

IN THE TOWN PLANNING APPEAL BOARD

Town Planning Appeal No. 9 of 2016

BETWEEN

LEE TIM SAU

Appellant

and

TOWN PLANNING BOARD

Respondent

Appeal Board:	Mr. Simon LAM Ken-chung	(Chairman)
	Mr. Tommy FUNG Hei-wai	(Member)
	Ms Emba LEUNG Wun-man	(Member)
	Ms Imma LING Kit-sum	(Member)
	Ms YUNG Wai-chi	(Member)
In Attendance:	Ms Lesley LEUNG	(Secretary)

Representation:	For the Appellant: Mr YIP Wing-san Roy Bowie
	For the Respondent: Ms Bonnie Y.K. CHENG

Date of Hearing:	26 September 2017
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Date of Decision:	28 June 2018
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DECISION

I. Introduction

This appeal arose from a planning application of the Appellant, made pursuant to section 16 of the Town Planning Ordinance Cap. 131 (“**TPO**”), for the development of a proposed New Territories Exempted House (“**NTEH**”) on a plot of land in Lei Uk Tsuen, Ta Kwu Ling. The application was rejected by the Rural and New Town Planning Committee (“**RNTPC**”) of the Town Planning Board (“**TPB**”). The Appellant then applied under section 17(1) of the TPO to the Respondent for a review of the decision of the RNTPC. On 2 September 2016, the Appellant was informed by the Respondent that the TPB had also rejected the Appellant’s said application. The Appellant therefore lodged an appeal with this Board, pursuant to section 17B(1) of TPO.

II. Background

2. The plot of land under appeal is situated in Lot No. 626RP in Demarcation District 82, Lei Uk Tsuen (“**the Site**”). It has a site area of about 197.7m², and saddles between the area zoned “Agriculture” (“**AGR**”) and the area zoned “Village Type Development” (“**V**”) under the approved Ping Che and Ta Kwu Ling Outline Zoning Plan No. S/NE-TKL/14 (“**the OZP**”). It is not in dispute that about 95.5% of the Site falls within the AGR zone, and 4.5% within the V zone.

3. Under the Notes to the OZP, “House (New Territories Exempted House only)” is a use always permitted in the “V” zone. On the other hand, “House (New Territories Exempted House only, other than rebuilding of New

Territories Exempted House or replacement of existing domestic building by New Territories Exempted House permitted under the covering Notes)” is a use that *may* be permitted with or without conditions on application to the TPB.

4. On 24 February 2016, the Appellant submitted a planning application under section 16 of the TPO, seeking permission from the TPB to build a NTEH on the Site. The application was considered by the RNTPC of the TPB which, during a meeting on 22 April 2016, decided to reject it, on the following grounds:

- (a) The proposed development was not in line with the planning intention of the “AGR” zone, which was primarily to retain and safeguard good quality agricultural land/farm/fish ponds for agricultural purposes. It 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) Land was still available within the “V” zone of Lei Uk Tsuen which was primarily intended for Small House development. It was 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 infrastructures and services.

5. Pausing here, it is opportune to set out the Planning Intention of the “AGR” zone under the OZP here, as follows:

“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.”

6. On 31 May 2016, the Appellant applied under section 17(1) of the TPO for a review of the RNTPC’s said decision. The decision was however upheld by the TPB, for the same reasons as that set out in paragraph 4 above.

7. On 31 October 2016, the Appellant submitted a Notice of Appeal to this Board against the said decision of TPB.

III. The grounds of appeal

8. Seven grounds of appeal were set out in the Appellant’s Notice of Appeal, and elaborated upon in the Skeletons Submissions submitted on his behalf by his legal representatives. We shall regroup and rephrase the grounds of appeal, as follows:

- (a) It is alleged that the TPB only took 5 to 6 minutes to consider the Appellant’s application. During the meeting, some TPB members left the meeting, and some others were late. Seven of the members did not participate in the full discussion of the Appellant’s application. The Appellant says that the TPB therefore acted in breach of the rule of natural justice and fairness, and must have reached its decision to reject the application before the meeting commenced;
- (b) The TPB failed to adhere to the Policy Objectives of the Secretary for Development;
- (c) The TPB failed to adhere to the Interim Criteria;

- (d) The TPB ought to have applied the “300-foot VE Rule” and allowed the Appellant’s application;
- (e) The Site was no longer used for agricultural purpose and there was no realistic prospect that it would be so used in future; and
- (f) The availability of land elsewhere for development is not a valid consideration.

