

IN THE TOWN PLANNING APPEAL BOARD

Town Planning Appeal No. 5 of 2014

BETWEEN

STEPHANE WONG

Appellant

and

TOWN PLANNING BOARD

Respondent

Appeal Board : Mr. Johnny FEE Chung-ming, JP (Chairman)
Ir. AU Choi-wa (Member)
Dr. Teresa LAW Sui-chun (Member)
Ms. Emba LEUNG Wun-man (Member)
Mr. Alex WONG Loi-fat (Member)
In Attendance : Ms. Suan MAN (Secretary)

Representation : Mr. Dick LEE, Counsel for the Appellant
Ms. Simone LEUNG, Counsel for the Respondent

Date of Hearing : 12 August 2015

Date of Decision : 22 October 2015

DECISION

This Appeal

1. This is an appeal (“**Appeal**”) by the Appellant under section 17B of the Town Planning Ordinance (“**TPO**”) against the refusal by the Town Planning Board (“**TPB**”) of his application for planning permission to build a proposed New Territories Exempted House – Small House (“**Small House**”) on his site (“**Appeal Site**”) at Lot 544 in D.D. 28, Tai Mei Tuk, Tai Po (“**Proposed Development**”)¹.

Zoning

2. The Appeal Site falls within an area zoned “Green Belt” (“**GB**” and the zoned area as “**GB Zone**”) in the draft Ting Kok Outline Zoning Plan No.S/NE-TK/18 (“**OZP**”), which is the current Outline Zoning Plan applicable to the Appeal Site².

Events leading to this Appeal

3. On 23 January 2013, the Appellant lodged his application to the TPB for planning permission for the Proposed Development under section 16 of the TPO (“**Application**”).
4. On 15 March 2013, the Rural and New Town Planning Committee (“**RNTPC**”) of the TPB, under delegated authority from the TPB, decided to refuse the Application for the following reasons³ :-

¹ TPB Paper No. 9432, Para. 1.1.

² Witness Statement of Mr. Lau Chi Ting, Para. 2.1. At the time the Appellant made the application for planning permission, the applicable Outline Zoning Plan was the approved Ting Kok Outline Zoning Plan No.S/NE-TK/17. The zoning of the Appeal Site remains unchanged as GB in the OZP.

³ TPB Paper No. 9432, Para. 1.2.

- “(a) the proposed development was not in line with the planning intention of the “Green Belt” zone which was primarily for defining the limits of urban and sub-urban development areas by natural features and to contain urban sprawl as well as to provide passive recreational outlets. The site and its adjoining slopes served as a buffer between the natural vegetated hillsides to the north and the village proper to the south. There was a general presumption against development within this zone;*
- (b) the proposed development did not comply with the Town Planning Board Guidelines No.10 for ‘Application for Development within “Green Belt” zone under section 16 of the Town Planning Ordinance’ in that the proposed development would affect the existing natural landscape on the surrounding environment; and*
- (c) the proposed development did not comply with the Interim Criteria for consideration of application for New Territories Exempted House/Small House in New Territories in that the proposed development would cause adverse landscape and sewerage impacts on the surrounding areas.”*

5. On 16 April 2013, the Appellant applied to the TPB under section 17 of the TPO for a review of the RNTPC’s decision in refusing his application (**“Review Application”**).

6. On 4 October 2013, the TPB considered the Review Application. As there were outstanding matters relating to sewerage proposal, the TPB agreed to defer making a decision on the Review Application to allow time for the Appellant to prove the feasibility of the proposal. In this

connection, the Appellant was asked to further liaise with Lands Department (“**LandsD**”) to obtain in-principle agreement for laying sewer pipes on government land and to obtain proof of consent from owner(s) of the house development to the south of the Appeal Site for connecting its sewer pipe to the private manhole for discharge into the public sewer⁴.

7. On 13 March 2014, the TPB received further information from the Appellant to prove the feasibility of the sewage disposal proposal (“**Further Information on Sewage Disposal Proposal**”) including (i) LandsD’s in-principle agreement for laying sewer pipes on government land; and (ii) consent from the owner of the house development to the south of the Appeal Site for connecting its sewer pipe to the private manhole for discharge into the public sewer⁵.
8. On 2 May 2014, having considered the Further Information on Sewage Disposal Proposal, the TPB by a majority decided to refuse the Review Application (“**TPB’s Decision**”) for the same reasons as provided by the RNTPC save that sewerage impact on the surrounding areas as a reason for refusal was deleted⁶ :-

“(a) the proposed development is not in line with the planning intention of the “Green Belt” zone which is primarily for defining the limits of urban and sub-urban development areas by natural features and to contain urban sprawl as well as to provide passive recreational outlets. The site and its

⁴ TPB Paper No. 9607, Para. 1.2.

