

IN THE TOWN PLANNING APPEAL BOARD

Town Planning Appeal No. 10 of 2006

BETWEEN

Mr. LAI Chi-kong and Mr. TO Yuen-kit

Appellants

and

THE TOWN PLANNING BOARD

Respondent

Appeal Board : Ms. Teresa CHENG Yeuk-wah, BBS, SC, JP (Chairman)
Mr. AU Chi-yuen
Dr. Eileen TSE Yuen-yee
Ms. Winnie TSUI Wing-chow
Dr. John WONG Yee-him

In Attendance : Miss Christine PANG (Secretary)

Representation : Mr. LAI Chi-kong (in person)

Mr. Simon LAU
(Government Counsel, Department of Justice)
for the Respondent

Date of Hearing : 10th May 2007

Date of Decision : 15 October 2007

DECISION

1. This is an appeal against the Town Planning Board's Decision made on 24th March 2006.
2. The Appellants applied under Section 16 of the Town Planning Ordinance for a temporary use of Lot No. 867A, 867B, 867CRP, 2507ARP, 2507B in DD130, Lo Fu Hang, Tuen Mun, New Territories ("the Site") as a vehicle park for goods vehicles, coaches and container vehicles for a period of three years. The site is located in the Green Belt zone on the draft Lam Tei and Yick Yuen Outline Zoning Plan (draft OZP) No. S/TM-LTYT/5 (Plan R-1). The site is already currently being used (without planning permission) as vehicle parking for coaches, container vehicles and private cars. According to the oral closing of the Appellants, it has been so used for 4 – 5 years already. This was the time when they started to convert the land into a concrete paved area and illegally used it as a car park.
3. The Appellants applied under Section 16 on 16th August 2005 and on 25th November 2005, the Rural and New Town Planning Committee of the Town Planning Board rejected the application for reasons as set out in the Town Planning Board's letter dated 9th December 2005.

The reasons were : the development was not in line with the planning intention of the Green Belt zone nor was there any justification in the submission for a departure from such planning intention, even on a temporary basis; and the development was not compatible with the residential dwellings in the vicinity; there was no information to demonstrate that there would be no adverse traffic, drainage and environmental impacts on the surrounding areas; and that the approval of the application would set an undesirable precedent for similar applications in the same Green Belt zone. The Town Planning Board paper considered by the Committee and the minutes of the Committee meeting held on 25th November 2005 were enclosed.

4. By a letter dated 24th December 2005, the Appellants applied for a review by the Town Planning Board under Section 17(1) of the Town Planning Ordinance.
5. The Town Planning Board by a letter dated 5th January 2006, notified the Appellants that the review would be conducted on 24th March 2006. By a letter dated 13th March 2006, the Appellants applied for an adjournment of three months. The reason that was stated was that the Appellants were collecting data and preparing relevant documents that necessitated time. This application was apparently rejected as the review hearing was conducted on 24th March 2006 as scheduled. However, there does not appear to be a reply from the Town Planning Board to the application before the date of the meeting. The application was referred to in paragraph 2 of the Town Planning Board Paper No. 7554. It is noteworthy that the main emphasis of the

paper is that set out in paragraph 3, “no justifications have been put forth by the applicant in support of the review”. This remark can be made in this appeal too. The Appeal Board will deal with this further below.

6. Various government departments have given their comments on the application in particular the Director of Environmental Protection, Assistant Commissioner for Transport/New Territories of the Transport Department and the Chief Highway Engineer/New Territories West of the Highways Department, and the Chief Engineer/Mainland North of the Drainage Services Department. Each of these departments raised concerns about the lack of support for justifying that the proposed development would cause no adverse impact on the surrounding areas. In gist, from an environmental point of view, the Director of Environmental Protection did not support the application; from a transport point of view, the single lane two-way road which provided access to and from the site could not cope with the traffic generated; and from a drainage point of view, the Director of Drainage Services was concerned that the Appellants have not demonstrated clearly that the proposed development would not cause any increase in the flooding susceptibility of the adjacent areas. These comments from these three departments were pretty much the same as those that were recorded in the paper that was considered at the Rural and New Town Planning Committee meeting held on 25th November 2005.

