

**IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF FIRST INSTANCE
CONSTITUTIONAL AND ADMINISTRATIVE LAW LIST
NO 645 OF 2017**

BETWEEN

HONG KONG RESORT COMPANY LIMITED Applicant

and

TOWN PLANNING BOARD Respondent

Before: Hon Au JA (sitting as an additional judge of the Court of First Instance) in Court

Dates of Hearing: 22 - 23 November 2018

Date of Judgment: 7 August 2020

J U D G M E N T

A. INTRODUCTION

1. The applicant is the developer owner of the land on which the development known as Discovery Bay situates.

2. Discovery Bay has since 1976 been developed into a self-contained sub-urban residential community compatible with its natural

conservation. Its development is governed by Outline Zoning Plan No S/I-DB/4 (“the DB OZP”).

3. By way of an application made under section 12A of the Town Planning Ordinance (Cap 131) (“the TPO”) (“the Application”)¹, the applicant asked the respondent (“the TPB”) to amend the DB OZP by rezoning Area 6f (“Area 6f”) therein from “Other Specified Uses” annotated “Staff Quarters (5)” (OU(SQ)) to “Residential (Group C)(12)”.

4. The Application was considered by the TPB² at a meeting held on 23 June 2017 (“the Meeting”)³. By its decision (“the Decision”) of the same date⁴, the TPB refused to approve the Application.

5. The TPB gave the following two reasons for the Decision:

(1) There is scope for further residential development under the DB OZP as the total maximum domestic gross floor area (“GFA”) allowed has yet to be realised (“the Unused GFA”). No strong justification has been provided for rezoning Area 6f. I will refer this as the “Unused GFA Reason”.

(2) Approval of the Application would set an undesirable precedent for other similar rezoning applications, the cumulative impact of which would further depart from the original development concept and overstrain infrastructure

¹ Under section 12A(1) of the TPO, any person may apply to the TPB for consideration of any proposal in relation to an original approved plan for the purposes of this section.

² More precisely, it was considered by the Rural and New Town Planning Committee (“the RNTPC”) of the TPB.

³ Under section 12A(23) of the TPO, upon consideration of an application at a meeting, the TPB may accept (in full or in part) or refuse the application.

⁴ The Decision was communicated to the applicant by a letter dated 14 July 2017.

capacities. I will refer this as the “Undesirable Precedent Reason”.

6. In this judicial review, the applicant in seeking to quash the Decision has raised five grounds to challenge it. They are in short these:

- (1) The TPB took into account an irrelevant consideration, namely, the Unused GFA factor (“Ground 1”)⁵.
- (2) The TPB failed to take into account relevant facts and planning considerations (“Ground 2”)⁶.
- (3) The TPB failed to discharge its *Tameside* duty to investigate whether the proposed increase in the total planned population by 1,190 would be consistent with the planning intention of the Discovery Bay (“Ground 3”)⁷.
- (4) The TPB has misapplied the concept of “undesirable precedent” to the Application (“Ground 4”)⁸.
- (5) The TPB has abdicated its function by the wholesale copying of the reasons suggested by the Planning Department (“the PlanD”) (“Ground 5”)⁹.

7. The applicant is represented by Mr Benjamin Yu SC together with Ms Eva Sit, and the TPB is represented by Mr John Litton together with Ms Catrina Lam.

⁵ See Form 86, paragraphs 46 - 54.

⁶ See Form 86, paragraphs 55 - 63.

⁷ See Form 86, paragraphs 64 - 75.

⁸ See Form 86, paragraphs 76 - 79.

⁹ See Form 86, paragraphs 80 - 83.

8. Before I elaborate on the grounds of challenge and deal with them, it is pertinent to set out the uncontroversial background fact relevant to this application first. This is mostly taken from Mr Yu's skeleton submissions and the Affirmation of Lung Siu Yuk ("the Affirmation of Lung") filed on behalf of TPB.

B. RELEVANT BACKGROUND

B1. Discovery Bay development control

9. Discovery Bay is a self-contained sub-urban residential development comprising mainly low-density private housing planned for an estimated total population of about 25,000 with supporting retail, commercial and community facilities and recreational uses. It is primarily a car-free development having evolved from the original concept of holiday resort approved in 1973¹⁰. The development has been constructed in a manner that is compatible with its natural environment and offers a wide range of recreational and leisure facilities for locals and visitors.

10. The applicant is the sole owner of the land on which Discovery Bay situates. Everything in Discovery Bay was built by the applicant from scratch and at its own cost, including (in addition to buildings) walls, banks, watercourses, drains and channels, roads, marine structures and pier, water supplies, refuse treatment, fire station, police

¹⁰ When the Government granted approval for the development of Discovery Bay in 1973, the original development concept of Discovery Bay was for a holiday resort featuring golf courses, a wide range of recreational facilities with resort accommodation and some commercial elements to serve visitors as well as local residents.

station and public primary school, indoor recreation centre and neighbourhood community centre.

11. Historically, development on Discovery Bay was controlled by the Master (Layout) Plan (“the MP”) which was subject to approval by the Lands Department, imposed as a lease condition. It was not until 2001 that the first outline zoning plan for Discovery Bay was directed to be prepared by the TPB. The DB OZP is the approved version of the outline zoning plan.

12. Thus, since 2001 development on Discovery Bay is subject to the dual control of:

- (1) the DB OZP, by the TPB; and
- (2) the applicable MP, by the Lands Department.

13. Prior to 2001 development control over Discovery Bay, including domestic GFA¹¹, was exercised through the MP by the Lands Department. In this regard:

- (1) In the 1980s, domestic GFA was gradually increased to 559,510m² in MP5.4.
- (2) At that time, the area now known as Area 6f had no separate existence, but was part of an area now largely falling within Area 6b and was zoned for “housing”.

¹¹ The MP uses “gross building area” but it is common ground that it is for present purposes the same as GFA: the Affirmation of Lung, footnote 1.

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- (3) In 1994, the applicant paid HK\$126 million for additional GFA of 8,400m² for staff quarters in Areas 1c, 6f and 19b. That was when Area 6f first came into existence.
- (4) In other words, Area 6f has always been zoned for residential purpose, in one form or another.
- (5) In February 2000, the domestic GFA was increased to 758,365m² (upon payment of premium of HK\$1.65 billion and undertaking obligations to construct various public facilities) in the approved MP6.0E1.
- (6) In September 2000, the applicant, upon securing informal approval to increase the domestic GFA by 17,423m² submitted a draft MP to the Lands Department to reflect the same. The Lands Department only offered terms to the applicant in 2012, assessed premium in 2015 (which the applicant accepted immediately), and the revised MP (MP6.0E7) was only issued in 2016, with a total domestic GFA of 775,655m². The whole process therefore had taken some 16 years to complete¹².

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14. In 2001, during the preparation of the first draft OZP for Discovery Bay, the Government also agreed in principle to the applicant's proposed additional residential GBA of 124,000m² (equivalent to GFA of 124,000m²) in Discovery Bay North (shown as "Potential Housing Development Area" on the then draft MP but had not been included in MP6.0E7h(a) approved in March 2016). The first OZP for Discovery Bay under preparation at that time has incorporated the additional domestic

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¹² During which the applicant issued various chasers to no avail. See also CHK-3 [1/13/150-157].

