DECISION

IN THE TOWN PLANNING APPEAL BOARD
TOWN PLANNING APPEAL NO. 8 OF 2019

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Between

LEE KENG WAI *Appellant*

and

TOWN PLANNING BOARD *Respondent*

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IN THE TOWN PLANNING APPEAL BOARD
TOWN PLANNING APPEAL NO. 9 OF 2019

_____

Between

LEE KENG YING *Appellant*

and

TOWN PLANNING BOARD *Respondent*

_____

Appeal Board:	Mr Simon LAM Ken-chung	(Chairman)
	Ms Teresa AU Pui-yee	(Member)
	Miss CHAN Ka-man	(Member)
	Dr LIU Chun-ho	(Member)
	Mr WONG Kin-yee	(Member)
In Attendance:	Ms Ivy LI	(Secretary)

Representation: For the Appellants: Mr Edward CHAN, Senior Counsel, leading Mr. Andrew TSE, barrister-at-law
For the Respondent: Mr. Stanley NG, barrister-at-law

Dates of Hearing: 14 December 2021;
8, 9, 15, 16 & 22 August; and 29 September 2022

Date of Decision: 6 December 2023

DECISION

I. PRELIMINARIES

IA. Introduction

Two appeals are involved. In Town Planning Appeal No. 8 of 2019 ("**Appeal A**"), the Appellant ("**Appellant A**") is the owner of a piece of land known as Subsection 1 of Section A of Lot 1109, and Section A of Lot 1124, both

of Demarcation District 218 ("**Lot A**"). In Town Planning Appeal No. 9 of 2019 ("**Appeal B**"), the Appellant ("**Appellant B**") is the owner of another piece of land known as the Remaining Portion of Section A of Lot 1109, and the Remaining Portion of Lot 1124, both of Demarcation District 218 ("**Lot B**")[1].

2. Both Lot A and Lot B are situated in the vicinity of a village known as Che Ha Village（輋下村）("**Che Ha**"), in Shap Sz Heung（十四鄉）(also referred to as Sai Kung North Heung in this appeal) ("**the Heung**") of Sai Kung North.

3. On 6 March 2019, Appellant A and Appellant B separately submitted a planning application, in relation to their respective piece of land, under section 16 of the Town Planning Ordinance Cap. 131 ("**the Ordinance**"), seeking planning permission for the development of a proposed New Territories Exempted House ("**NTEH**") – Small House ("**SH**") thereon. The applications were rejected by the Rural and New Town Planning Committee ("**RNTPC**") of the Town Planning Board ("**TPB**"). Both Appellants then applied separately under section 17(1) of the Ordinance to the TPB for a review of the decision of the RNTPC. In a meeting held on 23 August 2019, the TPB rejected both applications for review. The Appellants then jointly lodged an appeal with this Appeal Board, pursuant to section 17B(1) of the Ordinance, by way of a Notice of Appeal dated 6 November 2019 ("**the Notice of Appeal**"). Pausing here, given the afore-mentioned history of the proceedings, there ought to be two separate appeals instead of one. No directions have ever been sought from this Appeal Board for the appeals to be consolidated or heard together. All that we have is a "Note" in the Notice of Appeal, that "*Planning applications No. A/NE-SSH/127 and A/NE-SSH/128 are two cases. They are adjacent to each other and under*

[1] Lot A and Lot B are hereinafter collectively referred to as "**the Lots**".

similar conditions. The two cases are to be considered together." This is an undesirable situation, to say the least. Appropriate directions ought to have been sought from this Appeal Board, instead of the Appellants' authorised representative telling the Board that "*the two cases are to be considered together*".

4. Be that as it may, the appeals arising from the two applications have all along been proceeded together as if they were a single appeal, and it shall continue to be so treated. In so far as it may be necessary, an order is made that the two appeals be heard together.

IB. Background

IB1. Lot A and Lot B

5. Lots A and B are neighouring pieces of land. The former is of a site area 77.7 m^2, the latter 136.5 m^2. Both sites are old schedule lots held under a Block Government Lease, and stated therein to be for agricultural use. They are adjacent to the eastern edge of Che Ha proper, and entirely within the "Village Environs" ("**VE**") of Che Ha. The VE of a "recognised village"[2] generally refers to an area within a 300-foot radius from the edge of the last village type house built in the village before the formalisation of the Government Small House Policy ("**the Policy**") on 1 December 1972. In the present case, it is undisputed that Che Ha is a "recognised village" under the Policy.

6. The area surrounding the Lots are generally rural in nature, with village houses and scattered tree groups. A section of Tai Tung Wo Liu Stream (大洞禾寮河) runs at a distance of 22 metres from the eastern edge of the Lots.

[2] The Lands Department maintains a list of what the "recognised villages" are.

The Lots are generally flat, vacant and paved, and accessible by a vehicular track leading to Sai Sha Road（西沙路）. Both lots are vacant at all material times.

7. Both of the Lots fall within the approved Shap Sz Heung Outline Zoning Plan No. S/NE-SSH/11 ("**the OZP**"). For Lot A, it falls entirely within an area zoned "Comprehensive Development Area" ("**CDA**") under the OZP. In respect of Lot B, 89% by area of it falls within an area zoned CDA, while the remaining 11% falls within an area zoned "Village Type Development" ("**V**"). According to the Notes of the OZP, "*House (NTEH only)*" is a Column 1 use always permitted within the V zone. For the CDA zone, however, "*House (other than rebuilding of NTEH or replacement of existing domestic building by NTEH permitted under the covering Notes)*" is a Column 2 use for which planning permission from the TPB is required. It is for such reason that the Appellants had to seek permission from the TPB for their intended construction of NTEH in the first place.

IB2. <u>Previous planning applications pertaining to Lot A and Lot B</u>

8. Both Lots A and B were respectively the subject of a previous application for NTEH (SH) use.

9. Lot A (together with an additional 19 m^2 of Government land), was the subject of Application No. A/NE-SSH/96, and Lot B the subject of Application No. A/NE-SSH/97, both submitted to the TPB in 2014. The former application was lodged by a Mr. LAI Chun Fai, and the latter by a Mr. LAI Chun Wing, both being the owner of their respective lot (collectively "**the Original Owners**") at the material time. Both applications were rejected by the RNTPC on 14 November 2014. Upon an application for review, however, the TPB approved both applications during a meeting held on 10 April 2015. In [168] of the minutes of the said TPB meeting, the following was recorded:

> *"After further deliberation, the Board decided to approve the applications on review on the terms of the application as submitted to the Town Planning Board for Application No. A/NE-SSH/97 and subject to the excision of government land from the application site for Application No. A/NE-SSH/96. The planning permission for each of the applications should be **valid until 10.4.2019**, and after the said date, the permission should cease to have effect **unless before the said date, the development permitted was commenced or the permission was renewed**. ..."* (Bold emphasis added)

10. Although the reasons for the TPB's decision were not stated in the said minutes of meeting, it is apparent that the approval was granted despite the fact that '*there was still land available within the "V" zone to meet the Small House demand*.'[3]

IB3. The Appellants' acquisition of the Lots, and the events thereafter

11. The Appellants are the sons of a Mr. LEE Wan Hoi Aloysious ("**A Lee**"). The Appellants reside overseas, and general powers of attorney have been executed by them in favour of A Lee. The Appellants and A Lee all claim to be indigenous villagers of Tung Ping Chau Chau Mei Village（東平洲洲尾村） ("**Chau Mei**"), though their claim has yet to be formally verified by the Lands Department. Chau Mei and Che Ha are both villages within the Heung.

