angle, the practicability of achieving certain purpose can be demonstrated legally, technically and financially.

78. Comparing the three, the easiest to determine is whether an action is "legally practicable", followed by "technically practicable", and the most difficult to determine is whether an action is "financially practicable". It is because the first two can often be measured by objective standard, but subjective factors inevitably involved in "financial practicability".

79. In this appeal, although these 3 notions of practicability were not expressly referred to, the parties did consider the legal practicability of certain action (e.g. whether an applicant is "prevented" by law/guidelines from making building plans submission) and tried to distinguish it from the technical practicability (e.g. priority of the Appellant's suggested 3 Steps in implementing the development). Financial practicability was suggested by the Appellant to justify whether some actions should have been taken and some not.

80. The parties' arguments on what is "practicable" will be discussed in Parts E5 and E6 below. In here, I wish to sum up my analysis that objective standard rather than subjective standard should apply in considering criteria 4(d) and 4(e).

E5. Criterion 4(d) – reasonable action(s) for implementation

Examples of reasonable action(s) – what criterion 4(d) really considers

81. Taking the literal meaning, "submission of building plans for approval" and "application for Small House/land exchange" are only examples of "reasonable action(s)" for the implementation of the approved development. They are not meant to be the only "reasonable action(s)" which can be taken into account.

82. The Appellant is free to suggest that other actions may also be considered as "reasonable action(s)" for the implementation of the approved development. But the Appellant did not do so.

83. Instead, the Appellant demonstrated that it has made an application for land exchange and tried to argue that this is sufficient to fulfil criterion 4(d) because the criterion refers to "submission of building plans for approval" ***or*** "application for Small House/land exchange" rather than and (i.e. taking both actions). Apparently, the Respondent disagreed with this argument.

84. Then there were debates between the Appellant and the Respondent on whether both actions must be taken or just one will be sufficient for fulfilling criterion 4(d). It appears to me that in their debates, little focus had been put on the fact that "submission of building plans for approval" (including actions to comply with the approval conditions) and "application for Small House/land exchange" are only examples of "reasonable action(s)", they are not meant to be exhaustive.

85. Little focus had also been put on how criterion 4(d) is relevant to the considerations for granting an extension of time. In my view, based on my analysis in Part E4 above, what criterion 4(d) really considers is that ***since the planning permission was granted***, whether the applicant has taken **sufficient** actions to the extent that ***progress has been made*** for the implementation of the development with a view to ensuring that the development will be implemented within a reasonable period so as to uphold ***the ultimate goal of having "the right development in the right place and at the right time"***. In other words, criteria 4(d) is result-oriented, rather than process or subjective intention-oriented.

86. Of course, criterion 4(d) does not intend to create onerous burden on the applicant. So, in my view, "reasonable action(s)" should only mean actions that are ***legally and technically practicable*** to take for the implementation of the development and for upholding the ultimate goal of planning. Financial practicability likely involves subjective elements like the applicant's financial status, resources and expected investment return, therefore it should be outweighed by legal practicability and technical practicability.

Building plans submission and "hypothetical" site

87. One of the issues that the Appellant and the Respondent had debated on was that whether the Appellant should have made building plans submission, and/or alternatively complied with the approval conditions, in order to fulfil criterion 4(d).

88. The Respondent argued:

(1) Other than applying for a land exchange, there are many more actions that the Appellant could have taken for the implementation of the development, such as making building plans submission and commencing to comply with the approval conditions, yet the Appellant chose not to take these actions without any good or cogent reason.

(2) On Dr. Hui's evidence, the Appellant could and should have but declined to act on its consultant's advice to apply for general building plans ("**GBP**") approval. The Appellant declined for saving time and costs.

(3) The Appellant's decision not to spend time and costs on making building plans submission pending the outcome of the land exchange was not reasonable because a developer always runs the risk that all the preparation would prove to be futile at the end.

(4) Requiring the Appellant to apply for GBP approval and take other available steps to implement the development cannot be said futile or "paper approvals". In a similar appeal case[4], Join Smart managed to obtain building plans approval and partially complied with the approval conditions notwithstanding that its land exchange application was pending.

(5) Even if GBP approval were not granted, the Appellant's efforts to satisfy planning conditions and applying for GBP approval would be relevant factors favouring an extension of time as in *Join Smart case*.

89. The Appellant argued:

(1) There are 3 steps in implementing the development. Step 1: comply with the approval conditions; Step 2: submit building plans to BA for approval; Step: apply to LandsD for a land exchange. The planning permission provides no time limit for taking Step 2 i.e. making building plans submission.

(2) It is up to the Appellant to choose whether to take Steps 1, 2 and 3 in parallel.

