CACV 432/2020
[2021] HKCA 1313

IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF APPEAL

CIVIL APPEAL NO 432 OF 2020

(ON APPEAL FROM HCAL NO 645 OF 2017)

BETWEEN

HONG KONG RESORT COMPANY LIMITED Applicant

and

TOWN PLANNING BOARD Respondent

Before: Hon Kwan VP, Barma JA and G Lam JA in Court
Date of Hearing: 18 August 2021
Date of Judgment: 10 September 2021

J U D G M E N T

Hon Kwan VP (giving the Judgment of the Court):

1. On 7 August 2020, Au JA (sitting as an additional judge of the Court of First Instance) handed down his judgment ("**the Judgment**")[1] granting the application for judicial review brought against the Town Planning Board ("**TPB**") by Hong Kong Resort Company Limited ("**the applicant**"), the developer and sole owner of the land on which the development known as Discovery Bay is situated. The decision of the

[1] [2020] 4 HKLRD 298

TPB[2] ("**the Decision**") being the subject of the judicial review was made on 23 June 2017. By the Decision, the TPB refused the application of the applicant ("**the Application**") made under section 12A of the Town Planning Ordinance, Cap 131 ("**TPO**") to amend the Outline Zoning Plan No S/I-DB/4 ("**the DB OZP**") by rezoning Area 6f ("**Area 6f**") from "Other Specified Uses" annotated "Staff Quarters (5)" (OU(SQ)) to "Residential (Group C)(12)."

2. The TPB gave two reasons for the Decision[3]:

> "(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 ["**Unused GFA**"]. No strong justification has been provided by the applicant for rezoning the application site for residential use; and
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> (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."

3. These reasons are referred to by the judge as "**Unused GFA Reason**" and "**Undesirable Precedent Reason**".

4. By the Judgment, the Decision was quashed and the Application remitted to the TPB for reconsideration in light of the court's reasons in the Judgment. The judicial review was allowed on four grounds. Grounds 1 to 3 (the TPB took into account an irrelevant consideration, namely, the Unused GFA factor; the TPB failed to take into account relevant facts and planning considerations; the TPB failed to

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2 More precisely, the application was considered and the decision made by the Rural and New Town Planning Committee ("**RNTPC**") of the TPB.

3 Minutes of 582nd meeting of the RNTPC on 23 June 2017 ("**the Minutes**" and "**the Meeting**"), §29

discharge its *Tameside* duty of inquiry[4] in that it failed to ask the right question and take reasonable steps to acquaint itself with relevant information to enable it to answer the question correctly) are all related to the Unused GFA Reason. Ground 4 (the TPB misapplied the concept of "undesirable precedent") is in relation to the Undesirable Precedent Reason.

The background

5. The Unused GFA factor, which is of critical importance to the Decision, must be considered and assessed in the context of the general planning intention of Discovery Bay. I adopt the background matters from the comprehensive account in §§9 to 33 of the Judgment, supplemented by relevant quotations from non-controversial documents.

(1) Discovery Bay development control

6. As narrated in the Judgment:

> "9. Discovery Bay is a self-contained suburban 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 1973. 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.
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> 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 station and public primary school, indoor recreation centre and neighbourhood community centre.

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[4] *Secretary of State for Education and Science v Tameside Metropolitan Borough Council* [1977] AC 1014 at 1065

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 GFA, was exercised through the MP by the Lands Department. In this regard:

(1) In the 1980s, domestic GFA was gradually increased to 559,510m^2 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".

(3) In 1994, the applicant paid HK$126 million for additional GFA of 8,400m^2 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 758,365m^2 (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 17,423m^2 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 775,655m^2. The whole process therefore had taken some 16 years to complete.

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[5] of 124,000m^2 (equivalent to GFA of 124,000m^2) 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 GFA of 124,000m^2 as well as minor adjustments in other areas.[6] The total domestic GFA permitted in the first draft Discovery Bay OZP No S/I–DB/1 published on 14 September 2001 is therefore 900,683m^2, which has remained unchanged in the subsequent OZPs including the approved OZP (ie, the DB OZP).

15. Shortly thereafter, in June 2002, the applicant submitted draft MP7.0A to the Lands Department to incorporate the 124,000m^2 domestic GFA already agreed upon and reflected in the DB OZP. That draft MP remains unapproved by the time of this hearing[7]. 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 utilising the 124,000m^2 domestic GFA already granted in 2001. This 124,000m^2 is the "Unused GFA" that the TPB took into account in the Unused GFA Reason in the Decision.

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 900,683m^2 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.

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."

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5 The MP uses "gross building area". It is common ground for present purposes GBA is the same as GFA.

6 Involving 1,028m^2 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.

7 Draft MP7.0 has since been approved by the time of the hearing of this appeal.

(2) The selection of Area 6f and the Application

7. The site selection of Area 6f and the consequent Application to the TPB to rezone Area 6f from staff quarters to "Residential (Group C)(12)" came about in this manner as described in the Judgment:

> "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 …
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> 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.
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> 20. As to Area 6f:
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> (1) Its physical attributes are that:
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> (a) It is a very small area (0.12%) in Discovery Bay.
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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).
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> (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**")[8] at para.7.1(b).
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> (d) It is located on a slope at the back-end of the built-up area.
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> (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

[8] A paper prepared by the Planning Department ("**the PlanD**") for the Meeting.

para.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 para.2(b).