12. According to the Appellants, Tung Ping Chau forms part of the country park that falls within the Geopark, and is surrounded by the Marine Park. Due to the unique geographical location of Tung Ping Chau, and the lack of infrastructure there, it is near impossible to obtain permission to build a NTEH in Tung Ping Chau. The Appellants' contention in this respect has not been challenged by the Respondent. As the Appellants considered themselves to be

[3] [164] of the minutes of the TPB meeting.

indigenous villagers of Tung Ping Chau, and since it is near impossible to build a NTEH on Tung Ping Chau, A Lee on their behalf approached the Original Owners through a Mr. LEE Martin Vaughan ("**M Lee**"). The Appellants eventually acquired their respective piece of the Lots, and they became the owners thereof on 28 April 2017.

13. The Appellants then engaged a Mr. HUNG Shu Ping ("**Hung**") to make necessary applications to the District Lands Office on their behalf to build NTEH on the Lots. Applications were made on around 10 May 2017. With the approach of the expiry date of the planning permissions of 10 April 2019, the Appellants' applications to the District Lands Office had not yet been approved. Therefore, in January 2019, the Appellants instructed Hung to submit an application to TPB for extension/ renewal of the planning permissions, which Hung apparently did.

14. About a week later, Hung informed A Lee that, according to TPB, the Appellants' application for extension/ renewal of planning permission could not be entertained, as there had been a change of ownership of the Lots since the relevant planning permissions were granted. Two fresh applications for planning permissions were therefore lodged on 6 March 2019, as mentioned in paragraph [3] above.

15. On about 28 March 2019, however, Hung informed A Lee that it was in fact possible for the original planning permissions to be extended/ renewed, as long as the Appellants properly authorised the Original Owners to make the necessary applications on their behalf. A Lee was further advised that such applications by the Original Owners had to be submitted before 10 April 2019 (i.e., the expiry date of the original planning permissions).

16. Unfortunately, both the Original Owners and the Appellants were residing outside Hong Kong at the time. No application for extension/ renewal of the original planning permissions could be lodged before 10 April 2019, and the Appellants were left with the new applications for planning permissions that they lodged on 6 March 2019.

17. In the course of the appeal hearing, Senior Counsel for the Appellants, Mr. Edward Chan SC, clarified that the Appellants are not laying any blame or making any adverse allegations against the staff/officers of TPB. There is no allegation that the Appellants were misled or wrongly advised by any staff/officer of TPB. This appeal has therefore been proceeded on that basis.

IB4. <u>The grounds upon which the TPB rejected the Appellants' review applications</u>

18. As it is the TPB's decisions that are under appeal, it is unnecessary for this Appeal Board to set out or consider the reasons for the RNTPC's rejection of the Appellants' applications.

19. The grounds upon which the TPB rejected the Appellants' review applications, as contained in the minutes of TPB's meeting on 23 August 2019, at [43], are as follows:

> '*(a) the proposed Small House development does not comply with the Interim Criteria for assessing planning application for New Territories Exempted House/ Small House development in the New Territories in that there is no general shortage of land in meeting the demand for Small House development in the "Village Type Development" ("V") zone of Che Ha; and*
>
> *(b) land is still available within the "V" zone of Che Ha 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.'

20. The said grounds of rejection were also contained in a letter from the TPB to Hung (in his capacity as the Appellants' representative) dated 13 September 2019.

IC. <u>The grounds of appeal</u>

21. In the *Skeleton Opening Submissions for the Appellants* dated 30 November 2021 ("**A's Opening**"), four grounds of appeal were set out, and relied upon in this appeal:

"*(a) Ground 1: The [decision of the TPB] is inconsistent with the Planning Permissions as previously granted by the TPB back in 2015.*

(b) Ground 2: the TPB erred in finding that there is no shortage of land within the V Zone of Che Ha.

(c) Ground 3: The TPB erred in finding that the proposed NTEHs would be contrary to orderly development pattern, efficient use of land and provision of infrastructure and services.

(d) Ground 4: The TPB erred by failing to sufficiently consider the sympathetic considerations applicable to the Appellants."

22. It is noted that the grounds set out in [21] above are not identical to those stated in the Notice of Appeal. Some of the grounds stated in the Notice of Appeal were not pursued in the appeal hearing, and Grounds 3 and 4 in [21] above

do not seem to have been covered in the Notice of Appeal. Be that as it may, the Respondent was given sufficient notice of the grounds relied upon by the Respondent in the appeal hearing. A's Opening was lodged in November 2021, and the substantive hearing of the appeal only commenced in August 2022. The Respondent also raised no objection to the inclusion of the said Grounds 3 and 4. This Appeal Board therefore treats all four grounds set out in [21] above as the *only* grounds of appeal herein.

23. This Appeal Board will consider Ground 2 and Ground 3 first, before Grounds 1 and 4, which will be considered together.

ID. <u>The assessment criteria</u>

24. Before going into the individual grounds of appeal, it is necessary to set out the criteria upon which applications for planning permission pertaining to NTEH/ SH are assessed.

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

26. The following criteria stipulated in the 2007 version of the Interim Criteria are relevant to the appeals herein:

"*(a) sympathetic consideration may be given if not less than 50% of the proposed NTEH/ Small House footprint falls within the village 'environs' ('VE') of a recognized village and there is a general shortage of land in meeting the demand for Small House development in the "Village Type Development" ("V") zone of the village;* ("**Criterion (a)**")

…

(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 case, 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; ("**Criterion (d)**")

…

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

… ." (Words in bold-type added for the adoption of abbreviations)

IE. <u>The evidence</u>

27. The Appellants called the following witnesses in the course of the hearing:

(a) Hung;

(b) M Lee;

(c) A Lee; and

(d) Mr. LAU Tak Francis ("**Lau**"), who, *inter alia*, gave expert evidence on the availability of land in Che Ha for the construction of NTEHs/ SHs.

28. On the other hand, the Respondent called two witnesses:

(a) Mr. WU Yiu Chung Tony ("**Wu**"), Senior Town Planner, who gave factual evidence pertaining to the circumstances of this case, as well as expert evidence in response to that of Lau; and

(b) Ms. LAM Yuk Ling ("**Lam**"), Senior Land Executive of the Lands Department, who gave evidence on the processing of the NTEH/ SH applications by the Lands Department.

29. The witness statements (including attachments) of the factual witnesses were admitted as evidence in chief in the course of the appeal. Expert reports (including attachments) were compiled by the experts and admitted as evidence. Lau and Wu also compiled and submitted a joint expert statement ("**the Joint Expert Statement**") setting out their agreements and disagreements. All witnesses were subject to cross-examination by the opposition party. Besides, documentary evidence was contained in the Appeal Bundles lodged by the Respondent. The parties also submitted further documentary evidence in the course of the appeal hearing. They have been admitted and suitably marked as exhibits.

