

IN THE TOWN PLANNING APPEAL BOARD
Town Planning Appeal No. 8 of 2004

Between

Mr Wong Chuen-yuen (Appellant)

And

Town Planning Board (Respondent)

Date of Hearing: 11 January 2006

Date of Decision: 17 March 2006

Composition of the Appeal Board:

Mr Edward Chan King-sang, SC, JP (Chairman)
Professor Fong Wang-fun
Mr Kam Man-kit
Ms Ivy Tong May-hing
Dr Paul Yung Pui-yip

DECISION

The site

1. This appeal concerns the town planning permission in relation to a piece of land at San Tin, Yuen Long (hereinafter called “the site”). The land is situated partly on lot 769 in D.D. 99, partly on lots 3 and 4 in D.D. 105. The various lots of land in question were land granted under a Block Crown Lease in the early 20th century. The Appellant was not the owner of the site. However, he plainly had an arrangement with the owners whereby he was given possession of the site for his

operation of a business of container trailer or tractor park or other related activities. The owners did not object to his application.

2. The site has an area of about 3,600 square metres. It is currently partly used for open storage of trailers with containers and a site office, and partly used as a container tractor park or car park with a small workshop. The site is at the north of Castle Peak Road - San Tin. It is not immediately abutting Castle Peak Road. The entrance of the site is on the eastern side of the site and from there one can turn right and go south along a local track to reach Castle Peak Road. The entrance to the site is about 40 metres to the north of Castle Peak Road. The site is located at the fringe of the Deep Bay Wetland Buffer Area approximately 9 Km and 7 Km from Yuen Long and Fanling/Sheung Shiu new towns respectively. It is fairly close to Lok Ma Chau. In terms of linear distance, the site is only about 1.5 Km from Lok Ma Chau Control Point. The area separating the site and the control point is mainly occupied by fish ponds. If one were to go from the entrance of the site to the Lok Ma Chau Control Point, one has to go through Castle Peak Road and San Shum Road. The travel distance would be about 3 Km before one can reach the Control Point.

3. As mentioned above, there is a local track along the eastern side of the site. This track was paved and there was evidence from Madam Liu Che Wan, who resides at a house just to the north-west corner of the site that the local inhabitants around the area paid for the paving of this local track. The track used to be maintained by the local residents. However, since the time when there were large scale container parks in the nearby area, the local residents were no longer asked to contribute to the maintenance of the track. Apparently, the track is reasonably well maintained by the owners or operators of the container parks using the track. The track starts from Castle Peak Road and goes north. The part of the track between the entrance to the site and Castle Peak Road is quite wide. In fact the width of the track at the junction with Castle Peak Road is about 20 metres wide.

4. The site is roughly rectangular in shape with the north-west corner setback. This setback corner is occupied by an area with 2 residential structures occupied by Madam Liu Che Wan. The western boundary of the site abuts a stretch of water of about 5 to 10 metres wide. In fact, it is highly probable that the site or at least the northern part thereof was reclaimed from a fish pond so that the stretch of water on its west is in fact the remains of the filling. To the further west across the stretch of water is a big area which is currently vacant. We accept the evidence from Mr. Lee Chi Yuen called by the Respondent that this area had been used as a kind of container, open storage or parking yard without planning permission before 2002. In 2002, there was enforcement action by the Government and this area was left vacant. However, in May 2003 there was again someone operating in this area without

planning permission and as a result of enforcement action taken by the Government, the operator vacated the area in March 2004 and since then the area has remained vacant. This area is hereinafter called “the west area”.

5. On the eastern side of the site, across the local track, there was an area of about the same size as the site. This area was described as vacant land in a plan prepared on 6 August 2002 used in the hearing of Town Planning Appeal No. 3 of 2002, which plan was identified and marked “A-1” in this hearing. We accepted the evidence of Mr. Lee Chi Yuen called by the Respondent that the land became vacant in 2002 as a result of enforcement action by the Government. However, from the evidence of Madam Liu Che Wan, which we also accept, this area had since 2002 been used by someone for car repair and tire repair and also sometimes for car parking until a few months ago when the area was locked up. At the moment there are still some containers being placed inside this area. Mr. Lee Chi Yuen was able to confirm that a few days ago the Planning Department had received an application for planning permission to use this area for open storage and container vehicle parking. This area is hereinafter called “the east area”.

