

IN THE TOWN PLANNING APPEAL BOARD
Town Planning Appeal No. 24 of 2003

Between (Appellant)

Mr. Lam Ka-wing

And

Town Planning Board (Respondent)

Date of Hearing: 27 & 28 June 2005

Date of Decision: 3 October 2005

Composition of the Appeal Board:

Mr Edward Chan King-sang, SC, JP (Chairman)

Mr Richard Ho Kam-wing

Professor Lee Ngok, JP

Mr Thomas Ling Chi-kong

Mr Tony Luk Ka-luen

DECISION

1. The subject matter of this appeal is the piece and parcel of land known as and registered in the Land Office as Lot No. 4 section A in D.D. 230, Sheung Sze Wan, New Territories (hereinafter called “the site”). The Appellant was the owner of the site. He wanted to erect a New Territories Exempted House (hereinafter called “a ting house”) on the site. To do so he would require the permission of the Town Planning Board. On 11 April 2003, he applied for such permission and on 30 May 2003, the Rural and New Town Planning Committee rejected his application. He applied to the Town Planning Board for review of the decision of the Committee. On 26 September 2003, the Secretary of the Town Planning Board informed him that the Board had decided to affirm the decision of the Committee to reject his application. It was against the decision of the Town Planning Board that the Appellant now appeals

before this Appeal Board.

2. The first draft plan affecting the site was published on 26 July 2002 under reference of (DPA) Plan No. DPA/SK-CWBS/1. According to this plan, about 87% of the site would fall within an area zoned for Green Belt purposes and the remaining 13% would fall within the "Village Type Development" ("V") zone. Since the proposed ting house would not occupy the whole of the site, insofar as the foot print of the proposed ting house is concerned, about 94% of the area occupied by the proposed ting house would fall within the "Green Belt" ("GB") zone and 6% within the "V" zone.

3. The draft DPA plan was approved by the Chief Executive in Council under section 9(1)(a) of the Town Planning Ordinance on 17 June 2003. The DPA plan was renumbered as DPA/SK-CWBS/2 and gazetted under section 9(5) of the Ordinance on 27 June 2003. There was no change in the zoning of the site.

4. The site formed part of the land demised under a Block Crown Lease under which the site was described as an agricultural lot, meaning that the land was observed to be used for agricultural purposes at the time when the lease was granted. For the purpose of the Lands Department in deciding whether to grant a licence for the erection of a ting house at the site, the site would fall within an area classified as "village environs" ("VE") of Sheung Sze Wan Village of Hang Hau Heung, Sai Kung District, New Territories. The significance of this "VE" area is that the Lands Department would not normally grant any licence to erect a ting house in area outside a recognized "VE". However, "VE" classification does not have any direct relationship with the zoning in plans drawn up under the Town Planning Ordinance.

5. From the topography of the site and its surrounding area, it was fairly clear that once upon a time, the area surrounding the site had been used as terrace fields. The dotted lines seen on plans S-1 and S-2 enclosed with the statement of Madam Wong Oi Yee would indicate that at least sometime in the past there were fields around the area of the site. Indeed from the evidence of Lam Hon Fai, it is clear that the site was in fact made up of 2 levels with about 1 metre difference between them. However, it was equally clear that since at least the 1990s there was no farming or cultivation activities at the fields around the site. The present condition of the site is that there is some wild vegetation growing at the site. However, the vegetation is mainly wild grass and short bushes and there is no tree of any significant size.

6. The lower side of the site abuts a road accessible to Clear Water Bay Road. In fact the road serves as an emergency vehicle access (E.V.A.) road serving the area intended for the development of ting houses. The part of the road in front of the site runs in a north-west to south-east direction with the site on the south-western side of the road. However, the zone division line between the "V" zone and the

“GB” zone does not follow the road. As we have pointed out above, the zoning division bisects the site so that the north-eastern corner of the site would fall within the “V” zone and the rest of the site would fall within the “GB” zone.

7. In the course of the hearing we have tried to ascertain from the witnesses called by the Respondent as to the possible rationale for the drawing of the zone division line between the “V” zone and the “GB” zone at this part of the plan. We can only conclude that the drawing of the line was rather arbitrary. The zone division line does not follow either the contour line or the road running in the area. The net result is that there are areas not far from the site, which are at a higher level than the site in question being zoned in the “V” zone and it is not the case that on one side of the road the area is zoned as “GB” while at the other side of the road, the area is zoned as “V” zone. We can only remark that if town planning is intended to achieve a situation of orderly and harmonious development, the zone division line in the instant case has not achieved this result. However, it is not our function to redraw the division line of the zones. Our duty is to consider the appeal and to decide whether despite the zoning and the Notes to the relevant Plans, the Appellant should be granted town planning permission to build a ting house at the site.

