

DALY 帝理律師行 & ASSOCIATES

PRINCIPAL
MARK DALY 帝理

ASSOCIATES
KAREN MCCLELLAN
CHAN CHUN TAT 陳健地

Your Ref: CB4/SS/9/18
Our Ref: 7173 - SL

URGENT

30 May 2019

Legislative Council Secretariat – Legal Service Division
Legislative Council Complex
1 Legislative Council Road
Hong Kong

Attn.: Subcommittee on Subsidiary Legislation Relating to the Central Military Dock

By Fax Only: 2877 5029

Dear Sir/Madam,

Subsidiary Legislation Relating to the Central Military Dock HCAL 979/2019 (“Judicial Review”)

We refer to your letter of 23 May 2019 and our letters of 21 May 2019 and 27 May 2019.

We understand that the Subcommittee on Subsidiary Legislation Relating to the Central Military Dock (“**Subcommittee**”) is currently discussing the legislative work (i.e. Orders and Regulations) governing the handover of the Site (including the dock along the Central Harbourfront) (“**Site**”) to the Garrison. We also understand that the abovementioned subsidiary legislations (“**Sub Leg**”) will come into operation on 29 June 2019 subject only to the negative vetting of the Legislative Council. Given that the Judicial Review pertains directly to the disposal of the Site and we are of the view that the Briefs given to the Subcommittee do not fully and clearly represent the case for the Sub Leg, the real issue is whether the Subcommittee should repeal the Sub Leg or postpone the commencement date to a date to be fixed after the final disposal of the Judicial Review so as not to frustrate or decide in advance the subject matter of the Judicial Review. If nothing is done in the Subcommittee, this will have the effect of: (i) rendering academic any judgment of the Court which we say is good; and (ii) effectively maintaining an improperly and unlawfully zoned site.

We also draw your attention to the fact that the Judicial Review was stayed pursuant to Section 15 of the Legal Aid Ordinance (Cap. 91) and Rule 7A of the Legal Aid Regulations (Cap. 91A) (“**Legal Aid Stay**”) until 27 May 2019 and there is a pending application for stay of the subject matter of the Judicial Review for which the Court has indicated the matter is to be heard.

CONTACTS

3rd Floor Yam Tze Commercial Building,
23 Thomson Road, Wanchai, Hong Kong.

灣仔海濱中心23號
三子商業大廈3樓

t: +852 2781-2998
f: +852 2783-8072

www.dalyassociates.net
office@dalyassociates.net

To assist your consideration, we provide the following brief background and merits assessment on the Judicial Review:

Background of HCAL 979/2019

As set out in the enclosed Notice of Application for Leave for Judicial Review ("Form 86"), the Judicial Review challenges:

1. The decision of the Town Planning Board made on 14 February 2014 not to amend the Amended Draft Plan under Section 6B (8) of the Town Planning Ordinance (Cap. 131) in relation to the Site ("**TPB Decision**"); and
2. The decision of the Chief Executive in Council made on 22 January 2019 to approve the Amended Draft Central District (Extension) Outline Zoning Plan No. S/H24/8 under s 9(1)(a) of the Town Planning Ordinance (Cap. 131) ("**CEIC Decision**").

The prayer for relief is set out on page 3 of the Form 86 and includes *inter alia* orders to bring up and quash the TPB Decision and CEIC Decision as well as an injunctive relief to restrain the transfer or disposition of the Site to the Garrison or any third party on behalf of the Garrison.

We refer you to pages 26 to 40 of the Form 86 for the grounds for judicial review. In this connection and upon reviewing the Legislative Council Brief (SBCR 5/1486/98) by the Security Bureau dated 3 May 2019 ("**Brief**"), we highlight the following five issues for your attention which we consider are not fair or fully clear in the Brief:

1. First, referring to the Exchange of Notes between the Government of the People's Republic of China and the Government of the United Kingdom on the arrangements for the future use of military sites in Hong Kong ("**Exchange of Notes**"), we are of the view that the extent of the areas covered by the Sub Leg far exceeds what was required by the Exchange of Notes without proper explanation and justifications. We are of the view that the Government may have inflated Hong Kong's alleged responsibility under the Exchange of Notes which requires, *inter alia*, the re-provisioning of a military dock "*at a place at the eventual permanent waterfront in the plans for the Central and Wanchai Reclamation close to the Central Barracks*" only. It does not specify that the Government shall reserve 150 meters of the Central Harbourfront for the Garrison.
2. Second, in any event, the area proposed to be closed is excessive. Upon a careful reading of the terms of the Brief, only four buildings are necessary for 'defence operational needs' (save as when the berthing facilities are occupied). In that case, no evidence or justification is given to close the rest of the Site on a permanent basis. The Sub Leg has gone beyond what is necessary with serious consequences for the public. There is no justification for the Government to close any area in the waterfront open space at the New Central Harbourfront area other than the four buildings.

3. Third, with reference to paragraph 8 of the Brief, approximately 33,000 square feet of open space along the Central Harbourfront will be designated as “*protected place*” open to the public only upon consideration by and with permission from the Garrison. The Sub Leg is contrary to *inter alia*: (i) the Protection of Harbour Ordinance; (ii) the Harbour Planning Principles; (iii) the assurances and statements made by the Government in the Legislative Council (for example at the hearings of the Panel on Planning, Lands and Works on the Legislative Council of the CMD within the reclamation works); (iv) statements made by the Government (for example the Plaintiff and Lands Bureau Discussion Document for Legislative Council’s Public Works Sub-Committee May 2012; Hansard 2 June 2014 pp. 6390-1 and Hansard 6 June 2007 at pp. 7776, 7777-82 and in the Harbourfront Enhancement Committee 28th Meeting on 17th August 2009) and the commendation of the Harbourfront Commission and the public that the space would be open to the public when not in military use. The Sub Leg is contrary to those premises without any enforceable promise that the Garrison opens the Site for the public.
4. Moreover, the lack of planning limitations (except on height) on this space enables the Garrison to construct any building and/or structure without restriction as it deems fit. This would significantly limit the rights of the public to use and/or enjoy the Central Harbourfront.
5. Finally, it is improper to adopt the ‘buffer zone’ explanation to justify the designation of the military dock at the Central Harbourfront. Given that it is only intended to be used from time to time for berthing a military vessel, there is no justification of imposition of the permanent designation of restriction. The analogy used to justify this in the Brief, being ‘military basin’, is misleading as the berth, only to be used from time to time, is not military basin. The effect of such designation would be to improperly carve out the harbour from public enjoyment.

Merits of HCAL 979/2019

We are of the view that there are clear and sufficient reasonable grounds for taking the Judicial Review for the following two reasons:

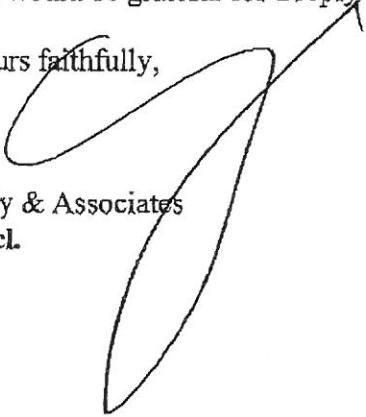
1. There is *prima facie* substantial merit given that the Court of First Instance had granted leave to a previous judicial review application (“HCAL 49/2014”) which challenged the same TPB Decision being challenged in the present Judicial Review. Whilst the present Judicial Review seeks also to review the CEIC Decision, given that the CEIC Decision was made pursuant to the TPB Decision, both HCAL 49/2014 and the present Judicial Review concern the same issues. Accordingly, there is no cogent reason for denying leave for judicial review in the present case. In this connection, please note also that in HCAL 49/2014, the Court granted a stay on the submission of the plans by the Town Planning Board to the Chief Executive in Council on the same grounds that interim and/or injunctive relief is sought in the present Judicial Review.

2. The Court of Final Appeal and the Court of First Instance have consistently accepted in the Protective Costs Order application pursuant to HCAL 49/2014 that HCAL 49/2014 is a public interest litigation which raises issues of general public importance and should be resolved by the Courts. Given that the present Judicial Review concerns the same decision being challenged in HCAL 49/2014, issues of general public importance are also raised presently.

In the circumstances, please pass this letter to the Subcommittee for its consideration. If the Subcommittee is not minded to repeal the Sub Leg, at the least, we seek a postponement of its operative dates until a date to be set following the final disposition of the Judicial Review. We would be grateful for a reply on or before **Monday 3 June 2019**.

Yours faithfully,

Daly & Associates
Encl.



No.86

Notice of application for leave to apply for judicial review

Claim nature: A. Non-monetary claim B. Judicial Review

HCAL 979 /2019

IN THE HIGH COURT OF THE
 HONG KONG SPECIAL ADMINISTRATIVE REGION
 COURT OF FIRST INSTANCE.
 CONSTITUTIONAL AND ADMINISTRATIVE LAW LIST
 NO. 979 OF 2019

IN THE MATTER of an Application by Lester Shum for leave to apply for Judicial Review, pursuant to Order 53, Rule 3 of the Rules of the High Court (Cap. 4A)

AND IN THE MATTER of the Town Planning Ordinance (Cap. 131)
BETWEEN

LESTER SHUM

Applicant

and

CHIEF EXECUTIVE IN COUNCIL

1st Putative Respondent

TOWN PLANNING BOARD

2nd Putative Respondent

DIRECTOR OF LANDS

3rd Putative Respondent

SECRETARY FOR SECURITY


4th Putative Respondent

**NOTICE OF APPLICATION FOR LEAVE
 TO APPLY FOR JUDICIAL REVIEW (O.53 r.3 (2))**

This form must be read together with the Notes for Guidance obtainable from the Registry.

TO: The Registrar, High Court, Hong Kong

Name, address and description of applicant	<p>LESTER SHUM (referred to herein as the Applicant)</p> <p>c/o Daly & Associates 3/F, Yam Tze Commercial Building, 23 Thomson Road, Wanchai, Hong Kong</p>
Name and address of Respondents	<p>The Applicant is a natural person.</p> <p>(1) Chief Executive in Council, Central Government Offices, Tamar, Hong Kong</p> <p>(2) The Town Planning Board, 15th Floor, North Point Government Offices, 333 Java Road, North Point, Hong Kong</p> <p>(3) Director of Lands, Lands Department, Headquarters, 20th Floor, North Point Government Offices, 333 Java Road, North Point, Hong Kong</p> <p>(4) The Secretary for Security, 9/F, East Wing, Central Government Offices, Tamar, Hong Kong</p>
Judgment, order, decision or other proceeding in respect of which relief is sought	<p>The decision (the CEIC Decision) of the Chief Executive in Council (CEIC) on 22 January 2019 to approve the Amended Draft Central District (Extension) Outline Zoning Plan No. S/H24/8 (the Amended Draft Plan) under section 9(1)(a) of the Town Planning Ordinance (Cap 131) (the Ordinance).</p> <p>The decision (the TPB Decision) of the Town Planning Board (the TPB) made on 14 February 2014 not to amend the Amended Draft Plan under s 6B (8) of the Ordinance.</p>
Name and address of Applicant's solicitors	<p>Nil.</p> <p>Daly & Associates, 3/F, Yam Tze Commercial Building, 23 Thomson Road, Wanchai, Hong Kong</p>

Signed 
Daly & Associates
Solicitors for the Applicant

Dated the 10th day of April 2019

RELIEF SOUGHT

1. A hearing of this application for leave to apply for judicial review under Order 53, rule 3(3) of the Rules of the High Court (Cap. 4A) and of the application for an interim order set out below;
2. A Declaration that the Decision of the Town Planning Board (the "TPB") (the "TPB Decision") not to amend the Amended Draft Central District (Extension) Outline Zoning Plan No. S/H24/8 (the "Amended Draft Plan") was unlawful;
3. A Declaration that the Decision of the Chief Executive in Council (the "CEIC Decision") to approve of the Amended Draft Plan was unlawful;
4. An Order of Certiorari to bring up and quash the TPB Decision;
5. An Order of Certiorari to bring up and quash the CEIC Decision;
6. An Order of Mandamus requiring the TPB to further consider and amend the Amended Draft Plan in accordance with law or to replace them with new plans;
7. An Order of Mandamus requiring the CEIC to either revoke the Amended Draft Plan or refer the Plan to the TPB for replacement or amendment;
8. An Injunction restraining 1) the CEIC, 2) the Director of Lands, 3) The Secretary for Security, and 4) the CEIC's, the Director of Lands' and the Secretary of Security's agents, from transferring or otherwise disposing of the Site¹ and/or take any step or steps to cause and/or result in the said transfer and/or disposal of the Site to the Garrison or any third party on behalf of the Garrison.
9. An interim Injunction under Order 53, rule 3(10)(a) of the Rules of the High Court upon the grant of leave to restrain 1) the CEIC, 2) the Director of Lands, 3) The Secretary for Security, and 3) the CEIC's and the Director of Lands' agents, from transferring or otherwise disposing of the Site and/or take any step or steps to cause and/or result in the said transfer and/or disposal of the Site to the Garrison or any third party on behalf of the Garrison, pending the determination of these proceedings by the Court of First Instance or until further order of the Court.

