

HONG KONG / JUDGMENT

CAPITAL RICH DEVELOPMENT LTD AND ANOTHER v. TOWN PLANNING BOARD

COURT

Court of Appeal

DECIDED

18 January 2007

CASE / FILE NUMBER

CACV386/2005

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bjbj CACV 386/2005 IN THE HIGH COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION COURT OF APPEAL CIVIL APPEAL NO. 386 OF 2005 (ON APPEAL FROM HCAL 51 OF 2004) BETWEEN CAPITAL RICH DEVELOPMENT LIMITED 1st Applicant WELL UNICORN DEVELOPMENT LIMITED 2nd Applicant and TOWN PLANNING BOARD Respondent and URBAN RENEWAL AUTHORITY Interested Party Before : Hon Stock JA, Cheung JA and Chung J in Court Dates of Hearing : 15 to 17 November 2006 Date of Judgment : 18 January 2007 J U D G M E N T Hon Cheung JA : The area AUTONUMOUT The area surrounding Staunton Street, Wing Lee Street and Aberdeen Street (the area) is located in an older part of Hong Kong. In the earlier years of Hong Kong this was one of the most prestigious residential areas, dominated by the mansions of rich merchants. Later on it became an important middle-class residential district populated by Chinese businessmen and Portuguese middle-class residents. AUTONUMOUT It is also located in a historical area. It is near the Tai Ping Shan area where the bubonic plague in Hong Kong occurred in 1894 which resulted in massive death and hospitalization of the population. It was in this area that Dr. Sun Yat-sen the founder of modern China spent some early years of his life. He was baptized at the American Congressional Mission Preaching House (Kung Lei Tong ed in the 1950 s and 1960 s by tenement buildings ranging between single to six storeys high. By the 21st century the former glory of the area has faded. The buildings are now in a deteriorated state. Many have illegal extensions and roof-top structures. The area lacks community facilities and public open space. It is in poor hygienic condition. Apart from some ground floor shops the area is residential in nature. Pedestrian access to most of the residential buildings is difficult and dangerous because the back lanes are narrow and not well lit at night and are enclosed by buildings. The Development Scheme AUTONUMOUT On 21 March 2003 the Urban Renewal Authority published in the gazette that it would implement a Development Scheme of the area prepared under section 25 of the Urban Renewal Authority Ordinance (URAO). Two podium blocks will be built upon which high rise residential buildings will be erected. One of the existing lanes will be eliminated and becomes part of the site. There will be areas of open space and a Dr. Sun Yat-sen Memorial Garden will be built. AUTONUMOUT The history of the Development Scheme, which was also known as H19 project, began in 1997 when on 30 December 1997 the

then Secretary for Planning, Environment and Lands gave approval to the now defunct Land Development Corporation () to prepare the Development Scheme. AUTONUMOUT In January 1998, the LDC announced its intention to pursue the Development Scheme. This, however, was not done before its eventual dissolution. It was one of the 25 uncompleted LDC projects. AUTONUMOUT In November 2001, the Government announced that priority would be given to the implementation of the 25 projects. In March 2003, the Financial Secretary approved the implementation of the Development Scheme. The development would be by way of a Comprehensive Development Area () zoning which covered a total area of about 4,400

- m. It is bound by Staunton Street, Wing Lee Street and Aberdeen Street. A number of internal streets are found inside the boundary including Shing Wong Street, Wa In Fong West, Wa In Fong East and Chung Wo Lane. AUTONUMOUT On the same day of the publication in the gazette a draft plan for the Development Scheme () was submitted by the URA to the Town Planning Board () for consideration pursuant to section 25(5) of the URAO. The TPB was required to consider the plan because the area was previously covered by the Sai Ying Pun and Sheung Wan Outline Zoning Plan () (Plan No. S/H3/18). The area was previously zoned R(A), R(C) and GIC in the OZP. AUTONUMOUT On 11 July 2003 TPB deemed the draft DSP as being suitable for publication under section 25(6)(a) of URAO. This plan in accordance with section 25(7) of the URAO was deemed to be a draft plan prepared by TPB and the provisions of the Town Planning Ordinance () are applicable in relation to the plan. In accordance with section 5 of TPO the plan was exhibited from 11 July 2003 for public inspection for a period of two months. AUTONUMOUT By virtue of section 25(9) of the URA the DSP has from that date replaced or amended the draft OZP in respect of the area affected. AUTONUMOUT Representations and objections to the DSP were received. The applicants AUTONUMOUT Among the objections was the one lodged by the two applicants in this appeal. The applicants are companies under the Henderson Development Limited group of companies. Since 1997 they became the owners of Nos. 70-72 Staunton Street, Nos. 9-12 Wa In Fong East and Nos. 5, 7, 9-21 Chung Wo Lane. They have also entered into an agreement in principle with the owner of No. 3 Chung Wo Lane to jointly develop the site they own. The applicants acquired No. 7 Chung Wo Lane after the commencements of the present set of proceedings in the Court of First Instance. On 4 January 2002 TPB granted planning permission to the applicants to redevelop their site into a tower block of 27 storeys. Building plans conforming to the planning permission had been approved by the Building Authority. AUTONUMOUT The applicants wished to have their site to be excluded from the CDA designation. The hearings before TPB AUTONUMOUT The TPB first conducted a preliminary enquiry to the objection. It refused to amend the DSP. It then convened two meetings on 6 February 2004 and 19 March 2004 respectively to hear objections. After hearing the objections, it chose not to amend the DSP. The challenge AUTONUMOUT The applicants challenged the decision by way of judicial review before Chu J. She dismissed the application. The appeal AUTONUMOUT The applicants now appeal to this Court. Urban Renewal Authority AUTONUMOUT The URA is a statutory body created by the URAO. Its function is to improve the standard of housing and the built environment of Hong Kong and the lay-out of built-up

areas by replacing old and dilapidated areas with new development which is properly planned and, where appropriate, provided with adequate transport and other infrastructure and community facilities section 5(b) of the URAO. URA replaced the function of the LDC. Urban Renewal Strategy AUTONUMOUT Under section 20 of URAO the Secretary for Housing, Planning and Lands (the Secretary) is required to prepare an Urban Renewal Strategy (the Strategy) for the purpose of carrying out urban renewal. Clause 3 of the Strategy prepared by the Secretary provides that a people centred approach should be used to carry out urban renewal. The purpose is to improve the quality of life for residents in the urban area. The government has to balance the interests and needs of all sectors of the community without sacrificing the lawful rights of any particular group. The aim is to reduce the number of inadequately housed people. AUTONUMOUT Clause 22 of the Strategy states that in order to expertise the urban renewal programme the URA may implement a project by way of development project or a development scheme. Public can lodge objections to a development project under the Urban Renewal Authority Ordinance or a development scheme under the Town Planning Ordinance. AUTONUMOUT Paragraph 35 further provides that the objective is to encourage private sector participation and a self-financing urban renewal programme in the long run. AUTONUMOUT The URA can implement urban renewal by way of a development project or a development scheme . Without going into the technical details, a development project does not need to be considered by the TPB whereas a development scheme has to be approved by it because this either involves an amendment to an existing lay-out plan or where such a plan provides for the grant of permission for any purpose. An application for the grant of such permission is required to be made to the TPB. Town Planning Ordinance AUTONUMOUT The long title of the Town Planning Ordinance (), Cap. 131 is To promote the health, safety, convenience and general welfare of the community by making provision for the systematic preparation and approval of plans for the lay-out of areas of Hong Kong as well as for the types of building suitable for erection therein and for the preparation and approval of plans for areas within which permission is required for development. AUTONUMOUT Section 3(1) provides that with a view to the promotion of the health, safety, convenience and general welfare of community, the TPB shall undertake the systematic preparation of, among other things, draft plans for the lay-out of such areas of Hong Kong as the Chief Executive may direct. These plans may make provisions for zones or districts set apart for use for residential, commercial, industrial or other specified uses and comprehensive development areas (sections 4(1)(b) and (f)). AUTONUMOUT Section 5 provides that a draft plan which the TPB deems suitable for publication shall be exhibited by it for public inspection for a period of two months. Any person affected by the plan shall within that period submit an objection to anything appearing in the draft plan (section 6(1)). AUTONUMOUT Upon receipt of the written statement of objection, the TPB may give preliminary consideration to the objection. In the absence of the objector it may propose amendment to the draft plan to meet the objection (section 6(3)). When the TPB does not propose an amendment it shall consider the written statement of objection at a meeting of which the objector is given reasonable notice and the objector or his authorized representative may attend such meeting and if he desires

