

IN THE TOWN PLANNING APPEAL BOARD

Town Planning Appeal No. 7 of 2015

BETWEEN

SHAM SIU CHEUNG,
SHAM SIU MAN and
SHAM SUI CHUNG WILLEM

Appellants

and

TOWN PLANNING BOARD

Respondent

Appeal Board :	Mr. Johnny FEE Chung-ming, JP	(Chairman)
	Ir. Dr. Kelvin LEUNG Kai-yuen	(Member)
	Mr. Kenny WONG Kam-shan	(Member)
	Mr. Alex WONG Loi-fat	(Member)
	Mr. Charles YANG Chuen-liang, BBS, JP	(Member)
In Attendance :	Ms. Suan MAN (on 18 April 2016)	(Secretary)
	Ms. Lesley LEUNG (on 17 June 2016)	(Secretary)

Representation : Mr. Bernard WU, Counsel for the Appellant
Ms. Simone LEUNG, Counsel for the Respondent

Date of Hearing : 18 April 2016 and
17 June 2016

Date of Decision : 10 August 2016

DECISION

This Appeal

1. This is an appeal (“**Appeal**”) by the Appellants under section 17B of the Town Planning Ordinance (“**TPO**”) against the refusal by the Town Planning Board (“**TPB**”) of their application for planning permission to build three houses (New Territories Exempted House (NTEH) – Small House) (“**Small House**”) on their site (“**Appeal Site**”) in Tai Po (“**Proposed Small House Development**”)¹.

Zoning

2. The Appeal Site, comprising two separate portions, is located at Lots 742 S.E, 742 S.G and 742 S.H in D.D. 10, Ng Tung Chai, Tai Po. It falls within an area zoned “Agriculture” (“**AGR**”) in the approved Lam Tsuen Outline Zoning Plan No. S/NE-LT/11 (“**OZP**”)².

Planning Permission

3. Since the Appeal Site falls within an area zoned “AGR”, planning permission from the TPB is required in order to use the Appeal Site for the Proposed Small House Development according to the OZP³.

¹ TPB Paper No. 9838, Para. 1.1.

² Witness statement of Lau Chi Ting of 8 April 2016, Para. 2.1.

³ Schedule of Uses to the OZP, Column 2 at Page 6.

Interim Criteria for Consideration of Application for New Territories Exempted House (NTEH)/Small House in New Territories (“Interim Criteria”)

4. According to the Interim Criteria, sympathetic consideration may be given to an application for planning permission to build a Small House if not less than 50% of the proposed Small House footprint falls with 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.
5. In this Appeal, it is not in dispute that Ng Tung Chai is a recognized village and that the Appeal Site falls within the VE of Ng Tung Chai⁴. The question is whether there is a general shortage of land in meeting the demand for Small House development in the “V” zone of Ng Tung Chai (**““V” Zone”**) so that sympathetic consideration may be given to the Appellants’ application pursuant to the Interim Criteria.
6. The demand for Small House development is based on the number of outstanding Small House applications being processed by the Lands Department (**“LandsD”**) and the number of 10-year Small House demand forecast (**“10-year Demand Forecast”**)⁵. The 10-year Demand Forecast is a forecast showing the number of Small Houses

⁴ Witness statement of Lau Chi Ting of 8 April 2016, Para. 8.1.

⁵ Witness statement of Lau Chi Ting of 8 April 2016, Para. 8.2.

required to meet the demand from the male indigenous villagers of the relevant village in the next 10 years.

Events leading to this Appeal

7. On 18 December 2012, the Appellants lodged their application (Application No. A/NE-LT/471) to the TPB for planning permission for the Proposed Small House Development under section 16 of the TPO (“**Application**”).

8. On 8 February 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 reasons⁶ :-

“(a) 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 there was still sufficient land available within the “Village Type Development” (“V”) zone to fully meet the future Small House demand; and

(b) the applicants failed to demonstrate in the submission why there was no alternative land available within areas zoned “V” for the proposed development.”

⁶ TPB Paper No. 9838, Para. 1.2.

