

IN THE TOWN PLANNING APPEAL BOARD

TOWN PLANNING APPEAL NO. 8 OF 2018

Between

JOIN SMART LIMITED

Appellant

and

TOWN PLANNING BOARD

Respondent

Appeal Board : Mr. John YAN Mang-yee, SC, JP (Chairman)

Mr. CHAN Bo-ching (Member)

Ir. Queenie CHAN Wah-kuen (Member)

Mr. Paul CHAN Yuen-king (Member)

Dr. CHIU Sein-tuck (Member)

In Attendance : Ms. Lesley LEUNG (Secretary)

Representation : Mr. Anthony Ismail, Counsel for the Appellant

Ms. Deanna LAW, Counsel for the Respondent

Dates of Hearing : 2 to 4 September and 14 October 2020

Date of Decision : 15 March 2021

DECISION

1. This is an appeal brought by Join Smart Limited (“**Appellant**”) pursuant to s.17B of the Town Planning Ordinance (Cap. 131) (“**TPO**”) against the decision of the Town Planning Board (“**TPB**”) made on 29 September 2018 (“**Decision**”) refusing the Appellant’s application for a review of the refusal by the Rural and New Town Planning Committee (“**RNTPC**”) to grant an extension of time of 4 years for the commencement of a residential development (“**the 273 Approved Development**”) on Lots 212RP, 232, 233, 234, 235, 236 RP, 237, 238, 239, 243, 244, 246 S.A, 246 S.B, 246 RP, 247, 367 and 368 RP all in D.D. 130 and adjoining Government Land, Lam Tei, Tuen Mun, New Territories (“**the Appeal Site**”), planning permission for which had been granted on 17 October 2014 (“**2014 Permission**”) under application no. A/TM-LTYT/273 (“**273 Application**”).

BACKGROUND FACTS

The 273 Application

2. The 273 Application for planning permission was made pursuant to s.16 of the TPO on 13 December 2013. At the time of the application, the Appeal Site fell within the Approved Lam Tei and Yick Yuen Outline Zoning Plan (OZP) No. S/TM-LTYT/6 (“**the Approved OZP6**”).
3. As recorded in §9.1.17 of the RNTPC Paper No. A/TM-LTYT/273D prepared by the Planning Department (“**PD**”) for the RNTPC’s consideration at its first meeting to consider the 273 Application on 22 August 2014, the Director of Housing (“**DOH**”) strongly objected to the 273 Application on the ground that the Appeal Site “*encroached onto part of a planned public housing development with associated welfare, education and retail facilities*” and that “*the proposed development ... will adversely affect the flat production, layout and associated community works currently under detailed study by the government*”. The DOH also noted that “*The target completion year of the public housing development is in the second 5-year period of Public Housing Development Forecast (i.e. 2019/20 - 2023/24). To meet with the target completion year, it is scheduled to consult Tuen Mun District Council in September 2014 and subsequent actions such as site clearance and site formation, and construction works have also been programmed.*” It was also pointed out

that “it [was] estimated that about 1,600 public housing flats would be lost and the achievement of Public Housing Production target would be adversely affected” if the 273 application was approved. (see §9.1.17 of RNTPC Paper No. A/TM-LTTY/273D [C/4/159].

4. Similarly, as recorded in §12.1(b) of the same RNTPC Paper, the PD did not support the 273 Application because, inter alia,

“(b) the application site encroaches onto part of a planned public housing development with associated welfare, education and retail facilities. Premature approval of the application may lead to substantial loss of public housing flats and jeopardise the implementation of the public housing project.”

5. At the meeting on 22 August 2014, the RNTPC decided to defer its decision on the 273 Application in order to seek more information on the potential public housing development and to take into account the views of the Tuen Mun District Council (“**the TMDC**”) on the public housing project.

6. At a meeting of the RNTPC to give further consideration to the 273 Application scheduled on 17 October 2014, despite the PD maintaining its position of not supporting the 273 Application for the same reasons as had been put forward at the 22 August 2014 meeting, the RNTPC decided to grant the Appellant the planning permission sought under the 273 Application. The permission granted (“**the 2014 Permission**”) was stated to be “*valid until 17.10.2018, and after the said date, the permission should cease to have effect unless before the said date, the development permitted was commenced or the permission was renewed.*”

7. The permission was also stated to be subject to the following conditions (“**273 Approval Conditions**”):

“(a) the implementation of the mitigation measures identified in the Environmental Assessment and Sewerage Impact Assessment to the satisfaction of the Director of Environmental Protection or of the TPB;

(b) the provision of vehicular access, parking and loading and unloading facilities to the satisfaction of the Commissioner for Transport or of the TPB;

- (c) *the submission and implementation of detailed drainage proposal to the satisfaction of the Director of Drainage Services or of the TPB;*
 - (d) *the provision of water supplies for firefighting and fire service installations to the satisfaction of the Director of Fire Services or of the TPB;*
 - (e) *the submission of detailed archaeological impact assessment and implementation of the mitigation measures identified therein to the satisfaction of the Director of Leisure and Cultural Services or of the TPB;*
 - (f) *the submission and implementation of tree preservation and landscape proposal to the satisfaction of the Director of Planning or of the TPB; and*
 - (g) *the design of the boundary treatment and provision of measures to mitigate the visual impact along the boundary of the proposed development, including its boundary fence, to the satisfaction of the Director of Planning or of the TPB”.*
8. The Appellant then started the process of complying with the 273 Approval Conditions. In parallel, the Appellant also applied to the Lands Department for a land exchange and to the Building Authority (“BA”) to obtain approval for general building plans of building works of the proposed buildings of the 273 Approved Development (“GBPs”). Significant delays were caused by addressing comments raised by various Government departments, including the PD, and such delays prevented the land exchange from being processed and the GBPs from being approved.

Application for Extension of Time

9. As it was anticipated that it was unlikely that all the 273 Approval Conditions could be completely complied with by the 17 October 2018 deadline (although most of them had been partially complied with), on 21 February 2018, the Appellant applied for an extension of time of four years to commence the 273 Approved Development pursuant to section 16A of the TPO (“**the section 16A Application**”). At the time of the application, the Appeal Site fell within the Draft Lam Tei and Yick Yuen Outline Zoning Plan (OZP) No. S/TM-LTY/9 (“**the Draft OZP9**”)

10. Both the DOH and the PD expressed the view that they did not support the application. Their views were summarised in RNTPC Paper No. A/TM-LTYY/273-1 prepared by the PD for the RNTPC's consideration as follows:

“7.1.2 Comments of the Director of Housing (D of H):

CEDD is conducting the Site Formation and Infrastructural Works for the Development at San Hing Road and Hong Po Road, Tuen Mun – Feasibility Study. In this connection, the application is not supported.

7.1.3 Comments of the Head of Civil Engineering Office, CEDD (Head of CEO, CEDD):

- (a) His office is conducting a consultancy study titled “Agreement No. CE 68/2017(CE) – Site Formation and Infrastructure Works for the Development at San Hing Road and Hong Po Road, Tuen Mun – Feasibility Study” for Housing Department (HD). The consultancy study commenced in February 2018 scheduled for completion in Q1 2020.*
- (b) The subject land lots under application (for private residential development) would encroach into HD's public housing development site area at San Hing Road...*

8. *Planning Considerations and Assessments*

.....

- 8.2 *For background information, the original planning application No. A/TM-LTYY/273 was objected by HD and not supported by PlanD mainly because of its encroachment onto a public housing site. The Committee approved the application upon further consideration on 17.10.2014 noting that, amongst others, the proposed public housing development at San Hing Road was still at the conceptual stage.*
- 8.3 *Since then, the Government had explored whether the proposed public housing developments in the area could be adjusted. Having reviewed the latest situation, the need for developing public housing in the area has been re-affirmed and the Government has now come up with a decision to plan the public housing development in San Hing Road and Hong Po Road on a larger scale. The Site, together*

with another approved private residential development site (No. A/TM-LTY/337), has been included into the study area and falls within the boundary of the proposed public housing and school sites (Plan AA-1b). The Study Brief under ELAO (Appendix V) has been issued and the study consultants have already been appointed. The feasibility study commenced in February 2018 and it was expected for completion in Q1 2020.

8.4 *As such, when compared to the time of consideration of Application No. A/TM-LTY/273, there is a material change in circumstances in that the Government has commenced a feasibility study to further explore developing a larger site area including the Site for public housing purpose and there is a clear intention and plan to use the Site for public housing purpose. Approval of the EOT is not recommended as this will run against the clear Government intention on the land use for the area, not to mention the very confused message that may be conveyed to the public. That said, the applicant's right to commence the approved development until 17.10.2018 under planning approval No. A/TM-LTY/273 will not be deprived of*

9.1 *Based on the assessment made in paragraph 8, the Planning Department does not support the application for EOT for commencement of the approved development for the following reason:*

the application is not in line TPB PG-No. 35C in that there has been a material change in planning circumstances in respect of a clear intention and plan to use the Site for public housing development."

11. In response to the views expressed by the DOH and PD, the position taken by the Appellant was that the RNTPC would be acting *ultra vires* if it took into account the possible public housing development on the Application/Appeal Site in light of the decision of the Court of Appeal in International Trader Limited and Anor v Town Planning Appeal Board [2009] 3 HKLRD 339 ("**International Trader**"). The Appellant also contended that the PD had been wrong in arguing that there had been a material change in planning circumstances under §4(a) of the TPB's Guidelines "TPB PG-No. 35C Town Planning Board Guidelines on Extension of Time for Commencement of Development" (May 2014) ("**TPB's Guidelines 35C**") in part because

(1) *"...although the Guideline refers to a change in "planning" circumstances, in the context of a planning application, the planning circumstance in question must be a relevant planning*

circumstances, namely, one which the RNTPC is entitled to consider in the exercise of its plan approval function, as opposed to the TPB's plan making function... ”;

- (2) *“The wish of the Government to enlarge the site of the public housing to include the Site is simply not a matter within the OZP and cannot be a relevant planning circumstances for consideration of the EOT... ”; and*
- (3) *“To achieve the wish of the Government to enlarge the public housing site, the Government must apply to the TPB to alter the OZP and obtain the approval of the TPB, in the exercise of its planning making function, to the alteration. In so doing, the TPB must go through the statutory process to allow the public to make representations and comments in accordance with the requirements of the Town Planning Ordinance. It is legally not permissible for the Government to seek to avoid the statutory plan making process through the backdoor by objecting to the EOT”.*

12. The RNTPC decided to reject the section 16A Application at its 605th meeting held on 15 June 2018 (“**the RNTPC’s section 16A Rejection Decision**”), §209 of the confirmed minutes of the meeting recording as follows:

“After deliberation, the Committee decided to reject the application for the following reason

“...the application is not in line with TPB Guidelines No. 35C on Extension of Time for Commencement of Development in that there has been a material change in planning circumstances as the Government has committed to plan for a comprehensive public housing development which covers the application site, and the applicant fails to demonstrate that there is a good prospect to commence the proposed development within the extended time limit.”

