Town Planning Appeal No. 2 of 2004
Appellant : Christopher Yau Garr Leung
Re : Lot 77 RP in DD 19
San Uk Tsai Village, Tai Po

And

Town Planning Appeal No. 3 of 2004
Appellant: Jonathan Yau Garr Wah
Re: Lot 77B in DD 19
San Uk Tsai Village, Tai Po

Date of Hearing : 13th & 14th October and 10th November, 2004
Date of Decision : 6th January 2005

Panel : Mr Edward Chan King Sang, SC, JP (Chairman)
Mr Eric Chan Jink Chou
Mr Kenneth Chau Tak Ho
Ms Helen Kwan Po Jen
Mr Thomas Ling Chi Kong

**Decision**

1. The ancestor of the appellants was the owner of Lot 77. This lot had since been divided into 3 sections, viz. Lot 77A, Lot 77B and Lot 77 RP and are now separately held by three brothers. The appellants Christopher Yau and Jonathan Yau are now the registered owners of Lot 77 RP and Lot 77B respectively. The remaining section Lot 77A is now held by their brother Kevin Yau.

2. The 3 brothers are descendents from an indigenous villager living in the New Territories in 1898, and accordingly under the current Government Policy, each of them would be entitled to build a small village house (or a Ting house) (hereinafter called "small house") in the New Territories. The brothers proposed to build their small village houses in Lots 77A, 77B and 77 RP respectively.

3. On 14 September 1998, the appellant Jonathan Yau submitted an application for the erection of a small house at lot 77B to the Lands Department. On 22 September 1998, the District Lands Office ("DLO") of Tai Po sent him a standard form letter telling him that there were a large number of applications to be processed and that the DLO would contact him again for detailed information and planning when his application was processed but meanwhile he should not even make any enquiry with the DLO on the progress of the processing. Nothing was heard by Jonathan Yau until about 21 May 2001 when he was informed by the DLO to attend an interview and he was asked to bring along copies of his ID card and his father's ID card and also the plan for the proposed small house. We were told that Jonathan did as told, and had attended an interview with the DLO.

4. Meanwhile Christopher Yau had also made an application for building a small house to the DLO of Tai Po on 31 January 2002. We were not specifically told what was the response of the DLO to his

application. We would assume that his application was handled in the same way as that of Jonathan Yau. However we are told that up to date, the DLO still had not given any formal substantive reply to the application of Christopher Yau.

5. By a letter dated 2 May 2003, the DLO of Tai Po told Jonathan Yau that the DLO could not continue to process his application because part of the land on which he proposed to build his small house was on land zoned outside the Village Type Development Zone ("V zone") on the plans drawn up by the Town Planning Board. The letter asked Jonathan Yau to obtain the consent of the Town Planning Board for permission to use the land for his small house within 3 months from the letter, before the DLO would continue to process his application.

6. According to the appellants whose contention we accept, it was only until the receipt of the letter of 2 May 2003 that they realised that it was necessary to obtain the consent of the Town Planning Board to erect small houses on their lands. We also accept that like most of the indigenous villagers, they thought that once they had submitted their application to the DLO for processing, the DLO would advise them of the procedure that they should take to obtain the permission for the construction of their small houses. We also accept

that until at least 2 May 2003, the appellants were not aware that Lots 77B and 77 RP were just outside the V zone and that these 2 sections are zoned for "Agriculture" purposes where the building of small houses would require the permission of the Town Planning Board.

7. The relevant plan for town planning purposes is the Lam Tsuen Outline Zoning Plan (OZP) under the reference of S/NE-LT. This plan covers the whole of San Uk Tsai Village and a number of other nearby villages in the Lam Tsuen area. At the time of the application by the appellants in May 2003, the relevant version was under the reference of S/NE-LT/7. We are told and we accept that in fact since the first version of the OZP, Lots 77B and 77 RP have always been zoned for agricultural purposes. However, for all intends and purposes Lot 77A has always been within the V zone. There were further amendments to the OZP in June 2004, and the current version of the OZP is S/NE-LT/8. However there is no alteration to the zoning of the sites in question.

8. The significance of the zoning is that if the land is within the V zone, then, under the Notes to the OZP, the land could be used for the building of small houses (described in the notes as the New Territories Exempted Houses (NTEH)) without any reference to the Town Planning Board. Hence all that the indigenous villagers need

to do is to obtain permission to build the small houses from the Lands Department and the Town Planning Board has no role to play whatsoever. If however the land in question is zoned for agricultural purpose, then according to the Notes to the OZP, the land may be used for the purpose of building small houses on application to the Town Planning Board. Of course it would then be up to the Town Planning Board to decide whether it would permit the land to be so used. Hence in the present case, the Town Planning Board has the discretion in deciding whether to allow Lots 77B and 77 RP to be used for the building of small houses.

9. At this stage it is also necessary to deal with the concept of "village environs" (or "VE"). The VE refers to an area just outside the boundary of a recognized village. This was introduced in 1972 by the Lands Department for the purpose of implementing the NTEH scheme. It does not have any direct relevance for town planning purposes in that in the zoning plans, there is no category of VE purpose. For town planning purposes, the VE area may be zoned as V zone and may be zoned for other purposes like agricultural purpose. However, the fact that a site in question is within the VE area may have certain significance in the way that the Town Planning Board would exercise its discretion when deciding whether to grant permission for small house development.

10. With a view to achieving consistency in the grant of permission for small house development, the Town Planning Board has drawn up a set of "Interim Criteria" as a kind of guidelines for considering the applications. These Criteria were first adopted by the Town Planning Board on 24 November 2000 and were subsequently revised from time to time. The first revision was on 30 March 2001. The revision did not have any material effect on the appellants' cases. There were subsequently further revisions on 23 August 2002 and 21 March 2003.

11. At all material times before the 2nd revision of 23 August 2002, the following paragraphs in the Interim Criteria would be material to the appellants' applications :

(1) § (a) – sympathetic consideration may be given if the application site is located within the village environs of a recognised village and there is a general shortage of land in meeting the demand for small house development in the "Village Type Development" zone of the village.

