

Town Planning Appeal Board

Town Planning Appeal No. 12 of 2005

Name of Appellant : Gold Plate Investments Limited

Premises Affected : Various Lots in DD 233 and adjoining G.L.,
Clear Water Bay Road, Ha Yeung, Sai Kung

Dates of Hearing : 29, 30 January & 6 March 2007

Representation : Mr. Anthony Ismail instructed by Louis K. Y.
Pau & Company for the Appellant
Mr. Y.C. Mok instructed by the D.O.J. for
the Respondent

Decision

1. On 1 November 2004, the Appellant submitted an application under section 16 of the Town Planning Ordinance for permission to build a housing development at various lots in DD 233 and the adjoining Government land (hereinafter collectively called “the said land”) near Ha Yeung New Village just off Clear Water Bay Road. The proposed development comprised 5 blocks of 2-storey houses with ancillary car park, landscape garden and a swimming pool for each house. The said land has an area of 4,261 square meters and was zoned as “Green Belt (GB)” on the then approved Clear Water Bay Peninsula South (CWBS) Development Permission Area Plan No. DPA/SK-CWBS/2 (DPA Plan).

2. On 17 December 2004, the Rural and New Town

Planning Committee of the Town Planning Board rejected the application. On 1 February 2005, the Appellant applied for a review of the Committee's decision. On 22 April 2005, the Town Planning Board upheld the decision of the Committee and rejected the application. Three reasons were given for the Town Planning Board's decision :

- (a) The proposed development was not in line with the planning intention of the GB zone which was to preserve the rural character and define the limit for development. There should be a general presumption against development in the GB zone, and there was no strong justifications for a departure from the planning intention.
- (b) There was insufficient information in the submission to demonstrate that the proposed development would not have adverse traffic impact in the area.
- (c) The approval of the application would set an undesirable precedent for similar applications in other GB zones. The cumulative effect of approving such application would result in adverse impacts on the natural landscape, traffic and infrastructural provisions in the area.

3. The said land was covered with vegetation and was zoned as "Countryside Conservation Area" on the Clear Water Bay Peninsula North Outline Development Plan approved by the then Development Progress Committee on 12 March 1987. This plan was used for internal references by Government departments but it did not have the same effect as the DPA plans or outline zoning plans drawn and approved under the Town Planning Ordinance. We were told and are

prepared to accept that the planning intention then was to protect the sensitive natural system in and adjoining the Clear Water Bay Country Park area from adverse effects of development. We are also prepared to accept that the policy of the Government then was that for land within this kind of zoning, there was a presumption against new development other than for agricultural activities and some other uses which were consistent with conservation such as horticulture, habitat conservation, nature reserve and forest plantation. Indeed in December 1987, there was an application for residential development at the said land to the District Lands Office/Sai Kung. The application was rejected on the ground that the proposed development was a departure from the planning intention of the Countryside Conservation Area zoning.

4. Until the enactment of the Town Planning (Amendment) Ordinance 1991 on 24 January 1991, land in the New Territories was not affected by any plan drawn and approved under the Town Planning Ordinance. Land development in the New Territories was regulated by the provisions in the Crown leases. At one time it was thought by many that if a piece of land was described as agricultural or paddi etc. in the schedule to the Block Crown lease, that would have the effect of prohibiting the land owner from using the land for non-agricultural purposes. This once popular thought was shown to be wrong. On 13 March 1983, the Court of Appeal in *Attorney General v Melhado Investment Ltd.* [1983] HKLR 327 held that the description of the land in the schedule to the Block Crown lease did not have the effect of restricting the use of the land to the purpose described. One effect of the decision was that the land which was commonly known as agricultural land covered by the Block Crown lease could be used for various non-agricultural purposes, such as open car park or for open storage or for such other uses which would not involve the erection of any structure on the land. In consequence of this decision, the Government could no longer rely on the provisions in the Block Crown lease to regulate the use of the land in the New Territories.

Resort was thus made to the Town Planning legislation to regulate land development and land uses in the New Territories.

5. The Town Planning (Amendment) Ordinance 1991 added a number of zones to be provided in the plans drawn under the Town Planning Ordinance. In fact, the GB zoning was amongst the various zones added to section 4(1) of the Town Planning Ordinance in 1991. The Town Planning (Amendment) Ordinance 1991 also amended the then Town Planning Ordinance by adding sections 20 to 26 to the Ordinance. One of the effects of section 20 was to enable plans drawn under section 3(1)(b) of the Ordinance to designate an area as development permission area. Plans so drawn up are generally known and referred to as the DPA plans. DPA plans would in due course be replaced by outline zoning plans prepared under section 3(1)(a) of the Town Planning Ordinance.

6. Section 20(7) of the Town Planning Ordinance provides that :

“20(7) Where land that is within a plan referred to in subsection (1) is included in a plan prepared under section 3(1)(a), no person shall undertake or continue development on that land unless –

- (a) the development was an existing use in relation to the plan prepared under this section;
- (b) the development is permitted under the plan prepared under section 3(1)(a); or
- (c) permission to do so has been granted under section 16 either before or after the land was included in the plan prepared under section 3(1)(a).”

Similar provisions were found in section 21 in relation to the development of land covered by a DPA plan which has not yet been superseded by an outline zoning plan.

7. “Existing use” is defined in section 1A of the Town Planning Ordinance as follows :

“existing use” in relation to a development permission area means a use of a building or land that was in existence immediately before the publication in the Gazette of notice of the draft plan of the development permission area.

8. Although the necessary power to designate the said land and its surrounding areas as development permission area or interim development permission area was available since the enactment of the Town Planning (Amendment) Ordinance 1991, in fact, the said land and its surrounding areas were not included in any DPA plan until 2002. On 26 July 2002, for the first time a draft DPA plan for the Clear Water Bay Peninsula South area prepared by the Town Planning Board was gazetted. This was the DPA Plan applicable at the time of the Appellant’s application in this case. The said land was zoned GB on this plan. The current position is that the DPA Plan was subsequently approved by the Chief Executive and the DPA Plan has now been replaced by a draft outline zoning plan No. S/SK-CWBS/1 published on 22 July 2005 (the “OZP”). However, the said land remained to be zoned for GB purposes in all the plans made under the Town Planning Ordinance.

