

Town Planning Appeal No. 19 of 2005

Name of Appellant: Wong Ka Lun

Date of Hearing: 29-31 May and 23 June 2007

Date of Delivery of Decision: 28 March 2008

1. This appeal is concerned with a piece of land at DD122, Ping Shan, Yuen Long. The lots involved are Lots 120(part), 121, 122, 246RP(part), 247, 248A, 248B, 248RP(part), 249RP, 250RP and 254RP. During the course of hearing, the site involved in this appeal was conveniently referred to as Site 1.

2. The appellant, Wong Ka Lun, was not the owner of Site 1. He was simply a senior employee of the operator of the Long Tin Car Parking Management Ltd. who was the occupier of Site 1 at the time of the application to the Town Planning Board for planning permission which eventually led to this appeal. The Long Tin Car Parking Management Ltd. operated a car park at Site 1 for the parking of heavy lorries and also container vehicles. In the course of the hearing of this appeal, it became clear that the Long Tin Car Parking Management Ltd. had 2 shareholders viz. Mr. Tang Kin Sang and Mr.

Kwong Cheuk Wing, and Mr. Kwong Cheuk Wing was the appellant in Town Planning Appeal No. 20 of 2005 (the “2nd Appeal”) involving a site (hereinafter referred to as “Site 2”) immediately to the east and north-east of Site 1. Mr. Tang Kin Sang himself was the appellant in Town Planning Appeal No. 2 of 2006 (the “3rd Appeal”) and that appeal was concerned with a site (hereinafter referred to as “Site 3”) situated immediately to the south of Site 1 and Site 2. There were plainly many points in common amongst these 3 appeals and it would be unrealistic for this Appeal Board to disregard what was happening in the adjoining sites in considering the merits of this appeal. Having regard to the fact that the appellants would be represented by the same team of lawyers and would be calling the same experts for all 3 appeals, and the respondent would be doing likewise, the parties had sensibly agreed that this same Appeal Board should hear all 3 appeals and that the evidence for the 2nd and 3rd appeals would be heard together. It was also agreed that the evidence submitted in all 3 appeals may be used in any of the appeals. However, it is also common ground that this Appeal Board should consider and decide each appeal on its own merits.

3. On 18 January 2005, the appellant applied under section 16 of the Town Planning Ordinance for permission to use Site 1 as a temporary container vehicle and lorry park for a period of 3 years.

The application was rejected by the Rural and New Town Planning Committee (the “Committee”) of the Town Planning Board (“TPB”) on 18 March 2005. The reasons given for rejecting the application were:

- (a) The application was not in line with the TPB Guidelines No. 13C as the development was not compatible with the residential structures east and south of the Site and the residential developments in Tin Shui Wai in the northwest, there was insufficient information to demonstrate that the development would not have adverse drainage impacts and environmental nuisances on the surrounding areas, and there were adverse departmental comments and local objections to the application; and
- (b) Since the TPB Guidelines No. 13C was promulgated, no planning permission had been granted for container vehicle and lorry park within the “Undetermined” (“U”) zone. The approval of this planning application would set an undesirable precedent for similar applications in this area.

The cumulative effects of approving these similar applications would result in a degradation of the environment in this area.

4. On 19 April 2005, the appellant applied for a review of the Committee's decision and on 8 July 2005, the TPB likewise rejected the application. In confirming the decision of the Committee, the TPB gave in effect the same reasons for rejecting the application as those given by the Committee. The only difference is that the words "... insufficient information to demonstrate that the development would not have adverse drainage impacts and environmental nuisances on the surrounding areas" in reason (a) were replaced by the words "... insufficient information to demonstrate that the development would not have adverse environmental impacts on the surrounding areas". The omission of any reference to adverse impact on drainage and nuisances was apparently because by the time of the review, it was clear that the Drainage Services Department had indicated that it had no in principle objection to the drainage proposals put forward by the applicant.

5. On 16 September 2005, the appellant lodged an appeal against the decision of the TPB to this Appeal Board.

6. Although the appellant is neither the owner nor the occupier of Site 1, it appears that under the Town Planning Ordinance there is no requirement that any one making the application for planning permission must have some proprietary interest in the land concerned. Since the respondent has not taken any objection to the locus of the appellant to make the application, we do not think that we need to consider this locus point.

