

**IN THE TOWN PLANNING APPEAL BOARD**

Town Planning Appeal No. 6 of 2018

BETWEEN

WONG WAI TSAK TONG

Appellant

and

TOWN PLANNING BOARD

Respondent

Appeal Board : Mr. CHUA Guan-hock, SC (Chairman)

Ms. Teresa AU Pui-yee (Member)

Dr. Barry LEE Chi-hong (Member)

Mr. Ben LEUNG Chi-hung (Member)

Ms. Ada WU Ching-mei (Member)

In Attendance : Ms. Lesley LEUNG (Secretary)

Representation : Mr. Dick K.F. LEE, Counsel for the Appellant

Mr. Gary LAM Chin-ching, Counsel for the Respondent

Dates of Hearing : 31 October 2019 and 14 January 2020

Date of Decision : 18 March 2020

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## DECISION

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### **A. Introduction**

1. The Appellant Wong Wai Tsak Tong appeals under *section 17B Town Planning Ordinance*, Cap. 131 (“**the Ordinance**”) by Notice of Appeal dated 29 June 2018 against the Town Planning Board (“**TPB**”)’s decision dated 2 May 2018 refusing its application dated 25 April 2017 to build a Proposed Religious Institution (Temple) and Columbarium (within a Religious Institution) in Green Belt Zone (“**GB Zone**”), Lot 4 (Part) D.D. Cheung Chau (“**the Site**”) under section 16 of the Ordinance (“**Proposed Development**”).

### **B. Background**

2. The Site of some 1,400m<sup>2</sup> is in the GB Zone on the approved Cheung Chau Outline Zoning Plan (“**Cheung Chau OZP**”) No. S/I-CC/7 currently in force. The Site is located at the slope of an upland area on the southwest part of Cheung Chau. It is mainly a slope covered

with natural vegetation, including large trees, grass, and shrubs. The Site is accessible by existing footpaths in the Cheung Chau Cemetery, and there is no vehicular access to the Site. The surrounding area is predominately rural. To the immediate north and east are slopes covered with dense trees and shrubs falling within that GB Zone. There are two villages (Round Table Third Village and Lutheran Village) zoned “Residential (Group D)” to the northwest and northeast respectively. The Site has to the west and south, the existing Cheung Chau Cemetery, Cheung Chau Columbarium, and Cheung Chau Crematorium (zoned as “Other Specified Uses (Cemetery)” (“OU(Cemetery)”). To the further south, is the Cheung Chau Catholic Cemetery also zoned “OU(Cemetery)”.

3. As stated, the Site is in the GB Zone on the approved Cheung Chau OZP at the time of application, and currently in force. ‘Religious Institution’ use and ‘Columbarium (within a Religious Institution or existing Columbarium only)’ use within the GB Zone are Column 2 uses that may be permitted, with or without conditions, on application to the TPB.

4. The OZP Notes state :-

“[a] The planning intention of this zone is *[i] primarily for defining the limits of development areas by natural features, [ii] to protect the natural landscape, as well as [iii] to provide passive recreational outlets* for local population and visitors.

[b] There is *a general presumption against development* within this zone.”  
(emphasis added)

5. The OZP Explanatory Statement supplements :-

“7.1 The general planning intention for Cheung Chau is to *preserve the rural character, car-free environment and the natural landscape of the island. The undisturbed natural coastlines and densely vegetated uplands should be protected from development* for nature conservation and landscape protection purposes, as well as to provide *a countryside recreation outlet* for local residents and visitors.”

“8.10.1 The planning intention of this zone is *primarily for defining the limits of development areas by natural features, to protect the natural landscape, as well as to provide passive recreational outlets* for local population and visitors.”

“8.10.2 Most parts of the hill slopes and upland covered with natural vegetation in the northern and southern parts of Cheung Chau are under this zoning.”