30. The admission of parts of the witness statement of Lam, as well part of the Joint Expert Statement, were objected to by the Appellants, as being beyond the scope of the leave granted by this Appeal Board on 14 December 2021. By consent of the parties, such evidence was received by this Appeal Board on a *de bene esse* basis. During the hearing on 14 December 2021, the Appeal Board informed the parties that it would exercise strict control over the additional evidence that was sought to be adduced, and gave directions accordingly. We have therefore excluded the following evidence from our consideration: [2] to [5], [8] to [11] and [15] to [16] of the Witness Statement of Lam (undated); and [113] to [114] of the Joint Expert Statement.

31. Reference will be made to the relevant admitted evidence as and when necessary.

II. GENERAL LEGAL PRINCIPLES APPLICABLE TO THE APPEALS

32. It is common ground between the parties that, in an appeal from the TPB to this Appeal Board, the hearing of the appeal is *de novo*, i.e., this Appeal Board must exercise an independent planning judgment, and is entitled to disagree with the TPB. Please see *Henderson Real Estate Agency Ltd v Lo Chai Wan* [1997] HKLRD 258, at 266A. As rightly observed by this Appeal Board in *Town Planning Appeal No. 15 of 2011* (27 February 2014), the implication of the Privy Council case is that "*The TPAB could substitute its own decision for that of the TPB even if the TPB had not strictly committed any error on the materials before it, as the hearing before the TPAB would normally be much fuller and more substantial than a review hearing under TPO s. 17*"[4].

33. *Town Planning Appeal No. 15 of 2011*, at [18] to [26], also set out other applicable principles under the umbrella of *Henderson Real Estate Agency Ltd v Lo Chai Wan*, supra. In this case, it suffices for two of the principles to be highlighted. Firstly, the burden is on the appellant to show that the TPB's decision was wrong, so that the Appeal Board should either reverse or vary that decision[5]. This seems contrary to what the Appeal Board said in [18] of its Decision ([32] above). We take the Appeal Board in that case to mean that, albeit that the Appeal Board has to consider the matter *de novo*, and should exercise its own independent planning judgment, it should also pay due regard to the TPB's

[4] [18] of the Decision in that case, citing *Town Planning Appeal No. 28 of 2005* (12 April 2007).
[5] [26] of the Decision.

decision, as the TPB is a body that has vast expertise and experience in dealing with town planning matters. Secondly, it is incumbent upon an appellant to satisfy the Appeal Board that there is sufficient justification to warrant planning permission to be granted by the Appeal Board to the proposed development.

34. These principles are borne in mind by this Appeal Board in the consideration of the appeal herein.

III. GROUND 2: WHETHER SHORTAGE OF LAND

IIIA. <u>The parties' respective case in this respect</u>

35. In his attempt to justify the first reason for TPB's decision ([19(a)] above), that there is no general shortage of land in meeting the demands for SH developments in the V zone of Che Ha, Wu gave evidence to the effect that, in considering whether there is general shortage of land, the TPB would take into account the number of outstanding SH applications being processed by the Lands Department, as well as the number of 10-year SH demand forecast as provided by the indigenous inhabitant representatives ("**IIRs**") to the Lands Department, and compare them with the land available within the village for the construction of SH. Wu says that[6], as at November 2021, there were 19 outstanding SH applications, and 30 SH demands according to the 10-year forecast, making up a total demand of 49 SHs for the next 10 years. On the supply side, the Respondent's estimation is that 2.05 hectare (ha) of land, which is equivalent to 82 SH sites, was still available within the V zone of Che Ha as at the date of Wu's Statement (i.e., November 2021). In [10] of Wu's expert report dated 28 February 2022 ("**Wu's Report**"), the figure is updated to 2.01 ha, which is equivalent to

[6] [8.3] of his Statement dated 16 November 2021 ("**Wu's Statement**").

80 SHs. This is, according to Wu, more than sufficient to meet the demand for SH sites in the next 10 years. 1 ha (hectare) is equal to 10,000 m^2. It is therefore apparent that the TPB assumes that each SH would take up about 250 m^2. This is a generous assumption. As mentioned in [5] above, Lot A is only 77.7 m^2, and Lot B 136.5 m^2. The Appellants propose to build a SH on each of the lots.

36. The Respondent also relies upon the so called "more cautious approach", which was mentioned during a TPB meeting on 14 August 2015. According to the minutes of the said TPB meeting, the Secretary of TPB introduced a paper to the TPB[7], [30] of the minutes of meeting then went on to record:

> "*The Secretary further said that in adopting the Interim Criteria for Consideration of Application for New Territories Exempted Houses/ Small House in New Territories (the Interim Criteria) in considering planning applications for Small House development, the Town Planning Board (the Board) and the Rural and New Town Planning Committee (RNTPC) had been* ***more cautious*** *in approving applications for Small House development* ***in recent years***. *Some general observations were summarised as follows:*
>
> *(a)* ***in considering if there was a general shortage of land in meeting the demand for Small House development, more weighting had been put on the number of outstanding Small House applications provided by the Lands Department****;*
>
> … ." (Bold emphasis added)

37. The Secretary clarified in [31] of the minutes that '*... in considering whether there was sufficient land available for Small House development, the outstanding Small House applications, 10-year Small House demand forecast, as well as land available within the concerned "V" zone were all factors taken into account*.'

[7] [29] of the minutes of the TPB meeting.

38. [34] of the minutes then recorded that "*The Chairman said that the information contained in the Paper was to facilitate Members' future consideration of Small House applications and that each application would be considered on its individual merits. Members agreed*."

39. It is thus apparent that the "more cautious approach" had been adopted by the TPB for some years, before the approach was summarised in a paper for TPB's information in August 2015. It appears that the approach has been followed by the TPB ever since. If the Respondent's estimations ([35] above) are correct, however, it does not have to rely on this approach, for the available land would be sufficient to meet both the outstanding SH applications and the 10-year demand forecast.

40. As for the estimate of available land, Wu relied on a plan (Plan AP-2b) attached to Wu's Statement, which delineates the clusters of land available for SH developments.

41. The Appellants attack the Respondent's case on shortage of land on two fronts. First, they say that, in its estimation of the quantity of land available in the V zone of Che Ha for SH development, the Respondent has erroneously included land which may not be suitable or available for building NTEHs. Second, the Appellants say that, in estimating the demand for land, the Respondent ought to have included not only demand from the villagers of Che Ha, but should also have considered the demand from indigenous villagers from other villages within the Heung. Each of the two fronts of attack will be discussed below.

