IN THE TOWN PLANNING APPEAL BOARD
Town Planning Appeal No. 3 of 2024

BETWEEN

Mr. LEE Mang-kan (李孟勤)	Appellant
And	
Town Planning Board	Respondent

Appeal Board:	Mr. WONG Yuk-lun, Horace, SC, JP	(Chairman)
	Ms. HO Sze-may, Mindy	(Member)
	Professor LIU Hong-bin	(Member)
	Mr. LO Chun-hang	(Member)
	Mr. WONG Chiu-lung, Dennis	(Member)
In Attendance:	Ms. Ivy LI	(Secretary)
Representation:	Mr. YAM Sai-ling (for the Appellant)	
	Miss Katrina CHAN, Government Counsel, Department of Justice (for the Respondent)	
Date of Hearing:	22 September 2025	
Date of Decision:	23 December 2025	

DECISION

A. Introduction

1. This is an Appeal by Mr. Lee Mang Kan ("**Appellant**") to the Town Planning Appeal Board ("**TPAB**") pursuant to section 17B(1) of the Town Planning Ordinance (Cap. 131) ("**TPO**") against the review decision by the Town Planning Board ("**TPB**" / "**Respondent**") ("**Review Decision**").

2. The Review Decision concerns the Appellant's application under section 16 of the TPO for planning permission to build a 3-storey New Territories Exempted House/Small House on a site in Lot 391 S.A in Demarcation District 28, Lung Mei, Tai Po, New Territories ("**Appeal Site**") ("**Appellant's Application**").

B. Background

3. Unless otherwise stated, the following background facts are undisputed or indisputable.

B1. Factual Background

4. The Appellant is an indigenous villager of Sha Lo Tung Lei Uk Village, Tai Po. He acquired the Appeal Site in September 2023.

5. The Appeal Site falls entirely within the Green Belt ("**GB**") zone of the approved Ting Kok Outline Zoning Plan No. S/NE-TK/19 ("**OZP19**"), which has been in force since November 2015.

6. Located near the boundary between the GB zone and the Village Type Development ("**V**") zone in OZP19, the Appeal Site is also wholly within the "village environs" ("**VE**") of Lung Mei Village and Tai Mei Tuk Village, i.e. within a 300-foot radius from the edge of the last village type house built in the recognized village before the introduction of the Small House Policy in 1972.

7. Further, the Appeal Site is subject to a Block Government Lease demised for agricultural use and is not covered by Modification of Tenancy or Building Licence.

8. In terms the surroundings of the Appeal Site:

   8.1. To the immediate northeast, east, south and west of the Appeal Site are Small House developments, all of which have been completed according to a site inspection in June 2025.

   8.2. To the immediate northwest of the Appeal Site (Lot 771 S.A RP in D.D. 28, Lung Mei, Tai Po ("**Lot 771**")), planning permission for Small House development was initially granted in March 2019 upon application No. A/NE-TK/664 ("**Application 664**"). The permission expired in March 2023, but the term of the permission was subsequently extended to March 2027.

8.3. Further, according to the TPB, a Small House grant by way of Modification Letter ("**M/L**") was approved on 28 December 2012 in respect of Lot 771. The M/L was executed on 24 June 2025 and has been sent to the Land Registry for registration.

8.4. Thus far, no construction has commenced on Lot 771.

9. The Appeal Site was subject of two previous applications for planning permission in 2007 (No. A/NE-TK/243, "**Application 243**") and 2013 (No. A/NE-TK/476, "**Application 476**"), which were approved. Collectively, they are referred below as the "**Previous Planning Permissions**".

9.1. Application 243 was granted on conditions from 14 December 2007 to 14 December 2011 on the following grounds:

(a) being in line with the Interim Criteria for Consideration of Application for NTEH/Small House in New Territories ("**Interim Criteria**") in that more than 50% of the proposed Small House footprint fell within the VE and there was a general shortage of land to meet the demand for Small House development within the V zone at the time of consideration;

(b) complying with the TPB Guidelines for Application for Development within "GB" Zone under section 16 of the Ordinance ("**TPB Guidelines No.10**"); and

(c) no significant adverse impacts on the surrounding areas.

9.2. Application 476 was granted on conditions from 8 November 2013 to 8 November 2017, on similar grounds:

(a) being in line with the Interim Criteria in that more than 50% of the proposed Small House footprint fell within the VE and there was a general shortage of land to meet the demand for Small House development within the V zone at the time of consideration;
(b) complying with TPB Guidelines No.10;
(c) no significant adverse impacts on the surrounding areas; and
(d) being the subject of previously approved application.

9.3. Subsequently, the planning permission under Application 476 was extended to 8 November 2021, which lapsed on 9 November 2021.

10. However, no construction commenced on the Appeal Site during the terms of the Previous Planning Permissions.

B2. Procedural History

11. In January 2024, the Appellant made the Appellant's Application, No. A/NE-TK/793 to build a 3-storey small house with a Total Floor Area of 195.09m², building height of 8.23m and roof-over area of 65.03m².

12. On 15 March 2024, the Appellant's Application was rejected by the Rural and New Town Planning Committee ("**RNTPC"**) ("**Application Decision**"). The grounds were as follows ("**Rejection Grounds**"):

"*(a) the proposed development is not in line with the planning intention of the "Green Belt" zone which is primarily for defining the limits of urban and sub-urban development areas by natural features and to contain urban sprawl as well as to provide passive recreational outlets. There is a general presumption against development within this zone. There is no strong planning justification in the submission for a departure from this planning intention; and*

(b) land is still available within the "Village Type Development" ("V") zone of Lung Mei and Tai Mei Tuk 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."

13. On 5 April 2024, the Application Decision was notified to the Appellant by letter.

14. On 24 April 2024, the Appellant applied for review against the Application Decision ("**Review**").

15. On 12 July 2024, the Review was heard before the TPB, represented by representatives for the Planning Department ("**PlanD**") and the Appellant. By the end of the Review, the TPB rejected the Appellant's Application, i.e. the Review Decision.

16. On 26 July 2024, the Review Decision was notified to the Appellant, giving the same Rejection Grounds.

17. By a notice of appeal dated 9 September 2024, the Appellant now appeals to the TPAB.

18. At the Appeal Hearing before the TPAB,

18.1. the Appellant was represented by Mr. Yam Sai-ling ("**Mr. Yam**"), and called one witness, Mr. Chan Koon-yau ("**Mr. Chan**"), Chairman of Lung Mei Village office; and

18.2. the TPB is represented by Miss Katrina Chan ("**Miss Chan**") and called one witness, Mr. Wong Po-kit, Jeffrey ("**Mr. Wong**"), Senior Town Planner/Tai Po 2 (acting) of the Sha Tin, Tai Po and North District Planning Office, PlanD.

C. General Legal Principles

19. The principles governing the approach of the TPAB to an appeal are well-established.

20. First, as summarised in **TPA No. 7 of 2021** at §§16-19:

"*16. First, the general approach to town planning appeals and permission was set out in the Appeal Board's decision of Town Planning Appeal No. 1 of 2017 (dated 31 December 2021) (chaired by Chua Guan-hock SC). §§61-62: -*

"61. As to onus of proof, an appellant has the burden of showing on a balance of probabilities, that an appeal should be allowed and there are no good reasons for refusing planning permission.

62. As to the [Appeal Board]'s role:

(1) The [Appeal Board]'s role is to exercise independent planning judgment within the parameters of the approved plan. The Appeal Board is not bound by the TPB's decision, and an appeal is a de novo hearing.

(2) It may substitute its own decision for that of the TPB even if the TPB did not strictly commit an error on the material before it. Hearings before the Appeal Board are normally much fuller and more substantial than before the TPB of a review under s.17 TPO.