“8.10.3 There is a general presumption against development within the “GB” zone. Development within this zone *will be strictly controlled* and development proposals *will be considered on individual merits* taking into account the relevant Town Planning Board Guidelines.” (emphasis added)

#### Brief chronology

6. On 25 April 2017, the Appellant lodged its application to the TPB for the Proposed Development under section 16 of the Ordinance (“**Application**”)
7. On 22 December 2017, the TPB’s Rural and New Town Planning Committee (“**RNTPC**”) decided to reject the Application for these reasons :-
  - (a) The proposed development is not in line with the planning intention of the “Green Belt” (“GB”) zone, which is primarily intended for defining the limits of development areas by natural features and to protect the natural landscape, as well as to provide passive recreational outlets for local population and visitors. There is a general presumption against development within this zone. There are no strong justifications to warrant a departure from this planning intention;
  - (b) The proposed development does not comply with the Town Planning Board Guidelines No.10 (TPB-PG No.10) for ‘Application for Development within “GB” Zone under section 16 of the Town Planning Ordinance’ in that you fail to demonstrate that the proposed development at the application site is essential and that no alternative sites are available;
  - (c) The Appellant fails to demonstrate that the proposed access arrangement is acceptable and that the proposed development would not have an adverse impact on public ferry services serving Cheung Chau; and

- (d) Approval of the proposed development would set an undesirable precedent for similar applications within the “GB” zone on the Outline Zoning Plan. The cumulative impact of approving such similar applications would have adverse effect on the integrity of the existing “GB” zone and result in general degradation of the natural environment and rural landscape character and overstrain the capacity of public ferry services serving Cheung Chau.
8. On 18 January 2018, the Appellant applied to the TPB under section 17 of the Ordinance for a review of the RNTPC’s decision.
9. On 13 April 2018, the TPB decided to reject the Appellant’s review application for the following reasons which were notified by the TPB’s letter of 2 May 2018. These essentially recited the RNTPC reasons (para 7 above), save for reason (c) above concerning access and ferry services :-
- (a) The proposed development is not in line with the planning intention of the “Green Belt” (“GB”) zone, which is primarily intended for defining the limits of development areas by natural features and to protect the natural landscape, as well as to provide passive recreational outlets for local population and visitors. There is a general presumption against development within this zone. There are no strong justifications to warrant a departure from this planning intention; (“**TPB’s 1<sup>st</sup> Reason**”)
- (b) The proposed development does not comply with the Town Planning Board Guidelines No.10 (TPB-PG No.10) for ‘Application for Development within “GB” Zone under section 16 of the Town Planning Ordinance’ in that you fail to demonstrate that the proposed development at the application site is essential and that no alternative sites are available; (“**TPB’s 2<sup>nd</sup> Reason**”); and
- (c) Approval of the proposed development would set an undesirable precedent for similar applications within the “GB” zone on the Outline Zoning Plan. The

cumulative impact of approving such similar applications would have adverse effect on the integrity of the existing “GB” zone and result in general degradation of the natural environment and rural landscape character. (“TPB’s 3<sup>rd</sup> Reason”)

10. On 29 June 2018, the Appellant appealed against the TPB’s Decision by Notice of Appeal under section 17B of the Ordinance.

Lease conditions; Green Belt Zone

11. The Block Government Lease for the Site which was belatedly produced by the TPB after closing submissions, and at this Appeal Board’s request, referred to “agricultural or garden ground”, and “Dry Cultivation and Waste”.

Thus, the permitted use is not open ended, nor a wider user of the site.

12. For the GB Zone for the Site and in general, Column 1 lists “Uses always permitted, including but not limited to “Agricultural Use”, “Picnic Area”, and “Tent Camping Ground”. Column 2 lists uses that “may be permitted with or without conditions on application to the TPB” - including but not limited to “Columbarium *within a Religious Institution or extension of existing Columbarium only*” (emphasis added), and “Golf Course”, “House”, and “School”.

We note 2 points. First, the planning intention behind an approved plan is a question of interpretation and law, to be applied to the facts. Second, Green Belt uses above are to be contrasted with those under “Government, Institution or Community” (“GIC”) which include “Columbarium” – without reference to “within a Religious Institution or extension of existing Columbarium only”.

