

**IN THE TOWN PLANNING APPEAL BOARD**

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**Town Planning Appeal No. 9 of 2014**

BETWEEN

MR LEE KA WAI

Appellant

and

TOWN PLANNING BOARD

Respondent

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**Town Planning Appeal No. 10 of 2014**

BETWEEN

MR LEE TIM SAU

Appellant

and

TOWN PLANNING BOARD

Respondent

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Appeal Board:

Mr. YEUNG Ming-tai

(Chairman)

Ms CHAN Pui-ying

(Member)

Professor Wallace CHANG Ping-hung

(Member)

Mr. Nelson CHENG Wai-hung

(Member)

Ms Cindi HUI Ming-ming

(Member)

In Attendance:

Ms Suan Man

(Secretary)

Representation:

For the Appellants: Mr. Jerry JIM Yiu-ming of Messrs.  
Jim & Co., Solicitor

For the Respondent: Mr. Raymond CW TAM, Senior  
Government Counsel

Date of Hearing:

19 May 2015

Date of Decision:

8 July 2015

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## DECISION

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### The Appeals

1. The Appellants, Mr Lee Ka Wai (for Appeal No. 9 of 2014) and Mr Lee Tim Sau (for Appeal No. 10 of 2014) lodged a Notice of Appeal dated 3 October 2014 to the Town Planning Appeal Board (“**the Appeal Board**”) appealing against the Town Planning Board (“**the TPB**”)’s decision under section 17B of the Town Planning Ordinance Cap.131 (“**the Ordinance**”), for its refusal to grant planning permission to the Appellants’ applications under section 16 (“**s16**”) of the Ordinance for development of two new houses (New Territories Exempted House) (“**NTEH / Small House**”) in the Appeal Sites.

### The Appeal Sites

2. The Appeal Sites consist of two adjacent Lots, one at Lot No. 626 S.A in D.D. 82 (Application No. A/NE-TKL/467) and the other at Lot No. 626 RP in D.D. 82 (Application No. A/NE-TKL/468), both located at Lei Uk Tsuen, Ta Kwu Ling, New Territories (“**the Appeal Sites**”).

3. The Appeal Sites are zoned “Agriculture” (“**AGR**”) on the approved Ping Che and Ta Kwu Ling Outline Zoning Plan (“**OZP**”) No. S/NE-TKL/14 at the time of the applications. The OZP is currently still in force.

4. Lot No. 626 S.A (Application No. A/NE-TKL/467) of the Appeal Sites is flat and is currently a piece of fallow agricultural land with minor encroachment onto

existing footpath and is situated entirely within the village 'environs' ('**VE**') of Lei Uk Tsuen.

5. Lot No. 626 RP (Application No. A/NE-TKL/468) of the Appeal Sites is similar to Lot 626 S.A., but with about 95.5% of area within "AGR" zone and about 4.5% within an area zoned "Village Type Development" ("**V**" zone).

### **S16 Applications**

6. On 14 February 2014, the Appellants, both represented by Intellects Consultancy Limited, submitted two applications (Application Nos. A/NE-TKL/467 and 468) to the TPB for a planning permission to build two Small Houses under s16 of the Ordinance.

7. On 4 April 2014, the Rural and New Town Planning Committee ("**RNTPC**") of the TPB rejected the applications. RNTPC's reasons for rejection are summarized as follows:-

- (1) The proposed development is not in line with the planning intention of the "AGR" zone on the OZP, which is 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. There is no strong planning justification given in the submission for a departure from the planning intention; and
- (2) Land is still available within the "V" zone of Lei Uk Tsuen where land is primarily intended for Small House development. It is considered more appropriate to concentrate the proposed Small House development close to the existing village cluster for orderly

development pattern, efficient use of land and provision of infrastructure and services.

8. The Appellants applied to the TPB for review under section 17 (“**s17**”) of the Ordinance. On 1 August 2014, the TPB rejected the review applications for the same reasons of RNTPC.

9. The Appellants thereafter lodged a Notice of Appeal dated 3 October 2014 to the Appeal Board appealing against the TPB’s decisions under section 17B of the Ordinance.

