

In the Matter of section 17 of the Town
Planning Ordinance Cap 131
and
In the Matter of Town Planning Appeal
Nos. 1 & 2 of 2005 brought by Lam
Kwun Kai,

Date of Hearing : 22 May 2007.

Date of Decision : 31 July 2007

Decision

1. These 2 appeals were heard together with the consent of both parties because both appeals involved the same points of law and insofar as any factual investigations were required, the matters involved were also almost identical. In fact the 2 pieces of land involved in each of the appeals were connected to one another and there is no physical barrier on the ground separating the 2 pieces of land.

2. Both pieces of land are situated at the Remaining Portion of section A of section 1212 in DD 115 at Nam Sang Wai, Yuen Long. The piece of land involved in appeal No. 1 of 2005 is on the western side, and the land in relation to appeal No. 2 of 2005 is on the eastern side. For ease of reference, the 2 pieces of land are hereinafter referred as site 1 and site 2 respectively. Site 1 has an area of about 7,000 square meters and site 2's area is about 4,000 square meters.

3. About 57% of the land in site 1 is private agricultural land and the remaining is land owned by the Government. Site 2 is private agricultural land.

4. On 26 April 2004, the Appellant made an application under section 16 of the Town Planning Ordinance for permission to use site 1 for the purpose of parking or open storage of about 60 container vehicles for a period of 3 years. On the same date, he also made an application for permission to use site 2 for the

purpose of a private car park for 100 vehicles also for a period of 3 years. On 25 June 2004, the Rural and New Town Planning Committee of the Town Planning Board rejected both of his applications. The Appellant applied for a review of the decisions by the Town Planning Board. On 29 October 2004, the Town Planning Board confirmed the decisions of the Committee and rejected the Appellant's applications. The reasons given by the Town Planning Board for their decisions were :

- “(a) The proposed development does not comply with the Town Planning Board Guidelines for “Application for Developments within Deep Bay Area” in that there is insufficient information in the submission to demonstrate that the development would not have adverse disturbance impact on the ecological integrity and ecological value of the fish ponds within the Wetland Conservation Area in the Deep Bay area;
- (b) The proposed development is incompatible with the nearby residential development; and
- (c) There is insufficient information to demonstrate that there is no adverse drainage, environmental and visual impacts on the surrounding areas.”

In relation to the site 2 application, the grounds given by the TPB for rejecting the application in their letter of 12 November 2004 were :

- (a) There is insufficient information to demonstrate that there is a shortage of car parks in the area given that there are provisions for car parks for residents, industrial undertakings and villagers nearby; and
- (b) There is insufficient information to demonstrate that the development would not have adverse drainage and visual impacts on the surrounding areas.

The Appellant brought these 2 appeals before us.

5. From the record of the aerial photos taken on 22 November 1988, it appears that site 1 was then part of a fish pond and site 2 had taken up the rest of the same fish pond and part of the next fish ponds. The fish ponds were divided by a bund. In fact the whole area bounded by what is now called Chung Yip Road, Chiu Tung Lane, San Pui Road and the Kam Tin River was then occupied by fish ponds (hereafter called “the Fish Ponds Area”).

6. The next aerial photo taken on 18 August 1990 showed that site 1 was still a fish pond. As to site 2, the part which occupied the same fish pond as site 1 still remained to be fish pond, but the rest of the site 2 fish pond area had disappeared because the next fish ponds had been filled up. In fact the land filling extended to 3 fish ponds to the north-west of San Pui Road.

7. The next aerial photo taken on 19 July 1995 showed that nearly all the Fish Ponds Area was filled up. The only parts which were not filled up were : (a) a small pond to the north-east of site 1; and (b) 3 fish ponds along the south and south-western bank of Kam Tin River before it joined the Nullah. It is also important to note that the July 1995 photo showed that site 1 was green indicating that there was some vegetation on the site, although it was not clear whether the vegetation was there as a result of some agricultural use of the site. A large part of site 2 was also green on the aerial photo. There were some isolated patches of brown which were consistent with the land not being covered by vegetation. It is important to note a piece of land rectangular in shape at the northern tip of the Fish Ponds Area had been leveled, paved and it appeared that there were some structures on it. This was the area of the Driving School. Access to the Driving School was from Chung Yip Road.

