

IN THE TOWN PLANNING APPEAL BOARD

Town Planning Appeal No. 13 of 2011

BETWEEN

SINO MORAL LIMITED
華孝有限公司

Appellant

and

TOWN PLANNING BOARD

Respondent

Appeal Board : Mr. Keith Yeung Kar-hung, SC (Chairman)
 Mr. Victor Chan Hoi-fung (Member)
 Mr. Ho Kui-yip (Member)
 Miss Alice Lee Suet-ching (Member)
 Ms Luciana Wong Wai-lan (Member)

Secretary : Ms Suan Man

Representation :

Appellant : Dr Siu See-kong, Director of the Appellant

Respondent : Mr. Abraham Chan, Counsel

Date of Hearing : 1st November 2012

Date of Decision : 17th April 2013

DECISION

The Appeal

1. This is an appeal by Sino Moral Limited (“**the Appellant**”) under section 17B of the Town Planning Ordinance Cap 131 (“**TPO**”) against the refusal by the Town Planning Board (“**the TPB**”) of its application for planning permission to develop an existing single-storey Taoist Temple at Cheung Chau into a 2-storey building for columbarium use.

The Site, and the Surrounding Areas

2. The existing single-storey Taoist Temple concerned (“**the Taoist Temple**”) has the Chinese name 歸元精舍. It is at 15 Fa Peng Road, with an area of about 168m². It is within and erected on Cheung Chau Inland Lot 11 (“**CCIL 11**”). The Taoist Temple has been vacant. We call it “the Site” below.
3. CCIL 11 is held under Government Lease¹ and is subject to the General Conditions of Sale as published in the Government Notification No.365 of 1906². Under those General Conditions, there is no restriction on columbarium use within the Site.
4. The Site can only accessed via a footpath called Fa Peng Road. It is of about 1.5m width. That footpath also serves the nearby developments. We will return to the access of the Site in more details later.
5. Mr. Fung Tin-yin Tim, Acting Senior Town Planner/Islands (1) of the Sai Kung and Islands District Planning Office, Planning Department, gave evidence for the TPB. According to him, the areas surrounding the Site are as follows:-
 - a. immediately surrounding the Site was an area under Government Land

¹ pages 179-180 of the Hearing Bundle

² pages 181-182 of the Hearing Bundle

License No. 5623³ for cultivation, cemented yard/open space, iron frame and kitchen. The area is currently occupied by building extensions of the Taoist Temple, partly paved open area with some sitting out facilities, and partly covered by grown trees;

- b. to the east and north of the Site, separated by a footpath, were predominantly low-density low-rise residential development (e.g. Fa Peng Knoll, Bethany Cottage & Bethany House) among hill slopes covered by trees and shrubs. Further north via footpaths connected to Fa Peng Road were some sites zoned “Recreation” occupied by youth camps;
- c. to the south was mainly hill slope covered by trees and shrubs and zoned “Green Belt”;
- d. to the west was hill slope area with shrubs zoned “Open Space.” Further west is the Jockey Club Don Bosco Youth Centre which was zoned “Recreation”.

The Appeal Board will come back to the nature of the surrounding areas later.

The Ownership of the Site

- 6. The Appellant is not the current owner of the Site. By an agreement dated 12 April 2011 signed by the Appellant as the purchaser of the one part and the registered owner Chan Suk Han Anna as the vender of the other, the Appellant agreed to purchase the Site. The agreement however has never been completed. We refer to the land search records of CCIL 11 attached to the letter of 26 October 2012 from the Secretary of the Appeal Board Panel to the parties. According to the records, that agreement was rescinded by a Memorandum of Rescission registered on 25

³ Plans AP-2, 5 & 6 attached to the statement of Fung Tin-yin [396, 399-400]

July 2011. Subsequently, a Lucky Limited entered into a sale and purchase agreement dated 18 August 2011 with the registered owner. That subsequent agreement was completed on 19 September 2011. Lucky Limited has since then been the registered owner of the Site.

