

FURTHER CONSIDERATION OF APPLICATION NO. A/TM-LTYT/381
UNDER SECTION 16 OF THE TOWN PLANNING ORDINANCE

Proposed Residential Development (Flat)

1. Background

- 1.1 On 1.8.2019, the applicant sought planning permission for the proposed residential development (flat) at the application site (the Site) which falls within the “Residential (Group E)” (“R(E)”) zone on the approved Lam Tei and Yick Yuen Outline Zoning Plan (OZP)¹. The application was first submitted to the Rural and New Town Planning Committee (the Committee) of the Town Planning Board (the Board) for consideration at its meeting scheduled for 29.11.2019. After issuance of the RNTPC Paper No. A/TM-LTYT/381A (**Annex A**), the applicant’s consultant submitted further information (FI) via a letter dated 27.11.2019 (**Annex B**) providing further justifications to support the application and responses to the views and assessments made by the Planning Department (PlanD) in the RNTPC Paper. As legal points were raised in the FI, after deliberation, the Committee decided on 29.11.2019 to defer a decision on the application pending legal advice was sought.
- 1.2 The proposed residential development is for 13 residential blocks comprising 96 numbers of duplex flats. It has a plot ratio of 1.0, a site coverage of 40% and a building height of 15m (4 residential storeys over 1 storey basement car park). An on-site sewage treatment plant was proposed. The proposed development will be developed in two phases. The location plan, section plans, phasing plan, ground floor plan, basement plan and block plan submitted by the applicant are on **Drawings A-1 to A-7** of **Annex A** respectively.
- 1.3 The major development parameters of the proposed development are as follows:

Site Area	about 14,553m ²
Private Land	about 13,778m ²
Government Land (GL)	about 775m ²
Maximum Gross Floor Area	not more than 14,553 m ²
Maximum Plot Ratio	not more than 1.0
Maximum Site Coverage	not more than 40%
No. of Blocks	13
Building Height	
In metres	15m
No. of Storeys	4-storey over single-storey basement car park
No. of Flats	96

¹ According to the Notes of the OZP, any new development within “R(E)” 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).

Average Flat Size	152m ²
Car Parking Spaces For Residents	157
For Visitors	7
Motorcycle Parking Spaces	2
Loading/Unloading Spaces	13
Communal Open Space	not less than 259m ²
Sewage Treatment Plant (Height)	10m (including 5m underground) and 2 storeys (including 1 basement storey)
Design Population (Persons)	about 259
Phasing	2 Phases
Envisaged Completion Year	2025

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

- (a) RNTPC Paper No. A/TM-LTYYY/381A (Annex A)
- (b) Applicant's letter dated 27.11.2019 (Annex B)
- (c) Extract of minutes of the Committee's meeting held on 29.11.2019 (Annex C)
- (d) Secretary of the Board's letters dated 13.12.2019 informing the applicant of the deferment of the Committee's decision (Annex D)

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

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

have regard to any and all planning considerations which it believes would assist it to reach the decision in the public interest. The Board's discretion must be exercised within the parameters of the OZP.

- 2.5 The recommended rejection reason² in paragraph 12.1 of **Annex A** has no relevance to the approved OZP, the "R(E)" zoning of the Site (**Plan FA-1**) and the planning intention of the "R(E)"³ zone which the application is made.
- 2.6 The study in relation to the proposed public housing development at San Hing Road does not form part of the planning intention of the OZP. Therefore, if the Committee was to take into account the study or the objection of the Housing Department (HD) (paragraph 9.1.3 of **Annex A**), it acts *ultra vires*.

3. Previous Applications

- 3.1 When the application was submitted to the Committee on 29.11.2019, there were six previous applications at the Site (paragraph 5 of **Annex A**). Since then, there is one additional application for amendment of plan under s.12A of the TPO considered by the Committee (No. Y/TM-LTY/8).
- 3.2 Application No. Y/TM-LTY/8 (PR: 6.0, 1998 flats) to rezone the Site with additional lots in the vicinity from "R(E)" on the OZP and "R(E)1" and an area shown as 'Road' on the approved Tuen Mun OZP No. S/TM/35 to "Residential (Group A)" for a private residential development was submitted by the same applicant and rejected by the Committee on 24.4.2020 on the grounds that the long-term development of the general area covering the application site (**Plan FA-1a**) is being reviewed under an on-going feasibility study undertaken by CEDD for a proposed comprehensive public housing development with relevant supporting infrastructures and Government, Institution and Community facilities. Suitable zonings of the area covering the application site are yet to be determined and the approval of the rezoning application would adversely affect the comprehensive planning of the area and jeopardise the implementation of the proposed public housing development; and the applicant fails to demonstrate that the proposed rezoning would not generate adverse water supplies, archaeological and traffic impacts on the surrounding areas.