(2) § (f) – the proposed development should not frustrate

the planning intention of the particular zone in which the application site is located.

(3) § (h) – the proposed development should not encroach onto the planned road network and should not cause adverse traffic, environmental, landscape, drainage, sewerage and geotechnical impacts on the surrounding areas. Any such potential impacts should be mitigated to the satisfaction of relevant Government departments.

12. In May 2002, there were concerns about the sufficiency of V zone land in Lam Tsuen. There was the proposal that an additional of 16.4 ha of land should be zoned for village type development purposes. However, there were also the concerns about the pollution problems to the Lam Tsuen River created by the village type developments. In the end, the Town Planning Board agreed to increase the V zone area by 8.34 ha only and at the same time, the Interim Criteria for considering applications for small houses were further revised to meet the concern on water pollution brought about by the village type developments. This was the background to the 2nd revision of the Interim Criteria on 23 August 2002. The additional 8.34 ha of land for the V zone in the Lam Tsuen area did not affect the San Uk Tsai Village. All the additional lands were lands

from other villages. The revision to the Interim Criteria however did have a direct impact on the appellants' applications. Insofar as it is relevant, there was the addition of § (i) to the Criteria :

> "§ (i) the proposed development, if located within water gathering grounds (WGG), should be able to be connected to existing or planned sewerage system in the area except under very special circumstances (e.g. the application site has a building status under the lease or the applicant can demonstrate that the water quality within water gathering grounds will not be affected by the proposed development*)."
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> * i.e. the applicant can demonstrate that effluent discharge from the proposed development will be in compliance with the effluent standards as stipulated in the Water Pollution Control Ordinance Technical Memorandum."

13. The Interim Criteria were further revised on 21 March 2003 but nothing material would turn on the further revision.

14. Meanwhile the Lands Department also adopted a new policy that for small house applications received after 1 March 2002,

the construction of the small houses would not be allowed to commence until there is provision of public sewerage for connection to the small houses. However, for applications received before 1 March 2002, the Lands Department would continue to process the applications but the Lands Department would require the successful applicants to provide space for retrofitting sewers in the future. Of course, this policy was adopted on the assumption that the sites for the building of the small houses were in the V zone where no permission from the Town Planning Board would be required. It is not entirely clear whether this policy is applicable to all parts of the New Territories. It is certainly applicable to the Lam Tsuen area.

15. It is common ground that the appellants' sites are within water gathering grounds and that the Government has planned to provide a public sewerage system to the V zone area in Lam Tsuen. When the Town Planning Board decided to revise the Interim Criteria in August 2002 and when the Rural and New Town Planning Committee (RNTPC) held its meeting on 31 May 2003, it was anticipated that the public sewerage would be available in 2007 or 2008. However in the hearing before us, the position taken by the respondent was that the public sewerage would only be available for connection by 2010 or 2011.

16. It is also important to note that the Interim Criteria were purely internal criteria adopted by the Town Planning Board. Unlike the draft OZPs, there is no statutory requirement for the views of the Board as expressed in the Criteria to be published for public consultation. No doubt the Lands Department would be aware of the adoption and the revision of the Criteria. However, there is nothing to indicate that representatives of the indigenous villagers, such as the Rural Committee or even the Heung Yee Kuk as a body had been consulted, although individual members of the Kuk may well be made aware of the Criteria and possibly also their revisions through their participation in other bodies. In all fairness to the respondent, the Criteria were not kept secret or confidential in the sense that the public would not be allowed access to them. They were published in the web-site of the Town Planning Board and hard copy of the same would also be supplied on request. However, although the Criteria are of crucial importance to those who have applied or intend to apply for permission to build small houses, there has never been any attempt to draw to the attention of the applicants or the potential applicants of the Interim Criteria or any proposal to revise the Criteria.

17. It is conceded before us that we are not bound by the policy or the Interim Criteria of the Town Planning Board. However, it was forcefully urged upon us and we so accept that the Interim

Criteria were formulated and adopted by the Town Planning Board having due regard to all relevant planning considerations and having balanced all interests concerned and as such we should give due weight to the Interim Criteria in our assessment of the merits of these appeals. Furthermore, it was urged upon us that we should give due weight to the Criteria in order to achieve a measure of consistency in the grant of permission for small house developments in area zoned for agricultural purposes. We would also consider that we should pay due regard to the criteria because although they do not have any statutory effect, the Town Planning Board has made it known that they would apply these criteria in considering the applications and generally applicants would have a legitimate expectation that their applications would be considered in the light of the criteria. However, while we must pay due regard to the policy enshrined in the Interim Criteria, we do not consider that the Criteria are to be applied without any flexibility. This is particularly so with reference to the cut off date for the application of the Interim Criteria.

18. The appellants' applications were considered by RNTPC on 25 July 2003. At that stage, the proposal from the appellants was that the sewage problem would be dealt with by the use of septic tanks to be built on their respective lots. The comments from the Chief Engineer/Mainland North, Drainage Service Department on the

applications were that :

(a) he had no in principle objection to the applications;

(b) as the application sites were in an area where no public storm water drainage connection is available, the applicants should be required to provide drainage facilities for the proposed developments to the satisfaction of the Drainage Services Department; and

(c) the application sites were in an area where no public sewerage connection was available.

The Director of Agriculture, Fisheries and Conservation also indicated that he had no strong view against the proposed small house developments. He further commented that the sites in question were classified as agricultural land of fair quality, but with low potential for agricultural rehabilitation. His views were obviously significant and relevant to the question of whether the planning intention in classifying the land as agriculture would be frustrated by the intended use of the land for small houses. There was likewise no adverse

comment from the various Government departments dealing with landscape, traffic, and fire safety aspect nor was there any adverse comment from the local community. We also note that from the information supplied by the Lands Department, the land available from the V zone in Fong Ma Po Village, Sun Uk Tsai Village, Tong Min Tsuen and Chung Uk Tsuen could not fully meet the future small house demand from those villages.

