

IN THE TOWN PLANNING APPEAL BOARD
TOWN PLANNING APPEAL NO.19 OF 2003

BETWEEN

EVER NEED COMPANY LIMITED

Appellant

-V-

TOWN PLANNING BOARD

Respondent

Dates of hearing: 10th and 17th March 2005

Date of Decision: 25 April 2005

Composition of the Appeal Board:

Mr Ronny Wong F.H. Wong, SC, JP (Chairman)

Ms Lister Cheung Lai-ping

Professor Fong Wang-fun

Mr Tam Kar-chuen

Professor Anthony Yeh Gar-on

DECISION

1. On 22nd January 2003, the Appellant submitted an application [“the 2003 Application”] under Section 16 of the Town Planning Ordinance (Cap. 131) [“the Ordinance”] for permission to use Lot 168 (Part) in D.D. 114 as an open storage for steel scaffolding equipment. Lot 168 (Part) is of an area of approximately 200 m².

2. By letter dated 15th February 2003, the Appellant amended its application to include Lot 54 (Part). Lot 154 (Part) is of an area of approximately 150 m².
3. By a further letter dated 3rd March 2003, the Appellant included Lot 156 (Part) in its application.
4. The Appellant had previously sought planning permission for Lots 154 and 155 by application No.A/YL-PH/216 lodged in 1998. Lots 154 and 155 were then within the “Agriculture” [“AGR”] zone of the applicable Outline Zoning Plan [“OZP”]. By letter dated 30th September 1998 [“the 1998 Approval”], the Town Planning Board granted the Appellant permission to use Lots 154 and 155 as a temporary open storage of scaffolding and formwork equipment for a period of 12 months up to 11th September 1999 subject to various conditions including the submission and implementation of landscaping proposals, the provision of drainage facilities and the provision of a street fire hydrant with adequate flow and pressure or a 245 m³ capacity water tank.
5. On 13th November 1998, substantial parts of Lots 154 and 155 were rezoned from AGR to “Open Storage”. However Lot 154 (Part), Lot 155 (Part) and Lot 168 (Part) remain within the AGR zone on the approved Pat Heung OZP No. S/YL-PH-6. They fall outside the “will-go”, “no-go and “tolerated” areas under the broad strategy in the Town Planning Board Guidelines No. 13B for Application for Open Storage and Port Back-up Uses. They fall within the Category 3 areas under Town Planning Board Guidelines for Application for Open Storage and Port Back-up Uses (TPB PG-No. 13C) [“the 13C Guidelines”]
6. The 2003 Application was considered by the Rural and New Town Planning Committee [“RNTPC”] on 21st March 2003.

- (a) The Planning Department did not support the application as “the proposed development is not in line with the planning intention of the “AGR” zone”.
- (b) The Drainage Services Department had no objection in principle to the application but observed that “The applicant should submit a satisfactory drainage proposal, including existing and proposed drainage, to demonstrate that all the existing flow paths as well as the runoff falling onto and passing through the site will be intercepted and disposed of via proper discharge point”.
- (c) The Planning Department had no in-principle objection to the application from the landscaping perspective but pointed out that “Should the application be approved, conditions should be imposed on the submission and implementation of landscaping proposals to his satisfaction”.
- (d) The Director of Fire Services commented as follows:

“Recent site inspection revealed that the site was accessible by fire appliance. However, the nearest fire fighting water supply is only available from a fire hydrant located more than 500m away. He would not object to the application providing (sic) that a street hydrant with adequate water flow and pressure is installed within 500m of the site or a 245m³ capacity water tank with associated pumping facilities is provided at the site to his satisfaction”.

RNTPC subscribed to the views of the Planning Department and rejected the Appellant’s application.

- 7. By letter dated 22nd April 2003, the Appellant applied for a review under section 17(1) of the Ordinance. By letter dated 12th June 2003, the Appellant stated that:

“Anyway, we wish your Board would reconsider our application, may the Board give us some alternatives, such as for a period of 1 year instead of 3 years? Or can we give up the application for the new rented area lot 168 (Part)”.