### **Guiding Principles**

10. The Appeal Board accepts the submission from Counsel for the TPB that it is to exercise an independent planning judgement in considering the appeal. As Lord Lloyd said in the Judgment of *Henderson Real Estate Agency Ltd. v. Lo Chai Wan* (1996) 7 HKPLR 1, “*the Appeal Board were, of course, entitled to disagree with the TPB. Their function was to exercise an independent planning judgment*”.

11. Therefore it is relevant for the Appeal Board to study and consider the “planning intention” of the TPB for a particular area (where an appeal site is located), as expressed in the relevant statutory plan. Pursuant to section 4 of the Ordinance, the Notes to the statutory plan shall be part of the statutory plan.

12. Apart from the statutory plan and its Notes which are material considerations, the Explanatory Statement (“**ES**”) (even if it does not form part of the statutory plan) and the TPB Guidelines (which are relevant to ascertaining the planning intention) cannot be disregarded.

13. As the Appeal Sites are zoned as “AGR”, it is imperative to ascertain in the present appeals the planning intention of the “AGR” zone under the OZP together with its Notes and ES.

14. Moreover, the Interim Criteria for assessing planning applications for NTEH / Small House development (“**Interim Criteria**”) which set out the planning policy on assessing application for NTEH / Small House in New Territories are also relevant.

### **Planning Intention and Interim Criteria**

15. The Appeal Board notes that both the planning intention of “AGR” zone and the Interim Criteria for the NETH / Small House had been considered by the RNTPC and the TPB when they reviewed the Appellants’ applications. The planning intention of the “AGR” zone under the OZP as stated in the Notes and ES is:

*“This zone is intended 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.”*

16. Paragraphs 9.8.1 - 9.8.7 of the ES stipulate:-

*“9.8.1 This zone is intended primarily to retain and safeguard good quality agricultural land / farms / 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. The Area has been one of the established agricultural bases in the NENT and most of the agricultural land in the Area is of good quality according to the grading exercise undertaken by the Agriculture, Fisheries and Conservation Department which has taken into account the existing availability and quality of infrastructural and marketing facilities.*

*Notwithstanding the proliferation of open storage and industrial uses in the Area and the general decline in agricultural activities in the territory, there is a significant amount of actively cultivated land concentrated in the northern and southern parts, along Ng Tung River of the Area.*

*9.8.2 The land under active cultivation is intermixed with livestock sheds and fallow agricultural land which has good potential for rehabilitation for cultivation purpose. Temporary domestic structures of small scale have been erected around the agricultural land and livestock sheds. Apart from the village housing inside the recognized villages, these domestic structures remain the key accommodation for the rural population.*

*9.8.3 In general, there are four major “AGR” zones in the Area and two of these zones are located in the northern part (to the north of Pak Hok Shan). The “AGR” zone in the north-east comprises actively cultivated land near Ping Yeung Village and the ex-Sing Ping Public School as well as the fallow agricultural land at Shek O.*

*9.8.4 The “AGR” zone in the north-west comprises actively cultivated land near Lei Uk Tsuen, Tai Po Tin Village and Ha Shan Kai Wat Village and the adjoining fallow agricultural land. Owing to the limited provision of infrastructure and the need to preserve the rural character, existing industrial and open storage uses clustered in the areas to the south of Lei Uk Tsuen and to the east of Ha Shan Kai Wat Village should be relocated in the long run. Proliferation of industrial activities and open storage uses in the area should be deterred since these haphazard developments would worsen interface problems and traffic conditions around existing villages.*

*9.8.5 In the south-western part of the Area, despite the infiltration of open storage and industrial development, much of the land along Ng Tung River and Kwan Tei River is still under active cultivation, the area*

*to the south of Wang Leng is one of the examples. These plots of cultivated land are usually intermixed with temporary domestic structures. In order to encourage farming activities and protect the arable land, these plots of land are zoned “AGR”.*

