IN THE TOWN PLANNING APPEAL BOARD
Town Planning Appeal No. 7 of 2021

BETWEEN

Keyman One Development Limited	Appellant
And	
Town Planning Board	Respondent

Appeal Board:	Mr. WONG Yuk-lun, Horace, SC, JP	(Chairman)
	Mr. CHAN Bo-ching	(Member)
	Mr. CHAN Yuen-king, Paul	(Member)
	Mr. PONG Yiu-po, Daniel	(Member)
	Dr. YU Yuen-ping, William	(Member)
In Attendance:	Ms. Ivy LI	(Secretary)

Representation: Mr. Justin Ismail, Counsel for the Appellant, instructed by Messrs Cocking & Co LLP

Mr. Justin Lam, Counsel for the Respondent, instructed by the Department of Justice

Dates of Hearing: 12 and 14 December 2022

Date of Decision: 28 February 2023

DECISION

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A. Introduction

1. This is the Appellant's appeal made pursuant to section 17B(1) of the Town Planning Ordinance (Cap. 131, "**TPO**") against the decision of the Town Planning Board ("**TPB**" / "**Respondent**") dated 20 August 2021 ("**the s.17 Review Decision**")

2. The matter concerns the Appellant's application ("**the Appellant's Application**") for planning permission to build a 4-storey house at a site in Ngau Chi Wan Village ("**NCWV**"), Kowloon ("**the Appeal Site**").

B. Background

3. The following background facts are taken from the agreed statement of facts, agreed *dramatis personae* and agreed chronology of events submitted by the parties.

4. The Appeal Site falls within an area zoned "Government, Institution or Community" ("**G/IC**") (62%) and "Road" (38%) on the Approved Ngau Chi Wan Outline Zoning Plan ("**OZP**") No. S/K12/16 ("**OZP 16**") at Lot 1663 (Part) in S.D.2, NCWV, Kowloon. The Appeal site was and is currently vacant.

5. In April 2012, an applicant named Liu Koon Sing (廖官勝, "**Mr. Liu**"), submitted planning application No. A/K12/39 under section 16 of the TPO seeking planning permission to build a 3-storey house with the gross floor area ("**GFA**") of 183.6 m^2 at 8.23 metres tall on the

Appeal Site ("**Liu's Application**").

6. On 1 June 2012, the Metro Planning Committee ("**the MPC**") of the TPB rejected Liu's Application. On 5 July 2012, Mr. Liu requested a review of the MPC's decision pursuant to section 17(1) of the TPO. The review application was rejected by the TPB for the same reasons given by the MPC. On 17 November 2012, Mr. Liu lodged an appeal to the Appeal Board pursuant to section 17B(1) of the TPO and on 8 October 2013, Mr. Liu's appeal was heard and a decision was made in TPA No. 14 of 2012 (dated 26 November 2013) (the "**2013 Decision**").

7. By the 2013 Decision, the majority members of the Appeal Board ***allowed*** Mr. Liu's appeal and granted planning permission to build a 3-storey (8.23 m in height) house at the Appeal Site subject to two conditions, namely (a) the provision of fire-fighting installations and water supplies to the satisfaction of the Director of Fire Services; and (b) the submission of design and layout of the proposed house that would not jeopardize the future road works to the satisfaction of the Commissioner for Transport.

8. There is no dispute that between September 2017 and February 2020, building plans were submitted. A set of general building plans ("**GBPs**") for the proposed 3-storey house under planning application No. A/K12/39 with a GFA of about 119 m^2 was approved by the Building Authority (the "**BA**") on 6 September 2017. The reduction of the GFA (from the original 183.6 m^2 to about 119 m^2) was largely caused by the fact that the site of the house has to be set back ("**the setback requirement**") in order to meet the conditions imposed

under the 2013 Decision – in particular the condition that design and layout of the proposed house that would not jeopardize the future road works to the satisfaction of the Commissioner for Transport. The Commissioner for Transport had no objection in principle to the compliance of the aforesaid approval condition (b). Subsequently, two more sets of GBPs with the same GFA of about 119 m^2 were approved by the BA.

9. In or around 2019, the Appellant in the present appeal, Keyman One Development Limited, purchased the Appeal Site from Mr. Liu.

10. On 5 March 2021, the Appellant, represented by MY Planning Limited, submitted planning application No. A/K12/43 under section 16 of the TPO to seek planning permission to build a 4-storey house (instead of a 3-storey house) on the Appeal Site: this is the Appellant's Application referred to above. On 30 April 2021, the Appellant's Application was rejected by the MPC ("**the s.16 Decision**"). In the s.16 Decision, the TPB's reasons of the rejection are stated as follows: -

> "*(a) the proposed house development is* ***not in line with the planning intention of the "Government, Institution or Community" ("G/IC") zone*** *which is intended primarily for the provision of Government, institution and community (G/IC) facilities serving the needs of the residents in the area/district;*
>
> *(b) the proposed house development* ***does not comply with the Town Planning Board Guidelines*** *for "Application for Development/Redevelopment within "G/IC" Zone for Uses other*

than GIC Uses" in that the proposed development would adversely affect the provision of the planned community hall and other Government facilities in the district on a long-term basis; and

(c) the building height of the proposed development is ***not in keeping with the surrounding low-rise structures*** *in Ngau Chi Wan Village and would result in undesirable visual impact.*" ("**Rejection Ground (a), (b), (c)** respectively", emphasis added)

11. On 1 June 2021, the Appellant applied for review of the s.16 Decision under section 17(1) of the TPO. On 20 August 2021, the Appellant and his representatives attended the section 17 review hearing. After giving consideration to the Appellant and its representatives' justification for the application and the views of relevant government departments, the TPB decided to reject the application on review for the same reasons as those of the MPC.

12. On 1 November 2021, the Appellant lodged the present appeal to the Appeal Board (pursuant to section 17B(1) of the TPO) against the s.17 Review Decision.

