

Town Planning Appeal No. 20 of 2005

Name of Appellant: Kwong Cheuk Wing

Date of Hearing: 28 June, 9 July and 22 October 2007

Date of Delivery of Decision: 28 March 2008

1. This appeal is referred to as the 2nd Appeal in our Decision in Town Planning Appeal No. 19 of 2005 (the 1st Appeal), and our Decision herein should be read in conjunction with our Decision in the 1st Appeal. In this Decision, we will adopt the same short hand terminology as defined in our decision in the 1st Appeal.

2. The land involved in this 2nd Appeal is hereinafter referred to as Site 2. Site 2 consists of Lots 105RP(part), 106RP(part), 107, 108(part), 109, 110(part), 111(part), 112-116, 118, 119(part), 120(part), 124(part), 127, 128 and 158(part) and some adjoining Government land, all in DD 122, Ping Shan, Yuen Long. The total area of Site 2 is about 24,000 square metres out of which about 500 square metres are Government land.

3. On 18 January 2005, the appellant, Kwong Cheuk Wing

applied for planning permission under section 16 of the Town Planning Ordinance to use Site 2 as a container vehicle parking and ancillary repairing activities for a period of 3 years. In fact at the time of the application, it would appear that this Site 2 was being used for such purposes already without planning permission.

4. The application was rejected by the Rural and New Town Planning Committee (“the Committee”) on 18 March 2005 and the appellant was informed of the decision on 15 April 2005. The grounds for rejecting the application given by the Committee were:

(a) The application was not in line with the TPB Guidelines No. 13C as the development was not compatible with the surrounding areas which were characterized by residential structures. 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 were

promulgated, no planning permission had been granted for container vehicle parking within the “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.

5. On 4 May 2005, the appellant applied to the TPB for a review of the decision of the Committee. On 22 July 2005, the TPB upheld the decision of the Committee. The grounds for rejecting the application were similar to those given by the Committee. However since by then, having regard to the drainage proposals made by the appellant, the Drainage Services Department had indicated that they had no in principle objection to the drainage proposals. The grounds for rejecting the application were slightly modified so as to leave out any reference to drainage impact.

6. On 5 August 2005, the appellant was informed of the decision of the TPB and on 30 September 2005, the appellant filed a notice of appeal against the decision of the TPB.

7. It is pertinent to note that on 9 July 2007 during the hearing

before us, the appellant's counsel informed us that the appellant was no longer pursuing any application for permission to carry out repairing activities in Site 2, and that the application was confined to permission for using the Site as lorries and container vehicles parking and for the storage of containers on trailer racks only. However, the appellant would like to have a reasonable period of time to evict those occupiers carrying on the non-complying activities.

8. Site 2 falls within the Ping Shan OZP No. S/YL-PS/11 and is within the "U" zone on that plan. We have already discussed the characteristics of the "U" zone on this OZP in our Decision in the 1st Appeal and the same is not repeated here. Site 2 is also within the Island and we have also made observation on the general description of the activities on the Island and also its immediate vicinity in our decision in the 1st Appeal. In term of categories of land use under TPB Guidelines No. 13D, Site 2 is within Category 2. Indeed, the whole of the Island is within Category 2.

9. With specific reference to Site 2, the land to its north across the West Rail is zoned for "V" purposes. Most of this land is now vacant and there are only a few residential structures to the north of Site 2 on the opposite side of the West Rail. Most of these structures are to the north of a small village path running roughly in parallel to the

West Rail and are over 50 meters away from Site 2. There is however one small structure on the south side of the path and the nearest part of this structure is only about 35 metres from Site 2. This small structure is nevertheless still separated from Site 2 by the West Rail. From Plan AP-2 at page 23 of the Respondent's Bundle, it also appears that all these structures were only erected sometime after 17 August 1990.

10. To the east of Site 2 and immediately abutting the Site is some vacant land and structure. Further away from these vacant structures is another open storage yard for the storage of construction materials. To the south east and south of Site 2 is another open storage for construction materials. It would appear that the open storage use of these 2 pieces of land is not an authorized or existing use under the Town Planning Ordinance.

11. Site 2 shares with Site 1 a common access road from the east-west section of Ha Mei San Tsuen Road. It is separated from Site 1 on its western and south western side by a small hill and some vacant land. To the south of Site 2 is Site 3. Vehicular access to Site 3 would have to go through Site 2.

