

IN THE TOWN PLANNING APPEAL BOARD

Town Planning Appeal No. 7 of 2006

---

BETWEEN

TO PING NAM

Appellant

and

THE TOWN PLANNING BOARD

Respondent

---

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

Miss Carmen CHAN Ka-man (Member)  
Ms. Lister CHEUNG Lai-ping (Member)  
Mr. Richard HO Kam-wing (Member)  
Ms. Denise HO Suk-chun (Member)

In Attendance : Miss Christine PANG (Secretary)

Representation : Mr. Tom TO, authorized representative for the Appellant

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

Date of Hearing : 23<sup>rd</sup> November 2006

Date of Decision : 22<sup>nd</sup> December 2006

---

## D E C I S I O N

---

1. This is an appeal by Mr. To Ping Nam (“the Appellant”) against a decision of the Town Planning Board (“the TPB”) to reject his application for permission to use his land for a certain purpose. The basic facts are substantially not in dispute and I set them out below.

### **The Basic Facts**

2. The land in question is situated in Ping Shan, Yuen Long, and known as Lot No. 743 in Demarcation District 122 (“the Land”). Under the Government lease in question, the Land is to be used as “agricultural land”. It has an area of about 607 square metres.
3. The Appellant is an indigenous resident in that part of the New Territories. He carries on, inter alia, agricultural activities and is one of the village representatives of his particular village. He owns various pieces of land in the New Territories.
4. The Appellant purchased the Land in about 1992. At the time of purchase, he noticed that there was a small quantity of marble material being stored on the Land. Such material apparently belonged to a marble workshop operating nearby. Subsequently, the marble workshop started to store more and more marble material on the Land. The Appellant and the proprietor of the marble workshop decided to regularize their relationship. In 1998, the parties entered into a tenancy agreement for the Land for a term of 3 years at a rental of \$6,000-per month. The same was extended upon expiry. Eventually, the Appellant was prosecuted and fined for unauthorized use of the Land because of the storage of marble material there. The Appellant and the proprietor of the marble workshop formally terminated their relationship as landlord and tenant as from 31<sup>st</sup> March 2005.
5. The Land is within the area covered by the Approved Ping Shan Outline Zoning

Plan S/YL – PS/11 (“the OZP”). The Land is part of an area designated in the OZP as land for “Undetermined” use.

6. Under paragraph (13) of the Notes to the OZP (which form part of the OZP itself), it is provided as follows : -

*“(13) In the “Undetermined” zone, all uses or developments except those specified in paragraphs (8) and (11) above require permission from the Town Planning Board.”*

7. By an application dated 30<sup>th</sup> July 2004, the Appellant made an application to the TPB pursuant to section 16 of the Town Planning Ordinance Cap. 131 (“the Ordinance”) for permission to use the Land as a temporary marble workshop and for storage of marble for a period of 3 years.

8. By a letter dated 15<sup>th</sup> October 2004, the TPB rejected the Appellant’s application. The letter set out the following reasons for the rejection : -

*“(a) the development is not compatible with the surrounding areas, in particular there are residential structures about 40m from the site;*

*(b) the proposed development is not in line with the Town Planning Board Guidelines No. 13C, as no information has been submitted to demonstrate that there would not have adverse drainage and landscape impacts on the surrounding areas; and*

*(c) the approval of this application would set an undesirable precedent for similar applications in this area. The cumulative effects of approving these similar applications would result in a serious degradation of the environment in this area.”*

9. The letter further said : -

*“Under section 17(1) of the Town Planning Ordinance, an applicant aggrieved by a decision of the Board may apply to the Board for a review of the decision. If you wish to seek a review, you should inform me within 21 days from the date of this letter. I will then contact you to arrange a hearing before the Board which you and/or your client will be*

*invited to attend.*

*Under the Town Planning Ordinance, the Board can only reconsider at the review hearing the original application in the light of further written and/or oral representations. Should you decide at this stage to materially modify the original proposal, such proposal should be submitted to the Board in the form of a fresh application under section 16 of the Town Planning Ordinance.”*

