IN THE TOWN PLANNING APPEAL BOARD

TOWN PLANNING APPEAL NO. 5 of 2020

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Between

ISAAC LAM *Appellant*

and

TOWN PLANNING BOARD *Respondent*

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Appeal Board:	Mr Simon LAM Ken-chung	(Chairman)
	Mr Ben LEUNG Chi-hung	(Member)
	Ms Imma LING Kit-sum	(Member)
	Mr Lawrence ONG Tong-sing, B of H, J.P.	(Member)
	Mr Daniel PONG Yiu-po	(Member)
In Attendance:	Ms Ivy LI	(Secretary)
Representation:	For the Appellant: Mr CHONG Kai Man, barrister-at-law	
	For the Respondent: Ms Deanna LAW, barrister-at-law; Ms Shirley LUI, Government Counsel	
Date of Hearing:	12 October 2021	

Date of Appellant's Supplemental Submissions:	18 October 2021
Date of Respondent's Second Submissions:	2 November 2021
Date of Appellant's Second Supplemental Submissions:	16 November 2021
Date of Respondent's Third Submissions:	30 November 2021
Date of Appellant's Reply Submissions:	2 December 2021
Date of Decision:	27 September 2022

DECISION

A. Introduction

This appeal arose from a planning application of the Appellant, made pursuant to section 16 of the Town Planning Ordinance Cap. 131 ("**TPO**"),

for the development of a proposed New Territories Exempted House ("**NTEH**") on a plot of land in Nam Wa Po (南華莆), Tai Po (大埔), New Territories, Hong Kong. The application was rejected by the Rural and New Town Planning Committee ("**RNTPC**") of the Town Planning Board ("**TPB**"). The Appellant then applied under section 17(1) of the TPO to the Respondent for a review of the decision of the RNTPC. On 9 June 2020, the Appellant was informed by the Respondent that the TPB had rejected the Appellant's review application. The Appellant therefore lodged an appeal with this Appeal Board, pursuant to section 17B(1) of TPO.

B. Background

2. The plot of land under appeal is situated in Section D of Lot No. 981 in Demarcation District 9 of the above-mentioned Nam Wa Po ("**the Site**"). It has a site area of about 181.7 m^2. At all material times the Site saddled, and it still Saddles, across two zones of the approved Kau Lung Hang (九龍坑) Outline Zoning Plan (No. S/NE-KLH/11) ("**OZP**"). 135 m^2 (or 74%) of the Site falls within the Green Belt (**GB**) zone, while 47 m^2 (or 26%) within the Village Type Development (**V**) zone. Under the Notes to the OZP, for land situated within the V zone, "House (New Territories Exempted House only)" is a use that is always permitted (and therefore no planning permission from the TPB is required). However, for land situated within the 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)" is a use that *may* be permitted with or without conditions on application to the TPB.

3. For the purpose of achieving a consistent approach in the consideration of planning applications for NTEH/Small House developments, the

TPB has drawn up a set of criteria, called "Interim Criteria for Consideration of Application for NTEH/Small House in New Territories" ("**the Interim Criteria**"). The Interim Criteria was first promulgated in 2000, and subsequently amended in 2001, 2002, 2003 and 2007. The 2007 version of the Interim Criteria is still effective as at the date hereof, and is the version relevant to this appeal.

4. The following criteria stipulated in the Interim Criteria are relevant to the appeal herein:

> "*(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;* ("**Criterion (a)**")
>
> …
>
> *(f) the proposed development should not frustrate the planning intention of the particular zone in which the application is located;* ("**Criterion (f)**")
>
> … ." (Words in bold-type added for the adoption of abbreviations)

5. The VE of a recognised village generally refers to an area within a 300-foot radius from the edge of the last village type house built in a recognised village before the formalisation of the Government Small House Policy on 1 December 1972. In the present case, it is undisputed that the entirety of the footprint of the proposed NTEH falls within the VE of Nam Wa Po.

6. On 25 January 2019, the Appellant submitted a planning application under section 16 of the TPO, seeking permission from the TPB to build a NTEH on the Site. Within a site area of about 181.7 m^2, the proposed NTEH would have a roofed-over area of 65.03 m^2, a building height of 8.23 m (3 storeys), and a total floor area of 195.09 m^2.

7. The application was considered by the RNTPC of the TPB which, during a meeting on 31 May 2019, decided to reject it, on the following grounds:

(a) The proposed development was not in line with the planning intention of the 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 is a general presumption against development within this zone. In the present case, it was considered that there was no strong planning justification for a departure from the planning intention; and

(b) Land is still available within the V zone of Nam Wa Po, where land is primarily intended for Small House development. It was considered more appropriate to concentrate the proposed Small House development within the V zone for a more orderly development pattern, efficient use of land and provision of infrastructures and services.