7. Site 1 is at the northwest corner of a large piece of land which is roughly semi-circular in shape. The cord of the semi-circle is on the northern side and is bounded by the West Rail. The arc of the semi circle is on the southern side and is bounded by Long Tin Road and Long Ping Road. For ease of reference, we shall refer to this piece of land as the Island. The land to the north Island and on the northern side of the West Rail was zoned for "Village Type Development" ("V") purposes on the west and for "Green Belt" ("GB") purposes on the east. To the south of the Island and across Long Tin Road, the land was zoned for "V" purposes. With the possible exception of 2 very small pockets of land within the Island, the whole Island was an "U" zone within the approved Ping Shan OZP No. S/YL-PS/11. There is a rather narrow road called Yung Yuen Road running roughly in the north south direction cutting the Island almost into halves. One of the small pockets of land is along this

Yung Yuen Road and this small plot of land apparently is affected by plan No. A/YL-PS/117. The other small pocket of land is along the West Rail at a location about one fifth of the length of the cord of the Island counting from the intersection point between the cord and the arc on the east. This plot of land is affected by plan No. A/DPA/YL-PS/46. We have no idea as to what is the permitted use of these 2 small plots. However, in view of their size relative to the Island, and also relative to Sites 1, 2 and 3, we do not consider that the permitted users of these 2 plots would have any impact on our decision. Sites 1, 2 and 3 are all on the west of Yung Yuen Road.

8. The land zoned for “U” purpose was described in paragraph 9.13.3 of the Explanatory Statement to OZP No. S/YL-PS/11 as follows:

“At present, the sites are mainly occupied by temporary structures, abandoned farmland, open storage of containers, workshops and village houses.”

Our site visit did confirm that the description remained to be generally accurate. In fact in relation to the Island, our observation was that while there were some village houses and temporary structures for residential use scattered within the Island, these residential structures

or houses only occupied a very small percentage of the area of the Island. It was certainly wrong to describe the Island as a rural area or agricultural area. To the north of Site 1 and across the West Rail, the land was used for the purposes of vehicle repairs and open storage notwithstanding that it was in a “V” zone. We understand that the vehicle repair use next to the junction between Long Tin Road and Ha Mei San Tsuen Road is an existing use and the open storage use would appear to be an unauthorized use.

9. In describing the planning intention of this “U” zone, paragraphs 9.13.1 and 9.13.2 of the Notes to the OZP No. S/YL-PS/11 said as follows:

“9.13.1 This zone denotes areas where detailed planning studies are required as these areas were affected by the WR alignment.

9.13.2 Within the “U” zone, any developments or redevelopments are required to prepare MLPs for approval of the Board to ensure that the future planning of the area would not be jeopardized, the environment would not be adversely affected and the infrastructure, GIC facilities and open spaces are adequately provided. The MLPs should take into account the railway alignment. The type of development should be

compatible with the surrounding area and the development intensity should take into account the rural characteristics of the area. Environmental Impact Assessment should be undertaken to address the possible environmental impact from the WR. Necessary mitigation measures should also be provided to minimize the adverse impact generated by and/or on the proposed development.”

10. Unlike other zones, the Notes to the OZP did not contain any schedule for the “U” zone. There is thus no specific use which could be said to be always permitted in the “U” zone save and except in paragraph (8) of the Notes there are the provisions for developments which are always permitted in any zoning except (a) where the uses or developments are specified in Column 2 of the Notes of individual zones; or (b) in relation to areas zoned “Conservation Area” where special provision is made in paragraph (9) of the Notes. In general terms, these general permitted uses or developments applicable also to “U” zones are in relation to repair and replacement of existing developments, the maintenance of roads and also the provisions, maintenance or repair of plant nursery, amenity planting etc.

