

IN THE TOWN PLANNING APPEAL BOARD

Town Planning Appeal No. 21 of 2005

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BETWEEN

TANG Fook-cheung

Appellant

and

THE TOWN PLANNING BOARD

Respondent

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Appeal Board : Ms. Teresa CHENG Yeuk-wah, BBS, SC, JP (Chairman)  
Dr. CHAU Kwai-cheong  
Mr. HUI Kam-shing  
Mr. KAM Man-kit  
Ms. Helen KWAN Po-jen

In Attendance : Miss Christine PANG (Secretary)

Representation : Mr. TANG Fook-cheung (in person)

Mr. Chisum HO  
(Senior Government Counsel, Department of Justice)  
for the Respondent

Date of Hearing : 7<sup>th</sup> March 2007

Date of Decision : 8<sup>th</sup> August 2007

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## DECISION

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### **Background**

1. This is an appeal under Section 17B of the Town Planning Ordinance. The Appellant, Mr. Tang Fook-cheung, is the owner of DD 129 Lot No. 212B2(Part), Deep Bay Road, Lau Fau Shan, Yuen Long.
2. The Appellant sought planning permission under Section 16 to use the site for temporary storage (warehouse) for a period of three years. The current use is stated in the Application Form as being for storage and soda crystal workshop.
3. On 24<sup>th</sup> January 2005, the Appellant applied under Section 16 of the Town Planning Ordinance for the subject site to be used as a temporary warehouse. This was heard and dealt with by the Rural and New Town Planning Committee. This was rejected as seen in the letter of 15<sup>th</sup> April 2005. The reasons were that the planning intention to use the subject site as a temporary warehouse was not consistent with the planning intention of the Green Belt zone within which this subject site was located. Furthermore, the Committee considered that there was insufficient evidence to show that no adverse impact would be caused to the surrounding areas by the drainage and waste water that would be discharged from the site. There was also a concern that any approval

might lead to an undesirable precedent which might result in approvals contrary to the planning intention.

4. The Appellant then applied for a review of the Committee's decision under Section 17 of the Town Planning Ordinance. By a letter dated 5<sup>th</sup> August 2005, the Appellant was notified of the decision that the review application was dismissed by the Town Planning Board.
5. The Appellant filed an appeal under Section 17B on the 29<sup>th</sup> September 2005.
6. The Appellant appeals against the decision of the review by the Town Planning Board in respect of its application for using the site as a temporary warehouse and processing factory.
7. The application under Section 16 itself refers only to storage use. By the time of the hearing, the Appellant pointed out that in fact it was not just for storage use but also for use as a processing yard. As will be seen below, whether it is for the purpose of a temporary warehouse or a temporary warehouse with processing facilities, the appeal is dismissed.

### **The Site**

8. The site falls within an area zoned "Green Belt" on the approved Lau Fau Shan and Tsim Bei Tsui Outline Zoning Plan (OZP) No. S/YL-LFS/7. It lies just south of Deep Bay Road. Across the road, north of the application site, the area is zoned as the Coastal Protection Area.

To the east of the application site, just beyond the Coastal Protection Area is the Tsim Bei Tsui Site of Special Scientific Interest. Very close to the site is the boundary of the Wetland Buffer Area and immediately next to it is the Wetland Conservation Area.

9. An aerial photograph shows that the site was generally green with vacant pigeon farms and pigsty nearby. There was also a war game training camp and a warehouse of chemical products just across the road north of the application site.
10. The subject site has been used as a warehouse and workshop for many years, including the time of its first application which was rejected. There is also a warehouse of chemical products and an open storage of construction materials to the north of the site across Deep Bay Road. Indeed it was the existence of these illegal uses that led the Appellant to feel that he was not being fairly treated as, by reason of his application, he was faced with a sanction whilst the other users continue to be able to occupy the site with such illegal uses. The war game training camp, the warehouse of chemical products and the open storage of construction materials across Deep Bay Road from the appeal site were in fact within the Coastal Protection Area. These uses were also *prima facie* illegal.
11. The site is on a private lot held under a block Government lease for agricultural use. The site is reported to be 1,500 square metres. As stated in the Application Form, the site is currently used as a warehouse of chemical products and workshop. The structure that was built on the

site was in use for a while by the chicken farm that once operated on the site. The Appellant could not remember the exact date when it was built.

