Noise Control Appeal Board

Noise Control Appeal No. 1 of 2010

In the matter of an appeal against
Noise Abatement Notice No. N810005
dated 28th January 2010

Between

Mr Berthier Serge, Supervisor of Lantau International School — Appellant

And

The Noise Control Authority — Respondent

Date of Hearing: 7th and 17th June 2010

Date of Decision: 9th August 2010

DECISION

Introduction

1. The Appellant, Mr Berthier Serge, is the Supervisor of a primary school known as Lantau International School ("the School") at G/F Lot 2852 D.D. 316 Pui O, Lantau Island, New Territories ("the Site"). The Site is more popularly known as No. 17 to 19, Lo Wai Tsuen, Pui O.

2. The Site is located within a zone known as "Village type development" ("the V zone") in the Approved South Lantau Outline Zoning Plan No. S/SLC/14 ("the OZP").

3. The School was established in 1993, initially with five students and one classroom. In May 2007, the School bought the Site and converted it into the present use as a school. The operation of the School at the Site was

approved by the Education Bureau.

4. On 23rd June 2008, the Appellant was offered the use of adjacent government land ("Short Term Tenancy (STT) land") located at the back and the front of the Site for the use by the School as a school courtyard. The STT land was eventually rented to the Appellant under a Short Term Tenancy Agreement No. CX1852.

5. According to the Appellant, it is the only primary international school located on the southern part of Lantau Island with English as the teaching medium. There are wide spectrums of students.

6. Since February 2010, the School has operated four classes consisting of two Primary 4 classes, one Primary 5 class and one Primary six class. Each class can accommodate 22 children. In September 2010, a second Primary 5 class will be added.

7. Physical education activities do not take place in the school but at the public sports grounds at Pui O. The school courtyard is only used by the students as a place for their relaxation during recesses and lunch time. Indeed, the courtyard is the only access to the male and female toilets on the ground floor.

8. The recess times are from 10:15 am to 10:45 am and from 1:50 pm to 2:00 pm whilst the lunch time is between 12:00 pm and 12:45 pm. The School, however, does not provide lunch to the students, who may choose to leave the School or to stay and eat their lunch boxes at the courtyard or at the classrooms.

9. On 24th September 2008, the Respondent received a complaint from the resident (Mrs. Tam) at House 20, Lo Wai Tsuen, Pui O ("the Complainant's Premises") of noise emanated from the School, which is situated adjacent to the Complainant's Premises.

10. On 24th November 2008, the Respondent's officers carried out an investigation of the Complainant's Premises and took measurement of the noise levels emanating from the School according to the procedure, standard and equipment laid down in the "Technical Memorandum for the

Assessment of Noise from Place other than Domestic Premises, Public Places or Construction Sites" ("TM") issued under the Noise Control Ordinance, Cap. 400 ("NCO").

11. After obtaining the data from the site investigation, the Respondent then carried out calculation and determination of the Measured Noise Level ("MNL") and the Corrected Noise Level ("CNL"). The MNL was adjusted where appropriate by the Respondent to allow for the influence of the background noise. The Respondent also determined the Acceptable Noise Level ("ANL"). According to the Respondent, the calculation and determination was made as per the requirements set out in the TM.

12. The CNL was found to be 62.0 dB(A). Compared with the ANL which was found by the Respondent to be 60.0 dB(A), the CNL exceeds the ANL by 2 dB(A).

13. A Noise Measurement Report was compiled by the Respondent on 26th November 2008.

14. On 5th December 2008, the Respondent notified the School of the noise measurement results and informed the Respondent that the noise emanating from the School did not comply with the noise limit contained in the TM. The Noise Measurement Report was, however, not sent to the Appellant.

<u>The 1st Noise Abatement Notice</u>

15. On 26th March 2009, the Respondent issued a Noise Abatement Notice No. N808024 ("the 1st NAN" or "the Original NAN") against the Appellant under Section 13(1) of the NCO. The 1st NAN was served on the Appellant by registered post on 31st March 2009.

16. The relevant provisions of section 13 of the NCO are as follows:

"(1) Where the Authority is satisfied that noise is emanating from any place other than domestic premises, a public place or a construction site and that such noise, whether on its own or together with noise emanating from any other place other than domestic premises, a public place or a construction site, -

(a) is a source of annoyance to any person (other than a person in the place from which the noise is emanating) in any place considered to be a noise sensitive receiver in any Technical Memorandum issued under section 10;

(b) does not comply with any standard or limit prescribed for the purposes of this section; or

(c) does not comply with any standard or limit contained in Technical Memoranda issued from time to time under section 10(1),

the Authority may serve a noise abatement notice in the prescribed form on any or all of the following -

(i) the person making the noise or causing or permitting the noise to be made; or

(ii) the owner, tenant, occupier or person in charge of the place from which the noise is emanating.

(2) A noise abatement notice served under subsection (1) relating to noise emanating from any place may require the person on whom it is served to abate the noise within the period specified therein and to do all things as may be necessary for that purpose, and may require the person on whom it is served to -

(a) ensure that the noise emanating from such place does not exceed any limit or standard specified in the notice;

(b) where the noise is emanating from such place by reason of the operation of any plant, machinery, vehicle, equipment or process, ensure that any such plant, machinery, vehicle, equipment or process is operated in accordance with any

condition specified in the notice; and

(c) notify the Authority in writing within the period specified in the notice that any requirement referred to in paragraph (a) or (b) and specified in the notice has been complied with.

(3) In specifying a period under subsection (2) within which noise is to be abated, the Authority shall have regard to the nature, difficulty and complexity of complying with any requirement in the noise abatement notice."

17. The complaint against the Appellant in the 1st NAN is that noise was emanating from activities including student activities during recess time of the School and such noise did not comply with the limits contained in the TM, as specified in section 13(1)(c) of the NCO. The School was required under the 1st NAN within the period from 4th May 2009 to 31st August 2009 (both days inclusive) to abate the noise and to ensure that at any time within six months commencing on 1st September 2009, the CNL of the noise emanating from activities of the School does not exceed 60 dB(A) at 1 meter from the exterior of the building façade of any domestic premises at No.16, 20, 20G, 22, 23, 23B and 23C-23D of Lo Wai Tsuen, Pui O, Lantau Island during the day and evening time period (0700 to 2300 hours) when assessed in accordance with the TM, under section 13(2)(a).

Appeal against the 1st NAN

18. On 20th April 2009, the School appealed against the 1st NAN.

19. In the Notice of Appeal, the School submitted the following:

"*1) The authority did not monitor continuously the activity of the school. A peak does not represent the continuous activities of the school, no more than loud music from domestic premises would represent the activities of a domestic premises.*

2) The school is required that at any time the noise emanating from activities at G/F Lot 2852 DD 316 Pui O and adjacent land granted under Short Term Tenancy CX1852 does not exceed 60 dB(A) at 1 meter from the

exterior of the building façade of any domestic premises at no. 16, 20, 20G, 22, 23, 23B and 23C-23D of Lo Wai Tsuen, Pui O during the day.

3) *However the Authority seems to be oblivious of the fact that:*

House 16 is a vacant lot. No domestic premises exist at the said lot.