9. The aerial photos taken on 9 September 1987 and 30 April 1989 showed that the said land was covered by vegetation. The aerial photo taken on 2 October 1991 showed that the said land had already been paved and was being used for car parking and open storage purposes. The significance of the date of 2 October 1991 was that it was before the gazette of the notice of the first draft DPA

plan concerning this area. Hence, the use of the said land for car parking and open storage purposes was an existing use for the purpose of the Town Planning Ordinance and in particular sections 20(7) and 21 thereof. At least for the purpose of the Town Planning legislation, there could be no action taken to stop the said land from being so used notwithstanding that such use is not a permitted use under the relevant DPA plan or OZP. For the sake of convenience, we would refer to the existing car parking and open storage use of the said land as just car park use. It is important to realize that this car park use would include the use for the parking of not just private cars, but also heavy lorries and container vehicles and for the open storage of, inter alia, containers.

10. The said land is situated at a gentle hill slope. Very roughly, the said land is rectangular in shape, with the 2 longer sides running in a north-west and south-east direction. To the north-eastern side of the said land and running in parallel with the long edge of the said land is Clear Water Bay Road. The current position is that the said land is relatively flat. In terms of level, Clear Water Bay Road is about 6.5 meters lower than the level of the said land and is separated from the said land by a hill slope covered by vegetation.

11. To the south-western side of the said land and at a level of about 3.5 meters higher than the level of the said land is Ha Yeung New Village, which is a residential development consisting of 5 blocks of 3-storey high buildings. It would appear from the photographs that each block is in turn divided into 2 buildings connected together. However, it is not clear from the photographs whether the whole block would consist of two 3-storey residential units or 6 residential units with 2 units on each floor. In term of area, Ha Yeung New Village would be roughly of the same size as the said land.

12. Ha Yeung New Village was built on land granted by the Government in 1977 to some indigenous villagers. There is a narrow road leading from this development to Clear Water Bay Road known as Ha Yeung San Tsuen Road. This road runs in a north-south direction and is on the western side of the said land. It joins Clear Water Bay Road at an angle of about 60 degrees. This road was probably built in the late 1970s when Ha Yeung New Village was built. The width of this road varies. It is widest at the junction with Clear Water Bay Road.

13. The hill slope between Ha Yeung New Village and the said land is covered by rather thick vegetation.

14. Since about 1991, the said land has always been used for open storage and also as car park. From the photographs produced in the hearing, the things stored included containers. The vehicles parked on the said land were of various types including container vehicles, trucks and private cars. From an aerial photo taken on 2 April 2002, about 60 vehicles were parked on the said land on that day. While plainly the number of vehicles parked there would vary from time to time, we are prepared to find that normally at least some 50 to 60 vehicles are parked on the said land. In fact, the size of the land is such that it may accommodate about 100 vehicles.

15. The ground of the said land was paved although it is not possible to tell from the photographs as to the materials used for the paving. Access to the said land is from Ha Yeung San Tsuen Road. There is in fact an access road leading from Ha Yeung San Tsuen Road to the north-western part of the said land. We will call this road "the access road". The access road runs in a north-west to south-east direction and joins Ha Yeung San Tsuen Road at an angle of about 90 degrees. The distance between Clear Water Bay Road and the nearest part of the access road where it joins Ha Yeung San Tsuen Road is about 15 meters.

16. As far as town planning is concerned, the relevant plan in question is the OZP. There are 2 main and very prominent roads in the area covered by this plan, viz. Clear Water Bay Road at the northern part and Tai Au Mun Road at the southern part. Clear Water Bay Road runs in a north-west to south-east direction dissecting the northern part of the area covered by this OZP. The land on the south-western side of Clear Water Bay Road is predominantly zoned for CA, i.e. Conservation Area purposes. There is only one very small pocket area zoned for V, i.e. Village Type Development. This is the Ha Yeung New Village. As we have mentioned above, the said land is lower than Ha Yeung New Village and is separated from Ha Yeung New Village by a slope. This slope between the said land and Ha Yeung New Village was zoned CA in the OZP. The said land and the strip of land between the said land and Clear Water Bay Road was zoned GB. In terms of area, the GB zone containing the said land is larger than the Ha Yeung New Village V zone. It is also important to note that the Ha Yeung New Village V zone and the said land GB zone are not connected, such that as far as the Ha Yeung New Village V zone is concerned, it is completely surrounded by land falling within CA zone, and as far as the said land GB zone is concerned, it is surrounded also by land falling within CA zone at 3 sides and by the Clear Water Bay Road on its north-eastern frontage.

17. Across Clear Water Bay Road just opposite to the GB zone of the said land is another area also zoned GB (hereinafter called "opposite road GB zone"). This GB zone area is much bigger. To the north-east of this GB zone is a large area zoned CA. Also, on the north-eastern side of Clear Water Bay Road and to the north of the said land is another area zoned V, where one can find the villages of Leung Fai Tin and to its further north, Ha Yeung (hereinafter called "Leung Fai Tin V zone"). The southern half of Leung Fai Tin V zone was surrounded by the opposite road GB zone. However, the part of the opposite road GB zone at the south-western part of the Leung Fai Tin V zone is just a very narrow strip of land of just a few meters wide

running along the north-eastern side of Clear Water Bay Road. Having regard to its physical shape, it is quite impossible to have any kind of development at this strip of land.

18. The case of the Appellant is short and simple. The proposed development could be permitted on land in a GB zone. The proposed development is a great improvement in the use of the said land when compared with its present use. It will result in less pollution, less traffic problem, more trees and vegetation and hence relatively more in line with the conservation and rural area preservation ideal. Also esthetically, the new development would be better than the current car park. The houses would be hidden behind the trees to be grown around the site, particularly along the boundary facing Ha Yeung San Tsuen Road and Clear Water Bay Road so that the development would not be easily noticeable by some one traveling along Clear Water Bay Road or by some one overlooking from the houses at Ha Yeung New Village.