*9.8.6 The agricultural land at the south-eastern part of the Area is largely categorized as good quality and much of it is still under active cultivation. Plots of cultivated land near Hung Leng, Leng Tsai and Ng Tung River are some of the examples. The “AGR” zoning is designated to preserve existing agricultural use. Several open storage yards and car-repairing workshops located to the north of Sha Tau Kok Road (near Leng Tsai) are non-conforming existing uses which should be relocated to other areas in the long run.*

*9.8.7 As filling of land / pond may cause adverse drainage and environmental impacts on the adjacent areas, permission from the [Town Planning] Board is required for such activities. However, filling of land specifically required under prior written instructions of Government department(s), or for the purposes of genuine agricultural practice including laying of soil not exceeding 1.2m in thickness for cultivation, and construction of agricultural structure with prior written approval from the Lands Department is exempted from the control.”*

17. The proposed development of Small Houses is a Column 2 use under the Notes for “AGR” zone which may be permitted with or without conditions on application to the TPB.

18. The Interim Criteria for assessing NTEH / Small House include:

*“(a) Sympathetic consideration may be given if not less than 50% of the proposed NTEH / Small House footprint falls within the ‘VE’ of a recognized village and there is a general shortage of land in*

*meeting the demand for Small House development in the “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;*
- (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 objectives such as phasing out of obnoxious but legal existing uses);*
- (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 cases, 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;*
- (e) If an application site involves more than one NTEH / Small House, application of the above criteria would be on individual NTEH / Small House basis;*
- (f) The proposed development should not frustrate the planning intention of the particular zone in which the application site is located;*

- (g) *The proposed development should be compatible in terms of land use, scale, design and layout, with the surrounding area / development;*
- (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;*
- (i) *The proposed development, if located within water gathering grounds, should be able to be connected to existing or planned sewerage system in the area except under very special circumstances (e.g. the application site has a building status under the lease or the applicant can demonstrate that the water quality within water gathering grounds will not be affected by the proposed development);*
- (j) *The provision of fire service installations and emergency vehicular access, if required, should be appropriate with the scale of the development and in compliance with relevant standards; and*
- (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 TPB guidelines should be observed, as appropriate.”*

### **Similar Applications in Lei Uk Tsuen**

19. There are 8 similar applications involving six sites for Small House development within the same “AGR” zone in the vicinity of the Appeal Sites of Applications No. A/E-TKL/467 and 468 to the west of Lei Uk Tsuen since the first promulgation of the set of Interim Criteria on 24.11.2000. All of them were rejected by the RNTPC or by the TPB on review between December 2012 and May 2014 for

reasons, *inter alia*, that (a) the applications were not in line with the planning intention; (b) land was still available within the “V” zone for Small House development; and (c) the development involved clearance of existing vegetation.

20. There are also 12 similar applications within the same “AGR” zone in the vicinity of the Appeal Sites but to the east of Lei Uk Tsuen since the first promulgation of the Interim Criteria on 24.11.2000. All of them were approved with conditions by the RNTPC between June 2002 and December 2014 mainly on the consideration that (a) the applications complied with the Interim Criteria in that the sites were located within the ‘VE’ of Lei Uk Tsuen where there was a general shortage of land in meeting the demand for Small House development in the “V” zone of the same village; and (b) the proposed Small House developments would unlikely have significant adverse environmental, drainage and traffic impacts on the surrounding area.

#### **TPB’s Reasons for not approving the present applications by the Appellants**

21. According to Mr Tang Wing Keung Wallace (“**Mr Wallace Tang**”), Acting Senior Town Planner/North of the Sha Tin, Tai Po and North District Planning Office, the TPB’s reasons for not approving the planning applications may be summarized as follows:

##### **Not meeting the planning intention for the “AGR” zone**

- (1) Despite the Appellants’ claim that the existing condition of the Appeal Sites should be considered as ‘vacant land without garbage dumped on it’, the Appeal Sites are in fact fallow agricultural land with a minor encroachment onto an existing footpath (for Application No. A/NE-TKL/467 only). The proposed Small House developments are not in line with the planning intention of the “AGR” zone which is primarily to retain and safeguard good quality agricultural land / farm / fish ponds for agricultural

purposes, and to retain fallow arable land with good potential for rehabilitation for cultivation and other agricultural purposes.