House 20 and House 20G facades are directly exposed to the South Lantau Road, where the average noise traffic recorded during a survey conducted according to the Technical Memorandum is 69 dB(A) (see A+A report). Therefore to require the school to ensure that at any time the noise at 1 meter of those premises be at 60 dB(A) is just to ignore that they are exposed continuously at a background noise above that limit coming from the road.

House 22 is at ground floor an "Iron Workshop factory" conducting noisy commercial activities, which are far above the 60 dB(A) level. Furthermore, because House 16 does not exist, its façade is currently directly exposed to the traffic noise of the South Lantau road.

House 23, 23B and 23C-23D are too far away from the lot 2852 to be exposed to any direct noise coming from the activities of the school at lot 2952 (which are Houses 17, 18 and 19). The Authority did not carry any survey to actually assess the level of noise of those houses. However we have in the past require that trees be planted between the school and those premises. So far the Authority has not followed our demand.

4) *Finally, the only domestic premises close to the school is House 20. It is from this house that noise above 60 dB(A) were recorded during the continuous survey we had commissioned.*

Because of the above we consider the noise abatement notice to be abusive and wrong. Schools provide a public service and thus the nature of their activities should be taken into account to assess whether their activities are prejudicial or acceptable. In that respect, the standard applied to the school at lot 2852 would have to be the same standard used for the public school of Pui O, for which no survey was conducted, or any other school, whether government-run or private."

20. In support of the School's contention, the School adduced evidence from Dr.

W.Y. Poon ("Dr. Poon") who had arranged his staff to carry out measurements at the adjacent lots of the School and produced his results and analysis in three reports dated 19th December 2008 (Report No. APJ08-085-RP001) ("1st report"), 27th May 2009 (Report No. APJ09-001-RP001-R1) ("2nd report") and 27th May 2009 (Report No. APJ09-009-RP001) ("3rd report").

21. Having considered the three reports of Dr. Poon and having considered his *viva voce* evidence given at the hearing on 22nd June 2009, the Board found that neither the 1st, 2nd nor 3rd reports of Dr. Poon could offer any data comparable with that taken by the Respondent on 24th November 2008 or suggest that the Respondent was incorrect in taking the measurement.

22. The Board also heard the evidence of Ms. Connie Wong ("Ms. Wong") who is an Environmental Protection Officer of the Respondent. Having considered her *viva voce* evidence and the documents referred to by her, the Board accepted that the iron workshop at the ground floor of House 20 is small scale and by no means could turn the area into an industrial one. The Board found that the Respondent was correct in concluding that the noise sensitive receiver ("NSR") was not affected by the Influencing Factors ("IF") and that by virtue of Table 1 of the TM, the Area Sensitivity Rating ("ASR") should be "A", which is 60 dB(A).

23. As the CNL of 62 dB(A) measured by the Respondent exceeded the ANL of 60 dB(A), the Board found that the Respondent was legitimate in issuing the 1st NAN.

24. In respect of the coverage by the 1st NAN, the Board found that it was legitimate to include Houses 20, 20G, 22, 23, 23B and 23C-23D in the 1st NAN. However, as there was then no domestic premise at House 16, the Board found it not necessary to include House 16 in the 1st NAN and ordered the 1st NAN be varied to that effect.

25. For the reasons more particularly set out in the Decision published by the Board on 22nd July 2009 ("1-2009 Decision"), the School's appeal against the 1st NAN was dismissed (except House 16) with costs.

Events after the dismissal of the appeal against the 1st NAN

26. After the publication of the 1-2009 Decision, the Respondent issued a Noise Abatement Notice No. NA(V)N No.N808024(V) dated 31st August 2009 ("the 2nd NAN") to vary the period given to the Appellant for his abatement of the noise to "*within the period from 6 October 2009 to 1 February 2010 both days inclusive.*" and to exclude No.16 of Lo Wai Tsuen, Pui O, Lantau Island in accordance with the Board's Decision.

27. According to Ms. Wong, the 1st NAN was suspended pursuant to section 19(4) of the NCO from the date of appeal until the time the appeal was disposed of. She considered that the 2nd NAN should be issued to the Appellant to offset the time spent for the appeal.

28. During the course of the appeal against the 1st NAN, the Appellant sent to the Respondent a copy of his letter dated 19th May 2009 to District Land Office/Islands ("DLO/Is") indicating its intention to install a tempered glass canopy at the STT land located at the back of the Site as a noise abatement measure. However, DLO/Is turned down the Appellant's application on 21st July 2009 and advised him to consider amending the proposal to make the canopy separate from the building. The Appellant then submitted an amended proposal to DLO/Is on 13th August 2009. Later in early January 2010, the Respondent was advised by DLO/Is that the Appellant's application for installing a tempered glass canopy at the back of the school premises would be discussed in the Islands District Lands Conference ("DLC") on 13th January 2010.

29. On 14th January 2010, the Appellant sent a letter to the Respondent advising that though DLC had verbally approved his application for installation of the tempered glass canopy as a noise abatement measure, the Appellant would not be able to install it by 1st February 2010 (being the last day of the abatement period varied by the 2nd NAN). The Appellant requested the Respondent to further extend the noise abatement period by 12 months until 1st February 2011.

30. Ms. Wong of the Respondent then made a telephone enquiry with the DLO/Is on 15th January 2010 about the progress of its processing of the Appellant's application. Based on the advice of the DLO/Is, the Respondent considered that the canopy installation works could reasonably

be completed by the Appellant by the end of August 2010.

31. By the Respondent's letter to the Appellant dated 21st January 2010, the Respondent expressed its intention to extend the abatement period until 31st August 2010, unless the Appellant could provide further justification for a longer abatement period by 26th January 2010.

32. Since then, the Respondent has not received any reply or further request from the Appellant for extension of the abatement period beyond 31st August 2010.

33. Therefore, the Respondent decided to and did issue a new Noise Abatement Notice No. N810005 ("the 3rd NAN" or "the New NAN") to the Appellant on 28th January 2010. The 3rd NAN was issued to the Appellant under the Respondent's letter of the same date. In the said letter, the Respondent informed the Appellant that the 1st NAN would be cancelled upon the 3rd NAN coming into effect.

34. The Board notes that the requirements specified in the 3rd NAN are the same as those in the 1st NAN except that there is no reference to the domestic premises at No.16 of Lo Wai Tsuen, Pui O, Lantau Island as the assessment location and that the period of compliance has been varied to that from 1st March 2010 to 31st August 2010 both days inclusive.

35. According to the Respondent and the Board accepts, the deletion of the domestic premises at No.16 as aforesaid was in accordance with the 1-2009 Decision of the Board on the appeal against the service of the 1st NAN while the variation of the noise abatement period was in response to the request of the Appellant for extension of abatement period, taking into consideration of the advice of the DLO/Is referred to above.

Appeal against the 3rd NAN

36. On 12th February 2010, the Appellant issued a Notice of Appeal appealing against the 3rd NAN on the ground that the requirements of the notice are unreasonable in character or extent or are unnecessary and that the compliance with the requirements of the notice would cause the Appellant economic hardship seriously prejudicial to the conduct of his business.

37. On 23rd March 2010, the Appellant submitted his Statement of Particulars as required under Regulation 5 of the Noise Appeal (Appeal Board) Regulations. The Statement of Particulars was amended by the Appellant on 8th April 2010.