10. The Appellant did not make an application for review under section 17(1) of the Ordinance.
11. By an application dated 18<sup>th</sup> July 2005, the Appellant made an application to the TPB again pursuant to section 16 of the Ordinance for permission to use the Land for the purpose of a temporary storage of building materials. Before the TPB had made any decision on such application, the Appellant had already started to use the Land for the purpose applied for.
12. By a letter dated 23<sup>rd</sup> September 2005, the TPB informed the Appellant that his application had been rejected.
13. On 12<sup>th</sup> October 2005, the Appellant applied for a review of the TPB’s decision pursuant to section 17(1) of the Ordinance.
14. On 10<sup>th</sup> February 2006, the TPB notified the Appellant that his application for review had been rejected.
15. Hence, the present appeal.

### **The Appellant’s Case**

16. At the hearing of this appeal, the Appellant was represented by his son, Mr. Tom To (“Mr. To”), who gave sworn evidence and made submissions on behalf of the Appellant.

17. The case of the Appellant as put forward by Mr. To in evidence and in submission can be summarized as follows : -

- (i) The Land is flat and fenced off and is proposed to be used for the storage of building materials, basically wooden planks and structures, used by the construction company operated by Mr. To himself who is a qualified structural engineer.
- (ii) At present, Mr. To stores his building materials on some land in Pat Heung paying a storage fee of \$10,000- per month. The owner of such land wishes to recover it for his own use.
- (iii) The Land is situated in the middle of an area where various plots are being used for the purposes of a marble workshop, storage of machinery and construction materials, a metal workshop and a car park for container vehicles, trailers, lorries and other vehicles.
- (iv) Insofar as there are any residential structures nearby, they are either vacant or sparsely populated and any residents there would be occupying the structures illegally and should not be protected.
- (v) There will be no work carried out on the Land and hence no noise produced.
- (vi) There is a big drain on one side of the Land which can solve any drainage problem there is.
- (vii) The application is only for use of the Land for the purpose applied on a temporary basis.
- (viii) The Appellant will plant trees along the boundary of the Land.
- (ix) In short, the application if granted will not produce any ill-effect on other land and people in the vicinity.

### **Certain Factual Aspects**

18. The Respondent, the TPB, called one witness, Mr. Chan Wai Shun, a Senior Town Planner from the Planning Department, to give evidence and to deal with certain allegations of the Appellant and Mr. To.

19. Mr. Chan made the following points on some of the factual matters. We accept his evidence and make the following findings of fact : -

- (i) Insofar as the metal workshop is concerned, the use of the Land is authorized by Government.
- (ii) As regards the residential structures, the photographs show clearly that they are occupied and the use of the Land by the occupants have been tolerated by Government.
- (iii) So far as the use of the other pieces of land in the vicinity by the marble workshop, for storage of machinery and building materials and as a car park for vehicles of various types is concerned, such uses are unauthorized and the illegal users are being or will be prosecuted.
- (iv) The building materials of Mr. To will need to be transported to and from the Land by heavy trucks which will produce a lot of noise and will burden the access roads unduly. Even according to Mr. To himself, trucks of up to 30 tons may have to be used.

20. We therefore find that the factual points relied on by the Appellant through Mr. To do not assist his case at all.

### **The Reasons Put Forward By The TPB**

21. The reasons put forward by the TPB for rejecting both the applications by the Appellant under section 16 and section 17(1) of the Ordinance are basically two :

-

- (i) The proposed use of the Land is not in harmony with the adjacent residential structures to the west and south-west of the Land;
- (ii) The Appellant has failed to comply with the relevant paragraphs in the Town Planning Board Guidelines For Application For Open Storage And Port Back-Up Uses Under Section 16 of the Town Planning Ordinance TPB PG-No. 13C (Revised April 2003) and subsequently TPB PG-No. 13D (Revised November 2005)

(respectively “the 2003 Guidelines” and “the 2005 Guidelines”).

