

IN THE TOWN PLANNING APPEAL BOARD
Town Planning Appeal No. 11 of 2004

Between

Chan Kai-wing (Appellant)

And

Town Planning Board (Respondent)

Date of Hearing : 25 October 2005

Date of Decision : 11 January 2006

Composition of the Appeal Board :

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

Mr. Richard Chan Kam-lam, MH

Mr. Hui Kam-shing

Mr. Kam Man-kit

Mr. Kevin Law Chi-shing

Decision

1. Since about November 2003, the Appellant was the occupier of a piece of land at Lot No. 172 in D.D. 108, Pat Heung (hereinafter called “the site”). He operated a business under the name of “Parsley Sauce and Food Industrial” at the site.

2. On 2 February 2004, the Appellant made an application to the Town Planning Board (TPB) for permission to use the site for temporary open storage of containers for storing sauces and also for use of part of the site as a canteen for his staff for a period of 3 years.

3. His application was considered and rejected by the Rural and New Town Planning Committee on 26 March 2004. On 28 April 2004, the Appellant applied for a review of the decision by the TPB. On 23 July 2004, the TPB considered his

application on review under section 17 of the Town Planning Ordinance (“the Ordinance”) and decided to reject the application. The Appellant was informed of the decision of the TPB on 6 August 2004. On 28 September 2004, the Appellant gave notice of appeal against the decision of the TPB to this Town Planning Appeal Board.

4. The site is within the area covered by a draft Pat Heung Outline Zoning Plan (OZP) No. S/YL-PH/7 which was exhibited for public inspection under section 5 of the Ordinance. The site was in fact zoned for “Residential (Group) D” (“R(D)”) on the plan. Since the submission of the notice of appeal, on 2 November 2004, the Chief Executive in Council approved the draft Pat Heung OZP which was subsequently renumbered as S/YL-PH/8 and the site in question continued to remain in the R(D) zone. Subsequently, there was a further draft OZP plan but the site in question remained in the R(D) zone.

5. The site has an area of about 2,367 square metres. It is a private lot held under a Block Government Lease. The site is located to the south-east of Fan Kam Road, Ta Shek Wu Shek Tong, Pat Heung, Yuen Long, and is at the southern portion of the R(D) zone on the relevant OZP. It is accessible via a local track leading from Fan Kam Road. The distance from the site to Fan Kam Road is about 35 metres.

6. The Appellant ran a business of supply of sauces and food stuff such as seasonings. According to the Appellant, the main factory of the Appellant is in China. The sauces were made and bottled in China. However, the Appellant would require some place in Hong Kong for the storage of the sauces and to do some minor re-packaging. The place in Hong Kong would also act as a centre for storage and distribution to the customers. According to the Appellant, before moving to the site, the Appellant’s operation in Hong Kong was at another nearby site at Wang Toi Shan. He moved to the present site in or about November 2003.

7. Currently, the Appellant had 34 containers at the site. The ground of the site was paved with cement concrete. The containers were stacked up in a double decked manner and were placed roughly along the perimeter of the site. The containers were arranged in groups. They were modified so that collectively they

appeared to be rows of 2 storey high structures. Access to the upper level was by means of external staircases. It also appeared that some areas between 2 rows of containers were covered by galvanized sheets to form a cover shed for workers to work or for temporary storage. Some of the containers were used as office, watchman office and rooms for the staff resting and recreation. There was one container with 4 gas stoves inside used as a kind of kitchen. There were about 4 containers being converted for the storage of water. The rest of the containers were used for storage. Amongst the things stored were sauces, caustic soda powder in bags and liquid bleach in plastic containers.

8. Apart from the container structures there were also septic tanks fitted with soakaway tanks for the treatment of foul water in the site. However, these tanks were put underground and were duly licensed by the Environmental Protection Department.

9. Photographs taken from the site in October 2005 indicated that there were a large number of plastic containers, heaps of metal cans and a discarded air conditioner lying exposed in the site. We were told by the Appellant that the cans and the discarded air conditioner were not meant to be stored at the site at all and they would be disposed of. We accept his explanation.

