

IN THE TOWN PLANNING APPEAL BOARD
TOWN PLANNING APPEAL No 13 of 2005

Between

China Resources Construction Co Ltd

Appellant

And

The Town Planning Board

Respondent

Dates of Hearing: 7 February 2007 and 15 March 2007

Date of Decision: 23 April 2007

Composition of the Appeal Board:

Professor Anthony M J Cooray (Chairman)

Mr Paul Chan Kam-cheung, JP

Mr Kenneth Chau Tak-ho

Professor Fong Wang-fun

Mr Yeung Pak-sing

1. The appellant, China resources Construction Company Ltd, applied for planning permission for the use of the appeal site for temporary open storage of construction materials and machinery for a period of three years. The application was rejected by the Rural and New town Planning Committee of the town Planning Board (RNTPC) on 17.12.2004 and that decision was upheld by the Town Planning Board on review on 22.04.2005. This appeal is against the Board's decision.
2. At the time the planning application was made, the appeal site fell within a "Comprehensive Development Area" zone ("CDA" zone) on the draft Ngau Tam

Mei Outline Zoning Plan No. S/YL-NTM/9. That zoning remains unchanged under the draft Ngau Tam Mei Outline Zoning Plan No. S/YL-NTM/10 which was gazetted in 2005 and the subsequently gazetted Outline Zoning Plans No. S/YL-NTM/11 and S/YL-NTM/12.

3. The appeal site covers an area of about 4,140m², made up of 17 private lots held under a Block Government Lease demised for agricultural use and a small area of government land. The site is accessible by a local track which leads to Chuk Yau Road. Its neighbouring land is mostly used for unauthorized open storage purposes. There are some residential dwellings to the north of the site.
4. The site is being used without planning permission for temporary storage of construction materials and machinery, with some temporary structures for office and storage use. Enforcement action has been taken in relation to the use of the land which the "Authority," namely the Director of Planning, believes not to be an existing use.
5. The appeal site has a history of 10 previous planning applications, six of which were rejected. The approved applications were:

While appeal site was within an "Unspecified Zone"

- i. Application No. A/IDPA/YL-NTM/5 for temporary building for storage of building materials, which was approved for a period of three years by the Director of Planning on 7.2.1991. The planning permission lapsed because the applicant failed to commence the proposed development.
- ii. Application No. A/DPA/YL-NTM/12 for godown for storage of steel and building materials, which was approved subject to conditions for a period of three years by the RNTPC on 3.9.1993. Approval conditions were not complied with.

While the site was within a "CDA" zone

- iii. Application No. A/YL-NTM/77 for temporary container tractor/trailer park, which was approved on 17.3.2000 for a period of three years by the RNTPC.
 - iv. Application No. A/YL-NTM/113 for temporary container tractor/trailer park, vehicle repair workshop, canteen and open storage of construction materials was approved on 26.10.2001 only for temporary container park and canteen only for 12 months.
6. The last two planning permissions were revoked in 2000 and 2002, for breach of a planning condition prohibiting "night time operations," when local complaints were received against the adverse traffic impact on Chuk Yau Road and traffic

and noise impact of heavy vehicles. The following applications were rejected by the Board while the appeal site was within the “CDA” zone.

- i. Application No. A/YL-NTM/26 for temporary container/trailer park for a period of 12 months was rejected by the RNTPC on 19.12.1997.
 - ii. Application No A/YL-NTM/39 for temporary container/trailer park for a period of 12 months was rejected by the RNTPC on 14.8.1998.
 - iii. Application No. A/YL-NTM/128 for temporary lorry/private car, container/trailer park for a period of three years was rejected by the RNTPC on 14.6.2002.
 - iv. Application No. A/YL-NTM/137 for temporary open storage of construction materials was rejected by the Board on review on 6.6.2003.
 - v. Application No. A/YL-NTM/157 for temporary warehouse for construction materials and open storage of trailers/tractors was rejected by the Board on review on 20.2.2004.
 - vi. Application No. A/YL-NTM/164 for temporary warehouse for construction materials and open storage of trailers/tractors was rejected by the Board on review on 20.8.2004.
7. The rejection reasons for all the above applications concerned adverse impacts such as drainage, traffic and environmental impacts. In the last three applications the main rejection reason was insufficient information in the submission to demonstrate that the development would not have adverse drainage, sewage, traffic and/or environmental impacts on the surrounding area.
 8. The present application was rejected for a similar reason, namely: “The proposed development does not comply with the TPB Guidelines No. 13C for Application for Open Storage and Port Back-up Uses in that there is insufficient information in the submission to demonstrate that the development would not have adverse environmental, traffic and drainage impacts on the surrounding area”.
 9. Guidelines No. 13C was promulgated in order to encourage location of open storage and port back-up uses in suitable areas, prevent further spread of these uses in an unregulated manner and minimize adverse impacts on the environment. The Guidelines classifies rural land into four categories of land for each of which a different set of planning criteria applies for the purpose of regulating open storage and port back-up uses.
 10. The appeal site is within a Category 3 area. As a general rule, a planning application in Category 3 will not receive favourable consideration unless the

application site has previous planning approvals. Sympathetic consideration will be given if -

- i. the applicant has demonstrated genuine efforts in compliance with approval conditions of such previous applications, and/or
- ii. included in the application relevant technical assessments/proposals to demonstrate that the proposed uses will not generate adverse drainage, traffic, visual and environmental impacts on the surrounding areas, and
- iii. there are no departmental and local concerns.

