

**IN THE TOWN PLANNING APPEAL BOARD**

Town Planning Appeal No. 2 of 2017

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BETWEEN

WONG TIN YIU

Appellant

and

TOWN PLANNING BOARD

Respondent

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Appeal Board : Mr Samuel CHAN Ka-yan, JP (Chairman)

Mr TANG Kwok-wai (Member)

Mr Edwin YEUNG Chi-wai, MH (Member)

Ms YEUNG Tse-ngok (Member)

Mr Nelson YIP Siu-hong, MH (Member)

In Attendance : Ms Lesley LEUNG (Secretary)

Representation : Mr Ivan CHEUNG, Counsel for the Appellant

Mr Kelvin CHEUNG, Senior Government Counsel for the Respondent

Date of Hearing : 29 & 30 May 2018

Date of Written

Closing Submissions : 20 & 27 June 2018

Date of Decision : 3 April 2019

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## DECISION

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### **A. Background**

1. On 26 October 2016, the Appellant submitted a planning application (No. A/NE-TK/598) (“the Application”) under section 16 of the Town Planning Ordinance (Cap. 131) (“the Ordinance”) seeking permission from the Town Planning Board (“TPB”) to build a New Territories Exempted House (“the Small House”) on Government land in D.D. 28 in Tai Mei Tuk Village, Tai Po, New Territories (“the Site”).
2. The Site is located on a gentle slope with existing young trees at the fringe. It encroaches onto a local footpath leading to some domestic structures to the north and is accessible by footpath connecting Ting Kok Road to the south. The surrounding areas are predominantly rural in character with village houses, temporary structures and agricultural land. Areas to the east and west of the Site are groups of Small Houses approved by the TPB in 2006. A stream running from north to south is located about 6 metres to the west of the Site.
3. At a meeting held on 23 December 2016, the Rural and New Town Planning Committee (“RNTPC”) of the TPB decided to reject the Application.
4. On 25 January 2017, the Appellant applied under section 17(1) of the Ordinance for a review of the RNTPC’s decision.
5. On 21 April 2017, the TPB rejected the review application and informed the Appellant of its decision on 5 May 2017.
6. By a Notice of Appeal dated 26 June 2017, the Appellant appealed against the review decision under section 17B(1) of the Ordinance to the Town Planning Appeal Board

(“TPAB”). The appeal was heard before this Appeal Board on 29 May 2018 and 30 May 2018, followed by further written submissions filed by both parties on 20 June 2018 and 27 June 2018 respectively.

## **B. Decision of the TPB**

7. The RNTPC of the TPB rejected the Application for the following reasons :
  - “(a) the proposed development is not in line with the planning intention of the “Green Belt” (“GB”) zoning for the area which is primarily for defining the limits of urban and sub-urban development areas by natural features and to contain urban sprawl as well as to provide passive recreational outlets. There is a general presumption against development within this zone;
  - (b) the proposed development does not comply with the Town Planning Board Guidelines No. 10 for ‘Application for Development within “GB” zone under section 16 of the Town Planning Ordinance’ in that the proposed development would involve clearance of vegetation affecting the existing natural landscape in the area;
  - (c) the proposed development does not comply with the Interim Criteria for Consideration of Application for New Territories Exempted House/ Small House in New Territories in that the proposed development would cause adverse landscape impacts on the surrounding areas; and
  - (d) land is still available within the “Village Type Development” (“V”) zone of Lung Mei, Tai Mei Tuk and Wong Chuk Tsuen which is primarily intended for Small House development. It is considered more appropriate to concentrate the proposed Small House development within “V” zone for more orderly development pattern, efficient use of land and provision of infrastructure and services.”
8. The same reasons were adopted by the TPB in its refusal of the Appellant’s application for review of the RNTPC’s decision.

### **C. Grounds of Appeal**

9. In the perfected grounds of appeal dated 4 September 2017 filed on behalf of the Appellant, 5 grounds of appeal have been put forward by the Appellant:

- “(a) The Town Planning Board ought to have find [sic] that the Proposed Development is in line with the planning intention of the “Green Belt” as the Proposed Development areas will not contribute to any urban sprawl; or alternatively that the Proposed Development as an exceptional case which warrants a departure from the planning intention of the “Green Belt” Zone;
- (b) The Town Planning Board ought to have find [sic] that the Proposed Development complies with the Town Planning Board Guidelines No. 10 for ‘Application for Development within “Green Belt” zone under section 16 of the Town Planning Ordinance’; or alternatively that the impact on the existing natural landscape of the surrounding environment caused by the Proposed Development is very minimal and could be tolerated.
- (c) Town Planning Board ought to have find [sic] that the Proposed Development complies with the Interim Criteria for Consideration of Application for New Territories Exempted House/Small House in New Territories; or alternatively that that [sic] there would not be adverse landscape impact on the surrounding areas caused by the Proposed Development.
- (d) The Town Planning Board wrongly accepted and concluded that land was still available within the “Village Type Development” (“V”) zone of Lung Mei, Tai Mei Tuk and Wong Chuk Tsuen for Small House development. The latest information shows that land is not available within the “V” zone of the relevant villages which is primarily intended for Small House development.
- (e) The Appellant has a legitimate expectation that the Application would be approved if the sewerage impact having been resolved;”