¹ The site is of approximately 3,000 square meters, being 150 meters long and 20 meters wide. It is situated along the Central Harbourfront. For a more precise description of the site, see Part A of this Form 86.

10. An Order under Order 53, rule 3(9) and an Order under Order 62, rule 3(2A) of the Rules of the High Court protecting the Applicant from all costs of the Putative Respondents in the interlocutory applications and the substantive proceedings herein, alternatively limiting the costs that may be awarded to the Putative Respondents to HK\$10,000 and limiting the costs that may be awarded to the Applicant to the reasonable costs of a solicitor and junior counsel or such sum as the Court may think just (the "Protective Costs Order");
11. Further or other relief.

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GUIDE TO THE DOCUMENT

1. In the previous set of judicial review proceedings addressing the TPB Decision, the HCAL 49/2014 proceedings, the then applicant, Designing Hong Kong Limited (“DHK”), filed a Form 86 dated 7th May 2014. This was followed by the Re-Amended Form 86 dated 15th May 2015 (see Appendix 1 to this present Form 86) (“the Re-Amended Form 86”).
2. Throughout this present Form 86, references will be made to the Re-Amended Form 86.
3. The Form 86 dated 7th May 2014 in the HCAL 49/2014 proceedings was filed together with an affirmation by Mr. Paulus Johannes Zimmerman, who was the Chief Executive of DHK, of 7th May 2014 (“Mr. Zimmerman’s Affirmation”), and a bundle of documents exhibited to the affirmation (see Appendix 2 to the present Form 86).
4. References in this present Form 86 in the format [# / # / #]² are to the bundle of documents accompanying Mr. Zimmerman’s affirmation, i.e. Exhibits “PZ-1” to “PZ-4”.
5. In addition to the above, the Applicant in these proceedings, Mr. Lester Shum, has also filed his own affirmation to go along with this application.
6. There are many thousands of documents and public statements that have been made concerning the reclamation in the Harbour and the planning of the Harbourfront land. It is impossible to include them all as exhibits to the affirmation in support. The documents exhibited are necessarily a selection, but the Applicant has included, by reference to exhibits to his affirmation and the bundle of documents exhibited to Mr. Zimmerman’s Affirmation, those he understands to be the most relevant to the points at issue herein.
7. This application is structured as follows:
 - a. Part I (§§8-68) deals with the factual background and chronology.
 - b. Part II (§§69-76) sets out the relevant statutory provisions and legal framework.
 - c. Part III (§§77-157) sets out the Applicant’s grounds for seeking judicial review under the following sub-headings:

² E.g. [1/2/3] refers to Exhibit 1, document 2, at page 3 of that Exhibit. Exhibit 1 appears in a single bundle (“Bundle 1”). All other exhibits appear in a separate bundle (“Bundle 2”).

- i. Failure to carry out the statutory task
 - ii. Illogicality
 - iii. Failing to take into account relevant matters, mistake of fact, etc
 - iv. Legitimate expectation
 - v. Abdication of statutory duty: substantive development control
 - vi. Tainting of the CEIC Decision
- d. Parts IV to VII (§§158-181) deal with standing, costs, amenability to judicial review and timing respectively.
- e. Part VIII (§§182-200) sets out the Applicant's application for interim relief and leave.
- f. Part XI (§§201-204) sets out the Applicant's compliance with the duty of full and frank disclosure, and concludes the Form 86.

GLOSSARY

The 2000 Agreement	The Garrison agreed with the Government in 2000 that it would open the area of the military dock site to the public as a part of the Promenade when it is not in military use
The Amended Draft Plan	OZP S/H24/8
The Approved Plan	OZP S/H24/6
BHR	Building Height Restriction
CEIC	Chief Executive in Council
The CEIC Approved Plan	OZP S/H24/9
The CEIC Decision	The CEIC's decision on 22 January 2019 to approve the Amended Draft Plan
CMD	Central Military Dock
CHCG	Central Harbourfront Concern Group
CPG	Central People's Government
CRI, CRU, CRU	Phase I, II, III of the Central Reclamation project
CWCR	Central Wanchai Reclamation project
C&WDC	Central and Western District Council
DevB	The Development Bureau
DLA	Defence Lands Agreement
DOJ	Department of Justice
The Draft Plan	OZP S/H24/7
ES	Explanatory Statement
"G"	Government use
The Garrison	Hong Kong Garrison of the People's Liberation Army
"G/IC"	Government, Institution/Community use
Government	Government of the Hong Kong Special Administrative Region
HC	Harbourfront Commission
HEC	Harbourfront Enhancement Committee
HKITF or HKTF or Task Force	Hong Kong Island Task Force of the Harbourfront Commission
HPPs	Harbour Protection Principles
"IC"	Institution/Community use
LandsD	Lands Department
MPC	Metro Planning Committee of the Town Planning Board
"O"	Open Space
"OU"	Other Uses
"OU(MU)"	Other Uses, Military Use

OZP	Outline Zoning Plan
Permanent Secretary	Permanent Secretary for Development (Planning and Lands)
PHO	Protection of the Harbour Ordinance (Cap 531)
Promenade	The continuous waterfront promenade in the 'Core Central Harbour' area on the north-shore of Victoria Harbour includes a continuous waterfront promenade about 500 metres long
PLA	People's Liberation Army
PlanD	Planning Department
RHC	Rules of the High Court (Cap 4A)
S for D	Secretary for Development
SPH	Society for the Protection of the Harbour
TPB	Town Planning Board
The TPB Decision	The TPB Decision made on 14 February 2014 not to amend the Amended Draft Plan
TPO	Town Planning Ordinance (Cap 131)
UDS	Urban Design Study for the New Central Harbourfront

PART I – FACTUAL BACKGROUND AND CHRONOLOGY

A. The Site

8. The reclaimed land as built and developed in the ‘Core Central Harbour’ area on the north-shore of Victoria Harbour includes a continuous waterfront promenade about 500 metres long (“the Promenade”), between the new Piers 9 and 10 to the west and the new Tamar Park in the east³. The zoning at issue is of a strip of waterfront land comprising the middle 150 of those 500 metres, extending some 20 metres back across the Promenade (“the Site”) leaving a paved stretch of walkway and the open areas behind it, zoned Open Space, back to the 4-lane dual-carriageway of the Lung Wo Road.
9. The decision at issue is that of the Town Planning Board (“the TPB”) not to amend the Amended Draft Central District (Extension) Outline Zoning Plan No. S/H24/8 (“Amended Draft Plan”) which re-zoned the Site from “Open Space” to exclusively “Military Use”⁴ dated 14th February 2014 (“the TPB Decision”). The re-zoning in the Amended Draft Plan was to accommodate setting the Site aside for use as a military dock by the Hong Kong Garrison of the People’s Liberation Army (“the Garrison”) (“the PLA”).
10. Additionally, the decision by the Chief Executive in Council (“the CEIC”) to approve of the Amended Draft Plan dated 22nd January 2019 is also being challenged by this Application (“the CEIC Decision”).
11. The two decisions above were made with a view to hand over the Site to the Garrison.

B1. Planning, the Secretary for Development and PlanD

12. In June 2013, the Government of the Hong Kong Special Administrative Region (the “Government”) (“the Region”) published a fact sheet detailing the function and operation of Town Planning in Hong Kong:⁵

“**Planning Organisations:** The Planning and Lands Branch of the Development Bureau (“the DevB”) is in charge of the policy portfolios of planning, land use, buildings and urban renewal in Hong Kong. Taking directives from the Development Bureau, the Planning Department (“the PlanD”) is responsible for formulating, monitoring and reviewing land use at the territorial level. The PlanD also prepares district/local plans, area improvement plans, the Hong Kong Planning Standards and Guidelines as well as undertakes actions against unauthorised land uses. The principal body responsible for statutory planning in Hong Kong is the Town Planning Board

³ PlanD plans H-3 [1/3/5] and H-5 [1/6/45] from TPB Paper 9491 [1/31/441] and Annex I hereto.

⁴ Plan H-2 [1/41/722].

⁵ “Town Planning”, the Information Services Department [1/8/48].

("the TPB"). It is formed under the Town Planning Ordinance ("the TPO") and served by the PlanD. Comprising predominantly non-official members, the TPB oversees the preparation of draft statutory plans, considers representations to such draft plans and considers applications for planning permission and amendments to plans. There are two standing committees under the TPB, namely, the Metro Planning Committee and the Rural and New Town Planning Committee..."

(abbreviations added)

13. The principal officer of the DevB is the Secretary for Development ("S for D").
14. While the TPB has a majority of non-official members, it is chaired by the Permanent Secretary for Development (Planning and Lands) ("the Permanent Secretary") of the DevB. The Director of Planning is also a member. The Secretary to the TPB is a Deputy Director of Planning, who also (with PlanD) provides its Secretariat. The CEIC appoints the TPB's non-official members.
15. The TPB is charged with preparing and publishing statutory plans under the TPO. This includes the *"Outline Zoning Plan (OZP) which shows the land use zones, development parameters and major road systems of an individual planning area."*⁶ The fact sheet sets out the following:

"Areas covered by OZPs are in general zoned for uses such as residential, commercial, industrial, green belt, open space, government/institution/community uses or other specified purposes. Attached to each OZP is a Schedule of Notes showing the uses which are always permitted (Column 1 uses) in a particular zone and other uses for which prior permission from the TPB must be sought (Column 2 uses)....."
16. These statutory plans are accompanied by an Explanatory Statement ("the ES"). The ES usually includes a statement of the planning intention for each zone. Although the ES does *not* form part of the plan and has no statutory effect, the Courts recognise that the TPB's planning intentions may be found in the ES. The contents of the ES are relevant, and to be taken into account by the TPB when considering amendments⁷.
17. The declared OZP applying to the Site is the Approved Central District (Extension) Outline Zoning Plan S/H24/6 ("the Approved Plan"). This was approved by the CEIC under section 9(1)(a) of the TPO on 17th December 2002 and exhibited for public inspection under section 9(5) on 27th December 2002.

⁶ "Town Planning", the Information Services Department [1/8/48].

⁷ *International Trader v The Town Planning Appeal Board* [2009] 3 HKLRD 339 (CA) at §63-§69, in which the relevant amendments were sought under section 16 of the TPO.

B2. The Intended Respondents

18. The Parties to the intended judicial review proceedings are the CEIC, the TPB and the Director of Lands.

CEIC

19. §§58 to 65 of *Society for Protection of the Harbour Ltd v Chief Executive in Council (No.2)* [2004] 2 HKLRD 902 set out the CEIC's role in town planning:

- a. Under the TPO, the CEIC was "*the fountainhead*" of planning matters, the source from which planning powers sprang and were returned.
- b. The CEIC instructed the TPB to prepare a plan. She may approve or reject the recommendations placed before her by the TPB even if it was shown that not all the requirements of the TPO were met.
- c. The CEIC's power to revoke an approved plan or to seek its amendment rested entirely with her.
- d. The TPO obliged the CEIC to make planning decisions, often of a detailed nature, in many circumstances.
- e. The CEIC determined the "*final form*" of the draft plans.
- f. Section 8 of the TPO stipulated that the draft plan submitted by the TPB to the CEIC must be accompanied by schedules detailing objections made to the TPB during the course of its preparation of the draft plan and any amendment that have been made by the TPB. This enabled the CEIC to consider the draft plan in substance.
- g. When the CEIC exercised her powers pursuant to section 12 of the TPO to consider revoking an approved plan in whole or in part or referring the plan to the TPB for replacement or amendment, she was under a duty to consider the substance of all relevant matters that were, or should be, placed before her.
- h. When fulfilling her duties under the TPO, the CEIC looked not only to the collective knowledge, experience and expertise of those who sat on the Council with her but also to those public officers who were best positioned to advise her.