13. Further as noted in the Opening Submissions of the Respondent and the agreed chronology/statement of facts:

    13.1 In the 2019 Policy Address, the Chief Executive ("**CE**") proposed to build a new housing development in the NCWV area, as part of a "*Government-led approach for the planning of land use and infrastructure… to resume the required private land for established public purposes*". Specifically, §19(3) of the 2019

Policy Address stated that the Government proposed to "*resume urban private land in…. [NCWV…suitable for high-density housing development, with a view to expediting the development of these.. urban sites and rebuilding a new community mainly comprising public housing*." ("**the Proposed Development**").

13.2 In January 2020, the Civil Engineering and Development Department ("**CEDD**") commenced the Engineering Feasibility Study ("**EFS**") on Site Formation and Infrastructure Works for the Proposed Development. The Appeal Site falls within the EFS study area.

13.3 In the 2020 Policy Address, the CE reported that the studies on the Proposed Development have made "*good progress*" and the Government "*[strives] to commence the rezoning procedure progressively in the first half of 2021*".

13.4 On 7 July 2020, the Planning Department ("**PlanD**"), CEDD and the Lands Department ("**LandsD**") (collectively, the "**Three Departments**") jointly consulted the Wong Tai Sin District Council ("**WTSDC**") regarding the Proposed Development.

13.5 On 4 May 2021, the affected villagers/operators of NCWV were invited to a briefing by the Three Departments on the broad development proposal, implementation program, and compensation and rehousing arrangements for the Proposed Development.

13.6 On 13 May 2022, as requested by the Vice Chairman of the

WTSDC Housing Committee, the Three Departments met with some NCWV representatives and two WTSDC members, to consult their views on the Proposed Development and the corresponding OZP amendments required.

13.7 On 10 June 2022, based on the EFS which confirmed the technical feasibility of the Proposed Development, OZP amendments to rezone the NCWV (including the Site) for high density public housing with GIC facilities ("**OZP Amendments**") were submitted to the MPC of the TPB, which agreed to the amendments. According to the Land Requirement Plan appended to the MPC Paper, the Appeal Site falls within the area to be resumed.

13.8 On 24 June 2022:

(1) A ***draft*** OZP, being OZP No. S/K12/17 ("**OZP 17**") which incorporated the OZP Amendments, was exhibited for public inspection under section 5 of TPO. Pursuant section 6 of TPO, within the period of 2 months during which a draft OZP is exhibited under section 5, any person may make representation to TPB in respect of the draft OZP. The period of 2 months expired on 24 August 2022.

(2) The Appeal Site falls within an area partly zoned "*Residential (Group A)1*" ("**R(A)1**") and partly shown as "Road" on OZP 17.

(3) LandsD commenced the pre-clearance survey for the

Proposed Development. By the notice, persons residing or operating in the area are required to depart no ***earlier*** than 2024.

13.9 On 7 July 2022, CEDD commissioned consultants to undertake the investigation, design and construction tasks/works for the Proposed Development.

14. As will be seen below, the Proposed Development is relied on by the Respondent in contesting the Appellant's appeal.

C. General Legal Principles

15. The general legal principles applicable to the present appeal are not in dispute between the parties. Mr. Ismail and Mr. Lam, Counsel for the Appellant and the Respondent respectively, have no disagreement on the following legal principles.

16. First, the general approach to town planning appeals and permission was set out in the Appeal Board's decision of *Town Planning Appeal No. 1 of 2017* (dated 31 December 2021) (chaired by Chua Guan-hock SC). §§61-62: -

> *"61. As to onus of proof, an appellant has the burden of showing on a balance of probabilities, that an appeal should be allowed and there are no good reasons for refusing planning permission.*
>
> *62. As to the [Appeal Board]'s role:*
>
> *(1) The [Appeal Board]'s 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 a de novo hearing.

(2) It may substitute its own decision for that of the TPB even if the TPB did not strictly commit an error on the material before it. Hearings before the Appeal Board are normally much fuller and more substantial than before the TPB of a review under s.17 TPO.

(3) The [Appeal Board]'s role is not limited to those on judicial review as it is concerned with the merits. Moreover, the [Appeal Board] 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: see British Railways Board v Secretary of State for the Environment [1994] J.P.L.32, per Lord Keith (at p.133):*
>
> > *"The function of the planning authority was to decide whether or not the proposed development was desirable in the public interest."(emphasis added).*

(4) On appeal, an Appellant does not strictly need to show planning benefit, as opposed to lack of planning harm in view of relevant planning policies and material considerations, compared to nothing being done in the circumstances: see R.(On the application of Mount Cook Land Ltd) v Westminster CC [2004] 2 P and CR 405 (C.A.), per Auld LJat [38]:-

> *"The Council had an obligation to consider Redevco's application on its own merits, having regard to national and local planning policies and any other material considerations, and to grant it unless it considered the proposal would cause planning harm in the light of such*

policies and/or considerations"(emphasis added).

We seek to apply the principles above."

17. Second, it is important to emphasize that appeals to the Appeal Board are heard *de novo*. The Appeal Board's function is to exercise an independent planning judgment: *Henderson Real Estate Agency Ltd. v Lo Chai Wan* [1997] HKLRD 258 at 266A. As explained by Tang PJ in *Town Planning Board v Town Planning Appeal Board* (2017) 20 HKCFAR 196 at §88:

> *"On appeal to the Appeal Board, the Appeal Board is entitled to and regularly makes planning decisions under s.16 de novo, assisted by expert evidence which would be subject to cross-examination, if necessary. Therefore in an appeal against refusal of permission or the conditions imposed, the Appeal Board would exercise its own independent judgment on the appropriateness of the refusal or the conditions..."*

18. Third, as pointed out in *TPA No. 1 of 2017*, the Appeal Board should have regard to all material considerations, and there is a distinction between planning making and planning permission. The Appeal Board is concerned with planning permission only (at §65):