## **D. Discussion**

### **Ground 1 – Planning intention**

10. It is common ground that the planning intention of the “Green Belt” (“GB”) zone in question is to be found in the Notes to the approved Ting Kok Outline Zoning Plan No. S/NE-TK/19 (“OZP”) which form part of the OZP:

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

11. It is also not in dispute that the OZP contains an Explanatory Statement which, albeit not forming part of the OZP, informs the planning intention of the “GB” zone in question (under paragraphs 9.9.1 and 9.9.2 thereof):

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

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

12. Mr. Ivan Cheung, counsel for the Appellant, fairly accepted that in order to rebut the general presumption against development within the “GB” zone, there should be “strong planning grounds” to justify the limited development sought by the Appellant in the present appeal.
13. Mr. Cheung, however, took a preliminary point that the Respondent was wrong to suggest that the proposed development would not be in line with the planning intention of the “GB” zone in question, as Column 2 of the Notes to the OZP includes “House” as one of the uses that may be permitted with or without conditions on application to the TPB. Reliance was also placed on the express reference to the possibility of “limited developments” under paragraph 9.9.1 of the Explanatory Statement.
14. Mr. Cheung submitted that the crux of the question should be whether the Appellant could demonstrate that the proposed development could be justified on strong planning grounds.
15. We do not accept that since limited development of Small Houses *may* be permitted in the “GB” zone under exceptional circumstances, the proposed development should be treated as being in line with the planning intention of the relevant zone under the OZP. The mere fact that the general presumption against development may be rebutted by strong planning grounds in some cases does not, *ipso facto*, imply that as a starting point, development of Small Houses within the “GB” zone should be considered as consistent with the planning intention.
16. It should also be noted that in his written submissions (as per paragraphs 18 and 32 of the Appellant’s Written Submissions dated 14 May 2018 and paragraphs 2 and 3 of the Appellant’s Reply Submissions to Respondent’s Closing Submissions dated 27 June 2018), Mr. Cheung expressly accepted that the question in issue is whether the proposed development “warrants a *departure* from the planning intention of the GB Zone” (emphasis supplied).

17. In support of his main contention under this ground that there are strong planning grounds that warrant a departure from the planning intention of the “GB” zone in favour of the proposed development, the Appellant relied on the following:

- (a) 100% of the footprint of the Site lies within the village ‘environs’ (“VE”) of Lung Mei, Wong Chuk Tsuen and Tai Mei Tuk.
- (b) The Site is largely concrete paved and the proposed access is also covered by concrete. No adverse impact on the surrounding areas will be caused as the proposed development (as the Appellant so claims) will not involve extension vegetation clearance or extensive site formation work.
- (c) The proposed development has been assessed by the relevant Government department as being not incompatible with the surrounding areas.
- (d) The Appellant will agree to blend in the design, layout, colour and materials of the proposed Small House with its surrounding environment and adjacent Small Houses.
- (e) There is no adverse sewerage impact as the sewer of the proposed development will be connected to the public sewer.
- (f) The Site is not in close proximity to Pat Sin Leng Country Park and is very close to an existing estate development known as “Meadow Cove” and the boundary of the “Village Type Development” (“V”) zone of Tai Mei Tuk Village where Small House development is always permitted according to the Notes to the OZP.
- (g) According to the Appellant, there is general shortage of land for Small House development in the “V” zone of the villages concerned.

18. The matters raised by the Appellant in paragraphs 17(b), (c), (d) and (e) above were repeated or further elaborated by the Appellant under Grounds 2 and 3 below vis-a-vis landscape impact. The point raised in paragraph 17(g) above also formed the

backbone of Ground 4 below vis-a-vis shortage of land and was extensively argued by both parties.