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GFA of 124,000m² as well as minor adjustments in other areas¹³. The
total domestic GFA permitted in the first draft Discovery Bay OZP
No S/I-DB/1 published on 14 September 2001 is therefore 900,683m²,
which has remained unchanged in the subsequent OZPs including the
approved OZP (ie, the DB OZP).

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15. Shortly thereafter, in June 2002, the applicant submitted draft
MP7.0A to the Lands Department to incorporate the 124,000m² domestic
GFA already agreed upon and reflected in the DB OZP. That draft MP
remains unapproved by the time of this hearing. Given that development
in Discovery Bay is subject to both the DB OZP and the MP, the applicant
has not been able to undertake any development utilizing the 124,000m²
domestic GFA already granted in 2001. This 124,000m² is the “Unused
GFA” that the TPB took into account in the Unused GFA Reason in the
Decision.

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16. Under the DB OZP, Discovery Bay is expected to be
developed in accordance with local conditions and the capacity of the
existing and planned infrastructure with a total planned population of about
25,000 and a maximum domestic GFA of 900,683m² upon full
development. Any further increase in population would have to be
considered in the context of the general planning intention for the area and
subject to detailed feasibility investigations on infrastructure and
environmental capacities.

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¹³ Involving 1,028m² domestic GFA located in the “Residential (Group C)7” zone covering the
existing residential developments in the headland between Tsoi Yuen Wan and Nim Shue Wan,
namely Crestmont Villa, Coastline Villa and Peninsula Villa.

17. The land area planned for residential development in Discovery Bay mainly falls within various “R(C)” and “Other Specified Uses” (“OU”) zones on the approved OZP. The land use zonings and development intensity as incorporated in the OZP has taken into consideration the development character, availability of infrastructure, the need to conserve the natural environment, the contents of the MP as well as the relevant height restrictions set out in the Deed of Restrictive Covenant of Hong Kong Disneyland.

B2. Site selection and the Application for Area 6f

18. It is the applicant’s case that, in response to the Government’s call for additional housing stock, the applicant entered into discussion with the Government and was informed that the applicant should undertake a review of its own to that end: See Minutes of the Meeting (“the Minutes”) at paragraphs 7(c) - (d).

19. Following that, the applicant submitted two proposed concept plans to the Government and revised the same taking into account the comments from the Government. Area 6f was identified after this process.

20. As to Area 6f:

(1) Its physical attributes are that:

(a) It is a very small area (0.12%) in Discovery Bay¹⁴.

¹⁴ Form 86 at paragraph 22.

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(b) It is situated in the middle of a much larger area (Area 6b) zoned and already built for residential use (Parkvale Village).

(c) The site has been formed (man-made), ready for development, and is left vacant: RNTPC Paper No Y/I-DB/2D (“2nd RNTPC Paper”)¹⁵ at paragraph 7.1(b).

(d) It is located on a slope at the back-end of the built-up area.

(2) In terms of user, it has always been zoned for residential use, initially as housing and since 1994 as staff quarters.

(3) As to its purpose as staff quarters, it is not in dispute that such purpose has become spent, as increased traffic connectivity in the North Lantau region means that it is no longer necessary for staff to live *in situ*: 2nd RNTPC Paper at paragraph 2(d). As a matter of fact, it has become spent for a long time, as Area 6f has never been built on.

21. The applicant thereafter identified Area 6f as a suitable site for rezoning given:

(1) It does not involve any destruction of natural habitat and is compatible with its surrounding setting: 2nd RNTPC Paper at paragraph 2(b).

(2) It involves replacement of the intended staff quarters (no longer needed) with residential buildings — both residential uses: 2nd RNTPC Paper at paragraphs 2(c) - (d).

¹⁵ This is a paper prepared by the PlanD for the purpose of the Meeting. See [28] below.

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(3) It is a logical location for residential development since it is in the middle of Area 6b which has already been developed to that end, and is already served by existing transport network because of that: 2nd RNTPC Paper at paragraph 2(c).

22. The proposed development upon rezoning consists of two mid-rise residential buildings of 18 storeys providing 476 flats, for an estimated additional population of 1,190: 2nd RNTPC Paper at paragraph 1.2. Under such development:

- (1) The PlanD has indicated that there is adequate infrastructure provision to cater for the same¹⁶; and
- (2) It is the applicant’s representation that the characteristics and resort elements of Discovery Bay would not be affected: Minutes at paragraph 8(c).

23. The application to rezone Area 6f under section 12A of the TPO was submitted on 25 January 2016 (ie, the Application).

B3. Area 10b

24. Later, the applicant also submitted an application to rezone Area 10b on 26 February 2016 (“Area 10b Application”).

25. As can be seen from the DB OZP, Area 10b is a long strip of land to the north of Nim Shue Wan. It consists of a mishmash of “Other Specified” and “Government, Institution or Community” uses, including

¹⁶ See 2nd RNTPC Paper at paragraph 2(e) - (l); also Minutes at paragraph 20(a).

service areas, refuse collection, telephone exchange, petrol stations and two pockets for staff quarters¹⁷.

26. The reason for seeking to rezone Area 10b was because it has become largely defunct and an eyesore: Minutes at paragraph 11(c).

27. However, as a result of technical problems to be resolved, the Area 10b Application had already been withdrawn on 7 April 2017 *before* the Meeting at which the Application was considered¹⁸. The applicant made clear that if the technical issues could not be resolved, it would *not* make the Area 10b Application again¹⁹.

B4. The Meeting and the Decision

28. As consideration of the Application was deferred on a number of occasions, two papers had been prepared by the PlanD for the TPB. For present purposes the following matters are pertinent:

- (1) In RNTPC Paper No Y/1-DB/2C prepared for the TPB meeting on 17 February 2017 (“1st RNTPC Paper”), although the Unused GFA was noted (at paragraph 11.5), the PlanD did not consider that to be relevant to the rezoning application, and did not recommend that as a reason for refusing the Application (at paragraph 2.1). Instead, the PlanD considered that the Application should be rejected on the grounds of (a) failure to demonstrate no infrastructural,

¹⁷ See the DB OZP compared against MP6.0E7.

¹⁸ See 2nd RNTPC Paper at paragraph 1.5, and transcript of the Meeting [Bundle 1/11/110-111].

¹⁹ See Transcript in Chinese at [1/11/110-111], which reveals a different emphasis in the applicant’s answer compared to the TPB Minutes paragraph 20(b) in English.

environmental and geotechnical impacts; and (b) undesirable precedent.

- (2) By the time of the Meeting on 23 June 2017, all technical issues had been satisfactorily resolved by the applicant: Minutes at paragraph 28. In the 2nd RNTPC Paper, the PlanD put forth the position, for the first time, that “the [Unused GFA] should be implemented first before new sites are proposed to be rezoned for additional residential development” (see paragraph 11.5), and that this be used as a reason to reject the Application (see paragraph 12.1).

29. At the Meeting, the Senior Town Planner of the PlanD gave a detailed presentation on, among other things, the background to the Application, the Applicant’s proposal, the departmental comments, the public comments and the PlanD’s views as detailed in the 2nd RNTPC Paper. The applicant’s representative and consultant also attended to present to the TPB and answer questions²⁰.

