

IN THE TOWN PLANNING APPEAL BOARD

Town Planning Appeal No. 7 of 2014

BETWEEN

LAM, JUSTIN CHUN LAN Appellant

and

TOWN PLANNING BOARD Respondent

Town Planning Appeal No. 8 of 2014

BETWEEN

LAM, DARREN GAR CHUN Appellant

and

TOWN PLANNING BOARD Respondent

Appeal Board: Mr. CHAN Chi-hung, SC (Chairman)
Ms CHAN Pui-ying (Member)
Mr. Tommy FUNG Hei-wai (Member)
Miss Julia LAU Pui-g (Member)
Mr. Eric WONG Sau-shing (Member)

In Attendance: Ms Suan MAN (Secretary)

Representation: For the Appellants: Mr. Anthony ISMAIL, Counsel instructed by Messrs. MUNROS
For the Respondent: Mr. Jin PAO, Counsel instructed by the Department of Justice

Date of Hearing: 26, 28, 29 October 2015, 14, 16, 17 March 2016

Date of Decision: 29 June 2016

DECISION

Background and Facts

1. The Appellants became the registered owner of respectively Lots 1024 S.C, 1025 S.B and 1028 S.A in D.D. 29 (TPA No.7/14) and Lots 1024 S.D and 1028 S.B in D.D 29 (TPA No.8/14) in Ting Kok, Tai Po (“**the Appeal Sites**”) since 15 November 2013. The 2 Appeal Sites adjoin each other, each of about 106 square meters (“**sq. m.**”).
2. Both Appellants are indigenous villagers of Ting Kwok Village. Mr. Tommy Lam Kwok-wai (“**Mr. Lam**”), the paternal uncle and father respectively of the Appellants, living near that area, assisted the Appellants to find and purchase the Appeal Sites, whilst both Appellants were and still are living and working in the United Kingdom (“**UK**”).
3. On 20 December 2013, each of the Appellants applied respectively to the Town Planning Board (“**TPB**”) for planning permission to build one New Territories Exempted House - Small House (“**Small House**”) on each of the Appeal Sites, each of roofed over area of 65.03 sq. m. and 3 storeys height of 8.23m (i.e. within the permitted dimensions of a Small House under the Small House Policy promulgated as a government policy in the New Territories since 1972.
4. On 7 February 2014, the Rural and New Town Planning Committee (“**RNTPC**”) of TPB rejected both applications for the following reasons:

“(a) the proposed development was not in line with the planning intention of the “Agriculture” (“**AGR**”) zone, which was primarily to retain and safeguard good quality agricultural land/farm/fish ponds for agricultural purposes. The

“AGR” zone was also intended to retain fallow arable land with good potential for rehabilitation for cultivation and other agricultural purposes. There was no strong planning justification in the submission for a departure from the planning intention; and

(b) approval of the application would set an undesirable precedent for similar applications at the subject “AGR” zone, resulting in village expansion to the south of Ting Kok Road, leading to disturbance to landscape resources in the surrounding area and degradation of the existing agricultural/recreational landscape character.”

5. On 21 February 2014, the Appellants were informed of the decisions of the RNTPC in rejecting the applications. On 14 March 2014, the Appellants applied for a review of the RNTPC’s decisions in rejecting the applications. On 4 April 2014, the Appellants’ representative submitted further information in support of the review applications. On 6 June 2014, the review applications were considered by the TPB under section 17 of the Town Planning Ordinance (“TPO”) and rejected for the same reasons as stated in the preceding paragraph.
6. Solicitors for both Appellants, Messrs. Munros, filed a Notice of Appeal in respect of each of the Applications appealing against the refusal of planning permissions.

Analysis

7. This Appeal Board has to consider afresh (finding on a balance of probabilities on contested factual issues), upon the evidence before this Appeal Board, each of the Applications, and decide in respect of each of the Application whether the planning permissions should be granted or refused.

The Planning Intention

8. The Appeal Sites lie in an area zoned “AGR” in the Approved Ting Kok Outline Zoning Plan No. S/NE-TK/17 (the “**OZP**”).
9. The Appeal Sites are also in the AGR zone in the Draft Ting Kok Outline Zoning Plan No. S/NE-TK/18 (the “**Draft OZP**”) which amended the OZP, and which is the plan currently in force.
10. There is no dispute that the governing plan is the plan in force at the time of the deliberation/decision by this Appeal Board and not the plan in force at the time of the Applications. But that would not make any difference in the analysis below, as both parties accept that there is no practical difference between the 2 plans in relation to the matters relevant to consideration of the 2 Applications or these 2 Appeals, as analysed herein.
11. The planning intention for the Appeal Sites (within “AGR” zone), as stated in the “Schedule of Uses” in the “Notes” of both the OZP and Draft OZP (“**the Plans**”) is as follows:-