13. There were accordingly 2 reasons given for the RNTPC’s section 16A Rejection Decision :

- (a) the section 16A Application was “*not in line with*” TPB’s Guidelines 35C in that there had been a material change in planning circumstances as the Government has committed to plan for a comprehensive public housing development which covers the Appeal Site; and

- (b) that the Appellant had failed to demonstrate that there is a good prospect to commence the proposed development within the extended time limit.

Application for Review of the Refusal of the Extension of Time

14. On 11 July 2018, the Appellant applied under section 17 of the TPO for a review of the RNTPC's section 16A Rejection Decision ("**the section 17 Review Application**"). The Draft OZP9 remained the relevant plan at the time of the application.
15. The DOH and PD maintained that they did not support the review application on essentially the grounds upon which they had not supported the section 16A Application.
16. The TPB decided on review to reject the section 17 Review Application ("**the section 17 Review Decision**") at its 1185th meeting held on 28 September 2018. However, unlike the RNTPC, the TPB was satisfied that the Appellant had demonstrated that there is a good prospect to commence the proposed development within the extended time limit.
17. §92 of the confirmed minutes of the meeting recorded the TPB's reason for rejection of the section 17 Review Application as follows:

"92. After deliberation, the Board decided to reject the application on review for the following reason:

"the application is not in line with the Town Planning Board Guidelines No. 35C on Extension of Time for Commencement of Development in that there has been a material change in planning circumstances, as demonstrated by the Government's commitment to plan for a comprehensive public housing development which covers the application site and the progressive action taken to pursue that development."
18. The TPB accordingly rejected the section 17 Review Application for the first of the 2 reasons given for the RNTPC's section 16A Rejection Decision as set out in §13(a) above.

The Present Appeal

19. On 16 October 2018, the Appellant lodged an appeal against the section 17 Review Decision pursuant to section 17B(1) of the TPO.
20. On the same day that the Appellant lodged the appeal, the Chief Executive in Council approved the Lam Tei and Yick Yuen Outline Zoning Plan (OZP) No. S/TM-LTYYY/10 (**“the Approved OZP10”**) within which the Appeal Site falls.
21. On 17 October 2018, planning permission for the 273 Approved Development lapsed.

The 381 Approved Development

22. On 1 August 2019, the Appellant made a fresh application for planning permission pursuant to section 16 of the TPO for a development (**“the 381 Approved Development”**) on the Appeal Site which application was assigned application no. TPB/A/TM-LTYYY/381 (**“the 381 Application”**).
23. In RNTPC Paper No. A/TM-LTYYY/381A prepared by the PD in November 2019 for the RNTPC’s consideration at its meeting on 29 November 2019, after having made reference, inter alia, to the Government’s stepped up efforts to increase the supply of public housing in the area of the Appeal Site, the PD expressed the view (at §12.1) that it did not support the 381 Application for the following reasons :

“the application site encroaches onto part of a planned public housing development. Approval of the application may lead to substantial loss of public housing flats, jeopardise the implementation of the public housing project and undermine the comprehensiveness of the public housing project.”
24. The Appellant having provided further information (**“FI”**) on 27 November 2019, at its meeting on 29 November 2019, the RNTPC decided to defer its decision on the 381 Application to allow the Secretary to the TPB the opportunity to seek legal advice on the legal issues raised in the FI.
25. A meeting of the RNTPC to give further consideration to the 381 Application was scheduled for 29 May 2020.

26. In RNTPC Paper No. A/TM-LTYT/381B (“**RNTPC Paper 381B**”) prepared by the PD for the RNTPC’s further consideration at the meeting, the PD adverted to the FI and the legal advice which had been obtained on the FI and indicated that it no longer objected to the 381 Application as follows:

“2. **Further Information submitted by the Applicant**

- 2.1 *Justifications and legal issues raised in the FI submitted by the applicant on 27.11.2019 (**Annex B**) are summarised as follows.*
- 2.2 *The application is a fresh application made under the provisions of the approved Lam Tei and Yick Yuen OZP No. S/TM-LTYT/10 (the approved OZP) while the previous application No. A/TM-LTYT/273-1 (the s. 16A application) for an extension of time of the planning approval (paragraph 5.2 of **Annex A**) was made and considered under the previous draft OZP No. S/TM-LTYT/9. Government departments and the Board are bound by the Town Planning Ordinance (TPO) to consider the application in the legal context within which the application is made. According to s. 13 of the TPO, “approved plans shall be used by all public officers and bodies as standards for guidance in the exercise of any powers vested in them”. However, the above fundamental point has not been fully made on the RNTPC Paper in **Annex A** and therefore the Committee is inadequately advised on the status of the application and how the application is to be considered.*
- 2.3 *The application has to be considered on a completely different statutory basis to the previous s.16A application. It must be considered in accordance with the provisions of the “R(E)” zoning on the approved OZP and considered on its own merits.*
- 2.4 *The Court of Appeal (CA) held in International Trader Limited v Town Planning Appeal Board [2009] 3 HKLRD 339 that when determining an application for planning permission under s.16 of the TPO, the Board does not have the power to have regard to any and all planning considerations which it believes would assist it to reach the decision in the public interest. The Board’s discretion must be exercised within the parameters of the OZP.*
- 2.5 *The recommended rejection reason [footnote 2: The rejection reason reads “the application site encroaches onto part of a*

planned public housing development. Approval of the application may lead to substantial loss of public housing flats, jeopardise the implementation of the public housing project and undermine the comprehensiveness of the public housing project.”] in paragraph 12.1 of **Annex A** has no relevance to the approved OZP, the “R(E)” zoning of the Site (**Plan FA-1**) and the planning intention of the “R(E)” [footnote 3 The planning intention of the “R(E)” zone is primarily for phasing out of existing industrial uses through redevelopment for residential use on application to the Board. Whilst existing industrial uses will be tolerated, new industrial developments are not permitted in order to avoid perpetuation of industrial/residential interface problem] zone which the application is made.

- 2.6 *The study in relation to the proposed public housing development at San Hing Road does not form part of the planning intention of the OZP. Therefore, if the Committee was to take into account the study or the objection of the Housing Department (HD) (paragraph 9.1.3 of **Annex A**), it acts ultra vires.....*

.....

5. Planning Considerations and Assessments

- 5.1 *In the FI submitted on 27.11.2019, the applicant claimed that the current application is a fresh s.16 application which should be considered on a completely different statutory basis to the previous s.16A application (No. A/TM-LTY/273- 1) and must be considered in accordance with the “R(E)” zoning of the approved OZP. As held by the CA in International Trader case, the Board, when determining a s.16 application, does not have the power to have regard to any and all planning considerations which it believes would assist it to reach the decision in the public interest. The Board’s discretion must be exercised within the parameters of the approved OZP. The Study in relation to the proposed public housing development does not form part of the planning intention of the approved OZP. If the Board were to take into account the Study or the objection of HD, it acts ultra vires.*
- 5.2 *Legal advice was obtained on the FI. In light of the legal advice, the Board should consider the current s.16 application as a new section 16 application under the approved OZP. The*

Board's consideration and decision on the current s.16 application should not be based upon the previous application No. A/TM-LTYT/273-1 for an extension of time of the previous planning approval. Furthermore, the CA judgement in the International Trader case is directly relevant in considering this application and the Board would be regarded as acting ultra vires if it had taken into account material considerations which fell outside the ambit of the approved OZP, i.e. the proposed public housing development under the Study in this application.

- 5.3 *Hence, for the purpose of the current s.16 application, the Board should confine its consideration to whether the applicant has demonstrated that the proposed private residential development is in compliance with the planning intention and development restrictions of the "R(E)" zone as found in the approved OZP, and whether the technical issues have been adequately addressed. In this context, the application has been re-assessed as follows*

.....

- 5.8 *The Site is included into the study area for proposed public housing development at San Hing Road and Hong Po Road, Tuen Mun (**Plan FA-1**). The Study is at an advanced stage and scheduled for completion in 2020. Subject to the findings of the Study to ascertain its feasibility, the Government will take further steps to proceed with public housing development through rezoning and any necessary land resumption under the LRO in accordance with the established practice. DLO/TM, LandsD advises that irrespective of whether the planning permission will be given, his office will not process any new land exchange application or amendment to the land exchange application already submitted. CE/HP2, CEDD has strong reservation on the application since approval of the application would affect the comprehensive public housing development and associated infrastructure works. D of Housing also does not support the application. In this regard, the approval of the application may lead to substantial loss of public-housing flats, undermine the comprehensiveness of the public housing project and jeopardise the timetable for implementation of the public housing development arising from the need to re-plan the area.*

5.9 *However, as the proposed public housing development under the Study has not been reflected on the approved OZP, based on the legal advice, the Board should not take the Study into account in considering the current application, otherwise it would act ultra vires. Nevertheless, the approval of the application does not pre-empt the Board from amending the OZP including the land use and development restrictions of the Site in future and the Government from implementing the proposed public housing development under the Study through land resumption under the LRO in accordance with the established practice. In this regard, if planning permission is to be granted, an advisory clause as advised by CE/HP2, CEDD is suggested to inform the applicant clearly 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.”(underlining added)*

.....