8. On 11 July 2019, the Appellant applied under section 17(1) of the TPO for a review of the RNTPC's said decision. The decision was upheld by the TPB. In the letter from the TPB dated 9 June 2020, by which the Appellant was informed of the TPB's said decision, the reasons given for the decision were identical to that set out in [7] above.

9. On 6 August 2020, the Appellant submitted a Notice of Appeal to this Appeal Board against the said decision of the TPB.

C. The grounds of appeal

10. The grounds of appeal, as set out in the said Notice of Appeal, may be summarised and paraphrased as follows:

(a) The TPB acted *ultra vires* in curtailing/ limiting the Appellant's constitutional right to erect a NTEH, in contravention of Article 40 of the Basic Law ("**the Basic Law Ground**");

(b) The TPB made a material error of fact in finding that there was sufficient land available within the V zone of Nam Wa Po for the Appellant to build a NTEH thereat ("**the Land Availability Ground**"); and

(c) In reaching its decision, the TPB had failed to consider all the relevant matters, viz., the unique features and characteristics of the Appellant's application herein ("**the Unique Features Ground**").

11. These grounds will be discussed in sequence below, after a summary of the evidence before this Appeal Board.

D. Evidence

12. The only witness called on behalf of the Appellant in the appeal hearing was Mr. LAM Isaac, the Appellant himself. He adopted his witness statement dated 1 October 2021 as his evidence in chief. The only question put to him under cross-examination was: whether he personally calculated the areas of land mentioned in his witness statement, to which his reply was in the negative.

13. The Respondent, on the other hand, called Mr. WU Yiu Chung Tony, Senior Town Planner/Country Park Enclaves of the Sha Tin, Tai Po and North District Planning Office, Planning Department, as its only witness. Mr. Wu adopted his witness statement dated 24 September 2021 as his evidence in chief. Ms. Deanna Law of the Respondent also asked him supplementary questions while he was giving evidence before the Appeal Board. Mr. KM Chong for the Appellant did not have any questions for him in cross-examination.

14. The respective evidence of Mr. Lam and Mr. Wu will be referred to hereinbelow where appropriate.

15. The Appellant and the Respondent also prepared and submitted their own hearing bundles for use in this appeal. These documents are accepted as evidence before this Appeal Board without objection from either party.

E. <u>The Basic Law Ground</u>

16. Mr. Chong relies on Article 40 of The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China ("**the Basic Law**"), which provides that:

> *'The lawful traditional rights and interests of the indigenous inhabitants of the "New Territories" shall be protected by the Hong Kong Special Administrative Region.'*

17. It is Mr. Chong's submission that the "*lawful traditional rights and interests of indigenous inhabitants of the New Territories*" includes, *inter alia*, the right to build NTEHs '*equivalent to that formerly (prior to 1.7.1997) enforced under the "Small House Policy", a government policy established by the Colonial*

Government in 1972.'[1] Mr. Chong further submitted that such constitutional right of the indigenous inhabitants was impeded by zoning under the outline zoning plans. In other words, it is Mr. Chong's submission that *any* control or regulation of the construction of NTEH by way of zoning under outline zoning plans is an infringement of lawful traditional rights and interests of indigenous inhabitants of the New Territories, and therefore unconstitutional.

18. It is Mr. Chong's submission that, as a result of what has been stated above, any control or regulation of the construction of NTEH by zoning would have to satisfy the "proportionality test".

19. In the course of the appeal hearing on 12 October 2021, Mr. Chong fairly conceded that, when we talk about the "*lawful traditional rights and interests of the indigenous inhabitants*", it is the rights and interests that they enjoyed as in April 1990, when the Basic Law was promulgated, that Article 40 seeks to protect. The question then arose as to whether the traditional rights and interests of the indigenous inhabitants, as far as the construction of NTEH is concerned, was already subject to the control or regulation of TPO as in April 1990. If such rights and interests were not subject to TPO at the time, any control or regulation imposed after that date would be in contravention of Article 40. On the other hand, if the indigenous inhabitants' rights as far as NTEH is concerned was already subject to regulation and control under the TPO as in April 1990, continuation after that date would not constitute contravention.