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

12. Mr. Ismail, Counsel for the Appellant, pointed out that the relevant planning intention for consideration of these Applications was that of the Appeal Sites (i.e. as that AGR zone), and that the planning intention of other nearby zones or areas, such as the “Village Type Development” (“**V**”) zone (in which Small Houses should be built) north of the Ting Kok Road, is irrelevant. It is quite correct that the pertinent planning intention is that of the zone covering the Appeal Sites, and a

general reference to “the planning intention” in this Decision means the planning intention stated in the preceding paragraph for the Appeal Sites.

13. The Explanatory Statement (“ES”)(which shall not be deemed to constitute a part of the Plans) §9.8 for the “AGR” zone states as follows:

“9.8.1 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. The zoned areas are usually well served by irrigation and servicing facilities as well as marketing facilities for intensive farming. According to the Director of Agriculture, Fisheries and Conservation, all the actively cultivated lots are worthy of preservation particularly those located at Ting Kok and Lai Pek Shan.

9.8.2 Apart from that, several patches of actively cultivated land are found clustering around the recognised villages within the Area. This zone also intends to retain fallow arable land with good potential for rehabilitation for cultivation and other agricultural purpose.

9.8.3 Extensive fallow agricultural land is found in the vicinity of the actively cultivated land. It is intended that with proper management, the land would be revitalised and utilised for agricultural uses, e.g. cash crop growing, orchards and nurseries, etc. The land under this zone is mainly concentrated at the western part of the Area.”

14. Column 1 of the Plans stipulates use always permitted, which do not require a planning permission from TPB. Column 2 stipulates use which may be permitted by TPB upon applications, with or without conditions. Amongst the Column 2 use for “AGR” zones are Barbecue Spot and Small Houses.

15. As the primary planning intention is to retain and safeguard good quality agricultural land for agricultural purposes and to retain fallow arable land with good potential for rehabilitation for agricultural purposes, building Small Houses for residential use are quite against such planning intention, and thus requires planning approval: to see whether other factors outweigh, inter-alia, such planning intention. Mr. Ismail's argument is as follows. The factual premise of such intention is absent and thus such intention has ceased to be a valid reason against the Appellants, because the Appeal Sites and their vicinity are neither good quality agricultural land, nor have good potential for rehabilitation, having been paved with concrete since 2007 as part of the BBQ site development (by another unrelated party).
16. Mr. Ismail also pointed out that although the then temporary planning permission for the BBQ site had been revoked on 25 April 2015 (for failure to comply with an approval condition), new temporary permission had been granted in November 2015 (i.e. during the adjournment of the hearing of these Appeals) for another period of 2 years, and the concrete paving over the Appeal Sites and their vicinity has never been undone.
17. In answer to the aforesaid arguments by Mr. Ismail, this Appeal Board finds the following. Before the concrete paving pursuant to the development as a BBQ site, the Appeal Sites and their immediate surrounding area were good quality agricultural land for agricultural purpose within the meaning of the stated planning intention as quoted in paragraph 11 above, for the following reasons.
18. This Appeal Board finds that, before the development as a BBQ site and concrete paving of the Appeal Sites and their surrounding area, they probably were green land grown with vegetation/plants.
19. In the aerial photographs showing the Appeal Sites and their vicinity (taken on 28 September and 22 December 2006 respectively, the latter originally used in the BBQ site application TK/235 approved in 2007, reproduced for the purpose of the

present Applications)(Respondent's Bundle pp.11001 and 11002), they were green areas of vegetation and/or some soil ground.

20. In the drawing A-1 dated 22 May 2007 prepared by Survey and Mapping Office of the Lands Department, amongst the papers for TK/235 (for BBQ site application, Respondent's Bundle p.11003, and Documents 6 of the Appeal Bundle), the Appeal Sites and their surrounding area, and indeed the whole of the lots 1024, 1025 and 1026, were described as "agricultural land/cultivation use".
21. The description as small plants and vegetation was given to the Appeal Sites and their vicinity in the drawing "X-2", which was the landscape proposal by the applicant of TK/235 as part of the application papers for the BBQ site in 2007 (Respondent's bundle p.11027).
22. Further, all the planning permissions for the BBQ Site were and are temporary, for a period of 2 or 3 years (see the summary/table at Appendix II to Mr. Lau's witness statement). The previous and the current planning permissions for the BBQ Site were/are all attached with the condition that at the end of that permission period, the BBQ Site has to be reinstated into an amenity area to the satisfaction of the Director of Planning.
23. According to "the Hong Kong Planning Standards and Guidelines" of the Planning Department, "Amenity Areas" mean: "A non-statutory land use zone for areas of incidental green space which are landscaped for amenity, visual or buffer purposes, but have no potential for recreation use." There is emphasis on green space indicative of grass, trees or other vegetation, which is consistent with the TPB's definition of "amenity planting" (within which amenity area is subsumed) in the Definition of Terms (Revised Edition) (Respondent's Bundle p.11015, a document which is available to the public) referring to planting "trees, shrubs, flowers, etc. to make a place pleasant and contribute to the general amenity and attractiveness of the area."