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

(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 para.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 para.1.2. Under such development:

(1) The PlanD has indicated that there is adequate infrastructure provision to cater for the same[9];16 and

(2) It is the applicant's representation that the characteristics and resort elements of Discovery Bay would not be affected: Minutes at para.8(c).

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

8. The relevant provisions of section 12A are as follows:

"**12A. Amendment of plans on application to the Board**

(1) Subject to subsection (2), any person may apply to the Board for consideration of any proposal in relation to an original approved plan for the purposes of this section.

…

(23) Upon consideration of an application at a meeting under subsection (16), the Board may –

[9] 2nd RNTPC Paper at §§2(e) to (f) and Minutes at §20(a)

(a) accept, in whole or in part, the application; or

(b) refuse the application."

(3) The application to rezone Area 10b

9. The application to rezone Area 10b is relevant to the Undesirable Precedent Reason and is described in the Judgment as follows:

> "24. Later, the applicant also submitted an application to rezone Area 10b on 26 February 2016 ("**Area 10b Application**").
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> 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 service areas, refuse collection, telephone exchange, petrol stations and two pockets for staff quarters.
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> 26. The reason for seeking to rezone Area 10b was because it has become largely defunct and an eyesore: Minutes at para.11(c).
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> 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 considered. The applicant made clear that if the technical issues could not be resolved, it would not make the Area 10b Application again[10]."

(4) The Meeting and the Decision

10. As mentioned in the Judgment:

> "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:
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> (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 para.11.5), the

[10] The original representation in Chinese in the Transcript of Meeting at p 31 line 29 to p 32 line 2 has a rather different emphasis compared to the Minutes in English at §20(b).

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 para.2.1). Instead, the PlanD considered that the Application should be rejected on the grounds of (a) failure to demonstrate no infrastructural, 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 para.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 para.11.5), and that this be used as a reason to reject the Application (see para.12.1)."

11. The reasons of the PlanD set out in the 2nd RNTPC Paper for rejecting the Application are important because they were adopted by the TPB after deliberation at the Meeting[11]. The detailed reasoning stated in the 2nd RNTPC Paper read as follows:

"Planning Intention of Discovery Bay

11.2 In terms of strategic planning context, according to the Revised Lantau Concept Plan 2007, Discovery Bay area was not recommended for further development. According to the Sustainable Lantau Blueprint (the Blueprint) announced by the Government in June 2017, North Lantau Corridor is recommended for strategic economic and housing development, North-eastern Lantau Node is recommended for leisure, entertainment and tourism development and East Lantau Metropolis is recommended as a long-term strategic growth area. *Under the Blueprint, Discovery Bay is not recommended as one of the potential development areas or strategic growth area.*

11.3 As highlighted in paragraphs 4.1 to 4.5, Discovery Bay is intended for a holiday resort and residential/commercial development under the original land grant with a total planned population of 25,000 and a total domestic GFA of 900,683 m^2 upon full development as stipulated in the OZP. *The general*

[11] The applicant had advanced as the fifth ground for judicial review contending that the TPB had abdicated its function by wholesale copying of the reasons of the PlanD. This ground was rejected by the judge.

planning intention of Discovery Bay is for conservation of the natural environment and to provide for low-density developments compatible with surrounding settings. 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 investigation on infrastructure and environmental capacities.

11.4 In terms of site specific planning context, the Site is currently zoned "OU(Staff Quarters(5))" under the current OZP subject to maximum domestic GFA of 170m^2 and maximum BH of 9 m (3 storeys) and is intended for the provision of staff quarters to serve the Discovery Bay development. Although the proposed residential development has a similar domestic nature with other residential developments in Discovery Bay and concerned government departments have no objection to the application in terms of environmental, sewage and water supplies aspects, *the proposed medium-rise development, which has a domestic GFA of 21,600m^2 and maximum BH of 18 storeys (128mPD) should be justified in the context of the development concept of Discovery Bay which is intended for a holiday resort and residential/commercial development. The current application, if approved, would set an undesirable precedent for similar rezoning applications.* Given that there are six "OU(Staff Quarters)" sites on the OZP with maximum GFA of 3,827 m^2 allowed under the OZP and a total area of about 2.68 ha (including the Site) (Plan Z-7) with similar nature and site conditions, the accumulative impact of developing those land with increase in population would further depart from the original development concept of Discovery Bay and overstrain the existing and planned infrastructure capacities which are subject to a planned population of about 25,000 persons.

11.5 It should also be noted that *there are some 124,000m^2 domestic GFA allowed* in the "R(C)2" zone (Plan Z-1a) of the Discovery Bay OZP *which have not been incorporated in the prevailing MP and yet to be implemented under the lease*. In other words, *there is scope for further residential developments within the planned residential area without resorting to rezone the Site. It is considered that the 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 supplied.)