20. It was Mr. Chong's submission, first advanced in the course of the appeal hearing, that although the TPO was first enacted in 1939, it was not applicable to the New Territories until 1991. As this was a new argument not

[1] Para. 5 of the Appellant's Submission dated 7 October 2021.

advanced by the Appellant until the day of the appeal hearing, this Appeal Board granted leave to the parties to make further written submissions after the hearing on the issue, which the Appellant did by way of Supplemental Submissions dated 18 October 2021, and the Respondent did by its Second Submissions dated 2 November 2021 (with additional documents attached). Further, as the Court of Final Appeal (**CFA**) decision in *Kwok Cheuk Kin v. Director of Lands* was still awaited at the time of the hearing on 12 October 2021, directions were given for further written submissions to be received from the parties after the delivery of the CFA judgment. The CFA Judgment was handed down on 5 November 2021[2]. The Appellant submitted his Second Supplemental Submissions on 16 November 2021, and the Respondent its Third Submissions on 30 November 2021. The Appellant had the last word vide his Reply Submissions dated 2 December 2021.

21. In relation to when the TPO first became applicable to the New Territories, Mr. Chong relies on the long title of the 1988 Edition of TPO, which stated:

> *"To promote the health, safety, convenience and general welfare of the community by making provision for the systematic preparation and approval of plans for* ***the future lay-out of existing and potential urban areas*** *as well as for the types of building suitable for erection therein."* (Bold emphasis added)

22. Mr. Chong invited this Appeal Board to compare the above 1988 version of the long title with that after the Town Planning (Amendment) Ordinance 1991, which came into effect on 25 January 1991. After the amendment, the long title of the TPO read (and still reads):

> "*To promote the health, safety, convenience and general welfare of the community by making provision for the systematic preparation and approval of plans for* ***the lay-out***

[2] [2021] HKCFA 38; (2021) 24 HKCFAR 349

> ***of areas of Hong Kong*** *as well as for the types of building suitable for erection therein and for the preparation and approval of plans for areas within which permission is required for development.*" (Bold emphasis added)

23. It is Mr. Chong's submission that the difference in wording of the long title of TPO before and after the 1991 amendment shows that TPO was not applicable to the New Territories until January 1991 – i.e., after the promulgation of the Basic Law in April 1990. The imposition of restrictions and control on the indigenous inhabitants' rights to build NTEHs, including by way of zoning, is therefore against the Basic Law.

24. It is however to be noted that, first of all, the long title of the pre-1991 TPO did not mention "the New Territories", just as no reference was made to either Hong Kong Island or Kowloon. The CFA observed in *Kwok Cheuk Kin*, supra, at [4]:

> "*As is well-known, the British colony of Hong Kong comprised three blocks of territory occupied at different times. The island of Hong Kong was ceded to Great Britain by the Treaty of Nanking in 1842 and the southern part of the Kowloon peninsula by the Convention of Peking in 1860. Under the Second Convention of Peking, in 1898, the Qing Government leased part of the administrative district of San On to Great Britain for 99 years with effect from 1 July 1898, and the district thereafter became known as the New Territories*."

25. The division of the Hong Kong SAR into Hong Kong Island, Kowloon and New Territories is therefore a historical, political as well as geographical division.

26. On the other hand, the term "*urban areas*" seems to involve an entirely different concept. The term was not defined under the pre-1991 TPO. There was no need to do so, for the word "*urban*" has a plain and ordinary meaning. The Concise Oxford Dictionary defines "*urban*" as "*of, living in, or*

situated in a town or city (an urban population) (opp. RURAL)". This definition is to be contrasted with the term "*rural*", defined in the same dictionary as "*in, of, or suggesting the country (opp. URBAN); pastoral or agricultural (in rural seclusion; a rural constituency)*."

27. "*Urban*" is therefore a description of the use, state of occupation and development of an area. It has nothing to do with historical, political or geographical divisions. It might be that a substantial areas of land in the New Territories were (pre-1991) *rural* and not *urban* in character. That does not mean the New Territories was not subject to planning and control under TPO. The point is made even clearer by the reference to "*potential urban areas*" in the long title of the pre-1991 TPO. The TPB might exercise planning control over an area which, though rural in nature at the time, was considered to have the potential of developing into an urban area. It was on that basis that new towns in the New Territories were developed, one of which being Tai Po, where the Site is situated. Vide its Second Submissions dated 2 November 2021, the Respondent produced (without objection from the Appellant), *inter alia*, the First Draft of the Tai Po Outline Zoning Plan No. LTP/47, which was gazetted under the TPO on 12 December 1980. This is clear evidence and indication of the TPO being applicable to the New Territories pre-1991.