12. Given that the appeal site is within the Green Belt zone, it is relevant to note the planning intention set out in the Explanatory Statement of the Outline Zoning Plan No. S/YL-LFS/7. Paragraph 9.9 sets out the planning intention of the Green Belt zone and paragraph 9.11 sets out that in relation to the Coastal Protection Area.

9.9 Green Belt ("GB") (Total Area 203.21 ha)

9.9.1 *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. However, limited development may be permitted with or without conditions on application to the Board, and each application will be considered on its individual merits taking into account relevant Town Planning Board Guidelines.*

9.11 Coastal Protection Area ("CPA") (Total Area 55.99 ha)

9.11.1 *This zone is intended to conserve, protect and retain the natural coastlines and the sensitive coastal natural environment, including attractive geological features, physical landform or area of high landscape, scenic or ecological value, with a minimum of built development. It may also cover areas which serve as natural protection areas sheltering nearby developments against the effects of coastal erosion. There is a general presumption against development in this zone. In general, only developments that are needed to support the conservation*

*of the existing natural landscape or scenic quality of the area or are essential infrastructure projects with overriding public interest may be permitted.*

### **Previous Application and Appeal**

13. In 2002 and 2003, the same Appellant has sought the same planning application under Section 16 of the Town Planning Ordinance very similar if not identical to the current application. The Town Planning Board refused the application and the matter was subsequently heard by the Town Planning Appeal Board which rendered a Decision on the 12<sup>th</sup> December 2003.
14. The Respondent invited this Appeal Board to take note of the Decision of the previous Appeal Board but quite rightly accepted that we were not bound by it. This is entirely correct given that we do not have the benefit of knowing what evidence was tendered before that Appeal Board and it would be unsatisfactory to start comparing the evidence then and now. This Appeal Board therefore looks at the last Appeal Board's Decision as part of the evidence that is tendered before it. We were surprised to learn that as matters stand, there is no limit as to the number of times a Section 16 application can be made for a particular site.
15. The Appeal Board was also informed that this is in fact the second application for the same use at the same subject site by the same appellant. Whilst it may be undesirable for repeated applications to be made, and whilst the previous decision made by the Town Planning

Appeal Board on 12<sup>th</sup> December 2003 was placed before us, the Appeal Board observes that there is no suggestion that by reason of that, the Appellant is not allowed to bring this appeal as a matter of the laws and regulations that are now in place. Undesirable though it may be, this Appeal Board cannot dismiss this appeal simply for the repeated applications. It is a matter that is of concern and has to be addressed. Secondly, the decision of the previous Town Planning Appeal Board has no binding effect on us nor has it been so argued. It is of course evidence that we can consider. It is a matter of what weight we should be giving to such decisions. We have not been provided with sufficient information to be satisfied that all the facts and circumstances surrounding this appeal remains unchanged with that as was heard on 12<sup>th</sup> December 2003. Neither the Committee nor the Town Planning Board when reviewing the Committee's decision thought that to be a matter that would have bound them to reject the appeal.

#### **TRUNCATED APPEAL BOARD**

16. The hearing was conducted with five members of the Appeal Board. For reasons which need not be gone into in this Decision, Mr. Kam Man Kit, one of the member's appointment was revoked with immediate effect on 8<sup>th</sup> March 2007. The parties were informed of that situation and were asked whether they agreed that the truncated Appeal Board, namely the remaining four members could continue to deliberate on the appeal. By letter dated 21<sup>st</sup> March 2007, the Respondent indicated its consent for the remaining four members to

continue to deliberate. The Appellant also indicated his consent by a letter dated 21<sup>st</sup> March 2007.

17. In the premises, the truncated Appeal Board is satisfied that it has jurisdiction, and indeed the duty to continue to deliberate and render its decision.

