IN THE TOWN PLANNING APPEAL BOARD

Town Planning Appeal No. 5 of 2013

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BETWEEN

CHAN YIU KAM Appellant

and

TOWN PLANNING BOARD Respondent

_____

Appeal Board :	Mr. Johnny FEE Chung-ming, JP	(Chairman)
	Professor Rebecca CHIU Lai-har, JP	(Member)
	Miss Julia LAU Pui-g	(Member)
	Ms. NG So-kuen	(Member)
	Ms. TONG Choi-cheng	(Member)
In Attendance :	Ms. Suan MAN	(Secretary)

Representation : Mr. Valentine S.T. YIM, Counsel for the Appellant

Mr. Jin PAO, Counsel for the Respondent

Date of Hearing : 28 - 29 May 2014 and 18 August 2014

Date of Decision : 31 October 2014

DECISION

This Appeal

1. This is an appeal ("**Appeal**") by the Appellant under section 17B of the Town Planning Ordinance ("**TPO**") against the refusal by the Town Planning Board ("**TPB**") of his application for planning permission to redevelop a 2-storey vacant house into four New Territories Exempted Houses (individually "**NTEH**") on his site ("**Site**") at Lot 757 in D.D. 115, Tung Shing Lei, Nam Sang Wai, Yuen Long, New Territories ("**Proposed Development**").

Zoning

2. The Site falls within an "Undetermined" ("**U**") zone on the approved Nam Sang Wai Outline Zoning Plan No. S/YL-NSW/8 ("**OZP**"). The subject U zone has an area of around 26.4 hectares ("**U Zone**").

Events leading to this Appeal

3. In November 2011, the Appellant lodged his application to the TPB for planning permission for the Proposed Development under section 16 of the TPO ("**Application**").

4. On 5 October 2012, the Rural and New Town Planning Committee ("**RNTPC**") of the TPB, under delegated authority from the TPB, decided to refuse the Application for the following reasons :-

> *"(a) the proposed houses were located at the middle of [a] "U" zone which was being comprehensively reviewed. Approval of the application would pose an undue constraint to the future land use in the area;*
>
> *(b) there was no strong planning justification for the proposed development intensity at the site; and*
>
> *(c) the approval of the application would set an undesirable precedent for similar applications for piecemeal redevelopment within the "U" zone. The cumulative impacts of approving such application would have adverse impacts on traffic, drainage and sewerage systems in the area."*

5. On 6 November 2012, the Appellant applied to the TPB under section 17 of the TPO for a review of the RNTPC's decision in refusing his application.

6. On 1 February 2013, having considered the submissions by the Appellant at a review hearing, the TPB decided to reject the review application ("**TPB's Decision**") for the following reason which was notified to the Appellant by letter dated 22 February 2013 :-

"[A]s a land use review for the "U" zone was being undertaken by [the Planning Department], the approval of the application at this stage was considered premature and might jeopardize the overall land use planning of the area."

7. On 22 April 2013, the Appellant lodged this Appeal against the TPB's Decision by filing a Notice of Appeal under section 17B of the TPO. The grounds of appeal set out in the Notice of Appeal were subsequently amended on 14 May 2014.

Grounds of Appeal

8. The Appellant's grounds of appeal, as ultimately set out in the Appellant's Closing Submissions of 13 June 2014, are put forward by the Appellant's Counsel as follows (collectively **"Grounds of Appeal"**) :-

(1) The TPB's Decision is wrong or unreasonable and should be reversed by the Appeal Board pursuant to section 17B(8)(b) of the TPO for the following reasons :-

(a) The fact of there being a land use review for the U Zone, which is currently being undertaken by the Planning Department, in itself is not a valid reason for refusal of planning permission ("**Ground 1A**");

(b) The "real reason" behind the rejection of the Application is

that it "may jeopardize the overall land use planning of the area" ("**Ground 1B**");

(c) Insufficient inquiries were made by the TPB in reaching the TPB's Decision that the Application may jeopardize the overall land use planning of the area ("**Ground 1C**"); and

(d) The TPB has failed to demonstrate clearly with evidence how the grant of permission for the Proposed Development would be "premature" and "prejudicial" to the outcome of the land use review ("**Ground 1D**").

(2) The Application should be approved as no "sound planning objections" have been shown by the TPB for the following reasons :-

(a) As far as planning intention of the Site is concerned, developing NTEH is a permitted land use and each application should be considered on its own merits ("**Ground 2A**"); and

(b) No "sound planning objections" have been shown by the TPB on its following stated reasons as to the Application's lack of merits ("**Ground 2B**") :-

(i) Lack of planning justifications;

(ii) "Prematurity" and "Jeopardy";

(iii) Governmental concerns; and

(iv) Undesirable precedent.

Witnesses and Representation of the Parties

9. The differences between the two sides are largely on opinions rather than on facts. The Appellant called Mr. Ian Brownlee ("**Mr. Brownlee**"), an expert witness and a Registered Professional Planner, in support of his arguments. The TPB called Mr. Ernest Fung ("**Mr. Fung**"), Senior Town Planner/Yuen Long East 1 of the Planning Department, in support of the TPB's Decision. The Appellant was represented by Mr. Valentine Yim of Counsel. The TPB was represented by Mr. Jin Pao of Counsel.

Appeal Board's Findings

Ground 2A: As far as planning intention of the Site is concerned, developing NTEH is a permitted land use and each application should be considered on its own merits

10. Ground 2A involves some general principles relevant to this appeal. It is better to deal with Ground 2A first.

11. In considering an appeal against the decision of the TPB, the Appeal Board must exercise an independent planning judgment and is entitled to disagree with the TPB (*Henderson Real Estate Agency Ltd v Lo Chai Wan* [1997] HKLRD 258 (PC) at 261, 266A). The Appeal Board could substitute its own decision for that of the TPB even if the TPB had not strictly committed any error on the materials before it, 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: *Town Planning Appeal No. 14 of 2011*, at §15.

12. The independent planning judgment of the Appeal Board on whether to grant planning permission must be exercised within the parameters of the relevant approved plan. By section 16(4) of the TPO, the TPB may grant planning permission only to the extent shown or provided for or specified in the OZP.

13. The Notes to the OZP are expressly stated to form part of the OZP. They are material documents to which the Appeal Board is bound to have regard to in exercising its independent planning judgment. While the Explanatory Statement to the OZP ("**Explanatory Statement**") is expressly stated not to be part of the OZP, it cannot be disregarded because it is a material consideration though the TPB and the Appeal Board are not bound to follow it: see *Henderson Real Estate Agency Ltd. v Lo Chai Wan* [1997] HKLRD 258 at page 267; *Halsbury's Laws of Hong Kong, Vol. 48*, at § [385.270].

14. Paragraph (13) of the Notes to the OZP provides that in a U zone, all uses or developments except those specified in paragraphs (8) and (11)(a) of the Notes require permission from the TPB. Paragraph (11)(a) of the Notes to the OZP deals with temporary use for a period of less than two months. It is not applicable to the Proposed Development which is not

for temporary use. By paragraphs (8)(e) and (f) of the Notes to the OZP, *"rebuilding of [NTEH]"* and the *"replacement of an existing domestic building, i.e. a domestic building which was in existence on the date of the first publication in the Gazette of the notice of the interim development permission area plan, by [an] NTEH"* are always permitted in a U zone. Although the existing domestic building to be replaced by the Proposed Development was in existence prior to the gazettal of the interim development permission area plan ("**IDPA plan**"), as that building will be replaced by four NTEHs instead of just one NTEH, we consider that paragraphs (8)(e) and (f) of the Notes to the OZP do not apply. The rest of paragraph (8) is irrelevant and inapplicable to the Proposed Development. The end result is that planning permission for the Proposed Development is required from the TPB.