(3) The Appellant had to show ownership or a realistic prospect of control of the site before BA may accept its building plans submission, but the Appellant has not obtained the land exchange since its application has been put on hold indefinitely by LandsD.

(4) The Appellant saved limited public resources and did not impose an administrative burden on BA.

(5) It is reasonable for the Appellant to save costs while the land exchange application has been put on hold indefinitely.

(6) It was futile and pointless to take Steps 1 and 2 while Step 3 is put on hold because it would not achieve the ultimate goal of implementation of the approved development.

(7) *Join Smart case* is not a precedent for taking Steps 1, 2 and 3 in parallel because *Joint Smart case* should be distinguished for having different facts and the applicant in that case was a large developer with many more resources.

90. By analogy, the Appellant referred to *REDA case*[5] to support its arguments, in particular points (3) and (4) above. In my view, REDA case should be distinguished because it has different facts and background, and accordingly I do not agree with the Appellant's arguments points (3) and (4). My analysis is as follows:

(1) *Different Background*

In *REDA case*, REDA applied for judicial review on BA's policy that proof of ownership or realistic prospects of ownership of the "site" in question were required when applying for GBP approval. Similar proceedings challenging BA's policy could be traced to the 2010-2011 Policy Address where it was announced that concessions regarding gross floor areas in return, for, inter, green and amenity features would not apply to new building plans submitted on or after 1 April 2011. From the perspective of property developers, their main concerns relate to the maximum development potential of a particular site, but a large number of development parameters cannot be known until BA gives approval. Therefore, for the purpose of getting greater commercial certainty, some developers submitted applications for GBP approval without being able to prove ownership or realistic prospects of ownership of the site they wish to explore.

In this appeal, ownership of the Site is out of question. The major problem faced by the Appellant was that its application for land exchange has been put on hold indefinitely resulting that the Site was not converted from agricultural purposes to residential purposes. This type of land exchange application delay was not contemplated in *REDA case*.

(2) *Ownership and control*

I agree with Ribeiro PJ's view in *REDA case that "ownership and realistic prospects of control* are often directly relevant to ascertaining the extent, position and nature of the site as an essential step in calculating the permitted parameters of the development." (at §22)

However, distinguished from *REDA case*, what this appeal really concerns about was land exchange, rather than ownership and realistic prospects of control. A land exchange would have impact on whether the Appellant can use the site for residential purposes, rather than on the building structure and designs. This is because if a land exchange is granted, there would unlikely be a substantial change to the boundaries and site area substantial, affecting the building structure and designs and also the application to BA. If a substantial change to the boundaries and site area does occur, the approved development probably has to be revised, and the planning permission cannot be proceeded anyway.

(3) *"Hypothetical" site*

REDA case referred to a 1983 Privy Council decision in *Attorney General v. Cheng Yick Chi*, in which Lord Fraser of Tullybelton considered the meaning of site and held that: "the land which forms a "site" for the purposes of the relevant legislation means land which a developer *bona fide* proposes to include in the development, being land which he owns or which he has a realistic prospect of controlling. (at §6)". Following this meaning, *REDA case* referred a site to be "hypothetical" if ownership of the site or a realistic prospect of controlling is not proved.

Taking into account the term "hypothetical" was arisen under such circumstances, it would be inappropriate to make an analogy and label the Appellant's Site to be "hypothetical" because ownership of the Site is certain, just that land exchange approval is pending to change the permitted use.

(4) *Public resources*

Tang PJ in *REDA case* considered that if a site could be hypothetical (i.e. ownership of site and a realistic prospect of controlling cannot be proved), BA could be vexed by a flood of hypothetical proposals (at §60).

However, it is unlikely that there would be many cases like the situation faced by the Appellant, i.e. LandsD putting on hold of a land exchange application indefinitely, yet the land owner decides to make application to BA for GBP approval in parallel with the pending land exchange application. Therefore, an argument that it is prudent and sensible not to seek GBP approval with a view to avoiding a floodgate of applications to BA as well as saving public resources and avoiding putting administrative burdens on BA is unlikely sustained.

Furthermore, Government departments have an implied obligation to promote good preparation of submissions and encourage exchange of views. By making submissions, the applicant may receive comments from the relevant departments, improving their preparation for future submissions, and in the long run making the approval process more efficient. (see also Dr. Hui's evidence at §92 below). In any event, if any Government department considers submissions made while land exchange application is pending create a waste of public resources or administrative burden, it may issue guidelines to stop undesirable submissions[6].

Therefore, potential waste of public resources is not a good reason for not making submissions.

