

IN THE TOWN PLANNING APPEAL BOARD

TOWN PLANNING APPEAL NO. 1 OF 2020

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Between

LEE KA WAI

*Appellant*

and

TOWN PLANNING BOARD

*Respondent*

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Appeal Board : Mr. YAN Mang-ye, John, SC, JP (Chairman)

Professor HO Chi-wing, Daniel (Member)

Mr. LAU Hing-tat, Patrick, JP (Member)

Mr. LEUNG Chi-hung, Ben (Member)

Ms. WU Ching-mei, Ada (Member)

In Attendance : Ms. Lesley LEUNG (Secretary)

Representation : Mr. YEUNG Siu-fung, Representative for the Appellant

Mr. CHIK Wai-on, Edward, Government Counsel  
for the Respondent

Date of Hearing : 3 June 2021

Date of Decision : 28 March 2022

## DECISION

1. This is an appeal brought by Mr. Lee Ka Wai (“**Appellant**”) pursuant to section 17B of the Town Planning Ordinance (Cap. 131) (“**TPO**”) against the decision of the Town Planning Board (“**TPB**”) made on 10 January 2020 (“**Decision**”) refusing the Appellant’s application for planning permission to build a New Territories Exempted House (“**Small House**”) on a site (“**the Appeal Site**”) within an area zoned “Agriculture” (“**AGR**”) in the Approved Kau Lung Hang Outline Zoning Plan No. S/NE-KLH/11 (“**OZP S/NE-KLH/11**”) in Application No. A/NE-KLH/573 (“**the Application**”).

## **BACKGROUND**

### **The Appeal Site**

2. The Appeal Site is located at Lot 310 S.C. in D.D. 9, Kau Lung Hang, Tai Po, New Territories, on a piece of flat land with groundcover and weeds as shown in photographs taken on 24 February 2021 which were exhibited to the Statement of Wu Yiu Chung, Tony (“**Mr. Wu**”), Senior Town Planner/Country Park Enclaves of the Sha Tin, Tai Po and North District Planning Office, filed on behalf of the Respondent (“**the TPB**”). It has an area of about 167.8m<sup>2</sup> and is accessible via a local footpath.
3. According to the Lands Department, the Appeal Site falls entirely within the “village environs” (“**VE**”) covering Yuen Leng, Kau Lung Hang San Wai and Lo Wai. Mr. Wu explained in his Statement that VE refers to the area within a 300-foot radius from the edge of the last village type house built in the recognised village before the introduction of the Small House Policy on 1 December 1972. The area concerned is the administrative boundary used by the Lands Department for consideration of Small House applications. Qualified indigenous villagers can apply for Small Houses within the VE.
4. The surrounding areas of the Appeal Site are predominantly rural in character comprising scattered tree groups, village houses and active/abandoned farmland. Village clusters are mainly found about 40m to the south and about 60m to the north of the Appeal Site.

## **The Application**

5. The Application for planning permission was made to the Rural and New Town Planning Committee (“**RNTPC**”) pursuant to section 16 of the TPO on 10 July 2019. On 6 September 2019, the RNTPC decided to reject the Application for the following reasons (“**the RNTPC’s Decision**”):-
  - (a) The proposed development is not in line with the planning intention of the AGR zone, which is primarily to retain and safeguard good quality agricultural land/farm/fish ponds for agricultural purposes. It is also intended to retain fallow arable land with good potential for rehabilitation for cultivation and other agricultural purposes. There is no strong planning justification in the submission for a departure from the planning intention. (“**the First Reason**”)
  - (b) Land is still available within the “Village Type Development” (“**V**”) zone of Yuen Leng and Kau Lung Hang which is primarily intended for Small House development. It is considered more appropriate to concentrate the proposed Small House development within the “**V**” zone for more orderly development pattern, efficient use of land and provision of infrastructure and services. (“**the Second Reason**”)

## **Application for Review of the RNTPC’s Decision**

6. On 11 October 2019, the Appellant applied under section 17 of the TPO for a review of the RNTPC’s Decision (“**the Review Application**”). No written representation was submitted by or on behalf of the Appellant in support of the Review Application.
7. In TPB Paper No. 10616 (“**the TPB Paper**”) prepared by the Planning Department (“**PD**”) for the TPB’s consideration at its 1216<sup>th</sup> meeting to consider the Review Application on 10 January 2020 (“**the TPB Meeting**”), it was recorded that whilst the PD had no objection to the Application mainly on sympathetic consideration that the proposed development was sandwiched by approved applications to the immediate north and south and therefore could be considered as an infill development, the RNTPC was of the view that the site was different from other infill sites in that it was not completely surrounded by developments and the surrounding areas were predominantly rural in

character and covered by vegetation. Given the above, the members of the RNTPC generally considered that the Application should not be approved on consideration that a more cautious approach had been adopted by the RNTPC in approving applications for Small House development and that there was no previous planning approval for a Small House at the Appeal Site.