### **Undesirable Precedents?**

18. The Appeal Board would first wish to indicate that it is not concerned nor would it be right for it to so do, with the submission that allowing this appeal would lead to undesirable precedents. Each case must be dealt with on its own facts and whether this appeal is allowed or dismissed does not necessarily mean that all other sites could not be ruled otherwise.

### **The Evidence**

19. The Appellant submitted that it was not appropriate to use traffic as a ground for rejecting the application because the impact on the traffic would be small. Furthermore, he objected to the reliance made by the Respondent on the other pending applications as being a relevant factor. The Appellant explained that as early as 2002 he has already started to apply for permission to use the subject site as a temporary warehouse. He complained that whilst there were emphasis on protecting wildlife, his rights to even make a living was ignored. For over 20 years, he said, it had been used as a farm for breeding chicken and mushrooms. As for



the treatment of waste water generated from the processing yard, he pointed out that he had already submitted a treatment proposal using two septic tanks, and that, it was submitted, would have been sufficient. He explained the process of production that would be involved if he were to be allowed to continue to use the site as a storage and processing yard. The Appellant then called a Mr. Cheng Ching-shuen who explained that it was used previously as a chicken farm and that had been so for many years. However, there was no clear evidence as to when it started to become a warehouse and processing yard.

20. The Respondent called Mr. Anthony C.Y. Lee to give evidence. In answer to the questions raised by the Appellant, Mr Lee said that warning letters have already been issued to the illegal users of the sites opposite the Appellant's site. The Appeal Board observed that five years have expired and yet no action or no enforcement actions have been taken in relation to the sites opposite to the Appellant's subject site. He accepted that there was no evidence of contamination actually leaving the site but there was a concern and as a result it would be up to the Appellant to satisfy the relevant Government authorities that any contamination would not leave the site, bearing in mind particularly that this is a site close to the Coastal Protection Area and the Wetland Conservation Area. He emphasised that warning letters had already been issued to the Appellant.
21. In the Closing Submissions, the Respondent relied on the previous Town Planning Appeal Board decision. As noted above, given that there is no details to show that the facts and circumstances in the

previous appeal remains the same as it is now, this Appeal Board, whilst taking into account the previous Town Planning Appeal Board's decision, does not find that it is bound to follow it. An independent planning judgment has to be made here.

22. A procedural point was also taken in that the original application made under Section 16 was for use as a temporary warehouse. It was submitted that this Appeal Board should hear the matter as if it is only for that purpose so that if the application is for a temporary warehouse and a processing yard, another application ought to be filed. The Appeal Board is not impressed with this argument. These are technical objections as it is clear from the application itself that all along the Appellant was expecting the site to be used not only as a temporary warehouse but as a fabrication yard. In any event, whether it is for use as a temporary warehouse or a temporary warehouse and fabrication yard, and as is seen below, the application is dismissed.
23. The Appeal Board asked for evidence from both parties to show when the subject site was first used as a storage and fabrication yard. The Respondent provided part of the survey record (which is in fact illegible) to show that the subject site was used as a pigsty in 1990. This was based on a survey record conducted by the Planning Department in 1990. The Appellant was also given the opportunity to show that prior to 1990, the use in which it is applying for has already been in place. No such evidence was forthcoming. The Appeal Board finds it difficult to rely on the evidence of the Respondent given its illegibility and also the fact that it was in fact only a plan made in 1990.

However, bearing in mind that it is the Appellant who has to discharge the burden of proving that prior to 1990 the subject site has already been used as a storage and fabrication yard, the Appeal Board is not satisfied that this burden has been discharged.

24. The importance of the evidence showing that the site was in use as a storage and fabrication yard prior to 1990 is because of Note 3 of the Outline Zoning Plan No. S/YL- LFS/7. (The interim development permission area plan was first gazette in 1990.) It provides:

*No action is required to make the use of any land or building which was in existence immediately before the first publication in the Gazette of the notice of the interim development permission area plan conform to this Plan, provided such use has continued since it came into existence. Any material change of such use or any other development (except minor alteration and/or modification to the development of the land or building in respect of such use which is always permitted) must be always permitted in terms of the Plan or in accordance with a permission granted by the Town Planning Board.*

25. Hence, it is necessary to ascertain what was the “existing use” as defined in Section 1 of the Town Planning Ordinance so far as the time as at 1990 is concerned. The Respondent submitted that we should look at what paragraph 26 of the last Town Planning Appeal Board decision sets out. As explained above, this Appeal Board is not bound by the Decision of the last appeal. Even if one is to look at paragraph 26 of the Decision, this Appeal Board feels it necessary that we should be provided with source evidence for us to come to an independent judgment based on the evidence that the parties could place before us.