6. To the south of the east area and still on the northern side of Castle Peak Road, there is a small area where there are two temporary structures apparently being used for residential purposes.

7. Along the northern boundary of the site, there is another local track running in an east-west direction. This track was unpaved. Access to this track could be gained from the paved local track at the east of the site. Across this unpaved local track is another very big area which is about 10 times as big as the site, and which is being used for the purpose of container vehicle park and various other port back-up activities with isolated locations within the area being used as tire or vehicle repair workshops. This area is hereinafter called “the north area”.

8. Access to the north area from Castle Peak Road could be gained via the paved local track and then the unpaved track running along the southern edge of this north area. According to Madam Liu Che Wan, container vehicles and trucks passing through this unpaved track generated a lot of noise and this was the real cause of annoyance to her and other residents in the locality.

9. From A-1, it appears that in 2002, the north area was being used as container vehicle park without any planning permission. It appears that subsequently the occupier of the north area decided to apply for planning permission to use the area as a temporary container tractor/trailer park with ancillary office. Eventually, the Town Planning Board in 2004 had decided to grant planning permission for such use

for a period of one year expiring on 10 December 2005 (see planning application No. A/YL-ST/253). We were supplied with a copy of the relevant minutes of the Town Planning Board when the Board made the decision to grant 1 year permission for the port back-up activities. It is clear from the minutes that the Board would like to send a strong message to the operator of this north area that the approval period of 12 months was given in order to provide time for relocation of the development to other suitable sites. The permission has expired, but since the expiration of the permission, the operator of the north area was told that the permission was revoked on 10 November 2005 on the ground that some of the conditions for the grant of the permission had not been complied with.

10. To the north-east of the site and on the other side of the paved local track, there were 4 fish ponds. However, to the north of the fish ponds there is another area which is being used for open storage or port back-up activities.

11. To the south of the site and across to the south side of Castle Peak Road the land is predominantly vegetated land with just an area of about one third of the size of the site being used for the erection of some temporary structures, apparently for residential purposes.

The town planning history

12. We do not have the complete planning history of the site. It would however appear that in 2000 the site was zoned as "Residential (Group D)" on the then applicable OZP. There was an application No. A/YL-ST/108 for permission to use the site for temporary container tractor/trailer park, and on 28 January 2000, the application was granted by the Town Planning Board for a period of one year subject to compliance of approval conditions on landscape, drainage provision and paving of the site by 28 July 2000, which date was later on extended to 28 October 2000. The applicant had only fulfilled the condition on paving of the site. A drainage proposal was put forward to the Director of Drainage Services on 14 July 2000 but it was not considered by the Director of Drainage Services as satisfactory. The planning permission was thus revoked on 28 October 2000. There is no direct information as to whether the applicant in A/YL-ST/108 was Mr. Wong Chuen Yuen, the Appellant in the present case. However, since it was recorded in the Decision of another panel of this Appeal Board in Town Planning Appeal No. 3 of 2002 that Mr. Wong Chuen Yuen, the Appellant there, had been using this site for the operation of his business for over 10 years (see § 32 of the Decision), we are prepared to assume that at all times since at least 1992, Mr. Wong, the Appellant in this appeal, has been operating his business at the site.

13. It would appear that notwithstanding the revocation of the planning permission, the Appellant continues his operation. He made 2 further applications for planning permission i.e. A/YL-ST/161 and A/YL-ST/171 to enable him to lawfully continue his operation. However in both instances, the applications were rejected. One of the reasons for the rejection of the later application was that there was insufficient information in the submission to address traffic, drainage, environmental and ecological concerns.