4. Comments from Relevant Government Bureau/Departments

- 4.1 Comments on the application made by relevant government bureau/departments are stated in paragraph 9 of **Annex A**.

² The rejection reason reads "*the application site encroaches onto part of a planned public housing development. Approval of the application may lead to substantial loss of public housing flats, jeopardise the implementation of the public housing project and undermine the comprehensiveness of the public housing project.*"

³ The planning intention of the "R(E)" zone is primarily for phasing out of existing industrial uses through redevelopment for residential use on application to the Board. Whilst existing industrial uses will be tolerated, new industrial developments are not permitted in order to avoid perpetuation of industrial/residential interface problem.

- 4.2 Relevant government bureau/departments have been consulted on the further information received on 27.11.2019 from the applicant at **Annex B**. The comments are summarised as follows.

Policy Perspective

4.2.1 Comments of the Secretary for Development (SDEV):

In response to the pressing demand for public housing, the Government has been identifying different lands in various districts that carry potential for public housing development. The area at San Hing Road and Hong Po Road, covering the Site in question, has been identified as one of such potential public housing sites. To this end, in February 2018 the Civil Engineering and Development Department (CEDD) has commissioned a consultancy study titled “Agreement No. CE 68/2018 (CE) – Site Formation and Infrastructural Works for the Development at San Hing Road and Hong Po Road, Tuen Mun – Feasibility Study” (the Study) (**Plan FA-1**) to explore the technical feasibility of providing public housing development and infrastructural capacities at the San Hing Road and Hong Po Road. At present, the Study is at its advanced stage and is scheduled for completion in 2020. Subject to the findings of the Study to confirm the feasibility of the public housing development, the Government will take further steps to proceed with public housing development through rezoning and any necessary land resumption under the Land Resumption Ordinance (LRO) in accordance with the established practice. Since the Site is located at the central portion of the Study area and encroaches onto sites designated for public housing and school developments under the Study (**Plan FA-1b**), government-led planning in respect of San Hing Road and Hong Po Road would have implications on the future development of the Site.

Land Administration

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

- (a) The proposed residential development contravenes the existing lease conditions and no permission has been given for the utilization of the adjoining GL. Should any unauthorized structures be found erected on the lots and unauthorized occupation of GL be detected, Government reserves the right to take enforcement actions as may be considered appropriate.
- (b) The proposed development may affect existing footpaths/tracks on GL which may be serving adjoining private lots in the neighborhood. Should the proposal involve closure and/or diversion of existing footpaths/tracks, statutory procedures involving gazettal of the proposal may be required.

- (c) It was noted from the previous application that there were local concerns on the possible impact on the existing graves in the vicinity of the site which may require the applicant's attention.
- (d) Irrespective of whether the planning permission will be given, any land exchange application will be considered by LandsD acting in the capacity as the landlord at its sole discretion, and there is no guarantee that such land exchange application will be approved and he reserves his comment on that.
- (e) The applicant had submitted a land exchange application for a similar proposed residential development based on an approved planning permission which was later lapsed. The said application had been put on hold pending the result of the feasibility study of the proposed public housing development at San Hing Road and Hong Po Road. Notwithstanding whether this planning permission will be given or not, his office will not process any new land exchange application or amendment to the land exchange already submitted.

Long-term Development

4.2.3 Comments of the Chief Engineer/Housing Project 2, CEDD (CE/HP2, CEDD):

- (a) His office is currently conducting the Study for the Government. The consultancy study commenced in February 2018 and is scheduled for completion in 2020. The subject land lots under application (for private residential development) will encroach onto the public housing development site area at San Hing Road. It would affect the comprehensive public housing development and infrastructure works in San Hing Road and Hong Po Road if these land lots are earmarked for private residential development. He has strong reservation on the application.
- (b) If the Board decides to grant the planning permission, it is suggested to include an advisory clause to inform the applicant that the Site might be subject to land resumption for the implementation of the San Hing Road and Hong Po Road Public Housing Development which might take place at any time within the validity period of the planning permission.