8. The next aerial photo taken on 8 November 1996 showed that site 1 was no longer green. Both site 1 and site 2 appeared to have been leveled and paved. It appeared that there were already some containers or container vehicles and other vehicles being placed in these sites. This photo also showed that the Driving School was in operation.

9. Insofar as the town planning aspect is concerned, there were various changes on the designated purposes of the Fish Ponds Area. It would appear that in February 2002, the 2 sites in question were zoned as residential (group D) under draft plan No. S/YL-NSW4.

10. On 16 April 2004, the Town Planning Board amended plan No. S/YL-NSW4 to become S/YL-NSW5. This was the set of plan applicable at the time when the Appellant made the application. In this plan, the 2 sites were both zoned for Comprehensive Development Area (3). Under the schedule in the Notes of the plan for this zone, there was no use which would automatically be permitted. There were various uses which may be permitted on application to the Town Planning Board, but the use for open storage or car park was not one of such uses. The planning intention for such zoning as stated in the Notes to the plan was as follows :

“This zone is intended primarily for environmental improvement of the area through low-density comprehensive residential developments with commercial use, open space and other supporting facilities, if any, to serve the residential neighbourhood. The zoning is to facilitate appropriate planning control over the development mix, scale, design and layout of development, taking account of various environmental, traffic, infrastructure and other constraints.”

11. Since the date of the application, as a result of changes to the town plans, the 2 sites had since 12 August 2005 been zoned for the purpose of “Other Specified Uses – Comprehensive Development Wetland Restoration Area” (“OU (CDWRA)”) in plan No. S/YL-NSW/6. Although the current version of the OZP is S/YL-NSW/8, the zoning of the 2 sites remains to be OU(CDWRA). Open storage and port back up facility uses are not amongst the uses which are always permitted or which may be permitted with or without condition upon application to the Town Planning Board under the 2nd column of the schedule. The planning intention statement of this zoning is as follows :

“This zone is intended to provide incentive for the restoration of degraded wetlands adjoining existing fish ponds through comprehensive residential

and/or recreational development to include wetland restoration area. It is also intended to phase out existing sporadic open storage and port back-up users on degraded wetlands. Any new building should be located farthest away from Deep Bay.”

12. Of course, even though open storage or car parking purposes are not amongst the lists of uses under either Column 1 or Column 2 of the schedule to the Notes of the relevant plans, the Town Planning Board (and hence also us) may still have power to permit such use for a period of not more than 3 years.

13. It is common ground that the car parking use of the sites had commenced by 1996 or 1997. Indeed it is not in issue that since then with the exception of a period of about 1 year in or around 2003, the 2 sites have always been used for lorries and container vehicles parking purpose. The explanation for the gap of one year was that there were some tenancy disputes over the 2 sites. As such use was not an existing, there was always the need to apply for planning permission. According to paragraph 9.8.13 of the Notes to the plan, it was stated that :

“Within the “OU(CDWRA)” zone, while open storage and port back-up uses that existed immediately before the first publication in the Gazette of the notice of the Nam Sang Wai IDPA Plan and those with planning permission from the Board are tolerated, new temporary open storage and port back-up uses would not be allowed by the Board.”

14. We note that in rejecting the applications of the Appellant, the TPB had not referred to the statement of Planning Intention quoted in paragraphs 12 and 13 above in relation to OU(CDWRA) zones. This is entirely understandable because at that time the 2 sites were zoned for Comprehensive Development Area (3) only.