19. Therefore, as far as Ground 1 is concerned, we shall only deal with the Appellant's arguments in respect of the matters stated in paragraphs 17(a) and (f) above.
20. It is not in dispute that 100% of both the footprint of the Small House and the Site lies within the "VE" of Lung Mei, Wong Chuk Tsuen and Tai Mei Tuk. However, we accept the Respondent's submission that such state of affairs does not constitute an "exceptional circumstance" *per se*. The extent to which the proposed Small House lies within the "VE" of a recognized village is only relevant to the question of whether sympathetic consideration may be given under the Interim Criteria where there is a general shortage of land in the "V" zone of the village (an issue which will be dealt with under Ground 4 below).
21. We also do not accept Mr. Ivan Cheung's contention that the Site is in close proximity to an existing development, namely, Meadow Cove. The Site is not in the immediate vicinity of Meadow Cove which is separated by a stream and trees to the west and by an access road and slope to the east. As can be seen from the site plans and photographs adduced, the Site sits on a slope in a predominantly undeveloped strip of land adjacent to a stream with existing trees and vegetation found nearby. There are no other developments in the immediate vicinities to the south or north of the Site.
22. We should also note that during the hearing attempts were made to cross-examine the Respondents' witness, Ms. Kathy Chan ("Ms. Chan"), Senior Town Planner of the Planning Department on the considerations given in relation to the approval of the Meadow Cove development. As there was nothing in the Appellant's grounds of appeal which might allude to the relevance of the reasons underlying the approval of that development which was of a very different scale, the questions put to Ms. Chan in this regard were disallowed as a matter of procedural fairness.

23. In any event, as pointed out by Ms. Chan, the development of Meadow Cove was first approved in 1995, well before the Interim Criteria were promulgated to regulate Small House applications in the New Territories.
24. Further, as Ms. Chan stressed in her evidence, Meadow Cove has already encroached onto the “GB” zone; any approval of the current application will therefore only *further deviate* from the planning intention of the relevant zone to define the limits of urban and sub-urban development areas by natural features and to contain urban sprawl.
25. We therefore find that there is no merit in this ground of appeal.

### **Grounds 2 & 3 – Landscape impact**

26. Grounds 2 and 3 are considered together as they both concern potential landscape impacts.
27. The Appellant argued that the TPB was wrong in concluding that the proposed development would involve adverse impacts on the landscape of the Site and the surrounding areas, having taken into consideration the Town Planning Board Guidelines for Application for Development within Green Belt Zone (“TPB PG-No.10”) and the Interim Criteria for Consideration of Application for New Territories Exempted House/ Small House in New Territories (“Interim Criteria”).
28. It is settled law that unlike the OZP and the Notes which are material documents to which the TPAB is bound to have regard in exercising its independent judgment, the TPAB is not bound to follow the Explanatory Statement, the Guidelines (such as TPB PG-No.10 in the present appeal) or the Interim Criteria, although they are also material considerations which could not be disregarded (see *Henderson Real Estate Agency Ltd v Lo Chai Wan* [1997] HKLRD 258 at 267).
29. TPB PG-No.10 contains, *inter alia*, the following relevant “main planning criteria”:

- “a. There is a general presumption against development (other than redevelopment) in a “GB” zone. In general the Board will only be prepared to approve applications for development in the context of requests to rezone to an appropriate use.
- b. An application for new development in a “GB” zone will only be considered in exceptional circumstances and must be justified with very strong planning grounds. The scale and intensity of the proposed development including the plot ratio, site coverage and building height should be compatible with the character of surrounding areas. ...
- c. Applications for New Territories Exempted House with satisfactory sewage disposal facilities and access arrangements may be approved if the application sites are in close proximity to existing villages and in keeping with the surrounding uses, and where the development is to meet the demand from indigenous villagers.
- ...
- g. The design and layout of any proposed development should be compatible with the surrounding areas. The development should not involve extensive clearance of existing natural vegetation, affect the existing natural landscape, or cause any adverse visual impact on the surrounding environment.
- ...
- i. The proposed development should not overstrain the capacity of existing and planned infrastructure such as sewerage, roads and water supply. It should not adversely affect drainage or aggravate flooding in the area.
- ...
- m. Any proposed development on a slope or hillside should not adversely affect slope stability.”

30. The following “assessment criteria for planning application” set out in the Interim Criteria are also relevant to Grounds 2 and 3:

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

...

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

...

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

31. As far as potential landscape impacts are concerned, it is the Appellant’s case that:

(a) TPB PG-No.10 only forbids “extensive” clearance of existing natural vegetation whereas the proposed development would only involve the felling of two young trees and tree saplings found in the Site, and that the existing vegetation are merely common species which do not enjoy any conservation status. (“Point (a)”)

(b) The Appellant will seek approval from the Lands Department (“LandsD”) to relocate the two young trees or trees of similar species to the natural slope on Government land adjacent to the Site to mitigate this impact, if so directed. (“Point (b)”)

(c) The landscape surrounding the Site had already been substantially affected by a major development known as “Meadow Cove” since about 2004; the Site has become largely concrete paved and the Director of Agriculture,

Fisheries & Conservation (“DAFC”) had no comment on the application from a nature conservation point of view. (“Point (c)”)