> *"65. The Appeal Board should consider all material considerations, although matters of materiality and weight are essentially matters of planning judgment for the Appeal Board:-*
>
> > *65.1 TPB Guidelines: it is common ground these should be followed, unless there is good or cogent reason.*
> >
> > *65.2 Distinction between plan making, and planning permission: this well established distinction appears in the cases. On appeal, the Appeal Board is concerned with the latter situation only.*

65.3 Distinction between granting planning permission, and its implementation: this distinction is well established. See British Railways Board v. The Secretary of State for the Environment [1994] J.P.L. 32 (HL) at (p.38):

> *'… there was no absolute rule that the existence of difficulties, even if apparently insuperable, had to necessarily lead to refusal of planning permission for a desirable development. A would-be developer might be faced with difficulties of many kinds … If he considered that it was in his interests to secure planning permission notwithstanding the existence of such difficulties, it was not for the planning authority to refuse it simply on their view of how serious the difficulties were'"*

19. Fourth, in construing the planning documents, the Appeal Board should not adopt an overly technical approach as in interpreting statutes or legal or constitution documents. As Cheung CJHC (as he then was) explained in *Hong Kong Television Network Ltd v Chief Executive in Council* [2016]2 HKLRD 1005 at §55 in the context of the broadcasting policy promulgated by the Government:

> *"Policy statements must be read in their proper contexts and with common sense. More often than not, they are not prepared by lawyers but by politicians and government officials. Technical approaches to their interpretation such as those adopted in interpreting statutes, wills, contracts or constitutional documents should generally be avoided…"*

D. The Issues

20. Based on the Succinct List of Issues filed by the parties on 16 November 2022, and having considered the parties' submissions made and all the relevant materials filed in the present appeal, the issues in the present appeal may be summarised as follows:-

20.1 Whether the Respondent was right to reject the Appellant's application on grounds that the proposed house development was not in line with the planning intention of the G/IC Zone and the TPB Guidelines No. 16 for "*Application for Development/ Redevelopment within "G/IC" Zone for Uses other than Government, Institution or Community Uses*" for applying for development within that zone ("**TPB Guidelines No. 16**") ("**Appeal Issue One**").

20.2 Whether the Respondent should have given favourable consideration to the Appellant's proposal to achieve the GFA of 183.6 m^2 – alleged by the Respondent to be the GFA approved by the Appeal Board in the 2013 Decision (the "**alleged Approved GFA**") – by building a house of 4 storeys instead of 3 storeys, as a remedy for the loss of GFA arising from the setback requirement ("**Appeal Issue Two**").

20.3 Further and in any event, whether the Respondent was right to conclude that the Appellant's application for permission to build a 4-storey house (instead of a 3-storey house) was not in keeping with the surrounding structures in NCWV and would result in undesirable visual impact ("**Appeal Issue Three**").

D1 Appeal Issue One: Planning Intention and TPB Guidelines 16

21. Relevant to this issue is the Respondent's refusal (on review) to grant planning permission on Rejection Grounds (a) and (b). The Appellant submits that neither of the two rejection grounds is sustainable and

should be rejected.

D1-1 The Planning Documents

22. Before going into greater details of the parties' case, it is necessary to have a closer look at the relevant planning documents in ascertaining the precise context of the relevant planning intention, and the guidelines/standard applicable for the purpose of the Appellant's Application.

23. As said, the Appeal Site falls within an area zoned "G/IC" (about 62%) and "Road" (about 38%) on OZP 16. The area concerned in the present appeal is however confined only the "G/IC" areas. The Schedule of Uses under OZP 16 identified 2 types of uses for areas zoned "G/IC", namely uses that are always permitted, and uses that may be permitted with or without conditions on application to the TPB: -

    23.1 Column 1 sets out the "*uses always permitted*". This includes various kinds of government and institutional use, hospital, school and library etc.

    23.2 Column 2 sets out the "*uses that may be permitted with or without conditions on application to the [TPB]*" ("**Column 2 Uses**"). "*House*" is one of the Column 2 Uses.

    23.3 The "planning intention" of the "G/IC" zoning is stated as follows: "*This zone is intended* ***primarily for the provision of Government, institution or community facilities serving the needs of the local residents and/or a wider district, region or***

the territory. *It is also intended to provide land for uses directly related to or in support of the work of the Government, organizations providing social services to meet community needs, and other institutional establishments*." (emphasis added)

24. Under the Explanatory Statement of the OZP 16, it is stated at §7.5.3 that "*[a] site at [NCWV] has been reserved for the development of a community hall with possible inclusion of other Government uses*."

25. The TPB Guidelines No. 16 contains, *inter alia*, the following provisions: -

    25.1 §1.2 explains the reason why in certain circumstances, non-GIC uses may be permitted in "G/IC" sites:-

    > "*Over the years, due to changing demographic structure and revisions to the standards and requirements of provision of GIC facilities, some existing or planned facilities may become surplus, obsolete or underutilized while some others may require in-situ expansion or reprovisioning elsewhere so as to meet the current and anticipated future operational needs. In these circumstances, opportunities exist for some "G/IC" sites to be developed/redeveloped for non-GIC uses or for a mixture of GIC and non-GIC uses.*"

    25.2 §1.3 further states that sufficient flexibility in accommodating the changing aspirations and requirement of the community is allowed: -

    > "*Use of "G/IC" sites for non-GIC uses which fall within Column 2 of the Notes for the "G/IC" zone may or may not be permitted with or without conditions on application to the Town Planning Board (the Board) under section 16 of the Town Planning Ordinance. The planning permission system*

will enable the Board to maintain adequate planning control over the use of "G/IC" sites and yet allow sufficient flexibility in accommodating the changing aspirations and requirements of the community, and sometimes to meet demand for better utilisation of the site potential."

