

**FURTHER CONSIDERATION OF APPLICATION NO. A/TM-LTYYY/273-1**  
**UNDER SECTION 16A OF THE TOWN PLANNING ORDINANCE**

**Proposed Extension of Time for Commencement of**  
**the Proposed Residential Development (Flat) for a Period of 4 Years**  
**until 17.10.2022 (i.e. Additional 4 Years from the Original Approval)**

**1. Background**

1.1 On 22.2.2018, the applicant sought planning permission for the extension of time (EOT) for commencement of the approved development under application No. A/TM-LTYYY/273 for an additional period of 4 years until 17.10.2022. Due to departmental objection, the case was submitted to the Committee for consideration at its meeting held on 20.4.2018. After issue of the RNTPC Paper No. A/TM-LTYYY/273-1 (**Annex A**), the applicant's consultant and legal representative had submitted 3 letters dated 17.4.2018 and 19.4.2018 raising further justifications and legal issues related to the subject application for EOT (**Annexes D to F**). After deliberation, the Committee decided on 20.4.2018 to defer a decision on the application to allow time for the Secretariat to seek legal advice on the legal issues raised in the letters prior to the consideration of the subject application.

1.2 For Members' reference, the following documents are attached:

(a)	RNTPC Paper No. A/TM-LTYYY/273-1	( <b>Annex A</b> )
(b)	Extract of minutes of the Committee's meeting held on 20.4.2018	( <b>Annex B</b> )
(c)	Secretary of the Board's letters dated 4.5.2018 informing the applicant of the deferment of the RNTPC's decision	( <b>Annex C</b> )
(d)	Applicant's 3 letters dated 17.4.2018 and 19.4.2018	( <b>Annexes D to F</b> )

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

2.1 Justifications and legal issues raised in the applicant's 3 letters dated 17.4.2018 and 19.4.2018 are summarised as follows :

**No material change in planning circumstances**

2.2 There has been no material change in planning circumstances since the original permission was granted to the applicant. There is no change in the planning policy, as the general planning intention as stipulated in the Explanatory Statement (ES) of the subject Lam Tei and Yick Yuen Outline Zoning Plan (OZP) remains unchanged, i.e. to develop the area for suburban development between the two existing urban centres of Tuen Mun New Town and Yuen Long

Town. There is also no change in the land-use zoning, as the application site (the Site) remains as a “Residential (Group E)” (“R(E)”) zone with a maximum plot ratio of 1.0, a maximum site coverage of 40% and a maximum building height of 4 storeys over single-storey car park (15m).

- 2.3 The Site falls within a “R(E)” zone under the OZP. The original planning application was made under s.16 of the Town Planning Ordinance (TPO) and the current application for EOT is made under s.16A of the same Ordinance to effect an amendment to the planning approval. The EOT application must therefore be considered within the parameters of the OZP and the planning intention of the “R(E)” zone.
- 2.4 In so far as the “R(E)” zone is concerned, the OZP has not been amended since the planning permission was granted. The possible public housing development is not part of the planning intention of the OZP and is still undergoing environmental impact assessment study. It is wrong in law to take into consideration the study being carried out by the Housing Department (HD) on the possibility or feasibility of including the Site for public housing development. The suggestion that there is a “change in planning circumstances” is also wrong in law. In particular, in relation to paragraph 4(a) of the concerned TPB Guidelines dealing with “change in planning policy”, the Administration and the Town Planning Board (the Board) shall take into account the planning intention as shown on the OZP and the ES which assists in the interpretation of the planning intention when assessing application for EOT for commencement of development, but no regard should be made to the Administration’s intention or study to include the Site for public housing development which is not part of the OZP.

#### Interpretation of Planning Intention

- 2.5 The planning intention for the “R(E)” zone is to be ascertained from the OZP including the Notes and, as the Privy Council held in *Henderson Real Estate Agency Ltd. v Lo Chai Wai* [1997], the ES, though not part of the OZP, should also be taken into account in ascertaining the planning intention.

#### No adverse planning implications

- 2.6 There would not be any adverse planning implications arising from the EOT. When the Board granted the original permission to the applicant on 17.10.2014, thorough discussion has already been given to assess if the approval of the private residential development would have any adverse implications to a potential proposed public housing development under planning in the area. After detailed consideration, the Board decided to approve the private residential development, which represented that the Board agreed to the development scheme which was in full compliance with all the statutory development restrictions and requirements. With no change to the development scheme under the subject application for EOT, the conclusion of the development scheme being statutorily complied with all development restrictions and requirements and having no adverse planning implications remain unchanged.

