

IN THE TOWN PLANNING APPEAL BOARD

Town Planning Appeal No.19 of 2010

BETWEEN

LAI TAT SHING

Appellant

and

TOWN PLANNING BOARD

Respondent

- Appeal Board : Mr. FEE Chung Ming Johnny (Chairman)
Miss CHUNG Ching May (Member)
Ms. HO Kam Shuen Lusina (Member)
Mr. KWONG Po Lam (Member)
Ms. WONG Wai Lan Luciana (Member)
- In Attendance : Ms. MAN Wai Chu Suan (Secretary)
- Representation : The Appellant, by his Authorized Representative Ms.
LAM Chui Sim Tracy

Ms. CHAN Yuk Ching Jess, Government Counsel
(Department of Justice), for the Respondent
- Date of Hearing : 31st October 2011
- Date of Decision : 20th December 2011

DECISION

The Site

1. The Appellant applied to the Town Planning Board (“**TPB**”) for planning permission under section 16 of the Town Planning Ordinance (“**Ordinance**”) in respect of a piece of Government land which is located to the south of House No.86 (“**House 86**”), Cheung Muk Tau Village, Sai Kung North, Ma On Shan, New Territories, and of a site area of about 24.1 square meters (“**Site**”).

This Appeal

2. This is an appeal by the Appellant under section 17B of the Ordinance against the refusal by the TPB of his application for planning permission to use the Site as part of the private garden ancillary to House 86 (“**Proposed Development**”).

The Private Lot

3. The Appellant is not the owner of the Site as it is a piece of Government land. Instead, he is the owner of a private lot known as Lot 1183 in D.D. 167 (“**Private Lot**”) and House 86 erected thereon. House 86 is a New Territories Exempted House (“**NTEH**”).

Zoning

4. The relevant town plan is the approved Ma On Shan Outline Zoning Plan No. S/MOS/16 (“**OZP**”). The Site falls within an area zoned “Green Belt” (“**GB**”) in the OZP.

5. “Private garden” is not a type of use recognized in the Notes to the OZP in respect of “GB” zone. To enable the Appellant’s application to be considered by the TPB, the Proposed Development is regarded as falling within the use of “House” as the private garden in question is ancillary to House 86. The Private Lot on the other hand falls within an area zoned “Village Type Development”. According to the Notes to the OZP (“**the Notes**”), “House (NTEH)” is always permitted in “Village Type Development” zone but requires planning permission in “GB” zone.

Events leading to this Appeal

6. The Appellant lodged his application to the TPB under section 16 of the Ordinance on 17th May 2010.
7. On 16th July 2010, the Rural and New Town Planning Committee (“**RNTPC**”) of the TPB decided to refuse the Appellant’s application for the following reasons :-

“(a) the proposed development is not in line with the planning intention of “Green Belt” (“GB”) zone which is primarily for defining the limits of urban and sub-urban development areas by natural features and to contain urban sprawl as well as to provide passive recreational outlets. There is a general presumption

against development in “GB” zone and no strong planning justifications have been provided in the submission for a departure from this planning intention;

(b) the proposed development does not comply with the TPB Guidelines No.10 [in] that the proposed development would cause adverse landscape impact on the surrounding areas; and

(c) approval of the subject application would set an undesirable precedent for other similar development proposals in the “GB” zone. The cumulative effect of approving such proposals would result in a general degradation of the environment in the area.”

8. On 4th August 2010, the Appellant applied to the TPB under section 17 of the Ordinance for a review of the RNTPC’s decision in refusing his application.
9. Having considered the submissions by the Appellant at a review hearing on 22nd October 2010, the TPB decided to reject the review application for the same reasons as the RNTPC. The Appellant was duly so informed by the TPB by letter dated 5th November 2010.

10. On 13th December 2010, the Appellant sent to the Secretary to the TPB a letter containing some of his grounds and evidence in support of this appeal.
11. On 21st December 2010, the Appellant lodged the present appeal by filing a Notice of Appeal under section 17B of the Ordinance.
12. On 27th September 2011, the Appellant sent a fax to the Appeal Board providing his further grounds and evidence in support of this appeal.

The Appeal Hearing

13. At the appeal hearing on 31st October 2011 :
 - (i) the Appellant conducted the appeal in person through his authorized representative Ms. Lam Chui Sim Tracy (“**Ms. Lam**”) who made submissions on behalf of the Appellant;
 - (ii) the Appellant did not call any witness but submitted letters and documents in support of his appeal;
 - (iii) the Respondent was represented by Government Counsel Ms. Chan Yuk Ching Jess (“**Ms. Chan**”) and called one witness : Mr. Luk Kwok On (“**Mr. Luk**”), Acting Senior Town Planner, Shatin, Tai Po and North District Planning Office of the Planning Department.
14. The points made by the Appellant may be summarized as follows :-