24. Considering the aforesaid, and the relevant evidence (expert witnesses were called by both the Appellants, Professor Chu Lee-man (“**Professor Chu**”), and the Respondent (Mr. Fung Ho-lam, Agricultural Officer (Development), Agriculture, Fisheries and Conservation Department (“**Mr. Fung**”)) as to the potential of cultivation after removing the concrete) as further discussed below, this Appeal Board finds that the more probable scenario after the expiration of the temporary permission would be reinstatement of the Appeal Sites and their vicinity with something greenish, either by removal of the concrete and growing vegetation (this Appeal Board does not accept that man-made (artificial/plastic) turf is, on balance, probable) on the soil beneath the concrete, or at least by overlaying a sufficient layer of soil (4 inches deep soil for turf, 5 cm for lettuce, 20 to 30 cm for shallow rooted plants, according to Professor Chu) on top to allow turf over it, or growing something greenish over it.
25. It is further contended by Mr. Ismail that soil cannot be overlaid on the concrete to reinstate inter-alia the Appeal Sites into an amenity area, as filling of soil “shall not be undertaken ...without the permission...”(OZP “Remarks” for AGR, at Respondent’s Bundle p.6019).
26. With respect, that submission is misconceived, as it is provided in the subsequent part of that Remark that: “This restriction does not apply to filling of land specifically required under prior written instructions of Government department(s) or for the purposes specified below: (i) laying of soil not exceeding 1.2m in thickness for cultivation; or (ii) construction of any agricultural structure with prior written approval issued by the Lands Department.”. Reinstatement to the satisfaction of the Director of Planning certainly falls within this exception. In any event, such contention by Mr. Ismail only pertains to the issue of overlaying of soil, and even if he is correct, it would not affect the overall conclusion this Appeal Board states in paragraph 28 below (that the planning intention for agricultural purpose is still valid), in the light of the other factors which this Appeal Board analyses herein.

27. This Appeal Board accepts the evidence of Mr. Fung that, even if the soil covered and pressed by the concrete paving for many years may have become less than optimal for growing turf or vegetation, the soil in the Appeal Sites can be rehabilitated for growing vegetation by tilling with an excavator, and improved with soil conditioner such as composts or organic fertilizers which are commonly used by local farmers, and are not expensive. This Appeal Board does not agree with Professor Chu's opinion that such soil restoration is not economically viable.

28. Thus, for the aforesaid reasons, the Appeal Sites and their immediate surrounding area are also having good potential for rehabilitation for agricultural purposes.

29. On the other hand, even if this Appeal Board is wrong in the aforesaid analysis and even if this Appeal Board is to assume that the aforesaid relevant area remains concrete paved, there is still other considerations as discussed below against the Applications, and this Appeal Board would still have come to the same conclusion in holding that the planning intention is still valid, and the further conclusion that the Appeals be dismissed, as further discussed herein.

30. One such other relevant consideration is that even paved concrete land can be used for agricultural purpose.

31. "Agricultural use" is defined by the TPB in its Definition of Terms (Revised Version) to mean: -

"any land used for the growing of crops and plants, and rearing of animals and fish including horticulture, aquaculture, fruit growing, seed growing, market gardens, nursery grounds, dairy farming, the breeding and keeping of poultry and livestock, grazing land, meadow land, fish ponds and paddy fields".

Agricultural use is defined to include: -

“any structure or premises ancillary to and directly connected with agricultural activities, such as ... greenhouse ... but excludes any structure or premises for domestic purposes”.