⁵ TPB Paper No. 9607, Para. 2.

⁶ Confirmed Minutes of the 1058th Meeting of the TPB held on 2.5.2014, Paras 66-67.

adjoining slopes serve as a buffer between the natural vegetated hillsides to the north and the village proper to the south. There is a general presumption against development within this zone.

- (b) the proposed development does not comply with the Town Planning Board Guidelines No.10 for 'Application for Development within "Green Belt" zone under section 16 of the Town Planning Ordinance' in that the proposed development would affect the existing natural landscape on the surrounding environment; and*
- (c) the proposed development does not comply with the Interim Criteria for Consideration of Application for New Territories Exempted House/Small House in New Territories in that the proposed development would cause adverse landscape impact on the surrounding areas."*

9. On 7 July 2014, the Appellant lodged this Appeal against the TPB's Decision by filing a Notice of Appeal under section 17B of the TPO.
10. On 10 August 2015, at the request of the Appellant, the Appeal Board conducted a site visit at the Appeal Site, shortly prior to the hearing of the Appeal on 12 August 2015.
11. The facts set out in paragraphs 1 to 10 above are not in dispute.

Applicable Principles

12. The following principles set out in the Appellant's Closing Submissions are not in dispute :-

- (1) In considering an appeal against a decision of the TPB, the Appeal Board must exercise an independent planning judgment and is entitled to disagree with the TPB (*Henderson Real Estate Agency Ltd. v. Lo Chai Wan* [1997] HKLRD 258 at 266A).
- (2) The Appeal Board could substitute its own decision for that of the TPB even if the TPB had not strictly committed any error, as the hearing before the Appeal Board would normally be much fuller and more substantial than a review hearing under section 17 of the TPO (*Town Planning Appeal No.15 of 2011*, Para.18).
- (3) 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 (*Town Planning Appeal No.15 of 2011*, Para. 26).
- (4) It is incumbent upon the Appellant to satisfy the Appeal Board that there is sufficient justification to warrant the Appeal Board granting planning permission to the Proposed Development (*Town Planning Appeal No.15 of 2011*, Para. 26).

Grounds of Appeal

13. The Appellant's grounds of appeal ultimately set out in the Appellant's Closing Submissions are as follows (collectively "**Grounds of Appeal**") :-

- (1) Ground 1 : The TPB has treated the Application unfairly since all the objective characteristics and surrounding environment of the Appeal Site are similar and/or almost identical to the sites of other approved applications in the GB Zone ("**Unfair Treatment Ground**");
- (2) Ground 2 : The Appeal Site does not serve as a "Buffer Zone" and the Proposed Development is in line with the planning intention of the GB Zone ("**Planning Intention Ground**");
- (3) Ground 3 : The Appellant has a legitimate expectation that the Application would be approved if the outstanding sewerage impact could be resolved ("**Legitimate Expectation Ground**");
- (4) Ground 4 : The Proposed Development does comply with the Town Planning Board Guidelines No. 10 for Application for Development within Green Belt Zone ("**TPB Guideline**") and the impact on the existing natural landscape of the surrounding environment caused by the Proposed Development could be tolerated ("**TPB Guideline Compliance Ground**");

- (5) Ground 5 : The Proposed Development does comply with the Interim Criteria for Consideration of Application for New Territories Exempted House/Small House in New Territories (“**Interim Criteria**”) and the TPB exaggerated the adverse landscape impact on the surrounding areas caused by the Proposed Development (“**Interim Criteria Compliance Ground**”);

Witnesses and Representation of the Parties

14. The Appellant called Dr. Lau Chee Sing (“**Dr. Lau**”), Authorized Person, in support of the Appeal. The TPB called Mr. Lau Chi Ting (“**Mr. Lau**”), Acting Senior Town Planner/Tai Po of the Planning Department (“**PlanD**”), in support of the TPB’s Decision. The Appellant was represented by Mr. Dick Lee of Counsel. The TPB was represented by Ms. Simone Leung of Counsel.

Appeal Board’s Findings

Ground 1 : Unfair Treatment Ground

15. The Appellant’s argument is that in respect of the GB Zone, those applications for sites that fell outside the village environs (“**VE**”) were rejected whilst those applications for sites that fell within the VE were approved. The Appellant submitted that since the Appeal Site is within the VE, the Application should have been approved, and that it is unfair to reject it.