30. The questioning centred on three areas²¹:

- (1) The applicant’s intention with respect to the five other staff quarter zones in Discovery Bay — the applicant explained that (a) the site nature and conditions were different; and (b) three of the other sites had already been developed as staff quarters and would be retained, one could not be developed as the GFA had already been taken up, and the remaining one was located on the hill top and there was no intention to rezone (See Minutes at paragraphs 11, 19(b), 20(b)).

²⁰ See PowerPoint [2B/9/99-146]; Minutes paragraphs 7 - 8.

²¹ See Minutes at paragraphs 10 - 21.

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- (2) Tree compensation and urban biodiversity – these were accepted as satisfactory and no issue arose out of that.
- (3) Unused GFA (see Minutes at paragraphs 17 - 18).

31. As shown in the Minutes at paragraphs 23 - 29, at the deliberation session of the Meeting:

- (1) The Chairman directed the TPB to focus on (a) unique background of comprehensive development concept in Discovery Bay; (b) Unused GFA; and (c) cumulative impact of approving similar rezoning proposals once a precedent was established (see paragraph 23).
- (2) There were views against approving the Application, on the basis that (paragraphs 25, 27):
 - (a) Discovery Bay was not recommended as a strategic growth area. Given its unique background of comprehensive development concept, the proposed development would have cumulative impacts on the overall planning of the area, and developments in Discovery Bay should be assessed comprehensively.
 - (b) The applicant had indicated intention for further residential development. There was still Unused GFA. Other than for providing more housing units, there was no strong justification for rezoning.
 - (c) Approval would set an undesirable precedent for similar applications for OU(Staff Quarters) or other zones in Discovery Bay.
- (3) There were also views in favour of granting the Application (see paragraph 26).

32. The TPB then made the Decision. Its reasons have been set out at paragraph 29 of the Minutes as follows:

“29. After further deliberation, the Committee decided not to agree to the application for the following reasons:

‘(a) there is scope for further residential development under the current Outline Zoning Plan as the total maximum domestic gross floor area allowed has yet to be realised. No strong justification has been provided by the applicant for rezoning the application site for residential use; and

(b) approval of the application would set an undesirable precedent for other similar rezoning applications, the cumulative impact of which would further depart from the original development concept of Discovery Bay and overstrain the existing and planned infrastructure capacities for Discovery Bay area.”

33. There is no dispute that paragraph 29 of the Minutes indeed adopted word-for-word the reasons for rejection recommended by the PlanD in the 2nd RNTPC Paper at paragraph 12.1.

34. The applicant thereafter applied for leave to judicially review the Decision. Leave was granted on paper by this court.

C. THIS JUDICIAL REVIEW

35. As mentioned above, the applicant has raised five grounds of judicial review to challenge the Decision. I will look at them in turn.

C1. Grounds 1 and 2

36. These two grounds are advanced by Mr Yu together. As pointed out by counsel, they are closely related, and seek in particular to challenge the Unused GFA Reason.

37. Under Ground 1, the applicant contends that in relying on the Unused GFA as a material factor to reject the Application, the TPB had taken into account an irrelevant consideration. This is so as this is not a factor of a planning nature and has nothing to do with the general planning intention and the relevant criteria as explained in the Explanatory Statement (“the Explanatory Statement”) for the DB OZP.

38. Further, under Ground 2, in looking at the Unused GFA as a basis for rejecting the Application, the TPB had also failed to take into account matters relevant to the general planning intention as it should have done so.

39. The main thrust of the arguments in support of these grounds can be summarized as follows.

40. Mr Yu says for the present purposes, it is common ground²² that in considering the Application:

- (1) The TPB should assess whether the proposed rezoning of Area 6f is consistent with the planning intention and the criteria as set out and explained at paragraph 7 of Explanatory Statement.

²² See the TPB’s skeleton, paragraphs 8 - 11 and 39, and the Affirmation of Lung, paragraph 48.

(2) The TPB should only take into account matters that are proper planning considerations. Planning considerations are only those which are related to the use and development of the land. Whether a factor is a planning consideration is a question of law for the court and may depend on the circumstances of the case: *Tesco Stores Ltd v Secretary of State for the Environment* [1995] 1 WLR 759 at 764 and 780, *Stinger v Minister of Housing and Local Government* (1971) 22 P&CR 255 at 269 - 270.

41. Premised on the above, under Ground 1, Mr Yu submits that for the following reasons, the Unused GFA is not a relevant planning consideration.

42. First, it is not in dispute that the planning intention of Discovery Bay is to be ascertained from the Explanatory Statement²³, which has been generally set out at paragraphs 5.4 and 7.1 - 7.3 as follows:

“5.4 The Discovery Bay development is a *self-contained sub-urban residential development comprising mainly low-density private housing planned for a total population of about 25,000 with supporting retail, commercial and community facilities and recreational uses. It is primarily a car-free development evolved from the original concept of a holiday resort approved in 1973. This intention is still maintained by the existing and planned provision of a diversity of recreation facilities including golf courses, sports and recreation clubs, beaches and marina, etc.* Such resort type recreation functions would be further enhanced by the planned open spaces, public recreation facilities and golf course in Yi Pak and the southern upland, reinforcing the area as a leisure place for both local residents and visitors.

²³ *Henderson Real Estate Agency Ltd v Lo Chai Wan* [1997] HKLRD 258 (PC), at 267 per Lord Lloyd.

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7.1 In line with the strategic planning context provided by the South West New Territories Development Strategy Review, *the general planning intention of the Area is for conservation of the natural environment and to provide for low-density developments compatible with the surrounding natural setting.* Existing natural features including the undisturbed backdrop of woodland and slopes and the natural coastlines with inlets, bays, beaches at Tai Pak, Yi Pak, Sam Pak and Sze Pak should be conserved. Areas of high conservation value and natural habitats including woodland, stream valleys, streamcourses and stream/tidal lagoons should also be protected.

7.2 Having regard to the character of the Area, environmental considerations and the existing and planned infrastructure provision, in particular the limited capacity of external links, the Plan provides *for a planned total population of about 25,000 persons* for the Discovery Bay development. *Any further increase in population would have to be considered in the context of the general planning intention for the Area and subject to detailed feasibility investigations on infrastructure and environmental capacities.* *In particular, the unique sub-urban low-density and car-free character of the development should be maintained in keeping with the surrounding natural setting.* In line with the original concept as a holiday resort, a variety of recreation and leisure facilities are allowed for. Future development at Discovery Bay should also be in keeping with the theme park development and its adjoining uses at Penny's Bay to ensure compatibility in land use, height, visual, and environmental terms. The existing rural settlements at Nim Shue Wan and Cheung Sha Lan would be retained with the planning intention of upgrading or redeveloping the existing temporary domestic structures with the provision of basic infrastructure.

7.3 The general urban design concept is to maintain a car-free and low-density environment and to concentrate commercial and major community and open space facilities at more accessible locations. One activity node each around the ferry piers in Tai Pak Wan and Yi Pak Wan have been earmarked. A stepped height approach with low-rise on the headland and coastal lowland and high-rise further inland is adopted. This complements the visual presence of the mountain backdrop and maintains the prominent sea view. Variation in height is also adopted

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within individual neighbourhood to add variety in character and housing choice. The interplay of the natural and man-made landscape elements such as beaches, waterfront promenades, parks and golf courses helps integrate developments with the natural surroundings.