19. The applications however did not receive the support from the Water Supplies Department and from the Director of Environmental Protection. Both of them made reference to the fact that the sites in question fell within the water gathering grounds and that there was no public sewerage available. Both raised the concern about the compliance with § (i) of the 23 August 2002 version of the Interim Criteria. This version of the Interim Criteria is hereinafter referred to as the "IC".

20. On 15 August 2003, the Town Planning Board informed the appellants that their applications were rejected. The appellants were given an extract of the minutes of the meeting of RNTPC on 25 July, 2003. The material parts read as follows :

> "35. …. The proposed Small Houses did not comply with

> the assessment criteria for Small House development in that the application sites fell within the water gathering grounds but were not able to be connected to the existing or planned sewerage system in the area. The Director of Environmental Protection and Director of Water Supplies did not support the application.
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> 36. After deliberation, the Committee decided to reject each of the Applications … and the reason was that the proposed Small House did not comply with the interim criteria for assessing planning application for NTEH/Small House development in the New Territories in that the proposed Small House was not able to be connected to the existing or planned sewerage in the area. There was no information in the submission to demonstrate that the proposed development located within the water gathering grounds would not cause adverse impact on water quality in the area."

The appellants were told that they could apply to the Town Planning Board for review of the decision of the Committee.

21. The appellants duly sought a review of the decision on 13

September 2003. In view of the reasons given for the decision, the appellants revised their plans. The revised proposal was that instead of building the septic tanks in their own lots, the septic tanks were to be built at Lot 77A which is within the V zone. The appellants also furnished a letter from Kevin Yau, the owner of Lot 77A , to the effect that he would consent to the placing of the septic tanks in his land.

22. The review was heard by the Town Planning Board on 14 November 2003. The Board decided to reject the applications on review and the reason was that the proposed small houses did not comply with the IC for assessing planning application for NTEH/small house developments in the New Territories in that the proposed small houses were not able to be connected to the existing or planned sewerage system in the area. The Board also took the view that there was insufficient information in the submission to demonstrate that the connection with the planned Government sewerage system proposed by the applicants was technically feasible. The Board considered that the proposed developments were within the water gathering grounds and the Board was not satisfied that there would be no adverse impact on the water quality in the area. It was also the view of the Board that the IC endorsed by the Board on 23 August 2002 should be consistently applied to all section 16 applications considered after that date. Thus the Board did not pay heed to the fact that the appellants had in fact submitted their applications for permission to

build the small houses to DLO of Tai Po on 14 September 1998 and 31 January 2002 respectively and that until May 2003 the appellants had been under a false sense of security that they could rely on the DLO to advise them of the relevant procedure that they would have to comply with to get their small house licences.

23. The appellants appealed to this Appeal Board. Before us the appellants sought to meet the objection from the Town Planning Board by producing a Deed of Grant of Easement executed by the owners of Lots 77A, 77B and 77 RP the effect of which is that the owners of Lots 77B and 77 RP would have an easement to connect a drain pipe from their proposed small houses to a septic tank to be located within Lot 77A at a location within the V zone. In the event that Government sewerage is available for connection at Lot 77A, the owners of Lots 77B and 77 RP would also have the right to connect and discharge their sewage into the Government sewerage system. There were also covenants in the Deed for the owners of the dominant tenements to maintain the installation and also to enter into Lot 77A to do the necessary maintenance and to clean up the pipes and sewers. Each of the appellants was also prepared to enter into a Deed of Undertaking with the Government that they would observe all the covenant terms and conditions contained in the Deed for Grant of Easement and that in the event of any default in observing or

performing the covenants on his part, the Government may at his expense perform the covenants. By the same proposed Deed of Undertaking, each of the 3 parties to the Deed for Grant of Easement also appointed the Government as his agent to enforce the performance of the covenants in the Deed of Grant of Easement.

24. Before us the appellants' main contentions were :

(a) We should not apply the IC in considering the appellants' applications because the DLO should have timeously informed them of the requirement to obtain the permission of the Town Planning Board to use their lands for the purpose of building the small houses. If they were informed of such requirement within a reasonable time of their applications, they would have made an application for the permission of the Town Planning Board before 23 August 2002 and applying the Interim Criteria applicable then, the Town Planning Board would or should have given them permission subject to the same conditions which the Town Planning Board had imposed in

relation to other similar applications then.

(b) Their proposals for the construction of small houses were no difference from many other applications approved by the Town Planning Board. In fact in many instances, the appellants' cases were better than those of many of the successful applicants.

(c) The Interim Criteria and in particular the effective date for the application of such Criteria, were only an internal policy or understanding amongst certain Government bodies. They were not published or brought to the attention of the appellants or bodies representing the interest of the indigenous villagers in the New Territories timeously. Indeed they were only made aware of the terms of the IC a week before the Town Planning Board considered their review applications.

(d) In any event even if the post 23 August 2002 version of the Interim Criteria were applicable,

they had met the requirements and their applications ought to be allowed.

25. On the other hand the Board contended that we should have due regard to the planning intention and also to the IC and in particular to §§ (a), (f), (h) and (i) thereof. With specific reference to these appeals, the respondent further contended that :

(a) The sites of the proposed small houses were located within the water gathering grounds, and according to the IC, no permission should be granted unless the development is able to be connected to an existing or planned sewerage system except under very special circumstances.

(b) The Board initially maintained that there was no sufficient evidence to show that the sewage pipes from the appellants' sites could be connected to the existing or planned public sewerage.

(c) In view of the evidence showing that the Lam

Tsuen Valley was being polluted by sewage from nearby villages, the Board was concerned that the water would be further polluted by the appellants' septic tanks and the Board maintained that the appellants had not been able to demonstrate that their septic tanks would not cause pollution to the water.

(d) There was no exceptional circumstances to justify the non-compliance with the IC and in particular § (i).

(e) The grant of permission to the appellants in this case would set a bad precedent and would open up a flood gate to similar applications which would inevitably aggravate the water pollution of the Lam Tsuen River which is a source of portable water.