- (d) The Chief Town Planner/Urban Design and Landscape of the Planning Department (“PlanD”) had only expressed “reservation” rather than “objection” to the proposed development. (“Point (d)”)
- (e) The proposed development was assessed by the PlanD as “not incompatible with the surrounding areas” when the application was considered by the RNTPC on 23 December 2016. (“Point (e)”)
- (f) The Director of Environmental Protection (“DEP”) had no objection to the application as the Appellant proposed to connect the Small House to the public sewer and no adverse sewerage impact would be caused. (“Point (f)”)
- (g) Although the Drainage Services Department (“DSD”) had indicated that satisfactory stormwater drainage and site formation proposals were required to be submitted, it had no in-principle objection to the proposed development from a public drainage viewpoint. (“Point (g)”)
- (h) The Civil Engineering and Development Department (“CEDD”) also had no in-principle geotechnical objection to the application although the Appellant was required to make necessary submissions covering the investigation of stability of any man-made slope or retaining walls within or near the proposed development to the Building Authority and/or the LandsD for approval. (“Point (h)”)

#### Points (a) & (b)

32. Much emphasis was placed by the Appellant on the word “extensive” under criterion (g) of TPB PG-No.10. However, the consideration underlying that paragraph is not confined to whether clearance of natural vegetation would be extensive or not. The overriding consideration is whether the proposed development would be compatible with the “surrounding area” or would cause any adverse visual impact on the “surrounding environment”, or that the “existing natural landscape” would be

affected. We must therefore consider the totality of the potential landscape impacts in order to decide whether the main planning criteria under TPB PG-No.10 are met to the extent that a departure from the planning intention of the “GB” zone can be justified with very strong planning grounds.

33. It should also be noted that where, as here, the footprint of the proposed Small House covers the entire Site thus leaving no space for landscape mitigating measures to be done, a proposed development may be rejected even though the degree of landscape or ecological impact may not be severe: see *TPA No. 1 of 2016, para 24*.
34. Insofar as the Appellant proposed to relocate the two young trees or trees of similar species nearby adjacent to the Site, we do not consider it practicable to impose such approval conditions as the use of Government land would be involved. We also note that although the Appellant had indicated that he would agree to “blend in” the design, layout, colour and materials of the proposed Small House with its surrounding environment, no concrete proposal has been put forward to explain how this can be practically done. What is expected of the Appellant is a solid landscape proposal rather than an agreement or undertaking to provide a proposal (see *TPA Nos. 4 & 5 of 2016 at paragraph 42*).

Point (c)

35. The fact that part of the Site and the surrounding area near Meadow Cove have already become largely concrete paved is neither here nor there. Firstly, as pointed out by Ms. Chan, there is a real concern about further deviation from the planning intention of the relevant “GB” zone (see paragraph 24 above).
36. Secondly, as the Appeal Board observed in *TPA No. 14 of 2011*:

“It is not in point for the Appellants to say that the Site has been turned into concrete surface without any plantation on it for a long time. As Mr Lau Chi Ting, the Senior Town Planner / Tai Po, explains, if and for so long as the Site remains Government land, it would be possible for the Government to turn it

into a public garden or recreational area with natural plantation, in line with the planning intention of GB zoning.”

Point (d)

37. It is true that when assessing against the assessment criteria set out in the Interim Criteria, the Chief Town Planner, Urban Design and Landscape Section (“CTP/UD&L”) of the PlanD expressed his or her comment as a “reservation” on the application from the landscape planning perspective. It is however important to note that, as recorded in Appendix IV of RNTPC Paper No. A/NE-TK/598 (“RNTPC Paper”) prepared by the PlanD for consideration by the RNTPC at its meeting on 23 December 2016, in the same paragraph under the heading “Landscape” the Chief Town Planner went on to make the following comments:

- “(c) Although there are previously approved Small House application adjacent to the Site, approval of the application would set an undesirable precedent and encourage Small House developments on Government land outside the Tai Mei Tuk village proper. Besides, the footprint of the Small House covers the whole Site and no landscape measure can be provided within or outside the Site. *Adverse landscape impact* due to the proposed development *cannot be mitigated*; and
- (d) should the application be approved, landscape condition is *not recommended* as there is no uncovered area within the Site for landscaping.”

(emphasis supplied)

38. We therefore do not find any substance in the Appellant’s contention that the Chief Town Planner of the PlanD was merely expressing a “reservation” rather than an outright “objection” to the application.