shall be heard (section 6(6)). Upon consideration of the objection the TPB may reject the objection in whole or in part or may make amendments to the draft plan to meet such objection (section 6(9)). AUTONUMOUT After consideration of all objections the TPB shall submit the draft plan with or without amendments to the Chief Executive in Council for approval. The Chief Executive in Council may approve, refuse to approve or refer the plans submitted by the TPB for further consideration and amendment. On such approval being given the approved plan shall be printed and exhibited for public inspection (section 9). Comprehensive Development Area AUTONUMOUT The TPB Guidelines for designation of comprehensive development area () zones and monitoring the progress of CDA developments provides in the introduction section the following 1.1 The Comprehensive Development Area) zoning (or the previous Other Specified Uses annotated Comprehensive Development/Redevelopment Area zoning) was first introduced in Outline Zoning Plans (OZPs) in 1976 with the key objective to facilitate urban restructuring and to phase out incompatible development and non-conforming uses. The Town Planning Board (the Board) is empowered to designate an area as under section 4(1)(f) of the Town Planning Ordinance (the Ordinance). 1.2 In general, CDAs are designated in the interest of the wider public although individual property owner s right would be taken into consideration. They are designated after careful consideration of such factors as the planning intention for the area, land status, ownership and other development constraints, including the likely prospect for implementation. They will only be designated where there are no better alternative zoning mechanisms to achieve the desired planning objectives specified in Section 3.1 below. 1.3 To avoid planning blight caused by the withholding of piecemeal individual developments within a zone, the Board recognizes that there is a need for close monitoring of the progress of development. A proactive approach is taken to facilitate development and to keep track on the progress of implementation of sites. AUTONUMOUT Clause 3 provides, among other things, 3.1 CDAs are intended to achieve such objectives as to: facilitate urban renewal and restructuring of land uses in the old urban areas; provide incentives for the restructuring of obsolete areas, including old industrial areas, and the phasing out of non-conforming uses, such as open storage and container back-up uses in the rural areas; The decision and reasons of TPB AUTONUMOUT By a letter dated 2 April 2004 the TPB informed the applicants that After giving full consideration to your submission and to your written statement of objection, the TPB decided not to propose any amendment to the above Plan to meet your objection and the reasons are : the Urban Renewal Strategy recommends that the Urban Renewal Authority may redevelop a project through joint venture partnership. Your right on the objection site would not be deprived; and the objection site is at a key location and accounted for a substantial portion of the Comprehensive Development Area) zone. Excision of it from the zone would frustrate the planning intention of the zone, jeopardise the whole development scheme and impose serious constraints on the comprehensive redevelopment of the rest of the Development Scheme Area. Preference of financial interest of the URA AUTONUMOUT Mr. Yu S.C. who appeared together with Mr. Ismail as counsel for the applicants relied on the preference of the financial interest of the URA by the TPB as his main plank of the appeal. AUTONUMOUT In support of his argument Mr. Yu relied on TPB

Paper No. 6963 prepared by the Planning Department for the consideration by TPB. It stated that 4.5 As to financial implications, the URA has advised that it is not a developer and financial viability is not a determining factor for whether the URA should proceed with an individual project or not. Nevertheless, Financial Secretary's approval would be required for URA to proceed with financially not viable projects. For the URA's 20 years urban renewal programme to be financially viable, cross subsidization among projects is necessary. The URA considers that splitting up the subject DSP will greatly reduce the available GFA which could erode the revenue of the notional scheme by some 33-60% and will have a general impact on the overall financial balance of the Corporate Plan. URA opined that given the mandate to manage its finance prudently, it may have to seriously consider whether to continue pursuing the scheme. AUTONUMOUT Mr. Yu submitted that when the TPB gave its reasons that the excision of the applicants site from CDP zone would frustrate the planning intention of the CDA zone, jeopardise the whole development scheme and impose serious constraint on the comprehensive redevelopment of the rest of the development scheme area, the basis for so doing is on the financial viability of the development scheme. This is because stripped of the consideration of financial viability, there really is nothing to suggest that the Development Scheme would be put into jeopardy in terms of physical development or urban renewal. He further submitted that in any event there was insufficient evidence to suggest that the Development Scheme would be put into jeopardy because of the financial considerations. This financial consideration point is tied up with the *Wednesbury* unreasonableness of the decision which was also relied upon by Mr. Yu. Five issues AUTONUMOUT I am only stating the obvious that in making a decision, the decision maker should not prefer the financial interest of one party against the other because such a purported exercise of power is invalidated by reason of an inadmissible purpose : see *Arthur Yates and Company Proprietary Limited v. The Vegetable Seeds Committee and Others* [1945] 72 CLR 37 at page 84 per Dixon J of the High Court of Australia and *Wade and Forsyth*, *Administrative Law*, 9th Edn. pages 395-396 and *de Smith, Woolf and Jowell*, *Judicial Review of Administrative Actions* 5th Edn., para. 6-084. AUTONUMOUT The argument of Mr. Yu needs to be considered under the following five issues : Did the TPB consider the financial viability of the Development Scheme as a basis of its decision? Was it proper for the TPB to take that matter into account? On the facts of this case was there a proper basis for the TPB to take this matter into account? Was that the only consideration relied upon by TPB when it held the Development Scheme would be put in jeopardy? The effect on the decision. The judgment AUTONUMOUT The starting point in the enquiry is paragraphs 87 to 89 of the judgment which states that

87. Under this ground (i.e. *Wednesbury* unreasonableness), the applicants also criticize the Board (i.e. TPB) for preferring the financial interests of the URA to that of the applicants. What gives rise to this is the assessment of the financial implications of the excision of the Objection site on the URA given in paragraph 4.5 of TPB paper 6963. The paragraph points out that the available gross floor area would be reduced by the splitting up of the DSP, and this would erode the revenue of the notional scheme by 33% to 60%. This would in turn

affect the overall financial balance of the URA Corporate Plan, which had been approved by the Financial Secretary. Given its mandate to manage its finance prudently, the URA would have to seriously consider whether to continue pursuing the development scheme. The applicants contend that this is wholly irrelevant and cannot form a basis for the Board's reasons and decision. It is even said that it demonstrates that the inclusion of the Objection Site is to provide more revenue for the URA for other projects. I am unable to accept this submission.

89. Under section 10(4) of the URAO, the URA is obliged to exercise due care and diligence over its finances. There is thus a real risk of the URA deciding not to proceed with the subject development scheme if it is financially not viable or because it may have a serious implication on its overall financial position. If this should happen, public interest will be affected in that there will not be urban renewal either in the scheme area or other areas. Alternatively, if the URA has to apply to the Financial Secretary for approval as a result of the financial consequences brought about by the excision of the Objection Site, this will cause delay to the urban renewal programmes. The public interest will likewise be affected. Given that it is the duty of the Board to promote the health, safety, convenience and general welfare of the community, it cannot be said that the financial implications of the excision of the Objection Site are wholly irrelevant. The fact that the Board considered these matters is also not a ground for saying that the Board had preferred the financial interests of the URA and ignored those of the applicants. TPB's position *AUTONOMOUT* Before the judge the written submission of Mr. Griffiths S.C. and Mr. Cooney, counsel for the TPB, was that The private finances of a developer are generally not relevant but the economic viability of a project may be relevant because the viability of a particular project may have planning consequences. It would have been wrong for the Board to take into account the financial interests of the Applicants alone. There needed to be associated planning consequences. None were ever presented by the Applicants to the Board. On the other hand, when considering the Authority's representation in respect of its finances (para. 4.3 of TPB Paper No. 6963) the Board considered them in the context of planning consequences, i.e., the Authority may have seriously to consider whether to continue with the scheme. [TPB Paper No. 6963 para. 8.1(f); C29/429] It is to be noted that this is but one of the reasons considered by the Board. There were others, see: TPB Paper No. 6963 section 8 [C29/428-429]. Even if it were to be held that the Board was wrong on this point, there were other reasons not to amend the plan. *AUTONOMOUT* The same point was made in their written submission for this appeal. Their submission further stated that The Board took the view, as it was entitled to do, that this would jeopardize the whole development scheme. [Decision letter C37/514] This was a concern in respect of planning and the interests of the community. The Board did not exercise its power for an anti-competitive and discriminatory purpose. *AUTONOMOUT* In the course of the submission to this Court, Mr. Griffiths, however, stated that the TPB did not take financial implications on the URA into account. This is further elaborated by Mr. Cooney who submitted that their instruction from TPB was that TPB had considered financial implications but it was not a reason relied upon by TPB in coming to the view that