The Outline Zoning Plan and Planning Intention

7. The Site is situated within CCIL 11 (part) and falls within an area zoned “Government, Institution or Community (4)” (“**G/IC (4)**”) on the approved Cheung Chau Outline Zoning Plan No. S/I-CC/5 (“**OZP**”).
8. According to the Notes of the OZP⁴, the planning intention of the “G/IC” zone is primarily for the provision of Government, institution or community facilities serving the needs of the local residents and/or a wider district. It is also intended to provide land for uses directly related to or in support of the work of the Government, organizations providing social services to meet community needs, and other institutional establishments.
9. According to paragraph (1) of the Notes to the OZP⁵ read with the Schedule relating to “Government, Institution or Community”⁶, the use of “Columbarium” requires the Town Planning Board’s permission. In contrast, some uses are always permitted. We refer to paragraph (7)(a) of the Notes. “Shrine” is one of them. We refer to Column 1 of the relevant Schedule. “Place of Recreation, Sports or Cultures, Religious Institution, and Social Welfare Facility” are some other of them.
10. We refer to the Explanatory Statement, which, though not part of the OZP, is

⁴ page 32 of the Bundle

⁵ page 19 of the Bundle

⁶ page 32 of the Bundle

within the category of relevant material which we can refer to when ascertaining the planning intention⁷. According to paragraphs 7.1 and 7.2 thereof:-

a. paragraph 7.1:-

“The planning intention of Cheung Chau is to preserve the rural character, car-free environment and the natural landscape of the island. The undisturbed natural coastlines and densely vegetated uplands should be protected from development for nature conservation and landscape protection purposes, as well as to provide a countryside recreation outlet for local residents and visitors.”

b. paragraph 7.2:-

“The existing low-rise low-density character of the villages and other residential areas should be retained to maintain the rural setting of Cheung Chau and to avoid overtaxing the limited access and infrastructure provision...”

The Appellant’s application under the TPO

11. The Appellant on 15 April 2011 lodged a planning application to the TPB (No.A/I-CC/10)⁸ under section 16 of the TPO (“**the s.16 Application**”).
12. The planning permission sought was for the development of a 2-storey columbarium at the Site. The proposal involved partial conversion of the Taoist

⁷ *International Trader Ltd v Town Planning Appeal Board* [2009] 3 HKLRD 339

⁸ pages 91 to 173 of the Hearing Bundle

Temple with the construction of one additional floor of about 68m² on top of it. The proposed columbarium would accommodate a total of 21,355 niches.

13. As mentioned in paragraph 9 above, the use of “Columbarium” at the Site requires the TPB’s permission.
14. The Rural and New Town Planning Committee (“RNTPC”) of the TPB deliberated upon the Appellant’s application on 8 July 2011 and decided to reject it. By a letter dated 22 July 2011 from the TPB to the Appellant⁹, it was informed of the rejection of its application. The reasons given for the rejection were as follows:-

“(a) the proposed development did not comply with the TPB Guidelines No. 16 for ‘Application for Development / Redevelopment within “Government, Institution or Community” (“G/IC”) Zone for Uses other than Government, Institution or Community Uses under Section 16 of the Town Planning Ordinance’ in that it is not compatible with the land uses in the surrounding areas which are mainly low-rise, low-density residential and recreational developments;

(b) the proposed columbarium involving 21,355 niches is only served by an existing 1.5m wide footpath, which is too narrow to accommodate the large number of visitors during Ching Ming and Chung Yeung Festivals causing potential pedestrian safety problems. There is no traffic impact assessment in the submission to demonstrate that the proposed development would not adversely affect pedestrian safety and would not cause adverse traffic impact on the surrounding areas; and

⁹ pages 229-230 of the Hearing Bundle

(c) *approval of the proposed development would set an undesirable precedent for similar applications with the “G/IC” Zone on the Outline Zoning Plan. The cumulative impact of approving such similar applications would result in pressure on the pedestrian and infrastructure facilities and degradation of the character of the Fa Peng area of Cheung Chau.”*

15. On 26 July 2011, the Appellant applied under section 17(1) of the TPO for a review of the RNTPC’s decision to reject its application (“**the Review**”).
16. In the review application, the Appellant proposed to reduce the total number of niches from the original scheme of 21,355 to 1,000. It also proposed, amongst other things, that the existing ancestral tablets then in the Taoist Temple be all removed out of Cheung Chau, and that no non-protestant rituals including but not limited to Ta Chai (打齋), burning of joss papers, joss sticks and other noisy activities should be conducted on the Site¹⁰. According to the Appellant¹¹, apart from the proposed changes, the floor layout, niches layout plan and other development parameters would remain unchanged. The 1,000 niches would most probably be accommodated on the Ground Floor while the remaining areas would be used as Church. If the number of attendance of the Church was too low, the remaining areas would be left vacant or utilized for other purposes allowed by law.
17. At the review hearing on 30 September 2011, the TPB, having considered the submissions made on behalf of the Appellant and other relevant considerations, decided to reject the Review. The reasons given for the rejection of the Review were the same as the three reasons given by the RNTPC for the rejection of the s.16 Application (which we will respectively call “**the 1st Reason**”, “**the 2nd**”