9. On 20 March 2013, the Appellants applied to the TPB under section 17 of the TPO for a review of the RNTPC's decision in refusing their application ("**Review Application**")⁷.
10. On 28 March 2014, the Review Application was considered by the TPB⁸. In considering the Review Application, the TPB raised concerns on the 10-year Demand Forecast provided by the Village Representative ("**VR**") of Ng Tung Chai, which demand forecast had been changed over the years⁹. After deliberation, the TPB decided to defer making a decision on the Review Application pending further information to be provided by the VR of Ng Tung Chai and District Lands Officer/Tai Po, LandsD ("**DLO/TP, LandsD**") in relation to the 10-year Demand Forecast and the relevant Small House figures in the past 10 years¹⁰.
11. In around July 2014, the VR of Ng Tung Chai provided a letter to the LandsD ("**Explanation Letter**") as well as a list containing names of the villagers of Ng Tung Chai ("**Name List**") in support of his 10-year Demand Forecast. In November 2014, the LandsD provided the Planning Department ("**PlanD**") with a list showing the 10-year Demand Forecast figures provided by the VR of Ng Tung Chai from 2005 to 2014 ("**2005 to 2014 Estimates**")¹¹.

⁷ TPB Paper No. 9838, Para. 1.3.

⁸ TPB Paper No. 9838, Para. 1.3.

⁹ A summary of the 10-year Demand Forecast from 2005 to 2014 is contained in the LandsD memo to PlanD November 2014.

¹⁰ TPB Paper No. 9838, Para. 1.4.

¹¹ TPB Paper No. 9838, Para. 2.1.

12. On 23 January 2015, the TPB conducted a further consideration of the Review Application (“**Further Consideration of Review Application**”) and decided to reject the Review Application (“**TPB Decision**”) for the following reasons¹²:-

“(a) 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 applicants fail to demonstrate that there is a general shortage of land within the “Village Type Development” (“V”) zone to fully meet the future Small House demand; and

(b) the applicants failed to demonstrate in the submission why there is no alternative land available within areas zoned “V” for the proposed development.”

13. On 2 April 2015, the Appellants lodged this Appeal against the TPB Decision by filing a Notice of Appeal under section 17B of the TPO (“**Notice of Appeal**”).

14. The matters set out in paragraphs 1 to 13 above are not in dispute.

¹² Letter of 13 February 2015 from TPB to Poon Wood Keung, the Appellants’ representative and Confirmed Minutes of 1078th Meeting of TPB held on 23.1.2015, Para. 106.

Grounds of Appeal

15. The Appellants' grounds of appeal as set out in the Notice of Appeal (collectively "**Grounds of Appeal**") may be summarized as follows :-

- (1) The TPB did not give proper weight to the evidence submitted to the TPB to prove the 10-year Demand Forecast and was unfair in treating such evidence. It is unfair and unreasonable for the TPB to arrive at the TPB Decision on the assumption that the 10-year Demand Forecast provided by the VR of Ng Tung Chai is unreliable. The Appellants say that from the figures provided by the VR of Ng Tung Chai for the 10-year Demand Forecast, and the number of outstanding applications, they have demonstrated that there is a general shortage of land in the "V" Zone, in compliance with the Interim Criteria thereby warranting approval of the Application ("**General Shortage Ground**")¹³.
- (2) There was no alternative land available within the "V" Zone. The TPB failed to give weight to the submission of the Appellants that some of the land in the "V" Zone are "Tso" or "Tong" land which is virtually impossible to acquire. The Appellants say that this is important as the shortage would be more acute after excluding such "Tso" or "Tong" land¹⁴ ("**No Alternative Land Ground**").

¹³ Paras. 4 – 10 of the Grounds of Appeal set out in the Notice of Appeal.

¹⁴ Para. 11 of the Grounds of Appeal set out in the Notice of Appeal.

Witness and Representation of the Parties

16. The Appellants did not call any witness in support of the Appeal. The TPB called Mr. Lau Chi Ting (“**Mr. Lau**”), Senior Town Planner/Tai Po of the Sha Tin, Tai Po and North District Planning Office, PlanD in support of the TPB Decision. The Appellants were represented by Mr. Bernard Wu (“**Mr. Wu**”) of Counsel. The TPB was represented by Ms. Simone Leung (“**Ms. Leung**”) of Counsel.

Applicable Principles

17. In determining the Appeal, it is essential to consider :
- (1) The nature of the Appeal and in particular whether it is a hearing de novo; and
 - (2) The burden of proof.
18. On the nature of the Appeal, it is common ground that an appeal under section 17B of the TPO is a hearing de novo. The Appeal Board is entitled to exercise its independent planning judgment de novo and is not limited or fettered to consider only those materials previously put before the RNTPC and the TPB. See *Town Planning Appeal No. 10 of 2010*, Para. 47 and *Town Planning Appeal No. 5 of 2013*, Para. 74.