the Development Scheme would be put into jeopardy. He further submitted that there ought to be an amendment to their written submission. Instead of this is but one of the reasons considered by the board it should be read as this is but one of the issues considered by the board. Change of stance AUTONUMOUT Mr. Yu objected to the change of stance. He referred to the well-established principle that a party to the appeal is not entitled to raise upon the appeal a new case inconsistent with that which he originally raised in the primary court, even though the evidence taken in that court supports the new case : see Ex p. Reddish, In Re Walton (1877) 5 Ch D 882, Snow v. Snow [1971] 3 All ER 833 and Bryanston Finance Limited v. De Vries (No. 2) [1976] 1 Ch 63. Matter to be looked at objectively AUTONUMOUT In my view, the matter must be looked at objectively. It is clear from a reading of the judgment and the submissions of the TPB before it changed its stand that it had considered financial implications although in the context of planning consequences. In my view, in considering this question one is not concerned so much with the use of words such as consideration or

reasons

but rather on what basis did TPB came to the view that the Development Scheme would be put in jeopardy. TPB certainly did not state before the judge that it had never relied upon financial implications as the basis of its decision. If that was the position one would not expect TPB to submit through counsel that the economical viability of the project was a relevant consideration because of its planning consequences. Sequence of events AUTONUMOUT This stand is clearly in accordance with the sequence of events that had taken place before the TPB. The issue to be considered before it on 19 March 2004 was on the viability of the URA project if the DSP area was split into smaller CDA sites. This was raised because in the earlier meeting of 6 February 2004 it required further information on this aspect. TPB Paper No. 6963 was prepared for this purpose. After providing a summary of the notional URA Development Scheme and a revised proposal of separate development sites in terms of site area, domestic gross floor area, non-domestic gross floor area, number of storey of the building, number of blocks, ancillary facilities, public open space and other facilities, the Planning Secretary expressed his view on the financial viability of splitting the scheme area into smaller sites at paragraph 4.5 which is set out earlier in the judgment. In paragraph 8, under the heading of Planning Department's view, it is stated that Taking into account the above assessments the Planning Department maintains its previous views that the subject DSP should not be amended to meet the objections for the following reasons. It then gave the reasons under the following headings : planning intention; need for comprehensive development; planning gain; timing of implementation; precedent cases; financial viability. AUTONUMOUT Details of these reasons were provided which included a summary of the matters stated in the earlier paragraph 4.5. AUTONUMOUT At paragraph 8.2 it is stated that Based on the above, it is considered that excision of the objection sites from the zone or splitting the DSP into several smaller CDAs will frustrate the planning intention, jeopardise integrity of the DSP, cause implementation problem of the DSP and lead to piecemeal redevelopment in the area. It is therefore important to maintain the development scheme

boundaries and not to uphold all the objections to the subject DSP. Submission of Mr. W. K. Hui AUTONUMOUT According to the minutes of the meeting on 19 March 2004 Mr. W. K. Hui (), Chief Town Planner/Urban Renewal had relied on financial viability of the Development Scheme. He submitted that URA advised that if the two objection sites were excluded, it might not be able to provide the same amount of open space and the Dr. Sun Yat-sen Memorial Square as proposed in the original notional scheme (Plan FH-10 of the Paper). URA also considered that splitting up the subject DSP would erode the revenue of the scheme by 33 60% and would have a general impact on the overall financial balance of the Corporate Plan. URA advised that it might have to seriously consider whether to continue pursuing the scheme (see paragraph 39(e)); and in view of the above, the PlanD maintained its previous view that the subject DSP should not be amended to meet the objections as it would otherwise frustrate the planning intention of the DSP, jeopardise the integrity of the DSP and cause implementation problem, and lead to piecemeal redevelopment in the area. He also pointed out that the objectors of Objection No. 2 had not acquired all the interests within the objection site and therefore the approved BP might not be readily implementable. For Objection site No. 3, there was no approved planning application or BP and hence it was even less certain on the implementation timing. In contrast, the subject redevelopment scheme had been incorporated in the URA Corporate Plan and programmed for acquisition in 2004/05 (see paragraph 41). TPB had taken into account financial viability

AUTONUMOUT In my view the evidence clearly pointed strongly that TPB had in fact taken into account financial considerations as a basis of its decision (I will address later on whether this was the only basis). The wording of the reasons by the TPB in terms of jeopardising the Development Scheme followed very closely the wording identified at paragraph 8.2 of TPB Paper No. 6963.

AUTONUMOUT Paragraph 54 of the minutes of the meeting of 19 March 2004 recorded that Members had a discussion on the objections and made the following main comments and observations : it would not be appropriate for the Board to balance different interests of the URA and landowners. The Board should be more concerned about the relative merits of different schemes and decided on which one could bring more benefits to the community; there were precedent cases to include private lots with planning permissions and/or BP approvals in DSPs where exclusion of such would affect the integrity of the redevelopment scheme; there would be more planning gains if the whole DSP area was developed comprehensively; and the URA should start negotiation with the objectors in order to achieve a win-win situation, particularly noting that the objectors of Objection No. 2 did not resist joint venture development with the URA.

AUTONUMOUT Although paragraph 54(a) stated that it would not be appropriate for the TPB to balance different interests of the URA and landowners, I do not regard this as a clear indication that it had not relied on financial viability as a basis of its decision because a consideration of the relative merits of different schemes and which one would bring more benefits to the community may also involve a consideration of the financial viability and the consequence if the Development Scheme is scrapped. AUTONUMOUT Likewise the statement by the chairperson of TPB i.e. the Permanent Secretary for Housing, Planning and Lands, that the crux of the matter was whether there was sufficient ground from a planning angle to justify the exclusion of objection sites No. 2 and 3 from the DSP, bearing also in mind the strong local support for comprehensive redevelopment by the URA as evidenced in the two letters from the Central and

Western District Council and the Residents Concern Group. does not exclude financial implications being taken by the TPB as a basis of its decision. Wording of the decision AUTONUMOUT It was suggested that the actual wordings used by the TPB in its reasons for decision was based on the wording suggested in an earlier TPB papers prepared by the Planning Department. In TPB Paper no. 6849 prepared for the meeting on 14 November 2003 it was stated that 8.2 Should the Board decide not to propose any amendment to DSP to meet the objection, the following reasons are suggested for Members consideration :

- (b) The objection site lies in a key location and accounts for a substantial portion of the Comprehensive Development Area zone. Excision of it from the zone will frustrate the planning intention of the zone, jeopardise the whole development scheme and impose serious constraints on the comprehensive redevelopment of the rest of the Development Scheme Area. (emphasis added) It was submitted that these words (which eventually were adopted by the TPB) were used before the financial viability of the project was considered later on. AUTONUMOUT In my view this argument cannot seriously challenge the view that financial implications had been considered by TPB as a basis of its decision that the Development Scheme would be jeopardised. AUTONUMOUT Hence, I would conclude that the TPB had indeed relied on financial implications. This may not be the sole basis when it came to the view that the Development Scheme may be in jeopardy but certainly it was relied upon as a basis of its decision. I would further hold that it is not permissible for TPB to change its stand on this issue. As stated by Laws LJ in *R (Quark Fishing Ltd) v Secretary of State for Foreign and Commonwealth Affairs* [2002] EWCA Civ 1409 30th October 2002 unrep. at [50] there is ... a very high duty on public authority respondents, not least central government, to assist the court with full and accurate explanations of all the facts relevant to the issue the court must decide. see *Judicial Review Handbook* 4th Edn by Michael Fordham para. 62.2.9. In my view it is improper for TPB to retract from such an important position at such a late stage of the proceedings.
- (2) Was it proper for TPB to take financial viability into account? AUTONUMOUT The next question is whether it was proper for the TPB to take into account the financial viability of the Development Scheme. The context in which this issue is discussed must be borne in mind : the choice is between a full Development Scheme as proposed by the URA and a smaller scale Development Scheme if the applicants site is being excluded. AUTONUMOUT To answer this question it is necessary to understand the unique role of URA in urban renewal. For the purpose of large scale urban renewal one of the means is by way of CDA zoning. While there does not appear to have any restriction on a private developer seeking the approval of the TPB to introduce a CDA zone, realistically any large scale urban renewal scheme, like the present CDA zoning application, can only be introduced and implemented by the URA either by itself or together with joint venture partners. Apart from providing for the housing needs of the population, the CDA will provide for community services and facilities as well. AUTONUMOUT Once this role of the URA is recognised, then it becomes clear that it is not appropriate to compare the URA as a private developer. The financial viability of a particular urban renewal project by the URA clearly has a direct bearing on

