

**IN THE TOWN PLANNING APPEAL BOARD**

**Town Planning Appeal No. 9 of 2011**

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BETWEEN

MA WAI SIM

Appellant

and

TOWN PLANNING BOARD

Respondent

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Appeal Board :	Ms. Sylvia SIU Wing-yee, JP	(Chairperson)
	Mr. CHAN Chung	(Member)
	Mr. Victor CHAN Hoi-fung	(Member)
	Mr. Paul CHAN Kam-cheung, BBS, JP	(Member)
	Mr. Frederick LAI Wing-hoi	(Member)
In Attendance :	Ms Suan MAN	(Secretary)
Representation :	The Appellant Madam MA Wai-sim act in person Mr Brian LEU, Government Counsel (Department of Justice), for the Respondent	
Dates of Hearing:	18 <sup>th</sup> April 2012	
Date of Decision:	21 <sup>st</sup> September 2012	

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# DECISION

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## Background of the Appeal

1. This is an Appeal under section 17B of the Town Planning Ordinance Cap 131 (“TPO”). The Appellant, Madam MA WAI SIM is the owner of a New Territories Exempted House (“NTEH”) ancillary to a piece of Government land of about 184 square metres adjoining Lot 595 S.A in D.D. 14, Tung Tsz, Tai Po (“**the Appeal Site**”).
2. The Appellant sought planning permission under Section 16 of TPO for renewal of planning approval for a temporary private garden for her NTEH (“**the private garden**”).
3. The last application No. A/NE-TK/244 for the same use of the Appeal Site was approved by Town Planning Board (“TPB”) on 22<sup>nd</sup> February 2008, with the express stipulation that it was on a temporary basis for a period of 3 years<sup>[1]</sup>.

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<sup>[1]</sup> Letter dated 22<sup>nd</sup> February 2008 from TPB to the Appellant under reference number TPB/A/NE-TK/244 stated “The TPB also agreed to advise you :

(a) that a temporary approval of 3 years is given so that the “Village Type Development” portion of the application site can be released for Small House development in future and the “Green Belt” portion of the site be reinstated to match with the surrounding green and natural environment ...”.

4. The Appellant lodged her application No. A/NE-TK/337 to the TPB under section 16 of the TPO on 17<sup>th</sup> November 2010 to renew the planning approval of the Appeal Site for use as the private garden.

5. On 14<sup>th</sup> January 2011, the Rural and New Town Planning Committee (“RNTPC”) of the TPB rejected the Appellant’s application. The Appellant was notified by a letter of 28<sup>th</sup> January 2011 stating the following:-

*“After giving consideration to the application, the Town Planning Board (the TPB) decided to refuse the application and the reasons are:*

- *the development is not in line with the planning intention of “Green Belt” 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 within this zone. You fail to provide strong planning justifications in the submission for a departure from this planning intention even on a temporary basis.”*

6. On 14<sup>th</sup> February 2011, the Appellant applied to the TPB under section 17 of the TPO for a review of the RNTPC’s decision in refusing her application.

7. Having heard and considered her submissions made at a review hearing on 13<sup>th</sup> May 2011, the TPB decided to reject the review application for the same reasons as given by the RNTPC. The Appellant was informed by the TPB of its decision by a letter dated 27<sup>th</sup> May 2011.

## The Present Appeal

8. On 19<sup>th</sup> July 2011, the Appellant lodged the present Appeal under section 17B of the TPO.

9. The grounds of the Appeal as set out by the Appellant are <sup>[2]</sup>:-

- “1. This is a lease renew. The prior and same application has been gone through and approved. This is not a precedence case.*
- 2. The private garden already existed on site and the portion of the site encroaching on the “Green Belt” zone is small which is mainly serving the drainage purpose and with two trees being planted within “GB” zone. We have submitted the “Tree Preservation Plan” for tree preservation of the existing trees of that area. As a result, the natural features can be maintained and matching the features of “GB” zone. It will be beneficial to all parties to keep it unchanged as there will not be any disturbance was made to the neighbours and the surrounding area.*
- 3. The prior application has been approved and this is only a renew case. When all the requests and conditions have been complied, it is unfair to refuse our renew request without considering all the complied conditions merits!*
- 4. All along, we have drainage/flooding problems in that area. We have spent extra effort to solve this problem and take up the ownership based on the previous approval. It is bad to turn down our renew request after the flooding problem is solved.*
- 5. We have spent much effort to preserve all the trees in our neighbourhood (not only within our lease area) in order to maintain the natural environmental surrounding. And the mentioned area is very tiny and is adjoining to my garden on one side and surrounded by trees on the other side. This area is a*

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<sup>[2]</sup> *Quoted verbatim from the Appellant's letter dated 19th July 2011 addressed to the Secretary of the Appeal Board Panel (Town Planning), copy found at P 4003 of the Respondent's Hearing Bundle.*