- (i) The Site has been planted with flowers and plants by the Appellant to make it compatible with the character of surrounding areas. The Appellant is not seeking planning permission to construct any building structure on the Site. The Proposed Development is in line with the planning intention of the “GB” zone;
- (ii) There were recently three burglary or attempted burglary cases at House 86. The Proposed Development would enhance security and be conducive to crime prevention;
- (iii) The planning permission granted to the adjacent land owner to build part of House No.85 (“**House 85**”) at Cheung Muk Tau Village on a piece of land which is within the “GB” zone has already destroyed the planning intention of the “GB” zone;
- (iv) The Site was previously clustered with weeds making it a place for mosquito breeding and hiding by criminals;
- (v) The Proposed Development would put the Site under proper management by the Appellant to enhance the amenity of the locality;
- (vi) There was no objection from other government departments to the Proposed Development;
- (vii) The Appellant had been misrepresented by estate agent over the possible use of the Site; and
- (viii) The Site is small of just around 200 square feet in size.

15. Mr. Luk mainly testified on planning intention of the Site, planning considerations, zoning, and reasons for granting planning permission to build part of House 85.
16. Ms. Chan's submissions mainly focused on planning intention of the Site, security reason not being a good ground of justification for departure from the planning intention, preservation of natural features, and the setting of undesirable precedent.

Reasons for dismissing the Appeal

17. Having considered the evidence and submissions from both parties, we decide to dismiss the appeal for the reasons set out below.

I. Proposed Development not in line with Planning Intention

18. The Site is situated in an area which has been zoned "GB" in the OZP.
19. The Notes form part of the OZP.
20. The stated planning intention for "GB" zone as stated in the Notes is as follows :-

Planning Intention

The planning intention of this zone is primarily for defining the limits of urban and sub-urban development areas by natural features and to contain urban sprawl as well as to provide passive recreational outlets. There is a general presumption against development within this zone.

21. The OZP also contains an Explanatory Statement. While the Explanatory Statement is expressly stated *not* to be part of the OZP, it cannot be disregarded because it is a material consideration though the TPB and the Appeal Board are not bound to follow it: see *Henderson Real Estate Agency Ltd. v Lo Chai Wan* [1997] HKLRD 258 at page 267.

22. Paragraph 9.10.1 of the Explanatory Statement states as follows :-

“9.10.1 The planning intention of this zone is primarily for defining the limits of urban and sub-urban development areas by natural features and to contain urban sprawl as well as to provide passive recreational outlets. The “GB” zone also provides a buffer between the developments in the Area and the adjacent Ma On Shan Country Park. There is a general presumption against development within this zone.”

23. Although the Site has been planted with flowers and plants by the Appellant to make it compatible with the character of surrounding areas and the Appellant is not seeking planning permission to construct any building structure on the Site, we consider that the planning intention of the “GB” zone is to preserve natural vegetation and the natural environment instead. It is not desirable from the planning perspective to replace natural vegetation and natural environment by a private garden though planted with flowers and plants. Moreover, as evidenced by a site photograph taken on 8th September 2011, part of the Site is now covered by floor tiles rather than by plants or vegetation. As further evidenced by an aerial photo taken on 26th September 2006, the Site was originally fully covered by natural vegetation. We accept that when the Appellant bought House 86, the natural vegetation of the Site had already been removed, and the Appellant also did not cut any trees at the Site. However, all these only show that it was not the Appellant who initiated the departure from the planning intention. They do not alter the fact that the Proposed Development is not in line with the planning intention of the Site.

24. Further, the Town Planning Board Guidelines No.10 for Application for Development Within Green Belt Zone under Section 16 of the Town Planning Ordinance (“**TPB Guidelines No.10**”) provides that :-

“1. Introduction

- 1.1 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.*
- 1.2 The “GB” zone covers mainly slopes and hillsides, most of which is naturally vegetated. Some “GB” areas also designated as Country Parks. Most of the land within the “GB” zone is Government land, although there are also small pockets of private land, generally near built-up areas.*
- 1.3 The main purposes of the “GB” zone include the following :-*
 - a. To conserve existing landscape features, areas of scenic value and areas of recognized “fung shui” importance;*
 - b. To define the outer limits of urbanized districts and to serve as a buffer between and within urban areas; and*

.....

2. Main Planning Criteria

- a. There is a general presumption against development (other than redevelopment) in a “GB” zone. In general the Board will only be prepared to approve applications for development in the context of requests to rezone to an appropriate use.”*

25. For the reasons stated in paragraph 23 above, we agree that the Proposed Development would cause adverse landscape impact on the natural environment and therefore does not comply with TPB Guidelines No.10.
26. Sub-paragraph (f) of paragraph 2 of TPB Guidelines No.10 provides that passive recreational uses which are compatible with the character of surrounding areas may be given sympathetic consideration. However, we agree with the TPB that “passive recreational uses” refers to passive recreational uses for public purpose. The Proposed Development is however a private garden for private use. Moreover, even if we are wrong on the construction of “passive recreational uses”, and are to give sympathetic consideration to the appeal, for the reasons set out below, we are of the view that the Appellant has in any event not shown a sufficient justification for a departure from the planning intention.