11. In our views, it is rather clear that in considering the

present application and appeal, we have to bear particularly in mind that the permission granted should not jeopardize future planning, and that the environment would not be adversely affected, and that the type of development applied for should be compatible with the surrounding area. In this respect, having regard to the fact that the present application was only for the use of Site 1 as a container vehicle and lorry park for a period of 3 years only, it is unlikely that such application, when granted, would jeopardize the future planning of the land, unless there is evidence to suggest that once the Site is allowed to be used as a container vehicle and lorry park somehow the potential use of the Site in the future would be affected irrevocably. There is no such evidence in this case.

12. As we have pointed out in paragraph 8 above, the area surrounding Site 1 is mainly occupied by abandoned farm land, open storage spaces, workshops, garages with some residential structures only. We also take note that in many instances, the use of the surrounding land as vehicle parks, workshops and open storage spaces was not authorized in the sense that there was no planning permission for such uses and that enforcement actions were being taken to stop such unauthorized use of the land. However, our observation was that even assuming that enforcement actions were promptly taken, we do not see much prospect of this Site and the land surrounding it to be

converted into rural farm land.

13. In relation to Site 1 specifically, to the immediate east and south east of Site 1 are rather shabby residential structures. From our site inspection, it would appear that at least one of such structures was no longer occupied by any one. We also accept the evidence from the appellant that the other 2 structures were occupied by persons as licencees of the owner of the Site and the occupiers were happy with the Site being used for its present purpose, i.e. as a vehicle park because this would improve the security of the area surrounding the structures.

14. Along the western front of Site 1 is Long Tin Road which is a major road in the locality. Across Long Tin Road on the western side of Site 1 are some areas zoned as “V” zone but are in fact being used as open storage of recycling materials and also as parking spaces for container tractors, trailer, vehicles and lorries. To the north-west of Site 1, across the intersection between Long Tin Road and the West Rail, is Tin Tze Estate which is a multi-storey high rise residential development. In view of the fact that distance between the nearest points in a residential block of Tin Tze Estate and Site 1 is some 175 metres and they are separated by the busy Long Tin Road and the West Rail, we do not consider that the proposed development at Site 1

would have any real effect on the residents of Tin Tze Estate, apart from the fact that some residents of Tin Tze Estate who owned or operated lorries or container vehicles may like to have the convenience of having a container and lorry park at Site 1.

15. To the immediate north of Site 1 is the West Rail Emergency Access Point across the West Rail Viaduct. Further north across the Ha Mei San Tsuen Road are a vehicle repairing workshop, an area for open storage of recycling materials, a car washing workshop, a number of public vehicle parks and some vacant land. There is only one common vehicular access to Sites 1, 2 and 3 and this access is via Ha Mei San Tsuen Road which runs in a west-east direction parallel to the West Rail and starting from the junction with Tin Tze Road on its west. The road then turns into a south-north direction at a point approximately 100 metres from Tin Tze Road. The stretch of Ha Mei San Tsuen Road running in a west-east direction is a standard road, but after the road turns into a south-north direction, the road narrows somewhat and gradually becomes a country road when it reaches Ha Mei San Tsuen. To reach the 3 Sites, instead of turning into the south-north stretch of Ha Mei San Tsuen Road, one should continue going east for another 30 metres or so and then turns south underneath the West Rail Viaduct to reach the common entrance of the 3 Sites. Site 1 is on the western side of the

common entrance. Site 2 is on the eastern side of the common entrance and entry to Site 3 is via Site 2. There is a small hill covered by some reasonably heavy vegetation separating Sites 1 and 2, and also the south eastern tip of Site 1 and the western tip of Site 3.

16. In accordance with the usual practice, the appellant's application was circulated to various Government Departments for comments. The Lands Department had no in principle objection but noted that if planning approval was given, the appellant should be advised to apply for short term waiver to cover structures, if any, erected in Site 1. The Chief Engineer/Mainland North, Drainage Services Department had the opportunity of considering the appellant's revised drainage proposal and considered that the proposal to be satisfactory and he had no in principle objection to the development either. The Transport Department also had no in principle objection to the development and only advised that the land status, management and maintenance responsibility of the road leading to the Site should be checked and clarified. The Buildings Department also has no objection in principle to the application subject to the removal of unauthorized structures on the Site. The Fire Services Department also had no objection. The comment from the Chief Town Planner/Urban Design and Landscape, Planning Department related mainly to the requirement of the appellant to

implement his landscape and tree preservation proposals to his satisfaction.

