

IN THE TOWN PLANNING APPEAL BOARD
TOWN PLANNING APPEAL No 8 of 2005

Between

Wo Kee Trading Company Appellant

And

The Town Planning Board Respondent

Dates of Hearing: 11, 13 and 14 September 2006
Date of Decision: 16 October 2006

Composition of the Appeal Board:
Professor Anthony M J Cooray (Chairman)
Professor Fong Wang-fun
Mr Kam Man-kit
Ms Lam Yuet-ming
Mr Yeung Pak-sing

DECISION

1. This appeal arises from planning application No. A/YL-KTN/205, which was rejected by the Rural and New Town Planning Committee of the Town Planning Board on 5.11.2004 and by the Town Planning Board on review on 4.2.2005.
2. The appellant had sought planning permission to use the appeal site for a temporary sales office for pre-owned private vehicles for a period of 12 months.

3. The appeal site is in Kam Tin, Yuen Long, and was in an "Agriculture" zone at the time the planning application was submitted and continues to be in an "Agriculture" zone under the Outline Zoning Plan which is currently in force. A small part of the site is zoned for "Road" use.
4. The use for which planning permission was sought is not a Column 1 use or a Column 2 use in the "Agriculture" zone. However, an application for temporary use for a period not exceeding 3 years may be permitted by the Town Planning Board for a purpose which is not listed in Columns 1 and 2. Thus, all the 9 previous applications and the present application have been for temporary use.
5. The appeal site has an area of about 2,460m², most of which is private land demised for agricultural use under a Block Government Lease. An area of about 500m² is government land which the appellant is occupying illegally. Certain structures that the appellant has erected on the appeal site are unauthorized.
6. The appeal site has a history of 9 planning applications for temporary open storage uses. Five of those applications, which were all made before the establishment of the reprovioned wetland in August 2003, were approved. The last of those five applications was approved on 11.1.2002 for a period of 12 months, while the planning application was for a period of 3 years. The reason for limiting the grant of planning permission to a much shorter period was the impending establishment of the reprovioned wetland. In granting planning permission, the Town Planning Board advised the appellant that the permission was limited to 12 months for the reason that the development might have an adverse ecological impact on the proposed reprovioned wetland and there was a need to avoid land-use incompatibility with the reprovioned wetland.
7. Subsequently, the appellant made two applications for open storage of cars for sale with an ancillary office. The first of these was rejected on 5.9.2003 and the other on 21.5.2004. Both applications were rejected on the ground that the use of the appeal site was incompatible with the reprovioned wetland and that the applicant did not provide sufficient information to demonstrate that the development would not cause any adverse ecological impact on the reprovioned wetland.
8. In rejecting the present application, the Rural and New Town Planning Committee and the Town Planning Board on review maintained the same two reasons, namely:
 - a. the development did not comply with TPB Guidelines No 13C for "Application for Open Storage and Port Back-up Uses" in that the development would not be compatible with the adjacent reprovioned wetland under the West Rail, which was established in August 2003; and

- b. there was no information in the current submission to demonstrate that the development would not cause adverse ecological impact on the existing reprovisioned wetland under the West Rail to the immediate east of the site.
9. The present application was submitted on 17.9.2004 and contained no new information regarding its impact on the reprovisioned wetland. The application relied on an ecological assessment that had been submitted as part of the planning application which was rejected on 21.5.2004.
10. The Town Planning Board maintained before us its position that the applicant had not provided sufficient information to satisfy the Town Planning Board, and likewise the Town Planning Appeal Board, that the current use of the land, which the appellant intends to continue, would not cause any adverse ecological impact on the reprovisioned wetland.

What is the planning application for?

11. In all the previous applications relating to the appeal site, the proposed use was open storage of vehicles for the purpose of sale. The site has been used under these planning permissions, and more recently without planning permission, for storage of cars and the maintenance of a sales office. In the present application, the appellant asked for permission to continue their current operations on the site.
12. A large part of the site which may be used for storage of vehicles is open or uncovered. Currently, there are around 50 to 60 vehicles on the site and there is spare capacity for many more vehicles. The evidence showed that a vehicle normally would remain up to two weeks before a sale is agreed. Sometimes, a vehicle may remain on the site for up to 2 months without attracting any interest when the appellant might consider offering it at a reduced price. After examining witnesses and hearing submissions, we are of the view that the appeal site is being used, and will be used if planning permission is granted, for open storage of vehicles for the purpose of sale.
13. The appellant contended that they were wrong to have stated in their previous applications that the proposed use of the site was temporary open storage of cars for sale with ancillary office: the proper description would be temporary sales office for private vehicles, with "vehicle show area" being an ancillary use. The twist of words was intended to keep at bay TPB Guidelines No 13C which regulates the location of open storage uses in the New Territories.
14. What we are concerned with is the compatibility of the actual use of the land, which a grant of planning permission will regularize, with the appeal site's neighbourhood. It serves little purpose to ask which is the primary use and which

is the ancillary use—sales office or open storage of vehicles. We agree with the Town Planning Board that the present application is intended to regularize the appeal site’s current use, namely for open storage of vehicles for sale.

