

Town Planning Appeal No. 1 of  
2007

IN THE MATTER of the  
Town Planning Ordinance (Cap. 131)

and

IN THE MATTER of an Appeal  
under Section 17B by  
Mr. Tsang Kwai

Date of hearing: 29 August 2007

Date of Decision: 23 November 2007

Appeal Board:

Ms Sylvia SIU Wing-yee (Chairman)

Dr. Jane LEE Ching-yee (Member)

Mr. TSANG Man-biu (Member)

Mr. Douglas LEE Kar-yan (Member)

Ir. Dr. LI Chi-kwong (Member)

In attendance: Ms Christine PANG (Secretary)

Representation:

Mr. Tsang Kwai, the Appellant

Mr. Tam Che Wai (instructed by the Department of Justice) for the Respondent

## TOWN PLANNING APPEAL DECISION

### The Background

1. This Appeal arises from the Appellant's Planning Application No. A/NE-MUP/52 lodged with the Town Planning Board (TPB) on 6 June 2006 for use of the Site for temporary open storage of building materials for three years.
  
2. The Application was turned down by the Rural and New Town Planning Committee ("RNTPC") on 4 August 2006 and the TPB's review of 24 November 2006 maintained the same view and not supported the application for the following reasons :
  - (a) the development was not in line with the planning intention of the "Agriculture" zone;
  - (b) the proposed use would cause adverse impact on agricultural activities in the vicinity of the Site;
  - (c) the development did not comply with the Town Planning Board Guidelines for "Application for Open Storage and Port Back-up Uses" in that no previous planning approval was granted to the Site and there were adverse departmental comments;
  - (d) there was insufficient information in the submission to demonstrate that the use would not generate adverse environmental impact; and
  - (e) the approval of the application would set an undesirable precedent for other similar applications and the cumulative effect would be a general degradation of the environment of the area.
  
3. Thereupon, the Appellant by its Notice of Appeal under section 17B of the Town Planning Ordinance raised this Appeal.

## The Site

4. The Site is situated and identified as subsection 5 of section B of Lot 160 in D.D. 38, Sha Tau Kok Road, Man Uk Pin, New Territories. It is located within an area zoned “Agriculture” (“AGR”) as shown on the approved Man Uk Pin Outline Zoning Plan No. S/NE-MUP/11 (“the Plan”) approved by the Chief Executive in Council under the Town Planning Ordinance on 17 October 2006.
5. The Site covers an area of 1598.8 m<sup>2</sup> and is held under Block Government Lease and demised as agricultural land. The Site is flat, paved, fenced-off and accessible from the south-eastern side of Sha Tau Kok Road.
6. The areas surrounding the Site are predominately agricultural and rural in character: it is surrounded by active and fallow agricultural land and served by farm access and irrigation facilities. It is considered to be good agricultural land by the Director of Agriculture, Fisheries and Conservation.
7. The Appellant acquired the Site on 12 June 2000 for HK\$ 1,450,000.00
8. Prior to the acquisition, the Site was the subject of two previous planning applications and the applications were rejected:
  - (i) Application No. A/NE-MUP/3 for two warehouses and open storage of ceramic wares for a period of 12 months was rejected by the TPB on 31 March 1995 on the grounds that the application (a) was not in line with the planning intention for the area; (b) was not compatible with the surrounding land uses; (c) would aggravate the traffic condition on Sha Tau Kok Road and the proposed run-in/run-out would impair the safe use of the pavement by pedestrians; (d) did not include adequate details on provision of driveway, parking and manoeuvring spaces; (e)

(ii) Application No. A/NE-MUP/31 for open storage of ceramic wares for three years was rejected by the RNTPC on 2 June 2000 on the grounds that it :- (a) was not compatible with the surrounding land uses; (b) was not in line with the planning intention of the “AGR” zone; and (c) would set an undesirable precedent for other similar application within the “AGR” zone, and the cumulative effect would result in a general degradation of the environment of the area.

9. The Appellant, after acquisition of the Site and without seeking prior planning approval, used the Site for open storage of building materials. Upon being warned on 18 October 2000 in writing, the Appellant on 30 October 2000 submitted an application No. A/NE-MUP/33 under §16 of the Town Planning Ordinance to seek permission to continue to use the Site for open storage of building materials for three years. The application was rejected by the RNTPC on 22 December 2000 on the grounds that it: (a) was not in line with the planning intention of the “AGR” zone; (b) would set an undesirable precedent for other similar applications within the “AGR” zone, and the cumulative effect would result in a general degradation of the environment of the area; and (c) was not compatible with the surrounding areas which were largely agricultural and rural in character, and the applicant had not demonstrated that the open storage of building materials at the site would not cause any environmental nuisance to the adjoining areas.
10. The Appellant then applied for a review of the decision of the RNTPC by the TPB. On 27 April 2001, the application for review was rejected for the same reasons as those stated in the decision of the RNTPC.

