

TOWN PLANNING APPEAL NO. 6 OF 2007

IN THE MATTER of the
Town Planning Ordinance (Cap. 131)
and

IN THE MATTER of an Appeal under
Section 17B by
Mr. Chung Sui-man (represented by Mr.
Chung Yuen-kong)

Date of Hearing: 24 January 2008

Date of Decision: 29 April 2008

Town Planning Appeal Board:

Ms. Sylvia SIU Wing-yee (Chairman)

Dr. LI Chi-kwong (Member)

Mr. Eddie LEE Chung-keung (Member)

Ms. Serena LAU Sze-wan (Member)

Mr. Louis PONG Wai-yan (Member)

In attendance:

Ms. Christine PANG (Secretary)

Representation:

The Appellant was represented by his father Mr. Chung Yuen-kong (“Mr. Chung”)

The Respondent was represented by Mr. Wu Yuk-fung , Gerald, Senior Government Counsel (“Mr. Wu”)

TOWN PLANNING APPEAL DECISION

The Background

1. This appeal arises from the Appellant's Planning Application No. A/NE-LT/365 lodged with the Town Planning Board ("TPB") on 8 August 2006 for planning permission to build a Small House that is a New Territories Exempted House ("NTEH") under S16 of the Town Planning Ordinance ("TPO").

2. The Application was turned down by the Rural and New Town Planning Committee ("RNTPC") on 29 September 2006. An application was made to the TPB for a review of the decision of the RNTPC on 3 November 2006. On 26 January 2007, TPB maintained the decision of the RNTPC and did not support the application. TPB's reasons at Appeal Bundle page 4003 were:

- a. the application was not in line with the planning intention of the "Agriculture" ("AGR") zone;
- b. the proposed development did not comply with the interim criteria for assessing planning application for NTEH/Small House development ("Interim Criteria"); and
- c. the proposed development is located within the water gathering grounds ("WGG") and there is no existing or planned public sewerage system to which the proposed development can be connected to. Further, the applicant has not produced sufficient information to prove that the proposed development would have no adverse impact on water quality in the area.

3. On 26 March 2007, the Appellant issued his Notice for an Appeal to the Town Planning Appeal Board under section 17B.

The Site

4. The Site is situated and identified as Lots 329 S.B ss.1 and 330 R.P. in D.D. 10, Chai Kek Village, Lam Tsuen, Tai Po. It is located within the "AGR" zone on the Lam Tsuen Outline Zoning Plan S/NE-LT/11 ("the OZP"). It covers an area of about 243m² held under Block Government Lease and demised as agricultural land.

5. The Map of the Planning Department reference No. A/NE-LT/365 Plan A-2 at page 1094 of the Appeal Bundle, shows that the Site falls outside the “Village Type Development” (“V”) zone and is within the “AGR” zone.

6. The areas surrounding the Site are predominately rural in character with farm land, abandoned fields and some village houses. The Lam Kam Road is located immediately to the north-west of the Site. The Site is considered to be good agricultural land by the Director of Agriculture, Fisheries and Conservation.

The Planning Intention

7. The Planning Intention in relation to an area zoned “AGR” is expressly stated in the Notes to the OZP:

“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.”

8. According to the Notes of the OZP, an application for NTEH in the “AGR” zone (see Column 2) requires planning permission from the TPB.

9. S2 of the Notes further stipulates:

“Any use or development which is always permitted or may be permitted in accordance with these Notes must also conform to any other relevant legislation, the conditions of the Government lease concerned, and any other Government requirements, as may be applicable.”

10. Further, the Explanatory Statement to the OZP (“the Statement”) explains:

a. at §7.1.1 of the Statement that “*According to the Agriculture, Fisheries & Conservation Department (AFCD), the agricultural land in the Area is of good quality and worth to be preserved...*”;

b. at §7.2.1 of the Statement that the “*The whole Area falls within the upper indirect water gathering grounds. To protect the water resources from contaminated by wastes and pollutants, developments in this area would be strictly controlled*”;

- c. at §8.2 of the Statement that “The planning intention for the Area is, therefore, to retain the rural character of the Area by controlling development and promoting agricultural activities, and to allow village expansion in areas where development is considered appropriate”;
- d. at §9.1.4 of the Statement that “For sites in close proximity to Lam Kam Road, new village housing development should be avoided as far as possible”, and
- e. at §9.4.1 of the Statement that “ This zone is intended primarily to retain and safeguard good quality agricultural land/farm/fish ponds for agricultural purposes”