- (2) The Director of Agriculture, Fisheries and Conservation (“DAFC”) does not support the applications from the agricultural development point of view as active farming activities are found in the vicinity of the Appeal Sites within the subject “AGR” zone and the Appeal Sites have high potential for agricultural rehabilitation.
- (3) The Appellants have not provided strong planning justification in their applications to demonstrate that the proposed Small House developments are in line with the planning intention of the “AGR” zone or merit a departure from the planning intention.

#### Not meeting the Interim Criteria

- (4) According to the District Lands Officer/North of Lands Department (DLO/N of LandsD), the total number of outstanding Small House applications for Lei Uk Tsuen is 38 while the 10-year Small House demand forecast for the same village is 580<sup>1</sup>. Based on Planning Department’s estimate, about 2.2 ha of land (equivalent to 87 Small House sites) are available within the “V” zone of Lei Uk Tsuen for Small House development. In this regard, the land available cannot fully meet the future Small House demand (about 15.5 ha which is equivalent to 618 Small House sites).
- (5) Nevertheless, even though there is a general shortage of land in meeting the demand for Small House development in the “V” zone of Lei Uk Tsuen and more than 50% of the proposed Small House footprints fall within the ‘VE’ to the west of Lei Uk Tsuen, both

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<sup>1</sup> According to DLO/N, LandsD, the 10-year Small House demand forecast was provided by the relevant Indigenous Inhabitant Representative(s) without any supporting evidence.

applications do not comply with the Interim Criteria in that the proposed Small House developments would frustrate the planning intention of the “AGR” zone where active agricultural activities are found.

Concentrate Small House development near the existing village cluster

- (6) As there is more than enough land within the “V” zone (2.2 ha or an equivalent of 87 Small House sites) to meet the 38 number of outstanding Small House applications, it is considered more appropriate to concentrate those proposed Small Houses close to the existing village cluster within the “V” zone for orderly development pattern, efficient use of land and provision of infrastructures and services.
- (7) The Chief Town Planner / Urban Design and Landscape of Planning Department also considers that approval of the applications may set the undesirable precedent of spreading village development into the “AGR” zone, and has reservation on the applications from the landscape planning perspective.

**Grounds of Appeal**

22. In the Appellants’ Notices of Appeal dated 3 October 2014, the Appellants set out the following grounds of appeal:-

- (1) The proposed development satisfies the environmental and hygiene requirements and is away from other residential developments and would not affect the others.
- (2) Most of the land within the “V” zone is not suitable for housing development.

- (3) As the TPB had approved applications for housing development in other lots in the same area, it should not adopt “double standard”.

**Response to the grounds of appeal by TPB**

23. The TPB’s responses to the grounds of appeal are as follows:

- (1) The planning intention of the “AGR” zone on the OZP is 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. All the Appellants’ grounds of appeal are considered not material considerations in the assessment of the applications. Suffice to say that they were rightly rejected by the RNTPC and the TPB for the same reasons namely the proposed development is not in line with the planning intention and there is no strong justification given in the submission for a departure from the planning intention and land is still available within the “V” zone of Lei Uk Tsuen where land is primarily intended for Small House development. The Appellants’ applications do not comply with the Interim Criteria in that the proposed development would frustrate the planning intention of the “AGR” zone where active agricultural activities are found. According to the estimate of the Planning Department, there are about 2.2 ha of land (about 87 Small House sites) within the “V” zone of Lei Uk Tsuen for Small House developments to meet the current demand for such developments (the number of outstanding Small House applications are merely 38). Although there is a 10-year Small House demand forecast for 580 Small Houses, that demand forecast is an estimate provided by the Indigenous Inhabitants Representative, the accuracy of which had not been verified by the

District Lands Officer. It is hence considered more appropriate to concentrate development close to the existing village cluster for orderly development pattern, efficient use of land and provision of infrastructure and services. The Appellants failed to demonstrate in the submission why suitable sites within areas zoned “V” could not be made available for the proposed development.