11. The Guidelines makes it clear that, while in the short term temporary permission for a period not exceeding three years may be given in such exceptional cases, there is a pressing need to stem the uncontrolled spread of open storage uses. See Paragraph 1.1 of the Guidelines.

12. The appellant presented their grounds of appeal in the form of a generalized criticism of the procedure in the Town Planning Board, as if the appeal were a judicial review application. The appellant set out what the Counsel for the respondent described as “noble principles of administrative law,” but did not specify how the Board was, for instance, biased or how the Board failed to give a proper and fair hearing to the appellant. When the appellant complained that they had not seen all the local objection letters, the respondent was prepared to disclose those documents but the offer was not taken.

13. When pressed to address the Appeal Board on substantive aspects of the Board’s decision which they find objectionable and why we should grant planning permission, the following points were raised:

- i. The appellant did not understand what is meant by “insufficient information” when the Board rejected their application on the ground that there was “insufficient information in the submission to demonstrate that the development would not have adverse environmental, traffic and drainage impacts on the surrounding area”.
- ii. There were no “local objections” to the use of their land for the current use which the appellant wished to regularize by obtaining planning permission. The objections were by persons living close to Chuk Yau Road, which is some 300 metres away from the appeal site. The appeal site lies by an access road which feeds Chuk Yau Road.
- iii. The use of the appeal site for the open storage of construction materials and machinery did not cause much environmental nuisance.

14. The appeal appears to us to be without merit. The applicable TPB Guidelines clearly indicates that the intention of the Board in relation to Category 3 areas is to try and eliminate open storage and port-back up uses, tolerating such uses where there are exceptional circumstances. In the present appeal, there are no such exceptional circumstances.
15. First, the appeal site does not have any previous planning permission which has been implemented in due compliance with planning conditions. In fact, there has been no successful planning application in respect of the appeal site since 2001. The last two grants of planning permission in 2000 and 2001 were revoked by the Board for non compliance with a “no night time operations” condition. Four planning applications made thereafter in 2002, 2003 and 2004 were all rejected. Furthermore, the Authority, has taken enforcement action in relation to the use of the appeal site which he considers an unauthorized use. When the present application was before the Board on review, the Planning Department submitted that planning circumstances had not changed since the recent rejection of the appellant’s planning application. The appellant did not argue that the Planning Department’s view was erroneous.
16. Secondly, even if there were previous planning permissions which had been implemented in due compliance with planning conditions, the applicant must supply sufficient information to satisfy the Board that there are no serious adverse environmental impacts and that there are no local concerns or departmental concerns (if there are such concerns the applicant must be able to show that they can be addressed through implementation of approval conditions): Paragraph 2.3 (Category 2 Area) and paragraph 2.4 (Category 3 areas) of the Guidelines read together.
17. The Board, having taken into account comments made and concerns expressed by the relevant government departments, was not convinced that the appellant’s use of land was one that could be favourably considered. The appellant cannot be heard to say that they do not know what is sufficient information to support their planning application. The previous applications had been rejected for similar reasons and an applicant for planning permission must examine the possible environmental and other impacts and justify their application on the ground either that there are no such serious impacts or that the applicants are able to propose mitigation measures which are acceptable to the relevant government departments. The appellant did not make an effort to establish the desirability of their development in either of those ways.
18. We cannot agree with the appellant that local objections must come from people who are resident in the immediate neighbourhood. It is common knowledge in planning circles that traffic impacts of a land use may not be limited to the immediate neighbourhood but may also extend to a larger area. Similarly, a land use may impact people living not only in the immediate neighbourhood but also

people living not too far away. In the present case, Chuk Yau Road which, according to the respondent, was not designed for heavy vehicle use and was already used up to its capacity, is fed by the access road which is used by a large number of land-users in the appeal site's neighbourhood. What the Board considered was not just the traffic generated by the appeal site, but the accumulative impact of all those uses. We have no reason to disagree with the Board on the question of adverse impact on the neighbourhood.

19. Most of the land in the appeal site's immediate neighbourhood is put to unauthorized use for open storage and related purposes. Enforcement action has been taken in relation to quite a few of them as in relation to the appeal site itself. In such circumstances, the present application cannot be supported unless a strong case is made for exceptional favourable consideration under Guidelines 13C. That the appellant has failed to do.

20. We dismiss the appeal.