91. Regarding the Appellant's arguments (points 1, 2 and 5), my views are:

(1) By nature, the planning permission is just a permission rather than an order. It does not compel the Appellant to implement the development or take any action (including to follow any priorities of actions). Therefore, it is true that the Appellant can choose whether to take Steps 1, 2 and 3 in parallel, or to choose not to take Steps 1 and 2 until there is a good prospect for Step 3.

(2) However, I do not agree with any assertion that it was "practicable" not to take Steps 1 and 2 while Step 3 is put on hold.

(3) As discussed in Part E4 above, practicability can be demonstrated legally, technically and financially.

(4) *Legally practicable*

On evidence in this appeal and taking Join Smart's experience, the Appellant was not prevented by law or BA's departmental practice from making building plans submission notwithstanding that the Appellant's land exchange application was pending. Therefore, it is not legally not practicable to make building plans submission.

(5) *Technically practicable*

The Appellant's witnesses asserted that the Appellant cannot make building plans submission because before land exchange is granted the boundaries and site area cannot be ascertained for preparing the draft building plans. This assertion is incorrect since making building plans submission is proved to be legally practicable.

But this assertion indirectly raised a valid issue that a lot of assumptions such as boundaries and site area have to be made in preparing the draft plans, and that if such assumptions were later proved to be inaccurate, the relevant draft plans have to be reprepared. Nevertheless, in practice, it is not uncommon to revise plans based on the relevant Government departments' comments after submission. On balance, since the technical inconveniences can be resolved, making building plans submission is still technically practicable as a whole.

(6) *Financially practicable*

On Dr. Hui's evidence, making each building plans submission would cost over HK$1.5 million, and the Appellant is only a small developer and has to save time and financial resources for two other projects. As the land exchange application was put on hold indefinitely, the Appellant took the view that it was financially not practicable to make building plans submission.

Nevertheless, I prefer the assertion of the Respondent's witness, Mr. Mak Weng Yip Alexander (Senior Town Planner of the Planning Department), that "financial viability and costs implications are not justified grounds for not taking any action for compliance with approval conditions and submission of building plans so as ***to take forward the approved development***." (emphasis added)

(7) Bearing in mind the ultimate goal of the planning permission regime and the purpose of imposing time condition, legal and technical practicability should prevail over financial practicability when deciding on what actions are "practicable" as a whole. Accordingly, I am of the view that submission of building plans approval is practical as a whole, notwithstanding that the land exchange approval was pending.

92. Regarding the Appellant's argument (point 6), i.e. it was futile and pointless to take Steps 1 (compliance with approval conditions) and 2 (building plans submission) while Step 3 (land exchange application) is put on hold, I prefer the Respondent's argument (point 5) i.e. even if GBP approval were not granted, the Appellant's efforts to satisfy planning conditions and applying for GBP approval would be relevant factors favouring an extension of time.

It is true that making building plans submission does not only can serve one purpose i.e. obtaining BA's approval. On Dr. Hui's evidence, submission of building plans application could be used "as a prop, as a testing limits, to see what the reactions of various departments are". In other words, even if building plans approval cannot be obtained before the land exchange is granted, it would be helpful to obtain the departments' comments and expedite any future re-application or modification of application. In this way, it ensures that the development could be implemented within a reasonable period.

93. Regarding the Appellant's argument (point 7), although *Join Smart case* has different facts, it demonstrated that it is possible to take Steps 1, 2 and 3 in parallel notwithstanding that the land exchange application was pending. So, Dr. Hui's assertion that the Appellant *cannot* make building plans submission shall fail.

Land exchange application

94. The Appellant was not "doing nothing" since the planning permission was granted. Supported by evidence, the Appellant had incurred time, expense, and efforts in applying for a land exchange and proactively liaising with various Government departments (including the Development Bureau and Housing Bureau) purporting to speed up the land exchange application process (collectively "**LEA Efforts**").

95. However, whether the Appellant's LEA Efforts were sufficient to demonstrate that reasonable actions have been taken for fulfilling criterion 4(d)?

96. I am not suggesting that one action or just a few actions will definitely not be sufficient anyhow. But I have to emphasize that to fulfil criterion 4(d), the action(s) taken must have made a progress to the implementation of the development.

97. If efforts are made without bringing any notable progress, then TPB in considering criterion 4(d) should scrutinize the circumstances and explore why the applicant got itself into such a position that having made efforts but without gaining any progress to the development. In the absence of very unusual circumstances (e.g. gross injustice suffered by the applicant or undue delays in pending legal proceedings) which are not otherwise considered in other criteria under Guidelines 35C/D, merely efforts (rather than actual progress) made by the applicant would only be given little weight in considering whether criterion 4(d) is fulfilled. (see also discussion at §67(3) above)

98. In this appeal, it is apparent that the Appellant's LEA Efforts did not make any progress to the implementation of the development. Its efforts were futile since the Appellant's land exchange application has been put on hold indefinitely without the Appellant's fault.

