

TOWN PLANNING APPEAL NO. 10 OF 2003

Between

CHOW CHING YEE : Appellant

-v-

The Town Planning Board : Respondent

Dates of hearing : 8th & 13th October, 2003 and 4th November, 2003

Date of decision : 5th December 2003

Panel : Mr Ronny F.H. Wong S.C. (Chairman)
Ms Wendy Chui Pui Man
Mr Fung Pui Cheung
Mr Patrick Lau Hing Tat
Mr Kevin Law Chi Shing

DECISION

History of the application

By an application received by the Town Planning Board [“the Board”] on 4th September, 2002, Mr. Woo Kei Wing [“Mr. Woo”] applied under section 16 of the Town Planning Ordinance for permission to build a New Territories Exempted House [“Small House”] on Lot 836F & 836RP in D.D. 130 [“the Site”]. Ms. Chow Ching Yee [“Ms. Chow”] is the owner of the Lot. She signed the application as agent for Mr. Woo.

2. The application was rejected by the Rural and New Town Planning Committee [“RNTRC”] on 25th October, 2002. By letter dated 18th November, 2002, Ms. Chow applied under section 17(1) of the Town Planning Ordinance (Cap. 131) [“the Ordinance”] for a review of the decision of the RNTRC. Ms. Chow signed the letter as “Applicant” without denoting in any way any representative capacity.

3. The Board reviewed the application on 14th February, 2003. The Board affirmed the decision of RNTRC. By letter dated 28th February, 2003, Ms. Chow was informed that her application was rejected for the following reasons :

- (a) The proposed development of a [Small House] is not in line with the planning intention of the “Green Belt” [“GB”] zone which is to define the limits of urban and suburban development areas by

natural features and to contain urban sprawl as well as to provide passive recreational outlets;

- (b) According to the Town Planning Board Guidelines for “Application for Development within Green Belt zone under Section 16 of the Town Planning Ordinance”, there is a general presumption against development in the “GB” zone. There is no strong justification for the proposed development to deviate from the general presumption; and
- (c) The proposed development does not comply with the “Interim Criteria for Consideration of Application for NTEH/Small House in the New Territories in that the application site is located outside the village “environs” of recognized villages and a major portion of the site fell outside the “Village Type Development” [“V”] zone on the approved Lam Tei and Yick Yuen Outline Zoning Plan. There is no strong justification in the submission to demonstrate that land is not available with the “V” zone in the area for the proposed development.

4. By notice dated 24th April, 2003, Ms. Chow sought to appeal against the decision of the Board. She was described as the Appellant in the notice of appeal under section 17B of the Ordinance. There is nothing in that notice to suggest that appeal is being lodged for an on behalf of Mr. Woo. At the hearing before us, Mr. S.W. Lai [“Mr. Lai”] acted as her spokesman.

The Site and the proposed Small House

5. The Site is

- (a) Of an area of about 242.7 m².
- (b) Is located near Lam Tei Tsuen/Lam Tei San Tsuen/To Yuen Wai in Tuen Mun and is accessible via a local track leading from Fuk Hung Tsuen Lane at distance of about 50m to its north.
- (c) Is regulated by the approved Lam Tei and Yick Yuen Outline Zoning Plan [“the OZP”]
 - (i) 87% of it falls within the Green Belt [“GB”] zone.
 - (ii) 13% of it falls within the Village Type Development [“V”] zone.

- (d) Is located outside the village environs of any recognised village.
- (e) Is located about 100m to the south of a medium-density residential development (i.e. Botania Villa).

6. The proposed Small House block falls wholly within the GB zone. Only part of the proposed emergency vehicular access falls within the V zone.

Planning intention

7. A total of 132.48 ha. was zoned GB in the OZP. The Explanatory Statement attached to the OZP makes it clear that

- (a) The planning intention of this zone is to define the limits of urban and suburban development areas by natural features and to contain urban sprawl as well as to provide massive recreational outlets. The zoned areas may include foothills, lower hill slopes, spurs, isolated knolls, woodland, traditional burial ground or vegetated land which occur at the urban fringe. There is a general presumption against development within this zone. However, limited developments may be permitted if they are justified on strong planning grounds. Any building development will require permission from the Board and development proposals will be considered on their individual merits.’
- (b) The “GB” zone covers the northern, south-western corner and western portion of the Area. The strip of land along the western side of Yuen Long Highway is also zoned “GB” in order to provide a buffer area for the adjoining areas.

Town Planning Board Guidelines For Application For Development Within Green Belt Zone [“TPB PG-No.10”]

8. These guidelines make it clear that ‘The planning intention of the “Green Belt” (“GB”) zone is primarily to promote the conservation of the natural environment and to safeguard it from encroachment by urban-type developments’.

9. They explain that one of the main purposes of the “GB” zone is “to define the outer limits of urbanized districts and to serve as a buffer between and within urban areas”.

10. They outline the main planning criteria in deciding whether planning permission for residential development should be granted within a “GB” zone.

The criteria include the following :

- (a) There is a general presumption against development (other than redevelopment) in a “GB” zone.
- (b) An application for new development in a “GB” zone will only be considered in exceptional circumstances and must be justified with very strong planning grounds.
- (c) Applications for New Territories Exempted Houses with satisfactory sewage disposal facilities and access arrangements may be approved if the application sites are in close proximity to existing villages and in keeping with the surrounding uses, and where the development is to meet the demand from indigenous villagers.
- (d) The proposed development should not be susceptible to adverse environmental effects from pollution sources nearby such as traffic noise, unless adequate mitigation measures are provided.

