

IN THE TOWN PLANNING APPEAL BOARD

Town Planning Appeal No. 14 of 2011

BETWEEN

LING WAI SHING AND LAM TSZ CHING EMILY Appellants

And

TOWN PLANNING BOARD Respondent

Appeal Board: Ms Linda CHAN Ching-fan, SC (Chairman)
 Mr Wallace HONG Wing-kwong (Member)
 Ms Ada IP Wai-ling (Member)
 Mr TSE Chi-ming (Member)
 Ms YUNG Wai-chi (Member)
In Attendance: Ms Suan MAN (Secretary)

Representation: The Appellants Mr LING Wai Shing and Ms LAM Tsz
 Ching Emily act in person
 Ms Queenie WU Chung Yi, Counsel for the Respondent

Dates of Hearing: 24th April 2013

Date of Decision: 26th September 2013

DECISION

1. This is an appeal by Mr Ling Wai Shing and Ms Lam Tsz Ching Emily (together “**Appellants**”) under section 17B of the Town Planning Ordinance (Cap. 131) (“**TPO**”) against the decision of the Town Planning Board (“**TPB**”) in refusing their application for planning permission to develop a private garden on a site adjoining a 3-storey house at Lot 400 in D.D. 34, Tai Po, Block B (“**House**”), which is one of the 2 house blocks of a residential development called Rainbow Height.

Background Fact

2. The following fact and matters relevant to the appeal are not in dispute.
3. The Appellants are the registered owners of the G/F of the House (“**Flat**”) and have been living there since about April 2009.
4. The site on which the Appellants propose to develop into a private garden is part of the Government land (“**Site**”) and falls within the “Green Belt”(“**GB**”) zoning in the draft Tai Po OZP No. S/TP/23, which is the prevailing Outline Zoning Plan (“**OZP**”) applicable to the Site¹.

¹ At the time the Appellants made the s.16 application, the applicable OZP was draft Tai Po OZP No. S/TP/22. There is no material difference between draft OZP No. S/TP/22 and draft OZP No. S/TP/23.

5. The Site is located on an elevated platform (about 3m high) adjoining the House and includes 2 portions currently used as a fish pond and a paved garden with amenity shrubs. It has an area of approximately 43 sqm and is accessible through staircases leading from an access track.
6. The Site is surrounded by two sets of fence leaving a narrow path in between which can barely accommodate one adult standing on it. According to the Appellants, the first set of wooden fence had already been installed before they moved into the Flat. The second set of fence, made of iron, was installed by the Appellants and is equipped with a lock although the Appellants claim that they have never locked the fence. It is however clear from the photos supplied by the Appellants that they have effectively used the iron fence to turn the Site into their private garden, where they put some wooden floor panels outside the entrance of their Flat and used the fenced off area to keep some pot plants and other personal items.
7. The surrounding areas of the Site are predominately rural in character with clusters of temporary structures on Government land. To the further west of the Site is a stretch of natural slope covered by vegetation.
8. By an application dated 13 April 2011, the Appellants applied under s.16 of the TPO for planning permission to develop a private garden on the Site. The justifications put forward by the Appellants were as follows:
 - 8.1. the Site is located near vertical cutting and steps, causing danger to pedestrians. It is reasonable to separate the vertical cutting and steps by plants in the private garden, which would not block the footpaths and steps;

- 8.2. the Site has been left vacant for over 30 years. It is too small for land auction and appears to be incapable for any reasonably beneficial use; and
- 8.3. the Appellants agree to use the Site as a private garden ancillary to the House on the conditions that:
 - (a) all the natural landscape in the private garden will be preserved and make green by planting. It will set a good precedent for similar applications in future; and
 - (b) the private garden is not located at the road. There will be no ingress or egress for other citizens or pedestrians.
9. There is no similar application within the same GB zone.
10. The application was considered by the Rural and New Town Planning Committee (“**RNTPC**”) of the TPB on 3 June 2011 and was rejected on the same day on the following grounds:
 - 10.1. the proposed development was not in line with the planning intention of GB zone, which was 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 was a general presumption against development in GB zone. The Appellants failed to provide strong planning justifications in the submission for a departure from this planning intention; and
 - 10.2. 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.

