

IN THE TOWN PLANNING APPEAL BOARD

Town Planning Appeal No. 25 of 2005

BETWEEN

TANG KWOK-TAI Appellant

AND

THE TOWN PLANNING BOARD Respondent

Appeal Board: Ms. Teresa CHENG Yeuk-wah, BBS, SC, JP (Chairman)
Dr. HUNG Wing-tat
Ms. Ellen LAU Hat-lan
Dr. LI Ling-hin
Dr. Paul YUNG Pui-yip

In Attendance: Miss Christine PANT (Secretary)

Representation: Mr. TANG Kwok-tat (absent)

Ms Jess CHAN
(Government Counsel, Department of Justice)
For the Respondent

Date of Hearing: 6th March 2007

Date of Decision: 8th August 2007

DECISION

Background

1. This is an appeal under Section 17B(1) of the Town Planning Ordinance against the decision of the Town Planning Board made on 4th November 2005.
2. The subject site is to the north of Sha Tau Kok Road – Lung Yuen Tau Section, at Lot 506RP and adjoining Government land in DD 83, Ta Kwu Ling, New Territories. The Appellant is the owner of the private lot of the sites.
3. The Appellant applied under Section 16 of the Town Planning Ordinance to seek permission to use the site for temporary open storage of vehicles for exhibition and sale for a period of three years.
4. On 24th June 2005, the Rural and New Town Planning Committee of the Town Planning Board rejected the application on the grounds set out in the letter, primarily on the basis that the development did not comply with the Guidelines for “Application for Open Storage and Port Back-up Uses”, that the use was not compatible with adjacent residential structures; there was no previous planning approval granted to the application site and no

technical proposals to demonstrate that there would be no adverse traffic and environmental impact on the surrounding areas.

5. On 15th July 2005, having received the decision, the Appellant applied for a review on 29th July 2005. On 21st October 2005, the Town Planning Board rejected the application generally on the same grounds as that of the Rural and New Town Planning Committee.
6. The Appellant did not attend the hearing before this Appeal Board. He has had full notice of the hearing but his chosen not to appear and based its application on the basis of the documents that is already before the Appeal Board.
7. By reason of Section 17B(5) the Town Planning Ordinance, the Appeal Board is satisfied that it should still proceed with the hearing of this appeal and cannot merely dismiss it because the Appellant was absent. The Respondent adduced one witness and made submissions. There was no new information provided at the hearing which has not been previously given to the Appellant. The Appeal Board asked for a clarification that both the Guidelines described as the 13C and 13D Guidelines ought to be considered in this appeal. Counsel for the Respondent provided their submissions in writing on this 9th March 2007. On 18th April 2007, the Appellant's representative, Macro & Associates confirmed that they "agree/accept" that the Town Planning Board Guidelines, 13C and 13D.

The Site

8. The subject site is within the draft Outline Zoning Plan S/NE-TKL/10. Around 90% of the site is zoned “AGR” and the remaining zoned “OS”. The relevant outline zoning plan underwent some amendments but there was no change to the subject site. The current relevant outline zoning plan number is now S/NE-TKL/12.

9. In the Notes of the Outline Zoning Plan, it is provided that:

Temporary use or development of any land or building not exceeding a period of three years requires permission from the Town Planning Board. Notwithstanding that the use or development is not provided for in terms of the Plan, the Town Planning Board may grant permission, with or without conditions, for a maximum period of three years, or refuse to grant permission.

10. Paragraphs 8.3 of the Explanatory Statement provides :

The general planning intention of the planning scheme area is to promote the conservation of the rural character so as to control urban sprawl, reduce flood risk and preserve agricultural land, and to achieve coherent planning and control of the open storage and industrial developments.

11. Paragraph 9.7.1 further provides that the planning intention of the “AGR” zone is :

Primarily to retain and safeguard good quality agricultural land/farms/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.

12. As for the planning intention of the “OS” zone, paragraph 9.4.1 provides that it is :

Primarily for the provision of land for appropriate open storage uses and to regularize the already haphazard proliferation of open storage uses. It provides for the orderly development of land for open storage uses that cannot be accommodated in conventional godown premises.

Planning Guidelines

13. Town Planning Board Guidelines 13C was in force at the time when the Rural and New Town Planning Committee rejected the application on 24th June 2005. On 2nd November 2005, the 13D Guidelines was promulgated. The categorization of the subject site remains the same in both guidelines and is within what is called the Category 3 area. At the time of considering this appeal, we were invited to look at the 13D Guidelines although at the time of the original application this was not in place. Under Section 17B(6)(c) and 8(b) of the Town Planning Ordinance, the Respondent submitted and it is not disputed by the Appellant that this Appeal Board may confirm, reverse or vary the decision appealed against. In so doing, Henderson Real Estate Agency Ltd v Lo Chai Wan held that this Appeal Board was to exercise an independent planning judgment. As a result, the Explanatory Statement and Guidelines made by the Town Planning Board can be regarded as material documents to be taken into account and that in exercising this independent planning judgment, both

the original as well as the amended Guidelines should be taken into account. This was not disputed by the Appellant.

14. On that basis, and given that we had to carry out an independent planning judgment exercise, it is pertinent to look at the new guidelines, the 13D Guidelines.

15. Paragraph 2.4 of the 13D Guidelines provided:

.... 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 approval conditions of the previous planning applications and included in the fresh applications 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 department 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. (our emphasis).

16. The Guidelines is quite clear that further proliferation is not acceptable. The only exception, seems from this guidelines, is that where the site has previous planning approvals. This is not applicable to this particular subject site.

17. Given that this Appeal Board has to consider the Guidelines when exercising the independent planning judgment and the Guidelines have laid down very clearly the planning intention and the expressed prohibition of proliferation of such open storage and port back-up uses, it may already be sufficient to dispose of the appeal by dismissing it on the ground that it does not comply with the Guidelines. Further, there was no previous planning approvals in relation to this site. No satisfactory technical assessments have been put before this Appeal Board either.

18. The Appeal Board has also reviewed the other factors. Part of the access road lies on Government land. The subject site is in rural area and the planning intention is to maintain its rural character. Ms. Stephanie Lai, witness of the Respondent explained that rural character means a rural village, agricultural land, greens, and farms all found near the site. As seen from the photographs, there is a domestic or residential premises adjacent to the site. There had been expressed concerns about the adequacy of the traffic arrangements if the site was granted the planning permission sought for. The landscape proposal was rather vague and was not acceptable. For instance, the suggestion of planting trees so as to preserve the green view of the residential areas was criticized as it was not physically possible for that to be done. We have not heard anything further from the Appellant to rebut that statement. One other matter raised by the Appellant in the written submissions is that the site is at the fringe of Category 1 area which is zoned “OS” and hence should not be subject to the Category 3 area limitations in the 13D Guidelines. We are

not impressed by this argument. Without the 90% of the land which is zoned as “AGR” that 10% open storage area is actually meaningless.

19. For the reasons above, the appeal is dismissed. There is not order as to costs.

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

Dr. HUNG Wing-tat
(Member)

Ms. Ellen LAU Hat-lan
(Member)

Dr. LI Ling-hin
(Member)

Dr. Paul YUNG Pui-yip
(Member)