8. The reasons given by the Committee and the Board for rejecting the Appellant’s application are :

- (a) The proposed development was not in line with the planning intention of the “GB” zone which was to prevent encroachment of development on well-vegetated areas and to preserve the rural character. There was a general presumption against development in this zone requiring strong justification for departure from the planning intention.
- (b) The proposed development did not comply with the Town Planning Guidelines for “Application for development within “GB” zone” (hereinafter called “the Guidelines”), in that it would involve extensive clearance of existing natural vegetation and affect the existing natural landscape.
- (c) The proposed development did not comply with the interim criteria for assessing planning application for NTEH/Small House development in the New Territories (hereinafter called “the Criteria”) in that sufficient land was available within the “V” zones of Sheung Sze Wan Village to meet its ting house demand.
- (d) The approval of the application would set an undesirable precedent for similar applications.

Also there was objection to the application from the Transport Department. The concern is that if the application was granted there would be other similar applications and all these developments would cumulatively create heavy traffic pressure on Clear Water Bay Road.

9. The Appellant's case is that in view of the special circumstances in the zoning in this case, the consequence of any departure from the use prescribed in the Plans would not give rise to any serious compromise of the planning intention of the "GB" zone. Furthermore, the Appellant contended that in view of the history of his ting house application, his case should be treated as a special case.

10. The Appellant is an indigenous male villager of the New Territories. Under the small house policy, he is entitled to apply for permission to build a ting house within the "VE" boundaries of a recognized village and "V" zone on the relevant statutory plan for his own use on his private land without any premium even though under the terms of the relevant Government lease of the land, the lessee could not build on the land without the consent of the Government. Since the extension of the Town Planning provisions to the New Territories, if the land he proposes to build his ting house is not zoned in a "V" zone or any other zone where building of ting house is always permitted, he would still have to meet the requirements of the Town Planning Ordinance by making application to the Town Planning Board for permission to build his ting house. If the indigenous villager does not own any private land within the "VE" of a recognized village, he may apply to the District Lands Office for a small house grant on Government land by a private treaty grant for a piece of Government land within the "VE" and "V" zone. In the present case the Appellant does own land within the "VE" of a recognized village, he would not be able to take the benefit under this policy for a private treaty grant, although it is fair to say that Mr. Wong Kai Sum of the Lands Department was not able to say whether the Government would still be willing to make such private treaty grant to him if his application to build a ting house on his own land within the "VE" is rejected on town planning grounds.

11. The Appellant worked in China although he still lived in Hong Kong when he was off work. His application for ting house was handled by his brother Lam Hon Fai on his behalf. Like nearly all indigenous villagers applying for ting house licence, Lam Hon Fai approached the District Lands Office for the application. In fact, it is generally understood that the District Lands Office provides an one stop service for such ting house application in the sense that this would be the only Government department that the applicant would have to approach in relation to all ting house matters, right from the time of the application for the permission to build the ting house to the time when the house is completed and ready for occupation. All legal procedures and documentations, such as the building licence, the certificates of exemptions and compliance are dealt with and issued by the District Lands Office.

The indigenous villagers would normally just rely on the District Lands Office for advice and guidance as to how to proceed with the application. The Appellant's case is no exception.

12. On 7 June 1996 the Appellant lodged an application for a licence to build a ting house. At that time, he was a co-owner of the land known as lot No. 4 in D.D. 230 Sheung Sze Wan. The other co-owner was Lam Chi Wai. Because he was not the sole owner of the land, his application was rejected by the District Lands Office on 20 June 1997.

13. The Appellant then proceeded with the partition of his land. On 1 December 1999 he informed the District Lands Office that he had completed the partition of the land and was the sole owner of the site. From the point of view of the District Lands Office, it was only on this date, i.e. 1 December 1999 that the Appellant was to be treated as having made his application for a licence to build his ting house. On 3 February 1999 the District Lands Office informed the Appellant his priority number in the small house application waiting queue.

14. On 20 April 2001 the District Lands Office requested the Appellant to provide a proposed ting house plan. The Appellant sent such plan to the District Lands Office on 23 November 2001. It was not until some 4 months later that on 26 March 2002 the District Lands Office requested the Appellant to revise his proposed ting house plan because certain portion of the balcony of the house encroached on Government land. According to Lam Hon Fai, after receiving the letter from the District Lands Office, he went up to the District Lands Office at Sai Kung and had a meeting with one Mr. Hung Hing Sum on the possibility of having a land exchange with the Government by surrendering the site in exchange of the grant of the land at the same location to accommodate the whole of the proposed ting house. However, he was told that there might be other complication on such proposed exchange in that in the future the Appellant may have to pay rates and more expensive Government rent. The outcome was that nothing was done.

