

IN THE TOWN PLANNING APPEAL BOARD

Town Planning Appeal No.16 of 2011

BETWEEN

LAU PAK KAU

Appellant

and

TOWN PLANNING BOARD

Respondent

Appeal Board : Mr. FEE Chung-ming Johnny (Chairman)
Ir. CHEUK Kim-tang (Member)
Dr. LAW Sui-chun Teresa (Member)
Mr. SIN Ming-hei (Member)
Ms. YUE Nga-fong Avon (Member)

In Attendance : Ms. Suan MAN (Secretary)

Representation : The Appellant, by his Authorized Representative
Mr. LEUNG Pak-keung

Ms. FUNG Sau-kuen Fanny, Government Counsel
(Department of Justice), for the Respondent

Date of Hearing : 28th November 2012

Date of Decision : 18th January 2013

DECISION

This Appeal

1. This is an appeal by the Appellant under section 17B of the Town Planning Ordinance (“**Ordinance**”) against the refusal by the Town Planning Board (“**TPB**”) of his application for planning permission to build a proposed house (New Territories Exempted House - Small House) (“**Proposed Development**”) on a piece of government land in DD 15, Shan Liu Village, Tai Po, New Territories, of a site area of about 65.03 square metres (“**Site**”).

Zoning

2. The Site falls within an area zoned “Village Type Development” (“**V**”) (around 53%) and “Agriculture” (“**AGR**”) (around 47%) on the draft Ting Kok Outline Zoning Plan No. S/NE-TK/16 at the time of submission of the application. The zonings of the Site remain unchanged on the current approved Ting Kok Outline Zoning Plan No. S/NE-TK/17 (“**OZP**”).
3. Although New Territories Exempted House (“**NTEH**”) is a use that is always permitted under “V” zone, NTEH is merely a use that *may* be permitted on application to the TPB under “AGR” zone. Since part of the Site is situated in an area which has been zoned “AGR” in the OZP, the Appellant is required to make the application for planning permission.

Events leading to this Appeal

4. On 26th January 2011, the Appellant lodged his application to the TPB for planning permission for the Proposed Development under section 16 of the Ordinance (“**Application**”).

5. On 18th March 2011, the Rural and New Town Planning Committee (“**RNTPC**”) of the TPB, under delegated authority from the TPB, decided to refuse the Application for the following reasons :-

- “(a) the proposed development did not comply with the Interim Criteria for consideration of application for New Territories Exempted House/Small House in New Territories in that it would likely involve site formation, slope stabilization and access construction works resulting in clearance of mature trees and dense vegetation that would damage the landscape quality of the area surrounding Pat Sin Leng Country Park. The applicant failed to demonstrate that the proposed development would not cause adverse geotechnical and landscape impacts on the surrounding areas; and*
- (b) the approval of the application would set an undesirable precedent for other similar applications in the area and the adjacent “AGR” zone. The*

cumulative impacts of approving such applications would result in further encroachment onto the woodland surrounding the country park area and a general degradation of the environment and landscape quality of the area.”

6. On 14th April 2011, the Appellant applied to the TPB under section 17 of the Ordinance for a review of the RNTPC’s decision in refusing his application.
7. On 11th November 2011, having considered the submissions by the Appellant at a review hearing, the TPB decided to reject the review application (“**TPB’s Decision**”) for substantially the same reasons as the RNTPC. The Appellant was informed of the TPB’s Decision by letter dated 25th November 2011.
8. On 2nd December 2011, the Appellant lodged the present appeal against the TPB’s Decision by filing a Notice of Appeal under section 17B of the Ordinance.
9. On 28th December 2011, the Appellant sent a letter to the Appeal Board setting out in greater detail his grounds in support of the appeal.

The Appeal Hearing

10. At the appeal hearing on 28th November 2012 :
- (1) The Appellant conducted the appeal in person through his authorized representative, Mr. Leung Pak Keung (“**Mr. Leung**”), who made oral submissions on behalf of the Appellant, initially with the assistance of a Madam Lee Suet Lan.
 - (2) The Appellant did not call any witness.
 - (3) The Respondent was represented by Government Counsel, Ms. Fung Sau Kuen Fanny (“**Ms. Fung**”). It called one witness, Mr. Lau Chi Ting (“**Mr. Lau**”), Acting Senior Town Planner/Tai Po of the Shatin, Tai Po and North District Planning Office.
11. The points made by the Appellant in support of his appeal may be summarized as follows :-
- (1) As adverse geotechnical and landscape impacts on the surrounding areas are merely technical concerns, the TPB may grant planning permission in principle and impose approval conditions for compliance by the Appellant. The Appellant has already undertaken in the application form and during the review hearing that he will employ authorized professionals to assess natural terrain hazards and prepare a site formation report, and that slope stabilization works will be implemented if necessary.