15. However, in deciding whether to allow the appeal, we must not only take into account the plans in force at the time of the application, we are also bound to consider whether in the light of all the circumstances existing now, it would be right to grant the planning permission applied for by the Appellant. In

other words, the fact that we consider that in all the circumstances existing at the time when the TPB considered the application, the TPB had come to a wrong conclusion would not mean that we must allow the appeal. If in all the circumstances as they exist now, we do not think that the Appellant should be allowed to use the sites for the purposes applied for, we are still bound to dismiss the appeal even though we think that the TPB was wrong on the facts before it.

16. As we have pointed out earlier, the 2 sites in question were connected with no physical demarcation between them. The 2 sites had been treated as one in many previous applications for planning permissions. All these applications carried a reference number with the prefix of A/YL-NSW/. For the sake of convenient, we would just refer to the reference number and omitting the A/YL-NSW/ prefix. In the previous planning applications, sometimes the application site was the combined site 1 and site 2. Sometimes it was the combined site 1 and site 2 less a narrow strip of area between site 1 and Chung Yip Road and also a narrow strip of land to the south-east of site 2. On one occasion, i.e. application No. 164, the application area covered not only the whole of site 1 and site 2 but also a large trunk of land to the north-east of the combined site 1 and site 2 and it was an application for a comprehensive development of a residential complex. This application was subsequently withdrawn in November 2006.

17. There were 7 previous applications involving the combined site 1 and site 2 or approximately the area of the combined sites with mixed results. Applications Nos. 35, 82, 99 and 114 were successful. Application Nos. 81, 117 and 125 were refused. In relation to the 4 successful ones, planning permissions were sought for the purpose of using the area as a temporary lorry and container vehicle park. In relation to the unsuccessful ones, 2 of them were for the use as lorry and container vehicle park and application No. 81 was for the open storage of containers and also for lorry and container vehicle park.

18. We have carefully considered the brief history of the previous applications set out in paragraphs 6.1 to 6.8 of the witness statement of Lee Chi Yuen. We note in particular that in respect of the successful applications, permissions were granted for a period of one year only. We also note that in

respect of applications Nos. 35 and 82, the applicant then had not carried out certain conditions for the grant of the permissions relating to the improvement of the environment, drainage and traffic within the permission period. In relation to application No. 99, there was a condition that unless the conditions relating to the landscaping and drainage were carried out within 6 months, the permission would be revoked. The applicant failed to comply with the conditions and the permission was revoked after 6 months. The permission granted in application No. 114 would have expired on 1 March 2003. However, again because of the failure to comply with the conditions, the permission was revoked on 1 June 2002.

19. The last application involving the combined sites for lorry and container vehicle parking was application No. 125 which was rejected on 26 September 2003.

20. The subject sites 1 and 2 are at the south-western corner of the area covered by OZP S/YL-NSW. The 2 sites also fall within the Deep Bay Area for which the Town Planning Board had from time to time laid down guidelines for considering any application for development of any site within this area. In general, the Deep Bay Area consists of land (including fish ponds and wetlands) around the Deep Bay Area, and the 2 sites are in fact at the fringe of it. The Deep Bay Area could be further divided into 2 parts – the Wetland Conservation Area and the Wetland Buffer Area. The 2 sites are within the Wetland Buffer Area. The Wetland Buffer Area extended to area further south of the sites and covered also the whole of the Shan Pui Chung Hau Tsuen to the west of the 2 sites on the western side of Chung Yip Road, and the whole of the high rise residential development known as The Parcville about 100 metres to the south-east of the 2 sites on the southern side of San Pui Road. In fact the whole of the Fish Ponds Area extending right up to the Kam Tin River falls within the Wetland Buffer Area. On the north and north-eastern side of the Kam Tin River is the Wetland Conservation Area.

21. On the south and south-western side of the 2 sites is the Yuen Long Tung Tau Industrial Area. This area is just outside the Wetland Buffer Area and is also just outside the S/YL-NSW plan. The distance between the closest points of the Tung Tau Industrial Area and the 2 sites is about 50 metres.