38. For the sake of completeness, the grounds and particulars of the Appellant's appeal are as follows:

B.1. The 1st ground of appeal

3. The 1st ground of appeal is under section 19(2)(a) of the NCO and more specifically, that the service of the Notice is not justified by the Technical Memorandum for the Assessment of Noise from Places other than Domestic Premises, Public Places or Construction Sites (the "Technical Memorandum") issued under section 10(1) of the NCO.

4. The further particulars of the 1st ground of appeal are as follows.

4.1 Paragraph 1of the Notice states as follows:-

"TAKE NOTICE that under section 13(1) of the Noise Control Ordinance the Authority being satisfied that noise is emanating from activities, including student activities during recess time of Lantau International School at G/F Lot 2852 D.D. 316 Pui O and adjacent land granted under Short Term Tenancy Agreement No. CX 1852, Lantau Island AND that such noise does not comply with the limits contained in the Technical Memorandum for the Assessment of Noise from Places other than Domestic Premises Public Places or Construction Sites issued under section 10(1), as specified in section 13(1)(c) REQUIRE YOU within the period from 1 March 2010 to 31 August 2010 both days inclusive to abate the noise AND to ensure that at any time within six months commencing on 1 September 2010 the Corrected Noise Level of the noise emanating from activities of Lantau International School at G/F Lot 2852 D.D. 316 Pui O and adjacent land granted under Short Term Tenancy Agreement No. CX 1852, Lantau Island does not exceed 60 dB(A) at 1 meter from the exterior of the building façade of any domestic premises at No. 20, 20G, 22, 23, 23B, and 23C – 23D of Lo Wai Tsuen, Pui O, Lantau Island during the day and evening time period (0700 to 2300 hours) when assessed in accordance with the said Technical Memorandum under section 13(2)(a)."

4.2 *The 60 dB(A) was fixed by the Respondent as the Acceptable Noise Level for the domestic premises at Nos. 20, 20G, 22, 23, 23B and 23C – 23D of Lo Wai Tsuen, Pui O, Lantau Island (the "domestic premises") which were Noise Sensitive Receivers under paragraph 2.1 of the Technical Memorandum.*

4.3 *The relevant parts of paragraph 2.2 of the Technical Memorandum headed "Location of the Noise Sensitive Receiver (NSR)" states as follows:-*

"For the purpose of this Technical Memorandum any domestic premises .. shall be considered to be a NSR ··· Any premises or place shall, however, be considered to be a NSR only when it is in use for its intended purpose." [Emphasis supplied]

4.4 *The service of the Notice is not justified by the Technical Memorandum because it is impossible to say whether the domestic premises or any of them would in fact be in use for their intended purposes on 1 September 2010 and for six months thereafter. The Notice cannot be justified by the Technical Memorandum unless the domestic premises are in use for their intended purposes which is a question of fact. The Notice is not conditional upon the domestic premises being in use for their intended purpose on 1 September 2010 and for six months thereafter and in any event, the NCO does not authorize the imposition of such a condition. Paragraph 2.2 of the Technical Memorandum does not permit deeming the domestic premises to be in use for their intended purpose at any future time.*

5. *In so far as may be necessary, the Appellant will rely on the further particulars of the 4th ground of appeal below.*

B.2. The 2nd ground of appeal

6. *The 2nd ground of appeal is under section 19(2)(a) of the NCO and more specifically, that the service of the Notice is not justified by the terms of the NCO.*

7. *The further particulars of the 2nd ground of appeal are as follows.*

7.1 *Section 13(3) of the NCO states that in specifying a period in a noise abatement noise within which noise is to be abated, the Respondent shall*

have regard to the nature, difficulty and complexity of complying with any requirement in the noise abatement notice.

7.2 *The Respondent failed to have regard to:*

(a) *The relevant parts of paragraph 2.2 of the Technical Memorandum referred to in paragraph 4.3 above; and*

(b) *Complying with the Notice if the domestic premises cease to be noise sensitive receivers on 1 September 2010 and for six months thereafter.*

B.3. *The 3rd ground of appeal*

8. *The 3rd ground of appeal is under section 19(2)(b) of the NCO and more specifically, that there has been some defect or error in the form or content of the Notice*

9. *The further particulars of the 3rd ground of appeal are the same as the 1st ground of appeal which are repeated.*

10. *In so far as may be necessary, the Appellant will rely on the further particulars of the 4th ground of appeal below.*

10A. *Further, the Notice is defective in form or content because it does not specify the action necessary to abate the noise. In this regard, the Appellant will:-*

10A.1 refer to and rely on:-

(a) *The letter dated 28 January 2010 from the Environmental Protection Department to the Appellant's supervisor (copied to the Appellant) which accompanied the Notice and in particular, the last sentence in paragraph 2 as follows: "You are required to take necessary action to abate the noise emanating from your place within the period specified in the attached Notice"; and*

(b) *The leaflet entitled "What to do when you receive a Noise Abatement Notice" that was attached to the said letter; and*

10A.2 refer to and rely on:-

(a) *London Borough of Camden v London Underground Limited [2000] Env LR 369; and*

(b) *Elvington Park Ltd & Anor v City of York Council [2009] EWHC 1805 (Admin) (20 July 2009).*

B.4. *The 4th ground of appeal*

11. The 4th ground of appeal is under section 19(2)(c) of the NCO and more specifically, that the requirements of the Notice are unreasonable in character or extent or are unnecessary.

12. The further particulars of the 4th ground of appeal are as follows.

12.1 It is unreasonable for the Respondent to use an Area Sensitivity Rating of "A" for the following reasons.

(a) *Under Table 2 of paragraph 2.4 of the Technical Memorandum, 60 dB(A) is the Acceptable Noise Level where the Area Sensitivity Rating is "A".*

(b) *Under Table 1 of paragraph 2.3.4 of the Technical Memorandum, an Area Sensitivity Rating of "A" applies where the type of area containing the noise sensitive receiver is a rural area, including village type developments.*

(c) *The area of the domestic premises is not a rural area because it contains trade and commercial activities: see the meaning of "urban area" in paragraph 2.3.4 of the Technical Memorandum and paragraph 5 to 8 of the Decision of the Town Planning Appeal Board in Town Planning Appeal No.2 of 2008, unreported, 25 February 2009.*

(d) *Further or alternatively, paragraph 2.3.2 of the Technical Memorandum, states that when "determining the type of area within which the NSR is located the Authority should not generally take into account the presence of the premises or place in which the noise under investigation is emanating. However, if the Authority considers that such a premises or place by virtue of its size or other*

characteristics plays a major role in determining the type of area within which the NSR is located, it should be taken into account."

