IN THE TOWN PLANNING APPEAL BOARD

Town Planning Appeal No. 6 of 2019 ("TPA 6/2019")

BETWEEN

To Chun-sing	Appellant
v	
Town Planning Board	Respondent

---

and

Town Planning Appeal No. 7 of 2019 ("TPA 7/2019")

BETWEEN

Li Kim-wing	Appellant
v	
Town Planning Board	Respondent

Appeal Board	:	Mr. Horace Wong Yuk-lun, SC, JP	(Chairman)
		Prof. Fung Tung, MH	(Member)
		Mr. Tang Kwok-wai	(Member)
		Ms. Mona Yeung Tse-ngok	(Member)
		Mr. Nelson Yip Siu-hong, MH	(Member)
In Attendance	:	Ms. Lesley Leung	(Secretary)
Representation	:	Mr. Koo Yuk-hung, authorised representative of both Mr. To Chun-sing and Mr. Li Kim-wing Ms. Jess Chan Yuk-ching, Senior Government Counsel, and Miss Camille Shek Ka-man, Government Counsel for the Respondent	
Date of Hearing	:	3 November 2020	
Date of Decision	:	3 February 2021	

DECISION

A. Introduction

1. The present appeals before the Appeal Board (being TPA 6/2019 and TPA 7/2019) arise from two applications:

   (1) The Appellant in TPA 6/2019, Mr. To Chun-sing (**"Mr. To"**), on 19 November 2018, submitted an application No. A/TM-LTYY/362 (**"the 362 Application"**) seeking planning permission, under section 16 of the Town Planning Ordinance (**"the Ordinance"**), for a proposed house (New Territories Exempted House (**"NTEH"**) – Small House (**"SH"**)) to be built on Lots 190 SD RP and 190 SE in DD 130, San Hing Tsuen, Lam Tei, Tuen Mun (**"the TPA 6/2019 Appeal Site"**).

   (2) The Appellant in TPA 7/2019, Mr. Li Kim-wing (**"Mr. Li"**) (Mr. To and Mr. Li are collectively referred to as **"the Appellants"**), on 19 November 2018, submitted an application No. A/TM-LTYY/363 (**"the 363 Application"**) seeking planning permission, under section 16 of the Ordinance, for a proposed house (NTEH – SH) to be built at Lots 190 SD ss2 and 190 SQ in DD 130, San Hing Tsuen, Lam Tei, Tuen Mun (**"the TPA 7/2019 Appeal Site"**)

   The TPA 6/2019 Appeal Site and the TPA 7/2019 Appeal Site are hereafter collectively referred to as **"the Appeal Sites"**.

2. The 362 Application and the 363 Application (collectively **"the Applications"**) were considered together and rejected by the Rural and New Town Planning Committee (**"the RNTPC"**) of the Town Planning Board (**"the TPB/the Board"**) on 3 May 2019 (**"the Decision"**).

3. Both Mr. To and Mr. Li were then represented by Mr. Koo Yuk-hung (**"Mr. Koo"**), who by way of a letter dated 21 May 2019 applied for a review of the 362 Application and the 363 Application under section 17(1) of the Ordinance (collectively **"the Review Applications"**).

4. The Review Applications were considered by the TPB together. On 9 August 2019, the TPB rejected the Review Applications on two grounds (collectively **"the Review Decision"**). On 10 September 2019, the Appellants lodged notices of appeal to appeal against the Review Decision (collectively **"the Appeals"**).

B. Background

5. The TPA 6/2019 Appeal Site falls within an area zoned "Residential (Group E)" (**"R(E) Zone"**) (84%) and "Village Type Development" (**"V Zone"**) (16%) on the approved Lam Tei and Yick Yuen Outline Zoning Plan (LTYY OZP) No. S/TM-LTYY/10 (**"the OZP"**) at the time of application and currently in force. According to the OZP:

(1) An R(E) Zone is intended primarily for phasing out of existing industrial uses through redevelopment for residential use on application to the TPB. Whilst existing industrial uses will be tolerated, new industrial developments are not permitted in order to avoid perpetuation of industrial/residential interface problem.

(2) The planning intention of a V Zone is to reflect existing recognised and other villages, and to provide land considered suitable for village expansion and reprovisioning of village houses affected by Government projects. Land within a V Zone is primarily intended for development of SHs by indigenous villagers.

6. The TPA 7/2019 Appeal Site falls entirely within an R(E) Zone on the OZP at the time of application and currently in force.

7. As mentioned above, on 19 November 2018, Mr. To and Mr. Li made the 362 Application and the 363 Application respectively.