Prior applications to TPB

13. Apparently due to insufficient space, and to provide a columbarium for the Appellant's members, and the general public, the Appellant made 1 aborted application and 2 rejected applications under section 16, and the present appeal.
14. The previous 2 applications are part of the background to the present application and appeal. The main differences are the number of niches, and site area :-
  - (1) On 22 June 2012, the Appellant submitted a section 16 planning application for proposed 'Religious Institution (Temple)' and 'Columbarium (within a Religious Institution)' uses at a site of about 7,000m<sup>2</sup>. The number of proposed niches was initially 20,000, subsequently reduced to 6,500 niches. The application was withdrawn on 29 April 2013.
  - (2) On 11 September 2013, the Appellant submitted a section 12A planning application for proposed rezoning of a site (about 4,384m<sup>2</sup>) from "GB" to "Other Specified Uses" annotated "Columbarium". The number of proposed niches was 6,500. The application was rejected by the RNTPC on 17 July 2015.
  - (3) In contrast, on this appeal the site area is 1,400m<sup>2</sup>, and number of proposed niches is 300.

As seen below, the substantial difference and drop in the number of proposed niches, and site area, are relevant in ascertaining the Applicant's intention as matter of fact, at all material times.

15. Under the current application and appeal, the proposed temple is for members of the Appellant, indigenous villagers, and other worshippers alike to pay tribute to Kwun Yum. In contrast, the proposed columbarium with 300 niches is intended for members of the Appellant (20%), and members of the public (80%) – who need not necessarily pray to or worship Kwun Yum.

#### Late disclosure of Appellant's AGM minutes

16. During the first day of the appeal hearing on 31 October 2019, the Appellant belatedly produced at this Appeal Board's request, its contemporaneous AGM minutes dated 22

January 2011 (Exhibit A1). These are in Chinese and referred (at paragraph III(3)) to “*Build Columbarium on Lot No.4*” (emphasis added) and “Open a limited company *to operate the Columbarium*” (emphasis added).

We were informed that these were the only relevant minutes of the Appellant.

It is noted that these contemporaneous AGM minutes, which were produced before any litigation or application under the Ordinance, made no reference to building or operating a temple, Kwun Yum temple, or religious institution. The minutes will be considered below when ascertaining the Appellant’s intention, at all material times.

17. The Appellant’s Counsel during oral opening before this late disclosure, upon the Appeal Board’s question, stated that the “primary” purpose of the Proposed Development was a religious institution, the proposed Columbarium being “secondary” and “not a stand alone or independent proposal”. Although Counsel made this submission, it does not appear to be supported by the contemporaneous AGM minutes, which were not produced at the time and were the subject of later cross examination. As is well known, at a hearing before the Appeal Board, it may consider and determine whether a party should have access to any document which is relevant and in the possession or control of another person, or take into account “any statement, document, information or matter whether or not it would be admissible as evidence in a court of law” (*section 17B(6)(a), (c)*).

#### Witnesses

18. At the appeal the Appellant called 2 witnesses who filed witness statements : (1) Mr. Wong Kwok-kwong, the Appellant’s representative; and (2) Ms. Yeung Wing-shan Theresa, the Director of Planning of Ove ARUP & Partners Hong Kong Ltd. The Respondent called Mr Richard SIU Yee-lin, Senior Town Planner / Islands of Sai Kung and Islands District Planning Office, Planning Department who filed a witness statement.
19. The Appellant’s Mr. Wong gave evidence on several matters, including the Appellant’s background as a Tong; the intention of the application being as he said, to build the Kwun Yum temple which would also have niches storage; that the Kwun Yum temple would be

open to the public (are not merely to the Appellant's members); and any interested person could apply for niches storage, whether or not worshipping Kwun Yum.

20. Ms. Yeung gave evidence on several matters including developments within the Green Belt Zone in Cheung Chau, and elsewhere; concerning the Site; and on the scale of the Proposed Development being less than that permitted in other planning applications approved.
21. Mr. Richard Siu's evidence touched on several matters, including the Site and access to it; the prior unsuccessful applications which were withdrew or rejected as referred to earlier; and why planning permission was refused having regard to the TPB's reasons.