7.4 In the designation of various zones in the Area, consideration has been given to the natural environment, physical landform, existing settlement, land status, availability of infrastructure, local development requirements and relevant strategic planning studies and master plans.” (*emphasis added*)

43. It can thus be seen that:

- (1) The planning intention for Discovery Bay is to provide a holiday resort with residential and commercial development. It is to have a sub-urban character and to maintain a car-free and low-density environment. See paragraphs 7.1 to 7.3 of the Explanatory Statement.
- (2) Further, under the planning intention, Discovery Bay is to have an estimated total population of 25,000. But this is not a bar to any increase as it is expressly stated that any further increase would have to be considered in the context of the general planning intention and subject to detailed feasibility investigations on infrastructure and environmental capacities. See paragraph 7.2 of the Explanatory Statement.

44. In the premises, the TPB should consider the Application by taking into account matters of a planning nature and matters that are relevant or related to assess whether the proposed rezoning is (a) consistent with the general planning intention, and (b) supported by detailed feasibility investigations on infrastructure and environmental capacities.

45. However, instead of doing so, the TPB took into account and relied on the Unused GFA factor as a basis for rejecting the Application. This is wrong because:

- (1) It is unrelated in any way to the questions of whether the proposed rezoning is consistent with the general planning intention or infrastructure and environmental capacities investigations.
- (2) In any event, the Unused GFA is about when and how the *implementation* of the MP7.0 is to be carried out. It has nothing to do with the proper land use of Area 6f.
- (3) In this respect, matters relating to the implementation of a plan are *not* planning considerations as they are irrelevant to what should be the proper land use of a particular site under the relevant outline zoning plan vis-à-vis its planning intention. See: *Delight World Ltd v Town Planning Appeal Board* [1997] HKLRD 1106, 1115D-I *per* Keith J.
- (4) Mr Yu asks rhetorically, why would the *implementation* of one area²⁴ in Discovery Bay be relevant to what is the proper land use of *another* area (Area 6f).
- (5) In the premises, the Unused GFA is neither a proper planning consideration nor is it related to the planning intention and the criteria set out in the Explanatory Statement.

46. Mr Yu therefore says the TPB had taken into account an irrelevant consideration (ie, the Unused GFA) in coming to the Decision.

²⁴ The Unused GFA are mainly located in subareas A, B and C of Residential (Group 2) 2 (ie, R(C)2) zone in Discovery Bay North on the DB OZP. See: the Affirmation of Lung, paragraph 11.

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47. For the same reasons, Mr Yu submits under Ground 2 that the TPB had also failed to take into account relevant considerations (ie, matters relating to the planning intention) in making the Decision.

48. In opposition, Mr Litton contends that the Unused GFA is clearly a relevant planning consideration for the purpose of assessing the Application.

49. Mr Litton says whether a factor is of a planning nature and thus a planning consideration must be dependent on the individual circumstances, in particular the specific planning intention of a subject OZP. As observed by Cooke J in *Stinger* at 269:

“It may be conceded at once that the material considerations to which the Minister is entitled and bound to have regard in deciding an appeal must be considerations of a planning nature. I find it impossible, however, to accept the view that such considerations are limited to matters relating to amenity. So far as I am aware, there is no authority for such a proposition, and it seems to me to be wrong in principle. *In principle, it seems to me that any consideration which relates to the use and development of land is capable of being a planning consideration. Whether a particular consideration falling within this broad class is material in any given case will depend on the circumstances.* However, it seems to me that in considering an appeal, the Minister is entitled to ask himself whether the proposed development is compatible with the proper and desirable use of other land in the area. For example, if permission is sought to erect an explosives factory adjacent to a school, the Minister must surely be entitled and bound to consider the question of safety. This plainly is not an amenity consideration. The broad nature of the duty of a planning authority in dealing with an application is indicated in the judgment of Widgery J. in *Fitzpatrick Developments Ltd. v. Minister of Housing and Local Government*. Widgery J. said:

It is the duty of the local planning authority in the first instance, and the Minister if the matter comes to him by way of appeal, to plan the area concerned, and an essential feature of planning must be the separation of different uses or

activities which are incompatible the one with the other.”
(*emphasis added*)

50. Mr Litton submits that, in relation to the present case, the particular circumstances of the DB OZP are these.

51. As reflected in the Explanatory Statement, the planning intention is to develop Discovery Bay *as a whole* into a holiday resort balanced with residential and commercial developments. Specifically, it is to be developed into a car-free area with low density and low rise residential housing, and compatible with its conservation and natural environment. This intention is achieved and reflected in the DB OZP by adopting an overall and holistic approach in designating in the plan carefully planned and specifically zoned areas over the *entire* Discovery Bay area. These zones include areas specified for residential use²⁵, open space, other specified uses²⁶, green belt, conservation area, coastal protection area, and country park. Further, each of these zones (and their sub-divided zones) are allocated with specific GFAs and specific height and storeys limitation as to the buildings to be erected in these zones. The intention and balance is also to be achieved by adopting an estimated population of 25,000 for the entire Discovery Bay.

52. In other words, the planning intention is a *comprehensive* and holistic development concept, to develop the *entire* Discovery Bay into a self-sustained holiday resort with residential and commercial development,

²⁵ Such as Residential Group C and Residential Group D uses.

²⁶ For examples, such as for “Commercial Complex and Residential Development cum Transport Interchange” only, “Commercial and Public Recreation Development cum Transport Interchange” only, “Hotel” only, “Public Recreation cum Residential Development” only, “Golf Course” only, “Marina” only, “Sports and Recreation Club” only, “Staff Quarters” only, “Pier” only etc.

compatible with its natural environment. This intention is achieved as a matter of planning through the well balanced and comprehensive designated zonings in the DB OZP with designated GFAs.

53. Given this comprehensive and holistic zoning plan for Discovery Bay, it must be open to the TPB in assessing the Application to take the view (as it did) that, for planning purposes, it would be more appropriate to assess the proposed development *with other developments in Discovery Bay as a whole*, than on a piecemeal basis²⁷.

54. Once understood this way, the Unused GFA is plainly a relevant planning consideration and the TPB was justified in taking this into account in assessing the Application.

55. Notwithstanding Mr Litton's persuasive submissions, for the following reasons, I am unable to agree.

56. First, as mentioned above, given what has been stated in the Explanatory Statement, it is common ground²⁸ that the TPB should assess the Application in the context of the general planning intention of the development for Discovery Bay, and the feasibility studies of infrastructure and environment capacities.

²⁷ See paragraphs 25, 27 - 28 of the Minutes; paragraphs 41 and 48 of the Affirmation of Lung.
²⁸ See also: the Affirmation of Lung, paragraph 48; paragraph 6(e)(ii) of the Minutes of the PlanD's view.

57. However, it is clear that the TPB's reliance on the Unused GFA factor has nothing to do with its consideration of any of these criteria.

58. As pointed out by Mr Yu, the TPB did not say in the Decision that the Application was disapproved because it was inconsistent with the planning intention or that it did not meet the infrastructure or environment capacities feasibility studies.

