

IN THE TOWN PLANNING APPEAL BOARD

TOWN PLANNING APPEAL NO. 3 of 2019

Between

CHEUNG STEVEN PAK HUNG

Appellant

and

TOWN PLANNING BOARD

Respondent

Appeal Board:	Mr Simon LAM Ken-chung	(Chairman)
	Ir Dr Wilton FOK Wai-tung	(Member)
	Mr KONG Chau-ming	(Member)
	Ms Cissy LAM King-sze	(Member)
	Professor TSE Kam-tim	(Member)
In Attendance:	Ms Lesley LEUNG	(Secretary)

Representation:	For the Appellant: Mr YEUNG Siu Fung
	For the Respondent: Ms Jess YC Chan, Senior Government Counsel

Date of Hearing:	30 September 2020
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Date of Further Written Submissions from the Respondent:	7 October 2020
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Date of Further Written 16 October 2020

Submissions from the

Appellant:

Date of Decision: 9 August 2021

DECISION

I. 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 Ma Tseuk Leng San Uk Ha (麻雀嶺新屋下), Sha Tau Kok (沙頭角), 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 5 March 2019, the Appellant was informed by the Respondent that the TPB had also rejected the Appellant’s said application. The Appellant therefore lodged an appeal with this Appeal Board, pursuant to section 17B(1) of TPO.

2. The Appellant is represented in this appeal by Mr. YEUNG Siu Fung, who is not a legally qualified person. Mr. Yeung has in fact represented the Appellant throughout the application procedure, including the proceedings before the RNTPC and TPB.

II. Background

3. The plot of land under appeal is situated in Lot No. 1356 Sub-section B in Demarcation District 39 of the above-mentioned Ma Tseuk Ling San Uk Ha (“**the Site**”). It has a site area of about 130.06 m². At all material times the Site fell, and it still falls, entirely within an area zoned “Agriculture” (“**AGR**”) in the Luk Keng and Wo Hang (鹿頸及禾坑) Outline Zoning Plan (“**OZP**”) (No. S/NE-LK/11). Under the Notes to the OZP, “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)” within the AGR zone is a use that *may* be permitted with or without conditions on application to the TPB.

4. For the purpose of achieving a consistent approach in considering 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.

5. 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)”**)

... .” (Bold emphases added for the adoption of abbreviations)

6. 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 introduction 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 Ma Tseuk Leng (麻雀嶺), Ma Tseuk Leng San Uk Ha and Wo Tong Kong (禾塘崗).

7. On 16 July 2018, 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 130.06 m², the proposed NTEH would have a roofed-over area of 65.03 m², a building height of 8.23 m (3 storeys), and a total floor area of 195.09 m². The Appellant indicated that the unroofed area of the Site would be used as garden for the proposed NTEH.

8. The application was considered by the RNTPC of the TPB which, during a meeting on 7 September 2018, decided to reject it, on the following grounds:

- (a) The proposed development was ***not in line*** with the planning intention of the AGR zone in the Luk Keng and Wo Hang area (“**the Area**”), which was primarily to retain and safeguard good quality agricultural land/ farm/ fish ponds for agricultural purposes, and to retain fallow arable land with good potential for rehabilitation for cultivation and other agricultural purposes. In the present case, it was considered that there was no strong planning justification for a departure from the planning intention;
- (b) The proposed development did not comply with the Interim Criteria, in that the proposed development would involve vegetation clearance and hence affect the existing natural landscape; and

- (c) Land is still available within the “Village Type Development” (“V”) zone of Ma Tseuk Leng, Ma Tseuk Leng San Uk Ha and Shek Kiu Tau (石橋頭) village cluster (“**the Subject V Zone**”), where land is primarily intended for Small House development. It was considered more appropriate to concentrate the proposed Small House development close to the existing village cluster for orderly development pattern, efficient use of land and provision of infrastructures and services.

9. On 8 October 2018, 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 5 March 2019, by which the Appellant was informed of the TPB’s said decision, the reasons given for the decision were that set out in sub-paragraphs (a) and (c) of paragraph 8 above. In other words, the TPB was no longer relying on the reason set out in sub-paragraph (b), which therefore does not require further consideration.