26. While it is not exactly clear as to why the Town Planning Board would not consider the letter from the owner of Lot 77A to be sufficient evidence to indicate that it is feasible for the appellants to install their septic tanks in Lot 77A, in the light of the Deed of Grant

of Easement, there could now be little doubt that it is both feasible technically and legally for the appellants to install sewage pipes from their sites to be connected to septic tanks placed within Lot 77A which is within the V zone. Before us the Board's stance was not so much that it was not feasible for the connection to take place, but the Board's objection was shifted to the question of maintenance of the connection pipes and the septic tanks. While conceding that the Deed of Grant had made clear provisions for the maintenance of the connection pipes and the tanks and that the same would be binding on the successors in title to the lands concerned, the Board's contention was that if there were nevertheless defaults in the performance of the covenants, the covenantees might not enforce the covenants. The Board maintained that the proposed Deed of Undertaking would not be sufficient to enable the Government to take any effective action to enforce the performance of the covenants. In this respect the Board would maintain that although the undertaking is in the form of a deed and hence the Government is entitled to enforce the undertaking even though the Government has not given any consideration, in the event of any breach of the undertaking the Government could only get nominal damages. On the other hand, the appellants maintained that plainly damages would not be a sufficient remedy and so the Government would be able to get an injunction to enforce the performance of the covenants.

27. On the effect of the Deed of Undertaking, we take the view that since there is clearly some Government land adjacent to Lots 77A, 77B and 77 RP which is capable of benefiting from the covenants to repair and maintain the connection pipes and the septic tanks including the cleansing of the tanks, it is possible to device a form of covenant that runs with Lots 77A, 77B and 77 RP and the adjacent Government land so that the Government as the owner of the adjacent land would be able to enforce the covenants against the successors in title of the Lots 77A, 77B and 77RP under section 41 of the Conveyancing and Property Ordinance. However, the proposed Deed of Undertaking is not such an instrument. This is because in order for section 41 of the Conveyancing and Property Ordinance to apply, the covenants in question must, inter alia be "expressed and intended to benefit the land of the covenantee and his successor in title or persons deriving title to that land under or through him or them" (see *section 41(2)(c), Lamaya Ltd. v Supreme Honour Development [1991] 1 HKC 198*). The covenants contained in the Deed of Undertaking were not expressed to benefit any land of the Government and further we do not consider that the overall intention of the Deed was to benefit any neigbouring land of the Government. The fact that the Deed does not identify any land of the Government and also the fact that the Deed contains a provision that upon any

change of ownership of the land, the covenantors would procure the new owner to enter into a similar Deed of Undertaking, is against the construction that the covenants contained in the Deed are expressed and intended to benefit any land of the Government.

28. We do not find it necessary to decide on whether the Government could enforce the terms of the Deed of Undertaking by injunction. Were it necessary for us to do so, we would take the view that as against the immediate covenantors, plainly damages would not be a sufficient remedy and as such we are inclined to take the view that the Government should be able to obtain the effective remedy of injunction. However, even if the Government could apply for an injunction to enforce the repair and maintenance covenants against the owners of Lots 77A 77B and 77 RP, we are not satisfied that the covenants contained in the Deed of Undertaking would be binding on the successors in title of these lots.

29. Our conclusion in the last paragraph would mean that as a matter of covenant in private law, the Government would not be able to enforce the performance of the covenants to maintain and to repair the proposed sewerage installations against any future owners of the proposed small houses. However, it does not follow that we would consider that the Government as an executive body is powerless if the

connection drains and the septic tanks are left in a state of disrepair or leaking conditions.

30. It is a pity that we are unable to reach a unanimous conclusion on the outcome of this appeal. The views expressed below are, unless otherwise stated, the views of the majority.

31. We are asked by the appellants to rule on whether the IC are applicable to the appellants' applications as a preliminary point in these appeals. We declined to do so. We do not think that the applicability of the IC is decisive in this case. This is because even if the IC are to be applied, the IC are not meant to be construed like a statue and the consideration of individual paragraphs in the IC may lead to different conclusions and the eventual conclusion must inevitably be a matter of judgment having regard to the overall assessment of the various factors. Likewise even if the IC are not to be held applicable, it does not mean that the concern expressed in § (i) of the IC over the question of water pollution should not be given due consideration. As we are told that there is one other appeal which is adjourned pending our decision in these appeals, for what is worth, we would indicate that it is our unanimous view that the IC should be taken into account in our deliberation. However, the majority would consider that in view of the history of the applications involved in these appeals, the appellants are entitled to sympathetic and fair

consideration on the application of the requirements set out in the IC. The conclusion reached by the majority and the minority upon the consideration of the IC also differs.

32. The primary argument raised by the appellants on the issue of the applicability of the IC is that it was really due to the fault of the Lands Department that their applications for Town Planning Board's approval was delayed until after the critical date of 23 August 2002, and hence the IC should not be applied in considering their applications. The argument of the Board on the other hand was that the Board was in no way responsible for the default of the Lands Department and hence there could not be any estoppel against the Board because of the default of the Lands Department. Moreover, the Board further argued that it was for the appellants themselves to find out whether they required any approval from the Town Planning Board for their developments and it was also for the appellants to find out what criteria the Board would use when considering their applications. We unanimously consider that technically the Board's contention is correct.

33. In considering these appeals we have to consider firstly the question of planning intention. Indeed this is one of the criteria enshrined in § (f) of the IC. In this regard, our attention had been

drawn to the statements on the general planning intention in § 8.2 of the Explanatory Statement (ES) of the OZP, and also the comments on agricultural use in §§ 7.1, 9.4.1 and 9.4.2 of the ES of the OZP. These paragraphs read (with emphasis added) :

> "§ 8.2 In view of the development constraints in [North East New Territories] and the need to conserve/preserve the rural character, the natural landscape and the ecological interest of the Area, it is intended not to encourage open storage uses, informal industrial development and residential development in the Area. The planning intention for the Area is, therefore, to retain the rural character of the Area by controlling development and promoting agricultural activities, and *to allow village expansion in areas where development is considered appropriate.*
>
> § 7.1 Agricultural Use
>
> According to the Agriculture, Fisheries and Conservation Department (AFCD), the agricultural land in the Area is of good quality and worth to be preserved. Improvements to irrigation channels, farm accesses and other facilities undertaken by the AFCD would further assist the farmers to practise/continue cash crop cultivation.