16. There is no allegation of failure to observe procedural fairness against the TPB.

17. Therefore, the Appeal Board has to determine Ground 1 mainly by examining the planning merits of the various applications concerned.

18. However, there is insufficient evidence before the Appeal Board to make a meaningful comparison of the individual planning merits between the Appeal Site and the other approved sites cited by the Appellant. There may or may not be special planning merits in the other approved sites to justify the grant of planning permission. The Appeal Board simply does not know as we have insufficient evidence before us to show the case one way or the other.

19. The Appeal Board notes that in 2 applications⁷ approved after the Application, the distance from their sites to the edge of the Pak Sin Leng Country Park (“**Country Park**”) is even closer than the distance from the Appeal Site to the edge of the Country Park.

20. The Appeal Board also notes that in 17 applications⁸ approved before the Application, the distance from their sites to the edge of the Country Park is

⁷ A/NE-TK/440 and A/NE-TK/450.

⁸ 1)A/NE-TK/140; 2)A/NE-TK/192; 3)A/NE-TK/243; 4)A/NE-TK/259; 5)A/NE-TK/260; 6)A/NE-TK/261; 7)A/NE-TK/262; 8)A/NE-TK/278; 9)A/NE-TK327; 10)A/NE-TK/328; 11)A/NE-TK/344; 12)A/NE-TK/362; 13)A/NE-TK/363 ; 14)A/NE-TK367; 15) A/NE-TK/373; 16)A/NE-TK/392 & 17)A/NE-TK/393.

closer than the distance from the Appeal Site to the edge of the Country Park.

21. However, it is not satisfactory to compare the planning merits of the Appeal Site and the 19 approved sites mentioned in paragraphs 19 and 20 above mainly on the proximity to the edge of the Country Park. Such a broadbrush approach fails to take into account the characteristics of the approved sites, their surrounding environment, their existing natural landscape, the impact of their approval on the surrounding areas, the possible mitigation measures proposed by the applicants, the possible existence of specific circumstances to justify the approval⁹, etc.

22. It is also accepted that according to paragraph 5.2 of Mr. Lau's witness statement, a total of 41 applications for sites within the GB Zone were approved mainly on the consideration that the relevant Small House fell mostly within the VE, that there was a general shortage of land to meet the demand for Small House development in the "Village Type Development" ("V") zone of the concerned village and that the proposed developments would have no significant adverse impact on the surrounding areas.

23. For the same reasons as mentioned in paragraph 21 above, it is not satisfactory to dictate the TPB to grant planning permission so long as a

⁹ Two examples cited in the Interim Criteria are that the site is an infill site among existing NTEHs/Small Houses; and that the processing of the Small House grant is already at an advanced stage.

proposed development falls within the VE though there is a general shortage of land to meet the demand for Small House development in the V zone of the concerned village. The TPB still has to consider the planning merits of that particular proposed development. This question may only be fairly resolved on a case by case basis. The previous precedent cases may at most be one of the factors to be taken into account by the TPB. However, it would only be fair that the weighing exercise is mainly dependent on the planning merits of the application site. After all, VE is only the boundary of a village worked out by the LandsD out of administrative rather than planning considerations¹⁰.

24. The Appellant also relies on Mr. Lau's agreement that the characteristics of the Appeal Site are similar to the approved sites of A/NE-TK/211 and A/NE-TK/213. However, it is still unsatisfactory to draw a conclusion from such an agreement that the planning merits of the Appeal Site are necessarily at par with the approved sites of A/NE-TK/211 and A/NE-TK/213. It is obvious from Plan AP-2a¹¹ that the Appeal Site is more than 50 metres away from the other two approved sites. The planning permissions of those two approved sites were granted in 2006. It may be seen from the aerial photos in Plan AP-3b¹¹ that the landscape of the surrounding areas has been changing quite fast over the years. It can be seen that there has been a continuing trend of building encroachment into the GB Zone over the years from 2006 (the year when planning permissions of the

¹⁰ During cross-examination, Dr. Lau fairly accepted such proposition from the TPB.

¹¹ Witness statement of Mr. Lau.

above two approved sites were granted) to 2013 (the year when the Application was made). The areas covered by natural vegetation are getting smaller and smaller. On the other hand, the areas covered by building developments are getting larger and larger. In such circumstances, the maxim that equality is equity may not always be true. It is also trite that discretion must not be fettered¹². It would only be fair that the TPB should be allowed to react to changing circumstances in exercising its powers.

25. To complete the picture, the Appeal Board would like to point out that there are also some other similar rejection cases within the GB Zone where the proposed developments are apparently within the VE¹³.