12. At the Meeting, the Senior Town Planner of the PlanD gave a presentation on their assessment in para 11 of the 2nd RNTPC Paper, summarising the reasons for not supporting the Application[12]. The applicant's representatives then gave a presentation on the Application and sought to address the rejection reasons of the PlanD[13]. This was followed by questioning from the TPB.

13. As stated in the Judgment:

> "30. The questioning centred on three areas:
>
> (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 paras.11, 19(b), 20(b)).
>
> (2) Tree compensation and urban biodiversity – these were accepted as satisfactory and no issue arose out of that.
>
> (3) Unused GFA (see Minutes at paras.17-18)."

14. The TPB then went into a deliberation session as recorded in the Minutes at paras 23 to 28:

> "23. The Chairman recapitulated that the application was a s. 12A application to rezone the Site from "OU(Staff Quarters)5" to "R(C)12" for a proposed medium-density residential

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12 Minutes, §§6(e)(i) to (iv)

13 Minutes, §§7(n) (strategic context); (o) (general planning intention); (p) (setting of precedent); (q) (unused GFA); (s) (the two rejection reasons in the 2nd RNTPC Paper); §§8(c) (impact of rezoning of the Site); (d) (development programme for Discovery Bay); (f) (guiding principles for Discovery Bay)

development, with a proposed maximum GFA of 21,600m^2. Concerned government departments generally had no adverse comment on the technical assessments. PlanD did not support the application. *The main points for consideration included that the unique background of comprehensive development concept in Discovery Bay; the scope for further residential development under the current OZP; and the cumulative impact of approving similar rezoning proposals once a precedent was established*.

24. Members noted that the same applicant submitted another s. 12A rezoning application (No. Y/I-DB/3) for rezoning a site at Area 10b in Discovery Bay from various zones to facilitate a low to medium-density residential development. The current application was originally scheduled for consideration by the Committee on 17.2.2017 and PlanD requested to defer the consideration of the application such that it could be considered together with application No. Y/I-DB/3, taking into account the unique background of the comprehensive development concept in Discovery Bay and the possible cumulative impacts of the proposed developments under the two applications on the natural environment and the infrastructure capacities in the area. After consideration of the applicant's presentation, the Committee on 17.2.2017 agreed that the current application should be submitted for its consideration together with application No. Y/I-DB/3. However, application No. Y/I-DB/3 was subsequently withdrawn by the applicant on 7.4.2017.

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) *the approval of the application would set an undesirable precedent for similar applications for rezoning of "OU(Staff Quarters)" or other zones on the Discovery Bay OZP*; and

(d) the applicant had failed to address the comments regarding the landscape proposal.

26. Some Members, however, considered that the technical issues, except landscape and geotechnical ones, had been resolved by the applicant and there would not be insurmountable technical problems arising from the proposed development. The proposed development could also facilitate the supply of housing units.

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* supplied.)

15. This was followed by rejection of the Application for the two reasons as mentioned at the beginning of this judgment.

This appeal

16. Mr Ambrose Ho, SC, who appeared for the TPB on appeal[14], contended that the judge was in error in allowing the judicial review in respect of Grounds 1 to 4. The central issue in this appeal is whether the unused GFA is capable in law of being a relevant consideration to be taken into account by the TPB in making the Decision. With no disrespect to Mr Ho, the arguments he advanced are in essence the submissions made

[14] With Ms Catrina Lam

by the former counsel of TPB and summarised in the Judgment at §§48 to 54.

17. The Decision is not a matter of complexity as far as planning decisions go and is relatively straightforward. Elaborate exposition is not required. The biggest objection is the unused GFA. It boils down to the question whether the TPB was entitled to take into consideration the un-utilised GFA of 124,000m^2 (in Sub-areas A, B and C of Residential (Group C)(2) in Discovery Bay North) to refuse the rezoning of Area 6f (in the middle of Area 6b zoned as Residential (Group C)(4) and already built for residential use, situated in the middle part of the Discovery Bay development about 600 m from the Discovery Bay Ferry Pier). The TPB's reasoning is that a comprehensive and holistic approach should be adopted, hence it would be more appropriate to assess the proposed rezoning and development of Area 6f with all other developments in Discovery Bay as a whole, rather than on a piecemeal basis[15].

18. I turn to consider each of Grounds 1 to 4.

Ground 1: whether the unused GFA factor is a relevant consideration

19. The judge has considered Ground 1 and Ground 2 together, as the challenge that the TPB took into account an irrelevant consideration and failed to take into account relevant considerations may be regarded as two sides of the same coin. In the course of dealing with Ground 1, there would be overlap with some of the matters pertaining to Ground 2 and they will not be repeated. Those matters that have not been covered in respect of Ground 2 will be treated separately.

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[15] Judgment, §60 and deliberations of TPB as recorded in the Minutes at §§25(a), (b), 27 and 28

20. Some non-controversial propositions should first be stated.

21. First, in an application for judicial review, the court is concerned only with the legality of the decision-making process, not with the merits of the Decision. It should not become bogged down in minutiae or undertake a detailed assessment of the merits. Instead, the court should evaluate the merits in a broad manner, and be vigilant against excessive legalism creeping in as a planning decision is not akin to an adjudication made by a court and planning policies do not normally require intricate discussion of their meaning.