22. The west and north-western boundary of site 1 is Chung Yip Road. It appears to be a public road in the sense that any member of the public could use that road. This road runs in a north-easterly direction from an un-named road behind Tak Yip Street at the extreme north of Yuen Long Tung Tau Industrial Area eventually reaching the Driving School. On its north-western side is the Shan Pui Chung Hau Tsuen, which appeared to be there for quite some time. On the northern part of Shan Pui Chung Hau Tsuen is a piece of land used as lorry and container park. To the further north of this park is the Driving School. On the southern side of Shan Pui Chung Hau Tsuen is the Yuen Long Kau Hui Sewage Pumping Station. From the aerial photos taken on 22 November 1988 and 18 August 1990, it appears that this Sewage Pumping Station was erected sometime between the dates of these 2 photos.

23. Farther way on the west of the sites and across the Nullah are the Yuen Long Industrial Estate and also the Tung Tau Wai Sun Tsuen.

24. The lands all along the eastern side of Chung Yip Road from site 1 right up to the Driving School are all used for car parking and open storage purposes. Here there are a number of small parking lots for the parking of various types of vehicles. Some of the lots were for storage of containers and the lot closest to the Driving School is being used as a loading and unloading area, probably to serve the container park next to it. With the exception of the one nearest to the Driving School, these lots are much smaller than either site 1 or site 2. From the aerial photograph taken on 10 February 2006, the one next to the Driving School is very large in area, probably bigger than sites 1 and 2 combined and extending almost to the small houses on the northern side of San Pui Road opposite to Shan Pui Hung Tin Tsuen. On the other side of Chung Yip Road where Shan Pui Chung Hau Tsuen is, at least 60% of the land along Chung Yip Street is being used for the parking of lorries and container vehicles.

25. One of the main contentions of the Appellant was that the TPB was wrong to require full information in the submission to demonstrate that the development would not have adverse disturbance impact on the ecological integrity and ecological value of the fish ponds within the Wetland Conservation Area in the Deep Bay area. In our view, he rightly pointed out that the

requirement of the ecological impact assessment within the Wetland Buffer Area set out in paragraph 6.5 of the Town Planning Board Guidelines for “Application for Developments within Deep Bay Area” would not be applicable because the permission sought was for temporary use only. From the reasons given by the TPB, it is to say the least not clear whether the TPB in rejecting the application in relation to site 1 had overlooked appendix A of that Guidelines. In this respect it is to be noted that none of the witnesses called by the Respondent had protested that the TPB’s reasons had been misunderstood, nor had counsel for the Respondent so submitted in the course of the hearing.

26. The reason for the exemption from the submission of ecological impact assessment in the case of temporary use is well understandable. Where the use applied for is only temporary, the impact on the ecology is not likely to be a permanent one. While it may well be financially worthwhile for a developer to commission a detailed ecological impact study in order to obtain permission for some permanent development such as the development of a housing estate, in most cases, it would not make much commercial sense for someone who simply wish to get permission for using the site temporary as a car park or open storage to invest money into commissioning an ecological study. Of course the fact that there is no compulsory requirement for the submission of an ecological impact assessment report does not mean that the TPB should not consider any ecological impact of the intended use.

27. In any event the Appellant did adduce a report said to be compiled by an engineer Mr. Tso. The report as submitted was unsigned. It purported to deal with traffic assessment of the proposed car park use, the drainage impact assessment, and it also gave certain landscape proposals. The Respondent had not objected to the Appellant’s adducing the report. However in his final submission, counsel for the Respondent submitted that we should attach little or no weight to the report because the expertise of the said Mr. Tso had not been established, and furthermore, in view of the lateness of the report there was no opportunity to obtain the comment of the various Government departments on the contents of the report. We consider the complaints were valid. However, in view of the fact that the Appellant was not legally represented and we are not bound by the strict rule of evidence and that the report was not objected to when

the same was adduced before us, we consider that we should nevertheless treat the report as part of the evidence before us, but when assessing the probative value of the contents of the report, we must bear in mind the criticism of the Respondent's counsel.