11. On 21 June 2011, the Appellants applied under s.17(1) of the TPO for a review of the RNTPC's decision to reject the application. No written representation was submitted in support of the application.
12. At the hearing before the TPB on 9 September 2011:
 - 12.1. the TPB considered the oral submissions of the Appellants and the submissions of the representative of the Planning Department ("PD"), which were substantially the same as those submitted to the RNTPC (as stated in §8 above) and to this Appeal Board (as further discussed below);
 - 12.2. the PD informed the TPB that the relevant departments had no objection to or adverse comments on the proposed development, with the exception of Chief Town Planner / Urban Design and Landscape, who had some reservation on the application from the landscape planning perspective as he considered that approval of the proposed development within the GB zone would encourage similar development encroaching into the predominately rural area and further deteriorate the landscape quality, and the PD itself did not support the application; and
 - 12.3. no public comment on the review application was received.
13. By letter dated 30 September 2011, the TPB informed the Appellants that their review application was refused on the same grounds as those given by

RNTPC (as stated in §10 above). It is against this decision that the present appeal is brought.

Applicable Principles

14. The following principles are relevant to this appeal.
15. First, in considering an appeal against the decision of the TPB, the Town Planning Appeal Board (“**TPAB**”) must exercise an independent planning judgement and is entitled to disagree with the TPB (*Henderson Real Estate Agency Ltd v Lo Chai Wan* [1997] HKLRD 258 (PC) at 261, 266A). The TPAB could substitute its own decision for that of the TPB even if the TPB had not strictly committed any error on the materials before it, as the hearing before the TPAB would normally be much fuller and more substantial than a review hearing under TPO s.17 (*Town Planning Appeal No. 18 of 2005*, unreported, 12 April 2007).
16. Secondly, the TPB’s independent planning judgement (as with the TPAB’s discretion) to grant planning permission must be exercised within the parameters of the relevant approved plan:-
 - 16.1. In *Henderson*, the Privy Council held that under s.16(4) of the TPO, the TPB may grant planning permission “only to the extent shown and provided for or specified in the plan” (at 261E-F).
 - 16.2. In *International Trader Limited v Town Planning Appeal Board & Anor* [2009] 3 HKLRD 339 (CA), the Court of Appeal considered the wordings of s.13 of the TPO, which provides that “Approved plans shall be used by all public officers and bodies as standards for guidance in the exercise of any powers vested in them”, and held that

the effect of s.13 is to “impose on all public officers and all public bodies the statutory duty to have reference to approved plans as the recognised measure by which they are to be guided; that is, directed, in the exercise of their powers.” (at §§31-33, 38-42, 47-51).

- 16.3. It is the duty of the TPB (and hence the TPAB) to see that the relevant town plan is faithfully implemented (*Town Planning Appeal No. 13 of 1993*, unreported, 26 August 1994 at §§5-7).
- 16.4. The TPB (and the TPAB) has no authority to deviate from the plan “however compelling other material considerations to the contrary might be” (*Halsbury’s Laws of Hong Kong*, Vol. 48, at §385.270 at p.300).
17. Thirdly, the draft OZP and the Notes are material documents to which the TPAB is bound to have regard in exercising its independent judgement and, indeed, they are the “most material documents”. Whilst the Explanatory Statement is expressly stated not to be part of the plan, it does not follow that it is not a material consideration for the TPAB to take into account. Similarly, the guidelines are also material considerations to be taken into account. The TPAB was not bound to follow the Explanatory Statement or the guidelines, but they could not be disregarded (*Henderson*, at 267A-C).
18. Fourthly, permission is never to be granted for a use which is neither in Column 1 nor in Column 2. The principle was described by Bokhary PJ (as he then was) in *Secretary for Transport v Delight World Limited* (2006) 9 HKCFAR 720 said at §30 as follows:-

“On this question, the initial difficulty which the Secretary faces is that you would not even be aware of any need for section 16

permission unless you had first taken zoning into account. This is because the TPO permission scheme only applies where a zoning plan provides for the grant of permission. And this requires one to know how the land in question has been zoned, for only then can one ascertain whether the proposed use comes within Column 1 (so that there is no need to seek permission) or comes within Column 2 (so that permission has to be sought) or falls outside both columns (so that permission is never to be granted).”
(Emphasis supplied)