8. Mr. To and Mr. Li both appointed Mr. Chan Chung-hong (**"Mr. Chan"**) as their attorney in the 362 Application and the 363 Application.

9. On 3 May 2019, the Applications were rejected by the RNTPC of the TPB for the following reason:

> "land is still available within the "Village Type Development" ("V") zone of Tsing Chuen Wai, Tuen Tsz Wai and San Hing Tsuen where land is primarily intended for Small House development. It is considered more appropriate to concentrate Small House development close to the existing village cluster within the "V" zone for more orderly development pattern, efficient use of land and provision of infrastructure and services."

10. By way of two letters both dated 17 May 2019, TPB informed Mr. Chan of TPB's rejection of the Applications.

11. On 21 May 2019, Mr. Koo made the Review Applications on behalf of both Mr. To and Mr. Li. Three grounds were raised:

(1) Mr. To and Mr. Li solely owned the TPA 6/2019 Appeal Site and the TPA 7/2019 Appeal Site respectively. They intended to build their own SH and could not purchase other land within the V Zone.

(2) The Appeal Sites are both located within the boundary of "Village Environ" (**"VE"**) of Tsing Chuen Wai, Tuen Tsz Wai and San Hing Tsuen in Lam Tei, Tuen Mun.

(3) There was an approved application which is adjacent to the Appeal Sites.

12. On 9 August 2019, the TPB made the Review Decision and rejected the Review Applications on two grounds:

(1) Land is still available within the V Zone of Tsing Chuen Wai, Tuen Tsz Wai and San Hing Tsuen where land is primarily intended for SH development. It is considered more appropriate to concentrate SH development close to the existing village cluster within the V Zone for more orderly development pattern, efficient use of land and provision of infrastructure and services; and

(2) The proposed development is in close proximity to the proposed public housing development currently under a feasibility study. Approval of the application will impose constraints to the planning for the proposed public housing development.

13. By two letters both dated 23 August 2019, TPB informed Mr. Koo of its decision to reject the Review Applications.

14. On 10 September 2019, the Appellants brought the Appeals. Four grounds of appeal were raised:

(1) Land within the V Zone was extremely difficult to acquire, the TPA 6/2019 Appeal Site and the TPA 7/2019 Appeal Site were only sufficient for Mr. Li and Mr. To to erect SHs for their own use.

(2) The TPA 6/2019 Appeal Site and the TPA 7/2019 Appeal Site do not fall within the boundary of the site for the proposed public housing development.

(3) A similar application No. A/TM-LTYY/301 (**"the 301 Application"**) which concerned a site adjacent to the Appeal Sites was approved by TPB in 2016.

(4) The Director of Lands, Mr. CC Chan, agreed that the area of VE was intended to let the villagers to build SHs.

C. <u>The Issues</u>

15. The TPB has clarified that it now only opposes the Appeals only on the basis of the 1st ground given in the Review Decision. As the 2nd ground given in the Review Decision is no longer maintained by the TPB for the purposes of the Appeals, the Appellants' ground of appeal in relation to the proposed public housing development is now a moot point and is no longer relevant.

16. Accordingly, in deciding the Appeals the Appeal Board has to consider the following three grounds of appeal only:

(1) Land within V Zone was extremely difficult to acquire, the TPA 6/2019 Appeal Site and the TPA 7/2019 Appeal Site were only sufficient for Mr. Li and Mr. To to erect SHs for their own use. (**"the 1st Ground of Appeal"**)

(2) The 301 Application which concerned a site adjacent to the Appeal Sites was approved by TPB in 2016. (**"the 2nd Ground of Appeal"**)

(3) The Director of Lands, Mr. CC Chan, agreed that the area of VE was intended to let the villagers to build SHs. (**"the 3rd Ground of Appeal"**)

(The 1st Ground of Appeal, the 2nd Ground of Appeal and the 3rd Ground of Appeal are collectively referred to as **"the Grounds of Appeal"**)

D. 2nd Ground of Appeal – The 301 Application

17. At the hearing, the Appellants' case, as presented by Mr. Koo, was centred on the 2nd Ground of Appeal. The Appeal Board will therefore deal with this issue first.

D1. Interim Criteria for Consideration of Application for NTEH/Small House in New Territories

18. There is no dispute between the parties that the set of "Interim Criteria for Consideration of Application for NTEH/Small House in New Territories" ("**the Interim Criteria**") sets out the relevant assessment criteria for consideration of the Applications, and is applicable to this case. The Interim Criteria was first promulgated on 24 November 2000 and has been amended 4 times, with the latest version promulgated on 7 September 2007.