The Appellant’s Case to the Town Planning Board

11. The Appellant was not legally represented. His case by letter (translation) to the TPB dated 3 November 2006 at page 1101 of the Appeal Bundle is recited in part hereunder:

“I ...would like to apply for a review as I find it unjustifiable [that my application was rejected]. In the vicinity of the same site, some applications were approved while some were rejected. If I apply for Small House development in other villages, the villagers there will not support the application. This is very reasonable. I can accept that the Board rejects my Small House application, provided that it is the only application within the “Agriculture” zone (village environs) of my village. Not every indigenous villager owns land within the (“Village Type Development” zone), so building a Small House is something really very difficult to achieve, and one probably may not have a chance in one’s lifetime. My father has a son and three daughters. I am the only one who is eligible to build a Small House.”

“Regarding sewage treatment, in accordance with the requirements of the Buildings and Lands Department, all sewage (generated from the Small House) will be discharged into a septic tank and a soakaway pit. It will not be discharged onto ground surface, causing adverse affect on the water quality of the area. I promise that sufficient space will be reserved for connection to the planned sewerage system.”

The Appellant's Grounds of Appeal

12. The Appellant's grounds and details of his appeal can be summarized from the Notice of Appeal (at Appeal Bundle pages 5001-5004):

- a. being an indigenous villager, he has the right to acquire one Small House once in his lifetime on private land;
- b. three Small Houses had been approved, namely, Applications Nos. A/NE-LT/ 307 & 308 and the application for D.D. 10 Lot 326B (see Photo A annexed thereto at Appeal Bundle page 5005). As such, he challenges the rejection of his application;
- c. he perceives that the "Interim Criteria" is unfair to him and other villagers. He points out that top Chinese officials at handover mentioned that there would be no change to the rights of the villagers for 50 years; and
- d. he is of the view that the Environmental Protection Department, the Water Supplies Department and the Agriculture, Fisheries and Conservation Department, unreasonably opposed his application even though there are many NTEH/Small Houses shown at Photos B & C annexed at Appeal Bundle pages 5006-5007 and the intended location of his NTEH/Small House is more than 200 meters from the river.

13. Submission was made at the hearing by Mr. Chung for the Appellant and Mr. Wu for the TPB. Mr Chung did not call any witness, Mr Wu called Dr. Kenneth Tang ("Dr. Tang") of the Planning Department and Mr. Wong Kin Lap ("Mr. Wong") of the Water Supplies Department to give evidence.

Submission of Mr. Chung

14. Mr. Chung submitted that his son, Mr. Chung Sui Man, the Appellant, merely wanted to have a residence. He pointed out that it is very difficult to identify a piece of land for building Small House as most of the suitable land had been acquired by property developers. He is of the view that although the site is outside the "V" zone where planning permission must be obtained, as there are other buildings around the Site, when the public system is completed after year 2013, sewerage system of his proposed development could then be connected to the public system. So, his son's application should be approved.

15. Mr. Chung also repeatedly stressed that the letters, opposing his son's application for permission to develop NTEH/Small House, were forged, but he did not call any witness nor produce any documentary proof.

Submission of Mr. Wu

16. Mr. Wu pointed out to Mr. Chung that the planning applications referred to in the annexure A to the Notice of Appeal dated 26 March 2007 at page 5005 of the Appeal Bundle were not the application for Lot 326B and Application No. A/NE-LT/307 but were Applications Nos. A/NE-LT/210 and 218 respectively. Mr. Chung answered he is not clear (“不清楚”) about the application numbers.

17. Mr. Wu pointed out that Applications Nos. A/NE-LT/210 and 218 were made prior to 2002 to which Mr. Chung concurred, even though he said he did not know the exact year those applications were made.

18. As to Applications Nos. A/NE-LT/307, 308 and 352, they were approved subject to the condition under paragraph (i) of the Interim Criteria, i.e. the proposed developments should be able to be connected to existing or planned sewerage system (“the Requirement”). As the Requirement has not been complied with, the developments have been stalled.

19. It is noted that paragraph (i) was first added to the Interim Criteria on 23 August 2002 and prior to that, there was not the Requirement of connection to existing or planned public sewerage system.

20. Mr. Wu explained that the use of septic tank is restricted to sites within the “V” zone, with the septic tank at least 30m away from rivers and streams.

21. Mr. Wu went through his opening written submission and reminded the Appeal Board that the legislative intent and objective under TPO is to promote (促進) hygiene (衛生), safety and convenience (便利) of the society as a whole.