32. Green houses or cultivation rooms can be built on the concrete-paved grounds for crop production with raised growing bed, hydroponic technology (a kind of hydroculture growing plants in mineral nutrients without soil), or growing mushrooms, or as a plant nursery with plotted plants. These are but some examples of numerous feasible agricultural use of the Appeal Sites even if they remain paved.
33. Thus, considering the above factors in the overall, the Appeal Sites and its immediate surrounding concrete paved area are both good quality agricultural lands for agricultural purposes, and have good potential for rehabilitation. In any event, weighing all the aforesaid factors, this Appeal Board is of the firm and unanimous view that the stated planning intention is still valid in respect of the Appeal Sites, and thus is an important consideration in assessing whether a Column 2 use as a Small House ought to be permitted, with or without conditions. With respect, this Appeal Board rejects the contention by Mr. Ismail as set out in paragraph 15 above.
34. The planning intention is for agricultural purposes/use, not building Small Houses for domestic occupation. Thus Small House development is not within Column 1 use as always permitted, but within Column 2 use requiring planning permission under s.16 of the TPO. Small Houses for residential purpose are contrary to the planning intention for agricultural purpose, and whether to grant such permission depends on weighing the frustration of the planning intention, and weighing the Applications’ adverse impact (if any) on the surrounding landscape and environment, and weighing and balancing with all the other relevant factors that may be in favour or against the Applications, as discussed herein.

Interim Criteria for Consideration of Small Houses

35. TPB has made a set of assessment criteria to guide itself in considerations of such applications for developing a Small House in “AGR” zones. These are contained in a document titled “Interim Criteria for Consideration of Application for New Territories Exempted House (NTEH)/Small House in New Territories”. This document can be assessed by the public through inter-alia the relevant websites. There have been several versions over time.
36. The relevant criteria (of the relevant version) are: “B (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 “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; (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.” (emphasis by underlining added for the parts more pertinent to the analysis here)
37. ‘VE’ was defined by the Lands Department in 1972 for purposes of its Small House Policy: an administrative policy rather than a legislative enactment. It means the area of a radius of 300 foot from the last village type house on the edge of a recognised village on 1 December 1972.
38. A number of previous decisions have been cited to this Appeal Board, and duly considered by it, concerning the weight of the relevant version of Interim Criteria (e.g. the decision by Edward Chan SC as Chairman in TPA 2/2004 at para 17). In so far as to how a discretion or flexibility permitted within the statutory ambits

under the TPO, and the OZP or Draft OZP, may be exercised by TPB or this Appeal Board, due regard must be given to the policy stated in the Interim Criteria (as there may be legitimate expectation that such will be the policy adopted). However, such policy guidelines, which has no statutory basis, could only be of weight in so far as they do not conflict with the relevant statutory provisions (TPO, and the OZP or Draft OZP), such as the stated planning intentions for the particular zoning. Further, being only policy guidelines, the Interim Criteria should be considered and construed with common sense and flexibility, and should not be regarded as if they are strict statutory provisions. Thus, arguments as to the precise interpretation or ambit of particular words, phrases, or paragraphs in the Interim Criteria, are not as helpful to this Appeal Board's deliberations, as a broad common sense understanding of the Interim Criteria as a whole, in their proper context.

39. It is not in dispute that, in relation to both of the Appeal Sites, more than 50% of the proposed foot-print of the proposed Small Houses falls within the 'VE'. In fact, apart from the tip of the south-west corner of the Appeal Site for TK/495, the Appeal Sites are within 'VE' of Ting Kok Village.

40. Apart from being a factor relevant as to whether there should be "sympathetic consideration" under Interim Criteria B(a), this Appeal Board is of the view that the fact that the Appeal Sites were very much within 'VE' is a factor which should in itself be weighed in favour of the Appellants though, this is not a very weighty consideration as compared to e.g. the planning intention and the surrounding landscape and environment.

41. However, it is notable that Ting Kok Village is across a major road (a 2 lanes 2 ways paved public road for vehicular traffic: Ting Kok Road) to the north of it, whilst the Appeal Sites are on the south of it. The areas north and south of Ting Kok Road are very very different in their landscapes and environment. To the north, Ting Kok Village is of a dense cluster of Small Houses. In contrast, the photographs taken in 2015 (Respondent's Bundle p.B005 to B006) showed the

vicinity of the Appeal Sites (no suggestion that it is now in 2016 any different significantly) to the south of Ting Kok Road, which is very different. Apart from the paved area for the BBQ development (see photographs at R bundle p.A042-A044), it was mostly green: grasslands, some abandoned lands, vegetable fields, some fruit trees, although also with some storages or sheds (this Appeal Board also took into account the Small House (TK/138 approved in 2002) to the south west of Ting Kok Road, pointed out by Mr. Ismail (see paragraph 61 below)). Considering all the evidence, this Appeal Board is clearly of the view that allowing Small Houses to the south of the Ting Kok Road at the Appeal Sites or their vicinity are seriously incompatible with, and will have a very substantial adverse impact on, the landscape and environment, apart from a serious frustration of the planning intention.