19. According to paragraph (B)(a) of the Interim Criteria:

> "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".

20. Paragraph (B)(a) of the Interim Criteria is the relevant paragraph applicable to the present appeals since, for both the 362 Application and the 363 Application, 100% of the footprint of the proposed SH falls within the VE of Tsing Chuen Wai, Tuen Tsz Wai and San Hing Tsuen. The same is also true for the 301 Application, which concerned a site adjacent to the Appeal Sites.

21. In short, under paragraph (B)(a) of the Interim Criteria two conditions must be satisfied before sympathetic consideration would be given to an application for SH:

(1) Not less than 50% of the proposed NTEH/SH footprint falls within the VE of a recognized village; and

(2) There is a general shortage of land in meeting the demand for SH development in the V Zone of the village.

22. Regarding the issue of general shortage of land, the Interim Criteria have to be construed together with a document entitled "Consideration of Applications for New Territories Exempted House (Small House) Development" (published by the Planning Department in August 2015)

(**"the 2015 Document"**). The 2015 Document was published by the Planning Department to provide recent statistics on approved SH applications and general approach adopted by the TPB in consideration of applications for SH development in recent years.[1]

23. The 2015 Document sets out the recent approach in considering planning applications for small house development. Paragraph 3.2 of the 2015 Document states:

> "While adopting the Interim Criteria, the Board/Committee has been more cautious in approving applications for Small House development in recent years. Some general observations are summarised as follows:
>
> (a) in considering if there is a general shortage of land in meeting the demand for Small House development, more weighting has been put on the number of outstanding Small House demand provided by the Lands Department;
>
> (b) factors such as the implementation progress of the approved Small House applications, location pattern of previously granted planning permissions for Small House development, and the amount of land still available within the '"Village Type Development" zone would duly be taken into account;

[1] See paragraph 1 of the 2015 Document.

(c) more favourable consideration might be given to Small House applications located close to the existing village clusters for an orderly development pattern, as well as for more efficient use of land and provision of infrastructures and services;

(d) special consideration might be given to sites with previous planning approvals for Small House development; and

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

D2. <u>Background information of the 301 Application</u>

24. The 301 Application concerned Lot No. 190 SD ss.1 in DD130, San Hing Tsuen, Tuen Mun (**"the 301 Site"**), which is adjacent to the Appeal Sites. The footprint of the proposed SH on the 301 Site also fell entirely within the VE of San Hing Tsuen, Tsing Chuen Wai and Tuen Tsz Wai.

25. The 301 Application was made on 8 October 2015. The RNTPC considered the 301 Application and approved it during its meeting held on 30 September 2016. It is noteworthy that the Planning Department made no objection to the 301 Application and took the view that the 301 Application complied with the Interim Criteria on two bases:

(1) The footprint of the proposed SH fell entirely within the VE of San Hing Tsuen, Tsing Chuen Wai and Tuen Tsz Wai; and

(2) There was a general shortage of land in meeting the demand for SH development in the V Zone.

26. On 26 June 2020 the applicant of the 301 Application sought an extension of time (**"EOT"**) for commencement of development of the approved development under the 301 Application for an additional period of 4 years under s.16A of the Ordinance (**"the 301 EOT Application"**). The 301 EOT Application was granted on 6 August 2020.

D3. <u>Analysis</u>

27. Mr. Koo submitted that the Applications cannot be distinguished factually from the 301 Application. The Appeal Board agrees with Mr. Koo's observation in this regard:

(1) The same consideration (viz. the Interim Criteria and the 2015 Document) applied for the 301 Application and the Applications.

(2) The Appeal Sites and the site of the 301 Application abut each other and the footprint of the proposed SH in all three sites fall entirely within the VE of San Hing Tsuen, Tsing Chuen Wai and Tuen Tsz Wai.

(3) At all material times (i.e. at the time of the 301 Application, the time of the Applications and in August 2020 when the latest figures were prepared for the present appeal) the land available for SHs was sufficient to meet the number of outstanding SH applications. A table of the respective supply and demand of land for SH is set out below. As the 2015 Document states that the demand for SH

development is gauged primarily ("more weighting has been put") with reference to the outstanding SH applications:[2]

	The 301 Application	The Applications (May 2019)	August 2020
Land available	734	861	853
Outstanding SH applications	173	150	123
10-year Forecast of SH demand	912	862	832

28. Whilst the Applications are not factually distinguishable from the 301 Application, it does not follow that the same decision ought to be made for the Applications. The Appeal Board bears in mind the following principles:

(1) The Appeal Board must exercise independent planning judgment within the parameters of the relevant statutory plan as to whether

[2] The figures for 10-year forecast of SH demand are not quite relevant for the consideration of SH applications and are merely stated for completeness' sake.

planning permission should be granted or refused, and is entitled to disagree with the TPB: ***Henderson Real Estate Agency Ltd v Lo Chai Wan*** [1997] HKLRD 258 (PC), pp. 261, 266A.