15. On 18 June 2002, the District Lands Office wrote to remind the Appellant to reply to their letter of 26 March 2002. The letter made no mention of any possibility that the area around Sheung Sze Wan would soon be subject to a draft DPA plan which would have the effect of immediately regulating development of the area. The Appellant took the point that the District Lands Office should have so informed the Appellant so that the Appellant could take action immediately to amend the ting house plan and to ensure that the approval of the ting house building licence would be issued before the publication of the draft DPA plan. While we have no doubt that some officers within the District Lands Office must be aware of the eminent plan to publish the draft DPA plan, we do not consider that the District Lands Office had any duty to inform the Appellant. In fact, it might well be a breach of duty of confidence for such officers to divulge such information to the public.

16. The outcome was that the Appellant did not immediately respond to the request of the District Lands Office despite the reminder of 18 June 2002. On 26 July 2002, there was the publication of the first draft DPA plan. On 9 September 2002, the District Lands Office again wrote to remind the Appellant to respond to their letter of 26 March 2002. The Appellant replied on 4 October 2002 asking the District Lands Officer to provide the revised length of the balcony.

17. On 4 November 2002, the District Lands Office circulated a memo to the then District Planning Officer/Sai Kung to seek his initial comment on the Appellant's ting house application at the site. On 18 November 2002, the District Planning Officer informed the District Lands Office that planning permission would be required. About one month later on 17 December 2002, the District Lands Office informed the Appellant of the revised length of the balcony and also the requirement of the permission from the Town Planning Board. On 11 April 2003, the Appellant made his application to the Town Planning Board for permission to build his ting house at the site.

18. From the chronology of events outlined above, it would appear to us that the Appellant's application for building licence for the ting house was processed at a very slow pace although we have no information as to whether this was an extraordinarily slow pace when compared with other similar applications. It is a bit surprising that between at least 1 December 1998 to 26 July 2002, the processing of the application was still uncompleted. Of course for the period since 26 March 2002, the delay could hardly be laid at the door of the District Lands Office. However, even though there was delay on the part of the District Lands Office, it does not mean that there was any fault on the part of the Planning Department or the Town Planning Board.

19. The site in question straddles between the "GB" zone and the "V" zone on the DPA plan. So far as the "V" zone is concerned, the building of ting house is under Column 1 of the Schedule of the Notes to the Plan and no planning permission is necessary. So far as "GB" zone is concerned, the construction of ting house is not under Column 1 but is under Column 2. This would mean that such use may be permitted with or without conditions on application to the Town Planning Board. The relevant parts of the statement of planning intention for the "GB" zone on the DPA is as follows :

"(a) The intention of this zone is to prevent encroachment of development on steep slopes and well-vegetated areas as a means to enhance the protection of the natural landscape, to preserve the rural character, and to provide for countryside recreational outlet. Area zoned "GB" include foothills, woodland or vegetated land. They also define the limit for development and serve as roadside

amenities.

(c) There is a general presumption against development within this zone. Development within this zone will be strictly controlled. Development proposals will be considered by the Board on individual merits taking into account the relevant Town Planning Board Guidelines.”

20. We pause to consider the implication on the stated planning intention if the application is granted. The part of the site falling within the “GB” zone is not steep slope nor could it be considered as well-vegetated although there are some wild grass and short bushes on it. In fact, that part of the site within the “V” zone is in much the same condition. As we have pointed out above, the site and in fact its surrounding area on the side of the “GB” zone were originally terrace fields. Even though they are now covered by some kind of vegetation, they are not exactly “natural landscape” nor would they be suitable as countryside or recreational outlet without any setting of the land. As the zone boundary between the “V” zone and the “GB” zone is not along the road, we can see little benefit of retaining the part of the site in the “GB” zone as roadside amenities.

21. From the evidence of the Respondent, it would appear that when the division line between the “V” zone and “GB” zone on the draft DPA plan was drawn, the relevant authority had taken into account those sites which the District Lands Office had already agreed to grant building licences for the construction of ting houses although no work for the construction had yet commenced. In fact even as of today, there were 2 such sites lying to the south of the site in question which the District Lands Office had granted building licences and which are yet un-built on. However, it would appear that the authority concerned had not taken into consideration any site under any pending application. Nor did the authority concerned take note of the boundaries of the lots under private ownership. This may be a reason for the rather irrational zone boundary between the “V” zone and the “GB” zone in this case. In fact, had the authority concerned taken into consideration the Appellant’s pending application for ting house building licence, it would appear to us that there would be much greater justification to include the whole of the site in question in the “V” zone than the 2 sites to its south, which are on a higher altitude and are farther away from the access road.