### **C. Issues**

22. Three main issues arise :-

- (1) Whether the Appellant has discharged its onus of showing strong planning grounds to displace the general presumption against development on the Site in the GB Zone ("**the strong planning ground issue**").
  - (2) Whether the Appellant has shown that the Proposed Development at the Site is essential, and no alternative site is available ("**the essential and no alternative issue**").
  - (3) Whether the TPB erred in considering that approval of the Proposed Development would set an undesirable precedent for similar applications within the GB Zone, and given the impact of approving similar applications ("**the undesirable precedent / impact issue**").
23. In fairness, the Respondent's Counsel confirmed he only relies on the 3 adverse reasons in the TPB's letter of 2 May 2018. Thus, no reliance is placed for instance, on matters concerning traffic and access, environmental and ecological matters, visual matters, drainage and sewerage, fire safety, and matters concerning the Police. With respect, we do not propose to deal with every matter raised in the parties' written argument or orally, or in evidence, which we have carefully considered.

#### **D. Applicable principles**

24. The principles applicable in a town planning appeal are summarised in *Hin Tack Gee Ltd v TPB*, TPA 15/2011, 27 February 2014 at [17-26], as conveniently set out in the Respondent's Counsel's Skeleton (at para 17) :-

- “(1) The Town Planning Appeal Board (“**TPAB**”) must exercise an independent planning judgment and is entitled to disagree with the TPB.
  
- (2) The TPB's independent planning judgment (as with the TPAB's discretion) to grant planning permission must be exercised within the parameters of the relevant approved plan. The TPB (and the TPAB) has no authority to deviate from the plan “however compelling other material considerations to the contrary might be”.
  
- (3) (a) The draft OZP and the Notes are *material documents to which the TPAB is bound to have regard* in exercising its independent judgment and, indeed, they are *the “most material documents”*.
  
- (b) Whilst the Explanatory Statement is expressly stated not to be part of the plan, it does not follow that it is not a material consideration for the TPAB to take into account.
  
- (c) Similarly, the guidelines are also material considerations to be taken into account.
  
- (4) In determining the merit of an appeal, the TPAB should have regard to the principle of consistency, always bearing in mind that its decision in granting or refusal to grant planning permission would become a precedent for similar applications in the future.

- (5) There is a clear distinction in principle between the grant of planning permission and its implementation. In this regard, ownership is normally considered an irrelevant fact.
- (6) The burden is on the Appellant to *demonstrate to the Appeal Board that the TPB's decision was wrong and should be reversed or varied*. It is also incumbent upon the Appellant to satisfy that the proposed development is *in line with the planning intention* and that there is *sufficient justification to warrant the Appeal Board granting planning permission* for it.” (our emphasis)

We note in particular, that the Board (and TPAB) may grant permission “only to the extent shown or provided for or specified in the plan”: see *s.16(4)* of the Ordinance.

25. We also bear in mind these principles :-

- (1) It is necessary to ascertain the planning intention behind an approved plan which “is a matter of interpretation which is itself a matter of law and, as such, *admits of only one correct answer*” (emphasis added) : *International Trader Limited v. TPAB* [2009] 3 HKLRD 339 (C.A.) per Hartmann JA (as he then was) at [55].
- (2) Although there is a general presumption against development in a GB Zone, this does not mean that no development is possible : *Lam Ka-wing v. TPB*, TPB Appeal No. 24 of 2003 at [23]; and *Stephane Wong v. TPB*, TPA No. 5 of 2014 at [35].

26. The Town Planning Board Guidelines (“**the Guidelines**”) TPB-PG No. 10 dated July 1991 do not have statutory force. Nonetheless, these are material considerations to be taken into account. The Guidelines provide *inter alia* :-

“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.”

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

- a. to *conserve existing landscape features*, areas of scenic value and areas of recognized "*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.*”

“2. Main Planning Criteria

a. There is a *general presumption against development* (other than redevelopment) in a "GB" zone...

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...

...

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.” (emphasis added)

We take the Guidelines into account below.