¹⁰ the Appellant’s letter of 26 July 2011 to the TPB [231]

¹¹ the Appellant’s letter of 7 September 2011 to the District Planning Officer/Sai Kung Islands [254-255]

Reason” and “**the 3rd Reason**”). The Appellant was duly so informed by the TPB by letter dated 14 October 2011¹².

18. By its Notice of Appeal dated 7 November 2011 filed under s.17B of the TPO, the Appellant lodged the present appeal.

The Grounds of Appeal

19. The Appellant’s Grounds of Appeal are attached to its Notice of Appeal (“**the Grounds of Appeal**”). The Appellant sought to attack all three reasons given by the TPB in dismissing the Review. On 12 January 2012, the Appellant filed its Further Grounds of Appeal (“**the Further Grounds**”). The Further Grounds related primarily to the questions of crowd control and emergency vehicular access to the Site. We will consider the Grounds and Further Grounds below.

The Appellant’s offer for “settlement” prior to the appeal hearing

20. The Appellant through its then solicitors issued a letter dated 13 October 2012 to the Department of Justice. It was said that “*We are instructed to offer the following terms of settlement for the consideration by your client, the Town Planning Board.*” The following terms (“**Terms of the Settlement Offer**”) were then set out:-

“The Government would grant permission for our client to change the Premises in issue into columbarium use subject to the following conditions:-

1. *The number of niches shall be not exceeding 1,000 without further consent from the Town Planning Board;*

¹² pages 327-328 of the Hearing Bundle

2. *The whole columbarium shall be closed during Ching Ming, Chung Yeung and Bun Festivals;*
3. *Visitors can only visit the columbarium during any day by prior appointment; the number of visitors during any hour of each day shall not exceed 20 persons;*
4. *The police can post a constable at the columbarium during the said Festivals and for any two days in a month without notice to check the appointment register and the actual number of visitors, the Appellant bears the costs. There used to be a rule that citizens can employ policemen for personal use. An auxiliary policeman will best serve the purpose. Should it be found that we have breached any of the above terms, the Town Planning Department will have the authority to revoke the above permission;*
5. *Any other reasonable conditions the Government would impose.”*

21. The Department of Justice replied by letter of 18 October 2012. According to that reply, the Appellant’s letter was only faxed to the Department of Justice on 15 October 2012. The Department of Justice said that “*We have obtained our client’s instructions. Your client’s proposed conditions (completely lacking particulars and mechanisms for implementation) are simply not agreeable to our client.*”

22. The Appellant, under cover of a letter dated 19 October 2012 from its then solicitors to the Secretary of the Appeal Board, volunteered copies the above-mentioned correspondence to the Appeal Board. It was further said in that letter that “*We request that the above letters be placed before the Honourable Appeal Board Panel Members on or before 1st November 2012. Our client would be happy to receive an adjudication based on the terms we offered on 13 October 2012, with details to be finalized with various Government Departments.*”

The Appeal hearing

23. The Appeal hearing took place on 1st November 2012. The Appellant was represented by Dr Siu See-kong, a Director of the Appellant. The Respondent was represented by Mr. Abraham Chan of Counsel.
24. The Appellant called one witness, who was Dr. Siu himself. He adopted his statement of 22 August 2012. The purpose of his evidence was primarily to confirm the facts set out in the Appellant's Grounds and Further Grounds of Appeal. We will consider his evidence in so far as relevant to the Grounds and Further Grounds of Appeal below. We note at this stage that Dr. Siu agreed upon cross-examination that he had no expertise and experience in matters of town planning, transport and logistics, traffic infrastructure and impacts, policing, crowd control and crowd management. The only reservation he had expressed was his experience with the MTR, where he said he retired from. He also referred to a planning application for columbarium use at Tai Po, which we will consider below.
25. The Respondent called three witnesses:-
 - a. Fung Tin-yin Tim (Senior Town Planner/Islands (1), Sai Kung and Islands District Planning Office of the Planning Department). He dealt with the Appellant's original s. 16 Application and the Review, the Site and its surrounding areas, the issue of planning intention, and the Respondent's responses to the Grounds and Further Grounds of Appeal. He was cross-examined by Dr. Siu on various aspects of his evidence. He was not shaken. His evidence has not been weakened. We accept his evidence;
 - b. Wong Po-yan Vicky (Divisional Commander (Cheung Chau) of the Hong Kong Police Force). She responded to those Grounds and Further Grounds of Appeal which relate to public safety. Her evidence was not challenged. We accept her evidence;