Evidence of Dr. Tang

22. Dr. Tang, Senior Town Planner of the Planning Department covering Shatin, Taipo and the Northern District gave evidence on behalf of the TPB. Dr. Tang's witness statement dated 10 January 2008, can be found at pages 0001 to 0016 of the Appeal Bundle). Dr. Tang explained the background, the Site, the difference between the appeal in question and the six similar applications

within the same “AGR” zone (3 were approved with conditions and 3 were rejected), the OZPs S/NE-MUP 10 and 11, the Planning Intention, the Guidelines and the reasons for not supporting the application, the subject of the appeal.

23. Dr. Tang confirmed that paragraph (i) of the Relevant Interim Criteria for Assessing Planning Application for NTEH/Small House Development in the NT, first promulgated on 23 August 2002, requires that “*proposed development, if located within water gathering ground, should be able to be connected to existing or planned sewerage system in the area except under very special circumstance*”.

Evidence of Mr. Wong

24. Mr. Wong also gave evidence for TPB. He stressed that 20% to 30% of Hong Kong’s drinking water comes from water gathering ground. Although the remaining 70 % to 80 % comes from China, it is essential for Hong Kong not to rely solely on China for water, and we should do our best to protect the gathering grounds.

25. Mr. Wong drew our attention to a paper “Impacts on Water Quality due to Small House Developments within Water Gathering Grounds” (“the Paper”).

26. Paragraph 2 of the Paper referred to Statutory Requirements on Protection of Water Quality in WGGs. It states:

“As defined in the Waterworks Ordinance (Cap 102), WGGs are any surface of land by which rain or other water is collected for or intended to be for use as a source of potable water. Rivers and streams within WGGs therefore require careful protection so as to ensure that they are suitable for their intended beneficial use as a source of water for potable supply. Pollution of these waters by domestic sewage carries obvious public health risks and is a matter of concern for both Government and the public at large.”

27. Paragraph 3 of the Paper states:

“Under the Water Pollution Control Ordinance (WPCO) (Cap 358), the Director of Environmental Protection has statutory obligations to seek to achieve and maintain the Water Quality Objectives (WQOs) established to protect the identified beneficial uses for streams and rivers. “ Abstraction for potable supply” is a recognized beneficial use for waters within WGGs and the associated WQOs were developed by EPD in consultation with Water Supplies Department (WSD) which has the overall responsibility for protecting the quality of potable water in Hong Kong. The WQOs so derived to protect this

beneficial use essentially requires that there should be no introduction of sewage bacteria (as measured by the indicator bacterium Escherichia coli) to these waters. Accordingly, new developments within the statutory WGGs should not be allowed to result in any bacteria pollution, thereby protecting the public from drinking water contaminated by sewage...”.

28. Paragraph 4 of the Paper dealt with Septic Tank Systems and it states:

“Village housing located in unsewered areas will normally make use of on-site septic tank and soakaway systems to treat and dispose of sewage effluent. As the effluent seeps through the surrounding soil, a process of natural purification occurs. This process includes the breakdown of the polluting materials by bacteria found naturally in the soil, and the eventual “die off” of the pathogens. Adequate purification, however, can only be achieved after the effluent has traveled a fairly long distance through the ground. Based on past experience, for a properly constructed and maintained septic tank system located in good ground conditions serving isolated small houses, a separation of 100 feet (30 metres) from rivers and streams will normally offer sufficient protection to the water quality in rivers and streams”.

29. Environmental concerns on septic tank systems in typical Hong Kong village setting was expressed. Paragraph 5 of the Paper, explains:

“In the past when small house developments were less intensive, adequate protection against surface water pollution in sparsely populated isolated areas might be achieved with the provision of septic tank systems for individual small houses. However, the increasing demand on village housing in the past few years from indigenous villagers has resulted in substantial increase in the number of new village houses... it is questionable as to whether the septic tank systems could remain as an effective means to treat sewage from village houses to such an extent that would cause adverse impact on the quality of water gathered in WGGs”.

30. The constraints to use septic tank systems were explained in paragraph 6 of the Paper:-

- “ - inadequate septic tank sizing or soakaway pit percolation area leading to frequent overflow;*
- soakaway systems located in unsuitable ground... prone to flooding causing overflow;*
- high intensity of small house developments with soakaway located close*

to one another, hence overloading soakaway capacity of the ground”.

31. Paragraph 8 of the Paper states:-

“Septic tank effluent carries high loads of nutrients and organic materials as well as microbiological pathogens. Overflows... causing aesthetic and hygienic concern ... also cause water pollution problem to streams and rivers. For these malfunctioning systems, which are not uncommon, the 100 feet (30 metres) requirement from streams and rivers can no longer offer the necessary protection to the water quality in streams and in WGGs, our valuable water resources. EPD and WSD are greatly concerned about the cumulative impacts arising from the widespread use of such systems in great intensity in WGGs”.