25.3 §1.5 sets out the threshold for granting planning permission if a major portion of the proposed development is not for G/IC uses:

"*As a general rule, for sites zoned "G/IC", a major portion of the proposed development should be dedicated to GIC and other public uses including public open spaces. Otherwise, the proposed development is considered to constitute a significant departure from the planning intention of the "G/IC" zone and, unless with very strong justifications and under special circumstances, planning permission for such development would not be granted.*"

25.4 §2.1 sets out the primary criteria for the TPB in assessing applications for non-GIC uses: -

"*In general, sites zoned "G/IC" are intended to be developed or redeveloped solely for GIC uses unless it can be established that the provision of GIC facilities would not be jeopardized and the concerned Government departments have no objection to releasing a particular 'G/IC' site or a certain part of it for non-GIC uses. For applications for development/redevelopment for non-GIC uses within a "G/IC" site, the applicant should satisfactorily demonstrate the following:*

a. in the case of a "G/IC" site designated with specific uses,

i. the application site is no longer required for the designated GIC uses, or adequate reprovisioning of the designated GIC uses is provided either in-situ or elsewhere;

ii. *and there is adequate provision of other GIC facilities in the district, or the application site is not suitable for other GIC facilities; or*

b. *in the case of an undesignated "G/IC" site, the application site is no longer required to be reserved for any GIC uses; and*

c. *the proposed development/redevelopment would not adversely affect the provision of GIC facilities in the district on a long-term basis.*" (emphasis added)

25.5 §2.2 provides that:

"*The proposed development should not adversely affect the normal operation of the existing GIC facilities nor delay the implementation of the planned GIC facilities, if any, within the "G/IC" site. Temporary reprovisioning, if necessary, should be provided prior to the completion of the proposed development.*"

25.6 §§2.4-2.5 set out further requirements concerning the scale, intensity and visual impact of the proposed development:

"*The scale and intensity of the proposed development should be in keeping with that of the adjacent area. In this regard, development restrictions stipulated on the statutory plan for similar development in the locality and the prevailing development restrictions administratively imposed by the Government on nearby similar developments (e.g. development restrictions in Special Control Areas and plot ratios in accordance with the density zones under the HKPSG) would be taken into consideration.*

The scale and design of the proposed development should have regard to the character and massing of the buildings in the surrounding areas and should not cause significant adverse visual impact on the townscape of the area…"

D1-2 The Parties' Cases

26. Regarding the said planning intention of the G/IC zone, relying on Liu's Application, the Appellant emphasized that it is not the first time that planning permission was sought from the Appeal Board to develop a house on the Appeal Site. Liu's Application was in fact granted by the Appeal Board subject to the two conditions mentioned above. The Respondent has not challenged the 2013 Decision (e.g. by judicial review of the same) and the 2013 Decision is and remains a valid decision binding on the Respondent. Accordingly, the Appellant says that it is entitled to develop the Appeal Site by building a house on it. It follows that a ***blanket*** objection based on breach of planning intention of the G/IC Zone is at odds with the 2013 Decision and ought to be rejected, subject to any or any material change of circumstances which would warrant a different outcome.

27. The Appellant further submits that there is no such change of circumstances. The planning intention of the G/IC Zone has and continues to remain unchanged, *viz.* it is primarily intended for the provision of G/IC facilities serving the needs of the residents in the area/ district but does not preclude the grant of planning permission for a Column 2 use under the relevant OZP. As said, "*house*" is a Column 2 use in the G/IC Zone of the OZP 16.

28. Regarding the said breach of TPB Guidelines No. 16 and the relevant "G/IC" facility, i.e. the planned community hall, the Appellant relied on the 2013 Decision in which the majority of the Appeal Board pointed out that although the G/IC zoning had been in place since 1989, and that certain government and community facilities (including a market, fire station, and sports and recreation centres),

had been constructed many years ago, there has been no other government or community facilities constructed within the G/IC areas for many years. In particular, the building of the community hall was never proceeded with. The implementation of the development (of the community hall) was hence doubtful, and it is unfair to "freeze up" the Appeal Site and refuse to grant planning permission on that ground (see §14 of the 2013 Decision).

29. It is the Appellant's case that there is nothing to suggest that any concrete implementation plans are underway in respect of the proposed community hall. It is noteworthy that the 2013 Decision was regarded as a precedent that carried considerable weight by the TPB in granting planning permission (with conditions) in a similar application (TPB No. A/K12/41) made within the same "G/IC" zone. The following reasons were given for granting the planning permission in that case: -

> *" (a) given the planned community hall development had already been delayed for some 20 years and there was still no firm implementation programme at that time, sympathetic consideration should be given to the application to allowing the applicant to develop houses in accordance with his lease entitlement. Delay in implementation of the "G/IC" zone was unjust to that applicant.*
>
> *(b) sympathetic consideration should be given since there was an existing house at that site and it was unfortunate that the house was demolished instead of repaired;*
>
> *(c) allowing the redevelopment of the houses would unlikely affect the community hall development in a substantial way while that applicant had stated clearly that they were well-aware that that site might be resumed by the Government at any moment for provision of public facilities. It would be up to that applicant to decide whether to implement the proposal knowing the possible land resumption in*

future; and

(d) given the small scale of development, it should not have any significant adverse precedent effect."

30. The Appellant therefore submits that both the 2013 Decision and the TPB's decision in No. A/K12/41 ought to be followed in this case unless there has been a change or material change in circumstances. There was, at the time of the 2013 Decision, no sign of any concrete implementation of the use of the Appeal Site for the provision of a community hall, and the position remains the same to date.

31. On the other hand, the Respondent's case is twofold. It relied on the latest ***draft*** OZP 17 to say that the present appeal serves no useful purpose or is academic and should be dismissed since the Appellant's proposed house, with the entire footprint within the "*R(A)1*" zone (under which "*house*" is one of the "*uses always permitted*"), is permitted ***as of right*** under OZP 17 and planning permission is not required.

