

IN THE TOWN PLANNING APPEAL BOARD

Town Planning Appeal No. 3 of 2007

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BETWEEN

LIU KA SING

Appellant

and

THE TOWN PLANNING BOARD

Respondent

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Appeal Board : Mr. Patrick FUNG Pak-tung, SC (Chairman)

Prof. CHAU Kwong-wing (Member)

Ms. Alice CHOW Kin-tak (Member)

Mr. KWONG Po-lam (Member)

Mr. Kevin LAW Chi-shing (Member)

In Attendance : Miss Christine PANG (Secretary)

Representation :

Mr. LIU Sui Lun, authorized representative for the Appellant

Mr. WU Yuk Fung (Senior Government Counsel, Dept of Justice)  
for the Respondent

Date of Hearing : 13<sup>th</sup> December 2007

Date of Decision : 15<sup>th</sup> February 2008

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## DECISION

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### **This Appeal**

1. This is an appeal by Mr. Liu Ka-sing (“the Appellant”) against the refusal by the Town Planning Board (“the TPB”) of applications by him to use his land for temporary open storage of construction materials.
2. The Appellant did not speak or give evidence at the hearing of the appeal. His authorized representative, a Mr. Liu Sui Lun (“Mr. Liu”), made submissions as well as gave oral evidence on his behalf.

### **The Application Site**

3. The Appellant is one of the owners of a piece of land in Wah Shan Village, Sheung Shui, New Territories, consisting of Lot 184 RP, Lot 186 RP and Lot 187 RP in D. D. 52. Both Lots 186 RP and 187 RP have been cut into two parts by an access road (“the Access Road”) which runs in a west-east direction such that a small portion of Lot 186 RP and a small portion of Lot 187 RP which are contiguous with each other are situated directly north of the Access Road whereas the larger portion of Lot 186 RP and the larger portion of Lot 187 RP are situated directly south of the Access Road. Lot 184 RP (which is contiguous with the larger portion of Lot 186 RP) together with such larger portion of Lot 186 RP and the larger portion of Lot 187 RP (which is also contiguous with the larger portion of Lot 186 RP) form the subject-matter of

the applications to the Town Planning Board and of this appeal. The same will hereafter be referred to as the “Application Site”.

4. The Application Site has an area of about 3,575 square metres. The Access Road leads to Man Kam To Road to its west.

### **History and Zoning**

5. The Ng Tung River (Indus River) (“the River”) runs along the west of the Application Site. A number of years ago, Government decided to alter part of the course of the River and there came to exist a section of the abandoned meander of the River directly west of the western boundary of the Application Site. The Access Road came into being as a result of resumption of land by Government and it was used by the Water Supplies Department for the purpose of changing the course of the River. The Access Road is supposed to be maintained by the Water Supplies Department as opposed to the Highways Department even now.
6. On the draft Fu Tei Au and Sha Ling Outline Zoning Plan No. S/NE – FTA/9 (“OZP No. 9”) which was gazetted on 24<sup>th</sup> February 2006, the Application Site fell within an area zoned “Agriculture”. The part of the land immediately north of the Access Road, including Lot 182 RP, Lot 183 RP, the smaller portion of Lot 186 RP and the smaller portion of Lot 187 RP, has all been zoned for “Other Specified Uses (Port Back-Up Uses)”. OZP No. 9 was subsequently approved by the Chief Executive-in-Council and re-numbered as S/NE – FTA/10 (“OZP No. 10”) and the same was gazetted on 27<sup>th</sup> October 2006. There has been no change between the two plans insofar as they affect the Application Site and the land north of the Access Road.
7. The Notes which form part of OZP No. 9 set out the

various permitted uses of land in a Schedule of Uses. Under that Schedule, the following appear : -

“

OTHER SPECIFIED USES

<i>Column 1</i>	<i>Column 2</i>
<i>Uses always permitted</i>	<i>Uses that may be permitted with or without conditions on application to the Town Planning Board</i>

For “Port Back-up Uses” only

<i>Government Refuse Collection Point</i>	<i>Ambulance Depot</i>
<i>Government Use (not elsewhere specified)</i>	<i>Cargo Handling and Forwarding Facility</i>
<i>Public Convenience</i>	<i>Container Storage/Repair Yard</i>
<i>Public Transport Terminus or Station</i>	<i>Container Vehicle Park/Container Vehicle Repair Yard</i>
<i>Public Utility Installation</i>	<i>Dangerous Goods Godown</i>
	<i>Eating Place (Canteen, Cooked Food Centre only)</i>
	<i>Petrol Filling Station</i>
	<i>Public Vehicle Park (excluding container vehicle)</i>
	<i>Refuse Disposal Installation</i>
	<i>Utility Installation for Private Project</i>
	<i>Vehicle Repair Workshop</i>
	<i>Warehouse (excluding Dangerous Goods Godown)</i>