19. We agree. Indeed, in comparison with the current use of the land, the Respondent has not been able to point to any feature in the proposed development which could reasonably be said to have caused deterioration to the environment and land use when compared with the current use.

20. The Respondent nevertheless resisted the appeal. Mr. Mok for the Respondent gave a helpful summary of the grounds for resisting the appeal in paragraph 1 of his skeleton closing submission. His main argument was that as the said land had been zoned GB, it required very strong planning grounds for the Town Planning Board to grant permission for any development not falling within column 1 of the schedule to the OZP, and the Appellant had failed to show such very strong planning grounds (see §§ 1(1), (2) & (3)). In this respect, the Respondent contended that since at the time when the said land was first zoned GB, the said land was being used as car park (which

was not one of the permissible uses under any column of the schedule), the requirement of very strong planning grounds before a column 2 development could be permitted was not to be weakened in anyway because of the existing use of the said land (see §§ 1(1) & (2)). The Respondent also contended that “it is against the clear planning intention applicable to the Appeal Site for the Appellant to rely solely on its existing use (and to ignore its planned use) to establish the planning justification for the Appellant’s proposed development” and that “there is no justification to do so in law, principle or policy” (see § 1(4) of the Respondent’s skeleton closing submission).

21. In addition, it was contended that when considering the weight to be given to the existing use of the said land, one should not assume that the existing use could continue forever because access to the said land would require going through Government land and the Government could stop the use of the Government land for access to the said land. It was also contended that allowing the appeal would “practically remove the possibility of Government for public purpose to either take resumption action or take action to bar the use of the ingress/egress track at least for vehicles” (see §§ 1(5) & 20).

22. On top of all the above arguments, the Respondent also relied on the almost ritual argument for resisting any town planning appeal that to allow the appeal would set an undesirable precedent (see §§ 11 – 14).

23. Insofar as it was the Respondent’s submission that whatever was the existing use of the said land, we should apply the same criteria set out in the notes to the relevant plan in relation to the GB zoning in considering whether to grant the permission sought, we agree with such submission. In this respect, we must have due regard to what was set out under paragraph 9.7 of the Notes to the OZP. We appreciate that at the time when the Appellant first submitted its application, the relevant plan was the DPA Plan. There

is no difference in so far as the zoning of the said land is concerned on the 2 sets of plans. However, the notes to the relevant parts of the plans are worded somewhat differently although the overall effects of the notes are more or less the same. We consider that since we are concerned with the grant of the permission which will affect the use of the land prospectively, we should take heed of the provisions in the current version of the plans. However, we have to say that even if we are wrong in applying the current version, our views and conclusion on this appeal will be the same.

24. Paragraph 9.7 of the Notes to the OZP is in the following terms :

“9.7.1 The planning intention of this zone 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. There is a general presumption against development within this zone. Development in this zone will be strictly controlled. Development proposals will be considered by the Board on individual merits taking into account the relevant Town Planning Board Guidelines.

9.7.2 The sites zoned “GB” include the densely vegetated areas which are mainly scattered around the village settlements, a strip of cut slopes along the western side of Tai Au Mun Road, and the landscaped area adjoining the single dwelling in the eastern end of the Area. These “GB” zones are generally covered by natural vegetation and provide a buffer between the development and conservation areas or Country Park areas. Another “GB” to the north-east of Ha Yeung New Village is a piece of private land under Block Government lease currently used as a car park.

9.7.3 As diversion of stream, filling of land/pond or excavation of land may cause adverse drainage impacts on the adjacent areas and adverse impacts on the natural environment, permission from the Board is required for such activities.”

The GB land spoken of in the last sentence of paragraph 9.7.2 is the said land, the subject matter of this appeal.

25. The relevant part of the Notes in the DPA Plan is in the following terms :

“7.4.7 Green Belt (“GB”): Total Area 28.04 ha

- (a) The intention of this zone is to prevent encroachment of development on steep slopes and well-vegetated areas as a means to enhance the protection of the natural landscape, to preserve the rural character, and to provide for countryside recreational outlet. Areas zoned “GB” include foothills, woodland or vegetated land. They also define the limit for development and serve as roadside amenities.
- (b) The sites zoned “GB” include densely vegetated areas which are mainly scattered around the village settlements, a strip of cut slopes along the western side of Tai Au Mun Road, and the landscaped area adjoining the single dwelling in the eastern end of the Area. These “GB” zones are generally covered by natural vegetation and provide a buffer between the development and conservation areas or Country Park areas. Another “GB” to the north-east of Ha Yeung New Village is a piece of private land under Block Government lease currently used as car park.

- (c) There is a general presumption against development within this zone. Development in this zone will be strictly controlled. Development proposals will be considered by the Board on individual merits taking into account the relevant Town Planning Board Guidelines.”

26. There are also some differences in the uses set out in the schedules to the two versions of plans for Green Belt zone. It is however notable to point out that amongst the column 1 uses (i.e. uses which are always permitted) in both versions, some uses which would involve the construction of building structures are included. For instances, in the DPA Plan, uses like on farm domestic structures, plant nursery and public convenience are always permitted. In the OZP, uses like Police Reporting Centre, on farm domestic structure, public convenience and tent camping ground are always permitted. It is also notable that the erection of houses is amongst the column 2 uses in both versions of the plans. Also, amongst the column 2 uses in the OZP, there are many other uses which would definitely involve the construction of building structures of some kind, like school, religious institution, residential institution, petrol station, columbarium, Government refuse collection point etc.

27. It is also notable that a statement to the same effect as paragraph 9.7.3 of the Notes to OZP was found under the Remarks section of the schedule to the DPA Plan. The Remarks section of the schedule relating to Green Belt of the OZP also contains the following statement which is quite similar to paragraph 7.4.7(a) of the DPA Plan :

“Planning Intention

The planning intention of this zone 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. There is a general presumption against development within this zone.”