6. *Planning Department’s views*

6.1 *Based on the assessments made in paragraph 5 above and having taken into account the public comments mentioned in paragraph 10 of **Annex A**, the Planning Department has no objection to the application...”*

27. The RNTPC acceded to the 381 Application at its 648th meeting held on 29 May 2020, the planning permission granted (“**the 2020 Permission**”) being valid until 29 May 2024 and subject to the following conditions:

- (a) the design and provision of vehicular access and parking facilities for the proposed development to the satisfaction of the Director of Highways and the Commissioner for Transport or of the TPB;
- (b) the submission of a revised traffic impact assessment and implementation of the traffic mitigation measures identified therein to the satisfaction of the Commissioner for Transport or of the TPB;
- (c) the submission of a sewerage impact assessment and implementation of sewer connection works identified therein to the satisfaction of the Director of Environmental Protection and the Director of Drainage Services or of the TPB;

- (d) the submission and implementation of a drainage proposal to the satisfaction of the Director of Drainage Services or of the TPB; and
- (e) the submission of a noise impact assessment and the implementation of the noise mitigation measures identified therein to the satisfaction of the Director of Environmental Protection or of the TPB.”
(underlining added)

The RNTPC also agreed to advise the Appellant to note the advisory clauses set out in Annex E to the RNTPC Paper 381B which included an advisory clause that the Appeal Site might be subject to land resumption for the implementation of the Government’s proposed public housing development.

APPLICABLE LEGAL PRINCIPLES

- 28. As the appeal is brought under section 17B of the TPO, the Appeal Board’s powers in the appeal are set out the said section. In particular, under section 17B(8)(b), the Appeal Board has the power to “*confirm, reverse or vary the decision appealed against*”.
- 29. Further, the legal principles applicable to an appeal brought under section 17B are as follows:
 - (a) The burden is on the appellant to show that the TPB decision was wrong so that the Appeal Board should either reverse or vary that decision (see Town Planning Appeal No.15 of 2011, unrep., 27 February 2014, §26; Town Planning Appeal No.4 of 2016, unrep., 17 October 2017, §22). The appellant should state why the TPB was wrong and the Appeal Board should address the grounds relied upon (see Cesario Li Wai Hung v Administrative Appeal Board, unreported, CACV 250/2015, 27 May 2016, per Cheung JA at §§6.1, 6.2, 6.3, 7.5 and 7.6).
 - (b) It is incumbent upon the appellant to satisfy the Appeal Board that there is sufficient justification to warrant planning permission to be granted by the Appeal Board to the proposed development or, to the application for extension of time (see Town Planning Appeal No. 15 of 2011, *ibid.* §26; Town Planning Appeal No.4 of 2016, *ibid.* §22).
 - (c) The hearing of an appeal to the Appeal Board is a *de novo* hearing. In deciding whether to confirm, reverse or vary the decision

appealed against, the Appeal Board must exercise an independent planning judgment, and is entitled to disagree with the TPB (see Henderson Real Estate Agency Ltd v Lo Chai Wan [1997] HKLRD 258 at 266A).

- (d) The Appeal Board can substitute its own decision for that of the TPB even if the TPB had not strictly committed any error, as the hearing before the Appeal Board would normally be much fuller and more substantial than a review hearing under section 17 of the TPO (see Town Planning Appeal No. 15 of 2011, *ibid.* §18; Town Planning Appeal No. 4 of 2016, *ibid.* §22).
 - (e) In considering an appeal, the Appeal Board has to take the plans as they are. It is its duty to see that permissions which should be given thereunder are given but “*only to the extent shown or provided for or specified in the plan*” as provided in section 16(4) of the TPO. Further, in considering an appeal, the Appeal Board must not engage in plan-making because there is a distinction drawn between the TPB’s plan-making function and the TPB’s (and the Appeal Board’s) planning permission function. (see International Trader at §§24, 33-38; Town Planning Appeal No. 13 of 1993, unrep., 26 August 1994, §§5-6; Town Planning Appeal No. 15 of 2011, *ibid.* §19)
 - (f) In considering whether permissions which should be given “*to the extent shown or provided for or specified in [a] plan*” as provided in section 16(4) of the TPO, the plan and the Notes attached thereto are the most material documents to which the Appeal Board is bound to have regard. Although the Explanatory Statement to a plan and subsequent guidelines do not form part of the plan and the Appeal Board is not bound to follow the Explanatory Statement or the guidelines, they are material considerations which cannot be disregarded by the Appeal Board (see Henderson Real Estate Agency Ltd v Lo Chai Wan, *ibid.* at 267A-D)
30. It is also important to note that the TPB’s Guidelines 35C provide guidance in relation to an application for extension of time for commencement of development. The Guidelines themselves commence with an “Important Note” which states that “*The Guidelines are intended for general reference only.*” As noted above, in Henderson Real Estate Agency Ltd v Lo Chai Wan, the Privy Council held that policy guidelines on land use control in areas around Mai Po Nature Reserve which had

been issued by the TPB were material considerations which could not be disregarded by the Appeal Board although the Appeal Board was not bound to follow them. Although those policy guidelines are in their nature somewhat different from the TPB's Guidelines 35C, we are of the view that the same approach should be taken towards the latter.

THE RELEVANT PLAN

31. As noted above, whilst the Approved OZP6 was the relevant plan at the time of the 273 Application and the Draft OZP9 was the relevant plan at the time of section 16A Application and the section 17 Review Application, on the date of the filing of the present appeal, the Approved OZP10 was approved by the Chief Executive in Council. The Appeal Site still currently falls within the zone earmarked as Residential (Group E) (**"the R(E) Zone"**) on the Approved OZP10. Accordingly, the Approved OZP10 should be the governing plan in this Appeal (see Town Planning Appeal No. 5 of 2011, unreported, 16 July 2013, at §§43 to 49).
32. The planning intention of the R(E) Zone as stated in the Notes in respect of the R(E) Zone in the Approved OZP10 is as follows:

"This zone is intended for phasing out of existing industrial uses through redevelopment for residential use on application to the TPB. Whilst existing industrial uses will be tolerated, new industrial developments are not permitted in order to avoid perpetuation of industrial/residential interface problem."
33. Further paragraph (a) of the "Remarks" in the Notes in respect of the R(E) Zone states that *"No new development (except 'New Territories Exempted House') shall exceed a maximum plot ratio of 1.0, a maximum site coverage of 40% and a maximum building height of 4-storeys over single-storey car park (15m)."* The Notes in respect of the R(E) Zone also provide that planning permission from the TPB is required for the use of the R(E) Zone for flats.
34. Paragraph 8.1 of the Explanatory Statement of the Approved OZP10 headed **"GENERAL PLANNING INTENTION"** states in part that the general planning intention for the Area is:

"(a) to designate suburban residential developments to appropriate locations along committed and planned infrastructure corridors;

.....

- (e) *to encourage upgrading for the environment through comprehensively planned development by private sectors and infrastructural improvement works by Government departments; ...”*

35. Paragraph 9.6.2 of the said Explanatory Statement explains the R(E) Zone, in part, as follows

“9.6.2The area is at present intermixed with structures for residential use, open storage and workshops. Since it may not be possible to phase out all the industrial uses at once, it is important to ensure that the residential development will be environmentally acceptable and not subject to Industrial/ Residential (I/R) interface problems. The applicant will be required to submit adequate information to demonstrate that the new development will be environmentally acceptable, and suitable mitigation measures, if required, will be implemented to address the potential I/R interface problems. In addition, the applicant will have to prove to the Board that the proposed development would have no or minimal adverse impact on the area in terms of environmental quality, land-use compatibility, infrastructural provision and traffic requirement.”

MERITS OF THE PRESENT APPEAL

The Appellant’s Grounds of Appeal

36. In the Notice of Appeal filed on 16 October 2018, the Appellant relied on 3 grounds of appeal :-

- (a) That the TPB had erred in finding that there had been a material change in planning circumstances.
- (b) That the TPB had confused its plan making role with its planning permission granting role.
- (c) That the TPB had acted in breach of Articles 6 and 105 of the Basic Law.

The TPB's Decision was Erroneous

37. As noted in §17 above, the TPB decided to reject the Appellant's section 17 Review Application on the ground that "*the application is not in line with the Town Planning Board Guidelines No. 35C on Extension of Time for Commencement of Development in that there has been a material change in planning circumstances, as demonstrated by the Government's commitment to plan for a comprehensive public housing development which covers the application site and the progressive action taken to pursue that development*". This was also one of the two grounds upon which RNTPC had rejected the Appellant's section 16A Application – see §12 above.
38. Thus, the TPB (and in this regard, also the RNTPC) had taken the approach that so long as there has been a material change in planning circumstances, the application for the extension "*is not in line with*" TPB's Guidelines 35C and must be rejected.
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.
40. It follows that we are of the view that the TPB failed to properly consider the Appellant's section 17 Review Application in accordance with TPB's Guidelines 35C and its decision to reject the section 17 Review Application was accordingly erroneously arrived at. Although this is not one of the grounds expressly relied upon in the Appellant's Notice of Appeal, we are of the view that this does not preclude us from setting aside the section 17 Review Decision on this ground.

Reconsideration of the Appellant's Application for Extension of Time

41. Having set aside the section 17 Review Decision, TPB's decision, it is incumbent on us to reconsider the Appellant's application for the extension of time afresh. In this regard, we are grateful for the assistance

provided to us by the parties' respective counsel in the form of their very detailed written opening and closing submissions, supplemented by their oral submissions before us.

Relevant Issues to be Considered

42. Through the course of the hearing of this appeal, the parties have fine-tuned and adapted their positions. Having considered their latest submissions, we are of the view that the issues which require to be considered are :-
- (a) Whether there has been a material change in planning circumstances since the 2014 Permission within the meaning of §4(a) of TPB's Guidelines 35C. This issue gives rise to two sub-issues :-
 - (i) Whether we are able to take into account the Government's public housing development commitment and progressive action in considering this appeal and the Appellant's application for extension of time under TPB's Guidelines 35C ("**Issue 1**"); and
 - (ii) If the answer to Issue 1 is in the affirmative, whether the Government's public housing development commitment and progressive action constitute material changes in planning circumstances within the meaning of §4(a) of TPB's Guidelines 35C ("**Issue 2**").
 - (b) If the answers to Issues 1 and 2 are in the affirmative, how we should exercise our discretion under section 17B of the TPO whether or not to allow the extension of time sought by the Appellant ("**Issue 3**").

