

**IN THE TOWN PLANNING APPEAL BOARD**

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**Town Planning Appeal No. 4 of 2016**

BETWEEN

MR LI CHI YAN MARK

Appellant

and

TOWN PLANNING BOARD

Respondent

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**Town Planning Appeal No. 5 of 2016**

BETWEEN

MR WONG JOHN BUT WAI

Appellant

and

TOWN PLANNING BOARD

Respondent

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Appeal Board: Mr. YEUNG Ming-tai (Chairman)

Dr. HUI Chun-man (Member)

Dr. MAN Chi-sum, JP (Member)

Ms NG So-kuen (Member)

Mr TANG Kwok-wai (Member)

In Attendance: Ms Lesley LEUNG (Secretary)

Representation: Mr. YEUNG Siu-fung for the Appellant (Appeal No. 4 of 2016)

Miss WONG Miu-yuk for the Appellant (Appeal No. 5 of 2016)

Ms Jess Y.C. CHAN for the Respondent

Date of Hearing: 12<sup>th</sup> June 2017

Date of Decision: 17<sup>th</sup> October 2017

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# DECISION

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## A. THE PARTIES

1. Mr. Li Chi Yan Mark (“**Mr. Li**”) is the Appellant under Town Planning Appeal No. 4 of 2016. Mr. Wong, John But Wai (“**Mr. Wong**”) is the Appellant under Town Planning Appeal No. 5 of 2016. Both Appellants agree that their appeal shall be heard together and represented by Mr. Yeung Siu Fung (“**Mr. Yeung**”). We shall call them the Appellants.
2. The Respondent in these appeals is the Town Planning Board (“**TPB**”). The TPB is represented by Ms. Jess Chan (“**Ms. Chan**”), Senior Government Counsel.

## B. THE APPEALS

3. The Appellants lodged their respective appeals, pursuant to section 17B(1) of the Town Planning Ordinance (Cap 131) (“**TPO**”), against the decision of the TPB made on a review under section 17(1) and dated 6<sup>th</sup> May 2016 (“**the S17 Review**”).

## C. THE RELEVANT FACTUAL BACKGROUND

4. There are few disputes on facts. We will deal with those factual disputes in paragraphs below. At this stage, it may be opportune if we set out the undisputed factual background for ease of understanding.

5. The Town Planning Appeal Board (“**the Appeal Board**”) is indebted to Mr. Yeung and Ms Chan for their detailed submissions. The facts summarised below are primarily adopted from their submissions.

#### **C1. The Appeal Sites**

6. The sites of Mr. Li and Mr. Wong are respectively located at Lot No 454 S.A. and Lot No. 454 S.B. in D.D. 28, Tai Mei Tuk Village, Ting Kok Road, Tai Po, New Territories (collectively referred to as “**the Appeal Sites**”).
7. For Lot No. 454 S.A. under Town Planning Appeal No. 4 of 2016, 69% of the site area is within “Village Type Development” zone (“**V**” zone) and 31% of the site area is within “Green Belt” zone (“**GB**” zone). For Lot No. 454 S.B. under Town Planning Appeal No. 5 of 2016, 17.8% of the site area is within “V” zone and 82.2% of the site area is within “GB” zone.
8. The Appellants proposed to build a New Territories Exempted House (“**NTEH**”) on each of Lot No. 454 S.A. and Lot No. 454 S.B. Each of the proposed houses has a roof-over area 65.03m<sup>2</sup>, a total gross floor area of 195.09m<sup>2</sup> and a height of 8.23m (3 storeys) (the “**Proposed Developments**”).
9. NTEH is always permitted in Column 1 for “V” zone under the Notes of draft Ting Kok Outline Zoning Plan No. S/NE-TK/18 and Approved Ting Kok Outline Zoning Plan No. S/NE-TK/19 (collectively referred to as the “**OZP**”).
10. According to the Notes under the OZP for “GB” zone, House (other than rebuilding of New Territories Exempted House or replacement of existing domestic building by New Territories Exempted House permitted under the covering Notes) falls within the uses in Column 2. The building of NTEH may be permitted with or without conditions on application to the TPB.