12. Within Site 2, there is a vehicle repair yard at its north western corner just to the north of the entrance of Site 2. Along the

western and south western boundary of Site 2 next to the vacant land and the small hill is a row of structures. These structures are being used for vehicle repairing. There is also a further vehicle repairing shed somewhat in the middle of the Site but slightly to the eastern side. At the south eastern corner of the Site is a structure currently being used for miscellaneous storage purpose. There are also some containers used as offices at the south of the Site close to its boundary with Site 3. The rest of the area of the Site is being used for the parking of lorries and container vehicles.

13. Our impression during the visit to the Site was that in general Site 2 was less well maintained than Site 1. Like Site 1, the ground of Site 2 was paved with asphalt. On the day of our visit, we saw many holes on the ground and the ground was not very leveled. However, we have to bear in mind that there was a lot of rain on the days before our visit.

14. In relation to the planning consideration for “U” zone, we wish to repeat what we said on this subject in our Decision in the 1st Appeal.

15. According to paragraph 5.2 of the summary prepared by the Planning Department for the consideration of the TPB, there were 2

objections to the application received from 2 members of the Yuen Long District Council. Their objection was mainly on the grounds that the development was not compatible with the surrounding land uses and will generate adverse traffic, drainage, visual and environmental impacts, in particular noise nuisance from the container vehicles to the sensitive receivers. We do not know if these 2 District Council members are the same members opposing the application in respect of Site 1. Insofar as the objection related to the drainage impact, we note that at least the Drainage Services Department had indicated that the revised drainage proposal of the appellant was considered satisfactory on the understanding that there would be no hindrance to the collection of overland flow caused by boundary walls.

16. On the other hand, there was another member of the Yuen Long District Council supporting the application. He was the same District Council member supporting the 1st application and his grounds for supporting this application were similar to those he gave for supporting the 1st application.

17. Apart from the 2 members of the District Council, according to the summary prepared by the Planning Department, there was also another objection from the villagers of Ha Mei San Tsuen. Their grounds of objection were that the noise and dust generated from

the development would adversely affect the environment and would also affect the access of the villagers. They also said that the development would bring about the parking of vehicles on the front paths. On the other hand, the Village Representative of Ha Mei San Tsuen had written to the TPB on 18 February 2005 to the effect that after consulting the villagers, he considered that the application should be supported because it would bring about an improvement of the environment. His reasons were that Site 2 was made up with lands under different ownerships, and if Site 2 could not be used for the purposes applied for, the Site would be left vacant and unattended as it would be extremely unlikely that there would be any permanent development of the whole site. The logic of his submission was that it was much preferable to have a regulated developed site than to have unattended vacant land with all its environmental and hygiene problems.

18. Apart from the Village Representative of Ha Mei San Tsuen, the Village Representative of the nearby Hang Tau Tsuen also supported the application. The grounds for the support were mainly that the operation at Site 2 was an improvement to the environment and also that the Site was suitable for such purpose and not suitable for residential use. There was also a similar supporting letter from the Village Representative of Sheung Cheung Wei, another nearby village

and also from the Chairman of the Ping Shan District Rural Committee.

19. On the question of the demand of spaces for lorries and container vehicles parking in the locality, for reasons already set out in our Decision in the 1st appeal, we are of the view that there is a reasonable demand for this kind of use in this location.

20. Insofar as the views of the relevant Government Departments are concerned, the Environmental Protection Department (EPD) had expressed concern about the effect of the development on the dwellings located in the “V” zone to the north of the Site and also to the south east of the Site. Concern was also raised in relation to the noise created by the traffic along the east-west stretch of Ha Mei San Tsuen Road. Furthermore, the paint spraying activities and oil changes activities etc. associated with car repairing would also cause pollution to the soil of the Site.

21. The Planning Department also objected to the application on grounds similar to those in relation to the Site 1 viz. (a) that the proposed use was not compatible with the surrounding land uses which the Department claimed were mostly characterized by residential structures and the residential developments in Tin Shui Wai in the northwest; and (b) the application was not in line with TPB Guidelines

No.13C. In particular, our attention was drawn to the fact that in relation to planning permissions granted previously to sites at or around the location of Sites 1, 2 and 3, there was a history that the permissions were revoked because of the non-compliance of the conditions imposed for the grant of the planning permissions. In the hearing, there was also concern raised in relation to the financial ability of the appellant to comply with the conditions imposed in relation to the implementation of the measures designed to mitigation the nuisance created by use of Site 2 for vehicles parking purpose.