10. On 2 May 2019, the Appellant submitted a Notice of Appeal to this Board against the said decision of the TPB.

III. The grounds of appeal

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

- (a) In respect of the ground of rejection set out in paragraph 8(a) above (“**the Planning Intention Ground**”):
- (i) Although the Site is situated in the AGR zone, it is close to the boundary with the “V” zone. The Director of Agriculture, Fisheries and Conservation (“**DAFC**”) has commented on the subject application as follows:

“the Site is a fenced backyard and has a relatively small size (approximate 130 m²). As the Site possesses low potential for agricultural rehabilitation, [DAFC] has no strong view against the application from agriculture point of view.”

The Appellant further alleges that the Site is franked by two existing small houses to the near south, and an approved section 16 application case on its immediate west. It is alleged that the TPB had failed to pay due regard to the views of the DAFC.

- (ii) There were 5 approved section 16 cases in the same locality, approved in 2000 and 2013 respectively, which were even further away from the Subject V Zone than the Site.
- (b) In respect of the ground of rejection set out in paragraph 8(c) above (**“the Land Availability Ground”**):
 - (i) According to TPB Paper No. 10517, the land available in the Subject V Zone is insufficient to fully meet the total small house demands for the future 10 years ahead; and
 - (ii) In the estimation of available land, the TPB had failed to deduct areas of land for recreation and worship (such as local shrines, Pak Kung 伯公 and To Tei 土地), and areas for the provision of essential infrastructures and services.

IV. Evidence

12. The Appellant did not call any witness to give evidence on his behalf. He relies on the documents contained in the Documents Bundle compiled for this appeal. The Respondent, on the other hand, called Mr. FUNG Tin Yin, Senior Town Planner/North of the Sha Tin, Tai Po and North District Planning Office, Planning Department, to give evidence on its behalf. Mr. Fung adopted his witness statement dated 14 September 2020 as his evidence in chief. He was also cross-examined by Mr. Yeung, and answered questions from members of this Appeal Board. His evidence will be referred to hereinbelow where appropriate.

V. The Land Availability Ground

13. We shall deal with this ground of appeal before the Planning Intention Ground.

14. This ground relates to Criterion (a), which says that sympathetic consideration may be given if not less than 50% of the proposed NTEH/ Small House footprint falls within the 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*. It is undisputed that the entirety of the NTEH proposed to be built on the Site falls within the VE of 3 villages, viz., Ma Tseuk Leng, Ma Tseuk Leng San Uk Ha and Wong Tong Kong. One of the questions in dispute is: whether there is a general shortage of land within the Subject V Zone to meet the demand for Small House development.

15. Mr. Yeung places reliance of paragraph 7.5 of TPB Paper No. 10517, which was prepared for the purpose of the review application of the present case by TPB. The said paragraph reads:

“Regarding the Interim Criteria, more than 50% of the footprint of the proposed Small House falls within the ‘VE’ of Ma Tseuk Leng, Ma Tseuk Leng San Uk Ha and Wo Tong Kong. While land available within the “V”zone is insufficient to fully meet the total Small House demand (in total about 14 ha or equivalent to 559 Small House sites), it is noted that land (about 2.31 ha or equivalent to 91 Small House sites) is still available within the “V” zone to meet the outstanding 64 Small House applications. It should be noted that the Board has adopted a more cautious approach in approving applications for Small House development in recent years. Amongst others, in considering whether there is a general shortage of land in meeting Small House demand, more weighting has been put on the number of outstanding Small House applications provided by [the Lands Department]. As such, 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.”

16. In short, in considering whether there is a general shortage of land in meeting Small House demand, TPB will put more weight on the number of presently outstanding applications, instead of forecasts of what might be the demand in future. Mr. Yeung however says that the TPB should look to the future because, “[w]ithout forward planning at the moment, the indigenous villagers have nowhere to turn to for their plight and quest for application of building small houses within their respective

village and their village environs” (paragraph III(1) of Mr. Yeung’s written submissions).