22. Second, there is a clear distinction between the question of whether something is a material consideration and the weight which it should be given. The former is a question of law for the court to determine. The latter is a planning judgment for the planning authority and the manner and intensity of an inquiry into the consideration is within the exclusive province of the authority. Provided that the planning authority has regard to all material considerations, and has not acted unreasonably in the *Wednesbury* sense, it is at liberty to give those considerations whatever weight it thinks fit or no weight at all.

23. Third, material considerations in this context meant relevant considerations, namely, that they are relevant to the exercise of the particular power (under section 12A(1) of the TPO) and for the purposes for which the power was granted. It is for the courts to decide what is a relevant consideration. If the planning authority wrongly takes the view that some consideration is not relevant or wrongly takes into account some irrelevant consideration, its decision cannot stand and it must be required to think again.

24. Fourth, relevant considerations to which a planning authority is entitled to have regard must be of a planning nature. In principle, 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.

25. Fifth, pursuant to section 3(1) of the TPO, the TPB is required to undertake the systematic preparation of draft plans for the lay-out of such areas of Hong Kong as directed by the Chief Executive, "[w]ith a view to the promotion of the health, safety, convenience and general welfare of the community". In accepting an application to amend an approved plan under sections 12A(1) and (23), the TPB must be satisfied that the application is proper and acceptable. What materials are required to satisfy the TPB that the application would not give rise to some insurmountable or unacceptable impact on the local community and whether some technical assessments or reports should be obtained to demonstrate that potential areas of concern could be appropriately addressed, must depend on the facts and circumstances of the case in question.

26. The authorities in support of the above propositions are: *Tesco Stores Ltd v Secretary of State for the Environment* [1995] 1 WLR 759 at 764G to H, 780F to H; *R (Health and Safety Executive) v Wolverhampton City Council* [2012] PTSR 1362 at §49; *Stringer v Minister of Housing and Local Government* (1971) 22 P&CR 255 at 269; *Royal Billion Investment Ltd v The Town Planning Board* [2021] HKCFI 1093 at §§44 to 46, 62 to 64.

27. Mr Ho submitted that as any consideration which relates to the use and development of land is capable of being a planning consideration, the unused GFA factor is capable in law of being a relevant planning consideration for two broad reasons.

28. First, given the unique nature of the Discovery Bay development, and the DB OZP takes a holistic view and sets out a comprehensive framework for the Discovery Bay development as a whole, any further increase in the GFA brought about by the Application (of 21,600m^2) and the consequential increase in population (estimated increase at 1,190) is "directly related" to the use and development of the land.

29. Further, as the unused GFA of 124,000m^2 has featured in the allocation of GFA in the DB OZP and the Notes (Sub-areas A, B and C in Residential (Group C)(2) of Discovery Bay North), the unused GFA forms part of the planning intention within the DB OZP itself and the very subject matter of the use and development of land within the area covered by the DB OZP, namely, Residential (Group C)(2). And as the unused GFA constitutes part of the approved DB OZP, the TPB must have regard to it as it is provided in section 13 of the TPO that "Approved plans shall be used by all public officers and bodies as standards for guidance in the exercise of any powers vested in them."

30. I do not agree with Mr Ho. In my view, the mere fact that the unused GFA has featured in the DB OZP and the Notes does not mean that this must be a relevant planning consideration. As mentioned above, although any consideration which relates to the use and development of land is capable of being a planning consideration *in principle*, whether it

does qualify as one in any given situation would depend on the context and particular circumstances.

31. As the judge has done, I will start with the planning intention and policy of the Discovery Bay development as stated in the Explanatory Statement to the DB OZP, as this is where the clearest and most detailed exposition is found. Although the Explanatory Statement is expressly stated not to constitute a part of the DB OZP for the purposes of the TPO, it reflects the planning intention and objectives of the TPB for the various land use zonings of the DB OZP. The TPB must have proper regard to it even though it is not bound to follow the Explanatory Statement, as it is a material consideration (*Henderson Real Estate Agency Ltd v Lo Chai Wan* [1997] HKLRD 258 at 267B to D).

32. The relevant parts of the Explanatory Statement read as follows:

> "5. THE PLANNING SCHEME AREA[16]
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> …
>
> 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

[16] The Planning Scheme Area ("**the Area**") is divided into four parts: the Discovery Bay development; the rural settlements at Nim Shue Wan and Cheung Sha Lan; the monastery at Tai Shui Hang; and the natural hillsides and coast.

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.

6. POPULATION

…

6.2 *Further population increase in the Area would be mainly from the future phases of the Discovery Bay development in Yi Pak*. The planned population in the Area will be about 25,200 including 25,000 persons in the Discovery Bay development and 200 persons in the rural settlements at Nim Shue Wan and Cheung Sha Lan.

7. GENERAL PLANNING INTENTION

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 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.