Point (e)

39. Mr. Ivan Cheung also drew our attention to another remark made by the PlanD as recorded under paragraph 10 of the RNTPC Paper in the table summarising the comments from the relevant Government departments, namely, that the proposed Small House was assessed as “not incompatible with the surrounding areas which are predominantly rural in character with village houses, temporary structures and agricultural land”.
40. Although it is not disputed by the Respondent’s witness, Ms. Chan, that the aforesaid remark had indeed been made by the Urban Design and Landscape Section of the PlanD, that comment must be put in its proper context.
41. Under paragraph 12 of the RNTPC Paper under the heading “Planning Considerations and Assessments”, the PlanD summarised the planning assessments as follows:

“12.3 The Site is located at the northern fringe of Lung Mei Village. Adjacent to the Site to the east and west are two clusters of Small Houses approved by the Committee under Application No. A/NE-TK/204 in 2006. The surrounding areas are predominantly rural in character with village houses, temporary structures, agricultural land and tree groups. The proposed Small House development is considered not incompatible with the surrounding areas.

12.4 The Site is situated on a gentle slope with existing young trees ... While DAFC has no comment on the application, CTP/UD&L of PlanD has reservation on the application from landscape planning perspective as it is very likely that the existing trees within and near the Site (including the rooting system and tree crown) will be affected by the construction of the Small House and the associated site formation works ... Besides, the footprint of the Small House covers the whole Site and no landscape measure can be provided within or outside the Site. Adverse landscape impact due to the proposed development cannot be mitigated.

...

12.7 As pointed out by CTP/UD&L of PlanD, the proposed development would involve clearance of vegetation and cause adverse landscape impact. The proposed development also does not comply with the TPB PG-No. 10 for development within “GB” zone in that the proposed development involving clearance of vegetation would result in deterioration of landscape quality in the subject “GB” zone.

...

12.9 ... 29 applications were rejected by the Committee or by the Board on review mainly for reasons of being not in line with the planning intention of “GB” zone; and/or not complying with the Interim Criteria and the TPB PG-No. 10 for development within “GB” zone in that the applicants failed to demonstrate that the proposed Small House would not cause adverse landscape, sewerage, water quality and/or geotechnical impacts on the surrounding areas. Applications No. A/NE-TK/559, 570 and 571 to the further west of the Site (Plan A-1) were also rejected mainly on the grounds of adverse landscape impacts ... Their circumstances are similar to the current application.”

42. As can be seen from the above observations and assessment as recorded in the RNTPC Paper, far from giving any favourable consideration to the proposed development, the PlanD had expressed serious concerns from a landscape planning perspective. The same reservations were repeated by the PlanD when the relevant Government departments were further consulted on review by the TPB: see TPB Paper No. 10270 prepared for consideration by the TPB on 21 April 2017, paragraphs 4.12 and 5.2.4.

43. We are therefore not persuaded by the Appellant that the proposed development was assessed by the PlanD as compatible with the surrounding environment as far as potential landscape impacts were concerned.

Points (f) & (g)

44. Regarding drainage and sewerage, it is true that both the DSD and the DEP had no or no in-principle objection to the proposed development. It should however be noted that although the DEP acknowledged that connection to the public sewer would be feasible and capacity was available, the DEP also pointed out that as there was a stream course close to the Site, potential environmental impacts during construction must not be overlooked; strict compliance with the relevant pollution control legislations and appropriate pollution control measures would have to be implemented. The risk of affecting embankment stability during or after construction of the Small House was also raised (see Appendix IV of the RNTPC Paper, paragraph 5(f)).
45. We also accept Mr. Kelvin Cheung's submission on behalf of the Respondent that the mere fact that there may be no in-principle objection from a drainage or sewerage point of view is not an exceptional circumstance by itself that warrants a departure from the planning intention of the "GB" zone.

Point (h)

46. For the same reason, we do not accept that the Appellant's reliance on the indication of no in-principle objection by the CEDD on the question of slope stability would take the Appellant's case any further.
47. Apart from inviting this Appeal Board to give due weight to the above features in relation to the proposed development, Mr. Ivan Cheung in his written submissions also drew our attention to three other applications in the same "GB" zone of Tai Mei Tuk Village, namely, Application No. A/NE-TK/432 which was allowed on appeal by the TPAB in TPA No. 5 of 2014 in 2015, and Application Nos. A/NE-TK/573 and A/NE-TK/585 which were approved by the RNTPC in 2016.
48. Mr. Cheung submitted, without any further elaboration, in his Reply Submissions to Respondent's Closing Submissions (under paragraph 3 thereof) that the proposed

development in the present appeal shared “striking similarity” with Application No. A/NE-TK/432.