26. In short, there is insufficient evidence from the Appellant to establish Ground 1.

Ground 2: Planning Intention Compliance Ground

27. In ascertaining the planning intention of the GB Zone, the OZP and the Notes to the OZP are the most material documents to which the Appeal Board are bound to have regard¹⁴.

28. The planning intention for the GB Zone as stated in the Notes to the OZP is as follows:-

¹² Fairland Overseas Development Co. Ltd. v Secretary for Justice [2007] 4HKLRD 949.

¹³ A/NE-TK/426; A/NE-TK/486-493; and A/NE-TK/524.

¹⁴ Henderson Real Estate Agency Ltd. v Lo Chai Wan [1997] HKLRD 258 at 267A-C.

Planning Intention

The planning intention of this zone is primarily for defining the limits of urban and sub-urban development areas by natural features and to contain urban sprawl as well as to provide passive recreational outlets. There is a general presumption against development within this zone.

29. The OZP also contains an Explanatory Statement which sheds light on the planning intention of the GB Zone. While the Explanatory Statement is expressly stated *not* to be part of the OZP, it cannot be disregarded because it is a material consideration though the TPB and the Appeal Board are not bound to follow it¹⁵.

30. Paragraphs 9.9.1 and 9.9.2 of the Explanatory Statement provide as follows:-

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

¹⁵ Henderson Real Estate Agency Ltd. v Lo Chai Wan [1997] HKLRD 258 at 267A-C.

9.9.2 *The zoned areas mainly include areas adjoining the northern boundary of the [Planning Scheme] Area which are in close proximity to Pat Sin Leng Country Park. Mature woodlands which are worth preserving are found in these areas. Apart from that, there are also vegetated lower hill slopes, knolls, etc.”*

31. The TPB’s first refusal reason is that *“The proposed development is not in line with the planning intention of the ‘Green Belt’ zone which is primarily for defining the limits of urban and sub-urban development areas by natural features and to contain urban sprawl as well as to provide passive recreational outlets. The site and its adjoining slopes serve as a buffer between the natural vegetated hillsides to the north and the village proper to the south. There is a general presumption against development within this zone.”*

32. Firstly, the Appellant submits that since there is no legal definition of the term “Buffer Zone”, the TPB did not have legal justification to say that *“the site and its adjoining slopes served as a buffer between the natural hillsides to the north and the village proper to the south”*. As a matter of fact, the TPB did not use the term “Buffer Zone”. As a matter of law, whether the TPB is entitled to regard *“[t]he site and its adjoining slopes as a buffer between the natural hillsides to the north and the village proper to the south”* does not depend on the existence or non-existence of a legal definition of the term “Buffer Zone”. The answer depends primarily on the OZP and the Notes to the OZP as they are the most material documents

to which the Appeal Board is bound to have regard (paragraph 27 above). The Notes to the OZP provide that the GB Zone “is primarily for defining the limits of urban and sub-urban development areas by natural features and to contain urban sprawl as well as to provide passive recreational outlets”. In view of such provisions, and with reference to the plain and natural meaning of the term “buffer” used by the TPB, it is reasonable for the TPB to regard the Appeal Site and its adjoining slope “as a buffer between the natural hillsides to the north and the village proper to the south”. In other words, the Appeal Site and its adjoining slope are intended to act as a buffer between two distinctive landscape characters, the natural hillsides to the north and the village proper to the south of the Appeal Site.

33. Secondly, the Appellant submits that in view of the similarity between the Appeal Site and the approved sites of A/NE-TK/211 and A/NE-TK/213, it is difficult to understand why the TPB did not treat those approved sites as a Buffer Zone and reject those applications. As explained in paragraphs 21 and 24 above, the argument based on site similarity is too broadbrush a ground to be valid in this Appeal.

34. As the TPB in fact did not use the term “Buffer Zone”, the Appellant’s related argument that such term should have been clearly defined cannot get off the ground. In any event, what is important is whether the planning intention of the GB Zone may be discerned without difficulty from the OZP, the Notes to the OZP, the Explanatory Statement and other relevant materials. It is not the Appellant’s case that the planning intention of the

GB Zone is unclear. In any event, the Appeal Board does not find the planning intention of the GB Zone unclear.

35. It is clear from the Notes to the OZP that there is a general presumption against development within the GB Zone. However this does not mean that no development is possible¹⁶.

36. The Explanatory Statement similarly provides that there is a general presumption against development within the GB Zone. However, it goes on to provide that :-

“Nevertheless, limited developments may be permitted if they are justified on strong planning grounds. Developments requiring planning permission from the [Town Planning] Board will be assessed on their individual merits taking into account the relevant Town Planning Board Guidelines.” (Paragraph 9.9.1)

37. The question is whether the Appellant has discharged the burden of showing strong planning grounds to displace the general presumption against development on the Appeal Site.