### On-going processing of land exchange

- 2.7 The commencement of the approved development is deferred due to the on-going processing of land exchange application and fine tuning of the site boundary. The applicant proceeded to apply to the Lands Department (LandsD) for a land exchange as early as 13.1.2015, which was 3 months right after the Board granted the planning permission. The land exchange case is currently under processing. During the land exchange application, the applicant has undertaken normal and important land administrative procedures to discuss the basic terms of lease conditions and refine the regrant site boundary to ensure the Site is available for surrender free from encumbrances.

### All reasonable actions have been taken for the implementation

- 2.8 The applicant has demonstrated that all reasonable actions have been taken for the implementation of the approved development, e.g. submission of building plans for approval by the Buildings Department (BD), submission of application for land exchange by LandsD, submissions for the discharge of approval conditions by the Planning Department (PlanD) and relevant departments.

### Good prospect to commence the approved development

- 2.9 The applicant has demonstrated that there is a good prospect to commence the approved development within the extended time limit, as most of the approval conditions have already been partially/fully complied with, the latest GBP has already been re-submitted to resolve the outstanding technical comments, and active negotiation with LandsD has been in progress regarding the basic terms and land premium offers. Besides, since July 2017, the existing open storage yards and workshop uses within the Site have ceased operation. The Site has been cleared and ready for commencement of development.

### Extension period applied for is reasonable

- 2.10 The extension period applied for is reasonable. The original duration for commencement of the approved development is 4 years. The applicant only applies for an EOT for commencement of the approved development for another 4 years (i.e. a period of 48 more months). It does not result in an aggregate extension period longer than the original duration for commencement of the approved development. An application for such an extension is only a Class B amendment as accepted by the Board.

### Ultra Vires

- 2.11 The Court of Appeal (CA) held in *International Trader Limited v Town Planning Appeal Board and Town Planning Board* [2009] held that when determining an application for planning permission under s.16 of the TPO and hence any amendment of permission under s.16A, the Board does not have the power to have regard to any and all planning considerations which it believes would assist it to reach the decision in the public interest. The Board's discretion must be exercised within the parameters of the OZP. If the Board takes into considerations which fall outside the ambit of the OZP, it acts *ultra vires*. As the CA held in *International Trader case*, the Committee, as a

committee of the Board, when determining the subject application for EOT, does not have the power to have regard to any and all planning circumstances which it believes to reach the decision in the public interest. It cannot take into account the possible public housing development which is outside the parameters of the OZP. Hence, it must ignore the objection of the HD. If the Committee was to take into account the objection of the HD, it acts *ultra vires*.

### 3. Town Planning Board Guidelines

- 3.1 The Town Planning Board Guidelines for Class A and Class B Amendments to Approved Development Proposals (TPB PG-No. 36A<sup>1</sup>) is applicable to this application. The applied EOT for commencement of the development is a Class B amendment under Category 19. According to the Guidelines, the Board has delegated its authority to the Director of Planning to consider applications for Class B amendments. However, application for Class B amendments which is unacceptable by the concerned Government departments will need to be submitted to the Board for consideration. In this regard, the Director of Housing (D of H) does not support the application as stated in paragraph 7.1.2 of **Annex A**. As such, the application is submitted to the Committee for consideration.
- 3.2 TPB PG-No. 35C is also applicable to this application. Any EOT for commencement of development shall not result in an aggregated extension period longer than the original duration for commencement of the approved development proposal. The criteria for assessing applications for EOT for commencement of development are as follow:
- (a) whether there has been any material change in planning circumstances since the original permission was granted (such as a change in planning policy/land-use zoning for the area);
  - (b) whether there are any adverse planning implications arising from the extension of time;
  - (c) whether the commencement of development is delayed due to some technical/practical problems which are beyond the control of the applicant, e.g. delays in land administration procedures, technical issues in respect of vehicular access and drainage works or difficulties in land assembly;
  - (d) whether the applicant has demonstrated that reasonable action(s), e.g. submission of building plans for approval or application for Small House/land exchange, have been taken for the implementation of the approved development;
  - (e) whether the applicant has demonstrated that reasonable action(s), e.g.

