

Appeal Tribunal
Buildings Ordinance (Chapter 123 of the Laws of Hong Kong)
Cases Nos. 1159-2008 and 1160-2008

- Matters : Appeal against Orders Nos. DH0073/NT/08/C and DH0074/NT/08/C by the Building Authority under section 27A of the Buildings Ordinance served on Hong Kong Gun Club, ordering it to appoint an authorized Person and a registered geotechnical engineer to co-ordinate the work required, and to carry out the approved remedial/preventive works in accordance with the proposals approved by the Building Authority on 19 December 2006 and 15 November 2007.
- Appellant : Hong Kong Gun Club (represented at the preliminary hearing by Mr. Denys Kwan and Mr. Mark Staples of C S Surveyors Limited and Mr. Clement Chow of the Appellant)
- Respondent : Building Authority (represented at the preliminary hearing by Ms Sally Ng, Senior Government Counsel)
- Date of Decision : 17 November 2010

Decision

1. On 17 November 2010, the Appeal Tribunal held a preliminary hearing under section 49 of the Buildings Ordinance to determine whether good cause has been shown for holding a full hearing for the appeals.

A preliminary point

2. Two Notices of Appeal both dated 24 September 2008 were filed which stated the Appellant as "Chow Tsun Man". By letter dated 9 November 2010 and written on what purported to be the notepaper of Hong Kong Gun Club, Mr. Chow Tsun Man notified this Tribunal that he as president of the Hong Kong Gun Club submitted the appeal in each case for and on behalf of the Hong Kong Gun Club. Mr. Clement Chow confirmed at the preliminary hearing that the General Committee, which is the governing body of Hong Kong Gun Club, had authorised these appeals.
3. The Respondent did not press the point.
4. This Tribunal accepts that these two appeals were made by Hong Kong Gun Club.

The Appeals

5. The Orders in question stated that the Building Authority was of the opinion that the formed or man-made land (Features Nos. 6SE-B/C9 and 6SE-B/F8) at Hong Kong Gun Club, Route Twisk, Tsuen Wan, New Territories on Tsuen Wan Town Lot No. 399 "is liable to become so dangerous that it will collapse or be likely to collapse, either totally or partially, and thereby cause or be likely to cause a risk of injury to persons or damage to property".

6. In February 2000, the consultant appointed by the Geotechnical Engineering Office, Civil Engineering Department ("GEO/CED"), submitted a Stage 2 Study Report S2R57/2000 on the subject features in which the subject features were assessed as Category 1 in Table 3 of the Works Bureau Technical Circular No. 13/99, as failure of Feature No. 6SE-B/C9 would affect the residential building that was in close proximity (i.e., a wooden hut), and failure of Feature No. 6SE-B/F8 would affect the commercial building that was in close proximity (i.e., the main office of the Appellant).
7. Upon the recommendation of the Chief Geotechnical Engineer/Works (CGE/W) of GEO/CED and pursuant to section 27A of the Buildings Ordinance, on 11 July 2003, the Building Authority served Dangerous Hillside Order Nos. DH0083/NT/03/C and DH0084/NT/03/C on the Appellant requiring it to appoint an authorized person to investigate, analyse and report on the subject features, and submit remedial/preventive works proposals for approval by the Building Authority.
8. The Appellant complied with the said orders and submitted slope remedial proposals which were approved by Buildings Department on 19 December 2006 and 15 November 2007. The Appellant did not however carry out the remedial works.
9. The Appellant's Statement of Particulars stated as the grounds of appeal that:
 - (a) As the Appellant has not carried out any works to the slopes in question, under the terms of the New Grant they would not be responsible for any slope treatment works, etc. that may be required. Reference was made specifically to clause 28(a) (Cutting away) of the New Grant.

When the Appellant took over the site from the Government, the subject slopes had already been formed and the site was taken over in its existing state. Clause 28(a) therefore implies that the Appellant is not responsible for the work required to the slopes and that the responsibility for slope maintenance therefore lies with the Government, as it was the Government that cut away the land and carried out the original slope treatment works.

The grant conditions require the grantee to maintain the slopes only when the grantee has carried out any works to them.