- (2) There were adverse departmental comments on the applications. The DAFC did not support the proposed development as active farming activities are found in the vicinity of the Appeal Sites which have high potential for agricultural rehabilitation. The Chief Town Planner / Urban Design and Landscape of the Planning Department considered that approval of the applications may set an undesirable precedent of spreading village development outside the “V” zone in an uncoordinated manner and would hence erode the rural landscape character of the area. The Commissioner for Transport (“**C for T**”) also has reservation on the applications and viewed that the proposed development should be confined within the “V” zone as far as possible.
- (3) Two local objections (Designing Hong Kong Limited and Kadoorie Farm and Botanic Garden Corporation) were received during the statutory publication period at both s17 review and s16 applications commenting that:
  - (i) the proposed developments are not in line with the planning intention of the “AGR” zone. Approval of such applications would result in reduction of farm land and affect food supply;
  - (ii) the proposed developments should be built within the “V” zone without encroaching onto the “AGR” zone;

- (iii) no technical assessment has been included in the applications to assess the possible traffic and environmental impacts on the surrounding areas; and
  - (iv) previous application Nos. A/NE-TKL/420 and A/NE-TKL/421 for Small House development (“the previous applications”) were rejected by the RNTPC on 11 January 2013 and by the TPB on review on 26 April 2013. The present applications shall be rejected on the same planning consideration and principle.
- (4) The Appeal Sites are the subject of two previous applications which were rejected by the RNTPC on 11 January 2013 and by the TPB on review on 26 April 2013 for the same reasons adopted by the RNTPC and the TPB in the present applications.
- (5) It is noted that the TPB has approved 12 similar applications (No. A/NE-TKL/207, 214, 216, 218, 221-223, 359-361, 466 and 493) within the same “AGR” zone located to the east of Lei Uk Tsuen while 8 applications (A/NE-TKL/406, 407, 414-416, 457, 458 and 471), which are located to the west of Lei Uk Tsuen, have been rejected. The planning circumstances of the current appeals are not comparable to the approved applications due to the fact that the Appeal Sites are located to the west of Lei Uk Tsuen, some 80m to 120m away from the village proper; the land in the vicinity of the Appeal Sites are under active agricultural use; the Appeal Sites have high potential for agricultural rehabilitation as advised by the DAFC; and the Appeal Sites are situated in an area of rural landscape character dominated mainly by tree groups and active farmland.
- (6) The Interim Criteria were endorsed by the TPB and were adopted specifically to ensure a consistent and coordinated approach in

assessing applications for NTEH / Small House developments. All proposed developments should not frustrate the planning intention of a particular zone in which the application sites are located (which is the “AGR” zone in these two appeals).

### **Hearing**

24. In the hearing before the Appeal Board held on 19 May 2015, the Appellants were represented by Mr Jerry Jim (“**Mr Jim**”), solicitors for both Appellants; and the Respondent represented by Mr Raymond Tam (“**Mr Tam**”), the Senior Government Counsel of Department of Justice.

25. Mr Lee Yee-Mui (“**Mr Lee**”) gave evidence for the Appellants. Mr Lee is the village representative of Lei Uk Tsuen. As the evidence reveals, Mr Lee sold the Appeal Sites to both Appellants.

26. Mr Lee Ka Wai (for Appeal No. 9 of 2014) was absent. The other Appellant, Mr Lee Tim-Sau (for Appeal No. 10 of 2014) was present but elected not to give evidence.

27. Mr Wallace Tang gave evidence for the TPB.

28. In his opening statement, Mr Jim for the Appellants stated briefly the background of the applications, and reiterated the reasons for appeal stated in the Grounds of Appeal, in particular:

- (1) TPB adopted “double standard”. The Appellants noted that 12 applications in the east of “V” zone were approved to date, but 8 applications in the west of “V” zone not approved, notwithstanding that all applications (in the east and west) are within the “V” zone. (The Appeal Sites are situated in the west of “V” zone.)