9. These grounds will be discussed one by one in later parts of this Decision. Ground 7 of the Notice of Appeal is difficult to understand, and was in any event not elaborated upon by Mr. YIP Wing-san Roy Bowie (“**Mr Yip**”), who appeared on behalf of the Appellant, either in his Skeleton Submissions or in the course of the appeal hearing. It will therefore be disregarded.

IV. The evidence before this Board

10. A Documents Bundle (“**the Bundle**”) was prepared for use in this appeal. The documents contained in the Bundle are largely undisputed, save for the following documents, which are both the Appellant’s documents:

- (a) A witness statement by LEE Tim Sau (李添壽), dated 4 February 2016; and
- (b) A witness statement by LEE Yi Mui (李怡妹), dated 4 February 2016.

11. Ms. Bonnie Y.K. Cheng (“**Ms Cheng**”), who appeared on behalf of the Respondent, disputed the said witness statements. As early as 28 August 2017, the Appellant had written to this Board, indicating that he would not call any witness in the appeal hearing. When asked by this Board as to how the Board might be able to resolve factual disputes without the relevant witnesses

giving evidence and subject to cross-examination under oath, Mr. Yip on behalf of the Appellant applied to call the aforesaid LEE Tim Sau and LEE Yi Mui as witnesses. Not surprisingly, Ms. Cheng objected to the application, and indicated that, should the Board be minded to allow the Appellant's application, the Respondent would have to seek an adjournment of the appeal hearing so as to adduce evidence in reply. Thereupon, Mr. Yip informed this Board that, after taking instructions from his client, it was decided that the said witnesses would not be called to give evidence, and that he would not rely on the two witness statements which, he said, should however remain in the Bundle as part of the background information. Ms. Cheng also did not object to the two witness statements being retained in the Bundle as part of the background, since they were part of the documents available to the TPB during the handling of the Appellant's application under section 16 of the TPO.

12. This Board therefore allows the two witness statements to be retained in the Bundle as background information. However, in so far as the evidence contained therein is contradicted or not admitted by the Respondent, no weight is given to such evidence.

13. The Bundle also contains a witness statement from Ms. WONG Kam Fung Cindy ("**Ms Wong**"), Acting Senior Town Planner/North of the Shatin, Tai Po and North District Planning Office, Planning Department, dated 19 September 2017, and a witness statement from Ms. HO Wai Hung ("**Ms Ho**"), Senior Town Planning/Town Planning Board (2) of the Town Planning Board Section, Planning Department, dated 19 September 2017. Both Ms. Wong and Ms. Ho gave evidence under oath for the Respondent during the hearing of the appeal. They adopted the content of their respective witness statement as their evidence in chief, and were subjected to cross-examination by Mr. Yip.

14. The Appellant also attached three “exhibits” to his Skeleton Submissions. Exhibit 1 is apparently the transcript of the audio recording of a meeting of the RNTPC. It transpired that the transcript had no relation to the case under appeal. It was therefore withdrawn by Mr. Yip. Exhibit 2 is the transcript of the hearing of the TPB in relation to the Appellant’s application for review herein. It is an unpaginated document of almost 1cm thick. It was not referred to in the Appellant’s Skeleton Submissions, nor in Mr. Yip’s oral submissions before this Board. It is of little value. However, since Ms. Cheng did not object to its production, though not admitting the accuracy of the transcription, this Board allowed the said Exhibit 2 to become part of the evidence before this Board. Exhibit 3 is a compact disc containing audio recordings of the RNTPC and TPB meetings in question. It was also accepted as evidence before this Board.

V. Alleged improprieties in the hearing before the TPB

15. This Board is perplexed by the Appellant’s allegation that the meeting before the TPB lasted only 5 to 6 minutes. The audio recording of the meeting (part of the aforesaid “Exhibit 3”) lasts 1 hour and 49 minutes. It is also apparent that the Appellant’s representative was able to give a lengthy submission before the TPB, followed by a question and answer session between TPB members and the Appellant’s representative. There is no substance in this allegation at all.