(3) The [Appeal Board]'s role is not limited to those on judicial review as it is concerned with the merits. Moreover, the [Appeal Board] should: -

> *(a) ask itself the right and relevant questions and take reasonable steps to acquaint itself with the relevant information to enable it to answer them correctly;*
>
> *(b) take into account all relevant considerations and ignore irrelevant ones;*
>
> *(c) decide whether a proposed development is desirable in the public interest, within the parameters of the relevant plan: see British Railways Board v Secretary of State for the Environment [1994] J.P.L.32, per Lord Keith (at p.133):*
>
> > *"The function of the planning authority was to decide whether or not the proposed development was desirable in the public interest."(emphasis added).*

(4) On appeal, an Appellant does not strictly need to show planning benefit, as opposed to lack of planning harm in view of relevant

planning policies and material considerations, compared to nothing being done in the circumstances: see R.(On the application of Mount Cook Land Ltd) v Westminster CC [2004] 2 P and CR 405 (C.A.), per Auld LJ at [38]:-

> *"The Council had an obligation to consider Redevco's application on its own merits, having regard to national and local planning policies and any other material considerations, and to grant it unless it considered the proposal would cause planning harm in the light of such policies and/or considerations"(emphasis added).*
>
> *We seek to apply the principles above."*

17. *Second, it is important to emphasize that appeals to the Appeal Board are heard de novo. The Appeal Board's function is to exercise an independent planning judgment: Henderson Real Estate Agency Ltd. v Lo Chai Wan [1997] HKLRD 258 at 266A. As explained by Tang PJ in Town Planning Board v Town Planning Appeal Board (2017) 20 HKCFAR 196 at §88:*

> *"On appeal to the Appeal Board, the Appeal Board is entitled to and regularly makes planning decisions under s.16 de novo, assisted by expert evidence which would be subject to cross-examination, if necessary. Therefore in an appeal against refusal of permission or the conditions imposed, the Appeal Board would exercise its own independent judgment on the appropriateness of the refusal or the conditions..."*

18. *Third, as pointed out in TPA No. 1 of 2017, the Appeal Board should have regard to all material considerations, and there is a distinction between planning making and planning permission. The Appeal Board is concerned with planning permission only (at §65):*

"65. The Appeal Board should consider all material considerations, although matters of materiality and weight are essentially matters of planning judgment for the Appeal Board:-

65.1 TPB Guidelines: it is common ground these should be followed, unless there is good or cogent reason.

65.2 Distinction between plan making, and planning permission: this well established distinction appears in the cases. On appeal, the Appeal Board is concerned with the latter situation only.

65.3 Distinction between granting planning permission, and its implementation: this distinction is well established. See British Railways Board v. The Secretary of State for the Environment [1994] J.P.L. 32 (HL) at (p.38):

'... there was no absolute rule that the existence of difficulties, even if apparently insuperable, had to necessarily lead to refusal of planning permission for a desirable development. A would-be developer might be faced with difficulties of many kinds ... If he considered that it was in his interests to secure planning permission notwithstanding the existence of such difficulties, it was not for the planning authority to refuse it simply on their view of how serious the difficulties were'"

19. *Fourth, in construing the planning documents, the Appeal Board should not adopt an overly technical approach as in interpreting statutes or legal or constitution documents. As Cheung CJHC (as he then was) explained in Hong Kong Television Network Ltd v Chief Executive in Council [2016] 2 HKLRD 1005 at §55 in the context of the broadcasting policy promulgated by the Government:*

"Policy statements must be read in their proper contexts and with common sense. More often than not, they are not prepared by lawyers but by politicians and government officials.

Technical approaches to their interpretation such as those adopted in interpreting statutes, wills, contracts or constitutional documents should generally be avoided…'""

(original emphasis)

21. Second, consistency in planning decisions is a significant consideration. As observed in **North Wiltshire District Council v Secretary of State for the Environment and Clover** (1993) 65 P.&C.R. 137, 145:

"*In this case the asserted material consideration is a previous appeal decision. It was not disputed in argument that a previous appeal decision is capable of being a material consideration. The proposition is in my judgment indisputable.* ***One important reason why previous decisions are capable of being material is that like cases should be decided in a like manner so that there is consistency in the appellate process****. Consistency is self-evidently important to both developers and development control authorities. But it is also important for the purpose of securing public confidence in the operation of the development control system. I do not suggest, and it would be wrong to do so, that like cases must be decided alike. An inspector must always exercise his own judgment. He is therefore free upon consideration to disagree with the judgment of another but before doing so he ought to have regard to the importance of consistency and to give his reasons for departure from the previous decision.*" (emphasis added)

22. Third, the approach to considering policy guidelines is set out in **TPA Nos. 3&4 of 2021** at §30:

"*38. A number of previous decisions have been cited to this Appeal Board, and duly considered by it, concerning the weight of the*

relevant version of Interim Criteria ..... In so far as to how a discretion or flexibility permitted within the statutory ambits under the TPO, and the OZP or Draft OZP, may be exercised by TPB or this Appeal Board, due regard must be given to the policy stated in the Interim Criteria (as there may be legitimate expectation that such will be the policy adopted). ***However, such policy guidelines, which has no statutory basis, could only be of weight in so far as they do not conflict with the relevant statutory provisions (TPO, and the OZP or Draft OZP), such as the stated planning intentions for the particular zoning****. Further,* ***being only policy guidelines, the Interim Criteria should be considered and construed with common sense and flexibility, and should not be regarded as if they are strict statutory provisions****. Thus, arguments as to the precise interpretation or ambit of particular words, phrases, or paragraphs in the Interim Criteria, are not as helpful to this Appeal Board's deliberations, as a broad common sense understanding of the Interim Criteria as a whole, in their proper context.*

39. It is not in dispute that, in relation to both of the Appeal Sites, more than 50% of the proposed foot print of the proposed Small Houses falls within the ' VE'. In fact, apart from the tip of the south-west comer of the Appeal Site for TK/495, the Appeal Sites are within 'VE' of Ting Kok Village.

40. Apart from being a factor relevant as to whether there should be "sympathetic consideration" under Interim Criteria B(a), this Appeal Board is of the view that the fact that the Appeal Sites were very much within 'VE' is a factor which should in itself be weighed in favour of the Appellants though, this is not a very weighty consideration as compared to e.g. the planning intention and the surrounding landscape and environment.

...

43. As the Appeal Sites fall almost entirely within the 'VE' of Ting Kok Village and the Appellants are indigenous villagers of Ting Kok Village, once the test as to shortage of land is satisfied, according to the Interim Criteria paragraph B(a) set out above, the Appellants should be given "sympathetic consideration". ***But the sympathetic consideration itself is not decisive, but should be weighed against the other relevant factors in Interim Criteria paragraph B (f), (g) and (h) as underlined above, and more importantly, be weighed in the general picture amongst all the relevant factual matrix discussed herein****. Furthermore, as discussed above, the Interim Criteria is not statutory, and is a policy guide rather than binding in a strait jacket sense. In weighing this issue of shortage of land in the "V" zone, this Appeal Board must bear in mind the broad picture, and should* ***balance all the factors under the statutory umbrella, in particular the planning intention****, which is also echoed in the Interim Criteria B(f): "...should not frustrate the planning intention..(the extent of frustration of the planning intention is also a matter of facts and degree to be weighed and balanced).*

44. On the other hand, apart from qualifying the Appellants for sympathetic consideration as under the Interim Criteria paragraph B(a), the fact that the Appellants are indigenous villagers of Ting Kok Village and that the Appeal Sites are within the 'VE' of Ting Kok Village are factors that this Appeal Board will bear in mind in favour of the Appellants in the ultimate weighing exercise, although they are not very weighty factors as compared with the counter factors such as the frustration of the planning intention." (emphasis added)

23. Similarly, the status and relevance of the Interim Criteria were recently affirmed in **Lee Keng Wai v Town Planning Appeal Board** [2025] 2 HKLRD 947 by Coleman J at §§40(1)-(8):

"*(1) The Interim Criteria were formulated and adopted by the TPB, having due regard to all relevant planning considerations and having balanced all interests concerned.*

(2) Part of their purpose was for the Interim Criteria to ***promote a measure of consistency*** *in the grant or refusal of permission for NTEHs or Small Houses.*

(3) Therefore, weight should be given to the Interim Criteria in the assessment of planning applications, and on appeals to the TPAB.

(4) Indeed, ***planning permission applicants would generally have a legitimate expectation that their applications would be considered in light of the Interim Criteria****.*

(5) But, because they have no statutory basis, the Interim Criteria can only be of weight in so far as they do not conflict with the relevant statutory provisions — such as the TPO or OZP — and any stated planning intentions for the particular zoning.