15. We now consider the Explanatory Statement. Paragraphs 9.8.1 and 9.8.2 of the Explanatory Statement provide as follows :-

> *"9.8.1 ….The areas are located in close proximity to the Yuen Long New Town and within a transitional location between the urban and rural areas. Development within the areas has to be comprehensively planned as piecemeal development or redevelopment would have the effect of degrading the environment and thus jeopardizing the long-term planning intention of the areas…*

9.8.2 Under the "U" zone, any private developments or redevelopments would require planning permission from the [Town Planning] Board so as to ensure that the environment would not be adversely affected and that infrastructure, GIC facilities, open space are adequately provided. The proposed development should also take into account the West Rail and the [Yuen Long Bypass Floodway]. To realize a built-form which represents a transition from the Yuen Long New Town to the rural area, the development intensity should take into account the urban type developments immediately to the west of the "U" zone and the rural characteristics of the area to its north."

16. The Appeal Board accepts that paragraphs 9.8.1 and 9.8.2 of the Explanatory Statement provide a clear guidance to the TPB and the Appeal Board on how a planning application in the U Zone should be determined. According to paragraphs 9.8.1 and 9.8.2 of the Explanatory Statement, development or redevelopment within the U Zone :-

(1) Has to be comprehensively planned as piecemeal development or redevelopment would have the effect of degrading the environment and thus jeopardizing the long-term planning intention of the areas;

(2) Has to ensure that the environment would not be adversely affected and that infrastructure, GIC facilities, open space are adequately provided; and

(3) Has to take into account the urban type developments immediately to the west of the U Zone and the rural characteristics of the area to its north in terms of development intensity.

17. Though we are not bound to follow the Explanatory Statement, it could not be disregarded. We agree that comprehensive planning is better than piecemeal development. Comprehensive planning is prima facie conducive to sound planning in promoting the health, safety, convenience and general welfare of the community. There is no sound reason not to follow the Explanatory Statement. The need for comprehensive planning is also highlighted by the fact that the U Zone is located in close proximity to the Yuen Long New Town and within a transitional location between the urban and rural areas. The Appellant has stressed that there is no express reference to the term "planning intention" for the U Zone in the Notes or the Explanatory Statement. However, that does not affect the nature of paragraphs 9.8.1 and 9.8.2 of the Explanatory Statement as material considerations for the Appeal Board to take into account.

18. Although the planning intention for the U Zone may not have been expressly specified in the Notes or the Explanatory Statement, the relationship between the U Zone and the long-term planning intention of the areas therein has been set out in paragraph 9.8.1 of the Explanatory

Statement: *"Development within the areas has to be comprehensively planned as piecemeal development or redevelopment would have the effect of degrading the environment and thus jeopardizing the long-term planning intention of the areas"*. As put by Mr. Brownlee in his witness statement, *"[t]he issue was whether approval of the application would pre-empt and compromise any future decision on the planning intention for the area"*.

19. The Appeal Board has noted the Appellant's complaint through Mr. Brownlee's evidence that the public infrastructures, like the Yuen Long Highway, the West Rail and the Yuen Long Bypass Floodway, have been settled and completed for quite some time, and yet the Site still has not had a definite land use zoning. However, the Appeal Board considers that the delay is not so serious as to displace comprehensive planning. We also accept Mr. Fung's evidence that the land use review has already reached an advanced stage. There is a real possibility that it will be completed in or near 2014. The explanation for the delay and Mr. Fung's evidence is dealt with in the latter part of this Decision in more details.

20. It has never been the case of the Appellant that he could, as of right, develop four NTEHs on the Site without application for planning permission: see paragraph 21 of Appellant's Reply Submissions. However, the Appellant submits that since the rebuilding of [NTEH] and the replacement of an existing pre-IDPA plan domestic building by one

NTEH are always permitted under a U zone by paragraphs (8)(e) and (f) of the Notes to the OZP, the Application involving just four NTEHs should also be permitted. He also submits that there is no express planning intention for the U Zone in the OZP on which the TPB may rely to refuse the Application. He further submits that the Explanatory Statement contains no express reference to any planning intention for the U Zone and the Appeal Board may therefore choose not to follow it. The Appellant thus concludes that as far as the planning intention of the Site is concerned, developing NTEH is a permitted land use and each application should be considered on its own merits.

21. We are unable to accept that as far as planning intention of the Site is concerned, developing NTEH is a permitted land use. It is *rebuilding* NTEH instead of *developing* NTEH which is permitted under paragraph (8)(e) of the Notes to the OZP (emphasis added). Moreover, as the existing pre-IDPA plan domestic building will be replaced by four NTEHs instead of just one NTEH, paragraphs (8)(e) and (f) of the Notes to the OZP do not apply. As pointed out above, paragraphs 9.8.1 and 9.8.2 of the Explanatory Statement provide a clear guidance to the TPB and the Appeal Board on how a planning application for a proposed development in the U Zone should be determined. The development therein has to be comprehensively planned.

22. Rebuilding of NTEH or replacement of an existing pre-IDPA plan domestic building by an NTEH respectively under paragraphs (8)(e) and (f) of the Notes to the OZP have their own justifications. The pre-existence of an NTEH (to be rebuilt) or a pre-IDPA plan domestic building (to be replaced) is the pre-condition for the application of these exceptions under the paragraphs. Such pre-condition significantly limits the scope of their application. One obvious justification for these limited exceptions is to preserve the status quo and give due regard to the existing NTEH or pre-IDPA plan domestic building. We note that according to paragraph (3) of the Notes to the OZP, without the need to show any planning merits, no action is required to make the use of any land or building which was in existence immediately before the first publication in the Gazette of the notice of the IDPA plan conform to the OZP. From this perspective, the exception contained in paragraph (8)(f) in particular somehow reflects a policy decision rather than a planning decision. The policy is to balance the right of a private owner to continue the existing use that was already in place prior to the publication of an IDPA plan as against the public interest of proper planning. However, the effect of the limited exceptions contained in paragraphs (8)(e) and (f) is further confined by the size of the new building to be erected thereon to that of an NTEH. The fixed parameters of an NTEH contain the exposure created by such exceptions. Therefore, the limited exceptions contained in paragraphs (8)(e) and (f) should be handled with care. They should not be readily expanded in support of a planning application.

23. We accept Mr. Brownlee's evidence that :-

(1) in the Schedule of Use to the OZP, under each "use" there is a statement of planning intention. Column 1 sets out uses that are always permitted and Column 2 sets out those uses for which planning permission has to be obtained;

(2) the U Zone was not included in the Schedule of Use to the OZP (i.e. there is no statement of planning intention nor are there Columns 1 and 2).

24. However, Mr. Brownlee's above evidence does not assist the Appellant's argument under Ground 2A. The U Zone was not included in the Schedule of Use to the OZP because the use to be put to the various areas of the U Zone has still not been determined yet. The planning intention for the specific use therefore cannot be specified. However, that does not mean that paragraphs 9.8.1 and 9.8.2 of the Explanatory Statement can be disregarded. They cannot be disregarded because, as explained above, the Explanatory Statement is a material consideration. Though the TPB and the Appeal Board are not bound to follow it, for the reasons explained above, we find that there is no sound reason not to do so.

25. In short, although we accept that each planning application should be considered on its own merits, we do not accept that as far as planning

intention of the Site is concerned, developing NTEH is a permitted land use.

26. We also note the evidence and opinion of Mr. Brownlee that "…..*but there is no long term planning intention established for the particular area within which [the Site] is located, so it remains unclear as to how it could be jeopardized"*. This argument is related to Ground 1D and we will deal with it there.