8. In §8.7 of Mr. Wu's Statement, it was clarified that during the meeting of the RNTPC, some members had in fact agreed with the PD's recommendation that sympathetic consideration could be given to the Application on the basis that the proposed development could be considered as an infill development but that some other members had noted that the Appeal Site was different from other infill sites in that it was not completely surrounded by developments and the surrounding areas were predominantly rural in character and covered by vegetation.
9. By the Decision made at the TPB Meeting, the TPB decided to reject the Review Application for the very same reasons as those given by the RNTPC for rejecting the Application as set out in §5 above ("**the Reasons**").
10. The Minutes of the TPB Meeting recorded that the issue of whether or not the proposed development could be considered as an infill development had also been considered by the members of the TPB as follows :-

*“32. A Member said that since the site was sandwiched between three sites on the north and south with approved Small House developments, there might be grounds for sympathetic consideration of the application as the proposed development could be considered as an infill. Two other Members, however, were of the view that most of the approved Small House developments in the area had not been implemented and it was uncertain whether they would be implemented at all. Since the approved Small House developments near the site had yet to be implemented, it might not be suitable to conclude that the proposed Small House at the current site could be considered as infill development at the juncture.*

*33. In response to a Member's enquiry, the Secretary said that in general, in consideration of whether a development could be regarded as an infill development, the approved developments though yet to be implemented, could be taken into account. A Member said that RNTPC had duly considered the application and*

*was of the view that the site should not be considered as infill since it was not fully surrounded by the existing/approved development. There was no overriding justification to warrant departure from the RNTPC's viewpoint."*

11. The Minutes then recorded that after deliberation, the TPB had decided to reject the Review Application for exactly the same reasons as those which the RNTPC had given for rejecting the Application, as set out in §5 above.

### **The Present Appeal**

12. By Notice of Appeal dated 27 March 2020, the Appellant lodged an appeal against the Decision pursuant to section 17B of the TPO. The Grounds of Appeal given in the Notice of Appeal were :

*"Disparity in treatment - Section 16 Application No. A/NE-KLH/572 with similar background and zoning was approved with condition on 6.9.2019."*

### **APPLICABLE LEGAL PRINCIPLES**

13. As the appeal is brought under section 17B of the TPO, the Appeal Board's powers in the appeal are set out the said section. In particular, under section 17B(8)(b), the Appeal Board has the power to "*confirm, reverse or vary the decision appealed against*".
14. Further, it is well established that the legal principles applicable to an appeal brought under section 17B are as follows:
  - (a) The hearing of an appeal to the Appeal Board is a *de novo* hearing. 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 (see *Henderson Real Estate Agency Ltd v Lo Chai Wan* [1997] HKLRD 258 at 266A).
  - (b) The Appeal Board can 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, ibid. §18; Town Planning Appeal Nos. 4&5 of 2016, ibid. §22).

15. Also of relevance in this appeal is the relatively recent decision of the Appeal Board in Town Planning Appeal No. 2 of 2019. In that decision, the Appeal Board was considering an appeal from a rejected application for planning permission to build an office block on a site located in a “Residential (Group A)” (“**R(A)**”) zone in an approved outline zoning plan (“**OZP**”), the planning intention of which was stated to be primarily for use for high-density residential development. One of the reasons which had been given by the TPB for rejection of the application was stated to be :

*“the planning intention of the “Residential (Group A)” (“R(A)”) zone is for high-density residential developments. You have not demonstrated that there are sufficient justifications to deviate from the planning intention of the R(A) zone.”*

16. The Appeal Board held that whilst the starting point for the consideration of the planning intention of the R(A) zone is that it is “*intended primarily for high density residential developments*”, it was, however, necessary to pay attention to the word “primarily” and that in its ordinary meaning, “primarily” means “mainly” or “principally” but not exclusively. The Appeal Board also pointed out that one must not overlook Column 2 of the Schedule of Uses under the R(A) zone which sets out uses which are not residential in nature which may be permitted with or without conditions upon successful applications under section 16 of the TPO. The Appeal Board explained that the significance of putting a use under Column 2 can be discerned from the following authorities :