17. The Departments having adverse comments were the Environmental Protection Department (EPD) and the Planning Department. The EPD was concerned that the proposed development would generate heavy vehicle traffic to the area and this would cause nuisance to the residents at the southern section of Ha Mei San Tsuen Road. Also, the EPD was concerned that the movement of the container vehicles on the Site would cause noise nuisance to the residents in close proximity to the Site.

18. The main grounds of objections from the Planning Department were that the development was not compatible with the residential structures located to the immediate east and south of the Site 1 and the residential developments in Tin Shui Wai in the northwest, and that the application was not in line with the TPB Guidelines No. 13C because the Site fell within Category 2 areas and the use was incompatible with the adjacent residential structures and that there was adverse departmental comments as well as local objections.

19. Indeed, there were objections from the local residents. The Village Representative of Ha Mei San Tsuen had written to object

to the application on the grounds of noise and dust pollution generated by the development and also that vehicles were parked on the footpath affecting access of the local villagers. There was also concern raised in relation to the alleged adverse effect on the drainage of the village. On top of that, two objection letters were received by the Yuen Long District Officer from 2 Yuen Long District Councilors. The grounds of their objections were very wide ranging. They said that the development was not in line with the long term planning intention of the “U” zone and was not in line with the TPB Guidelines for open storage and port back-up uses. They also said that the development was not compatible with the environment and surrounding land use and would generate adverse drainage, visual and environmental impacts on the surrounding areas. In this respect, the surrounding areas spoken of by them extended not just to the area immediately abutting Site 1 or the combined Sites 1, 2 and 3 or the Island but would include the whole of the Tin Shui Wai new town. They also suggested that there was no shortage of supply of open storage site in Yuen Long District and thus implicitly suggested that there was no real demand to use the Site for the purposes applied for.

20. On the other hand, there was also placed before us a letter from the Chairman of the Ping Shan District Rural Committee in support of the application. The main ground for supporting was that

from his observation, since the car parking operation at DD122 Ping Shan, Yuen Long, there was some gradual improvement of area and also there was the demand for port back-up uses in the area. In addition, there were also the letters from 2 other District Councilors from the Yuen Long District Council supporting the application on similar grounds.

21. The case of the appellant was not that the proposed use of the land would not cause any pollution at all, but rather his case was that such pollution caused by the proposed use could be contained and minimized and the disturbance to the neighbours could be reduced to a reasonably acceptable level. To support their application and appeal, the appellant had commissioned an expert consultancy firm to prepare a report advising on the measures to be taken for their operation. The appellant has also commissioned a report from an environmental expert on the noise pollution aspects of the development. The appellant was of course prepared to implement the suggestion of the experts and was agreeable that should any planning permission be granted, such permission be conditional upon the implementation of the suggestions.

22. Having considered all the evidence adduced before us including what we observed during our site visit, we do not consider

that there was any serious risk of any adverse effect on the drainage of Ha Mei San Tsuen or the surrounding areas at all if the drainage proposals of the appellant were implemented. Further, we do not consider that the proposed use of Site 1 would cause any real street or path parking problem to the villagers of Ha Mei San Tsuen. On the contrary, we take the view that most of the users of the parking facilities at Site 1 are residents in the vicinity and as such the provision of proper parking facilities to them at the Site would be likely to reduce the street parking problem.

23. Insofar as the effect of the proposed development to Tin Shui Wai is concerned, we consider that it is very unlikely that the lorry or container park in the Site would cause any real traffic problem to the Tin Shui Wai area. Furthermore, having regard to the fact that Site 1 is separated from Tin Tze Estate, the closest housing estate in Tin Shui Wai, by the wide and major junction between Long Tin Road and the West Rail, we do not consider that any activities within Site 1 would cause any real nuisance to the Tin Shui Wai.