8. <u>LAND USE ZONINGS</u>

8.1 <u>Residential (Group C) ("R(C)"): Total Area 100.79 ha</u>

8.1.1 This zone is intended primarily for low-density residential developments.

8.1.2 This zone mainly covers the existing housing developments at … and *the proposed developments in Yi Pak*.

> 8.1.3 *This zone is divided into eleven sub-areas*[17] with further sub-division to reflect the variations in height and building form in individual neighbourhood. To preserve the existing amenity and character, and to avoid excessive development overburdening the infrastructure provisions and external transport capacity of the Area, on land under this zoning, no new development or addition, alteration and/or modification to or redevelopment of an existing building (including structure) shall result in a total development or redevelopment in excess of the gross floor area (GFA) and building height restrictions set out in the Notes of the Plan." (Emphasis supplied.)

33. The Judgment noted two matters in the Explanatory Statement:

> "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 paras.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 para.7.2 of the Explanatory Statement."

34. I would add that the estimated population of 25,000 has taken into account the unused GFA of 124,000m^2 as it is stated that "Further population increase in the Area would be mainly from the future phases of the Discovery Bay development in Yi Pak". And the land use zoning in respect of Residential (Group C) covers the unused GFA of 124,000m^2 as

[17] If the Application is granted and Area 6f is rezoned, it would be an additional Sub-area and denoted as "Residential (Group C)(12).

it is stated that "This zone mainly covers the existing housing developments … and the proposed developments in Yi Pak."

35. Mr Benjamin Yu, SC, who appeared for the applicant here and below[18], emphasised that the DB OZP, in providing for domestic GFA of 900,683m^2, already includes the unused GFA of 124,000m^2, for which no permission from the TPB is required to build flats, and such designation is done on the basis of inter alia infrastructure provisions, see the Explanatory Statement at §§7.4 and 8.1.3. He made the point that *over and above* the provision of GFA of 900,683m^2, the Explanatory Statement §7.2 expressly states that there can be "further increase" of population – which necessarily entails rezoning to increase the domestic GFA – subject to what Mr Yu described as the "prescribed control factors" of: (a) a planned estimated total population of 25,000; (b) consistency with the stipulated general planning intention for the Area; and (c) detailed feasibility investigations on infrastructural and environmental capacities. Hence, the comprehensive and holistic zoning plan has *already factored in* the unused GFA being fully utilised – which would not require permission from the TPB – and *on top of that* allows for further increase by reference to the prescribed control factors. Each individual application for rezoning would have to be so assessed based on its merits by reference to those factors against the facts as presented at the time of the application. It is therefore plainly wrong to suggest that the unused GFA could be relevant to the Application, which is concerned with the "further increase" stage.

36. As stated in the Judgment:

> "58. As pointed out by Mr Yu, the TPB did not say in the Decision that the Application was disapproved because it was

[18] With Ms Eva Sit, SC

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 emphasises that the applicant's representative and consultant had made representations at the Meeting as to why the Application would meet all these criteria. The TPB did not address any of them in its deliberation and in its reasons in rejecting the Application. 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 resolved. The PlanD had also indicated that there was adequate infrastructure provision to cater for the proposed rezoning development."

"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, paras.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: paras.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."

37. The judge also made these pertinent observations in §67 of the Judgment:

"(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, para.6(e)(iii) (the PlanD's view), and para.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. …"

38. I caution myself against approaching the planning decision of the TPB with excessive legalism and that I should not be looking for elaborate analysis by the TPB how it reached the Decision. On a fair reading of the deliberations as recorded in the Minutes and the reasons of the Decision, I am inclined to agree with the judge's above observation that in taking into account the unused GFA factor, the underlying premise of the Decision would appear to be that "not until the Unused GFA was implemented, [the TPB] could not say what impact the proposed rezoning might have on the planning intention", similar to the views advocated by the PlanD. In other words, unless the unused GFA is implemented so that the "practical consequences" of the unused GFA can be assessed, the TPB cannot be satisfied that the additional GFA of 21,600m^2 and the population increase of 1,190 from the rezoning of Area 6f would still be consistent with the general planning intention and requirements of the DB OZP in a holistic manner. Insofar as Mr Ho has contended that the unused GFA is not an implementation issue, I do not agree with him. Nor do I agree with Mr Ho that the judge had misunderstood the evidence in making the observations in §67 of the Judgment.

39. As rightly held in §62 of the Judgment, "the TPB was indeed concerned with the implementation programme of the zoned areas allocated with the Unused GFA". The "no strong justification" mentioned in §§25(b) and 29(a) of the Minutes was plainly attributable to the unused GFA. I reject Mr Ho's contention to the contrary that the Board had inquired into various planning merits such as the best land use for the site in question. I have set out earlier the relevant parts of the Minutes (at §§25(a), (b), 27 and 28) and the 2nd RNTPC Paper (at §11.5), which demonstrated in my view this underlying premise of the Decision. Further support for this may be found in the presentation of the PlanD at the Meeting as recorded in the Minutes at §6(e)(iv):

> "there were some 124,000m2 domestic GFA allowed in the "Residential (Group C)2" ("R(C)2") zone in Discovery Bay North on the OZP which had not been incorporated in the 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;" (Emphasis supplied.)