IIIB. The quantity of land available

IIIB1. Suitability versus immediate availability

42. In relation to the ease with which a villager may be able to acquire a piece of land that is suitable for the development of NTEH/ SH, the Appellants fairly said in [47] of A's Opening:

> '*It is accepted that when considering whether there is a general shortage of land, the emphasis is on "general" shortage and that the particular difficulty of the Appellants in acquiring land would not be in point.*'

43. This must be correct. In considering the availability of land for the purpose of assessment of Criteria (a), the focus must be on the suitability of the pieces of land concerned. Whether or not the owner of a particular piece of land would be willing to release the land for another villager to build a NTEH/ SH on it would depend on a whole lot of factors such as the price offered, the market situation, the personal circumstances and wish of the owner, etc. Such factors may also change with time. Even if a piece of land is presently put into use by the owner for another purpose, e.g., as a garden or agricultural use, there is no reason why he would not release the land for NTEH/ SH purposes, given the right circumstances. It is wholly unrealistic, and unfair, for the TPB to be required to make inquiries into the owners' willingness to sell while estimating the quantity of land available for development into NTEHs/ SHs. It is noted that land with existing village houses are excluded from land estimation ([46] below).

44. The same issue was considered in *Town Planning Appeal No. 5 of 2020* (27 September 2022), where the Appeal Board said:

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

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

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

> *'33. The Appellants' complaint in this regard is that the lands within the V Zone were all owned/acquired by t'so/t'ong and developers. It is very difficult, said Mr. Koo, for the Appellants to purchase any land within the V Zone to build SHs.*
>
> *34. The Appeal Board rejects [this] Ground of Appeal in that* ***the difficulties in acquiring lands within the V Zone is not a relevant***

factor in granting planning permission. *As explained by the Appeal Board in Town Planning Appeal No. 2 of 2017 (§§66-69):*

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

consideration, thereby resulting in a proliferation of Small House development outside the "V" zone and further encroachment into the "GB" zone inconsistent with the clear planning intention."' (Bold emphasis added)

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

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

45. The reliance on *British Railways Board v Secretary of State for the* Environment [1994] JPL 32 and *Merritt v Secretary of State for the Environment, Transport and the Regions* [2000] 2 PLR 125 in previous decisions of this Appeal Board was heavily criticized by Mr. Chan SC. This Appeal Board shares the reservation expressed in [49] of the Decision in *Town Planning Appeal No. 5 of 2020*, supra, but adopts and repeats the analysis contained in [50] of the Decision therein, and repeats what we said in [43] above. It is suitability, not immediate availability, that should be the TPB's concern.

IIIB2. <u>The quantity of available land</u>

46. The way in which TPB makes estimations of the quantity of land available in a village is well-known, and has been set out in *Town Planning Appeal No. 3 of 2019* (9 August 2021):

> '*24. … It is the evidence of Mr. Fung, which this Appeal Board accepts, that the land available within the Subject V Zone for Small House development is estimated according to the established practice of the Planning Department. First of all, the net developable area within a "V" zone is calculated by deducting the following areas from the total area of the "V" zone, viz.:*
>
> *- Existing village houses;*
> *- Road, footpath and track;*
> *- Steep slopes;*
> *- Tree clusters especially Fung Shui woodland;*
> *- Fung Shui pond;*
> *- Existing heritage site/ village office/ Tsz Tong/ ancestor hall/ shrine;*
> *- Temple, church and other permanent building development within the village;*
> *- Burial ground;*
> *- Stream buffer;*
> *- NTEH cases already approved; and*
> *- Planned public facilities on Government and private land.*

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

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

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

47. Lau however says that TPB, in its estimation of land quantity, has failed to exclude the following areas of land from its calculations (these are his latest figures after the amendments contained in the Joint Expert Statement, as reproduced by Wu in a document produced as Exhibit R2 in the course of the appeal hearing):

Land type	Area (m^2)
Government land not suitable for erection of Small House	3,118
Private land too small or in irregular shapes	2,511
Land with Building Licenses/ New Grants	1,421
Land grown with trees or on a slope	3,252
Land where owners are unwilling to part with their land	3,076
Total:	13,378

48. In the said Exhibit R2, Wu pointed out that certain mistakes were made by Lau in his calculations, in that some of the areas have been double-counted, mainly because Wu has taken them out in his own estimation. Wu's calculations, based on Lau's contentions (but without admitting them to be correct), are as follows:

Land type	Area (m^2)
Government land not suitable for erection of Small House	1,785
Private land too small or in irregular shapes	2,422
Land with Building Licenses/ New Grants	906
Land grown with trees or on a slope	3,252

Land where owners are unwilling to part with their land	2,277
Total:	10,642

49. Wu's revised calculations have not been challenged by the Appellants. This Appeal Board shall take 10,642 m^2 as the total deduction from the land available, should Lau's contentions be accepted in full.

50. We have already made a ruling to the effect that the willingness of land owners to part with their land is irrelevant. The corresponding area of 2,277 m^2 therefore should not be deducted from the amount of land available. We shall discuss the other items of deduction proposed by Lau.

IIIB2.1 *Government land allegedly not suitable for erection of Small House*

51. The Government land deducted by Lau are "*either in irregular shapes, too small in area, on the public access road, being a part of the garden of other houses etc*."[8].

52. Government land that is used as part of the garden area of a person is likely to be under a short-term tenancy to that person. Such tenancy could be terminated upon short notice. These land should not be excluded from land estimation.

53. As for the size and shape of the land, it is apparent that Lau has considered each piece of Government land individually, without considering the possibility of them being amalgamated with neighbouring pieces of land, including private lots. Wu has compiled a table[9] showing how the pieces of land

[8] [25] of Lau's expert report dated 12 November 2021 ("**Lau's 1st Report**").
[9] Table 1 of Wu's Report.

alleged by Lau to be too small or irregular in shape may be amalgamated to form six clusters of land for development into NTEH sites. This Appeal Board accepts his evidence in that regard. It is not unusual for pieces of land to be amalgamated for development. Sites with irregular shape may also undergo surrender and regrant with the Government to form a site with improved shape. There is no justification for excluding land on ground of size or shape, unless the situation is such that it cannot be realistically made use of even by amalgamation or exchange.

54. This Appeal Board is more concerned about land that is presently used as public access road. According to Lau[10], 2,479 m^2 of the Government land straddles across public accesses or roads[11]. This constitutes a significant portion of the total of 3,118 m^2 of Government land estimated by Lau.

55. According to Wu[12], Lau's estimation was based on an outdated position of the Respondent, and that G5, G7 and G8, as well as *part* of G6 and G11, had already been excluded by the Respondent. It is a pity that Wu did not give the exact areas of the parts of G6 and G11 that had already been excluded. It is also a pity that, [14] of Wu's Report has lumped private and Government land together. Doing our own arithmetic, it appears that the total area that ought to be excluded by reason of double counting is 841 m^2 (4,039 m^2 – 3,198 m^2). We shall therefore assume that the total area of Government land affected by the access road issue is **1,638 m^2** (2,479 m^2 – 841 m^2).