24. As to the main objection raised by the EPD in relation to noise pollution, we are satisfied that insofar as the few structures immediately to the east and south east of Site 1 is concerned, having heard of the evidence, we considered that the noise generated from the

activities on Site 1 could be satisfactorily contained if the measures, and in particular the erection of the fence walls, recommended by the appellant's experts were implemented. In this respect, we note that the number of such structures involved is very small. They were in fact very dilapidated temporary structures and the number of people occupying living in those structures was very few. We were told that, in fact, the occupiers were mere licensees of the owners of the Site. The occupiers are happy with the development and indeed they support the appellant's application.

25. However, there still remains the question of the off site noise pollution to other residents in the vicinity. It is accepted by the appellant that the fence walls would not be able to reduce the noise level generated by vehicles using the east-west stretch of Ha Mei San Tsuen Road for access to Site 1. In this respect, the respondent also emphasized that in view of the close proximity of Sites 1, 2 and 3 and the close relationship between the management of the 3 sites, it was likely that vehicles intending to use Site 1 may be diverted to the other 2 Sites thus increasing the capacity of Site 1 and the volume of the traffic using the west-east stretch of Ha Mei San Tsuen Road. The respondent submitted that the noise generated as this stretch of Ha Mei San Tsuen Road would create unacceptable noise pollution to some of the residents living on the southern part of the north-south stretch of

Ha Mei San Tsuen.

26. The appellant's answer to the respondent's point was that according to the Code of Practice on Handling Environmental Aspects of Temporary Uses & Open Storage Sites, the minimum separation between the road and the residential houses required was 50 metres. It was contended that the distance between the nearest part of the nearest house under construction and the middle of the nearest part of the east-west stretch of Ha Mei San Tsuen Road was 51.09 metres. So it was contended that the relevant criterion was met and there was no ground for complaint. The respondent responded by contending that when the Code spoken of 50 metres, it meant 50 metres measured from the house to the nearest part of the road, and having regard to the width of the traffic lane on that part of Ha Mei San Tsuen Road, the distance was something less than 50 metres. Moreover, the respondent also pointed out that the so called nearest house was only the nearest house at the time when the EPD people went to inspect the Site sometime ago and that there were and could be some further houses being erected to the south of this house and the distance between them and the east-west stretch of Ha Mei San Tsuen Road would be even shorter.

27. We do not consider that we have to resolve the

differences between the experts' views from both sides as to whether the correct measurement should be from the middle of the road or from the nearest part of the road. We do not think that a distance of just 1 or 2 metres in this context should make all the difference. The Code is meant to be for guidance and is not meant to be read as a statute. Furthermore, the noise generated by the moving traffic would depend much on the speed of the vehicles as well as the number of vehicles passing at a particular time. In this respect, we note that the relevant stretch of Ha Mei San Tsuen Road was close to the entrance of the Sites and was very short. The road was just a two-way traffic road with one traffic lane in each direction. Thus, we do not think that the vehicles would be traveling at great speed along this stretch of the road and given the fact that vehicles parked at Site 1 and the other 2 sites are expected to be mainly heavy and container lorries which would be leaving in the morning and returning in the evening, we do not anticipate that at any given point of time in the day there would be really heavy traffic on both directions along this stretch of the road. Thus, on the whole, we consider that the distance was sufficiently great that the nuisance level to the nearest house was such that we should not reject on this ground, if the application is otherwise meritorious enough.

28. We do not think that we could place much regard to the

possibility of some future development to the south of this house. This is because the application was only for permission for 3 years and in any event whoever residing in these houses under construction or yet to be constructed would be well aware of the environment before moving into them. There is no requirement that any residential houses must be separated from any road with lorry traffic by at least 50 metres. We think we can take “judicial notice” that there are many residential houses abutting busy roads. In any event, the noise created along Ha Mei San Tsuen Road and its impact on the villagers of Ha Mei San Tsuen did not appear to be the particular concern of the 2 District Councilors who raised objections to the proposed development.