Undoubtedly, this is a circumstance beyond the control of the Appellant, but this has been duly considered in criterion 4(c) and there are no other very unusual circumstances which may justify that this "beyond-control" factor should be "double-counted" in criterion 4(d). As such, LEA Efforts would be given only little weight.

99. In short, LEA Efforts alone are not sufficient to satisfy criterion 4(d).

Short conclusion on criterion 4(d)

100. TPB's Guidelines should be read in a practical, down to earth way. Accordingly, criterion 4(d) calls for substance rather than nominal. Therefore, to fulfil criterion 4(d) favouring an extension of time, the applicant must demonstrate sufficient reasonable actions have been taken, making a notable progress for the implementation of the development.

101. In my view, it was right for the Respondent to argue that many actions could have practicably taken by the Appellant to fulfil criterion 4(d) but the Appellant had failed to take them. The Appellant has also failed to provide a good and cogent reason for not having taken such actions. Nevertheless, the Appellant's decision of not taking any other actions would not be penalized, yet would not give any weight to fulfil criterion 4(d).

102. So, the only relevant reasonable actions taken by the Appellant are LEA Efforts. Those efforts alone are not sufficient to make any progress for the implementation of the development, and thus in conclusion, the Appellant failed to fulfil criterion 4(d).

E6. Criterion 4(e) – reasonable action(s) in complying with approval conditions

103. I will adopt the same approach of analysis applied in criteria 4(d) in considering criterion 4(e).

104. Based on my analysis in Part E4 above, I consider that what criterion 4(e) really considers is that ***since the planning permission was granted***, whether the applicant has taken ***sufficient*** reasonable action(s) ***to the satisfaction of relevant Government departments*** in complying with ***any (not necessarily all)*** approval conditions. The wordings "to the

satisfaction of relevant Government departments" connotes that notable progress should have been made for the implementation of the development. Merely submitting plans and proposals to the Government departments may not be sufficient to fulfil criterion 4(e) because those submissions might not be to the satisfaction of the relevant Government departments.

105. In considering criterion 4(d), the Appellant has indeed taken some actions (i.e. LEA Efforts) and thus it focused on arguing that the actions it had already taken are sufficient to fulfil the criterion, other actions are not practicable to be taken. However, in considering criterion 4(e), it is undisputed that the Appellant has not made any submission to the Government departments for complying with the approval conditions. Therefore, the Appellant shifted the focus of its arguments.

106. The Appellant argued:

(1) First, ***the Appellant was reasonable not to make approval conditions submissions*** for the same reasons under its arguments for criterion 4(d), i.e. argument points 2 (free to choose), 4 (saved public resources), 5 (saved costs), 6 (futile to submit) and 7 (experience in *Join Smart case*).

(2) Second, compliance with approval conditions (Step 1) involves a number of Government departments. If submissions were made, administrative burdens would be placed on them.

(3) Third, ***there is no time limit for complying with the approval conditions***. According to TPB's Guidelines 20, the approval conditions have to be complied with "*as far as practicable before the use applied for actually come into place*" (at §1). Given that there is no time limit to comply, it cannot be unreasonable to wait at least until the land exchange application (Step 3) is considered on its merits and processed.

107. For the same reasons I gave in considering criterion 4(d) (at §§ 90-93 above), I reject the Appellant's first and second arguments and would like to add:

(1) What criterion 4(e) really considers is that whether the applicant has made submissions making a progress to the implementation, rather than whether the applicant has acted unreasonably by not making submissions. After all, even if the applicant has acted unreasonably, it will not be penalized.

(2) In criterion 4(e), "reasonable actions" should be construed by reference to a specified purpose, i.e. complying with the approval conditions. It is illogical to say that even non action can bring about the compliance of the approving conditions.

(3) Attention should be paid to the following important words in criterion 4(e): "***to the satisfaction of relevant Government departments***". How can the Government department be satisfied if the applicant has not even made any submission?

(4) Concluding my points (2) and (3) above, it is illogical that ***non action*** can ever be taken as "reasonable action(s)" in criterion 4(e). Similarly, any arguments that the Appellant was reasonable not to make approval conditions submissions, and thus criterion 4(e) should either be treated not relevant or be given no weight must fail.

(5) I tried to understand why the Appellant raised that it was reasonable not to make approval conditions submission. If the Appellant's intention was to prove criterion (e) is fulfilled, it is groundless because the mere fact that no submission has been made to comply with the approving conditions would give a straight forward conclusion that criterion 4(e) is not fulfilled. But if the Appellant's intention was to lead TPAB to think that even if criteria 4(d) and 4(e) were not met, the appeal board should be lenient to the Appellant because the Appellant had acted reasonably in the unusual circumstances beyond its control, the "beyond control" factor has already been raised in considering criterion 4(c) and "the Appellant was reasonable" could only be submitted as "other relevant considerations" when considering criterion 4(h).