*dead area and cannot be developed into anything unless you have to cut off all the trees in the surrounding which is definitely an environmental disaster. Are you really want to do this? ”*

### **The Appeal Site**

10. The Appeal Site falls within an area partly zoned “Village Type Development” (“V”) and partly zoned “Green Belt” (“GB”) in the Outline Zoning Plan. The relevant town plan is the approved Ting Kok Outline Zoning Plan No. S/NE-TK/17 (“OZP”). The Appeal Site is entirely within the village ‘environs’ of Tung Tsz and Tseng Tau Villages. The Appeal Site is fenced off and used as a private garden with concrete floor and a drainage channel is on the eastern side. The surrounding areas are predominantly rural in character with clusters of village houses to the south and west, and dense vegetation with shrubs and grass to the east.
11. Given that the Appeal Site falls partly within GB and partly within V zones, it is relevant to note the respective planning intentions of GB and V zones as set out in the Explanatory Statement of the OZP.
12. Paragraph 9.9 of the Explanatory Statement of the OZP sets out the planning intention of GB zone. It is noted that the planning intention of the GB zone is

primarily for defining the limits of urban and sub-urban development areas by natural features and to provide passive recreational outlets <sup>[3]</sup>.

13. Paragraph 9.2 of the Explanatory Statement of the OZP sets out the planning intention of the V zone. It is noted that the planning intention of the V zone is to reflect existing recognized and other villages, and to provide land considered suitable for village expansion and land within this zone is primarily intended for development of Small Houses by indigenous villagers <sup>[4]</sup>.
14. The Town Planning Board Guidelines <sup>[5]</sup> contain relevant assessment criteria for this application. In particular it is provided in paragraphs 4.1 and 4.2 that :

*“4.1 (a) whether there has been any material change in planning circumstances since the previous temporary approval was granted;*

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<sup>[3]</sup> “9.9 Green Belt (“GB”) (Total Area 90.52 ha)

*9.9.1 The planning intention of this zone is primarily for defining the limits of urban and sub-urban development areas by natural features such as foothills, lower hill slopes, spurs, isolated knolls, woodland and vegetated land and to contain urban sprawl as well as to provide passive recreational outlets. There is a general presumption against development within this zone. Nevertheless, limited developments may be permitted if they are justified on strong planning grounds. Developments requiring planning permission from the Board will be assessed on their individual merits taking into account the relevant Town Planning Board Guidelines.”*

<sup>[4]</sup> “9.2 Village Type Development (“V”) (Total Area 70.32 ha)

*9.2.1 The intention of this zone is to designate both existing recognized and other villages and areas of land considered suitable for village expansion. Land within this zone is primarily intended for development of Small Houses by indigenous villagers. It is also intended to concentrate village type development within this zone for a more orderly development pattern, efficient use of land and provision of infrastructures and services ...”*

<sup>[5]</sup> *Town Planning Board Guidelines No. 34B (TPB-PG No. 34B) on “Renewal of Planning Approval and Extension of Time for Compliance with Planning Conditions for Temporary Use or Development”*

- (b) whether there are any adverse planning implications arising from the renewal of the planning approval;*
- (c) whether the planning conditions under previous approval have been complied with to the satisfaction of relevant Government departments within the specified time limits;*
- (d) whether the approval period sought is reasonable; and*
- (e) any other relevant considerations.*

*4.2. Under normal circumstances, the approval period for renewal should not be longer than the original validity period of the temporary approval. In general, the Board is unlikely to grant an approval period exceeding three years unless there are strong justifications and the period is allowed for under the relevant statutory plans. Depending on the circumstances of each case, the Board could determine the appropriate approval period, which may be shorter than the time under request.”*

15. The Appellant did not present any written evidence to support her grounds for Appeal, despite the advice of the Appeal Board Secretariat.

### The Appeal Hearing

16. It was only at the hearing that the Appellant handed out 5 pages of handwritten notes in an attempt to address the statement of Mr Edward Lo, the Respondent's witness.
17. At the Appeal hearing on 18<sup>th</sup> April 2012:
- (i) The Appellant appeared in person and also gave evidence herself; she did not call any other witness;
  - (ii) The Respondent was represented by Government Counsel Mr. Brian Leu ("Mr. Leu") and called Mr Edward Lo, Senior Town Planner, Shatin, Tai Po and North District Planning Office of the Planning Department ("Mr. Lo") as witness;
  - (iii) Mr. Lo's witness statement (filed earlier with the Appeal Board) was adopted as his evidence and he also gave oral evidence and elaborated on various matters which we will mention later.

