

IN THE TOWN PLANNING APPEAL BOARD

Town Planning Appeal No. 6 of 2005

BETWEEN

MR. CHEUNG CHI-KIN

Appellant

AND

THE TOWN PLANNING BOARD

Respondent

Date of Hearing : 5 June 2006

Date of Decision : 23 June 2006

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

Mr. AU Chi-yuen (Member)

Mr. HUI Kam-shing (Member)

Ms. Sylvia SIU Wing-yee (Member)

Dr. Paul YUNG Pui-yip (Member)

In Attendance : Miss Christine PANG (Secretary)

Representation : Mr. Edward K. K. SIT (of E & S Land Data Management Consultants Ltd.) for the Appellant

Miss Yasmin Mahomed (Senior Government Counsel, Dept of Justice) for the Respondent

DECISION

1. This is an appeal by the Appellant pursuant to section 17B of the Town Planning Ordinance Cap. 131 ("the Ordinance") against the decision of the Town Planning Board ("the Board") on an application for review of the Board's earlier decision not to entertain the planning application made by the Appellant under

section 16 of the Ordinance in relation to a site in the New Territories. The Board refused to vary its earlier decision on review.

The Site

2. The site in question comprises Lots 287 (Part), 296 (Part), 298 (Part), 299 S.A (Part), 300 (Part), 301 (Part), 302 S.A, 302 R.P., 303, 304, 306 and 307 (Part) in D.D. 119, Shan Ha Tsuen, Yuen Long (“the Site”).
3. The Site has an area of about 12,535 sq. m.. It consists of various private lots held under the Block Crown Lease and demised for agricultural use. The Appellant is not a registered owner of any of the lots within the Site. According to Mr. Sit who represents the Appellant, the latter is a descendant of one of the registered owners of land within the Site.

The Applications by the Appellant

4. By an application No. A/YL – TYST/249 dated 5th July 2004 (“the Application”), the Appellant applied to the Board for permission in relation to use of the Site pursuant to section 16 of the Ordinance. In paragraph 3 of the application form, under the heading “Zoning and Approval Sought” and in the box under “Use(s) applied for”, the Appellant wrote the following words : “Temporary hardware and plastic material recycle use”. It was further stated that the Application was for temporary use for one year.
5. In paragraph 7 of the application form, the Appellant set out in Chinese a number of reasons to justify the Application. As translated, they read as follows : -
 - “1. *The site has an area of about 11,420m² which meets the minimum requirement of 1,000m² for open storage uses.*
 2. *The development would not cause drainage problem and traffic noise as it is only used for temporary open storage of hardware and plastic materials for recycling use.*
 3. *The site is surrounded by a mix of land uses including container yards, machinery repair yards and warehouse for storage of miscellaneous items. The development is compatible with the surrounding open storage uses which have been recently approved.*

4. *The owner and operator of the site are willing to follow the requirements of the Town Planning Board and the concerned Government departments, should the application be considered on a sympathetic and long-term social benefit bases.*
5. *The application is submitted according to the notice issued by the Planning Department. It is a good example of co-operation between the Planning Department and the occupiers and it would set a desirable precedent for similar applications.*
6. *Should the application be rejected, about 50 staff will lose their jobs.”*

(emphasis added)

6. On 10th September 2004, the Rural and New Town Planning Committee of the Board (“the RNTPC”) decided to reject the Application after deliberation.
7. On 11th October 2004, the Appellant applied under Section 17(1) of the Ordinance for a review of the RNTPC’s decision (“the Review Application”).
8. The Review Application was to be considered by the Board on 7th January 2005. Despite due notice to the Appellant, he did not attend the Review Application hearing in person and did not send any representative or make any submission in writing. As a result, the Review Application was considered by the Board in his absence and rejected.

The Appeal

9. On 18th March 2005, the Appellant lodged a Notice of Appeal under Section 17B of the Ordinance against the decision of the Board to the Town Planning Appeal Board.
10. In paragraph 5 of the Notice of Appeal, the Appellant stated that he was appealing against : -

“The TPB’s rejection on review to the application No. A/YL – TYST/249 for temporary (storage of) hardware and plastic materials for recycling use for a period of 1 year.”

(emphasis added)

11. In paragraph 6 of the Notice of Appeal, instead of listing the grounds of appeal in full (as he was supposed to), the Appellant only put the following : -

“The application No. A/YL – TYST/249 had not been fairly considered by the TPB. (Details would be submitted prior to/at the appeal hearing.)”

The Outline Zoning Plans

12. As at the time of the Application and the Review Application, the prevailing Outline Zoning Plan applicable to that locality was the draft Tong Yan San Tsuen OZP No. S/YL – TYST/8 (“Plan No. 8”).
13. The Site falls squarely within a “V” zone in Plan No. 8, meaning “Village Type Development”. According to the Notes which form part of Plan No. 8, “hardware and plastic material for recycling use” was neither a Column 1 nor a Column 2 use of the “V” zone. Paragraph 11(b) of the Notes, however, provides as follows : -

“(b) Except as otherwise provided in paragraph (11)(a), and subject to temporary uses for open storage and port back-up purposes which are prohibited in areas zoned “Conservation Area”, 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.”