19. On the burden of proof, the Appellants do not accept that they have the burden of proof. More specifically, the Appellants disagree that they have to prove the 10-year Demand Forecast to the satisfaction of the TPB. No authority was cited by the Appellants in support of their position.
20. The Appellants mainly rely on certain wording used in the following documents in support of their position :-
- (1) The underlying minutes of the TPB meeting held on 28 March 2014 (“**the TPB Meeting Minutes**”);
 - (2) The letter from the TPB dated 11 April 2014 to the Appellants’ representative Poon Wood Keung (“**the TPB Letter**”); and
 - (3) The minutes of another TPB meeting for another case held on 18 June 2010 (“**Minutes of Another TPB Meeting**”).
21. The relevant part of the TPB Meeting Minutes reads as follows :-
- “114. After deliberation, the Board decided to defer a decision on the application pending further information to be provided by the VR of Ng Tung Chai village and DLO/TP, LandsD in relation to the 10–year Small House demand forecast and the relevant Small House figures in the past 10 year. **The Planning Department was requested to coordinate with the VR and DLO/TP, LandsD in this respect.**”*
- (Emphasis added).

22. The relevant parts of the TPB Letter read as follows :-

*“After giving consideration to your review submission, the Town Planning Board (TPB) decided on 28.3.2014 to agree to defer a decision on the application pending further information to be provided by the Village Representative (VR) of Ng Tung Chai village and District Lands Office/Tai Po of Lands Department (DLO/TP) in relation to the 10-year Small House demand forecast and the relevant Small House figures in the past 10 years. **The Planning Department is requested to coordinate with the VR and DLO/TP, LandsD in this respect.***

A copy of the relevant extract of minutes of the TPB meeting held on 28.3.2014 is enclosed herewith for your reference.”

(Emphasis added).

23. The relevant part of the Minutes of Another TPB Meeting (both in Chinese and English versions) reads as follows :-

“(d) 大埔地政專員已與村代表核實梧桐寨村未來 10 年對小型屋宇的需求，最新預測總數為 57 幢，而該村尚未處理的小型屋宇申請則為七宗。……”

*“(d) **DLO/TP had confirmed with the VR** that the latest total number of 10-year Small House demand forecast for Ng Tung Chai Village was 57 while the outstanding Small House applications for Ng Tung Chai Village was 7.”*

(Emphasis added).

24. Relying on the above wording of the TPB Meeting Minutes, the TPB Letter as well as the Minutes of Another TPB Meeting, the Appellants submitted that it was the duty of the PlanD or the LandsD to co-ordinate with the VR of Ng Tung Chai to confirm the 10-year Demand Forecast.
25. It is trite law that he who asserts has the burden of proof. This fundamental principle has been applied in a number of Town Planning appeal cases : see, for example, *Town Planning Appeal No. 10 of 2006*, Para. 8; *Town Planning Appeal No. 15 of 2011*, Paras. 25 and 26; and *Town Planning Appeal No. 15 of 2013*, Para. 48.
26. Paragraph 8 of *Town Planning Appeal No. 10 of 2006* provides as follows :-
- “8. At the appeal, the Appeal Board was also referred to this Guidelines and in answer to the question posed by the Appeal Board as to why it is the Appellants who have to provide justification that there would be no adverse impact on the surrounding areas, Mr. Lau, Counsel for the Respondent, referred the Appeal Board to paragraphs 2(a), (b), (g), (i) and (l). In the latter three subparagraphs, it is clearly stated that the design and layout of any proposed development should be compatible with the surrounding areas and that it should not overstrain the capacity of existing and planned infrastructure such as sewerage and roads. Further, the proposed development should not be the source of any pollution, including that of traffic noise. Whilst these

latter three subparagraphs do not explicitly provide that the burden is on the Applicants/Appellants to demonstrate that there is no adverse impact on the surrounding areas that would be caused by the proposed development, they do nonetheless emphasise that such would have to be shown before approval would be given for any proposed development within the Green Belt zone. That together with the fundamental principle that he who asserts bears the burden of proof, the Appeal Board is satisfied that it is up to the Applicants/Appellants to demonstrate to the Town Planning Board/Town Planning Appeal Board that the criteria laid out in this Guidelines are met. The Town Planning Board was correct in approaching the issue on the basis that the Applicants/Appellants bear the burden of proof.”

