

## TOWN PLANNING APPEAL NO. 3 OF 2008

**IN THE MATTER** of the  
Town Planning Ordinance (Cap. 131)  
and  
**IN THE MATTER** of an Appeal under  
Section 17B by  
MTR Corporation Limited (represented  
by Messrs Deacons)

**Date of Hearing:** 9 September 2010

**Date of Decision:** 27 September 2010

### **Town Planning Appeal Board:**

Professor Anthony M J Cooray (Chairman)

Mr Paul Chan Kam-cheung, BBS, JP (Member)

Professor Chau Kwong-wing (Member)

Professor Barnabas Chung Hung-kwan (Member)

Mr Lo Pui-yin (Member)

### **DECISION ON COSTS**

1. The appellants, the MTR Corporation, successfully appealed to us from the decision of the Town Planning Board (TPB). The appellants' grievance was that the TPB had imposed certain conditions on the planning permission for the revision of their approved master layout plan for a Comprehensive Development Area zone, known as the Union Square, permitting the provision of alfresco dining facilities. They were aggrieved that the planning permission was granted only for a period of three years subject to an "operational hours" condition. We held that the regulation of alfresco dining facilities could be left to a licensing regime associated with the government initiative, "Outside Seating

Accommodation Scheme”. On that basis we decided to remove the planning condition.

2. Our decision was made on 28 June 2010 and the appellants applied for costs on 15 July 2010.
3. Upon receiving the appellants’ claim the TPB submitted its submissions opposing the application on 29 July 2010. The appellants submitted counter arguments on 4 August 2010 and TPB submitted further submissions in reply on 6 August 2010.
4. Meanwhile we considered that we should hear the parties on the costs application. We sent some questions to the parties for their consideration and both parties submitted additional written submissions. The hearing was conducted on 9 September 2010.

#### The Town Planning Appeal Board’s present practice on cost awards

5. The Town Planning Appeal Board (TPAB) has the power to award costs. Section 17B(8)(c) of the Town Planning Ordinance (Cap 131) provides as follows:

(8) At the completion of the hearing of parties appearing at an appeal or at any adjourned hearing, an Appeal Board may-

(c) award to a party such costs legal or otherwise as it considers reasonably incidental to the preparation and presentation of an appeal.

6. Since its establishment in 1991, the TPAB has made 127 decisions and has not ever awarded costs. The TPAB has given thought to the question of costs in six cases.
7. In the first of those six cases, Appeal No. 3 of 1992, decided on 28 July 1992, the TPB, the successful party, asked for costs in the event of the TPAB dismissing the appeal. The Chairman, Mr Justice Litton, said: “We conclude that, generally speaking, we should not [award costs]. The Appellant is exercising a right conferred by statute to appeal against a decision of the TPB where, by the nature of things, the TPB cannot be expected to state fully its deliberations and reasons for refusing the application. The

appeal on behalf of the Appellant has been conducted with dignity and restraint and there are no exceptional circumstances in this case which suggest that we should award costs against the Appellant and, in effect, deter future appellants from pursuing what, on its face, is an unfettered right of an aggrieved party.” (para 28).

8. The second case where a party asked for costs was in 1994: Appeal No 12 of 1993 decided on 9 May 1994. The TPB, the successful party, indicated that they would ask for costs in case they succeeded. The Chairman, Mr Justice Litton, wrote: “We are provisionally of the view subject to further representations on behalf of the appellants that this is a proper case for awarding costs against the appellants. The application was doomed to failure and this should have been apparent to the appellants’ professional advisers. The appeal borders on the frivolous.” (para 17).
9. The third TPAB decision to refer to the question of costs was Appeal No 13 of 1993, decided on 26 August 1994, where the appeal succeeded. The Chairman, Mr Robert Tang, QC, disallowing the appellant’s application for costs said: “Our practice is that normally costs do not follow the event. Mr Neoh [for the appellant] observed that on appeal the respondent advanced a new case based on the alleged intrinsic value of the fish ponds. He said that amounted, in effect, to “moving the goal post” between the time when the grounds of appeal were given and the hearing of the appeal and is unfair. But, fortunately, the appellant was able to deal with the new case in its stride. Given the novel nature of the appellant’s approach which combines development with environmental and ecological enhancement, we think it right to allow the respondent greater latitude.” (para 86).
10. The fourth case where the TPAB directed its mind to costs was 1996: Appeal No 4 of 1996 decided on 29 October 1996, where the appeal was unsuccessful. The TPB asked for costs. The Chairman, Mr Robert Tang, QC, said: “It has not been the practice of the Appeal Board to award costs to a successful party. This practice is ripe for review. But until a new policy has been adopted, we believe, in the circumstances, we should not order costs against the appellant.” (para 30). While the decision does not make it clear why the TPB asked for costs, the reasons might be that the appellant’s case was built on certain evidence that the TPAB considered to be “highly unsatisfactory”, and that the appellants should have been aware that their application to intensify the

current use of the land was clearly contrary to the planning intention.