- c. Lui Ko-ming (Engineer/Islands 2, Traffic Engineering (NTE) Division of the Transport Department). He dealt with specifically the traffic-related reasons for the refusal of the s.16 Application and the Review. He was cross-examined by Dr Siu, but only in respect of whether the proposed settlement terms were acceptable to the Transport Department. His evidence was otherwise not challenged. We accept his evidence;
- d. We will refer to specific aspects of the witnesses' evidence when we proceed later to consider the Appellant's Grounds and Further Grounds of Appeal.

The Grounds and Further Grounds of Appeal, and our deliberation thereof

- 26. Some of the Appellant's Grounds and Further Grounds of Appeal are not readily comprehensible. We consider them, as far as they can be understood and as best as we can, in turn as follows.
- 27. Against the 1st Reason:-
 - a. To recap, the 1st Reason given by the TPB was that *"the proposed development did not comply with the Town Planning Board Guidelines No. 16 in that it is not compatible with the land uses in the surrounding areas which are mainly low-rise, low-density residential and recreational developments"*;
 - b. In gist, the Appellant criticized the TPB for having erred in its finding that uses in the surrounding areas of the Site are mainly low-rise, low-density residential and recreational developments, and as a result its conclusion that the proposed development of the Site into a columbarium was not compatible with the land uses in the surrounding areas was incorrect;

- c. We note that the TPB's approach of considering the compatibility of the proposed development with the land uses in the surrounding areas is a correct one. It represents a direct application of paragraph 2.3 of the TPB's Guidelines No.16, which provides that "*The proposed development should be compatible in land-use terms with the GIC uses on the site, if any, and with the surrounding areas.*" That is one of the "main planning criteria" that has to be taken into account;
- d. We do not accept that the TPB has erred in its finding that uses in the surrounding areas of the Site are mainly low-rise, low-density residential and recreational developments, or has erred in its conclusion of incompatibility:-
- i. We refer to the 7.1 and 7.2 of the Explanatory Statement of the OZP mentioned in paragraph 10 above. It is specifically said at paragraph 7.2 that "*The existing low-rise low-density character of the villages and other residential areas should be retained to maintain the rural setting of Cheung Chau and to avoid overtaxing the limited access and infrastructure provision...*";
- ii. We have considered the evidence of Mr. Fung. He, with the aid of a number of plans, explained to the Appeal Board the characteristics of the areas surrounding the Site. We have summarized those characteristics at paragraph 5 above. We accept in particular what he observed at paragraph 6.1.6 of his statement, that "*The surrounding areas of the Site are characterized by low-rise, low-density residential houses to its immediate north and further east such as Fa Peng Knoll and recreational uses (i.e. the Jockey Club Don Bosco Youth Centre to its further west and the Caritas Oi Fai Camp and Caritas Jockey Club Ming Fai Camp to its further north)...*";

- iii. The TPB was specifically criticized for have totally disregarded the existence of Bethany Lodge (a retreat centre for protestants) and the Proposed Redevelopment of Christian Zheng Sheng School in the vicinity (said to be neither residential nor recreational);
- iv. We note in this regard Mr. Fung’s evidence at paragraph 6.17 of his statement, that *“The Bethany Cottage/Bethany House and the Bethany Lodge to the north and north-east of the Site respectively are generally residential retreats for the believers under the operation of the Bethany Ministries. The proposed reprovision site for Christian Zheng Sheng School and rehabilitation accommodation as mentioned by the Appellant is located to the further north-east of the Site. It is a vacant school site and is zoned “G/IC(2)” on the OZP. According to the Notes for the “G/IC(2)” zone, “School” and “Social Welfare Facility” are always permitted within the “G/IC” Zone”*;
- v. The fact that the Bethany Lodge and the proposed redevelopment of Christian Zheng Sheng School had not expressly been mentioned by the TPB does not mean that the TPB has “totally disregarded” them. Our view is that their existence is still consistent with the TPB’s finding that *“the land uses in the surrounding areas which are mainly low-rise, low-density residential and recreational developments”* (emphasis added);
- vi. Even if the TPB had not specifically considered the Bethany Lodge and the proposed redevelopment of Christian Zheng Sheng School, we are not limited by the evidence and considerations that the TPB had taken into account. The issue for us to decide remains this : whether, according to the evidence before us, the proposed development of the Site by the Appellant is compatible with the uses