20. It is self-evident why the CEIC is an intended respondent, because the CEIC Decision is most crucial in this Application.

The TPB

21. The role of the TPB in town planning and its relationships with the PlanD have already been set out in section B1 above.
22. It is self-evident why the TPB is listed as an intended respondent in the Application, because it addresses the TPB Decision.

The Director of Lands

23. The Government is the executive authorities of the Region by virtue of Article 59 of the Hong Kong Basic Law.
24. Article 7 of the Hong Kong Basic Law stipulates the following:

“The land and natural resources within the [Region] shall be State property. The [Government] shall be responsible for their management, use and development and for their lease or grant to individuals, legal persons or organizations for use or development. The revenues derived therefrom shall be exclusively at the disposal of the government of the Region.”
25. According to the Basic Law, the Site is owned by the Region, and the Government would be responsible for the transfer of the Site, and its grant to the Garrison.
26. However, pending the handover to the Garrison, the Lands Department (“the LandsD”) undertakes the daily management of the site.⁸
27. Because of the task that the LandsD has been charged with, it follows that its head, the Director of Lands, must be made a respondent in these proceedings. The Director does not have any powers under the Basic Law, planning law or any other ordinance to own, manage or transfer land. However, *in practice*, he is responsible for all land matters in the Region, and for granting and transferring land on behalf of the Government and/or under the direction of the CEIC.
28. Although the live issues as set out in the Grounds of Challenge do not concern the Director of Lands nor his decision-making, he must be made a respondent in these proceedings. This is the only way to ensure that the Court can make an enforceable order to prevent the Site from being handed over to the Garrison as interim and/or final relief should the Application ultimately prevail.

⁸⁸ See Security Bureau, LC Paper No. CB(2)1100/18-19(03), “For discussion on 2 April 2019 - Legislative

Council Panel on Security Central Military Dock” of March 2019, and Council Business Division 2 of LegCo Secretariat, LC Paper No. CB(2)1100/18-19(04), “Panel on Security – Information note prepared by the Legislative Council Secretariat for the meeting on 2 April 2019” of 27 March 2019. Both documents are exhibited to the Applicant’s affirmation.

B3. Designing Hong Kong Limited v TPB (HCAL 49/2014 proceedings)**Previous proceedings**

29. In respect of the Amended Draft Plan, there was a previous set of judicial review proceedings (HCAL 49/2014) with Designing Hong Kong Limited ("DHK"), a non-profit organization as the applicant:
- a. In 2003, DHK launched the "Designing Hong Kong Harbour District" campaign, which called for integrated sustainable urban planning for the Harbour, the Harbourfront and surrounding districts on Hong Kong Island and Kowloon (including the development of Central District (Extension)). This led to a report submitted to the Government's Harbour-front Enhancement Committee ("the HEC")⁹ and the TPB.
 - b. Between 2007 and 2011, DHK participated in the Urban Design Study for the New Central Harbourfront ("the UDS") activities, which led to the 2011 report in 2011 ("the UDS Final Report"). This was adopted and published by PlanD¹⁰.
 - c. After the Amended Draft Plan was gazetted, DHK commented on the Proposed Amendments at a meeting held by the Harbourfront Commission ("the HC") on 21st February 2013.
 - d. In 2013, DHK joined the Central Harbourfront Concern Group ("the CHCG") which represented the public's demand for access to the Waterfront and opposition to the Amended Draft Plan, and made comments and representations to the TPB.
 - e. DHK participated in the representation process on the Amended Draft Plan before the TPB.
30. The Re-Amended Form 86 dated 15th May 2015 submitted by DHK is attached to this present Form 86 as **Appendix 1 ("the Re-Amended Form 86")**. This document will be referred to throughout this present Form 86.
31. Upon hearing both DHK and the TPB, the Court of First Instance granted leave for judicial review on 21st July 2014 on Grounds 1 to 5 in the Re-Amended Form 86 (which directly correspond with Grounds 1 to 5 in this present Form 86):

⁹ See Section B5 below.
¹⁰ [1/22/236].

- “(1) the [TPB] erred in law in disregarding its own statutory duty under section 3(1) of [the TPO] in upholding the [Amended Draft Plan] which is contrary to its own declared planning intention;
- (2) the [TPB’s] decision is irrational in the public law sense;
- (3) the [TPB] failed to take into account relevant matters such as its own declared policy to protect the Harbourfront, ensure public access thereto and maintain visual access to the [Harbour], the [PlanD’s] own report made in 2011 prescribing public “Open Space” land use for the Site, the views and recommendations of the [HC] and the Administration’s public commitment to effectively keep the Site open for public use;
- (4) the [TPB] mistook or ignored an established and relevant fact that if the Site was to be closed for military use, there would not be a continuous pedestrian connection along the waterfront;
- (5) the [TPB] misapplied the public law principle of “consistency” by saying that the proposed zoning of the Site was consistent with the existing military exclusive “Military Use” zoning of the PLA headquarters sited nearby in Admiralty;
- (6) the [TPB] failed to give effect to the applicant’s legitimate expectation that it would take into account the relevant matters as identified; and
- (7) the [TPB] abdicated its duty under section 3(1) of the TPO in not to amend the [Amended Draft Plan] so as to impose any development restriction on the Site other than [building] height restriction (“the BHR”).”

(abbreviation added)

32. On 23rd July 2014, the Court of First Instance ordered an interim stay of submission of the Draft Amended Plan to the CEIC for approval pending its determination of the judicial review or until further order.

33. When DHK applied for leave for judicial review, it sought a protective costs order:

- a. The Court of First Instance accepted that the issues raised in the judicial review were of general public importance, and that it was in the public interest to have them resolved: see *Designing Hong Kong Limited v TPB* [2015] 3 HKC 525, §§54 to 55. It also agreed that DHK had no private gain or interest from the outcome of the judicial review: see §56. By a judgment given on 30th April 2015, Au J (as he then was) refused DHK’s application for the protective costs order.

- b. The refusal was upheld by the Court of Appeal by judgment dated 16th February 2017 and by the Court of Final Appeal by judgment dated 15th May 2018: see [2017] 2 HKLRD 60 and (2018) 21 HKCFAR 237.

Madam Ho Loy's joinder application

34. By summons dated 19th July 2018, Madam Ho Loy ("Madam Ho") applied to join the HCAL 49/2014 proceedings as an applicant after the TPB refused its consent to the same.
35. DHK and the Department of Justice ("DOJ") agreed to the making of the consent order dated 30th August 2018, which ordered:
- a. That DHK do cease to be a party to the judicial review and, subject to the dismissal of the above summons by the court upon determination, leave be granted to it to discontinue this judicial review.
 - b. That, subject to the determination by the Court of First Instance dismissing the above summons, the order for interim stay of submission of the Amended Draft Plan to the CEIC for approval made on 23rd July 2014 be discharged.
36. Au J dismissed Madam Ho's joinder application on 30th November 2018.
37. The application of Madam Ho for leave to apply was filed on 14th December 2018.
38. On 14th December 2018, the Legal Aid Department filed a notice to mark its receipt of Madam Ho's application for legal aid in respect of her appeal. Proceedings were stayed for 42 days.
39. On 20th December 2018, Daly & Associates wrote to the DOJ to seek consent for an interim stay of the submission of the Draft Amended Plan.
40. On 24th December 2018, the Court of First Instance ordered that the hearing for the leave to appeal scheduled on 9th January 2019 be vacated and re-fixed if necessary.
41. On 31st December 2018, Daly & Associates sent another letter to the DOJ to seek consent for an order for the interim stay of submission of the Amended Draft Plan. This was rejected by the DOJ on 2nd January 2019.
42. Throughout the correspondence, Daly & Associates warned the DOJ that the interim stay was necessary, because of the real risk of the TPB's submission of the Amended Draft Plan for consideration and the CEIC's approval, rendering the HCAL 49/2014 proceedings nugatory.

Submission of the Amended Draft Plan to the CEIC

43. The following were made known to Daly & Associates on 4th February 2019:
44. The TPB submitted the Amended Draft Plan recently.
45. On 22nd January 2019, the CEIC approved of the Amended Draft Plan (i.e. the CEIC Decision) under section 9(1) of the TPO.
46. On 1st February 2019, the notification of the approval of the Amended Draft Plan was gazetted and the approved plan (No. S/H24/9) ("the CEIC Approved Plan") was exhibited for public inspection pursuant to section 9(5) of the TPO.
47. The CEIC Approved Plan superseded the Amended Draft Plan pursuant to section 9(3) of the TPO, and the HCAL 49/2014 judicial review proceedings were rendered nugatory.

B4. The Applicant

48. This section reiterates what has been set out in the Applicant's affirmation.
49. The Applicant is an active and well-known political figure in Hong Kong.
50. The Applicant is and has been involved with various political and legal issues in Hong Kong at educational, vocational and professional levels. More specifically, he has played a prominent role in respect of many of these issues. He has demonstrated a sincere concern for constitutional issues:
- a. Between 2013 and 2014, he was the Vice-President (External) of the Student Union of the Chinese University of Hong Kong ("the CUHK").
 - b. Between 2014 and 2015, he served as the deputy-secretary of the Hong Kong Federation of Students ("the HKFS").
 - c. Since the 2010s, the HKFS has been focused on defending social and political rights in Hong Kong.
 - d. During his tenure as deputy-secretary of the HKFS, he played a leading role in the 2014 class boycott campaign against the National People's Congress Standing Committee which set the framework of the restrictive electoral method of the 2017 Chief Executive of Hong Kong elections.

- e. The HKFS was a participating organisation in the 2014 Occupy Central protests in Hong Kong. The movement demanded genuine democracy in the elections of future Chief Executives.
 - f. In October 2014, he was invited alongside four other HKFS delegates to convene with government officials including the then Chief Secretary for Administration, Ms. Carrie Lam, GBM, GBS. The meeting was televised and concerned well-known political issues surrounding the elections of the Chief Executive in 2017. The meeting was attended by Mr. Edward Yau GBS, JP (then director of the Chief Executive's Office), Mr. Rimsky Yuen GBM, SC, JP (then Secretary for Justice), Ms. Lam, Mr. Raymond Tam (then Secretary of the Constitutional and Mainland Affairs Bureau) and Mr. Lau Kong-wah, JP (then Undersecretary of the Constitutional and Mainland Affairs Bureau).
 - g. In 2016, he graduated from the CUHK with a Bachelor of Social Science from the Department of Government and Public Administration.
 - h. At present, he is employed as a full-time research officer attached to the office of Mr. Eddie Chu Hoi-dick, who is a member of the Legislative Council of Hong Kong (his constituency being New Territories West) ("the LegCo"). He has worked for Mr. Chu since he assumed office on 1st October 2016.
51. The Harbourfront Promenade, and in particular the stretch between the Convention Centre and Central Pier 10, is adjacent to the Legislative Council Complex. This building is where the Applicant has worked since 1st October 2016.
52. The Applicant uses the Promenade regularly. The Applicant walks along the Promenade approximately once to twice per week, and occasionally stops to sit, read, eat and to meet friends there. He finds walking along the Harbourfront Promenade and its neighbouring area comfortable and enjoyable. It also helps him relax, especially when he is stressed. In the past, he has on occasion protested at the Promenade as well.
53. The Applicant's work at Mr. Chu's LegCo office has increased his exposure to, and knowledge and interest in conservation, environmental and cultural issues in Hong Kong.
54. In around mid-February 2019, the Applicant was made aware of the CEIC's intention to hand over part of the Promenade, the Site specifically, to the PLA and that as a result, the public, including users of the Promenade and the Applicant himself, would be prevented from using and enjoying it.

55. Prior to this time, he was unaware of any litigation or zoning dispute relating to the section of the Harbourfront Promenade at issue in these proceedings.

56. The Applicant immediately began looking into the matter and in the course of his enquiries, he learned about the live issues associated with the TPB Decision and the CEIC Decision.

57. The Applicant is aggrieved. In broad terms, he takes objection to:

- a. The about-face that the CEIC and the TPB Decisions demonstrate, from public to military use; and
- b. The disregard for various important matters that they disclose—in particular, the special status of the Harbourfront as a public asset of the Hong Kong people and the weight of public opinion against the proposal to hand over the Site to the Garrison.