- (2) It is unfair of the TPB to require the Appellant to undertake expensive studies without any assurance that the Application will be approved. This goes against the spirit of the NTEH policy which is supposed to provide an inexpensive means to meet the housing demand of villagers.
- (3) The Director of Agriculture, Fisheries and Conservation (“DAFC”) incorrectly commented that the Site has high potential for agricultural rehabilitation. It is also questionable whether the Lands Department would permit an individual to use a piece of government land for agricultural use.
- (4) The Planning Department erroneously zoned as “V” zone in the OZP areas that are covered by hill slopes and wooded areas where large-scale site formation works are required and NTEH developments are undesirable. The Planning Department refused to extend the “V” zone in Shan Liu Village under the OZP. As a result, the Appellant was forced to look for land near the “V” zone for the Proposed Development. That is not the fault of the Appellant.
- (5) The Application should not be rejected for fear of setting an undesirable precedent. Instead, the Application should be dealt with in accordance with the common law and the TPB could set a maximum number of approvals instead of rejecting all applications in one go.

12. Mr. Lau's testimony and Ms. Fung's submissions mainly focused on how the Application failed to comply with the Interim Criteria for Consideration of Application for New Territories Exempted House (NTEH)/Small House in New Territories ("**Interim Criteria**"), why the grounds raised by the Appellant should be rejected, and the location of the Site.

Reasons for dismissing the Appeal

13. Having considered the evidence and submissions from both parties, the Appeal Board decides to dismiss the appeal for the reasons set out in the paragraphs below.

Public Safety

14. Based on the evidence of the TPB, the Appeal Board accepts that :-
- (1) The Site is located on the top of a natural slope and at the edge of two steep slope features 3SE-C/C186 and 3SE-C/DT40 as shown in Plan AP-4 produced by Mr. Lau.
 - (2) Slope feature 3SE-C/C186 has a steep gradient of 55 degree as shown in the data and photographs contained in a document known as Slope Information of feature 3SE-C/C186.
 - (3) According to the Head of Geotechnical Engineering Office, Civil Engineering and Development Department (H(GEO), CEDD) :-

- (a) The Proposed Development will affect the existing slope features No. 3SE-C/C186 and 3/SE-C/DT40. According to the Department's records, the stability conditions of the two features are unknown, and the Site has been substantially modified by unauthorized site formation works.
 - (b) The Appellant is required to make site formation submission covering the investigation of stability of any man-made slopes/retaining walls and natural slopes within or near the Proposed Development to the Building Authority and/or District Lands Office for approval as required under the provisions of the Buildings Ordinance.
 - (4) Unstable slope may lead to collapse of the slope thereby causing landslide and personal injury accident cases.
15. The Appeal Board considers that the Site is located at a highly undesirable location on the top and at the edge of two steep slope features that calls for close examination of its safety issues as soon as possible. The Proposed Development will affect the existing slope features whose stability conditions are however unknown. The Site has already been substantially modified by unauthorized site formation works. Therefore, the stability of the existing slope features should be ascertained without further delay. The Appeal Board does not consider it satisfactory to grant planning permission in principle and impose

approval conditions for compliance by the Appellant since public safety is seriously at stake in the present case. The adverse geotechnical and landscape impacts on the surrounding areas are not merely technical concerns. They are safety concerns. The Appeal Board therefore considers it reasonable for the TPB to require the Appellant to make site formation submission on the stability of the slope features, even if expensive, without any assurance that the Application will be approved. The Appeal Board does not consider that such requirement is against the spirit of the NTEH policy since public safety is not a matter that may be lightly compromised.