11. The Appellants thus need planning permission for their intended NTEH development on the Appeal Sites.

## **C2. Summary of Procedural History**

12. On 30<sup>th</sup> October 2015, the Appellants sought planning permission (Applications No. A/NE-TK/570 and A/NE-TK/571) to build a NTEH at each of the Appeal Sites under section 16 of the TPO.

13. On 18<sup>th</sup> December 2015, both section 16 applications were rejected by the Rural and New Town Planning Committee (“**RNTPC**”) of the TPB (“**S16 Decisions**”) for the following reasons:

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

*(b) land is still available within the “V” zone of Lung Mei, Tai Mei Tuk and Wong Chuk Tsuen which is primarily intended for Small House development. It is considered more appropriate to concentrate the proposed Small House development within “V” zone for more orderly development pattern, efficient use of land and provision of infrastructure and services; and*

*(c) the proposed development will have adverse impacts on the existing landscape of the area including the Banyan tree near the site.”*

14. On 8<sup>th</sup> January 2016, the Appellants were informed of the S16 Decisions of the RNTPC in rejecting the applications.

15. On 29<sup>th</sup> January 2016, the Appellants applied pursuant to section 17(1) of the TPO for a review of the RNTPC's decision in rejecting the applications.
16. On 15<sup>th</sup> April 2016, both of the review applications were considered by the TPB under section 17 of the TPO ("**S17 Decisions**") and rejected for the same reasons as stated in Paragraph 13 above.
17. On 6<sup>th</sup> May 2016, the Appellants were informed of the TPB's S17 Decisions in rejecting their applications on review.
18. On 28<sup>th</sup> June 2016 and 29<sup>th</sup> June 2016, the Appeal Board received from the Appellants their respective appeals under section 17B(1) of the TPO against the S17 Decisions of the TPB.

#### **D. THE APPELLANTS' GROUNDS OF APPEALS**

19. The Appellants advanced the following grounds of appeal against the S17 Decisions:
  - a) The Proposed Development should not frustrate the planning intention of the particular zone in which the application is located ("**Planning Intention Ground**"):
    - i) Appeal Sites are not entirely within "GB" zone;
    - ii) Many sites completely within "GB" zone were approved in the past, including the applications nos. A/NE-TK211, 213 and 226 approved respectively on 4<sup>th</sup> August 2006 and 9<sup>th</sup> March 2007, where grounds of approval were "there was a general shortage of land to meet the demand for small house development in the "V" zone of the concerned village and the proposed developments would have no significant adverse impact on the surrounding areas";

- iii) The shortage should be more acute these days, as compared to the shortage in 2006 and 2007;
  - iv) 3 approved cases together with 8 approved cases to the left of application sites are further north in the “GB” zone and were deemed as of “no significant adverse impact on the surrounding areas”.
- b) Sympathetic consideration should be given if not less than 50% of the proposed house is within the Village Environs of a Recognised Village and there is a general shortage of land in meeting small house development in the “V” zone of the village (“**Interim Criteria Ground**”):
- i) The total 10-year demand for small house applications is 307, including 60 outstanding small house applications and 247 “10-year demand” based on forecast of small house applications, whereas land within “V” zone is only available for 122 small house sites;
  - ii) The projected figures given by the Village Representatives are genuine but not verified by Lands Department;
  - iii) These 122 sites would eventually be consumed in the long run;
  - iv) Available land within “V” Zone is extremely hard to get;
  - v) The various clusters of land will require detailed checking and examination to ascertain the total available plots.
- c) The Appellants undertake to provide landscape proposals to address any adverse impact on landscape, though the Banyan Tree in the vicinity had been removed (“**Landscape Ground**”).
20. The Appellants did not call any witness. The Respondent called one witness, Mr Lau Chi-ting (“**Mr. Lau**”) who is the Senior Town Planner responsible for the Tai Po Area. We will not recite Mr. Lau’s evidence in full. Suffice for us to say is that

we find Mr. Lau a frank and honest witness. We will briefly mention the relevant evidence when we discuss the issues below.