29. One area of concern is whether the appellant's could be trusted to implement the measures suggested by his experts to minimize the pollutions brought about by the development. The respondent has put before us the history of the applications relating to the 3 Sites and our attention had been drawn to the fact that in the past there were many occasions where the planning permissions granted had been revoked because of the failure in complying with the conditions imposed for the grant of the planning permission. In answer, the appellant submitted that in fact there was a change in the management responsible for the Sites and that the non-compliance

with the conditions in the past was due mainly to ignorance. No doubt the rather relaxed attitude of the Planning Department in enforcing the law in the past must also have partially contributed to the attitude of the occupiers of the sites in taking chances that the Planning Department would not strictly enforce the conditions. This is no longer the position now. The Planning Department has demonstrated a much more determined attitude in taking enforcement action. On this issue, we do not think that it is necessary for us to set out in details organization structures of the operators of Sites 1, 2 and 3 and how they differed from the operators of sites at similar locations in the past. We are satisfied that although there were some degrees of overlapping of personalities involved, we could not come to a conclusion at this stage that the new management would be likely to behave in the same manner as those in the past. Now the attitude of the Planning Department over enforcement action is well known. We are prepared to allow the operators a chance (and possibly the final chance) of complying with planning conditions. If they should fail to do so, of course any planning permission would be automatically revoked or terminated.

30. Another area which had been much debated during the hearing was the issue on the financial ability of the appellant to implement the measures suggested by the appellant's experts. There

was detailed evidence adduced before us on the probable costs for the implementation of the various measures, such as the costs for the erection of the fence walls, the costs of for the planting of trees and the paving of the ground etc. We had also had evidence on the financial ability of the proprietor of Site 1. The relevance of this kind of evidence is that if we are satisfied that the financial position of the appellant or the proposed operators at the Site is such that the conditions we are going to impose for the grant of the planning permission would not be complied with, then we would be inclined to refuse planning permission because in such circumstances, to grant permission subject to the conditions would just amount to giving the operators time to continue with the unauthorized operation for the period intended for the implementation of the conditions. If, however, we are not satisfied that the conditions would not be complied with, then it appears to us that provided that the application is meritorious enough, we should not withhold the grant of planning permission simply because we may have certain doubts as to whether the appellant or the current operators at the Site may not be able to fully comply with the conditions we see fit to impose. In such circumstances, we are inclined to grant the planning permission subject to the conditions and, of course, if it transpires that the conditions are not complied with whether for financial reasons or otherwise, then the planning permission will be revoked. In this

respect, we have to take into account that the planning permission will not be attached to the person and so long as the conditions for the grant of the permission are complied with, it does not matter who would be the proprietor of the Site and who would be paying the costs for complying with the conditions.

31. In relation to the paving of the ground, although it would of course be better if the whole Site 1 is paved with cement concrete, having regard to the fact that the Site is relatively isolated, we are satisfied with the appellant's paving proposal that the ground of the Site be covered with asphalt with regular maintenance but with the area of at least 5 metres from the Site frontage next to the access gate to the Site be paved with hard concrete surface.

32. On the whole, we are satisfied that the current proprietor of Site 1 would have the financial ability to implement the various measures to minimize the adverse effect of the proposed development suggested by the appellant's experts.

33. In relation to the issue on the application TPB Guidelines No. 13C, we think that we should approach the issue with reference to the current edition of the guidelines, i.e. TPB Guidelines No. 13D. In this respect, we think that the current application should be

classified as an application for port back-up uses under that guidelines. The whole of the Island (and thus including Site 1) falls within Category 2 area. The relevant provision in TPB Guidelines No.13D provides:

“2.3 Category 2 areas are areas mostly without clear planning intention or fixed development programme, to be affected by major upcoming infrastructural projects, within or close to clusters of open storage or port back-up sites which are regarded as “existing uses” under the Town Planning Ordinance and/or subject of previous approvals, and the areas not subject to high flooding risk. Technical assessments, where appropriate, should be submitted to demonstrate that the proposed uses would not have adverse drainage, traffic, visual, landscaping and environmental impacts on the surrounding areas. Subject to no adverse departmental comments and local objections, or the concerns of the departments and local residents can be addressed through the implementation of approval conditions, planning permission could be granted on a temporary basis up to a maximum period of 3 years.”

