

IN THE TOWN PLANNING APPEAL BOARD

Town Planning Appeal No. 3 of 2013

BETWEEN

MR TSUI PO

Appellant

and

TOWN PLANNING BOARD

Respondent

Appeal Board:	Mr CHAN Chi-hung, SC	(Chairman)
	Mr Marvin CHEN	(Member)
	Ms Fion LAI Tin-yin	(Member)
	Mr LAI Yip-hung	(Member)
	Dr Emmy LI Yuen-mei	(Member)
In Attendance:	Ms Suan MAN	(Secretary)

Representation:	Mr Henry TAI Ngan-chiu, for the Appellant
	Mr Raymond TAM Che-wai, Counsel for the Respondent

Dates of Hearing: 21 May 2014

Date of Decision: 31 July 2014

DECISION

The Appeal

1. The Appellant submitted an application (“**the Application**”) to build a proposed house (“**the House**”), a New Territories Exempted House (“**NTEH**”), on Lot No. 2316 S.A in D.D. 116, Tai Tong, Yuen Long, New Territories (“**the Site**”) under s.16 of the Town Planning Ordinance Cap 131 (“**the Ordinance**”).
2. On 21 September 2012, the Rural and New Town Planning Committee (“**RNTPC**”) of the Town Planning Board (“**TPB**”), the Respondent, rejected the Application. The Appellant subsequently applied for a review of the RNTPC’s decision under s.17 of the Ordinance, which was refused by the TPB on 18 January 2013. The Appellant thus appeals to this Town Planning Appeal Board (“**the Appeal Board**”).

Analysis

3. The Site is entirely within the zone Agriculture (“**AGR**”) on the relevant approved Outline Zoning Plan (“**OZP**”) ¹.
4. The Appeal Board must take into consideration “the planning intention” for the area zoned AGR, which is set out in the Notes (“**the Notes**”)(which forms part of the OZP: see the Ordinance s.4). Therein the stated planning intention is:

¹ The approved Tai Tong OZP No. S/YL-TT/16 refers.

“...primarily to retain and safeguard good quality agricultural land/farm/fish ponds for agricultural purposes. It is also intended to retain fallow arable land with good potential for rehabilitation for cultivation and other agricultural purposes.”

5. Thus, under AGR, the planning intention is for agricultural purposes, not building the House for residential purposes. The Application’s inconsistency with the planning intention is an important consideration against the Application.
6. However, it is not the case that a NTEH will not be considered in an AGR zone. Under this zone, as stipulated under Column 2 of the Schedule of Uses under AGR of the Notes, use for building a NTEH may be permitted on application to the Respondent.
7. The criteria for considering such applications are set out in the “Interim Criteria for Consideration of Application for New Territories Exempted House (NTEH)/Small House in New Territories” (“**the IC**”)².
8. The criteria in the IC which are more pertinent to this Appeal are those in relation to an application site within a “Village Type Development” (“**V**”) zone or within the village ‘environs’ (**VE**) of a recognized village:

“(A) **Explanatory Notes on NTEH/Small House Development Exempted from Planning Application**

- (a) for NTEH/Small House development on a site straddling the “Village Type Development” (“**V**”) zone and other land use zones, planning permission will not be required if the proposed NTEH/Small House footprint falls wholly within the “**V**” zone;

² The version promulgated in 2007 refers (p.8001-8002 of the Appeal Bundle).

- (b) planning permission will also not be required if not less than 50% of the footprint of a Small House falls within the “V” zone and the village ‘environs’ (‘VE’) of a recognized village;

(B) Assessment Criteria for Planning Application

- (a) sympathetic consideration may be given if not less than 50% of the proposed NTEH/Small House footprint falls within the village ‘environs’ (‘VE’) of a recognized village and there is a general shortage of land in meeting the demand for Small House development in the “Village Type Development” (‘V’) zone of the village;
- (b) if more than 50% of the proposed NTEH/Small House footprint is located outside the ‘VE’, favourable consideration could be given if not less than 50% of the proposed NTEH/Small House footprint falls within the “V” zone, provided that there is a general shortage of land in meeting the demand for Small House development in the “V” zone and the other criteria can be satisfied;”

9. However, in the present case, the Site is not in nor straddles any “V” zone or within any ‘VE’ at all.

10. Another pertinent criterion in the IC is in relation to the “exceptional circumstances” of such applications :

“(B)(c) development of NTEH/Small House with more than 50% of the footprint outside both the ‘VE’ and the “V” zone would normally not be approved unless under very exceptional circumstances (e.g. the application site has a building status under the lease, or approving the application could help achieve certain

planning objective such as phasing out of obnoxious but legal existing uses); ...”.