14. The Appellant then made another application No. A/YL-ST/182. It is important to note that since the time of the first approval was given in 2000, the zoning of the site in the OZP plan had changed. Instead of being zoned as "Residential (Group D)" zone, the site was put into the "OU (CDWRA)", i.e. Other Specified Uses (Comprehensive Development to include Wetland Restoration Area) zone. Eventually on 19 November 2002, his application was allowed by the Town Planning Appeal Board in Town Planning Appeal No. 3 of 2002 but only to the extent that the period of the planning permit was only to be 12 months and the permission was subject to a number of conditions. These conditions included :

- (a) There were to be no night time operation between 11 p.m. and 7 a.m.
- (b) The Appellant had to implement accepted landscaping proposals at the site within 6 months from 19 November 2002 to the satisfaction of the Director of Planning or of the Town Planning Board.
- (c) The Appellant had to implement accepted drainage proposal at the site within 6 months from 19 November 2002 to the satisfaction of the Director of Drainage Services or of the Town Planning Board.
- (d) The Appellant had to fence the site within 6 months from 19 November 2002 to the satisfaction of the Assistant Director/Task Force (Black Spots), Lands Department or of the Town Planning Board.
- (e) If any of the conditions (b), (c), or (d) are not complied with by 20 May 2003, the approval shall cease to have effect and shall on the same date be revoked without further notice.
- (f) Upon expiry of the planning permission, the Appellant was to

reinstate the site to an amenity area to the satisfaction of the Director of Planning or of the Town Planning Board.

There is no dispute between the parties that the Appellant had complied with the conditions relating to the landscaping, fencing and drainage during the validity period of the permission given. There was also no evidence of any breach of the condition on the restriction on carrying out work at night.

Events leading to the present appeal

15. Before the expiration of the one year permission granted by the Town Planning Appeal Board on 19 November 2002, on 21 October 2003, the Appellant applied under section 16 of the Town Planning Ordinance to seek planning permission to use the site for a temporary container trailer/tractor park with ancillary office for a period of 3 years. By then the relevant OZP was (OZP) No. S/YL-ST/5, and the site continued to be put in the "OU(CDWRA)" zone. The application was rejected by the Rural and New Town Planning Committee (hereinafter called "the committee") on 19 December 2003 and the Appellant was informed of its decision on 9 January 2004. On 26 January 2004, the Appellant applied for a review of the committee's decision and on 23 April 2004, the Town Planning Board considered the review application under section 17 of the Ordinance and decided to reject the Appellant's application. It is against the Town Planning Board's decision that the Appellant brought the present appeal before this Town Planning Appeal Board.

16. The committee as well as the Town Planning Board rejected the application on the following main grounds :

- (a) The development was not in line with the planning intention of the "OU(CDWRA)" zone which was to encourage the phasing out of sporadic open storage and port back-up uses, and to provide incentive for the restoration of degraded wetlands adjoining existing fish ponds.
- (b) The development did not comply with the revised Town Planning Board Guidelines for "Application for Development within Deep Bay Area" (hereinafter called "the Deep Bay Guidelines") in that there was no information in the submission to demonstrate that the development would not have a negative off-site disturbance impact on the ecological integrity and ecological value of the fish ponds within the Wetland Conservation Area in the Deep Bay area.

- (c) There was insufficient information in the submission to demonstrate that the development would not have adverse environmental and traffic impacts on the surrounding areas.

All these are familiar grounds of rejecting an application for temporary use of any area not permitted by the use specified on the OZP. In fact, very similar reasons were given by the committee and the Town Planning Board in the Appellant's previous application No. A/YL-ST/182. Suffice it to note that despite these similar objections, the Town Planning Appeal Board had decided to allow the Appellant's appeal in November 2002. However, this does not mean that we must arrive at the same conclusion in relation to this appeal because circumstances may have changed.

The 3 relevant guidelines

17. There were 3 main guidelines relevant to the Appellant's application, which the Town Planning Board and the Town Planning Appeal Board will have to bear in mind. They are (a) the statement of the planning intention in the Notes to the OZP which forms part of the Plan; (b) the Deep Bay Guidelines; and (c) the Town Planning Board Guidelines for Application for Open Storage and Port Back-up Uses under Section 16 of the Town Planning Ordinance (hereinafter called "the Open Storage Guidelines"). Of the 3, the Notes to the Plan are in fact part of the OZP and their authority has the backing of the Town Planning Ordinance. It is the duty of the Town Planning Board to give effect to the statement in the Notes on planning intention, although the Town Planning Board had the power to grant short term permission despite the fact that the use is not in compliance with the planning intention. The other guidelines were formulated by the Town Planning Board so as to ensure certain degree of uniformity in the exercise of its power and they do not have any direct statutory force. The guidelines gave guiding principles on how an application should be approached. The application of different guiding principles in the guidelines may not necessarily result in the same conclusion on whether a particular use should be permitted. Ultimately, it is the duty of the Town Planning Board to exercise its discretion having regard to all the circumstances to decide whether a particular application should be allowed.