27. Paragraphs 25 and 26 of Town Planning Appeal No. 15 of 2011 provide as follows :-

“25. There is only one point which is in dispute. Mr Ismail submits that the TPAB should allow an appeal if there are no good reasons for refusing planning permission. Reliance is placed on Town Planning Appeal Nos. 4 and 5 of 1993, 22 December 1993, §20; Town Planning Appeal No. 16 of 1993, 21 April 1994, §12 Town Planning Appeal No. 6 of 1994, 7 March 1995, §12 and Halsbury’s Laws of Hong Kong, Vol. 48, §[385.270]. Mr Fung SC on the other hand submits that the authorities cited by Mr Ismail do not support the Appellant’s proposition, and the burden is on the Appellant to show that the TPB’s decision was wrong so

that the TPAB should either reverse or vary that decision (Town Planning Appeal No. 18 of 2005, 12 April 2007, §55). Mr Fung SC further submits that the general principle governing burden of proof in civil cases apply, that is, it is for the party who asserts affirmatively as part of his case that a certain state of facts is present or is absent, or that a particular thing is insufficient for a particular purpose, to prove such averment positively (Phipson on Evidence, 17th ed, 2010, §§6-02 and 6-06; Abrath v North Eastern Railway Co (1883) 11 QBD 440 at 457).

26. *In our view, the burden is on the Appellant to demonstrate to the TPAB that the TPB's decision was wrong and should be reversed or varied. It is also incumbent upon the Appellant to satisfy the TPAB that the proposed Hotel is in line with the planning intention of R(A) zone and that there is sufficient justification to warrant the TPAB granting planning permission for it."*

28. The question is whether the above fundamental principle on burden of proof has been displaced by the TPB Meeting Minutes, the TPB Letter and the Minutes of Another TPB Meeting.
29. Though the PlanD was requested by the TPB to co-ordinate with the VR of Ng Tung Chai and DLO/TP, LandsD in respect of information about the 10-year Demand Forecast and the relevant Small House figures in the past 10 years, it does not mean that the Appellants' burden of proof

is thereby displaced. As a matter of construction, no such meaning may be construed from the above documents. The fact that the LandsD had previously taken the step to confirm the 10-year Demand Forecast with the VR of Ng Tung Chai also does not mean that the Appellants have no duty to prove their case.

30. The Appeal Board finds that the Appellants have the burden to prove that there is a general shortage of land in meeting the demand for Small House development in the “V” Zone so that sympathetic consideration may be given to the Application pursuant to the Interim Criteria. If the Appellants chose to sit back and do nothing, they have to bear the consequence of such omission.

General Shortage Ground

A. 10-year Demand Forecast

31. Under the prevailing practice, the LandsD would no longer confirm the 10-year Demand Forecast figures provided by a VR¹⁵. Firstly, the Appellants submitted that the letter dated 26 May 2013 from the VR of Ng Tung Chai (“**26 May 2013 Letter**”) and his letter dated 3 November 2013 (“**3 November 2013 Letter**”) provide sufficient evidence in support of the 10-year Demand Forecast of 99 provided by him¹⁶.

¹⁵ Unchallenged evidence of Mr. Lau contained in his witness statement of 8 April 2016, Para. 8.8.

¹⁶ Opening Submissions of the Appellants, Para. 2.5.

32. The Appellants knew that as shown in the TPB Meeting Minutes, the TPB was not satisfied that the above documents provide a sufficient proof of the 10-year Demand Forecast. The Appellants sought to convince the Appeal Board to disagree with the TPB on the general principle that the Appeal Board is entitled to exercise its independent planning judgment and disagree with the decision of the TPB¹⁷ (“**Independent Planning Judgment Principle**”). The Appeal Board certainly accepts the Independent Planning Judgment Principle which is well established : see *Henderson Real Estate Agency Ltd. v. Lo Chai Wan* [1997] HKLRD 258 at 266A. The question is however not about the law but the facts.
33. Apart from the 26 May 2013 Letter and the 3 November 2013 Letter, there was in fact also a letter from the same VR of Ng Tung Chai dated 2 May 2013 (“**2 May 2013 Letter**”) confirming that the 10-year Demand Forecast was just 69. The Appellants were unable to explain why there was a sudden surge of the 10-year Demand Forecast from 69 as shown in the 2 May 2013 Letter, to 99 as shown in the 26 May 2013 Letter with the lapse of just 24 days, or with the lapse of just 6 months as shown in the 3 November 2013 Letter. The Appellants produced the Explanation Letter to explain why the 10-year Demand Forecast has been fluctuating in recent years¹⁸. However, the Explanation Letter does not explain the above sudden surge in just 24 days or 6 months.

¹⁷ Opening Submissions for the Appellants, Para. 2.5.

¹⁸ Opening Submissions for the Appellants, Para. 2.9.