7. From a planning point of view, the Planning Department's view was that the proposed development would not be compatible with the planning intention which is "primarily for defining the limits of urban and sub-urban development areas by natural features and to contain urban sprawl as well as to provide passive recreational outlets". Furthermore, this proposed use was not in column 1 (Uses always permitted) nor column 2 (Uses that may be permitted with or without conditions on application to the Town Planning Board) in the notes of the draft OZP. Furthermore, the Town Planning Board was referred to the Town Planning Board Guidelines for Application for Development within the Green Belt Zone under Section 16 of the Town Planning Ordinance promulgated in July 1991. In this Guidelines, paragraph 1.3 provided that the main purposes of the Green Belt zone included conservation of existing landscape features, defining the outer limits of urbanised districts serving as a buffer between and within urban areas and providing additional outlets for passive recreational uses. As set out in paragraphs 2(a) and (b) of the Guidelines, there is a general presumption against development in a Green Belt zone, and an application for new development in a Green Belt zone will only be considered in exceptional circumstances and must be justified with strong planning grounds.
8. At the appeal, the Appeal Board was also referred to this Guidelines and in answer to the question posed by the Appeal Board as to why it is the Appellants who have to provide justification that there would be no adverse impact on the surrounding areas, Mr. Lau, Counsel for the Respondent, referred the Appeal Board to paragraphs 2 (a), (b), (g), (i)

and (l). In the latter three subparagraphs, it is clearly stated that the design and layout of any proposed development should be compatible with the surrounding areas and that it should not overstrain the capacity of existing and planned infrastructure such as sewerage and roads. Further, the proposed development should not be the source of any pollution, including that of traffic noise. Whilst these latter three subparagraphs do not explicitly provide that the burden is on the Applicants/Appellants to demonstrate that there is no adverse impact on the surrounding areas that would be caused by the proposed development, they do nonetheless emphasise that such would have to be shown before approval would be given for any proposed development within the Green Belt zone. That together with the fundamental principle that he who asserts bears the burden of proof, the Appeal Board is satisfied that it is up to the Applicants/Appellants to demonstrate to the Town Planning Board/Town Planning Appeal Board that the criteria laid out in this Guidelines are met. The Town Planning Board was correct in approaching the issue on the basis that the Applicants/Appellants bear the burden of proof.

9. The application for review was rejected by the Town Planning Board and the reasons for decision were notified to the Appellants by a letter dated 21st April 2006. The paper as well as the minutes of the Town Planning Board meeting were also attached.
10. It is clear therefore that by reason of the receipt of these two letters, namely the rejection letter under Section 16 and the rejection of the application for review under Section 17(1), the Appellants were fully

aware of the reasons for the failure of their application. In short, there was simply no supporting evidence to demonstrate that the planning criteria laid down in the Town Planning Board Guidelines have been met. Whilst the Appeal Board appreciates that a lay person may not be aware of the Guidelines (which of course is not normally a justification for failure to provide substantiation), the gist of the requirements of the Guidelines have been enunciated in the papers and the minutes of the two meetings that the Appellants have received.

11. On 13th June 2006, pursuant to its right given under Section 17B(1) of the Town Planning Ordinance, the Appellants appealed.
12. In the appeal, the Appellants did not file any further evidence together with its Notice of Appeal to address the reasons for rejection of the Section 16 and Section 17(1) application and review. At the hearing, there was also no evidence filed. The Appellants chose not to make any oral opening submissions. They did not call any witness either.
13. The Respondent called Mr. Wilson Chan Wai Shun, a Senior Planner of the Planning Department to give evidence. Having set out the background of the appeal, in paragraph 2.5 of the Statement, Mr. Chan explained that the Town Planning Board decided to reject the application to adjourn which was filed on 13th March 2006 because that application relates to an enforcement proceeding brought in respect of the subject site, and the Appellants (Applicants for review) did not provide any further evidence or information.

14. The Applicants did not appear at the 24th March 2006 review hearing. The contents of paragraph 2.5 of Mr. Chan's Statement was not disputed or challenged.
15. For the reasons below, this Appeal Board came to the same decision that the appeal should be dismissed and planning permission for the proposed development should not be granted.
16. This Appeal Board accepts the argument as to the planning intention of the draft OZP as well as the relevance and materiality of the Guidelines as set out in paragraphs 5 and 7 of Mr. Chan's Statement. These very points have also been set out above and made at the Section 16 application and the Section 17 (1) review. The Appellants have not sought to argue otherwise nor provide any basis to suggest that the planning intention was complied with. Further, there is also no evidence that the proposed development has in fact complied with the Guidelines and planning intention.
17. Mr. Chan in paragraph 4 of the Statement pointed out that at the time of the Section 16 application and Section 17(1) review, the OZP was referenced S/TM-LTY Y/5 as it was at that time a draft OZP. At the time of this appeal, the draft OZP has been approved and is now renumbered S/TM-LTY Y/6. So far as the site is concerned, there is no difference in these two plans. The Appeal Board accepts the argument that the planning intention is an important factor to be taken into account when deliberating on the appeal.