Issue 1

Appellant's Submissions

43. Under this issue, the Appellant puts forward 4 main contentions in contending that we are not entitled to take into account the Government's public housing development commitment and progressive action in considering this appeal and the Appellant's application for extension of time :-

44. First, the Appellant contends that we are bound by sections 13 and 16(4) of the TPO and the decision of the Court of Appeal in International Trader.
45. In support of this contention, the Appellant points out that section 16(4) states that permissions should be given “*only to the extent shown or provided for or specified in the plan*” and that in the present case, the relevant plan is the Approved OZP10.
46. The Appellant also points out that section 13 provides 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.”
47. The Appellant also points out (relying on TPA No. 13 of 1993 at §§5 to 7; TPA No. 5 of 2011 at §39c; and TPA No. 15 of 2011 at §§19.4 and 19.5) that we are duty bound to see that the Approved OZP10 is faithfully implemented and we are not to deviate from it “*however compelling other material considerations to the contrary might be*”.
48. The Appellant also contends that in International Trader, the Court of Appeal established a number of planning principles of general application, of which the following are particularly important in this Appeal.
- (a) The effect of section 13 of the TPO is to impose on all public officers and all public bodies the statutory duty to have reference to approved plans as the recognised measure by which they are to be directed in the exercise of their powers under the TPO.
- (b) When exercising the power to grant planning permission, the TPB does not have the power to have regard to any and all planning considerations which it believes will assist it to reach the right decision in the public interest. Its power or discretion must be exercised within the limits of the relevant approved plan or else the TPB would act *ultra vires* its powers. The TPB is not given a “blank canvas” but one already painted with the relevant approved plan and so the TPO, considered as a whole, requires that the discretion be exercised within the limits of the relevant approved plan. The approved plan is not merely a relevant consideration, one which the TPB (and the Appeal Board) may, for cogent reason, ignore.

- (c) The TPB has dual roles: first, the systematic creation of draft plans and secondly, the consideration of applications by persons who seek some required permission under a plan. It confuses these dual roles to say that, when considering an application for permission under section 16 of the TPO, the TPB may take into account any consideration that it considers promotes the “health, safety, convenience and general welfare of the community”. Those matters, in accordance with the mandate imposed by section 3 of the TPO have already guided the TPB in the preparation of the relevant approved plan and must be integral to that plan.
 - (d) In determining what is or is not a relevant matter to take into account when an application for planning permission is made, it is necessary to ascertain the planning intention for the zoning of the site in question in the relevant plan.
49. Secondly, the Appellant contends that sections 13 and 16(4) of the TPO and the principles in *International Trader* also apply to an application under section 16A of the TPO for the following reasons :-
- (a) It is not disputed, and the 2020 Permission demonstrates, that sections 13 and 16(4) of the TPO and *International Trader* apply to an application under section 16 of the TPO.
 - (b) The renewal of the 2014 Permission is part and parcel of the 2014 Permission and fundamentally and essentially the grant of planning permission under section 16 of the TPO because :
 - (i) the validity of the 2014 Permission was permitted to be renewed after 17 October 2018. The renewal simply stops it from expiring. It remains the 2014 Permission. The practical effect of granting an extension of time is the same as the 2014 Permission;
 - (ii) section 16A(7)(a) of the TPO states in part that “*Where the Board has under subsection (5) accepted any application or applications in respect of any permission granted under section 16...*”. Section 16(3) of the TPO empowers the TPB to grant planning permission and section 16(4) of the TPO states that the Board may grant planning permission under section 16(3) of the TPO “*only to the extent shown or provided for or specified in the plan*”. The

effect of section 16(4) of the TPO is that there is no power to deviate from the relevant plan “*however compelling other material considerations to the contrary might be*”; and

- (iii) section 16A(7)(a) of the TPO states that the planning permission may be read as having effect “*subject to the amendment*” which is the subject matter of the application.
 - (c) Furthermore, section 13 of the TPO 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*” and section 16A of the TPO vests the Board with a power.
 - (d) Additionally, the Appellant points out that an application under section 16A of the TPO is not to amend the draft or approved plan governing such planning permission and therefore any amendment has no impact whatsoever on the Approved OZP10. Any amendment is to the permission.
50. Thirdly, the Appellant contends that sections 13 and 16(4) of the TPO and the principles in International Trader also apply to TPB’s Guidelines 35C with the consequence that the material change in planning circumstances referred to in §4(a) of TPB’s Guidelines 35C must fall within the ambit of Approved OZP 10 for the following reasons :-
- (a) The Appellant argues that TPB’s Guidelines 35C are linked to section 16A of the TPO (since §1.2 of TPB’s Guidelines 35C provides that “*...With good justifications, the Board may grant an extension of time for commencement of development under s. 16A of the Town Planning Ordinance...*”) which in turn is linked to section 16 of the TPO (for the reasons set out in §49(b) above) which in turn is linked to Approved OZP 10 and International Trader.
 - (b) The Appellant also points out that section 13 of the TPO applies to the TPB’s power in section 16A of the TPO (see §49(c) above) which in turn is directly linked to TPB’s Guidelines 35C (since §1.2 provides that “*With good justifications, the Board may grant an extension of time for commencement of development under s. 16A of the Town Planning Ordinance*”).

- (c) The Appellant further points out that TPB's Guidelines 35C were published in May 2014 after the decision in International Trader in 2009. The Appellant therefore argues that it must be taken that the TPB was aware of the decision and that therefore, the "*planning circumstances*" when "*the original permission was granted*" at §4(a) of TPB's Guidelines 35C are those defined in International Trader and excludes "*any and all planning considerations which the TPB or the Appeal Board believes would assist it to reach the decision in the public interest*" or "*material considerations which fall outside of the ambit of an approved plan*" because of the dual functions of the TPB (per Hartmann JA at §51). Accordingly, the "*planning circumstances since the original permission was granted*" must only be those relevant to the TPB's planning permission granting function.

- (d) Additionally, the Appellant argues that TPB's Guidelines 35C are not plan-making or plan amendment guidelines and that the assessment criteria at §4 are not plan-making or plan amendment criteria. Accordingly, only the plan prepared by the TPB under section 3 of the TPO (i.e. Approved OZP10) can "*paint the canvas*" for the TPB and this Appeal Board. The Appellant further points out that the TPO does not empower the TPB to make or amend plans through guidelines and argues that TPB's Guidelines 35C cannot overrule or rewrite or take precedence over Approved OZP10 and International Trader.

- (e) The Appellant also contends that the TPB's interpretation of TPB's Guidelines 35C is incompatible with the statutory plan-making scheme because it completely bypasses the statutory plan-making process and extensive public consultation and jumps the gun on the rezoning of the Appeal Site and such a drastic consequence could not have been intended, especially since TPB's Guidelines 35C can be revised without notice.

- (f) Additionally, the Appellant points out that §1.2 of TPB's Guidelines 35C states "*...However, should there be new planning circumstances **governing the application**, the Board is under **no obligation** to approve the application*" (emphasis added) and invites us to note that :

- (i) “*the application*” is for an extension of the time for commencement of the “*development*” or “*permitted development*”: see §1.1 of TPB’s Guidelines 35C. Since the “*development*” or “*permitted development*” is on the Appeal Site, it follows that we only need to consider “any material change in planning circumstances” that impacts on or affects the Appeal Site;
- (ii) the “*new*” planning circumstances must amount to a “*material change in*” planning circumstances: see §4(a) TPB’s Guidelines 35C;
- (iii) even if the Government’s public housing development commitment and progressive action are “*new planning circumstances*”, the “*application*” is still **governed** by Approved OZP 10 and the principles in International Trader Limited i.e. the new planning circumstances do **not exclusively** govern the application; and
- (iv) the words “*no obligation*” mean that the TPB (and this Appeal Board) are entitled to approve the application and are not bound to refuse approval.

51. In this regard, the Appellant points out (relying on International Trader at §55) that the proper interpretation of TPB’s Guidelines 35C is a matter of law for us to decide and there is only one correct answer. The Appellant also points out (relying on International Trader Limited Anor v Town Planning Appeal Board, unreported, HCAL 13 of 2007, 15 November 2007, per A. Cheung J (as he then was) at §98 and Town Planning Appeal No. 12 of 1996, unreported, 12 November 1997, at §29) that TPB’s Guidelines 35C should be read in a down-to-earth, practical manner, and the language used is not to be invested with more precision than it would naturally bear.

52. Fourthly, the Appellant contends that the Government’s public housing development commitment and progressive action fall outside the ambit of Approved OZP 10 for the following reasons :

- (a) The planning intention of the “R(E)” zone as stated in the Notes of the “R(E)” zone at the time of the 2014 Permission (when Approved OZP6 was the governing plan) and at present, under Approved OZP 10, is as follows:

“This zone is intended for phasing out of existing industrial uses through redevelopment for residential use on application to the TPB. Whilst existing industrial uses will be tolerated,

new industrial developments are not permitted in order to avoid perpetuation of industrial/residential interface problem.”

- (b) §(a) of the “Remarks” in the Notes in respect of the “R(E)” zone in Approved OZP6 and Approved OZP10 contains the following development restrictions: a maximum plot ratio of 1.0, a maximum site coverage of 40% and a maximum building height of 4-storeys over a single-storey car park (15m). ‘Flat’ is a use in Column 2 of the Notes and therefore requires prior planning permission from the TPB.

- (c) §8.1 of the Explanatory Statement of Approved OZP6 and Approved OZP 10 headed “*General Planning Intention*” states in part that the general planning intention for the Area is for the private sector to develop “flats” and for Government to improve the infrastructure viz.

“(a) to designate suburban residential developments to appropriate locations along committed and planned infrastructure corridors; ...

(e) to encourage upgrading for the environment through comprehensively planned development by private sectors and infrastructural improvement works by Government departments; ...”

- (d) §9.6.2 of the Explanatory Statement of Approved OZP6 and Approved OZP10 also elaborates on the planning intention, in part as follows

“9.6.2The area is at present intermixed with structures for residential use, open storage and workshops. Since it may not be possible to phase out all the industrial uses at once, it is important to ensure that the residential development will be environmentally acceptable and not subject to Industrial/ Residential (I/R) interface problems. The applicant will be required to submit adequate information to demonstrate that the new development will be environmentally acceptable, and suitable mitigation measures, if required, will be implemented to address the potential I/R interface problems. In addition, the applicant will have to prove to the Board that the proposed development would have no or minimal adverse impact on the

area in terms of environmental quality, land-use compatibility, infrastructural provision and traffic requirement.”