28. The Appellant further submitted that the TPB was wrong in rejecting the application relating to site 2 on the ground that there was insufficient information to demonstrate that the development would not have adverse drainage and visual impacts on the surrounding areas, or that in relation to site 1 the proposed development was incompatible with the nearby residential development. We think that there is merit in the Appellant's submission.

29. In relation to the ground of insufficient information to demonstrate the development would not have adverse drainage and visual impacts on the surrounding areas, we note that when giving its reasons for rejecting an application, it is a common occurrence for the TPB to use the formula of "insufficient information to demonstrate" certain features, and in this case it was the feature of no adverse drainage and visual impacts on the surrounding areas. This would give us the impression that the TPB did not find that the proposed development would, in their view, cause adverse drainage and visual impacts, but instead the TPB merely found that the applicant has failed to discharge a certain burden of proof. The TPB had not identified what evidence the TPB would consider as probative towards there being an adverse impact or there being no adverse impact. A reference to the minutes of the proceedings of the TPB did not reveal any such information either. We do not find such formulation of the grounds for refusal helpful.

30. We consider that the question of visual impact may be eliminated or at least mitigated by landscaping features. This is especially so if one is concerned with residents from nearby village type low rise houses. At any rate, the sites had been used for car parking purposes for nearly 10 years. There was no reason to suppose that the adverse visual impact would be more serious with the proposed developments at the 2 sites. We have not forgotten that quite close to site 2 is a high rise development called Parcville and we will consider the views and concern of its residents below. .

31. In relation to the views collected from the local residents, the information from the District Officer Yuen Long revealed that there were 15 objection and 51 supporting views collected. The information from the District Officer Yuen Long suggested that the residents of Parcville strongly objected to the applications on the ground of the adverse environmental impacts (including air pollution and noise nuisance), additional burden to the traffic flow nearby and deterioration to the surrounding living quality. We note however, that the Parcville was itself within the Wetland Buffer Zone and it was completed in 2002. While we are far from saying that the Parcville residents' view should be ignored, we must also take into account that by 2002, the sites in question were being used as car parks for all kinds of vehicles and there is nothing to suggest that the operation of the 2 car parks, one at site 1 for lorry and containers and 1 at site 2 for private cars would generate more adverse traffic problem or would have a more adverse impact on the environment than before. Nor can we see any reason as to why the permitted user of the sites in question should be limited or restricted by how the owner of the Parcville land had decided to use his land.

32. We also note that it was reported by the District Lands Officer that the Shap Pat Heung Rural Committee, the village representatives and villagers of the nearby villages also objected to the applications on the ground that the applied use was unnecessary because a lot of vacant parking spaces were available nearby and it would cause adverse traffic, environmental and ecological impacts to the surrounding area. We have no information on which were supposed to be the nearby villages. We presume that this would have included Shan Pui Chung Hau Tsuen and Shan Pui Hung Tin Tsuen and possibly also San Pui Tsuen. On the question of the demand for parking space, we accept the evidence that the car parking spaces within Parcville were only meant for the residents' use, and we also accept that there are also a number of car parks open to the public in Tung Tau Industrial Area, as well as along Chung Yip Road and also close to San Pui Village. However, we also accept the evidence that there were nevertheless lorry and container vehicles parked at the road side especially during the evening. On the whole, we find that there is still demand for parking space although the shortage is not so acute that all the road side lawful meter parking spaces as well as the car parks, both public and private are so full that vehicles are forced to park illegally at the road sides. We take the view that no matter what is the supply

position, unless there is a very strict enforcement of the parking law, there are always people who are prepared to take the risk of illegal parking at the road side. In this regard, we have no information as to the exact identities of the persons making the claims that there were a lot of vacant car parking spaces nearby and we do not know whether these people were motivated by any self interest as they might well have interest in the operation of other car parks in the vicinity. Looking at the matter realistically, the fact that the sites in question have since 1996 or thereabout been used for the operation of car parks would indicate that there must be a reasonable demand for the parking spaces.