18. The other main factor that the Appeal Board takes into account is the fact that there was no supporting evidence to show that the proposed development would not cause any adverse impact to the surrounding areas in respect of the environmental, transport and drainage point of view. Mr. Chan dealt with that in paragraphs 8.2 and 8.3 of the Statement. The comments made there are the same as or similar to those made in the Section 16 application and Section 17(1) review. The Appellants cross-examined Mr. Chan on the point about adequacy of drainage by stating that there was no flooding after they have converted the piece of land into a car park, albeit it without permission. This line of cross-examination unfortunately was not supported by any evidence. Mr. Chan pointed out that the burden of proof was on the Appellants to show that there was no adverse impact caused by the proposed development on the site and that it had failed to do so. As noted above, the Appeal Board accepts that by reference to the Guidelines, the burden is on the Applicants/Appellants to establish the absence of adverse impact on the surrounding areas. This, the Appellants have failed to do.
19. The Appeal Board was taken to the photographs and plans produced in Mr. Chan's Statement. They show that the existing access road would not be sufficient for use by the types of vehicles that the proposed development was supposed to provide parking facilities. The proximity of the residential areas can also be seen from the photographs and plans. The additional noise generated by the increased traffic is inevitable as observed by the Director of the Environmental Protection. This would cause a nuisance to the

environment as well as the enjoyment of the occupants of the properties in the surrounding areas. As to the point about the effect that there was no flooding after the agricultural land was illegally converted into a car park, there is no evidence to support that. Furthermore, the fact that in the past few years (4-5 years according to the Appellants), no flooding occurred does not mean that it will not happen in the future.

20. As a result, both on the basis of the development being incompatible with the planning intention and the fact that the Appellants have failed to demonstrate that the proposed development will not cause any adverse impact to the environment, transport and drainage facilities in the surrounding areas, the Appeal Board dismiss this appeal.
21. The evidence of Mr. Chan, paragraph 8.4 of the Statement, and the submission of Mr. Lau, Counsel for the Respondent, invited this Appeal Board to take into account the precedent effect of allowing this appeal. The Respondent pointed out that case No. 133 and 137 in fact covers the same plot. Case No. 133 had been dismissed and another application for the same site was made and had been rejected and it is now pending appeal to the Appeal Board. Case No. 147 has also been rejected by the Town Planning Board and no appeal was filed. Two points arise from the above. First, the Appeal Board is not persuaded that in deciding this appeal, the possible effect that it could become a bad precedent is a relevant factor to be taken into account. Every case must turn on its own facts and whether this appeal is accepted/rejected does not mean that the decisions in those other cases

must follow suit. Secondly, by way of observations, this Appeal Board is concerned about the same application could be made for the same site more than once when there are no change in circumstances or no new evidence. The Appeal Board is making this by way of observation as such applications and appeal could delay any enforcement actions that ought to have been taken and it could also result in unnecessary time and costs being incurred.

22. Another observation that this Appeal Board wishes to make is that it is unfortunate that the Applicants have gone through two processes before coming to the appeal and have been informed of the reasons for the rejections but have chosen not to put in any new evidence or substantiation in this appeal. It is of course a right on the part of the Appellants to appeal against the decision of the Town Planning Board, it would have been more fruitful had the Appellants considered the reasons for rejection and provide evidence or substantiation to address those reasons.
23. Be that as it may, and quite apart from the observations that have been made which is irrelevant to the decisions that are made here, the appeal is dismissed.
24. The Respondent stated that they would not ask for costs and hence although in contentious proceedings the common law rule would be that costs would follow the event, the Appellants would not be liable to the costs that the Respondent has incurred.

Dated the 15 day of October 2007.

Teresa CHENG Yeuk-wah, BBS, SC, JP
(Chairman)

AU Chi-yuen
(Member)

Eileen TSE Yuen-yee
(Member)

Winnie TSUI Wing-chow
(Member)

John WONG Yee-him
(Member)