As the Appellant only occupies the property under a relatively short term lease (until June 2012), it was never intended to make the Appellant liable, particularly considering the long term nature of any works that are carried out. In addition, the main beneficiary will be the Government/Highways Department due to a public road, Route Twisk, being most affected.

- (b) Although there may be a risk of "collapse", due to the location of the slopes being situated within an unpopulated area which is used occasionally by a small number of people (and is also not used during extreme weather conditions, notably heavy rain, when a slope collapse would be expected to be more likely), a slope failure would not "...cause or ... be likely to cause, a risk of injury to any person or damage to any property..." This is particularly the case as regards the

slope contained wholly within the boundary of the Appellant (Feature No. 6SE-B/C9) but this applies to a lesser extent with regards to the slope adjacent to Route Twisk (Feature No. 6SE-B/F8) due to the fact that Route Twisk is a public highway.

- (c) The Appellant is a non-profit making organisation whose main objective is the promotion and conduct of shooting sports activities at the club grounds, where the Appellant holds a short term lease subject to a nominal land premium of HK\$1,000 and whereas the Appellant is a company limited by guarantee whose memorandum and articles of association provide that in the event of insolvency, each member's liability is limited to HK\$100 per member (approximately 450 members) and thus it is most unreasonable and ineffectual for the Government to expect the Appellant to have the financial resources or the responsibility to maintain/improve a slope on top of a major public road, Route Twisk.

The short term is a non-assignable concessionary lease (effectively having no commercial value as a result).

The Gun Club is located within an area comprising predominantly hilly terrain. As a result there are a large number of slopes, both formed and natural within the vicinity. If the Appellant were to be held responsible not just for the slopes subject to the Building Orders but for all of these slopes as well, then they would face an uncertain and ongoing onerous financial obligation for which the only currently available means for financing would be to obtain funds from its members. In the event that the Appellant is unable to raise the required funds for the works required under the existing Orders, let alone any future Orders that may be served, it will have no other choice but to close and discontinue its activities.

If the Appellant was forced to close down, then the unique services and facilities that it provides to Hong Kong would be lost. These include ammunition storage and training facilities for a variety of people, including but not just National Competitors representing Hong Kong in international competitions (25M, 50M and shotgun events) but also for security guards and a wild boar hunting team.

Finally, if the Appellant was forced to close down, the responsibility for the slopes would revert back to the Government anyway.

10. Section 27A(1) of the Buildings Ordinance provides:

"Where in the opinion of the Building Authority any natural, formed or man-made land, or any earth-retaining structure, has due to any cause been rendered so dangerous or liable to become so dangerous that it will collapse, or be likely to collapse, either totally or partially, and thereby will cause, or will be likely to cause, a risk of injury to any person or damage to any property, the Building Authority may by order in writing served on *the owner of the land or structure, or on the person who under the terms of a Government lease is under an obligation to maintain the land or structure*, declare the land or structure to be dangerous or liable to become dangerous." (Emphasis added)

Section 27A (2B) further provides that:

“On giving approval to proposals for work required to be submitted under subsection (2), the Building Authority may by order in writing served on *the owner or person referred to in subsection (1)* require the carrying out of such approved work on the land and structure to make the land and structure safe within such time as may be specified in the order.” (Emphasis added)

11. There is no dispute that the Appellant is the owner of the land in question.

The expression “owner” is defined in wide terms in section 2(1) of the Buildings Ordinance to include “any person holding premises direct from the Government whether under lease, licence or otherwise, any mortgagee in possession and any person receiving the rent of any premises, solely or with another, on his own behalf or that of any person, or who would receive the same if such premises were let to a tenant...”

The person who may be held responsible for the remedial works under section 27A is “the owner of the land” or “the person who under the terms of a Government lease is under an obligation to maintain the land”. There would seem to be no justification to cut down the width of the expression “owner” by reference to the latter phrase “the person who under the terms of a Government lease is under an obligation to maintain the land”.

In the circumstances, there would be no answer to the case that the Appellant as the owner of the land in question may, pursuant to section 27A of the Buildings Ordinance, be ordered by the Building Authority to carry out the approved work to make the land safe.