(6) Further, ***as policy guidelines, the Interim Criteria should be considered and construed with common sense and flexibility****.*

(7) ***Arguments as to the precise interpretation or ambit of particular words, phrases, or paragraphs in the Interim criteria are not helpful****.*

(8) Rather, there should be the ***adoption of a broad common sense understanding of the Interim Criteria as a whole****, in their proper context*". (emphasis added)

D. Issues on Appeal

24. The ultimate question to be determined by the TPAB is whether planning permission should be granted to the Appellant. In answering that ultimate question, two issues are required to be determined in this Appeal:

24.1. Whether the proposed development is in line with the planning intention of the GB zone and/or whether there is sufficiently strong planning justification for a departure from the general presumption

against development within this zone ("**GB Planning Intention Issue**"); and

24.2. Whether there is a general shortage of land within the V zone of Lung Mei and Tai Mei Tuk for Small House development ("**Land Shortage Issue**").

E. The GB Planning Intention Issue

E1. The Planning Documents

25. Before turning to the parties' cases, it is important to understand the following key statutory documents and policy guidelines ("**Planning Documents**"), which provides the context of the relevant planning intention regarding the Appeal Site.

E1.1 OZP19

26. As mentioned, the Appeal Site falls within the GB zone in OZP19. The Schedule of Uses of the GB zone identifies 2 types of uses:

26.1. Column 1 sets out "*uses always permitted*".

26.2. Column 2 sets out "*uses that may be permitted with or without conditions on application to the [TPB]*".

Column 2 includes "*House (other than rebuilding of New Territories Exempted House ["**NTEH**"] or replacement of existing domestic buildings by [NTEH] permitted under the covering Notes)*".

26.3. In other words, a Small House falls within the Column 2 uses that may be permitted on application to the TPB.

27. The Schedule of Uses further makes it clear that:

> "*Any filling of land/pond or excavation of land, including that to effect a change of use to any of those specified in Columns 1 and 2 above… shall not be undertaken … without the permission from the Town Planning Board under section 16 of the Town Planning Ordinance.*"

28. The planning intention of the GB zone is three-fold, namely:

> "***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.*" (emphasis added)

29. This is contrasted with the planning intention of the V zone, which is

> "*to designate both existing recognized villages and areas of land considered suitable for village expansion. Land within this zone is primarily intended for development of Small Houses by indigenous villagers. It is also intended to **concentrate village type development within this zone for a more orderly development pattern, efficient use of land and provision of infrastructures and services**. Selected commercial and community uses serving the needs of the villagers and in support of the village development*

are always permitted on the ground floor of a New Territories Exempted House. Other commercial, community and recreational uses may be permitted on application to the Town Planning Board". (emphasis added)

30. Further, the Explanatory Statement in OZP19 provide:

30.1. *Vis-à-vis* the V zone:

"*9.2 <u>Village Type Development ("V")</u> : Total Area 71.25 ha*

9.2.1 The intention of this zone is to designate both existing recognized villages and areas of land considered suitable for village expansion. ***Land within this zone is primarily intended for development of Small Houses by indigenous villagers. It is also intended to concentrate village type development within this zone for a more orderly development pattern, efficient use of land and provision of infrastructures and services****. Selected commercial and community uses serving the needs of the villagers and in support of the village development are always permitted on the ground floor of a New Territories Exempted House. Other commercial, community and recreational uses may be permitted on application to the Board. Areas for village expansion and other infrastructural improvements will be guided by detailed layout plans whenever applicable.*" (emphasis added)

30.2. *Vis-à-vis* the GB zone:

"*<u>9.9 Green Belt ("GB")</u> : Total Area 90.77 ha*

9.9.1 The planning intention of this zone is primarily for defining the limits of urban and sub-urban development areas by natural features such as foothills, lower hill slopes, spurs, isolated knolls, woodland and vegetated land and to contain urban sprawl as well as to provide passive recreational outlets. ***There is a general presumption against development within this zone. Nevertheless, limited developments may be permitted if they are justified on strong planning grounds****. Developments requiring planning permission from the Board will be assessed on their individual merits taking into account the relevant Town Planning Board Guidelines.*

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

E1.2 TPB Guidelines No.10

31. TPB Guidelines No.10 was issued by the TPB in July 1991, which sets out (1) the planning intention of the GB zone and (2) the Main Planning Criteria, as follows:

"*(Important Note :*

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****. ...)*

1. Introduction

1.1 The planning intention of the "Green Belt" ("GB") zone is primarily to ***promote the conservation of the natural environment and to safeguard it from encroachment by urban-type developments****.*

1.2 The "GB" zone covers mainly slopes and hillsides, most of which is naturally vegetated. Some "GB" areas are also designated as Country Parks. Most of the land within the "GB" zone is Government land, although there are also small pockets of private land, generally near built-up areas.

1.3 The ***main purposes*** *of the "GB" zone include the following:*

a. ***to conserve existing landscape features, areas of scenic value and areas of recognised "fung shui" importance****;*

b. ***to define the outer limits of urbanized districts and to serve as a buffer between and within urban areas****; and*

c. ***to provide additional outlets for passive recreational uses****.*

1.4 To preserve the character and nature of the "GB" zone, the only uses which will always be permitted by the Town Planning Board (the Board) are compatible uses which are essential and for public purpose such as waterworks, water catchment areas, nature reserves, agriculture, forestry and certain passive recreational uses. ***Other uses****, including government/institution/community (G/IC),* ***residential development*** *and public utility installations will require planning permission from the Board* ***and each proposal will be assessed on its individual merits****. Applications for development will be considered by the Board according to the criteria set out below.*

2. *Main Planning Criteria*

a. ***There is a general presumption against development (other than redevelopment) in a "GB" zone****. In general the Board will only be prepared to approve applications for development in the context of requests to rezone to an appropriate use.*

b. ***An application for new development in a "GB" zone will only be considered in exceptional circumstances and must be justified with very strong planning grounds****. The scale and intensity of the proposed development including the plot ratio, site coverage and building height should be compatible with the character of surrounding areas. With the exception of New Territories Exempted Houses, a plot ratio up to 0.4 for residential development may be permitted.*

c. *Applications for New Territories Exempted Houses with satisfactory sewage disposal facilities and access arrangements may be approved if the application sites are in close proximity to existing villages and in keeping with the surrounding uses, and where the development is to meet the demand from indigenous villagers.*

d. *Redevelopment of existing residential development will generally be permitted up to the intensity of the existing development.*

e. *Applications for G/IC uses and public utility installations must demonstrate that the proposed development is essential and that no alternative sites are available. The plot ratio of the development site may exceed 0.4 so as to minimize the land to be allocated for G/IC uses.*

f. *Passive recreational uses which are compatible with the character of surrounding areas may be given sympathetic consideration.*

g. *The design and layout of any proposed development should be compatible with the surrounding area. The development should not involve extensive clearance of existing natural vegetation, affect the existing natural landscape, or cause any adverse visual impact on the surrounding environment.*

h. *The vehicular access road and parking provision proposed should be appropriate to the scale of the development and comply with relevant standards. Access and parking should not adversely affect existing trees or other natural landscape features. Tree preservation and landscaping proposals should be provided.*

i. *The proposed development should not overstrain the capacity of existing and planned infrastructure such as sewerage, roads and water supply. It should not adversely affect drainage or aggravate flooding in the area.*

j. *The proposed development must comply with the development controls and restrictions of areas designated as water gathering grounds.*

k. *The proposed development should not overstrain the overall provision of G/IC facilities in the general area.*

l. *The proposed development should not be susceptible to adverse environmental effects from pollution sources nearby such as traffic noise, unless adequate mitigating measures are provided, and it should not itself be the source of pollution.*

m. *Any proposed development on a slope or hillside should not adversely affect slope stability."* (emphasis added)

