

IN THE TOWN PLANNING APPEAL BOARD

Town Planning Appeal No. 10 of 2010

BETWEEN

STONE TARGET LIMITED

Appellant

and

THE TOWN PLANNING BOARD

Respondent

Appeal Board : Ms. Teresa CHENG Yeuk-wah, GBS, SC, JP (Chairman)

Mr. Paul LAM Ting-kwok

Dr Ellen LAU Hat-lan

Ir. NG Kwok-chun

Miss Winnie NG Wing-mui

Date of Decision on Cost : 16 December 2011

DECISION ON COSTS

1. The Town Planning Appeal Board (TPAB) rendered its decision on this appeal on 4 November 2011.

2. By a letter dated the 14 November 2011, Solicitors for the Appellant wrote to the Secretary of the TPAB, inviting this Appeal Board to make an order on costs in the Appellant's favour pursuant to section 17B(8)(c) of the Town Planning Ordinance and the normal rule that costs should follow the event.

3. The Respondent, by a letter from the Department of Justice dated the 21 November 2011, opposed the application. In summary, it contends that the usual practice of the TPAB is not to make any order for costs against any party irrespective of the results and that costs are rarely awarded and only in exceptional circumstances. Four town planning appeal decisions, which will be dealt with below, have been referred to. Apart from the practice, the Department of Justice also emphasised that there are good policy reasons for the usual practice which they relied on. The Respondent submits that there should be no order for costs for these reasons:

- (a) There is a long-standing practice that costs would not be ordered save only in exceptional cases.
- (b) There are good policy reasons for the usual practice. An award of costs against an unsuccessful Appellant would deter future Appellants from pursuing its unfettered right. On the other hand, members of the Town Planning Board (TPB) when exercising their public function and duty ought not to be in a position of having to consider whether a decision to refuse planning permission on the basis of what it considered as in the interests of good planning should attract an award of costs if their decision is reversed on appeal. This, the Respondent said, is an application of common sense and common fairness that parties should be treated equally.
- (c) There are no exceptional circumstances in this case that justify the award of costs.

4. Solicitors for the Appellant countered the Department of Justice's submissions by its letter dated 28 November 2011. Its submissions can be summarised as follows:

- (a) Section 17B(8)(c) of the Town Planning Ordinance contains a specific statutory power enabling the Appeal Board to make an

order for costs. It must therefore have been the intention of the legislature that this power be used.

- (b) The past practice does not bind this Appeal Board. The discretion that is conferred on the Appeal Board should be one that should be exercised fairly, reasonably and judiciously based on the matters before them as opposed to the past practice.
- (c) In the decision of TPA No. 3 of 2008, Professor Anthony M. J. Cooray cited a decision from TPAB 4 of 1996 where Mr Robert C. Tang, QC (as he then was) stated that the practice was "ripe for review". Some 15 years later now, this Appeal Board should review the practice and consider awarding costs.
- (d) The Appellant is not a large developer but the owner and operator of a small petrol filling station.
- (e) The TPB did not put forward any environmental evidence when the ground for rejection was based on environmental grounds.
- (f) It is not accepted that there is good policy reason for costs awards not to be made to successful Appellants. Other government departments' decisions would be subject to review by the courts which would invariably attract an award on costs to the successful party. The TPB's decisions are, by reason of

the legislation, subject of appeal to an independent tribunal. A successful Appellant should not be treated differently. The government's policy on the question of costs has already been clearly expressed in the legislation, namely section 17B(8)(c).

5. The Appeal Board is grateful to the parties for a detailed analysis and arguments on this question. The Appeal Board accepts that as a matter of practice, costs is not normally awarded to either party irrespective of the results. Whilst it has been said that costs can be awarded in exceptional cases, no one has drawn to the Appeal Board's attention where costs were actually awarded.

6. Section 17 B (8) (c) provides:

“At the completion of the hearing of the 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.”

7. Another power that would be relevant to the consideration of the power of the Appeal Board to award costs is the power to vary the decision of the TPB that has appealed against and replace its town

planning decision which is final. This power to vary the TPB's decision effectively empowers the Appeal Board to make planning decisions based on the facts and arguments before it at the hearing of the appeal *de novo*.

8. The Appeal Board agrees with the Appellant's submissions that it should not be bound by any previous practice. Each decision regarding an appeal, including that of costs, must be considered on its own merits based on the matters before an Appeal Board. However, it is also necessary to ascertain the intention of the legislature expressly empowering the Appeal Board to make an award on costs, bearing in mind the intention of the legislation. It is therefore useful to review the rationale for the development of such practice.

9. The Department of Justice has helpfully highlighted four decisions on which costs was considered and dealt with. The first is the Decision from Mr Justice Litton QC (as he then was) in TPA No. 3 of 1992. This rationale of not awarding costs in favour of a successful Appellant like in litigation is adopted and repeated in a subsequent decision rendered by Professor Anthony M. J. Cooray on 27 September 2010 under TPA No. 3 of 2008. Whilst the passage appears to be looking at the practice, this Appeal Board considers that

the rationale set out there is actually consonant with the intention of the legislature when section 17B is viewed as a whole –

“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 the appeal with restraints 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 judgement 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.”