Hence, the Appellant made the Application under section 16 of the Ordinance.

14. Since after the Review Application had been rejected by the Board, draft Tong Yan San Tsuen OZP No. S/YL – TYST/9 and thereafter approved Tong Yan San Tsuen OZP No. S/YL – TYST/10 have come into effect. The “V” zoning of the Site has remained unchanged.

Previous Applications

15. In fact, the Site was the subject of three previous applications, apparently not by the Appellant. Applications Nos. A/YL – TYST/199 and 211 for temporary

open storage of construction materials and equipment were rejected by the RNTPC and the Board on review on 25th April 2003 and 12th December 2003 respectively. Application No. A/YL – TYST / 241 for temporary open storage of scrap metal and plastic materials for recycling was rejected by the RNTPC on 25th June 2004.

The Case of the Appellant

16. Despite what was stated by the Appellant in the Notice of Appeal, the Appellant or his representative never supplied details of his grounds of appeal. No written submission was submitted by Mr. Sit representing the Appellant. Even when Mr. Sit was beginning to make his opening submission at the hearing, he appeared reluctant to state the Appellant's grounds of appeal. Eventually he developed his argument which can be summarized as follows : -
- (i) By stating in the application form under section 16 of the Ordinance that the use applied for was "Temporary hardware and plastic material recycle use", the Appellant was **not** applying for permission to use the Site for "open storage" of such materials.
 - (ii) There was a failure of duty on the part of the Planning Department or the Board in not seeking clarification from the Appellant as to the exact nature of his application.
 - (iii) What the Appellant was in fact applying for was permission to use the Site as a "transfer station" for the said materials.
 - (iv) In all the circumstances, the Planning Department had misled the Board in giving the impression that the Appellant was applying for permission to use the Site for "open storage".
 - (v) By virtue of the fact that the application was not for use of the Site for "open storage", the relevant guidelines regarding applications for use as "open storage" should not apply.
 - (vi) Hence, the Appellant was unfairly treated by the Board.
 - (vii) The Appellant did not attend the hearing of the Review Application on 7th January 2005 or send a representative because he felt that he had been unfairly treated.
 - (viii) Hence the appeal should be allowed.

17. Mr. Sit did not call any witness to give evidence on behalf of the Appellant. In the course of his submission, he lapsed into giving evidence on factual matters. The Appeal Board pointed out to him that his submission on factual matters was not supported by any evidence. Eventually, he was forced to ask the Appeal Board to draw inferences favourable to the Appellant from the plans and photographs put before the Appeal Board in evidence.

The Case of the Board

18. The Board called as its only witness a Mr. Ng Siu-Tsun, Frederick ("Mr. Ng"). Mr. Ng is a Senior Town Planner/East, Tuen Mun and Yuen Long District Planning Office of Planning Department. Mr. Ng had submitted a witness statement and also gave oral evidence. Mr. Ng was cross-examined by Mr. Sit. We wish to record that a considerable part of such cross-examination led to nowhere because the questions put by Mr. Sit to Mr. Ng were too lengthy and convoluted and were at times simply incomprehensible both to the witness and the Appeal Board. At the end of the day, we find Mr. Ng to be a truthful witness and we accept his evidence, both written and oral, in toto. On this basis, we make our findings of fact and arrive at our conclusions set out below.

Our Findings

19. We find as a fact that the Site has indeed been used as an open storage for hardware, scrap metal, plastic and electronic wastes, used computer parts and monitors, miscellaneous materials and container trailers. The photographs put before us bear out such fact. We have been informed by Mr. Ng that the Site is in fact subject to enforcement actions by Government pending the result of this Appeal.
20. Although Mr. Sit sought to rely on the existence of some open canopied structures/structure on the Site to say that in fact the Site was not being used for open storage, he plainly admitted that such structures/structure could not have been erected with the approval or permission of the Building Authority. We find in all the circumstances that the open canopied structures/structure do not alter the fact that the Site is being used as an open storage for the abovementioned articles and materials.
21. Further, we find the claim by Mr. Sit that the Application was not an application to use the Site as "open storage" but as a "transfer station" to be disingenuous. As pointed out by Miss Mahomed, Counsel representing the Respondent, the reasons put forward by the Appellant in paragraph 7 of the application form (see

paragraph 5 above) show clearly that the Appellant himself understood that his application was for permission to use the Site as “open storage”. Such understanding on the part of the Appellant is further manifested by paragraph 5 of the Appellant’s Notice of Appeal (see paragraph 10 above). Furthermore, Mr. Sit has not been able to point out to the Appeal Board any document or literature which gives recognition to any category of use called “transfer station”.