10. As the Appellant claimed that his main business was the supply of sauces, we raised the query with him on the reason for the large stock of bleaching agents and caustic soda powder at the site. We were told that the Appellant would use the bleaching agent for cleaning and sterilization of the site and the caustic soda powder was used as insecticide for killing mosquitoes. We accept the Appellant's evidence that there were thick bushes and vegetations around the site and mosquito problem was an acute one. We also accept that some of the bleaching agent kept at the site is probably used for the cleaning and sterilization of the site. However, we do not think that the whole stock of the caustic soda powder and bleaching agents kept at the site is intended solely for the Appellant's own use. From the business registration certificate of the Appellant in the bundle of documents placed before us, it appeared that the Appellant dealt with soy products & detergent and from the Appellant's letter head found within the bundles, it appeared that the Appellant dealt in soy bean sauce, food seasoning material, and also washing liquid or detergent. We

believe that the Appellant also deals with other kinds of cleaning detergents commonly used in restaurant kitchens like bleach and caustic soda.

11. The Appellant was in fact a wholesaler supplying to restaurants, eateries, supermarkets and grocery stores. He employed about 20 staffs at the site. This was the only place of business of the Appellant in Hong Kong. Most of the staff were employed as drivers or delivery men. It would appear that the Appellant intended to store his goods like the various kinds of sauces, bleaching agents and caustic soda in the container structures at the site. He would also like to provide his staff with some eating, resting and recreation facilities at the site. On top of that, there would plainly also be some loading and unloading activities at the site, and when his lorries were not in use he would also expect to be able to park his lorries at the site.

12. In the Appellant's application to the TPB, it was stated that the Appellant proposed to place 34 containers at the site and would use the uncovered area for parking of lorries. It was also stated that the Appellant proposed to use the site as a storage site. Despite the description given in the application form, we had the distinct impression that the main aim of the Appellant was to obtain the necessary approval in order to continue his operation at the site in the manner described earlier.

13. The TPB rejected the Appellant's application on the following grounds :

- (a) The proposed development was not in line with the planning intention of the R(D) zone, which was intended primarily for improvement and upgrading of existing temporary structures within the rural areas through re-development of existing temporary structures into permanent buildings. It was intended for low-rise, low-density residential development subject to planning permission from the TPB.
- (b) The proposed development did not comply with Town Planning Board Guidelines No. 13C for 'Application for Open Storage and Port Back-up Uses' in that it was not compatible with the nearby residential structures; and

- (c) There was insufficient information in the submission to demonstrate that the development would not have adverse environmental impact on the residential dwelling nearby.

14. The site is surrounded by area predominately used for residential purposes. There is a narrow stream course immediately to the north and also to the east of the site. On the northern side across the stream, the land is cultivated agricultural land. On the western side across the stream, the land is also used for residential houses. To the immediate west and south of the site, again the land is being used for residential houses. Further to the north-east of the site is a pigsty and further to the south-east and south-west beyond the residential houses area are some fallow agricultural land. To the further west of the site is a site for the open storage of construction machinery. We are told that this is an unauthorized development liable for enforcement action. To the further south-west is an open storage yard for the storing of excavators and loaders. There is planning permission for this yard.

15. Although there appears to be a large area immediately surrounding the site being used for residential houses, very few of the houses are in fact inhabited. In fact, nearly all houses around of site are just temporary structures. To support his case, the Appellant had produced some 14 signatures said to be all the members of the villagers living at Ta Shek Tong village where the site is situated, to support his application. In their joint open letter dated 20 October 2000 addressed to the TPB, it was stated that the Appellant's activities had produced some economic benefits to the village in creating more employment and that the Appellant's operation had not caused any traffic, environmental and noise pollution affecting the daily life of the villagers. We are of course unable to verify whether these 14 signatories are all the persons living in the nearby village. However, we do accept the Appellant's evidence that the temporary structures around the site are mostly vacant and that there are very few households living nearby. We are also prepared to accept that there is in fact no complaint by any of the residents in the vicinity against the Appellant's operation, which has been going on since about November 2003.

16. There was a suggestion that some 20 years ago, the site was used as some kind of workshop. From the aerial photos taken of the site, it appeared that there were some structures at the site in October 1990 and April 1992. We accept the

Respondent's submission that it is not our function to make any determination as to whether the Appellant's use or intended use of the site would fall within the meaning of "existing use" in the Ordinance and we make no finding in this respect.