34. The explanations provided in the Explanation Letter are fairly general and are not satisfactory in establishing the basis of the 10-year Demand Forecast :-
- (1) Some villagers who have emigrated overseas do not provide updated information to the VR of Ng Tung Chai;
 - (2) Since the VR of Ng Tung Chai took office in 2003, he has not demanded an annual declaration of updated information from the villagers;
 - (3) Some villagers who have left Ng Tung Chai and moved to other parts of Hong Kong do not provide updated information to the VR of Ng Tung Chai.
35. The Appeal Board is not convinced that the 26 May 2013 Letter and the 3 November 2013 Letter provide a sufficient proof of the 10-year Demand Forecast of 99.
36. In addition, the Appellants relied on the Name List submitted by the VR of Ng Tung Chai to the LandsD in July 2014 that is said to contain the names of Ng Tung Chai male indigenous villagers¹⁹. However, even in the Name List, the total number of Ng Tung Chai male indigenous villagers is just 90, which is less than the 10-year Demand Forecast of 99. The Appellants were unable to explain why the figure is 90 instead of 99.

¹⁹ Opening Submissions for the Appellants, Paras. 2.9 – 2.11.

37. The Appellants submitted that in view of the wording of the TPB Letter, the TPB Meeting Minutes and the Minutes of Another TPB Meeting, it should be the duty of the DLO/TP to verify the 10-year Demand Forecast figure of 99 with the VR of Ng Tung Chai²⁰. The Appellants even submitted that the problem came to a “dead end” because DLO/TP did not take step to verify the 10-year Demand Forecast of 99²¹. The Appeal Board disagrees. The Appellants themselves could always take the necessary steps to verify the 10-year Demand Forecast so as to convince the TPB to act on it in approving the Application. Regardless of whether any government department might or might not have any duty to do the verification work, that would not stop the Appellants from resorting to self-help to protect their own interest. As held by the Appeal Board above, the Appellants have the burden of proof.

38. The Appellants further submitted that they were in the dark as to what supporting documents were required by the TPB. The Appeal Board also disagrees.

39. Paragraph 105 of the TPB Meeting Minutes clearly sets out what the TPB would like to be produced as supporting evidence :-

“105. Five Members considered that a decision on the application should be deferred and that the VR should be invited to clearly explain to the Board the basis of his forecast and provide relevant

²⁰ Opening Submissions for the Appellants, Para. 2.11.

²¹ Opening Submissions for the Appellants, Para. 2.14.

records to verify the forecast, e.g. the genealogy, records of eligible indigenous villagers, the annual increase in the number of eligible indigenous villagers and the number of eligible indigenous villagers who had already made use of their rights to build Small Houses. There was a need for verification of the 10-year Small House demand forecast figures provided by VRs.”

40. The TPB Meeting Minutes which show what the TPB would like to be produced as supporting documents were sent to the Appellants by letter dated 11 April 2014, more than 9 months before the Further Consideration of Review Application, and more than 2 years from the hearing of this Appeal. However, only the Explanation Letter, the Name List and the 2005 to 2014 Estimates were added as supporting documents. As the hearing of this Appeal is a hearing de novo, the Appellants might still apply to submit fresh evidence for the Appeal Board’s consideration as late as the first day of the hearing on 18 April 2016, or even the second day of the hearing on 17 June 2016. Of course, it would then be up to the Appeal Board to consider if there was good cause to allow the late submission of fresh evidence. However, the Appellants chose not to supplement their evidence by any of the above documents or information identified by the TPB in support of the 10-year Demand Forecast. The only exception is perhaps the Name List which is however not satisfactory for the reasons explained above. The Appellants did not explain why the requested documents or

information such as genealogy, records of eligible indigenous villagers, the annual increase in the number of indigenous villagers and the numbers of eligible villagers who had already made use of their rights to build Small House were not produced to support the 10-year Demand Forecast.

41. The Appellants also chose not to call the VR of Ng Tung Chai to give evidence for them. The Appellants submitted²² that “[they] could not and should not do anything to approach the VR for verification of the figure. The Appellants should not approach the VR as there would be conflict of interest for them to approach the VR.” The Appellants are unable to explain what the above alleged conflict is. The Appeal Board is not satisfied that there is a conflict. Anyway, it is up to the Appellants to decide which witness to call or not to call. By choosing not to call the VR of Ng Tung Chai, the Appeal Board was not given the opportunity to hear oral evidence from him on the 10-year Demand Forecast, which may probably be against the interest of the Appellants as they have the burden of proof.