28. It is plain that the planning intention has always been that there is a general presumption against development within the GB zone and as such we must be satisfied that there are strong grounds for giving permission for development even though the intended development should fall within column 2 of the schedule.

29. Also, from the various notes to the plans as set out above, we also discern that one of the main purposes of the GB zoning is to provide for some sort of natural barrier between the urban and sub-urban development area on the one hand and the rural area on the other. In this regard, we note that although the said land was specifically identified and referred to in notes of the plans, the only possible “urban or sub-urban” area which the said land as GB zone could serve to separate from the rural area is the small pocket of Ha Yeung New Village V zone land. However, it is equally clear that the said land, although zoned for GB use, was at all times since the introduction of the first DPA plan, neither covered by natural vegetation nor any other natural features. Having regard to the fact that the Ha Yeung New Village V zone and the said land GB zone are separated by land zoned as conservation area, it is extremely doubtful as to whether it could properly be said that the said land could serve the purpose of separating the Ha Yeung New Village V zone from land zone for Conservation Area purposes.

30. In short, our conclusion is that the GB zoning of the said land is atypical of GB zoning.

31. The Respondent also laid great emphasis on the statement on general planning intention of the whole area covered by the plan in § 7.2.1 of the Notes to the DPA Plan :

“7.2.1 The general planning intention of the Area is to conserve the undisturbed woodland, long stretch of natural coastlines, and rural character by protecting the natural landscape, topographical features and ecologically sensitive areas from encroachment by development. The predominant low-rise and low-density character of development should be preserved to also avoid overtaxing the limited infrastructure.”

We note that similar statements are also found in paragraphs 8.1 and 8.2 of the Notes to the OZP.

32. We agree with the Respondent’s contention that the fact that the existing use of the said land as car park is not a ground for weakening the presumption against development and also the requirement for strong grounds for permitting development. However, insofar as it is suggested that we should not give any weight or consideration to any improvement brought about by the proposed development, we disagree with such suggestion. In considering whether the proposed development would bring about any improvement to the land use or to the environment or towards the achievement of the purpose of the GB zoning, we consider that it is common sense that one just cannot disregard the existing use of the said land. On the other hand, we agree with the Respondent’s contention that the mere fact that a proposed development would bring about some improvement, no matter how little, could not per se always be sufficient to justify the grant of permission for that proposed development. What improvement is required is a matter of degree and it is not something which could be spelt out with mathematical precision.

33. We recognize the fact that the proposed development would bring about a general improvement to the environment is only

one of the factors that we have to take into account, although this is a very important one. Another important factor that we must bear in mind is the impact of the proposed development on the planning intention of the said land. In this respect, the Respondent urged strongly that since at the time when the first set of DPA plan came into being, the said land, although being used as car park, was nevertheless zoned for GB, the planning intention must be that the said land was specifically targeted for GB purpose. In our view, it is beyond dispute that when the first DPA plan was drawn up, the TPB was aware that the said land was used as car park. However beyond this, we do not think that one can further surmise whether the original intention of the TPB was to make it easier or more difficult for any permission to be granted for any development of the said land. Given that column 2 of the relevant schedule to the notes of the plans would allow permission to be given for the development of houses, we do not think that there should be any stronger presumption against the development of houses in the said land than in any other land zoned for GB purposes.

34. It is certainly not for us to second guess the thinking of the TPB when the DPA Plan was first drawn up. It would appear to us that if it was the intention to create a GB zone as a buffer zone to prevent the expansion of the Ha Yeung New Village village development, then it is difficult to explain why the whole of the Ha Yeung New Village V zone was and still is surrounded by area zoned for CA purposes. Likewise, given the fact that the whole of the area to the south-west of Clear Water Bay Road was virtually all zoned as CA (the only exception being the Ha Yeung New Village V zone and the said land GB zone), it is difficult to see why the said land was not zoned for CA purposes if the intention was that there should not be any houses to be erected on the said land. In this respect, we like to point out that if a piece of land is zoned for CA purposes, then the erection of houses (except in cases of re-development) would not be permitted under the schedule to the notes of the plan. Since there

was no house erected on the said land at the time when the first DPA plan was drawn up, if the said land was zoned for CA purposes, there would be no room for the present application at all.

35. The Respondent also submitted that when considering the issues relating to planning benefit and planning intention, we must not assume that the said land may be used for car parking purpose forever, because (a) the Government could effectively stop such use by not allowing access to the said land through Government land; and (b) the Government could stop the use by land resumption.

36. Of course, we accept that access to the said land would require access through Government land. However, there is nothing to indicate that the Government has ever had any intention of preventing any one from using Government land for access to the said land ever since the land was used for car parking purposes. In fact, it is common ground that part of the said land itself is Government land. The Lands Department has never raised any objection to the application based on this ground. The only comment of the Lands Department was that a land exchange would be necessary to implement the proposed development if planning permission for such development was granted. Of course, it was clearly understood that there could be no guarantee that the Government would be prepared to have such land exchange.

37. In the circumstances of this case, we do not think that much weight could be given to the fact that access to the said land would require going through Government land. No doubt without access, the land could not be used either for the purpose of car parking or the proposed development or indeed for any purpose at all. However, there is nothing to indicate that the Government would be more or less ready to tolerate the use of Government land for access to the said land if the said land is to be used for the purpose of the proposed development. It may well be the case that at the end of the

day, even if we were to decide to grant planning permission, the applicant could still not be able to use the land for any purpose at all because of the lack of access. This is a matter beyond our jurisdiction.

38. As to the argument based on the Government's right to resume the land under the Lands Resumption Ordinance, we again consider that this is a red herring. There is always power on the part of the Government to resume land under the Lands Resumption Ordinance when the land is required for public purposes. The existence of public purposes to justify the resumption of the land could not be affected by the zoning of the land or the use permitted by the Town Planning Board under the Town Planning Ordinance. In fact under section 12(aa) of the Lands Resumption Ordinance, the fact that the said land is zoned for GB purposes could not be taken into account when assessing the compensation payable.