The planning intention

18. At the time of the section 16 application in this case, the relevant OZP in force relating to the site was OZP No. S/YL-ST/5. Since then there were a few amendments and the current version of the OZP covering the site is OZP No. S/YL-ST/7. However the zoning of the site remains the same, i.e. OU(CDWRA).

The Notes to the Plan set out the planning intention of the OU(CDWRA) zone as follows :

“This zone is intended to provide incentive for the restoration of degraded wetlands adjoining existing fish ponds through comprehensive residential and / or recreational development to include wetland restoration area. It is also intended to phase out existing sporadic open storage and port back-up uses on degraded wetlands. Any new building should be located farthest away from Deep Bay.”

The Notes to the Plan contain further details of the requirements on the information to be provided for any application for permission of use or development, and these requirements would include information on plans for wetland restoration, environmental studies, landscape proposals, traffic impact report, drainage and sewerage proposals etc.

19. No doubt the Appellant had not supplied any of the detailed proposals set out in the Notes. However, having regard to §§ 9.4.6 to 9.4.9 of the Explanatory Statement of the current version of the OZP No. S/YL-ST/7 (which are in identical terms as §§ 9.4.5 to 9.4.8 of the S/YL-ST/5 version), it would appear to us that the information is certainly essential if the application is for a permanent development and in the case of an application for a temporary use for a short period, the absence of the information should not be considered as per se fatal. Further, § 9.4.10 of Explanatory Statement of OZP No. S/YL-ST/7 (i.e. § 9.4.9 of OZP No. S/YL-ST/5) expressly provides :

“Within the “OU(CDWRA)” zone, while open storage and port back-up uses that existed immediately before the first publication in the Gazette of the notice of the San Tin IDPA Plan and those with planning permission from the Board are tolerated, new temporary open storage and port back-up uses would not be allowed by the Board.”

Since the Appellant had in fact got planning permission at the time when he made the current application, we do not consider that the general direction in the Notes that no new temporary port back-up uses in § 9.4.10 would have any direct application. At any rate, the fact that an applicant is not able to fully comply with all the requirements or criteria laid down in the OZP for a particular use is not per se fatal to an application for permission to use the land for a particular purpose for a period not exceeding 3 years. In fact it is very often the case that in such circumstances, the applicant would have to ask for the indulgence of the Town Planning Board to grant the permission

despite the non-compliance of all the stated requirements.

20. On the point about the planning intention, we consider that the Respondent is right in its contention that the intended use by the Appellant is not in line with the planning intention relating to the site. The location of the site is such that it is rather close to some fish ponds. The general intention of the OZP is to encourage the phasing out of the Appellant's activities. Thus, at least, in the long term, the activities of the Appellant at the site should cease. The Appellant should not hold an expectation that he could renew his planning permission forever.

The Deep Bay Guidelines

21. As it is expressly stated in the Deep Bay Guidelines, these Guidelines are intended for general reference only and the decision to approve or reject an application rested entirely with the Town Planning Board and the decision would be based on individual merits and other specific consideration in each case.

22. The site in the present case would fall within the wetland buffer area referred to in the Deep Bay Guidelines. From §§ 6.4 and 6.5 of the Deep Bay Guidelines, it is clear that the intention of the wetland buffer area is to protect the ecological integrity of the fish ponds and wetland within the wetland conservation area and prevent development that would have a negative off-site disturbance impact on the ecological value of fish ponds. Thus generally speaking, any person intending to carry out a development within the wetland buffer area would be required to produce an ecological impact assessment report to demonstrate that there is no negative impact or that such impact could be mitigated through positive measures. However, there are certain exceptions to this requirement and temporary uses are within the exceptions. Hence we do not consider that § 6.5 of the Deep Bay Guidelines would have any direct application to the Appellant's application which is only for permission to use the site for a temporary period of 3 years.