planning issues which have to be considered by the TPB. AUTONUMOUT Furthermore under section 10(4) of the URAO, the URA is obliged to exercise due care and diligence over its finance. Hence, as the judge observed there is a real risk of the URA deciding not to proceed with a development scheme if it is financially not viable to do so or because it may have serious implications on its overall financial position. If this should happen, public interest will be affected in that there will not be urban renewal in the affected area. Further, approval to implement a non-viable scheme would have to be sought from the Financial Secretary. This means there would be further delay in the deliberation by the TPB of the DPS and its eventual implementation. In any event, the Financial Secretary may not necessarily approve such a project. One cannot proceed on the assumption that approval would be given. AUTONUMOUT Likewise, bearing in mind this unique role of URA and the fact that there are other urban renewal schemes to be implemented by it, URA has to rely on cross-subsidization amongst projects as to ensure that its 20 years urban renewal programme to be financially viable. AUTONUMOUT With this background, in my view, it is proper for the TPB when considering planning issues to take into consideration the financial viability of the Development Scheme to be implemented by the URA. This does not mean that TPB has preferred the financial interest of URA to other private property developer. AUTONUMOUT As Kerr LJ observed in *R. v. Westminster City Council, Ex. p. Monahan and another* [1990] 1 Q.B. 87 Financial constraints on the economic viability of a desirable planning development are unavoidable facts of life in an imperfect world. It would be unreal and contrary to common sense to insist that they must be excluded from the range of considerations which may properly be regarded as material in determining planning applications. Where they are shown to exist they may call for compromises or even sacrifices in what would otherwise be regarded as the optimum from the point of view of the public interest. Virtually all planning decisions involve some kind of balancing exercise. A commonplace illustration is the problem of having to decide whether or not to accept compromises or sacrifices in granting permission for developments which could, or would in practice, otherwise not be carried out for financial reasons. Another, no doubt rarer, illustration would be a similar balancing exercise concerning composite or related developments, i.e., related in the sense that they can and should properly be considered in combination, where the realisation of the main objective may depend on the financial implications or consequences of others. However, provided that the ultimate determination is based on planning grounds and not on some ulterior motive, and that it is not irrational, there would be no basis for holding it to be invalid in law solely on the ground that it has taken account of, and adjusted itself to, the financial realities of the overall situation.

- (3) Was there a proper basis to consider this factor? AUTONUMOUT However, the real issue in this case is whether there was a proper basis for the URA to contend that splitting up the DSP will greatly reduce the available GFA which would erode the revenue of the Development Scheme by some 33% to 60% and would have a general impact on the overall financial balance of the corporate plan. In other words whether there was a proper basis for the TPB to come to the view that the Development Scheme would be jeopardised by reason

of financial restraints. AUTONUMOUT In this case the stark fact is that the applicants have already received planning permission to develop their own site at a plot ratio of ten. While the exclusion of their site from the Development Scheme would cause URA a loss of revenue, at the same time the URA will have to pay compensation to the applicants for the resumption of their site at a plot ratio of 10 if it is to be included in the Development Scheme. Under the Development Scheme the URA could only build with a lower plot ratio of eight. In other words URA has only dealt with the revenue aspect without considering the costs aspect as well when it objected to separate developments of the area. I should also point out the URA is not the owner of any properties under the Development Scheme. *Prest & Straker and others v. Secretary of State for Wales and another* [1983] RVR 10 is an illustration of how the costs of acquiring the land was a relevant factor which was not properly considered by a decision maker. AUTONUMOUT In this case despite the clear submission of Mr. Yu S.C. who also appeared before the TPB, the URA has not provided the TPB with details on the financial implication. AUTONUMOUT Mr. Griffiths S.C. submitted that Mr. Yu had not challenged the figures of loss of revenue of 33% to 60% and that he had not asked for details of these figures. In my view this is not the correct way of looking at the matter. Clearly the submission by Mr. Yu on the costs aspect is a challenge on the statement by the URA on the loss of revenue. It behoved TPB to make inquiries so as to satisfy itself that what was put forward was supported by evidence. As Watkins LJ observed in *Prest & Straker* There are times, however, when a vital point, as it seems to him later, has either been insufficiently ventilated or not touched upon at all at an inquiry. In either of these circumstances, if he is going to allow the point to affect him, he must cause enquiries to be made into it even to the extent of reopening the public inquiry. Lord Greene MR in *Associated Provincial Picture Houses Limited v Wednesbury Corporation* said, [1948] 1 KB 223, 229: He must call his own attention to the matters which he is bound to consider. . What he may not do is to proceed to exercise his discretion and allow it to be swayed by a factor which is inadequately presented to him. It matters not, so it seems to me, that he could reasonably have expected an objector or a supporter of his ultimate decision to have fully exposed for him that factor in all its facets at public inquiry or in some other way. He conducts a process of administrative decision which is quite unlike that conducted by courts and some, if not all, tribunals. Nevertheless, it is a process which is governed by disciplines vital to the public interest. AUTONUMOUT In my view, in the context of this case, when the TPB relied on financial viability as the basis for saying that the Development Scheme would be put in jeopardy there was insufficient evidence for it to come to such a conclusion. In the context of public law the TPB had taken an irrelevant consideration into account. As Lord Diplock observed in *Secretary of State for Education and Science v. Tameside Metropolitan Borough Council* [1977] A. C. 1014 at page 1065 it is for a court of law to determine whether it has been established that in reaching his decision unfavourable to the council he had directed himself properly in law and had in consequence taken into consideration the matters which upon the true construction of the Act he ought to have considered and excluded from his consideration matters that were irrelevant to what he had to consider : see *Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation*

- [1948] 1 K.B. 223, per Lord Greene M.R., at p. 229. Or, put more compendiously, the question for the court is, did the Secretary of State ask himself the right question and take reasonable steps to acquaint himself with the relevant information to enable him to answer it correctly? AUTONUMOUT A more recent pronouncement of this principle is in Regina (Alconbury Developments Ltd. and others) v. Secretary of State for the Environment, Transport and the Regions [2003] 2 A.C. 295 where Lord Slynn of Hadley at page 320 stated that It has long been established that if the Secretary of State misinterprets the legislation under which he purports to act, or if he takes into account matters irrelevant to his decision or refuses or fails to take account of matters relevant to his decision, or reaches a perverse decision, the court may set his decision aside. AUTONUMOUT In this context it should be noted that Lord Slynn of Hadley has stated at pages 320 and 321 that the difference of the test of proportionality and Wednesbury unreasonableness is not as great in practice as sometimes supposed. It is unnecessary and confusing to keep these two principles in separate compartments. He was of the view that even without reference to the Human Rights Act 1998, the principle of proportionality is part of English administrative law not only when judges are dealing with European community legislations but also when they are dealing with acts subject to domestic law.
- (4) Was that the only consideration taken by the TPB? AUTONUMOUT This, however, is not the end of the inquiry in challenging the decision of TPB. The Court has to consider whether other factors had been taken into account when TPB concluded that the Development Scheme may be in jeopardy. Let me say immediately that I do not regard financial viability as the only consideration relied upon by the TPB when it came to the view that the Development Scheme may be jeopardised. It had clearly taken into account relevant planning issues as well. Planning issues AUTONUMOUT I would set out in full the Planning Department's view as contained in paragraph 8 of the TPB Paper no. 6963
8. Planning Department's View 8.1 Taking into account the above assessments, the Planning Department maintains its previous views that the subject DSP should not be amended to meet the objections for the following reasons : Planning intention The planning intention of the zoning of the DSP is to achieve environmental improvement through comprehensive redevelopment, restructuring the street pattern, promoting efficient land use and providing community facilities/public open space. Upholding the objection would defeat the planning intention. Need for comprehensive development All buildings in the Scheme area are over 40 years old and in poor or deteriorating conditions. Only a few buildings with frontages to Staunton Street and the Bridges Street Wet Market have been redeveloped into high-rise building and in a piecemeal manner. The remaining buildings in the Scheme area mostly front onto pedestrian or stepped streets. These left-over land-locked buildings without direct vehicular access are rendered less attractive and less efficient for redevelopment since their redevelopment potential is diminished. Without comprehensive redevelopment, the fundamental problems of undesirable land use, layout and inefficient street pattern in the Scheme area cannot be solved. Comprehensive redevelopment is a more effective means to bring about substantial environmental improvement to the area and provide a higher