16. Furthermore, it is the unchallenged evidence of Ms. Ho, supported by the minutes of the TPB, that at the time of consideration of the Appellant’s review application on 19 August 2016, there were a total of 37 members of the TPB, including the Chairman and Vice-chairman thereof. 34 members attended the meeting on 19 August 2016. Although 3 members left the meeting either before or during the consideration of the Appellant’s review application, and 3 members did not participate in the deliberation session, the

remaining 28 members were present and participated in the deliberation. This is considerably more than the required quorum of the TPB.

17. In any event, as pointed out by Lord Lloyd in the Privy Council case of *Henderson Real Estate Agency Ltd. v. Lo Choi Wan* [1997] HKLRD 258, at 266A, the function of this Board is to exercise an independent planning judgment. This Board is not bound by the strait jackets of a judicial review application. We are entitled to consider the case afresh from the evidence properly produced before this Board, with due regard being paid to the TPB's decision and reasons for that decision. Any alleged impropriety in the course of the TPB hearing, even if established, goes only to the weight that this Board would give to the TPB decision. In cases of serious improprieties, this Board may disregard the TPB decision altogether. This, however, is far from being the situation in the present case.

18. There is no substance in this ground of appeal.

VI. Policy Objectives of the Secretary for Development

19. Neither party has seen fit to provide this Board with a copy of the written Policy Objectives of the Secretary for Development. It is however the undisputed evidence of Ms. Wong that there are 10 such Policy Objectives. The two relied upon by the Appellant are:

- (a) *To facilitate Hong Kong's continual development through effective land use planning as well as a steady and sufficient supply of land; and*
- (b) *To achieve the optimum use of land resources and maintain an effective land administrative system.*

20. It is difficult to understand why it is alleged that the TPB had failed to adhere to the said Objectives of the Secretary for Development. It certainly cannot be argued that in each and every case where an application for approval to build a NTEH is rejected, the said Objectives were breached or not adhered to. There are many factors which the TPB has to consider, not least the planning intention under the OZP concerned, before deciding whether to grant the approval applied for. As rightly pointed out by Ms. Wong in her witness statement, the Policy Objectives of the Secretary for Development are broad principles followed by the TPB in preparing the statutory town plans (i.e. the OZPs) and exercising statutory planning control (including considering planning applications). It is absurd to suggest (as apparent from the Notice of Appeal herein) that because the Policy Objectives were not specifically mentioned in a TPB meeting, the TPB members had failed to take the Objectives into consideration, or had paid no regard to them.

21. There is no substance in this ground of appeal also.

VII. The TPB had failed to adhere to the Interim Criteria?

22. The “interim criteria” referred to in the course of the appeal hearing are contained in a document compiled by the TPB and entitled “Interim Criteria for Consideration of Application for New Territories Exempted House (NTEH)/Small House in New Territories” (“**the Interim Criteria**”). The criterion relied upon by the Appellant is paragraph (B)(a) of the Interim Criteria, viz.:

“sympathetic consideration may be given if not less than 50% of the proposed NTEH/Small House footprint falls within the village ‘environ’ (‘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;”

23. The “footprint” of a house means its four corners. “VE” is not a term defined under the OZP. It refers to an area which is within 300 feet of the “V” zone.

24. In the present case, it is not disputed that the Site falls within the “VE” zone of Lei Uk Tsuen. There is however dispute as to whether there is a general shortage of land in meeting the demands for Small House development in the “V” zone of the village.

25. The Appellant attempted to rely on the aforesaid witness statements of LEE Tim Sau and LEE Yi Mui to establish shortage of land. However, as mentioned in paragraphs 11 and 12 above, these statements are placed before this Board as background information only. No weight is given to the content thereof unless such content is undisputed. In the present case, shortage of land is an issue in dispute between the parties.