Ground 1A: The fact of there being a land use review for the U Zone, which is currently being undertaken by the Planning Department, in itself is not a valid reason for refusal of planning permission

Ground 1B: The "real reason" behind the rejection of the Application is that it "may jeopardize the overall land use planning of the area"

27. Grounds 1A and 1B may be dealt with together. We accept the mere fact that a land use review is being conducted is not in itself a valid reason for refusal. We accept that the Application is refused by the TPB because the approval is considered premature and may jeopardize the overall land use planning of the area. However, Grounds 1A and 1B alone do not determine the outcome of this Appeal. We need to examine the other grounds and assess the impact of the approval.

Ground 1C: Insufficient inquiries were made by the TPB in reaching the TPB's Decision that the Application may jeopardize the overall land use planning of the area

28. We do not accept that insufficient inquiries had been made. Explanation for the time taken for the land use review, the progress of the land use review, the estimated timing for completion of the land use review, the site constraints, the planning merits of the Application, the planning intention for the Site etc. were discussed during the review hearing as shown in the minutes of the TPB's review hearing of 1 February 2013 :-

> *"217. A Member said that…For the subject application within the "U" zone, as the land use review for the entire "U" zone had not been completed, it would be premature to approve the application at this stage; otherwise, the appropriate land use of the area would be compromised. There was no reference for the [Town Planning] Board to consider whether the proposed development would be in line with the planning intention of the area and compatible with its surrounding land uses in future. Noting that the results of the land use review for the "U" zone would be a valid and important consideration for the subject application, this Member enquired on the estimated timing for the completion of the land use review by [Planning Department].*
>
> *218. The Secretary said that since the commencement of the land use review of the "U" zone in late 2008, [Planning Department]*

had been working closely with concerned departments. Various site constraints had to be taken into account in the land use review. They included the noise impacts from the Yuen Long Highway and MTR Viaduct, the industrial/residential interface with the open storage and workshop activities in the area, the ecological impacts on the ponds located at the northern part of Tung Shing Lei and the egretry in the wooded area at the south-eastern part of Tung Shing Lei. Different land use options had been formulated and circulated for departmental comments in the past and time was required to test the technical feasibility of these options. As a few modified land use options recently proposed by [Planning Department] were being considered by concerned departments, it was anticipated that more concrete land use proposals for the "U" zone might be finalized and submitted to the [Town Planning] Board for consideration in the near future.

……

222. Another Member appreciated the complexity of conducting the land use review for the "U" zone given the presence of various mixed and incompatible uses within this zone and the area was subject to a number of site constraints posed by major roads and the WR. This Member also pointed out that the approval of the application would impose further constraints on the land use review and might jeopardize the long term land use planning for the area.……

223. The Chairman said that as the planning intention of the "U" zone was yet to be determined pending the finalization of technical assessments on various land use options, it might be premature to approve the application at this stage.

…….……

225. The Secretary advised that……Although the land use review for the "U" zone was yet to be finalized, planning applications could still be submitted to the [Town Planning] Board for approval and each application would be considered on its individual merits…… However, other than the reasons of building entitlement under the lease and land use compatibility with the existing residential dwellings in the vicinity of the application site, the applicant did not provide other strong planning justifications which warranted an approval of the application."

29. The Appellant complains that the land use options were not produced for consideration by the TPB and that no inquiries had been made as to the context or details of these land use options. The explanation given by Mr. Fung for not disclosing the land use options being studied is that they were confidential and sensitive in nature: see page 10 of Mr. Fung's witness statement. In his testimony, Mr. Fung further explained that the land use review was confidential because it would determine the use of the U Zone. He suggested that, as such, it might result in the increase or reduction of development rights in the U Zone, and such information

was therefore highly price sensitive and had to be kept confidential to maintain a level-playing field in the land market. We find Mr. Fung's above explanation reasonable and acceptable. We also accept that due to the complicated nature of the land use review, there is no undue delay in conducting it. We accept Mr. Fung's evidence as set out in his witness statement that the land use review was commenced in late 2008, after completion of important infrastructure projects including the Yuen Long Highway, West Rail and Yuen Long Bypass Floodway. In the course of the review, government departments have expressed numerous concerns. The Planning Department had to consider all these comments, and explore different land use options. Time was then taken to test the technical feasibility of those options. We are satisfied that reasonable inquiries had been made as to the context or details of these land use options to the extent permissible. As to the estimated timing for completion of the land use review, during the hearing of this Appeal, Mr. Fung has further clarified that the land use review is nearly complete and the target date of its completion is the end of 2014.

30. Moreover, as accepted by the Appellant in his Closing Submissions, it is for the decision-maker and not the Courts, subject to Wednesbury review, to decide upon the manner and intensity of inquiry: *R (Khatun) v. Newham London Borough Council* [2005] QB 37, 55 at §35. The Court should only strike down a decision by the authority not to make further inquiries *"if no reasonable council possessed of that material could*

suppose that the inquiries they had made were sufficient": *R v. Nottingham City Council, ex parte Costello* [1989] 21 HLR 301, at 309. We are of the view that the inquiries made by TPB are reasonably sufficient bearing in mind the constraints that the land use options have not been finalized and the land use review process is confidential in nature.

Ground 1D: The TPB has failed to demonstrate clearly with evidence how the grant of permission for the Proposed Development would be "premature" and "prejudicial" to the outcome of the land use review

31. The Appeal Board has read and considered all the evidence and materials produced by the parties. Having considered all the evidence and arguments put forward by the parties, we are of the view that the TPB has not failed to demonstrate with evidence how the grant of planning permission for the Proposed Development would be premature and prejudicial to the outcome of the land use review.

32. The location of the Site being in the middle of the U Zone, the almost 3-fold increase in development intensity, the constraints on planning for the road, public sewage and drainage systems for the U Zone, the constraint created by the height level of the four NTEHs etc. do support the finding that granting the Application would be premature and prejudicial to the outcome of the land use review.

33. Mr. Fung's witness statement is clear :-

> *"The Appellant's allegation regarding the lack of evidence or insufficient evidence to show in what way the proposed development might jeopardize the overall land use planning of the area is further denied. With due respect, it is obvious how approval of a stand-alone application in respect of the Site which stands in the middle of the "U" zone about 26.4 ha might affect overall land use planning. The proposed 4 NTEHs development involves the provision of 4 car parking spaces and the use of 4 septic tanks for sewage disposal. Yuen Long Tung Shing Lei Road is a narrow and substandard local track for two-way traffic and the Site is not served by public stormwater drainage and sewers. There is also a significant difference in the site level between the Site (about 7.7mPD) and Castle Peak Road – Yuen Long Section (about 10.4 mPD). The approval of the current application would definitely pose constraints on the overall land use planning in the area in that the future land uses of the surrounding area and their respective development intensity, as well as the planning for the road system and the public sewage and drainage system for the area would need to take into account these 4 NTEHs development."*

34. Mr. Fung further explained the jeopardy point in his testimony. His evidence is that granting the planning permission would pose constraints on the overall land use planning in the U Zone. He explained that the purpose of the land use review was to formulate the long-term land use planning for the areas in the U Zone. The Planning Department was reviewing comments on environment, traffic, noise, drainage and various other issues from other government departments. He explained that the purpose of the land use review was to determine afresh what land uses were suitable to the various different areas in the U Zone. In addition, the suitable height restriction and plot ratio for the areas had to be determined in the land use review. He explained that the objective of the land use review was to improve the environment. Yuen Long Tung Shing Lei Road was not a government road. It was doubtful whether there was an adequate road system to support the development of the areas. If the four NTEHs were allowed to be built, road access to the Site would have to be provided. That would aggravate the problem of an inadequate road system. It might be necessary to widen or relocate the existing road in the future. Moreover, once the four NTEHs, each with three storeys, is approved, the height of future buildings surrounding the four NTEHs would also have to match the height of the four NTEHs for planning purposes. As pointed out by the Appellant, the Site is small. Therefore the improvement to the surrounding environment that might be brought by the Proposed Development would be small. On the other hand, the land use review would become more difficult to conduct as one had to

take care of the constraints created by the Proposed Development. We find the above explanations given by Mr. Fung reasonable and acceptable.