§ 9.4.1 The intention of this zone is to retain and safeguard good agricultural land for agricultural purposes. The zoned areas are served by fairly adequate irrigation and servicing facilities as well as marketing facilities for intensive farming including fish culture and horticulture. This zone also intends to retain fallow agricultural land *with good potential for rehabilitation.*

§ 9.4.2 The Area is characterised by the presence of good farmland under active agricultural activities including the growing of vegetables, fruit trees and flowers. According to the AFCD, the agricultural land of the Area is of good quality. Most of the agricultural land is under active cultivation and worthy of preservation. Clusters of this cultivated land are found near She Shan Tsuen, Chuen Pei Lung Village, San Tong Village, Ma Po Mei Village and Chai Kek Village."

34. We note however that the OZP in question covers a large area, and the planning intention described in the ES is intended to be a generalization for the area as a whole. We also note that the use of the land for NTEH is included in column 2 of the schedule in the ES for agricultural use. This would at least indicate that the construction

of the small houses on land zoned for agricultural use is not considered to be wholly inconsistent with the planning intention behind the "AGR" zoning. While the ES described the area zoned for agricultural use in the Plan as being characterised by good quality agricultural land, the sites in question are considered to be agricultural land of fair quality only and the potential for agricultural rehabilitation is considered to be low. In the circumstances of the present case, we do not consider that the fact that the sites in question are zoned for agricultural use is any impediment to a decision to allow them to be used for construction of small houses.

35. Further, as mentioned in § 8.2 of the ES, it is also one of the general planning intentions to allow village expansion in area where development is considered appropriate. This brings in the consideration set out in § (a) of the IC. In view of the comments from the Lands Department set out in § 18 above, we consider that there is a shortage of land in meeting the demand for small house developments in the V zone of San Uk Tsai Village. Indeed the fact that there were 8 successful applications for land zoned for agricultural purposes to be used for the construction of small houses since November 1999 on the basis that there was a general shortage of land in meeting the small house demand within the V zone of San Uk Tsai Village (and not in the area covered by the Lam Tsuen OZP) is a

good indication that such shortage did exist. Although in 2002 there was an increase in the supply of land in the V zone covered by the Lam Tsuen OZP, there was no expansion of the V zone in San Uk Tsai Village at all. In this respect, we note that § (a) of the IC speaks of shortage of land in meeting the demand for small house development in the "Village Type Development" ("V") Zone of the "*village*", and so the Board's contention that there was a systematic increase in the area of the V zone covered by the Lam Tsuen OZP or even in the villages near San Uk Tsai Village is no answer to the shortage of V zone land in the San Uk Tsai Village. Thus we conclude that there is still a shortage of land in meeting the demand within the V zone of the San Uk Tsai Village.

36. The sites in question lie in the VE area of San Uk Tsai, and they are abutting the V zone of the Village. The lands were fallow agricultural land with low potential for rehabilitation. We consider that apart from the water pollution consideration which we will consider separately later, the sites are appropriate for village expansion. The consideration of § (a) of the IC tends to support the conclusion that the applications ought to be allowed.

37. In relation to the concern of water pollution, we consider that even without § (i) of the IC, the concern of water pollution is a

material consideration for planning permission. In the present case, we propose to set out our views on the effect of § (i) and then to go on to consider whether the appellants have complied with the requirement of § (i).

38. The wordings of § (i) are set out in § 12 above. The effect of this paragraph is that :

(a) It is applicable whenever the development in question is within water gathering grounds.

(b) The development "*should* be able to be connected to existing *or* planned sewerage system in the area".

(c) There could be an exception to the requirement under (b) if there are "very special circumstances" (examples of which are given in the paragraph).

(d) Examples of the very special circumstances are :

(i) the site has a building status under the government lease, or

(ii) the applicants can demonstrate that the water quality within the water gathering grounds will not be affected by the proposed developments by showing that the effluent discharge from the proposed developments will be in compliance with the effluent standards stipulated in the Water Pollution Control Ordinance Technical Memorandum.

(e) As (d) are just examples of the very special circumstances, the very special circumstances are not meant to be restricted to the 2 cases under (d). However the cardinal requirement must be that there is clear evidence that there will be no risk of water pollution.

(f) Since the "very special circumstances" requirement referred to in (d) is only exception to (b), where the applicant can show that he meets the requirement of (b), there is no need to

show the very special circumstances.

39. It is common ground that the sites in question are within water gathering grounds. Thus the first concern is whether proposition (b) set out in § 38 above is met. It is notable that § (i) of the IC merely stipulates that "the proposed development should be able to be connected to existing or planned sewerage system in the area." We take the view that "the area" should refer to the area of the water gathering grounds or alternatively to an area in the vicinity of the proposed development. We do not think that it is right to construe the words "the area" as meaning the area of the proposed development because it is well known that the Government sewerage system will not be running in private land and so there could not be any public sewerage within the lot area of the proposed development which is usually on private land. What the paragraph does not say is that the proposed development must be or should be located in a lot or an area where there is an existing sewerage system or a planned sewerage system. Also since "existing sewerage" and "planned sewerage system" are disjunctive, it follows that the requirement in proposition (b) in § 38 above would be satisfied if an appellant could show that the proposed development "should" be able to be connected to a planned sewerage system.

40. By definition, a "planned" sewerage system would be one which is not yet in existence at the time when the application falls to be considered. Of course there must be some solid plan for the construction of the sewerage system so that it would come into existence one day in the future. It must also follow that by the time when the development is completed, the planned sewerage system may or may not be completed yet. Thus strictly speaking, the requirement of (b) does not exclude the possibility that during the interim period pending the connection with a planned sewerage system, there would be other ways of solving the sewage problem such as the use of septic tanks.