59. In this respect, Mr Yu further emphasizes that the applicant's representative and consultant had made representations at the Meeting as to why the Application would meet all these criteria.²⁹ The TPB did not address any of them in its deliberation and in its reasons in rejecting the Application³⁰. Indeed, the TPB was satisfied that the proposed residential development was *not* incompatible with the surroundings in terms of land use and development intensity and the major technical issues of the proposed development could be resolved³¹. The PlanD had also indicated that there was adequate infrastructure provision to cater for the proposed rezoning development³².

60. Further, as explained by Mr Litton above, the TPB in referring to the Unused GFA factor was rather saying that such proposed rezoning and redevelopment should only be considered and assessed comprehensively together with all other developments in the Discovery Bay as a whole. Hence, at the deliberations, members recommending

²⁹ See paragraphs 7 - 16 of the Minutes and [20] above.

³⁰ See paragraphs 23 - 25 and 27 - 29 of the Minutes.

³¹ See paragraph 42 and 48 of the Affirmation of Lung.

³² See [22] above.

rejecting the Application were recorded at paragraphs 25(a) and (b), 27 and 28 of the Minutes to be saying:

“25. Some Members supported PlanD’s recommendation of rejecting the application and had the following major views:

(a) Discovery Bay was not recommended as a strategic growth area. Given the unique background of comprehensive development concept in Discovery Bay, *the proposed development* would have cumulative impacts on the overall planning of the area, *and developments in Discovery Bay should be assessed comprehensively*;

(b) the applicant had indicated intention for further residential developments in Discovery Bay. There was still undeveloped domestic GFA allowed on the OZP. Other than for providing more housing units, there was no strong justification for rezoning the Site for residential use;

(c) ...

...

27. The Vice-chairman was of view that as site area of the application site was not small and the applicant had indicated intention for further residential developments in Discovery Bay, *it would be more appropriate to assess the application with other developments in Discovery Bay comprehensively*.

28. The Chairman concluded that Members in majority did not support the application. Although the major technical issues of the proposed development had been resolved, the approval of the application would set an undesirable precedent for similar applications. The cumulative impact of approving similar rezoning applications was an important factor for consideration. There was scope for further residential development under the current OZP, and *the proposed development should be assessed with other developments in Discovery Bay comprehensively.*” (*emphasis added*)

61. In the premises, the TPB in relying on the Unused GFA as a factor to reject the Application did not do so on the basis that the Application failed to meet the planning intention or the criteria set out in

A the Explanatory Statement. This shows that the Unused GFA as a factor
B has nothing to do with any of these criteria.
C

D 62. Second, in coming to the above view, the TPB was indeed
E concerned with the implementation programme of the zoned areas
F allocated with the Unused GFA. This is underlined by the fact that, in
G opposing the Application by reference to the Unused GFA, the PlanD was
H focused on the absence of indication as to the implementation programme
I of those areas:

- H (1) Thus at paragraph 11.5 of the 2nd RNTPC Paper, the PlanD
I stated:

J “It should also be noted that there are some 124,000m²
K domestic GFA allowed in the ‘R(C)2’ zone (Plan Z-1a) of the
L Discovery Bay OZP which have not been incorporated in the
M prevailing MP and yet to be implemented under the lease.
N In other words, there is scope for further residential
O developments within the planned residential area without
P resorting to rezone the Site. It is considered that the
Q planned residential developments should be *implemented*
first before new sites are proposed to be rezoned for
additional residential development. The applicant has
however not indicated *the implementation programme* of
these further residential developments within the ‘R(C)2’
zone, and no justification has been provided by the applicant
on this aspect. As advised by DLO/Is, LandsD,
endorsement by ExCo is required if it is decided that any
development proposal to be incorporated in the MP would
change the development concept of Discovery Bay. While
this would be a lease matter to be followed up by the Lands
Authority, no account has been provided by the applicant on
this aspect.” (*emphasis added*)

- R (2) Similarly, at paragraph 6(e)(iv) of the Minutes, the PlanD was
S recorded to have represented that:

S “there were some 124,000m² domestic GFA allowed in the
T ‘Residential (Group C)2’ (‘R(C)2’) zone in Discovery Bay
U North on the OZP which had not been incorporated in the
V prevailing MP and yet to be *implemented*. The planned

residential developments should be *implemented* first before new sites were proposed to be rezoned for additional residential development. The applicant had not indicated the *implementation programme* of the residential developments within the ‘R(C)2’ zone and no justification had been provided; and” (*emphasis added*)

63. However, as submitted by Mr Yu above, matters concerning implementation of the plan are *not* proper planning considerations. As observed by Keith J in *Delight* at 1115D, there is a “well-settled distinction in planning law between the grant of planning permission and its implementation”:

“I cannot go along with this reasoning. It does not follow that because the bypass might cut across the site, therefore the company’s application for planning permission had to fail. What the Appeal Board ignored was the *well-settled distinction in planning law between the grant of planning permission and its implementation*. That principle was explained by the House of Lords in *British Railways Board v The Secretary of State for the Environment* [1994] JPL 32 at p.38 as follows:

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

64. This distinction is in my view a valid one. By definition, *planning* concerns the making of *designs or schemes* according to which things are, or are intended to be, arranged or carried out.

65. Hence, when the TPB is to consider whether the proposed rezoning of Area 6f as a *plan* for the use of that piece of land is consistent

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with the *planning intention* of the DB OZP as a *plan*, what it should consider is whether the proposed rezoning and residential development is consistent with the development *design or scheme* set out for the entire Discovery Bay. In other words, it is to assess whether the proposed amended plan and the existing plan are compatible with each other as a *design or scheme*.

66. In other words, whether or not certain proposed development approved in the original plan has in fact been carried out should not be relevant to the question of whether the proposed rezoning *for planning purposes* is consistent with the original plan as a matter of *design or scheme*.

67. In this respect, Mr Litton's submissions that the planning intention for Discovery Bay is a holistic and comprehensive one, although initially attractive, does not assist him:

(1) In the present case, the TPB also did not in fact say, because of the Unused GFA, the proposed rezoning of Area 6f was inconsistent with the planning intention. All it was saying (relying on the PlanD's similar view) is that, not until the Unused GFA was implemented, it could not say what impact the proposed rezoning might have on the planning intention. See Minutes, paragraph 6(e)(iii) (the PlanD's view), and paragraphs 25(a) and (b).

(2) In other words, what it effectively said is, it could only assess whether the proposed rezoning was consistent with the planning intention *after* the Unused GFA had been made use of. However, it had not explained why. For example, it did

not even say, *for planning purposes*, what were the matters it could not assess to determine whether the proposed rezoning was consistent or not with the planning intention unless it could have knowledge of the implementation of the Unused GFA. The lack of such explanation or analysis highlights the distinction between matters concerning planning and matters relating to its implementation. For this, I repeat my observation at [65] - [66] above.

68. For all these reasons, I accept Mr Yu's submissions that, looking at the way the TPB had taken it into account under the Unused GFA Reason, it had taken into account an irrelevant consideration.