39. It would also appear to be the contention of the Respondent that the use of the land as car park was merely a tolerated use and if for any reason the said land ceased to be used as car park, then the land owner could not resume the car park use again having regard to the fact that the said land was zoned for GB purposes and car parking was not within any of the uses under either column to the schedule. We say "it would appear to be" the Respondent's contention because such contention, although slightly touched upon in the course of the hearing, was not pressed in counsel's final submission. The argument was that there was always hope that by refusing the permission for development, one day the owner of the said land might cease using the said land for car parking because the Government not giving permission for access or because of economic or other reasons. Once the car parking use has ceased, the said land could only be used for column 1 purposes and the GB planning intention would be fully accomplished. The argument may be developed further by contending that even though the present use of

the said land is much less conducive towards the achievement of the GB planning intention than the proposed development, the TPB should still refuse planning permission because if the TPB is obstinate enough to refuse all proposed developments, in the long term, it may be possible to bring about a situation that the land owner would cease the existing use of the land, and the ultimate goal of the GB zoning would then be achieved.

40. We think that there are some fundamental flaws in the arguments set out in paragraph 39. First, we are of the view that since the car parking use is an existing use under the Town Planning Ordinance, there is nothing in the Town Planning Ordinance to stop the land owner from using the said land for car parking even though the car parking use has not been continuous since the said land was included in a DPA plan (see section 20(7) of The Town Planning Ordinance). Hence, unless the law is changed, it does not really matter whether one classifies the car parking use as a permitted use or a tolerated use. Furthermore, we find it very unattractive to suggest that the TPB may adopt the attitude of refusing an otherwise good proposed development in the hope that one day the land owner could be forced, by economic reasons or otherwise, to use his land in conformity with what is set out in column 1 of the schedule to the Notes of the OZP. In any event, given the shortage of land for car parking purposes and the economic benefit that one can derive from using the said land for car parking (including parking of container vehicles and storage of containers) purposes, it is fanciful to suggest that the land owner would be prepared to give up such use of the land and/or to revert to using the land for any purposes under column 1 of the schedule. We consider that realistically the land owner would only be prepared to give up using the land for its present purpose if he is permitted to use the land for another purpose which would bring him greater economic benefit.

41. The Respondent also contended that we should not give

permission for the proposed development because :

“The Assistant Commissioner for Transport/New Territories of the Transport Department (AC for T/NT of TD) has reservation on the application as it would set a precedent for other similar cases in the “GB” zone. The cumulative traffic impact of such similar applications for house development in the zone could be substantial and would cause adverse traffic impact on the nearby road network. There is insufficient information in the submission to demonstrate that the proposed development would not have adverse traffic impacts on the surrounding area.” (see statement of Ann Wong § 6.2)

42. The concern as expressed in the statement of Ann Wong was plainly directed at a situation where there were many other houses being erected in GB zones in the areas nearby. In this regard, we fully appreciate that the Respondent was literally right in contending that there was no evidence to show what the amount of the existing traffic was particularly during peak hours. Likewise, we think that the Respondent was also literally correct in its contention that there was no evidence on the comparison between (a) the current traffic load on the nearby area on the one hand and (b) the probable traffic load on the same nearby area if the proposed development was completed and if there were to be other residential developments in other GB zones which were made possible based on the precedent of the present appeal being allowed, on the other. The absence of the evidence appeared to be the basis for the Respondent’s contention that there was insufficient information in the submission to demonstrate that the proposed development would not have adverse traffic impacts on the surrounding area.

43. We are not convinced that this is a reason for rejecting the application. Even though there is no evidence on the existing traffic load or on how the existing traffic load would compare with the

probable traffic load as a result of the proposed development being allowed, we do not consider that it would thus follow that we cannot draw the inference from the fact that the existing use of the land as car park accommodating about 100 private cars and goods vehicles would inevitably generate more traffic than a housing estate of 5 houses with only 10 car parking spaces. As a matter of fact, there was evidence from the Appellant's transport consultant on the estimated traffic load generated by the proposed development (see page 1100 of the Respondent's bundle) which was not challenged by the Respondent's expert. Even assuming that the residents in the proposed development would invariably use their vehicles at peak hours and even assuming (which we do not think is a right assumption) that the present position is that there is to be no vehicle coming into or leaving the car park at the said land during peak hours, applying our common sense and knowledge of the traffic conditions in Hong Kong, we still do not think that the extra traffic generated by 5 house-holds with 10 vehicles would cause such stress on Clear Water Bay Road and Ha Yeung San Tsuen Road that we should refuse permission for the proposed development.

44. In relation to the traffic concern arising from the knock on effect of our giving planning permission for the proposed development, we do not think that that should be a ground for us to withhold giving planning permission for the proposed development. It is wholly uncertain as to whether there is going to be any application for housing development on land zoned for GB in the nearby areas. The total GB area provided in the OZP is only 28.04 hectares occupying about 6.6% of the total area covered by the plan and the evidence before us is that apart from the said land, there is no other area zoned GB in the OZP having an existing use of car park or open storage. Hence, it is unlikely that the present application could be used as a precedent to support any application for housing development in a GB zone nearby. In any event, if any future development would cause any real traffic problem, we see no reason

why the Planning Department or the Transport Department could not then raise objection to those future applications based on the traffic grounds.