11. The fifth case where the TPAB considered the question of costs came up before the TPAB ten years later in 2006, in Appeal No 6 of 2005 decided on 23 June 2006. There the appellant asked for costs but the TPB did not. The TPAB dismissed the appeal and denied the appellant's request for costs. The Chairman, Mr Patrick Fung, SC, considered that this was a suitable case for a costs order to be made against the appellant. Mr Fung referred to the decisions of the TPAB in Appeal No 3 of 1992, No 13 of 1993 and 4 of 1996 and concluded that "it would appear that the **usual practice** of the Appeal Board is not to make any order for costs against any party irrespective of the result of an appeal" (para 33). He went on to say: "Although such is the usual practice, we are of the view that section 17B(8)(c) must have been enacted for a purpose. In exceptional circumstances, the Appeal Board must have the power to make an order for costs against a party." (para 34).
12. Applying that principle to the facts before the TPAB Mr Fung said: "In the present case, we take the view that the Appellant's appeal is frivolous and wholly without merit. Although the Appellant chose not to make any representation or submission to the Board on the Review Application, which would have been the appropriate occasion for the Appellant to put forward his arguments addressed to the Appeal Board, he now accuses the Board of not having fairly considered his Review Application. Further, the way that the Appeal was being conducted is far from being commendable." (para 35).
13. The sixth and last case where the question of costs was referred to is Appeal No 10 of 2006, decided on 15 October 2007, where the appeal was unsuccessful. The Chairlady, Ms Teresa Cheng, SC, observed thus: "The Respondent stated that they would not ask for costs and hence although in contentious proceedings the common law rule would be that costs would follow the event, the Appellants would not be liable to the costs that the Respondent has incurred."(para 24)

An analysis of the TPAB decisions or observations on costs

14. It appears that the TPAB has not favoured the view that the successful party is ordinarily entitled to costs, with the exception of the view expressed in Appeal No 10 of 2006.
15. The general practice of the TPAB could be presented as follows:
  - (i) In the vast majority of cases parties do not appear to have asked for costs.
  - (ii) In the six cases where the TPAB dealt with the issue of costs, it did not adopt the “costs follow the event” principle, except in one case. In all the six cases there were circumstances which in fact triggered or could have triggered a request for costs.
  - (iii) The TPAB has favoured awarding costs not as a matter of course but only in exceptional circumstances.
  - (iv) Exceptional circumstances would be where the appellant’s case is “frivolous” or “wholly without merit”; or where a party has not conducted the case “with dignity and restraint” or has conducted the case in a way “far from being commendable”; or where a party has acted in an unfair manner placing an undue burden on the other party.
  - (v) It would be safe to say that the TPAB would be prepared to award costs if unacceptable behavior of a party has resulted in wasted expenditure by the other party.
16. We are of the view that the practice of the TPAB not to award costs unless there are exceptional circumstances to justify an award of costs is a sound one. Just as an aggrieved applicant for planning permission must be encouraged to appeal to the TPAB without the risk of being burdened with costs if they conduct their appeal with restraint and dignity, so must the TPB be given every opportunity to defend its decision before the TPAB, with a similar freedom, so long as they conduct their case fairly and in a professional manner. If the TPAB is to exercise its independent planning judgment based fully and fairly on an examination of all aspects of the appeal, it is important to continue the current practice that has been followed for the last 20 years.

Is this a suitable case to award costs?

17. Both the appellants and the respondent assisted us in the conduct of the case with utmost professionalism. Neither party made any attempt to mislead the TPAB or their opponent. We in turn afforded every opportunity to the parties, especially the appellants, to present their arguments fully and without any undue restraint on time.
18. The respondent did not act in any manner which did or would cause prejudice to the presentation of the appellants' case. Nor did they conduct their case in such a manner that resulted in wasted time or expenditure to the appellants. We also hold that the TPB's case was not frivolous or wholly without merit. The TPB had decided to impose a limitation on operational hours, whereas we concluded that such regulatory measures could be taken by other regulatory agencies. As we observed in our decision dated 28 June 2010 to grant planning permission, the TPB must not slavishly defer to other regulatory agencies. Our preference for regulation by other regulatory agencies was the result of exercise of our independent planning judgment. The TPB was entitled to insistently argue that the controls should be exercised through the planning process. On that front too, we do not find fault with the TPB to slap on them a costs order.
19. We dismiss the application for costs. It remains to thank Counsel and parties for their painstaking research and admirable assistance to us in this application for costs.

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Professor Anthony M J Cooray  
(Chairman)

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Mr Paul Chan Kam-cheung, BBS, JP  
(Member)

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Professor Chau Kwong-wing  
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