in the surrounding areas, including the Bethany Lodge and the proposed redevelopment of Christian Zheng Sheng School;

- vii. In respect of the nature of the use of a site as a columbarium, we have considered the case of *Hero Ltd v. Director of Planning* CACV 231/2011. A columbarium is different from a shrine. It is not religious in nature. Particularly in a rural setting, a purpose built, large-scale commercial columbarium with 1,000 niches is meant to draw business from others living elsewhere. Human ashes are deposited inside. It draws crowd. It raises environmental concerns. It is by nature different from residential or recreational uses (as the areas next to it occupied by Fa Peng Knoll and Don Bosco Youth Centre are respectively put to). It is different from a residential retreat, as Bethany Lodge is. It is not a school or social welfare facility, as Christian Zheng Sheng School, when developed, will become. A columbarium in our view is not similar to any of those uses, and can hardly be said to be in harmony with the surrounding areas;
- viii. We form the view that the consideration of the existence of the Bethany Lodge and the proposed development for Christian Zheng Sheng School in fact reinforces the conclusion that the proposed development of the Site into a columbarium is incompatible with the uses of the surrounding areas;
- e. The Appellant raised a related ground that the TPB erred in construing “uses” as meaning actual uses of the vicinity. It was submitted that “*the correct interpretation of the term ‘uses in the surrounding areas’ must be ‘uses specified by the Town Planning Board.’*” We reject that submission. As Mr. Chan has submitted, the determination of compatibility is a straightforward matter of observation and planning judgment. The TPB cannot specify any uses it likes. When entertaining a planning review, the

TPB must make its determination within the parameters of the relevant approved plan. We are of the view that that was what the TPB had done. Thus, and by way of illustration, if the sites on which the youth camps were developed had been zoned “Green Belt” instead of “Recreation”, planning application to the TPB would have been required for their development. Crowd management and accessibility of emergency vehicles to the sites would have been relevant considerations, as they are in respect of the s.16 Application made by the Appellant;

- f. The Appellant further sought to rely upon s.16 of the Conveyancing and Properties Ordinance Cap 219:-
 - i. The Appellant submitted that “*the Taoist Temple with 1,000 ancestral tablets has for decades been compatible with the vicinity, by acquiring the Application Premises, the Applicant would be acquiring such right of compatibility without any chance of challenge under section 16...*”;
 - ii. We have great difficulty understanding this ground. No authority has been produced to us which supports the existence of any “*right of compatibility*”. Further, as Mr. Chan has submitted, s.16 operates only when there has been a transfer of land by way of an assignment. We have mentioned above that the Appellant is not the owner of the Site. The sale and purchase agreement once signed between the Appellant and the registered owner has been rescinded. No assignment has been signed in the Appellant’s favour. We agree with Mr. Chan that this submission made by the Appellant is entirely misconceived;
- g. By reason of the above, we reject all grounds the Appellant has raised against the 1st Reason;

- h. Having reached the above conclusion, we can dismiss the Appeal. However, for completeness sake, we deal with the other Grounds raised by the Appellant.

