

TOWN PLANNING APPEAL NO. 6 OF 2003

Between

YAU CHI HANG : Appellant

-v-

The Town Planning Board : Respondent

TOWN PLANNING APPEAL NO. 7 OF 2003

Between

YAU NGAN HIM : Appellant

-v-

The Town Planning Board : Respondent

Date of hearing : 27th & 28th August and 25th September, 2003.

Date of decision : 3rd December 2003

Panel : Mr Ronny F.H. Wong S.C. (Chairman)
Ms Helen Kwan Po Jen
Ms Gidget Lun Kit Chi
Mr Steve Ng Siu Pang

DECISION

There are 2 appeals before us. Mr. Yau Chi Hang is the Appellant in Appeal No. 6 and Mr. Yau Ngai Him is the Appellant in Appeal No. 7. Mr. Yau Chun Kei represented him at the hearing before us. The facts and the issues raised in both appeals are similar. With the consent of both Appellants, the 2 appeals were heard at the same time.

2. Both Appellants seek to challenge the decision of the Town Planning Board in refusing planning permission for the erection of a New Territories Exempted House ("Small House") on land held by each of them. Mr. Yau Chi Hang is the holder of Lot No. 369 in D.D. 253 ("Lot 369") whilst Mr. Yau Ngai Him is the holder of Lot No. 367RP in D.D. 253 ("Lot 367"). The 2 sites :

- (a) Are located near Tseng Lan Shue Village.
- (b) Are within the village environs ("VE") of Tseng Lan Shue Village.

- (c) Are within the "Green Belt" ("GB") zone on the current approved Tseng Lan Shue Outline Zoning Plan ("OZP") No. S/SK-TLS/5 ("the Plan").
- (d) Are within 20 metres from Clear Water Bay Road.
- (e) are outside the "Village Type Development" ("V") zone on the Plan.

3. Lot 369 is of an area of about 100.29 m². It is made up of 2 parts of different levels. The western part is flat and hard paved with some vehicle spare parts and repair equipments on it. The eastern part consists of a vegetated slope with a tree at the northeastern corner. It is accessible via a vehicular access leading from Clear Water Bay Road. To the immediate west of Lot 369 is a flight of steps running up a steep and vegetated slope. About 5m west of Lot 369 is the Tseng Len Shue Village Office. To the immediate east are some temporary structures for workshop use. Further east, about 17m from this lot, is a Small House which existed before the publication of the Tseng Lan Shue Interim Development Permission Area Plan No. IDPA/SK-TLS/1. Clear Water Bay Road, broadly at the same level, is about 10m to the south of the lot.

4. Lot 367 is of an area of about 145.06 m². It is located at the eastern end of a car park. It is flat and hard paved with temporary structures and a number of parking spaces on it. It is accessible via a vehicular access from Clear Water Bay Road. A car park and a nullah can be found immediately along the western boundary of the lot. On the other side of the nullah is another car park. To the immediate east is an access track. Further east about 7m is the Tsang Lan Shue Village Office. Clear Water Bay Road is about 10m to the south of the lot and is about 2m higher in level.

5. By letter dated 28th February, 2003, the Town Planning Board ("the Board") affirmed the decision of the Rural and Town Planning Committee ("RNTRC") dated 8th November, 2002 and rejected the applications on the following grounds :

- (a) 'Sufficient land for Small House development has been reserved within the "Village Type Development" ("V") zones for Tseng Lan Shue Village. There is insufficient information in the submission to demonstrate that no suitable land within the "V" zone is available for Small House development'. We shall refer to this as "The Sufficiency of Land Point".
- (b) 'The proposed development would be subject to high traffic noise impact from Clear Water Bay Road'. We shall refer to this as the "Noise Pollution Point".

- (c) 'Approval of the proposed development would set an undesirable precedent for similar applications. Approving such applications would result in cumulative adverse impacts on the environment, traffic and infrastructure provision in the area'. We shall refer to this as "The Undesirable Precedent Point".

6. At the hearings before us in August and September, 2003, the Appellants challenged the conclusions reached by the Board on the Sufficiency of Land Point, the Noise Pollution Point and the Undesirable Precedent Point.