17. The issue has been considered in previous decisions of this Appeal Board (differently constituted). Thus, in *Lee Tim Sau v Town Planning Board* (Town Planning Appeal No. 9 of 2016), it was stated that:

‘46. The other explanation proffered by Ms. Wong is more reasonable. It concerns the “demand” side instead of the “supply” side of the equation. While the sufficiency of land available for development is now assessed more predominantly by reference to the number of outstanding applications, previously, more weight was given to the “10-years demand forecast” provided by the indigenous inhabitant representatives of the villages concerned. Such forecasts were not verified by the Lands Department, and are very substantial. Ms. Wong said that there was no fixed time for the implementation of this “cautious approach”, but she was able to say that the 2011 approvals were most likely based on the previous approach. It is to be noted that there has been no approval of the construction of NTEH in the “VE” zone of Lei Uk Tsuen at all after 2014, probably reflecting the effect of the adoption of the “cautious approach”.

47. The adoption of this “cautious approach” cannot be faulted. It is certainly a more realistic way of estimating the sufficiency of land available for development, and would result in better planning of land use.

48. This Board therefore does not consider that the *previous* approval of planning applications to the east of Lei Uk Tsuen necessarily contradicts the Respondent’s case that there is *now* sufficient land within the “V” zone of Lei Uk Tsuen for NTEHs/Small Houses.’

18. Similarly, in *Mr LI Chi Yan Mark v Town Planning Board*, heard together with *Mr. WONG John But Wai v Town Planning Board* (Town Planning Appeals No. 4 & 5 of 2016), this Appeal Board stated, at paragraph 30(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.”

19. To a similar effect, please see 鄭惟鍵 v 城市規劃委員會 (Town Planning Appeal No. 3 of 2017), at paragraph 24.

20. This Appeal Board agrees with what was discussed and decided in the above-mentioned previous cases. We are dealing with the issue whether there *is* a general shortage of land in meeting the demand for Small House development. What is important is the *present* situation, *not* what the situation might be in 10 years’ time.

21. As explained by Mr. Fung, whose evidence is not challenged at least in this respect, amongst the 8 previous section 16 cases cited by Mr. Yeung, 6 were approved under 3 separate applications between 1992 and 2013, before the above-mentioned “cautious approach” was adopted by the TPB. In particular, the two houses to the near south of the Site (mentioned in paragraph 11(a)(i) above) was approved in 2000, and the one to the immediate west of the Site in 1992. The other 2 cases were domestic buildings in existence before the gazetting of the Interim Development Permission Plan pertaining to the Area in 1990. None of them is useful as a comparison to the case presently under appeal.

22. On the contrary, to the southeast of the Site, there were similar applications which were rejected in 2018 for the reasons of being not in line with the planning intention of the “AGR” zone, and of land being still available within the “V” Zone. According to Mr. Fung, the “cautious approach” has been consistently adopted in all Small House applications since 2015. The approval of the subject application would set an undesirable precedent, and would have a significant read-across implication to all similar cases.

23. This Appeal Board considers that there is no unfairness to the Appellant as far as the application of the “cautious approach” is concerned. Government policies do change from time to time. As long as the changes are well-reasoned, and apply equally to all subjects concerned, there can be no cause of complaint.

24. Mr. Yeung’s criticism against the estimation of the amount of land available in the Subject V Zone also seems misconceived. It is the evidence of Mr. Fung, which this Appeal Board accepts, that the land available within the Subject V Zone for Small House development is estimated according to the established practice

of the Planning Department. First of all, the net developable area within a “V” zone is calculated by deducting the following areas from the total area of the “V” zone, viz.:

- Existing village houses;
- Road, footpath and track;
- Steep slopes;
- Tree clusters especially Fung Shui woodland;
- Fung Shui pond;
- Existing heritage site/ village office/ Tsz Tong/ ancestor hall/ shrine;
- Temple, church and other permanent building development within the village;
- Burial ground;
- Stream buffer;
- NTEH cases already approved; and
- Planned public facilities on Government and private land.

25. Mr. Fung also gave evidence to the effect that land ownership is not a material consideration in the estimation of available land, and that both private and Government land are included in the estimation. For Government land, applications may be made to the Lands Department for a lease in respect thereof. Private land sale is of course a matter for private negotiations. Areas currently occupied by private gardens and temporary structures or uses, though may not be readily available for Small House development, are still included as a source of land supply in the long run. Odd-shaped land that could not reasonably accommodate the footprint of a Small House would however be excluded.

26. After calculating the net developable area within the “V” zone as aforesaid, it will be assumed that 40 small houses could be built per hectare of land. This is equivalent to a site coverage of about 26%, which seems fairly reasonable.