38. Plainly, the Proposed Development is not in line with the planning intention of the GB Zone which is primarily for defining the limits of urban and sub-urban development areas by natural features and to contain urban sprawl as well as to provide passive recreational outlets. The question is whether the Appellant has shown sufficient individual merits in the

¹⁶ TPB Appeal No.24 of 2003, Para. 23.

Proposed Development to warrant a departure from the planning intention of the GB Zone¹⁷.

39. The Proposed Development has its unique features and characteristics (collectively “**Unique Characteristics of the Appeal Site**”). They are :-

- (i) 100% of the footprint of the proposed Small House and 97% of the Appeal Site lie within the VE¹⁸.
- (ii) The Appeal Site is on active agricultural land and is not covered by dense vegetation or woodland¹⁹.
- (iii) The fact that the Appeal Site is not covered by dense vegetation or woodland is not procured or caused by the Appellant²⁰.
- (iv) The Appeal Site is separated from the edge of the Country Park by a buffer distance of at least 130 metres²¹.
- (v) Instead of septic tank, the sewer from the proposed Small House would be connected to the public sewer²². Hence, the proposed Small House would not cause adverse sewerage impact and would not cause adverse impact on the development of Lung Mei Beach.

¹⁷ See also paragraphs 63 and 64 below.

¹⁸ RNTPC Paper No.A/NE-TK/432, Para.10.1.

¹⁹ Mr. Lau’s witness statement, Plan AP-2b.

²⁰ The Appeal Board accepts Dr. Lau’s evidence that as shown by the aerial photos in Plan AP-3b of Mr. Lau’s witness statement, the Appeal Site became less densely vegetated in 2005, long before the Appellant applied to build a Small House with the LandsD in 2012. There is no evidence to show that the densely vegetated landscape shown in the aerial photo of 2002 was changed by the Appellant to pave way for future development of the Appeal Site.

²¹ TPB Paper No. 9432, Plan R-2.

²² In-principle agreement letter from District Lands Officer/Tai Po dated 6 March 2014 and consent letter from owner of house development to the south of the Appeal Site dated 7 March 2014 – Dr. Lau’s witness statement, Paras. 14 and 15.

- (vi) The Appeal Site is very close (about 10 metres away as shown in Plan AP-2a of Mr. Lau's witness statement) to adjacent Small House developments and village cluster²³.
- (vii) The Appellant agrees to blend in the design, layout, colour and materials of the proposed Small House with its surrounding environment and adjacent Small Houses²⁴.
- (viii) The Appeal Site is close (less than 20 metres away as shown in Plan AP-2a of Mr. Lau's witness statement) to the V zone²⁵.
- (ix) The Appellant's landscape proposal to plant 3 Juniperus Chinensis to some extent mitigates the landscape impact caused by the Proposed Development²⁶.
- (x) There is a general shortage of land in the V zone of the concerned village to satisfy outstanding Small House applications and the 10-year Small House demand in the village concerned²⁷.
- (xi) The scale and intensity of the Proposed Development, being one Small House, is relatively small²⁸.
- (xii) The Appeal Site is accessible by footpath and local track leading to Ting Kok Road to the south²⁹.

²³ A fairly sizable and tidy development, i.e. Meadow Cove under approved Applications No.A/NE-TK204 (37 Small Houses) and 217 (2 Small Houses), is to the southeast of the Appeal Site – RNTPC Paper No.A/NE-TK/432, Para. 8.2 and Mr. Lau's witness statement, Para. 3.2.

²⁴ Appellant's Closing Submissions, Para. 51(v).

²⁵ Plan AP-1b of Mr. Lau's witness statement. Small House development is always permitted in the V zone according to the Notes to the OZP.

²⁶ Dr. Lau further stated on behalf of the Appellant that such landscape proposal may be further improved to the satisfaction of PlanD or TPB – Dr. Lau's witness statement, Para. 19(iv).

²⁷ RNTPC Paper No.A/NE-TK/432, Para.10.1.

²⁸ The proposed Small House has a total floor area of 195.09m², a building height of 8.23m (3 storeys) and a roofed-over area of 65.03m² – Mr. Lau's witness statement, Para. 2.3.

²⁹ RNTPC Paper No.A/NE-TK432, Para. 8.1(c) and Mr. Lau's witness statement, Para. 3.1.