49. The comparison which the Appellant sought to draw with TPA No. 5 of 2014 may be disposed of shortly. It is pertinent to note that the TPAB allowed the appeal on the basis of certain unique characteristics of the site including, *inter alia*, that the site was on active agricultural land not covered by dense vegetation or woodland and was very close (about 10 metres away) to the adjacent Small House developments and village cluster; a landscape proposal to mitigate the landscape impact had also been put forward by an Authorized Person instructed by the appellant in that case who was called to give evidence in support of the appeal. In any event, on the limited information available, we are not prepared to assume that the planning merits identified by the TPAB in that appeal back in 2015, albeit in relation to the same “GB” zone in Tai Mei Tuk Village, should lead this Appeal Board to come to a similar conclusion in respect of the present appeal.
50. As far as Application Nos. A/NE-TK/573 and A/NE-TK/585 are concerned, the Appellant submitted that since planning policy should be fairly administered, the PlanD should also have taken no objection to the proposed development when the matter was considered by the TPB in the present case.
51. In our view, the attempted comparisons with these two other approved cases can also be disposed of quickly. As explained by Ms. Chan whose evidence was supported by the site photo produced (Plan AP-5b), the sites concerned in Application Nos. A/NE-TK/573 and A/NE-TK/585 were not covered by dense vegetation and were located in close proximity to the existing village cluster and village houses or approved Small House sites. The PlanD also pointed out at the meeting of the RNTPC on 14 September 2016 that the existing village cluster and approved Small Houses adjacent to those sites had generally been developed into an extension of the existing village.
52. At the end of the day, the burden is on the Appellant to demonstrate “strong planning grounds” in order to rebut the general presumption against development within the

“GB” zone. On the totality of the evidence in relation to potential landscape impact as assessed against the planning criteria set out in TPB PG-No. 10 and the Interim Criteria, we find that the burden of proof in this regard has not been discharged by the Appellant.

53. Therefore, Grounds 2 and 3 of the Appellant’s grounds of appeal must also fail.

#### **Ground 4 – Shortage of land**

54. We shall now turn to Ground 4 to consider whether the Appellant has proved that there is a general shortage of land in meeting the demand for Small House development in the “V” zone of the villages concerned, so that sympathetic consideration may be given for the application under paragraph (B)(a) the Interim Criteria, which provides that:

“sympathetic consideration may be given if not less than 50% of the proposed NTEH/Small House footprint falls within the village ‘environs’ (‘VE’) of a recognized village and there is a general shortage of land in meeting the demand for Small House development in the “Village Type Development” (“V”) zone of the village”.

55. According to the evidence of Ms. Chan, the PlanD’s latest estimate in 2018 shows that about 2.7 ha of land (or equivalent to 108 Small House sites) is still available within the “V” zone of Lung Mei, Tai Mei Tuk and Wong Chuk Tsuen for Small House development, which is more than sufficient to meet the 59 outstanding Small House applications as at the time of the appeal.

56. The Appellant’s challenge against the reliability of the PlanD’s estimate, which has included both Government land and private land within the “V” zone concerned, is essentially three-fold:

- (a) Certain sites or parcels of land within the “V” zone of Tai Mei Tuk should be discounted from the PlanD’s said estimate due to their physical or location constraints. (“Physical Constraints Point”)
- (b) All private land within the “V” zone of Lung Mei, Tai Mei Tuk and Wong Chuk Tsuen should be disregarded as no suitable private land in these villages is available for the Appellant on the evidence. (“Private Land Point”)
- (c) All Government land of the same “V” zone within the two neighbouring villages, Lung Mei and Wong Chuk Tsuen, should also be excluded from the PlanD’s estimate as only private land is relevant for the purpose of making a “cross-village” application for Small House development. (“Government Land Point”)

#### Physical Constraints Point

57. Based on a desktop survey, the Appellant contended that some 13 sites or strips of land (marked up as Locations 1 to 18 on the Location Plan at page E060A of the hearing bundle, being an enlarged version extracted from Location Plan AP-2c) should not have been included in the PlanD’s estimate of 2.7 ha, as either the size and/or shape of these pieces of land would not suffice or their locations were inherently unsuitable for building a Small House.
58. We do not find it necessary for this Appeal Board to deal with the merits of each and every challenge in respect of the aforesaid sites or parcels of land within the “V” zone of Tai Mei Tuk. Suffice it for us to say, although there is some force in the Appellant’s contention in relation to some of the challenged locations – and Ms. Chan has fairly conceded that some of the areas such as emergency vehicle parking space and access roads should be excluded (as set out in the Table at Appendix V of Ms. Chan’s witness statement dated 17 May 2018) – the Appellant has failed to show that the PlanD’s estimate was so inaccurate or unreliable that the projected estimate of 108 Small House sites was demonstrably wrong.