(e) *The size or characteristics of the Appellant is that it is on all 3 floors of a building consisting of 3 New Territories Exempt Houses combined together with adjacent land granted under Short Term Tenancy Agreement No. CX 185. The site has in the past been used as a hotel, illegally converted to operate as one building but later left vacant. There is no evidence that the site has ever been used as New Territories Exempt Houses for residential purposes: see paragraph 7 of Town Planning Appeal No.2 of 2008. The area ceased being a rural area a long time ago.*

(f) *The area should be categorized in paragraph (iv) of Table 1 of the paragraph 2.3.4 of the Technical Memorandum, namely, "Area other than above", and if so categorized, an Area Sensitivity Rating of "B" applies and the Acceptable Noise Level under Table 2 of paragraph 2.4 of the Technical Memorandum is 65 dB(A).*

(g) *The Notice was issued because the noise emanating from the Appellant was 62 dB(A).*

12.2 It is unreasonable to use an Acceptable Noise Level of 60 dB(A) for the following reasons.

(a) *Paragraph 2.4 of the Technical Memorandum states that:*

"the appropriate ANL, in dB(A), for a given NSR <u>may</u> be determined from Table 2, having regard to the appropriate ASR and the time period under consideration." [Emphasis supplied]

(b) *The word "may" confers a discretion on the Respondent.*

(c) *When exercising the discretion, the Respondent must take into account all relevant consideration, ignore all irrelevant considerations and must not come to a decision which no reasonable body properly directed on the law and facts would come to.*

(d) *The Acceptable Noise Level of 60 dB(A) is inappropriately low having*

regard to the facts referred to in paragraphs 12.1(c) and (e) above which are relevant considerations. In particular, it is inappropriately low for the ironmongery premises next to the Appellant which operates daily with noisy machines: see paragraph 8 of Town Planning Appeal No.2 of 2008.

12.3 Further, given that the Notice was issued by the Respondent under section 13(1)(c) of the NCO (on the basis that the noise measured exceeded the acceptable noise limit) and not under section 13(1)(a) of the NCO (on the basis that the noise is a source of annoyance to persons in the domestic premises), the Notice is unreasonable because similar noise abatement notices were not issued against all premises at the same or closer distances from the domestic premises such as the ironmongery premises referred to in paragraph 12.2 (d) above and accordingly, the Respondent has treated the Appellant unequally with no or no sufficient justification: see So Wai Lun v HKSAR (2006) 9 HKCFAR 530 at page 539, paragraph 20 and R v Man Wai Keung (No.2) [1992] 2 HKCLR 207 at page 217."

Res judicata

39. The Respondent takes a preliminary point concerning the Appellant's appeal against the 3rd NAN. The Respondent submits that the doctrine of *res judicata* applies to the 1-2009 Decision and the Original Appeal against the 1st NAN because of the very similar features between the 1st NAN and the 3rd NAN.

40. According to the Respondent, the validity of the 1st NAN had been adjudicated upon by the Board and confirmed to be valid in the Original Appeal, except House 16. In the 3rd NAN, House No. 16 was not included. Further, the 3rd NAN was issued essentially to extend the time for the Appellant to comply with the 1st NAN as varied by the Board and in view of the fact that there is no express provision in the NCO to allow for the issue of a notice to vary an already varied NAN (i.e. the 2nd NAN). There is no substantial difference in circumstances to differentiate between the 1st and 3rd NAN.

41. The Respondent submits that the Appellant is estopped from raising all or any of the six grounds of appeal under the wider sense of *res judicata* as defined in the cases of Henderson v Henderson ("Henderson") [1843] 3 Hare 100, Yat Tung Investment Co. Ltd. v Dao Heng Bank Ltd. & Anor

("Yat Tung") [1975] AC 581 and Greenhalgh v Mallard ("Greenhalgh") [1947] 2 ALL ER 255.

42. The *locus classicus* of *res judicata* is found in the judgment of Wigram V.-C. in Henderson v. Henderson (1843) 3 Hare 100, 115, where the judge said:-

"*... where a given matter becomes the subject of litigation in, and of adjudication by, a Court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time.*"

43. In Greenhalgh v Mallard [1947] 2 All E.R. 255, Somervell L.J. said at p.257 (H):

"*...res judicata for this purpose is not confined to the issues which the court is actually asked to decide, but ... it covers issues or facts which are so clearly part of the subject matter of the litigation and so clearly could have been raised that it would be an abuse of the process of the court to allow a new proceeding to be started in respect of them.*"

44. Further, in Yat Tung Investment Co Ltd v Dao Heng Bank Ltd & Anor [1975] AC 581, Lord Kilbrandon said at p.590 (A) held that:

"*But there is a wider sense in which the doctrine may be appealed to, so that it becomes an abuse of process to raise in subsequent proceedings matters which could and therefore should have been litigated in earlier proceedings.*"

45. The Doctrine of Res Judicata written by Spencer Bower, Turner, and Handley (3rd edition) also said the following concerning *res judicata*:-

(a) Para. 20 – "A *res judicata* is a decision, pronounced by a tribunal which is judicial in the relevant but special issue."

(b) Para. 21 – "In determining the characteristics of a judicial tribunal one must discard the antiquated view that only a court of record can be a judicial tribunal for the purposes of this doctrine.... It is enough if the tribunal exercised judicial functions under the law of England, or, in the case of a foreign tribunal, the law of the foreign state, whether invested with permanent jurisdiction or only with temporary authority to adjudicate on a particular dispute, or group of disputes."

(c) Para. 23 – "A third class of civil tribunals accounted "judicial" for present purposes are "statutory tribunals".

(d) Para. 23 – "The decision of a statutory tribunal may be "judicial" for present purposes although there are no pleadings and it is not bound by the rules of evidence or legal procedure." The author then quoted the test in Pastras v Commonwealth (1966) 9 FLR 152 (Sup Ct of Victoria) for distinguishing between judicial and purely administrative decisions.

46. The Respondent submits that under this doctrine, arguments that could have been raised in the previous proceedings but not raised cannot be raised in the present proceedings concerning similar issues. The Respondent further submits that ground 4 of the Appellant's Submission has been raised and adjudicated upon by the Noise Control Appeal Board. It is an abuse of process for the Appellant to raise this ground in the present appeal. The other grounds of appeal were not raised in the Original Appeal but are grounds which could and should have been raised by the Appellant in the Original Appeal. Thus, the Appellant's submissions should be dismissed by operation of the doctrine of *res judicata*.

47. On the other hand, the Appellant submits that the doctrine of estoppel or *res judicata* does not apply as a matter of law and fact.

48. According to the Appellant, there are the following differences between the 1st NAN and the 3rd NAN:

(a) The abatement period is different viz. 4th May 2009 to 31st August 2009 (1st NAN) and 1st March 2010 to 31st August 2010 (3rd NAN);

(b) The premises are different viz. the 1st NAN includes House No. 16

whereas the 3rd NAN does not; and

(c) The circumstances leading to the 1st NAN are different from those leading to the 1st NAN.

49. The Appellant also submits that by virtue of the legal principle set out in the following cases, the doctrine of estoppel and *res judicata* does not apply as a matter of law:

(a) Swallow and Pearson v Middlesex County Council [1953] 1 WLR 422 ("Swallow")
(b) Mounsdon v Weymouth and Melcombe Regis Corporation [1960] 1QB 645 ("Mounsdon")
(c) Newbury District Council v Secretary of State for the Environment [1981] AC 578 ("Newbury")
(d) Kok Hoong v Leong Cheong Kweng Mines Limited [1964] AC 993 ("Kok Hoong")

50. The Appellant refers the Board to the case of Swallow wherein the Court said the following in dismissing the appeal:

"In that connexion Mr. Squibb referred me to W. Davis (Spitalfields) Ld v Huntley and Others. In that case it was held that a tenant, having applied for a new lease under the Landlord and Tenant Act, 1927, on the basis of his existing lease having been determined, could not thereafter as against the landlord set up that a notice given to him by the landlord was invalid and had not terminated the lease. I am not in my own mind quite clear how far those principles apply when one is considering something which is prescribed by Act of Parliament. There is no doubt that a man in such a case is entitled to waive, or to agree to waive, the advantage of the law or rule made solely for his benefit and protection. It is equally clear that no person can waive a provision or a requirement of the law which is not solely for his benefit but which is for the public benefit. In my view, however, in this case, if one looks at it more closely, the plaintiffs are not waiving some irregularity for their benefit, but, it is said, are estopped from denying that a particular document is valid. This enforcement notice is one which Parliament has said must be in a particular form, and when it is in that particular form its non-observance is a criminal offence, not only on the part of the person on whom it is served but, in some cases, on others, and I cannot think that in such a case a person can make a document which is

patently unenforceable on its face into a valid document carrying the consequences which I have described. I do not think that any amount of so-called waiver or approbation can make a document such as this, which is patently and wholly invalid, into a valid document with the consequence that would follow."