23. In § 6.6 of the Deep Bay Guidelines, it is provided that :

“Applications for new open storage or container back-up uses including workshops within the WBA (wetland buffer area), whether temporary or permanent, would normally not be allowed in view of the adverse disturbances of such activities on birds, in particular for such uses involving filling of contiguous ponds. However, open storage or container back-up uses located close to the Lok Ma Chau crossing and without involving pond filling might be sympathetically considered by the Board in view of the genuine need

to facilitate cross-boundary movements of goods in the area.”

24. In the present case, the site is about 3 Km from the control point of Lok Ma Chau. We note that the lands along San Shum Road are mostly zoned for “U” (Undetermined) or “OU” (Other Specified Uses). The area along Castle Peak Road from the intersection with San Shum Road to the site is mainly zoned for “V” (Village Type Development), or “R(D)” (Residential (Group D)) or “OU”. The area along Castle Peak Road to the east of its junction with San Shum Road is mainly zone for “U” or “GB”(Green Belt) which is likewise not suitable for port back-up uses. We were told that there was quite a bit of area at Ngau Tam Mei at the south of Castle Peak Road which is zoned for open storage. However, it would appear from the aerial photograph taken on 19 December 2005 that most of the area to the south of Castle Peak Road was “green” indicating that not much of the area was being used for port back-up uses. Thus, it would appear that the area at Ngau Tam Mei said to be zoned for open storage use must be out of the aerial photo and is some distance away from the site and from Lok Ma Chau. Having regard to the fact that this site is in fact only about 1.5 Km by linear measurement from the Control Point of Lok Ma Chau, we consider that it is close enough to Lok Ma Chau to warrant sympathetic consideration of the Appellant’s application under § 6.6 of the Deep Bay Guidelines.

The Open Storage Guidelines

25. At the time when the Town Planning Appeal Board considered the Appellant’s appeal in S/YL-ST/182, the relevant Open Storage Guidelines was TPB PG-NO.13B. At that time the New Territories were divided into 4 types of areas for the purpose of giving guidance to the grant of permission for open storage and port back-up uses. They were the “Will-go”, the “No-go”, the “Tolerated” and the residuary which does not fall into any of the previous 3 types. The site in question was then classified as “No-go” area. By the terms of § 2.3 of the then Open Storage Guidelines, applications for open storage and port back-up uses would normally not be allowed in ‘No-go’ area. There were also the further guiding criteria that port back-up sites generating adverse noise, air pollution and visual intrusion and frequent heavy vehicle traffic should not be located adjacent to sensitive receivers, such as residential dwellings, hospitals, and schools, and that when the site had to be accessed by local roads adjoining sensitive receivers, traffic generating activities, such as container storage/repair yards and/or container tractor/trailer parks, would not be permitted unless traffic generated to and from the site was proved to be minimal (see § 2.7). In the hearing of the appeal in 2002, the Respondent sought to justify the refusal of permission on, inter alia, the ground of the noise impact on the surrounding residential structures. The Appellant produced a report to show that the proposed use would cause insignificant noise level at the noise sensitive areas close to the site. It

purported to show that the traffic generated to and from the site would only contribute to about 0.1 dB(A) to 0.2 dB(A) to the traffic noise impacts on the noise sensitive area. Plainly, the fact that the Appellant's appeal was allowed would show that the Town Planning Appeal Board on the last occasion did not consider that this objection was substantial enough to justify a total rejection of permission.

26. Before us, the Respondent sought to show that the test carried out on the last occasion was mainly at the structures along Castle Peak Road to the south-east of the site. It was suggested that there the Appellant's activities would cause great nuisance and annoyance to the residential structures at the north-west corner of the site. This suggestion was refuted by Madam Liu Che Wan who actually resided at the structure at the north-west corner of the site. According to her, the noise and nuisance generated from the Appellant's site was minimal compared with those generated from the north area. We accept her evidence.