40. In view of the Unique Characteristics of the Appeal Site, and taking into account the TPB Guideline and the Interim Criteria, the Appeal Board is satisfied that the Appellant has discharged its burden of showing the Proposed Development as an exceptional case which warrants a departure from the planning intention of the GB Zone. Ground 2 is for this reason accepted by the Appeal Board.

Ground 3: Legitimate Expectation Ground

41. The Appellant submits³⁰ that paragraphs 162 to 165 of the minutes of the TPB meeting held on 4th October 2013 for the Review Application (“**Review Application Minutes**”) and TPB’s letter dated 18th October 2013 (“**Request Letter**”) :-

“have conveyed a strong and clear message to the Appellant that the TPB has concluded that the adverse visual impacts of the Small House development and possible precedent effects could be tolerated and the outstanding matters that the Appellant needed to resolve was only relating to the sewerage proposal. It is further submitted that it indeed constituted a legitimate expectation of the Appellant that if the outstanding sewage impacts could be resolved, the TPB would approve the Appellant’s review application.”

42. Paragraphs 162 to 165 of the Review Application Minutes are as follows :-

“162. The Chairman said that if Members decided to defer the application to allow the applicant more time to only prove the feasibility of the sewage disposal proposal,

³⁰ Appellant’s Closing Submissions, Para. 27.

Members were in fact also agreeing that due to the special circumstances, i.e. the site being within the 'VE' and there being a shortage of land to meet the Small House demand, the adverse visual/landscape impacts of the development would be accepted.

163. *A Member agreed that the adverse visual impacts of the development could be tolerated as the proposed Small House was close to the village cluster. Regarding possible precedent effects, if the future applications complied with the Interim Criteria, then the [Town Planning] Board was also obliged to approve them.*

164. *The Chairman concluded Member's view that the application should be deferred to allow time for the applicant to resolve outstanding matters relating to the sewerage proposal.*

165. *After deliberation, the [Town Planning] Board decided to defer a decision on the review application (Emphasis provided). The applicant would be asked to further liaise with LandsD to obtain in-principle agreement for laying sewer pipes on government land. The applicant should also be asked to obtain proof of consent from owner(s) of the house development to the south of the application site for connecting its sewer pipe to the private manhole for discharge into the public sewer."*

43. The relevant passage of the Request Letter provides as follows :-

"..... After giving consideration to your review submission, the Town Planning Board (TPB) decided on 4.10.2013 to defer a decision on the review application. You are asked to further liaise with LandsD to obtain in-principle agreement for laying sewer pipes on government land. You are also asked to obtain

proof of consent from owner(s) of the house development to the south of the application site for connecting its sewer pipe to the private manhole for discharge into the public sewer.”

44. A copy of the Review Application Minutes was sent by the TPB to the Appellant under cover of the Request Letter.

45. The question turns on the construction of the Review Application Minutes and the Request Letter.

46. As a matter of construction, the Appeal Board finds that the TPB did not make the conclusion or representation asserted by the Appellant. As shown in the last two paragraphs of the Review Application Minutes, i.e. paragraphs 164 and 165, the conclusion or representation made by the TPB was merely that the Review Application should be deferred to allow time for the Appellant to resolve outstanding matters relating to the sewage proposal. There was no representation that the Review Application would be granted if proof of consent from owner(s) of the house development to the south of the Appeal Site for connecting its sewer pipe to the private manhole for discharge into the public sewer was obtained. Reading the Review Application Minutes as a whole, the TPB Chairman's comments about the acceptance of the adverse visual/landscape impacts of the development in paragraph 162 are his personal comments instead of a representation made or a conclusion reached by the TPB.

47. As a matter of construction, the Request Letter is merely in the nature of a request for information. No representation as to the outcome of the Review Application is made therein.

48. In the absence of a relevant representation from the TPB, the Appellant's submission based on legitimate expectation cannot be sustained. Ground 3 is not established.

Ground 4: TPB Guideline Compliance Ground

49. The TPB's second refusal reason is that *"The proposed development does not comply with the Town Planning Board Guidelines No. 10 for 'Application for Development with 'Green Belt' zone under section 16 of the Town Planning Ordinance' in that the proposed development would affect the existing natural landscape on the surrounding environment."*

50. It is not disputed that the relevant assessment criteria of the TPB Guidelines are as follows :-

"(a) there is a general presumption against development in the 'GB' zone;

(b) applications for new development in 'GB' zone will only be considered in exceptional circumstances and must be justified with very strong planning ground. The scale and intensity of the proposed development including the plot ratio, site coverage and building height should be compatible with the character of surrounding areas. With the exception of