(6) The Appellant tried to rely on Guidelines 20 and emphasized that approval conditions should only be complied with ***as far as practicable*** (at §1 of Guidelines 20). However, on evidence given in this appeal, taking actions to comply with the

approval conditions by making approval submissions is ***practicable as a whole***. Regarding the assessment of practicability, please make reference to §91 above.

108. About the Appellant's third argument, criterion 4(e) does not say "reasonable action(s)" should be measured by making reference to Guidelines 20. The Appellant nevertheless argued that Guidelines 20 were relevant to criterion 4(e).

109. Guidelines 20 do not mention anything about extension of time or Guidelines 35C/D but provide explanation on the time requirements for fulfilling the approval conditions. There are three types of conditions, each subject to different time requirement: first, conditions imposed with time limit prescribed in the planning permission; second, conditions to be complied with before the Building Plan approval; third, conditions to be complied with after the Building Plan approval.

110. The Appellant asserted that "there is no time limit for complying with the approval conditions" and the approval conditions "have to be complied with as far as practicable before the use applied for actually come into place". I think what the Appellant actually meant is that when the application for extension of time is made, the time by which the approval conditions must be complied with has not yet come, i.e. the approval conditions were not due. The Appellant submitted that "it cannot be unreasonable to wait at least until the land exchange application (Step 3) is considered on its merits and proceeded or until its outcome in about 22 weeks". It appears to me that the Appellant was trying to argue that it has acted reasonably and that since no actions are due to be taken for complying with the approval conditions, no "reasonable action(s)" virtually exist and thus criterion 4(e) should not be given much weight.

111. I reject the Appellant's third argument for the following reasons:

(1) Whether there is any time limit for complying with the approval conditions (i.e. whether actions are due) is irrelevant. It is because what criterion 4(e) really considers is whether the applicant has made submissions making a progress to the implementation, rather than whether the applicant has followed the time limit or priorities in complying with the approval conditions.

(2) In practice, application for extension of time is required only if the development has not commenced i.e. approval of building plans or land exchange is not obtained (see §2 of Guidelines 35C/D). The applicant has probably not even made any building plans submission and thus the relevant approval conditions which are to be complied with before building plan approval are not yet due. Nevertheless, there is nothing wrong for an applicant to comply with the approval conditions (or some of them) before they are due. On the contrary, complying with the approval conditions proves that progress has been made to the development and shows the applicant's commitment, and these are factors favouring an extension of time application. Therefore, it is illogical (and would be unfair to applicants who have taken actions voluntarily in advance) to argue that virtually no "reasonable action(s)" exist because no actions for complying with the approval conditions are due.

(3) Following my analysis in §107(5) above, if the Appellant's intention was to lead TPAB to think that leniency should be given to the Appellant since it is not unreasonable for it not to comply with the approval conditions but wait until its land exchange application is processed, this issue could be submitted as "other relevant considerations" when considering criterion 4(h).

112. In short, I consider that the Appellant has not fulfilled criterion 4(e). Nevertheless, criterion 4(e) is a relevant criterion to consider in considering extension of time application and should be given appropriate weight notwithstanding that the Appellant tried to argue it was reasonable for it not to comply with the approval conditions.

E7. Criterion 4(f) – good prospect to commence

113. Criterion 4(f) reads "whether the applicant has demonstrated that there is a ***good prospect to commence*** the proposed development ***within the extended time limit***". (emphasis added)

114. In my view, in considering whether there is a good prospect, a neutral approach should be taken by ***not*** taking into account the following factors: (1) whether it is someone's fault for not bringing a good prospect, (2) whether prospects are within the applicant's control, and

(3) the applicant's "promises" to take steps in ensuring a better prospect after the extension of time is granted.

115. In considering whether the proposed development can be commenced within the extended time limit, the applicant has to produce objective and independent evidence to support its assertion. Proposed action plan and timeframe prepared by an applicant and/or its consultants might not be sufficient, especially when the response time of the Government departments or other third parties like service providers of the applicant is involved. Unless supported by concrete evidence, an applicant's mere allegation that the draft submissions and assessment reports are in place should not be readily relied on.

116. In this appeal, the Appellant failed to demonstrate that there is a good prospect to commence the proposed development within the extended time limited of two years being applied for, mainly because the land exchange application has been put on hold indefinitely and there no evidence that when LandsD will start to process the application, not to mention, the merits of the application.