(2) The Appellants bear the burden to demonstrate to the Appeal Board that the TPB's decision was wrong and should be reversed or varied. In particular, it is also incumbent upon the Appellants to prove that there is a general shortage of land in meeting the demand for SH development in the V Zone so that sympathetic consideration may be given to the Applications: ***Town Planning Appeal No.7 of 2015***, §30.

(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 (most recently applied in ***R (on the application of Davidson) v Elmbridge Borough Council*** [2020] 1 P.&C.R. 1, §34 and ***Town Planning Appeal No. 5 of 2015***, §10.16:

> "In this case the asserted material consideration is a previous appeal decision. It was not disputed in argument that a previous appeal decision is capable of being a material consideration. The proposition is in my judgment indisputable. One important reason why previous decisions are capable of being material is that like cases should be decided in a like manner so that there is consistency in the appellate process. Consistency is self-evidently important to both developers and development control authorities. But

> it is also important for the purpose of securing public confidence in the operation of the development control system. I do not suggest, and it would be wrong to do so, that like cases must be decided alike. An inspector must always exercise his own judgment. He is therefore free upon consideration to disagree with the judgment of another but before doing so he ought to have regard to the importance of consistency and to give his reasons for departure from the previous decision." (emphasis added)

29. In the Appeals, had there not been the 301 Application, the Decision and the Review Decision would have been readily justified:

(1) Applying the Interim Criteria, it is not disputed that the first condition is met – 100% of the proposed SH footprint of the Appeal Sites fall within the VE.

(2) Applying the cautious approach as stated in the 2015 Document, more weighting should be put on the number of outstanding SH applications in considering whether there is a general shortage of land in meeting the demand.

(3) Adopting the most recent figures (i.e. the figures as of August 2020), the land available in the V Zone (on which 853 SH could be built) comfortably meets the demand, as there are only 123 outstanding SH applications. These figures are not challenged by the Appellants.

(4) Therefore, it cannot be said that there is a general shortage of land in meeting the demand for SH development. Sympathetic

consideration would not be given in considering the Applications. The TPB is entitled to reject the Applications.

30. In the light of the similarity between the 301 Application and the Applications, the grievances of the Appellants are readily understandable. However, the Appeal Board has come to the conclusion that the outcome in 301 Application should not be followed in considering the Applications.

(1) Both the Interim Criteria and the 2015 Document had already been published at the time of the 301 Application.

(2) Applying the Interim Criteria, it is clear that the first condition was met in the 301 Application – 100% of the proposed SH footprint of the 301 Site fall within the VE.

(3) Insofar as the second condition is concerned, the Planning Department took the view that there was a general shortage of land in meeting the demand for SH development. The Planning Department apparently formed such a view on the basis that the land available (on which 734 SH could be built) was insufficient to meet the 10-year forecast of SH demand (being 912 SH). As a result, the Planning Department made no objection to the 301 Application.

(4) In the Appeal Board's view, at the time of the 301 Application the Planning Department was clearly wrong in forming the opinion that there was a general shortage of land in meeting the demand. It appears that neither the Planning Department nor the TPB applied the cautious approach as stated in the 2015 Document. Had the cautious approach been adopted, more weight should have been given to the number of outstanding SH applications, being 173 at

that time. As such, the land available should have been considered more than sufficient to meet the demand for SH applications.

(5) Indeed, Mr. Alexander Mak (**"Mr. Mak"**), Acting Senior Town Planner, confirmed the Appeal Board's view in his testimony given at the hearing. He agreed that, if the 301 Application were to be considered afresh, the Planning Department, adopting the cautious approach, would object to the 301 Application.

(6) The Appeal Board in considering the relevancy of the 301 Application bears in mind the principle that there should be consistency in town planning and absent other considerations, like cases should be treated alike. However, where a previous decision is found to be wrong, the wrong decision should not be followed or else the error in the wrong decision would be perpetuated and the error would in due course become established as correct. By allowing errors to perpetuate, the town planning scheme may be significantly compromised as potential applicants may rely on the error to make unmeritorious applications which, if the wrong decision is blindly followed, may be approved thereby confirming the error through the creation of further precedents. Accordingly, a rigid adherence to consistency will proliferate a previous error and, as a result, undermine wider public interest from a town planning perspective.