34. As noted above, the grounds for refusing the application given by the TPB was that the development was not in line with TPB

Guidelines No. 13C in that it was not compatible with the residential structures at the east and south of Site 1 and the residential development in Tin Shui Wai in the northwest. For reason already given, we do not think that the development in Tin Shui Wai in the north-west is of much relevance to our consideration. As to the few structures to the immediate east and south of the Site 1, we consider that their presence may well be viewed as being de minimus. If planning permission is to be withheld on this ground, the reality of the situation is that the occupiers would simply be evicted by the owners of the land and the structures would be demolished. Instead of protecting the occupiers, this would simply cause greater hardship to them. After all, they supported the application. Hence, in the particular circumstances of this case, we considered that the concern could be properly met with the imposition of conditions.

35. The TPB however further considered that there was insufficient information to demonstrate that the development would not have adverse environmental impacts on the surrounding areas and that there were adverse departmental comments and local objections on the application. These are of course matters raised in paragraph 2.3 of TPB Guidelines No. 13D.

36. In relation to whether the appellant had submitted

sufficient information to demonstrate that the proposed development would not have adverse drainage, traffic, visual, landscaping and environmental impacts on the surrounding areas as required by paragraph 2.3 of the Guidelines, the respondent took the point that, in fact, the proprietors of the Sites had tried to evade the requirements by splitting up their applications into 3 applications so that the total area involved in respect of each of the application was below 50,000 square metres. It was contended that in fact the proprietors of the operation at Sites 1, 2 and 3 had common shareholders and directors, even though the applicant for planning permission for each of the Sites was a different person. It was submitted that if all the 3 Sites were made the subject matter of one single application for planning permission, then since the total area involved would be over 50,000 square metres, under the current practice, the applicant would have to submit a detailed environmental assessment report for the approval of the EPD.

37. The appellant's response was that there was no conscious attempt to avoid the submission of the environmental assessment report. The fact that there were 3 applications was because each of the 3 Sites was intended to be operated independently. In any case, the planning permission applied for in respect of each of the Sites was somewhat different. As it turns out that each of the applications did

not involve an area in excess of 50,000 square metres, the applicants had not prepared the environmental assessment report. However, in respect of each of the applications, the applicant concerned had appointed experts to make submissions on the measures to be implemented to mitigate the environmental impacts caused by the proposed development and to demonstrate that with the implementation of the measures, the proposed development would not have adverse drainage, traffic, visual, landscaping and environmental impacts on the surrounding areas.

38. As it is, we do not think that there was any breach of the requirements for the submission of the environmental assessment report. Without deciding whether there was any breach of the spirit of the requirement for the submission of the environmental assessment report, we are of the view that the respondent's objection is of substance only if it could be shown that had the applicants been required to submit such environmental assessment report, the applicants would not be able to meet the criteria required by the EPD. As it is in each of the applications the applicant concerned had submitted expert reports on the measures to be implemented and in each case the EPD had made comments on the suggested measures. There was never any suggestion that had a full environmental assessment report been required, the applicant would not be able to

submit one with suggestions complying with the full environmental requirements.

39. We already considered the departmental objections and also the objections from the local residents. On the whole, we consider that their concerns and objections could reasonably be met by the implementation of the measures suggested by the appellant's experts.

40. There is the further question of whether, in fact, there is any need or demands for lorry or container vehicle parks in the area. The respondent submitted that there should be sufficient spaces allocated for open storage and port back-up uses in the Yuen Long and Ha Chuen area and these Category 1 areas have not yet been exhausted. There is however no evidence on the exact locations of available areas and their accessibility. Furthermore, even though the areas were zoned as Category 1 areas, it does not mean that their owners are prepared to put them up for open storage or port back-up use. In our view, the fact that the Site and a sizeable part of the Island and its surrounding areas are now being used for lorry and container vehicles parking and there appears to be no shortage of customers patronizing such vehicle parks adequately demonstrates that there is a shortage of supply of such parking spaces in the area. To

say the least, there is no shortage in demand. If planning permission is refused, this would only lead to great inconvenience of the users of these vehicle parks and would also aggravate the problem of street parking of lorries or container vehicles.