E1.3 Interim Criteria

32. Last revised on 7 September 2007, the Interim Criteria sets out the Assessment Criteria for Planning Applications:

> "*(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****;*
>
> *(b) if more than 50% of the proposed NTEH/Small House footprint is located outside the 'VE', favourable consideration could be given if not less than 50% of the proposed NTEH/Small House footprint falls within the "V" zone, provided that there is a general shortage of land in meeting the demand for Small House development in the "V" zone and the other criteria can be satisfied;*
>
> *(c) development of NTEH/Small House with more than 50% of the footprint outside both the 'VE' and the "V" zone would normally not be approved unless under very exceptional circumstances (e.g. the application site has a building status under the lease, or approving the application could help achieve certain planning objectives such as phasing out of obnoxious but legal existing uses);*
>
> *(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 NTEHs/Small Houses*, the processing of the Small House grant is already at an advance stage;*

(e) if an application site involves more than one NTEH/Small House, application of the above criteria would be on individual NTEH/Small House basis;

(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;

(h) the proposed development should not encroach onto the planned road network and should not cause adverse traffic, environmental, landscape, drainage, sewerage and geotechnical impacts on the surrounding areas. Any such potential impacts should be mitigated to the satisfaction of relevant Government departments;

(i) the proposed development, if located within water gathering grounds, should be able to be connected to existing or planned sewerage system in the area except under very special circumstances (e.g. the application site has a building status under the lease or the applicant can demonstrate that the water quality within water gathering grounds will not be affected by the proposed development);*

(j) the provision of fire service installations and emergency vehicular access, if required, should be appropriate with the scale of the development and in compliance with relevant standards; and

(k) all other statutory or non-statutory requirements of relevant Government departments must be met. Depending on the specific land use zoning of the application site, other Town Planning Board guidelines should be observed, as appropriate.

**i.e. the applicant can demonstrate that effluent discharge from the proposed development will be in compliance with the effluent standards as stipulated in the Water Pollution Control Ordinance Technical Memorandum.*" (emphasis added)

E2. Parties' Cases

33. The Appellant advances the following main arguments:

33.1. First, since the Appeal Site is already hard-paved, no adverse environmental or landscaping effect is caused to the surrounding area.

33.2. Second, since the Appeal Site is located among a cluster of village houses or Small Houses or surrounded by village houses or Small Houses either existing or under construction, the Application should not be considered as a proliferation of Small Houses outside the V zone or contravention of the planning intention of the GB zone, i.e. define the limits of urban and sub-urban development areas by natural features and to contain urban sprawl.

33.3. Third, the Appeal Site cannot be used as a passive recreational outlet in any event.

33.4. Fourth, for reasons above, the general presumption against development on GB zone is unreasonably harsh with over-restriction on the Appellant's Application.

33.5. Fifth, the basis of the planning intention of the GB zone should be inapplicable or "non-existent" to the Appeal Site because developed land should be regarded as an exception to such planning intention.

33.6. Sixth, since (a) the former land owner of the Appeal Site and the land owner of an adjoining site had each obtained a Small House grant by the Lands Department ("**LandsD**"), and (b) the Appellant has succeeded the responsibility from the former land owner to maintain the drainage pipes on the Appeal Site connected to the main discharge pipe of the Government, he has a legitimate expectation to obtain the planning permission.

33.7. Seventh, the TPB considered the Appeal Site not to be an infill site. It is unfair that a planning permission was granted to Application 664 on Lot 771, which is located closer to the woodland of the GB zone, up to 2027.

34. In response, the TPB submits that:

34.1. First, there is a general presumption against development within the GB zone. The proposed Small House is not in line with the planning intention of the GB zone and there is no strong planning justification in

the subject application for a departure from the planning intention of the GB zone.

34.2. Second, an application with previous planning permission lapsed will be considered on its own merits. No special circumstances are present in this Application, in that:

(a) the Appeal Site is not an infill site among existing Small Houses as the surroundings of the Appeal Site are not occupied by **existing** NTEHs/Small Houses **on all sides**, and

(b) no valid Small House grant application is being processed at an advance stage or at all.

34.3. Third, there is no legitimate expectation to a grant of planning permission. The responsibility of the Appellant as the current land owner of the Appeal Site to maintain drainage pipes is irrelevant to whether planning permission should be granted. Further, the drainage impact is not the material consideration in rejecting the Appellant's Application and Review.

E3. Analysis

35. At the outset, we reject the Applicant's submission that the planning intention of the GB zone is inapplicable or non-existent *vis-à-vis* the Appeal Site. The planning intention of a planning zone is enshrined in the relevant Outline Zoning Plan ("**OZP**") – in this case OZP19 – a document with statutory force

which applies to the entirety of the zone concerned. The planning intention of the GB zone in this case does not cease to be applicable merely because a site therein has been hard-paved (or even partly developed without planning permission). In other words, a site does not cease to be subject to the planning intention of the GB zone because it is being used in a manner contrary to the planning intention. To hold otherwise would mean that a site could be developed in disregard of the restrictions or conditions imposed by the OZP simply by creating a *fait accompli*.

36. On the other hand, it is also indisputable that, although there is a general presumption against development in the GB zone, the presumption can be displaced and planning permission may be granted in cases with sufficiently strong justification. This is evident from the fact that "House" (including a Small House) is included in the Schedule 2 uses of OZP19, such that one can be developed if planning permission was obtained.

37. In our view, there **are** such sufficiently strong grounds in the present case to justify the departure from the presumption.

Appellant's Application does not frustrate planning intention

38. We agree with the Appellant that a Small House development on the Appeal Site does not frustrate or contravene the planning intention of the GB zone:

(a) "*to promote the conservation of the natural environment and to safeguard it from encroachment by urban-type developments*", *per* TPB Guidelines No.10 at §1.1; and

(b) "*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*", *per* OZP19, Schedule of Uses for GB zone; see also TPB Guidelines No.10 at §1.3.

39. Nor do we think the proposed Small House development would frustrate the planning intention of the V zone, which is to "*concentrate village type development within this zone for a more orderly development pattern, efficient use of land and provision of infrastructures and services"*, *per* OZP19, Schedule of Uses for V zone and Explanatory Statement.

40. **First**, the Appeal Site is situated on an already hard-paved area of the GB zone. It is located within a cluster of existing Small Houses and is buffered from the woodlands by other Small Houses erected at the fringe of the hard-paved area.

41. **Second**, the Appellant's Application received **no** objections from any Government department.

41.1. At first instance before the RNTPC, a document titled Detailed Comments from Relevant Government Departments was prepared ("**Detailed Comments**") (Appendix VI of RNTPC Paper No. A/NE-TK/793), which summarised the comments from the heads of eight Government departments responsible for (1) Land Administration, (2) Traffic, (3) Environment, (4) Water Supplies, (5) Fire Safety, (6) Nature Conservation, (7) Landscape and (8) Demand and Supply of Small House Sites.

41.2. In the Detailed Comments, apart from LandsD that expressed no views, all other Government departments made no objections. Notably,

(a) **Traffic**: The Commissioner for Transport noted that "*the application only involves development of one Small House and **can be tolerated** on traffic grounds*";

(b) **Environment**: The Director of Environmental Protection gave "***no in-principle objection** to the application*" subject to compliance with technical conditions;

(c) **Water Supplies**: The Chief Engineer/Construction, Water Supplies Department gave "***no objection** to the application*";

(d) **Fire Safety**: The Director of Fire Services gave "***no in-principle objection** to the application*" subject to non-encroachment on emergency vehicular access;

(e) **Natural Conservation**: the Director of Agriculture, Fisheries and Conservation noted that "*the Site is formed. He has **no strong view on the application from nature conservation point of view***";

(f) **Landscape**: the Chief Town Planner/ Urban Design and Landscape, PlanD noted that:

"*(a) **no objection** to the application from landscape planning perspective;*

*(b) the Site is situated in an area of settled valleys landscape character surrounded by village houses and dense woodland to the east and north respectively. The proposed use is considered **not incompatible** with the landscape character of its surroundings; and*

*(c) the Site is covered with wild grass with **no significant landscape resource observed**. **Significant adverse impact** on existing landscape resources within the Site arising from the proposed use is **not anticipated**.*"

(g) **Demand and Supply of Small House Sites**: the District Land Office/Tai Po ("**DLO/TP**") opined that the available land for Small House development in the V zone was **insufficient**:

"*According to the DLO/TP, LandsD's record, the total number of outstanding Small House applications for Lung Mei and Tai Mei Tuk is 37 while the 10-year Small House demand forecast for the same villages is 212. Based on the latest estimate by the Planning Department, about 1.64ha (or equivalent to about 65 Small House sites) of land are available within the "V" zone of Lung Mei and Tai Mei Tuk. **Therefore, the land available cannot fully meet the future demand of 249 Small Houses** (or equivalent to about 6.23ha of land).*"

42. **Third**, in light of the above, we also consider that the Appellant's Application is consistent with Main Planning Criteria (c), (g), (h), (i) and (l) of TPB Guidelines No.10, and Interim Criteria (g), (h) and (k).