- (2) In the southern part of “V” zone, there is vacant private land available for development, but most of these are owned by “Tso” which cannot be utilized easily.
- (3) The Appeal Sites fall into fallow, not active agricultural land.
- (4) While there is one tree in Lot No. 626 S.A (Application No. A/NE-TKL/467) of the Appeal Site, it would not be affected by the proposed development.
- (5) The Appellants provided 6 supporting letters, 4 sent from the Rural Committees of Sheung Shui, Fanling, Sha Tau Kok and Ta Kwu Ling, 1 from Lei Uk Tsuen and 1 from Heung Yee Kuk.

29. In his opening statement, Mr Tam for the TPB agreed the basic facts cited by Mr Jim. In addition, Mr Tam also helpfully provided the Appeal Board a location plan marked up to show the detailed location of various lots in the ‘VE’ of Lei Uk Tsuen. For those lots where applications for permission had been made, they are also marked in the plan for identification purpose.

30. In response to the Appeal Board’s query as to why all s16 applications in the east were approved but all applications in the west were rejected, Mr Tam stated that those land in the west are all active agricultural land but those in the east are just fallow land. There are also environmental, planning and traffic considerations as well. Thus, the TPB has adopted a balancing exercise in coming to the decision that those applications in relation to the lots in the east would be approved but not in the west.

### **The Decision**

31. Having thoroughly considered the submissions from Solicitors for the Appellants and Counsel for the TPB, the evidence from the two witnesses and the

documents included in the hearing bundle, the Appeal Board would dismiss the appeals for the reasons set out below.

### **Reasons for the Decision**

32. The Appeal Board has carefully considered the reasons relied on by the TPB in rejecting the Appellants' s16 applications. These reasons are set out in paragraph 21 above. The Appeal Board finds the reasons legitimate.

33. In addition, the Appeal Board notes that the Appeal Sites are the subject of two previous s16 applications for Small House development. The applications were, however, rejected by the RNTPC on 11 January 2013 and by the TPB on review on 26 April 2013. The reasons for rejection then held by the TPB (i.e. the proposed development not in line with the planning intention of "AGR" zone and no strong planning justification for departure had been shown) are substantially the same as the current one held by the TPB.

34. The Appeal Sites are situated at the south western part of Lei Uk Tsuen. It is a relatively flat ground. Previously the Appeal Sites were cultivated by a Mr. Ng Chun Wai ("**Mr Ng**") and his wife for crops and vegetables. However, in about 2011, Mr. Ng stopped cultivating in the Appeal Sites and the same has remained as fallow agricultural land since then. A corner of the Appeal Sites has been used as an existing footpath.

35. The Appeal Sites are outside "V" zone and hence permission to build Small House thereon has to be permitted by the TPB.

36. The Appeal Board notes that the Appeal Sites are surrounded by primarily active agricultural land.

37. The DAFC does not support the applications from agricultural development point of view as active farming activities are noted in the vicinity of the Appeal Sites and the Appeal Sites have high potential for agricultural rehabilitation.

38. The Chief Town Planner/Urban Design and Landscape has reservation on the applications from landscape planning point of view. He opines that although significant adverse impacts arising from the proposed Small Houses are not anticipated, approval of the applications might set an undesirable precedent of spreading of Small House development outside the “V” zone in an uncoordinated manner and would thus erode the rural landscape character where the Appeal Sites are located.

39. The C for T also has reservation on the applications. He is also concerned with setting an undesirable precedent case for similar applications in the future and the resulting cumulative adverse impact could be substantial.

40. In addition to the aforesaid adverse comments from the government departments, Designing Hong Kong Limited as well as the Kadoorie Farm and Botanic Garden Corporation also submitted objections to the applications.

41. The Appeal Board notes that at the moment, the Appeal Sites could not be accessed by vehicles; nor is there emergency vehicular access to the Appeal Sites. In contrast, those lots at the north-eastern part of Lei Uk Tsuen (i.e. Lot 659 ssA, B & C, 669 ssA, B, C & RP, 671 ssA & B, 676, 680 ssA & B) are well served by vehicular access which link up Lei Uk Tsuen with the public highways including Ping Che Road. The Appeal Board shares the same concern as C for T that if development of Small Houses were allowed at the Appeal Sites and similar applications were made to the surrounding sites such as Lot 612 and approved, the resulting cumulative traffic thereby generated would be quite substantial. This would have adverse impact on the traffic as well as the provision of fire service installations and emergency vehicular access.