28. Our view that TPO (both pre- and post-1991) is concerned with the use, state of occupation and development of land, on a territory-wide basis, rather than the historical, political or geographical division into Hong Kong Island, Kowloon and New Territories, finds support from the background of planning legislation in Hong Kong, as expounder by the learned authors of Halsbury's Laws of Hong Kong. We shall extract certain paragraphs thereof below for the ease of reference:

(a) [385.014]:

"*In Hong Kong, land has always been an important concern of the Government. The first issue of the Hong Kong Government Gazette contained a preliminary notice regarding land sales. The notice asserted the importance of reserving to the Crown as extensive a control over lands as might be compatible with the immediate progress of the establishment. Surveying of the land commenced and the first land sale took place in 1841. A Lands Office was setup in the same year. The Government introduced regulations in view of the rapid erection of houses and in 1842 established a Land Committee with town planning-type powers. ... [T]he administration in Hong Kong continued to promote building developments subject to controls and regulations which were considered desirable.*

(b) [385.016]:

"*Public health was a major concern throughout the 19th century and led to legislation designed to enforce standards of health in respect of building works. ...*"

"Whilst the early land development may have been piecemeal and without plan, planning and regulation of land use in the early years of Hong Kong were directed towards immediate needs, and proved inadequate to meet demands of later times."

(c) [385.018]:

"*With the lease of the Kowloon Peninsula in 1860, the administration extended its future development strategies to Kowloon, to ease pressure for development on Hong Kong Island. The 99-year lease of the New Territories in 1898 led to an expansion of land development and supported by the completion of the Kowloon-Canton Railway in 1916 the New Territories rapidly developed with the creation of New Towns.*[4]"

Footnote 4 of the paragraph reads:

"New town developments commenced in 1960s. ***The first draft outline zoning plan facilitating new town developments, covering Tsuen Wan, Kwai Chung and Tsing Yi areas, was gazetted in 1961****. They gained an important impetus when the Government published its Ten-year Housing Programme in 1972. Today there are nine new towns with a population capacity of about 3.47 million … .*" (Bold emphasis added)

(d) [385.019]:

"*The early legislation dealing with public health and sanitation paved the way for the first Ordinance to deal exclusively with buildings. …*"

"1903 saw the consolidation of legislative measures on public health and building controls, which began in 1887. Part III of the consolidating statute, the Public Health and Buildings Ordinance of 1903 contained a number of town planning related regulations, such as limits on building height and number of storeys, the right to regulate the types of buildings and the Building Authority's power to approve drawings and block plans."

(e) [385.022]:

"The first attempt at introducing ***territory-wide planning strategy*** *came about in 1922 with the publication of a Town Planning Scheme for the whole of urban Hong Kong*[3]*. The Town Planning Scheme, which revised, consolidated and co-ordinated existing schemes of development and proposed future directions of land-use development, consisted of a set of maps for layout of building lots for future private development; but more importantly, it reserved sites for a wide variety of public services, rail and road works and reclamation. These master lay-out plans had a profound influence on the future land-use development pattern in urban Hong Kong.*" (Bold emphasis added)

(f) [385.023]:

"In 1935, a new Buildings Ordinance was enacted granting the Building Authority a number of specific town planning powers. …

[3] The scheme was non-statutory.

> *A Town Planning Officer was first appointed in 1935 in the Public Works Department. There was a separate Buildings Ordinance office within the Public Works Department, and the introduction of a Town Planning Officer in the department began the separation of town planning and building control functions.*
>
> *"The Housing Commission, appointed in 1935 to inquire into housing difficulties, made a recommendation in 1938 for the creation of a permanent Town Planning and Housing Committee and a permanent Town Planning and Housing Sub-Department of the Public Works Department. Later that year, the Executive Council resolved to enact legislation appointing a Town Planning Authority to draw up zone schemes and other town plans for the Governor's approval. The resulting legislation, the Town Planning Ordinance (Cap 131) came into effect on 23 June 1939 and a Town Planning Board consisting of 12 members was appointed soon thereafter.*"

29. The above statutory background helpfully set out in Halsbury's Law of Hong Kong shows that, as for many other pieces of legislation, the town planning legislation in Hong Kong was evolved over a long period of time to solve social problems or meet social needs of the time. While most of these problems and needs might arise in urban areas, there was never any attempt to exclude the New Territories from the legislative regime. On the contrary, one of the purposes of town planning legislation was to enable and facilitate the development of new towns in the New Territories.

30. Furthermore, the existence of town planning in the New Territories prior to April 1990 was acknowledged or alluded to by the CFA in *Kwok Cheuk Kin*, supra:

(a) In [12], reference was made to a 1957 Memorandum which standardised the Policy regarding the grant of free building licences. The Court quoted from [9] of the Memorandum:

"*A bona fide villager will in general be permitted,* ***subject to planning*** *and fung-shui considerations, to build a village-type house for his own occupation, and such permission (by building licence) will be free of premium*." (Bold emphasis added)

(b) At [15], the CFA said:

"*The 1957 Memorandum referred to a note prepared by the District Commissioner for the New Territories, which was annexed to it. This identified five policy considerations underlying the revised policy. They included "the need to honour our undertakings towards the country people", along with ordinary considerations of* ***town planning***, ***development control*** *and government revenue. ...*" (Bold emphasis added)