standard of urban design and better provision of public facilities. Planning gains The subject DSP provides a framework for the URA to carry out comprehensive redevelopment of the Scheme area. In URA's notional scheme, an at-grade public open space of 855m easily accessible by the residents in the area and a Dr. Sun Yat-sen Memorial Square to respect the historical significant of the objection site would be provided. The URA Scheme would also result in more efficient street network. Moreover, in the planning brief endorsed by the Board on 4.7.2003, Shing Wong Street is required to be preserved. Such planning gains achievable under the URA Scheme would not be realised by piecemeal development. Timing of implementation DSPs are implemented according to the URA's Corporate Plan approved by the Financial Secretary and there are statutory procedures for land acquisition. The draft DSP has been programmed for acquisition in 2004/05. Hence, the DSP has more certainty in terms of the timing of redevelopment. In contrast, private sector redevelopment is subject to market conditions. As mentioned in paragraph 7 above, the Concern Group has expressed their support for early implementation of the URA Scheme. It should be noted that Objection No. 2 has not yet acquired all the lots within the Objection No. 2 site and therefore the approved BPs may not be readily implementable. For Objection No. 3, it has no approved planning application/BPs and hence even less certain on the implementation timing.

Precedent Cases As discussed in paragraph 3 above, it is not uncommon to find cases of private lots with approved planning applications and BPs in the previously published DSPs. However, the Board did not exclude such lots from the DSPs in most cases as piecemeal and uncoordinated redevelopments would frustrate the planning intention to regenerate an area comprehensively. Only two private lots with approved planning applications and BPs which were ready for implementation and not causing adverse impact on the integrity of the DSP were agreed by the Board for exclusion. For the subject DSP, only Objection No. 2 has approved planning permissions and approved BPs. Both sites of Objection Nos. 2 and 3 lie in the central part of the DSP and their excision would split the DSP into fragmented portions and impose serious constraints on the comprehensive redevelopment of the Scheme area.

Financial viability Cross subsidization among URA's projects is necessary. Reducing the size of the due to the upholding of the objection(s) would definitely erode the revenue of the subject Scheme which in turn might have a negative impact on the overall financial balance of the Corporate Plan of the URA. The URA has advised that given the mandate to manage its finance prudently, it may have to seriously consider whether to continue pursuing the Scheme. Factual challenges AUTONUMOUT Mr. Yu challenged the Planning Department's view that three buildings in the affected area would be land-locked if the area is to be divided up into separate schemes. He further maintained that under the separate schemes the Dr. Sun Yat-sen Memorial Square would still be built and that the applicants scheme also provided for open space accessible to the residents in the area. Overall impression AUTONUMOUT In my view this issue can only be dealt with by way of an overall impression of the URA Development Scheme and the separate schemes. In terms of efficient land use, the Development Scheme would encompass two podiums upon which buildings will be erected, the separate schemes would consist of three podiums with the applicants site in the middle. The applicants site and the remaining site will have a very narrow frontage. Further

the Development Scheme envisaged the incorporation of Chung Wo Lane into the second podium block, the separate schemes will cause Chung Wo Lane to remain in the area. There clearly was material for TPB to regard that the aim of restructuring street pattern and promoting efficient land use could not be achieved by separate schemes and on that basis to conclude that the Development Scheme would be jeopardised from a planning angle. Hence financial viability could not be and was not the only basis that the TPB came to that particular conclusion.

- (5) Effect of TPB's decision AUTONUMOUT The final question to be asked is : if the TPB had taken both relevant and irrelevant matters into consideration, how would that affect its decision? The answer is that the decision is faulted. In *Judicial Review of Administrative Action* 5th Edn. by de Smith, Woolf and Jowell, para. 6 086 the authors stated that If the influence of irrelevant factors is established, it does not appear to be necessary to prove that they were the sole or even the dominant influence. As a general rule it is enough to prove that their influence was material or substantial. AUTONUMOUT This statement was approved in the case of *R v Rochdale Metropolitan Borough Council, Ex. p. Cromer Ring Mill Ltd* [1982] 3 All ER 761 where Forbes J stated that at p. 770 It seems to me Megaw J is there saying, having been apprised of the argument about dominant purpose, that the exercise of a power is bad if it is shown that an authority exercising that power has taken an irrelevant factor into account, one of many factors, as long as that irrelevant factor is not insignificant or substantial. To that extent, it seems to me, that that case wholly supports the formulation in Professor de Smith's book. The fact that there were other good reasons for coming to the same conclusion does not seem to me to matter, having regard to the formulation of the principle, which I have just referred to, as set out in the late Professor de Smith's book. AUTONUMOUT In *R v. Broadcasting Complaints Ex parte Owen* [1985] QB 1153, May LJ at page 1177 referred to Forbes's view and held that I respectfully agree that the material law is as was stated by Forbes J. but with one qualification Where the reasons given by a statutory body for taking or not taking a particular course of action are not mixed and can clearly be disentangled, but where the court is quite satisfied that even though one reason may be bad in law, nevertheless the statutory body would have reached precisely the same decision on the other valid reasons, then this court will not interfere by way of judicial review. In such a case, looked at realistically and with justice, such a decision of such a body ought not to be disturbed. AUTONUMOUT Mr. Griffiths submitted that if the TPB had considered financial implications as one of the bases of its decision then this reason was not mixed with the other reasons given by the TPB and can easily be disentangled within the meaning of *R v. Broadcast Complaints Commission*. He submitted there were separate and distinct reasons given : The objection site is at a key location and accounted for a substantial portion of the Comprehensive Development Area zone . Excision of it from the zone would frustrate the planning intention of the zone. Moreover such excision would jeopardise the whole development scheme . Because the objection site is at a key location and accounted for a substantial portion of the Comprehensive Development Area zone, excision of it from the zone would impose serious constraints on the comprehensive redevelopment of the rest

of the Development Scheme Area AUTONUMOUT He submitted that these reasons were based on planning consideration and a concern to preserve the integrity of the whole site and not split it in two, with the consequent planning detriments, which is what would happen if the Appellants site was excised. AUTONUMOUT R v. Broadcasting Complaints Commission is not the end of the discussion on this topic because subsequent to it the English Court of Appeal in R v. Lewisham London Borough Council, ex parte Shell UK Ltd [1988] 1 All ER 938 was further of the view that, But where the two reasons or purposes cannot be disentangled and one of them is bad or where, even though the reasons or purposes can be disentangled, the bad reason or purpose demonstrably exerted a substantial influence on the relevant decision the court can interfere to quash the decision. This proposition is recognised in the authorities referred to by May LJ in the Broadcasting Complaints case and by that decision itself. Indeed, on this aspect of the case, the principles of law are not in dispute (per Neill L.J. at page 951). AUTONUMOUT This approach was followed in two other English Court of Appeal decisions, namely, Glidewell L.J. in the Court of Appeal decision of R v Greenwich London Borough Council, ex parte Lovelace; R v Greenwich London Borough Council, ex parte Fay [1990] 1 WLR 18 per Glidewell L.J. at 26 and in Currai & Another v Ministry of Defence, Court of Appeal (Civil Division), 11 March 1994 (Lexis) per Kelly L.J. at page 5. AUTONUMOUT I have already held that the TPB had relied on both financial and planning considerations as the basis of its decision. However, I am not convinced that the financial consideration did not have had a substantial or material influence upon the decision. Financial consideration clearly was regarded by the Planning Secretary as an important factor. TPB Paper No. 6963, paragraph 4.5 and Mr. Hui had addressed this issue. Put in another way, I cannot say that without the financial considerations, the TPB would have reached the same conclusion based solely on the planning consideration. This being the case. I do not consider that the two bases of the decision to be so distinct and separate that I can say with confidence that the decision was valid based solely on planning grounds. The decision should be quashed on this ground AUTONUMOUT In my view for this reason alone the decision of TPB was faulted and should be quashed. I come to this view with a certain degree of regret because urban renewal is clearly for the benefit of the community in this area. The Development Scheme is supported by the residents in the locality who clearly wish to have their living environment improved. However, the overarching principle is that administrative decisions must comply with the requirement of law and in the present case this has not been observed. Failure to balance the interest of the applicants AUTONUMOUT Having reached this view, I would now deal briefly with the other submissions by Mr. Yu. AUTONUMOUT Mr. Yu submitted that TPB failed to balance the conflicting interest of URA and the applicants. He submitted that TPB started from the position that there was a presumption in favour of the Development Scheme and that the applicants carried the burden of showing why exclusion of their site from the Development Scheme was justified. Mr. Yu relied on the direction by the Chairperson of TPB which I have previously set out in my judgment in support of this contention. The basis of my decision AUTONUMOUT In considering this issue, I proceed on the following bases : A planning authority must evaluate an application objectively and