## **E. The Merits**

### **E1. The strong planning ground issue**

#### The planning intention

27. The planning intention of the GB Zone as stated in the Notes to the Cheung Chau OZP is set out at para 4 above.
28. The Appellant relies on the Explanatory Statement (at para 8.10.3) in the Cheung Chau OZP, as set out at para 5 above.
29. Thus, the question arises whether the Appellant has discharged its onus of showing “strong planning grounds” (Guidelines at para 2b) to displace the “general presumption against development” in the GB Zone and for the Site.

The Appellant rightly accepts that the Proposed Development is “not in line with the planning intention of the GB Zone”. The issue arises whether the Appellant has shown sufficient “individual merits” (OZP Explanatory Statement at para 8.10.3) in the Proposed Development to warrant a departure from the planning intention.

30. The Appellant argues the Proposed Development has unique features and characteristics. In essence, it relies on public demand for niches, and the 10 year restriction (“**the Prerequisite**”) for Cheung Chau ordinary residents to apply for a niche in the Cheung Chau Columbarium; compatibility of surrounding land use; minimal or no landscape impact; that additional passengers generated is acceptable in terms of traffic and access; there is an available public footpath leading to the Site; the selection of the Site is most logical, acceptable and reasonable; and the absence of adverse comments from various other Government departments as referred to earlier (para 23).
31. The Respondent argues there are no exceptional circumstances nor strong planning grounds.
32. Before we resolve this question, the Respondent argues that while the planning intention behind an approved plan is a question of law, the Appellant’s primary, real, or only intention was to build and operate a columbarium, rather than a columbarium “within a Religious Institution” with the latter as the primary or real intention. The Respondent relies on 3 matters : (1) the Appellant’s contemporaneous AGM minutes (paras 16 to 17 above); (2) the huge difference and drop in number of niches initially proposed (20,000 reduced to 6,500, then 300) (para 14 above); and (3) the site area to be occupied by the niches (65%) versus temple (32%). And that the Kwun Yum Temple is at most ancillary. It thus argues that on the facts, this does not satisfy the Column 2 use for Green Belt of columbarium “*within* a Religious Institution” (para 12 above).

The Appellant’s Mr. Wong in cross examination gave evidence that the references in the AGM minutes to building or operating a “columbarium” rather than a temple, or religious institution was to make matters “easier to understand”. With respect, his evidence is not consistent with or supported by the contemporaneous minutes, produced before any litigation or planning application arose. The minutes are clearly relevant and important, and should have been disclosed much earlier.

33. We accept the Respondent’s arguments above on the Appellant’s primary or real intention. And that the Proposed Development is in effect, a columbarium in disguise, which is not allowed. As the construction of the permitted uses in Column 2 is a question of law, as a matter of fact, we find that the Appellant has failed to show on the balance of probabilities, that the primary or main use is for a Kwun Yum Temple, with a columbarium being an incidental or ancillary use. If anything, it is the other way around. Thus, on this question of fact, this suffices to dispose of the first main issue. The Appellant does not contend that it had a change of intention, let alone at a particular date or stage. Thus, we infer that its intention above was unchanged, at all material times. We also accept the Respondent’s argument that the test of intention is objective and not subjective, to determine whether a columbarium is ancillary to a religious institution. We were referred to the Court of Appeal case of *Regal Shining Ltd v. Secretary for Justice*, CACV 230/2014, 16 November 2015. While on different facts, we extract these principles :-
- (1) “The correct approach is to ask whether in substance *different primary uses* are being made of the land as opposed to *one activity or function being ancillary to the primary use* as a religious institution. If there were *distinct uses* in the sense that a particular use cannot properly be regarded as being incidental or ancillary to one primary use, *all* the users should comply with the planning requirements under the relevant OZP” (emphasis added) : at [50] per Hon Lam VP.
  - (2) “Financial considerations cannot turn a commercial activity into an ancillary use of a religious institution from a town planning point of view” : at [51].
  - (3) “The primary and core function of a [religious institution] must be activities like the conducting of religious services and saying of prayers” : at [51].
34. Before we apply *Regal Shining* to the facts, we note that the Appellant is not a religious body or charitable organization registered under s.88 *Inland Revenue Ordinance*, Cap 112. Nor has it sought to be recognized or incorporated as such. Although this factor may not be conclusive, it is a relevant factor when considering whether its primary or real intention was for a religious institution, i.e. a Kwun Yum temple.