Alleged Shortage of Supply in “V” zone of Ting Kok Village

42. As to the issue of short supply of land in the “V” zone of Ting Kok Village, the test as stated in the Interim Criteria is by reference to the “general shortage” of land in the Village in meeting the demand for building a small house. As to how the Planning Department usually gauges the general shortage by reference to a 10 year projected demand, see paragraph 50 below.
43. As the Appeal Sites fall almost entirely within the ‘VE’ of Ting Kok Village and the Appellants are indigenous villagers of Ting Kok Village, once the test as to shortage of land is satisfied, according to the Interim Criteria paragraph B(a) set out above, the Appellants should be given “sympathetic consideration”. But the sympathetic consideration itself is not decisive, but should be weighed against the other relevant factors in Interim Criteria paragraph B (f), (g) and (h) as underlined above, and more importantly, be weighed in the general picture amongst all the relevant factual matrix discussed herein. Furthermore, as discussed above, the Interim Criteria is not statutory, and is a policy guide rather than binding in a strait jacket sense. In weighing this issue of shortage of land in the “V” zone, this Appeal Board must bear in mind the broad picture, and should balance all the

factors under the statutory umbrella, in particular the planning intention, which is also echoed in the Interim Criteria B(f): "...should not frustrate the planning intention..." (the extent of frustration of the planning intention is also a matter of facts and degree to be weighed and balanced).

44. On the other hand, apart from qualifying the Appellants for sympathetic consideration as under the Interim Criteria paragraph B(a), the fact that the Appellants are indigenous villagers of Ting Kok Village and that the Appeal Sites are within the 'VE' of Ting Kok Village are factors that this Appeal Board will bear in mind in favour of the Appellants in the ultimate weighing exercise, although they are not very weighty factors as compared with the counter factors such as the frustration of the planning intention.

45. As both Appellants were (and are) still living and working in UK, it was Mr. Lam, the father and paternal uncle of the Appellants respectively, who looked for land to be purchased by them to build a Small House, allegedly as their own residences.

46. During the hearing of these Appeals in October 2015, Mr. Ismail made the point (e.g. he relied on the minutes of the hearing of the TPB recording Mr. Lam's submissions before the TPB) that Mr. Lam had asked the village representative of Ting Kok Village Mr. Pang ("Mr. Pang") to find land within the Village/the "V" zone but was told by Mr. Pang that no available land could be found within the Village, and ultimately Mr. Pang could only help Mr. Lam to find the Appeal Sites within 'VE'. Mr. Pao, Counsel for the Respondent, hotly contested this issue, and thus it was mentioned that a further witness might be called to testify on this issue.

47. However, at the resumed hearing of these Appeals in March 2016, only Mr. Lam, not Mr. Pang, was called to give evidence to support that allegation. His evidence as to what Mr. Pang told him and the alleged efforts to find land within the Village was hotly contested.

48. This Appeal Board is of the view that Mr. Lam is not a credible witness and his evidence of the alleged inability to find available land within the “V” zone is rejected, for the following reasons. His explanations (as observed together with his demeanour in giving such evidence) as to his alleged inability to procure Mr. Pang to give evidence (asserting inter-alia that Mr. Pang was “busy” on 14 March 2016) were incredible and unsatisfactory. There was no application to the District Lands Office for allocation of government land (the pretext was that it would take long). The alleged efforts to find land was vague, devoid of any details or specifics such as the price to be offered in the minds of the Appellants (or Mr. Lam), the persons/agents approached (apart from Mr. Pang) etc. Neither the Appellants nor Mr. Lam provided more specifics on this issue further (save seeking, after the hearing in October 2016 was adjourned, to call Mr. Lam as witness giving the aforesaid vague evidence) after the Respondents put forward evidence/information as to availability of land for the purpose of these Appeals.

49. Further, apart from the alleged subjective experience/result of the Appellants’ (or Mr. Lam’s) in their efforts to find land, the objective availability of land within the “V” Zone is also a pertinent consideration, analysed as below.