58. As for why the Applicant was not involved in the TPB meetings and the public consultations concerning the Draft Amended Plan, they had occurred primarily in 2013 and 2014. At the material time:

- a. The Applicant was only 18/19 years old. He was too young to participate in and fully grasp the impact of those activities relating to the TPB, given the complexity of town planning issues.
- b. Moreover, as set out above, the Applicant had assumed the position of Vice President (External) of the Students' Union of the CUHK in Session 2013-2014. He was also the Deputy Secretary-General of the HKFS. He, like his colleagues, was very much focused on the issues surrounding universal suffrage in the election of the Chief Executive and the LegCo, and the large-scale social movement associated with this.

59. Furthermore, to reiterate the above, he was unaware of the key issues until around mid-February 2019.

60. Consistent with his academic interests, his vocation as a social activist and his professional role with Mr. Chu's LegCo office, the Applicant sought legal advice on the means of maintaining standards of public administration available to him, and now applies to this Honourable Court for relief.

B5: Further Background

61. To reiterate the above, the Re-Amended Form 86 is attached to this present Form 86 as Appendix 1. What was set out in the Re-Amended Form 86 regarding the

background of the case is now adopted herein in respect of the following sections (references in this present Form 86 will be made to the Re-Amended Form 86):

B:

B3: The Tamar Basin; the Site and the Defence Lands Agreement

B4: The *Protection of the Harbour Ordinance*; the Board's 'Vision and Goals' for Victoria Harbour' and the OZPs

B5: The *SPH* case; the Harbourfront Enhancement Committee and the Harbourfront Commission

B6: Government's Commitments and the Urban Design Study (UDS)

B7: 2012: The management of the Site and the HC's insistence on development restrictions

B8: January 2013: The re-zoning 'Proposed Amendments': PlanD abandons the UDS and reneges on Government's commitments

C: The Amended Draft Plan and 'Proposed Amendments'

D: Public Consultations on the 'Proposed Amendments'

D1: Public consultations

D2: The Representations and Comments

E: Before the Board

E1: PlanD's Paper 9491 for the TPB

E2: The TPB Hearings

E3: The Decision and the Board's Reasons (the reasons)

E4: Subsequent Correspondence

Developments in March 2019 and the Government's intended legislative proposals

62. New developments in March 2019 show that the Government intends to legislate for the Central Military Dock ("the CMD") prior to the handover of the CMD to the Garrison. By extension, this will also cover the handover of the Site to the Garrison.

63. The Government intends to discuss this issue in a meeting at the LegCo on 2nd April 2019. There are two LegCo papers prepared for this purpose: both LC Paper No. CB(2)1100/18-19(03) dated March 2019 and LC Paper No. CB(2)1100/18-19(04) dated 27th March 2019 are exhibited to the Applicant's affirmation.

64. In LC Paper No. CB(2)1100/18-19(04), which was prepared by the LegCo Secretariat for the meeting, recent developments regarding the Site since the filing of the Re-Amended Form 86 in 2014 are set out:¹¹

- a. The Site has not been handed over to the Garrison yet.
- b. Pending the handing over of the Site, the LandsD undertakes its daily management.
- c. The Government considers it not suitable to open up the Site for any public activities before it is handed over to the Garrison.
- d. To facilitate effective management, the LandsD has fenced off the Site on government land managed by the LandsD pending the handover.

65. LC Paper No. CB(2)1100/18-19(03), which was prepared by the Security Bureau, is the more comprehensive of the two LegCo papers. At §§8 and 10, it sets out the Government's position in relation to its legislative proposals:¹²

- a. The Government intends to propose legislation and see it enacted prior to the handover of the CMD for defence purposes. This is in line with the Government's position that military facilities within the Region shall be managed by the Garrison, and jointly protected by the Garrison and the Government. Under the Garrison Law, no person other than members of the Garrison shall enter military restricted zones without the permission of the Commander of the Garrison or other officers as he may authorise to give such permission; and guards of the military restricted zones shall have right to stop according to law any unauthorised entry into the military restricted zone or any act which damages or endangers any military facilities.
- b. The Government must fulfil the relevant statutory obligations under the Garrison Law.

¹¹ See Council Business Division 2 of LegCo Secretariat, LC Paper No. CB(2)1100/18-19(04), "Panel on Security – Information note prepared by the Legislative Council Secretariat for the meeting on 2 April 2019" of 27 March 2019. See also Appendix to this LegCo paper, which sets out the Government's reply to a relevant question raised by a member of the LegCo at the Council meeting of 22nd February 2017.

¹² See Security Bureau, LC Paper No. CB(2)1100/18-19(03), "For discussion on 2 April 2019 – Legislative Council Panel on Security Central Military Dock" of March 2019.

- c. In addition to specifying the Garrison's authority in managing its military facilities, the Garrison Law also specifically provides that the Government "*shall support the Garrison in its performance of defence functions and responsibilities and guarantee the lawful rights and interests of the Garrison and its members*" (Article 10), "*shall jointly protect the military facilities within the [Region] with the Garrison*" (Article 12); and "*shall assist the Garrison in maintaining the security of the military restricted zones*" (Article 12). To provide the CMD with suitable legal protection, the Government must legislate for the CMD.

66. This document shows the legislative proposals put forth by the Government at §11:

- a. For the land area, the CMD should reasonably be delimited as a "*closed area*" under the Military Installations Closed Area Order (Cap. 245B), such that any person shall not enter a concerned area unless individually permitted by the Garrison.
- b. The four one-storey buildings on the CMD will not be open for public use due to the operational needs on defence functions. The concerned areas will be declared as "*closed place*" by amending the Military Installations Closed Area Order (Cap. 245B). Any person not individually permitted by the Garrison shall not enter the concerned buildings at any time.
- c. As regards the area outside for buildings, the Garrison will in future consider opening it to the public on the condition that its defence functions would not be compromised. The Government will declare the land area of the CMD as "*protected place*" by amending the Protected Places Order (Cap. 260A), and will amend the Protected Places (Safety) (Authorized Guards) Order (Cap. 260C) to allow the Garrison to engage "*authorized guards*" in future to assist in securing the CMD according to its needs.
- d. As for the sea area, the waters off the military basins are delimited as restricted areas under the laws to restrict entry of unauthorised vessels, so as to provide a buffer zone to ensure that there is a safe distance between civil vessels and military vessels as well as the relevant berthing facilities.
- e. The Government will delimit an area at the waters off the CMD as "*entry restricted area*" to restrict the entry of unauthorised vessels and an area outside this "*entry restricted area*" as "*stay restricted area*" to serve as a buffer zone. Vessels under 60 meters long will be permitted to pass through the "*stay restricted area*" directly without staying to ensure the safety of moored military battles and the operation of the vessels navigating in the vicinity.

67. This document concludes with the following at §12:

- a. Owing to the need of conducting reclamation works and amending the statutory plan, the CMD has yet to be handed over to the Garrison for commencing operation.
- b. The Government has a duty to hand over the CMD to the Garrison as soon as possible in order to fulfil the statutory responsibility as set out in the Garrison Law concerning the support to be provided to the Garrison for its performance of defence functions.
- c. The Government plans to submit the legislative amendment proposals to the LegCo within this year (i.e. 2019) and hand over the CMD to the Garrison formally upon completion of the legislative work.

68. These recent developments will be referred to in the application for interim relief at Part VIII of this Form 86.

PART II – THE RELEVANT STATUTORY PROVISIONS

The TPO

69. In terms of Grounds 1 to 5, this application is brought on the basis that the TPB has not acted in accordance with its statutory duty under section 3(1) of the TPO:

“3(1) With a view to the promotion of the health, safety, convenience and general welfare of the community, the Board shall undertake the systematic preparation of-

- (a) draft plans for the lay-out of such areas of Hong Kong as the Chief Executive may direct, as well as for the types of building suitable for erection therein”

70. The TPB’s obligation to submit the Amended Draft Plan to the CEIC alongside various materials is set out in section 8(1A) of the TPO:

“(1A) The Board shall submit a draft plan to the Chief Executive in Council under subsection (1) together with—

a schedule of the representations (if any) made under section 6(1) in respect of the draft plan (whether with or without any amendments made under this Ordinance) or any of the amendments made under section 7 to the draft plan (whether with or without any amendments

made under this Ordinance), and the comments (if any) made under section 6A(1) in respect of any of such representations;

a schedule of the further representations (if any) made under section 6D(1) in respect of any proposed amendments to the draft plan (whether with or without any amendments made under this Ordinance); and

a schedule of the amendments (if any) made by the Board under this Ordinance to the draft plan (whether with or without any amendments made under this Ordinance).”

71. As for Ground 6, this application is brought on the basis that the CEIC Decision has been tainted by the TPB Decision. The CEIC's powers upon receiving the Amended Draft Plan are set out in section 9(1) of the TPO:

“Upon submission of a draft plan the Chief Executive in Council may—

- (a) approve it;
- (b) refuse to approve it;
- (c) refer it to the Board for further consideration and amendment.”

72. Other relevant provisions are essentially procedural and are referred to in Part I above and in the application for interim relief in Part VIII below. A copy of the TPO is attached for easy reference at *Annex 2* hereto.

The Protection of the Harbour Ordinance (Cap. 531) (“the PHO”).

73. Section 3 of the PHO has been set out in section B4 of the Re-Amended Form 86 at §31, which is now being adopted by the present Form 86.

74. A copy of the PHO is attached for easy reference at *Annex 3*.

The Garrison Law

75. The Garrison Law is a law of the PRC, exceptionally applicable in Hong Kong pursuant to Article 18 and Annex III of the Hong Kong Basic Law and as promulgated by the former Chief Executive on 1st July 1997¹³. It contains provisions as to territoriality, jurisdiction and immunity not found elsewhere in the law of Hong Kong. A copy is attached at *Annex 4*.

¹³ *Promulgation of National Laws (No. 2) 1997*, L.N. 386 of 1997, Schedule 2, Instrument A403. *Annex 4* hereto.

76. There remains a question regarding the lawful public use of the land area of the Site, including the continuous waterfront Promenade that will be zoned only as "Military Use" and handed over to and/or will be managed by the Garrison under Garrison Law. However, as reason (e) of the TPB's reasons for declining to propose amendments to the Amended Draft Plans shows, the TPB declined to consider how that would affect public access.

PART III – GROUNDS OF CHALLENGE

77. In reaching the TPB Decision not to amend the Amended Draft Plan and thereby to zone the Site exclusively for 'Other Uses' (Military Use), not imposing any development restrictions thereon other than as to BHR and permitting "minor relaxation" of the BHR on application, the TPB erred in law.

78. The TPB Decision tainted the CEIC Decision. Therefore, the CEIC also erred in law in reaching her decision.

79. As a reminder, Grounds 1 to 5 hereinbelow are same as the ones set out in the Re-Amended Form 86. Particular emphasis should be paid to section E3 of the Re-Amended Form 86, which sets out the TPB's reasons for the TPB Decision.

Summary of Grounds

80. In summary, the grounds for judicial review in respect of the TPB Decision are set out at Grounds 1 to 5, and in respect of the CEIC Decision, at Ground 6.

Ground 1: Failure to carry out and comply with its statutory task

81. The TPB failed to carry out its statutory duty under section 3(1) of the TPO to prepare a draft plan for the lay-out of the area including the Site, so as to promote the convenience and general welfare of the community by zoning the Site exclusively for 'Military Use' contrary to its own declared planning intention and reasons for re-zoning, namely that the Site was intended for a military dock that will be open to the public when not in military use¹⁴.

82. The TPB erred in law by disregarding its statutory duty and general power to zone so as to give effect to both uses set out in its intention for the Site¹⁵;

Ground 2: Illogicality and 'irrationality' in the public law sense

¹⁴ ES§8.5(a) as amended [1/4/38]; reason (f) [1/4/39].

¹⁵ To do so would not be a novel exercise for the TPB. The 'Other Specified Uses' zoning permits the TPB to provide specific zones for uses 'not otherwise specified'. The 'always permitted' use in column 1 of the Notes for all zones allows for multiple uses. Piers are zoned in different ways for different uses within the same structure [1/36/650, 651]. Sites used by the PLA military in Hong Kong are already variously zoned to suit their particular uses, including 'Residential', 'Camp', and 'OU' (Airport Service Area) [1/36/646].