17. We accept that the planning intention behind R(D) zone is for the improvement and upgrading of existing temporary structures within rural area. Indeed, we note that the area surrounding the site is basically occupied by temporary structures. We would only remark that the same is also true for the site. In this respect, we like to point out that the containers placed on the site are basically temporary building structures. As we have pointed out earlier, some of the containers are being used as offices and rooms for the employees to rest and others are being used as kitchen and canteen. Of course, some are used for storing sauces, bleaching agents and caustic soda powder. It is also notable that the metal panels of the containers were cut open to make doors and windows of the structures. Electricity supply and lighting were provided inside these containers. In short, the containers placed at the site are very much different from those stacks of containers found at many of the container storage yards in other parts of the New Territories and they serve a very different function. Containers used in this manner had been held to be building works for the purpose of the Buildings Ordinance (see e.g. Appeal Tribunal (Buildings) Case No. 2-93 decision given on 5 May 94, Case no. 36-93 decision given on 31 May 96).

18. We are satisfied that the proposed use of the site by the Appellant would not fall within any of the uses permitted under Column 1 under R(D) zone in the Schedule to the OZP. The closest that one can get from this column is the item of use as "house (re-development; addition, alteration and/or modification to existing house only)". However, there is nothing here to suggest that the Appellant's container building structures are addition or alteration or modification of any existing structures in the site. Thus, plainly given that the site falls within an R(D) zoning, the Appellant could not rely on Column 1 of the Schedule to the OZP.

19. Column 2 of R(D) zone of the Schedule to the OZP sets out the uses that may be permitted with or without conditions on application to the TPB. Amongst the uses set out in this column are "houses (not elsewhere specified)", "eating place", "flat", "place of recreation, sports or culture". The intended use of some part of the

site as a canteen would appear to us to be within the meaning of "eating place", and also the rooms or cubicles for the employees to rest and to use as recreation room would also fall within the meaning of "place of recreation, sports or culture". The more difficult issue is whether the rows of containers as a whole should be treated as merely open storage of containers (with or without its contents), or whether they should be treated as "houses (not elsewhere defined)". The answer to this issue is also bound up with the issue of whether it is correct to evaluate the Appellant's application with reference to the "Town Planning Board Guidelines No. 13C for 'Application for Open Storage and Port Back-up Uses under section 16 of the Town Planning Ordinance'" (hereinafter called the "Guidelines").

20. In relation to the issue of whether the proposed use is in line with the planning intention of the R(D) zone, we are of the view that even if one were to consider that the rows of containers should be treated as "houses (not elsewhere defined)" under Column 2 of the Schedule, the intended use is not in line with the statement of intention of the R(D) zone because plainly there is no evidence that the Appellant intended to upgrade the existing structures within the site. What he had put into the site were just some other temporary structures and even assuming that what he had put into the site were structures replacing the existing ones (as to that we have no evidence), we are not satisfied that what he had put in or intended to put in would achieve the level of improvement and upgrading that a planning authority would expect. Thus, we consider that the TPB was right in coming to the conclusion that the intended use was not in line with the planning intention of the R(D) zone.

21. However, what the Appellant is now applying for is not a permission to effect some permanent development. What he wanted is permission for 3 years to continue his operation at the site. In this respect, in considering his application, the fact that the proposed development is not in line with the planning intention stated in the OZP would carry less weight against his application than the case of an application for permanent development.

22. In relation to the question of the application of the Guidelines, we are of the view that strictly speaking the Guidelines have no application to the containers placed in the site, and would only have limited application to those areas between 2 stacks of containers where there was some kind of covers. It appears to us that the

purpose of the Guidelines is to deal with cases where the land is intended to be used for the placing or storage of containers as articles or chattels, or for the open (i.e. not under cover) storage of goods or chattels. It is not intended to cover the cases of erection of temporary building structures on the land, even though the building structures concerned are made up of modified containers. In the case where the containers served the purpose of prefabricated building structures, we do not think that one should regard them as being chattels stored at the site.

23. Section 1 of the Guidelines set out the scope and application of the Guidelines. We consider that paragraphs 1.2 and 1.3 would support our view, and it is not the intention of the Guidelines to cover cases where the containers placed on the land are intended to be building structures.