40. The judge accepted Mr Yu's submission that in focusing on the absence of indication as to the implementation programme of the unused GFA[19], the TPB had taken into account matters that are not proper planning considerations, citing *Delight World Ltd v The Town Planning Appeal Board* [1997] HKLRD 1106 at 1115D to F which mentioned the

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[19] According to the power point presentation of the application at the Meeting, some sort of implementation programme was provided to the TPB. On the premise that the approval of draft MP 7.0 by the Lands Department had taken 15 years (the process was ongoing at the time of the Meeting in June 2017) and assuming approval would be obtained in 2020, ten years would be required to complete construction, ie in 2030. See also Minutes §7(q) and §8(d), in which the applicant explained that the reason for the long time required for implementing the unused GFA was mainly due to the slow process for approval of draft MP 7.0.

well-settled distinction in planning law between the grant of planning permission and its implementation. The judge said in §66 of the Judgment:

> "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."

41. Mr Ho cited *Royal Billion Investment Ltd v The Town Planning Board* at §§88 to 90 in support of his proposition that implementation was a relevant consideration which the TPB was entitled to take into account in an application to amend an approved OZP under section 12A of the TPO. In that case, the development proposal put forward in support of a rezoning application involved road widening works. Chow J (as he then was) noted that the distinction between "planning permission" and "implementation" is relevant in the context of an application under section 12A as a matter of principle, notwithstanding the difference between such an application (in which the TPB has no power to impose conditions in section 12A(23)) and an application under section 16 to carry out a development which is a permitted use but subject to planning permission (as in *Delight World Ltd*; the TPB may impose conditions in granting permission in section 16(5)). That said, Chow J regarded the feasibility of the proposed road widening works a relevant factor, as the prospect of fulfilment of a desirable condition is a relevant, albeit non-conclusive factor that the planning authority was entitled to take into account.

42. It seems to me there is no absolute rule that the feasibility of a proposed development, which would have something to do with its implementation, might not be taken into consideration in an application for

planning permission, just as there is no absolute rule that difficulties in implementation must lead to the refusal of planning permission. This passage from the judgment of Lord Keith of Kinkel in *British Railways Board v Secretary of State for the Environment* [1994] JPL 32 at 38 was quoted in *Delight World Ltd* and *Royal Billion Investment Ltd*:

> "The function of the planning authority was to decide whether or not the proposed development was desirable in the public interest. … But 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 different kinds, in the way of site assembly or securing the discharge of restrictive covenants. 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."

43. Lord Keith further said:

> "What was appropriate depended on the circumstances and was to be determined in the exercise of the discretion of the planning authority. But the mere fact that a desirable condition appeared to have no reasonable prospects of fulfilment did not mean that planning permission must necessarily be refused. Something more was required before that could be the correct result."

44. This was said in the context of planning permission that may be granted subject to condition. But I see no reason why it should not apply in the context of an application to amend an approved OZP in which the TPB has no power to impose condition in granting permission. Looking at the matter with common sense, one can well understand why the feasibility of the proposed road widening works is a relevant consideration in *Royal Billion Investment Ltd.* The contrast with the implementation of unused GFA in the present case could not be greater.

Whereas it could be readily seen why the proposed road widening works would be relevant to rezoning a site from "Green Belt" to residential for a residential development, it is not readily apparent why the implementation of unused GFA in Discovery Bay North (the use and development of which has been provided for in the DB OZP) should be relevant to rezoning a site in a different area from staff quarters to residential when the proposed rezoning was in line with the general planning of the DB OZP and there would be no infrastructure or environmental capacities issues arising.

45. I have mentioned earlier the judge's observations to the effect that the TPB was unable to explain how or why, without the implementation of the unused GFA, it could not properly assess whether the proposed rezoning was consistent with the planning intention of the Discovery Bay development as described in the Explanatory Statement at §5.4 – "a car-free development evolved from the original concept of a holiday resort … maintained by the existing and planned provision of a diversity of recreation facilities including golf courses, sports and recreation clubs, beaches and marina, etc." All this must be viewed in light of the general planning intention in §7 of the Explanatory Statement which is explicit in contemplating further increase in population and has set out the relevant planning considerations for the "further increase" stage.

46. Mr Ho argued that the applicant had failed to provide sufficient justification for the rezoning and questioned that instead of rezoning to residential, whether the site for staff quarters might be rezoned to open space or some other uses. But these possibilities were not raised in the papers prepared by the PlanD for the Meeting or by the TPB at the Meeting. They were not the subject of the deliberations and formed no

part of the reasons for the Decision. They were only raised in the affirmation of Lung Siu Yuk at §44, filed on behalf of the TPB in opposition to the application for judicial review.