8. The application was reviewed by the Town Planning Board on 18th July 2003. The Town Planning Board took into account the 1998 Approval and decided to partially approve the Appellant's application in relation to Lot 154 (Part). By letter dated 8th August 2003, the Town Planning Board informed the Appellant of such partial approval. The Appellant was further informed that the approval was on a temporary basis for a period of one year up to 18th July 2004 and subject to various conditions including the following:
 - (a) the submission of landscaping proposal within 3 months from the date of planning approval to the satisfaction of the Director of Planning or of the Town Planning Board;
 - (b) the submission of drainage proposal within 3 months from the date of planning approval to the satisfaction of the Director of Drainage Services or of the Town Planning Board; and
 - (c) the provision of a street fire hydrant with adequate flow and pressure within 500m of the application site or a 245m³ capacity water tank with associated pumping facilities at the application site within 3 months from the date of planning approval to the satisfaction of the Director of Fire Services or of the Town Planning Board.

9. By notice dated 9th September 2003, the Appellant sought to challenge the decision of the Town Planning Board on the grounds that the Town Planning Board failed to state clearly whether approval was given in respect of Lot 168 (Part) and that the Appellant was required to comply with stipulated conditions within a period of 1 year. By letter dated 19th September 2003, the Appellant further asserted that it was unfair to impose conditions on grant of a 1 year permit in respect of Lot 154 (Part). The Appellant referred to the 1998 Approval in

support of its contentions.

10. Proposals in respect of drainage, fire fighting facilities and landscape were submitted by the Appellant on 7th October 2003. These were considered not acceptable by the relevant Government departments. On 8th October 2003, the Appellant submitted an application for extending the time limit for compliance with the relevant conditions imposed by the Town Planning Board. A 3 months extension was granted on 10th November 2003. There was no compliance by 18th January 2004. The planning permission granted by the Town Planning Board in respect of Lot 154 (Part) was revoked on the same day for non-compliance with the conditions.
11. When the matter first came before us on 10th March 2005, Mr Lai for the Appellant informed us that the Appellant did not wish to pursue the appeal in relation to Lot 156 (Part) and Lot 168 (Part). The appeal was confined to Lot 154 (Part) and in particular the imposition of conditions in relation to that part. We adjourned the hearing and invited the Appellant to amplify its grounds in challenging the conditions imposed by the Town Planning Board.
12. By letter dated 10th March 2005, the Appellant invited our attention to the 1998 Approval, the minutes of the meeting of the RNTPC on 21st March 2003 and the minutes of the meeting of the Town Planning Board on 18th July 2003. The Appellant asserted that it was unreasonable for the Town Planning Board to impose conditions in relation to Lot 154 (Part) when no approval was given for Lot 156 (Part) and Lot 168 (Part).
13. We are of the view that the Appellant had placed undue weight on the 1998 approval. It was a temporary approval. It expired on 12th September 1999. The rezoning on 13th November 1998 did not alter the zoning status of Lot 154

(Part). It remains within the AGR zone. The 1998 approval did not have the effect of granting the Appellant leave to use Lot 154 (Part) as an open storage after 12th September, 1999. Permission is required and hence the current application which has to be assessed in accordance with the 13C Guidelines.

14. Paragraph 2.4 of the 13C Guidelines provides that:

“Category 3 areas are those outside the Category 1, 2 and 4 areas. Applications falling within Category 3 areas would normally not be favorably considered unless the applications are on sites with previous planning approvals. In that connection, 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 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. The proposed uses will only be allowed on a temporary basis up to a maximum period of 3 years, and shall be phased out in the long term. Approval is also subject to no adverse departmental comments and local concerns as per Category 2 areas”.

15. By its letter dated 12th June, 2003 the Appellant indicated its readiness to accept a one year approval. Given this stance of the Appellant, there is no basis to challenge the decision of the Town Planning Board in confining the permission to a period of one year.

16. Once it is clear that the 1998 Approval does not have the effect of a permanent grant and permission is still required from the Town Planning Board, there can be no question that the Town Planning Board is fully entitled to impose conditions to acceding to the Appellant’s application.

17. We have not lost sight of the fact that the Appellant’s initial application was for permission covering Lot 154 (Part), Lot 156 (Part) and Lot 168 (Part). The Appellant did not clearly identify the reasons and made little effort to explain

why conditions which are applicable to a collective application in respect of the three lots should cease to apply when the approval is confined merely to Lot 154 (Part). The Appellant rests its case on the basis of the 1998 Approval. That too was a conditional approval. Had the same been relevant, the Appellant did not comply with the conditions which formed part of the 1998 Approval. The 1998 Approval could not therefore constitute a reason for challenging the similar conditions imposed by the Town Planning Board when the jurisdiction of that Board is invoked for the grant of the requisite permission.

18. For these reasons, we dismiss the Appellant's appeal.

Mr. Albert M. C. Lai and Mr. Lee Oi Ting for the Appellant

Mr. Brian Leu of the Department of Justice for the Respondent