69. The applicant therefore succeeds under Ground 1.

70. For the same reasons, I also accept Ground 2:

- (1) The applicant's representatives with the aid of PowerPoint presentation had addressed the TPB that the Application was in line with the general planning intention of the DB OZP and that there would be no infrastructure or environmental capacities issues. See in particular: Minutes, paragraphs 7(h), (j), (o), 8(c) and (f).
- (2) Further, it is pertinent to note that it is the PlanD's view that there would be no infrastructure or environment capacities issues. See: paragraphs 2(e) to (l), 9.1.2 to 9.1.12 of the 2nd RNTPC Paper.
- (3) However, as explained above, these had not been dealt with by the TPB in the deliberations on the applicant's

representations that the proposed rezoning was consistent with the planning intention.

(4) In such context, I agree with Mr Yu that the TPB in making the Decision had at the least also failed to take into account relevant considerations, *viz* matters relating to the planning intention.

71. I will therefore quash the Decision on the basis of Grounds 1 and 2³³.

C2. Ground 4

72. It is convenient to consider Ground 4 first as in the way Mr Yu has advanced his submissions.

73. This ground concerns the Undesirable Precedent Reason.

74. The TPB set out this reason at paragraph 29(b) of the minutes as follows:

“approval of the application would set an undesirable precedent for other similar rezoning applications, the cumulative impact of which would further depart from the original development concept of Discovery Bay and overstrain the existing and planned infrastructure capacities for Discovery Bay area.”

³³ Mr Yu has fairly accepted that just because the Application “ticks all the boxes” does not mean it necessarily must be approved. But as submitted by Mr Yu, in the present case, it is not that the TPB acknowledged that the Application satisfied all the prescribed criteria but that in the exercise of its discretion taking into account relevant considerations it considered that the Application should not be approved. The TPB had taken into account irrelevant consideration and failed to take into account relevant consideration in rejecting the Application. In the premises, the Decision should be quashed: *Secretary of State for Education and Science v Tameside Metropolitan Borough Council* [1977] AC 1014 at 1065A-B; *Capital Rich Development Ltd v Town Planning Board* [2007] 2 HKLRD 155 at [63] - [64].

75. The applicant says under this reason, the TPB was rejecting the Application on the basis that (a) the approval of it would set an undesirable precedent for “other similar applications”, which (b) would lead to a “cumulative impact” that would further depart from the original development concept of Discovery Bay and overstrain the existing and planned infrastructure capacities for Discovery Bay Area.

76. This has been further made clear in the Affirmation of Lung at paragraph 51:

“51. I do not agree that approving the rezoning of the Site for residential development would not set an undesirable precedent. The RNTPC was well aware that there are six ‘OU(Staff Quarters)’ sites in the approved OZP with a total GFA of 3,827m² and a total area of about 2.68 hectares (including the Site) of a similar nature [paragraph 11.4 and Plan Z-7 of RNTPC Paper]. In light of the general planning intention and the unique development concept for Discovery Bay, it is entirely reasonable for the RNTPC to be cautious and concerned as to the impact on the planning intention and the existing and planned infrastructure capacity of Discovery Bay. This is particularly relevant given that approving similar applications within the ‘OU(Staff Quarters)’ sites on the approved OZP is likely to have a cumulative impact on the overall planning of the area and would further depart from the original development concept of Discovery Bay as a holiday resort and residential/commercial development. In fact, the Applicant has indicated that several pieces of land have been identified for better use [paragraph 8(b) of Minutes] and an intention for further residential developments in Discovery Bay (for example, application No. Y/I-DB/3 which was withdrawn by the Applicant is an application for a comprehensive residential development involving another two ‘OU(Staff Quarters)’ sites). *Thus, if the RNTPC agreed to the Application, it might find it difficult to reject other similar applications involving ‘OU(Staff Quarters)’ zone in the future. In this regard, RNTPC’s decision to approve the Application would be likely to set a precedent that the RNTPC would have to take into account in considering future similar applications, and in the present case, the cumulative effect would be a departure from the original development concept of Discovery Bay and may overstrain the existing and planned infrastructure capacity*

for Discovery Bay [paragraph 11.4 of RNTPC Paper and paragraphs 25 and 28 of Minutes].” (*emphasis added*)

77. Mr Yu says this reason is wrong in principle as the TPB had misapplied this concept of “undesirable precedent”. His contentions run as follows.

78. First, this reason is inconsistent with the planning intention. Mr Yu emphasizes again that under the planning intention, further increase in population beyond the estimated 25,000 is *permissible* and any application for that purpose would have to be considered with reference to the planning intention and the criteria as explained in the Explanatory Statement.

79. Thus, it is wrong in principle for the TPB to reject the Application on the basis of the possible or speculative “cumulative” effect if there were other future similar applications. Although the approval of the Application may well form a relevant consideration for any future applications, each of those applications would have to be considered on its own merits at the time of the application based on the proposed rezoning and by reference to those criteria.

80. Second, the TPB had wrongly regarded that this application would set an “undesirable precedent” for “other similar applications”, presumably referring to the five other sites in Discovery Bay which have been zoned also as “OU(Staff Quarters)”.

81. In the DB OZP, there are a total of six sites (including Area 6f) which have been zoned for staff quarters use. However, Mr Yu has pointed out that, in answer to questions raised at the Meeting as to whether the applicant intended to rezone all the six sites, Mr Wilson Cheung (a representative of the applicant) had explained that the other five zoned staff quarters sites were different from the one at Area 6f, and hence the applicant had no present intention to rezone them³⁴. Mr Cheung's explanations are recorded in the Minutes at paragraphs 10 - 11 as follows³⁵:

10. The Chairman and a Member enquired if the applicant had the intention to rezone all the six 'OU(Staff Quarters)' zones on the OZP for residential use.

11. Mr Wilson Cheung, the applicant's representative, made the following responses:

(a) there were existing staff quarters at three of the 'OU(Staff Quarters)' zones, which were adjacent to Peninsula Village, the fire station and to the south of the golf course respectively. Although the demand for staff quarters was reduced, there was a need to retain such use;

(b) amongst the remaining three undeveloped 'OU(Staff Quarters)' zones, the GFA for the one at the junction of Marina Drive/Discovery Bay Road was already taken up by the one adjacent to Peninsula Village. The one adjacent to Bijou Hamlet was located at the hill top and there was no intention for changing its use. The remaining one was the application site; and

(c) the 'OU(Staff Quarters)' zone with existing staff quarters adjacent to Peninsula Village was included in the application site of the s.12A application (No. Y/I-DB/3) for rezoning to residential development. That rezoning application was not aimed at changing the use of staff quarters. Area 10b, where the application site of Y/I-DB/3 was located, was a barging and services area in Discovery Bay 30 years ago for loading/unloading activities and

³⁴ See the applicant's PowerPoint presentation during the Meeting [Bundle 2B/9/136].
³⁵ See also transcript of the Meeting, pp 100 - 102.

garages. It had been the back-of-house area for Discovery Bay in the past. As barges were no longer required due to availability of road traffic, Area 10b had become an eyesore, and was proposed to be rezoned for a better overall planning. It was a coincidence that some existing staff quarters were located in Area 10b.”

82. These representations had not been challenged or disputed at the Meeting, nor had they even been discussed by the members at the deliberation session.