19. Fifthly, in determining the merit of an appeal, the TPAB should have regard to the principle of consistency, always bearing in mind that its decision in granting or refusal to grant planning permission would become a precedent for similar applications in the future. The principle of consistency was explained by the English Court of Appeal in *North Wiltshire District Council v Secretary of State for the Environment and Clover* (1993) 65 P & CR 137 at 145² as follows:-

“In this case the asserted material consideration is a previous appeal decision. It was not disputed in argument that a previous appeal decision is capable of being a material consideration. The proposition is in my judgment indisputable. One important reason why previous decisions are capable of being material is that like cases should be decided in like manner so that there is consistency in the appellate process. Consistency is self-evidently important to both developers and development control authorities. But it is also important for the purpose of securing public confidence in the operation of the development control system. I do not suggest and

² Cited in *Halsbury's Laws of Hong Kong*, Vol. 48, §385.270, footnote 47 (p.311)

it would be wrong to do so, that like cases must be decided alike. An inspector must always exercise his own judgment. He is therefore free upon consideration to disagree with the judgment of another but before doing so he ought to have regard to the importance of consistency and to give his reasons for departure from the previous decision.” (Emphasis supplied)

20. Lastly, there is a clear distinction in principle between the grant of planning permission and its implementation. In this regard, ownership is normally considered an irrelevant fact (*TPA 13 of 1993*, at §§80-81; *TPA 13 of 2006*, at §§83(1) & 88; *Delight World Ltd v The Town Planning Appeal Board* [1997] HKLRD 1106, at 114H-115I and *Merritt v Secretary of State for the Environment, Transport and Regions and another* [2000] JPL 371, Lexis transcript, at p.10).

Merit of the Appeal

21. In this appeal, the Appellants repeat the same grounds advanced in support of their applications before the RNTPC and the TPB, which have been summarised in §8 above.
22. In addition, the Appellants contend that their application should be approved for the following reasons:
 - 22.1. The Site has been turned into concrete surface with no plantation or natural greenery for over 30 years and has a septic tank built underneath. As such, the Site has been used for a purpose inconsistent with the planning intention of GB for a long time.

- 22.2. The area of the Site is too small and too close to the Flat and is not suitable for developing any facilities for enjoyment by the public. In view of its location and height, members of the public would not walk pass the Site.
- 22.3. The TPB failed to have regard to the special circumstances of the Site and, instead, put too much weight on the lack of precedent for similar development in the GB zone. The TPB should have allowed the application and imposed conditions on the Appellants, such as requiring the Appellants to build railings around (as opposed to fencing off) the Site and maintain natural plantation on the Site or even expand the size of the fish pond currently located within the Site. Such conditions say the Appellants are consistent with the planning intention of GB and would enhance the quality of the Site and the surrounding area.
- 22.4. If the application is not approved, there is a risk that the Appellants would be required to remove the fence presently installed by them at the Site which, in turn, would pose a risk to the Appellants and their family members.
- 22.5. Although the Site is part of the Government's land, the Government has not taken any step to maintain the Site. This the Appellants say is inimical to the interest of the public and the persons residing in the vicinity.
- 22.6. The Government has already granted short term leases over various pieces of land (for example, STT 746 and STT 1329) in the vicinity to be used for temporary garden purpose.

23. Ms Wu, counsel for the TPB, submits that the proposed development of a private garden on the Site comes within Column 2, as it is ancillary to a house which is within Column 2. This is not controversial.
24. Ms Wu submits that the Appellants' application should not be approved as it is inconsistent with the planning intention of the GB zoning, 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, and there is a general presumption against development within the GB zone.
25. In support of her submissions, Ms Wu relies on the draft OZP No. S/TP/23, which described the planning intention of the GB zoning in this way:

“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.”

26. Ms Wu also relies on the Explanatory Statement to the draft OZP No. S/TP/23, which described the area zoned as GB in this way:

“Green Belt (‘GB’) : Total Area 1,279.04ha

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.