35. Applying *Regal Shining*, we find as a fact, that the uses of “columbarium” and proposed Kwun Yum Temple are different or distinct primary uses. Alternatively, that the use as a temple is ancillary or incidental to the intended primary or real use as a columbarium. Second, we have seen no evidence that religious services are intended to be conducted, and prayers to be said, regularly at all.

For these reasons, the Appellant fails on Issue 1, which should suffice to dispose of the appeal. Out of an abundance of caution, we consider the other grounds of appeal.

## **E2. The essential and no alternative issue**

36. The Appellant submits that the Proposed Development is essential for these reasons :-
- (a) The Appellant has over a century of development on Cheung Chau. To make contribution to society, the descendants of the Appellant who wholly owns the Site wish to optimize a piece of underutilized land which is currently vacant on Cheung Chau to establish a dedicated space for the establishment of a temple. The temple, which is a religious institution will serve members of the Appellant, indigenous villagers, and other worshippers to pay tribute to the goddess. The Proposed Development is compatible with the surrounding land use and environment;
  - (b) There is limited land in Hong Kong. The site has been abandoned for over 100 years, which is a waste of land and resources. The Proposed Development can optimize the use of an underutilized land and resources, and cater for the overall public and territorial demand for columbarium facilities;
  - (c) There are more than 1,000 clan members of the Appellant scattered over Hong Kong, around 50 of whom live in Cheung Chau. The Proposed Development could provide a gathering place for reunion of clan members. It is essential to establish a formalized gathering and worshipping temple for members of the Appellant;
  - (d) Although there is an existing Tsz Tong at Tai San Street where a Kwun Yum Statue is placed, the Tsz Tong is too small to accommodate more than 1,000 clan members

of the Appellant. Further, there is no columbarium inside the Tsz Tong. The Appellant would reserve 60 niches (out of 300) with priority to clan members to obtain a niche;

- (e) The majority of the Appellant's clan members cannot fulfill the Prerequisite of 10 years ordinary residence in Cheung Chau. They would be eligible to apply for niches in the Proposed Development. Residents of Cheung Chau who cannot fulfill the Prerequisite can also apply; and
- (f) Although there are already temples of different religious background in Cheung Chau, including an existing Kwun Yum Temple at Kwun Yum Beach in Cheung Chau, there is *no* columbarium facility in the existing Kwun Yum Temple. The Proposed Development can provide an alternative for local worshippers of Kwun Yum to apply for a niche on Cheung Chau Island.

37. The Appellant then submits there is no alternative private site available on Cheung Chau Island that is suitable for the Proposed Development :-

- (a) The Site is carefully selected by the Appellant. It is located adjacent to the existing Cheung Chau Cemetery, Columbarium, and Crematorium, and Cheung Chau Catholic Cemetery. It is also located away from the residential area which is privately owned. The selection of the Site is compatible with the surrounding land use and environment, which would cause minimal disturbance to Cheung Chau residents;
- (b) There is an existing pedestrian footpath serving the Site that is accessible from both Sai Wan Pier, and Cheung Chau Public Pier via Cheung Chau Sai Tai Road, Tsan Tuen Road, and Cheung Chau Peak Road West. This route is currently the existing access serving the Cheung Chau Cemetery, and other nearby funeral related facilities. Part of the Appellant's land is currently encroached by the public footpath leading to Cheung Chau Cemetery without obtaining the Appellant's consent; and
- (c) Although the Appellant owns other land in Cheung Chau, these are mostly in the northern part, and with longer walking distance. The Site is adjacent to Cheung

Cheung Chau Cemetery, served by paved footpaths with public toilets and sitting areas en-route, and is more suitable for the Proposed Development.