- (a) Town Planning Appeal Nos. 2&3 of 2004 (6 January 2005), in which the Appeal Board had held (at §34) that :

*“...We also note that the use of the land for NTEH is included in column 2 of the schedule in the ES for agricultural use. This would at least indicate that the construction of the small houses on land zoned for agricultural use is **not considered to be wholly inconsistent with the planning intention behind the “AGR” zoning...**”* (emphasis added)

- (b) Town Planning Appeal No. 15 of 2011 (27 February 2014), in which the Appeal Board had held (at §42) that :

*“In our view, the proposed Hotel is in line with the planning intention of R(A) zone, which is “intended for high-density residential developments”. This is reinforced by the fact that hotel use is listed under Column 2 of the Draft Plan, which is a permissible use subject to obtaining planning permission. This is reinforced by the fact that there is nothing in the Draft Plan, the Notes and the ES cited by the Appellant and the TPB which suggest that the development of a hotel on the Site is inconsistent with the planning intention of R(A) zone.”*

17. The Appeal Board accordingly expressed the view that whilst the planning intention for all sites zoned “R(A)” in the relevant OZP is that it should primarily be used for high-density residential development, it would be consistent with the planning intention to permit other uses covered in Column 2 (such as office) *if* permission to do so (with or without conditions) is given based on the individual merits of a particular case by reference to the relevant planning criteria. The Appeal Board then concluded that the TPB’s conclusion that the application should be rejected because it would be a deviation from the planning intention of the “R(A)” zone was overly simplistic and wrong.
18. Whilst the decision in *Town Planning Appeal No. 2 of 2019* was not cited or relied upon by the parties, after the conclusion of the hearing of this appeal, this Appeal Board drew the parties’ attention to it and invited further submissions in the light thereof. The Appellant and the Respondent provided their respective further submissions on 21 and 29 October 2021 respectively. We have taken these into account in our decision.

## **THE RELEVANT PLAN**

19. As noted above, the relevant governing plan which relates to the Application and the present appeal is OZP S/NE-KLH/11 (“**the Relevant OZP**”).
20. In the Notes to the Relevant OZP (“**the Notes**”), the planning intention of the AGR zone is stated as follows :

*“This zone is intended primarily to retain and safeguard good quality agricultural land/farm/fish ponds for agricultural purposes. It is also intended to retain fallow arable land with good potential for rehabilitation for cultivation and other agricultural purposes.”*

21. The Schedule of Uses of the AGR zone in the Notes consists of two columns: Column 1 sets out the “*Uses always permitted*” whereas Column 2 sets out “*Uses that may be permitted with or without conditions on application to the Town Planning Board*”. The uses under Column 1 include, inter alia, “*Agricultural Use*” whereas the uses under Column 2 include, inter alia, “*House (New Territories Exempted House only, other than rebuilding of New Territories Exempted House or replacement of existing domestic building by New Territories Exempted House permitted under the covering Notes*”

22. §4.1 of the Explanatory Statement to the Relevant OZP explains the significance of the Schedules of Uses in the Notes as follows :

*“Attached to the Plan is a set of Notes which shows the types of uses or developments which are always permitted within the Area and in particular zones and which may be permitted by the Board, with or without conditions, on application. The provision for application for planning permission under section 16 of the Ordinance allows greater flexibility in land-use planning and control of development to meet changing needs.”*

23. Further, §14.3 of the Explanatory Statement to the Relevant OZP states that :

*“Planning applications to the Board will be assessed on individual merits. In general, the Board, in considering the planning applications, will take into account all relevant planning considerations which may include the departmental outline development plans and layout plans, and guidelines published by the Board.”*

## **PLANNING CRITERIA**

24. To provide for a consistent approach in considering planning applications for NTEH/Small House developments, the TPB has drawn up a set of interim assessment criteria which were first promulgated on 24 November 2000 (*Interim Criteria for Consideration of Application for New Territories Exempted House (NTEH) / Small House in New Territories*) and which have been amended 4 times since then. The latest set of these interim assessment criteria (“**the Interim Criteria**”), which

was promulgated on 7 September 2007, is that which is relevant to the consideration of the Application and this appeal.

25. Of the Interim Criteria, those which appear to us to be most relevant in relation to the Application and this appeal are those set out below :-

*“(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;*

.....