41. In the present case, it is common ground that there is a planned sewerage extending to the V zone in the OZP and this would include Lot 77A. If the proposed developments were located at Lot 77A, there is no question that in due course there will be connection with the planned public sewerage system. As we have pointed out, § (i) of the IC does not require that the proposed developments must be physically located within an area where there is an existing or planned sewerage system. All that is required is that it could be shown that the proposed developments "*should* be able to be connected with the existing or planned sewerage system". With the letter of consent from the owner of Lot 77A and also the Deed of Grant of Easement,

we are satisfied that the sewage disposal from Lots 77B and 77 RP could be connected to septic tanks located at Lot 77A. We are told that in places where public sewerage is available, the arrangement would be that the building owners would build their sewage pipe up to the last manhole near their site boundary closest to the public sewerage and they would be responsible for the maintenance of the drains from different parts of their land to this last manhole. There will be another drain pipe leading from the last manhole to the public sewerage which will be maintained by the Government. Of course when the planned sewerage is available for connection, the septic tanks should no longer be used and in place thereof, there will be manholes built for connection to the Government sewerage system. In the absence of any suggestion to the contrary, we are satisfied that in due course, when the planned sewerage system is ready for connection, the pipes for the draining of the sewage from Lots 77B and 77 RP should be able to be connected to the planned sewerage system via Lot 77A. In this regard we cannot see any possible objection from the Government to the owner of Lot 77A connecting a manhole in Lot 77A to the public sewerage even though the sewage collected in this manhole does not come exclusively from Lot 77A , and we see no reason for owners of Lots 77A, 77B and 77 RP not to get rid of their septic tanks and replace them with the direct connection to the Government sewerage via a manhole at Lot 77A.

42. To improve their position, the appellants informed us that if necessary, the owner of Lot 77A who is their brother would be prepared even to carve out certain parts of Lot 77A for them to place their septic tanks and the connection pipes. The Board on the other hand urged us not to pay heed to such proposal on the ground that in fact this has not yet been done and that it would not be appropriate for us to consider this proposal because we would not have the benefit of the views of other Government departments. However, counsel for the Board has not told us anything which could indicate that there could be any objection to the owner of Lot 77A carving out certain part of his lot in favour of the owners of Lots 77B and 77 RP. Nor could we think of any good reason why the ownership of the strip of land where the septic tanks and the connection drains are laid should result in any fresh objections from any Government departments. We can see why there is no carving out of the land at this stage because plainly there is no point in carving out and conveying the strip of land if eventually no planning permission is given to the appellants.

43. In our view, it is not necessary to go to the extent of showing that the appellants own the land where the septic tanks and the connection drains are laid. The offer to crave out the land however does show the determination on the part of the owners of

Lots 77A, 77B and 77 RP to do whatever they can to meet the objection and requirement of the Town Planning Board and to do what they can to provide for the best solution to the sewage problem of the proposed developments. As we have pointed out before, § (i) of the IC does not require that the proposed developments must be within the lot area where there is an existing or planned sewerage system. All that is required is that we should be satisfied that the developments should be able to be connected to such public sewerage system.

44. Thus in our view, in fact the appellants have satisfied us that § (i) of the IC is met.

45. The Board's argument is not so much that the Government would not allow the owners of Lots 77A, 77B or 77 RP to make connection to the planned public sewerage, but it seeks to argue that the connection may cause the planned sewerage system to be overloaded and this would cause problems. In terms of the provisions in the IC this would be an objection based on § (h) of the IC. In effect the contention would amount to suggesting that the proposed developments would cause adverse impact to the sewerage system on the surrounding areas. We consider the objection to be unreal. Given the fact the sewerage system is still at the planning stage and given that one can reasonably expect that there would invariably be

allowances for extra loading we do not consider that any discharge of sewage from Lots 77B and 77 RP would cause any real problem to the planned sewerage system. In this regard, the position on the physical loading of the system would not be any difference if the 3 brothers should decide to merge the title of their developments and hold undivided shares in the whole Lot 77 and decide to discharge the sewage of the whole lot at the point within the V zone where the planned sewerage is available. If that should happen, we fail to see any possible ground for anyone suggesting that the connection is not feasible or that there will be overloading of the planned sewerage system.

46. Even though we consider that the objection based on § (i) of the IC is met, we are also concerned that there should be proper measures to safe guard the quality of the water of the Lam Tsuen River in the interim pending the connection with the planned public sewerage.

47. The interim solution proposed by the appellants is to install septic tanks in Lot 77A. The Board raised a number of queries over this proposed solution. The Board drew our attention to a document reporting on the pollution of the Lam Tsuen River based on data collected between January 1999 and March 2002. The data

show that as one proceeds down stream one would find more pollution in terms of Escherichia coli contents. The inference sought to be drawn is that the river water is polluted by unsewered village developments along the catchment.

48. The Board's objection to the appellants' proposed use of the septic tanks are two folds. First, it is contended that there is the problem of maintenance. Secondly, it is contended that there is no sufficient evidence to show that the proposed septic tanks could function properly so as not to cause any pollution to the river.

49. In relation to the issue of maintenance, there is the question of the maintenance of the drain pipes connecting the houses to the septic tanks and there is also the question of the maintenance of the tanks and the soakaway pits. No doubt the septic tanks would require periodic cleansing to remove the cumulated sewage solids. It is contended that since most parts of the drainage pipes would be below ground it would be difficult to locate any leakage and a leaking pipe would of course cause pollution.

50. We do not consider that there is any substance in the Board's contention. No doubt in the long run, the drainage pipes, the septic tanks and the soakaway pits would all have to be maintained,

and if no proper maintenance is done, as time goes by they will be worn out and leakage will occur one day. However, common sense will tell that these installations are durable and do not usually need a lot of attention and maintenance. The evidence from Mr. Man is clear that these pipes and the tanks should be able to last for 2 or 3 or even 5 decades. There is no reason to believe that the appellants would use sub-standard pipes or that they would permit sub-standard construction of the septic tanks and the soakaway pits. If there is any accidental damage to the installation, there is no reason to believe that the appellants or the owner of Lot 77A would not take any immediate step to repair the damage. The distance between the appellants' proposed houses and the septic tanks is short and this would of course mean a smaller burden on maintenance of the underground pipes. There is no reason to believe that the appellants would not maintain the system and regularly cleanse the septic tanks to ensure that they would function well. Indeed if the septic tanks do not function well the appellants and the owner of Lot 77A are likely to be the persons immediately affected.