35. The Appellant relies on a UK policy document *The Planning System: General Principles*, published by the Office of the Deputy Prime Minister in 2005 ("**the UK Principles**"**)**, which provides that :-

> "*17. In some circumstances, it may be justifiable to refuse planning permission on grounds of prematurity where a DPD (Development Plan Document) is being prepared or is under review, but it is not yet adopted. This may be appropriate where the proposed development is so substantial, or where the cumulative effect would be so significant, that granting permission could prejudice the DPD by predetermining decisions about the scale, location and phasing of new development which are being addressed in the policy of the DPD. A proposal for development which has an impact on only a small area would rarely come into this category. Where there is a phasing policy, it may be necessary to refuse planning permission on grounds of prematurity if the policy is to have an effect.*
>
> *18. Otherwise, refusal of planning permission on grounds of prematurity will not usually be justified. Planning applications should continue to be considered in the light of current policies.*

However, account can be taken of policies in emerging DPDs. The weight to be attached to such policies depends on the stage of preparation or review, increasing as successive stages are reached…

19. Where planning permission is refused on the grounds of prematurity, the planning authority will need to demonstrate clearly how the grant of permission for the development concerned would prejudice the outcome of the DPD process."

36. No authorities have been produced by the Appellant to show that the UK Principles are binding on us. The Appellant accepts during his Closing Submissions that they are not binding. Although we find the UK Principles not to be strictly binding on us, we find them to be of some reference value. We adopt a common sense approach in assessing the impact of a pending land use review having considered the UK Principles.

37. We agree that the closer it is to the completion stage of a land use review, the greater weight should be given to the land use review. In the present case, the land use review has reached an advanced stage. There is a real possibility that it will be completed by the end of 2014. It is fair and appropriate to attach greater weight to it. Such conclusion is in line with paragraph 18 of the UK Principles.

38. The size and location of the Site, as well as the parameters of the Proposed Development, are relevant to the Application. According to paragraph 2.1.1 of the Planning Statement for the Application, the Site, with a site area of about 562.5m^2, is located in Tung Shing Lei, an area located to the east of Pok Oi Hospital and to the west of Au Tau. The Site is accessible from Castle Peak Road-Yuen Long Section which is about 130m to its south via Yuen Long Tung Shing Lei Road. The existing built-up areas of Yuen Long New Town is located about 1 km to its west. According to paragraph 3.2.1 of the Planning Statement, the Appellant is seeking to redevelop an existing 2-storey house into four NTEHs. The proposed four NTEHs have a plot ratio of about 1.3, total floor area of 728.4 m^2, total roofed-over area of about 242.8m^2 and height of 8.23m with three storeys. According to Mr. Brownlee's witness statement, the building land entitlement in respect of the Site is 242.8m^2.

39. We accept that the size of the Site is relatively small. We accept that generally the smaller the site the lesser the impact of its development is. However the actual impact will depend on the facts of the case. The actual impact is particularly fact-sensitive in a U zone since the prime concern is to preserve the possibility of comprehensive planning within such zone. Therefore the location of the site is also highly relevant. Generally, the more central the location the bigger the impact is. Moreover, if the size of the site and the proposed development therein is so big that it is capable of demonstrating comprehensive planning, the

sizable site and development may actually assist the planning application. Application No. A/YL-NSW/172 involving the development of 100 houses is an example. It was approved because the site and the development were so big that comprehensive planning was capable of being demonstrated by the applicant.

40. Returning to the facts of this case, the size of the Site and the Proposed Development, though relatively small, is still not insignificant. We are talking about four NTEHs and four car parks. There is about a 3-fold increase in development intensity. However, the Proposed Development is certainly not big enough to demonstrate comprehensive planning. Further, the Site is located in the middle of the U Zone which is being comprehensively reviewed. Bearing in mind the Site's central location, it is reasonable to conclude that the Proposed Development may hinder comprehensive planning thereby jeopardizing the long-term planning intention of the areas. Approval of the Proposed Development would obviously pose a constraint to the future land use in the U Zone. We also take into account the need for comprehensive planning for the Site and the U Zone. As pointed out in paragraph 9.8.1 of the Explanatory Statement, *"[t]he areas are located in close proximity to the Yuen Long New Town and within a transitional location between the urban and rural areas"*. According to the Planning Statement for the Application, the built-up areas of Yuen Long New Town is located just about 1 km to the west of the Site.

41. It is common ground that existence of a land development right to support a proposed development is not conclusive: see paragraph 25 of Appellant's Reply Submissions. We accept that it is a relevant consideration. However, in the present case, we find it appropriate that the Appellant's development right has to give way to the wider public interest of preserving comprehensive planning in the U Zone. As pointed out by Stock JA in *Fine Tower Associates Ltd. v. Town Planning Board* [2008] 1 HKLRD 553 (in the context of an unlawful deprivation of property challenge), at §33: "*there can be no expectation upon the purchase of land that use permitted by the lease will forever after match the use permitted by town planning legislation. It is an incident of ownership that the uses permitted by the authorities may change. Land is purchased with that knowledge, actual or imputed*".

42. The Appellant also complains that in rejecting the Application on the prematurity ground, the TPB is imposing an unjustified moratorium on the redevelopment of the Site. We disagree. There is no moratorium as planning applications have continued to be considered and there are many approval examples. Application No. A/YL-NSW/186 for the redevelopment of an existing church which is located close to the Site is one such example. That application was approved because the proposed footprint of the new church is only slightly larger than that permissible under the building licence, i.e. +12%. The Proposed Development, however, will have an almost 3-fold increase in development intensity.

In the present case, planning application was refused on the ground of prematurity because there was a real risk that comprehensive planning would be prejudiced and the land use review had already reached an advanced stage.

43. As to Mr. Brownlee's evidence that there is no known public work which is likely to be affected by the proposed four NTEHs, that may be explained by the confidential nature of the land use review and the land use options that are being studied. We also share the concerns raised by Mr. Fung during his testimony that the four NTEHs may aggravate the problem of an inadequate road system to support the development of the areas in the U Zone.

Ground 2B: No "sound planning objections" have been shown by the TPB on its following stated reasons as to the Application's lack of merits :-
(i) Lack of planning justifications;
(ii) "Prematurity" and "Jeopardy";
(iii) Governmental concerns; and
(iv) Undesirable precedent

44. At first glance, there are some apparent planning merits in the present case in replacing an aged and dilapidated building by four new ones. However, one should not assess such planning merits microscopically but has to look at the bigger picture as we are dealing with a U zone. Subject to existing constraints, it is akin to a blank piece of paper the use of which is to be determined according to the planning system. Judging from a broader perspective, we come to the conclusion that the benefit of

having four new houses is insufficient to outweigh the bigger interest of preserving comprehensive planning. Without comprehensive planning, there is always a real risk that an apparently good development may actually amount to a piecemeal development that is inconsistent with the overall land use planning of the areas.

45. The Appellant argues that the government may rely on its powers under the Lands Resumption Ordinance, Cap 124 if the Site is needed for road widening. As a matter of principle, we believe land resumption should not be treated as a panacea to secure comprehensive planning. It is a draconian step that should only be used as a last resort. If there are genuine concerns that certain development may jeopardize the overall land use planning, and the review on the overall land use planning will likely be completed in the near future, we believe the proper way to handle such situation is to put the development on hold rather than permitting it and then resorting to land resumption if necessary. In this regard, we note and accept Mr. Fung's evidence that the land use review is nearly complete, that he and his colleagues are trying their best to complete it as soon as possible, and that the target date of its completion is the end of 2014.