21. The Appellants advanced further submissions on their grounds of appeals after the hearing:

a) Planning Intention Ground:

- i) A total of 42 similar application cases (12 cases within “GB” and “V” zones and 30 cases within “GB” Zone) in the same area had been approved by the TPB from 31<sup>st</sup> May 2002 to 17<sup>th</sup> April 2015;
- ii) Out of the 30 approved cases within the “GB” zone, 3 cases are located immediately to the north of the Appeal Sites with one case of A/NE-TK/213 being 15m away, and 2 other cases of A/NE-TK/211 and A/NE-TK/226 being 25m away. There is no buffer zone at the moment with the approval of sites in the north and house clusters in the south;
- iii) From the testimony of the TPB’s witness (Mr. Lau), it is revealed that the Appeal Sites are now paved for the parking of cars;
- iv) Despite of the application of a cautious approach being adopted since 2013/2014, 12 cases were approved (6 cases partly within “GB” and “V” zones, and 6 cases within “GB” zone) since 25<sup>th</sup> January 2013. The cautious approach has not been strictly adhered to but exercised with discretion;
- v) Differential treatment for cases prior to the application of the cautious approach and for cases after the application of the cautious approach;
- vi) It is very obvious that refusal of the present 2 applications is against the Rules of Natural Justice.

b) Interim Criteria Ground

- i) Figures of small house demands put up by the Village Representatives and compiled by Lands Department should be respected, otherwise there is no point in formulating such a table of data for all to consider;
- ii) The table clearly indicates that the 10-year demand forecast for small house applications is 247 whereas the TPB's calculation of available small house sites are 122. After the consumption of the 122 sites, the Appellants ask rhetorically where the extra 125 sites would come to place;
- iii) The computation of available land is also subject to argument. The factors include Fung Shui, place of worship (locations of pak-kung / worshipping stones), access tracks, retaining walls and drainage networks that are currently in use need to be considered. Detailed examination with Village Representatives is warranted before saying a certain number of sites could be provided.

c) Landscape Ground

- i) The applicants will definitely provide landscape proposals to the TPB to address any adverse impact. Initially Bauhinia Blakeana of minimum size of 2.75m or the crawling vine species are desired by the applicants, and a formal proposal will be submitted by landscape architect as soon as possible for the TPB's re-consideration on this landscape issue.

**E. THE RELEVANT LEGAL PRINCIPLES**

22. We state the relevant applicable legal principles as follows:



- a) The Appeal Board could substitute its own decision for that of the TPB even if the TPB had not strictly committed any error, as the hearing before the Appeal Board would normally be much fuller and more substantial than a review hearing under section 17 of the TPO (see *Town Planning Appeal No. 15 of 2011, Para. 18*).
- b) The burden is on the Appellant to show that the TPB's decision was wrong so that the Appeal Board should either reverse or vary that decision (see *Town Planning Appeal No. 15 of 2011, Para. 26*).
- c) It is incumbent upon the Appellant to satisfy the Appeal Board that there is sufficient justification to warrant planning permission be granted by the Appeal Board to the Proposed Development (see *Town Planning Appeal No. 15 of 2011, Para. 26*).
- d) In deciding whether to confirm, reverse or vary the decision appealed against, the Appeal Board must exercise an independent planning judgment, and is entitled to disagree with the TPB. The plan and the Notes attached to the plan are material documents to which the Appeal Board are bound to have regard to and the Explanatory Statement is a material consideration which the Appeal Board must also take into account but is not bound to follow (see *Henderson Real Estate Agency Ltd v Lo Chai Wan* [1997] HKLRD 258).

## **F. DISCUSSIONS AND THE APPEAL BOARD'S FINDINGS**

### **F1. Planning Intention, Interim Criteria and Other Relevant Considerations**

- 23. The Planning intention of GB zone as stated in the Notes to the OZP is as follows:-

“Planning Intention

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

24. Paragraphs 9.91 and 9.92 of the Explanatory Statement provide as follows:-

*“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.*

*9.9.2 The zoned areas mainly include areas adjoining the northern boundary of the Area which are in close proximity to Pat Sin Leng Country Park. Mature woodlands which are worth preserving are found in these areas. Apart from that, there are also vegetated lower hill slopes, knolls, etc.”*

25. The Explanatory Statement provides that:-

*“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.”*

26. The following provisions of the Interim Criteria for Consideration of Application for NTEH/Small House in New Territories are useful under the present consideration:

(A) Under “Explanatory Notes on NTEH/Small House Development Exempted from Planning Application”, it provides that:-