56. Wu said that[13] all the concerned accesses/ roads marked and identified by Lau are "*informal tracks or outdoor spaces used by villagers for circulation*". They do not form part of the major thoroughfare across Che Ha. If any of the informal tracks/ circulation spaces are needed to be retained/ re-routed

[10] Exhibit LTF-8 of Lau's 1st Report.
[11] Marked G5 to G8, G11, G17, G23, G27, and G28 in Exhibit LTF-8.
[12] [14] of Wu's Report.
[13] [15] of Wu's Report.

for the convenience of villages, so Wu says, the retaining/ re-routing arrangements could be handled in the detailed planning of the SH layout at the stage of SH grant application. Furthermore, the area of each SH assumed for the calculation of the number of SHs that can be accommodated, i.e., 250 m^2, is much larger than the maximum footprint of 65.03 m^2 for a standard SH. It should have allowed flexibility to address the need for access road, circulation space, local open space and other necessary supporting facilities. All the land that Lau considers to be subject to the constraint of existing access/ road should be sizeable enough to accommodate a SH and still leave sufficient space for the reprovisioning of any track/ circulation space if necessary.

57. We must say we are not convinced by Wu's arguments. It is somewhat artificial to classify accesses/ roads into formal or informal ones. The reality of the situation is that villagers are using these spaces for passage or circulation. No doubt some of them may be reprovisioned or re-routed, but space would similarly be required for the reprovisioned or re-routed accesses/ roads. Furthermore, the reprovisioning/ re-routing may cause objections from villagers, which could cause obstructions or delay to the intended SH development. We also notice that "*road, footpath and track*" are as a matter of practice deducted from land estimation ([46] above). We have no doubt that not all 1,638 m^2 of land is required for accesses/ roads, and that, with suitable arrangements (including reprovisioning and re-routing), Government land could be released out of the 1,638 m^2 for SH developments. There is however no evidence as to how land could be so released; we shall therefore deduct the whole 1,638 m^2 from the area of Government land available for SH developments.

IIIB2.2 *Private land allegedly too small or irregular in shape*

58. The discussion in [53] above applies. Private land ought not be excluded on ground of size or shape, unless the situation cannot be improved by amalgamation and/or exchange.

59. Though not specifically relied upon by Lau, it is apparent that certain parts of private land are also used as accesses/ paths. The consideration in this respect is different from Government land. Unless there is express or implied grant of right of way or easement, private owners are entitled to use their land without regard to the existing accesses/ path. There is no suggestion that any right of way or easement exists over the private land concerned. No deduction would be made therefor.

IIIB2.3 *Land with building licence/ new grant*

60. It is undisputed that no building has yet been built on the pieces of land in respect of which building licence or new grant has been granted. As such, these land could be used in whole or in part for the development of one or more NTEHs. They should not be excluded from the land available for SH developments.

IIIB2.4 *Land grown with trees or on a slope*

61. The issue concerns three areas, marked T1, T2 and T3 in Exhibit "LTF-13" in Lau's 1st Report. The exhibit is an aerial photograph taken on 13 March 2018. From a more updated aerial photograph taken on 13 October 2021, as well as from a photograph attached to Wu's Report as Photo 2 in Plan 5, it does appear that area T3 is sparsely vegetated. Moreover, all 3 areas are sandwiched between village houses to the south, and already disturbed land to the north. According to Wu, which is not disputed, these disturbed land were previously used for unauthorised open storage, and are considered as non-landscape sensitive

areas. Furthermore, the areas do not seem to be situated on a significant slope. This Appeal Board therefore agrees that these areas ought *not* be excluded from land estimation.

IIIB2.5 Summary on the quantity of land available

62. For the above reasons, this Appeal Board has come to the conclusion that an area of 1,638 m^2 ought to be deducted from the 2.01 ha (20,100 m^2) of land available for the development of SHs. The net area available is therefore 18,462 m^2, which is sufficient for the development of about 74 SHs, assuming each SH would take up 250 m^2.

IIIC. The demand for land

IIIC1. The demand from Che Ha

63. It is Wu's evidence that, according to information provided by the IIR of Che Ha, the 10-year forecast of SH demand is 30. Lau however adopted a figure that he said was obtained from a Town Planning Board paper dated 23 August 2019 (see Exhibit "LTF-4.0" attached to Lau's 1st Report), which is 46. As the demand figures are updated from time to time by the IIR, Wu's figure seems more recent, and is accepted by this Appeal Board. Furthermore, as at 16 November 2021, there were 19 outstanding SH applications. The quantity of land available ([62] above) can therefore comfortably satisfy the need for SH developments of the indigenous inhabitants of Che Ha. The Appellants however say that the demands from other villages of the Heung should also be taken into account. This argument is discussed below.

IIIC2. Should the demand from other villages of the same Heung be considered?

64. According to Lau (the aforesaid Exhibit "LTF-4.0"), there are a total of 39 villages in the Heung. From the 10-year forecasts submitted by the IIRs of

some of these villages[14], there is a total demand of 8,682 SHs for the next 10 years. Coupled with the number of outstanding applications[15], Lau's estimate of the demand for the whole Heung is 9,227.

65. It is undisputed that, under the Policy, an application for permission to build a SH outside the applicant's own Heung is impermissible. Furthermore, as recapitulated in a pamphlet entitled "*How to Apply for a Small House Grant*" ("**the Pamphlet**")[16]:

> "*The New Territories Small House Policy is a policy approved by the Executive Council in November 1972 and has been implemented since December 1972. It is formulated to allow an indigenous villager to apply for permission to erect, for once in his lifetime, a small house on a suitable site* ***within his own village***." (Bold emphasis added)

66. It is apparent that the main objective of the Policy has been to facilitate the settlement of villagers within their own village. Although cross-village applications within the same Heung may be entertained, they seem to be the exceptions rather than the norm. According to Lam, during the period from December 2011 to November 2021, there were a total of 136 "cross-village" SH applications in Sap Sz Heung/ Sai Kung North Heung, out of which 18 were approved, 42 were rejected or withdrawn, and 76 were still being processed. Lam did not give the total number of "same-village" SH applications during the same period.

67. From the flow-chart attached as Annex II to the Pamphlet, it is apparent that objections may be raised against "cross-village" applications, presumably by villagers of the village in respect of which the "cross-village"

[14] The IIR of the other villages have not submitted forecast figures to the Lands Department.
[15] [20] of Lau's Supplemental Witness Statement dated 10 May 2022 ("**Lau's 2nd Report**").
[16] [(II)(a)] of the pamphlet.

applications are made. In that scenario, the applicant would be required to resolve the objection within 6 months. Although there is no hard and fast rule that applications in relation to which objections are not resolved would definitely be rejected, it is Wu's evidence, which is uncontradicted, that in processing "cross-village" applications with unresolved objections from indigenous villagers of the village in which the application site is located, the Lands Department will generally respect the views of the villagers – i.e., refuse the application. That said, it is the Appellants' contention, similarly uncontradicted, that among the 19 outstanding SH applications in Che Ha, as many as 13 are "cross-village" applications. It is not known whether and if so how many objections have been raised in relation to these "cross-village" applications.

68. There is little evidence on the success rate of "cross-village" applications (other than the not very useful figures in [66] above), nor is there evidence on the percentage of successful SH "cross-village" applications versus successful "same-village" applications, whether in Che Ha or in any other village.

69. Under the circumstances above-described, how should the Appeal Board deal with the possible demand from other villages of the Heung?