*(d) application for NTEH/Small House with previous planning permission lapsed will be considered on its own merits. In general, proposed development which is not in line with the criteria would normally not be allowed. However, sympathetic consideration may be given if there are specific circumstances to justify the cases, such as the site is an infill site among existing NTEH/Small Houses, the processing of the Small House grant is already at an advanced stage;*

.....

*(f) the proposed development should not frustrate the planning intention of the particular zone in which the application site is located;*

*(g) the proposed development should be compatible in terms of land use, scale, design and layout, with the surrounding area/development;”*

26. It has also been drawn to our attention that at a meeting of the TPB held on 14 August 2015, it had been noted that in adopting the Interim Criteria, the TPB and the RNTPC had been more cautious in approving applications for Small House development in recent years and that the following general observations about such cautious approach had been recorded :

- (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.

27. Further, the minutes of that meeting record that whilst pointing out that such information was to facilitate future consideration of Small House applications by members of the TPB, the Chairman had also indicated that each application would be considered on its individual merits.

## **MERITS OF THE PRESENT APPEAL**

### **Were The Reasons Given by the TPB for the Decision Sound?**

28. As noted above, the TPB had rejected the Review Application for the same reasons as those which had been given by the RNTPC for rejecting the Application as set out in §5 above.

#### ***The First Reason***

29. The main thrust of the First Reason (see §5(a) above) is that the development proposed under the Application is not in line with the planning intention of the “AGR” zone, which is primarily to retain and

safeguard good quality agricultural land/farm/fish ponds for agricultural purposes and also to retain fallow arable land with good potential for rehabilitation for cultivation and other agricultural purposes.

30. With the greatest respect to the TPB, we are of the view that, like its reason for rejecting the application in Town Planning Appeal No. 2 of 2019 as adverted to in §15 above, the First Reason is overly simplistic and wrong. As the building of an NTEH is one of the uses provided for under Column 2 of the Schedule of Uses of the AGR zone, it was not correct for the TPB to have simply rejected the Application as being not in line with the planning intention of the AGR zone. Our view in this regard is also supported by the observations of the Appeal Board in its decision in Town Planning Appeal Nos. 2&3 of 2004 referred to in §16(a) above.

### ***The Second Reason***

31. In the Statement of Mr. Wu, it was pointed out that there were 133 outstanding Small House applications in the relevant VE of Yuen Leng, Kau Lung Hang San Wai and Lo Wai at the time of the Application and the Review Application and that by the time of this appeal (2021), the number had fallen to 122. Correspondingly, 6.43 hectares of land (equivalent to about 256 Small House sites), 6.28 hectares of land (equivalent to about 250 Small House sites) and 6.03 hectares of land (equivalent to about 240 Small House sites), were available for development of Small Houses in the “V” zone of Yuen Leng, Kau Lung Hang San Wai and Lo Wai at the times of the Application, the Review Application and this appeal (2021) respectively.
32. In the light of these figures and the more cautious approach in approving applications for Small Houses involving greater weighting being put on the number of outstanding Small House applications as discussed in §26 above, we are of the view that the Second Reason was a sound and correct reason which the TPB could have taken into account in rejecting the Application. In this regard, we also note that the Appellant has not challenged the correctness of the Second Reason as such.

### **Reconsideration of the Application**

33. Having concluded that the First Reason was not a valid or proper reason for rejection of the Application, we should reconsider the Application. Indeed, as noted in §14 above, the hearing of this appeal being a *de novo*

hearing, we must exercise an independent planning judgment and can substitute our own decision for that of the TPB even if the TPB had not strictly committed any error.

### ***Relevant Issues to be Considered***

34. We have, in §25 above, identified the Interim Criteria which appear to us to be most relevant to the Application and this appeal.
35. With regard to interim assessment criterion (a), this is in fact the issue addressed in the Second Reason which we have already found to be sound and correct. Accordingly, we are of the view that interim assessment criterion (a) weighs against the Application.
36. As regards interim assessment criterion (d), we have discussed in §§7 to 10 above the consideration by the RNTPC and the TPB of the issue as to whether sympathetic consideration should be given to the Application on the ground that the Appeal Site is an infill site.
37. As noted above, the starting point was that the PD had expressed the view that it had no objection to the Application on sympathetic consideration that the Appeal Site could be considered as an infill site and that some members of the RNTPC had agreed with this recommendation. However, this view was not shared by some members of the RNTPC who took the view that the Appeal Site was different from other infill sites in that it was not completely surrounded by developments and the surrounding areas were predominantly rural in character and covered by vegetation. It is not, however, clear how many members of the RNTPC had agreed with the PD's recommendation and how many members had taken a different view.
38. During the Review Application, one member of the TPB had taken the view that since the Appeal Site was sandwiched between three sites on the north and south with approved Small House developments, there might be grounds for sympathetic consideration of the Application as the proposed development could be considered as an infill but two other members had, however, taken the view that as most of the approved Small House developments in the area had not yet been implemented it might not be suitable to conclude that the proposed Small House at the Appeal Site should be considered as infill development. The Secretary of the TPB had thereafter pointed out that in considering whether a development could be regarded as an infill development, the approved