The Interim Criteria for Consideration of Application for New Territories Exempted House/Small House in the New Territories [“the Interim Criteria”]

11. These provide that :

- (a) Sympathetic consideration may be given if the application site is located within the VE of a recognized village and there is a general shortage of land in meeting the demand for Small House development within the “V” zone of the village.
- (b) If the proposed NTEH/Small House is located within the ‘VE’ and falling partly with the “V” zone, even if there is no general shortage of land in meeting the demand for Small House development in the “V” zone, favourable consideration may also be given if more than 50% of the proposed NTEH/small House footprint falls within the “V” zone, provided that the other criteria can be satisfied.
- (c) If the proposed NTEH/Small House is located outside the ‘VE’ but falling partly with the “V” zone, favourable consideration could be given if more than 50% of the proposed NTEH/Small House footprint falls within the “V” zone, provided that there is a general shortage of land in meeting the demand for Small House development in the “V” zone and the other criteria can be satisfied.

Available sites and the Interim Criteria

12. At the hearing before us, considerable time was spent in debating whether there is a general shortage of land in meeting the demand for Small House development in the “V” zone.

13. The Board contends that :

- (a) On the approved OZP, about 102.78 ha of land is zoned “V” to designate both existing recognized villages and areas of land considered suitable for village expansion.
- (b) The number of outstanding Small House applications for Lam Tei Tsuen, Lam Tei San Tsuen and To Yuen Wai was 30 at the time when the application was considered by the Board.
- (c) Total area of “V” zone covering the three villages is about 13.8 ha. About 2.9 ha would be available for Small House development. On the assumption that 1 ha. of land could accommodate 40 Small Houses, 2.08 ha. which could accommodate about 83 Small Houses is not yet committed for development.

14. Mr. Lai hotly disputed these assertions of the Board. He conducted an overall review of the 15 plots lands said to be available by the Board. He contended that only 1 such piece is available for the construction of Small House. He drew our attention to various notices and advertisements seeking agricultural land for the erection of Small House. He argued that the total lack of response to those notices and advertisements reinforced his contention.

15. We are of the view that this debate relates merely to one facet of the Interim Criteria. In order to qualify for “sympathetic consideration”, an applicant must demonstrate that his site is within the VE of a recognised village. There is no dispute that the Site is not. In order to qualify for “favourable consideration”, an applicant must demonstrate that 50% of the footprint of his proposed Small House falls within the “V” zone. There is also no dispute that 50% of the footprint of the proposed Small House does not.

16. Quite apart from these considerations, the Board drew our attention to the fact that Mr. Woo is in fact an indigenous villager of Tai Lam Chung Tsuen. Mr. Lai explained that Ms. Chow and Mr. Woo had entered into an agreement for sale and purchase. Completion of that sale and purchase is dependant upon the grant of planning permission by the Board. We have not been shown a copy of that sale and purchase agreement. In this connection, we have outlined the

history of this appeal in paragraph 4 above. Quite apart from the question of the propriety of this appeal in the light of section 17 of the Ordinance, this is not a case of an indigenous villager seeking to advance his native right over his own land. This is a case of an owner seeking monetary gain on the back of the right of an indigenous villager of an alien village. In these circumstances very strong planning grounds must be advanced for the planning permission sought.

Any strong planning ground ?

17. The principal grievance of Ms. Chow stems from the fact that planning permissions were granted in favour of various plots of land adjoining the Site. The various approvals may be summarised as follows :

Application No.	Date of approval	Reasons for approval as explained by the Board
20	02/09/1994	The development was in line with the planning intention of the "Unspecified Use" area under the then applicable plan
7	18/04/1997	The site is located at the edge of the V zone and the applicants were clearerees of Fu Tei Tsuen affected by a public housing project
12	23/01/1998	The applicant was an indigenous villager of Nai Wai and the site is adjacent to the V zone and an existing village
49	30/10/1998	The applicant was an indigenous villager of San Hui Tsuen affected by the resiting of the village resulting from land resumption by the

		Government
91	25/01/2002	The site is located right at the edge of the “V” zone and the applicants were indigenous villagers of a recognised village in Tsuen Wan who had relocated to Fu Tei but subsequently their houses in Fu Tei were resumed for implementation of a housing project.

18. Application 91 is the only successful application after promulgation of the Interim Criteria. Application 99 in respect of a plot in close proximity to the Site was considered and rejected on 13th September, 2002 on the ground that the proposed development is not in line with the planning intention of GB zone.

19. An application was lodged on 23rd October, 2002 for the rezoning of the Site from “GB” zone to “V” zone. This was rejected on the basis that the “GB” zone serves as a buffer between the Yuen Long Highway and the residential development to its north and that rezoning is unnecessary as there is provision for application to the Board for Small House development.

20. Mr. Lai sought to persuade us that the Site should not be zoned “GB” as it does not fall within the meaning of “foothills, lower hill slopes, spurs, isolated knolls, woodland...”. and that it is not within the buffer area as it does not lie on the western side of Yuen Long Highway. We have reviewed the Site in the context of the OZP. We have no doubt that it falls within the important buffer area between Yuen Long Highway and the residential development to its north. Given the objective of this buffer area, any development must be justified “on strong planning grounds”.

21. We see no such justification. There is no humanitarian reason which prompted most if not all the approvals prior to promulgation of the interim criteria. The application is clearly not within the Interim Criteria. Grant of approval in these circumstances would set an undesirable precedent leading to the gradual erosion of the buffer. Such risk far outweighs the potential monetary loss of Ms. Chow arising from denial of the planning permission sought.

22. For these reasons, we dismiss Ms. Chow’s appeal.

23. We would like to express our appreciation for the preparation and assistance of Mr. Lai.

Mr. S.W. Lai for Ms. Chow Ching Yee

Ms. Yasmin Mahomed (Senior Government Counsel) for the Respondent