26. On the other hand, according to Ms. Wong, whose evidence in this regard is undisputed and accepted by this Board, 2.29 ha of land was available within the “V” zone of Lei Uk Tsuen at the time when the section 16 application was made by the Appellant in April 2016, sufficient for the building of 91 Small Houses. At that time, there were 81 outstanding Small Houses applications. The figures remain substantially the same as at the time of the Appellant’s application for review under section 17(1) of the TPO, in August 2016. As at the time of the hearing of this appeal, the area of land available was reduced to 2.26 ha, sufficient for the building of 90 Small Houses. The number of outstanding Small House applications at the time became 83. There was therefore no general shortage of land in meeting the demand for Small House development in the “V” zone of Lei Uk Tsuen. The indigenous inhabitants of Lei Uk Tsuen put forward much higher figures as 10-years demand forecast for Small House applications. These figures were however not verified by the Lands Department. This Board agrees that it is the number

of existing outstanding applications, rather than unverified forecasts, that are material to the consideration of whether or not there is shortage of land in the village.

27. The Appellant has therefore failed to satisfy this Board that there is a general shortage of land in the “V” zone of Lei Uk Tsuen.

28. In any event, paragraph (B)(a) of the Interim Criteria is not the only criterion that is relevant. The following sub-paragraphs of paragraph (B) of the Interim Criteria are also relevant:

(a) *Sub-paragraph (f): “the proposed development should not frustrate the planning intention of the particular zone in which the application site is located”; and*

(b) *Sub-paragraph (g): “the proposed development should be compatible in terms of land use, scale, design and layout, with the surrounding area/development”.*

29. Thus, even if the criterion in paragraph (B)(a) of the Interim Criteria is satisfied (which this Board does not consider to be the case here), an application for the construction of NTEH/Small House *may* be given “sympathetic consideration” only. There is no guarantee that the application would be approved. As Ms. Wong pointed out, a basket of factors would be considered. She also informed this Board that if a criterion in the Interim Criteria is not satisfied, the application will usually be rejected; on the other hand, if a criterion is satisfied, that does not mean the application will definitely be approved. Other factors have still to be considered.

VIII. The “300-foot VE rule”

30. This ground is in substance no different from the Interim Criteria ground discussed above. It does not warrant further discussion.

IX. The Site is no longer used for agricultural purpose, and there was no realistic prospect that it would be so used in future?

31. According to Ms. Wong¹, the Site is a piece of flat and mostly fallow agricultural land, with some agricultural activities at its eastern end. From an aerial photograph taken on 28 October 2016 (reference no. A/NE-TKL/541; Plan AP-3), and from an extract plan (also reference no. A/NE-TKL/541; Plan AP-2a) prepared on 30 August 2017, it is apparent that, at least as in October 2016, about 1/5 to 1/6 of the area of the Site was still active agricultural land. It may therefore not be entirely correct to say that the Site is no longer used for agricultural purpose.

32. What is more important, it is not only the present use of the Site that matters, for the Planning Intention of “AGR” zone clearly states that:

“It is also intended to retain fallow arable land with good potential for rehabilitation for cultivation and other agricultural purposes.”

In the Explanatory Statement of the OZP, in paragraph 8.3, it is stated that:

“The general planning intention of the Area is to promote the conservation of the rural character so as to control urban sprawl, reduce flood risk and preserve agricultural land, and to achieve coherent planning and control of the open storage and industrial developments.”

¹ Paragraph 3.1 of her witness statement.

33. Preservation of fallow arable land for rehabilitation for cultivation and other agricultural purposes is therefore an important consideration when deciding whether or not to grant approval for the construction of NTEHs/Small Houses.

34. In the present case, is it correct to say that there is no realistic prospect that the Site would be used for agricultural purposes in future? To answer that question, it is necessary to look at the areas surrounding the Site.