50. Senior Town Planner Mr. Lau Chi-ting (“**Mr. Lau**”) gave evidence for the Respondent. He stated that Interim Criteria paragraph B(a) was fulfilled (his witness statement paragraph 7.3). But the reasons for his answer are important, as follows. Apart from the fact of the Appeal Sites largely being within ‘VE’ satisfying one limb of the requirement under paragraph B(a), the Government would gauge the issue of general shortage of land by such method: projected 10 year demand for Small Houses (based only on the unverified 10 year forecast by the Village Representative) (being 220 in the present case), plus the outstanding applications for Small Houses (being 54 in the present case), and then compared against the number of Small Houses that could be built in the available land in the “V” zone (being only 124). Thus Mr. Lau’s answer in the positive meant only that the available number was less than the unverified 10 year projection and the outstanding applications added together. This is a fact that this Appeal Board will

have to bear in mind in the weighing exercise. This Appeal Board should also take into consideration that it was a 10 year projection of future demand rather than present demand, and that the projection was unverified (though it still has some value as a projection by the Village Representative).

51. On the other hand, in relation to the present Applications, on the issue of whether the Appellants should be able to, objectively assessed, obtain land within the “V” zone of Ting Kok Village, this Appeal Board finds that the answer is “yes”, for the reasons below. (As to the relevance of available present supply even though there is a general shortage by reference to the 10 year projection of future demand, see the Board’s decision in TPA 9 & 10/2014).

52. After considering all the evidence (including that by Mr. Chan Kim-on (“**Mr. Chan**”), professional town planner giving evidence for the Appellants, as analysed below, this Appeal Board accepts the evidence from Mr. Lau, and finds that there was 3.11 hectares of available land within the “V” zone. Although this Appeal Board is not bound by the practice of the Planning Department in assessing 40 Small Houses per hectare (see Respondent’s Bundle p.11052: Extract of Planning Department’s Internal Practice Note January 2010), this Appeal Board finds such estimation to be on the generous side, and is reasonable and correct for the present purposes. At a generous standard of 40 houses per hectare, this Appeal Board finds that there is land for at least 124 Small Houses.

53. Mr. Chan also relied on a chart/plan (Appellants’ Bundle Tab 10, “the Chart”), to elaborate his case against the Respondent’s case of sufficient present land supply (though insufficient general supply in the sense of a projected 10 year demand). However, the Chart shows a total area of 2.9 hectares (adding the red figures therein for the coloured red areas i.e. vacant Government and private lands and lands in agricultural use, but excluding the slope of 0.49 hectare, which Mr. Chan insisted was not suitable for building houses). This Appeal Board does not accept his argument that areas now used as carparks (not the sort of one parking space

beside a house but a bigger area for parking a number of cars) should not be regarded as available for building houses.

54. Apart from this Appeal Board's finding of available land for 124 houses and Mr. Lau's evidence showing that there was available land for the present demand, even Mr. Chan had to accept that, on the estimation of 250 sqm of land for one Small House (of the permitted dimension of about 65 sqm), there was space for 27 houses for private land, 42 for Government land, and 35 for land now used as carparks, a total of 104.

55. The aforesaid availability can be compared to the relevant number of outstanding applications for Small Houses (54 by the time of the hearing of the Applications by TPB on 6 June 2014). By a letter dated 8 March 2016 (i.e. shortly before the resumed hearing of these Appeals) from the Appellants' solicitors to the Department of Justice, the Appellants asked the Respondent about the Small Houses Applications in the purple-coloured areas in the "V" zone in a plan (this Appeal Board has considered this with the one in the following paragraph)(that plan was amongst the 9 plans submitted by the Appellants' solicitors on 8 March 2016). The answer (letter dated 11 March 2016) was that there were 24 approved and 17 under processing for the purple areas.

56. Considering all the evidence, this Appeal Board is of the view that, as a matter of degree (for the overall weighing exercise) rather than a matter of strict yes or no, and assessed objectively, the Appellants should not be unable to find land within the "V" zone for their 2 Small Houses. Their alleged difficulty in finding land within the "V" zone, and the "sympathetic consideration" under Interim Criteria paragraph B(a) should be viewed in the above factual context. The aforesaid conclusion by this Appeal Board (that there is available land within that "V" zone that Mr. Lam or other present applicants for Small Houses, objectively assessed, should be able to find, and there is no present shortage of land) will nevertheless hold, even if the version of subjective experience of inability to find land asserted by Mr. Lam were truthful. The alleged subjective experience of inability to find

land, and the general shortage of land in the “V” zone when compared with the projected 10 year demand (and thus Interim Criteria B(a)), are not that weighty in favour of the Applications in the balancing exercise, against the other factors against the Applications as discussed herein, such as the planning intention (which is for agricultural use rather than building a Small House), and the surrounding landscape and environment. In particular, that subjective experience of inability to find land, even if believed by this Appeal Board, would not affect the overall conclusion of this Appeal Board in dismissing these Appeals (see further below), because of the other strong counter considerations discussed herein.