(c) At [16] of the Judgment:

"*This is one of a substantial number of internal documents of the colonial authorities recording the government's view that it was honour bound to respect the building rights which had formerly been enjoyed by those holding Old Schedule lots in 1898. This was never the only consideration, however. Other factors included* ***development control****, improving building standards, dealing with the squatter problem, catering for the larger needs of an expanding population, and maintaining government revenue. ...*" (Bold emphasis added)

31. It is thus clear that town planning and development control existed in the New Territories even before the formalisation of the Small House Policy in its present form in 1972; and no doubt such control continues thereafter.

32. Although the Explanatory Memorandum of the Town Planning (Amendment) Bill 1990 stated that "*The purpose of this Bill is to amend the Town Planning Ordinance to – (a) expand the scope of the Ordinance to the whole of Hong Kong*", this must mean extending the scope of TPO to include rural areas that are not potential urban areas. It does not mean that the New Territories were not hitherto subject to the jurisdiction of the Ordinance.

33. There is therefore no merit in the Appellant's argument that the TPO did not apply to the New Territories before January 1991.

34. The Appellant further attacked the Interim Criteria, as well as another document entitled "*Town Planning Board Guidelines for Application for Development within Green Belt Zone under Section 16 of the Town Planning Ordinance*", which has been given an TPB internal reference number "TPB PG-NO. 10" ("**the Guidelines**"). The Guidelines, together with the Interim Criteria, were followed by the TPB in the consideration of the Appellant's planning application. As earlier mentioned, the Interim Criteria were first promulgated in 2000; the Guidelines were compiled in July 1991. Mr. Chong therefore submitted that, since both documents came into existence after April 1990, reliance on them to restrict the rights of indigenous inhabitants constitutes breach of Article 40 of the Basic Law. Furthermore, it is argued that under Article 39 of the Basic Law, "*The rights and freedoms enjoyed by Hong Kong residents shall not be restricted unless* ***prescribed by law***." (Bold emphasis added). As orders, guidelines and executive directions do not constitute an instrument "prescribed by law", the Interim Criteria and the Guidelines cannot be relied upon to restrict the Appellant's constitutional rights.

35. Such argument is obviously misconceived. The power and authority of the TPB to regulate and control the construction of NTEHs by indigenous inhabitants are not derived from the Interim Criteria or the Guidelines. They are derived from the TPO. The Interim Criteria and Guidelines are nothing more than administrative guidelines as to how the power and authority conferred under the TPO would be exercised by the TPB. The publication of such administrative guidelines must be welcome and encouraged because, on the one hand, they will be generally followed by the relevant officers who process planning applications

to achieve consistency; on the other hand, these guidelines enhance transparency as they will be available and known also to applicants and prospective applicants.

36. This Appeal Board has no hesitation in rejecting the Basic Law Ground.

F. The Land Availability Ground

37. In the Notice of Appeal, it is alleged that the TPB made a "material error of fact" in finding that there was sufficient land available within the V zone of Nam Wa Po for the Applicant to build his NTEH. This allegation was based on the following contentions:

(a) The TPB wrongly included tso/tong land (祖堂地) in its estimation of available land;

(b) The TPB was wrong to include government land in its calculation, as the Government of the HKSAR is *precluded* from selling land to accommodate Small House developments, relying on the first instance decision in *Kwok Cheuk Kin & Another v. The Director of Lands & Others* [2019] HKCFI 867; [2020] 1 HKLRD 988; and

(c) The TPB was wrong to include vacant land with irregular shape, passageway, small spaces between existing small houses, and land within the curtilage of existing Small Houses in its estimation.

38. The contention in [37(b)] above was no longer pursued by Mr. Chong during the hearing before this Appeal Board, and rightly so. First of all, Au J in *Kwok Cheuk Kin* merely decided that "ding" rights in the form of private

treaty grant or exchange were not "lawful traditional rights or interests" of the indigenous inhabitants within Article 40 of the Basic Law. He did not say that the Government was *precluded* from making such grant or exchange. In any event, the first instance decision in that respect was overturned by the Court of Appeal[4]; and the Court of Appeal decision was upheld by the CFA. The other two contentions will be considered below.