117. Rezoning of the Site to R(A) and the public housing development being under study would also cast a doubt on whether the development could actually be commenced. Therefore, even though there is no fault on the Appellant and the prospects are beyond the Appellant's control, the position will not change i.e. criterion 4(f) is not fulfilled.

118. The Respondent's witness, Mr. Mak, suggested that if an applicant provides a roadmap as to how the applicant will commence the development in detail within the extended time limited being applied, it may help to prove fulfillment of criterion 4(f). However, since no roadmap was provided by the Appellant in this case, I refrain from making comments that whether provision of a roadmap may be helpful in proving the prospects to commence the development in an extension of time application.

119. Since the holding of the land exchange application is beyond the control of the Appellant, the Appellant asserted that criterion 4(f) should not be given much weight. With due respect, I object to this assertion.

120. In practice, criterion 4(f) could be a weighty consideration in an extension of time application. In here, I wish to make the following remarks trying to explain why a "good prospect" to commence the development should be a relevant factor and how to assess the proper weight to be given to the "good prospect" factor.

121. In a normal situation, when TPB grants a planning permission, it should have satisfied that there is a prospect (not necessarily a good one) to commence the proposed development within the time limit, otherwise it would only be a waste of public resources to grant a planning permission and then assess its compliance. Why a "good prospect" is not necessarily required at this stage? When a planning permission is applied, many factors affecting the actual implementation of the development often remain uncertain. Yet it is fair to give a chance to the applicant to try commencing the development even if it is unable to prove there is a good prospect to commence. The chance will lapse if the applicant does not commence the development within the time limit, which is imposed as the reasonable time long enough for the applicant to commence the development.

122. After the planning permission is granted, it is understandable that circumstances might change over the years, and the changes may cast a doubt on whether there is still a prospect to commence the proposed development.

123. Even so, during the original time limit, the applicant is not required to report to TPB any change affecting the prospects. But when it comes to the time the applicant cannot commence the development within the original time limit and is required to apply for an extension of time, then it would be reasonable and necessary for TPB to review whether there is still a prospect to commence the development within the extended period, and this time the prospect should be a good one.

124. There are at least three reasons why a good prospect is required for granting an extension of time. First, at the stage of applying for extension of time, the applicant should be ***in a better position than when the planning permission was granted to assess the prospect***. Probably, the applicant has also better prepared for the implementation of the development.

Second, the original time limit was supposed to be the reasonable period within which the development should have commenced. If the reasonable period is to be extended, it is reasonable to require the applicant to demonstrate a good prospect and ***ensure that the development would be implemented soon so as to meet the ultimate goal of having "the right development in the right place and at the right time"***. Third, an extension of time infers that TPB (and maybe also other Government departments) has to spend time and efforts on continuing to assess the compliance of the planning permission. ***Public resources should not be wasted on a project without a good prospect***.

125. Therefore, even in normal circumstances, criterion 4(f) should not be underweighted compared with other relevant assessment criteria under Guidelines 35C/D. Where there is evidence that the proposed development is unlikely to have a good prospect of being commenced within the extended time limit, this consideration relating to prospects which opposes to an extension of time should be given greater weight compared with other considerations in order to avoid wasting public resources. Considerations favouring an extension of time should also exist and be sufficient to counter the consideration relating to prospects. This is to ensure that the proposed development will indeed be able to be commenced within the extended time limit.

126. In short, the Appellant failed to fulfil criterion 4(f). Notwithstanding that it is beyond the Appellant's control to have a good prospect to commence the development, criterion 4(f) remains a relevant consideration in an extension of time application. Further, in the circumstances of this appeal, criterion 4(f) should be given more weight compared with other assessment criteria under Guidelines 35C/D.

E8. Criterion 4(g) – extension period applied for being reasonable

127. In this appeal, there is no objective and independent evidence given to suggest what would be the reasonable extended time limit to enable the Appellant to commence the development.

128. The Appellant asserted that if unlimited time is given to LandsD to decide on the land exchange application, unlimited time should logically also be given to the Appellant in the interest of fairness. A fortiori the Appellant was not asking for unlimited time but only two years, and there is no harm in granting a 2-year extension. I do not accept this assertion because LandsD/TPB and the Appellant have different role and "fairness" cannot be inferred in this way. Besides, the test is not whether there is any harm in granting the extension but whether there is a good justification to grant the extension. Even if there is a good justification to grant, the Appellant still has to prove the extended time being applied for to commence the development is reasonable.

129. In this case, it is believed that no evidence on the reasonable extended time can ever be given because the Appellant's land exchange application has been put on hold indefinitely and without the land exchange approval the Appellant could hardly commence the development.