70. In the first place, we must say that Lau's proposed demand figure of 9,227 is highly unreliable. He produced what appear to be returns on 10-year SH demand forecast submitted by IIRs of villages of the Heung and Tai Po to the Tai Po District Officer. Most of the returns were dated 2020 or 2021. Not only were the figures contained in the returns not verified, the evidence given by Lau under cross-examination reveals the poor quality of such returns. The following are examples:

(a) For Ko Tong Ha Yung Village （高塘下洋村), the number of villagers (over 18) who intended to apply for SH development in the

next 10 years (34), together with the number of villagers who had already exercised their right to build SH (11), exceeded the total number of villagers (40); and for the under 18 category, the number of villagers expected to apply for SH development in the next 10 years (15) exceeded the total number of villagers in that category (12);

(b) For Hoi Ha Village （海下村), the number of villagers (over 18) living in Hong Kong and overseas (35 + 59 = 94) does not tally with the total number of villages (120); and the number of villagers (over 18) living in Hong Kong and overseas, and who have not exercised their right to build a SH (91 + 56 = 147) exceeded the total number of villagers in that category (90);

(c) For Tung Ping Chau Chau Tau Village（東坪洲洲頭村), the total number of villagers (over 18) residing in Hong Kong and overseas were stated to be 513 and 920 respectively. It was also stated that there was no information about the number of villagers who had already exercised their right to build SH, and it was simply assumed that all 513 and 920 villagers respectively had not exercised their development right. The IIR then gave a figure of 405 and 705 for the number of local and overseas villagers who intended to build a SH in the next 10 years, respectively, which seems wholly arbitrary. For the under 18 category, the IIR did not state the number of villagers presently residing in Hong Kong or overseas, but arbitrarily gave demand figures of 620 (local) and 1,210 (overseas). When asked whether these figures were pure speculations, Lau's reply was: "*You can say so*";

(d) A similar situation occurred for Tung Ping Chau Sha Tau Village（東坪洲沙頭村）- while no figures were inserted for the total number of villagers (whether living in Hong Kong or overseas; and whether over of under 18), and while it was stated that the IIR did not have information about the number of villagers who had exercise their right to build SH, the IIR was apparently able to insert the number of villagers who had not exercised their SH right, and the number of them who would exercise such right in the next 10 years, coming up with a total figure of 1,806. This looks haphazard. Furthermore, for the above 18 category, the number of villagers expected to exercise their SH rights in the next 10 years (603) is even greater than the number of villagers stated to have not yet exercised such right (503);

(e) For Sai Keng Village（西徑村）, the number of villagers over the age of 18, presently residing in Hong Kong, was stated to be 20, out of which 8 villagers were stated to have exercised their right to build SH. The number of villagers who had not yet exercised their right was however stated to be 40, and the number of villagers expected to exercise their right in the next 10 years stated to be 60. For villagers residing overseas, the total number of villagers was stated to be 40, but the number expected to exercise their right within the next 10 years stated to be 60;

(f) For Sai O Village（西澳村）, the stated number of villagers (over 18) residing in Hong Kong, and who had already exercised their SH right (85), exceeded the total number of villagers in Hong Kong (55); similarly, for villagers residing overseas (over 18), the number of villagers who had allegedly exercised their SH right (70), together

with those who had not (35), exceeded the total number of villagers overseas (70), and the number of villagers expected to exercise their SH right in the next 10 years (40) exceeded the number of villagers who had not yet exercised their right (35). The latter anomaly also occurred for villagers residing in Hong Kong (and over 18); while there were only 25 villagers under this category who had not yet exercised their SH right, the demand for the next 10 years was stated to be 30.

(g) For Tap Mun Village（塔門村）, the number of villagers (over 18) residing in Hong Kong, who were expected to exercise their SH right in the next 10 years (200), is greater than the number who had not yet exercised their SH right (30), and even greater than the total number of villagers under that category (185). Similarly, the number of overseas villagers (over 18) who were expected to exercise their SH right (85) is greater than the total number of villagers under that category (75); and the number of villager who had exercise their SH right (10), together with those who had not (85), did not tally with the total number of villagers (75). The IIR who filled in the form did not state the number of villagers (under 18) who would likely exercise their SH right in the next 10 years; Lau, in compiling his estimates, simply assumed that all villagers under this category would do so.

(h) For Yung Shu O Village（榕樹澳村）, in relation to villagers over 18, the number of persons who had exercised their SH right, together with the number of those who had not, did not tally with the total number of villagers (for both the residing in Hong Kong and overseas categories). For villagers under 18, the number of persons

expected to exercise their SH right in the next 10 years vastly exceeded the total number of villagers under that category [(535 +143 = 678) versus (51 + 24 = 75)].

71. In short, the majority of the returns submitted by IIRs are problematic. It comes as no surprise that, in estimating the demands for SHs, the TPB has adopted the "more cautious approach" - putting more weight on the actual number of outstanding applications, and less weight on the 10-year forecast figures. This Appeal Board has grave doubt on the accuracy and reliability of the figures propounded by Lau, in relation to the demands from other villages of the Heung.

72. Even if this Appeal Board were to rely on Lau's figures, we are still faced with the problem of how to translate the demands for SHs in the other villages into demands for land in Che Ha. Mr. Chan SC proposes two alternative ways. The first way proposed is that the total demand (of 9,227 SHs) be equally distributed among the 22 villages in the Heung that has a V zone, and where land is still available for SH developments. If Che Ha's own demand of 30 SHs in deducted from the total figure, each village would have to shoulder about 418 SHs [(9,227 – 30) / 22]. Mr. Chan SC therefore suggested that the Appeal Board adopts 418 as the number of "cross-village" demands in the next 10 years.

73. We do not find Mr. Chan SC's said proposal attractive at all. Each village in the Heung has different size, population and land availability. We have no idea whether land within each village is sufficient to meet its 10-year demand forecast, and if negative, how many "cross-village" applications would have to be made in other villages. Take Che Ha as an example, our finding in [62] and [63] above shows that the land available in the village is sufficient to meet the 10-year demand. There is no need for "cross-village" applications to be made.

The same may hold true for some of the other villages. It makes no sense equally distributing the SH demands among all villages of the Heung.

74. Mr. Chan SC's alternative suggestion is that, since among the existing 19 outstanding SH applications in Che Ha, 6 are from Che Ha itself, and 13 from outside villages, if the same proportion is applied, 30 SH demands from Che Ha in the next 10 years would mean 65 demands from outside Che Ha, making up a total of 95. This suggestion is again unconvincing. In the first place, there is no certainty that every outstanding application would succeed. The uncertainty is even more acute for "cross-village" outstanding applications. It is not known whether there are objections from Che Ha villagers in relation to these outside applications, and if there are objections, whether they may be resolved. Furthermore, the fact that a substantial proportion of the outstanding applications are "cross-village" applications is an indication that land is still available within the V zone of Che Ha for SH developments, thereby attracting applications from outside villages. As and when land supply become scarce in Che Ha, it is likely that the villagers would object to "cross-village" applications, thereby closing their door to outsiders.