46. Moreover, the fact that there are existing constraints within the U Zone as a result of existing uses (see paragraphs 8 to 10 of Appellant's Reply Submissions), though relevant, should not hinder the efforts of the

planning authorities to work out a comprehensive planning to improve the situation. Whilst taking into account the practicality point or concern raised by the Appellant in implementing comprehensive planning, the Appeal Board looks at it from a slightly different angle. Where existing use permitted under paragraph (3) of the Notes, or rebuilding of NTEH and replacement of a qualified existing domestic building by an NTEH respectively permitted under paragraphs (8)(e) and (f) of the Notes, are exercised by the owners, the hands of the planning authorities are tied except perhaps to resort to the draconian step of land resumption. They have no choice. However, now that an application is put before them and they are under a duty to deal with the situation, they are given a choice. We believe they should reach a decision that is beneficial to sound planning. We agree with the TPB that in the present case refusing the Application is beneficial to sound planning. In arriving at our decision, we also note that the areas of land that are subject to existing uses still form a very minor part of the U Zone as compared with the areas of land that are not subject to existing uses. There is insufficient evidence to prove that comprehensive planning in the U Zone is impractical. Lack of planning justifications is a valid planning reason to show that the Application is unmeritorious.

47. The Appellant also relies on Mr. Brownlee's evidence to argue that "… *the land use review is not part of [the OZP], it does not exist so it cannot be part of the OZP and should not be given any weight …*": see

paragraph 82 of Appellant's Closing Submissions. We do not accept such argument. To accept such argument would mean that we have to disregard paragraphs 9.8.1 and 9.8.2 of the Explanatory Statement. It also means a wholesale rejection of any refusal based on prematurity, which is even against the UK Principles and other related authorities cited by the Appellant on possible rejection based on prematurity. Those authorities do not suggest a wholesale rejection of the prematurity argument but rather provide some suggestions as to how to determine the appropriate weight to be given to a pending land use review.

48. As to the burden of proof, we follow the general principle that he who asserts has the burden of proof. Such principle has been endorsed by the more recent decisions of the Appeal Board: *Town Planning Appeal No. 10 of 2006*, at §8 and *Town Planning Appeal No. 15 of 2011*, at §26. Since it is the Appellant's application for planning permission, we believe the Appellant has to show that prima facie there are planning merits in his application or that the planning objection raised by the TPB is prima facie unsound. As concluded above, we do not consider that there is sufficient planning merits in the Appellant's application or that the TPB's planning objection based on the potential jeopardy to comprehensive planning is unsound. In respect of paragraph 19 of the UK Principles, it is not strictly binding on us. In any event, as concluded above, we are of the view that the TPB has been able to demonstrate with evidence how the grant of planning permission for the Proposed

Development would be premature and prejudicial to the outcome of the land use review. We agree that prematurity and jeopardy to overall land use planning are valid planning reasons to show that the Application is lack of merits.

49. There were no significant objections raised by other government departments because safeguarding comprehensive planning fell primarily within the jurisdiction of the Planning Department. For instance, the concern raised by the Commissioner of Transport on potential illegal parking is primarily an operational issue rather than a planning issue. Moreover, the Transport Department and other government departments are assessing the Application on the basis of the current state of affairs. However, the Planning Department has to consider whether the Proposed Development may affect the future development and the overall land use planning of the U Zone. In any event, the TPB is not relying on the adverse comments from the other government departments in refusing the Application. As stated by Mr. Fung in his witness statement, the reason for rejection of the Application is simply as follows: *"As a land use review for the "U" zone was being undertaken by [Planning Department], the approval of the application at this stage was considered premature and might jeopardize the overall land use planning of the area"*. Planning concerns raised by the Planning Department, which is the government department responsible for

planning matters, constitute a valid planning reason to show that the Application is unmeritorious.

50. The need to avoid an undesirable precedent has some force in the present case. Pending the land use review, there is a high degree of uncertainty over the planning merits of any application. *Town Planning Appeal No. 19 of 2010* and *Town Planning Appeal No.16 of 2011* cited by the Appellant to dismiss the TPB's undesirable precedent argument do not deal with the situation where there is a pending land use review through which comprehensive planning of a U zone is being undertaken. The cumulative effect of an approval example on the overall land use planning, and on traffic, drainage and sewage systems may also be substantial since completion of the land use review may not mean the immediate gazettal of any amendment plan to effectively and immediately reshape the land use landscape. The completion of the land use review therefore may not immediately stop further applications based on the approval example. As the impact of just one piecemeal development or redevelopment on comprehensive planning can be very substantial, we are unable to accept the submission that there may not be many owners who can make an application similar to the Application. On the facts of the present case, the need to avoid an undesirable precedent is a valid planning reason to show that the Application is unmeritorious.

Conclusion on this Appeal

51. The Grounds of Appeal do not advance the Appellant's case very far. As remarked by the Appeal Board in *Town Planning Appeal No. 6 of 1994*, at §32: "*[P]lanning is for the common good. Sometimes the burden on individual owners can be heavy*". Despite our sympathy for the Appellant, we have to dismiss this Appeal.

52. Following the usual practice of the Appeal Board, we make no order as to costs in respect of this Appeal and the three preliminary issues mentioned below.

The Three Preliminary Issues

53. To complete this Decision, we set out below the reasons for our decision on the following three preliminary issues :-

(1) Our refusal to accept the TPB's submission that the Appellant has failed to cross-examine Mr. Fung thereby accepting his unchallenged evidence;

(2) Our refusal of the Appellant's application for discovery of documents; and

(3) Our refusal of the TPB's application for an adjournment.

54. The first preliminary issue arose from the Closing Submissions of the TPB. The second and third preliminary issues were determined and

refused on 28 May 2014. The reasons for the refusals are now given below.

Was Mr. Fung's evidence unchallenged?

55. The TPB submitted that the Appellant failed to cross-examine the TPB's witness Mr. Fung on the issues regarding the adverse impact of approving the Application on the overall land use planning of the U Zone ("**Jeopardy Argument**"). The TPB submitted on the authority of *Brown v. Dunn* (1894) 6 R 67 HL, as recently explained by the English Court of Appeal in *Markem Corporation v. Zipher Limited* [2005] EWCA (Civ) (at §§ 57-60), that the Appellant has thereby accepted the unchallenged evidence of Mr. Fung and is not permitted to argue otherwise :-

> *'58. Brown v. Dunn is only reported in a very obscure set of reports. Probably for that reason it is not as well-known to practitioners here as it should be although it is cited in Halsbury's Laws of England para 1024 for the following proposition:*
>
> *"Where the court is to be asked to disbelieve a witness, the witness should be cross-examined; and failure to cross-examine a witness on some material part of his evidence, or at all, may be treated as an acceptance of the truth of that part or the whole of his evidence." '*

56. We accept the Appellant's submission that, as a matter of law, the paramount consideration of the rule in *Brown v. Dunn* is to ensure fairness to a witness so as not to deprive him of the opportunity to explain away the challenges mounted on his evidence. It is clear from the judgment of *Markem Corporation v. Zipher Limited* [2005] EWCA (Civ) (at §§ 59) that so long as the principle of fairness is not breached, the rule in *Brown v. Dunn* is not inflexible :-