51. The Board finds that waiver in the above case concerns a provision or a requirement of the law. It does not relate to or consider as the doctrine of *res judicata*. The Board is unable to see how this case will assist the Appellant's argument that the doctrine of *res judicata* has no application in the present appeal. The Board is unable to accept the Appellant's submission.

52. Regarding the cases of Mounsdon and Newbury, the Board opines that they are not related to *res judicata*. In these two cases, the Court held that the validity of an enforcement notice was either contrary to the applicable legislation or was called into question for the first time in litigation. Indeed, the doctrine of *res judicata* was not mentioned in the judgments.

53. The Appellant refers the Board to the judgment in Kok Hoong wherein the Privy Council said:

"*The respondent has invoked in support of its defence a principle which appears in our law in many forms, that a party cannot set up an estoppel in the face of a statute. Thus a corporation upon which there is imposed a statutory duty to carry out certain acts in the interest of the public cannot preclude itself by estoppel in pais from performing its duty and asserting legal rights accordingly. ... Given a "statutory obligation of an unconditional character" it is not open to the court to allow the party bound by that obligation to be barred from carrying it out by the operation of an estoppel. Similarly, there is, in most cases, no estoppel against a defendant who wishes to set up the statutory invalidity of some contract or transaction upon which he is being sued, despite the fact that by conduct or other means he would otherwise be bound by estoppel...*"

54. In the present appeal, the Appellant is not suggesting estoppel against the statutory obligation as in Kok Hoong. Thus, Kok Hoong cannot be applied in the present appeal. Further, the Privy Council in Kok Hoong held that "the full rigour" of the Henderson Principle should not be applied to a

default judgment, which is again not the case in the present appeal.

55. The Appellant also submits that *res judicata* does not apply in fact because there are differences between the new NAN and the original NAN. First, the abatement period is different between the two NANs. Secondly, the domestic premises to be protected are different between the two NANs in that the original NAN includes House No. 16 whilst the new NAN does not. Thirdly, the circumstances leading to the issue of the original NAN are different from those leading to the new NAN.

56. The Board does not find these differences substantial enough to nullify the applicability of *res judicata*. The original NAN and the new NAN are substantially the same with only minor differences. Both NANs require abatement of noise and do not require any specific actions to be taken. Both NANs cover the same domestic premises in the vicinity of the School, except that the new NAN omitted House 16 as per the Decision of the Board. The Board accepts that the revised time table stated in the new NAN is to enable the Appellant to have sufficient and ample time to comply with the requirement of the new NAN, namely, to abate the noise within the period therein defined such that at any time within six months commencing from the expiry of the period the CNL of the noise emanating from activities of the School does not exceed 60 dB(A).

57. The Board further notes that there is no evidence to suggest that there has been a change of circumstances in the area since the issue of the original NAN.

58. The Board is established under Section 20 of the NCO to hear and determine an appeal against, inter alia, a notice issued under section 13(1) of the NCO by any aggrieved person. In discharging this statutory duty, the Board is exercising judicial function, not administrative function. To enable this duty be properly exercised, the Board is vested with those powers laid down in sub-section (6) to (11) of section 21 of the NCO.

59. The Board finds that the wider sense of *res judicata* as laid down in Henderson, Yat Tung and Greenhalgh remain good law and should be applicable to the 1-2009 Decision and the present appeal.

60. The Board agrees with the Respondent that the first 3 grounds of appeal

stated in the Amended Statement of Particulars could and should have been raised by the Appellant in the Original Appeal. The 4th Ground of Appeal has been raised and adjudicated upon by the Board.

61. Since the Board has already adjudicated on the validity of the original NAN, the Board finds that it is not open for the Appellant to challenge the validity of the new NAN, which is substantially the same as that of the old NAN.

62. By virtue of the matters aforesaid, the Appellant's appeal against the new NAN is dismissed.

63. Nonetheless, in deference to the thorough submissions made by the Appellant's counsel and in the event that the Board were wrong in finding that the doctrine of *res judicata* applies to the Decision and the present appeal, the Board considers it just and equitable that the grounds of appeal canvassed by the Appellant should also be considered and dealt with in this Decision.

1st Ground of the Appeal

64. The first ground of Appeal of the Appellant is that the new NAN is defective under Section 19(2)(b) of the NCO and/or service is not justified under Section 19(2)(a) of the NCO because it assumes or speculates that the domestic premises would continue to be used for their intended purposes until 31st August 2010 and for 6 months starting on 1st September 2010.

65. The Appellant refers to paragraph 2.2 of the TM which provides that

"*For the purpose of this Technical Memorandum any domestic premises,..., temporary accommodation, ... shall be considered to be a NSR. ··· Any premises or place shall, however, be considered to be a NSR only when it is in use for its intended purpose.*"

66. The Appellant submits that the words "in use" cannot mean "used as" or "used for". The term "in use", according to the Appellant, means it must actually be used since it is only when domestic premises is actually used can it be said to be sensitive to noise. The purpose of NAN is to protect NSRs and not domestic premises which is vacant.

67. Further, the Appellant submits that there is no presumption that a domestic premises is a NSR unless it ceases to be domestic premises. The NAN must be based on the fact that the domestic premises will be NSRs from 1st March 2010 to 31st August 2010 and for six months starting on 1st September 2010. However, there is no evidence adduced by the Respondent to show that the domestic premises will be in use for their intended purposes until 31st August 2010 and for six months commencing on 1st September 2010.

68. The Board is unable to agree to the Appellant's submissions. In the Board's opinion, a domestic premises is a NSR unless it is not in use for its intended purpose. A domestic premises will not become non-domestic simply because it is vacant for a certain period of time. There could be many reasons that a domestic premises may be left vacant for a period of time. These reasons may include the owner/occupier going abroad during the said period or the premises being used as second home. The TM does not state that a domestic premises will cease to attract protection because it is vacant. Indeed, temporary accommodation is considered by the TM to require protection. Of course, if there is evidence to show that the domestic premises is not in use as domestic purpose, for example, the use changed to commercial or industrial, then the premises or place shall cease to be NSR.

69. Regarding the Appellant's complaint that the Respondent has adduced no evidence to show that the domestic premises will be in use for their intended purposes, the Board does not find this complaint of substance.