130. Since a reasonable extended time cannot be assessed in the circumstances, I consider that criterion 4(g) becomes irrelevant and should be given no weight compared with other assessment criteria under Guidelines 35C/D.

E9. Criterion 4(h) – other relevant considerations

Leniency to the Appellant due to the holding of the land exchange application?

131. Although the Appellant did not expressly ask for leniency, it repeatedly said that it has acted reasonably and why the Appellant still got itself into the position of having to apply for an extension of time is that LandsD has put its land exchange application on hold indefinitely. This unusual delay alone is a good justification to grant an extension of time.

132. On evidence, the holding of the land exchange application is indeed beyond the Appellant's control, and the application being put on hold for an indefinite period is an unusual circumstance. Land exchange approval is one of the crucial factors for commencing the development. But how much weight should be given to these circumstances? In my view, two relevant factors should be considered: one, whether these circumstances were totally

unforeseeable when the planning permission is granted. Two, whether the Appellant has acted reasonably in dealing with such circumstances.

133. Regarding the first factor, as early as the Appellant applied for the planning permission, it knew that land exchange approval is required to convert its Site from agricultural purposes to residential purposes and there is no guarantee LandsD will approve. It also knew that the public housing development was under study and depending on the results, it might affect its proposed residential development. Combining these two pieces of information, it is readily foreseeable, at least to an experienced land developer for small projects like the Appellant, that the process of the land exchange application might not be a smooth one. Yet the Appellant still applied for the planning permission, meaning that the Appellant knew the nature of risk and has voluntarily accepted it. (see also the discussion in §65(3) & (4) above)

134. Regarding the second factor, I do not totally agree that the Appellant has acted reasonably. On Dr. Hui's evidence, the Appellant knew about the delay in land exchange application very soon after the planning permission was granted, but it chose to wait rather than proceeding with other possible actions such as making building plans submission and complying with the approval conditions.

135. The Appellant betted that LandsD would start to process the land exchange application in time before the time limit in the planning permission expired, but the Appellant lost in the bet. Perhaps, at that time of the bet, the Appellant had never thought it has to apply for an extension of time and thus not taking serious to the assessment criteria in Guidelines 35C/D. When it was certain that application for an extension of time was required, it was already too late for the Appellant to make building plans submission and comply with the approval conditions. Then the Appellant in turn argued that it is reasonable and practicable not to take all those actions while the land exchange application was pending.

136. For reasons given in Parts E4, E5 and E6 above, I do not agree making building plan submission and complying with the approval conditions are not practicable ***for the implementation of the development*** (emphasis added), which is the focus of Guidelines

35C/D. It might only be not practicably to maximize the Appellant's commercial interests. It is inappropriate to only consider the Appellant's private interests, without taking into account the purpose of Guidelines 35C/D and factors relating to public interest.

137. Guidelines are not law which a person must comply with. However, guidelines have their functions, which are to maintain an orderly system and protocol, to ascertain the rights and responsibilities of the stakeholders, and to reduce uncertainties. Often, people comply with the requirements in the guidelines not because non-compliance will do any harm to any person or the regulatory body and thus they would be penalized, but to maintain the system and protocol which all relevant stakeholders rely on in the long run to protect their interests. This factor regarding public interest should not be neglected in considering whether a person has acted reasonably.

138. In short, I consider that the unusual circumstances of the exchange land application being put on hold definitely are a relevant factor to consider, but leniency should not be given to the Appellant.

Hardship to the Appellant if extension of time not granted?

139. Hardship may be measured by references to the resources already spent and any unfavourable consequences which may be unfairly suffered by the Appellant if the extension of time is not granted. In this context, resources spent before the planning permission was granted would not be taken into account because it cannot be said resources spent on obtaining a planning permission are hardship otherwise all planning permission cases exist hardship and arguably all developers are entitled to special treatment because of the hardship they suffer.

140. The Appellant had not made building plans submission or complied with the approval conditions, or taken any expensive actions to implement the development after the planning approval was granted. The Appellant should therefore have not expended so much time, money and effort on the proposed development that it would be deemed to have suffered hardship if an extension of time is not granted.

141. According to the Respondent, if the Appellant had put resources on making building plans submission and/or complied with the approval conditions (not necessarily need to do all), TPB might have already approved the extension of time and this case would not have to be brought before TPAB. Even if TPB still did not approve, there would be a good justification for claiming hardship if more resources had been spent.

142. So, the next consideration, if the extension of time is not granted, whether the Appellant is still able to develop? Under Approved OZP 12 currently in force, the Appellant's Site has been rezoned to R(A) and "flat" is under Column 1, which means planning permission is not required to develop residential units.