11. An appeal to the Town Planning Appeal Board ensued, that is, Town Planning Appeal No. 5 of 2001. The Appeal was rejected by the decision of the Appeal Board on 3 January 2002.

### The Planning Intention

12. It is to be noted that the Notes form part of the Outline Zoning Plan S/NE-MUP/11.

13. The Planning intention in relation to an area zoned “AGR” is expressly stated in the Notes:

*“This zone is intended primarily to retain and safeguard good quality agricultural land/farm/fish ponds for agricultural purposes. It is also intended to retain fallow arable land with good potential for rehabilitation for cultivation and other agricultural purposes.”*

14. It is to be further noted that open storage of building materials is not one of the uses permitted under Column 1 “*Uses always permitted*” nor under Column 2 “*Uses that may be permitted with or without conditions on application to the Town Planning Board*”.

15. The Explanatory Statement to the Outline Zoning Plan S/NE-MUP/11 sets out the history of the zoning plans from IDPA/NE-MUP/1 to S/NE-MUP/11. (See §§ 2.1 to 2.12 of the Explanatory Statement).

16. At § 7.1.1 of the Explanatory Statement, it is explained that “*one of the primary planning intentions for the Area is to promote natural conservation...*” and at §7.1.2, it went on to say: “*in view of the rural characteristics of the Area, another planning intention of the Area is to retain the existing active agricultural land.*”

17. At § 9.4.1, it is repeated that the intention is primarily to retain and safeguard the Area under AGR of 97.36 hectares for good quality agricultural land/farm/fish ponds and at § 9.4.2 that the Director of Agriculture, Fisheries and Conservation advises that all actively cultivated agricultural lots are worthy of preservation. While some patches of fallow agricultural land found scattering on two sides of Sha Tau Kok Road has been used for open storage of various types, it is stated at § 9.4.3 that: “*it is not the planning intention to tolerate them in the long run*”.

Town Planning Board Guidelines for “Application for Open Storage and Back-up Uses”

18. This is provided under §16 of the Town Planning Ordinance. As stated in the TPB Guidelines No.13D (November 2005 version), locations are categorized into four areas: (1) Category 1 areas: locations that are considered to be suitable for open storage and port back-up uses. Favourable consideration will normally be given to applications 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; (2) Category 2 areas: locations where there is no clear planning or development intent, to be affected by major upcoming infrastructural projects, within or close to clusters of open storage or port back-up sites which are regarded as “existing uses” under the Town Planning Ordinance and/or subject of previous approvals, and not subject to high flooding risk. The applicant shall submit assessments as to drainage, transport, visual and environmental impacts, and where no serious objections are raised by government departments and residents in adjoining areas, temporary permission up to a maximum of three years may be granted; (3) Category 3 areas: save for existing use and save where planning approval had been given for open storage and port back-up, further permissions (in proliferation) would not be granted; and (4) Category 4 areas: locations of fish ponds, wetland and environmental sensitive areas. Open storage and port back-up applications would usually be refused.
19. The Coloured Map dated October 2005 and marked Plan No. M/NE/04/50E “Locations of Category 1, 2, 3 and 4 Areas for Open Storage and Port Back-up Uses in North East New Territories” shows that all the locations of Man Uk Pin

along Sha Tau Kok Road are Category 3 Areas. The rest of the locations of Man Uk Pin are Category 4 Areas.

The Appellant's Grounds of Appeal and Case

20. The Appellant's grounds of appeal are:
- (a) the business of collecting and refurbishing discarded sanitary appliances is environmentally friendly: with the refurbished sanitary wares destined for Hong Kong or third countries;
  - (b) agricultural activities in and around DD 38, in the vicinity of Sha Tau Kok Road and Man Uk Pin, has been on the decline and most of the agricultural land have been left to fallow. The Appellant in using the Site for open storage of sanitary wares has actively carried out environmental protection and improvement measures such as planting of trees;
  - (c) there has been no complaint as to noise, traffic, waste water and environmental pollution;
  - (d) if approval is given, the Appellant will satisfy conditions imposed to achieve the goal of environmental protection;
  - (e) the Appellant does not understand why the land opposite to the Lot has been zoned Residential (Group D) ("R(D)"); and
  - (f) it is wholly impractical to attempt to rehabilitate and use the Site for agricultural purposes.
21. Mr. Tsang Kwai gave evidence in person. He was assisted by Mr. Chan Tse-yee, Mr. Lee Siu-ming and Cheung Kei Wai, who all sat closely behind him. Mr. Tsang was given opportunities to talk to the three gentlemen during break and as and when he required their assistance. Although these three gentlemen were there as the Appellant's witnesses, none of them gave any written witness statements and Mr. Tsang did not tender any of them as witness. Mr. Chan Chi-yee stepped in and acted as Mr. Tsang's spokesman. Both Mr. Tsang and Mr. Chan argued

along the lines of the grounds of the application. Despite they were given the opportunity to adduce further evidence of assessments as to environmental, traffic and visual impacts, no new evidence was adduced.