11. However, although Mr. Tai (the representative for the Appellant) in his further written response dated 17 June 2014 referred to a nearby Lot 2239 having the description “House and Dry Cult” in the Schedule to the Block Crown Lease, there is no evidence or suggestion of any similar description, or anything suggesting a building status, in relation to the Crown/Government lease condition for the Site (p.1036 of the Appeal Bundle: the Paper dated September 2012 by the Planning Department for consideration of the Application by the Respondent, only stated that the lease is “Block Government Lease (demised for agricultural use)”.
12. The Appeal Board is of the clear view that, in the present case, there are no exceptional circumstances within the aforesaid criterion of IC.
13. Another pertinent criterion in the IC is that :

“(B)(f) the proposed development should not frustrate the planning intention of the particular zone in which the application site is located;”
14. The Department of Agriculture, Fisheries and Conservation was of the view that the Site and its surroundings, although abandoned agricultural lands, had high potential for agricultural rehabilitation. There is no sufficient evidence otherwise, and the Appeal Board accepts that is the case.
15. There were also 22 local objections on the grounds, inter alia, that the Application was against the planning intention of AGR zone, which is a justified complaint (see paragraphs 5 and 13 above).

16. The Appellant has not demonstrated that there have been other approvals of planning applications reflecting a significant departure from the planning intention of an OZP, or from the IC, or that thereby the Appellant has not been treated fairly.
17. The 5 other cases of approvals for NTEH cited by Mr. Tai in his further submissions dated 27 May 2014 were all within the ‘VE’, and all involved quite different considerations. The Appeal Board will not in this appeal analyse or go into the details as to why those other 5 applications should or should not be approved, as all such applications should be individually assessed on their own merits, and such considerations are not helpful to the deliberation and determination of this Appeal.
18. Mr. Tai during the hearing of this Appeal also referred to 4 other successful applications in the vicinity of the Site. But they were within “Unspecified Use” zone and not AGR, at the time they were approved. Some involved relocations of the respective applicants as they were affected by government public works projects. Since then there has been no similar application approved in the vicinity.
19. In any event, each case must be assessed on their individual circumstances and merits.
20. The Appellant’s other written grounds of appeal (allegedly, that much land has been re-zoned from AGR to V; that many other planning applications involving AGR zones have been granted; that there are insufficient land in Hong Kong for residential purposes and a property developer Mr. Lee Shau Kee considers donating his own farmland to assist first-time buyers of homes; and that agricultural industry is

declining) have all been carefully considered by the Appeal Board, but they can bear little weight against the planning intention.

21. Mr. Tai also submitted that the House was intended to be used as the residence of the Appellant. That is a matter that the Appeal Board will bear in mind. But it is not a weighty consideration as compared with the importance of the planning intention.
22. In the present case, the Application clearly is against the planning intention, and no significant circumstances have been demonstrated to sufficiently outweigh the aforesaid considerations against the Application. As a matter of weighing and balancing of all the factors and circumstances analysed above, the Appeal Board is clearly of the view that the Application should not be allowed at all, but must be refused.

Conclusion

23. For the aforesaid reasons, this Appeal is wholly dismissed.
24. There is no order as to costs.

(Signed)

Mr CHAN Chi-hung, SC

(Chairman)

(Signed)

Mr Marvin CHEN

(Member)

(Signed)

Ms Fion LAI Tin-yin

(Member)

(Signed)

Mr LAI Yip-hung

(Member)

(Signed)

Dr Emmy LI Yuen-mei

(Member)