59. As pointed out by Ms. Chan, in accordance with the established practice of the PlanD, after discounting areas occupied or reserved for specific users or purposes (e.g. ancestor hall/shrine, burial ground, planned public facilities etc.), a uniform rate of 40 Small Houses per hectare representing a site coverage of only about 26% was applied for the remaining areas within the “V” zone, in order to give sufficient allowance for access road, circulation space, local open space and other necessary supporting facilities. Such method of calculation of available land has been found by the TPAB to be reasonable and prudent: see *TPA Nos. 4 & 5 of 2016*, at paragraphs 36-37).
60. We therefore accept the submission of Mr. Kelvin Cheung that the adoption of such relatively conservative site coverage (or a generous assumption of 40 Small Houses per hectare) should leave a sufficient “buffer” so that any error arising from these so-called odd-shaped or narrow strips of land should not affect the overall reliability of the PlanD’s estimate.

#### Private Land Point

61. It is the Appellant’s unchallenged evidence that he does not own any private land within the “V” zone, whether in his native village in Tai Mei Tuk or the neighbouring villages of Lung Mei and Wong Chuk Tsuen.
62. According to the evidence given by the Appellant’s father, Mr. Alan Wong, enquiries had been made with estate agents to acquire suitable private land in the “V” zone concerned, but to no avail.
63. Mr. Ivan Cheung essentially argued that such evidence of lack of available private land on the market should further support the Appellant’s contention that the inclusion of private land by PlanD in its estimate was flawed.
64. As put by Mr. Kelvin Cheung on behalf of the Respondent, the Appellant’s contention is tantamount to saying that the reference in paragraph (B)(a) of the Interim Criteria to “general shortage of land in meeting the demand for Small House

development in the ‘V’ zone of the village” should read “general shortage of *Government* land within the particular village of which the applicant is an indigenous village ...”.

65. We accept the submission by Mr. Kelvin Cheung that there is no reason why paragraph B(a) of the Interim Criteria, the assessment criterion for giving sympathetic consideration, should be construed in such a narrow manner.
66. Paragraph (B)(a) of the Interim Criteria, in its plain and ordinary meaning, simply addresses the “general” shortage of land and makes no distinction between Government land and private land.
67. More importantly, it is settled law that ownership is not a material or relevant consideration in town planning law. The real issue is the acceptability of land development **in the public interest** rather than ownership of land interest or, for that matter, implementation: see *British Railways Board v. Secretary of State for the Environment* [1994] JPL 32 (HL); *Merritt v Secretary of State for the Environment, Transport and the Regions* [2000] 3 PLR 125; *TPA No. 5 of 2011, paragraph 39(f)*; and *TPA No. 13 of 2006 & TPA No. 5 of 2008, paragraph 83(1)*.
68. The irrelevance of the difficulties that an applicant or appellant may encounter in implementation was succinctly put by the TPAB in *TPA No. 13 of 1993* at paragraphs 80 to 81:

“Of course, planning permission alone will not secure the appellant’s objective but the appellant also requires Government’s cooperation, e.g. on lease modification and exchange of land.

Whether such cooperation will be forthcoming is beyond our control. Nor does it concern us. Our task is to determine *purely from a planning point of view* whether the Appellant’s proposal should be permitted. This approach is consistent with views expressed in *British Railways Board v. Secretary of State*

for the Environment, The Times, 29<sup>th</sup> October 1993. There Lord Keith of Kinkel said in the House of Lords:

‘A would-be developer may be faced with difficulties of many different kinds, in the way of site assembly or securing the discharge of restrictive covenants. If he considers that it is in his interests to secure planning permission notwithstanding the existence of such difficulties, it is not for the planning authority to refuse it simply on their view of how serious the difficulties are.’

(emphasis supplied)

69. We agree with Mr. Kelvin Cheung’s submission on the reasons underlying this principle. If all private land which is not “immediately available” is to be discounted, it may open up a floodgate of applications claiming for sympathetic consideration, thereby resulting in a proliferation of Small House development outside the “V” zone and further encroachment into the “GB” zone inconsistent with the clear planning intention.
70. Further, as pointed out by Ms. Chan, land ownership is always subject to change and land parcels could be sub-divided to suit development needs.
71. We therefore do not accept the Appellant’s submission that the PlanD’s estimate on land availability was unreliable on the ground that it had failed to take into account the immediate availability of private land within the “V” zone of Lung Mei, Tai Mei Tuk and Wong Chuk Tsuen.

#### Government Land Point

72. Mr. Ivan Cheung referred us to the comments made by the LandsD in the review application. Paragraph 5 of TPB Paper No. 10270 prepared for consideration by the TPB at its meeting on 21 April 2017 stated as follows:

“Land Administration

5.2.1 ... Regarding the cross-village Small House application, according to the Small House Policy, an indigenous villager who does not wish to make use of the concession in his own village may build in another village in his Heung provided that he is acceptable to the native indigenous villagers there and that he can obtain suitable private land ...”