70. First, Ms. Wong testified that prior to issue of the NANs in question, she and her colleagues had inspected the area including the village houses covered in the NANs. There are at least two visits made by her, one in November 2008 and another one on 7th January 2010. During the said visits, there was no indication to Ms. Wong that any of the domestic premises included in the NANs for protection would be converted to non-domestic use in the near future. According to Ms. Wong, while there might be possibility that one or a few of the domestic premises would be occasionally vacant for trip, vacant for rental, or only occupied as vacation accommodation after issuing the new NAN, this should not affect the scale and location of the tempered glass canopy to be installed by the Appellant and hence would not affect the determination of the abatement period.

Unless the owner or tenant indicates to her that the premises is no longer used for domestic purpose, the Respondent cannot consider the premises not in use for domestic purpose. Nevertheless, if she noticed any evidence indicating the premises had been converted to other use, she would not consider it as domestic premises as defined under Section 2 of the NCO.

71. The above evidence of Ms. Wong had been critically examined by Mr. Ismail, Counsel for the Appellant. Despite the skilful and eloquent cross examination, Ms. Wong's evidence remains unshaken. Having compared Ms. Wong's evidence with other contemporaneous documents and photographs, the Board finds that Ms. Wong is a true and honest witness. The Board accepts her evidence and the observations she made during site inspections.

72. Secondly, there is no evidence adduced by the Appellant to show that any domestic premises mentioned in the new NAN had not been used for the intended purpose before or after the issue of the NAN. The Appellant is operating the School in the vicinity of the NSRs. Had he found that any NSR had been converted to use other than domestic, it would be very surprising that the Appellant would not have noticed the same and brought to the attention of the Board.

73. The only complaint lodged by the Appellant so far is the iron workshop at the ground floor of House 22. House 22 which is covered by the old NAN as well as the new NAN. However, the Board notes that the NANs make reference to "any domestic premises at House 22" and the Respondent submits that the iron workshop being operated commercially would not be covered by the NANs.

74. As the ground floor had been turned into iron workshop, it is not in use for domestic purpose. To avoid any possible ambiguity, the Board considers that the ground floor of House 22 should be excluded from the new NAN.

75. According to Ms. Wong, the iron workshop was being operated at family-scale and the scale of such operation would not be significant to turn the area into an industrial area. Nonetheless, the effect of the existence of the iron workshop had been considered by the Board in the 1-2009 Decision. The Board is not going to repeat its reasoning.

76. Thirdly, the Board considers it reasonable for the Respondent to make an inference that any domestic premises would continue to be in use for domestic purpose unless there is evidence to suggest otherwise. In the absence of any evidence to suggest that there would be a change of intended use, it would be reasonable for the Respondent to conclude that the present use of the place or premises will be continued and to issue NAN on this conclusion.

77. By reason of the matters aforesaid, the Board does not find merits in the Appellant's first ground of appeal.

2nd Ground of the Appeal

78. The Appellant contends that the new NAN is defective because the abatement period is unreasonable. The Appellant submits that despite the effort made by the Appellant, there is no way that the noise can be abated by 30th August 2010 given that at the time of hearing of the appeal, it was already 7th June 2010. By then, the supplementary agreement was still being scrutinized and it was not certain when the supplementary agreement of terms acceptable to the Appellant could be finalized. Further, the Appellant needs to engage an Authorized Person ("AP") to prepare the necessary building plans for obtaining the Building Authority ("BA")'s approval. It would require at least six months to complete the above work. Thus, it would simply not be possible for the Appellant to comply with the requirements shown in the new NAN.

79. In Bristol Corporation v Sinnott [1918] 1 Ch 62, Swinfen Eady L.J. said at page 71 the following:

"*Where a statue provides that an authority may serve a notice for work to be done within a time to be specified in such notice it must, in order to be a valid and not an illusory notice, specify a time within which the work can reasonably be completed. The authority must consider the nature and extent of the work and, having regard to the circumstances, the time which ought fairly and reasonably to be allowed for the completion of that work. They have no discretion to fix a shorter time. When once the least time that could be fairly and reasonably allotted for the completion of the work has been ascertained that is the least time to be inserted in the notice. They have, however, a discretion to allow further time.*"

80. There seems to be no dispute between the parties that the time for assessing whether the Respondent was reasonable in fixing the duration of the period for compliance is the issue date of the new NAN. This also accords with the Board's view.

81. In the new NAN, the Appellant has been given 6 months (from 1st March 2010 to 31st August 2010) for abating the noise.

82. According to Ms. Wong, she had followed section 13(3) of the NCO when she determined the period for noise abatement to be specified in the new NAN. She took into consideration of the nature, difficulty and complexity of installing the tempered glass canopy, which was the Appellant's proposal and measure to abate the noise. She considered that the glass canopy would be required to cover the whole playground at the back of the School. She was aware that an application had been made to the Lands Department ("LandsD") for approval to have the glass canopy at the STT land. She called the LandsD and was told that approval had been granted for the construction of the glass canopy at the STT land and a supplementary agreement was being prepared. It would take about 1 to 2 months for preparation of the supplementary agreement. Nevertheless, the Appellant could go ahead to submit drainage plan and building plan for approval whilst waiting for the issuance of the supplementary agreement. Ms. Wong also made a search of the Building Department ("BD")'s website and noted that there was a pledge of 2 months for approval after submission. Based on the matters above and on the premise that it would take the Appellant approximately 2 months for construction, she then came to the view that 6 months (2 months for the supplementary agreement, 2 months for the BD's approval and 2 months for the construction) would be required from the inception to completion of the glass canopy construction.

83. The Board finds that the assessment made by Ms. Wong was reasonable on the basis of information then available to her.

84. The Board notes that the new NAN was issued on 28th January 2010 and Ms. Wong could only refer to and rely on those information known to or reasonably accessible to her by 28th January 2010.

85. The Appellant criticizes the assessment of Ms. Wong as unreasonable and unrealistic.

86. The documents submitted to the Board show that the Appellant was informed by the DLO/Is on 29th March 2010 that the installation of tempered glass canopy above the rear portion of the School granted under the STT was approved and that the supplementary agreement was being scrutinized. On 20th May 2010, the Appellant was informed by DLO/Is that whilst the supplementary agreement was being scrutinized, the Appellant might start to engage an AP to submit formal building plans and to prepare drainage proposals for submission to the BD for approval.

87. According to the Appellant, the BA has 60 days to consider an application for approval and a further 30 days to consider a re-submission. Further, the BA has a discretion to refuse to approve the building plans and drainage plans. The Appellant is under no legal or moral obligation to engage an AP to prepare those plans before he knows the terms of the supplementary agreement. Thus, realistically speaking there is no way that the noise can be abated by 30th August 2010 in light of the aforesaid matters since as at 7th June 2010, the supplementary agreement prepared by DLO/Is was still not forthcoming.

88. The Appellant further submits that the NAN cannot be amended by extending the date to 1st February 2011 or any date. The reason which the Board understands is that the Appellant does not know the terms and conditions of the supplementary agreement and is in no position to know whether he would accept the supplementary agreement or not.

89. The Board can well understand the dilemma which the Appellant is facing. However, this cannot constitute a good ground to say that the Respondent was unreasonable when fixing the period of abatement.