NTEHs, a plot ratio up to 0.4 for residential development may be permitted;

- (c) applicants for NTEHs with satisfactory sewage disposal facilities and access arrangements may be approved if the application sites are in close proximity to existing villages and in keeping with the surrounding uses, and where the development is to meet the demand from indigenous villagers;*
- (d) the design and layout of any proposed development should be compatible with the surrounding area. The development should not involve extensive clearance of existing natural vegetation, affect the existing natural landscape, or cause any adverse visual impact on the surrounding environment;*
- (e) the proposed development should not overstrain the capacity of existing and planned infrastructure such as sewerage, roads and water supply. It should not adversely affect drainage or aggravate flooding in the area;*
- (f) the proposed development should not overstrain the overall provision of Government, institution and community facilities in the general area; and*
- (g) any proposed development on a slope or hillside should not adversely affect slope stability.”*

51. The only issue taken by the TPB is that the Proposed Development would affect the existing natural landscape on the surrounding environment. The TPB is satisfied that the Proposed Development complies with the rest of the assessment criteria of the TPB Guideline.

52. However, in response to the Appellant's landscape proposal quoted in paragraph 10.8 of his witness statement, Mr. Lau acknowledged that the Chief Town Planner/Urban Design and Landscape of PlanD considers that significant adverse impact on existing landscape resources from the Proposed Development is not expected ("**Mr. Lau's Acknowledgement**").

53. Furthermore, at the meeting of the TPB held on 4th October 2013 for the Review Application, members and the Vice-chairman of TPB had the following comments and views :-

"156. ... The visual impact of the Small House was not a major concern as the site was very close to adjacent houses and the slope to its south was not a steep slope.

.....

161. The Vice-chairman said that the case should not be rejected outright, given that the site was within "VE" and there was insufficient land to meet the Small House demand at that location. The application could be deferred to allow the applicant more time to prove that the sewage disposal proposal was feasible. He considered that the visual impact of the development could be tolerated.

.....

163. A member agreed that the adverse visual impacts of the development could be tolerated as the proposed Small House was close to the village cluster."

54. The Appeal Board accepts the Appellant's submission that the Appeal Site is an agricultural land which is covered with grass and shrub instead of dense vegetation or woodland. The Appeal Board also accepts that the

Appeal Site is at the edge of the GB Zone with no dense vegetation in the vicinity of the Appeal Site.

55. In view of the above and the Unique Characteristics of the Appeal Site, the Appeal Board finds that there is insufficient evidence in support of the TPB's conclusion that the Proposed Development does not comply with the TPB Guidelines.

56. Ground 4 is established.

Ground 5: Interim Criteria Compliance Ground

57. The TPB's third refusal reason is that "*The proposed development does not comply with the Interim Criteria for Consideration of Application for New Territories Exempted House/Small House in New Territories in that the proposed development would cause adverse landscape impact on the surrounding areas.*"

58. As far as the Appeal is concerned, the assessment criteria listed in paragraphs (a), (f), (h) and (k) of the Interim Criteria are of particular significance, namely :-

"(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;*

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

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

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

59. The TPB is worried that approval of the Application would create an undesirable precedent and encourage the spreading of similar developments within the GB Zone. The cumulative effect of these developments would result in urban sprawl and building developments extending further towards the edge of dense woodland of the Country Park and degrading the landscape quality in the area. This is shown in paragraph 10.1 of RNTPC Paper No. A/NE-TK/432 :-

“The Chief Town Planner/Urban Design and Landscape, Planning Department (CTP/UD&L, PlanD) objects to the application from landscape planning point of view. Although significant adverse impact on existing landscape resources from the proposed scheme is not expected, the subject slope area acts as a significant buffer between two distinctive landscape characters – the dense undisturbed

hillside woodland to the north of Pat Sin Leng Country Park, and the village proper to the east and south of the site. If this application is approved, similar developments will be encouraged within the “GB” zone resulting in village developments be extended further towards the edge of dense woodland of the country park and thus inevitably degrading the landscape quality in the area.”

60. It is clear from the Explanatory Statement that the general presumption against development may only be displaced by strong planning grounds and individual merits. There is no reference in the OZP or otherwise that the presumption may be displaced by a similar precedent case. The reason is simple. Each case has to be determined on its own facts.

61. As pointed out in paragraph 24 above, the landscape in the surrounding areas may also change over time causing different considerations to come into play in subsequent applications. The Explanatory Statement also expressly provides that *limited* developments (emphasis added) may be permitted even if justification based on strong planning grounds is shown³¹.