35. It is the evidence of Ms. Wong² that:

“The surrounding areas have the following characteristics ... :

- (a) surrounding the Site is active and fallow agricultural land. The village proper of Lei Uk Tsuen is located about 120m to the east/northeast of the Site;*
- (b) to the southeast of the Site is wooded area zoned “Green Belt” on the OZP ...; and*
- (c) to the south of the Site is a structure for domestic use and storage of agricultural tools. Further to the south is active agricultural land.”*

36. From the aforesaid extract plan (Plan AP-2a) and aerial photograph (Plan AP-3), it is clear that, while the Site itself is largely situated on fallow arable land, it is surrounded by active agricultural land. This Board is not convinced at all that there is no realistic prospect that the Site would be used for agricultural purposes in future. On the contrary, should the Site be used for building NTEH, there is a high probability that a precedent would be

² Paragraph 3.2 of her witness statement.

set whereby neighbouring sites would also be used for building purposes, thereby destroying a well preserved piece of agricultural land, which is so rare and precious nowadays in Hong Kong.

37. This Board's above view also finds support in the comments given by the Director of Agricultural, Fisheries and Conservation on this case³, as follows:

“A recent visit to the Site found that it comprises active farmland and abandoned land overgrown with vegetation, and active farming activities are also noted in the vicinity of the Site. Access path and water supply are available, and the Site possesses potential for agricultural uses. In this connection, the application is not supported from the agricultural development point of view as active farmland and fallow farmland possessing potential for agricultural rehabilitation should be preserved as far as possible.”

38. This Board therefore has no hesitation in rejecting this ground of appeal also.

X. The availability of land elsewhere for development

39. Neither in his Skeleton Submissions, nor in his oral submissions before this Board, did Mr. Yip elaborate on the reasons why it was contended that “The availability of land elsewhere for development is never a valid consideration” (Ground 6 of the Notice of Appeal). The TPB considered that it was more appropriate for proposed Small House developments to be concentrated close to the existing village cluster, so as to achieve a more orderly development pattern, and for more efficient use of land and provision of infrastructures and services. This must be a valid consideration.

³ Extracted in Paper No. A/NE-TKL/541 of the RNTPC.

40. In the appeal hearing before this Board, instead of arguing that the TPB ought not have taken into consideration the availability of land elsewhere for development, the Appellant appears to have changed his focus and tried to argue that, contrary to the TPB's finding, there is in fact *no* land available within the "V" zone of Lei Uk Tsuen for Small House development. As explained in paragraph 26 above, there is ample evidence that land is still available. The Appellant tried to rely upon the evidence contained in the witness statements of LEE Tim Sau and LEE Yi Mui to prove the contrary. For the reasons stated in paragraph 25 above, however, such evidence is given no weight.

41. The Appellant has therefore failed to satisfy this Board that the TPB was wrong in its factual finding that there is still land available within the "V" zone of Lei Uk Tsuen for development, nor can he show that it was wrong for the TPB to take that consideration into account when making a determination on the Appellant's case. There is no merit in this ground of appeal either.

XI. Precedent cases

42. Though not specifically mentioned in the Notice of Appeal, Mr. Yip made reference to a location plan prepared on 16 August 2017 (reference no. A/NE-TKL/541; Plan AP-1b), in which all applications for permission to build NTEH in the "VE" area surrounding Lei Uk Tsuen, whether they were approved or rejected, are shown. The applications that were approved have also been plotted and shown in an aerial photograph (Plan AP-3). It is observed that most of these applications were situated at or near to the boundary line between the "V" and the "VE" zones of Lei Uk Tsuen. The date of determination of these applications started from the year 2002.

43. As this Board understands it, the Appellant is trying to make two points out of these precedent cases. The first point being: since all these precedent applications were situated in the “VE” zone near Lei Uk Tsuen, there is no reason why some of the applications were approved while the Appellant’s application was not. In relation to this point, it is noted that all the approved applications were situated on the eastern side of Lei Uk Tsuen, while all the rejected applications were situated on the western side. As observed by Mr. Yip in paragraph 24 of his Skeleton Submissions,

“It is expected that TPB might want to avoid setting a precedent to extend village development in the “AGR” zone to the west of Lei Uk Tsuen.”

This Board can see nothing wrong with the apparent policy on the part of TPB of opening up the “VE” area on the eastern side of Lei Uk Tsuen for development, while preserving the agricultural nature of the area on the western side. This, we reckon, is what the TPB meant by “orderly development pattern, efficient use of land and provision of infrastructures and services”.