83. In the premises, Mr Yu says there is simply no proper basis for the TPB to form the view that the approval of the Application concerning Area 6f would form an undesirable precedent for “other similar applications”, as the TPB had failed to appreciate the difference between the site under the Application and the other sites. One is not comparing like with like in the present case. See: *Smart Gain v Town Planning Board*, (HCAL 12/2006, 6 November 2007, A Cheung J) at [109] - [111]; *Jonnex International Ltd v Town Planning Board* [2018] 1 HKLRD 577, at [63] - [67].

84. I agree.

85. As submitted by Mr Yu, the principle that a previous planning decision may be a relevant consideration in assessing a subsequent planning application is based on the principle of consistency in decision-making³⁶.

³⁶ See: *DLA Delivery Ltd v Baroness Cumberlege of Newick* [2018] Env LR 34.

86. Hence, for the TPB to come to the conclusion in that the approval of the Application could constitute an undesirable precedent, it had to have proper and reasonable basis (a) to say that the rezoning application of Area 6f was similar to other applications that might follow; and (b) to conclude that approving the Application would constitute a strong basis to require the TPB to approve subsequent similar applications.

87. In the present case, for the following reasons, I agree there is no or no proper basis for the TPB to form those views.

88. Given that the TPB had not dealt with the applicant's representations that the other five staff quarters sites are different from the subject site at Area 6f for technical and other reasons, and that it had no current intention to make any further rezoning application for them, the TPB did not have proper factual or reasonable basis for it to conclude that the present Application to rezone Area 6f would be "*similar*" to any subsequent applications.

89. Further, as submitted by Mr Yu, in the context of the DB OZP and the Explanatory Statement, there are control factors built in to assess each rezoning application which would result in increase in population, they are: (a) a planned estimated total population of 25,000; (b) consistency with stipulated general planning intention; and (c) the infrastructural and environmental capacities. Each individual application would have to be so assessed based on its merits by reference to these factors against the facts as presented at that time of the application.

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90. As illustrated by Mr Yu, the Application involves an increase in the estimated population figure from 25,000 to 26,190 in the proposed development after rezoning. The TPB had not questioned or disagreed with applicant's representations that the proposed rezoning and development could meet the existing infrastructure and environmental capacities. In the circumstances, if and when the applicant does make another subsequent rezoning application say for another increase of 1,000 population, the TPB would then be asked to consider an increase from the estimated population of 26,000 to say 27,000 odd. The baseline and circumstance would therefore have been changed. That would involve *different* considerations as to whether the subsequent proposed rezoning application with the materials then presented could satisfy these factors. As said by Mr Yu, if the Application had been successful, all that means is that a subsequent application, which must still meet those criteria set out in the Explanatory Statement, would find it harder to meet those requirements and succeed.

91. In the premises, there is also no proper logical basis in the present case for the TPB to say that approval of the Application would constitute an undesirable precedent for other similar applications.

92. Mr Litton has taken me to paragraphs 8 - 11 of the Minutes, and pointed out that, understood properly, all Mr Cheung was saying is that the applicant had no "current" intention to apply for their rezoning of the staff quarters sites. It does not mean that it had no intention at all to do so in the future, in particular when it is the applicant's own case that the demand for staff quarters had been much reduced since 2000 given the

improved transportation facilities linking Discovery Bay to outside. Counsel points out that the Application itself is a proof of such intention.

93. With respect to Mr Litton, this does not however address the lack of proper basis for the TPB's reason as identified above.

94. Further, Mr Litton also says even if the court accepts that the TPB is erroneous in arriving at the Undesirable Precedent Reason, the court should not exercise its discretion to quash the Decision. This is so as the Undesirable Precedent Reason is clearly separate and a stand-alone reason from the Unused GFA Reason. As such, the result of rejecting the Application is inevitable based on the Unused GFA Reason alone.

95. I am unable to accept this submission.

96. Leaving aside that I have also found that the Unused GFA Reason cannot stand, purely reading from the way these reasons are set out at paragraph 29 of the Minutes, I cannot come to a clear view that the TPB made the Decision on the basis of *either* one of those two reasons. This is particularly so as the TPB used the word "and" in setting out the two reasons for rejecting the Application.

97. Moreover, the Minutes shows that there were also members in the deliberation who were in support of the Application³⁷. In the circumstances, I cannot exclude the possibility that the Undesirable Precedent Reason might have influenced some members to ultimately

³⁷ See paragraph 26 of the Minutes.

decide to reject the application and thus tipped the balance in reaching the Decision.

98. In the premises, I also accept Ground 4, and would quash the Decision on this basis.

C3. Ground 3

99. It is well established that the *Tameside* duty of inquiry requires the TPB to ask itself the right question and take reasonable steps to acquaint itself with the relevant information to enable it to answer it correctly. However, it is generally for the TPB in discharge of such duty to decide whether sufficient inquiries have already been made, subject only to a *Wednesbury* unreasonableness challenge, bearing in mind the TPB's consultative role and statutory scheme of the TPO in assessing that question: *Hysan Development Co Ltd v Town Planning Board* (CACV 242 & 233/2012, 13 November 2014, Lam VP, Chu JA and Au J) at [94]; *Flintshire County Council v R (on the application of Anthony Jayes)* [2018] EWCA Civ 1089 at [14] *per* Hickbinbottom LJ.

100. The meaning and scope of the *Tameside* duty was recently clarified in *Ho Loy v Director of Environmental Protection* (HCAL 21 & 22/2015, unreported, 22 December 2016) at [46] - [54]. Chow J emphasised the following points:

- (1) [51] - [52]: It is important to appreciate that *Tameside* did not establish any general common law duty to consult before a public officer or body could exercise a statutory power which might affect the public generally. *Hysan*, *Capital Rich* and

Smart Gain also did not establish any general common law duty to consult or inquire.

(2) [51]: The true basis of the decision in *Tameside* is grounded on traditional administrative law principles, namely, that a decision maker exercising a statutory power must ask himself the right question and take reasonable steps to acquaint himself with the relevant information to enable him to answer it correctly.

(3) [53]: It is generally for the decision maker to decide what steps to take to collect relevant information for the purpose of answering the right question, absent any specific statutory requirement, subject to the court's supervisory jurisdiction exercised by way of judicial review.

(4) [53]: The manner and intensity of the inquiry to be undertaken into any relevant factor accepted or demonstrated as such is a matter for the decision-maker, not the courts.

101. Under this ground, the applicant's complaint is that the TPB failed to discharge its *Tameside* duty to make proper inquiry of the issues raised in the applicant's representations. In particular, the applicant says in its Form 86 that the TPB should have made inquiries into the following specific areas³⁸:

(1) Whether 25,000 was an absolute control figure such as to affect the TPB's consideration, by reference to the development concept of Discovery Bay, and whether the Application, with the attendant increase in total population by 1,190, was consistent with such development concept.

³⁸ In its Form 86, paragraph 73.

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- (2) Whether the approval of the Application would have jeopardized the 25,000 figure, bearing in mind the Unused GFA had not yet been utilised and the total population of Discovery Bay had yet to reach 25,000.
- (3) Whether the prevailing circumstances were such as to warrant lifting or relaxing the 25,000 figure.