43. **Fourth**, it is noted that even the TPB acknowledged that a Small House is not incompatible with surrounding area of the Appeal Site:

> "*Although the Appeal Site is currently partly paved and partly covered by wild grass with occupation by some construction materials [reference omitted] and the* ***proposed Small House is not incompatible with the surrounding areas which are predominantly rural in character with village houses to the east and south and dense woodland to the north and west*** *[reference omitted], the proposed Small House is not in line with the planning intention of the "GB" zone and there is no strong planning justification in the subject application for a departure from the planning intention of the "GB" zone.*"

44. Therefore, it is clear that building a Small House on the Appeal Site would not pose any threat to the conservation of the natural environment in the GB zone. Nor can we see how it would infringe the limits of urban and sub-urban development or cause urban sprawl. Further, being surrounded by existing Small Houses on all sides except the northwest, the Appeal Site is not suitable to be used as a passive recreational outlet. The TPB has not seriously contended the contrary. It also accords with the orderly development pattern of the area.

45. Therefore, we find that the Appellant's Application does not frustrate or contravene the planning intention of the GB zone or V zone.

Consistency with similar applications and Previous Planning Permissions

46. As mentioned, consistency in approach is key in town planning decisions. Similar cases must be decided similarly. Otherwise, inconsistent treatment may result in unfairness, unpredictability and loss of public faith.

47. Therefore, unless there are material changes in circumstances, the approach to the relevant considerations in the Appellant's Application must be consistent with (a) previous applications for planning permission in respect of the Appeal Site; as well as (b) similar applications for planning permission as the Appeal Site. In doing so, we have not lost sight of the fact that each application must be decided on its own merits.

48. **First**, as mentioned, the Previous Planning Permissions were granted in 2007 and 2013 respectively on Applications 243 and 476 respectively, the latter of which was extended in 2017. The following three reasons were given to *both* Planning Permissions (see §9 above):

(a) **being in line with the Interim Criteria** in that more than 50% of the proposed Small House footprint fell within the VE and there was a general shortage of land to meet the demand for Small House development within the V zone at the time of consideration;
(b) **complying with TPB Guidelines No.10**; and
(c) **causing no significant adverse impacts** on surrounding areas.

49. Furthermore, Application 476 was also approved on the ground that it was the subject of previously approved application. Indeed, when considering the merits of Application 476, the comments of 10 Government departments were collected (similar to the Detailed Comments) and no objection was raised by any department at that time.

50. The considerations above are relevant to the present Application, subject to a caveat regarding consideration (a). We are no doubt aware of the adoption of

the More Cautious Approach in August 2015, which has impacted the mode of calculating the demand for Small House developments. As will be discussed in detail when we examine the Land Shortage Issue below, adopting the More Cautious Approach, there is insufficient evidence for the TPAB to find that there is a general shortage of land to meet the demand for Small House development within the V zone at the time of the Appellant's Application. However, we also note that the extension to Application 476 was granted in 2017, after the More Cautious Approach.

51. Apart from that, we see no material change in circumstances to render the other considerations inapplicable, or less applicable, to the Appellant's Application. As regards considerations (b) and (c) mentioned in §48 above, the TPB has adduced no evidence to show, and have not suggested, that there has been any material change in the conditions of the Appeal Site such that a Small House development would cause non-compliance with TPB Guidelines No.10 or significant adverse environmental impact now, when it did not in 2007, 2013 and 2017.

52. For completeness, we would point out that the mere fact that the Appellant was not the applicant to the Previous Planning Permissions does not in any way affect our consideration of their relevance. Each application for planning permission must of course be considered on its own merits. However, as pointed out above, like cases should be decided alike, and if there are no material differences (in terms of planning considerations) between a new application and a previous application, it would be arbitrary (and certainly not conducive to consistency) for the new application to be determined differently from a previous application. As the relevant planning considerations do not

typically depend on the identity of the applicant, whether the new application is made by the same applicant to the previous application is generally not a relevant consideration.

53. **Second**, since the first promulgation of the Interim Criteria in 2000 to the time of this Appeal, there has been 28 similar applications in the vicinity of the Appeal Site in total. 18 of them were approved and the remaining 10 were rejected.

53.1. Among the 18 approved applications, only three of them were approved after the adoption of the More Cautious Approach, they are applications (i) No. A/NE-TK/580 ("**Application 580**"), (ii) No. A/NE-TK/618 ("**Application 618**") and (iii) Application 664.

53.2. The site of Application 580 was situated in between two village houses and about 83% of it falls within the V zone. The Application was approved mainly on sympathetic consideration of (a) being the subject of a previously approved application submitted by the same applicant; (b) being an infill development; (c) complying with TPB Guidelines No.10; and (d) that the processing of a Small House grant was at an advance stage.

53.3. The sites of Applications 618 and 664 are situated entirely outside the V zone. The Applications were approved mainly on sympathetic consideration that they were (a) the subject of previously approved applications submitted by the same applicants, and (b) the processing of Small House grants was considered to be at an advance stage.

54. In comparison, we consider that the merits of the Appellant's Application are equally strong, if not stronger, than the three approved Applications mentioned above.

54.1. First, as in the case of Applications 580, 618 and 664, the Appeal Site in this case is subject to two previous approved applications. We have already explained why the identity of the applicant is irrelevant in this context.

54.2. Second, like Application 580, the Appeal Site here also complies with TPB Guidelines No.10. In particular, as discussed below, we consider that in the present case the Appeal Site is an "infill site" (a term which is not precisely defined in the Interim Criteria), or in the nature of an infill site for planning purposes.

54.3. Third, as mentioned, as seen in the approvals for Applications 243 and 476, the TPB had previously considered that a Small House development on the Appeal Site would not cause significant adverse impact to the surroundings to the Appeal Site.

54.4. Fourth, it is important to note that the approved sites of the three approved applications were all located at the frontier of the Small House clusters, directly adjacent to the woodlands of the GB zone.

54.5. Finally, we have not overlooked the fact that in the other three approved applications, Small House grants were being processed and were

considered to be at an advance stage. However, we do not consider this to be a difference of great importance. As pointed out above, in the present case the Appellant only acquired the Appeal Site in September 2023. He must first apply for a planning permission before he can make an application to the LandsD. If after considering all the relevant planning considerations, we are satisfied that allowing the Appellant's Application would not frustrate or contravene the planning intention of the GB zone, the mere fact that there is no pending Small House grant in the present case is of no real significance.

Infill Site?

55. Sympathetic consideration may be given to the Appellant's Application if the Appeal Site constitutes an infill site under Criterion (d) of the Interim Criteria, which provides:

> "*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 NTEHs/Small Houses****, the processing of the Small House grant is already at an advance stage*".

56. However, the meaning of an "*infill site among existing NTEHs/Small Houses*" is undefined in the Planning Documents.

57. In this Appeal, the TPB contends for an adoption of the strictest construction. It submits that a site can only be regarded as an infill site among existing

NTEHs/Small Houses if it is surrounded by **fully completed** Small Houses **on all sides**.

58. As mentioned, the policy guidelines must be construed in the proper context with common sense, flexibility and consistency. As observed by the TPB itself in the Review Decision,

> "*there was scope for the Board to interpret flexibly the Interim Criteria, for example, how to interpret "an infill site among existing NTEHs/SHs" under assessment criterion (d) of the Interim Criteria. However, any decision that would lead to inconsistency with the Board's established practice in considering planning applications should be based on compelling reasons and with strong justifications.*"

59. We have also reminded ourselves of the observations of Coleman J, made in the case of **Lee Keng Wai v Town Planning Appeal Board** (cited in §23 above). As pointed out by the learned Judge, the Interim Criteria should be considered and construed with common sense and flexibility, and arguments as to the precise interpretation or ambit of particular words, phrases, or paragraphs in the Interim criteria are not helpful. Absent any definition of the term in the Interim Criteria (or any of the Planning Documents), we must give a flexible and common sense construction to the term "infill site" as that term is referred to in the context of Criterion (d) of the Interim Criteria.