Interim Criteria

16. Based on the evidence of the TPB, the Appeal Board accepts that :-
- (1) The Site is situated in a woodland area on the upper foothills of Pat Sin Leng and in close proximity (as close as 25 metres) to Pat Sin Leng Country Park, and surrounded by hills, woodland and fallow agricultural land covered with grass as shown in Plan AP-2 produced by Mr. Lau.
 - (2) The natural slope on which the Site is located is covered by mature trees and dense vegetation as shown in Plans AP-3 and AP-4 produced by Mr. Lau.
 - (3) According to the comments from the Chief Town Planner/Urban Design and Landscape, Planning Department, the Site is located within an area classified with High (Qualified) value, which typically possesses high

scenic and landscape values and is expected to possess no visual detractors as evidenced by the Landscape Character Mapping of Hong Kong.

- (4) Since the Proposed Development footprint covers the entirety of the Site, there is no space for implementation of any landscape planting within the Site boundary to compensate for or remedy the loss of vegetation caused by the Proposed Development.
- (5) Under assessment criterion (h) of the Interim Criteria, the Proposed Development is required not to cause adverse landscape and geotechnical impacts on the surrounding areas, and any such potential impacts should be mitigated to the satisfaction of the relevant government departments.
- (6) According to paragraphs 8.1 and 8.2 of the Explanatory Statement to the OZP, *“the general planning intention should be oriented towards conservation and landscape protection. In view of the high scenic and ecological value and the rural nature of the Area, the general planning intention for the Area is to conserve its natural environment”*.
- (7) According to the Notes to the OZP, the planning intention of AGR zone is also *“to retain fallow arable land with good potential for rehabilitation for cultivation and other agricultural purposes.”*
- (8) The Planning Department does not support the Application because the Proposed Development does not comply with assessment criterion (h) of the Interim Criteria in that :-

- (a) The Proposed Development will likely involve site formation, slope stabilization and access construction works resulting in clearance of mature trees and dense vegetation that will cause irreversible damage to the landscape quality of the area surrounding the Pat Sin Leng Country Park.
 - (b) The Appellant fails to demonstrate that the Proposed Development will not cause adverse geotechnical and landscape impacts on the surrounding areas.
- (9) DAFC does not support the Application since the Site is located within “AGR” zone and has high potential for agricultural rehabilitation.
- (10) The Site is not easily accessible and there is no existing access road to the Site.
17. The Notes to the OZP are expressly stated to form part of the OZP. While the Explanatory Statement to the OZP 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.
18. The Appeal Board observes that assessment criterion (h) of the Interim Criteria is in line with and conducive to the implementation of the general planning intention of Ting Kok area and the planning intention of AGR zone in the Site.

It is a relevant matter for the TPB to take into account.

19. The Appeal Board is satisfied that the Appellant has failed to demonstrate that the Proposed Development will not cause adverse geotechnical and landscape impacts on the surrounding areas. The Appeal Board is also satisfied that the Proposed Development will likely involve site formation, slope stabilization and access construction works resulting in clearance of mature trees and dense vegetation that will cause irreversible damage to the landscape quality of the area surrounding the Pat Sin Leng Country Park. The Appeal Board therefore finds that the Proposed Development does not comply with assessment criterion (h) of the Interim Criteria.

20. As to the Appellant's query on DAFC's comment about the Site's potential for agricultural rehabilitation, no concrete evidence has been produced by the Appellant to contradict DAFC's comment. Therefore, insufficient cause has been shown to persuade the Appeal Board to disregard the comment from DAFC. As to whether the Lands Department would permit an individual to use a piece of government land for agricultural use, according to the OZP, agricultural use is always permitted in the Site and therefore such use is not subject to planning permission. The Appeal Board sees no basis to speculate that the decision of the Lands Department will run counter to the planning intention of the OZP. The Appeal Board thus also considers that the Proposed

Development is not in line with the planning intention of “AGR” zone in the Site.

Discretion within the Parameters of the OZP

21. The Appeal Board notes with sympathy the comments of the Appellant against the OZP. However, in determining this appeal, the Appeal Board has to exercise its discretion within the parameters of the OZP. Whether the OZP has room for improvement is irrelevant. The law has been succinctly expounded by the Court of Appeal in *International Trader Ltd. v. Town Planning Appeal Board Anor* [2009] 4 HKC 411 at 422 :-

“48. In my judgment, when considering a s.16 application for permission under and in terms of an approved plan, the Board is not given a blank canvas. The canvas is already painted with the relevant approved plan. That being so, while the Board’s discretion is a broad one, it is evident that the Ordinance, considered as a whole, requires that the discretion be exercised within the limits of the relevant approved plan. Put another way, the approved plan is not merely a relevant consideration, one which the Board may, for cogent reason, ignore.”