83. Further or alternatively, the TPB Decision not to amend the Amended Draft Plan and thus to zone the Site exclusively for 'military use' was illogical and thus irrational (in the public law sense) and/or unreasonable.

Ground 3 (a): Failure to take into account or give weight to relevant matters

84. The TPB failed to take into account or to attribute any or appropriate weight to:

- a. Its own declared policy to protect the Harbourfront, ensure public access thereto and maintain visual access to the Harbour and from the Harbourfront, set out in its 'Vision Statement: The Board's Visions and Goals for Victoria Harbour'¹⁶;
- b. The provisions of the UDS Final Report published by PlanD in March 2011 prescribing public 'Open Space' land use for the Site, for development restrictions as to massing and disposition to be imposed on the Site by the Amended Draft Plan and for its public management set out in §8.8.3, §8.8.4, §10.1 and §10.2 of the Final Report¹⁷;
- c. The HC's views and recommendations on the proposed amendments to the Amended Draft Plan, including that the TPB should safeguard public access and restrict development on the Site by means of the Plan and to review the management of the Site, including the fact of, and as set out in the HC's letter to the TPB dated 15th April 2013;
- d. The public commitments of the Administration recited in section B6 in the Re-Amended Form 86¹⁸ to like effect;
- e. The weight of public opinion against the amendments expressed by the unprecedented number of representations and comments sent to the TPB under sections 6 and 6A of the TPO, and by members of the LegCo on 28th May 2013; and
- f. The absence of any documentary evidence of the full and precise terms of the agreement as to public use of the Site, said by PlanD to have been made between the PLA and the Government in 2000 ("the 2000 Agreement"),¹⁹ or

¹⁶ [1/10/72].

¹⁷ The UDS applied the HC's Harbourfront Planning Principles [1/13/100] and provided that the Site should be public Open Space, part of the continuous waterfront Promenade, managed by the public and subject to development control [1/22/325 et seq].

¹⁸ See Section B6 in the Re-Amended Form 86.

¹⁹ As mentioned in the Legco Panel on Development paper (28.5.2013), the Garrison has, on the request of

of a "confirmation" or "undertaking" as to public use of the Site, said by PlanD to have "recently" been given by the PLA.

Ground 3 (b): Mistake, misunderstanding or ignorance of existing fact

85. The TPB mistook, misunderstood, ignored or was ignorant of an established and relevant fact, namely that if the Site was to be closed for military use, there would not then be a continuous pedestrian connection along the waterfront. Alternatively, the TPB made a mistake of fact that there would be such a connection when the Site was closed; see reason (f).

Ground 3(c): inappropriate 'consistency' applied to inconsistent facts

86. At reason (h), the TPB wrongly took into account and sought to zone the Site 'consistent with' the existing exclusive 'Military Use' zoning of the PLA Headquarters²⁰ sited to the south across Lung Wo Road, thus also failing to take into account the Site's own particular and special characteristics, and zone it accordingly. In doing so, the TPB both misapplied the public law principle of "consistency", meaning like treatment of like subjects where appropriate, and failed to take into account the following relevant matters:

- a. Unlike the PLA Headquarters, the Site is on the central part of the New Central waterfront and includes a section of the continuous east-west waterfront Promenade, to which the TPB's 'Vision', the Harbour Protection Principles ("the HPPs") and the HC's views and recommendations apply, and in respect of which the Administration had given commitments as to public use;
- b. The TPB expected and its own planning intention was that the Site was to be in use by the public 'when not in military use'. There was no such intention for the PLA Headquarters and there was no evidence before the TPB that the PLA Headquarters was or was ever 'not in military use'. Rather, there was evidence to the contrary that the PLA headquarters is a 'closed area' under the Military Installations Closed Areas Order (Cap. 245B) and a 'protected place' under the Protected Places Order (Cap. 260A) and thus prohibited to the public²¹.

Ground 4: Legitimate expectation

the HKSAR Government, agreed in 2000 that it would open the area of the military dock site to the public as a part of the promenade when it is not in military use, having regard to its operation and need for protecting the military dock.

²⁰ Reason (h) [L/39/709].

²¹ See section 38 of the Public Order Ordinance (Cap 245) and section 8 of the Protected Places (Safety) Ordinance (Cap 260).

87. The TPB failed to give effect to the legitimate expectations of the public that it would take account of those matters in Ground 3(a) above and give effect to those matters in its planning decision.

Ground 5: Abdication

88. In respect of the TPB Decision not to amend the Amended Draft Plan so as to impose any development restriction on the Site other than the BHR, it abdicated its duty to plan under section 3(1) of the TPO.

Ground 6: Tainting of the CEIC Decision

89. The CEIC Decision has been tainted by virtue of its reliance on the TPB Decision. That the CEIC did not provide any reasons in approving the Amended Draft Plan demonstrated this issue.

Overall

90. In respect of each of the above Grounds 1 to 5, the TPB thus acted contrary to its statutory duties under sections 3 and 6B of the TPO, so as to vitiate the TPB Decision.
91. In respect of Ground 6 above, the CEIC Decision was also tainted, and must be disturbed.

The Grounds – Further exposition

Ground 1: The TPB failed to comply with the statutory requirements in the exercise of its power

92. This ground is self-explanatory. The TPB's statutory duty was two-fold:
- a. To plan in accordance with the 'view' prescribed by section 3(1) of the TPO i.e. the planning intention;
 - b. In doing so, to consider the representations, further representations and comments and decide whether or not to accept the objections, the proposed amendments or make its own amendments to the Amended Draft Plan so as to meet the representations, etc. in accordance with sections 6B(8) and 6F(8) of the TPO.
93. The TPB failed to do so. It zoned contrary to its own planning intention and failed to make amendments to meet the representations.

94. In the TPB's own amended Explanatory Statement (the "ES") and its reasons of 2nd April 2014²² evidence, it expressed its planning intention for public use of the continuous waterfront Promenade within the Site (including by reference to the 2000 Agreement between the Government and the PLA on which the TPB relied). No reason is given for not zoning accordingly.
95. Paragraph 1 of the ES²³ as amended provides that it "aims to reflect the planning intention and objectives of the... Board for the various land use zonings of the plan." (emphasis added). As such, the ES is to be relied upon when construing the Plan: see *International Traders v TPB* [2009] 3 HKLRD 339 at §59 - §71.
96. Paragraph 7 of the ES recites the TPB's intention to 'create a truly memorable place at the heart of the city'. ES §7.1 deals with 'The Urban Waterfront' and within it, §7.1.2 'Along the Waterfront.' §7 does not mention an area exclusively for military use. On the contrary, it states the TPB's intention to lay out a "unifying green edge to the city" by a "large public open space at the waterfront."
97. ES §8.4.2 describes the planning intention for the 'O' Open Space zone, including particulars of the waterfront Promenade. The east-west description of the Promenade *prima facie* includes the area of the Site. The paragraph describes the area as "a major tourist attraction and focus for the local community."
98. ES §8.5²⁴ deals with 'Other Specified Uses' ('OU'), a type of zone which did not previously include the Site. As amended, §8.5(a) re-zones the Site at issue to the same zoning 'OU, annotated Military Use' as the PLA Headquarters and its adjacent area. The location described in this amendment does not even mention the waterfront (but this can be seen from the Amended Draft Plan).
99. The TPB's reasons set out in its letter of 2nd April 2014 show that its planning intention in amending ES§8.5(a) was to recite its recognition of the provision of the 2000 Agreement that the area of the Site was to be opened to the public as part of the Promenade when not in military use.
100. The public use of the Site as part of the continuous waterfront Promenade was the primary aim of the representations, further representations, comments and proposed amendments made by the public and civil society.
101. Having intended (or taken the statutory "view") that the public will use that part of the continuous waterfront Promenade with the Site, the TPB was bound:
- a. To plan accordingly, and

²² [1/39/707 et seq].

²³ [1/4/27].

²⁴ [1/4/38 et seq].

b. As the Amended Draft Plan did not provide for such use, to amend it to provide accordingly.

102. There was no reason why the TPB could not have zoned this site to meet its own special uses. The TPB's duty was to do so, and it was bound to consider its powers in that respect: see, e.g. *R (Watford Grammar School for Girls) v Adjudicator* [2003] EWHC 2480 (Admin).

103. The TPB has already done exactly that elsewhere in Hong Kong by zoning other military-occupied sites as 'Residential', 'Camp' and 'Other Uses' annotated 'Airport Service Centre'²⁵.

104. Further, the TPB has repeatedly and successfully argued that it has power to impose specific use and development restrictions on specific sites: 'spot zoning': see, e.g. *Turbo Top v TPB*, unrep., HCAL 23/2011, 21.11.2011, and *Hysan Development Co Ltd and Others v TPB*, unrep. CACV 232 of 2012, 13.11.2014.

105. And the existing 'Open Space' zoning permits 'Government use' on application to the TPB. A Government application for approval of use for the berthing of military vessels would have to be properly considered and there was no reason to believe it would be refused.

106. This ground of judicial review also includes the TPB's amendments to the zoning 'to reflect the land use of the CMD' (reasons (a) and (x)). The TPB's duty is itself to decide upon and to plan for the appropriate land use taking the 'view' and on the criteria provided in section 3(1) of the TPO. It was not lawful to simply accept a use suggested by the construction on Site or as it has been told the use is to be in future. To do so is contrary to section 3(1) of the TPO.

107. The TPB therefore erred in law in disregarding its own statutory duty under section 3(1) of the TPO in upholding the Amended Draft Plan and not amending it, contrary to its own declared planning intention. As such, the TPB Decision was unlawful and must be quashed.

Ground 2: The TPB Decision not to amend the Amended Draft Plan was illogical and irrational

108. The TPB Decision and the various reasons the TPB gave lack logic and consistency to such a degree as to be lacking in rationality. They "do not add up", whether considered individually or together. As such, they are unreasonable and/or the TPB has failed to carry out its statutory task. The TPB Decision is thus unlawful.

²⁵ [1/36/646].

109. This ground is closely related to the classic ground of review for a "material error of fact" leading to unfairness: see *Capital Rich Development v TPB* [2007] 2 HKLRD 155 (CA) at §93, applying *E v Secretary of State and Alconbury* [2001] UKHL 23, *Secretary of State for Education and Science v Tameside Metropolitan Borough Council* [1976] UKHL 6 and *R v Parliamentary Commissioner for Administration ex p Balchin* [1997] COD 146. The Applicant therefore relies on the following matters under both heads as providing grounds for review.

110. Three plain examples of illogicality stand out:

- (1) As noted under Ground 1 above, the exclusive "military use" zoning in the Amended Draft Plan was inconsistent with the TPB's stated planning intention that the public will use the continuous waterfront Promenade within the Site.
- (2) The TPB's reason (h)²⁶ expressly recites that military use is to be "the primary use of the Site"²⁷. It was illogical not to amend so as to zone for the public use so recognised, albeit as a secondary use.
- (3) The TPB chose not to amend to impose any development restrictions (other than the BHR) in order to allow for 'unforeseen needs for defence purposes': reason (k)²⁸. But if no development needs were foreseen, there was no need to permit any development on the waterfront, especially where all other factors and the TPB's own policy in its 'Vision and Goals' were against doing so.

111. Further, the only evidence before the TPB was that no further development was expected or planned, including by the PLA. No indications had been given to the TPB that "future defence needs"²⁹ might require any further structures on the Site.

112. The principal internal contradiction in the TPB's failure to amend is self-evident: if the zoning remains exclusively 'military use', the use of the continuous waterfront Promenade through the Site by the public for a leisurely stroll along the Harbour from the Convention Centre to Pier 10 or the Star Ferry becomes a use not permitted under the TPO.

113. In addition, it appears that the TPB has never sought or considered the particular terms of the 2000 Agreement relied upon by PlanD in its Papers or the Agreement itself. As such, there was nothing before the TPB to establish whether there was any specific provision requiring or restricting the public use of that part of the continuous waterfront Promenade within the Site or defining what was meant by

²⁶ [1/39/709].

²⁷ See the Schedule of Uses to the Plan for zone 'O' [1/4/19].

²⁸ [1/39/709].

²⁹ The TPB's reason (k) [1/39/709].