51. The second contention is more fundamental. The contention is that the appellants bear the burden of demonstrating positively to us that the water quality within the water gathering grounds would not be affected by the appellants' developments.

52. However, although the Board would contend that the appellants had not shown that their proposed developments should be able to be connected to a planned sewerage system in accordance with the requirement of the first limb of § (i) of the IC, the Board had not contended that it is the appellants' positive burden to demonstrate that the effluent discharge from the appellants' development will be in compliance with the effluent standard stipulated in the Water Pollution Control Ordinance Technical Memorandum as required by the example in the second limb of § (i). Indeed since the use of the septic tanks would not entail any direct sewage discharge to a surface watercourse the Technical Memorandum would not have any application.

53. As we have pointed out that the 2 limbs of § (i) are disjunctive, and since we are satisfied that the proposed developments should be able to be connected to a planned sewerage system, it is not necessary for the appellants to rely on the second alternative limb of showing very special circumstances. However, whether we are right in our conclusion that the appellants have satisfied the first limb, we consider that it is still the burden of the appellants to satisfy us that they have effective measures to prevent pollution whether to the Lam Tsuen River or otherwise. However, we do not consider that the

burden of the appellants would extend to bringing positive evidence to negative any conceivable source of pollution that the proposed developments might bring about. For instance, in the absence of any evidence to show that the drain pipes and septic tanks system would not be properly maintained, we do not find it necessary for the appellants to adduce positive evidence to show that the pipes they proposed to use would be of good quality or that the whole system would not be allowed to fall into disrepair. The standard of proof is on the balance of probabilities.

54. The Board called Mr. Man Tin Ho to give evidence. Mr. Man is a professional engineer with more than 20 years' working experience, 15 years of which are on planning of sewerage infrastructures and assessment of water quality impacts in different projects, including environmental impact assessment. He explained to us the theory behind the use of septic tanks to solve the sewage problems in area where public sewerage is not available. The sewage will be led into the septic tank and the solid in the sewage will settle in the septic tank. The effluent, which is mainly liquid but still with high polluting materials and pathogens, will then travel to the soakaway pit, which has a perforated lining through which the effluent from the septic tank can soak into the surrounding soil. As the effluent seeps through the surrounding soil, a process of natural

purification occurs. This process includes the breakdown of the polluting materials by bacteria found naturally in the soil, and the eventual "die off" of the pathogens. It thus follows that the purification process will not be complete unless there is a fairly long distance through which the effluent can travel. Mr. Man's view was that, based on the past experience, for a properly constructed and maintained septic tank system located in good ground conditions serving an isolated small house, a separation distance of 30 metres from rivers and streams would normally be sufficient protection to the water quality in the rivers and streams.

55. The effectiveness of the septic tank system is affected by :

(a) the size of the tank and soakaway pit percolation;

(b) the ground soil condition, and in this respect area with a high underground water table and area prone to flood would hamper the effectiveness of the system;

(c) the density of the septic tank and soakaway pit

in a given area and this is directly related to the amount of effluent that needs to be purified; and

(d) the state of maintenance of the system, including the cleansing of the solid in the tank.

56. The Board made no complaint on the size and construction of septic tanks and soakaway pits. This is probably because the Government has clearly laid down in the Drainage and Health Requirements for Village Type Houses the dimensions and details of the construction of the septic tank system and there is no reason to contend that the requirements so laid down are not adequate. The complaint by the Board was that apart from showing that the distance from the proposed septic tanks to the nearest position in the river was over 70 metres there was no positive evidence on (a) the ground condition and how it would affect the function of the septic tanks; and (b) the effect of the density of the septic tanks in the area. Accordingly, the Board submitted that in the absence of any technical field test, we should not come to the conclusion that the water quality would not be affected.

57. However, we note that there has never been any suggestion that the soil condition including the underground water

table at the San Uk Tsai area is such that the ordinary rule of thumb of a 30 metres separation distance from watercourse should not be applied. Indeed it is the standard provision in the Drainage and Health Requirements for Village Type Houses that the location of the septic tank should be situated not less than 30 metres from any watercourse and there has never been any suggestion that such 30 metres distance should be modified in the light of the density of the houses or the septic tanks. Indeed, even in the 8 approvals given between 1999 and March 2002 by the Town Planning Board, the only condition imposed relating to sewage disposal is that the septic tank and soakaway pit for foul effluent disposal and sewerage connection should be at a distance not less than 30 metres from any watercourse. Some of the sites where approval was so given are also close to one another and are much closer to the Lam Tsuen River than the proposed sites of the appellants' septic tanks.

58. We note that there are a number of small houses to the north-east, east, south-east, south and south-west of the appellants' septic tank sites. However, there is no small house development between the proposed septic tanks and the nearest part of the river. From the plans, the distance between the appellants' proposed septic tanks and the river is about 90 metres.

59. Mr. Man drew our attention to the pollution study of the Lam Tsuen River and in particular the finding that the Eschericha coli concentration increased as one went downstream. The inference he drew was that the river water was polluted from the unsewered village development. From this phenomenon Mr. Man's view was that "the 30 metres separation of septic tanks from streams and rivers requirements which all existing houses have already complied with, do not *necessary* offer adequate protection to river water quality" (emphasis added). We are asked to draw the further inference that the soil condition and the density of the septic tanks on the land along the Lam Tsuen River is such that the septic tank system could no longer serve its intended purification function. While we do accept that the concentration of septic tanks would necessary affect the purification efficiency, we are not prepared to draw the inference that the appellants' septic tanks would cause pollution to the Lam Tsuen River for the following main reasons :

(a) Although the Lands Department has adopted the policy that for new applications received after 1 March 2002, the construction of the small house could not commence until after the completion of the sewerage work and this would effectively mean that these new houses

could not be built until after the planned sewerage system is available, the Department is still processing applications received before 1 March 2002 and for these old applications, there is no requirement that the construction cannot commence until the sewerage system is available. There is no change in the Drainage and Health Requirements for these houses under the old applications. In particular the 30 metres separation between the septic tanks and the watercourse remains unchanged.