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<sup>1</sup> TPB PG-No. 36A has been revised and superseded by TPB PG-No. 36B on 2.3.2018. As the subject EOT application was submitted before 2.3.2018, TPB PG-No. 36A is applicable. Nevertheless, the revision to TPB PG-No. 36A has no direct bearing on the assessment of the EOT application.

submission and implementation of proposals, have been taken to the satisfaction of relevant Government departments in complying with any approval conditions;

- (f) whether the applicant has demonstrated that there is a good prospect to commence the proposed development within the extended time limit;
- (g) whether the extension period applied for is reasonable; and
- (h) any other relevant considerations.

#### **4. Comments from Relevant Government Departments**

4.1 Comments on the s.16A application made by relevant Government departments are stated in paragraphs 7.1 and 7.2 of **Annex A**.

4.2 Relevant Government departments have been consulted on the further information (FI) received from the applicant. The comments are summarized as follows:

4.2.1 Comments of the District Lands Officer/Tuen Mun, LandsD (DLO/TM, LandsD):

He has no comment on the FI. A land exchange application for the Site is currently under processing and consideration.

4.2.2 Comments of the Chief Building Surveyor/New Territories West, BD (CBS/NTW, BD):

He has no further comment. He received the latest General Building Plan submission for the Site on 18.4.2018 and is still under processing.

4.2.3 Comments of the Chief Engineer/Mainland North, Drainage Services Department (CE/MN, DSD):

(a) He has no objection in principle from public drainage point of view on the proposed EOT.

(b) In view of the prolonged period of extension, the applicant should provide updates to the drainage proposal in relation of approval condition (c) to ensure that the drainage proposal remains valid as per the latest situation of the proposed development.

(c) Adequate drainage facilities should be provided to prevent the risk of flooding. Prior to completion of the proposed/

permanent drainage works, adequate temporary drainage measures should be provided and maintained at all times.

4.3 The following Government departments have no further comment on the application and maintain their previous objection/views on the application as stated in paragraph 7.1 in **Annex A**:

- (a) Director of Housing (D of H);
- (b) Head of Civil Engineering Office, CEDD; and
- (c) Assistant Commissioner for Transport/New Territories, Transport Department (AC for T/NT, TD).

4.4 The following Government departments have no further comment on the application and maintain the previous view of having no comment on the application as stated in paragraph 7.2 of **Annex A**.

- (a) Director of Agriculture, Fisheries and Conservation (DAFC);
- (b) Director of Environmental Protection (DEP);
- (c) Director of Electrical and Mechanical Services (DEMS);
- (d) Director of Fire Services (D of FS);
- (e) Director of Food and Environmental Hygiene (DFEH);
- (f) Chief Highway Engineer/New Territories West, Highways Department (CHE/NTW, HyD);
- (g) Director of Leisure and Cultural Services (DLCS);
- (h) Antiquities and Monuments Office, Leisure and Cultural Services Department (AMO, LCSD);
- (i) Commissioner of Police (C of P);
- (j) District Officer(Tuen Mun), Home Affairs Department (DO(TM), HAD);
- (k) Chief Town Planner/Urban Design and Landscape (CTP/UD&L), PlanD; and
- (l) Project Manager (West) (PM(W)), CEDD.

## **5. Planning Considerations and Assessments**

5.1 The applicant's legal representative, JSM, claimed that as held by the CA in *International Trader* case, the Committee, when determining the current s.16A application, does not have the power to have regard to any and all planning considerations which it believes would assist it to reach the decision in the public interest. As such the Committee cannot take into account the proposed public housing development which is outside the parameters of the OZP. In this regard, the legal advice is that the above case is relevant to the current EOT application in the sense that it provides guidance as to what kind of documents that the Committee may rely on when ascertaining the true planning intention contained in an OZP. In this regard, CA decided that: (i) an OZP and the Notes attached thereto are obviously material documents that the Board is bound to have regard to; (ii) the ES, although not forming part of an OZP, is prepared by the Board in order to assist in an understanding of the same; and (iii) although the Board is not bound to follow an ES or any TPB Guidelines, such documents cannot be disregarded.