(e) In the light of the above provisions, the Government’s public housing development commitment and progressive action fall outside the ambit of Approved OZP 10 for the following reasons :-

(i) The proposed public housing development is not a comprehensively planned development by the “private sector” as adverted to under §8.1 of the Explanatory Statement of Approved OZP6 and Approved OZP 10.

(ii) The proposed public housing development was (and still is) for “high-density” public housing developments with a plot ratio of more than 4 and a building height of more than 4-storeys over a single-storey car park (15m). It was more than a concept given its details such as kindergarten and primary school. The Government considered it a feasible plan and worth presenting to the TMDC: see

(1) §2.2 of RNTPC Paper No. A/TM-LTYYY/273D; Plan AP-1a and §135(c) of the minutes of the 520nd meeting of the RNTPC meeting held on 17 October 2014 where the plan was to provide 1,600 public housing flats for which the maximum plot ratio was 5 and the maximum building height was 39 storeys of 11 blocks of about 8,000 flats over about 8.7 hectares of land (including the Appeal Site) for a design population of 24,500 (“**the 2014 proposed high-density public housing development**”) [Referred to as the “San Hing Project” in the Press Release; and

(2) §5.7 of RNTPC Paper No. A/TM-LTYYY/273-1A [**B2/53/574-575 (also C3/7/962-963)**] as follows:

“After granting the planning approvals for two applications for private residential developments on 17.10.2014 (A/TM-LTYYY/273) and on 13.3.2015 (A/TM-LTYYY/282) respectively (Plan FAA-1), the Government had explored whether the proposed public housing developments in the area could be adjusted to take into account the approved private housing developments. However, in view of the acute demand for public housing, the Government stepped

up its effort in increasing the supply by maximising the development potential of each housing site. The Site, together with the other approved private residential site (No. A/TM-LTTY/282), has been included into the study area of the much larger-scale San Hing Road and Hong Po Road public housing project (Plan AA-1b of Annex A). The Study Brief under the Environmental Impact Assessment Ordinance (EIAO) ... was issued in 4.8.2017 and the feasibility study [the Feasibility Study] had commenced in February 2018 and was expected for completion in Q1 2020. In accordance with established practice, the zoning amendment for the public housing site will be submitted to the Board upon completion of the feasibility study”.

(iii) The RNTPC admitted that the proposed public housing development under the Feasibility Study fell outside the ambit of Approved OZP 10 when it granted the 2020 Permission based on legal advice from the Legal Adviser of the Development Bureau of the Government: see

(1) §4.2.1, §5 and §6 of RNTPC Paper No. A/TM-LTTY/381B. §5.9 recognized that the Feasibility Study is irrelevant to the RNTPC’s planning permission granting function but relevant to its plan-making or plan amendment function : see §26 above;

(2) §74(f) of the confirmed minutes of the RNTPC meeting recorded as follows:

“.....Nevertheless, the approval of the application would not pre-empt the Board from amending the OZP including the land use and development restrictions for implementing the proposed public housing development in future and the Government from implementing the proposed public housing development under the Study through land resumption under the Land Resumption Ordinance (LRO) under the established practice”; and

(3) §77 of the confirmed minutes of the RNTPC meeting recorded as follows:

“Mr Simon P.S. Lee, LA/DEVB, further explained that for the current application, it would be difficult to justify how the Government’s latest intention to use the site for a proposed public housing development under the Study was a material consideration that the Board was entitled to take into account, given the fact that such information had not yet been reflected on the approved OZP..”.

Respondent’s Submissions

53. The Respondent disagrees with the Appellant’s contention that we are not entitled to take into account the Government’s public housing development commitment and progressive action in considering this appeal and the Appellant’s application for extension of time. It argues that, in effect, the Appellant’s contention is that in considering whether there is any material change in “planning circumstances”, one can only consider whether the planning intention as stated in the relevant OZP has changed and that this construction is too narrow and cannot be right for the following reasons :

- (a) The focus of the inquiry under §4(a) of TPB’s Guidelines 35C is the presence or absence of any material change in “*planning circumstances*”, not a change in “*planning intention*” or “*planning policy*”. The fact that the broad term of “*planning circumstances*” was deliberately adopted evinces an intention on the part of the drafters to allow all new circumstances which, from a planning perspective, have a bearing on the approved development to be taken into account.
- (b) The references to change in “*planning policy*” and “*land-use zoning for the area*” in §4(a) are but examples of what would constitute a change in “*planning circumstances*”. They are not definitive or exhaustive of what “*planning circumstances*” entail (as evidenced by the fact that the phrase “*such as*” rather than “*that is*” is used).
- (c) In a similar vein, “*change in planning circumstances*” should not be confined to changes in the relevant OZP, the Notes attached to the OZP or the Explanatory Statement. Had the drafters of TPB’s Guidelines 35C intended the scope of §4(a) to be confined to changes in these documents, it would have been very easy for them to have spelt this out.

- (d) The Respondent therefore invites us to give the phrase “*planning circumstances*” its plain and ordinary meaning and to hold that what §4(a) of TPB’s Guidelines 35C empowers us to take into account are all circumstances which, from a planning perspective, have a bearing on the proposed development. This, the Respondent contends, requires a holistic assessment of all “*planning circumstances*” (including but not limited to the planning policy, OZP, planning intention, site conditions, surrounding environment etc.) prevailing since October 2014 when the 2014 Permission was granted.
- (e) What the Court of Appeal held in International Trader was that the TPB is not given a “*blank canvas*” when considering a section 16 application for permission and cannot simply have regard to “*any and all planning considerations which it believes will assist it to reach the right decision in the public interest*”. Accordingly, in the context of a section 16 application, the relevant “*canvas*” is the OZP (read together with the Notes and Explanatory Statement). On the other hand, in the context of a section 16A application for an extension of time, the “*canvas*” is all relevant “*planning circumstances*” *per* TPB’s Guidelines 35C, which include but is not limited to the OZP, Notes and ES. International Trader does not therefore in any way support the Appellant’s contention that the Government’s public housing development commitment and progressive action cannot be taken into account as a relevant “*planning circumstance*” for the purpose of the present section 16A application.
- (f) Relying on the decision of the TPAB in Town Planning Appeal No. 15 of 2011, at §§38-39, the Respondent contends that International Trader was decided on its unique facts in that the relevant zone had been re-zoned for a specific purpose of limiting certain development and that on account of the fact that the planning intention of the relevant zone in Town Planning Appeal No. 15 of 2011 was stated in the “*most general terms*”, the TPAB had rejected the appellant’s argument (based on International Trader) that the physical characteristics of the site and the land in the vicinity of the site were irrelevant considerations. By analogy, the Respondent argues that since the planning intention of the “R(E)” zone in Approved OZP10 is also phrased in the “*most general terms*” (see §32 above), applying the reasoning in Town Planning Appeal No. 15 of 2011, there is nothing in Approved OZP10 which precludes the Government’s public housing development commitment and progressive action to be taken into account.

Discussion

54. We agree with the Appellant's contentions as discussed in §52 above that the Government's public housing development commitment and progressive action fall outside the ambit of the Approved OZP10. That said, despite the Appellant's lengthy and detailed submissions, for the reasons set out below, we are not persuaded that we are not entitled to have regard to the Government's public housing development commitment and progressive action ("**the Contentious Matters**") in considering this appeal and the Appellant's application for extension of time under TPB's Guidelines 35C.
55. First, whilst we agree that we are bound by sections 13 and 16(4) of the TPO and that we are duty bound to see that the Approved OZP10 is faithfully implemented and is not deviated from, we do not agree that this precludes us from having regard to the Contentious Matters in considering, in accordance with TPB's Guidelines 35C and section 16A of the TPO, whether or not there has been a material change of planning circumstances for the purposes of exercising our discretion on the application for extension of time to commence the 273 Approved Development.
56. In so far as section 16(4) is concerned, we do not see how our having regard to the Contentious Matters in considering whether or not to grant an extension of time could result in any permission being given which is not "*to the extent shown or provided for or specified in*" the Approved OZP10. Similarly, whilst we are fully aware of our duty (as provided by section 13) to use the Approved OZP10 as "*standards for guidance*" in the exercise our powers and to see that the Approved OZP10 is faithfully implemented and is not deviated from, we cannot see how our having regard to the Contentious Matters in considering whether or not there has been a material change of planning circumstances for the purposes of exercising our discretion on the application for an extension of time could constitute or result in any breach of such duty. This is particularly so given that there appears to be nothing in the Approved OZP10 laying down any temporal restrictions on any development(s) permitted (and it has not been contended by the Appellant that there is any such restriction).
57. We are also not persuaded that the decision of the Court of Appeal in *International Trader* precludes us from having regard to the Contentious Matters in considering whether or not there has been a material change of planning circumstances for the purposes of exercising our discretion. As

the Court clearly stated, the issue considered by it in International Trader was limited to :-

*“Whether, as a matter of law, the appellant and in its turn the Appeal Board, when **determining an application for planning permission made under s.16 of the Ordinance** are entitled, indeed required, to have regard to any and all planning considerations which they reasonably judge to be relevant in their task of taking the right decision on the application in the public interest.”* (emphasis added)

58. The Court was therefore only considering, and its judgment was only concerned with, the proper approach to an application for planning permission made under section 16 of the TPO. Understandably therefore, the Court emphasised and focussed upon sections 13 and 16(4) in coming to the conclusion that it did that –

*“..... on a true construction of the Ordinance, **when determining an application for planning permission under s.16**, the Board does not have the power to have regard to any and all planning considerations which it believes will assist it to reach the right decision in the public interest. The Board's discretion is one that must be exercised within the parameters of the approved plan in question. Accordingly, if it takes into account material considerations which fall outside of the ambit of an approved plan, considerations which are therefore not relevant to it, it acts ultra vires.”*

59. Given the specific legal issue which was considered and determined in International Trader, and notwithstanding the arguments put forward by the Appellant that the extension of time sought is a renewal of the 2014 Permission and therefore part and parcel of the 2014 Permission, we are not persuaded that in considering an application for an extension of time and in determining whether or not there has been a material change of planning circumstances for the purposes of exercising our discretion in accordance with TPB's Guidelines 35C we are precluded from having regard to the Contentious Matters but are limited to considering only matters which fall squarely with the Approved OZP10.
60. First, the very nature of an application for planning permission pursuant to section 16 is completely different from an application for an extension of time to commence an approved development pursuant to section 16A. Under the former, the applicant is seeking permission to develop the land

covered by a draft plan or approved plan. Understandably, such development must, in the light of sections 13 and 16(4) and for the reasons adumbrated by the Court of Appeal in *International Trader*, be strictly constrained by the plan itself. Conversely, by the time of any application for an extension of time to commence an approved development, permission for the development has already been given pursuant to section 16 and in accordance with the requirements and limitations set out under section 13 and 16(4) as well as the guidance provided under *International Trader*. 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. Unless the temporal limitation imposed was due to anything expressly provided for in the draft plan or approved plan, it would not result in any permission being given which is not “*to the extent shown or provided for or specified in*” the plan.

