

3.5 Applications for planning permission, amendments to permissions, review and appeal

[1-63] When the TPO was enacted in 1939 it was only concerned with the systematic preparation and approval of plans and contained no provision for the grant of planning permission or review or appeal which were only introduced in the form of sections 16 and 17 respectively by the 1974 amendments to the TPO. These sections were inserted into the TPO following the *Singway* case¹³⁰ where the court upheld a challenge to a draft plan on the basis that the Board's then practice of including notes in draft plans was unlawful under the TPO. A consequential effect of the *Singway* case was that it cast doubt on the validity of including within such notes a requirement to obtain permission from the Board to do certain things which were otherwise in the plan. In response to this uncertainty, the TPO was amended in 1974 to insert sections 16 and 17 allowing applications for permission to be made in respect of plans, a right to have the Board's decision refusing planning permission reviewed and a right of appeal to the then Governor-in-Council from the Board's decision on review.¹³¹

[1-64] When section 16 was first enacted there were no requirements to publish or consult with the public on planning applications and no right was given to an applicant for permission to be heard because it was thought unnecessary for him to attend to argue his case. It was only on a review under section 17, following a refusal of his application, that he was entitled to appear.¹³² The publicity and consultation provisions relating to planning applications now found in section 16 were introduced in 2004 but it remains the case that an applicant for permission has no right to appear and be heard by the Board when it meets to determine the planning application.

[1-65] As explained earlier, draft or approved plans may prohibit development which is otherwise in the plan, typically Column 2 uses, unless permission is first obtained from the Board pursuant to an application made under section 16 of the TPO. Thus, where a plan requires permission to be obtained, section 16(3)–(5) of the TPO regulates the procedure for making planning applications to the Board and the Board's powers in determining them.

[1-66] One of the functions performed by the Planning Department is to process planning applications submitted to the Board and, to assist in that process, it has published practice notes¹³³ providing guidance to potential applicants both before and after they make a planning application. The Board also publishes detailed guidance to applicants.¹³⁴ However, anything the Planning Department's officers

130 *Singway Co Ltd v The Attorney General* [1974] HKLR 275.

131 See the Explanatory Memorandum to the Bill introducing the amendments and the Attorney-General's Statement to the Legislative Council – Hong Kong Hansard dated 31 July 1974 at pp 1080–1081.

132 *ibid.*

133 See the Planning Department's, 'Practice Note for Professional Persons' No 4/2005.

134 See the Planning Department's Guidance Note on 'Application for Permission under Section 16 of the Town Planning Ordinance (Cap 131)'.

say in pre-application discussions cannot bind the Board or fetter its discretion in determining a subsequent planning application.

[1-67] Where a planning application is submitted, it must be made in writing to the secretary of the Board and has to comply with certain statutory requirements. Thus, as with section 12A applications, an applicant has to set out whether he has obtained, within a reasonable period before the application is made,¹³⁵ each of the current land owner's¹³⁶ consent for the land within the application or has notified the land owners of the application. Alternatively, the applicant has to show that he has taken reasonable steps to obtain the consent or to notify the land owners of the application.¹³⁷

[1-68] In addition to the land owner notification requirements, the application has to be in the required form and be accompanied by the prescribed fee.¹³⁸ The Board may require the applicant to verify the matters included in the planning application by a statutory declaration¹³⁹ and can refuse to consider a planning application if it does not comply with the statutory or its own requirements, or if the notification requirements have not been met.¹⁴⁰

[1-69] The onus is on the applicant to ensure that all the required information is included in the planning application. However, on 1 November 2017, the Board's Secretariat introduced a streamlined procedure for checking that planning applications are properly made and for requesting an applicant to rectify any apparent deficiency before the planning application is accepted as having been made. The checking procedures distinguish between simple¹⁴¹ and more complicated applications and provide a short time frame for the vetting of applications by the Planning Department and the rectification of any deficiencies before being accepted by the Board.

[1-70] The 2004 amendments to the TPO significantly increased the public's ability to know when planning applications have been made and to participate in the planning process by commenting on them. Thus, once an application for planning permission has been accepted, the Board must make it available for public inspection at reasonable hours until it is determined.¹⁴² However, a distinction is made between (a) the public inspection period, and (b) the period in which the public is able to comment on the application. Whilst the public is entitled to inspect the application up until the Board decides whether to approve

135 Generally within the previous 12 months before the application is made.

136 'Current land owner' in s 16 is given the same definition as in s 12A(25) – see s 16(8).

137 Section 16(2)(a).

138 Section 16(2)(b) & (c).

139 Section 16(2A).

140 Section 16(2B).

141 Simple cases are considered to be ones such as those relating to New Territories Exempted Houses; planning applications for temporary uses or development of less than 5 years; and applications to renew temporary permissions.

142 Section 16(2C).

or refuse planning permission, there is only a 3 week period in which the public is entitled to comment on the planning application.