44. The other point that Mr. Yip apparently made on behalf of the Appellant is in effect this: the TPB is contradicting itself by saying, on the one hand, that there is still available land within the “V” zone of Lei Uk Tsuen while, on the other hand, approving applications for the building of NTEHs/ Small Houses in the “VE” zone on the eastern side of the village. Furthermore, so Mr. Yip suggested, the amount of land available in the “V” zone in 2011 and 2014 (when some of these applications were approved) could not be less than the amount now available (as more NETHs were built as time went by, using up more land). Therefore, if there was land shortage in 2011/2014, there must be shortage of land now.

45. To this query, Ms. Wong gave two explanations. The first explanation was that the quantity of available land would be reviewed from time to time. This Board finds the explanation rather lame. Ms. Wong has not been able to suggest any reason why the quantity of available land within the “V” zone would suddenly increase, so that the quantity of available land now becomes larger than that in 2011/2014.

46. The other explanation proffered by Ms. Wong is more reasonable. It concerns the “demand” side instead of the “supply” side of the equation. While the sufficiency of land available for development is now assessed more predominantly by reference to the number of outstanding applications, previously, more weight was given to the “10-years demand forecast” provided by the indigenous inhabitant representatives of the villages concerned. Such forecasts were not verified by the Lands Department, and are very substantial. Ms. Wong said that there was no fixed time for the implementation of this “cautious approach”, but she was able to say that the 2011 approvals were most likely based on the previous approach. It is to be noted that there has been no approval of the construction of NTEH in the “VE” zone of Lei Uk Tsuen at all after 2014, probably reflecting the effect of the adoption of the “cautious approach”.

47. The adoption of this “cautious approach” cannot be faulted. It is certainly a more realistic way of estimating the sufficiency of land available for development, and would result in better planning of land use.

48. This Board therefore does not consider that the *previous* approval of planning applications to the east of Lei Uk Tsuen necessarily contradicts the Respondent’s case that there is *now* sufficient land within the “V” zone of Lei Uk Tsuen for NTEHs/Small Houses.

49. Some members of this Board were at one stage somewhat concerned about case 493 (application approved on 12 December 2014). The site involved in that application was apparently further away from Lei Uk Tsuen than all the other applications, and was situated close to the outer boundary of the “VE” zone thereof. On further examination, however, we consider that case 493 was very different from the present application. Besides being situated on the eastern side of Lei Uk Tsuen, it was also located in an uncultivated area the nature of which is totally different from that of the Site, which is surrounded by cultivated land (paragraphs 31 to 37 above).

XII. Should the TPB have considered setting a precedent for future applications as a relevant factor?

50. In the course of the hearing, Mr. Yip submitted that the creation of undesirable precedents is not part of the Interim Criteria, and should not have formed part of TPB’s consideration in deciding whether or not to grant planning approval.

51. In the first place, it must be pointed out that the TPB did not give undesirable precedent as a reason for rejecting the Appellant’s application. Secondly, this is a curious argument the logic of which is difficult to follow. The Interim Criteria was not meant to be an exhaustive list of criteria that the TPB may take into account in deciding whether or not to grant planning approval. Furthermore, the approval of a single application for the building of a single NTEH might have only a small effect on the environment. It would however almost certainly form a precedent which other applicants for planning approval would seek to rely upon, thereby opening a floodgate which eventually may result in substantial change in the nature of the environment. The Appellant himself is trying to rely on precedents in the vicinity of Lei Uk Tsuen to support his application (paragraph 42 to 49 above). It is difficult to understand how it may be argued that whether or not the approval of an

application would form an undesirable precedent should not be one of the considerations of the TPB.

XIII. Conclusion

52. For the above reasons, this Board has unanimously decided that there is no merit in this appeal, and that it ought to be rejected. The relevant decision of the Town Planning Board is hereby confirmed. If any party has any application for costs, such application should be made in writing to this Board within 21 days of the date of this Judgment.

(Signed)

Mr. Simon LAM Ken-chung
(Chairman)

(Signed)

Mr. Tommy FUNG Hei-wai
(Member)

(Signed)

Ms Emba LEUNG Wun-man
(Member)

(Signed)

Ms Imma LING Kit-sum
(Member)

(Signed)

Ms YUNG Wai-chi
(Member)