102. In its skeleton at paragraph 56, the applicant has also said the TPB should have made inquiries as to (a) whether the “about 25,000” figure has been exceeded; and (b) if so to what extent it has been exceeded.

103. Mr Litton submits that, at the heart of the applicant’s above complaints is that the TPB regarded the planned total population figure of about 25,000 as a “cap” or “absolute control figure” when it referred to the “original development concept of Discovery Bay” in the second reason for the Decision. This, Mr Litton says, is incorrect.

104. Mr Litton has made comprehensive submissions³⁹ to demonstrate that it was clear from the reading of the Minutes and the Affirmation of Lung that the TPB, in assessing the Application, did not regard the 25,000 figure as a cap and was fully aware of the planning intention set out at paragraph 7 of the Explanatory Statement and that it did

³⁹ See paragraphs 46 and 48 of the Affirmation of Lung.

permit further increase in the population⁴⁰, which was guided by the factors set out at paragraph 7.2 of the Explanatory Statement⁴¹.

105. In such circumstances, it is obvious that the TPB must have asked itself those questions. However, the extent of the inquiry is a matter for the TPB, and it is open to the TPB, as a matter of planning judgment, to take the view that for planning purposes it would be more appropriate to assess the proposed development with other developments in Discovery Bay as whole, rather than on a piecemeal basis⁴².

106. Thus, in the context in which the TPB was being asked to make a decision, it was fully acquainted with the issue raised by the applicant. There was no controversy between the applicant and the PlanD that the DB OZP figure of 25,000 could be increased. The TPB accepted this position and reached its Decision *on other planning considerations*. It was therefore unnecessary for the Board to inquire into any of the specific matters raised by the applicant in Form 86 or its skeleton.

107. I would have agreed with Mr Litton's above submissions if the applicant's case under this ground is premised only on questions relating to treating 25,000 figure as effectively a cap.

⁴⁰ As pointed out by Mr Litton, extensive representations had been made by the applicant's representatives before the TPB to the effect that (a) the Explanatory Statement made clear the total planned population was about 25,000 and that it was possible to increase that further; and (b) materials placed before the TPB by the applicant showed that the 25,000 figure was adopted a long time ago based on different circumstances and considerations. See: Minutes, paragraphs 7(j) & (n); Slides 10 & 16 of the applicant's Power Point Presentation for the Meeting [2B/9/108, 114].

⁴¹ See paragraphs 32, 36 - 38 of the TPB's skeleton.

⁴² See paragraph 39.

108. However, in his reply at the hearing, Mr Yu has further submitted that the TPB in looking at the Application was charged with the function to determine whether the proposed rezoning of Area 6f was a proper land use for it under the DB OZP. For that, the TPB was guided by the planning intention and the criteria set out in the Explanatory Statement⁴³. Hence, in proper discharge of its *Tameside* duty, the TPB should have asked these right questions namely, whether the rezoning was consistent with the planning intention, and whether it met the feasibility study of infrastructure and environmental capacities.

109. In relation to these questions, for the reasons I have explained under Grounds 1 and 2 above, I agree with Mr Yu that the TPB had failed to ask the proper questions as to whether the Application was consistent with the planning intention⁴⁴. Mr Litton's contentions that the TPB was entitled to make the Decision based on *other planning considerations* (on the basis that the proposed rezoning should be considered and assessed comprehensively together with the other developments in Discovery Bay) cannot assist him, as I have already concluded above that those considerations are not proper planning considerations.

110. I would therefore also allow Ground 3 on the basis that the TPB failed to discharge its *Tameside* duty in asking the right question and

⁴³ As mentioned, Mr Litton also agrees that any increase in population for planning purposes is to be guided by the factors set out at paragraph 7.2 the Explanatory Statement, as is the same position adopted by the PlanD in the 2nd RNTPC Paper. See paragraph 37 of Mr Litton's skeleton.

⁴⁴ Given that the PlanD had in effect been satisfied that the Application raised on issues on infrastructure and environmental capacities issues as mentioned at [70] above, it appears the only principal outstanding question that was left for the TPB to consider in relation to the criteria set out in the Explanatory Statement was whether the Application was consistent with the planning intention.

making proper inquiry as to whether the Application was consistent with the planning intention of the DB OZP.

C3. *Ground 5*

111. Under this ground, the applicant complains that:

- (1) The Decision is a word-for-word copying of the reasons set out by the PlanD in the 2nd RNTPC Paper at paragraph 12.1.
- (2) Even in the subsequently filed affirmation by the TPB⁴⁵ in support of the Decision, the TPB is still unable to articulate any proper and logical basis in support of the reasons.

112. In this respect, Mr Yu has emphasized that the court has repeatedly deprecated the practice by the TPB to copy the reasons from the PlanD papers. The vice of so doing is that such copying raises the real issue as to (a) whether a material issue was or was not taken into account; and (b) whether the TPB had in fact exercised independent decision-making as it should: *Hysan, supra*, at [199] - [200].

113. In these circumstances, Mr Yu submits that the TPB did not apply an independent judgment in coming to the Decision, and abdicated its function and deferred to the PlanD instead.

114. With respect, I am unable to agree.

115. As it has also been repeatedly said, although the practice of copying reasons should be strongly discouraged, the mere fact that the TPB

⁴⁵ See the Affirmation of Lung.

had adopted the PlanD's reasons is not by itself objectionable as long as it can be shown that it had independently considered the application before it. See: *Smart Gain*, at [12]; *Jonnex*, at [83].

116. In the present case, I accept Mr Litton's submissions that, looking at the Minutes as whole (in particular paragraphs 23 - 28 concerning the deliberation) and considered it in context, the TPB had independently considered and assessed the Application:

- (1) The TPB did independently deliberate on the points raised for consideration including (a) the unique background of the comprehensive development concept in Discovery Bay; (b) the scope of further residential development under the current OZP and; (c) the cumulative impact of approving similar rezoning proposals once a precedent was established: paragraph 25.
- (2) Some members raised the opposing view that the proposed development could facilitate the supply of housing units and the major technical issues had been resolved by the applicant: paragraph 26.
- (3) The Vice-Chairman responded to the opposing view, pointing out that (a) the Site was not small; (b) the applicant had indicated an intention for further residential developments; and (c) it would be more appropriate to assess the application with other developments in Discovery Bay comprehensively: paragraph 27.
- (4) The Chairman then concluded that the majority members did not support the Application: paragraph 28.

117. Although I have concluded in the above that the TPB in arriving at the Decision had relied on reasons which are erroneous, this does not mean that the TPB had not considered the Application independently in the exercise of its own judgment.

118. In the premises, the applicant fails on this ground.

D. CONCLUSION

119. For the above reasons, I will allow this judicial review on Grounds 1 to 4. I will quash the Decision and remit the same to the TPB for reconsideration in light of the court's reasons set out in this judgment.

120. I further make an order *nisi* that costs of this application be to the applicant, to be taxed if not agreed, with certificate for two counsel.

121. It remains for me to thank counsel for their assistance in this matter.

(Thomas Au)
Justice of Appeal
sitting as an additional judge of
the Court of First Instance

Mr Benjamin Yu SC and Ms Eva Sit, instructed by Mayer Brown, for the applicant

Mr John Litton and Ms Catrina Lam, instructed by Department of Justice, for the respondent