[1-71] To give effect to the requirement to make the planning application publicly available, the Board must display a prominent site notice specifying where and when the application can be inspected and informing anyone who wishes to comment on the application that they may do so within a 3-week period from when the application was first made available for public inspection.¹⁴³ The site notice must also inform the public of where and when any comments they make will be available for public inspection.¹⁴⁴ This ensures that there is transparency both in relation to the planning application and any comments that are made on it. As an alternative to posting a site notice, the Board may publish, once a week for 3 weeks, a press notice, containing the same information as the site notice, in 2 daily Chinese language newspapers and 1 daily English language newspaper.¹⁴⁵

[1-72] Anyone wishing to comment on the planning application may do so within the first 3 weeks of the public inspection period provided that the comment is made in such manner as the Board requires.¹⁴⁶ Comments made after the 3-week period are treated by the TPO as not having been made¹⁴⁷ which also confers on the Board a discretion to treat any comment which does not comply with Board's requirements as having not been made even if it was submitted within the 3-week period for submission of comments.¹⁴⁸ When determining whether to grant or refuse planning permission, the Board must take into account all duly made comments,¹⁴⁹ in addition to all other relevant matters.

[1-73] An applicant may submit further information to the Board to supplement the information included in the planning application before it is determined by the Board, provided that the further information does not materially change the nature of the application.¹⁵⁰ Where the Board accepts further information from the applicant, it is deemed to have been included in the planning application¹⁵¹ and must be made publicly available for comment in the same manner as the original planning application,¹⁵² unless the Board considers there to be reasonable grounds to exempt the further information from those requirements.¹⁵³ Where the Board accepts further information from the applicant and does not exempt it from the publicity and consultation requirements, the planning application is deemed to have been received by the Board when the further information was received and

143 Section 16(2D)(a), (2E) & (2F).

144 Section 16(2E)(b). Certain personal information such as addresses, telephone numbers and email addresses are not made available for inspection.

145 Section 16(2D)(b).

146 Sections 16(2F) & (2G). Guidance on how to make comments on a planning application is contained in TPB PG-No 30B.

147 Section 16(2H)(a).

148 Section 16(2H)(b).

149 Section 16(3A).

150 Section 16(2J).

151 Section 16(2K)(a).

152 Section 16(2K)(b) & (c)(i).

153 Section 16(2L).

not when the planning application was first submitted.¹⁵⁴ This is important because the Board is required to consider the application at a meeting within 2 months of the application being received.¹⁵⁵

[1-74] The Board's powers in determining a planning application are contained in sections 16(3)–(5) of the TPO. As the Court of Final Appeal held in *Town Planning Board v Town Planning Appeal Board* (2017) 20 HKCFAR 196, [2017] 2 HKC 372 (CFA) the Board is empowered under section 16 to take one of three primary decisions.¹⁵⁶ First, it may refuse the application.¹⁵⁷ Secondly, it may grant planning permission unconditionally.¹⁵⁸ Thirdly, it may grant permission subject to such conditions as it thinks fit.¹⁵⁹ Where the Board grants permission, whether unconditionally or subject to conditions, it can only do so in accordance with the plan.¹⁶⁰

[1-75] In considering whether to grant planning permission, the Board does not have a free hand and is bound by the contents of the plan. In *International Trader Ltd v Town Planning Appeal Board* [2009] 3 HKLRD 339, [2009] 4 HKC 411 (CA) it was argued by the Board that when determining a planning application it was entitled to take into account any planning consideration and was not constrained by the parameters of the plan.¹⁶¹ However, the Court of Appeal rejected the argument and, per Hartmann JA, said:

48. ... when considering a s 16 application for permission under and in terms of an approved plan, the Board is not given a blank canvas. The canvas is already painted with the relevant approved plan. That being so, while the Board's discretion is a broad one, it is evident that the Ordinance, considered as a whole, requires that the discretion be exercised within the limits of the relevant approved plan. Put another way, the approved plan is not merely a relevant consideration, one which the Board may, for cogent reason, ignore.

...

51. In summary, therefore, I am satisfied that, on a true construction of the Ordinance, when determining an application for planning permission under s.16, the Board does not have the power to have regard to any and all planning considerations which it believes will assist it to reach the right decision in the public interest. The Board's discretion is one that must be exercised within the parameters of the approved plan in question. Accordingly, if it takes into account material considerations which fall outside of the ambit of an approved plan, considerations which are therefore not relevant to it, it acts *ultra vires*.

154 Section 16(2K)(c)(ii).

155 Section 16(3).

156 *Town Planning Board v Town Planning Appeal Board* (2017) 20 HKCFAR 196, [2017] 2 HKC 372 (CFA) at para [45](1).

157 Section 16(3).

158 Section 16(3).

159 Section 16(3) & (5).

160 Section 16(5).

161 *International Trader Ltd v Town Planning Appeal Board* [2009] 3 HKLRD 339, [2009] 4 HKC 411 (CA) at para [40]. In that case, the Appeal Board had taken into account the adverse effects of traffic and the visual impact in refusing permission.