The Sufficiency of Land Point

7. The Board placed before us a statement from Mr. Ho Siu Hung ("Mr. Ho"), a Chief Land Executive of the Lands Department. The Appellants did not challenge this statement of Mr. Ho. According to Mr. Ho :

- (a) Under the current Small House Policy of the Lands Department, all 18-year old male indigenous villagers in the New Territories are entitled to apply to build Small Houses within the VE of their own recognized villages for their own occupation on their own agricultural lots held under the Block Government Lease, free of premium.
- (b) If the proposed site falls with the VE and also falls within a "V" Zone on the relevant statutory plan, the Lands Department would consider issuing a Free Building Licence for Small House development to the applicant.
- (c) If the proposed site is within the VE but falls outside a "V" Zone, the applicant has to obtain planning permission from the Board before consideration of his application by the Lands Department.
- (d) Where an indigenous villager does not own any private land within the VE of his village, he may apply for a Private Treaty Grant of Government land for his construction of a Small House.
 - (i) Unless the applicant has identified a specific site suitable for the Small House development applied for, the Lands Department would normally reject his application if it is satisfied that there is no identified Government land suitable for Small House development in the V zone.
 - (ii) If the applicant has identified a specific piece of Government Land for the proposed Small House development and if there is a large number of similar applications, the Lands Department may require the Village Council to draw up a list of nominations before processing the applications.

- (e) The Lands Department has formulated internal guidelines to assess the applications. According to those guidelines, Small House applications in respect of sites within the "prohibited areas" should normally be rejected. The "prohibited areas" include areas "20 metres from trunk roads or primary distributor roads (including Rural Road Type A)".
- (f) In the past 10 years, there were a total of 179 Small House applications from indigenous villagers of Tseng Lan Shue. In respect of these 179 applications :
 - (i) 84 applications were approved of which 72 were by way of Free Building Licence and 12 by way of Private Treaty Grant.
 - (ii) 88 applications were rejected for various reasons.
- (g) The Small House demand for next 10 years in Tseng Lan Shue as estimated by its Village Representative is about 210.
- (h) Mr. Yau Chi Hang submitted an application on 1st December, 1996 to build a Small House on Government land. As no suitable Government land was identified at that time, Mr. Yau Chi Hang's application was rejected on 3rd January, 1997. Mr. Yau Chi Hang then submitted a second application in respect of Lot 369 on 16th November, 2000. In the absence of planning permission from the Board, this second application was rejected by the Lands Department on 30th November, 2001. District Lands Office/Sai Kung does not support the current application of Mr. Yau Chi Hang for planning permission as Lot 369 is within the 20m prohibited area of Clear Water Bay Road.
- (i) Mr. Yau Ngai Him submitted an application on 2nd December, 1996 to build a Small House on Government land. As no suitable Government land was identified at that time, Mr. Yau Ngai Him's application was rejected on 3rd January, 1997. Mr. Yau Ngai Him then submitted a second application in respect of Lot 367 on 16th November, 2000. In the absence of planning permission from the Board, this second application was rejected by the Lands Department on 28th November, 2001. District Lands Office/Sai Kung does not support the current application of Mr. Yau Ngai Him for planning permission as Lot 367 is within the 20m prohibited area of Clear Water Bay Road.

8. Mr. Lau Cheung Ching ("Mr. Lau"), Senior Town Planner/Sai Kung explained to us that there are 7.88 ha. of buildable land within the "V" Zone of the village. According to his estimate, 294 Small Houses could be built on such buildable land. This exceeds the anticipated demand of 210 Small Houses up to

2013.

9. The Appellants dispute the estimate of Mr. Lau. They pointed out that the 7.88 ha. of land are held largely by private individuals. It is unlikely that those individuals would countenance erection on their land the fire services access required for the 294 Small Houses as projected by Mr. Lau. Mr. Lau countered this by his submission that land ownership is not a relevant planning consideration.

The noise pollution point

10. The Director of Environmental Protection does not support the application as the proposed Small Houses would be susceptible to severe traffic noise from Clear Water Bay Road.

11. The Appellants drew our attention to the fact that they have been and are still residing in village houses nearby. They said that they have not experienced any significant degree of discomfort from noise generated by traffic on Clear Water Bay Road. They maintained that mitigation measures could be provided for the proposed developments to address any traffic noise problem and they were willing to comply with conditions imposed in the grant of planning permission. They further said that they were prepared to withstand any noise generated by traffic along Clear Water Bay Road. This is therefore not a matter of concern to the authorities.