"[open to the public] when not in military use". To rely on what little it had heard of that Agreement as sufficient to fulfil its own policy commitment in the Vision Statement (or the commitments of the Government set out above) was not logical.

114. That position was *a fortiori* in respect of the further two conditions for public use first disclosed in January 2013, namely that such public use was to be "*subject to operations and the need for protection*". These conditions were *not* said to have been agreed by the Government but merely "*recently confirmed*" by the Garrison³⁰. How and in what form these further conditions came to be "*confirmed*" was not made known.
115. To the Applicant's knowledge, neither the particular terms of the 2000 Agreement as to public use nor the terms of that "*recent confirmation*" have been disclosed to any representers for them to consider and to make an informed comment on them, as would have been fair. As far as the Applicant knows, DHK had requested for these documents before, but its request was ignored.³¹
116. As the Permanent Secretary had, in 2007, committed the Government to open that part of the continuous waterfront Promenade to the public "*most of the time*" and "*on normal days*"³² and the UDS zoning was for Open Space³³, the TPB was bound to zone to give effect to them. If it was not to do so, the TPB was bound logically to resolve the apparent inconsistency between that commitment and the UDS zoning on one hand and the Garrison's conditional opening, including closure to meet a "*need for protection*" on the other, and it was incumbent on the TPB to show how it did so in its reasons³⁴.
117. The TPB's proceedings disclose no inquiry of PlanD or otherwise as to the terms of the Agreement or of the "*confirmation*" which would have enabled it to make clear and reliable findings of fact on which to understand and resolve that inconsistency. The TPB's reasons do not disclose how it decided that "*military use*" of the Site was capable of including the use by the public of that part of the continuous waterfront Promenade within the Site for some meaningful period of time, in accordance with its planning intention. The Court can only conclude that it did not do so.³⁵
118. Nor did the TPB exercise its powers under section 3(2) of the TPO to make the necessary inquiries or call for those documents, and so further erred in law.

³⁰ [1/30/439].

³¹ Bundle 2, [2/1/3].

³² [1/26/409, 412].

³³ [1/22/370].

³⁴ *Smart Gain Investment Ltd v C&EC, unrep.*, HCAL 12/2006, 6.11.07, *MDB v Betty Kwan* HCAL 18/2012 and *R v Immigration Appeal Tribunal, ex p. Amin* [1992] Imm AR 367.

³⁵ *Smart Gain and Capital Rich Development v TPB* [2007] 2 HKLRD 155 (CA).

Ground 3(a): Failure to take into account relevant matters, or to give them weight

119. The following, directly relevant matters are conspicuous by their absence from the TPB's 2nd April 2014 reasons for the TPB Decision:

- (a) The TPB's own declared policy to protect the Harbourfront, its views and its accessibility to the public as set out in its "Vision and Goals"³⁶, in particular Goals 1, 2, 3 and 4 noted above;
- (b) The public Open Space land use and development restrictions to be provided by planning control, specified in the UDS³⁷. In its reason (I), the TPB stated that it was not prepared to depart from the land use for the Site in the UDS³⁸.
- (c) The HC's Task Force views and recommendations that:
 - (i) There be no "*minor relaxation*" of development control in planning for the Harbourfront³⁹;
 - (ii) Public access to the continuous waterfront Promenade in the Site be safeguarded by "*official*" means in the Notes to the Plan⁴⁰;
 - (iii) Development restrictions be imposed to prevent any further development in addition to the 4 buildings there on the Site;
 - (iv) The management of the Site be clarified⁴¹

This ground rests upon the TPB failing to take into account that these 4 recommendations came from the HC, which DevB set up to have "*overarching*" responsibility for the Harbourfront and which wrote to the TPB asking that its recommendations be taken into account.

- (d) The numerous, repeated and personal commitments of the Administration, including that of the S for D⁴², that the Government would provide public access to the Site when '*not in military use*' '*most of the time*' and '*on normal days*' etc, as set out in the Re-Amended Form 86.

³⁶ [1/10/72].

³⁷ [1/22/333].

³⁸ [1/39/709].

³⁹ [1/18/162].

⁴⁰ [1/19/176]. This could only have been achieved by a provision in the Notes. The BS has no statutory force.

⁴¹ [1/19/177].

⁴² [1/23/373].

- (e) The weight of public opinion against the amendments as expressed by the unprecedented number of representations and comments sent to the TPB under sections 6 and 6A of the TPO, and by the LegCo members on 28th May 2013.
- (f) The alternative zoning possibilities open to the TPB and the availability of 'Government use' for berthing on application to the TPB, above.
120. The Vision Statement, the HC Task Force's views and recommendations, the HC's letter of 15th April 2013, the HPPs and the Open Space land use and development restrictions in the UDS, the Government's public commitments, the unprecedented response, and the LegCo views also do not appear in the minutes of the TPB's deliberations.
121. Although the TPB's reasons (l) and (j) mention the UDS, they directly contradict the substantive land use (zoning) prescribed for the Site in §8.8.3 and §8.8.4 of the UDS and the development restrictions in §10.1 and §10.2 without any reference to them (or to their stated formulation in accordance with the HPPs and the TPB's Vision Statement) and without any reasoned explanation as to how the TPB considered, weighed and dismissed the land use and development restriction in the UDS.
122. In the absence of clear and cogent reasoning showing how each of these relevant matters was taken into account, the Court will conclude that they were not taken into account, and quash the TPB Decision.

Ground 3(b): Mistake, misunderstanding or ignorance of a relevant fact

123. It is difficult to understand how the TPB can rationally conclude that if the Site is closed to the public, there remains a "*continuous east-west connection along the waterfront*", as it did in its reason (f) headed "*Connectivity of the Waterfront*".
124. The position was clearly before the TPB on plans H-4 and H-5 attached to the TPB Paper⁴³. It was set out in the representations and comments⁴⁴. The Court is invited to view the situation on the ground for itself.
125. When the Site is closed, the public must walk around the back of the Site, *behind* its buildings (and any fence or wall that may be erected, in the absence of development control) and 20m away from the waterfront for 150m of the 500m east-west stretch of Promenade between Pier 10 and Tamar Park. There would be a continuous east-west connection but not along the waterfront, just as there is now.

⁴³ [1/5/44] and [1/6/45].

⁴⁴ E.g. [1/32/551].

126. The break in this public connection to be permitted by the zoning at the Site was a critical and central factual cause for the public's opposition to the rezoning.
127. This factual error was first fed to the TPB by PlanD in §3.7 of its MPC Paper 3/13⁴⁵ and repeated in §2.8, §5.1.2 and §5.4.2(m) of Paper 9491⁴⁶.
128. The situation here is identical to that in *Smart Gain v CEIC*, unrep., HCAL 12/2006, 6.11.07, in which PlanD and the TPB repeatedly described the subject sites as "wooded slopes and river valley" when they were nothing of the kind, as the Court saw on a view of the locus in quo.
129. In those circumstances, the Court will quash the TPB Decision: see *Smart Gain* itself, *E v Secretary of State and Alconbury* [2001] UKHL 23, and *Judicial Review Handbook* by Michael Fordham QC (6th edn, Hart Publishing 2012) at §49.2.

Ground 3(c): 'Consistency' misapplied to inconsistent facts

130. This ground is also self-explanatory. The flaw in the TPB's reason (h) for zoning this Harbourfront site, intended to be used as a military dock and by the public as part of the continuous waterfront Promenade when not in military use⁴⁷, identically to that of the PLA Headquarters which is a walled and gated site some 200m away from the waterfront across a dual carriageway, and closed to the public by law⁴⁸, may be analysed in various ways.
131. Firstly, by relying upon the exclusive zoning of the PLA Headquarters for 'military use' and requiring itself to be consistent in its zoning of this Site, the TPB can only have failed to consider and take into account the individual physical characteristics and dual use of this site set out in the TPB's own ES, the UDS and the representations and comments before it.
132. Secondly, the TPB here adopted an over-rigid policy in zoning the two military sites identically: see *Judicial Review Handbook* by Michael Fordham QC (6th edn, Hart Publishing 2012) at §50.4.4, 50.4.5.
133. Thirdly, the TPB failed to take into account its own previous particular zoning of other sites accepted by the military in accordance with their 'Residential' and 'Service Area' uses⁴⁹.

⁴⁵ [1/29/428].

⁴⁶ [1/31/446, 457 and 460].

⁴⁷ ES §8.5(a) [1/4/38]; reasons (a), (b), (j) etc [1/39/707 et seq] as amended.

⁴⁸ See the Schedules to the Military Installations Closed Areas Order (Cap. 245B) and the Protected Places Order (Cap. 260A).

⁴⁹ [1/36/646].

134. The same error of law appears in the TPB's reliance upon 'standard practice' for the 'minor relaxation clause' in its reason (j), given the special location and circumstances of the Site. See also *R(S) v SSHD* [2007] EWCA Civ 546, *Ng Siu Tung v Director of Administration* (2002) 5 HKCFAR 1 and *Ghulam Rbani v Secretary for Justice* (2014) 17 HKCFAR 138, below.

Ground 4: Breach of Legitimate Expectation⁵⁰

135. In addition or alternatively to the TPB's failure to take into account:
- (a) Its own policy in its Vision Statement, in particular Goals 1, 2, 3 and 4 for the Harbour⁵¹;
 - (b) The land use and restrictions on development of the Site and management provisions in the UDS Final Report;
 - (c) The views and recommendations of the HC and its letter⁵²;
 - (d) The commitments of the Administration in 2007, 2009, 2010 and 2011 in section B6 of the Re-Amended Form 86, being 'clear and unequivocal' in respect of the future public access to the Harbourfront and to this Site in particular; and
 - (e) The weight of public opinion against the amendments, as expressed by the unprecedented number of representations and comments sent to the TPB under sections 6 and 6A of the TPO, and in the LegCo on 28th May 2013.

the public at large⁵³ had a legitimate expectation that the TPB would take into account each of those matters in the exercise of its statutory function, and that the TPB would abide by the land use set out in the UDS and the TPB would honour those commitments made by the Administration⁵⁴.

See *Ng Siu Tung v Director of Administration* (2002) 5 HKCFAR 1 at [92], [93], applying *R v London Borough of Newham ex p. Bibi* [2002] 1 WLR 237 at §39, §51 and §59; *R(S) v SSHD* [2007] EWCA Civ 546; *Ghulam Rbani v Secretary for Justice* (2014) 17 HKCFAR 138.

⁵⁰ See *Ng Siu Tung v Director of Administration* (2002) 5 HKCFAR 1, *Ghulam Rbani v Secretary for Justice* (2014) 17 HKCFAR 138 and *R(S) v SSHD* [2007] EWCA Civ 546; *De Smith's Judicial Review* by Lord Woolf and others (7th ed, Sweet & Maxwell 2013) at Chapter 12, and *Administrative Law* by Professor Paul Craig (7th ed, Sweet & Maxwell 2012) at §12-016.

⁵¹ [1/10/72 et seq].

⁵² [1/20/183].

⁵³ *Ng Siu Tung* at §109.

⁵⁴ So long as consistent with law, and subject to the freedom to change policy: see *Ng Siu Tung* at §93.

136. In addition to the commitments given and set out in section B6 of the Re-Amended Form 86, that expectation was reinforced during the period of the TPB's proceedings on the Amended Draft Plan. Specifically, the S for Dev reaffirmed and emphasised the Government's commitment to plan the Harbourfront 'with the people', and to give 'due consideration' to the views of the HC in regard to 'projects at the [Harbourfront]', and to adopt the guidance in the HPPs.⁵⁵
137. At no point has it been suggested that the 2000 Agreement, with or without the further conditions for 'operation' and 'protection' advised in early 2013 (even if the TPB had seen them for itself) would preclude the opening to the public for Open Space 'when not in military use' or that the agreement would make zoning to give effect to that expectation unlawful or impossible. If there was any suggestion that the Agreement with the PLA might have precluded zoning for 'public use', the TPB would have been so informed by PlanD.
138. The TPB is an administrative body within the Government's system of planning⁵⁶ headed by the Permanent Secretary: see the 'fact sheet' in Section B1 above. The TPB is chaired by the Permanent Secretary, on which sits the Director of Planning and which is staffed and supported by PlanD. As such, that fairness requires that the TPB honour the unequivocal public commitments made by the Secretary and the Permanent Secretary on behalf of the Government.
139. Even if it be held that the TPB is not a part of that system but a separate body, in all the circumstances fairness requires that such a body be so bound: see *R v (BAPIO Actions) Ltd v SSHD* [2008] 1 AC 1003 at §60; *R (O'Callaghan) v Charity Commission* [2007] EWHC 2491 (Admin), [2008] W.T.L.R. 117.
140. Those commitments continue to found an enforceable expectation—that is, unless or until circumstances have changed since the commitments were given, or if a substantive reason unknown to the Permanent Secretary emerges, which when disclosed and properly taken into account can justify an explained departure from the commitments. No such change of circumstances or reasoned explanation has been shown in this case.
141. As noted above, the TPB's reasons do not disclose that it considered and weighed⁵⁷ its 'Vision and Goals', the land use and development restrictions in the UDS, the HPPs, the views and recommendations of the HC and its Task Force, the Government's commitments or the weight of public opposition. In the absence of such reasons, the Court cannot conclude that it did so.