27. We are aware that since 2003, TPB PG-NO.13B was replaced by TPB PG-NO.13C and there was some major change in the guidelines given. Instead of the "Will-go", "No-go" and "Tolerated" etc., the area is now being classified into 4 categories, i.e. Categories 1 to 4. The site falls within Category 4. The broad guidelines given for Category 4 area are contained in § 2.5 :

"Category 4 areas are areas with ponds or with extensive vegetation and close to environmentally sensitive areas, areas which are mostly used for residential purposes, areas near existing major residential settlements or areas subject to extremely high flooding risk. Applications for open storage and port back-up uses in Category 4 areas would normally be rejected except under exceptional circumstances. For applications on sites with previous planning approvals, and subject to no adverse departmental comments and local objections, sympathetic consideration may be given if the applicants have demonstrated genuine efforts in compliance with approval conditions of the previous planning applications and/or included in the applications relevant technical assessments/proposals on such aspects as drainage, traffic, landscaping and environmental mitigation to demonstrate that the proposed uses would not generate adverse drainage, traffic, visual and environmental impacts on the surrounding areas. The intention is however to encourage the phasing out of such non-conforming uses as early as possible. Under such circumstances, approval of the proposed uses, if granted, will only be for a shorter duration than the maximum of 3 years allowed for Category 1, 2 and 3 areas, basically to provide time for

relocation to other suitable location.” (emphasis added)

28. The current version of the Open Storage Guidelines also gives specific guidance in § 2.6 which is in the same terms as § 2.7 of the previous version.

29. The Appellant contended that since there was previously approval given in respect of this site, his application should be subject to sympathetic consideration in view of the fact that he had duly complied with all the conditions attached to the grant of the approval by the Town Planning Appeal Board. The Respondent however contended that under this paragraph, sympathetic consideration is only given when there was no adverse comment from other Government departments. In this case, there were in fact some adverse comments from Government departments. Furthermore, it was contended that the current version of the guidelines was amended in the light of the Town Planning Appeal Board's decision of the Appellant's case in 2002 and the purpose of the last sentence of § 2.5 of the current version of the Open Storage Guidelines was to give effect to the decision.

30. We do not consider that the guidelines given in the Open Storage Guidelines should be construed as though they are statutory provisions. In the context of whether an application to renew a short term permission given in relation to a particular use at a particular site, we do not consider that once there is any objection from any Government department, the situation was automatically taken out of § 2.5 of the Guidelines. We consider that in considering whether the application should deserve sympathetic consideration, one must look at the substance of the objection to assess the strength and validity of the objection from the Government departments and if the objections are not based on substantial grounds there is no reason why sympathetic consideration may not be given to the application simply because of the fact that an objection had been raised.

The adverse comment from Government departments

31. There are 4 Government departments who had given adverse comments on the Appellant's application in the present case.

32. The Director of Environmental Protection did not support the application. His main reasons were that the intention of the "OU(CDWRA)" zoning of the site was to encourage the phasing out of the non-conforming uses, such as using it as container trailer/tractor park and that the current application was not compatible with the planning intention of the zoning. He further considered that the submission did not provide adequate assessment to address his concern on traffic noise nuisance affecting the scattered dwelling in the "R(D)" zone opposite to the site and on the

operation noise nuisance and sewages/waste handling of the tractor/trailer park and the ancillary uses within the wetland restoration area.

33. We note that the R(D) zone was found at the south of site and on the other side of the Castle Peak Road. We do not consider that the objection based on the alleged noise and nuisance to the R(D) zone is a valid ground for objection on the facts of this case. As it has been pointed out, the noise and traffic generated from the site was rather minimal when compared with the existing traffic along Castle Peak Road and also those from the north area and those other sites to the further north. There is no evidence that there is any increase in the activities at the site since 2002. Madam Liu who lived at the north-west corner of the site did not consider that the activities at the site had caused her any nuisance or concern. There is no evidence of any complaint by any of the people whether living in the R(D) area or otherwise. There is no real evidence that there was any sewages/waste handling arising from the site that had actually caused any problem. The site has been in operation since about 2002, and if the concern is a real one, it is surprising that there is no solid evidence on the problem or any complaint by the residents nearby.