42. The Appellants also sought to rely on the approved case of Application No. A/NE-LT/499 (“**Application 499**”) in support of their case that 99 should be adopted as the 10-year Demand Forecast. Application 499 was approved on 21 February 2014 and 99 was adopted as the 10-year

²² Opening Submissions for the Appellants, Para. 2.15.

Demand Forecast therein. The site of Application 499 was just located a few meters away from the Appeal Site. The Appellants submitted that it was unfair to the Appellants that 99 was not similarly adopted by the TPB as the 10-year Demand Forecast in the Application²³.

43. Application 499 was approved by the RNTPC instead of by the TPB. There was only one 10-year Demand Forecast of 99 before the RNTPC when it was considering Application 499²⁴. In the Application, the 10-year Demand Forecast was however changed from 57, when considered by the RNTPC on 8 February 2013²⁵, to 99, when considered by the TPB during the Review Application on 28 March 2014²⁶. The dramatic increase in the 10-year Demand Forecast from 57 to 99 caused the TPB to inquire into the basis and criteria adopted by the VR of Ng Tung Chai in conducting the 10-year Demand Forecast and whether the figures had been verified by a third party²⁷.

44. As rightly submitted by the Appellants, the TPB has to exercise its independent planning judgment. In view of the change of the 10-year Demand Forecast from 57 at the RNTPC stage to 99 at the Review Application stage, the TPB was in fact duty-bound not to simply adopt 99 as the 10-year Demand Forecast until and unless it was satisfied that

²³ Opening Submissions for the Appellants, Paras. 2.15 and 2.16.

²⁴ Minutes of Meeting of the RNTPC held on 21 February 2014 and the unchallenged evidence of Mr. Lau.

²⁵ RNTPC Paper No. A/NE-LT/471, Para. 11.2.

²⁶ TPB Meeting Minutes, Para. 81(j)(ii).

²⁷ TPB Meeting Minutes, Para. 88.

99 was indeed a reliable forecast. The Appellants' complaint that the TPB's refusal to adopt 99 as the 10-year Demand Forecast is unmeritorious.

45. The 2005 to 2014 Estimates provided by the LandsD²⁸ do not assist the Appellants' case. The 2005 to 2014 Estimates in fact show that the figures provided by the VR of Ng Tung Chai to the LandsD as the 10-year Demand Forecast had changed significantly in the past years. It was changed from 50 in 2005 to 30 in 2009, and then suddenly to 57 in 2010 and 99 in 2013 and 2014.
46. In short, notwithstanding Mr. Wu's submissions and the following evidence and matters submitted/relied upon by the Appellants, the Appeal Board is not satisfied that the 10-year Demand Forecast is 99 :
- (1) The Explanation Letter;
 - (2) The Name List;
 - (3) The 2005 to 2014 Estimates;
 - (4) The 26 May 2013 Letter;
 - (5) The 3 November 2013 Letter;
 - (6) The TPB Letter, the TPB Meeting Minutes and the Minutes of Another TPB Meeting; and
 - (7) The TPB's approval of Application 499.

²⁸ The Appellants did not challenge the figures in the 2005 to 2014 Estimates.

B. Number of Small Houses per hectare

47. The assumption on the number of Small Houses that may be built per hectare of land in the “V” Zone would obviously affect the answer as to whether there is a general shortage of land in meeting the demand for Small House development in the “V” Zone. The Appellant submitted that the assumption of 30 Small Houses per hectare, instead of 40 Small Houses per hectare, should be adopted²⁹.
48. The Appellants submitted that the higher assumption of 40 Small Houses per hectare, instead of 30 Small Houses per hectare, should not be applied to those applications which have already been submitted to the TPB for approval³⁰. However, the higher assumption of 40 Small Houses per hectare has in fact been adopted since early 2010³¹, about 2 years before the Application was submitted by the Appellants on 18 December 2012. RNTPC Paper No. ANE-LT/471 also shows that the higher assumption of 40 Small Houses per hectare has been adopted in assessing the Application since day one. There is no evidence that the assumption has changed after the submission of the Application.
49. The Appellants also submitted that the 40 Small Houses per hectare assumption should not be adopted as it is only derived from an internal guideline and that no document has been produced by the TPB to prove

²⁹ Opening Submissions for the Appellants, Para. 2.6.

³⁰ Opening Submissions for the Appellants, Para. 2.6.

³¹ Testimony of Mr. Lau in the Appeal hearing. There is no rebuttal evidence from the Appellants. The Appeal Board finds this point proven by the TPB.

such guideline. The 40 Small Houses per hectare assumption was however also adopted³² in Application 499, which is an approved case relied upon by the Appellants.