39. The Appellant relies on a letter from Mr. LAM Yick Kuen (transliteration) (林奕權) ("**YK Lam**") dated 29 November 2019 to the Chairman of the TPB for the purpose of the section 17 review application. YK Lam was the Chairman of the Tai Po Rural Committee, as well as representative of the indigenous inhabitants of Nam Wa Po. What he stated in the letter may be summarised as follows:

- The land within the V Zone of Nam Wa Po was insufficient to meet the demand for NTEHs of indigenous inhabitants, both as at the present moment and for the next 10 years.
- The lands towards the south of Nam Wa Po was tso/tong land belonging to a neighbouring village. These lands would not be sold or made available to indigenous inhabitants of Nam Wa Po.
- Some of the land marked by the Planning Department as available for the construction of NTEH are within the area of existing houses, and the other areas were either slopes, woodland, passageway, carparking areas or sitting-out areas for residents, and are unavailable for NTEH construction.
- The tso/tong of Nam Wa Po (Lam Wing Kat Hall) had stopped carving out land for NTEH construction since the 1980s.

[4] *Kwok Cheuk Kin v. Director of Lands* [2021] 1 HKLRD 737.

40. It is to be noted that YK Lam has not been specific in his comments about the availability of land in the V zone of Nam Wa Po. He only made general remarks and observations on the issue. Further, the Appellant has not seen fit to call him as a witness in the appeal hearing.

41. The Appellant further relies upon a Supplemental Planning Statement by Euro Asia Construction Engineering Limited dated December 2019, which was also submitted to the TPB in the course of the review application. This Statement contains an attempt to make a detailed assessment of areas available for NTEH construction, as well as an estimation of the number of NTEHs that could be built on them. The identity and professional qualifications of the individual who compiled the Statement is unknown; nor was the complier called to give evidence before this Appeal Board. The Appellant made no attempt to explain or elaborate upon the findings of the Statement, which makes it difficult to comprehend, not to mention having its veracity tested under cross-examination. The only other observation that this Appeal Board can make on the Statement is that it has apparently excluded all Government land in its assessment of land availability. This must be wrong in view of [38] above.

42. On the other hand, it is the evidence of Mr. Wu that, in the Planning Department's estimation of land available for the construction of NTEHs within the V zone, land occupied by major tree clusters, steep slopes, existing and approved village houses, roads and stream buffers were deducted from the area available for Small House development. Mr Wu also produced to the Appeal Board an extract plan prepared on 11 May 2021 (Planning Department Reference No. A/NE-KLH/562 Plan AP-2b) showing the estimated amount of land available for Small House development within the V zone of Nam Wa Po.

43. Mr. Wu's estimation of land available may be summarised as follows:

	As at the time of s.16 application (in 2019)	As at the time of s.17 review (in 2020)	As at the time of appeal (in July 2021)
Outstanding Small House Applications in 'VE' (i)	18	16	12
No. of 10-year Small House demand in 'VE' (ii)	185	185	185
Future Small House demand (i) + (ii)	203	201	197
Land available within the 'V' zone	2.32 ha (equivalent to about 92 SH sites)	2.27 ha (equivalent to about 90 SH sites)	2.23 ha (equivalent to about 89 SH sites)

44. Mr. Wu said while giving *viva voce* evidence before this Appeal Board that each and every cluster of land marked as land available in the aforesaid extract plan can accommodate at least one NTEH of 65.03 m^2. Parcels of land which are of odd shapes, and which cannot accommodate an NTEH, have been excluded. Furthermore, a buffer of 3 m has been allowed between houses.

45. Mr. Wu's evidence was not challenged via cross-examination. This Appeal Board has no difficulty accepting his evidence, and preferring his evidence over that of the Appellant's hearsay evidence as set out in [39] and [41] above in so far as there are contradiction between the evidence of the parties.

46. What remains is the issue concerning the ease with which some of the lands, predominantly those held by tso/tong and private individuals (such as that within the curtilage of existing Small Houses), may be available to the Appellant.

47. The Respondent does not deny that there might be practical difficulty in making some of the lands included in its estimation actually available for the construction of NTEHs. Mr. Wu however said that land ownership is not a material consideration in the estimation of land available, as it could be subject to change, and land parcels could be sub-divided to suit development needs. As for land held by tso/tong, although the selling of it requires the consent of the relevant District Office pursuant to the New Territories Ordinance Cap. 97 (and probably also subject to complicated procedures among the indigenous inhabitants, as mentioned by YK Lam in his aforesaid letter to the TPB), there is no absolute prohibition against the change of ownership of these land. Mr. Wu also cited an example in 2008, when an indigenous villager of San Au Kok obtained a Small House grant to build a Small House on a piece of land carved out from a lot owned by tso/tong of Nam Wa Po. The Appellant has not adduced any evidence of advanced any arguments in response to this example.

48. In Town Planning Appeal Nos. 6 & 7 of 2019 (date of Decision: 3 February 2021), this Appeal Board (differently constituted) said:

'33. The Appellants' complaint in this regard is that the lands within the V Zone were all owned/acquired by t'so/t'ong and developers. It is very difficult, said Mr. Koo, for the Appellants to purchase any land within the V Zone to build SHs.