34. Thus apart from the planning intention point, which we will deal with later, we do not consider that the adverse comments from the Director of Environmental Protection were of such substance that would carry substantial weight against the Appellant's application.

35. The Director of Agriculture, Fisheries and Conservation (DAFC) also did not support the application. The first reason given by him was that the proposed use did not comply with the planning intention. The DAFC took the view that the Town Planning Appeal Board in giving permission for one year in 2002 had already allowed the Appellant the opportunity to move out from the site. He also took the view that the proposed use was not in line with the planning intention to prevent development that would have a negative off-site disturbance impact on the ecological value of the fish ponds and wetland in the wetland conservation area, and that even though the site had been filled and had been used in a manner very similar to that of the surrounding area, it would be desirable to discourage such use.

36. We take note of the fact that part of the site was in fact reclaimed from fish ponds sometime between 1990 and 1991. However it was also a fact that since at least 1992, the site has been used for its current purposes, and a vast area near the site had also been used in a similar manner. From an ecological point of view, there is nothing to suggest that the activities at the site would have any continuous deteriorating effect to the fish ponds or the wetland, although the activities would certainly not help in the restoration of the wetland. Thus the objection would also

boil down to the point that the continuous use of the site as port back-up purposes is against the planning intention.

37. The Assistant Commissioner for Transport/NT commented that the track to the east of the site via which the site gains access from Castle Peak Road was about 3.5 metres wide and was thus inadequate in terms of road width to accommodate the use of container vehicles. We queried whether the Assistant Commissioner was factually correct in term of the width of the track because from the plan (RB-0016) drawn by the Planning Department, the width of that paved track at the junction with Castle Peak Road was some 20 metres wide. Although the track gets narrow as it goes north, the width of the track at the entrance of the site is still about 10 metres wide. We have raised the point about the width of the track with counsel for the Respondent who told us that Mr. Lee Chi Yuen, Anthony called by the Respondent would deal with the point about the width of the track. In fact he did not. At any rate, as the plan at RB-0016 was in fact agreed, we could work out the width of the track from the scale given in the plan. We think that the Assistant Commissioner may well have made a mistake here. From the plan, the part of the track which would be about 3.5 metres wide is found at a part well passed the site and on the eastern side of the north area. The narrowness of this part of the track had no significance whatsoever on the suitability of using the site for port back-up purposes.

38. From the evidence of Madam Liu, it was no doubt the case that the container vehicles would have to stop at the junction before they could turn into Castle Peak Road. However, this would be the normal thing to do for any vehicle turning from a side road into a main road.

39. In any event even if we are wrong on the width of the track, there is no evidence of an accident or any actual danger caused by the container traffic from the site. We do not consider that the traffic concern or objection to be a valid one.

40. There was of course the objection from the Planning Department. The objection was based on the ground of non-compliance with (a) the planning intention; (b) the Deep Bay Guidelines; and (c) the Open Storage Guidelines. It has also been pointed out that since the publication of the current version of the Open Storage Guidelines, there were already a few instances where similar applications were rejected by the Town Planning Board.

Decision

41. As we have noted earlier, we do not consider that the continuous use of

the site for port back-up purposes is in line with the planning intention of the OU(CDWRA) zoning. However, we agree with the reasoning in paragraph 32 of the Decision of the Town Planning Appeal Board in Town Planning Appeal No. 3 of 2002. When it could be shown that there is not much prospect in the immediate future to achieve the long term aim of the restoration of the wetland whether the subject site was allowed to be used for port back-up purposes or not, the application could be sympathetically considered.

42. However in the present case, there is clear evidence that the Government has made some real efforts to restore the wetland and to phase out the sporadic open storage and port back-up uses in this OU(CDWRA) zone. This is evidenced by the fact that enforcement actions had been taken in relation to the east area and also the west area. Also, although permission had been granted to use the north area for port back-up purposes in 2004, such permission was granted for one year only and was granted for the express purpose of enabling the operator to find suitable alternative site for its operation. Of course, although the permission in relation to the north area has expired or revoked now, it is not clear whether the same would be renewed. We do not want to second guess the decision of the operator and also the Town Planning Board, but from what we could see on the general policy of the Town Planning Board and also the actual steps taken by the Government to phase out the open storage and port back-up uses in the area surrounding the site in this case, we are reasonably optimistic that the open storage and the port back-up uses would be gradually phased out in the area surrounding this site in the not too distant future.