27. It is of course understandable and foreseeable that, since most if not all of the developable area within the “V” zone is held either by private individuals or by the Government, it may sometimes be difficult for an intended Small House applicant to acquire suitable land to build. Land owners may also demand a high price from prospective purchasers. This is however a market reality which every citizen of Hong Kong faces. The existing town planning policy, which aims at concentrating proposed Small House developments close to the existing village cluster for more orderly development, more efficient use of land, and easier provision of infrastructures and services, cannot be said to be unreasonable or flawed.

28. This Appeal Board therefore unanimously decide to reject this ground of appeal.

VI. The Planning Intention Ground

29. In the Notes of the OZP, under the heading “Agriculture”, the “Planning Intention” of the AGR zone is stated to be 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.”

30. In the Explanatory Statement of the OZP, when describing the general planning intention for the Area, it is stated that:

“8. GENERAL PLANNING INTENTION

The general planning intention for the Area is to enhance natural conservation of countryside and to preserve natural landscape and features of ecological significance and site/structure of archaeological/historical significance; and to promote the conservation of the rural character of the Area, with a view to controlling urban sprawl and protecting and preserving agricultural land.”

31. In the Explanatory Statement, it is also stated that:

“9.4 Agricultural (“AGR”): Total Area 109.15 ha

9.4.1 This zone is intended primarily to retain and safeguard good quality agricultural land/ farm/ fish ponds for agricultural purposes. The zoned areas are generally well served by irrigation and servicing facilities as well as marketing facilities for intensive farming including livestock rearing, fish culture and horticulture. This zone is also intended to retain fallow arable land with good potential for rehabilitation for cultivation and other agricultural purposes.”

32. Mr. Yeung relies heavily on the comments on this application by DAFC, as set out in paragraph 11(a)(i) above, as well as the fact that the Site is already fringed by two existing small houses to the near south, and an approved section 16 application case to its immediate west.

33. It is Mr. Fung's argument that comments of DAFC in relation to section 16 applications are for the consideration of the RNTPC and TPB only. While the RNTPC and TPB no doubt considered and took into account DAFC's comments, they were not bound by such comments. The subject application remained not in line with the planning intention of the "AGR" zone, and the Site could be used not only for cultivation but also for other agricultural activities such as plant nursery. The Appellant has not provided strong planning justification in his application to demonstrate that the proposed Small House development is in line with the planning intention of the "AGR" zone, or merit a departure from the planning intention.

34. The majority of the Appeal Board (Ir Dr Wilton FOK Wai-tung, Ms Cissy LAM King-sze and Professor TSE Kam-tim) agree with what Mr. Fung said in evidence (paragraph 33 above). Although DAFC has "no strong view against" the application, he did not say he support the application either. Approving the subject planning application may create a bad precedent and open a flood-gate for similar applications. Moreover, the majority disapproves of the Appellant's attempt to create a *fait accompli*, by removing the trees that were originally on the Site, and partly paving the Site with concrete. They therefore reject this ground of appeal also.

35. In particular, Ms Lam would like to express the following views:

- (a) While each case must be considered on its own merits, the fact that the present decision may set a precedent for later applications is a relevant and important consideration - see Town Planning Appeal No.8 of 2014, paragraphs 62-64.
- (b) The Appellant in his review application to the TPB referred to 8 previously approved developments in the vicinity to support his application. Mr. Fung, in giving evidence on behalf of the TPB, had to explain how each of the approved cases was distinguishable from the present case (see paragraph 21 above). That exercise demonstrates how one must be careful when making a decision that may set a precedent for allowing for erosion or further erosion of the rural landscape and agricultural use of the area.

- (c) Secondly, the minority believes that if the building of a NTEH frustrates the planning intention of the area, then the previous applications would not have been allowed. But read holistically, the Interim Criteria constitutes a balancing exercise - the housing need of a villager is balanced against the stipulated planning intention and land use of the area. So if the proposed NTEH development falls within the V zone or largely within the V zone, then the impact on the rural environment takes a back seat and the demand for NTEHs is allowed to take precedent - hence paragraphs A(a) and (b). Conversely, if it falls outside, then unless housing demand is demonstrated, other considerations come into play.
- (d) The previous applications were decided before the “cautious approach” was implemented. A different yardstick was used in assessing housing demand. In approving the previous applications, the Board there could simply be of the view that housing needs outweighed other considerations. It does not necessarily follow that they considered that there was no frustration of the planning intention.