50. Mr. Lau also testified that the 40 Small Houses per hectare assumption has been consistently applied throughout the entire New Territories. In his view, it would be reasonable to adopt the 40 Small Houses per hectare assumption, which would mean a site coverage of only about 26 percent thereby still leaving sufficient open space in the vicinity. He is of the view that the 30 Small Houses per hectare assumption would be too generous as it would mean a site coverage of less than 20 percent. No rebuttal evidence was produced by the Appellants to challenge the above opinion expressed by Mr. Lau. Such opinion appears reasonable to the Appeal Board. The Appeal Board finds it appropriate for the TPB to adopt the 40 Small Houses per hectare assumption.

C. Estimated land available within the “V” Zone

51. Similarly, the estimated land available within the “V” Zone would affect the answer as to whether there is a general shortage of land there in meeting the demand for Small House development. The Appellants submitted that 1.61 hectare, instead of 2.23 hectare, should be adopted as the estimated land available in the “V” Zone for Small House development (“**the Estimated Available Land**”)³³.

³² Minutes of Meeting of the RNTPC held on 21 February 2014, Para. 45.

³³ Opening Submissions for the Appellants, Para. 2.7.

52. The Appellants relied on Application No. A/NE-LT/400 (“**Application 400**”) in support of their case that 1.61 hectare should be adopted as the Estimated Available Land³⁴ in the “V” Zone. Application 400 was considered by the TPB on 18 June 2010 and 1.61 hectare was then adopted by the TPB as the Estimated Available Land³⁵.
53. On the other hand, 2.23 hectare was adopted by the RNTPC as the Estimated Available Land in considering the Application on 8 February 2013³⁶. Similarly, 2.23 hectare was adopted by the TPB as the Estimated Available Land in considering the Review Application on 28 March 2014³⁷ and during the Further Consideration of Review Application on 23 January 2015³⁸. It was also adopted³⁹ in Application 499 which is an approved case relied upon by the Appellants.
54. However, according to the current estimate by the PlanD, only about 2.04 hectare of land (equivalent to about 81.6 Small House sites) is still available within the “V” Zone⁴⁰. Therefore, the question now is whether 1.61 hectare or 2.04 hectare should be adopted as the Estimated Available Land.

³⁴ Opening Submissions for the Appellants, Para. 2.7.

³⁵ Minutes of 960th meeting of the TPB held on 18 June 2010, Para. 14(d).

³⁶ RNTPC Paper No. A/NE-LT/471, Para. 11 and Minutes of 482nd RNTPC Meeting held on 8 February 2013.

³⁷ TPB Meeting Minutes, Para. 81(j)(ii).

³⁸ Confirmed Minutes of 1078th Meeting of TPB held on 23 January 2015, Para. 88 (k)(ii).

³⁹ Minutes of Meeting of the RNTPC held on 21 February 2014, Para. 45.

⁴⁰ Mr. Lau’s witness statement of 8 April 2016, Para. 9.3(d) and as clarified by his testimony during the Appeal hearing.

55. Mr. Lau explained⁴¹ that his estimate of 2.04 hectare is reasonable and is done by adopting “a net development area approach” (“**Net Development Area Approach**”) :

“In estimating the land supply for Small House development within the “V” zone, PlanD has followed the established practice and adopted a net developable area approach by deducting the land occupied by or reserved for the existing village houses, road, steep slope, tree clusters, village office/Tsz Tong/ancestor hall/temple/church and other permanent building development within the village, NTEH cases approved by LandD, etc.”

56. Mr. Lau maintained that his estimate is reasonable during cross-examination. Mr. Lau gave direct and consistent answers during cross-examination. The Appeal Board finds Mr. Lau a credible witness. There is also no evidence from the Appellants to contradict Mr. Lau’s estimate. The Appeal Board therefore accepts that the available land in the “V” Zone for Small House development at the moment is 2.04 hectare.

D. The New Forecast

57. The new VR of Ng Tung Chai appointed recently (“**the New VR**”) provided a new 10-year Demand Forecast of just 28 in a document dated

⁴¹ Mr. Lau’s witness statement of 8 April 2016, Para. 9.4.

29 January 2016 (“**the New Forecast**”). The TPB relied on the New Forecast and said that the 10-year Demand Forecast should be 28. The New Forecast of 28 is said to be made up of 12 male indigenous villagers resident in Hong Kong and 16 male indigenous villagers resident overseas. However, the basis of the New Forecast is unclear. In fact, the new VR of Ng Tung Chai acknowledged in the New Forecast that he had no idea at all on various key figures. The Appeal Board does not find the New Forecast to have any probative value.