⁵⁵ [1/14/102, 103].

⁵⁶ *Kwan Kong v Town Planning Board* (unrep.) HCMP 1675 of 1994.

⁵⁷ As it was bound to do: *Administrative Law* by Professor Paul Craig (7th ed, Sweet & Maxwell 2012) at §22-622 a(ii), (iii).

142. The result of the TPB Decision is drastic, affecting as it does the public use and future lawful development of 150m by 20m section of the centre of Hong Kong's central Harbourfront.
143. To zone the entire site, including the continuous waterfront Promenade, for exclusive 'Military Use' by not amending the zoning to provide for the public use of that Promenade was therefore contrary to the legitimate expectations of the public in general. To do so was an abuse of power: see *R(S)* at §49, §50 and §70 and *Ng Siu Tung v Director of Administration* (2002) 5 HKCFAR 1 at pp41J-42F, applying *R v London Borough of Newham ex p. Bibi* [2002] 1 WLR 237.
144. *Prima facie* the TPB Decision should also be quashed for breach of legitimate expectation and remitted to the TPB as the decision-maker: see *R v London Borough of Newham ex p. Bibi* [2002] 1 WLR 237 and *Administrative Law* by Professor Paul Craig (7th ed, Sweet & Maxwell 2012) at §22-018, 019.

Ground 5: Reason (k): unrestricted site coverage, building mass and disposition

145. This ground is related to Grounds 2, 3(b), 3(c) and, by principle, to Ground 4 above.
146. The TPB explained the TPB Decision⁵⁸ not to amend the Amended Draft Plan so as to impose massing and disposition controls and not to restrict development to the existing 4 buildings so as to prevent any further building obstructing the public in the use of the continuous waterfront Promenade, as proposed by the Applicant and other objectors⁵⁹, thus:
- “(k) no additional development restrictions should be imposed for the “OU(MU)1” zone to allow flexibility in case there are unforeseen needs for defence purposes;”
147. “[I]n case there are unforeseen defence needs” was plainly related to its reason (e), headed “Law Enforcement and Operational Details”. There the TPB found that the CMD “will be under the management and use by the Garrison after the completion of works”⁶⁰, pursuant to its understanding of the Defence Land Agreement (“the DLA”) set out in its reason (a).
148. By not restricting development on the Site in the Amended Draft Plan other than as to BHR, the TPB was ceding to the future occupier all control of the future built form on and in the Site, including the portion of the continuous waterfront Promenade along the Harbour edge and thus all control over the future use and access

⁵⁸ Reason (k) [1/39/709].
⁵⁹ [1/31/453] and [1/32/552].
⁶⁰ [1/39/708].

to the Site, including the intended public use of the Promenade "when not in military use". For example, the erection of a wall around and just within the boundary of the Site, to the maximum permitted height, would need no planning permission but would permanently preclude the public use of that part of the continuous waterfront Promenade which has been designed to be integrated into the Site.

149. This part of the TPB Decision left to the future occupier the right to develop as it may itself decide, without the TPB's duty to follow the statutory aims and balancing the various considerations inherent in doing so. It assumed that in all cases so long as the development fell within some kind of 'Military Use', the occupier's own purpose⁶¹ would be sufficient to outweigh all other planning considerations for this central Harbourfront site, including those in the TPB's Vision Statement, the UDS and the HPPs.
150. Having decided to plan for the layout of this area and having previously done so by zoning it for public Open Space use and having then embarked upon the consideration of amendments to zone for its future use, the TPB could not then lawfully recuse or remove itself from that task in favour of a future occupier.
151. Ceding control of the future built form on the Site was an abdication of the TPB's own statutory duty under section 3(1) of the TPO to make plans "with a view to promoting the health, safety convenience and general welfare of the community" and so contrary to law: see *R(S)* above at §50, the principles and authorities cited in *Judicial Review Handbook* by Michael Fordham QC (6th edn, Hart Publishing 2012) at §50.1 and *Ng Yuen Shiu v A-G* [1983] 2 AC 629 at 637, applying *Reg v Liverpool Corporation, Ex parte Liverpool Taxi Fleet Operators' Association* [1972] 2 QB 299.
152. As such, the TPB Decision was unlawful and must be quashed.

Ground 6: The CEIC Decision being tainted

153. The CEIC's usual practice in respect of approving draft OZPs by the TPB is not to provide any reasons. The TPO does not specifically require the CEIC to give reasons for her approval of a draft OZP presented to it by the TPB. There is also no general duty for the CEIC to give reasons for her decisions. Whether the CEIC must give reasons in a particular case is based on the question of fairness. Fairness depends on the individual circumstances of a case. In some situations, the Court may find the decision to be aberrant as to call for the giving of reasons.

See *The Hong Kong Canadian International Hospital Foundation Ltd v Secretary for Justice*, unrep., HCAL 131/2006, 4.5.07 at §97, *Smart Gain v Chief Executive in*

⁶¹ For example, a marine waste collection tank for military vessels or a private Harbourfront bar for PLA Navy officers, with its ancillary toilet and storage facilities.

Council, unrep., HCAL 12/2006, 6.11.07 at §§121-122, and *Chan Ka Lam v CEIC and TPB*, unrep., HCAL 28/2015, 24.11.17.

154. Should the original decision made by the TPB be wrong, the Court must be satisfied with evidence that the same errors have in fact been corrected in or have not affected the CEIC's decision-making process in approving the TPB's decision. How and whether that can be shown must be dependent on the circumstances and the nature and types of the errors that tainted the draft plans in the first place.

See *Chan Ka Lam v CEIC and TPB*, unrep., HCAL 28/2015, 24.11.17, §178.

155. In the present case, the Applicant asks the Court to find in his favour in respect of Grounds 1 to 5, and that the TPB Decision was decided unlawfully, and thus the Amended Draft Plan was tainted with wrongs and errors when submitted to the CEIC.

156. As per the CEIC's usual practice, she did not provide any reasons for her decision to approve of the Amended Draft Plan (i.e. the CEIC Decision). It follows that there are only two possibilities:

- a. First, the CEIC was not alive to the errors made by the TPB (see Grounds 1 to 5), and, therefore, approved the Amended Draft Plan on the same basis as the TPB. In this case, the CEIC Decision must be similarly tainted with the errors as the TPB Decision and be disturbed.
- b. Secondly, and in the alternative, the CEIC was aware of the errors identified above (in whole or in part), but nevertheless for some reason decided to approve the Amended Draft Plan. This constitutes special circumstances requiring the CEIC to provide reasons for her decision to approve the Amended Draft Plan in spite of the TPB's errors. Unless the CEIC supplies reasons to explain her decision to approve, it must appear aberrant given the errors committed by the TPB which have tainted the Amended Draft Plan.

See *Smart Gain v Chief Executive in Council*, unrep., HCAL 12/2006, 6.11.07 and *Chan Ka Lam v CEIC and TPB*, unrep., HCAL 28/2015, 24.11.17.

157. Because of the above, the Court should hold that the CEIC Decision was tainted, and must be disturbed accordingly.

PART IV – STANDING

158. With reference to section 5B hereinabove, the Applicant has sufficient interest in the subject matter of this Application to satisfy the requirements of Order 53, rule 3(7) of the Rules of the High Court (Cap. 4A) ("the RHC").

159. It is crucial to the Court's understanding that the Applicant himself has no private or pecuniary interest in the matter. He only brings this Application in the public interest, namely the interest of the public in zoning which protects the public use, access and enjoyment of a continuous waterfront Promenade, which has been similarly and adversely affected by both the TPB Decision and the CEIC Decision.

PART V – COSTS

A Protective Costs Order

160. The Applicant seeks an order from the Court Order 62 rule 3 (2A) and Order 53 rule 3(9) of the RHC protecting him from liability for all costs of the Putative Respondents (i.e. prior to leave, if need be and up to and including a substantive hearing and advice on appeal) or an order limiting the costs that may be awarded to the Putative Respondents to HK\$10,000 and limiting the costs that may be awarded to the Applicant to the reasonable costs of a solicitor and junior counsel or such sum as the Court may think just.

161. If granted leave, the Applicant intends to seek costs orders incorporating the above restriction as reflecting the public interest in the resolution of the questions raised in these proceedings.

Principles of Protective Costs Orders

162. The Court's broad discretion includes the jurisdiction to make an order at the outset of the proceedings which provides that the party applying for the Order shall, regardless of the outcome of the proceedings, either not be liable at all for the other party's costs or to be liable only for a set sum or fixed proportion thereof but if successful may be entitled to recover all or part of his costs from the other party. This is known as the protective costs order ("the PCO").

163. In *Designing Hong Kong Ltd v TPB, Secretary for Justice* (2018) 21 HKCFAR 237, the Court of Final Appeal approved of *R (Corner House Research) v Secretary of State for Trade and Industry* [2005] 1 WLR 2600 by Lord Phillips MR (as he then was). The *Corner House* principles regarding the granting of PCOs were:

- a. The issues raised are of general public importance;
- b. The public interest requires that those issues should be resolved;
- c. The applicant has no private interest in the outcome of the case;

- d. Having regard to the financial resources of the applicant and the respondent and to the amount of costs that are likely to be involved, it is fair and just to make the order; and
 - e. If the order is not made the applicant will probably discontinue the proceedings and will be acting reasonably in so doing.
164. Lord Phillips added that if those acting for the applicant are doing *so pro bono*, this would be likely to enhance the merits of the application. In light of these considerations, the court will decide whether it is fair and just to make the order.
165. Furthermore, the Court of Final Appeal was of the view that there were three underlying aspects that ought to be firmly borne in mind when considering the grant of PCOs:
- a. Exceptionality: a PCO is made at an early stage of the proceedings and having the effect of denying the costs of a potentially successful party even at this early stage.
 - b. Rationale: to ensure that proceedings of great public importance are not stifled through a lack of financial means.
 - c. Overall fairness and justice: whenever flexibility is urged upon the courts in the exercise of discretion, this concept lies at the heart of it.
166. The Applicant will expand upon the law at the hearing for a PCO. In hearings regarding the PCO, and on any application for its continuation or variation, the Applicant may rely upon updated evidence of his means and costs to be put before the Court.

The Circumstances of this Case

167. This Application is a public interest litigation.
168. The protection and preservation of the waterfront of the Harbour, a special public asset of the people of Hong Kong, is in and of itself a matter of great and general public importance. See section 3 of the PHO, the decision of the Court of Final Appeal in the *TPB v Society for the Protection of the Harbour Ltd* case (2004) 7 HKCFAR 1 ("*the Harbour*) is and has throughout the history of Hong Kong been a central part of its identity"), the Chief Secretary's Circular, the terms of the TPB's 'Vision Statement', the HC's terms of reference, Government's repeated statements to that effect in and out of LegCo et al.