62. The risk of creating an undesirable precedent is therefore not substantial.

63. Another objection from the TPB is based on the argument that the Proposed Development is not in line with the planning intention of the GB Zone. This is shown in paragraph 7.3 of Mr. Lau’s witness statement :-

³¹ Explanatory Statement, Para.9.9.1.

“Although more than 50% of the proposed Small House footprint falls within the ‘VE’ and there is a general shortage of land within ‘V’ zone in meeting the future Small House demand, the proposed development does not meet the Interim Criteria in that the proposed development is not in line with the planning intention of the ‘GB’ zone which is primarily for defining the limits of urban and sub-urban development areas by natural features and to contain urban sprawl as well as to provide passive recreational outlets and would cause adverse landscape impact on the surrounding areas. In this regard, Chief Town Planner/Urban Design and Landscape of Planning Department (CTP/UD&L of PlanD) raises objection to the application from landscape point of view.”

64. However, as held in paragraphs 39 and 40 above, the Proposed Development has individual planning merits which warrant a departure from the planning intention of the GB Zone.

65. Mr. Lau’s Acknowledgment in paragraph 52 above is also a relevant consideration here.

66. The Appeal Board accepts that the Proposed Development complies with the Interim Criteria. Ground 5 is established.

Conclusion and Approval Conditions

67. Since Grounds 2, 4 and 5 are established, there is no longer any basis to refuse the Application.

68. The Appeal is therefore allowed subject to the validity period mentioned in paragraph 69 below and to the following approval conditions and advisory clauses which the Appellant has agreed to comply with³² :-

Approval Conditions

- (1) submission and implementation of landscape proposal to the satisfaction of the Director of Planning or of the TPB;
- (2) submission and implementation of drainage proposal to the satisfaction of the Director of Drainage Services or of the TPB; and
- (3) submission and implementation of proposal to blend in the design, layout, colour and materials of the proposed Small House with its surrounding environment and adjacent Small Houses to the satisfaction of the Director of Planning or of the TPB.

Advisory Clauses

- (1) to note the comments of the Director of Environmental Protection (“DEP”) that (i) the Appellant should resolve the technical and land issues involved for making the connection to the planned sewerage system; (ii) the construction of the house shall not be commenced before the completion of the planned sewerage system; and (iii) the connection of the house to the future public sewer should be made at the Appellant’s own costs;

³² Appellant’s Closing Submissions, Para. 56.

- (2) to note the comments of the Chief Engineer/Mainland North of Drainage Services Department that there is no existing public drain available for connection in this area. The Appellant/owner is required to maintain the drainage systems properly and rectify the systems if they are found to be inadequate or ineffective during operation. The Appellant/owner shall also be liable for and shall indemnify claims and demands arising out of damage or nuisance caused by failure of the systems. There is no existing public sewerage available in the vicinity of the site. The DEP should be consulted regarding the sewage treatment/disposal aspects of the proposed development;
- (3) to note the comments of the Chief Engineer/Development(2), Water Supplies Department (WSD) that for provision of water supply to the development, the Appellant may need to extend his/her inside services to the nearest suitable government water mains for connection. The Appellant shall resolve any land matter (such as private lots) associated with the provision of water supply and shall be responsible for the construction, operation and maintenance of the inside services within the private lots to the WSD's standards;
- (4) to note the comments of the Director of Fire Services that the Appellant is reminded to observe 'New Territories Exempted Houses – A Guide to Fire Safety Requirements' published by the LandsD. Detailed fire safety requirements will be formulated during land grant stage; and

(5) to note that the permission is only given to the development under application. If provision of an access road is required for the proposed development, the Appellant should ensure that such access road (including any necessary filling/excavation of land) complies with the provisions of the relevant statutory plan and obtain planning permission from the TPB where required before carrying out the road works.

69. The planning permission shall be valid for 4 years from the date of this Decision, thereafter the permission shall cease to have effect unless before the expiry date, the development permitted is commenced or the permission is renewed.

Costs

70. It has been the practice of the Appeal Board not to award costs under section 17B(8)(c) of TPO unless there are exceptional circumstances to justify an award of costs³³. We see no exceptional circumstances which justify an award of costs in the Appeal. We order that there be no order as to costs in the Appeal.

³³ *Town Planning Appeal No.3 of 2008*, Para.16.

(Signed)

Mr. Johnny FEE Chung-ming, JP
(Chairman)

(Signed)

Ir. AU Choi-wa
(Member)

(Signed)

Dr. Teresa LAW Sui-chun
(Member)

(Signed)

Ms. Emba LEUNG Wun-man
(Member)

(Signed)

Mr. Alex WONG Loi-fat
(Member)