“1.2 Specific open storage and port back-up uses such as containers storage, storage of vehicles for stripping or breaking, storage of scrap metals, storage of dangerous goods and container trailer/tractor park which may cause environmental nuisance, safety hazards or transport problems require planning permission from the Board. The purpose is to ensure that such open storage and port back-up uses would have no adverse environmental, drainage, traffic and other impacts on the surrounding area.

1.3 Planning permission is also required for temporary open storage and port back-up uses in areas covered by statutory town plans, except in environmentally/ecologically sensitive areas including the “Site of Special Scientific Interest” (“SSSI”), “Conservation Area” (“CA”), “Coastal Protection Area (“CPA”) ... ”

It is notable that § 1.2 refers to “container storage”, and not merely the placing of containers on the land as building structures. In fact, when containers are adapted or modified to be used as building structures, they cease to be containers.

24. Further, “Open Storage Uses” and “Port Back-up Uses” are also specifically dealt with in paragraphs 1.4, 1.5 & 1.6 of the Guidelines :

“1.4 “Open Storage” uses considered here relate to activities carried out on a site for which the greater part of the site (i.e. generally assumed to be more than 50%) is uncovered and used for storage, repair or breaking other than container-related uses. Storage activities ancillary to industrial, workshop and warehousing on the same site are excluded from this definition. The definition however includes temporary structures such as those found on dumping and vehicle repair sites (for example galvanized sheeting used for carports), as these do not radically differ from the appearance, nature or impact of operations carried out in open accommodation.

1.5 Activities conforming to the above definition include :

- Storage of rattan and bamboo
- Storage of logs and timber
- Storage of ceramic/pottery products
- Storage of processed agricultural products
- Storage of scrap metal
- Storage of cans/tanks
- Storage of paper and general rubbish
- Storage of cement/sand
- Storage of construction equipment
- Storage of chemical products
- Storage of dangerous goods
- Storage of vehicles for stripping/breaking or repair
- Storage of vehicles and vehicle parts for sale or disposal
- Vehicle depot

Port Back-up Uses

1.6 Port back-up uses are those port-related activities which are situated off-port. ... Such activities are essential to the operation of port activities but do not need to be located within the confines of the port. For the purpose of these guidelines, the following

activities are defined as port back-up uses :

- container storage/repair yard
- container freight station
- container trailer/tractor park.”

25. Plainly, the containers found at the site could not fairly be described as containers stored at the site and the site is not being used for the purpose of port back-up use. While we appreciate that the list of storages set out under § 1.5 is not exhaustive, none of the activities carried out at the site would fall within the list. Moreover, the sauces, bleaching agents and the caustic soda powder were not stored uncovered. They were stored inside structures adapted from containers. We appreciate that it may well be the case that at times some of the goods stored may be taken out from the structures and placed under the covered shed between the stacks of containers while waiting to be loaded onto vehicles or for re-packaging. However, we do not consider that this would be the major or the intended use of the site nor is it intended that the goods would be stored at the site just beneath the sheds.

26. It would appear that the TPB took the view that the Guidelines applied to the present application, and since the site was located within the category 3 areas, generally the application to use the site for “Open Storage” or “Port Back-up” use would not be granted unless the application was in relation to a site with previous planning approval (see § 2.4 of the Guidelines). Since the present site did not have any previous planning approval for such “Open Storage” or “Port Back-up” use, the TPB took the view that the Appellant’s application should be dismissed.

27. In our view, the TPB was wrong in taking the view that the Guidelines applied and in any event we consider that we have a discretion in not adhering strictly to the Guidelines in the present case where, in any view, the intended use is not a typical open storage use or port back-up use adumbrated in the Guidelines.

28. It is unfortunate that we cannot reach a unanimous view on whether the Appellant’s appeal should be allowed. The majority consider that the appeal should be allowed to the extent that the Appellant should be granted permission for his intended use of the site for a period of one year subject to the conditions set out below.