32. However, on the premises that the appeal is to proceed on the basis of OZP 16, the Respondent submits that having regard to the current prevailing circumstances namely the implementation of the Proposed Development, which commenced in 2020, covering *inter alia* the Appeal Site, it is clear that the present appeal should be dismissed. The development of a 4-storey house at the Appeal Site is contrary to the planning intention of the G/IC zone, i.e. to serve governmental/community needs, and would adversely affect the Proposed Development.

33. The Respondent says that material changes in circumstances have taken place since the time when the 2013 Decision (as well as the TPB's decision in No. A/K12/41 in 2018) was handed down. In this regard, the Respondent essentially relies on the Proposed Development and submits that there are clearly not just plans, but concrete action taken by the Government, for the implementation of the Proposed Development in NCWV.

34. Notably, the Appellant's stance on the Respondent's reliance of the Proposed Development is that it is irrelevant to the determination of this present appeal, and that the Proposed Development should not be a matter relevant to the grant of planning permission on the Appellant's Application.

D1-3 Analysis

35. Having considered the submissions made by the parties in the present appeal, this Appeal Board unanimously finds that the first issue should be ruled in favour of the Appellant, i.e., the Appeal Board considers that the TPB was wrong in rejecting the Appellant's Application on grounds that the proposed house development was not in line with the planning intention of the G/IC Zone or the TPB Guidelines No. 16. The Appellant's appeal on Rejection Grounds (a) and (b) should therefore be allowed. We hereby set out our reasons as follows.

36. **First**, the starting point is to recognize the fact that although the Appeal Site concerned falls within the "*G/IC*" zone, planning permission may still be granted for one of the Column 2 Uses, with or without condition. This is despite the fact that the use concerned is a

non-GIC use (e.g. the use as a private house). In this regard, OZP 16, its notes, including Schedule of Uses and Explanatory Statement as well as the TPB Guidelines No. 16, are material documents to which this Appeal Board is bound to have regard.

37. Indeed, as mentioned above, it is expressly stated in TPB Guidelines No. 16 that "*The planning permission system will enable the Board to maintain adequate planning control over the use of "G/IC" sites and* ***yet sufficient flexibility in accommodating the changing aspirations and requirements of the community, and sometimes to meet demand for better utilisation of the site potential***."(emphasis added)

38. It is therefore open to the Appellant to apply for a non-G/IC use development for the Appeal Site. The question is whether or not the requirements, as set out in the said planning documents, are duly met to merit the grant of planning permission. Each application should be considered on its own merits.

39. **Second**, it is noteworthy that in the present case, as has been rightly pointed out by the Appellant, this is not the first time planning permission was sought from the Appeal Board. In the 2013 Decision, permission has already been given to the Appellant to build a 3-storey house subject to two conditions. As already mentioned above, there is no dispute between the parties that the two conditions imposed by the Appeal Board have been met, and building plans have been submitted and approved by the BA in or around 2020. The 2013 Decision stands and continues to stand at this time, and regardless of the result of the present appeal, the Appellant would in any event be entitled to proceed to build a house on the Appeal Site, albeit one with

3 storeys only.

40. This is an important matter that this Appeal Board is bound to take into account for the purpose of the present appeal. Although every planning application should be considered on its own individual merits, this Appeal Board would not shy away from, or turn a blind eye to, the fact that the present application is "standing" on the 2013 Decision under which a 3-storey house is *already permitted* to be built on the Appeal Site.

41. This means that, as rightly submitted by Mr. Ismail, a blanket objection made solely on the basis that the building of a house on the Appeal Site is in breach of planning intention of the G/IC zone must be rejected. In making the 2013 Decision, the Appeal Board had given consideration to the fact that the Appeal Site fell within the G/IC zone, and for the reasons given in the 2013 Decision, was of the view that planning permission should nonetheless be granted (subject to two conditions) to enable a house to be built on the Appeal Site. We would add – although this is not strictly necessary for our present decision – that this Appeal Board is in entire agreement with the majority of the Board in the 2013 Decision, and having considered the materials presented to the us in the present Appeal, have no doubt that the 2013 Decision was correctly made.

42. As a binding decision has already been made by the Appeal Board that granting planning permission to enable a 3-storeys house to be built on the Appeal Site would not, *per se*, be inconsistent with the relevant planning intention applicable, it is not open to the Respondent to argue in this Appeal that no house should be allowed

to be built on the Appeal Site. The Respondent would have to point to some material difference or change of circumstances between the Applicant's Application and that which was involved in the 2013 Decision that would make it wrong or inappropriate to grant planning permission in the present case.

43. **Third**, the Appeal Board cannot agree with the Respondent's purported reliance on the Proposed Development as such a "material change of circumstances" that justifies the rejection of the Applicant's Application.

44. On this issue, the Appeal Board has taken note that the Proposed Development never formed part of the TPB's ***reasons*** of rejection notwithstanding the fact that apparently the Proposed Development was mentioned/considered in both the s.16 application and s.17 review stage of the Appellant's Application.

45. In light of this, on the first day of the substantive hearing of this appeal, this Appeal Board has sought Counsel's assistance on the following questions:

    45.1 Pending approval of the Chief Executive in Council (**"CE in C"**) of the draft OZP 17, when OZP 17 remains a draft, what is its legal effect? and

    45.2 To what extent should the Appeal Board take into account matters which did not form part of the TPB's rejection of the Appellant's planning application?

46. On the first question, the Appellant submitted that OZP 17 has no relevant legal effect because the proposed amendments to OZP 16 have not yet been submitted, let alone approved, by the CE in C. For the purpose of the present appeal, the governing plan is the one that was in force at the time when the section 16 (and section 17) applications were heard. In this regard, Mr. Lam on behalf of the Respondent has also made it clear that the TPB is not relying on OZP 17 as a ground to reject the Appellant's application.