22. The relevant parts of the 2003 Guidelines read as follows :-

“2. General Planning Criteria

2.1 *The following are criteria to be used in the assessment of planning applications for open storage and port back-up uses.*

*Site Location*

.....

Category 2 areas

2.3 *Category 2 areas are mostly those without clear planning intention or fixed development programme, to be affected by major upcoming infrastructural projects, within or close to open storage or port back-up sites which are regarded as “existing uses” under the Town Planning Ordinance, and areas not subject to high flooding risk. Technical assessments, where appropriate, should be submitted to demonstrate that the proposed uses would not have adverse drainage, traffic, visual and environmental impacts on the surrounding areas. 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, planning permission could be granted on a temporary basis up to a maximum period of 3 years. Open storage and port back-up uses in these areas should be phased out in the long term.”*

23. There is no dispute that the Land is a “Category 2 area”.

24. By the time of the consideration by the TPB of the Appellant’s application for review under section 17(1) of the Ordinance, the 2005 Guidelines had become applicable. The relevant parts of the 2005 Guidelines read as follows : -

“2. General Planning Criteria

2.1 *The following are criteria to be used in the assessment of planning applications for open storage and port back-up uses.*

*Site Location*

.....

Category 2 areas

2.3 *Category 2 areas are areas mostly without clear planning intention or fixed development programme, to be affected by major upcoming infrastructural projects, within or close to clusters of open storage or port back-up sties which are regarded as “existing uses” under the Town Planning Ordinance and/or subject of previous approvals, and areas not subject to high flooding risk. Technical assessments, where appropriate, should be submitted to demonstrate that the proposed uses would not have 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 departments 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.”*

25. In practical terms, the parts of the two Guidelines quoted above are not much different from each other.

**Our Findings**

26. On the evidence before us, we agree with the decision of the TPB and find the following : -

- (i) There is strong objection to the applications by a District Board member representing local residents as set out in his “Comments on



Planning Application” dated 8<sup>th</sup> November 2005.

- (ii) There are objections by officials in the relevant Government departments to the ill-effects on the environment and areas surrounding the Land in the event of the applications being granted. There is a cumulative effect in the improper use of different pieces of land in the area.
  - (iii) Most important of all, the Appellant has simply failed to submit any technical assessments “to demonstrate that the proposed uses would not have adverse drainage, traffic, visual, landscaping and environmental impacts on the surrounding areas.”
27. The point made in paragraph 26(iii) above is not equivalent to asking the Appellant to remedy the situation outside the boundaries of his own land as alleged by Mr. To. Furthermore, the failure by the Appellant to submit the technical assessments required under the Guidelines is inexcusable bearing in mind the fact that his son, Mr. To, is a qualified structural engineer who would have been able to assist his father, the Appellant, in this regard. According to Mr. To, he did “drainage design work” for other people. Yet, all he said was : “I do not feel the need for a drainage assessment in this case.” For him to merely point to a photograph showing a drainage point on the Land is not sufficient. The Appellant should have addressed all the points raised by the TPB previously in preparing for the present appeal.
28. In the circumstances, we find that the Appellant has failed to comply with the requirements of both Guidelines.

### **Conclusion**

29. We cannot see any error on the part of the TPB in rejecting the applications by the Appellant under section 16 and section 17(1) of the Ordinance. Indeed, we agree with the conclusions and reasons of the TPB.
30. We therefore dismiss the appeal by the Appellant.
31. We should add that the Appellant has already obtained the benefit of the rental

collected from the proprietor of the marble workshop by illegally letting the Land to him between 1998 and 2005. Further, by making the two applications under section 16 of the Ordinance and going through the application for review under section 17(1) of the Ordinance and the present appeal, the Appellant has gained more time during which the Land has been used for the storage of the building materials of his son.