The Undesirable Precedent Point

12. The Appellants adverted to the fact that the Board had previously approved similar applications in Tseng Lan Shue. They said that given the number of successful applications it was unfair to deny their planning permission.

13. Mr. Lau provided us with an analysis of the 12 applications lodged after the first gazetting of the Tseng Lan Shue OZP on 8th July, 1994.

- (a) 1 application was for proposed redevelopment of an existing house in a "V" zone. This was approved by the RNTPC with conditions in 1998.
- (b) 9 applications relating to sites close to Clear Water Bay Road were approved with conditions by the RNTPC in 1996 and 1997. 5 of these were within a "GB" zone, whereas the remaining 4 were on the boundary between a "GB" zone and a "V" zone. One of the main reasons for approving these applications was that the applicant in each case had identified mitigation measures to address the noise impact.
- (c) 2 other applications were rejected on various grounds including that the applications were not in line with the planning intention of the

"GB" zone and that sufficient land for Small House developments had been reserved within the "V" zone.

14. Mr. Lau laid considerable emphasis on the fact that the 10 applications referred to in paragraphs 13(a) and (b) were all considered and approved by the RNTPC before the promulgation of the Interim Criteria for Consideration of Application for New Territories Exempted House/Small House in the New Territories ["the Interim Criteria"] in 2000. No other similar application for Small House development has been approved after promulgation of those criteria.

Planning intention

15. According to paragraph 8.1 of the Explanatory Statement of the Plan, the general planning intention of the Tseng Lan Shue area :

"is primarily to conserve the natural landscape features and the rural character of the area. Except for the village expansion areas designated to meet the outstanding Small House demand of the recognised villages, the planning intention is to confine residential developments to the already established areas mainly along Fei Ngo Shan Road and Razor Hill Road and in Ta Ku Ling San Tsuen, as well as to maintain such developments to their existing and committed intensity".

16. As stated in paragraph 9.8.1 of the Explanatory Statement, the planning intention of the "GB" Zone on the Plan is :

"to define the limits of urban development areas by natural features including foothills, lower hillslopes, spurs, isolated knolls, woodland, vegetated land and amenity areas found at the urban fringe so as to contain urban sprawl. It would also serve the purpose of providing passive recreational outlet and delineating roadside amenity area".

17. Paragraph 9.8.2 of the Explanatory Statement further provides that :

"There is a general presumption against development within this zone. Development within this zone will be strictly controlled. Any building development will require permission from the Board and development proposals will be considered on their individual merits taking into account the relevant Guidelines published by the Board".

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

18. 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'.

19. 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".

20. 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"]

21. 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) The proposed development should not cause environmental impacts on the surrounding areas. Any such potential impacts should be mitigated to the satisfaction of the relevant Government departments.
- (c) The provision of fire services installations and emergency vehicular access, if required, should be appropriate with the scale of the

development and in compliance with relevant standards.

Our Decision

22. We accept the evidence of Mr. Lau. We are not persuaded that there is a general shortage of land within the "V" Zone of the village. These 2 applications therefore do not call for sympathetic consideration.

23. We reject the Appellants' argument that the any noise pollution is their personal matter. Such argument negates in total the beneficial objective of any planning legislation. Given their close proximity to the Clear Water Bay Road, the 2 lots are obviously susceptible to severe traffic noise from that road. The Appellants had not placed before us any concrete proposal to mitigate such adverse impact. The onus rests squarely on them.

24. The 2 lots are located within the "GB" zone. The applications involve new developments which must be justified on strong planning grounds. We are not persuaded that the Appellants have identified any planning consideration to rebut the general presumption against development in that zone. We further accept the evidence of Mr. Lau that no similar application has been approved after promulgation of the Interim Criteria. We are of the view that consistency must be maintained and in the absence of any strong planning justification, it would not be right for us to accede to these applications.

25. For these reasons, we dismiss the appeals.

Mr. Yau Chi Hang in person

Mr. Yau Chun Kei for Mr. Yau Ngan Him

Mr. Clifford Tavares for the Respondent