12. Clause (28)(a) of the New Grant provides:

“Where there is or has been any cutting away, removal or setting back of any land, or any building up or filling in or any slope treatment works of any kind whatsoever, whether with or without the prior written consent of the Director, either within the lot or on any Government land, which is or was done for the purpose of or in connection with the formation, levelling or development of the lot or any part thereof or any other works required to be done by the Grantee under these Conditions, or for any other purpose, the Grantee shall at his own expense carry out and construct such slope treatment works, retaining walls or other support, protection, drainage or ancillary or other works as shall or may then or at any time thereafter be necessary to protect and support such land within the lot and also any adjacent or adjoining Government or leased land and to obviate and prevent any falling away, landslip or subsidence occurring thereafter. The Grantee shall at all times during the term hereby granted maintain at his own expense the said land, slope treatment works, retaining walls or other support, protection, drainage or ancillary or other works in good and substantial repair and condition to the satisfaction of the Director.”

As the Appellant has noted, clause (22) of the New Grant provides that:

"The Grantee shall observe and comply with all Ordinances, regulations and bye-laws for the time being in force and applicable to the lot or the Grantee's user thereof."

This shows that the provisions of clause (28)(a) do not affect the Appellant's obligations under the Buildings Ordinance. Indeed, the Appellant would in any event have to comply with the relevant provisions of Buildings Ordinance. A provision of a Government lease would be no answer to non-compliance. A Government lease would not have the effect of overriding the Buildings Ordinance.

The Appellant would read the beginning part of clause (28)(a) to refer only to works done by the grantee. There does not seem to be a sound justification for this restricted reading. Even if the clause should be read as suggested by the Appellant, the clause provides only for the case where the grantee has carried out any works to the slopes. In light of section 27A of the Buildings Ordinance and the other provisions of the lease particularly clause (22), the clause should not be read to "imply" that there is no obligation for remedial works unless the grantee has carried out works to the slopes.

The clause provides no ground for the Appellant's expanded reading that the Government is responsible for slope maintenance because it had cut away the land and carried out the original slope treatment works.

13. That the slope (Feature No. 6SE-B/C9) is situated within an unpopulated area which is used occasionally by a small number of people would not support the conclusion that a slope failure would not "...cause or ... be likely to cause, a risk of injury to any person or damage to any property..." If the facility is used, as it is, there would be a likelihood of injury to people. There is some structure nearby and there would be a likelihood of damage to property. It needs to be noted that the question whether the slopes are likely to cause a risk of injury to any person or damage to any property is to be judged "in the opinion of the Building Authority".

As the Appellant has more or less noted, this argument does not really apply to the slope (Feature No. 6SE-B/F8) adjacent to Route Twisk which is a public highway.

14. The Appellant urged upon this Tribunal that it is a non-profit making organisation, and only occupies the property under a short term non-assignable concessionary lease (subject to a nominal land premium of HK\$1,000) which has no commercial value. The remedial works are however of a long term nature. The land in question lies in a hilly terrain with a large number of slopes. If the Appellant were to be held responsible, it could potentially be liable for all the slopes. The consequences are potentially disastrous for the Appellant and unreasonable. The future of the Appellant, which provides a valuable service to the community, could be at stake.

These are points which need to be taken into account, but ultimately we do not believe that they are sufficient for this Tribunal to override the Building Authority's decision to issue the Orders in question.

15. The Appellant urged upon this Tribunal that the case is complicated, possibly unique and a full hearing is required.

Having considered all the arguments, we do not think that the Appellant has shown good grounds for appeal, and we do not believe that, given the nature of the arguments, a full hearing would take the matter any further. The appeals are therefore dismissed.

16. As the appeals have not been successful, the Appellants should be ordered to pay costs. This Tribunal so orders.

[SIGNED]

Lam Wing-wo

Chairman, Appeal Tribunal

[SIGNED]

Chen Marvin

Member, Appeal Tribunal

[SIGNED]

Ng Wang-wai Charles

Member, Appeal Tribunal

[SIGNED]

Ng Kam-chun Stephen
M.H., J.P.

Member, Appeal Tribunal