(b) There is positive evidence that many septic tank systems are poorly maintained and in many cases, unauthorized overflow pipes are installed to conduct the unpurified effluent to the surface channels and eventually to the watercourses. Hence it is impossible for one to draw the inference that the increase in the pollution downstream is necessarily caused by the inadequate purification process or the inadequate distance between the septic tanks and the watercourse.

(c) Although Mr. Man's evidence is that there should not be any pig or poultry farm in the Lam Tsuen area, the plan (Ref M/NE/04/72) submitted to us relating to Town Planning Appeal No. 26 of 2003 indicated that there is at least one big poultry farm quite close to the Lam Tsuen River. Of course this does not mean that this farm is a source of pollution to the river but the possibility of pollution from sources other than the septic tanks could not be eliminated.

(d) We are not prepared to assume that the appellants would not properly maintain their septic tank systems nor are we prepared to assume that the appellants would install any unauthorized overflow pipes. On the contrary, we take the view that in the absence of any evidence to the contrary, we should assume that the appellants would properly construct and maintain their systems and would not do anything illegal or unauthorized.

(e) The closest distance between the appellants' proposed septic tanks and the nearest watercourse is some 3 times the required separation distance and there is no other septic tank in between.

60. In all the circumstances in this case, while we consider that the possibility of the risk of water pollution could not be totally eliminated, three members of this Appeal Baord are satisfied on balance of probabilities that even if there is any water pollution caused by the appellants' proposed developments, if the appellants would comply with the construction requirements, it is likely to be insignificant. At least, there should not be any more pollution than any of the pre-existing small houses.

61. It was urged upon us that the grant of permission in the present cases would set a very bad precedent. The underlying contention is that in the future there would be many more applications for small houses which the Town Planning Board would feel obliged to approve in the light of our decision and these developments would singly or cumulatively aggravate the water pollution problem of the Lam Tsuen River.

62. Our attention was specifically drawn to an appeal to the Town Planning Appeal Board which has been adjourned pending our decision on these appeals. The applicant there made his application for permission to erect a small house on 29 August 1996. However, he did not make a section 16 application for Town Planning approval until 16 May 2003. Although we have given the Board special leave to adduce evidence on this pending case, there is no information put before us as to why the applicant there did not make his section 16 application until 16 May 2003 and in particular we are not told whether the delay is due to any default on his part or whether it is a case where the delay is due to the tardiness on the part of the Lands Department in processing his application. However, like the appellants' cases, the applicant's own site is within an VE area zoned for agricultural purpose. He proposed to construct a 120 metres sewage pipe through private land to the planned public sewer in the V zone of another village. However, the applicant had not yet made any detailed proposals on essential information, such as the alignment of the sewage pipe and the position of the private lots that may be affected by his proposed sewage pipe.

63. The Board drew our attention to 2 common features between these appeals and the appeal pending before another panel of this Appeal Board. They are (a) the relative timing of the

applications to the Lands Department and the Town Planning Board; and (b) the proposed arrangement of constructing and maintaining a septic tank and soakaway systems on other people's land in the V zone with a view of connection to the planned public sewerage system in the future.

64. In term of the relative timing of the applications to the Lands Department and the section 16 application to the Town Planning Board, our conclusion is that the IC should also be considered. We do not see how our decision would cause any bad precedent. In terms of the proposed arrangement of having a septic tank within a V zone area while the small house is to be built outside the V zone, we see no reason to change our view that § (i) of the IC has not required that the proposed development must be within the V zone, or within a lot where there is an existing or planned sewerage system. It is a matter of evidence in each case as to whether the applicant could show that his proposed development "should be able to be connected to existing or planned sewerage". This would depend on the facts of each individual case.

65. As to whether an applicant could show that his proposed development would not cause pollution to the watercourse, it is a matter of facts and evidence in each case. The extent of the risk of

pollution and the seriousness of the pollution are also relevant factors. The distance between the proposed septic tank and the watercourse is of course an important factor. In any case, since (a) for the Lam Tsuen area, given that for applications received after 1 March 2002 the Lands Department would not allow the commencement of the construction of NTEH until after the sewerage is connected; and (b) there is a strict time limit in any review or appeal against the decision of the Town Planning Board, we do not consider that there will be too many cases similar to the present ones.

66. Taking all the circumstances into account, the majority consider that the appeal ought to be allowed and the appellants should be given planning permission to erect their proposed NTEH on Lots 77B and 77 RP respectively subject to the following conditions (being mutatis mutandus the same conditions imposed by the Board in respect of the 8 applications received before 23 August 2002) :

(a) The provision of drainage facilities to the satisfaction of the Director of Drainage Services or of the Town Planning Board;

(b) The disposal of soils during the site formation and construction period to the satisfaction of

the Director of Water Supplies or of the Town Planning Board;

(c) The provision of septic tank and soakaway pit for foul effluent disposal and sewerage connection at Lot 77A in D.D. 19 within an area zoned for village type development.

(d) The provision of fire services installations to the satisfaction of the Director of Fire Services or of the Town Planning Board;

(e) The submission and implementation of landscaping proposals to the satisfaction of the Director of Planning or of the Town Planning Board; and

(f) The permission ceases to have effect at the expiration of 3 years from the date of publication of our decision to the appellants unless prior to the expiration of the 3 years period either (i) the development hereby permitted is commenced; or (ii) there is an

application to the Town Planning Board for extension of time and the extension is subsequently granted.

67. The minority considers that the pollution of the Lam Tsuen River is serious and this question of water pollution is of great and growing public concern. It is right that the applicants for town planning approval should be asked to comply with the current requirements for the prevention of water pollution. In all the circumstances of this case, the minority considers that the appellants have not met the requirements of § (i) of the Interim Criteria of 23 August 2002 and is not satisfied that the proposed septic tank arrangements would not cause adverse pollution effects to the Lam Tsuen River. Weighing up all the factors in this case and having regard to the bad precedent that may be set by allowing these appeals, the minority considers that the appeals ought to be dismissed.

68. To conclude, by a majority of 4 to 1, we would allow these appeals on terms set out in § 66 above.