> *'59. ……..*
>
> *His Lordship conceded that there was no obligation to raise such a matter in cross-examination in circumstances where it is "perfectly clear that (the witness) has had full notice beforehand that there is an intention to impeach the credibility of the story which he is telling".*
>
> *……..…..*
>
> *Failure to cross-examine, however, will not always amount to an acceptance of the witness's testimony, e.g. if the witness has had notice to the contrary beforehand …..'*

57. The Appellant's submission is further supported by local authorities in *Kaifull Investments Ltd v. Commissioner of Inland Revenue* [2002] 1 HKLRD 858 (at § 31) and *Pacific Electric Wire & Cable Company Limited v. Texan Management Limited & Others*, unreported, CACV90-96/2012 (at §§ 124-125) :-

"124. The rule in Browne v Dunn, as noted in Phipson on Evidence (17th ed) at §12-12, is not an inflexible one. It is not broken even if a material matter is not put to a witness, if the witness can fairly and objectively be said to be on notice of it or where the point is so apparent (Flower & Hart v White Industries (Qld) Pty Ltd (1999) 163 ALR 744 at §§51 to 52; Fong Ka Yeung v Medical Council of Hong Kong, CACV 157/2007, §30(1)). It is pertinent to have regard to the full written opening of PEWC so Willi must be on notice of the allegations that would be made against him.

125. Nor does the principle in Browne v Dunn inflexibly require every point which might be used against a witness to be put to him. In essence, the principle is breached if in all the circumstances an omission to cross-examine on a specific point is unfair to a witness (Kaifull Investments Ltd v Commissioner of Inland Revenue [2002] 1 HKLRD 858 at §31(4)).….."

58. We also accept the Appellant's submission that, as a matter of fact, by the witness statements of Mr. Brownlee served prior to the hearing of this Appeal, and the testimony of Mr. Brownlee given during such hearing, Mr. Fung knew or ought to have known that his evidence on the Jeopardy Argument is being challenged, save his point that the Site is in the middle of the U Zone.

59. In the circumstances, the TPB's submission that the Appellant has failed to identify from the transcript of proceedings a single question which challenges Mr. Fung's evidence on the Jeopardy Argument is neither here nor there.

60. For the reasons explained above, save Mr. Fung's point that the Site is in the middle of the U Zone, we treat Mr. Fung's evidence on the Jeopardy Argument as being challenged. The Appellant has not accepted Mr. Fung's evidence on the Jeopardy Argument and is permitted to dispute it.

61. As to Mr. Fung's point that the Site is in the middle of the U Zone, we accept his point. However, we accept Mr. Fung's point not simply because it was not specifically challenged on cross-examination, but mainly because we are satisfied, after looking at the OZP and considering other documentary and oral evidence before us, that the Site may fairly be regarded as being in the middle of the U Zone.

62. In respect of the rest of the Jeopardy Argument, as concluded in the earlier part of this Decision, we also accept that it has been made out by the TPB. Again, this is based on our assessment of the evidence before the Appeal Board.

63. In conclusion, we do not accept the TPB's submission that Mr. Fung's evidence on the Jeopardy Argument is unchallenged. However, that does not affect the outcome of this Appeal as we are satisfied, after weighing

all the evidence before us, that the TPB has made out its case on the Jeopardy Argument.

Discovery Application and Adjournment Application

64. On 21 May 2014, the TPB filed and served its witness statement of Mr. Fung. In a twist of events, on 23 May 2014, the Appellant applied by letter under section 17B(6)(a) of the TPO for an order that Mr. Fung or the Planning Department do give the Appellant "*access to the documents relating to the land use review referred to by Mr. Ernest Fung in paras. 8.3(d) and (e) of his witness statement*" ("**Discovery Application**"), and proposed that the Discovery Application be heard as a preliminary issue in this Appeal on 28 May 2014.

65. In his Skeleton Submissions filed on 26 May 2014, the Appellant sought to support the Discovery Application broadly on the following grounds :-

(1) The documents sought were relevant to this Appeal;

(2) The documents sought were in the possession or control of Mr. Fung and/or the Planning Department; and

(3) The documents sought should be provided to the Appellant as a matter of procedural fairness to enable him to pursue this Appeal in a fair and meaningful manner.

66. In its Skeleton Submissions filed on 27 May 2014, the TPB opposed the Discovery Application broadly on the following grounds :-

(1) There was prolonged and unexplained delay in making the Discovery Application;

(2) The scope of the discovery sought was hopelessly wide, imprecisely drafted and a fishing expedition;

(3) The discovery sought was not necessary for the fair disposal of this Appeal;

(4) The documents sought were confidential and price-sensitive; and

(5) The cases on procedural fairness were inapplicable.

67. In another twist of events, when this Appeal was heard on 28 May 2014, and before the Discovery Application was dealt with by the Appeal Board, the TPB applied for an adjournment of this Appeal to a date to be fixed but not before 1 January 2015 ("**Adjournment Application**"). According to the TPB, its target date for completion of the land use review was the end of 2014. When the land use review was completed, it would be provided to the Appellant. The TPB made the Adjournment Application broadly on the following grounds :-

(1) The adjournment sought would solve the issue of discovery as it would no longer be necessary to look at the documents relating to the land use review sought under the Discovery Application when the end product of the land use review had been provided to the Appellant;

(2) The Discovery Application would lead to an adjournment in any event. The TPB had to identify the documents and it would take

the parties some time to analyse them. The TPB would also need to file further evidence in response if discovery was ordered;

(3) The adjournment would remove the concerns about confidentiality; and

(4) The actual outcome of the land use review would be highly relevant.

68. The Appellant did not accept the TPB's arguments and opposed the Adjournment Application broadly on the following grounds :-

(1) The Discovery Application would not lead to an adjournment since the Appellant was prepared to confine the scope of discovery to documents which had come into existence between 1 February 2013 and 21 May 2014, i.e. the period between the TPB's review hearing and the service of Mr. Fung's witness statement;

(2) The TPB's confidentiality ground was in essence a ground based on public interest immunity which had to be supported by a certificate signed by the Chief Secretary on the authority of *Secretary of Justice v. Yaumati Ferry Co. Ltd*. [2001] 2 HKLRD 301;

(3) After the Civil Justice Reform, a Court might not grant an adjournment even if the prejudice brought by the adjournment could be sufficiently compensated by costs, and now as the adjournment would throw up the whole case, this ground alone would be sufficient for refusing the Adjournment Application;

(4) No one could guarantee when the land use review would be completed and it was highly uncertain whether it would in fact be completed by the end of 2014; and

(5) The Appeal Board would no longer have jurisdiction to determine this Appeal when a new draft OZP had been gazetted during the adjournment.

69. As the Discovery Application and the Adjournment Application were inter-related, the Appeal Board decided to hear them at the same time and make a decision on them at the same time.

Discovery Application

70. The Appellant therefore proceeded to make the Discovery Application. The grounds raised by the parties have been largely covered by their Skeleton Submissions and summarized above.

71. To further strengthen the Discovery Application, the Appellant subsequently reduced the scope of the documents sought further to documents relating to ***"land use options for the appeal site from 1.2. 2013 to present, including relevant plans and diagrams"*** (emphasis added). According to the Appellant, the documents involved were only half an inch thick and their discovery could be dealt with in an hour's time.

72. To deal with the confidential and price-sensitive nature of the documents sought, the Appellant was prepared to undertake to :-

(1) Inspect the documents at the place where this Appeal was heard without taking them away or making copies of them; and

(2) Keep the information confidential.

73. Subsequently when the TPB suggested to redact confidential information from the plans if discovery was ordered, the Appellant changed his position somehow and submitted that the above undertaking would not be necessary. However, the Appellant indicated that if the Appeal Board was not prepared to order discovery without the above undertaking, he would leave it to the Appeal Board to decide whether to impose an undertaking on the Appellant.