22. Therefore, the Appellant’s submission of adverse comments against the OZP does not advance his appeal.

Insufficient Planning Merits

23. Every application for planning permission must be considered in the light of its own facts and individual merits. Therefore, the Appeal Board does not think much of the argument based on the setting of an undesirable precedent. In the present case, there are insufficient individual merits or site-specific circumstances to justify the Application. The undesirable location of the Site (which is on the top and at the edge of two steep slope features whose stability condition is unknown), its close proximity to Pat Sin Leng Country Park, and its poor accessibility, all provide planning grounds to refuse the Application. Indeed, the Appellant acknowledged the undesirability of the Site for building a NTEH both in paragraph 9(7) of the justifications contained in the Application, and in his closing submissions.

24. Although the Appellant did not refer the Appeal Board to the approval case of A/NE-TK/359 or the scenarios for sympathetic/favourable consideration suggested by the Interim Criteria, the Appeal Board would like to briefly raise them below for the sake of completeness.

25. The Appeal Board notes that in the approval case of A/NE-TK/359, its site is located quite close to the Site. However, the Appeal Board is satisfied that the above approval case is distinguishable for the following reasons :-

- (1) The footprint of the proposed development in the approval case lies mostly in the “V” zone.
- (2) The slope in the approval case only has a gradient of 18 degree as compared with the steep gradient of 55 degree in slope feature 3SE-C/C186 of the Site.
- (3) The site in the approval case has a site area of more than 700 square feet to provide sufficient space for landscape planting to the satisfaction of the Planning Department.
- (4) Each case must be considered in the light of its own facts and individual merits. As explained above, in the present case, there are insufficient individual merits to justify the Application. The facts of the present case are against allowing the Application.

26. Furthermore, the Appeal Board notes that as the Proposed Development footprint is located entirely within the village ‘environs’ (“VE”) and there is a general shortage of land in meeting the demand for NTEH in Shan Liu Village, (“**General Shortage Problem**”), sympathetic consideration may be given to the Application according to the Interim Criteria. Further, as more than 50% of the Proposed Development footprint is located within the “V” zone and in view of the General Shortage Problem, favourable consideration could be given to the Application according to the Interim Criteria. However, the Interim Criteria also expressly provides that the above scenario for favourable

consideration will only apply if the other assessment criteria can be satisfied. As pointed out in paragraph 19 above, assessment criterion (h) of the Interim Criteria is not satisfied in the present case. In respect of the scenario for sympathetic consideration, although the Appeal Board has sympathy for the Appellant, the paramount consideration must be whether as a matter of planning merits, the Application should be granted. Regrettably, for the reasons explained above, there are insufficient planning merits to justify an approval of the Application even giving it sympathetic consideration.

27. As to the General Shortage Problem, the Appeal Board considers that it should be dealt with comprehensively and systematically, and having due regard to all relevant planning considerations. That is however the function of the TPB under section 3 of the Ordinance. Similarly, the Appellant's submission of adverse comments against the OZP is a matter for the TPB to follow up under section 12A of the Ordinance when considering appropriate amendment to the OZP. The above matters are outside the jurisdiction of the Appeal Board. The Appeal Board is however pleased to note that communications between the Appellant and the TPB are already underway. Hopefully, such communications would soon lead to an improvement of the OZP from the planning perspective.

Conclusion

28. We are satisfied that insufficient grounds have been shown in support of the appeal. The appeal is therefore dismissed with no order as to costs.

(Signed)

Mr. FEE Chung-ming Johnny
(Chairman)

(Signed)

Ir. CHEUK Kim-tang
(Member)

(Signed)

Dr. LAW Sui-chun Teresa
(Member)

(Signed)

Mr. SIN Ming-hei
(Member)

(Signed)

Ms. YUE Nga-fong Avon
(Member)

IN THE TOWN PLANNING APPEAL BOARD

Town Planning Appeal No.16 of 2011

BETWEEN

LAU PAK KAU

Appellant

and

TOWN PLANNING BOARD

Respondent

DECISION