### Respondent's Points

18. In the Respondent's Opening Submission, the Respondent opposed the Appellant's grounds of Appeal for reasons including those set out as follows:-
- (i) The Appellant could not have the expectation that the Respondent would automatically grant renewal of the temporary planning permission: in the

letter of 22<sup>nd</sup> February 2008, under which the Appellant was granted the temporary planning permission, the Respondent expressly stated that it was under no obligation to renew the temporary permission;

- (ii) Permitting the use of Government land zoned GB as the private garden will be contrary to planning intention;
- (iii) Even if the area zoned GB is small, use of the Appeal Site as the private garden does not accord with planning intention;
- (iv) As the Appeal Site is on Government land, natural trees and vegetation in the area zoned GB should not be disturbed;
- (v) The approval of the Appellant's prior application was conditional upon her compliance of certain imposed terms; implementing those imposed terms does not result in automatic renewal of the temporary planning permission;  
and
- (vi) As no valid planning ground has been put forward, the granting of this application would set a bad precedent.

19. Mr. Lo for the Respondent further gave evidence that the Appellant's application was not approved as it is not in line with the planning intent of GB zone. He pointed

out that 9 similar applications for private garden at GB zone have been rejected<sup>[6]</sup> for the same reason, and allowing this Appeal will set a bad precedent.

20. Mr. Lo stressed that using GB area for the private garden would be contrary to the planning intent of GB zone even on a temporary basis. He drew our (this Appeal Board) attention to the various photos taken of the Appeal Site showing there are continual drainage problems despite the Appellant's alleged efforts in dealing with those problems. He confirmed that, as the Appeal Site falls within Government land, relevant government departments will deal with the drainage problems.

21. He also showed photos of the concrete flooring formed at the Appeal Site.

#### Appellant's Points

22. Points made by the Appellant during the hearing and at her Closing Submission include those briefly summarized as follow:-

- (i) Application No. A/NE-TK/244 was approved for 3 years from 1<sup>st</sup> February 2008 to 1<sup>st</sup> February 2011; her application for renewal was applied within the time stipulated by TPB and the use applied for was exactly the same as the last application;
- (ii) The Appellant is not seeking planning permission to construct any building structure on the Appeal Site;

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<sup>[6]</sup> Applications no.: A/MOS/81; A/MOS/85; A/NE-TK/334; A/NE-TK/338; A/NE-TK/366; A/SK-HC/191; A/ST/743; A/TP/447 and A/TP/497

- (iii) The private garden existed before the Appellant purchased the NTEH, and the private garden has already blended into the environment; and
- (iv) At the Closing Submission <sup>[7]</sup>, the Appellant asked for usage of the private garden on a permanent basis.

#### Determination by the Appeal Board

23. We have carefully taken into consideration all the points/grounds, submissions and evidence raised by the Appellant and by the Respondent, whether given orally or in writing. We find that :-

- (i) Being zoned as GB, the Appeal Site should be preserved in its natural environment. Turning the Appeal Site for private usage of the Appellant and her family as their own private garden would be contrary to the planning intent of GB zone.
- (ii) Covering the Appeal Site with concrete floor is objectionable.
- (iii) An area of 184 square metres of the garden (which falls within Government land) is more than 2 times the site coverage of the NTEH. No valid reason has been given to justify the continued invasion into the GB.

24. It is to be noted that under cross-examination, the Appellant admitted that the private garden was used for “盆菜宴” on 2 occasions.

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<sup>[7]</sup> 8. 本人期望上訴委員團能考慮以上之理由可予以有關的規劃許可為永久性質。

25. In this respect, the Appellant might have also breached the terms of the tenancy <sup>[8]</sup> in that the user was restricted for use as a private garden.
26. We agree that allowing this Appeal may set a bad precedent for owners of NTEH to apply similarly.
27. As said, the Appellant has no right or entitlement under the temporary planning permission for the granting of automatic renewal and the concrete floor maintained at the Appeal Site goes against her claim that she had “spent much efforts to preserve all the trees in the neighbourhood (not only within the leased area) in order to maintain the natural environmental surrounding.” The Appellant knows that part of Appeal Site falls within GB zone and her application is not in line with the relevant planning intention, even on a temporary basis.
28. We also note that there are objections against the application from neighbours.
29. According to paragraph 4.2 of the Guidelines <sup>[5]</sup>, any renewal cannot exceed the original validity period for the temporary approval. It is impossible for us to entertain such a daring request by the Appellant to use the Appeal Site permanently as her private garden. As the Appellant has already enjoyed the private garden at the expense of the general public, it is time to surrender the Appeal Site.
30. There is no merit in the Appellant’s Appeal.

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<sup>[8]</sup> *The Tenancy as submitted by the Appellant pursuant to the request of this Appeal Board.*

### **Conclusion**

31. For the aforesaid reasons, we dismiss the Appellant's Appeal and uphold the decision of the TPB. We firmly believe that using Government land for the Appellant's own private garden is contrary to the planning intention of the GB and V zones.
32. We are mindful that areas zoned GB should be preserved for passive recreational outlets, and the consequence of allowing the Appellant's application will set a bad precedent. It will run foul of the planning intention of the GB and V zones.

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Ms. Sylvia SIU Wing-yee, JP  
(Chairperson)

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(Member)

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