Planning Intention

*This zone is intended primarily for accommodating the anticipated increasing cross-boundary freight traffic, especially the parking of container vehicles, including container trailers and tractors, and other port back-up uses.*

AGRICULTURE

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<i>Column 1</i>	<i>Column 2</i>
<i>Uses always permitted</i>	<i>Uses that may be permitted with or without conditions on application to the Town Planning Board</i>
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<i>Agricultural Use</i>	<i>Animal Boarding Establishment</i>
<i>Government Use (Police Reporting Centre only)</i>	<i>Barbecue Spot</i>
<i>On-Farm Domestic Structure</i>	<i>Burial Ground</i>
<i>Public Convenience</i>	<i>Field Study/Education/Visitor Centre</i>
<i>Religious Institution (Ancestral Hall only)</i>	<i>Government Refuse Collection Point</i>
<i>Rural Committee/Village Office</i>	<i>Government Use (not elsewhere specified)</i>
	<i>House (New Territories Exempted House only, other than rebuilding of New Territories Exempted House or replacement of existing domestic building by New Territories Exempted House permitted under the covering Notes)</i>
	<i>Picnic Area</i>
	<i>Place of Recreation, Sports or Culture (Horse Riding School, Hobby Farm, Fishing Ground only)</i>
	<i>Public Utility Installation</i>
	<i>Religious Institution (not elsewhere specified)</i>
	<i>School</i>
	<i>Utility Installation for Private Project</i>

### Planning Intention

*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.”*

8. Paragraph (10) of the Notes reads as follows : -

*“(10) (a) Temporary use of development of any land or building not exceeding a period of two months is always permitted provided that no site formation (filling or excavation) is carried out and that the use or development is a use or development specified below:*

*structures for carnivals, fairs, film shooting on locations, festival celebrations, religious functions or sports events.*

*(b) Except as otherwise provided in paragraph (10)(a), 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.*

*(c) Temporary use of development of land or building exceeding three years requires permission from the Town Planning Board in accordance with the terms of the Plan.”*

### The Applications

9. By an application received by the TPB on 25<sup>th</sup> May 2006, the Appellant applied for permission under section 16 of the Town Planning Ordinance Cap. 131 (“the Ordinance”) to use the Application Site for “temporary open storage for construction materials”. Such application was considered by the Rural and New Town Planning Committee (RNTPC) of the TPB.
10. By a letter dated 4<sup>th</sup> August 2006, the TPB rejected the Appellant’s application with reasons set out.
11. The Appellant then applied for a review by the TPB of its own decision pursuant to section 17(1) of the Ordinance.
12. After a review hearing before the TPB and by a letter dated 24<sup>th</sup> November 2006, the TPB decided to reject the application for review by the Appellant. This letter sets out the same reasons as in the previous letter. They are as follows : -
  - “(a) *the proposed open storage of construction materials is not in compliance with TPB Guidelines for ‘Application for Open Storage and Port Back-up Uses’ in that there is no previous planning approval granted to the application site;*
  - (b) *the access road leading to the application site is sub-standard and is not suitable for use by medium/heavy goods vehicles; and*
  - (c) *there is insufficient information in the submission to demonstrate that the proposed development would not cause adverse environmental and traffic impacts on the surrounding areas.”*
13. The Appellant now appeals against the decision of the TPB

pursuant to section 17B of the Ordinance.

**Reasons (b) and (c)**

14. We propose to deal first with reasons (b) and (c) as set out in the TPB's letter referred to in paragraph 12 above.
  
15. On the evidence of Mr. Liu and the two witnesses for the TPB, namely, Ms. Lai Bik Hung ("Ms. Lai"), Senior Town Planning of the Sha Tin, Tai Po and North District Planning Office in the Planning Department, and Mr. So King Kwong ("Mr. So"), Senior Engineer of the Traffic Engineering (New Territories East) Division in the Transport Department, there is no doubt that the Access Road has been used for a few years to serve the container handling yards and logistics companies on its north side and also the lot immediately east of the Application Site. Mr. So has explained that the Access Road is no wider than 4 metres and had not been properly paved so that it is actually not suitable for container truck traffic. He also says that the reason why the land north of the Access Road was originally zoned for Port Back-up Uses was that it was originally contemplated that a proper road would be built by Government to serve the area but that did not materialize because the project was not approved by LegCo (probably its Finance Committee).
  