- 5.2 In the present case, the Committee should consider the planning intention under the draft OZP as well as the relevant TPB Guidelines, i.e. the TPB PG-No. 35C.
- 5.3 The planning intention for the “R(E)” zone is primarily for phasing out of existing industrial uses through redevelopment for residential use on application to the Board. New development within this zone is restricted to a maximum plot ratio of 1.0, a maximum site coverage of 40% and a maximum building height of 4 storeys over single-storey car park (15m). The approved development under A/TM-LTY/273 is in line with the planning intention and complies with the OZP restrictions.
- 5.4 TPB PG-No. 35C, which is specifically applicable to EOT applications, has set out the assessment criteria as summarized in paragraph 3.2 above. The main considerations include any material change in planning circumstances, any adverse planning implications arising from EOT, the reason for delay in commencement of development, any reasonable action to comply with approval conditions, any good prospect to commence the development within extended time limit and reasonableness of the extension period applied.
- 5.5 Regarding the applicant’s justifications in the FIs about no change in land use zoning, no change in planning intention of “R(E)” zone, no adverse planning implications, reasonable actions taken to implement the approved development and good prospect to commence the development in the extended time and extension for 4 years being reasonable (see paragraph 2 above), the information is factually correct or there is no dispute about these aspects. In fact, the actions taken by the applicant to take forward the approved development have been clearly set out in paragraph 4 of **Annex A**. CBS/NTW, BD has also updated the latest position of building plan submissions in paragraph 4.2.2 above. Information on compliance with approval conditions is already given in paragraph 4.6 of **Annex A**, which is given below:

Approval Conditions	Status of Compliance
(a) the implementation of the mitigation measures identified in the Environmental Assessment and Sewerage Impact Assessment to the satisfaction of the Director of Environmental Protection or of the TPB;	To be complied with at implementation stage
(b) the provision of vehicular access, parking and loading and unloading facilities to the satisfaction of the Commissioner for Transport or of the TPB;	To be complied with at implementation stage
(c) the submission and implementation of detailed drainage proposal to the satisfaction of the Director of Drainage Services or of the TPB;	<b>Partially complied with</b> on 17.8.2015

<b>Approval Conditions</b>	<b>Status of Compliance</b>
(d) the provision of water supplies for firefighting and fire service installations to the satisfaction of the Director of Fire Services or of the TPB;	To be complied with at implementation stage
(e) the submission of detailed archaeological impact assessment and implementation of the mitigation measures identified therein to the satisfaction of the Director of Leisure and Cultural Services or of the TPB;	<b>Fully complied with<sup>2</sup></b> on 15.9.2017
(f) the submission and implementation of tree preservation and landscape proposal to the satisfaction of the Director of Planning or of the TPB; and	<b>Partially complied with</b> on 28.12.2016
(g) the design of the boundary treatment and provision of measures to mitigate the visual impact along the boundary of the proposed development, including its boundary fence, to the satisfaction of the Director of Planning or of the TPB.	<b>Partially complied with</b> on 28.12.2016

5.6 For background information (also see paragraph 4 in **Annex A**), the original planning application No. A/TM-LTY Y/273 was objected to by HD and not supported by PlanD mainly because of its encroachment onto a public housing site. The Committee approved the application upon further consideration on 17.10.2014 noting that, amongst others, the proposed public housing development at San Hing Road was still at the conceptual stage, the Tuen Mun District Council (TMDC) had concern on the public housing development (see paragraph 5.8 below), the proposed development under application complied with the OZP restrictions, and the “Industrial/Residential” interface and other technical issues were adequately addressed.

5.7 After granting the planning approvals for two applications for private residential developments on 17.10.2014 (A/TM-LTY Y/273) and on 13.3.2015 (A/TM-LTY Y/282)<sup>3</sup> respectively (**Plan FAA-1**), the Government had explored whether the proposed public housing developments in the area could be adjusted to take into account the approved private housing developments. However, in view of the acute demand for public housing, the Government has stepped up its effort

<sup>2</sup> According to the findings of the detailed archaeological impact assessment, it is concluded that the Site has no archaeological potential, thus no mitigation measure for the proposed development is required. AMO, LCSD on 13.9.2017 agreed that approval condition (e) is considered fully complied with.

<sup>3</sup> Application No. A/TM-LTY Y/282 was subsequently amended (mainly to increase the building height) by another application No. A/TM-LTY Y/337 approved on 23.6.2017. The reference to A/TM-LTY Y/337 in paragraph 4.9 of **Annex A** is a typo and it should be referring to the original planning approval granted under A/TM-LTY Y/282.