60. Adopting this approach, we are unable to accept the TPB's construction.

61. **First**, the TPB has not provided any rational basis for the construction it contends.

61.1. At the Appeal Hearing, the TPB submitted that its construction was based on a Meeting Minutes of the 732nd RNTPC Meeting held on 8 December 2023 (the "**Meeting Minutes**") in respect of another planning permission application. §63 of that Meeting Minutes reads:

"*Deliberation Session*

63. The Chairman observed that there was still ample land available within the "V" zone of Shan Liu and queried the justifications to give a sympathetic consideration to the current application noting that the Committee had adopted a more cautious approach since August 2015. The Committee noted that the Site was located at the eastern fringe of the village 'environs' of Shan Liu and the approved Small House development to the immediate south of the Site was being processed at an advanced stage. ***The Secretary supplemented that 'the existing NTEHs/Small Houses' as stated in criterion (d) of the Interim Criteria should generally refer to the NTEHs/Small Houses which were physically in existence, but sites with Small House grant applications might also be taken into account if considered appropriate*** *by the Committee in deciding whether sympathetic consideration could be given to the application*".

61.2. We do not think the opinion of the Secretary in that case is authoritative and should be taken as binding on TPB.

61.3. Apart from the above, Miss Chan has not referred us to any authority or other basis for the construction that TPB contends.

61.4. In any event, even if one were to take the Meeting Minutes on its face value, the Secretary's opinion is not quite the same as the construction presently contended by TPB in this case. In particular, as stated in the

Meeting Minutes, the Secretary informed the RNTPC that while "the existing NTEHs/Small Houses' referred to in Criterion (d) of the Interim Criteria should generally refer to the NTEHs/Small Houses which were "physically in existence", "sites with Small House grant applications might also be taken into account if considered appropriate". This is different from the contention presently advocated by the TPB, namely that a site could only qualify as an infill site if it is surrounded by fully completed Small Houses on all sides.

62. **Second**, we consider the construction advocated by the TPB to be unduly restrictive when one applies a common sense approach to the construction of Criterion (d) of the Interim Criteria. A key rationale for granting sympathetic consideration to an infill site is to allow a site located in a cluster of Small Houses in the GB zone to be put to good use and not be wasted. It is an exception to the general presumption because such a site poses no risk of urban sprawl and is line with orderly development pattern and efficient land use. That being the case, the common sense meaning of an infill site must be one that gives effect to, and is consistent with, the purpose behind the sympathetic consideration mentioned in Criterion (d).

62.1. Adopting this "purposive interpretation" – which in our view accords with the approach commended by Coleman J in **Lee Keng Wai** – a site that is located within a cluster of Small Houses the development on which will pose no risk of urban sprawl and in line with the existing and/or permitted development of its immediate neighbourhood could, and should, qualify as an infill site. That is so even though it may not be completely surrounded by fully completed Small Houses on all sides.

63. **Third**, in any event, the wordings in Criterion (d) do not support the construction presently contended by TPB:

63.1. It may be remembered that the words used in Criterion (d) are: "*...sympathetic consideration may be given if there are specific circumstances to justify the cases, such as the site is an infill site among existing NTEHs/Small Houses...*". An infill site is merely described as located "*among*" existing Small Houses. The word "surrounded" is not used, let alone "surrounded by fully completed Small Houses on all sides".

63.2. Further, if the requirement is taken to mean that the site has to be completely surrounded or encircled by fully constructed Small Houses, the TPB's construction would appear to be **inconsistent** with that adopted in Application 580. There, the subject site is only surrounded by Small Houses on its east and west sides, but not the north and south sides. Yet, in that case, the TPB considered that the subject site did constitute an infill site, which formed one of the grounds for approval.

64. **Fourth**, the construction argued by TPB, taken literally, would mean that even if a site is completely surrounded by Small Houses, one or some of which are in the course of being constructed, it is still not an infill site:

64.1. The consequence of such construction is that if one of the surrounding Small Houses is only, for example, 80% built at the time when the planning application is considered, the site would not qualify as an infill

site; but would become so a short time later when the last brick is laid for that Small House. We are not attracted by an interpretation that would produce such a strange result.

64.2. More importantly, the time of completion of the Small Houses on the neighbouring sites is not under the control of the applicant of the planning permission – in the ordinary course of events the same is likely to be in the hands of the owner of the neighbouring site having the carriage of the construction of the house. As pointed out at the Appeal Hearing, the site owner may for one reason or another (such as lack of funds, personal reasons, emigration etc.) fail or choose not to complete the construction. In that case, whether (and when) a site can be classified as an infill site becomes a question depending on the neighbouring owner's whim. Such a result does not appear to accord well with common sense.

65. It is not necessary – nor desirable – for us to pronounce or lay down a definition of infill site. We are not here concerned with a legal definition, or construction of a statute. In our view, whether a particular site could properly be regarded as an infill site is a question to be answered by adopting a "purposive interpretation" mentioned in §62 above. A common sense and flexible approach to the construction of Criterion (d) of the Interim Criteria would require the TPB to approach the question by examining all the circumstances of the case, including in particular the location of the site, the state of development of its neighbouring lands and the general condition of its surroundings.

66. If, having regard to the location of the site relative to its neighbouring sites and surrounding conditions, permitting development of the site will not carry any real risk of urban sprawl, and the development permitted by the planning application is in line with the existing or permitted developments of the neighbourhood, a case of "sympathetic consideration" within the meaning of Criterion (d) will likely have been made out. Following this approach, there are no strict technical requirements to be satisfied for a site to qualify as an infill site. There is no requirement of complete "blocking" by fully completed (whatever that means) Small Houses on all sides of the site.

67. In the present case, as pointed out in §8 above, the Appeal Site is surrounded by Small Houses on its east, west, south and northeast sides. There is no Small House yet constructed on Lot 771, the site that is to the immediate northwest side of the Appeal Site. However, by reason of Application 664 and the M/L (see §§8.2 and 8.3 above), permission to erect a Small House on Lot 771 has already been granted to erect a Small House on that lot by the TPB and the LandsD respectively.

68. In these circumstances, adopting the approach mentioned in §§62 and 65 above, we are satisfied that a case of sympathetic consideration within the meaning of Criterion (d) of the Interim Criteria has been made out, on the basis that the site is an infill site, and permitting the development of the Appeal Site for use as a Small House will not frustrate or contravene the planning intention of the GB zone. In exercise of our planning judgment, we hold that allowing the Appellant's Application is in the public interest and we will allow the Appeal on this ground.

Legitimate Expectation?

69. In light of our views above, it is not strictly necessary to determine this argument. For the following brief reasons, we reject the Appellant's argument.

69.1. As a matter of law, the doctrine of substantive legitimate expectation is not casually invoked. The doctrine applies to situations in which persons may have a legitimate expectation of a substantive outcome or benefit, in which event failing to honour the expectation may result in such unfairness to individuals as to amount to an abuse of power justifying intervention by the court. To establish his claim, the Appellant must demonstrate that a legitimate expectation arose from a promise or representation, the expectation being that the promise or representation would be honoured, should be properly taken into account in the decision-making process so long as to do so fell within the power, statutory or otherwise, of the decision-maker: **Ng Siu Tung & Others v Director of Immigration** (2002) 5 HKCFAR 1 at §§92, 94.

69.2. The Appellant argued that as planning permissions for Small House development were given to the former land owners of the Appeal Site, and the Appellant as the current land owner of the Appeal Site needs to carry out the responsibility of drainage pipe maintenance, the Appellant has a legitimate expectation that he can obtain the planning permission to build a Small House at the Appeal Site.

69.3. The Appellant's argument of legitimate expectation is directed at obtaining of planning permission. It bears emphasis that it does not refer to an entitlement of a procedural right.