45. Before us, Mr. Tang Wai Leung of the Transport Department raised a further objection to the proposed development. The objection centred on the transport arrangement for ingress and egress to the said land. It was said that Ha Yeung San Tsuen Road was not up to current standards for permanent access for many reasons. One of the main reasons was that there was no foot path on both sides of the carriageway and that its width was less than 5 metres at certain sections and in particular, it was said that Ha Yeung San Tsuen Road was between 4.6 to 5 metres wide only at the junction with the access road. In conjunction with the width of the roads at this junction, Mr. Tang further commented that the Appellant's traffic consultant had not done any swept path analysis. What this meant was that the Appellant's consultant had not mentioned anything in her report or mentioned anything in her evidence which showed that she had considered that when a vehicle was turning from the access road into Ha Yeung San Tsuen Road, the turning path covered by the vehicle must be such that the vehicle would have to occupy also part of the opposite traffic lane of Ha Yeung San Tsuen Road before the vehicle could eventually take its position on the traffic lane it wanted to turn into. The suggestion would appear to be that because during the turning process the vehicle would have to occupy space in the opposite traffic lane, this would in effect make the opposite traffic lane even narrower for traffic in the other direction to pass. It was also said that the sight line distance between the access road at the junction with Ha Yeung San Tsuen Road and a vehicle traveling north-west bound and turning left into Ha Yeung San Tsuen Road was only 15 metres and this was too short. It was suggested by the Respondent in cross examination that proper sight line distance would require that the access road should be moved to at least 30 metres away from the junction between Ha Yeung San Tsuen Road and Clear Water Bay

Road. When Mr. Tang gave evidence, he said that the sight line distance was at least 60 metres for normal public road.

46. To support his views, Mr. Tang relied on Hong Kong Planning Standards and Guidelines (hereinafter called “the HKPSG”) published by the Government setting out the criteria for determining the scale, location and site requirement of various land uses and facilities. It is not in dispute that the HKPSG is widely used as a reference work by planners, both in the public and private sectors.

47. In relation to the width of the road required, Mr. Tang referred to § 3.3.2 of the HKPSG where it was set out that the minimum carriageway width in rural areas was 6.75 m for 2-lane rural road B, 6 metres wide for a 2-lane feeder road, and 3.5 metres wide for a 1-lane single track access road which should be widened to 6 metres at passing bays areas.

48. The Appellant submitted that we should not give any weight to the evidence of Mr. Tang on his further objection to the proposed development on the ground that the points were not raised by him or by the Transport Department when the matter was considered by the Rural and New Town Committee and by the Town Planning Board when the Appellant applied for a review. We agree that the points were new points raised for the first time when we heard the appeal. Nevertheless, we admitted the evidence of Mr. Tang on the new points because we took the view that subject to the Appellant’s having a proper opportunity to deal with the new points raised, there was no reason to shut out relevant matters from our consideration. However, when it comes to our assessment on the probative value to be given to these objections, we are bound to take into account the fact that the points were raised rather late and that unless there was a good explanation for the omission of all these points when the matter was previously considered, one would be fully justified to question whether all these short comings and the alleged

non-conformity with the requirements set out in the HKPSG were really of such drastic consequences that should result in refusing the Appellant's application.

49. The Appellant's traffic consultant maintained that the stretch of Ha Yeung San Tsuen Road between the access road and Clear Water Bay Road was in fact wide enough to cater for 2-way traffic. She also made some suggestions to mitigate the short comings in the access arrangement of the proposed development. First, the width of junction between Ha Yeung San Tsuen Road and the access road could be slightly widened by setting back the access road, and it was also possible to provide a foot path on the side of Ha Yeung San Tsuen Road closer to the said land. It is however not possible to widen Ha Yeung San Tsuen Road to the width of 6.75 meters and to provide a foot path also on the other side of the road because this would involve the use of Government land and in any case Ha Yeung San Tsuen Road was built, managed and maintained by the Government. To improve the sight path at the junction, it was suggested that the vegetation at the corner of the junction between Ha Yeung San Tsuen Road and Clear Water Bay Road could be trimmed. To further improve the drivers' view of the traffic, she suggested that suitable mirror(s) may be installed at suitable position, and as an additional safety precaution, she also suggested suitable road signs may be installed to warn the drivers of the hidden junction between Ha Yeung San Tsuen Road and the access road.

50. Mr. Tang was adamant that even though there were still many mirrors found at public roads, it was the current practice of the Transport Department not to allow any mirrors to be installed at any public road and if the Transport Department should receive any complaints against the mirrors, it would have them removed. He tried to impress on us, and we do not think that we need any persuasion that road safety was a paramount consideration and that foot path on either side of the road was conducive to road safety

because not only could pedestrians travel safely on the foot path, the foot path was also useful for placing road furniture, traffic aids and providing safe loading and unloading points. Mr. Tang acknowledged that in fact there were many stretches of busy public roads in Hong Kong without any foot path at either side of the road. However, he maintained that it was the current policy of his department to require the developer undertaking any new development to provide for access roads which met the current requirements even though (a) the existing roads at the development site or serving the development site did not meet the current standard or requirements and the Government had no plan or intention to bring them up to the current standard and requirements; and (b) the new development would only reduce the volume of traffic on the roads. The philosophy behind this policy appeared to be that it would be a golden opportunity for the Government to save money by making the developers to pay for the improvement of the road system as a quid pro quo for getting permission or support for their application for permission to develop. From one point of view, it may be said that this is a policy serving the public interest because the Government could have the roads improved without spending public money. However, we are not impressed by such policy. We do not think we are bound by it.

51. We have no doubt that the provisions of the HKPSG are popular references frequently resorted to by town planners. However, it is quite clear that what are set out there are not to be read as gospel bible. In fact, paragraph 5 of HKPSG itself provides :

“5.3 Planning guidelines for development include locational criteria, compatibility between uses, development intensity and design guidelines, etc. These guidelines are provided for reference, assuming least development constraints.

- 5.4 The planning standards and guidelines should be applied with a degree of flexibility, having regard to land use demands, local conditions, development constraints and resource availability. They should not be applied in isolation and cross-reference between standards and guidelines should be made, whenever necessary.
- 5.5 Although planning standards and guidelines for various uses are not mutually exclusive, they have the effects of competing for scarce land and financial resources. In drawing up development proposals, trade-offs between standards may be necessary so that the community at large would benefit most from the development. In the development process, planners have to play the role of arbitrators, balancing the objectives and requirements between different parties in order to arrive at acceptable solutions.”