90. First, the time for assessment of the abatement period by the Respondent when issuing the new NAN is 28th January 2010. The matters which the Appellant draws the Board's attention to, however, took place after the issue of the new NAN. There is no evidence to suggest that at the time when Ms. Wong was making the assessment, she knew that it would take such a long time (as it now transpires) for the LandsD to prepare the supplementary agreement. With the benefit of hindsight, one can always claim that a longer period should have been allowed by the Respondent for the abatement period. However, by the time of her assessment, Ms. Wong had

been informed by the LandsD that it would require 1 to 2 months for preparation of the supplementary agreement. She acted on such belief and the Board does not find such belief and reliance unreasonable.

91. Secondly and more importantly, the new NAN (indeed following what had been provided for in the old NAN) requires the Appellant to abate the noise within the period specified. The Respondent did not specify what measure or works need to be carried out by the Appellant in the new NAN. It is up to the Appellant to consider what measures or works should be carried out in order to have the noise be abated below the statutory limit stated in the new NAN. The Appellant came to the view that a glass canopy should be constructed at the STT land. This proposal was considered by the LandsD to be viable subject to the glass canopy being not connected to the buildings. The Respondent also considered the Appellant's proposal to be viable and hence proceeded on this basis when issuing the new NAN.

92. However, it is vital to note that the glass canopy is a proposal made by the Appellant, not a measure or work requested or directed by the Respondent in the new NAN. Had the Respondent required the Appellant to construct a glass canopy at the STT land, the situation would be entirely different and the Appellant is justified to make complaints about those matters raised in paragraphs 87 and 88 above. However, what the new NAN requires is an abatement of noise by the Appellant within the abatement period. Construction of a glass canopy is one of the possible measures. However, there is no evidence before the Board that this is the only possible measure. Thus, the Appellant should bear the responsibility to ensure that reasonable steps be taken by it during the abatement period to ensure that the noise could be abated as specified in the new NAN. Such reasonable measures include engaging AP to prepare building plans and drainage plans for submissions to the BA for approval even though the terms of supplementary agreement was still being negotiated. In the Board's view, it is not reasonable for the Appellant to delay the engagement of AP simply on the ground that the Appellant has not had sight of the supplementary agreement and does not know whether he would accept the terms and conditions imposed under the supplementary agreement. Assuming that the Appellant does not accept the terms and conditions imposed by the LandsD through the supplementary agreement, it does not mean that the Appellant is excused from complying with the requirements stated in the new NAN. As the Board has just indicated, the Board is not satisfied on the basis of evidence

before us that there is no measure other than the construction of glass canopy to abate the noise.

93. By reason of the matters aforesaid, the Board does not find merits in the Appellant's second ground of appeal.

94. As the matter now transpires, if the Appellant wishes to implement the option of constructing glass canopy, it should give serious consideration to the supplementary agreement (which the Board understands from the parties' correspondences to the Board after the hearing) which has been sent to the Appellant.

95. It is noted that the Respondent has invited the Board to consider varying the new NAN in the event that the appeal is dismissed. The Respondent suggests that the period to be given to the Appellant to comply with the requirements of the new NAN should be varied from the period between "1st March 2010 and 31st August 2010" to "within the period ending 1st March 2011" or to such period as the Board shall deem fit.

96. The Board is prepared to give further time to the Appellant for implementing the glass canopy option and will vary the new NAN to that effect.

97. To minimize any possible disruption to the study of school children during construction of the glass canopy, the Board comes to the view that it would be desirable to have the construction works be carried out during summer vacation. There is no chance that the construction of the glass canopy can be carried out during this summer vacation. Thus, the Board will vary the NAN and extend the time of compliance to 31st August 2011.

98. However, if the Appellant decides that he will not take up the offer by the LandsD and will not enter into a supplementary agreement, he should forthwith decide and implement whatever alternative ways or measures to ensure that the noise can be abated below 60 dB(A) by 31st August 2011.

3rd Ground of the Appeal

99. The Appellant contends that the new NAN is defective under Section 19(2)(b) of the NCO and/or service is not justified under Section 19(2)(a) of

the NCO because it does not specify the action to be taken to abate the noise and the method of lowering the noise level to 60 dB(A).

100. The principal complaint by the Appellant is that the NAN must be construed with the covering letter and the leaflet. Although the NAN had deleted the words "/**AND*** for that purpose to (*specify things considered to be necessary to abate the noise within the time*)", paragraph 2 of the covering letter which enclosed the new NAN did not delete the words "take necessary action to" in "You are required to take necessary action to abate the noise emanating from your place within the period specified in the attached Notice." The leaflet also requires action to be taken because it states "When you receive a noise abatement notice, immediate attention should be paid to comply with the notice, by lowering the noise emission from the premises to the required level within the stipulated period". The words "by lowering the noise emission from the premises to the required level within the stipulated period" were not deleted. A reasonable inference from the above to the recipient of the new NAN, said by the Appellant, is that he is required to take necessary action to abate the noise emanating from his premises within the period specified.

101. The Board notes that the new NAN was issued by the Respondent in the prescribed form EPD84(s) as required under Section 13 of the NCO which states "*...the Respondent may serve a noise abatement notice in the prescribed form on any or all of the following person ...*". Thus, the only piece of document that has statutory effect is the new NAN, not the covering letter or the leaflet.

102. Unless the new NAN refers to the covering letter and the leaflet, the covering letter and the leaflet do not form part of the NAN and do not have statutory effect. In the present case, the new NAN makes no reference to the covering letter of the leaflet. Thus, it is not open for the Appellant to contend that by reason of the covering letter and the leaflet suggesting that the Appellant be required to take some action, the new NAN would be void for uncertainty as no action to be taken by the Appellant has been specified in the new NAN.

103. The new NAN, in the Board's view, is clear in its requirement. There are two alternative modes of action available to the Respondent in the prescribed form. The Respondent has discretion to choose whether simply

requiring the Appellant to abate the noise OR stipulating matters or actions to be taken by the Appellant to abate the noise. If the Respondent considers that some necessary actions should be taken by the Appellant, the Respondent can specify the same and the Appellant should comply with this, failing which the Appellant will be considered to be in breach of the NAN and is liable for being prosecuted for the breach. On the other hand, the Respondent may just choose to leave the Appellant to decide what action he may wish to take and so long if the noise is abated to the specified requirement within the period defined, the NAN is complied with and there is no statutory consequence to follow.

104. In the new NAN, the Respondent has clearly chosen the latter way (i.e. simply requiring abatement) and the Appellant is given liberty to decide whatever way which he considers to be suitable and necessary to abate the noise. The Board does not find the Respondent being unreasonable in exercising such discretion. In the new NAN, the Appellant is given free hand to implement whatever abatement measure within the time specified so long if the noise could be reduced to 60 dB(A) within six months after the time specified. The Appellant is not confined to installing glass canopy at the STT land as it now intends to. If the Appellant could think of other viable options, these options could be implemented if the noise could thereby be abated to the specified level.

105. The Board also finds that the covering letter and the leaflet only suggest the Appellant to take necessary action to abate the noise emanating from his place within the period specified in the new NAN. The Appellant is given the liberty to decide what action he deems fit to accomplish the purpose, namely, to abate the noise. This cannot be said to be faulted. Indeed, if the Appellant fails to take necessary or any action, the Appellant may only be prosecuted for non-compliance of the new NAN, and certainly not the covering letter or the leaflet.

106. Even applying the ordinary canon of statutory construction, the recipient can only resort to other documents if the NAN is ambiguous or if the content is affront to commercial sense. The Board finds that the requirements of NAN are clear. There is no need to resort to the enclosure letter or the leaflet for explanation.