28. Against the 2nd Reason:-

- a. To recap, the 2nd Reason was this, that *“the proposed columbarium is only served by an existing 1.5m wide footpath, which is too narrow to accommodate the large number of visitors during Ching Ming and Chung Yeung Festivals causing potential pedestrian safety problems. There is no traffic impact assessment in the submission to demonstrate that the proposed development would not adversely affect pedestrian safety and would not cause adverse traffic impact on the surrounding areas”*;
- b. In gist, the Appellant claimed that for its planning application, a traffic impact assessment is *“totally unnecessary and redundant”*, that the 1,000 or so families who have been worshipping the tablets inside the Taoist Temple had been using the access road without problem, that a certain common law right of easement of passage has been acquired, and that the change of use of the Taoist Temple to a columbarium would not cause any adverse traffic impact. Further, in its Further Grounds, the Appellant made certain proposals that it could position staff to guide traffic during festive seasons, and contended further that the number of people visiting the Site will be restricted by the capacity of ferry. The Applicant then offered some figures in that regard;
- c. We reject those grounds. Traffic impact and pedestrian safety are important considerations in the present planning context. Based upon the evidence in front of them, both the RNTPC and the TPB formed the view, correctly in our opinion, that the proposed development raised serious traffic and pedestrian safety concerns. The Appellant was aware of the concerns. It chose not to address those concerns by presenting the Appeal Board with

any Traffic Impact Assessment. Dr. Siu is not an expert in this field, and we place no weight upon his assertions in this regard. The Appellant asked the Appeal Board to allow its appeal on the condition that it can subsequently produce a Traffic Impact Assessment to the satisfaction of all departments concerned. We see no basis to leave such a fundamental matter to be dealt with by way of the imposition of a condition subsequent. We are of the view that we would be failing our duties if we were to do that;

- d. In fact, the matter does not stop here. This is not simply a case of the Appellant not being able to adduce any evidence to ease the concerns of public safety, public nuisance and traffic issues. The Appeal Board has in fact received very cogent evidence from both CIP Wong and Mr. Lui that the Appellant's application in fact raises such serious concerns. We highlight some of the evidence given by CIP Wong, which we accept:-
 - i. the Taoist Temple has been in a state of abandonment. Most of the worshipping activities and vegetarian banquets held by the nuns and monks there have ceased, and that those ancestral tablets which are still being attended to have been removed to another facility in Mui Wo. Few worshippers are seen visiting it whether during the festive seasons or any other days. CIP Wong said that it would be incorrect to assume that there are 1,000 families currently using the Site. It would further be incorrect to assume that a traffic impact assessment is not necessary;
 - ii. She described with the assistance of plans and photographs the access road to the Site. It is a 300m long and 1.5m wide footpath. It is steep, and accidents may occur when the path is congested;
 - iii. Emergency vehicle access to the Site is restricted;
 - iv. In support of her evidence and concerns, she described in detail the

joint site visit attended by the police and the Fire Services Department on 14 August 2012;

v. In respect of the Further Grounds, she commented that:-

(1) crowd management in public places is the responsibilities of the police. The placing of private crowd management operatives at the road/path junctions does not address the issues of the steepness and potential dangers that may be caused by the unprotected slopes along the length of the route;

(2) With statistics obtained from the First Ferry Company, she was able to say that the Appellant's estimates in respect of the number of visiting public was pure speculation;

(3) the Appellant has not addressed the concern of the inaccessibility of emergency vehicles to the Site;

vi. She concluded that *“the Site is not a suitable place for developing into a columbarium and the number of worshippers is beyond control”*, and that *“the points raised by the Appellant have been tested and addressed. We consider that the Appellant has been unable to answer the serious public safety issues. Our investigation and testing of the issues involved leave us with no hesitation in objecting to the Appellant's proposal for the columbarium development on the Site”*;

vii. CIP Wong has both the experience and expertise to give the opinion and conclusions summed up above. We have no hesitation accepting her conclusions;

e. The Terms of the Settlement Offer:-

- i. Then, about two weeks before the Appeal, the Appellant made the “offer for settlement” we mentioned above at paragraph 20. We deplore such attempt to vary the terms of the application shortly before the appeal hearing, thereby leaving the authorities and departments no time to make the necessary deliberations and to do the proper consultation;
- ii. In any event, the terms lacked details as to how they would be implemented. The matter had not been properly thought through. When asked about how the number of visitors to the proposed columbarium could be limited to 20 a day, Dr Siu said by contract. When asked about how the Appellant could control the number of friends and relatives who might travel along with the worshipper, he said also by contract. When asked about the details of the contractual terms, he orally gave us an answer, which was supplemented to by an uninvited letter of 5 November 2012 (4 days after the appeal hearing). The contractual term he set out therein was this:

“Any visitor visiting the columbarium shall first be registered by prior appointment with Sino Moral Limited with at least 1 day’s notice and shall not bring any unregistered person to walk up Fa Peng Road with him/her during the visit, breach of this condition shall render the licence contract...voidable...”;