52. We have no doubt that some of the criticisms made by Mr. Tang on the access arrangement of the proposed development are valid ones. Our approach is to consider whether in the light of all the deficiencies pointed out by Mr. Tang, we are still of the view that having regards to all the features in the proposed development, there is a strong enough case for giving permission for the proposed development. In this respect, while we accept that it would be wholly desirable for the proposed access arrangement to meet each and every standard and requirements of the HKPSG and the Transport Department, in discharging our duty in this appeal, we are still bound to consider the likely impact on road safety of the deficiencies in meeting the standard or the requirements as pointed out by Mr. Tang.

53. On the width of the stretch of Ha Yeung San Tsuen Road between the access road and Clear Water Bay Road, we consider that

the proposed width of the road, although not quite wide enough to meet the requirements of the HKPSG, should not post any real danger. It has to be remembered that Ha Yeung San Tsuen Road is basically to serve the said land and the 10 buildings of Ha Yeung New Village. It is also noted that the part of Ha Yeung San Tsuen Road after it passes the said land is even narrower and it would appear that this part of the road is only a single track road with passing bays. As we have pointed out earlier, currently the said land is being used as car park for all sorts of vehicles, including heavy lorries and container trailers. There has never been any suggestion that there is any real traffic problem because of the width of Ha Yeung San Tsuen Road. Upon the change of the use of the said land from car park to a residential development of 5 houses only, it is to be expected that the number of heavy goods vehicles using the road would be very much reduced and in fact the volume of traffic as a whole should be substantially reduced. As there does not appear to be any real swept path problem currently, we would only expect the problem would be even less significant with the proposed development.

54. In relation to sight path, we note that the problem is mainly in relation to the north-west bound traffic from Clear Water Bay Road turning left into Ha Yeung San Tsuen Road. Having regard to the fact that the left turn angle is about 120 degrees and is therefore a rather sharp one, common sense will dictate that the speed of any vehicle so turning left into Ha Yeung San Tsuen Road could not be high. With the agreement of the parties, we have taken the liberty of consulting the Highway Code for information on the stopping distance of vehicles. A distance of 15 meters would roughly represent the stopping distance (thinking plus braking distance) of a vehicle traveling at about 35 km per hour. If one were to apply the more conservative 2 seconds travel distance between vehicles rule, a vehicle traveling at about 27 km per hour would cover a distance of 15 meters in 2 seconds. For the sake of comparison, we note that a stopping distance of 60 metres would roughly represent the stopping

distance of a vehicle traveling at about 82 km per hour, and a vehicle traveling at about 108 km per hour would cover 60 meters in 2 seconds.

55. We do not have any evidence on the sort of speed of vehicles turning left into Ha Yeung San Tsuen Road, but we think we can safely assume that having regard to the angle of turning and the width of Ha Yeung San Tsuen Road, the speed of the turning vehicles could not be high. Furthermore, even disregarding the current car parking use of the said land, we also note that for some of the uses which are always permitted under column 1 of the schedule for GB zone such as barbecue spot and picnic area, there are bound to be some vehicular traffic, the volume of which during peak picnic seasons may not be lower than the traffic generated by the 5 houses of the proposed development. Having regard to the fact that there was no complaint on the traffic and no record of any traffic accident at this location, we do not consider that imperfection or deficiency in the access arrangement is such a critical factor which would call for a rejection of planning permission regardless of the other merits of the proposed development.

56. Having regard to the proposed development as a whole, we consider that planning permission for the proposed development should not be withheld. First, we consider that the proposed development would be a great improvement of the environment as a whole. Having regard to the fact that the whole of the said land is surrounded by area of the CA zone which is not built on, we do not see much chance of any spreading of any urban or sub-urban development because of the proposed development. Also, the size of the development, the height of the proposed buildings and the landscape proposals are such that we do not consider that it could bring about any reasonable complaints from any of the nearby residents and the esthetic harmony in the rural outlook of the whole area to the south-west of Clear Water Bay Road is not in any way

affected by the proposed development. If anything, the position is improved by the provision of more vegetation in the proposed development. The planning intention of GB zone is not lost by allowing the proposed development and if anything, we consider that the proposed development would be more conducive to achieving the goal of the GB zoning. Even from the traffic point of view, although the proposed access arrangement has not met the standard and requirements to the expectation of the Transport Department, we are of the view that what is proposed in the proposed development would definitely be an improvement over the current position.

57. We have not overlooked the Respondent's objection based on the contention that it would set an undesirable precedent if the Appellant's application is allowed. The argument was developed in 2 ways. First, it was the concern raised by the Transport Department. It was said that if the present application was allowed it would set a precedent for other people to follow, so that there would be many more applications for development of land in the GB zone, and this development would generate cumulatively so much traffic that might overload Clear Water Bay Road. We have already dealt with this argument and we do not think much of it.

58. The other facet of the argument is that although there is no other piece of land within the OZP zoned for GB purposes with an existing use of car park or open storage, there are some GB or Agriculture zone lands with similarly existing use in other areas, such as in Ho Chung. The contention was that if the present appeal was allowed, it would encourage applicants to apply for such GB or Agriculture zone land to be used for similar development and this would destroy the purpose of the GB zoning. We do not think much of this argument either. Without any other details concerning these other possible applications, it is quite impossible for us to make any assessment as to whether the current case could properly be used as a precedent to support the applications. Suffice is for us to say that

every application for planning permission must be considered in the light of its own facts. We would only add that since we are convinced in the overall merits of the present application, if indeed there is to be a future application which is in all material respects on all fours with the present one, we see no reason why such future application should not be allowed. In this way, the present decision is a desirable precedent rather than an undesirable precedent.