33. Given the fact that in the usual course of things, one would expect the owners or users of the vehicles to have their vehicles parked at a place convenient to themselves, one would not expect that the overall traffic of around the Tung Tau Industrial Area and the Fish Ponds Area to be dramatically increased because of the sites in question were used for car parking. If the vehicles are not parked at the sites, they would probably be parking at some nearby car parks, such as those along Chung Yip Road, and the mobility of the vehicles would likewise generate more or less the same amount of traffic in the nearby area.

34. In relation to the traffic issue, we also note that in fact the Commissioner for Transport and the Highway Engineer had not raised any objection based on the volume of traffic generated by the proposed developments. The only concern raised was in relation to the question of who has the obligation to maintain the access road to the sites from Chung Yip Road. This would further support our view that the question of traffic is not a real issue compelling us to reject the application.

35. In connection with traffic, we note that the Director of Environmental Protection indicated that he would not support the application because he considered that the on site mitigation measure would not be able to properly address the noise nuisance generated by the traffic movement. It would appear that the main concern of the Director was not so much on the noise generated from the sites, but rather the off site traffic noise and its impact on the sensitive receivers which were identified to be the Shan Pui Chung Hau Tsuen in relation to the access point at Chung Yip Road and the Parcville in relation to Tak

Yip Road in the Tung Tau Industrial Area. In relation to the access point at Chung Yip Road, we consider that with the separation distance of some 50 meters, the nuisance created by the traffic using the access point should be reasonably acceptable. In any event, we do not consider that the vehicle noise would be significantly reduced if the vehicles (particularly the lorries and container vehicles) which would otherwise be parking at the sites were forced to park at other car parks along Chung Yip Road. The same consideration would also apply to the movement of heavy vehicles along Tak Yip Road.

36. In relation to the point about the drainage impact, we note that the TPB rejected the applications on inter alia, the ground that there was no sufficient information that there was no adverse drainage impact. We disagree with such view of the TPB. The strongest evidence is that there was nothing to suggest that there was any flooding problem caused by the sites being used for parking purposes in the past 9 years or so. In any event, the Chief Engineer on Drainage had no objection in principle to the applications. He merely expressed the view that should the application be approved, there should be a condition requiring the applicant to carry out a Drainage Impact Assessment (“DIA”) and flood mitigation measures proposed in the DIA and any other storm water drainage facilities to the satisfaction of the Board.

37. In the report said to be prepared by Mr. Tso, there was a section purporting to be the DIA. We appreciate that in view of the timing in the disclosure of the report, the Respondent did not have the opportunity of fully considering the report. However, in view of the fact that although the sites were used for vehicle parking in the last 9 years, there was no suggestion of any real drainage problem, this drainage concern may be addressed by suitable conditions to be imposed in the grant of permission if we are satisfied that permission should otherwise be granted.

38. We note that the sites were classified as Category 3 areas for the purpose of the Town Planning Board Guidelines for Application for Open Storage and Port Back-up Uses (TPB PG-13D) (“Guidelines”). The relevant guiding principles are set out in § 2.4 of the Guidelines :

“2.4 Category 3 areas are those outside Category 1, 2 and 4 areas. Within these areas, “existing” and approved open storage and port back-up uses are to be contained and further proliferation of such uses is not acceptable. Applications falling within Category 3 areas would normally not be favourably considered unless the applications are on sites with previous planning approvals. In that connection, sympathetic consideration may be given if the applicants have demonstrated genuine efforts in compliance with the approval conditions of the previous planning applications and included in the fresh application relevant technical assessments/ proposals, if required, to demonstrate that the proposed uses would not generate adverse drainage, traffic, visual, landscaping and environmental impacts on the surrounding areas. Subject to no adverse departmental comments and local objections, or the concerns of the departments and local residents can be addressed through the implementation of approval conditions, planning permission could be granted on a temporary basis up to a maximum period of 3 years.” (emphasis added).