47. In light of the above and given the plain reading of the relevant sections of the TPO, including *inter alia* section 13 thereof which states that ***approved*** plans shall be used by all public officers and bodies as standards for guidance in the exercise of any powers vested in them: see *International Trader Limited Anor v Town Planning Appeal Board* [2009] 3 HKLRD 339 at §§28-32, the Appeal Board considers it clear that for the purpose of the present appeal, the governing plan is OZP 16 and not OZP 17, which has an approved plan within the meaning of the TPO.

48. On the second question, the Respondent submits that the Appeal Board is empowered to consider and rely on matters which do not form part of the TPB's reasons for rejection. The Appeal Board is not bound by the TPB's reasons and is free – indeed duty-bound – to make its own independent assessment on the evidence before it.

49. On the other hand, the Appellant submits that, although the Appeal Board is to approach this appeal by way of a rehearing and is not bound by the TPB's decision, this does not mean that the Appeal Board is required to perform the task of a first instance decision-

maker.

50. We have no doubt that the Appellant is right in this regard. While appeals before the Appeal Board are heard *de novo* – and the Appeal Board is entitled to consider new evidence and exercise independent judgment for that purpose – the new evidence (whether furnished by the appellant or the respondent to the appeal) must not be of a kind (or of such extent) that substantially changes the nature of the appeal. In exercising its function, the Appeal Board is discharging an appellate function. That is so even though it is hearing an appeal *de novo*. The Appeal Board is not a decision maker of the first instance. It should not be required, and should firmly reject, any attempt to convert an appeal into a first instance meeting or hearing. Such situations must be rare, but are plainly conceivable. Such a situation may occur, for example, when the original s.16 application was made premised entirely upon an OZP, and the relevant s.16 decision and review decision were also made on that basis. If, upon appeal to this Board, a party changes its case completely and seeks to put forward submissions and new evidence based entirely on a different OZP, it may be an appropriate case for the Appeal Board to refuse to accept the new evidence rather than proceeding to hear the appeal on an entirely different basis that was never considered before. Relegating the Appeal Board to a first instance decision maker is plainly contrary to the appeal mechanism provided for under section 17B of the TPO. The Appeal Board sits on appeal from a decision made by the TPB under section 17(6) of TPO.

51. In this regard, we are unable to accept the submission – made by Mr. Lam in his written Closing Submission but not pursued with any rigor

in his oral elaboration – that the Appeal Board is an administrative body and is merely discharging an administrative function in hearing appeals lodged under section 17B of TPO. Reliance was made to certain observations made by another Appeal Board in TPA No. 10 of 2010 (see in particular §§7 and 10 of the decision in that case). While we have no doubt that the Appeal Board in that case was right in holding that its power to vary the TPB's decision "effectively empowers the Appeal Board to make planning decisions based on the facts and arguments before it at the hearing of the appeal *de novo*", we are unable to agree with the proposition that in hearing appeals, the Appeal Board is exercising administrative powers conferred on it by the legislature and not judicial power. While the powers and functions of the Appeal Board are obviously different from the courts (e.g. the Appeal Board regularly hears oral evidence when hearing appeals under section 17B of the TPO), the Appeal Board on hearing appeals certainly has a judicial function to discharge and it must exercise its powers in a judicial manner. While the Appeal Board has wide powers in forming independent planning judgment, it is not merely performing a purely administrative role when hearing appeals and making decisions on appeals. It has the same duty as any judicial body discharging judicial function in ensuring fairness between the parties, conducting hearings, following due process and exercising any discretionary power in the discharge of its functions. In making decisions on the appeals before it, the Appeal Board regularly interprets and applies the law, draws conclusions from contested evidence, and assess the credibility and admissibility of evidence given by witnesses. These are all functions typically performed by a judicial body. Accordingly, while the Appeal Board is not a judicial organ like the courts – it exercises different powers (e.g. it is not

bound by the strict rules of evidence) and functions (mandated by the TPO) – it is not merely a pure administrative body. In traditional legal language, the Appeal Board is a "quasi-judicial" body.

52. In the present case, the Proposed Development had been considered by the TPB at the review hearing, although in giving reasons for its decision the TPB did not refer to or rely on the Proposed Development. In these circumstances, we are of the view that this is not a case where admitting evidence on the Proposed Development (and taking into account of the same) would substantially alter the nature of the appeal, or such as would relegate the Appeal Board to the position of a first instance decision-maker As the Proposed Development had been considered by the TPB, but found no place in the reasons given by the TPB for its review decision, it must be taken that the TPB did not consider the Proposed Development as being relevant to the decision on the review application before it. The TPB may or may not be right on this, but it cannot be said that the Proposed Development is an entirely new matter that had never been considered by the TPB before the present appeal came before us.

53. We are therefore prepared to consider the evidence adduced, and submissions made by the Respondent based on the Proposed Development.

54. We however find great difficulties in the Respondent's submissions based on the Proposed Development. There is a glaring inconsistency in those submissions: on the one hand, the Respondent has made it clear that it is relying on OZP 16 and TPB Guidelines No. 16 to say that the Appellant's proposed application to develop a house is

inconsistent with the planning intention of a G/IC zone and has failed to meet the necessary requirements set out for non-G/IC uses applications on a G/IC zone. It has expressly disavowed reliance on OZP 17, which is presently still in draft form and has not yet been approved by the CE in C. At the same time, the Respondent says that it is relying on the Proposed Development in justification of the TPB's rejection decision (as constituting material change of circumstances), when it is clear that the Proposed Development – if implemented, will have required very substantial amendments to OZP 16 (i.e. the OZP Amendments referred to in §13.7 above), to such an extent that the present G/IC zonings in OZP 16 will become wholly irrelevant. Indeed, if the Proposed Development is to be implemented, a very substantial part of the GIC zonings in OZP 16 (including the part that presently covers the Appeal Site) will have to be replaced with different zonings in order to accommodate the development of high density public housing. That is precisely the reason why OZP 17 was prepared and exhibited for public inspection. It is hence difficult to see how the Respondent could place reliance on the Proposed Development while expressly disavowing reliance on OZP 17. It would be entirely unrealistic for us to consider the Proposed Development without at the same time considering the effect that it will have on OZP zonings, and the substantial changes that this will entail to the present zonings as set out in OZP 16. Accordingly, if we are to take into account the Proposed Development in considering the present appeal, we cannot possibly ignore the zoning changes that are required to be made, and on the evidence presently available, these changes are captured by the proposed zonings marked on OZP 17 (albeit the same is presently still in draft form).