The merits of the application

15. The appellant argued in the alternative that the continued use of the appeal site would satisfy the planning criteria for “Category 3” areas set out in TPB PG-No 13C: “Town Planning Board Guidelines for Application for Open Storage and Port Back-up Uses under Section 16 of the Town Planning Ordinance”.
16. TPB PG-No 13C sets out the Town Planning Board’s policy on regulating open storage uses in the New Territories which had led to degradation of the rural environment. The Board’s policy is to prevent unregulated sprawl of open storage activities and minimize adverse impacts of such uses. (see para 1.1 of the guidelines). The Board’s approach is two-pronged: It has identified suitable areas for open storage (known as Category 1 areas) and has set out criteria to determine whether open storage should be permitted in any other areas. It is relevant in some way to the present application that the Board’s policy is not to permit open storage even on a temporary basis in environmentally/ecologically sensitive areas (see para 1.3 of the Guidelines).
17. Category 2 areas are those without a specific planning intention, to be affected by proposed infrastructure projects, or in the neighbourhood of existing open storage uses. Planning applications for open storage in Category 2 areas, as in Category 1 areas, will be favourably considered.
18. Category 4 areas are those with ponds or extensive vegetation and close to environmentally sensitive areas, areas near major residential settlements or areas subject to extremely high flooding. Planning applications in Category 4 areas will be approved in exceptional circumstances only.
19. Category 3 covers areas not covered by the other 3 categories. Normally a planning application for open storage in a Category 3 area will be considered favourably where the site has a history of planning permission for open storage. Sympathetic consideration will be given if the applicants had taken “genuine efforts in compliance with approval conditions of the previous planning applications and/or included in the fresh 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”. Planning permission will be granted, as in category 1 and 2 areas, only if the applicant is able to take measures to overcome any adverse departmental comments and local concerns.

20. The appeal site is in a Category 3 area. In order to obtain planning permission for open storage in a Category 3 area, an applicant must satisfy 3 conditions. They are:

- i. The site must have a history of planning permission and there must have been satisfactory compliance with planning conditions. That condition has been met fairly in relation to the appeal site.
- ii. The planning application must be supported by relevant technical assessments/proposals to demonstrate that the proposed use will not have adverse environmental and other impacts on the surrounding areas. The appellant did not submit a fresh ecological impact assessment but relied on an assessment that had been submitted with a previous application made in 2003. When the 2003 application was considered, that report was regarded insufficient to allay concerns raised by relevant government departments. Moreover, the Town Planning Board considered that in making a fresh application in 2005, the applicant can reasonably be expected to submit a fresh report sufficiently detailed taking into account the changed circumstances. Thus, the appellant failed to satisfy the second condition.
- iii. The third condition, which to a certain extent overlaps in our case with the second condition, is that there should be no local or departmental concerns: If there are such concerns the applicant must establish what measures can be taken to address them. The Town Planning Board considered that the appellant had failed to address concerns raised by relevant government departments regarding (a) the compatibility of the appeal site's use with the surrounding area and (b) insufficiency of information to establish that the appeal site would not have adverse impacts on its neighbouring area. We conclude below that the appellant failed in this regard too.

Is the proposed/actual use of the site compatible with the surrounding areas?

21. The appeal site runs immediately along the re-provisioned wetland, which is an ecological measure implemented by the Kowloon Canton Railway Corporation to compensate for the loss of wetland due to the West Rail project. The respondent contended that the overall ecological value and performance of the wetland has gradually improved since its establishment in 2003. The appellant, in their ecological assessment, recognized that the wetland was of medium to high ecological value. Aerial photographs taken in 2003, 2004 and 2005 (AP 5,4,3)

clearly showed how the area surrounding the appeal site has been transformed from a brown area to a green area.

22. The appeal site is paved and has little vegetation except along its boundary. These are not conditions that wild life favours. Added to this would be impacts of human activities on the site including movement of vehicles. The Department of Agriculture, Fisheries and Conservation was of the view that, especially since circumstances have changed, the study carried out by the applicant in relation to the application in 2003 did not provide sufficient information to show that the use of the site would be compatible with its neighbourhood, especially the reprovioned wetland, and questioned the adequacy of ecological measures that the appellatnt proposed, namely tree planting, fencing and drainage facilities that were already in place.
23. Having heard the witnesses and submissions made by both parties, we are of the opinion that the appellatnt has failed to submit sufficient information and adequate assessment to convince the Town Planning Board or us that the appellatnt is able to take preventive or mitigation measures to make the use of the appeal site compatible with the surrounding area. We agree with the Town Planning Board that it would be prudent to discourage incompatible developments in the neighbourhood of the reprovioned wetland.

Is the planning intention of the "Agriculture" zone realistic?

24. The appellatnt also doubted whether the land, which is zoned "Agriculture," would ever be put to agricultural use and whether agricultural use itself would not be incompatible with the reprovioned wetland. The Town Planning Board contended not only that traditional farming would be compatible with the reprovioned wetland but that certain farming practices might have a beneficial effect. The appellatnt did not seriously challenge that view.

Conclusion

25. The appellatnt has failed to comply with TPB Guidelines No 13C by providing information sufficient to establish that either the proposed use of the site is compatible with the surrounding area, especially the reprovioned wetland, or that the appellatnt is able to take adequate and effective measures to prevent or mitigate adverse environmental and other impacts on its neighbourhood. The appellatnt has failed to convince us that the Town Planning Board was wrong to conclude that measures the appellatnt had put in place in compliance with previous planning permission conditions, namely landscaping, fencing and drainage facilities, were insufficient to allay concerns expressed by the relevant

government departments. As long as these concerns remain unanswered, the appellant has no realistic hope of success.

26. We dismiss the appeal without any order for costs.