61. Further, as the Appellant has highlighted, TPB’s Guidelines 35C were drafted and promulgated after the decision in *International Trader*. We agree with the Respondent’s submissions that had the intention been that the same restrictive approach laid down in *International Trader* should be applied in considering applications for extensions of time, this could and should easily have been provided for in TPB’s Guidelines 35C. This was not done.
62. We therefore hold that we are entitled to have regard to the Contentious Matters in considering, in accordance with TPB’s Guidelines 35C and section 16A of the TPO, whether or not there has been a material change of planning circumstances for the purposes of exercising our discretion on the application for extension of time to commence the 273 Approved Development. We stress that we are only holding that as a matter of principle, we are entitled to have regard to the Contentious Matters. We are not holding that the Contentious Matters do constitute a material change of planning circumstances. This is what we need to consider under Issue 2 to which we next turn.

Issue 2

Appellant’s Submissions

63. The Appellant submits that the answer to Issue 2 is in the negative for the following reasons.

64. First, the Appellant submits that §4(a) of TPB's Guidelines 35C only applies if there is (1) a material; (2) change; in (3) planning circumstances.
65. The Appellant contends that planning considerations or circumstances are only those which relate to the use and development of land: see Hong Kong Resort Co Ltd v Town Planning Board [2020] HKCFI 1956 at §40(2) and points out that Mr Mak Weng Yip Alexander ("**Mr Mak**"), the Acting Senior Town Planner/Tuen Mun 2 of the PD called as the Respondent's witness, also agreed that a planning circumstance is one that relates to the use and development of land.
66. The Appellant also contends that even assuming that the Government's public housing development commitment and progressive action or public housing policy are planning considerations or circumstances (because they relate to the use and development of the Appeal Site) and that "planning circumstances" are broader than "planning intention", they not material changes in planning circumstances impacting on or affecting the Appeal Site because the Appeal Site could not lawfully be used and developed for high-density public housing at the time of the 2014 Permission and cannot be so used and developed now because it must be rezoned first, as has been admitted by the Respondent :-
 - (a) The Appeal Site can only lawfully be used and developed under Approved OZP 10 which is in all material respects identical to Approved OZP 6 in force when the 2014 Permission was granted.
 - (b) At the time of the 2014 Permission and now, the Appeal Site is still in the "R(E)" zone, with the same Notes, same plot ratio, site coverage and height maxima and same Explanatory Statement: see the Appellant's submissions referred to in §52 above.
67. Secondly, the Appellant contends that "*a change in ... planning policy/land-use zoning for the area...*" cannot mean an intention to change or an intended change or steps for a possible future change because these words must be construed in a "*down-to-earth, practical manner, and the language used is not to be invested with more precision than it would naturally bear*": see §51 above.
68. Further, the Appellant contends that, in any event, there has been no change in intention because the Appeal Site was also intended to be studied for high-density public housing development in 2014, the only

difference being that whereas in 2014, the Government intended to have the proposed high-density public housing development over 8.7 hectares whereas from 2018, it intended to have them over about 27 hectares.

69. The Appellant therefore contends that the Government's public housing development commitment and progressive action are no more than a change in intention or the state of mind or awareness.
70. In so far as the "*progressive action*" which the RNTPC and the TPB took into account as demonstrating that there has been a material change of circumstances, the Appellant contends that such action only constitute steps for a possible future change of the land-use zoning of the Appeal Site relying on the following :

- (a) §7.8 of TPB Paper No.10476 ("**TPB Paper 10476**") for consideration by the TPB at the meeting on 28 September 2018 which stated as follows:

".....In accordance with established practice, the zoning amendment for the public housing site will be submitted to the Board for consideration upon completion of the feasibility study. As such, the Government has a clearer policy on the planned land use for the area and greater commitment in the proposed comprehensive public housing development..."

- (b) §87 of the confirmed minutes of the TPB meeting held on 28 September 2018 which recorded that the Chairperson commented as follows:

"Besides, after the feasibility study for the proposed public housing was completed and the zoning amendments to the OZP were published, the landowner still had the right to make representations..."

- (c) §43.2(d) of the Respondent's Opening Submissions before us in which it was submitted that "*Upon completion of the feasibility study, it is anticipated that zoning amendments will be submitted to facilitate the implementation of the proposed public housing developments.*" and §43.5 thereof in which it was submitted that "... the clear commitment to the Public Housing Project is a relevant "*planning circumstance*" because this project, when fully implemented, will lead to zoning amendments".

71. Thirdly, the Appellant contends that in 2014, the Government already had a policy and was committed to have high-density public housing development and community facilities on land including the Appeal Site albeit on a smaller scale but that such policy only became “clearer” and the commitment “greater” after a review as demonstrated by the following documents :
- (a) §8.3 of RNTPC Paper A/TM-LTY/273-1 [B2/52/468] for consideration by the RNTPC at its meeting on 20 April 2018 which stated as follows :

“...Having reviewed the latest situation, the need for developing public housing in the area has been re-affirmed and the Government has now come up with a decision to plan the public housing development in San Hing Road and Hong Po Road on a larger scale.”

- (b) Both §7.8 of TPB Paper 10476 and §78(a) of the minutes of the TPB meeting held on 28 September 2018 which recorded as follows:

“...the Government has a clearer policy on the planned land use for the area and greater commitment in the proposed public housing development...”

The Appellant contends that this does not constitute a change or material change in planning circumstances.

Respondent’s Submissions

72. The Respondent contends that the RNTPC (and the Respondent) were correct in finding that there has been a material change in planning circumstances since the grant of the 2014 Permission for the following reasons :
- (a) At the time of the 2014 Permission, the plan of having a public housing development at the Appeal Site was still at a “conceptual stage”. Accordingly, there was no basis to find at the time that the Appellant’s proposed development would be adversely impacted by the intended public housing development or *vice versa*. This was why the Appellant’s application for planning permission in 2014

was approved by the RNTPC despite the fact that it was, at the time, objected to by the Housing Department (“**HD**”) and not supported by the PD on the basis of its encroachment onto a public housing site.

- (b) However, in view of the acute demand in public housing, the Government has “*stepped up*” its effort in increasing the supply by maximizing the development potential of each public housing site. The Appeal Site (together with another private residential development site) has been included into the study area of a much larger-scale project of about 27 hectares (“**Public Housing Project**”) as compared to the much smaller scaled proposed development of 8.7 hectares in 2014.
- (c) The increase in size of the Public Housing Project is significant because it entails different development parameters (such as the design of pedestrian walks and transport system, number of hospitals, sewerage and drainage system etc.). It is not simply “the same plan with a bigger area”. Such is the impact which is expected to be brought about by the more advanced public housing development that it was specifically discussed at the TPB Meeting on 28 September 2018 when considering the section 17 Review Application :

“As for the proposed public housing development, according to the latest project profile, the site covered a total area of about 27 ha, with a PR [i.e. Plot Ratio] of 6, the development could accommodate 63,000 persons. There was no information on the number of units that would be affected by application No. A/TM-LTY/273 based on the latest planning parameters. However, according to the previous public housing scheme in consultation with TMDC in September 2014, the numbers of units that would be accommodated at the Site was about 1,600 based on a PR [i.e. Plot Ratio] of 5. As the PR of the proposed public housing development had been increased to 6, it was expected that the number of units that would be accommodated at the Site would be more than 1,600. Besides, as the Site was located in the middle of the San Hing Road site, it was noted that application No. A/TM-LTY/273 would impose significant development constraints and reduce the synergy effect of comprehensive public housing development, such as pedestrian linkages and internal road arrangements.” (emphasis added)

- (d) The Respondent contends that the concerns discussed at the TPB Meeting are all concerns which had not even begun to surface at the time of the 273 Application and the 2014 Permission because the intended scale, density and stage of the then proposed public housing development were completely different.
- (e) Further, given that the area of the Public Housing Project now covers more than 20 hectares, it has become a “designated project” under the Environmental Impact Assessment Ordinance (“EIAO”) for which an Environmental Impact Assessment (“EIA”) has to be carried out. As a result :
 - (i) On 21 June 2017, the project profile for applying for the EIA Study Brief was submitted. This kick-started the EIA process. The Respondent contends that it is noteworthy that, according to §1.2.1 of the Project Profile, the Public Housing Project has been “identified as potential long term public housing sites”;
 - (ii) On 4 August 2017, the Study Brief under the EIAO was issued;
 - (iii) In February 2018, the feasibility study had commenced and was expected to be completed in the first quarter of 2020;
 - (iv) In August 2020, the EIA report of the feasibility study was submitted under the EIAO and on 12 October 2020, the Director of Environmental Protection (“DEP”) has advised that it is suitable for public inspection;
 - (v) Upon completion of the feasibility study, it is anticipated that, in accordance with established principle, zoning amendments will be submitted to facilitate the implementation of the proposed Public Housing Project.
- (f) Accordingly, rather than remaining a “*conceptual plan*”, the plan to develop public housing at, *inter alia*, the Appeal Site had, by June 2017 at the latest, become a “*concrete*” plan (of a much larger scale with denser population) for which the Government has demonstrated an unquestionable commitment to implement.
- (g) The Respondent therefore contends that the clear commitment to the Public Housing Project is a relevant “*planning circumstance*” which

the RNTPC and the Respondent were entitled to take into account for the purpose of §4(a) of the Guidelines 35C because this project, when fully implemented, will lead to zoning amendments and which, from a planning perspective, will have a bearing on the Appellant's proposed development (which is a private residential housing development).