without pre-judgment on its merits and in the particular context of a case objectivity is not the same thing as neutrality, see *R. v. Teeside Development Corporation, Ex. p. William Morrison Supermarket Plc and Redcar and Cleveland B.C.* [1998] JPL 23. The starting point is, of course, objections to the proposed zoning by the applicants before the TPB is the only chance for them to challenge the zoning proposal. If the zoning became effective the consequence is that their site would be resumed by the URA under the Lands Resumption Ordinance (Cap.

- 124) : section 29(1)(a) of the URAO. It would not be possible at the resumption stage to challenge the inclusion of the applicants property in the zoning plan. This point is well established by *Silver Mountain Limited v. Attorney General* [1994] 1 WLR 925. It is also not a valid argument to say that the applicants should have challenged the decision of URA when it decided to publish the Development Scheme. As Lord Steyn said in *R (Burkett) v. Hammersmith LBC (HL(E))* [2002] 1 WLR 1593 at 1607C In law the resolution is not a juristic act giving rise to rights and obligations. It is not inevitable that it will ripen into an actual grant of planning permission. In these circumstances it would be curious if, when the actual grant of planning permission is challenged, a court could insist by retrospective judgment that the applicant ought to have moved earlier for judicial review against a preliminary decision which is the real basis of his complaint I further recognize that the applicants have an accrued right in their site. Apart from being landowners they already have planning permission to redevelop their site : see the discussion of the relevance of planning permission in cases such as *Wells v. Minister of Housing and Local Government* [1967] 1 WLR 1000 and *Spackman v. Secretary of State for the Environment* [1977] 1 All ER 257 which showed that a planning permission is clearly a relevant factor to be taken into account. The applicants have further incurred \$162 million in respect of their development project. I have also no dispute with the Munjaz principle that where a guideline has been introduced, there may be a good reason for departing from a guide in particular circumstances but the repository of a power is not at liberty to ignore, depart from or qualify the content of the provisions without cogent reasons : see *R (on the application of Munjaz) v Mersey Care NHS Trust* [2006] 2 A. C. 148 and applied by the Court of Final Appeal in *Shiu Wing Steel Limited v. the Director of Environmental Protection (Airport Authority of Hong Kong, interested party)* [2006] 4 HKC 111 at 125. TPB had carried out the balancing act AUTONUMOUT Proceeding as such, I do not regard that I am stating too wide a proposition when I say that in planning enquiries, the decision maker has to balance the conflicting interests affected by the planning proposal. That a decision maker should balance the conflicting interest of the parties affected by the planning application have been expressed in cases such as *R. v. Westminster City Council v. Ex p. Monahan and another* [1991] Q. 87 and *Sha Lo Tung Development Co. Ltd. v. the Chief Executive in Council*, HCAL 124 of 2000, decision of 9 January 2001. The Strategy itself requires the government to balance the interests and needs of all sectors of society in urban renewal. AUTONUMOUT In considering the protection of private property rights under the relevant provisions of the European Convention of Human Rights the European Court of Human Rights in *Allan Jacobsson v. Sweden* [1989] EHRR 56 at page 67 stated that : there

must be a reasonable relationship of proportionality between the means employed and the aim sought to be realised. In striking the fair balance thereby required between the general interest of the community and the requirements of the protection of the individual's fundamental rights, the authorities enjoy a wide margin of appreciation. AUTONUMOUT However, what I do not agree with Mr. Yu is that TPB had not balanced the conflicting interest of the URA and the applicants. I do not consider TPB had strayed from its position of objectivity or neutrality and became partisan in nature. The evidence clearly showed that it had considered the merits of the different schemes on their own. It did not start from a position of presuming the Development Scheme in favour of the URA. It clearly had appraised of the details of the different schemes together with the accrued rights of the applicants in terms of permission to redevelop their own sites. AUTONUMOUT It is not necessary for me to address the argument that the role of the TPB when considering the objections should discharge the task similar to the Appeal Board established to hear appeals under the objection procedure in development projects. Under the objection procedures in section 6 of the TPO, an objector must, of course, justify his objections to the draft plan but beyond that I do not see that he is required to carry any higher burden. Certainly there is no presumption in favour of the Development Scheme. When the Development Scheme was introduced it was accompanied by supporting materials. Faced with the objections, the URA will seek to meet the objections and the TPB will then consider the objections in the light of the evidence before it. AUTONUMOUT I do not regard the direction by the Chairperson as being an indication that there was a presumption in favour of the Development Scheme. AUTONUMOUT Personally I do not consider that too much weight should be attached to the summary of the discussions by members of the TPB. When a decision maker deliberated on an issue there would be expression of ideas and views which may not be fully articulated or necessarily correct. But it does not mean that when the decision maker finally decided on an issue it would necessarily have relied upon one or more of the matters that had been discussed. It is far more important to see how the decision maker articulated the reasons for the decision. CJ in *Oriental Daily Publisher Ltd v. Commissioner for Television and Entertainment Licensing Authority* [1997-98] 1 HKCFAR 279 at page 291 stated that : We are concerned with the duty to give reasons by the tribunal which operates in the context of the statutory framework in the ordinance. In my view, the following general observations could be made as to the reasons that should be given by the tribunal. First, the reasons given should show that the tribunal has addressed the substantial issues before it and show why the tribunal has come to its decision. There may not be any need however to address every single issue. But the reasons should show that the issues that arise for serious consideration have been considered. Secondly, when deciding on questions of indecency or obscenity, there may be cases where the contents of the articles in question would virtually speak for themselves. In these instances, the duty to give reasons could be discharged by describing the contents without much more. Apart from cases of this kind, a decision on indecency or obscenity which merely recites the statutory guidelines in s. 10 would not normally be adequate. Such statements would in effect assert conclusions and would not reveal why the tribunal has come to such conclusions. Thirdly, the reasons may not require great

elaboration and they may be brief. It is only when they are defective in substance that they should be considered inadequate. Ultimately, what are adequate reasons in the circumstances of a particular case has to be approached sensibly. Fourthly, where a point of law is raised the point has to be decided by the presiding magistrate and the statute expressly requires reasons to be given in writing. See s. 7(3). Reasons for a decision on a point of law should usually set out the findings of fact, the point of law at issue and the process of reasoning leading to the conclusion. AUTONUMOUT In this case the TPB had given reasons why it chose not to amend the DSP. The reasons were, of course, brief, but I am not prepared to say that the reasons betrayed the view now advanced by Mr. Yu that the TPB had not considered the conflicting interests of URA and the applicants. TPB is not obliged by statute to give reasons but it had volunteered to give reasons for its decision. In my view it should take into account the views expressed in *Oriental Daily Publisher Ltd* in its future decisions. Development Scheme has no legal effect? AUTONUMOUT Another challenge of the applicants is that the Development Scheme has no legal effect because it violates section 25(3)(b) of the URAO in that it did not set out how the URA intended the development scheme would be implemented, including whether implementations would be by the URA alone or the URA in association with the applicants; and which portion of the land in the draft DSP is owned or leased by the URA. AUTONUMOUT The judge dealt with this point at paragraphs 91 to 100 of her judgment. The second actor theory AUTONUMOUT Mr. Dykes, S.C. counsel for the URA, maintained that the DSP is not illegal and further advanced the interesting argument that even if the DSP is illegal the decision maker, i.e. the TPB, is not affected by the invalid DSP. He relied on the case of *Boddington v. British Transport Police* [1999] 2 A.C. 143 where Lord Steyn at page 172 held that Nevertheless, I accept the reality that an unlawful byelaw is a fact and that it may in certain circumstances have legal consequences. The best explanation that I have seen is by Dr. Forsyth who summarised the position as follows in *The Metaphysics of Nullity Invalidity, Conceptual Reasoning and the Rule of Law*, at p. 159: it has been argued that unlawful administrative acts are void in law. But they clearly exist in fact and they often appear to be valid; and those unaware of their invalidity may take decisions and act on the assumption that these acts are valid. When this happens the validity of these later acts depends upon the legal powers of the second actor. The crucial issue to be determined is whether that second actor has legal power to act validly notwithstanding the invalidity of the first act. And it is determined by an analysis of the law against the background of the familiar proposition that an unlawful act is void. (Emphasis supplied.) AUTONUMOUT Although this grounds remains to be one of the grounds of appeal of the applicants, Mr. Yu did not address us on the matter. He accepted in his final reply that this is not an important part of his case. This being the case I would refrain from expressing views on this issue. Illogical decision AUTONUMOUT What Mr. Yu now complains of is that TPB had given as its first reason that the rights of the applicants had not been deprived because the Strategy recommends that the URA may develop a project through joint venture of partnership. He complains that the URA in the planning report of the Development Scheme, apart from stating that it may implement the Development Scheme on its own or in association with one or more joint venture partners,