55. The planning intention of OZP 16 and OZP 17 are clearly different, and it is impossible to take it as one. There is no dispute that under OZP 17, the Appeal Site concerned is planned to fall within the "*R(A)1*" zone under which "*house*" is one of the "*uses always permitted*" under Column 1. Accordingly, if the Proposed Development is to be taken into account, with the necessary zoning changes that it will entail (which changes are captured by OZP 17, still in draft form), the presently G/IC zoning in OZP 16 would no longer have any relevance at all to the Appeal Site. As recognised by Mr. Lam, if the zonings under OZP 17 should come into effect, the Applicant could proceed to build a house on the Appeal Site without making any planning application to the TPB at all.

56. Furthermore, as mentioned above, according to the feasibility study for the purpose of the Proposed Development, there is currently plan to resume the Appeal Site for the purpose of the Proposed Development. This is confirmed by the witness called by the Respondent, Mr. Chan Wai Lam, William ("**Mr. Chan**"). According to Mr. Chan, the area on which the Appeal Site falls would be used as part of the "*ingress and egress*" of the Proposed Development, and for that reason it is intended that the Appeal Site will be resumed for the Proposed Development. However, it is not disputed between the parties that the fact that the Appeal Site may be subject to resumption in the future is ***not*** a reason to refuse planning permission. There is a well-known distinction between permission and implementation. Resumption is a completely different form of land management in the tool-box of the government, and it should not be confused with planning permission.

57. If planning permission is granted and a house is built on the Appeal Site before the government resumes the land, all it means is that if the government does proceed to resumption later, it may have to pay more compensation for the resumption. That cannot be a good reason for not granting the planning permission sought.

58. In fact, as has been mentioned above, in the TPB's decision in No. A/K12/41 in 2018, the possibility of future resumption of the land is also expressly recognized. However, that was not considered as an obstacle to the grant of planning permission by the TPB.

59. For the reasons mentioned above, the Appeal Board holds that the Proposed Development – even if it is not just in "embryonic form" as contended by Mr. Ismail – cannot be a good reason for refusing planning permission in this case.

60. **Fourth**, having considered the evidence adduced on the Proposed Development, it appears to the Appeal Board that the suggestion that the Appeal Site may be required for use as a community hall is even more remote. As pointed out by the Appeal Board in the 2013 Decision (see §28 above), despite the lapse of many years, the community hall has not been built. Notably, Mr. Chan confirms in his evidence that he is not aware of any plan to build a community hall at the Appeal Site at this point in time. Indeed, according to the feasibility study made for the Proposed Development, a community hall is planned to be built at a location far from the Appeal Site (in Tower 1 of the Proposed Development). It may be that this is still at a "*design stage*" (as pointed out by Mr. Chan), but the fact remains that on the evidence presently before the Appeal Board, there is currently no plan to build a community hall at the Appeal Site, and

the community hall presently being planned is one that is designed to be built at a location far from the Appeal Site.

61. In these circumstances, the reason given by the TPB that granting planning permission would adversely affect the provision of community hall and other government facilities in the district seems to us to be entirely remote, if not artificial.

62. Having considered all the relevant circumstances of the case, this Appeal Board is of the view that Rejection Grounds (a) and (b) are not good reasons for refusing planning permission in this case.

D2 Appeal Issue Two: The Alleged Approved GFA

63. According to the Appellant, central to the determination of this issue is whether the Appeal Board ought, in the exercise of its independent planning judgment within the parameters of the approved OZP (i.e. OZP 16), to allow the Appellant's Application to build a 4-storey house (instead of a 3-storey house) at the Appeal Site so as to achieve the maximum amount of GFA of 183.6 m^2.

D2-1 The Parties' Cases

64. The Respondent strenuously opposes the Appellant's case that effect should be given to the alleged Approved GFA such that the Respondent should be allowed to build a 4-storey house (instead of a 3-storey house) to make up for the loss of GFA caused by the need to meet the setback requirement. According to the Respondent, the notion that in granting planning permission, the Appeal Board had

given approval to the building of a house that would achieve a GFA of 183.6 m^2 is entirely unfounded, for the following reasons:-

64.1 First, the OZP in the present case does not provide for any maximum GFA up to which the Appellant is entitled to build; and

64.2 Second, when the Appeal Board granted planning permission by the 2013 Decision, it did not do so with reference to any specified GFA. To the contrary, it described the proposed development as "一幢三層高（8.23 米）、佔地 61.20 平方米的屋宇" (a house of 8.23 m in height with site area of 61.2 $m^{2)}$ with the express qualification that the building plans cannot jeopardize future road works. In other words, it was a ***condition*** of the planning permission that the GFA of the proposed development may have to be reduced so as not to jeopardize the future road works in the area. The alleged Approved GFA is not something which was "lost" as a result of complying with the condition and requires a "remedy".

65. On the other hand, the Appellant relied on Liu's Application and submits that in the 2013 Decision, the Appeal Board must be taken to have granted planning permission to Mr. Liu for the permission "*applied for*". In this connection, the Appellant refers to section 16(3) of the TPO, which provides that:

> "The [TPB] shall within 2 months of the receipt of the application, consider the same at a meeting and, subject to subsection (4), may grant or refuse to grant the permission **applied for**." (emphasis added)

66. It is submitted by the Appellant that the words "*applied for*" are significant because they qualify the extent of the TPB's powers to grant or refuse permission to the subject application.

D2-2 Analysis

67. Having considered the submissions made by the parties, the Appeal Board cannot agree with the Appellant's submissions for the simple reason that the 2013 Decision cannot be taken to have given approval for any GFA to be achieved.