38. The Respondent argues that the Proposed Development is not essential, and this is not a case where no alternatives are available. Again, having regard to our findings above that a columbarium is the real or primary purpose, we are not concerned with a permitted use where a temple or religious institution is the primary, main, or real purpose. We find on the facts, that the proposed Kwun Yum Temple is not essential. Therefore, the essential and no alternative ground of appeal fails. We also note there are other temples in Cheung Chau, and there is no evidence of how many members of the Appellant or the public, would like a Kwun Yum Temple in Cheung Chau.

39. We therefore find as a fact, that the Proposed Development is not essential :-

(1) Having regard to our findings on the real or primary purpose being for the niches and columbarium. Indeed, 80% (240/300) of the proposed niches is for the general public. It is in fact, a private columbarium regulated by the *Private Columbaria Ordinance Cap 630*, in disguise as a religious institution.

(2) Having regard to the lease conditions referred to earlier (para 11), these are for “agricultural or garden ground”, rather than some wider user rights.

The fact the Appellant wishes to optimize the use of its land, does not mean this is “essential” for town planning purposes in a GB Zone.

(3) We are not persuaded it is essential to have a temple and columbarium to have clan gatherings, let alone that the proposed temple is essential for the public benefit.

As a Kwun Yum Temple is not essential, no planning permission for a Religious Institution should be granted on this application. The application is not for a “Columbarium within a Religious Institution”.

40. On alternative sites (Guidelines at para 2e; para 26 above), the Respondent sought to argue that if the Appellant had another site, the Guidelines could not be satisfied.

41. With respect to the Respondent, the Guidelines should be construed purposively, and with common sense. Otherwise, these could be applied in a literalistic way that is discriminatory and unfair to land owners with more than one site – the Respondent could argue in such circumstances that a landowner could always use another site, such that it could not literally satisfy the reference in the Guidelines to “no alternative sites”. We note that the Respondent’s Mr. Siu accepted in evidence, that the focus was on a *practical* alternative. We agree. As we have found that the Proposed Development is not essential, the question of alternative sites does not arise.

### **E3. The undesirable precedent / impact issue**

42. The Applicant argues that the Proposed Development has unique features and characteristics (para 30 above), and there would not be many sites in the vicinity that would be identical or similar to the Site. Hence, it would not cause cumulative effect, nor result in degradation of the natural environment and rural landscape character. Further, it emphasizes that approval of the application would not set an adverse precedent, or be in breach of the principle of consistency. The TPB is no rubber stamp, and would assess each application on its individual merits and own facts taking into account all relevant TPB Guidelines.
43. The Appellant also relies on Ms. Theresa Yeung’s evidence: there are precedents for development in GB zones. For instance, several temples (with ancillary columbarium) in Hong Kong are built in a GB zone. Some examples are at Appendices 2 to 8 to Ms. Yeung’s witness statement. There is no evidence of many similar applications in those GB zones which created a floodgate and resulted in degradation of the natural environment and rural landscape character in those GB zones.
44. The Respondent argues first, there is to date, no similar application for proposed religious institution and columbarium use in the GB zone on the Cheung Chau OZP approved by the TPB or RNTPC. Absent exceptional circumstances, approval of the Proposed Development would set an undesirable precedent for similar applications in the GB Zone on the OZP. The cumulative impact of approving similar applications would adversely

affect the integrity of the GB Zone at the southwest upland area of Cheung Chau, and result in encroachment and degradation of the natural environment and rural landscape character. Second, that the approvals mentioned in Ms. Yeung's statement (at paragraph 12) have no true value as precedents :-

- (1) None of the approvals related to Cheung Chau.
- (2) Those approvals related to applications for niches or additional niches in *existing* religious institutions (A/ST/665 also involved application for regularization of an existing temple).
- (3) The considerations could be different from an application to construct a *new* religious institution with ancillary columbarium, from scratch. The suitability of a site to construct a new religious institution with columbarium is the key consideration, while for sites fully within a GB zone, the main considerations are more about whether the greenery environment should be disturbed if there are strong planning grounds.