69.4. In our view, neither of the two bases advanced by the Appellant is capable of constituting promises or representations that gives rise to a legitimate expectation that the Appellant's Application will be approved.

69.5. There is clear authority that a local planning authority cannot bind itself to exercise its statutory function in a particular way. As held in **R v Secretary of State for the Environment Ex p. Barratt (Guildford) Ltd** [1990] JPL 25 at 34:

> "***There is clear authority that neither the Secretary of State nor a local planning authority can bind itself to exercise its statutory function in a particular way***. *The views expressed as to prospective development by the Secretary of State did not bind the local planning authority or the Secretary of State to any future decision.* ***The doctrine of estoppel has no place in public law and cannot be raised to prevent the Secretary of State or the local planning authority (a statutory body) from exercising its statutory discretion or performing its statutory duty***. *There is no evidence on which the applicants were justified in thinking that the Secretary of State was binding himself or that the planning officials were binding the council indefinitely and irrevocably. Further, to bind the Secretary of State or the council might cause injustice to other members of the public who might wish to object at subsequent inquiries. Thus there could be no legitimate expectation that the principle of residential development to the west would be continued. It was not an immutable policy in law*."
>
> (emphasis added)

69.6. In any case, there is no representation by the TPB that a planning permission would be granted. There is simply no evidence showing that the TPB has made any representation to the Appellant in definite terms that the application will be approved if the Appellant took up the alleged maintenance responsibility and/or on the basis of the said LandsD's approval.

69.7. Further, regarding the Appellant's maintenance responsibilities over the drainage pipes, as admitted by Mr. Chan in cross-examination, the permission to carry out the Stormwater Drainage Works in 2015 and connect the drainage pipes to the government drainage systems was granted by the LandsD – not the TPB – to the former land owner to alleviate the proneness to flooding in the village. We therefore agree that it is unrelated to the TPB and the Appellant's prospects of obtaining planning permission.

Conclusion

70. For the reasons above, we are of the unanimous view that the GB Planning Intention Issue should be found in favour of the Appellant.

F. Land Shortage Issue

71. To put the Issue in context, under Criterion (a) of the Interim Criteria:

> "*(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***"

72. In the present case, there is no dispute that over 50% of the Appeal Site is within the VE. Therefore, whether sympathetic consideration may be given to the Appellant's Application under Criterion (a) depends on whether there is a general shortage of land in the V zone for Small Houses.

F1. The More Cautious Approach

73. On the demand side, in August 2015, the TPB issued a paper calling for a "more cautious" approach in approving applications for Small House Development ("**More Cautious Approach**").

73.1. In the past, the demand for land to develop Small Houses was determined by calculating the sum of (a) the outstanding Small House applications currently being handled by the LandsD and (b) the 10-year Small House demand forecast, which is provided by the village representatives to the LandsD ("**10-year Demand Forecast**"). The sum of the above was then compared with the land in the V zone available for Small House development to determine whether there is a general shortage of available land.

73.2. According to the TPB, it was observed that the 10-year Demand Forecast provided by the village representatives could not be verified by relevant government departments and its accuracy and basis were in

doubt. This, the TPB said, also led to proliferation of Small House development outside the V zone even though land was still available within the V zone for Small House development. Hence, the More Cautious Approach was adopted in August 2015.

74. Consequently, the More Cautious Approach provides that:

"*3. Recent Approach*

3.1 In considering planning applications for Small House development, the Board/Committee has made reference to the assessment criteria set out in the Interim Criteria for Consideration of Application for New Territories Exempted House/Smell House in Niew Territories (the Interim Criteria), which was last promulgated on 7.9.2007. (Annex A).

3.2 While adopting the Interim Criteria, the Board/Committee has been ***more cautious*** *in approving applications for Small House development in recent years. Some general observations are summarised as follows:*

(a) in considering if there is a general shortage of land in meeting the demand for Small House development, ***more weighting has been put on the number of outstanding Small House demand 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" zone would duly be taken into account;

(c) ***more favourable consideration might 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) ***special consideration might be given to sites with previous planning approvals for Small House development;*** *and*

(e) all assessment criteria in the Interim Criteria are still relevant criteria in the consideration of Small House applications."

(emphasis added)

F2. Parties' Cases

75. The Appellant's submissions can be summarised as follows:

75.1. First, the PlanD overestimated the available land within the V zone by including land surrounding Tsz Tong and graves, land close to the village "Pai Lau" (牌樓) and the land reserved for the future village office.

75.2. Second, the 10-year Demand Forecast provided by the village representative provides an accurate estimate of future demand for Small House developments.

75.3. Third, the outstanding Small House grant applications at the LandsD does not predict future demand. Further, even as an estimate for existing demand, it fails to account for the portion of indigenous villagers who cannot make an application because of their incapability to acquire suitable private or government land.

75.4. Fourth, the More Cautious Approach should be applied only to fresh applications, not to those with previous planning approval.

76. In response, the TPB's submissions can be summarised as follows:

76.1. On the demand side, land is available for Small House development in the V zone under the More Cautious Approach. The following table is produced by the TPB:

	As at the time of section 16 application (Mar 2024)	As at the time of section 17 Review (Jul 2024)	As at the time of Appeal (Jun 2025)
Outstanding Small House applications (i)	37	39	38
10-year forecast of Small House demand (ii)	212	212	271
Total Small House demand (outstanding applications plus 10-year forecast) [(i) + (ii)]	249	251	309
Land available within the "V" zone of Lung Mei and Tai Mei Tuk	1.64 ha (equivalent to about 65 Small House sites)	1.64 ha (equivalent to about 65 Small House sites)	1.61 ha (equivalent to about 64 Small House sites)

At the time of the Appeal, the number of outstanding Small House applications is 38. Therefore, the latest estimation by PlanD of about 1.61 ha of land (equivalent to about 64 Small House sites) is still available and sufficient to meet the outstanding Small House applications.

76.2. On the supply side, there is no overestimation of land availability in the V zone as it is calculated based on the net developable area deducting land occupied by or reserved for various uses/features, namely:

(a) existing village houses;
(b) road, footpath and formal track;
(c) steep slope;
(d) tree clusters especially Fung Shui woodland;
(e) Fung Shui pond;
(f) existing heritage site/village office/Tsz Tong/ancestor hall/shrine;
(g) temple, church and other permanent building development within the village;
(h) burial ground;
(i) stream buffer (generally assumed to be 3m but the actual buffer could be determined taking local circumstances and departmental advice into account);
(j) NTEH cases already approved by LandsD; and
(k) planned public facilities on Government and private land.

Further, in the latest calculations, the site on which the new Lung Mei Village is constructed has been discounted, while the site of the old Lung Mei Village, now demolished, has been taken into account.

76.3. The More Cautious Approach is applied to applications with or without previous planning permissions applied as a matter of consistency.

F3. Analysis

77. As a starting point, we reject the Appellant's submission that the More Cautious Approach should be inapplicable to the Appellant's Application because of the Previous Planning Permissions granted in respect of the Appeal Site. The More Cautious Approach has been considered and repeatedly affirmed by the TPAB, see, for example, **TPA No.1 of 2023** at §§31-32.

78. Further, we also bear in mind that the burden is on the Appellant to demonstrate that there is insufficient land available within the relevant V zone for Small House development.

Supply Side

79. The TPB provided a chart titled Estimated Amount of Land Available for Small House Development Within the V Zone, which identified **64 sites** (in around 1.61 ha) available for Small House development within the V zone in OZP19 comprising both Lung Mei Village and Tai Mei Tuk Village.

80. The Appellant challenged that (a) some areas in the V zone considered as developable land are in reality not developable; and (b) some other sites, although sufficiently spacious for the roof-over area of a Small House (700 square feet or 65.03m^2), are not configured in the shape suitable for Small House developments, such as a square or rectangle.