47. Mr Ho further submitted that in discharging its function as a plan maker, the TPB is required under section 3(1) of the TPO to undertake the systematic preparation of draft plans "[w]ith a view to the promotion of the health, safety, convenience and general welfare of the community" and so is not limited to considering only the general planning intention and infrastructure and environmental capacities as stated in the Explanatory Statement. He prayed in aid the statements of Ribeiro PJ in *Hysan Development Co Ltd v Town Planning Board* (2016) 19 HKCFAR 372 at §126 that "[p]lanning is a holistic process, involving balancing numerous factors" and "Planning decisions are made with entire districts, and not just the parties' sites, in view". In assessing an application for rezoning, the TPB can legitimately take into account the "impact on the local community" and "whether the proposed new zoning is appropriate and acceptable from a planning point of view and desirable in the public interest" (*Royal Billion Investment Ltd* at §§62 and 88). Reliance was placed on these statements of Lord Widgery CJ in *Collis Radio Ltd v Secretary of State for the Environment & Anr* (1975) 29 P & CR 390 at §396:

> "Planning is something which deals with localities and not individual parcels of land and individual sites. In all planning cases it must be of the greatest importance when considering a single planning application to ask oneself what the consequences in the locality will be – what are the side effects which will flow if such a permission is granted. In so far as an application for planning permission on site A is judged according to the consequences on sites B, C and D, in my judgment no error of law is disclosed but only what is perhaps the most elementary principle of planning practice is being observed."

48. I do not find the statements of general guidance helpful in this particular context. It does not assist the position of the TPB to keep harping on a holistic approach without being able to explain why it could not properly assess the proposed rezoning until the unused GFA was implemented. As for matters that would have "impact on the local community", specific provision has been made in the Explanatory Statement at §7.2. As to *Collis Radio Ltd*, as rightly pointed out by Mr Yu, the regime under the Town and Country Planning Act 1971 is governed by a generalised provision (section 88(6)) that the planning authority "shall have regard to the provisions of the development plan, so far as material to the subject-matter of the enforcement notice, and to any other material considerations". In contrast, specific provisions have been made in the Explanatory Statement at §7.2 governing how further increase to the GFA should be assessed.

49. It was contended by Mr Ho that to have regard only to what Mr Yu described as the "prescribed control factors" in the Explanatory Statement in considering the Application would be to adopt "a narrow, strait-jacketed approach" and that the TPB would be shutting its eyes to the factual circumstances in making a "limited assessment" "in a vacuum without reference to practical reality". I do not accept that to have regard to the planning considerations in the Explanatory Statement would mean that the TPB is required to shut its eyes to the facts as they existed at the time. I agree with Mr Yu that properly construed, the "further increase" stage is governed by the "prescribed control factors" in the Explanatory Statement. I reject also Mr Ho's contention that this would be to conflate an application under section 12A with an application under section 16.

50. Mr Ho also submitted that the TPB was entitled to ascertain the general planning intention of the Discovery Bay development, not only from the Explanatory Statement, but also from the Revised Lantau Concept Plan 2007 and the Sustainable Lantau Blueprint 2017.

51. According to the evidence adduced[20], the former mentioned that the Discovery Bay area was not recommended for further development and it could be gathered from the latter that Discovery Bay is not recommended as one of the potential development areas or strategic growth areas. The general planning intention in these further documents is entirely consistent with what is found in the Explanatory Statement §7.1, namely, that the Discovery Bay development should be a low density development compatible with surrounding natural setting. That Discovery Bay is not recommended as a strategic growth area does not mean there should be no growth or that very modest growth would not be consistent with the general planning intention. If the rezoning is approved, the estimated growth in population is just by 1,190.

52. A further point was raised by Mr Ho that it was not pleaded in the Form 86 that the discretionary planning judgment was challengeable on *Wednesbury* grounds. This is not a point of substance. As stated in *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223 at 229, the decision maker must exclude from his consideration matters which are irrelevant to what he has to consider and if he does not do so, he may truly be said to be acting unreasonably in taking into consideration extraneous matters.

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[20] Affirmation of Lung Siu Yuk, §§22 and 23

53. For all the above reasons, the judge is correct in holding that the unused GFA is not a relevant consideration and that the applicant succeeds under Ground 1. I will deal with Grounds 2, 3 and 4 succinctly.

Ground 2: whether the TPB failed to take into account relevant considerations

54. Ground 2 follows from the judge's holding in Ground 1. The judge found that the TPB, in focusing wrongly on an irrelevant consideration, failed to take into account relevant considerations[21].

55. Mr Ho contended that the judge failed to read the deliberations and reasons of the TPB in the Minutes with "reality and contextual sense", in that the TPB would have taken into consideration the views and assessment of the PlanD in the 2nd RNTPC Paper, the presentations of the PlanD and those of the applicant at the Meeting. I do not agree with this contention for the reasons already given. I see no reason to differ from the judge.

Ground 3: whether the TPB failed to ask the right question in discharge of the Tameside duty of inquiry

56. The failure to discharge the *Tameside* duty of inquiry also follows from the judge's conclusion on Grounds 1 and 2. The judge held that for the reasons explained in Grounds 1 and 2, the TPB had failed to ask the proper question as to whether the Application was consistent with the planning intention, which was the principal outstanding question left for the TPB to consider in relation to the criteria set out in the

[21] Judgment, §70

Explanatory Statement, given that the PlanD had in effect been satisfied that there would be no infrastructure or environment capacities issues[22].