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

- 5.8 In respect of the TMDC's concern, the proposed public housing development was discussed at the TMDC meeting held on 1.11.2016 in the context of public housing developments in Tuen Mun district (**Annex G**). At the meeting, members expressed views that the TMDC indeed supported the proposed public housing development at San Hing Road. However, TMDC did not support HD's proposal in 2014 on grounds that there were no detailed planning, supporting transport facilities had not been properly provided, and there was a lack of sufficient local consultation and therefore requested the Government to do more work. Some members also considered that TMDC's intention was distorted by media and requested HD to clarify TMDC's position.
- 5.9 Having considered the above, whilst the land use zoning for the Site remains unchanged as "R(E)" since 2014, there is a material change in circumstances when compared to the time of consideration of Application No. A/TM-LTYT/273 in that the Government has committed to plan for a larger scale public housing project on the San Hing Road/Hong Po Road site including the Site and the related feasibility study including an EIA had commenced. Approval of the EOT is not recommended as this will run against the clear Government policy on the planned land use for the area.

## **6. Planning Department's Views**

- 6.1 Based on the assessment made in paragraph 5 above, the Planning Department maintains its view that the application **is not supported** as it is not in line with TPB PG-No. 35C in that there has been a material change in planning circumstances in that the government has committed to plan the Site for public housing development.
- 6.2 Alternatively, should the Committee decide to approve the EOT application, it is suggested that the permission shall be valid until **17.10.2022**, and after the said date, the permission shall cease to have effect unless before the said date, the development permitted is commenced. The following conditions of approval and advisory clauses are suggested for Members' reference:

### *Approval conditions*

- (a) the implementation of the mitigation measures identified in the Environmental Assessment and Sewerage Impact Assessment to the satisfaction of the Director of Environmental Protection or of the Town Planning Board;

- (b) the provision of vehicular access, parking and loading and unloading facilities to the satisfaction of the Commissioner for Transport or of the Town Planning Board;
- (c) the submission and implementation of detailed drainage proposal to the satisfaction of the Director of Drainage Services or of the Town Planning Board;
- (d) the provision of water supplies for firefighting and fire service installations to the satisfaction of the Director of Fire Services or of the Town Planning Board;
- ~~(e) the submission of detailed archaeological impact assessment and implementation of the mitigation measures identified therein to the satisfaction of the Director of Leisure and Cultural Services or of the Town Planning Board;~~
- ~~(f)~~(e) the ~~submission and~~ implementation of tree preservation and landscape proposal to the satisfaction of the Director of Planning or of the Town Planning Board; and
- ~~(g)~~(f) the design of the boundary treatment and provision of measures to mitigate the visual impact along the boundary of the proposed development, including its boundary fencing, to the satisfaction of the Director of Planning or of the Town Planning Board.

*[Except the original approval condition (e) which has been fully complied with and the original approval condition (f) which has been partially complied with, the other approval conditions are the same as those of Application No. A/TM-LTYT/273.]*

Advisory Clauses

The recommended advisory clauses are at **Appendix VI of Annex A**.

*[The advisory clauses at Appendix VI of Annex A are the same as those of Application No. A/TM-LTYT/273.]*

**7. Decision Sought**

- 7.1 The Committee is invited to consider the application and decide whether to grant or refuse to grant permission.
- 7.2 Should the Committee decide to approve the application, Members are invited

to consider the approval condition(s) and advisory clause(s), if any, to be attached to the permission, and the date when the validity of the permission should expire.

- 7.3 Alternatively, should the Committee decide to reject the application, Members are invited to advise what reason(s) for rejection should be given to the applicant.

## **8. Attachments**

<b>Annex A</b>	RNTPC Paper No. A/TM-LTYT/273-1
<b>Annex B</b>	Extract of minutes of the Committee's meeting held on 20.4.2018
<b>Annex C</b>	Secretary of the Board's letters dated 4.5.2018 informing the applicants of the deferment of the RNTPC's decision
<b>Annexes D to F</b>	Applicant's 3 letters dated 17.4.2018 and 19.4.2018
<b>Annex G</b>	Extract of minutes of Tuen Mun District Council meeting held on 1.11.2016
<b>Plan FAA-1</b>	Location Plan

**PLANNING DEPARTMENT  
JUNE 2018**