### The Case of the TPB

22. Ms Lai Pik Hung, Senior Town Planner of the Planning Office covering Shatin, Taipo and the Northern Districts gave evidence on behalf of the TPB. Mr. Tam Che Wai tendered Ms Lai's witness statement dated 15 August 2007, ( found at p0001 to 0009 of the Hearing Bundle) as evidence-in-chief. Ms Lai explained the background, the Site, the previous six rejected applications (3 on the same Site, and 3 similar applications in the vicinity of the Site), the OZP plans S/NE-MUP 10 and 11, the Planning Intention, the TPB Guidelines for Application for Open Storage and Port Back-up Uses and the reasons for not supporting the application, the subject of the appeal.
23. Ms Lai was cross-examined by Mr. Tsang on why his application was not supported.
24. Ms Lai confirmed that:
  - (a) the Site is situated in Category 3 areas and in accordance with the TPB Guidelines No. 13D, save where temporary approval had previously been given for open storage and port back-up uses, further permissions would not be granted. In any event, even in the case where previous temporary permission had been given, the applicant should provide and attach to the new application, technical assessments to prove that the conditions imposed pursuant to the previous temporary permission had been complied with and that the proposed use would not impact drainage, traffic, visual and the environment adversely. Not only is there no previous permission in this case, the Appellant did not carry out the required technical assessments;
  - (b) the application was not supported by the Director of Agriculture, Fisheries and Conservation and the Environmental Protection Department (see the reasons at paragraphs 8(a) and 8(d) of Ms Lai's witness statement);



- (c) about 139 hectares of land have been zoned for Open Storage and Industrial (Group D) uses in the adjoining districts of Ping Che and Ta Kwu Ling. Users requiring land for open storage uses should be encouraged to move to these areas;
  - (d) the Site is part of an area zoned AGR: to the north and east is active agricultural land; to the west is fallow, vacant land and land for recreation farming; and to the south is empty land and land with residential structures. The application to use the Site for open storage purpose is incompatible with the rural characteristic of the location and the zoning intention; and
  - (e) the planning intention of the part of the land south of Sha Ta Kok Road as R(D) can be seen at paragraphs 9.1.1 and 9.1.4 of the Explanatory Statement to the OZP: for improvement and upgrading of existing temporary structures into low-rise, low intensity permanent structures and as incentive to convert open storage to residential use. For good quality agricultural land south of Sha Tau Kok Road, it is also zoned AGR.
25. Mr. Tam pointed out to the Appeal Board that the Appellant was prosecuted for unauthorized use of the Site for open storage and on 28 February, 2007, he was found guilty and fined at the Shatin Magistracy. Mr. Tsang admitted to the same.

#### Our Decision

26. We accept the evidence of the TPB as to the planning intention and policy to maintain the rural characteristic in areas zoned “AGR” and to encourage rehabilitation and active use of good quality agricultural land.
27. We also accept it is a sensible policy to limit proliferation of open storage in Category 3 areas to which the Site belongs.
28. We agree that the use of the Site for open storage and recycling used sanitary wares is likely to generate environmental nuisance and is incompatible with the planning intention for the area.
29. As no previous temporary permission had ever been granted for the Site to be used as temporary storage, in accordance with what has been laid down in TPB

Guidelines No. 13D, no new permission should be granted to limit proliferation of open storage uses.

30. We agree that the approval of the application would set an undesirable precedent for other similar applications, and the cumulative effect would be a general degradation of the environment of the area.
31. There is no change in planning circumstances since the rejection of the application.
32. It was pointed out to us that public comment was received which raised the concern of environmental pollution and health of the villagers and the TPB was urged to adhere to the planning principle.
33. We noted that the Appellant could submit evidence or put forth technical submissions to address the concerns raised by the Agriculture, Fisheries and Conservation Department and the Environmental Protection Department but did not do so.
34. Having heard the parties, read their submissions and fully considered all the evidence before us, we see no reason to disturb the decision of the TPB and the Appellant's appeal is dismissed.

Ms Sylvia SIU Wing-yee  
(Chairman)

Dr. Jane LEE Ching-yee  
(Member)

Mr. TSANG Man-biu  
(Member)

Mr. Douglas LEE Kar-yan  
(Member)

Ir. Dr. LI Chi-kwong  
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