E. Conclusion on the General Shortage Ground

58. As the available land in the “V” Zone for Small House development is now 2.04 hectare, adopting the 40 Small Houses per hectare assumption, it may meet the demand for the development of 81 Small Houses⁴². The latest number of outstanding Small House applications is 20⁴³. The Appellants will therefore be able to establish the General Shortage Ground if they are able to satisfy the Appeal Board that the 10-year Demand Forecast is more than 61, i.e. 81 - 20. In his oral closing submission, Mr. Wu submitted that it is up to the Appeal Board to consider whether the 10-year Demand Forecast should be 28 (as stated in the New Forecast), or 99 (as submitted by the Appellants), or 90 (as suggested in the Name List). For the reasons given above, none of them represents a reliable forecast. Indeed, there is simply no reliable

⁴² Mr. Lau confirmed in his testimony during the Appeal hearing that “83” as stated in para. 9.3(d) of his witness statement of 8 April 2016 was a slip.

⁴³ In Mr. Lau's witness statement of 8 April 2016, Para. 9.3(d) which was unchallenged, the figure was 15. During the hearing, it was clarified that 15 was based on information up to September 2015. It was submitted by Counsel for TPB at closing that the latest figure is 20.

evidence before the Appeal Board as to whether the 10-year Demand Forecast is more than 61 or not. As the burden of proof is on the Appellants, the Appeal Board finds that the General Shortage Ground is not established by the Appellants.

59. Although it is not the Appellants' case that the Appeal Board should adopt the 10-year Demand Forecast of 69 as contained in the 2 May 2013 Letter, if necessary, the Appeal Board also finds that the 10-year Demand Forecast of 69 has not been proved to the satisfaction of the Appeal Board for the following reasons :-

- (1) Neither the Appellants nor the VR of Ng Tung Chai have provided any evidence to verify the 10-year Demand Forecast of 69;
- (2) Neither the Appellants nor the VR of Ng Tung Chai explained why the 10-year Demand Forecast surged from 57, when considered by the RNTPC on 8 February 2013, to 69 as shown in the 2 May 2013 Letter; and
- (3) The 10-year Demand Forecast was only 30 in 2009 according to the 2005 to 2014 Estimates.

No Alternative Land Ground

60. The No Alternative Land Ground, if established by the Appellants, may tend to show that the Interim Criteria should still be held applicable to the Application though the General Shortage Ground is not established.
61. In Paragraph 11 of the Grounds of Appeal, the Appellants stated that they intended to produce a land survey report in support of the No Alternative Land Ground :
- “11. ... To substantiate the Appellant’s case that there is no land available, the Appellant intends to produce a land survey report indicating land that would not be available for Small House development.”*
62. However, no such land survey report has subsequently been produced by the Appellants. The Appellants also have not called any witness to support the No Alternative Land Ground.
63. There is also no evidence to show what steps, if any, the Appellants have taken to try to find alternative sites in the “V” Zone for the Small House development.
64. The TPB relied on the Net Development Area Approach to prove that their estimate of available land is reasonable.

65. The Appellants sought to discredit Mr. Lau in cross-examination. However, Mr. Lau is not shaken in cross-examination. As mentioned above, the Appeal Board finds Mr. Lau a credible witness. No rebuttal evidence has been produced by the Appellants. There is no reason for the Appeal Board not to adopt Mr. Lau's evidence.
66. The Appeal Board finds that the No Alternative Land Ground is not established by the Appellants either.

Conclusion

67. As none of the Grounds of Appeal has been established by the Appellants, the Appeal is dismissed.
68. There is insufficient evidence to prove that the Interim Criteria is applicable to the application. It is not necessary for the Appeal Board to consider if the Application should be approved pursuant to the Interim Criteria.
69. It has been the practice of the Appeal Board not to award costs under section 17B(8)(c) of the TPO unless there are exceptional circumstances to justify an award of costs⁴⁴. We see no exceptional circumstances to

⁴⁴ Town Planning Appeal No.3 of 2008, Para. 16.

justify an award of costs in the Appeal. We order that there be no order as to costs in the Appeal.

(Signed)

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

(Signed)

Ir. Dr. Kelvin LEUNG Kai-yuen
(Member)

(Signed)

Mr. Kenny WONG Kam-shan
(Member)

(Signed)

Mr. Alex WONG Loi-fat
(Member)

(Signed)

Mr. Charles YANG Chuen-liang, BBS, JP
(Member)