10. This Appeal Board would elaborate the rationale by saying that given the legislative intent, the practice is reinforced by the power and duty of the TPAB to exercise independent planning judgements on the matter before it. The TPAB is exercising administrative powers conferred on it by the legislature and not judicial power. The power of the courts to award costs to successful party in matters of judicial review is not apposite to the powers of the TPAB in the context of town planning appeals. The Appeal Board has to act judicially but its

power is not to be mirrored directly with that of the court in respect of costs.

11. An Appellant in an appeal to the TPAB is seeking to invite an independent body, the TPAB, to make a planning decision such that the TPB's planning decision is confirmed, reversed or varied. In this situation, just as no costs should be awarded in favour of either party before the TPB, an appeal under section 17B should not therefore normally attract an award of costs in favour of the successful party.
12. Planning decisions are invariably a balancing exercise between the rights of the Appellants and other planning considerations in the public interest and the overall planning and development of Hong Kong. It is not always apt to describe any decision of the TPAB as being in favour of one or the other party but that it has made a planning decision which accords more with one or another party's position.
13. The Appeal Board believes that the normal principle in litigation of costs following the event cannot therefore be simply applied to cases of town planning matter such as this. As Professor Cooray has set out in the passage quoted above, both parties should be afforded an

equal opportunity to present and argue their case. No party should therefore be hindered by considerations of legal costs in important issues such as town planning matters, including when pursuing the appeal before the TPAB.

14. Yet, there must be a reason why section 17B(8)(c) exists in the legislation. The Appeal Board agrees with the Department of Justice's explanation that it is there to deal with exceptional cases. This also then explains why in the TPAB decisions cited by the Department of Justice the question of costs was considered and whether those circumstances amount to situations that the Appeal Boards opined should attract an award of costs.
15. It is also noteworthy that section 17B(8)(c) does not refer to any principles familiar to lawyers such as that of costs following the event. The discretion is to be exercised, in the Appeal Board's view, with the overall statutory intent in mind.
16. It is not possible to enumerate the circumstances in which discretion should be exercised in granting costs but bearing in mind that the right of an Appellant and that of the TPB to pursue and defend an appeal should be preserved, exceptional circumstances as explained by

Professor Cooray would justify a consideration of whether or not costs should be awarded against a party. The Appeal Board quotes from Professor Cooray's decision as follows:

“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.”

17. The Appellant referred to a passage from the decision of Mr Tang QC in TPA No. 4 of 1996 which was quoted by Mr Patrick Fung SC in TPA No. 6 of 2005. The Appellant suggested that the phrase "this practice is ripe for review" means that the practice of normally not awarding costs save in exceptional circumstances should be reviewed. The Appeal Board does not think that was the practice that was being discussed. As can be seen from the decision itself, the practice being referred to is the practice of the TPB not asking for costs. It is that practice that was the subject of consideration. We agree that the practice inevitably adopted by the TPB not to ask for costs should be reviewed. In circumstances where, for instance, an appeal which

was wholly without merit is being sought for, taxpayers' money should be protected and costs should be sought against the Appellant, and depending on the circumstances the Appeal Board may decide to award such costs pursuant to the powers under section 17B(8)(c).

18. In the circumstances, the Appeal Board concludes that upon a proper interpretation of the Town Planning Ordinance in particular section 17B, the "practice" that has been adopted actually reflects the statutory intent of section 17B(8)(c).
19. The Appeal Board turns now to consider whether there are any circumstances justifying the departure of this rule that there be no order as to costs normally.
20. The Appellant refers to the personal financial position of the Appellant. This is an entirely irrelevant consideration. If discretion is to be exercised judiciously, it should be such that all are equal, rich or poor, knowledgeable or ignorant. It cannot be that an affluent Appellant be deterred from receiving costs under the rule of practice when another less well-off Appellant should be able to rely on such considerations to seek costs.

21. The next element is the lack of environmental evidence from the Respondent. In this respect, the Appeal Board is of the view that it is a matter for the parties to decide how they wish to pursue their claim. It cannot be a legitimate ground to seek costs on the basis of the opponent's lack of evidence.

22. In the premises, the Appeal Board holds that the normal rule under section 17B(8)(c) is that there should not be an award of costs in favour of the "successful party". The award on costs should be made in exceptional circumstances, the bounds of which cannot be defined but will have to be considered on a case by case basis. The grounds relied on by the Appellant do not justify an award of costs as applied for in its letter dated 14 November, 2011.

Ms. Teresa CHENG Yeuk-wah, GBS, SC, JP
(Chairman)

Mr. Paul LAM Ting-kwok
(Member)

Dr Ellen LAU Hat-lan
(Member)

Ir. NG Kwok-chun
(Member)

Miss Winnie NG Wing-mui
(Member)