43. On the other hand, we also take note of the fact that even up to the present moment, the north area is still being used for port back-up purposes and there is a pending application in relation to the east area, and that currently there are some containers being placed inside the east area. It may take some time for the application in relation to the east area to be disposed of. If there were to be any application by the operator of the north area for renewal of the permission, likewise it may take a few months for the application to be disposed of.

44. In paragraph 32 of the Decision in Town Planning Appeal No. 3 of 2002 the Town Planning Appeal Board said that :

“The Appellant has run his business at the Site for over 10 years and may have some difficulty in relocation to a site where he may reasonably expect planning permission for his land use to be granted. To that extent, we believe that he should be given a reasonable period of time in which to find that site without detriment to his business”.

The Respondent argued that this shows that the Appellant had been given the

opportunity of finding alternative site already and bearing in mind that by now 2 years had lapsed since the expiration of the one year permission granted by the previous Town Planning Appeal Board, the Appellant should not be given any further opportunity to find another site for his operation. The Appellant on the other hand contended that it was not expressly stipulated by the previous Town Planning Appeal Board that the grant of the permission was for the purpose of allowing him time to find another site. The Appellant had made considerable effort in complying with the various conditions imposed by the Town Planning Appeal Board. He further pointed out that now § 2.5 of the applicable Open Storage Guidelines TPB PG-NO.13C expressly provided for sympathetic consideration for applications on sites with previous approvals and also expressly provided for the grant of a short period of permission to enable the applicants to find another suitable site and there was no reason why he should be deprived from the benefit of such benevolent policy statements in the Guidelines.

45. We consider that while it might well be in the mind of the previous Town Planning Appeal Board that the appeal should be allowed because the Appellant having been in operation at the site for over 10 years, had not been given an opportunity to find another suitable site, the Appeal Board did not say clearly that the permission was really for the purpose of enabling the Appellant to find an alternative site, with the clearest implication that there would not be, or at least, very unlikely to be, any renewal of the permission. Likewise we consider that since the last decision was given before the new Open Storage Guidelines TPB PG-NO.13C, which is currently in force, we must consider the Appellant's appeal in the light of the current provisions, and give such sympathetic consideration to the Appellant's application as the merits of his case would deserve.

46. We note the determination of the Government in phasing out open storage and port back-up uses in this location. This would mean that in the not distant future there is a likelihood that the environment would be improved and be more favourable towards the restoration of the wetland. However, we also note that the recent zeal of enforcement activities would also mean that it would be more difficult to find suitable alternative site in the nearby area.

47. Having regard to all the circumstances of this case, and in particular the unlikelihood that the whole of the area surrounding the site used for open storage or port back-up purposes would be vacated in the next 6 months, we decide to allow the appeal to the extent that the Appellant is given permission to use the site for container tractor/trailer park with ancillary facilities for a period of 6 months from the date of the publication of this decision. We want to make it clear that this period of 6 months is to give the Appellant time to look for an alternative site to continue his

operation. We do not think that we need to impose any condition for the permission except that upon expiry of this planning permission, the Appellant is to reinstate the site to an amenity area to the satisfaction of the Director of Planning or of the Respondent. The same condition had in fact also been imposed by the Town Planning Appeal Board on the Appellant in Town Planning Appeal No. 3 of 2002.

48. While we fully recognize that we do not have the jurisdiction to fetter the power of the Town Planning Board or the Town Planning Appeal Board in considering any application or appeal which the Appellant may bring after our decision, we do mean to say that, barring any unforeseen change of circumstances, this is the final extension of any permission to the Appellant to use the site for its current purposes.

(Signed)

Mr. Edward Chan King-sang, SC JP
(Chairman)

(Signed)

Prof. Fong Wang-fun
(Member)

(Signed)

Mr. Kam Man-kit
(Member)

(Signed)

Ms. Helen Kwan Po-jen
(Member)

(Signed)

Ms. Ivy Tong May-hing
(Member)