- (h) The Respondent further contends that the said change is “*material*” in terms of both the nature and the extent of the change. As to nature of the change, the Public Housing Project dramatically changes the intended land use/ zoning of the relevant sites (including the Appeal Site) from one without any public housing development to one designated to comprehensive development with high-density public housing and community facilities. On the other hand, the extent of the change is demonstrated by the progress which the Government has made with respect to the Public Housing Project.

Discussion

- 73. Although it is not expressly stated in §4(a) of TPB Guidelines 35C that the “*material change in planning circumstances*” must be a change in planning circumstances as pertains specifically to the specific site for which planning permission has been granted, it appears to us that there is other language in TPB Guidelines 35C which support and point to such a construction. First, in the last sentence of §1.2, it is provided that “*should there be new planning circumstances governing the application, the Board is under no obligation to approve the application*”. Since “*the application*” is the application for extension of time to commence the permitted development on the specific site, it appears to us that “*new planning circumstances governing the application*” must be read as referring to new planning circumstances as pertaining to the specific site in relation to which planning permission has been granted. Further, in §4(a) itself, one of the examples given of a “*material change in planning circumstances*” is “*a change in the planning policy/land use zoning **for the area***”. In our view, “*the area*” refers to the specific site for which planning permission has been granted.
- 74. In the light of the foregoing, it appears to us that in considering whether there has been a “*material change in planning circumstances*”, we must consider whether there has been such a change as pertains specifically to the Appeal Site.

75. As noted in §§3 and 4 above, at the time of the 273 Application, the PD's objection thereto was premised essentially on the following grounds :-
- (a) the Appeal Site “[**encroaching**] onto part of a **planned** public housing development with associated welfare, education and retail facilities” (emphasis added);
 - (b) the proposed development on the Appeal Site “adversely [affecting] the flat production, layout and associated community works currently under detailed study by the government”; and
 - (c) approval of the 273 Application “may lead to substantial loss of public housing flats and jeopardise the implementation of the public housing project”.
76. In so far as the section 16A Application (dated 21 February 2018) was concerned, the PD's (and the DOH's) objection thereto was stated to be premised essentially on the following grounds (see §10 above) :-
- (a) the Appeal Site's “[**encroaching**] into HD's public housing development site area at San Hing Road with associated welfare, education and retail facilities”;
 - (b) “the need for developing public housing in the area has been **re-affirmed** and the Government has now come up with **a decision to plan the public housing development** in San Hing Road and Hong Po Road **on a larger scale**. The [Appeal] Site, together with another approved private residential development site (No. A/TM-LTYT/337), has been included into the study area and falls within the boundary of the proposed public housing and school sites (Plan AA-1b). The Study Brief under ELAO (Appendix V) has been issued and the study consultants have already been appointed. The feasibility study commenced in February 2018 and it was expected for completion in Q1 2020” (emphasis added);
 - (c) “....when compared to the time of consideration of [the 273 Application], there is a material change in circumstances in that the Government has commenced a feasibility study to further explore developing a larger site area including the Site for public housing purpose and there is a **clear intention and plan** to use the Site for public housing purpose. Approval of the [section 16A Application] is not recommended as this will run against the clear Government intention on the land use for the area, not to mention the very confused

message that may be conveyed to the public” (emphasis added);
and

- (d) “.... *the application is not in line TPB PG-No. 35C in that there has been a material change in planning circumstances in respect of a **clear intention and plan** to use the Site for public housing development” (emphasis added).*

77. It is also pertinent to note that the PD’s objection (in November 2019) to the 381 Application was stated to be :-

*“the application site **encroaches** onto part of a **planned** public housing development. Approval of the application may lead to substantial loss of public housing flats, jeopardise the implementation of the public housing project and undermine the comprehensiveness of the public housing project.” (emphasis added)*

78. In the light of the foregoing, we are of the view that there has been no material change in planning circumstances as pertains specifically to the Appeal Site. We are of the view that the PD’s objection to the extension of time sought is the same as its objection to the 273 Application : that because the Appeal Site encroaches onto part of the planned public housing development, approval of the application may lead to substantial loss of public housing flats and jeopardise the implementation of the public housing project. We are not persuaded by the Respondent’s arguments that because the plan of having a public housing development at the Appeal Site at the time of the 273 Application was at a *conceptual* stage whereas the Government has since then stepped up its efforts to increase public housing supply and included the Appeal Site into the study area of a much larger scale project so that the Government now has a *concrete* plan, there has been a material change of planning circumstances. Both at the time of the 273 Application and now, the proposed public housing project was and still is a *planned* public housing project. We agree with the Appellant that there has not been any change in intention.

79. In so far as the Public Housing Project will be of a larger scale, we note that the bulk of the land for the increased size of the Public Housing Project will come from outside of the Appeal Site. That said, we do note from the marked up PLAN AP-1a (Reference No.A/TM-LTTY/273-1) annexed and referred to in the Witness Statement of Mr Mak dated 30 June 2020 that whereas under the Government’s plans for the public housing project at the time of the 273 Application, a small section of the Appeal Site did not fall within the area of the planned public housing

project (“**the Excluded Section**”), under the Government’s current plans, the whole of the Appeal Site would fall within the area of the Public Housing Project. However, the PD has not explained exactly what the size of the Excluded Section was nor has the Respondent contended that it is the specific inclusion of the Excluded Section which is, or contributes to, a material change of planning circumstances. For these reasons, we are not persuaded that the larger scale of the Public Housing Project is a material change of planning circumstances.

80. The Respondent has placed heavy reliance on the fact that given that the area of Public Housing Project now covers more than 20 hectares, it has become a “designated project” under the EIAO for which an EIA has to be carried out and that the Government has submitted an EIA report of the feasibility study had been submitted and that the DEP has advised that it is suitable for public inspection. We are not persuaded that because of this, there has been any material change of planning circumstances as pertains to the Appeal Site. 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.
81. In so far as the Respondent contends that there has been a material change of planning circumstances because the Public Housing Project dramatically changes the intended land use/zoning of the relevant sites (including the Appeal Site) from one without any public housing development to one designated to comprehensive development with high-density public housing and community facilities, we cannot see how this can be considered a material change of planning circumstances as pertains to the Appeal Site because even under the planned public housing project in 2014, the intended land use/zoning of the Appeal Site would have been required to be changed from one without any public housing development to one designated to comprehensive development with high-density public housing and community facilities if the Government wished to proceed with its plans to use the Appeal Site for high density public housing.
82. For all the above reasons, we are not persuaded that there has been any material change in planning circumstances as pertains to the Appeal Site.

Issue 3

83. Even though we have held that there has not been any material change in planning circumstances, for the sake of completeness, and in the event

that we are wrong in our conclusion under Issue 2, we will now go on to consider Issue 3. In so doing, we shall only consider the parties' submissions on points which remain in issue between them and are necessary for our decision. We do not propose to address contentions which had originally been raised in the parties' opening submissions and/or during the hearing but are no longer in issue in light of their closing submissions.

Appellant's Submissions

84. The Appellant submits that even if there has been a material change in planning circumstances, we must have proper regard for all relevant and material considerations and ignore irrelevant or immaterial considerations. This is not disputed by the Respondent.
85. Further, the Appellant contends that the relevant or material considerations all favour the grant of an extension of time of 4 years to commence from the date of our decision and there are more than good justifications for granting such extension.
86. The Appellant contends that little or no weight should be attached to the Government's progressive action taken to pursue the comprehensive public housing development which covers the Appeal Site. Instead, the relevant considerations all favour the grant of an extension of time of 4 years from the date of this Appeal Board's decision and there are more than good justifications for granting such extension for the following reasons.
87. First, the practical consequence of the 2020 Permission is that the Government would have to exclude the Appeal Site from the boundaries of the Public Housing Project and if it chooses, make up the loss in public housing flats on the Appeal Site by increasing the plot ratios in the remaining areas of at most, 255,467 m² (270,000 m² - 14,533 m²) or resume the Appeal Site. The Appellant contends that the only reason for the TPB's refusal to grant the extension of time has been superseded by the 2020 Permission since a refusal of the present application for an extension of time will not achieve what the Government wants to achieve, namely, using and developing the Appeal Site for high-density public housing. On the other hand, granting an extension gives the Appellant the choice of 2 development schemes and more importantly, will not waste all its efforts in complying with the planning conditions of the 2014

Permission. The balance is therefore clearly in favour of granting an extension.

88. The Appellant also contends that in light of the 2020 Permission, the current situation is a repeat of what it was after the grant of the 2014 Permission and the approval of two other applications, A/TM-LYTT/282 (on 13 March 2015) and A/TM-LYTT/337 (on 23 June 2017) also located on the site of the Public Housing Project. The Appellant points out that the Government had a proposal to deal with the situation, as can be gleaned from :

- (a) the explanation of Ms Teresa FONG of the Housing Department at TMDC meeting on 1 November 2016 as follows:

“...Later on 17 October 2014 and 13 March 2015, the TPB had approved the applications for two private residential development projects on the site of the originally proposed San Hing Road project. In view of this, the Government had been actively exploring ways to modify the public housing development on the San Hing Road site and its vicinity, in a bid to minimise the impacts of the two approved applications on the San Hing Road PRH development project. The department’s proposal at the present stage was to raise the plot ratio for the site and expand its size (i.e. another piece of land to the west of the site of the 2014 original plan for the San Hing Road public housing development project)”;

and

- (b) the press release on 29 September 2016 translated as

“...Meanwhile, the Town Planning Board approved two planning applications for private housing developments within the site in October 2014 and March 2015.

The Government said it has been studying ways to adjust the plan to build public housing at the San Hing Road and nearby areas, since the original proposal was rejected by the district council....