*“(b) planning permission will also not be required if not less than 50% of the footprint of a Small House falls within the “V” zone and village ‘environs’ (‘VE’) of a recognized village;*

*(c) the above exemption from planning application is not applicable to any NTEH/Small House development on a site encroaching on:*

*(i) conservation-related zones (such as “Coastal Protection Area”, “Conservation Area”, “Site of Special Scientific Interest”) and “Country Park”;*

*(ii) “Green Belt” zone;*

*(iii) “Open Space” (“O”) zone involving Government land, or where the proposed NTEH/Small House footprint encroaching on the “O” zone;*

*(iv) water gathering grounds; and*

*(v) area shown as ‘Road’”*

(B) Under “Assessment Criteria for Planning Application”, it provides that:-

*“(a) sympathetic consideration may be given if not less than 50% of the proposed NTEH/Small House footprint falls within the village ‘environs’ (‘VE’) of a recognized village and there is a general shortage of land in meeting the demand for Small House development in the “Village Type Development” (“V”) zone of the village;*

- (f) *the proposed development should not frustrate the planning intention of the particular zone in which application site is located;*
- (h) *the proposed development should not encroach onto the planned road network and should not cause adverse traffic, environmental, landscape, drainage, sewerage and geotechnical impacts on the surrounding areas. Any such potential impacts should be mitigated to the satisfaction of relevant Government departments.”*

27. The TPB Guidelines No. 10 (TPB PG-No. 10) for ‘Application for Development within “GB” zone under section 16 of the TPO’ is also relevant. The relevant assessment criteria are summarized as follows:

- a) there is a general presumption against development in the “GB” zone;
- b) applications for new development in “GB” zone will only be considered in exceptional circumstances and must be justified with very strong planning ground. The scale and intensity of the proposed development including the plot ratio, site coverage and building height should be compatible with the character of surrounding areas. With the exception of NTEHs, a plot ratio up to 0.4 for residential development may be permitted;
- c) applications for NTEHs with satisfactory sewage disposal facilities and access arrangements may be approved if the application sites are in close proximity to existing villages and in keeping with the surrounding uses, and where the development is to meet the demand from indigenous villagers;
- d) the design and layout of any proposed development should be compatible with the surrounding area. The development should not involve extensive clearance of existing natural vegetation, affect the existing natural landscape, or cause any adverse visual impact on the surrounding environment;

- e) the proposed development should not overstrain the capacity of existing and planned infrastructure such as sewerage, roads and water supply. It should not adversely affect drainage or aggravate flooding in the area;
- f) the proposed development should not overstrain the overall provision of Government, Institution and Community (“G/IC”) facilities in the general area; and
- g) any proposed development on a slope or hillside should not adversely affect slope stability.

## **F2. Planning Intention Ground**

- 28. The Appellants have the burden of showing strong planning grounds to displace the general presumption against development within this “GB” zone.
- 29. The Appellants brought the attention of the Appeal Board to the following matters:-
  - a) The Appeal Sites are not entirely within “GB” zone. 69% of the site area is within “V” zone and 31% of the site area is within “GB” zone for Lot No. 454 S.A. (“**the Appeal Site 1**”) under Town Planning Appeal No. 4 of 2016. 17.8% of the site area is within “V” zone and 82.2% of the site area is within “GB” zone for Lot No. 454 S.B. (“**the Appeal Site 2**”) under Town Planning Appeal No. 5 of 2016.
  - b) According to the Interim Criteria, planning permission is required as the Appeal Site 1 is partly within “GB” zone. Sympathetic consideration may be given since this Appeal Site 1 has not less than 50% of the proposed NTEH/Small House footprint falling within the village ‘environs’ (‘VE’) of a recognized village and there is a general shortage of land in meeting the demand for Small House development in the “V” zone of the village.