45. In the instant case, we acknowledge the importance of the principle of consistency, for coherent and reasonably predictable decision making. Nonetheless, we note :-

- (1) The Respondent belatedly accepted that the correct focus was not simply on the GB Zone in the Cheung Chau OZP, but also on GB zones in other areas in Hong Kong. It appears from the precedents relied on by Ms. Yeung, that several are for "GIC" use, rather than in a GB zone.
- (2) Again, a relevant factor is whether the Proposed Development is for an existing, as opposed to new religious institution. Neither strictly arises given our factual findings on the Appellant's primary or real intention. If we had been satisfied that the main or primary purpose was for a religious institution, then the question of an incidental or ancillary columbarium could arise. We note on the evidence, that the precedents relied upon by Ms. Yeung largely concerned columbariums within a temple *already* established - rather than a new religious institution. Given our

factual findings on the Appellant's primary or real intention, with respect her evidence is not of real assistance in this case.

#### **E4. Proportionality**

46. We deal briefly with this issue which was raised shortly before the hearing commenced upon this Appeal Board's invitation, given the Court of Final Appeal decision in *Hysan Development Co. Ltd. v. TPB* (2016) 19 HKCFAR 372. On that authority, when considering proportionality, a four-step analysis, instead of a three-step analysis, would be adopted :-

- (a) The restriction or limitation must pursue a legitimate aim;
- (b) The restriction or limitation must also be rationally connected to that legitimate aim;
- (c) The restriction or limitation must also be no more than necessary to accomplish that legitimate aim;
- (d) Where an encroaching measure had passed the three-step test, the analysis should incorporate a fourth step, asking whether a reasonable balance had been struck between the societal benefits of the encroachment and the inroads made into the constitutionally protected rights of the individual, asking in particular whether pursuit of the societal interest resulted in an unacceptably harsh burden on the individual : at [52-53] & [134-135]; and
- (e) In the case of town planning restrictions, where the Board reaches decisions which are not flawed on traditional judicial review grounds, the standard or test applicable in assessing proportionality at the third step is the "manifestly without reasonable foundation" standard : at [142].

47. Pursuant to the Appeal Board's letter dated 28 October 2019, parties were directed to provide brief supplemental submissions on this question :-

*“whether and to what extent, that parties’ submissions accord with Article 6, 7, and 105 of the Basic law.”*

There is no challenge to the constitutionality of any statutory provision.

48. The Respondent argued that the issue of proportionality is irrelevant to a section 16 application; and that once there are restrictions in a OZP and Notes, such restrictions are constitutional and proportionate.

49. The Appellant argued that the TPB's 3 reasons for refusal were unreasonable; that the planning restrictions and the application of the presumption against development produced “extremely unbalanced and unfair results”, oppressively imposing excessive and harsh burdens on the Appellant which in effect, is incapable to overcome and would be regarded as infringing the Appellant's property rights under Articles 6 and 105 of the Basic Law.

50. In the instant case, we consider that the TPB's refusal of planning permission is not disproportionate :-

(1) On the facts, we do not consider that the TPB's decision was wrong, let alone that it should be reversed or varied.

(2) Nor do we consider that the TPB's decision is open to attack on judicial review grounds. For instance, that it took into account irrelevant factors, or failed to take into account relevant factors.

(3) In an exceptional case, it is possible that if there was no error on judicial review grounds, a TPB decision could conceivably be open to attack on proportionality grounds. It is unnecessary for us to resolve this issue on this appeal.

## **F. Conclusion**

51. For the reasons above, this appeal is dismissed. We have some sympathy for the Appellant given its several attempts over the years, to obtain planning approval, and the reduced scale and intensity of the Proposed Development. Nonetheless, having regard to all the facts found and the evidence adduced, we regret that we have no option but to dismiss the appeal.
52. We apply the usual practice on costs before the Appeal Board which is not to make a costs award, in the absence of exceptional circumstances.
53. Lastly, we thank both Counsel for their very helpful assistance.

(Signed)

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Mr. CHUA Guan-hock, SC

(Chairman)

(Signed)

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Ms. Teresa AU Pui-yee

(Member)

(Signed)

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Dr. Barry LEE Chi-hong

(Member)

(Signed)

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Mr. Ben LEUNG Chi-hung

(Member)

(Signed)

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Ms. Ada WU Ching-mei

(Member)