42. Further, the Appeal Sites form part and parcel of agricultural land where there are still active farming activities. Even though the Appeal Sites are not being farmed at the moment, there is cogent evidence and the Appeal Board is satisfied that it has high potential for agricultural rehabilitation.

43. Regarding the Appellants' complaint that there is not enough land within the "V" zone for development of Small Houses, the Appeal Board accepts the Planning Department's estimate that there are about 2.2 ha of land (which means about 87 Small House sites) within the "V" zone of Lei Uk Tsuen for Small Houses development. Although part of this land is currently held under Tso/Tong, there is no evidence from the Appellants on whether all 2.2 ha are Tso/Tong land or whether there are still some land available for development of Small Houses. According to the Planning Department, there are only 38 outstanding applications for Small Houses at the moment. Thus, there seems to be adequate supply of land within the "V" zone to meet the villagers' demand for Small Houses. In fact, Mr Lee under cross-examination admitted that the Appellants had never attempted to source any land within the "V" zone.

44. The Appellants submit that there is a 10-year demand forecast for Small Houses and the result shows that a total of 580 Small Houses would be required. Thus, the "V" zone in Lei Uk Tsuen would not be large enough to cope with this 10-year demand. It is therefore necessary to extend the current "V" zone to enable the demand be met. As the Respondent rightly pointed out, the demand forecast is an estimate provided by the Indigenous Villagers. The accuracy and basis of this forecast is in doubt. More importantly, the correct way to put the right things into perspective is to apply to the TPB for enlarging the extent of "V" zone to meet with the future demand of Small Houses. It would not be appropriate for the Appellants to apply for a s16 planning permission to change the use of the Appeal Sites from "AGR" to Small House development.

45. The Appeal Board has also taken note of those letters of recommendation issued by Heung Yee Kuk, Chairmen of the Rural Committees of Sheung Shui, Fanling, Sha Tau Kok and Ta Kwu Ling, and the Indigenous Inhabitant Representative of Lei Uk Tsuen. These letters purport to state the fact that there is a high demand for land where Small Houses could be built and there should be a balance between agricultural land and Small House land. The Appeal Board recognizes this and trusts that this was a task already undertaken by the TPB when they made the zoning in the OZP.

46. The Appellants complain that there is an inconsistent approach adopted by the TPB in dealing with applications for Small Houses. They said that the lots situated at the west of Lei Uk Tsuen should be treated equally as those lots situated at the east of Lei Uk Tsuen.

47. The Appeal Board notes the current approach of the TPB in dealing with similar applications for Small Houses – 8 applications in the lots west to the “V” zone were rejected and 12 applications in the lots east of the “V” zone were approved. The Appeal Board is satisfied that the same assessment criteria have been applied by the TPB and that there is no double standard. The TPB has explained and the Appeal Board accepts that the TPB has properly carried out a balance exercise in considering the aforesaid applications. The TPB has properly considered the traffic demand, the availability and quality of arable land, and the impact of approving applications to the surrounding in making a decision that those lots to the east of the “V” zone should be given favourable consideration but not those to the west.

48. The Appeal Sites are situated in the west where there are plenty of good quality and active agricultural lands. These lands should be retained in line with the planning intention of “AGR” zone. If the current applications are approved with no good reason, it will open a floodgate for spreading the development to the west, and such change will damage the planning intention and is irreversible.

49. While flexibility may have to be considered in appropriate case, the Appellants simply do not make out good grounds to depart from the well established assessment criteria.

### **Conclusion**

50. For the reasons stated above, the Appeal Board dismisses the two Appeals and makes no order as to costs for these appeals.

(Signed)

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Mr. YEUNG Ming-tai  
(Chairman)

(Signed)

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Ms. CHAN Pui-ying  
(Member)

(Signed)

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Professor Wallace CHANG Ping-hung  
(Member)

(Signed)

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Mr. Nelson CHENG Wai-hung  
(Member)

(Signed)

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Ms. Cindi HUI Ming-ming  
(Member)