39. The application in relation to site 1 is for Port Back-up use. Site 1 has previously had planning approvals for such Port Back-up use. Although previously when the matter was put before the TPB there was no assessment or proposal put forward, there is now the Tso’s report put before us. Other than the Director of Environmental Protection and the Planning Department, there was no real adverse comments from the various Government departments, and the views of the local residents were mixed.

40. We note of course that paragraph 9.8.13 of the Notes to the plan also said that “new temporary open storage and port back-up uses would not be allowed by the Board”, we interpret these words as providing for something similar to § 2.4 of the Guidelines. In this respect we consider that the statement here would only apply to those sites where there was no previous permission for use for temporary open storage and port back-up uses only.

41. In relation to the application relating to site 2, technically it is an application for use as a car park for private cars and as such it is not within the

meaning of open storage or port back-up use. We take on board the points made by the Respondent's counsel that the 2 sites were in fact only one site with no clear demarcation between them. There is only one entry to the sites from Chung Yip Road and access to site 2 would have to go through site 1. The consequence of all these is that there may be a danger that site 1 may be used for the parking of private cars or site 2 may be used for the parking of container vehicles.

42. On the planning side, we must not overlook the general planning intention of the OU(CDWRA) zone set out in paragraph 11 above. Since we are now concerned with whether planning permission ought to be granted for the future use of the sites, we consider that it is more appropriate for us to direct our attention to the current zoning of the sites rather than the zoning on the date of the submission of the application in 2004. We consider that in view of the current zoning of the sites, in the long term it would be incompatible with the planning intention to have the sites to be used for parking purpose permanently. However, we do not see that the grant of temporary permission for the sites to be used for vehicle parking would defeat the general planning intention for this zone. In this regard it is pertinent to note that around the sites and in particular all along Chung Yip Road there were wide spread of land being used for vehicle parking purposes. Also at the end of Chung Yip Road, there is the Driving School which has also obtained temporary planning permission for its operation there. We have enquired of the Respondent and the Town Planning Department as to the steps which the Government has taken to stop all these vehicles parking use as we note that none of these vehicle parking uses was existing use for the purpose of the Town Planning Ordinance. We were not given any information as to what action that the Government has taken or would propose to take in relation to all these vehicle parking sites. Apparently all these operations were carried out on Government land and it was the Lands Department and not the Planning Department to decide what action to be taken in relation to all these uses.

43. Furthermore, there is the Driving School at the end of Chung Yip Road which continued to enjoy the temporary permission for its operation. In terms of location, the Driving School is much closer to the Wetland Conservation Area. We consider that there is force in the Appellant's contention that if it is

said that the proposed development at the sites would defeat the planning intention of the OU(CDWRA) zoning, then the Driving School could not be any better and indeed is even worse. We consider that in view of the current zoning of the sites, in the long term it would be incompatible with the planning intention to have the sites to be used for parking purposes permanently, but a different consideration may be given to short term temporary use.

44. In all the circumstances, we consider that it is unlikely that there would be much improvement in the Fish Ponds Area or the area along Chung Yip Road for the next 2 years such that there would be any real or significant improvement on the restoration of the wetland in this area. Accordingly we are of the view that allowing the sites to be used for parking of vehicles would not have any or any long term impact on the planning intention of the CU(CDWRA) zoning.

45. We will thus allow the appeals. We consider that permission should be granted on conditions directed at addressing the particular areas of concern identified by the various Government departments. In deciding to grant the permission on the condition, we have also considered whether there is any realistic chance that the conditions imposed would be met. Our position is that if we do not think that there is any realistic chance that the conditions would be met, we should refuse to grant permission altogether. In this regard, we have not overlooked the fact that in the past, on a few occasions, the conditions imposed for the grant of an one year permission had not been met resulting in the revocation of the permission. We have no information on the reasons for the non-fulfillment of the conditions. However, we do think that one important factor affecting the question of whether an applicant for permission is likely to fulfill the conditions is whether the costs for complying with the conditions are disproportionate to the benefit that he would expect to derive from the permitted use of the land. On the whole having regard to the length of the period of permission that we are prepared to grant and the length of time allowed for satisfying the conditions, we consider that there should be a realistic chance that the conditions we seek to impose would be complied with.