74. The Appellant further stressed that the Appeal Board was entitled to exercise its independent planning judgment *de novo* and was not limited or fettered to consider only those materials previously put before the RNTPC and the TPB but should hear representations from the Appellant as to the land use review documents.

75. As to the prolonged and unexplained delay ground, the Appellant submitted in paragraph 3 of his Reply Submissions that "*[t]he appeal as originally launched did not necessitate the Appellant to know the contents of the documents relating to the land use review before it can*

conduct the appeal". He further submitted in paragraph 4 of his Reply Submissions that "*[h]owever, for the first time in the history of this application for planning permission, the TPB now says that the land use review has been largely completed. This constitutes a change in circumstances.*"

76. As a fallback, the Appellant submitted that even if there was delay, on the authority of *The Decurion* [2012] 1 HKLRD 1063, following *Costellow v. Somerset County Council* [1993] 1 WLR 256, an expeditious disposal of a case should be considered together with the equally salutary objective of ensuring fairness between the parties.

77. The Appellant also submitted that the documents sought were necessary for the fair disposal of this Appeal as they would throw light on whether the proposed re-development might really jeopardize the overall land use planning of the area.

Section 17B(6)(a) of the TPO

78. The Discovery Application was made pursuant to section 17B(6)(a) of the TPO which provides that :-

> "*Prior to or at the hearing of an appeal, an Appeal Board may consider and determine whether a party should have access to documents which the party claims are relevant to the appeal and*

which are in the possession or control of another person and order that other person to give the party access to such documents."

The Applicable Principles on Discovery

79. It was not in dispute that the test of relevance was propounded by Brett LJ in *Compagnie Financiere du Pacifique v. Peruvian Guano Co* (1882) 11 QBD 55 at 63 :-

> "*It seems to me that every document relates to the matters in question in the action, which not only would be evidence upon any issue but also which, it is reasonable to suppose, contains information which may – not which must – either directly or indirectly enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary.…*"

80. It is trite that the burden is on the party seeking specific discovery to make out a *prima facie* case of relevance, possession and existence of the documents: *Deak & Co. (Far East) Ltd. V. N M Rothschild & Sons Ltd. & Ors* [1981] HKC 78, 80H-I (CA) and *Full Range Electronics Co. Ltd. v. General-Tech Industrial Ltd. & Anor* [1997] 1 HKC 541, 544C-E.

81. In addition, even if the documents requested are relevant, discovery and production have to be refused if they are not necessary either for

disposing fairly of the cause or matter or for saving costs: Order 24, rules 8 and 13 of the Rules of the High Court.

82. The function of the Appeal Board is to exercise independent planning judgment on the matter before it. Although the Appeal Board is exercising administrative powers conferred on it by the legislature and not judicial power, the Appeal Board has to act judicially. The Appeal Board considers that the above general principles on discovery in court proceedings are fair and sensible principles. They are relevant considerations which the Appeal Board should take into account in determining the Discovery Application. As a matter of fact, both parties referred to previous court cases and Rules of the High Court in support of their submissions.

Prolonged and Unexplained Delay

83. As mentioned above, the Discovery Application was only made on 23 May 2014, just a few days before the hearing of the Appeal on 28 May 2014. To deal with this delay point, the Appellant submitted that the Discovery Application was triggered by paragraph 8.3 (d) of Mr. Fung's witness statement because "*for the first time in the history of this application for planning permission, the TPB now says that the land use review has been largely completed*".

84. In paragraph 8.3(d) of his witness statement, Mr. Fung states that :-

> *"… I confirm that at present the land use review has been largely completed. Prior to its submission to the TPB for consideration, the details concerning the land use review cannot be disclosed due to its confidential and sensitive nature."*

85. TPB's indication that the land use review had been largely completed does not assist the Appellant. Firstly, the Appellant is not interested in the land use review but the proposed land use options. Secondly, the Appellant himself tried at pains to argue in opposing the Adjournment Application that it was still highly uncertain as to when the land use review would in fact be completed, notwithstanding Mr. Fung's indication that it had been largely completed. He does not accept the TPB's position that the land use review would be completed in the near future.

86. Moreover, as shown in the minutes of the TPB's review hearing of 1 February 2013, as early as at the review hearing, the Appellant was informed by the Planning Department that the land use review had already commenced for more than four years since late 2008, that considerable work had been done in the land use review, and most importantly that land use options were then already being explored :-

"195(g)(ii) … With the completion of these infrastructure projects, the [Planning Department] had commenced an in-house land use review of the "U" zone since late 2008;

(iii) in the course of the review, [Director of Environmental Protection], [Commissioner for Transport] and Director of Agriculture, Fisheries and Conservation (DAFC) had expressed concerns on the noise impacts of the Yuen Long Highway and MTR [West Rail] viaduct; the [Industrial/Residential] interface with the open storage and workshop activities in the area; the traffic impacts of the proposed developments and the ecological impacts on the ponds located at the northern part of Tung Shing Lei; and the egretry in the wooded area at the south-eastern part of Tung Shing Lei respectively. Different land use options were being explored. Prior to the completion of the land use review, approval of the proposed piece-meal redevelopment of the site for four NTEHs at the middle of the "U" zone would impose further constraints to the land use review and jeopardize the long-term land use planning for the area and pre-empt the finding of the review;"

87. In short, by the time the TPB held the review hearing on 1 February 2013, it was already made known to the Appellant that land use options were being explored in the course of the land use review which by then had been conducted for more than four years. The land use review was therefore apparently at an advanced stage. If the Appellant was interested

in getting the proposed land use options for the Site from 1 February 2013, he did not need to wait until 23 May 2014, just a few days before the hearing of this Appeal, to seek their discovery.

88. We therefore accept that there is prolonged and unexplained delay on the part of the Appellant in making the Discovery Application.

89. It is common ground that the Civil Justice Reform has brought a change in litigation culture. The Appeal Board is now entitled to place a substantial weight on delay in considering an application to the extent that in appropriate circumstances delay alone would be a sufficient ground for dismissing an application. The Appeal Board also accepts the TPB's submission that the hearing date of an appeal, being a milestone date, should not be varied unless there are exceptional circumstances. See *Citibank NA v. Days Properties Ltd.* [2014] 2 HKC 235 at §§22-31.

90. The TPB submitted that as a result of the Appellant's delay in making the Discovery Application, such late application, if granted, would lead to an adjournment of this Appeal. It is however disputed by the Appellant that the Discovery Application would lead to such an adjournment. We disagree. Firstly, there is no evidential basis to support the Appellant's bare assertion that the documents involved were only half an inch thick. Secondly, it is not reasonable to order the TPB to comply with the discovery sought within an hour as apparently suggested by the Appellant.

Thirdly, it will not be fair to deny the TPB of an opportunity to deal with the newly discovered documents by adducing further evidence.

91. Prolonged and unexplained delay therefore is a valid ground against the Discovery Application. However, that is not the only ground relied upon by the Appeal Board in refusing the Discovery Application.

Relevance and Necessity

92. Existence and possession of the documents are not in dispute. The Appeal Board also accepts that it is entitled to exercise its independent planning judgment *de novo*. Relevance and necessity of the documents are the main bone of contention.

93. Since the land use review has not been completed, the land use options sought by the Appellant are only proposed options. As evidenced by paragraph 195(g)(ii) and (iii) of the minutes of the TPB's review hearing of 1 February 2013 and paragraph 8.3(d) of Mr. Fung's witness statement, these land use options are not finalized options to be submitted to the TPB for consideration. They are only proposed options for comments by different government departments concerned. Technical feasibility of these options has to be tested by the Planning Department. These options will then be modified. More concrete options will then be generated before they can become finalized options for the TPB's consideration. The Appellant has also made it clear that the scope of the discovery sought not only covers the options in its current form but also the evolution process

of such options in order to capture their changes since 1 February 2013. However, these options, even in their current form, remain in an evolutionary state and are still subject to change. Moreover, the Appellant apparently has no idea as to the contents of these land use options. It is highly speculative if these land use options have any relevance to this Appeal.