For the rest of the sites in the original proposal, assuming that the two private residential projects in the original proposal are to go ahead, the Government may construct public housing with a higher plot ratio, providing 5,600 flats.”

89. The Appellant further points out that Mr Mak stated in evidence that the DEP had been informed of the 2014 and 2020 Permissions and had agreed that the boundaries of the Feasibility Study, which is ongoing, would have to be adjusted and that the consultants had been informed of the 2020 Permission.
90. Additionally, the Appellant pointed out that the TPB had agreed to warn the Appellant that the Appeal Site may well be resumed even if the 381 Application succeeded :
- (1) §5.9 of the RNTPC Paper prepared in May 2020 in relation to the 381 Application stated as follows: -
- “...if planning permission is to be granted, an advisory clause as advised by CE/HP2, CEDD is suggested to inform the applicant clearly 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.”;*
- (2) the proposed advisory clause was set out at §(i) of the RNTPC Paper; and
91. Secondly, the Appellant contends that the Government’s progressive action taken to pursue the Public Housing Project is a long way to completion and is fraught with uncertainty.
92. Thirdly, the Appellant contends that the TPB has yet to receive an application to rezone the Appeal Site for high-density public housing, let alone make a decision. Extensive public consultation must take place when such an application is made. The TMDC would have to be consulted and it is not a rubber stamp. The plan-making or plan amendment process has not yet even started. The TPB is not bound to rezone the Appeal Site for the proposed public housing development. The TPB is not a rubber stamp of the Government or any Government department. The TPB may well excise the Appeal Site because of the 2020 Permission and since it constitutes only 5.38% of the total area for the Public Housing Project of 27 ha or 270,000 m² (14,533 m² out of 27 ha or 270,000 m²) and is already vacant. Accordingly, rezoning of the Appeal Site for a high-density public housing development is still a long way away and by no means a given. In support of this contention, the

Appellant points out that Mr Mak admitted that there were uncertainties until completion and that they were facing a lot of uncertainties.

93. Fourthly, the Appellant contends that there is no dispute that the Appellant has met the planning criteria at §§4(b) to (g) of TPB's Guidelines 35C. In particular, the Appellant points out that it has fulfilled the conditions of the 2014 Permission not involving implementation and is not seeking to change the conditions of the 2014 Permission.
94. In so far as the proposed length of the extension of time, the Appellant contends that this Appeal Board has the power to grant an extension of 4 years, relying on :
- (a) §3.1 of TPB's Guidelines 35C (May 2014) which provides :
- “3.1 Any extension(s) of time for commencement of development shall not result in an aggregate extension period longer than the original duration for commencement of the approved development proposal....”; and*
- (b) Category 18 in TPB's Guidelines 36B (March 2018) which provides :
- “The period of extension, or the aggregate of all the periods of extensions, not exceeding the original duration for commencement of development of the approved development proposal”.*
95. The Appellant contends that it requires 4 years because there are a number of building appeals against the refusal by the Building Authority (“**the BA**”) to approve building plans which are on hold. These building appeals would have to be restored and determined. Further, the losing party may apply to judicially review the BA's decisions and there may be appeals to the Court of Appeal by the unsuccessful party. Additionally, the Appellant also needs time to execute the land grant/lease modification.
96. As to when the extension of time sought should start to run, the Appellant contends that this Appeal Board has the power to order that the extension of 4 years should start to run from the date of the Appeal Board's decision, relying on :

- (a) section 17B(8)(b) of the TPO, which provides that the Appeal Board has the power to “*confirm, reverse or vary the decision appealed against*”; and
 - (b) section 16A(6) of the TPO, which provides that an application under section 16A(5) of the TPO “*may be acceptedsubject to such conditions as the Board requires.*”
97. The Appellant also points out that in successful applications for planning permission, the period of such permission generally runs from the date of the Appeal Board’s decision.

The Respondent’s Submissions

98. The Respondent accepts that a “*material change in planning circumstances*” is only one of the 8 specified criteria in the TPA’s Guidelines 35C for assessing applications for an extension of time for commencement of development. It further points out that the weight which should be given to each of the criteria is not expressly provided for, although it points to §1.2 of the Guidelines 35C which provides that :

*“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 (Ordinance). **However, should there be new planning circumstances governing the application, the Board is under no obligation to approve the application.**” (emphasis added)*

99. Based on the language of §1.2, the Respondent contends that it appears that the general tenor of TPA’s Guidelines 35C is in favour of granting an extension of time as long as there is good justification, except in a case where there has been a material change in planning circumstances, which is considered a special category warranting a different starting point altogether (*viz.* there is no obligation to grant an extension of time). The Respondent therefore submits that the presence of a “*material change in planning circumstances*” is a particularly weighty consideration amongst the 8 criteria stated in §4 of TPA’s Guidelines 35C.
100. The Respondent however, accepts that TPA’s Guidelines 35C do not go so far as to prohibit the grant of an extension of time in face of a material change of planning circumstances and that so long as the change is taken

into account and not brushed aside or ignored, whether or not the TPB or this Appeal Board decides to grant an extension of time is entirely a matter within its own discretion.

101. The Respondent therefore contends that in appropriate circumstances, an extension of time could be granted despite new planning circumstances coming into play, such as where the change in planning circumstances, albeit material, is not inconsistent with or adverse to the development in respect of which planning permission had been granted. The Respondent contends that this, however, is not such a case for the following reasons :

- (a) The effect of the relevant change in the present case is to introduce a substantial public housing development at the Appeal Site. This fundamentally changes the character of the Appeal Site and does not sit well with the Appellant's proposed private housing development on the same site.
- (b) The Appellant has demonstrated no countervailing factor or consideration to address the said change.
- (c) Accordingly, the Respondent contends that to grant an extension of time despite the material change of planning circumstances would be irrational or unreasonable in the *Wednesbury* sense as it would be a decision "*so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it*" (citing Council of Civil Service Unions & Ors v Minister for the Civil Service [1985] AC 374 at 410).

102. The Respondent therefore contends that if we find that there has indeed been a material change in planning circumstances as contended by the Respondent, the only logical conclusion on the facts of the present case would be to refuse to grant the extension of time sought.

Discussion

103. For the purposes of this discussion, we shall assume that the Government's commitment to plan for a comprehensive public housing development and the progressive action taken to pursue that development do constitute a material change of planning circumstances ("**the Assumption**") as the TPB had found.

104. Making the Assumption, we are of the view that even if there has been the assumed material change of planning circumstances, our discretion should be in favour of the grant of the extension of time for the reasons set out below.
105. First, we accept the Respondent's contention that in the light of the specific reference in §1.2 of TPA's Guidelines 35C to the TPB having no obligation to approve an application for an extension of time in cases where there are "*new planning circumstances governing the application*", the presence of a "*material change in planning circumstances*" is a particularly weighty consideration amongst the 8 criteria stated in §4 of TPA's Guidelines 35C.
106. That said, we are of the view that the Government's commitment to plan for a comprehensive public housing development and the progressive action taken to pursue that development are nevertheless outweighed by the following factors :-
- (a) We agree with the Appellant's contention that whilst the Government has ***committed to plan*** for a comprehensive public housing project and has taken progressive action to pursue that development, it is by no means certain that the Government would be able to include the Appeal Site within such comprehensive public housing project as the Government would need to make an application to rezone the Appeal Site and the outcome of such an application is by no means certain. Accordingly, even if we were to exercise our discretion against the granting of an extension of time, this would not necessarily achieve the Government's aim of using and developing the Appeal Site for high-density public housing.
 - (b) Conversely, if we were to exercise our discretion in favour of granting the extension of time, in light of the matters adverted to in §88 above, it appears that the Government could still be able to implement its plan for a comprehensive public housing development by either increasing the plot ratios in the areas outside the Appeal Site and/or by resuming the Appeal Site. Additionally, as pointed out by the Appellant, even if the Government does not succeed in resuming the Appeal Site, it only occupies a small area of the Public Housing Project.
 - (c) We are also persuaded that since the Appellant has worked hard to fulfil the 273 Approval Conditions not involving implementation,

this is an important factor in favour of granting the extension of time sought.

- (d) We also accept the Appellant's contention that consideration of the planning criteria at §§4(b) to (g) of TPB's Guidelines 35C would all weigh in favour of granting the extension of time :-
 - (i) There is no suggestion that there would be any adverse planning implications arising from the extension of time.
 - (ii) The commencement of the development under the 2014 Permission has been delayed due to problems which are beyond the control of the Appellant.
 - (iii) The Appellant has demonstrated that reasonable actions have been taken by it for the implementation of the development under the 2014 Permission.
 - (iv) The Appellant has demonstrated that it has taken reasonable actions and worked hard to fulfil the 273 Approval Conditions not involving implementation.
 - (v) The Appellant has demonstrated that there is a good prospect to commence the proposed development within the extended time limit – see §16 above.

107. In the light of the foregoing, even assuming that there has been a material change of planning circumstances as found by the TPB, we are of the view that our discretion should be exercised in favour of the grant of the extension of time sought.

108. We also accept the Appellant's submissions discussed in §§95 to 98 above (which do not appear to be challenged by the Respondent) and are of the view that such extension of time should be for 4 years commencing from the date of our decision.

CONCLUSION

109. For all the reasons set out above, we allow the Appellant's appeal and grant the Appellant an extension of time of 4 years from the date of this decision to commence the 273 Approved Development.

110. Further, in the light of our decision to allow the Appellant's appeal for the reasons already discussed, it is not necessary for us to consider the Appellant's other grounds of appeal identified under §36(b) and (c) above.
111. On the issue of costs, having considered such limited submissions on this as have been contained in the parties' opening and written submissions, we make an order *nisi* that there should be no order as to costs. Any party which disagrees with such order should file further written submissions within 14 days and the opposite party shall have leave to file submissions in response thereto within 14 days thereafter.
112. We thank Counsel for their very helpful and detailed submissions and assistance rendered to us.

(Signed)

Mr. John YAN Mang-yee, SC, JP
(Chairman)

(Signed)

Mr. CHAN Bo-ching
(Member)

(Signed)

Ir. Queenie CHAN Wah-kuen
(Member)

(Signed)

Mr. Paul CHAN Yuen-king
(Member)

(Signed)

Dr. CHIU Sein-tuck
(Member)