- c) According to the Interim Criteria, planning permission is required as the Appeal Site 2 is partly within “GB” zone. Sympathetic consideration may be given since this Appeal Site 1 has not less than 50% of the proposed NTEH/Small House footprint falling within the village ‘environs’ (‘VE’) of a recognized village and there is a general shortage of land in meeting the demand for Small House development in the “V” zone of the village.
  - d) The Appellants asked rhetorically why many sites completely within “GB” zone were approved in the past.
30. In our judgment, the answers to this question d) would not assist the Appellants’ case due to the following reasons:
- a) In general, each application of these successful cases has to be considered on its own merit and background, to which the Appellants also agreed. Merits and backgrounds supporting those successful cases would not necessarily apply to the Appellants’ cases. The Appeal Board considered some of these cases below.
  - b) The Appellants cite the approval of 3 houses (A/NE-TK/211, 213 and 226) which were in 2006 and 2007 and which were located completely within “GB” zone and entirely outside “V” zone in support of their contention that similar approval should be given to their application for permission. It is important to note that there has been a change of approach taken by the TPB after 2013/2014 and a more cautious approach has since then been adopted. According to Mr. Lau, the cautious approach (which is more particularly set out in sub-paragraph d) below) has been in force since around 2013/2014<sup>1</sup> albeit he was not certain about the exact dates.

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<sup>1</sup> The timing of adoption of the cautious approach by TPB was contained in TPB’s responses to the appellant’s written submission made after the hearing that was received by the appeal board on 12 July 2017.

- c) Nonetheless, we note from the Confirmed Minutes of 1091<sup>st</sup> Meeting of TPB held on 14<sup>th</sup> August 2015 that there were the following discussions and deliberations of the approach to be adopted by the TPB:

*“30. The Secretary further said that in adopting the Interim Criteria for Consideration of Application for New Territories Excepted House/Small House in New Territories (the Interim Criteria) in considering planning applications for Small House development, the Town Planning Board (the Board) and the Rural and New Town Planning Committee (RNTPC) had been more cautious in approving applications for Small House Development in recent years. Some general observations were summarized as follows:*

- (a) In considering if there was a general shortage of land in meeting the demand for Small House development, more weighting had been put on the number of outstanding Small House applications provided by the Lands Department;*
- (b) Factors such as the implementation progress of the approved Small House applications, location pattern of previously granted planning permissions for Small House development, and the amount of land still available within the “Village Type Development” (“V”) zone had duly been taken into account;*
- (c) Due consideration would be given to Small House applications located close to the existing village clusters for an orderly development pattern, as well as for more efficient use of land and provision of infrastructures and services;*
- (d) Due consideration would be given to sites with previous planning approvals for Small House development; and*

*(e) All assessment criteria in the Interim Criteria were still relevant criteria in the consideration of Small House applications.*

*34. The Chairman said that the information contained in the Paper was to facilitate Members' future consideration of Small House applications and that each application would be considered on its individual merits. Members agreed."*

- d) We understand from Mr. Lau on the "cautious approach" is that when considering whether permission should be granted for small house development on the ground of general shortage of land, the TPB had to consider two figures, the outstanding small house applications (which were provided by the Lands Department on the basis of the actual number received) and the anticipated numbers of applications in the next 10 years which were provided by the Village Representatives on account of his knowledge of the need. There are always substantial difference between these two figures. Since around 2013/2014<sup>1</sup>, the TPB would give more weight to the Lands Department's figure as this reflected the actual need at present. Since the Lands Department did not verify the figures provided by village representatives and the figures provided by the Village Representatives were at best their estimate and did not base on any statistical figures nor scientific methods, lesser weight would be given to the Village Representatives' figures.
- e) We note that the Appellants' application for planning permission were only made on 30<sup>th</sup> October 2015, which was after the adoption of the cautious approach by the TPB as evidenced in the discussions in the 1091<sup>st</sup> Meeting.
- f) We further note the following which was recorded under the Confirmed Minutes of 1109<sup>th</sup> Meeting of TPB held on 15<sup>th</sup> April 2016:



*“180. There was a general shortage of land in meeting the demand for Small House development if the number of outstanding Small House applications plus the 10-year Small House demand forecast was larger than the estimated number of Small Houses that could be developed in the land available within the “V” zone. However, the RNTPC had adopted a more cautious approach since 2013/1014 and more weighting had been put on the number of outstanding Small House applications. For the subject applications, the land available within the “V” zone for Small House development was equivalent to 125 Small House sites, which was much higher than the 64 outstanding Small House applications.*

*181. A Member said that a more cautious approach was adopted by putting more weighting on the number of outstanding Small House applications since the 10-year Small House demand forecast was in general more uncertain. If land was still available within the “V” zone, proliferation of Small House developments outside the “V” zone should be avoided.”*

- g) We agree with the cautious approach adopted by the TPB. The figures on the outstanding applications should be given more weight to when compared with the 10-year forecast figures provided by the village representatives. The 10-year demand is only a forecast or estimate. It is not known how these figures were arrived at by the Village Representatives. Unless and until the basis of how Village Representatives arrive at the forecast are known (which is absent in these appeals), we do not consider that too much weight should be put on these forecast figures. It would be more prudent to look at the numbers of outstanding applications and the land available for building NTEH within the village.