II. Security Ground Not a Sufficient Justification

27. We accept that, as evidenced by the supplemental documents filed by the Appellant on 27th September 2011, three burglary or attempted burglary cases took place at House 86. Two of them took place on or about 24th August 2010 and 27th December 2010 respectively. The third case took place on a certain day after 27th December 2010.

28. However, as evidenced by a site photo taken on 25th May 2010, the Site was already used as a private garden as early as 25th May 2010. The burglary or attempted burglary cases on the other hand all took place after 25th May 2010. It shows that the use of the Site as a private garden does not seem to have much relevance in enhancing the security of House 86. We are of the view that the use of the Site as a private garden is not conducive to crime prevention. We therefore do not accept that security ground provides a sufficient planning justification for a departure from the planning intention of the Site.

III. House 85 Not a Sufficient Justification

29. Although planning permission to build part of House 85 in the “GB” zone was granted by the TPB on 10th October 2008, such planning permission does not permit the use of any land in the “GB” zone as a private garden. According to Mr. Luk and as evidenced by a site photo taken on 13th October 2011, the land adjacent to House 85, which is in the “GB” zone, has been used as a private garden without planning permission. In this regard, Mr. Luk has confirmed that the use of such land is unauthorized unless planning permission authorizing such use is granted by the TPB.

30. As to the planning permission to build part of House 85 in the “GB” zone, it was pursuant to the Government’s NTEH policy since House 85 is located in the “Village Environs” (“VE”) of Cheung Muk Tau. It is beyond our

jurisdiction to comment on the NTEH policy. Suffice it to say that “VE” is a completely different concept from Village Type Development (“V”). “VE” defines the area where a male indigenous villager may be permitted to build a NTEH. “V” on the other hand is a zoning concept. An area zoned “V” therefore may not totally overlap with an area defined as “VE”. A small part of the VE of Cheung Muk Tau may extend outside the “V” zone and intrude into the “GB” zone. House 85 is such an example. According to Mr. Luk, House 85 was completely located within the VE and therefore it was entitled to benefit from the Government’s NTEH policy though part of House 85 in fact falls within the “GB” zone. However, in so far as the use of the land adjacent to House 85 as a private garden is concerned, as mentioned in paragraph 29 above, such use is unauthorized.

IV. Other Grounds also Insufficient

31. The Appellant produced a few photographs to show that part of the land within the “GB” zone in the vicinity of the Site was dumped with some waste and clustered with weeds. As frankly admitted by Ms. Lam, those photographs were not taken at the Site. More importantly, the situation shown in the photographs was relatively easy to rectify. Improving the management of such land by the relevant government departments so that the natural landscape will be maintained in a cleaner and tidier condition may be a solution. Converting

such land into a private garden is however not a desirable solution from the planning perspective.

32. As to the point that there was no objection from other government departments to the Proposed Development, it was because preserving the planning intention of the Site fell exclusively within the jurisdiction of the Planning Department.

33. As to the point that the Appellant had been misrepresented by estate agent over the possible use of the Site, it was a matter between the Appellant and the estate agent. It was not a relevant consideration for the TPB to take into account in considering the planning application.

V. Undesirable precedent

34. Every application for planning permission must be considered in the light of its own facts and individual merits. If an application has planning merits, any precedent thus set will indeed be a desirable rather than an undesirable precedent. Normally, an argument based on the setting of an undesirable precedent does not have much force.

35. In the present case, there were however insufficient individual merits or site-specific circumstances to justify a departure from the planning intention.

36. Moreover, there are other NTEHs nearby having highly similar circumstances that they are adjacent to Government land zoned “GB”. As mentioned in paragraphs 29 and 30 above, the land adjacent to House 85, which is situated right next to House 86, is such an example. We therefore have to be very careful in examining the planning merits of the present appeal though the Site itself is relatively small in size. As stated above, we do not find sufficient planning merits in the present appeal to justify a departure from the planning intention.

Conclusion

37. We are satisfied that the Proposed Development is not in line with the planning intention of the Site. Further, insufficient planning merits have been shown in the Proposed Development to justify a departure from the planning intention of the Site. The appeal is dismissed with no order as to costs.

38. By way of a side observation, we would like to remind the Government that enforcement actions should be pursued not just on those who have taken the proper step in trying to apply for a planning permission but also on those who simply do not even bother to apply for a planning permission to rectify the unauthorized use of land.

Mr. FEE Chung Ming Johnny
(Chairman)

Miss CHUNG Ching May
(Member)

Ms. HO Kam Shuen Lusina
(Member)

Mr. KWONG Po Lam
(Member)

Ms. WONG Wai Lan Luciana
(Member)