developments though yet to be implemented, could be taken into account. Despite this, one member (it is not clear whether this was one of the two members who had expressed reservations about considering the proposed development as an infill development) had said that the RNTPC had duly considered the Application and had been of the view that the Appeal Site should not be considered as infill since it was not fully surrounded by the existing/approved developments and there was no overriding justification to warrant departure from the RNTPC's viewpoint.

39. It is apparent from the above analysis that the issue as to whether or not the Application should be afforded sympathetic consideration on the ground that the Appeal Site could be considered as an infill site is a controversial one on which different members of the RNTPC and the TPB had taken opposing views.
40. We have carefully considered this issue and we take the view that the initial recommendation by the PD that sympathetic consideration be afforded to the Application on the basis that the Appeal Site should be considered as an infill site should be accepted. It is clear that the Appeal Site fits entirely and snugly into the area between the site the subject matter of application No. A/NE-KLH/572 (“**the 572 Site**”) to the north and the plot of land comprising the sites the subject matter of applications Nos. A/NE-KLH/563 (“**the 563 Site**”) and A/NE-KLH/564 to the south. Indeed, the western boundary of the Appeal Site is flush with the western boundary of the 572 Site and the eastern boundary of the Appeal Site is flush with the eastern boundaries of the 572 Site and the 563 Site. We are accordingly of the view that the Appeal Site should be considered as an infill site.
41. Additionally, in taking the view that sympathetic consideration be afforded to the Application on the basis that the Appeal Site should be considered as an infill site, we have also taken into account that given the size, specific location and surroundings of the Appeal Site, it would not be realistic to expect the Appeal Site to be used for agricultural purposes. We are therefore of the view that the proposed development would not frustrate the planning intention of the zone in which the Appeal Site is located and is therefore in accordance with interim assessment criterion (f).
42. Further, given that the Appeal Site is sandwiched between three other proposed developments of Small Houses, we consider that the proposed development would be compatible in terms of land use, scale, design and

layout with the surrounding area, in accordance with interim assessment criterion (g).

### ***No Disparity of Treatment***

43. As noted in §12 above, the Appellant had, in his Notice of Appeal, complained of disparity in treatment between the Application and application No. A/NE-KLH/572. We do not agree that there had been disparity in treatment of these two applications by the TPB. In this regard, we accept the submissions of the Respondent that application No. A/NE-KLH/572 was different from the Application because planning permission had previously been granted for the development of a Small House on the 572 Site whereas there had been no previous planning permission granted in respect of the Appeal Site.

### ***Conclusion***

44. Notwithstanding our rejection of the Appellant's complaint of disparity of treatment and our finding in respect of interim assessment criterion (a), we are of the view that sympathetic consideration should be afforded to the Application for the reasons set out in §§36 to 42 above. We are accordingly of the view that the appeal should be allowed and that the planning permission sought under the Application should be granted.
45. We are also of the preliminary view that the grant of the planning permission should be subject to the Approval Conditions and Advisory Clauses adverted to in §§7.2 and 7.3 and Annex G to the TPB Paper. We direct that the parties should, within 28 days of this Decision, file any submissions in writing which they may wish to make about the conditions and advisory clauses to which the planning permission should be subject and the validity period of the planning permission. We will then provide our concluded views on whether or not the planning permission should be subject to any conditions or advisory clauses and if so what those conditions and/or advisory clauses should be and the validity period of the planning permission.

(Signed)

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Mr. YAN Mang-ye, John, SC, JP  
(Chairman)

(Signed)

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Professor HO Chi-wing, Daniel  
(Member)

(Signed)

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Mr. LAU Hing-tat, Patrick, JP  
(Member)

(Signed)

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Mr. LEUNG Chi-hung, Ben  
(Member)

(Signed)

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Ms. WU Ching-mei, Ada  
(Member)