57. The new point taken by Mr Ho is a 'pleading' objection. He argued that it was only in Mr Yu's submissions in reply at the hearing before the judge that it was submitted the TPB had failed to discharge its *Tameside* duty in inquiring into whether the rezoning was consistent with the planning intention, and whether it met the feasibility study of infrastructure and environmental capacities[23]. Mr Ho submitted that in Form 86, the challenge under Ground 3 was premised only on the alleged failure of the TPB to inquire into the planned population of about 25,000 for Discovery Bay including whether this was an absolute control figure[24]. Order 53 rule 6(1) of the Rules of the High Court is in mandatory terms: "no grounds shall be relied upon or any relief sought at the hearing except the grounds and relief set out in the [Form 86] statement". The reply submissions of Mr Yu amounted effectively to a new or different ground of challenge and formed no part of Form 86. Hence, the judge should have rejected Ground 3 on this basis.

58. This seems to be a technical argument of little merit. As rightly submitted by Mr Yu, in light of the judge's findings and conclusions on Grounds 1 and 2 – that the relevant criteria are as set out in §7.2 of the Explanatory Statement (ie the "prescribed control factors" mentioned earlier) which included whether the rezoning is consistent with the general planning intention of Discovery Bay and the absence of consideration given to this criterion – it must follow that the TPB could not have asked

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22 Judgment, §109 and footnote 44
23 Judgment, §108
24 Form 86, §§64 to 75, in particular §73; Judgment, §§101, 102

itself the right question, and that would be a breach of the *Tameside* duty of inquiry. I agree with Mr Yu the complaint that the TPB had failed to have regard to the criteria in the Explanatory Statement has been expressly pleaded in Form 86 at §§56 to 62, 64 to 67, 70 to 71, 73 to 74.

Ground 4: whether the TPB misapplied the concept of undesirable precedent

59. This relates to the Undesirable Precedent Reason for rejecting the Application. The "other similar rezoning applications" which the TPB had in mind would appear to refer to five other sites in Discovery Bay which have also been zoned as "OU (Staff Quarters)". The judge held there is 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 rezoning applications", as the TPB had failed to appreciate the difference between the site under the Application and the other sites and was not comparing like with like[25]. Further, in the context of the DB OZP and §7.2 of the Explanatory Statement, there are control factors built in to assess each rezoning application so precedent does not have an important role to play in an application for "further increase"[26].

60. Mr Ho took issue with the holding there is no proper basis for the TPB to form the view that the approval of the Application for Area 6f would form an undesirable precedent for other similar applications. The judge should have held that the TPB was entitled to take into account the consequences or side effects of approving the Application might have on other sites within the locality and that whether other sites are comparable is a matter of judgment for the TPB. He pointed out that in the

[25] Judgment, §§83 to 88
[26] Judgment, §§89 to 91

2nd RNTPC Paper as well as the presentation of the PlanD at the Meeting, it was stated that the six "OU (Staff Quarters)" sites are "with similar nature and site conditions"[27]. Further, the applicant's representative had said at the Meeting that a fresh application might be submitted for Area 10b if the technical issues could be resolved[28].

61. I do not accept the above submissions. The judge made no error of law. It is common ground that for a precedent to be relevant, there must be similarity in the previous and subsequent applications[29]. The assertion of the PlanD that the six "OU (Staff Quarters)" sites are similar in nature and site conditions was disputed in the presentations of the applicant at the Meeting[30] which were not challenged or queried by the TPB. There is no valid basis to attack the judge's conclusion that the TPB had no proper factual basis to say that the site of the Application has similar characteristics to other sites in Discovery Bay that might be the subject of rezoning applications.

62. Mr Yu pointed out that in the deliberations of the TPB as recorded in §25(c) of the Minutes, in rejecting the Application for the Undesirable Precedent Reason, reference was made to "similar applications for rezoning of "OU (Staff Quarters)" or other zones on Discovery Bay OZP". There is no evidence as to what those "other zones on Discovery Bay OZP" might be, let alone any mention of the conditions of those other zones.

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27 2nd RNTPC Paper, §11.4; Minutes, §6(e)(iii)

28 Minutes, §20(b); as stated in footnote 10, the Minutes in English has a rather different emphasis compared to the original words in Chinese in the Transcript of the Meeting.

29 Judgment at §83, citing *Smart Gain Investment Ltd v Town Planning Board*, HCAL 12/2006, 6 November 2007 at §§109 to 112; *Jonnex International Ltd v Town Planning Board* [2018] 1 HKLRD 577 at §§63 to 67

30 Power point presentation and Minutes at §11

Conclusion and costs

63. For the above reasons, I would dismiss the appeal of the TPB. There is no dispute that costs should follow the event. Accordingly, I would order the TPB to pay the costs of the applicant of this appeal, with a certificate for two counsel.

Hon Barma JA:

64. I agree with the judgment of Hon Kwan VP.

Hon G Lam JA:

65. I agree with the judgment of Hon Kwan VP.

(Susan Kwan)	(Aarif Barma)	(Godfrey Lam)
Vice President	Justice of Appeal	Justice of Appeal

Mr Benjamin Yu SC and Ms Eva Sit SC, instructed by Mayer Brown, for the Applicant (Respondent)

Mr Ambrose Ho SC and Ms Catrina Lam, instructed by Department of Justice, for the Respondent (Appellant)