94. More importantly, the TPB is not relying on any specific land use options in refusing the Appellant's planning application. The reason for the refusal of the planning application was rather based on the fact that the land use review had not been completed. As shown in the TPB's ground of rejection, the potential jeopardy to the overall land use planning was not caused by any specific land use options but simply by the fact that the land use review had not been completed :-

> *"as a land use review of the "U" zone was being undertaken by [Planning Department], the approval of the application at this stage was considered premature and might jeopardize the overall land use planning of the area."*

95. The proposed land use options, which are still in an evolutionary state, indeed, prima facie tend to show that the land use review of the U Zone is in fact still being undertaken by the Planning Department and has not been completed. In other words, they prima facie tend to advance the

TPB's case and damage the Appellant's case, rather than the other way round.

96. All in all, the Appeal Board is not satisfied that the Appellant has shown a prima facie case of relevance.

97. For the same reasons, the Appeal Board is also not satisfied that the documents sought are necessary either for disposing fairly of this Appeal or for saving costs. Therefore, by virtue of Order 24, rule 13 of the Rules of the High Court, the Appellant's reliance in his Reply Submissions on Order 24, rule 10 for production of documents referred to in Mr. Fung's witness statement also does not assist.

Procedural Fairness

98. The Appellant relied on the Basic Law, the Bill of Rights Ordinance and Article 10 of the International Covenant on Civil and Political Rights to argue that everyone should be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The Appeal Board agrees that it is under a duty to act fairly and judicially.

99. The Appellant also relied on a passage of Lord Mustill in *R v. Secretary of State for the Home Department, ex p Doddy* [1994] 1 AC 531, at 560D-G to argue that fairness would very often require that a litigant be informed of the gist of the case which he has to answer. Again, the Appeal Board has no doubt about it. However, the grounds given by the TPB in rejecting

the Appellant' application are already clearly stated in its letter of 22 February 2013.

100. Further, the Appellant relied on *Fine Tower Associates Ltd. v. Town Planning Board*, unrep., HCAL 5/2004 to argue that as a matter of procedural fairness the Appellant should be granted the Discovery Application just like the objectors of a draft plan "*should be given sufficient information about the reasons relied on by the department as justifying the draft scheme to enable them to challenge the accuracy of any facts and validity of any arguments upon which the departmental reasons are based*." Moreover, it was submitted that "*the right to make representations is worth little if material factors which may weigh against an objector are not disclosed to the objector so that he may speak to them.*" However, *Fine Tower* dealt with an administrative consultative process conducted by the TPB under section 6 of the TPO which is fundamentally different in nature from the hearing of an appeal by the TPB under section 17B of the TPO. For example, as pointed out by Litton VP (as he then was) in *Kwan Kong Company Ltd. v. Town Planning Board* [1996] 2 HKLR 363, at 373, there were no contesting parties as such in a consultative process. Moreover, as Leonard J said in *R. v. Town Planning Board, ex parte the Real Estate Developers Association of Hong Kong* [1996] 2 HKLR 267, at 292, in determining an objection to a draft plan under section 6 of the TPO, the TPB is not making a final determination of an objector's rights, it is instead :-

> *"… conducting an administrative consultative process, provided by statute, designed to enable it to take into account all shades of opinion before forming a view as to the final form of its recommendations to be made to the Governor-in-Council."*

101. As pointed out by Hartmann J in *Fine Tower*, at §35 :-

> *"35. The principles of procedural fairness are not, to use the words of Lord Bridge in Lloyd v. McMahon [1987] AC 625 at 702, "engraved on tablets of stone"; they are not immutable, rigid or universal. They must be considered always in context."*

102. Moreover, materials which may weigh against the Appellant, the party seeking discovery, as opposed to materials which may advance his case, are not relevant materials under the test of relevance as propounded by Brett LJ in *Compagnie Financiere du Pacifique v. Peruvian Guano Co* (1882) 11 QBD 55 in a discovery application.

103. The authorities on procedural fairness therefore do not assist the Discovery Application.

Conclusion on the Discovery Application

104. For the reasons stated above, the Discovery Application is refused.

Sensitive Nature of the Documents

105. The TPB also objected to the Discovery Application on the ground that the land use options were confidential and sensitive in nature and their disclosure would lead to market speculation and improper gain by those who were in possession of such non-public information. In view of our refusal of the Discovery Application, it is not necessary to deal with this objection. It is also not necessary to deal with the possible undertaking which may be imposed on the Appellant to tackle this objection, as well as the Appellant's submission that the TPB is in essence relying on public interest immunity which has to be supported by a certificate signed by the Chief Secretary.

Adjournment Application

106. The Adjournment Application was neither made by summons nor supported by any affidavit or skeleton submissions, and it was not made with any prior notice to the Appellant or the Appeal Board. That is highly undesirable. However, this factor alone should not stop the TPB from making the Adjournment Application.

107. More importantly, with the Appeal Board's refusal of the Discovery Application, most of the grounds in support of the Adjournment Application have already faded away.

108. First, the TPB submitted that the adjournment sought would solve the issue of discovery as it would no longer be necessary to look at the

interim documents sought by the Appellant under the Discovery Application. With the refusal of the Discovery Application, this justification for an adjournment is no longer applicable.

109. Second, the TPB submitted that the Discovery Application would lead to an adjournment in any event. Similarly, with the refusal of the Discovery Application, there is no longer any adjournment resulting from the Discovery Application.

110. Third, the TPB submitted that the adjournment would remove the concerns about confidentiality. Similarly, it is no longer necessary to deal with the confidentiality issue with the refusal of the Discovery Application.

111. Fourth, the TPB submitted that the actual outcome of the land use review would be highly relevant. However, the force of this argument has considerably been watered down by the Appellant's objection to the Adjournment Application. The Appellant would like to have this Appeal heard as scheduled without the need to wait for the actual outcome of the land use review. In short, it is the Appellant's case that the adjournment sought is not necessary. The Appeal Board noted that during the earlier hearing before the RNTPC and the review hearing before the TPB, neither party saw fit to seek any adjournment pending the actual outcome of the land use review. There is no material change in the circumstances since

the above two earlier hearings. The Appeal Board is not satisfied that the adjournment is necessary.

112. Further, the adjournment, if granted, will affect the hearing date of this Appeal, which is a milestone date. It should not be varied unless there are exceptional circumstances: see *Citibank NA v. Days Properties Ltd.* [2014] 2 HKC 235 at §§22-31 cited by the TPB in opposing the Discovery Application. No exceptional circumstances have been shown by the TPB.

113. To conclude, the Appeal Board is not satisfied that the TPB has shown sufficient grounds for an adjournment. The Adjournment Application is therefore refused.

114. With the refusal of the Adjournment Application, it is not necessary to deal with the Appellant's opposition on the ground that the Appeal Board would no longer have jurisdiction to determine this Appeal when a new draft OZP had been gazetted during the adjournment.

Conclusion on the Adjournment Application

115. For the reasons stated above, the Adjournment Application is refused.

(Signed)

Mr. Johnny FEE Chung-ming, JP
(Chairman)

(Signed)

Professor Rebecca CHIU Lai-har, JP
(Member)

(Signed)

Miss Julia LAU Pui-g
(Member)

(Signed)

Ms. NG So-kuen
(Member)

(Signed)

Ms. TONG Choi-cheng
(Member)