(7) Applying the above, the Appeal Board considers the approval of the 301 Application as a wrong decision in that the TPB did not properly apply the Interim Criteria and the 2015 Document in approving the same. Therefore, the approval of the 301 Application does not constitute a valid ground in supporting the Applications.

31. Having formed the view that the 301 Application was wrongly decided, the granting of the 301 EOT Application is, strictly speaking, irrelevant. For completeness, it should be pointed out that a different set of guidelines apply in the context of an application for extension of time. The Appeal Board also notes that Mr. Mak confirmed, during the hearing, that in granting the 301 EOT Application, the Planning Department took into account the fact that the 301 Application would have been objected by the Planning Department if it were to be considered afresh. The Appeal Board is in no position to interfere with the granting of the 301 EOT Application but it can well see the potential unfairness which could be caused to the applicant in the 301 Application, who might already have incurred substantial resources in developing the 301 Site in reliance on the initial approval of the 301 Application, if the 301 EOT Application was refused (assuming that the other criteria for approving the extension of time were met – and there is no suggestion that they were not met).

32. In the light of the aforesaid, the 2nd Ground of Appeal fails.

E. 1st Ground of Appeal

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 the 1st 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.

67. More importantly, it is settled law that ownership is not a material or relevant consideration in town planning law. The real issue is the acceptability of land development **in the public interest** rather than ownership of land interest or, for that matter, implementation: see *British Railways Board v. Secretary of State for the Environment* [1994] JPL 32 (HL); *Merritt v Secretary of State for the Environment, Transport and the Regions* [2000] 3 PLR 125; *TPA No. 5 of 2011*, paragraph 39(f); and *TPA No. 13 of 2006 & TPA No. 5 of 2008*, paragraph 83(1).

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'."

(emphasis supplied)

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."

35. The Appellants have made no rebuttal in this regard.

36. Whilst the Appeal Board has some reservation as to why paragraph (B)(a) of the Interim Criteria, in assessing the "general" shortage of land, draws no distinction between Government land and private land, this issue does not arise for determination in the present case. Mr. Mak has given evidence that out of the 21.33 ha of land available within the V Zone, around 15 ha is private land. Such land could approximately accommodate 600 SHs, which far exceeds the current outstanding SH applications (viz. 123 as of August 2020).

37. In the view of the Appeal Board, the 1st Ground of Appeal must be rejected.

F. <u>The 3rd Ground of Appeal</u>

38. This ground centres on the contention that the VE was intended to let the villagers to build SH. Mr. Koo, at the hearing, repeatedly alluded to promises made by the District Office (□ □ □) that SHs could always be built within the boundary of the VE.

39. Upon enquiry made by the Appeal Board, Mr. Koo fails to tender evidence in support of such alleged promises. Indeed, the Appeal Board takes the view that the 3rd Ground of Appeal overlooks the fact that the Appeal Sites fall within the R(E) Zone.

40. According to the Schedule of Uses to the OZP, R(E) Zone is intended primarily for phasing out of existing industrial uses through redevelopment for residential use on application to the TPB. "House (other than rebuilding of NTEH or replacement of existing domestic building by NTEH permitted under the covering Notes)" is a Column 2 use which requires planning permission from the TPB.

41. As such, the conditions set out in the Interim Criteria, construed with reference to the 2015 Document, must be satisfied for the Applications to be approved. The Appeal Board has already dealt with this issue under Section D above and held that the conditions for sympathetic consideration are not met. The Appellants could not get around those criteria on the mere basis that the Appeal Sites are located within the VE. The 3rd Ground of Appeal must fail accordingly.

G. Conclusion

42. In the premises, all the Grounds of Appeal must fail. The Appeal Board upholds the 1st ground given in the Review Decision and would dismiss the Appeals.

H. Costs

43. The Appeal Board's practice is that, unless there are exceptional circumstances, no costs order will be made under section 17B(8)(c) of the Ordinance. The Appeal Board sees no exceptional circumstances in the Appeals and will not make any orders as to costs.

(Signed)

Mr. Horace Wong Yuk-lun, SC, JP

(Chairman)

(Signed)

Prof. Fung Tung, MH

(Member)

(Signed)

Mr. Tang Kwok-wai

(Member)

(Signed)

Ms. Mona Yeung Tse-ngok

(Member)

(Signed)

Mr. Nelson Yip Siu-hong

(Member)