107. The Board is not convinced that the 3rd Ground of the Appeal is meritorious.

4th Ground of the Appeal

108. The Appellant considers that the ASR of 60 dB(A) is unreasonable because the area is not a rural area.

109. The Appellant relies on the finding by the Town Planning Appeal Board ("TPAB") which made a visit to the School and found that there were trade and commercial activities such as ironmongery, guesthouses, a publishing business and a club/bar. According to the Appellant, the situation is the same today and the Respondent has not said otherwise.

110. The Board does not consider the finding by TPAB of much assistance to the Appellant's present appeal. The Board notes that the TPAB was not required to decide whether the area was or was not a rural area or whether the "V" zone was a correct zoning. It was only concerned whether the School was compatible with zoning as village type development. The TPAB concluded that it was compatible. However, there is no finding by the TPAB (which in any event is not binding on this Board) that the area was or was not a rural area.

111. The Appellant also submits that the size of the School is not small (being of total area of 831 m^2) and the building which the School occupied had previously been used as a hotel. There is no evidence that the site had ever been used as New Territories Exempted Houses for residential purpose. As a matter of common sense, an area with such trade and commercial activities and a school of such size that was formerly a hotel is either not rural or not wholly rural. At the highest, the area is semi-rural. In either case, it should be properly classified in "(iv) Area other than above". This, according to the Appellant, makes sense and is consistent with the TM because an area with trade and commercial activities does not need the same level of protection from noise as an area without them.

112. In reply thereto, the Respondent relies on the evidence of Ms. Wong who said that the size of the School would not affect the assessment on the type of the subject area given the hundreds and even a thousand village houses in the subject area which consists of an area of 500 m radius. Further, the larger the school is, the more likely that the noise generated will exceed the ANL of 60 dB(A).

113. Regarding the commercial use in the vicinity of the School, the Respondent submits that the Appellant has ignored that (a) some of the commercial uses are holiday houses (NSR); and (b) the domestic premises in the upper floors of the village houses although there may be shops and eating places on the ground floors. These are NSRs requiring protection. In any event, commercial uses scattered around in the vicinity of the School are not of such scale or intensity as to alter the rural and village type development of the subject area. The area opposite the School at South Lantau Road consists of preservation area and there is no development at all at this piece of land.

114. Having considered the evidence before the Board including the index plan and the photographs, the Board prefers the argument put forward by the Respondent and finds that the subject area is still a rural one. Although the size of the School is not small, it cannot by any means be said to be of such size and character that it plays a major role in determining the type of area within which the NSRs are located.

5th Ground of the Appeal

115. The 5th ground of appeal was added to by the Appellant in his "Summary of the Appellant's grounds for allowing appeal" dated 7th June 2010 submitted to the Board during the first day of hearing. It is essentially an offspring of the 4th ground of appeal.

116. The Appellant contends in this ground of appeal that the Respondent acted unreasonably in using the 60 dB(A) in all the circumstances. It is an unreasonable exercise of discretion under paragraph 2.4 of the TM to treat the School differently from the ironmongery with no or not sufficient justification.

117. The Appellant submits that the Respondent is under a duty to take noise measurements from the ironmongery pursuant to the principle of equality. The Respondent's duty to take measurements does not arise only when there is a complaint especially when it knew that the ironmongery was producing a noise. The school children's best interests and their rights to engage in play and recreational activities which are internationally recognized are clearly relevant considerations to be taken into account in the exercise of the discretion under paragraph 2.4 of the TM.

118. In reply, the Respondent submits that all noise measurements have to be carried out in accordance with the TM. The written admission by the owner of the ironmongery and the video provided by the Appellant to the Respondent are not sufficient evidence for the Respondent to issue a NAN against the ironmongery. Further, it is impracticable to take noise measurements of the noise from ironmongery at vacant lots or at other NSR in the absence of any complaint by such NSR. Indeed, the Appellant had failed to respond to the Respondent's requests to conduct a noise measurement at the School.

119. The Board does not see the issue of whether the Respondent takes action against the ironmongery is relevant to the present appeal. The noise emanated from the School and the noise emanated from the ironmongery business are two different matters. It is not the contention of the Appellant that the noise emanated form the School is aggravated by the noise emanated from the ironmongery.

120. In any event, the Board does not see the complaint of inequality justified. If the Appellant were serious in considering that the noise emanated from the ironmongery has disrupted the learning of its school children, he should have made complaint to the Respondent for its follow-up. However, there is no such complaint. Further, the Appellant for reasons unknown has refused the Respondent to take measurement at the School.

121. In respect of the Appellant's reference to and reliance on the United Nations Convention on the Right of the Child ("the Convention"), the Board does not see how the Convention would assist the Appellant's contention.

122. The Board understands and supports the importance of children being given freedom of movement and space for recreation and development. On the other hand, as the Respondent has rightly pointed out, nothing in the Convention suggests that the rights of the children are absolute and can be exercised in total disregard to and violation of the applicable law in a contracting state.

123. The Board believes that the Convention aims to promote and protect the rights of children internationally. Indeed, one of the objectives of the Convention is to educate children so that they learn to be considerate and responsible.

124. There is no evidence to suggest that the issue of new NAN will impede the education and recreation of the children receiving education at the School. Indeed, the children at the School do not need the backyard for sports activities. They have the sports ground at Pui O to accomplish this purpose. The backyard is for access to toilets and relaxation. Even there were some restriction to the activities that could be undertaken at the backyard for the purpose of abating the noise generated during children's activities, this should not be said to be violation of the rights under the Convention.

125. By reason of the matters aforesaid, there is no merit in the 5th ground of appeal.

Summary

126. For the above reasons, the Board would dismiss the appeal. However, the Board would also vary the NAN to exclude reference to the ground floor of No. 22, Lo Wai Tsuen, Pui O, Lantau Island and to extend the compliance period to 31st August 2011. There will be a corresponding revision to the time for commencement of the six-month period from 1st September 2010 to 1st September 2011.

127. For administrative convenience and for the sake of clarity, the Board opines it desirable for the Respondent to issue and serve on the Appellant a notice in the prescribed form pursuant to section 13(4) of the NCO to vary the requirements in the new NAN as varied and directed by the Board.

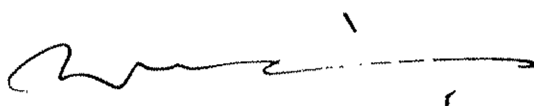
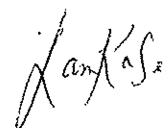
Costs

128. In relation to the question of costs, the Board makes an order *nisi* that the Appellant should bear the costs of the appeal. Such an order *nisi* will become absolute unless the Appellant makes an objection with grounds stated within 14 days of the date of receipt of this Decision.

129. In coming to the above provisional view on question of costs, the Board adopts the oft-cited principle that "*costs should normally follow the event*". There seems to be no exceptional circumstances justifying why the said principle should not apply in this appeal.

130. Finally, it remains for the Board to express our gratitude to the able and valuable assistance provided by the Appellant's counsel and the Respondent's counsel. The Board is greatly indebted to them.

Dated the 9th day of August 2010

Yeung Ming Tai	Tsui Hing Chuen, William	Lam Ka Se
(Chairman)	(Member)	(Member)