4.2.4 Comments of the Director of Housing (D of Housing):

CEDD is now conducting the Study. In this connection, the proposed application is not supported.

- 4.3 The following government departments have no comments on the further information at **Annex B** and maintained their previous comments on the application as stated in paragraph 9.1 of **Annex A**:

- (a) Commissioner for Transport (C for T);
- (b) Chief Highway Engineer/New Territories North, Highways Department (CHE/NTW, HyD);
- (c) Director of Environmental Protection (DEP);
- (d) Chief Engineer/Mainland North, Drainage Services Department (CE/MN, DSD);
- (e) Director of Fire Services (D of FS);
- (f) Chief Town Planner/Urban Design and Landscape, Planning Department (CTP/UD&L, PlanD);
- (g) Chief Architect/Central Management Division 2, Architectural Services Department (CA/CMD2, ArchSD); Executive Secretary (Antiquities and Monuments) (ES(A&M));
- (h) Chief Building Surveyor/New Territories West, Buildings Department (CBS/NTW, BD);
- (i) Director of Food and Environmental Hygiene (DFEH);
- (j) Director of Electrical and Mechanical Services (DEMS); and
- (k) District Officer (Tuen Mun), Home Affairs Department (DO(TM), HAD).

4.4 The following government departments have no further comment on the application and maintained their previous views of having no comment on the application as stated in paragraph 9.2 of **Annex A**:

- (a) Director of Agriculture, Fisheries and Conservation (DAFC);
- (b) Director of Leisure and Cultural Services (DLCS);
- (c) Project Manager (West), Civil Engineering and Development Department (PM(W), CEDD);
- (d) Chief Engineer/Construction, WSD (CE/C, WSD); and
- (e) Commissioner of Police (C of P).

5. Planning Considerations and Assessments

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

5.2 Legal advice was obtained on the FI. In light of the legal advice, the Board should consider the current s.16 application as a new section 16 application under the approved OZP. The Board’s consideration and decision on the current s.16 application should not be based upon the previous application No. A/TM-

LTY/273-1 for an extension of time of the previous planning approval⁴. Furthermore, the CA judgement in the *International Trader* case is directly relevant in considering this application and the Board would be regarded as acting *ultra vires* if it had taken into account material considerations which fell outside the ambit of the approved OZP, i.e. the proposed public housing development under the Study in this application.

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

Planning Intention

- 5.4 The current application is for proposed residential development (flat) comprising 13 residential blocks of 96 numbers of flats. It has a plot ratio of 1.0, a site coverage of 40% and a building height of 15m (4 residential storeys over 1 storey basement car park). The Site falls within an area zoned “R(E)” which is intended primarily for phasing out of existing industrial uses through redevelopment for residential use on application to the Board. Whilst existing industrial uses will be tolerated, new industrial developments are not permitted in order to avoid perpetuation of industrial/residential (I/R) interface problem. The proposed development is generally in line with the planning intention of “R(E)” zone and complies with the OZP restrictions.

Land Use Compatibility

- 5.5 The proposed development with a building height of 15m (4 residential storeys over 1 storey basement car park) and a PR of 1.0 is considered compatible with the surroundings low rise residential developments in terms of land use and development intensity, including Villa Pinada to its north-west, Tsz Tin Tsuen to its south and San Hing Tsuen to its north-east (**Plan FA-1**).

Technical Feasibility

- 5.6 The proposed development is also surrounded by brownfield operations including rural workshops, storage yards and open storage of construction materials (**Plan A-2 of Annex A**). To address the I/R interface problems, environmental mitigation measures such as blank façade/maintenance window at facades of Tower T1, T2, T8 to T13 (**Drawing A-7 of Annex A**) facing the identified noise measures have been proposed for implementation. Furthermore, peripheral planting strips (**Drawing A-7 of Annex A**) are provided along the site boundary to screen off the surrounding brownfield operations. In this regard, DEP considers that the proposed development will unlikely be susceptible to insurmountable I/R interface problems and have no objection to the application

⁴ The rejection reason reads “the application is not in line with Town Planning Board Guidelines No. 35C on Extension of Time for Commencement of Development in that there has been a material change in planning circumstances, as demonstrated by the Government’s commitment to plan for a comprehensive public housing development which covers the application site and the progressive action taken to pursue that development”.

subject to the implementation of noise mitigation measures. CTP/UD&L, PlanD has no objection from urban design and visual point of view.