81. We recognise that there is some validity to both criticisms. Regarding the first criticism, Mr. Yam identified an example of a site where "Pai Lau" (牌樓) was erected but was nevertheless included as developable land (Site 21). The basis for the TPB to include this site in the calculation was that the Pai Lau was allowed to stand due to the grant of a type of licence called Temporary Government Land Allocation (or TGLA Licence), which is renewable every 3 or 5 years. Since a TGLA Licence is not permanent and subject to revocation, it is regarded as a temporary structure, the site on which may potentially be used for Small House developments. We agree with Mr. Yam that this is unrealistic. In practice, TGLA Licences granted to certain structures like Pai Lau are perpetually renewed at the expiration of the previous term. In effect, these structures are permanent and will not be removed as they hold cultural and symbolic values to the villagers. Such reality is not reflected in the calculation.

82. Regarding the second criticism, we also agree that not all the sites demarcated on the chart are regularly shaped for a square or rectangular Small House. For example, Mr. Yam cited Site 40, which is rod-shaped. We also recognise the importance of the shapes of the sites in addition to the floor area, and that they must be suitable for the construction of a Small House.

83. Nevertheless, save for a few individual sites for which valid doubts may be raised, we are satisfied that most of the sites identified by the TPB are suitable for Small House development within the V zone. In particular, we note Mr. Wong's evidence that for every site to construct a standard-sized Small House (65.03m^2), an area of 250m^2 is generously reserved. This is confirmed by the TPB's estimation that 40 Small Houses can be erected on every hectare,

which means each 250m^2 is reserved for the construction of every Small House. This also means that there is a possibility that more than one Small House is developable on one reserved site.

84. Furthermore, we also accept the TPB's evidence that the net developable area in the V zone has deducted the areas used for items (a) to (k) mentioned at §76.2 above.

85. Therefore, on the whole, we think that the estimation of available land for Small House development of 1.61 ha, i.e. around 64 Small Houses, is an accurate figure.

Demand Side

86. Boiling it all down, the crux of the issue on general shortage of land depends on whether the 10-year Forecast Demand should be included in the calculation for demand for Small House developments in the V zone. At the time of this Appeal, the figure, which combines the future demand of both Lung Mei Village and Tai Mei Tuk Village, stands at **271**. Meanwhile, the number of outstanding Small House applications to the LandsD is not in dispute, which is currently at **38**. The figures combined exceeds the available 64 sites, while the latter alone does not.

87. The TPB's approach in the Appellant's Application was to give **zero** weight to the 10-year Demand Forecast. We note that this is inconsistent with its own assessment in the Detailed Comments, which did take into account such

forecast (see §41.2(g) above). On the other hand, the Appellant submits that the figure is accurate and should be included in the calculation.

88. Conceptually, the 10-year Demand Forecast ought to be included. This is because the Forecast estimates *future* demand while the outstanding Small House applications measures *existing* demand. The figures are complementary and necessary to provide a comprehensive picture of the true demand for Small House developments presently and in the future (of 10 years).

89. We note that in **TPA No. 3 of 2022**, similar observations were made by the TPAB in *obiter* at §46.

90. That said, the TPB (and the TPAB) are not bound to accept any figure submitted by the village representative. It is for the applicant, such as the Appellant, to adduce credible evidence to support the figure of the 10-year Demand Forecast submitted to the LandsD, so as to demonstrate the general supply or shortage of developable land in the V zone. Such evidence, if available, will be considered by the TPB, which should then determine the weight to be afforded to the figure of the 10-year Demand Forecast. This approach is confirmed by Mr. Wong at the Appeal Hearing.

91. In addition, where the actual supply of land in the V zone is constrained by practical reasons, such as time taken to identify suitable land or the difficulty in acquiring ownership in land in an indigenous village etc., such "real available evidence" of actual shortage of land should also be considered. As held in **Lee Keng Wai** at §§64-65:

"*64. As to the point of availability of other land within the V-zone, the argument is perhaps more fine. The TPAB held that it would be contrary to principle and reality to consider the actual, as opposed to general, supply of land in the V-zones of recognised villages. Reference was made at para.44 of the Decision to Isaac Lam v TPB (Town Planning Appeal No 5 of 2020, Mr Simon Lam Ken-chung, 27 September 2022), where support was given to the Planning Department's approach that when 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, so long as such acquisition is physically and legally possible. This is because, 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, which is in reality a matter of market negotiation between the landowners and the individuals desirous of building and NTEH, which should not be relevant consideration from the town planning point of view.*

65. I see force in that general principle. But that does not seem to me to mean that real available evidence of actual shortage of land must be regarded, in favour of some assumption as to the general supply of land in the V-zone. Of course, it would not be correct to require the Planning Department to make its own enquiries into whether individual owners of land are or would be willing to sell the land. But the present case differs because the Applicants were able to place before the TPAB significant evidence as to the actual situation. They could demonstrate that (1) it took years for any suitable land to be identified, not only in Che Ha but in other areas within the Sai Kung North Heung; (2) the applicants had run advertisements in newspapers and sought help from estate agents specialising in New Territories land to no avail. There was no contrary evidence that there was in reality land actually available entirely within Che Ha's

V-zone, which might lead in this case to the conclusion that there was ample supply."

92. At the Appeal Hearing, only Mr. Chan gave evidence for Lung Mei Village that the demand in the next 10 years will be 50 (including 12 villagers who have already applied for a Small House grant).

92.1. Mr. Chan asserts that the figure is reliable, because the Village calculates the number of male descendants born in the Village every year by the practice of "candle-lighting" (點燈) and "Clan registration records" (族譜登記). In his calculation, Mr. Chan has assumed that every male descendant will apply to build a Small House when they attain majority and become eligible.

93. That being the only evidence, we are unable to verify the accuracy of the future demand of 271 Small Houses in the next 10 years.

93.1. First, no evidence has been submitted on behalf of Tai Mei Tuk Village, which means the future demand for Small Houses of the other Village in the V zone is entirely unknown.

93.2. Therefore, even if Mr. Chan's evidence was wholly accepted, that would only mean that the future demand for Small Houses in the next 10 years was 38 (50 less 12), not 271.

93.3. However, there is no evidence at all from Mr. Chan or the Appellant verifying that figure, such as the Clan registration records which purportedly record the births of each male descendant every year. Still

further, we consider the figure should also be qualified by the consideration that not all male descendants will apply to build a Small House when they become eligible, for instance, because of their financial inability, their lack of need or lack of interest etc.

94. In the premises, the TPAB cannot give any meaningful analysis to the mere assertions of Mr. Chan. As such, absent any credible evidence, the Appellant has not been able to demonstrate what the future demand for Small Houses in the next 10 years is (whether 271 or 38 or any other figure).

Conclusion

95. Overall, we are of the view that the Appellant has not provided sufficient evidence to demonstrate that there is a general or actual shortage of developable land in the V zone. We therefore cannot afford the Appellant sympathetic consideration under Criterion (a) of the Interim Criteria.

F. Conclusion

96. To conclude, we find the GB Planning Intention Issue in favour of the Appellant, but not the Land Shortage Issue.

97. Although no sympathetic consideration is given to the Appellant's Application for general shortage of land under Criterion (a), on the basis of our findings on the GB Planning Intention Issue, we are of the unanimous view that there are sufficiently strong justifications in the present case to allow the Appellant's Application and grant a planning permission.

98. The Appellant should be granted planning permission for a term of 4 years to build the 3-storey Small House applied for on the Appeal Site. We note that in the Detailed Comments, none of the Government departments providing comments has suggested that any condition should be imposed if planning permission is granted (we note that a set of Recommended advisory clauses was included as Annex F to TPB Paper No. 10974 at the Review hearing on 12 July 2024. The said Recommended advisory clauses included various advisory comments made by the relevant Government departments, but there was no suggestion that any condition should be imposed based on these advisory comments). Neither has any condition been suggested by the TPB at the Appeal Hearing. We do not see the need of imposing any condition for the planning permission granted.

99. We order accordingly.

100. As to costs, it is the TPAB's practice that, absent exceptional circumstances, no costs order will be made under section 17B(8)(c) of the TPO. We see no exceptional circumstances in this case. We therefore make no order as to costs.

(Signed)

Mr. WONG Yuk-lun, Horace, SC, JP
(Chairman)

(Signed)

Ms. HO Sze-may, Mindy
(Member)

(Signed)

Professor LIU Hong-bin
(Member)

(Signed)

Mr. LO Chun-hang
(Member)

(Signed)

Mr. WONG Chiu-lung, Dennis
(Member)