41. The Appeal Board deliberated on the 3 Appeals on 22 October 2007 and for the appeal in respect of Site 1, for reasons set out above, 4 members of this Appeal Board are prepared to grant planning permission subject to the imposition of suitable conditions. The minority however considers that (1) one should further consider the general Government policy of confining open storage and port back-up uses and not to give any new permission for open storage and port back-up uses in areas outside Category 1 areas; and (2) the grant of planning permission, albeit for only a temporary period of 3 years, would set an undesirable precedent for similar application in this area. The majority do not agree that there is any such Government policy and even if there is, the same is not binding on us and in any event the proposed use is not against paragraph 2.3 of TPB Guidelines No. 13D. As to the issue of precedent, the majority consider that each application should be viewed on its own merits. Nor do the majority see much relevance of TPB Guidelines No. 13D (or its predecessor version) in providing a dividing line for the grant of temporary permission for port back-up uses in “U” zone area. While it may

well be true that as stated by the TPB, since the promulgation of TPB Guidelines No. 13C, no planning permission had been granted for container vehicle and lorry parking within the “U” zone, it is plainly not the purpose of the Guidelines to prohibit or discourage the grant of planning permission for port back-up uses in any particular kinds of zones. Under the Guidelines, land is divided into 4 categories and these categories do not have any direct bearing with the zoning under the OZP. In any event, it is clearly stated in the Guidelines that:

“The guidelines are intended for general reference only. The decision to approve or reject an application rests entirely with the Town Planning Board and will be based on individual and other specific considerations of each case”.

42. To conclude, by a majority of 4 to 1 we allow the appeal in respect of Site 1 and would be prepared to grant planning permission for Site 1 to be used for the purpose of parking of lorry and container vehicle for a period of 3 years subject to the following conditions:

- (1) No vehicle repair activity is allowed at the Site.
- (2) All existing trees at the Site are to be preserved.

- (3) There shall be erected on the Site a fence 2.5 metres high corrugated iron fence wall painted in dark green as shown on page 1120 of the Respondent's Bundle placed before us. The fence wall shall be properly maintained throughout the period of the planning permission.
- (4) There shall be planted at the Site trees in accordance the proposals set out in paragraph 3.4.2 on page 1048 of the Respondent's Bundle placed before us. The trees shall be properly maintained to the satisfaction of the Planning Department or the TPB. Any variation to the proposals shall be subject to the consent of the Planning Department or the TPB.
- (5) There shall be a submission of a Drainage Impact Assessment (DIA) within 6 months from the date of the delivery of this Decision to the satisfaction of the Director of Drainage Services or of the TPB. The period of 6 months may be extended by the Director of Drainage Services or the TPB.

- (6) In relation to (5) above, there shall be the implementation of the flood mitigation measures as proposed in the DIA and other storm water drainage facilities within 9 months from the date of the delivery of this Decision to the satisfaction of the Director of Drainage Services of the TPB. The period of 9 months may be extended by the Director of Drainage Services or the TPB.
- (7) The provision of a 4.5Kg CO₂ /3Kg dry powder fire extinguisher on the Site within 6 months from the date of the delivery of this Decision.
- (8) The strip of land in the Site extending up to at least 5 metres from that part of the boundary of the Site not lined with tree plantation shall be paved with cement concrete. The rest of the Site shall be properly paved with asphalt or alternative cement concrete or such other materials as may be approved by the Director of Environmental Protection or the TPB. The paving of the Site shall be properly maintained throughout the period

of planning permission.

- (9) If any of the conditions set out above are not complied with during the term of the planning permission given herein, the planning permission shall cease to have effect and shall be revoked immediately without further notice.

43. We note that there are some structures in the Site which may be required for the purpose of the operation of the vehicle parking business. These structures may require the permission of the Lands Department or the Buildings Department. We do not propose to impose any condition regarding these structures. We would however point out that the planning permission given herein does not absolve the owner of the Site from complying with the conditions of the Government lease or from complying with the requirements of the Buildings Ordinance.

Edward Chan (Chairman)	Au Chi Yuen (Member)	Richard Ho (Member)	Helen Kwan Po-jen (Member)	Kevin Law Chi-shing (Member)
---------------------------	-------------------------	------------------------	-------------------------------	---------------------------------