had not provided details of the joint venture at all. He argues that this is not an indication that the URA may enter into joint venture with the applicants. This is an error of reasoning which robs the decision of logic and contravenes the Wednesbury reasonableness ground. In *R. v. Parliamentary Commissioner for Administration*, Ex. p. *Balchin* [1997] JPL 917 Sedley J. at 927 held, Mr George does not have to demonstrate, as respondents sometime suggest is the case, a decision so bizarre that its author must be regarded as temporarily unhinged. What the not very apposite term irrationality generally means in this branch of the law is a decision which does not add up in which, in other words, there is an error of reasoning which robs the decision of logic. AUTONUMOUT As disclosed in TPB Paper No. 6920 the current practice of the URA is that it would only proceed with acquisition and joint venture partnership arrangement upon the approval of the DSP by the Chief Executive in Council. There have been no negotiations between the URA and any lot owners in the scheme area. Mr. Yu argued that the TPB failed to take into account that the inclusion of the applicants site would mean that there is the possibility of resumption of their site. This severely interferes with their rights and there also has the effect of putting the applicants at a grave disadvantage in the negotiation for joint venture. Not necessary to express view AUTONUMOUT There is much strength in Mr. Yu s submission. It seems to me that the TPB cannot, on the one hand, said that the applicants rights are not affected because of a possible joint venture when, on the other hand, URA has not indicated that it will enter into any joint venture with the applicants. However, since I have already held that the decision is invalid by reason of the financial viability point it is not necessarily for me to express a final view on this matter.

Conclusion

AUTONUMOUT I would allow the appeal, quash the decision of the TPB and remit the matter back to the TPB for consideration. Hon Stock JA AUTONUMOUT Sound public administration requires that when reasons are required or are provided for an administrative decision, they should be clear as well as sufficient to the circumstances. The provision of adequate and clear reasons, where reasons are required by law, is a function of sound administration because transparency is more likely to promote confidence in public administration than is opacity, and also because the very requirement to provide clear reasons against the background of the particular issues raised itself encourages a disciplined approach to the issues at hand. But, most obviously, the requirement is based on fairness, so that the person or body adversely affected by a decision should have an adequate indication of the reasoning process, enabling him to know whether the decision-maker has addressed his grievance and whether there may be a basis for challenging the decision. So too clarity and sufficiency of reasons enable a supervisory court in judicial review better to assess the legality of a decision under challenge. See Fordham s *Judicial Review Handbook*, 4thed., paras. 62.1.5 to 62.1.9. AUTONUMOUT What is sufficient will depend on the legal framework within which the body takes the decision and upon the case at hand. Sometimes a brief statement of reasons will suffice, because in context no more needs to be said. Sometimes, although the words employed in the reasons articulated might have been more

clearly stated, a common sense approach in context of the reasons, or of the particular history, as a whole will readily reveal what was obviously intended and the courts should be loathe to permit scrutiny of reasons as if they constituted a statutory instrument. Reasoning must be examined with reality and contextual common sense. That said, where a real issue arises as to whether an allegedly material issue was or was not taken into account, or what was at the end of the day made of that issue by the decision-maker, the courts are entitled to expect the answer to be sufficiently clear from the evidence before it without having to resort to guesswork. That, so it seems to me, is the problem in my judgment, the sole problem with which the respondent is faced in this appeal. AUTONUMOUT The problem arises in this way. There came a stage in the course of the months during which the plan was under consideration by the Board at which there was injected the question of the viability of the project if the area were split into smaller sites, each for its own development. It is an issue that so exercised the Board, and an issue of vital significance to the objectors, that the Board deferred consideration of the proposals so that that question as well as some others might be examined. The question of viability was then addressed by the Planning Department in its paper to the Board for consideration at its meeting on 19 March 2004. Under the heading Viability of Splitting the Scheme Area into Smaller Sites , the issue was canvassed in terms of physical or planning viability and of financial viability. This was the first time that the issue of financial viability emerged: it was a factor that had hitherto been untouched by any of the papers placed before the Board. It was said that the URA site and the appellants site were capable of separate development, though in the Department s view the planning gains envisaged by the URA s plan would not be realized by piecemeal development and the URA plan had distinct advantages in terms of layout, street usage and environmental improvement . As for financial viability, there were potential difficulties. Whilst it was said that financial viability was not a determining factor as to whether the URA should proceed with an individual project or not, nonetheless, Financial Secretary's approval would be required for URA to proceed with financially not viable projects. For the URA's 20 years urban renewal programme to be financially viable, cross subsidisation among projects is necessary. The URA considers that splitting up the subject DSP will greatly reduce the available GFA which could erode the revenue of the notional scheme by some 33 to 60% and will have a general impact on the overall financial balance of the Corporate Plan. URA opined that given the mandate to manage its finance prudently, it may have to seriously consider whether to continue pursuing the scheme. AUTONUMOUT The Planning Department then offered its view for the Board s consideration. It recommended that the plan should not be amended for the following reasons and one of the following reasons was financial viability. It said that reducing the size of the CDA by excluding the objection site would definitely erode the revenue of the Scheme which might in turn have a negative impact on the overall financial balance of the Corporate Plan of the URA, and the point was repeated that the URA may therefore have seriously to consider whether to continue with the Scheme. There then followed the Department s conclusion: Based on the above, it is considered that the excision of the sites from the CDA zone or splitting the [plan] into several smaller CDAs will frustrate the planning intention, jeopardize the integrity of the [plan], cause implementation problem of the [plan] and lead to piecemeal redevelopment in the area. It is therefore important to maintain the development scheme boundaries and not to uphold all the objections to the

subject [plan] AUTONUMOUT Against that background, it could hardly be a matter of surprise that the appellants took the question of financial viability seriously which, no doubt, is why it was an issue specifically addressed in the PowerPoint presentation made by counsel on behalf of the appellants at the hearing on 19 March 2004. A section of the presentation was devoted to the question of financial considerations, counsel emphasizing that the objectors had spent over \$160 million on the project thus far but, more particularly, that the contentions advanced on behalf of the URA had omitted from the equation the compensation that they would have to pay for acquiring the objection site. AUTONUMOUT In the course of discussions at that meeting, the point was repeated that if the scheme based on used site area was found not be viable, [the URA] would seriously reconsider whether to continue pursuing the scheme or not. Approval to implement a nonviable scheme would have to be sought from the Financial Secretary.