75. For the reasons set out above, this Appeal Board has come to the conclusion that "cross-village" SH demands for the next 10 years ought not be taken into account in assessing whether there is general shortage of land in Che Ha. In the first place, there is no reliable figure as to what that demand might be. Furthermore, there is a mechanism by which Che Ha villagers may object to, and therefore block, "cross-village" applications. Should land availability in Che Ha become a problem, villagers could object to such outside applications. It is Wu's undisputed evidence that, unless the outsider is able to resolve the matter with the villagers, the District Lands Office is likely to respect the views of the villagers and reject the outside application. There is therefore a mechanism by which the

villagers of Che Ha may reserve the available land for their own use if they so desire. Outside applications would not cause a problem to land availability.

IIID. Conclusion on shortage of land

76. This Appeal Board has therefore unanimously reached a conclusion that there is no general shortage of land to meet the demand for SH developments in Che Ha. Ground 2 is therefore rejected.

IIIE. Burden of proof

77. In the course of the appeal hearing, one of the points in contention between the parties is: where does the burden of proof of general shortage of land lie. This Appeal Board therefore feels obliged to express its views in this regard.

78. The first question to be answered is: when does the Court (or tribunal) has to resort to burden of proof? In the civil context, the legal principle involved is well explained in *Phipson on Evidence*, 20th Edition ("**Phipson**"), at [6-07]:

> "*While a judge or tribunal of fact should make findings of fact if it can, in* ***exceptional cases*** *it may be* ***forced*** *to conclusion that it cannot say that either version of events satisfies the balance of probabilities. In such a case the burden of proof may determine which party succeeds.* ***The judge or tribunal of fact may only dispose of a case on this basis if it cannot reasonably make a finding one way or the other on a disputed issue. A judge should only do this where the state of the evidence is so unsatisfactory that no other course was open to them***." (Bold emphasis added)

79. Thus, in civil cases, the Court's approach is this: The judge will do his best to make a finding of fact on a disputed issue. However, in some **exceptional** case, where the state of the evidence is so unsatisfactory that the judge cannot reasonably make a finding one way or the other, he would have to

turn to the burden of proof **as a last resort**. In that exceptional circumstance, the party who bears the burden of proof would fail.

80. The above exposition of the situation in civil cases is also affirmed in *Emmanuel v Avison* 1696 (Ch) [2020] EWHC, in which Birss J. said, under the heading "*Resorting to the burden of proof*":

> '38. In relation to resorting to the burden of proof, at paragraph 80 the judge referred to paragraph 32 of Lady Hale's speech in *Re B (Children)* [2008] UKHL 35 in which she said:
>
> > "*In our legal system, if a judge finds it more likely than not that something did take place, then it is treated as having taken place. If he finds it more likely than not that it did not take place, then it is treated as not having taken place.* ***He is not allowed to sit on the fence. He has to find for one side or the other****. Sometimes the burden of proof will come to his rescue: the party with the burden of showing that something took place will not have satisfied him that it did. But* ***generally speaking a judge is able to make up this mind where the truth lies without needing to rely upon the burden of proof***."' (Bold emphasis added)

81. After referring to some of the cases that the trial judge relied on, Birss J. went on to say:

> '40. For the position on appeal in these burden of proof cases, the appellant referred to the Court of Appeal in *Stephens v Cannon* [2005] EWCA 222 and then in *Verlander v Devon Waste Mgt* [2007] EWCA Civ 835. In the latter, at paragraphs 18-19, Auld LJ summarized the positions identified in the former case after a review of the authorities. They are:
>
> > "*First,* ***a judge should only resort to the burden of proof where he is unable to resolve an issue of act or facts after he has unsuccessfully attempted to do so by examination and evaluation of the evidence****. Secondly, the Court of Appeal should*

only intervene where the nature of the case and/or the judge's reasoning are such that he could reasonably have been able to make a finding one way or the other on the evidence without such resort."' (Bold emphasis added)

82. In the present case, this Appeal Board does not find it necessary to resort to the burden of proof. We are able to resolve the issue of general shortage of land by reference to the available evidence, as we have discussed and analysed above.

83. Should it become necessary to rely on the last resort of burden of proof, the legal principles are also well-established, as stated in [6-06] of Phipson:

"*So far as the persuasive burden is concerned, the burden of proof lies upon the party who substantially asserts the affirmative of the issue. Where a given allegation, whether affirmative or negative, forms an essential part of a party's case, the proof of such allegations rests on that party. ...*

...

In deciding which party asserts the affirmative, regard must be had to the substance of the issue and not merely to its grammatical form; the latter the pleader can frequently vary at will. Moreover, a negative allegation must not be confused with the mere traverse of an affirmative case. The true meaning of the rule is that ***where a given allegation, whether affirmative or negative, forms an essential part of a party's case, the proof of such allegation rests on him****. An alternative test, in this connection, is to strike out of the record the particular allegation in question, the onus lying upon the party who would fail if such a course were pursued*." (Bold emphasis added)

84. Since the TPB relies on the no general shortage of land point as a ground for rejecting the Appellants' respective applications, the burden of proof is on TPB. However, as we have made clear earlier on, this Appeal Board does not find it necessary to resort to burden of proof.

IV. GROUND 3: WHETHER PROPOSED NETHs CONTRARY TO ORDERLY DEVELOPMENT PATTERN, EFFICIENT USE OF LAND AND PROVISION OF INFRASTRUCTURE AND SERVICES

85. The Appellants' arguments under this ground may be summarised as follows:

- The proposed NTEHs are within the village environs and are close to the existing SHs in Che Ha. They can be described as "concentrated" and are in line with an orderly development pattern.
- The "concentration" is demonstrated by the fact that the proposed NTEHs would take up a total area of 214.2 m^2; this is to be compared with the area of 341 m^2 taken up by 3 other SHs in the vicinity, and 250 m^2 per SH adopted by the Planning Department in land estimations.
- A local track is the only infrastructure that can be identified near the proposed NTEHs. They would not affect the local track, nor any other infrastructure.
- There is no question of opening any floodgate, as the proposed CDA development in Che Ha has already taken up the vast majority of land zoned CDA in the proximity. There is little scope of possible further development, including development of NTEHs.

86. This ground of appeal targets the second reason ([19(b)] above]) which the TPB gave for rejecting the Appellants' planning applications. In our view, the two reasons relied upon by the TPB are inter-related, and complementary to each other, with the reason in [19(b)] no more than an elaboration of the reason in [19(a)]. What [19(b)] says in effect is that, where

there is no general shortage of land in the V zone of the village to meet the demand for SH development, it is TPB's policy to require the SH to be built in the V zone. The rationale behind such a policy is so that the SHs could be concentrated within the V zone as far as possible, and so as to achieve more orderly development pattern, efficient use of land and provision of infrastructure and services. Contrary to the Appellants' submissions, there is no requirement that, for any particular case, the TPB has to establish that "*shall the Applications be allowed, it would be contrary to orderly development pattern, efficient use of land, and provision of infrastructure and services*"[17].

87. The reason in [19(b)] is a mere corollary of the one in [19(a)]. Since the Appellants have failed on Ground 2, they must fail on Ground 3 also.