73. The Appellant argued that since finding a suitable *private* land was one of the conditions for making a cross-village Small House application, it was clearly wrong for Ms. Chan to include Government land within the “V” zone of Lung Mei and Wong Chuk Tsuen as available land for the Appellant to apply for building his Small House. Mr. Ivan Cheung therefore submitted that all Government land outside of Tai Mei Tuk should be disregarded.
74. In our view, the fallacy of this argument is that it has failed to distinguish between land administration (which is the remit of the LandsD) and town planning (which is within the responsibilities of the PlanD) in the context of the Town Planning Ordinance.
75. As we have indicated above, the task of the TPB (and of the TPAB) is to determine purely from a planning point of view whether the Appellant’s proposed development should be permitted. Any subjective difficulties perceived by the Appellant in relation to the implementation of any permission which may be granted by the TPB are neither here nor there. In any event any such difficulties experienced by an applicant are not weighty factors: see *TPA Nos. 7 & 8 of 2014* at paragraph 56. To hold otherwise would not only be contrary to the well-established principle laid down in a long line of authority, but would also be reading paragraph (B)(a) of the Interim Criteria as focusing on the general shortage of land within a particular village of an indigenous villager rather than the general shortage of land within the “V” zone concerned.

76. The submission put forward by the Appellant would also impose practical difficulties and an unduly onerous task on the PlanD in estimating the availability of land for a section 16 application under the Ordinance. It would mean that notwithstanding that the burden is on an applicant to demonstrate shortage of land, the PlanD will have to ascertain the details of private land ownership in the neighbouring villages of the same VE (i.e. the village environs of Lung Mei, Wong Chuk Tsuen and Tai Mei Tuk in the present case) within the “V” zone in order to calculate how much private land might be available for the applicant indigenous villager if and when a cross-village application becomes necessary.
77. Mr. Kelvin Cheung also drew our attention to the fact that the same approach of counting available land in all villages of the same VE within the same “V” zone was also adopted by the TAPB in *TPA Nos. 4 & 5 of 2016*, an appeal which concerned the very same “V” zone of Lung Mei, Tai Mei Tuk and Wong Chuk Tsuen under the same OZP.
78. It is also pertinent to note that despite the subjective difficulties said to have been perceived by the Appellant, Mr. Wong admitted under cross-examination that the Appellant had never applied for approval of any Small House development on Government land within the “V” zone concerned.
79. The Appellant’s challenge against the PlanD’s estimate of available land within the “V” zone in question on the basis of the Government Land Point is therefore also rejected.
80. As far as the demand for Small House sites is concerned, as mentioned above, Ms. Chan’s evidence is that the 2.7 ha of land (equivalent to 108 Small House sites) should be sufficient to meet the 59 outstanding Small House applications. As further explained by Ms. Chan, the more cautious approach of focusing on the number of outstanding Small House applications instead of the number of 10-year Small House demand forecast has been formally discussed and established by the TPB since August 2015. Such approach has been endorsed by the TPAB in many cases since

then, including the appeals in *TPA Nos. 4 & 5 of 2016* and *TPA No. 1 of 2016* which concerned Small House applications in the same “GB” zone of the same OZP.

81. We therefore come to the conclusion that the Appellant also fails on Ground 4.
82. Since we are not persuaded that there are any merits under Grounds 1, 2, 3 and 4, the Appellant’s contention that there are “strong planning grounds” that justify a departure from the clear planning intention of the “GB” zone under the OZP cannot stand.

### **Grounds 5 – Legitimate expectation**

83. The Appellant also alleges that as a result of certain oral representations made by two officers of the PlanD, Shatin Office to Mr. Wong in 2016, he has a “legitimate expectation” that the Application will be approved by the TPB if the sewerage impact and the footpath issues can be resolved.
84. Quite apart from the different roles and functions of the PlanD and the TPB as pointed out by Ms. Chan, on his own admission under cross-examination, Mr. Wong fairly accepted that neither of the two officers had represented to him in definite terms that the Application would be approved by the TPB once those issues were resolved.
85. In the absence of any unqualified and unambiguous representation which is a fundamental requirement before a legitimate expectation can be established (see *Ng Siu Tung v Director of Immigration* (2002) 5 HKCFAR 1, paragraph 103), the Appellant’s complaint about legitimate expectation cannot even get off the ground.

### **E. Conclusion**

86. For the reasons set out above, this Appeal Board unanimously decides that the present appeal must be dismissed.

(Signed)

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Mr. Samuel CHAN Ka-yan

(Chairman)

(Signed)

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Mr. TANG Kwok-wai

(Member)

(Signed)

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Mr. Edwin YEUNG Chi-wai

(Member)

(Signed)

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Ms. YEUNG Tse-ngok

(Member)

(Signed)

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Mr. Nelson YIP Siu-hong

(Member)