22. Insofar as the Guidelines are concerned, we note that they are for general reference and are not intended to fetter the discretion of the Town Planning Board, although generally for the sake of consistency due regard must be paid to the Guidelines. We note that in the Guidelines, the main purposes of the “GB” zone are stated to be :

“(a) to conserve existing landscape features, areas of scenic value

and areas of recognised “fung shui” importance;

(b) to define the outer limits of urbanized districts and to serve as a buffer between and within urban areas; and

(c) to provide additional outlets for passive recreational uses”.

For reasons discussed in paragraph 20 above, we do not see any serious compromise with the main purposes of the “GB” zone if the application is allowed in the special circumstances of this case.

23. We note that there is a general presumption against development in a “GB” zone. However, this does not mean that no development is possible. The Respondent referred to and relied on paragraph (g) of the Guidelines which provides:

“(g) The design and layout of any proposed development should be compatible with the surrounding area. The development should not involve extensive clearance of existing natural vegetation, affect the existing natural landscape, or cause any adverse visual impact on the surrounding environment.”

24. We note that the area surrounding the site is designated for the development of ting house and there is no question that the Appellant’s development of his site would be compatible with the surrounding development. Since the development is only in respect of a relatively small site there would not be a lot of clearing of vegetation. In view of the fact that the whole area is intended to be used for ting house development and some sites for such development are at a higher altitude than the site in question, we do not see much adverse visual impact on the surrounding environment and the existing landscape.

25. Insofar as the Criteria are concerned, we note that since there is sufficient area reserved in Sheung Sze Wan Village for building ting houses, and that under 50% of the site is within a “V” zone, the Appellant would not be able to claim the benefit of the sympathetic consideration under paragraphs (a) & (b) of the Criteria. However, it would appear to us that the application could easily meet other requirements of the Criteria in that it would be compatible in terms of land use, scale, design and layout with the surrounding development (of paragraph (g)) and does not appear to be in serious conflict with the planning intention of the “GB” zone. Furthermore, the site abuts the emergency vehicular access road and there would be no problem in meeting the requirement of paragraph (j) of the Criteria.

26. We are seriously concerned with the issue as to whether the grant of the permission in the present case would give rise to a bad precedent thus opening up a flood gate for applications for using land within “GB” zone for building purposes.

We consider that each case must be considered on its own merits and there are hardly 2 cases which are on identical facts. There are a number of special features in this case, e.g. the fact that the zone division line bisects the Appellant's land, the fact that the zone division line was drawn on some rather arbitrary basis and not following either the road or the contour of the landscape, and that the Appellant had made his application to the District Lands Office for building licence before the publication of the first draft plan. We are told that in fact there was no pending application involving land which is partly on a "V" zone and partly on a "GB" zone and in this respect the Appellant's application could be treated as rather unique, and it is unlikely that there could be any similar application in the future. Hence, we do not consider that allowing the application would open up a flood gate.

27. We would mention that we do not think that there is any merit in the objection to the application on traffic ground. The road leading from Clear Water Bay Road to Sheung Sze Wan is a 2 way traffic road and is much better than many of the other roads in the vicinity serving the nearby villages. The fear of an enormous increase in the traffic flow along Clear Water Bay Road was predicated on the whole of the "GB" zone area being used for building ting house purposes. However, this would not be the case even if the Appellant's application is allowed. This is because there is a limit to the number of persons qualified to make application for ting houses and it would not create any increase of traffic flow if the ting house is built on "GB" zone instead of in the "V" zone.

28. In view of the rather unique circumstances of this case, we decide to allow the appeal and to grant the Appellant planning permission to erect his ting house at the site subject to the following conditions :

- (a) the submission and implementation of landscaping and tree preservation proposals to the satisfaction of the Director of Planning or to the Town Planning Board; and
- (b) the permission shall cease to have effect on the expiration of 4 years from the date of the communication of this decision to the Appellant unless prior to that date, either the development hereby permitted is commenced or this permission is renewed.

29. In accordance with the usual practice when planning approval was given for the construction of ting house, we would advise the Appellant of the following matters :

- (a) the Appellant should follow the Environmental Protection Department's 'Practice Note for Professional Persons – Drainage Plans subject to comments by the Environmental

Protection Department (ProPECC PN 5/93) in designing the soakaway system;

- (b) the Appellant should assess the need to extend his inside services to the nearest Government water mains for connection and to sort out the land matters related to the main lying in private lots; and
- (c) the Appellant should consult the Director of Civil Engineering and Development regarding the submission of site formation plan to the Director of Building.