- h) Mr. Lau testified that land of 3.06 hectares (which was equivalent to about 122 small house sites) is still available within the “V” zone for small house development and was capable to meet the outstanding 60 small house applications.
- i) As the evidence at present stands, we are not satisfied that there is a shortage of land available within the “V” zone to meet the demand for small house development.
- j) The Appellants also refer to another application No. A/NE-TK/432, which was the subject of an appeal (*Town Planning Appeal No 5 of 2014*) (“**TPAB 5/2014**”) before the Appeal Board differently constituted. The appeal was allowed by the Appeal Board on 22<sup>nd</sup> October 2015 and permission was given to the appellant in that case to build a NTEH, mainly on consideration of the unique characteristics of the appeal site (i.e. located on agricultural land not covered by dense vegetation, well separated from the edge of the Pat Sin Leng Country Park, close to adjacent small house developments and being able to be connected to public sewer, general shortage of land in the “V” zone of the concerned village to satisfy outstanding small house applications and the 10-year small house demand in the village concerned).
- k) We have carefully considered the facts and reasons of the decision in the said TPAB 5/2014. We are not persuaded that the current applications should be allowed because of the success of the appellant in the said TPAB 5/2014. We note that the present cases are distinguished from the said TPAB 5/2014 on the following aspects:
  - a. There are unique characteristics of the appeal site in TPAB 5/2014 which is different from the current applications, particularly with reference to adverse impact on landscape.

b. There is a change on the approach to the issue of whether “*there was a general shortage of land in meeting the demand for Small House development*” after 2013. Since then, more cautious approach with more weight being placed on the number of outstanding small house applications has been adopted. We note that this change in approach has not been discussed in the TPAB 5/2014 decision. One of the factors listed under the unique characteristics of the appeal site in TPAB 5/2014 is:

*“There is a general shortage of land in the V zone of the concerned village to satisfy outstanding Small House applications and the 10-year Small House demand in the village concerned”*

It seems to us likely that the decision was made in accordance with the approach adopted prior to the adoption of more cautious approach (i.e. in consideration of 10-year demand and giving more weight thereto), which coincided with timing of the application on this case (first made on 23<sup>rd</sup> January 2013 to the TPB for planning permission for the Proposed Development under section 16 of TPO).

- l) If there was still land within the “V” zone (which we find to be as the land within the “V” zone is adequate to provide 122 NTEHs), proliferation of small house development outside the “V” zone should be controlled and avoided.
- m) Regarding the 12 approved cases after the application of the cautious approach in 2013/2014, we do not have the opportunity to be presented with the information on each and every approved case and would not be able to comment on their effects over the consideration of the current applications on current Appeal Sites. We would like to reiterate again that each application of these successful cases, as well as the current applications on the Appeal Sites, has to be considered on its own merit and

background. Given that there is lack of background as to why those applications were approved, these cases will not assist the Appellants.

31. In conclusion, we conclude that the Appellants failed to succeed on this Planning Intention Ground.

### **F3. Interim Criteria Ground**

32. According to the Village Representatives, the 10-year demand for NTEH is 307 as at 2017. This figure exceeds the supply of 122 small house sites within the land available in the “V” zone. Looking at these two figures alone, there seems to be a shortage of land available for the NTEH development.
33. However, as explained in previous sections, the TPB (in our view rightly) adopted a more cautious approach since around 2013/2014<sup>1</sup> and put more weight to the number of small house outstanding applications. As at 2017, this number is 60. The areas within the “V” zone which can provide at least 122 small house sites are sufficient to meet the current demand for NTEHs.
34. The Appellants have expressed their difficulty in acquisition of land for small house development within the “V” zone. Whilst we have every sympathy with the Appellants, the land ownership should not be a material consideration for the Appeal Board. We are only dealing with the planning issue and not the land ownership issue.
35. Further, we note that the Appellants have not provided detailed information to demonstrate that available land within “V” zone is not suitable for small house development and did not put up concrete evidence before the Appeal Board to challenge on the calculation of available land within “V” zone to build small houses (i.e. 122 small house sites).