16. According to Mr. Liu, if the Appellant is allowed to use the Application Site for open storage of construction materials, it will only be used for the storage of concrete pipes measuring about 1.5 feet in diameter and 4 feet in length. He says that only light or medium lorries will be used to transport the pipes 2 or 3 times each day between the hours of 8:30 a.m. and 6:30 p.m..
  
17. According to Mr. So, such traffic will not adversely affect



18. Mr. Liu also says that the anticipated traffic and storage activities as described by him will not produce any air or noise pollution. Mr. So and Ms. Lai do not appear to differ. We also take the view that there are only a few huts nearby along the side of the Access Road and that the more populated area of the village is a considerable distance away from the Access Road.
19. In the circumstances, we take the view that allowing the Appellant to use the Application Site for the purpose and to the extent as stated by Mr. Liu will not adversely affect the existing traffic on the Access Road or the environment in the area.
20. We therefore do not think that reasons (b) and (c) put forward by the TPB are valid. We further do not think that the objections from local residents put in evidence before us are justified.

**Reason (a)**

21. We now deal with reason (a).
22. Reason (a) is based on the TPB's Guidelines for Application for Open Storage and Port Back-Up Uses (TPB PG – No. 13D) which were promulgated in November 2005 (“the Guidelines”). Under the Guidelines, land is classified into 4 categories. The Application Site falls into Category 3.
23. In relation to applications for permission under section 16

of the Ordinance to use land in Category 3 for open storage and Port Back-up Uses, the following is said : -

*“(c) Category 3 areas : applications would normally not be favourably considered unless the applications are on sites with previous planning approvals. 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 to demonstrate that the proposed uses would not generate adverse drainage, traffic, visual, landscaping and environmental impacts on the surrounding areas. Planning permission could be granted on a temporary basis up to a maximum period of 3 years, 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”.*

24. Both Ms. Lai and Mr. So express their main concern as being that allowing the Appellant’s application would set a bad precedent.

25. It is to be noted that the TPB Guidelines in general, the Guidelines and the classification of land into the various categories do not have the force of law or the status of an Outline Zoning Plan and the Notes thereto. This is, of course, far from saying that the Guidelines and the classification of land into categories by the TPB are not to be respected or followed.

26. In the context of the present case, whilst the Guidelines are to be taken into consideration and respected and are not lightly to

be departed from, the circumstances prevailing are quite unusual, in particular, in the following respects : -

- (i) The original zoning was to take into account the works to be carried out in altering the course of the River. Such works having been completed, the rationale behind the original zoning has become inapplicable or not wholly applicable. In this regard, it is to be noted that Ms. Lai commented in her evidence that Government may possibly re-consider the zoning of land south of the Access Road.
  
- (ii) The land owned by the Appellant and his co-owners (which is not very large in area) has been cut into two portions on two sides of the Access Road with different zonings.

27. In the circumstances, we believe that there is enough leeway given under paragraph (10) (b) of the Notes of OZP No. 9 in the exercise of our discretion to grant permission to the Appellant for temporary use of the land as requested but subject to stringent conditions, despite the Guidelines which themselves also leave some room for the exercise of discretion. (See the quotation in paragraph 23 above.)

### **Conclusion**

28. In all the circumstances, we allow the appeal of the Appellant and grant him permission to use the Application Site for the purpose of an open storage for a period of two years. Such permission is granted subject to the following conditions, namely :

- (i) Only concrete pipes can be stored on the Application Site.
- (ii) The Appellant whether by himself, his servants or agents or whosoever otherwise is allowed to transport the concrete pipes stored or to be stored on the Application Site only by the use of light goods vehicles (i.e., under 5.5 tons) on the Access Road or any part thereof limited to three return trips per day between the hours of 8:30 a.m. and 6:30 p.m..
- (iii) In the event of a breach by the Appellant of condition (i) or (ii) above, the permission granted above shall be deemed to be automatically withdrawn with immediate effect.

29. In view of the stringent conditions imposed above, we believe that it is not necessary for us to impose the other conditions set out in paragraph 6.3 of Document No. 7704 put before the TPB for its consideration at the review application hearing on 10<sup>th</sup> November 2006.

30. We are confident that our decision will not open the flood-gate for other applications relating to other lots in the area because of the unique circumstances in the present case. We make it clear that every case must be decided on its own facts and in light of all the prevailing circumstances and that it is fully open to the Planning Department and the TPB to monitor the situation in the next two years and take the same into account in considering any other application by other land owners or occupiers and any future application for renewal of permission by any owner including the Appellant of the Application Site.

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Patrick FUNG Pak-tung, SC  
(Chairman)

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CHAU Kwong-wing  
(Member)

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Alice CHOW Kin-tak  
(Member)

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KWONG Po-lam  
(Member)

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Kevin LAW Chi-shing  
(Member)