36. The Chairman and remaining member (Mr. KONG Chau-ming) of the Appeal Board, on the other hand, consider that there is substance in this ground of appeal. In the first place, the RNTPC and TPB found that the proposed development is “**not in line with**” the planning intention of the “AGR” zone of the OZP. The term used in Criterion (f) is however that “the proposed development should not **frustrate** the planning intention of the particular zone”. Is “not in line with” synonymous with “frustrate”? The minority does not think so. Any use that is *not* agricultural would be “not in line with” the planning intention. To “frustrate”, however, carries a more serious connotation. According to the Concise Oxford Dictionary, “frustrate” means “make ineffective” or “prevent from achieving a purpose”. It means more than non-conformity; it carries a “destructive” meaning. It is therefore apparent that the RNTPC and TPB had applied a wrong test when considering whether Criterion (f) was satisfied.

37. Giving the word “frustrate” its proper meaning, the minority cannot see how the planning intention could be frustrated by the building of a NTEH on the Site. As earlier mentioned, there is a Small House already built to the immediate west of the Site. In fact, the Site was (and may still be) used as the garden of that house, which is owned by the Appellant’s relative. There is also a site approved for the building of two

Small Houses not far away to the south of the Site. Further, the Site is close to the “V” zone of Ma Tseuk Leng San Uk Ha. Any adverse effect that the building of a NTEH on the Site might bring to the rural or agricultural environment of the locality must be minimal, as suggested by the above-mentioned comments from DAFC.

38. The minority’s view in this respect is further reinforced by the grant of planning permission for the cases mentioned in paragraph 21 above. Some of the approvals were granted after the promulgation of the Interim Criteria in 2000, probably including the two houses to the south of the Site (mentioned in paragraph 36 above). Although a different policy for the estimation of available land was used at that time, these applications should still have been rejected if they were in breach of Criterion (f). Why would the subject application be in breach of Criterion (f), when these previous applications did not? There has been no explanation from the Respondent in this regard.

39. The minority therefore holds that the Appellant succeeds on the Planning Intention Ground. However, since the Appellant fails in the Land Availability Ground, and therefore has not been able to satisfy Criterion (a), the minority would still reject this appeal.

VII. Further matter

40. This Appeal Board would also like to deal with a point on which we invited further written submissions from the parties after the hearing of this appeal on 30 September 2020. This point concerns whether the Site is an Old Schedule agricultural lot held under Block Government Lease restricting its use to agricultural purpose. The Block Government Lease concerned (“**the BGL**”) was subsequent to the hearing provided by Senior Government Counsel for the Respondent vide a letter dated 7 October 2020. As mentioned in paragraph 4 of the said letter, the Lot in which the Site is situated (Lot 1356) was *described* as “Padi” in the Schedule of the BGL. It has however been long-established by the Court of Appeal case in *Attorney General v Melhado Investment Ltd* [1983] HKLR 327 that the use of the land as listed in the schedule to the Government lease was descriptive only, the purpose of the schedule being to identify the lands to which the lease related. This Appeal Board therefore does not accept the Respondent’s submission that the use of the Site is restricted by the terms of the BGL to agricultural purposes.

41. As with most, if not all, Block Government Leases, the BGL contains a building covenant, to the effect that the lessees shall not erect or construct any building or structure on the Site without the approval of the Director of Land. A building covenant is however very different from a user covenant. Precedents also show that approval to build was readily granted should planning permission be obtained for the erection of a NTEH. In any event, neither the existence of a user covenant nor a building covenant had been the reason behind the rejection of the planning application by RNTPC or TPB. Possible restrictions under the BGL have similarly been disregarded by this Appeal Board in the present case.

VIII. Conclusion

42. For the above reasons, although members of the Appeal Board hold different views as to whether the Appellant's proposed development frustrates the planning intention under the OZP, they have unanimously decided that this appeal ought to be rejected. 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.

[Ending]

(Signed)

Mr. Simon LAM Ken-chung
(Chairman)

(Signed)

Ir Dr Wilton FOK Wai-tung
(Member)

(Signed)

Mr KONG Chau-ming
(Member)

(Signed)

Ms Cissy LAM King-size
(Member)

(Signed)

Professor TSE Kam-tim
(Member)