59. On the basis of the materials and the other details of the proposed development put before us, our conclusion is that the appeal should be allowed. We will give planning permission for the said land to be used for the development of houses subject to some conditions which are designed to ensure that ultimately the development to be undertaken on the said land is substantially the same as the proposed development presented before us. In connection with the conditions to be imposed, at the early stage of the hearing, the Appellant through its counsel had indicated to us that it was prepared to accept the 4 conditions set out in paragraph 7.2 of the "Review of Application No. A/DPA/SK-CWS/4" (hereinafter called "the paper") prepared by the Planning Department found at page 1007 of the Respondent's bundle for this hearing save that the date for the permission to cease to have effect under paragraph 7.2(d) should be amended to 22 April 2011. The reason for the alteration of the date is that it is normal to give 4 years for an applicant to exercise the right given by the permission. The Respondent was also agreeable to the conditions to be imposed in terms set out in the said paragraph 7.2 subject to the alteration to the date.

60. We note that apart from the expiration date of the permission, the conditions proposed in paragraph 7.2 of the paper also covered the landscape aspect, the traffic aspect and also the geotechnical aspects of the development. The aspect concerning the traffic was extensively canvassed in the course of the appeal. Plainly, the Appellant's consultant and the Transport Department could not

come to any agreement in relation to transport arrangement requirements. On this matter, we have come to a view that despite the various deficiencies and imperfection in the proposal, what was proposed by the Appellant was sufficient to convince us to decide to grant planning permission. We would therefore feel that we should not impose any condition relating to traffic in terms set out in paragraph 7.2(b) of the paper because to do so would be to invite dispute and disagreement in the future and it may be the case that the Appellant though able to convince us to grant planning permission, is never able to device any proposal which could satisfy the Commissioner for Transport. For planning permission purpose which is all that we are concerned with, we think that it is sufficient for us to impose the condition that in relation to the traffic aspect, the permission is to be conditional upon the Appellant's carrying out what was proposed in paragraphs 2.3.2 and 3.3 of the Traffic Statement found at pages 1100, 1101 and 1102 of the Respondent's bundle.

61. We would emphasize that our decision on the traffic requirements is only in relation to the grant of planning permission. If, as it appears to be almost inevitable that the Appellant would require a modification of the terms of the Block Crown lease or a surrender and re-grant of the land before any development could be undertaken, it is a matter for some other authorities to decide whether such lease modification or surrender and re-grant should be given, and if so what terms, including any undertakings relating to traffic arrangement.

62. During the hearing of the appeal, we indicated that we were concerned that if planning permission for houses was given without any conditions or qualification, there would be no planning restriction to prevent the erection of a multi-storey sky scrapper at the said land and this would surely defeat the planning intention of GB zone. To address this issue, we enquire whether the Appellant would be prepared to accept a condition limiting the height of the

development on the said land. In response to our enquiry, the Appellant proposed in paragraph 37 of the closing submission the condition that “each building shall not exceed a maximum plot ratio of 0.4, a maximum site coverage of 20% and a maximum height of 9 metres and 2 storeys including car port”.

63. In a written submission in response to the terms proposed in paragraph 37 of the Appellant’s closing submission, the Respondent submitted that it may create confusion if we were to impose a condition in terms as suggested because the suggested criteria of plot ratio 0.4, maximum site coverage of 20% and maximum height of 9 metres with only 2 storeys appeared on the face of it to be similar to the restrictions for Residential (Group C) zone, and yet there are some differences in that Residential (Group C) zone has the restriction of maximum plot ratio of 0.5, site coverage of 25% and maximum building height of 9 metres and 3 storeys. Instead, the Respondent submitted that if the appeal was allowed, planning permission should be subject to “all the terms of the application as submitted to the Town Planning Board and as set out in the Appellant’s Planning Statement, including the detailed development parameters of the proposed development under the application as set out in section 4 (pages 4 and 5) of the Application Form submitted by the Appellant (pages 1025 and 1026 of the bundle) and section 4.2 of pages 6 and 7 of the Appellant’s Planning Statement (pages 1051 and 1052 of the bundle)”.

64. We accept the Respondent’s points on the possible confusion which may arise if we were to impose a condition in terms as suggested in paragraph 37 of the Appellant’s closing submission. We also accept that, in principle, since the planning permission is given on the basis of a set of proposals, there should be a condition imposed to make sure that the proposals would not be departed from in any material respect.

65. To conclude, our decision is that the appeal is allowed.

We will grant planning permission for the said land to be used for the development proposed by the Appellant subject to the following conditions :

- (a) The development shall be in compliance with section 4 of the Application Form (pages 1025 and 1026 of the Respondent's bundle) and paragraphs 4.2.1, 4.2.2, 4.2.3 and 4.2.4 of the Planning Statement (pages 1051 and 1052) of the Respondent's bundle;
- (b) The submission and implementation of landscaping and tree preservation proposals to the satisfaction of the Director of Planning or of the Town Planning Board;
- (c) The implementation of the proposals in paragraphs 2.3.2 and 3.3 of the Traffic Statement (pages 1100, 1101 and 1102 of the Respondent's bundle), or at the Appellant's option, the submission of traffic impact assessment and implementation of the road improvement works identified therein to the satisfaction of the Commissioner for Transport or of the Town Planning Board;
- (d) The submission of Geotechnical Assessment for the existing slopes on the said land, if so required by the Building Authority and Site Formation Plan showing the necessary site formation works, as prescribed by the Building (Administration) Regulation 8(1); and
- (e) The permission shall cease to have effect on the date 4 years after the delivery of decision herein to

the Appellant unless (i) prior to the said date either the development hereby permitted has commenced or (ii) an extension of time is granted by the Town Planning Board, and for this purpose, the Town Planning Board may grant extension from time to time both before and after the expiration of permitted time.

66. For the sake of the record, this appeal was heard originally by a panel of 5 members. After the completion of the hearing it was discovered that one of the presiding members was not qualified for appointment. The parties had indicated that they were content with the decision being given by 4 of the presiding members only. Accordingly, this is the unanimous decision of the remaining 4 members whose signatures are found at the end of this decision.

Dated this 30 day of July 2007.

Edward Chan SC JP
(Chairman)

Kenneth Chau Tak-ho
(Member)

Hui Kam-sing
(Member)

Tsang Man-biu
(Member)