169. The unprecedented number and weight of public representations and comments opposing the Decision are a testament to the high degree of interest taken by the public in this matter.
170. In the HCAJ 49/2014 proceedings, the Court of First Instance and the Court of Final Appeal recognised that the judicial review concerning the Amended Draft Plan were of general public importance and concern, and that it was in the public interest to have the issues raised and resolved in Court.
171. Furthermore, at §54 of the Court of First Instance judgment, it was accepted that, *inter alia*, the resolution of the live issues would help further clarify the scope and duty of the TPB generally in making planning decisions.
172. The Applicant himself has no private interest in the outcome of these proceedings. His sole purpose for bringing this Application is to do his part in protecting the public interest in the lawful public use, access and enjoyment of the continuous waterfront Promenade.
173. Regrettably, the Applicant has a meagre salary of HK\$13,000 per month and very limited funds. He does not have and will not be able to raise the funds necessary to bring or risk losing in this litigation. If an order is not made limiting his exposure to costs, the Application will be stifled and unable to continue these proceedings at all.
174. Given the sheer costs of the proceedings, the Applicant would not be unreasonable in electing to discontinue proceedings if an order is not made.
175. By contrast, the Putative Respondents (being the CEIC, the TPB and Director of Lands) are all part of the Government with effectively unlimited financial resources. Whether or not a protective costs order is made, there is little doubt that the Government will be able to fight and fund a defence of the TPB Decision and the CEIC Decision.
176. The Applicant's solicitors and counsel, *ab initio*, have agreed to act *pro bono* in this case pending the Applicant's application for Legal Aid in view of the public importance of the issues raised. If a PCO is not granted, the Applicant has agreed to allow them to reconsider their position and to withdraw if they wish.
177. Further, should a PCO not be obtained, the Applicant reserves his rights to seek an order for his costs and disbursements on an indemnity basis under Order 62 rule 28(3) of the RHC on the grounds that this is a public interest litigation: see *TPB v Society for the Protection of the Harbour (No.2)* (2004) 7 HKCFAR 114.
178. In the circumstances, the Court is asked to make a PCO in favour of the Applicant immediately after the grant of leave.

PART VI – AMENABILITY TO REVIEW

179. The TPB Decision and the CEIC Decision are amenable to judicial review because they are the decisions of public bodies exercising statutory functions.

PART VII – TIMING OF APPLICATION

180. To reiterate what has already been set out, the TPB Decision has been superseded by the CEIC Decision, and the HCAL 49/2014 proceedings rendered nugatory.
181. This Application has been made promptly and in any event within 3 months from the date of the CEIC Decision and/or from the date on which the CEIC Decision was made known to Daly & Associates.

PART VIII – APPLICATION FOR INTERIM RELIEF

182. The Applicant seeks interim relief in aid of the pending substantive application for judicial review.
183. The application is for an injunction order to restrain 1) the CEIC, 2) the Director of Lands, 3) The Secretary for Security, and their agents, from transferring or otherwise disposing of the Site and/or take any step or steps to cause and/or result in the said transfer and/or disposal of the Site to the Garrison or any third party on behalf of the Garrison, pending the determination of these proceedings or until further order.

The law

184. The application is made pursuant to jurisdiction conferred by section 21K of the High Court Ordinance (Cap 4) and Order 53 rule 3(10) of the RHC.
185. Order 53 rule 3(10) engages where leave is granted. This court however has jurisdiction to grant the injunction sought *before* the question of leave has been determined, e.g. should it be adjourned for argument: see *M v Home Office* [1994] 1 AC 377 (HL) per Lord Woolf at 422A–B, *MAR v Director of Immigration* [2014] 2 HKLRD 99 at §1, and *Hong Kong Civil Procedure* 2019 at §53/14/46.
186. The principles governing whether such an injunction should issue were recently summarised in *Re Hong Kong Journalists Association* [2017] 2 HKLRD 756 (CFI), by G Lam J at §16. The court will ask:
- (1) “whether there are serious issues to be tried in the application for judicial review”;

- (2) "whether damages would be an adequate remedy for either party (though, in a public law case of this kind, the adequacy of damages as an alternative remedy is of less relevance)"; and
- (3) "whether the balance of convenience lies in favour of granting or refusing interim relief. In this last stage, in the public law context, it is important to have regard to the wider perspective of public interest."

187. The leading local authority on public law injunctions in the context of planning is *Society for Protection of the Harbour Ltd v CEIC and Others* [2003] 3 HKLRD 960 (Hartmann J, as he then was), §§8 and 11, from which additional aspects of the jurisdiction at public law can be taken:

- (1) public law injunctions preserve the *status quo ante*, and ensure that the benefit of a successful application for JR is not denied;
- (2) the Administrative Court in England and Wales "routinely" grants such stays, including where administrative decisions have partially (but not fully) taken effect;
- (3) a "good example" of such a case in the planning context, where permission is contested and development stayed; and
- (4) the fact that the adequacy of damages is less relevant in public law cases also means that the court will be less concerned should the applicant not be able to offer the cross-undertaking (still less fortification) in damages to the respondent, that is sometimes sought in private law matters.

188. A serious issue to be tried is *less* than a good arguable case. It is merely a claim not liable to be struck out: see *Hong Kong Civil Procedure 2019* at §11/1/8C, *Dong Shin F&T Co Ltd v Hanec Co Ltd* [2010] 5 HKLRD 261 (CFI) at [42] (Fok J, as he then was) and *Heitamp & Thumann KG v Living Profit Trading Develop Ltd and Others* [2019] HKCA 119 at [29].

189. By contrast leave to apply for judicial review may be granted where the application discloses a reasonably arguable case: *Peter Po Fun Chan v Winnie CW Cheung & Another* (2007) 10 HKCFAR 676 at §15. Thus if leave to apply for judicial review is granted it follows that there is a serious issue to be tried.

The application

190. Whether or not leave is granted at the hearing of this application, the Applicant submits that the 6 grounds enumerated above stand good prospects of

success. They are based on orthodox and settled principles of administrative law, and draw largely from the uncontroversial documentation.

191. In the HCAL 49/2014 proceedings, the Court of First Instance granted leave after argument on grounds that were the same as those now put forward by the Applicant at Grounds 1 to 5 herein: [2015] 3 HKC 525 (CFI) at §5.
192. Although the adequacy of damages is less important in public law cases, they *are* inadequate in the present case.
193. At the heart of the application is the balance of convenience. When considering this issue and the injustice that will occur, the Court should take into account the following:
 - a. It is all but inevitable that the Government and its agents will hand over the Site to the Garrison prior to the determination of this intended Application without the interim injunction. This is the only inference to be drawn from the Government's statements in March 2019 (set out at section B5 above) that it has the "*duty to hand over the [CMD] to the Garrison as soon as possible in order to fulfil the statutory responsibility as set out in the Garrison law concerning the support to be provided to the Garrison for its performance of defence functions*", and "*plans to submit the legislative amendment proposals to the [LegCo] within [2019] and hand over the [CMD] to the Garrison formally upon completion of the legislative work*".
 - b. Should the handover of the CMD—and by extension, the Site—to the Garrison be done before the conclusion of the judicial review, the Application will be frustrated. Relief will be unavailable should the Court ultimately find in the Applicant's favour.
 - c. Once the handover of the CMD—and by extension, the Site—to the Garrison is complete, it remains unclear what the consequences are, and whether the handover is reversible should the Application for the judicial review ultimately succeed.
 - d. High stakes are involved in the handover of the Site and the CMD, given, *inter alia*, the implications regarding the inability of the Government to control development or any new structures on the waterfront if the Site is zoned (or "*designated*") for military use, and the application of the Garrison law. According to the Garrison law, no person other than members of the Garrison shall enter military restricted zones without the permission of the Commander of the Garrison or other officers as he may authorize to give such permission; and guards of the military restricted zones shall have the right to stop

according to law any unauthorized entry into any military restricted zone or any act which damages or endangers any military facilities.

194. The above injustices weigh heavily in favour of granting the interim injunction.

195. On one hand, the Applicant's need for this interim injunction is urgent. It is evident that the Government seeks to proceed very quickly, and thus the timeline is incredibly short. The Government intends to hand over the CMD—by extension, the Site—to the Garrison *"as soon as possible"*, i.e. by submitting the legislative amendment proposals within this legislative year and to complete the handover once the amendments have been made.

196. On the other hand, there is no urgency for the Government to hand over the Site to the Garrison:

- a. The HCAL 49/2014 proceedings began on 7th May 2014, upon DHK's filing of the Form 86.⁶² Since then and throughout the HCAL 49/2014 proceedings, there has been no suggestion that there is an urgent need nor request for the use of the continuous Harbourfront Promenade by the PLA as a berth or a dock for military purposes.
- b. LC Paper No. CB(2)1100/18-19(03) mentions that the handover of the CMD to the Garrison enables *"support to be provided to the Garrison for its performance of defence duties"*. This is not only vague, but merely goes to the general purpose of the CMD. This fails to demonstrate any urgent need nor request for the continuous Harbourfront Promenade by the PLA.
- c. The PLA Berth⁶³ and the four single-storey structures for the dock's support and operation facilities stand today as they did when they were completed at the start of 2013.
- d. The fact remains that the Government cannot now claim prejudice, inconvenience or urgent need when none have been evident thus far—from 2014 until now.
- e. Any claim by the Government that there is an urgent need for the Site or the CMD to be handed over to the Garrison *"as soon as possible"* or else it would suffer prejudice would be problematic. It would be made to circumvent the

⁶²
⁶³

I.e. the first Form 86, *not* the Re-Amended Form 86.

To accommodate the requirements of Annex III of the DLA, the 1998 OZP and all draft OZPs covering the Central District (Extension) prior to the plan at issue have also included a 150m-long line on the seaward side of the sea wall on the planned waterfront to the immediate north of the PLA Headquarters marked "150m military berth (subject to detailed design)". That planned line has consistently been described in the Explanatory Statement of both draft and approved plans as being "reserved for military use" as a berth ("the PLA Berth").

unlawful nature of the TPB Decision and the CEIC Decision. This should not be sanctioned by the Court.

197. Furthermore, it is in the interests of good administration that a decision which is alleged to be unlawful be properly considered by the Court. This is especially so where the subject of the Application is the Harbourfront, which is not only a special public asset of Hong Kong, but is also intrinsically linked to the identity of Hong Kong. A determination of the merits of the Application either way will be an assertion of the rule of law.
198. To await a hearing of this application at this stage will add little to the overall timing of the matter. The Hong Kong community will not be prejudiced by this relatively short delay in light of what is at stake and the importance of the case.
199. The injunction sought will not have the effect of effectively determining the substantive proceedings in question. This is an application for judicial review of the lawfulness of decisions that can be taken again. The Applicant's case, at its highest, is that the TPB Decision was unlawful on various public law grounds and that the CEIC Decision is thus infected with such errors. Declarations and quashing orders are sought.
200. In all the circumstances, it is submitted that the balance of convenience, taking into account the wider public interest, requires that the status quo be preserved pending the outcome of this Application for judicial review and that the interim injunction must be granted.
- PART IX – CONCLUSION**
201. The Applicant has been advised of his duty of full and frank disclosure. In this Application, he does make full and frank disclosure.
202. To reiterate what was set out on page 6 herein, the sheer amount of documents and public statements made concerning the reclamation in the Harbour and the planning of the Harbourfront land, it is impossible to include all of the relevant documents as exhibits to the affirmation in support. Thus, the documents exhibited herein are necessarily a selection, and the Applicant has included, by reference to exhibits to his affirmation and the bundle of documents exhibited to Mr. Zimmerman's Affirmation, those that he understands to be the most relevant to the live issues.
203. The Applicant submits that his application for leave to apply for judicial review should be granted.
204. Respectfully submitted.

Dated this 10th day of April 2019.

Nigel Kat, SC
Cordelia Yeung
Counsels for the Applicant

Daly & Associates
Solicitors for the Applicant

HCAL 979 /2019

IN THE HIGH COURT OF THE
 HONG KONG SPECIAL ADMINISTRATIVE REGION
 COURT OF FIRST INSTANCE
 CONSTITUTIONAL AND ADMINISTRATIVE LAW LIST
 NO. 979 OF 2019

BETWEEN

LESTER SHUM

Applicant

and

CHIEF EXECUTIVE IN COUNCIL

1st Putative Respondent

TOWN PLANNING BOARD

2nd Putative Respondent

DIRECTOR OF LANDS

3rd Putative Respondent

SECRETARY FOR SECURITY

4th Putative Respondent

NOTICE OF APPLICATION FOR LEAVE TO APPLY FOR
 JUDICIAL REVIEW (O.53 R.3 (2))

Dated this 10th day of April 2019
 Filed on the 10th day of April 2019 at 2-30

Daly & Associates
 Solicitors for the Applicant
 3rd Floor, Yam Tze Commercial Building,
 23 Thomson Road, Wanchai, Hong Kong
 Tel.: 2781-2998
 Fax: 2783-8072