36. On the other hand, Mr Lau managed to explain to the Appeal Board the calculation of available land by using deduction method, namely,
- a) Take away all small houses in “V” zone;
  - b) Take away land, such as slopes, footpaths, rivers, roads, lands covered by tree groups and fish ponds, land already granted by Lands Department for small house development, G/IC facilities (village school), etc.;
  - c) Remaining area with assumption of each hectare to give 40 houses of 65 square meters large for each house (occupying 26% to 27% on each plot of land and giving ample allowance to build each house on each plot of land).
37. We find the estimate by the TPB on the supply of land site, being 40 houses per hectare to be reasonable and prudent.
38. We find that the assessment criteria (a) of the Interim Criteria is not fully complied with as there is still available land within the “V” zone of the concerned villages for small house development. Thus, the Appellants also failed to succeed on this Interim Criteria Ground.

#### **F4. Landscape Ground**

39. The Chief Town Planner/Urban Design and Landscape of Planning Department expressed reservation on the applications prior to S16 Decisions and S17 Decisions, on the ground that the construction of the small houses would likely disturb the roots and tree crown of the Banyan tree in close proximity to the Appeal Sites and there was no available space within the Appeal Sites to shift the small house footprints away from the tree.
40. The Appellants had not provided any information on landscape & tree preservation proposal to address the issue.

41. The Banyan tree near the Appeal Sites was one of the main reasons for rejections under S16 Decisions and S17 Decisions. However, at the time of this hearing, the Banyan Tree had already been cut by the Lands Department's contractor on 29<sup>th</sup> September 2016. According to Mr. Lau, the condition of the mature tree deteriorated within a span of a few months from average health condition to poor health condition, and the cutting down of the tree was due to its poor health and structure. No information is available to offer a reasonable explanation as to why the tree's health condition deteriorated so significantly in such short period of time (between April 2016 and September 2016). We would not make any finding as to why the Banyan Tree suddenly deteriorated and came to a stage that it need to be taken down.
42. What concerns us is that the subject land sites are partly located in the "GB" zone. Yet the Appellants have not provided any landscape proposal to address the landscape impacts of the Proposed Development on the "GB" zone. The Appellants only said that they would undertake to provide the landscape proposals to address the adverse impact on landscape.
43. Under item (B)(h) of Interim Criteria for Consideration of Application for NTEH/Small House in New Territories, it provides that:-
- "(h) the proposed development should not encroach onto the planned road network and should not cause adverse traffic, environmental, landscape, drainage, sewerage and geotechnical impacts on the surrounding areas. Any such potential impacts should be mitigated to the satisfaction of relevant Government departments."*
44. We took the view that the Appellants had not satisfied us that the construction of NTEHs at the Appeal Sites would not cause landscape impacts on the surrounding "GB" areas. We further note that the Appeal Sites were quite small and we are sceptical whether there would be any more grounds after construction of small

houses to enable substantial landscape work be carried out to alleviate the impact on the adjacent “GB” areas.

45. The Appellants also failed to succeed on this Landscape Ground.

## **G. CONCLUSION**

46. We accordingly dismiss the appeal.

47. On the issue of costs, we note the normal rule under section 17B(8)(c) is that there should not be an award of costs in favour of the “successful party” save in exceptional circumstances: see *Town Planning Appeal No. 10 of 2010*.

48. At this stage, we see no exceptional circumstances which justify any award of costs in this appeal. We make an order that there be no order as to costs.

49. We wish to express our wholehearted thanks to Mr Yeung and Ms Chan for their able assistance.

(Signed)

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Mr. YEUNG Ming-tai  
(Chairman)

(Signed)

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Dr. HUI Chun-man  
(Member)

(Signed)

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Dr. MAN Chi-sum, JP  
(Member)

(Signed)

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Ms NG So-kuen  
(Member)

(Signed)

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Mr TANG Kwok-wai  
(Member)