Whether an undesirable precedent

57. To contend against the Respondent’s argument that allowing the Applications on the south side of Ting Kok Road and outside the “V” zone would set an undesirable precedent, Mr. Ismail pointed out that there were instances of permissions for Small Houses being granted outside the “V” zone (e.g. see Mr. Chan’s Witness Statement section G4, and the table at Document 22 of the Appellants, in particular those approvals printed in red with application numbers prefix: “TK”, which are in the same locality as the Appeal Sites). Further, Mr. Ismail argued, previous approvals of Small Houses applications outside the “V” zone, in particular at south of Ting Kok Road, should help his case against the Respondent’s criticism that the proposed 2 Small Houses would be inconsistent with the surrounding green landscape and environment on the south side of Ting Kok Road.

58. All these other instances of approvals outside the “V” zone of Ting Kok Village, cited by Mr. Ismail or Mr. Chan, should be and have been carefully considered by this Appeal Board. This Appeal Board found them to be of no or minimal assistance to Mr. Ismail (in this Appeal Board’s ultimate weighing exercise), as they were all of very different and distant circumstances. To demonstrate this, this Appeal Board sets out below several examples of this Appeal Board’s analysis of those approvals relied on by Mr. Ismail.

59. In the RNTPC paper TK/547 (Document 12 of the Appellants' Bundle), in respect of an application for a site at north of (and outside) the "V" zone, the attached plan A-1 showed the positions of several other applications for Small Houses (in the years 2003 to 2009). They (the approved as well as the rejected ones) were all north of the "V" zone and far north of Ting Kok Road. Further, as can be seen from the aerial photograph at plan A-3 of that application, the relevant application site there was much nearer (then the Appeal Sites) to the cluster of houses in the "V" zone. As seen from the A-1 plan therein, that application site was less than 50m from the "V" zone's north east boundary, unlike the Appeal Sites.
60. For TK/154 approved in 2003 and TK/296 approved in 2009, their sites were next to each other and both were on the very edge of the "V" zone (though outside it), very close to the cluster of the houses of the "V" zone, and was to the north of the "V" zone (and north of Ting Kok Road). For TK/296 approved in 2009, the site straddled both AGR and "V" zone. The many other cases referred to by Mr. Chan locating much further north near Shan Liu Village are of little assistance, being far away, of another AGR zone altogether.
61. TK/138 approved in 2002 (Appellant's Bundle Document 19), though south of the Ting Kok Road, was far away to the west of the Appeal Sites. The papers revealed by the Appellants did not show enough details of that application. The relevant papers considered by RNTPC in 2002 were later produced by the Respondent (at Respondent's bundle pp.11028-11051). That subject site was a house lot and not an agricultural lot according to the relevant government lease (Old Schedule agricultural lots), and it was not an application to build a new house, but replacement of an existing house with the same development intensity. In fact, although this probably was not a reason considered by the TPB when the application was considered in 2002 (as the TPB probably could not foretell the later change obviating the need for a planning permission, as Mr. Ismail submitted), with effect from April 2004, under OZP S/NE-TK/9, planning permission was no longer required for replacement of an existing house. It is very obvious that the planning consideration pertaining to an application to erect a

house when none is there, is very different from that as to replacement of an existing house, as echoed by paragraph 9(f) of the Notes to OZP: replacement of a domestic building existing before a plan covered that site is generally always permitted in an area within that plan.

62. Mr. Ismail further argued that each application would be considered on its merits and therefore other future applications could not rely on these 2 Applications as precedents even if they were approved. However, approving these Applications will bring about a change of the landscape and environment (having 2 Small Houses in existence) away from the present environment as found in paragraph 41 above, and thus present less obstacles to future applications in the vicinity. Further, the Appellants in these Appeals also sought to rely (though unsuccessfully in this Appeal Board's view as aforesaid) on other approvals to support the Applications, and it is quite true that the Planning Department often, if the other approvals are nearby and of similar circumstances, took into account such other approvals in favour of an application (see e.g. LYT/545 where 3 houses were approved near Kan Tau Tsuen in Fanling when 52 similar applications had been approved in the vicinity between 2001 and 2013).

63. Thus, this Appeal Board finds that granting the Applications will have an undesirable precedent effect in respect of the other possible future applications for Small Houses in the vicinity of the Appeal Sites, and should so weigh and balance this issue in considering whether to grant the Applications.

64. In particular, the undesirable precedent effect in relation to that part of the 'VE' to the south of the Ting Kok Road (an area of about 0.577 hectare, which can accommodate up to 22 Small Houses if planning permissions are granted), is a significant factor against the Applications, because Small Houses in that area south of Ting Kok Road are undesirable in regard to the planning intention, and will be causing adverse impact as to the surrounding landscape and the environment. Such other possible future applications, with the statement of

“sympathetic consideration” under the Interim Criteria as being within ‘VE’, will be assisted by any precedent set by these 2 Applications (if they are successful).