V. GROUNDS 1 & 4: PREVIOUS PERMISSIONS AND SYMPATHETIC CONSIDERATIONS

VA. Previous permissions

88. One of the Appellants' complaint is that the decisions of the TPB under appeal are inconsistent with its own decisions, made in respect of the same lots, in 2015 ([8] to [10] above). The authority relied upon by the Appellants is the English Court of Appeal case of *North Wiltshire District Council v Secretary of State for the Environment and Clover* (1993) 65 P. & C.R. 137. This is a planning case in which the inspector, in reaching a conclusion that certain garden and associated buildings formed one part of the village concerned, did not indicate that he had taken into account a previous appeal decision which was

[17] [65] of the Appellants' Skeleton Opening Submissions dated 30 November 2021.

materially indistinguishable from the case before him, nor did the inspector explain why he had departed from that earlier decision.

89. In the judgment of that case, Mann L.J., with whom the other Lord Justices agreed, said, at [145]:

> *"... 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. ..."*

90. It should however be noted that, by virtue of the then Tribunal and Inquiries Act 1971 in U.K., an inspector, when making his determination, was obliged to have regard to those matters specified in section 29(1) of the Act. Those matters included "*other material considerations*", which the Court of Appeal held included previous decisions made under materially indistinguishable circumstances. The Court of Appeal further held that, if an inspector failed to have regard to what in the circumstances of the case was a material consideration, then his determination was exposed to challenge on the ground that it was not within the power of the Act.

91. It is in the context of what has been set out in [90] above that Mann L.J. went on to say, at [145]:

> *"... **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.***

> *To state that like cases should be decided alike presupposes that the earlier case is alike and is not distinguishable in some relevant respect. If it is distinguishable then it usually will lack materiality by reference to consistency although it may be material in some other way. Where it is indistinguishable then ordinarily it must be a material consideration. …"* (Bold emphasis added)

92. Thus, in the U.K., the inspector was under a statutory duty to consider, but he did not necessarily have to follow, previous decisions. In Hong Kong, there is not even a statutory requirement to consider previous decisions. However, for the reasons quoted from Mann LJ in [89] above, it makes good sense for TPB to consider its own previous decisions in relation to the Lots. If circumstances have changed materially, the TPB should point out what the changes are. If the circumstances are materially indistinguishable, but the TPB nevertheless decides to make a different decision, then it ought to explain why.

93. The importance of consistency has been emphasised in previous decisions of this Appeal Board. Thus, in *Town Planning Appeal No. 15 of 2011* (27 February 2014), the Appeal Board said, at [22]:

> "*Fifthly, in determining the merit of 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. The principle of consistency was explained by the English Court of Appeal in North Wiltshire District Council v Secretary of State for the Environment and Clover (1993) 65 P & CR 137 at 145 … .*"

94. Similarly, in *Town Planning Appeal Nos. 6&7 of 2019* (3 February 2021), the Appeal Board said, at [28(3)]:

> "*Consistency in town planning is one of the relevant considerations but it does not replace the necessity of independent judgment. As stated by the English Court of Appeal in North Wiltshire District Council v Secretary of State for the Environment and Clover (1993) 65 P.&C.R. 137, 145 ...* ."

95. In the present case, it is undisputed that there has been no material change in circumstances since the previous decision in 2015. The "more cautious approach" was already in place at that time ([36] to [39] above), and the decisions were apparently made on the basis that there was still land available within the V zone to meet the SH demands ([10] above). In so far as the TPB, while making the decisions under appeal herein, did not seem to have considered or distinguished the decisions that it made in 2015, and did not give reasons why it departed from the previous decisions, this must have been wrong. The appeal herein is *de novo* in nature ([32] above). This Appeal Board will take the 2015 decisions into account in exercising its independent planning judgment.

VB. Sympathetic considerations

96. Criterion (d) of the Interim Criteria ([26] above) provides that applications for NTEH/ SH with previous planning permission lapsed will be considered in its own merits. This must be right, but subject to what have been said in [88] to [94] above. Criterion (d) however went on to say that sympathetic consideration may be given if there are specific circumstances to justify the case, such as the site in question being an infill site among existing NTEHs/ SHs, or the processing of the SH grant was already at an advanced stage.

97. There is dispute between the parties as to whether the processing of the Appellants' SH applications were already at an "advance stage" when the 2015 planning permissions lapsed. We do not find it necessary to make a determination in that respect. The instances mentioned in Criterion (d) are no

more than illustrations of what may constitute "specific circumstances" for "sympathetic consideration" to be given. It suffices for this Appeal Board to take the circumstances described in [8] to [17] above in mind when deciding whether the appeals herein ought to be allowed.

98. The Appellants also invited this Appeal Board to take other factors into account in the exercise of its planning judgment. These factors include the contention that the Appellants had tried but found it "nearly impossible"[18] to locate other land in the V zone of Che Ha to exercise their rights to build NTEHs; that the Lots are entirely within the VE of Che Ha; that, apart from part of Lot B that falls within the V zone, the remaining of the Lots are zoned CDA (not agricultural or green belt zone); that the Lots are not included in the land grant for the approved comprehensive development in the CDA zone (the Appellants' applications therefore would not frustrate the planning intention of the CDA zone); and that the proposed NTEHs are compatible with the surrounding areas and the character of the surrounding environment.

VC. <u>The Appeal Board's considerations</u>

99. Two members of this Appeal Board, viz., Mr. Simon LAM Ken-chung, the Chairman, and Miss CHAN Ka-man, member, consider that, since the applications under appeal are materially indistinguishable from the applications in respect of which planning permissions were granted in 2015, including the fact that all applicable rules and criteria have remained the same, consistency ought to be maintained for the purpose of securing public confidence in the town planning system in Hong Kong. Furthermore, they can find no justification for the TPB's decision made in 2015 to be departed from. They have therefore come

[18] [93] of the A's Opening.

to the conclusion that the appeals herein ought to be allowed, and planning permission granted for NTEHs to be developed on Lots A and B.

100. The other three members of the Appeal Board, viz., Ms. Teresa AU Pui-yee, Dr. LIU Chun-ho and Mr. WONG Kin-yee, however take the view that Criterion (a) is a most important consideration. Since there is no general shortage of land in Che Ha, they consider that there is insufficient justification for planning permission to be granted for NTEHs to be built on Lots A and B. They take the view that the TPB, while making its 2015 decision, did not pay sufficient regard to Criterion (a), and they therefore disagree with it. They decide to dismiss the appeal, and uphold the decision of the TPB in relation to both of the Appellants' applications.

VI. CONCLUSION

101. By reason of the above, this Appeal Board has decided by a 3:2 majority that the appeals herein be rejected. The relevant decisions of the TPB are hereby confirmed. If any party has any application for costs, such application should be made in writing to this Appeal Board within 14 days of the date of this Decision, with detailed reasons and the amount(s) applied for.

(Signed)

Mr. Simon LAM Ken-chung

(Chairman)

(Signed)

Ms. Teresa AU Pui-yee

(Member)

(Signed)

Miss CHAN Ka-man

(Member)

(Signed)

Dr. LIU Chun-ho

(Member)

(Signed)

Mr. WONG Kin-yee

(Member)