68. As rightly pointed out by Mr. Lam for the Respondent, nothing in the 2013 Decision suggests that in granting planning permission, the Appeal Board gave approval – let alone guaranteed – for any GFA to be achieved. If, in meeting the conditions set by the Appeal Board for granting the planning permission, some GFA cannot be achieved, that is simply the consequence arising from the conditions imposed by the Appeal Board when it exercised its planning judgment. The Appellant has no right or entitlement to claim for remedy of such a "loss".

69. Mr. Ismail's reading of section 16(3) of the TPO cannot carry the Appellant's case any further. Under section 17B(8) of TPO, the Appeal Board has power to allow, reverse or vary the decision appealed against, and this must include imposing conditions – if it allows an appeal – that the TPB would have power to impose if it had originally granted the permission sought. By virtue of section 17(6) of TPO, on a review under section 17, the TPB is entitled to "*confirm or reverse the decision in question,* ***or substitute for the decision in***

question any decision it could have made under section 16". Section 16(5) of TPO expressly provides that "*Any permission granted under subsection (3) may be* ***subject to such conditions as the Board thinks fit***". When all these sections are read together, plainly the Appeal Board is entitled to impose conditions when it allows an appeal and grants planning permission – as the TPB itself would have power to do so if it had granted planning permission in the first place.

70. We would therefore reject the Appellant's submission based on the alleged Approved GFA. However, this does not mean that planning permission should not be given to the Appellant to build a 4-storey house. Whether planning permission should be granted for a 4-storey house does not depend on whether the Appellant has a "right" (which it has not) to achieve the alleged Approved GFA. What matters in this regard, as a matter of planning judgment, is whether permitting the building of a 4-storey house would be contrary to the planning intention applicable to the Appeal Site. If, as has already been held, the building of a 3-storey house is not contrary to the relevant planning intention, it is not easy to see – subject to the matters to be discussed in relation to Appeal Issue Three below – why building a 4-storey house would have that effect. In the view of the Appeal Board, unless the Respondent can point to some material difference between a 3-storey house and a 4-storey house relevant to the exercise of our planning judgment, there is no reason why planning permission should be allowed for the former but not the latter.

D3 Appeal Issue Three: Visual Impact

71. Before considering this issue, it should first be noted that there is no

building height requirement/restrictions for the G/IC Zone in the OZP 16.

72. In this regard, a visual appraisal was performed by the Appellant from 6 public viewing points to assess the visual relationship between the proposed house at the Appeal Site and the surrounding neighbourhood. We have carefully examined the photomontages exhibited in the appeal bundles.

73. Having perused the visual appraisal, the accuracy of which is not disputed by the Respondent, the Appeal Board agrees with the submissions made by the Appellant that the proposed 4-storey house would not adversely affect any visual amenity, nor would it generate any "undesirable" visual impact on the surrounding area and the local landscape character.

74. In regard to the house proposed to be built on the Appeal Site, we note that the change from 3 to 4 storeys involves an increase in building height of about 4.77 meters (from 8.23 metres to 13 metres, i.e. more than 50%). However, having examined the character of the surrounding area, in particular the multi-storey developments in the vicinity of the Appeal Site, this Board does not consider that such a change would make any material difference insofar as visual impact is concerned.

75. Further, the Appeal Board has also considered the evidence of Mr. Chan, who has given evidence to the effect that:

75.1 the Appeal Site lies at the northern fringe of the G/IC zone. It is close to Bayview Garden, the Fire Services Department Wing

Ting Road Fire Services Married Quarters and Fortune Garden, all of which are multi-storey developments of over 4 storeys high;

75.2 the residential developments formed part of the surrounding areas relevant to the TPB's assessment of the building height as a matter of reasonableness and common practice;

75.3 when asked in cross-examination how it could fairly be said that the building height of the Appellant's proposed development was excessive in light of these immediate surroundings, which were relevant considerations, Mr. Chan replied that the TPB had only referred to the adjacent squatter areas for comparison;

75.4 Mr. Chan however provided no sound reason as to why only the neighbouring squatter areas were selected for visual impact assessment, nor could he explain why the multi-storey developments in the close vicinity of the Appeal Site are ignored for this purpose.

75.5 Indeed, at a later stage of his oral evidence, Mr. Chan expressly confirmed to this Appeal Board that the TPB did not disagree with the Appellant's visual impact assessment shown in the visual appraisals and photomontages and that the TPB would take into account high-rise buildings as well in considering visual impact.

76. In the premises, the Appeal Board is of the view that there is no good reason to refuse planning permission on the ground of alleged "undesirable" visual impact. It is wrong for the TPB to rely on

Rejection Ground (c) to refuse granting permission.

E. **Conclusion**

77. Having carefully considered all the evidence and submissions made to us, we are of the view that the Appellant's appeal should be allowed. Our decision is that the Appellant should be granted permission to build the 4-storey house as applied for (13 meters in total height on the site area of about 61.2 m^2) and subject to the same two conditions imposed in the 2013 Decision, i.e. (a) the provision of fire-fighting installations and water supplies to the satisfaction of the Director of Fire Services; and (b) the submission of design and layout of the proposed house that would not jeopardize the future road works to the satisfaction of the Commissioner for Transport.

78. We order accordingly.

F. **Costs**

79. The Appeal Board's practice is that, unless there are exceptional circumstances, no costs order will be made under section 17B(8)(c) of the TPO. The Appeal Board sees no exceptional circumstances in the present appeal and will not make any order as to costs.

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(Signed)

Mr. WONG Yuk-lun, Horace, SC, JP
(Chairman)

(Signed)

Mr. CHAN Bo-ching
(Member)

(Signed)

Mr. CHAN Yuen-king, Paul
(Member)

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Mr. PONG Yiu-po, Daniel
(Member)

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Dr. YU Yuen-ping, William
(Member)