143. On Dr. Hui's evidence, if the extension of time were granted, the Appellant may sell or mortgage the land for a higher value. But in my view, this is purely speculative. The value of the Site depends more on whether the land exchange approval could be obtained for building residential units, than whether the planning permission and extension of time have been granted.

144. Furthermore, assuming that the Appellant really suffers hardship, it should be because the land exchange application has been put on hold indefinitely, rather than the extension of time is not granted.

E10. Weight of the Criteria

145. As in many planning permission related cases, both parties have already taken side in their own favour before deciding on how much weight should be given to each consideration, but they still claim that the weight is fairly and objectively given according to the circumstances. This is not desirable.

146. In my view, to assess the appropriate weight given in respect of each assessment criterion in Guidelines 35C/D, there are three steps. First, identify which criteria are relevant according to the circumstances. Second, give appropriate weight to each relevant criterion by primarily taking into account how the factor to consider in the criterion may uphold the

purpose of imposing time limit and the ultimate goal of having "the right development in the right place and at the right time". Each criterion may be given equal weight, more weight or less weight. Third, apply the facts to each relevant criterion and make a conclusion whether the considerations favouring an extension of time outweigh the considerations opposing to the extension, or vice versa.

147. In this appeal, following the discussion in Part E, the relevant criteria include 4(c), 4(d), 4(e), 4(f) and 4(h). By primarily taking into account the purpose of imposing time limit and the ultimate goal, I consider criteria 4(c), 4(d) and 4(e) should be given equal weight, 4(f) should be given more weight, and 4(h) should be given less weight.

148. By applying the facts to the factors to consider in each criterion, it comes to the conclusion that while there are two considerations in favour of the grant of an extension of time, i.e. occurrence of delay which is beyond the Appellant's control (under criterion 4(c)) and unusual circumstances exist (under criterion 4(h), which is given less weight), the following considerations opposing to the grant of extension of time apparently outweigh the considerations favouring the extension:

(1) the Appellant has failed to demonstrate that reasonable action(s) have been taken for the implementation of the approved development (under criterion 4(d));

(2) the Appellant has failed to demonstrate that reasonable action(s) have been taken to the satisfaction of relevant Government departments in complying with the approval conditions (under criterion 4(e)); and

(3) the Appellant has failed to demonstrate that there is a good prospect to commence the proposed development within the extended time limit (under criterion 4(f), which is given more weight).

F. Conclusion

149. It is an unusual circumstance that LandsD put on hold an application for land exchange for an indefinite period, but it has a good reason i.e. a public housing development is under

study which may affect the site in question. This unusual circumstance is beyond the Appellant's control but is not totally unforeseeable.

150. Given the uncertainty in the land exchange application, the Appellant has chosen to wait for the outcome, without taking any other actions to implement the proposed development for saving resources. It chose to let the time limit in the planning permission expired, hoping that extension of time would be granted. I can imagine the Appellant was compelled to make this difficult decision but with due respect, I do not agree this is a good decision.

151. There are clear assessment criteria in TPB's Guidelines 35C (now 35D) in considering an extension of time application. The Guidelines shall apply equally to small developers and large developers without taking into account an applicant's financial strength in determining what are "reasonable" actions to be taken. In this case, the Appellant argued that it was reasonable to wait for the land exchange application outcome before taking any other actions. I consider that this might be reasonable only for maximizing the Appellant's private interests, but not reasonable for failing to take into account the purpose of imposing time limit and the ultimate goal of town planning from a public interest perspective.

152. Having properly considered each criterion in Guidelines 35C/D, it comes to a conclusion that considerations opposing to the grant of extension of time apparently outweigh the considerations favouring the extension. Therefore, the Appellant's application for extension of time should be denied.

153. I sincerely appreciate the Chairman's efforts in giving a good summary of the facts and the thoughtful analysis, though I respectfully do not agree with the conclusion given by him and other members of the appeal board.

[1]Introduction, Planning System in Hong Kong, official website of TPB

[2]TPB v Nam Sang Wai Development Company Limited & Ors, FACV No.8 of 2016

[3]Garner, Bryan A. (Ed.), "Black's Law Dictionary" (Abridged 7th Edn.), 2000, West Group

[4]Join Smart Limited v TPB, Town Planning Appeal No.8 of 2018

[5]Real Estate Developers Association of Hong Kong v Building Authority, Final Appeal No.19 of 2015 (Civil)

[6]For example, the Buildings Department issued a letter dated 27 September 2021 to all Authorized Persons, Registered Structural Engineers and Registered Geotechnical Engineers giving guidelines on "Typical Acceptable Situations as Indications of Realistic Prospect of Control of the Land Forming a Site" and what submissions they may reject.

(Signed)

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Dr. CHU Ching-wah, Teresa

(Member)

22 November 2023