Nonetheless, we do take that into account. But more importantly, we accept the Respondent's Submission that the burden of proof is on the Appellant to show that the use which it is applying for is already in place. As this burden has not been discharged as explained above, the Appellant cannot rely on paragraph 3 of the note to the outline zoning plan.

26. The planning guidelines laid down the planning intention of the Green Belt zone as quoted above is well founded and clear. Given that the existing use as at the time of 1990 has not been shown to be the use that the Appellant is applying for, this appeal ought to be dismissed.
27. As a result, the Appeal Board wishes to deal with these points first, although they are not strictly relevant. Nonetheless, they are complaints of the Appellant and it can be understood why he felt the grievance he did. The Appellant complained that the enforcement action was not taken in relation to the illegal users across the road. The actions were pursued by the Planning Department, as we are informed, but it was almost 5 years and yet it appears that no final position or decision has been made. The Appeal Board would observe that it is important that these enforcement actions should be actively pursued not just on those who has taken the proper step in trying to apply for a change of use but including those who, knowingly to the Government, has been using the site illegally.

### **Other Factors**

28. Nonetheless, it is important however to consider whether the traffic and other concerns raised by the Government departments are justified. The prime complaint is that the necessary information for the traffic impact and the likely damage to the environment due to contamination caused by the discharge from the fabrication yard has not been provided. More information was actually provided verbally during the hearing. Quite apart from the fact that the Respondent would not have had the benefit of the relevant Government departments from commenting on these information, the Appeal Board is not satisfied because the proposed arrangements does not show how the contaminated water would be discharged out of the site and where it would be discharged to. On balance, both on the point about the possible prejudice that would be caused to the Respondent as well as the inadequate information that is provided even at the oral hearing, the Appeal Board is not satisfied that the environmental concerns regarding the contamination that would be caused has been addressed. We note in particular of the proximity of the Coastal Protection Area and the Wetland Conservation Area and the very fact that this is in the Green Belt zone. It is trite that contaminated water/fluid seeping out of the septic tank and through the soil is a genuine concern as the surrounding conservation areas may very well be affected.
29. The Respondent elaborated on the undesirable influence that this appeal may have if it were to be allowed. It is effectively saying that this would be a floodgate argument as other cases can then rely on how this

appeal is decided. As noted above, the Appeal Board does not think that this is a relevant consideration. Even if we are to consider that on the basis that it could be a floodgate, it cannot really be conclusive one way or another because where there are adequate measures taken to protect the environment, and depending on the location of the site and the exact details of the use, this may not have precluded any applicant from coming forth. The cause for this floodgate concern is the power given to the Town Planning Board and hence Town Planning Appeal Board to decide each application and allow it if there are exceptional circumstances justifying it. If the real concern is one of floodgate, then guidelines prohibiting any further use of the area as open storage with no proviso will have to be applied for. That is not a matter this Appeal Board is concerned with here.

30. The Appellant raised the point of his livelihood contending that it would be affected if the application is not allowed. Whilst the Appeal Board is very sympathetic with the concern, nonetheless we have to act in accordance with the law, the facts and matters before us. The lease restricts the use of the site for agricultural purposes. In any event, what this Appeal Board is concerned with, is the application under the Town Planning Ordinance.
31. In the premises, this appeal is dismissed. The Respondent has stated that it would not ask for costs and as a result no order as to costs is made.

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

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Dr. CHAU Kwai-cheong  
(Member)

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Mr. HUI Kam-shing  
(Member)

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Ms. Helen KWAN Po-jen  
(Chairman)