46. In relation to TPA No. 1 of 2005 (i.e. site 1), we will grant

permission for site 1 to be used for the parking of lorries and container vehicles for a period of 2 years from the date of the delivery of this decision to the Appellant subject to the following conditions :

- (a) Within one month from the date of the delivery of this decision the Appellant shall cause a clear demarcation marking out the boundary between site 1 and site 2. Such demarcation is to be effected by physical objects attached to the ground such that crossing over between site 1 and site 2 is only permissible through designated points.
- (b) The Appellant shall submit a Drainage Impact Assessment report to demonstrate to the satisfaction of the Drainage Services Department or alternatively the Town Planning Board that the proposed use of site 1 for the purpose of parking of lorries and container vehicles would not cause any increase in the flooding susceptibility of the adjacent areas and that the said site 1 is provided with an adequate drainage system.
- (c) The Appellant shall submit a landscape proposal for the planting and preservation of trees or other vegetation to mitigate against any adverse visual impact of the proposed development, to the satisfaction of the Landscape Architect of the Planning Department or alternatively the Town Planning Board.
- (d) The Appellant shall implement :
 - (i) all the proposals and suggestions contained in the Drainage Impact Assessment report referred to under (b) to the satisfaction of the Drainage Services Department or alternatively the Town Planning Board; and

- (ii) the landscape proposals under (c) to the satisfaction of the Landscape Architect of the Planning Department or alternatively the Town Planning Board

both within a period of 8 months from the date of delivery of this decision to the Appellant or within such extended time as may be granted by the Town Planning Board from time to time before the expiration of the original prescribed time.

- (e) Upon any default in complying with any of the conditions set out herein, the permission granted for the proposed development is automatically revoked.

47. We will also grant permission for the use of site 2 for the purpose of parking of private car or light vehicles not exceeding 5 MT for a period of 2 years from the date of the delivery of this decision to the Appellant subject to the following conditions :

- (a) Within one month from the date of the delivery of this decision the Appellant shall cause a clear demarcation marking out the boundary between site 1 and site 2. Such demarcation is to be effected by physical objects attached to the ground such that crossing over between site 1 and site 2 is only permissible through designated points.
- (b) The Appellant shall submit a Drainage Impact Assessment report to demonstrate to the satisfaction of the Drainage Services Department or alternatively the Town Planning Board that the proposed use of site 2 for the purpose of parking of private cars or light vehicles not exceeding 5 MT would not cause any increase in the flooding susceptibility of the adjacent areas and that the said site 2 is provided with an adequate drainage system.

(c) The Appellant shall submit a landscape proposal for the planting and preservation of trees or other vegetation to mitigate against any adverse visual impact of the proposed development, to the satisfaction of the Landscape Architect of the Planning Department or alternatively the Town Planning Board.

(d) The Appellant shall implement :

(i) all the proposals and suggestions contained in the Drainage Impact Assessment report referred to under (b) to the satisfaction of the Drainage Services Department or alternatively the Town Planning Board, and

(ii) the landscape proposals under (c) to the satisfaction of the Landscape Architect of the Planning Department or alternatively the Town Planning Board

both within a period of 8 months from the date of delivery of this decision to the Appellant or within such extended time as may be granted by the Town Planning Board from time to time before the expiration of the original prescribed time.

(e) Upon any default in complying with any of the conditions set out herein, the permission granted for the proposed development is automatically revoked.

Dated this 31 day of July 2007

Edward Chan SC JP
(Chairman)

Carmen Chan
(Member)

Kenneth Chau
Tak-ho
(Member)

Ivy Tong
May-hing
(Member)

Winnie Tsui
Wing-chow
(Member)