The major factors that influence the view of the majority are that :

- (a) The locality is thinly populated. Most of the temporary structures in the vicinity are not in fact inhabited.
- (b) The Appellant's operation has not brought serious ill effects to the locality in terms of traffic or pollution. There is no objection from the local community. In fact, they rather support the application.
- (c) Although we take the view that the promise by the Appellant to widen or improve the access road to the site from Fan Kam Road is unlikely to materialize because the performance of that promise would depend on a lot of factors beyond the Appellant's control, in view of the fact that the area is relatively thinly populated and that the number of vehicle trips to and from the site would not be too frequent, the majority do not consider that the traffic concern is a weighty factor against the grant of the permission in the present case.
- (d) Apart from the Planning Department and the Transport Department, the concern of other Government Departments can be met by the imposition of suitable terms in the grant of the permission. In fact it would appear that the question of water pollution, being one of the major concerns, has now been solved, as evidenced by the grant of the license by the Environmental Protection Department on 4 February 2005.
- (e) The Appellant's activities created jobs for the locality and generally for Hong Kong.
- (f) The Appellant is expected to comply with the conditions imposed for the grant of the permission and if the conditions are complied with, it would have the effect of improving the environment of the site and the locality, or at least would keep any adverse effect

of the Appellant's operation to the locality to an acceptable level.

29. It is also the view of the majority that even if we are wrong in taking the view that the Guidelines do not apply to the present application, in all the circumstances of the present case, the Appellant should be given a chance to demonstrate that his operation would not generate adverse drainage, traffic, visual and environmental impacts on the surroundings areas.

30. The minority however take the view that having regard to the fact that the proposed use is not in line with the planning intention, the Appellant had not made out a strong enough case for the TPB and hence this Appeal Board to exercise the power to grant him permission to use the site for his intended purpose. Furthermore, the minority take the view that the Appellant has not shown that he could not have moved his operation to some land zoned for open storage or for purposes which would suit his intended use.

31. The conditions which the majority would impose for the grant of the permission to use the site for the purpose of storage of food sauces, food seasoning materials, bleaching agents and caustic soda powder and for the purpose of a canteen for the Appellant and his bona fide employees, for a period of one year are as follows :

- (a) There shall be no structure inside the site higher than 2 conventional containers stacked together. For this purpose containers whether standing alone or stacked together are to be considered structures.
- (b) No part of the site may be used to store anything other than goods belonging to or dealt with by the Appellant in his business of Parsley Sauce and Food Industrial. In particular, no part of the site may be used for storing anything for reward.
- (c) All goods stored at the site shall be kept inside the structures put or erected in the site. No goods shall be placed in open storage or in area or space which is not enclosed in wind and water tight structures.

- (d) Except for the purpose of loading and unloading, no vehicle shall be parked in the site except for vehicles belonging to the Appellant, but in any event there shall not be more than 10 vehicles parked in the site.
- (e) The Appellant shall keep the site clean and shall ensure that the condition of the site is such that it shall not be subject to any complaint or adverse comments from the Director of Food and Environmental Hygiene. Further, the Appellant shall comply with such instructions or requirements that the Director of Food and Environmental Hygiene may give from time to time in relation to the site.
- (f) The Appellant shall use his best endeavour to preserve the trees in the site. No tree in the site may be cut or removed without the consent or approval of the Director of Agriculture, Fisheries and Conservation.
- (g) The Appellant shall submit drainage proposals in respect of the site to the Drainage Services Department for approval within 4 weeks from the date of the notification of the result of this appeal or within such time as may be extended by a Chief Engineer of the Drainage Services Department or by the TPB, and shall implement the approved proposals to the satisfaction of the Drainage Services Department within such time as may be allowed by the Drainage Services Department or the TPB.
- (h) The Appellant shall provide a 9 litre water type fire extinguisher for every 100 square metres of area used as office, canteen and rest room, and/or shall comply with such requirements of the Fire Services Department in relation to the provisions of fire safety equipments at the site.
- (i) The permission is personal to the Appellant and shall be

automatically revoked upon the Appellant's parting with possession of the site or any part thereof.

32. Finally, we would like to remind the Appellant that the permission granted herein does not necessarily mean that he may continue his operation at the site. There are usually conditions in the Block Government Lease which would not permit the erection of structures on the land covered by the lease. It is beyond the jurisdiction of the TPB and this Appeal Board to deal with anything relating to the Government leases.