AUTONUMOUT My lord, Cheung JA, has recited at paragraph 29 above the reasons provided by the Board for the decision which was then reached, and which was communicated to the appellants by letter dated 2 April 2004. It is worth repeating what was said in that letter, which follows precisely the wording that appears in the minutes of the meeting of 19 March: After giving full consideration to your submission and to your written statement of objection, the TPB decided not to propose any amendment to the above Plan to meet your objection and the reasons are: the Urban Renewal Strategy recommends that the Urban Renewal Authority may redevelop a project through joint venture partnership. Your right on the objection site would not be deprived; and the objection site is at a key location and accounted for a substantial portion of the Comprehensive Development Area) zone. Excision of it from the zone would frustrate the planning intention of the zone, jeopardise the whole development scheme and impose serious constraints on the comprehensive redevelopment of the rest of the Development Scheme Area. A copy of the relevant extract of minutes of the TPB meeting on 19.3.2004 is enclosed herewith for your reference. AUTONUMOUT What is so noteworthy about the reasons there given and the phraseology used is that it is a precise repetition of the reasons and phraseology advanced by the Planning Department, and the reasons and phraseology proffered by the Board, at each and every stage of the decision making process, for refusing to amend the plan: by the Department in its paper prepared for the Board s meeting on 14 November 2003, at a stage when finance had not been raised as a consideration; by the Board for its preliminary decision on 14 November 2003, communicated in those terms to the appellants by letter dated 28 November 2003; by the Department in its paper to the Board for the meeting on 6 February 2004, when finance had still not been raised as an issue; by the Department in its paper to the Board for the meeting on 19 March 2004, a paper that raised financial viability for the first time; and by the Board in its decision of 19 March as communicated in its letter of 2 April 2004. AUTONUMOUT The same reasons were given each time, in the same words, no more and no less. That is not of itself conclusive of anything, but in the context of this case it raises an obvious question: Given that the viability of two developments became an issue, and that financial viability was part of that consideration, what did the Board make of that consideration? Did it treat financial viability for the URA as relevant or irrelevant? If relevant, did it accept the strong hint that the financial implications for the URA of excising the objection site were such that the whole project was thereby put at risk for, if so, still further questions arise. Was it the financial viability of this

project that concerned the Board or the impact for other projects, or both? Was the evidence of adverse impact so imprecise and the suggestion of having to withdraw as a result so remote (may have to seriously consider would seriously reconsider) that the suggestion ought to have been ignored or, if not, that it should have been the subject of further evidence? What was made of the cost savings contention advanced by the appellants? AUTONUMOUT The fact of the matter is that one cannot know what the Board made of this issue, for they have not said, either in the reasons provided or in the evidence filed in the judicial review, and the court, as well as the objectors, have been left to divine the answer. The suggestion was made by counsel for the respondent that it is precisely because the phraseology employed both before and after financial viability was introduced as a topic was the same phraseology, that one can safely assume that the feared financial non-viability did not in fact form part of the reasons for refusing to amend the plan. I am not comfortable with that suggestion. It is clear enough that the spectre of financial non-viability was suggested by the Planning Department as one of the valid reasons for refusing to amend the plan. Viability was particularly raised by the Board as an issue of concern; it specifically determined in February 2004 to defer its decision to enable that issue, amongst others, to be examined. It was an issue that was addressed by the interested parties in some detail at the meeting of 19 March. For my part, I am not in the circumstances prepared to make the assumption that we were invited to make. In this regard, it is idle to ignore the fact that until rather late in the hearing before us it had always been the respondent s position, through counsel, that the financial issue was considered as a relevant one by the Board. The respondent s stand in this regard was that it was a consideration which the Board was entitled to address as relevant. The skeleton argument in the court below, filed on behalf of the respondent, asserted in terms that the Authority s finances were considered, albeit in the context of planning consequences: It is to be noted, the argument went that this is but one of the reasons considered by the Board. There were others even if it were to be held that the Board was wrong on this point, there were other reasons not to amend the plan. That contention was repeated in the skeleton argument filed by the respondent for the purposes of this appeal. In the course of the hearing before us we were told by counsel for the respondent that the Board did not in fact, in reaching its decision, take into account the suggested possible adverse financial implications of splitting the development. It was a matter that was considered by the Board but did not, in the event, form part of the reason for the decision. In saying so, counsel was no doubt acting upon instructions given but this was evidence, as it were, coming from the Bar table and, in the circumstances, it was hardly satisfactory to resolve the matter in this way. AUTONUMOUT This issue of the clarity and sufficiency of the reasons given whether they included financial implications and, if so, whether the evidence sufficed upon which the Board could come to a proper conclusion in that regard was not how the matter appears to have developed before Chu J. In the court below, the issue seems to have been, rather, whether the Board was entitled to take into account financial considerations; but no point has been taken before us that it was not open to the appellants to develop their argument in the way now developed. If indeed the Board took into account the financial viability of splitting the scheme from the standpoint of the Authority, then in my opinion it was entitled to do so. It was entitled, it seems to me, to address the question of viability of this development, rather than the financial impact upon other developments. It was open to it

to ask the question whether the financial consequences of splitting the development so impacted upon the viability of that part left to the Authority to develop, that no such development would take place. That is a question of planning consequence; consequence, that is, to the development of this particular area an area sorely in need of redevelopment. AUTONUMOUT There is an allied point taken as to reasoning which is paragraph

- (a) of the reasons given for the decision under challenge. The argument is that to state as a reason that the objectors right on the objection site would not be deprived by the Authority's plan and its implementation is irrational, since it presupposes a joint venture agreement commercially satisfactory to the appellants whereas, in fact, no such agreement had been concluded (or had indeed been the subject of any negotiations) and, in any event, the threat of resumption would have the effect of putting the appellants at a material disadvantage in any such negotiation. It appears to me, if one looks at the paragraph as a whole, that what was intended by the paragraph as a whole was that, planning permission having been granted, it was still open to the appellants to develop their site and open to them as well to enter into a joint venture with the Authority so that they have not been denuded of their rights in relation to the site, albeit undoubtedly affected. It seems sufficiently clear that the suggested disadvantages to the appellants were well in the Board's mind but that the Board was saying that all was not lost to the appellants. That was not an irrational conclusion, though the wording of it was not as it might have been. AUTONUMOUT A number of other grounds were advanced before the court below, and in this court, in support of the attack upon the decision of the Board. They included the following: that the Board considered the applicant's objections from the planning angle only whereas it was under a duty, so it is said, to consider and balance various conflicting interests in addition to planning merits; that the Board failed to take into account a number of relevant considerations, including the fact of the applicant's interests as landowners, namely its accrued right to develop the objection site; that the Board's decision was *Wednesbury* unreasonable because there was no evidence to support its finding that the planning intention would be frustrated; and that the Scheme was invalid because, contrary to section 25(3)(b) of the Urban Renewal Authority Ordinance it did not specify whether it would be implemented by the URA alone or in conjunction with the appellants. The learned judge in the court below disagreed with these contentions and in my respectful opinion she was for the reasons provided by her correct to do so. That said, I agree, for the reasons I have provided, that the decision should be quashed and that the matter should be remitted to the Board for reconsideration. Hon Chung J : AUTONUMOUT I agree with para. 46 to 48, 52 to 58, 70 to 76, 78, 79 to 92 and 96 of the judgment of Cheung JA and the judgment of Stock JA. Hon Stock JA AUTONUMOUT Accordingly, the appeal is allowed. The decision of the Respondent of 19 March 2004 not to propose an amendment to the Development Scheme Plan to meet the appellants' objection to the Plan is quashed and there will be an order of mandamus requiring the Respondent to re-consider that objection in accordance with law. There will be a costs order nisi that the appellants' costs of this appeal and below be paid by the Respondent, to be taxed if not agreed; and that as to the costs of the Interested Party, there be no order. (Frank Stock) Justice Of Appeal (Peter

Cheung) Justice of Appeal (Andrew Chung) Judge of the Court of First Instance Mr. Benjamin Yu, S.C. and Mr. Anthony Ismail, instructed by Messrs Fairbairn Catley Low & Kong, for the Applicants Mr. John Griffiths, S.C. and Mr. Nicholas Cooney, instructed by Department of Justice, for the Respondent Mr. Philip Dykes, S.C., instructed by Messrs Lovells, for the Interested Party PAGE - A B C D E F G H I J K L M N O P Q R S T U V 1udk 1udk S T U V A B C D E F G H I J K L M N O P Q R S T U V (#p# fWfW fWfW vhwvWh xibXbXTbXbX rfrfrf }][K f} f} {m{m{m{ qfqf wlwl zizi[jVjVjV `QFQ }spl (#p# r p# (#p# r p# r p# (#p# r p# (#p# " @AB9D + &0 + &0 , &0 , &0 6 &0 6 &0 6 &0 6 &0 6 &0

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Prepared on 27 October 2026 · Esheria