34. The Appeal Board rejects [this] Ground of Appeal in that ***the difficulties in acquiring lands within the V Zone is not a relevant factor in granting planning permission****. As explained by the Appeal Board in Town Planning Appeal No. 2 of 2017 (§§66-69):*

> *"66. Paragraph (B)(a) of the Interim Criteria, in its plain and ordinary meaning, simply addresses the 'general' shortage of land and makes no distinction between Government land and private land.*
>
> *...*
>
> *68. The irrelevance of the difficulties that an applicant or appellant may encounter in implementation was succinctly put by the TPAB in TPA No. 13 of 1993 at paragraphs 80 to 81:*
>
> *'Of course, planning permission alone will not secure the appellant's objective but the appellant also requires Government's cooperation, e.g. on lease modification and exchange of land. Whether such cooperation will be forthcoming is beyond our control. Nor does it concern us. Our task is to determine* ***purely from a planning point of view*** *whether the Appellant's proposal should be permitted. This approach is consistent with views expressed in British Railways Board v. Secretary of State for the Environment, The Times, 29th October 1993. There Lord Keith of Kinkel said in the House of Lords:*
>
> > *"A would-be developer may be faced with difficulties of many different kinds, in the way of site assembly or securing the discharge of restrictive covenants. If he considers that it is in his interests to secure planning permission notwithstanding the existence of such difficulties, it is not for the planning authority to refuse it simply on their view of how serious the difficulties are'."*
>
> *69. We agree with [the TPB]'s submission on the reasons underlying this principle. If all private land which is not "immediately available" is to be discounted, it may open up a floodgate of applications claiming for sympathetic consideration, thereby resulting in a proliferation of Small House development outside the "V" zone and further encroachment into the "GB" zone inconsistent with the clear planning intention."'* (Bold emphasis added)

49. The present case (as well as the Town Planning Appeal cases referred to above) is however in a situation that is the "converse" of that in *British Railways Board v Secretary of State for the Environment*, supra. Instead of rebuffing the suggestion that a planning application should be rejected because of the difficulties in the implementation of the scheme under application, the Appellant is arguing that the planning application ought to be approved because, were it otherwise, there would be great difficulty in implementing his scheme of construction of the NTEH. We have some reservation as to the applicability of *British Railways Board* case, supra, as well as *Merritt v Secretary of State for the Environment, Transport and the Regions* [2000] 3 PLR 125 in the latter situation, as well as the reasoning adopted by previous Town Planning Appeal cases.

50. Be that as it may, we are in support of the Planning Department's approach that, while estimating the amount of land available for the construction of NTEHs, the ease (or difficulty) with which land may be acquired from individual (non-government) owners ought to be disregarded, as long as such acquisition is physically and legally possible. Were it otherwise, the Planning Department would be required to conduct an almost impossible inquiry into whether individual owners of land were willing to sell their land. This is a matter of market negotiation between the land owners and the individuals who are desirous of building an NTEH, and should not be a relevant consideration from the town planning point of view. Moreover, as Mr. Wu rightly pointed out, market situation and considerations may change.

51. Even if we are wrong in the above respect, it is Mr. Wu's uncontroverted evidence that the amount of Government land available within the V zone of Nam Wa Po is sufficient for the construction of 25 Small Houses. The table in [43] above shows that there are only 12 outstanding Small House applications. It is Mr. Wu's evidence that, since about 2013/2014, having noticed

that there was a proliferation of Small House development outside the V zone even though land was still available within the V zone for development, a more cautious approach in approving applications for Small House development was adopted by TPB. On 14 August 2015, TPB considered a paper submitted by the Planning Department regarding the statistics on approved Small House applications in recent years. The meeting discussed and formally established this cautious approach, which entails that, in considering whether there was a general shortage of land in meeting Small House demand, more weight would be put on the number of outstanding Small House applications under processing by the Lands Department[5].

52. In the present case, since the amount of Government land alone would be sufficient to meet the demand of outstanding Small House applications, the TPB's view that there is no general shortage of land in Nam Wa Po to meet Small House demands cannot be faulted.

53. The Land Availability Ground is therefore also rejected.

G. <u>The Unique Features Ground</u>

54. In the Notice of Appeal, the "unique features" that were contended to constitute "strong reasons for a departure from the planning intention of the GB Zone" were as follow:

(a) 100% of the Site falls within the VE of Nam Wa Po;
(b) The Site is located immediately adjacent to the existing cluster of Small Houses;

[5] And less weight on the 10-year demand figures.