- iii. When asked about what would happen if the worshippers refuse leave, Dr Siu said they would be removed by force;
- iv. The Appeal Board failed to see how the proposed term, even if enforceable, can be policed. How can the identities of all persons waiting and congregating outside the Site be ascertained? The

proposed use of forcible removal further raises serious concerns of public safety and public nuisance;

- v. In any event, the terms failed to address the concerns relating to emergency vehicular access to the Site, which CIP Wong has carefully explained to us;
 - vi. Bearing in mind the fact that the Appellant is acting in person, the Appeal Board is prepared to give it and Dr. Siu more leeway. We are prepared to consider the Terms of the Settlement Offer. But having considered it, we are still of the view that the 2nd Reason is a valid one;
- f. We mentioned two further matters:-
- i. in respect of the Appellant's attempt to rely upon s.16 of the Conveyancing and Properties Ordinance under this Ground, we repeat our observations made above on that section. We have further not been presented with any reliable evidence substantiating any acquisition of any "*common law right of easement of passage by 1,000 families of its user members to pass through Fa Peng Road to the Application Premises*";
 - ii. Dr. Siu has referred us to some previous applications for permissions to develop columbaria, such as the proposed development in Po Fuk Shan Shatin and within the Soka Gakkai International of Hong Kong Cultural and Recreation Centre (HKSGI) in Tai Po. We have considered Mr. Fung's evidence in this regard. The two previous applications were materially different from the present one. In particular, in respect of the Po Fuk Shan application, columbarium use was always permitted under the relevant zoning plan. In the HKSGI case, a traffic impact assessment report was adduced during

the review application to address the traffic concerns. In the present case, none has been offered.

29. Against the 3rd Reason:-

- a. To recap, the 3rd Reason was this, that *“approval of the proposed development would set an undesirable precedent for similar applications within the “G/IC” Zone on the Cheung Chau Outline Zoning Plan. The cumulative impact of approving such similar applications would result in pressure on the infrastructure and degradation of the character of the Fa Peng area in Cheung Chau”*;
- b. In the light of our conclusions above, we will be brief here;
- c. We have been referred by Mr. Chan to *Town Planning Appeal No.8 of 2001* and *Poundstretcher v. Secretary for the Environment [1988] 3 PLR 69* in support of his submission that it is legitimate in appropriate circumstances to refuse an application for planning permission for the fear of setting an undesirable precedent even if, taken in isolation, the application is unobjectionable. We agree. We agree that the 3rd Reason is a valid one;
- d. The Appellant claimed that from the wording of the 3rd Reason alone, *“it appears to the Applicant that the Planning Department is treating columbaria as hazardous or low class matter which should not appear at all, which clearly implies the biased discriminative attitude of the Planning Department against columbaria”*. The Appeal Board sees no substance in that criticism. In any event, the Appeal Board has considered the matter impartially and in full, as we have above.

30. For the reasons expressed above, we are of the view that the Reasons given by the TPB in rejecting the Review are all valid.

31. The Appeal Board further sees no other reasons why the decision of the TPB dismissing the Review should be varied or reversed.

Conclusion

32. Having considered all the relevant circumstances and evidence, and by reason of the matters set out above, the Appeal Board unanimously decides to dismiss the Appeal. The Appeal Board confirms the decision of the TPB dismissing the Review.

Costs

33. Under s.17B(8)(c) of the TPO, the Appeal Board has power to “*award to a party such costs legal or otherwise as it considers reasonably incidental to the preparation and presentation of an appeal.*” Mr. Chan on behalf of the Respondent asked for costs, on the basis that the Appeal is unmeritorious. We are minded to invite further submissions in this regard before we make our ruling. We direct, if the Respondent maintains its application for costs, the following submissions be filed and served: Respondent within 5 working days from the date it receives this Determination, and the Appellant within 5 working days upon receipt of the Respondent’s submissions. The Appeal Board will then hand down its determination on costs in writing in due course.

(Signed)

Mr Keith Yeung Kar-hung, SC

(Signed)

Mr Victor Chan Hoi-fung

(Signed)

Mr Ho Kui-yip

(Signed)

Miss Alice Lee Suet-ching

(Signed)

Ms Luciana Wong Wai-lan