- 5.7 The applicant has submitted relevant technical assessments, including Traffic Impact Assessment, Environmental Assessment, Drainage Impact Assessment, Sewerage Impact Assessment and Water Supply Assessment, landscape master plan and tree preservation proposal. Relevant government departments, including DEP, CTP/UD&L, PlanD, C for T, CE/MN, DSD, CHE/NTW, HyD and CE/C, WSD have no objection to or no adverse comment on the application. It is anticipated that the proposed development would not be subject to nor generate adverse impact from/to the surrounding areas. To address the technical requirements of concerned government departments, appropriate approval conditions are recommended in paragraph 6.2 below.

Long Term Development

- 5.8 The Site is included into the study area for proposed public housing development at San Hing Road and Hong Po Road, Tuen Mun (**Plan FA-1**). The Study is at an advanced stage and scheduled for completion in 2020. Subject to the findings of the Study to ascertain its feasibility, the Government will take further steps to proceed with public housing development through rezoning and any necessary land resumption under the LRO in accordance with the established practice. DLO/TM, LandsD advises that irrespective of whether the planning permission will be given, his office will not process any new land exchange application or amendment to the land exchange application already submitted. CE/HP2, CEDD has strong reservation on the application since approval of the application would affect the comprehensive public housing development and associated infrastructure works. D of Housing also does not support the application. In this regard, the approval of the application may lead to substantial loss of public housing flats, undermine the comprehensiveness of the public housing project and jeopardise the time table for implementation of the public housing development arising from the need to re-plan the area.
- 5.9 However, as the proposed public housing development under the Study has not been reflected on the approved OZP, based on the legal advice, the Board should not take the Study into account in considering the current application, otherwise it would act *ultra vires*. Nevertheless, the approval of the application does not pre-empt the Board from amending the OZP including the land use and development restrictions of the Site in future and the Government from implementing the proposed public housing development under the Study through land resumption under the LRO in accordance with the established practice. In this regard, if planning permission is to be granted, an advisory clause as advised by CE/HP2, CEDD is suggested to inform the applicant clearly that the Site might be subject to land resumption for the implementation of the San Hing Road and Hong Po Road Public Housing Development which might take place at any time within the validity period of the planning permission.
- 5.10 Regarding the public comments received (paragraph 10 of **Annex A**), the planning considerations and assessments in paragraphs 5.4 to 5.9 above are relevant.

6. Planning Department's Views

- 6.1 Based on the assessments made in paragraph 5 above and having taken into account the public comments mentioned in paragraph 10 of **Annex A**, the Planning Department has no objection to the application.
- 6.2 Should the Committee decide to approve the application, it is suggested that the permission shall be valid until 29.5.2024, and after the said date, the permission shall cease to have effect unless before the said date, the development permitted is commenced or the permission is renewed. The following conditions of approval and advisory clauses are also suggested for Members' reference:

Approval conditions

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

Advisory clauses

The revised recommended advisory clauses are at **Annex E**.

- 6.3 Alternatively, should the Committee decide to reject the application, the following reason for rejection is suggested for Members' reference:

the applicant fails to demonstrate that the proposed development would not be susceptible to or cause environmental impact.

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

Annex A	RNTPC Paper No. A/TM-LTY Y/381
Annex B	Applicant's letter dated 27.11.2019
Annex C	Extract of minutes of the Committee's meeting held on 29.11.2019
Annex D	Secretary of the Board's letters dated 13.12.2019 informing the applicant of the deferment of the Committee's decision
Annex E	Advisory Clauses
Plan FA-1	Location Plan
Plan FA-1a	Previous and Similar Applications
Plan FA-1b	Proposed Public Housing Development at San Hing Road and Hong Po Road, Tuen Mun

**PLANNING DEPARTMENT
MAY 2020**