32. Evidence of water quality impacts due to small house development using Lam Tsuen as an example was quoted in paragraph 9 of the Paper:

“The main streams in the Lam Tsuen Valley show a progressive increase in bacterial concentration ... attributed to increasing sewage pollution from adjacent villages. The upper reaches of these waters carry E. coli concentrations of the order of a few hundred counts per 100ml, which is typical of unpolluted natural stream waters in Hong Kong. Monitoring datashow that as the streams flow past the village areas, E. coli levels increase between about 10 and 100 fold. Similarly, routine WSD monitoring data... indicated an increase in nutrient and bacteria loads in Lam Tsuen River from unsewered villages in the areas. Water samples collected... all show very high E. coli concentration, confirming ...heavily contaminated by sewage”.

33. Paragraph 10 of the Paper stated:

“Similar water pollution problems are also observed in other areas such as at Kau Lung Hang”.

34. Paragraph 11 of the Paper states:

“It is inevitable that if village housing and population continue to build up in new “V” zones prior to the provision of a proper sewerage system, the pollutant load carried by the streams which will ultimately enter the potable supply source will increase further... ”.

35. The paper concluded at Paragraph 12 stating:

“As a septic tank and soakaway system can only function properly under specific conditions but such conditions cannot be easily met in full in Hong Kong due to the topography, ground conditions, maintenance problems and high development intensity of our villages, septic tank and soakaway system is not considered to be an acceptable mean of dealing with the sewage from new “V” zones”.

The six similar applications

36. As to the six similar applications, namely, Applications No.s A/NE-LT/307, 308, 310, 347, 352 and 362, Mr. Wu brought to our attention that:-

- a. Applications Nos. A/NE-LT/307 and 308 were approved on 21 November 2003 with conditions by the RNTPC of the TPB;
- b. Application No. A/NE-LT/352 was approved with conditions on 13 February 2006 by the RNTPC.
- c. These applications were approved mainly for the reasons that they were able to comply with the Interim Criteria in that the application sites are located within the village environs (“VE”). There was a general shortage of land to meet the demand for Small House development in the “V” zone of the village and the proposed developments were able to be connected to the planned sewerage system.
- d. Application No. A/NE-LT/310 was rejected by the TPB on review on 6 August 2004 for reasons of not complying with the Interim Criteria: it was not able to be connected to existing or planned sewerage system in the area, insufficient information was produced to demonstrate that the proposed sewerage disposal/connection would be technically feasible and there would be no adverse impact to water quality in the WGG.
- e. Applications Nos. A/NE-LT/347 and 362 were rejected by the RNTPC on 9 December 2005 and 1 September 2006 respectively for reasons of not complying with the Interim Criteria in that the sites were not able to be connected to existing or planned sewerage system in the area and the proposed developments were not in line with the planning intention of the “AGR” zone.

Other Considerations

37. The Appeal Board also noted that:-

- a. The Director of Agriculture, Fisheries and Conservation (DAFC) advises that there are agricultural activities in the vicinity of the site. The application is unfavourable from the point of view of agricultural development as the site has high potential for rehabilitation.
- b. The application site falls within the WGG and will not be served by the planned sewerage system in the area. The Director of Environmental Protection (DEP) and the Director of Water Supplies (DWS) do not support the application.
- c. Approval condition on the provision of drainage facilities is required.
- d. Approval condition on landscaping is required.
- e. There is no change in planning circumstances since the rejection of the application.
- f. The Appellant could have but did not submit evidence nor put forth technical submission to demonstrate that the proposed development (located with the WGG) would not adversely impact on the water quality in the area.

Having heard the parties and submissions made by them, and fully considered all the evidence before us, the Appeal Board agrees with the TPB that:

- a. the proposed development would not be in line with the planning intention of the “AGR” zone;
- b. the proposed development did not comply with the Interim Criteria; and
- c. the proposed development is located within the water gathering grounds (“WGG”) and there is no existing nor planned public sewerage system to which the proposed development can be connected to.

For the above, the Appeal Board sees no reason to disturb the decision of the TPB and the Appellant’s appeal is dismissed.

Ms. Sylvia SIU Wing-yee
(Chairman)

Dr. LI Chi-kwong
(Member)

Mr. Eddie LEE Chung-keung
(Member)

Ms. Serena LAU Sze-wan
(Member)

Mr. Louis PONG Wai-yan
(Member)