22. We have already dealt with similar points of objections in our Decision in the 1st Appeal and apart from the possible pollution caused by the car repair activities which we will discuss below, we do not see any reason to depart from our observation and reasons given in the 1st Appeal. For the avoidance of doubt, we would expressly adopt the views we have expressed in relation to those points in our Decision in the 1st Appeal. With reference to the financial ability of the appellant to implement the mitigation measures, we are satisfied that on the totality of the evidence that the appellant should have the ability to comply with the conditions. The compliance is a matter of will rather than financial ability. In any event, even if the appellant personally does not have the financial ability to meet all the expenses required, there is nothing to prevent other persons to operate the Site while

complying with the conditions for the grant of planning permission.

23. We like to point out that factually we do not agree with the observation that the surrounding areas to Sites 1, 2 and 3 were characterized with residential structures. Looking at Sites 1, 2 and 3 as a whole and Site 2 in particular, we would observe that it was full of vehicles parking and open storage uses. While there are some residential structures on these lands, the total area occupied by these structures is relatively small and many of the structures are empty. Even if we were to view the surrounding areas by ignoring all unauthorized use, still we could not envisage that those pieces of land with unauthorized use would have been used for residential purposes. There are a number of hurdles that one would have to cross before the land could be used for residential houses, e.g. the lease restrictions and also the planning restrictions for the erection of houses in “U” or “V” zones. Furthermore, although the erection of small village house (Ting house) is always permitted in “V” zone, it is notorious that the Government is very slow in processing the application for permission for this type of houses.

24. Also we are of the view that little, if any, regard could be made from the fact that there is a big residential development in Tin Shui Wai. As we have pointed out in our Decision in the 1st Appeal, the

nearest estate in Tin Shui Wai is the Tin Tze Estate and even the Tin Tze Estate is separated from Site 1 by the intersection of 2 very major roads.

25. As far as the noise pollution aspect is concerned, we consider that the noise generated within the Site could be mitigated by the proposed fence walls. In this respect, we note that the structures abutting the south-eastern boundary of Site 2 are vacant and there was no suggestion that they would be occupied within the foreseeable future. Many of them appeared to us to be rather dilapidated any how. Those structures to the north of Site 2 are too far away to be unreasonably affected by the noise of the activities within Site 2. In relation to the noise outside Site 2 caused by the traffic attracted by the vehicle parking activities in Site 2, for the same reasons as those we had given in the 1st Appeal, we are not convinced that we should refuse the application on this ground. In this respect, we note that the data collected by the appellant's expert in relation to the noise pollution aspects were based on all the traffic movements on 7 September 2005 and not specifically directed to traffic from any particular site.

26. In relation to the pollution caused by the car repairing activities, we accept that those activities may have some more permanent effect on the soil and the mitigation measures proposed by the appellant may not be all that effective to prevent such pollution. For

this reason, we are not prepared to grant any planning permission for any vehicle repair activities. In any event, as we have noted before, the appellant had indicated through counsel that it was no longer pursuing any application for such permission.

27. On the whole, we consider that the departmental objections and the objections from local residents could be reasonably alleviated by the implementation of the measures suggested by the appellant's experts.

28. The Appeal Board deliberated on the 3 Appeals on 22 October 2007. For reasons set out in this Decision and our Decision in the 1st Appeal where applicable, 4 members of this Appeal Board are prepared to grant planning permission for Site 2 to be used for the parking of lorries and container vehicles and also containers on container trailer racks 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 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 applications 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 park 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 town planning 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”.

29. To conclude, by a majority of 4 to 1 we allow the appeal in respect of Site 2 and would be prepared to grant planning permission

for Site 2 to be used for the purpose of parking of lorries and container vehicle and also containers on container trailer racks for a period of 3 years subject to the following conditions:

- (1) No vehicle repair activity is allowed at the Site after 6 months from the date of delivery of this Decision.
- (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 1047 of the Respondent's Bundle for this appeal 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 1049 of the Respondent's Bundle placed before us for this appeal. 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 or 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 alternatively cement concrete or such other material 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 the conditions set out above or any of them 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.

30. We like to point out that in paragraph 29(1) we impose the condition that there must not be any vehicle repairing activities in Site 2 after 6 months from the delivery of our Decision. This does not mean that we have given planning permission for using Site 2 for the purpose of vehicle repair for 6 months. The continuous use of Site 2 for vehicle repair purposes is still unauthorized and is liable to be subject to enforcement action taken by the Government. Condition (1) so worded

simply means that the use of the Site for vehicle repair purposes within 6 months from the delivery of our Decision herein would not have the result of automatically revoking the planning permission granted herein. The appellant is thus well advised to cease the vehicle repair activities as soon as possible.

31. We note that there are some structures in the Site which may be essential for the purpose of the operation of the vehicles 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)
------------------------------	----------------------------	------------------------	----------------------------------	------------------------------------