Suggested mitigation measures by the Appellants

65. The Applicants’ evidence also suggested ways of mitigating the adverse impact on the landscape and environment, such as vertical green plantation covering the walls of the Small Houses, or planting bamboo trees (which required only little open ground to plant) around the Small Houses. Mr. Ismail reminded this Appeal Board that it could impose conditions to ensure such measures would be implemented, and Mr. Ismail properly submitted to this Appeal Board the correct proposition that if the adverse impact could be substantially mitigated by such measures, then this Appeal Board should weigh such adverse impact on the basis that it would be mitigated as such.

66. However, this Appeal Board is of the view that such measures can hardly mitigate, and if so only very little, the adverse impact on the landscape and environment, bearing in mind the nature of the landscape and environment, and the substantial dimensions of the 2 Small Houses. Thus, although this issue is not determinative of the Appeals by itself and should be weighed in the balance as a matter of degree, these mitigation measures could be of very little weight against the weighty factors against the Applications (in particular the planning intention) as discussed herein.

Alleged Intended use by the Appellants themselves

67. Mr. Lam gave evidence that the Appellants made these Applications with the intention of themselves residing in the 2 Small Houses respectively. This Appeal Board does not find Mr. Lam to be a credible witness generally, for the reasons set out in paragraph 48 above. Further, and more specifically (this Appeal Board bearing in mind the possibility that a witness may be honest or truthful as to some but not truthful as to other issues) this Appeal Board disbelieves him (and the Appellants’ case as such) because of the following reasons.

68. Both Appellants studied in UK, have long been working and living in UK, and are still so, at present. No convincing reason was put forward as to why their decision to return to work and live in Hong Kong has practically become dependent on the approval of the planning permission of the Appeal Sites, so that they are now still working and living in UK. They could have returned and lived in some other places had they genuinely decided to return to reside in Hong Kong.

69. The Appellants relied heavily on Mr. Lam to pursue these Applications and these Appeals, conducted by Messrs. Munros. Yet, Mr. Lam could not even tell the name of the Appellants' firm of solicitors, when asked by this Appeal Board during the hearing of these Appeals. That is indicative of another party having substantial interest in these Appeals and might have taken a greater part than either the Appellants or Mr. Lam in liaising with Messrs. Munros. Mr. Lam has failed to give an innocuous or credible reason for such alleged absent-mindedness (in not noting or recalling the name of the firm of solicitors). In any event, for the reasons stated in the preceding paragraph, this Appeal Board would still have come to the conclusion that Mr. Lam is not reliable in his evidence, and this Appeal Board would still have concluded that the Appellants did not intend to return to Hong Kong to reside on the Small Houses, even without the above additional observation in relation to the credibility of Mr. Lam.

70. Thus, this Appeal Board does not accept that the Appellants intend to build the Small Houses for their own use as their residences.

71. In any event, whether they intend the Small Houses for their own use is not a weighty factor in the balancing exercise. This Appeal Board would have come to the same decision in refusing the Applications and dismissal of these Appeals for the other reasons stated herein, even if this Appeal Board were to accept that the Appellants intend both Small Houses for their own use.

The weighing and balancing

72. All the evidence and all arguments of the Appellants (as well as of the Respondents) have been carefully considered by this Appeal Board. The Applications (if granted) would seriously frustrate the planning intention, would greatly (adversely) impact on the landscape and the environment, would be substantially incompatible with the surrounding area, and would set a very undesirable precedent. The factors against the Applications far outweigh the factors that the Appellants can rely in support of the Applications, and that conclusion of this Appeal Board would remain so even if this Appeal Board were to (which this Appeal Board does not) accept that the Appellants did intend the Small Houses for their own residence, that they were not able (as per their version of subjective efforts and experience only) to find the land within the “V” zone of Ting Kok Village, and that the Appeal Sites will remain concrete paved (and without any soil overlay) for a substantial period in future.

Conclusion

73. For these reasons, by unanimous decision, both of the Applications should be refused, and both of the Appeals are hereby wholly dismissed.

(Signed)

Mr. CHAN Chi-hung, SC

(Chairman)

(Signed)

Ms. CHAN Pui-ying

(Member)

(Signed)

Mr. Tommy FUNG Hei-wai

(Member)

(Signed)

Miss Julia LAU Pui-g

(Member)

(Signed)

Mr. Eric WONG Sau-shing

(Member)