This zoning covers mainly steep hillsides in the peripheral areas which are of limited potential for urban type development and should be retained in their

natural state. These areas nevertheless provide opportunities for additional outdoor 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 considered on their individual merits taking into account the relevant Town Planning Board Guidelines.”

27. We agree with the TPB that the planning intention of the GB zoning, which applies to the Site, is that set out in §§24-26 above. Applying the principles described in §§15 to 18 above, we consider that the proposed development of a private garden on the Site is inconsistent with the planning intention of the GB zoning and should not be allowed in the absence of special circumstances or strong planning justifications.

28. The question is whether the grounds and justifications advanced by the Appellants are sufficient to displace the general presumption against development on the Site. For this purpose, the following criteria set out in the Town Planning Board Guidelines for “Application for Development within ‘GB’ Zone under Section 16 of the Town Planning Ordinance”, TPB PG-No.10 (“**Guidelines**”) are relevant to the application:

“Main Planning Criteria

- a. There is a general presumption against development (other than redevelopment) in a ‘GB’ zone. ...

- b. An application for new development in a ‘GB’ zone will only be considered in exceptional circumstances and must be justified with very strong planning grounds. ...

f. Passive recreational uses which are compatible with the character of surrounding areas may be given sympathetic consideration.”

29. Having considered the justifications for the proposed development advanced by the Appellants, we do not consider that the Appellants have shown any special circumstances or strong planning justifications which warrant a departure from the planning intention of the GB zoning, for the following reasons.
30. First, the proposed development, far from defining the limits of urban and sub-urban development areas by natural features or containing urban sprawl, would advance urban sprawl further into the GB zone. It is not in point for the Appellants to say that the Site has been turned into concrete surface without any plantation on it for a long time. As Mr Lau Chi Ting, the Senior Town Planner / Tai Po, explains, if and for so long as the Site remains Government land, it would be possible for the Government to turn it into a public garden or recreational area with natural plantation, in line with the planning intention of GB zoning. Once the Site is turned into a private garden, it would not be possible for the Government to do so. We agree.
31. Secondly, the proposed development is to convert a public area into a private garden for the exclusive enjoyment of the Appellants and their family members and visitors. This is against the planning intention of the GB zoning, which is to provide passive recreational outlets for members of the public to enjoy. It is also not a use envisaged in the Guidelines.
32. Thirdly, we do not see how the development of a private garden on the Site, even with the conditions proposed by the Appellants, can be said to be a planning justification as the Appellants appear to suggest.

33. Fourthly, the reasons advanced by the Appellants for installing iron fence on the Site, viz, the Site has always been fenced off and their concern for safety, are not relevant planning considerations and, therefore, are irrelevant to the application. In any event, they do not amount to planning justification in support of the proposed development.
34. Fifthly, in respect of the short term leases granted by the Lands Department in the vicinity for temporary garden purpose, Mr Lau says that according to the records of PD, STT 746 was granted by the Lands Department without consultation with the PD. As for STT 1329, the PD had been consulted and no objection was raised as the lease was granted on the basis that it could only be used for gardening purpose, which is consistent with the planning intention of the GB. Mr Lau's evidence in this regard has not seriously been challenged and we accept it. That being the position, we do not consider that any of these short term leases relied on by the Appellants can be regarded as a "precedent" of a private garden development with planning permission.
35. Lastly, Mr Lau produces a summary of 12 applications for planning permission concerning developments of private garden on land within the GB zoning which were considered by the TPB in the past 2 years. It can be seen from the summary that all the applications were rejected by the TPB primarily on the ground that (a) they were inconsistent with the planning intention of the GB zoning, (b) the proposed development was not in compliance with the Guidelines and (c) if allowed, would set an undesirable precedent for other similar development proposals in the GB zone. We agree. In light of the principle of consistency, which should be followed by the TPAB, we consider that this is an additional ground for rejecting the Appellants' appeal.
36. For the reasons set out above, the Appellants' appeal is dismissed.

(Signed)

Ms Linda CHAN Ching-fan, SC

(Chairman)

(Signed)

Mr Wallace HONG Wing-kwong

(Member)

(Signed)

Ms Ada IP Wai-ling

(Member)

(Signed)

Mr TSE Chi-ming

(Member)

(Signed)

Ms YUNG Wai-chi

(Member)