22. In the circumstances, we are in no doubt that the Application should be treated and was correctly treated by the Board on the basis of an application to use the Site for “open storage” of the articles and materials specified in the Appellant’s application form.
23. In the extract from the Confirmed Minutes of the 827th Meeting of the Board held on 7th January 2005 put before us, the reasons given by the Board in rejecting the Review Application were set out as follows : -

“144. After deliberation, the Board decided to reject the application on review and the reasons were :

- (a) the development was not in line with the planning intention of the “Village Development Type” (“V”) zone which was to designate both existing recognized villages and areas of land considered suitable for village expansion. Land within “V” zone was primarily intended for development of Small House by indigenous villagers. No strong justification had been given in the submission to justify for a departure from the planning intention, even on a temporary basis;*
- (b) the development did not comply with the Town Planning Board Guidelines for Application for Open Storage and Port Back-up Uses (TPB PG-No. 13C) in that the development was not compatible with the nearby village houses and active/fallow agricultural land and there were adverse departmental comments on the application;*
- (c) there was no information in the submission to demonstrate that the development would not generate adverse environmental, drainage and visual impacts on the surrounding areas; and*
- (d) approval of the application would set an undesirable precedent for other similar uses to proliferate into the “V” zone. The cumulative effect of approving such similar applications would result in a general degradation of the environment in the area.”*

24. On the evidence before us, we are of the opinion that the reasons put forward by the Board in rejecting the Review Application are valid.
25. The Appellant has therefore failed to discharge the burden on him to show that the Board's decision on the Review Application is wrong. Further, we cannot see how the Appellant can accuse the Board of being unfair to him when he did not even bother to attend the Review Application hearing whether by himself or by a representative or send in any written submission. Any suggestion by the Appellant of failure of duty and misleading of the Board on the part of the Planning Department is without foundation and rejected.
26. In the circumstances, we dismiss the Appeal of the Appellant.

Costs

27. At the end of his submission, Mr. Sit was bold enough to ask that the Appeal be allowed with a costs order against the Respondent.
28. Section 17B(8)(c) of the Ordinance provides as follows : -

“(8) At the completion of the hearing of parties appearing at an appeal or at any adjourned hearing, an Appeal Board may –

(c) award to a party costs legal or otherwise as it considers reasonably incidental to the preparation and presentation of an appeal.”

There is therefore statutory power enabling an Appeal Board to make an order for costs against a party to an appeal.

29. Prompted by the submission on costs by Mr. Sit, the Appeal Board asked Miss Mahomed for assistance on the practice relating to costs. She informed the Appeal Board that it would only be very rarely that an Appeal Board would make an order for costs against any party. She did not ask for any order for costs against the Appellant in the event that the Appeal Board were to dismiss the appeal.
30. Some guidance has been given by the Appeal Boards in other cases. In **Town Planning Appeal No. 03/92 (28/7/92)**, the Chairman, the Hon. Mr. Justice Litton, had this to say : -

"Costs"

28. *We are empowered by section 17B(8)(c) to award costs to the successful party on an appeal. Mr. McNamara, on behalf of the TPB, asked for such an order in the event of our dismissing this appeal, and submitted a statement of the respondent's costs incurred on this appeal. On its face, the amounts incurred appear reasonable and the question is whether, as a matter of principle, we should exercise our powers under section 17B(8)(c) in the respondent's favour. We conclude that, generally-speaking, we should not. The Appellant is exercising a right conferred by statute to appeal against a decision of the TPB where, by the nature of things, the TPB cannot be expected to state fully its deliberations and reasons for refusing the application. The appeal on behalf of the Appellant has been conducted with dignity and restraint and there are no exceptional circumstances in this case which suggest that we should award costs against the Appellant and, in effect, deter future appellants from pursuing what, on its face, is an unfettered right of an aggrieved party."*
31. In **Town Planning Appeal No. 13 of 1993** (26/8/94) the Chairman, Mr. Robert C. Tang, Q.C., in response to an application for costs by the successful appellant said : "Our practice is that normally costs do not follow the event." He further said that in all the circumstances of that appeal the Appeal Board was of the view that it should not depart from its **usual practice** and made no order as to costs.
32. In **Town Planning Appeal No. 4 of 1996** (29/10/96), the Chairman, again Mr. Robert C. Tang, Q.C., said the following : -
- "30. The Town Planning Board has asked for costs. It has not been the practice of the Appeal Board to award costs to a successful party. This practice is ripe for review. But until a new policy has been adopted, we believe, in the circumstances, we should not order costs against the appellant."*
33. Thus, it would appear that the **usual practice** of the Appeal Board is not to make any order for costs against any party irrespective of the result of an appeal.
34. Although such is the usual practice, we are of the view that section 17B(8)(c) must have been enacted for a purpose. In exceptional circumstances, the Appeal Board must have the power to make an order for costs against a party.

35. In the present case, we take the view that the Appellant's Appeal is frivolous and wholly without merit. Although the Appellant chose not to make any representation or submission to the Board on the Review Application, which would have been the appropriate occasion for the Appellant to put forward his arguments addressed to the Appeal Board, he now accuses the Board of not having fairly considered his Review Application. Further, the way that the Appeal was being conducted is far from being commendable. We believe that the circumstances are such that we would have seriously considered making an award of costs against the Appellant. Nevertheless, as the Respondent has not asked for any order for costs against the Appellant, we will do nothing.

Conclusion

36. We dismiss the Appeal of the Appellant.