(c) The proposed development is compatible with the surrounding area;

(d) The vegetation destruction near the Site is not procured or caused by the Appellant, but by typhoon;

(e) Relevant Government departments had no objection to the application; and

(f) The V zone of Nam Wa Po was designated in 1993. Since then, there had been a substantial increase in the population of indigenous villagers and Small House demand, as well as changes in the surrounding development context, as a result of which delineation of the V and GB zones should be reviewed.

55. These "unique features" were not elaborated upon by Mr. Chong, whether in his written or oral representations. They were in any event presented to the TPB during the review hearing, and presumably duly considered by the TPB. Be that as it may, this Appeal Board will take them into account in our exercise of independent planning judgment, in [63] to [65] below.

56. We should also add that, for the "feature" at [54(f)], it is Mr. Wu's uncontroverted evidence that in 2002, the TPB, having regard to the large number of Small House applications outside the V zone at the time, expanded the V zone of Nam Wa Po from approximately 5.7 ha to 7.5 ha through an amendment to the OZP under section 5 of TPO. This ground of complaint is therefore unsustainable. Any proposed amendment to the OZP is in any event outside the ambit of this appeal.

57. Mr. Chong, in his submissions before the Appeal Board, raised two further points which are more conveniently dealt with under this head.

58. The first point criticizes TPB for accepting the view of the Planning Department, that the planning application ought to be rejected for being not in line with the planning intention of the GB zone, in circumstances where, in the same paper as the one setting out the aforesaid view of the Department[6], the Department stated that '*the proposed development is generally in compliance with [the Guideline] for development within "GB" zone*.'

59. To be fair to the Planning Department, in the context of the aforesaid paper, in stating that "*the proposed development is generally in compliance with [the Guideline]*", the Department was probably referring to the fact that there was no objection or adverse comment on the application[7] from other Government departments, as the Guidelines contains references to numerous planning criteria which involve other Government departments. In any event, the "Important Note" of the Guidelines clearly states:

> " *The guidelines are intended for general reference only. The decision to approve or reject an application rests entirely with the Town Planning Board and will be based on individual merits and other specific considerations of each case.*"

60. The TPB no doubt formed its own independent judgment rather than following blindly the view of the Planning Department; so will this Appeal Board.

61. Mr. Chong's other complaint concerned "misleading submission" made to the TPB, concerning two previous approvals granted by TPB to the development of NTEHs within the GB zone (Application Nos. A/NE-KLH 330 of 28 January 2005; and A/NE-KLH/463 of 21 March 2014). It is unusual, to say the least, for the decision of a tribunal to be criticized on the ground that misleading submissions had been made to it, and that such submissions "would

[6] RNTPC Paper No. A/NE-KLH/562A.
[7] Paragraph 12.4 of the paper.

have affected" the Tribunal's decision. Furthermore, these two applications were approved by RNTPC at a time when the "more cautious approach" had not yet been adopted by TPB. Neither in the Notice of Appeal, nor in Mr. Chong's written and oral submissions to this Appeal Board, has it been suggested that these two previous applications are of relevance to this appeal.

62. There is therefore no substance in Mr. Chong's aforesaid complaints.

H. <u>This Appeal Board's Planning Judgment</u>

63. For the reasons above-mentioned, this Appeal Board agrees with TPB's conclusion that paragraph B(a) of the Interim Criteria is not satisfied, as there is no general shortage of land in meeting the demand for Small House development in the V zone of Nam Wa Po. Be that as it may, we are still obliged to come to our own independent planning judgment, taking into account all the circumstances of the case, including the "unique features" set out in [54] above.

64. Under the Explanatory Note of the OZP:

> "*The planning intention of this zone* [i.e., the GB 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***." (Bold emphasis added)

65. Has the Appellant succeeded in rebutting this "*general presumption against development*"? We must answer this question in the negative. As much as 74% of the Site falls within the GB zone. Approving this application would certainly contribute to the development of "urban sprawl" which is already seen happening along the boundary between the V and GB zones in the OZP. Allowing the proposed Small House development to go ahead would also create

a bad precedent – opening a floodgate to future developments, thereby defeating the planning intention of the OZP.

I. Conclusion

66. This Appeal Board has therefore unanimously decided to reject this appeal. The relevant decision of the Town Planning Board is hereby confirmed. If any party has any application for costs, such application should be made in writing to this Appeal Board within 21 days of the date of this Decision.

(Signed)

Mr Simon LAM Ken-chung

(Chairman)

(Signed)	(Signed)
Mr Ben LEUNG Chi-hung	Ms Imma LING Kit-sum
(Member)	(Member)

(Signed)	(Signed)
Mr Lawrence ONG Tong-sing, B of H, J.P.	Mr Daniel PONG Yiu-po
(Member)	(Member)