

IN THE TOWN PLANNING APPEAL BOARD
Town Planning Appeal No. 23 of 2003

Between

Stand Faith Development Limited (Appellant)

And

Town Planning Board (Respondent)

Date of Hearing: 24 January 2005, 23 & 24 February 2005 and 9 June 2005.

Date of Decision: 22 September 2005

Composition of the Appeal Board:

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

Dr Gary William John Ades

Professor Fong Wang-fun

Mr Fung Pui-cheung

Mr Michael Robert Mann

DECISION

1. The subject matter of this appeal is a piece of land situated at lots 3719P1A (part) and 3719P3 (part) in D.D. 104, Tai Sang Wai, Yuen Long (hereinafter called “the Property”). On 26 December 2002, the appellant submitted an application to the Town Planning Board (“the Board”) for permission to use the Property as a temporary warehouse. The application was considered by the Rural and New Town Planning Committee on 21 February 2003 and the Committee decided to reject the application. The appellant applied to the Board for review of the decision of the Committee. On 26 September 2003, the appellant was notified that upon review, the Board decided to affirm the decision of the Committee to reject the appellant’s application. The appellant thus brought this appeal against the decision of the Board.

2. At the time of the application, the appellant used the Property as a warehouse for the storage of stainless steel sheets and coils. The intention behind the application was such that the appellant may continue using the Property for such purpose for such period as may be permitted by the Board.

3. The Property has a long and narrow rectangular configuration. It is 150 metres long and 18 metres wide and it covers an area of about 2,177 square metres. The warehouse component of the Property is about 745 square metres consisting of a single storey covered structure of about 20 feet high.

4. The Property was at all material times and is within the following statutory plans :

<u>Date of Notification</u>	<u>Plan No.</u>
17 August 1990	Nam Sang Wai IDPA Plan No. IDPA/YL-NSW/1
12 July 1991	Nam Sang Wai DPA Plan No. DPA/YL-NSW/1
26 April 1994	Nam Sang Wai DPA Plan No. DPA/YL-NSW/2
3 June 1994	Nam Sang Wai OZP No. S/YL-NSW/1
27 October 2000	Nam Sang Wai OZP No. S/YL-NSW/2
18 May 2001	Nam Sang Wai OZP No. S/YL-NSW/3
8 February 2002	Nam Sang Wai OZP No. S/YL-NSW/4
16 April 2004	Nam Sang Wai OZP No. S/YL-NSW/5 (the OZP)

5. Up to the stage of the OZP No. S/YL-NSW/1, the Property was zoned for Recreation purposes. As from OZP No. S/YL-NSW/2 onwards, the Property was zoned within an area for “Other Specified Uses “Annotated” Comprehensive Development to include Wetland Restoration Area” (OU(CDWRA)). In fact the Property falls within the Wetland Buffer Area of the Deep Bay Area. It is at the edge of the OU(CDWRA) provided in the OZP and is very close to a large stretch of fish ponds falling within the Wetland Conservation Area.

6. Whether the Property was zoned for Recreation purposes or as OU(CDWRA), the use of the Property as a warehouse, whether with or without cover, would require the permission of the Board under Section 16 of the Town Planning Ordinance and in relation to each application for such permission, the Board may grant permission for such use for a maximum period of 3 years only. For OU(CDWRA) zoning, the uses which are always permitted without the necessity of

any planning permission are : agricultural use, barbecue spot, field study/education/visitor centre, on farm domestic structure, picnic area, ancestral hall and rural committee/village office only. The list of uses which may be permitted with or without conditions on application to the Board under Column 2 of the Notes for OU(CDWRA) use is longer. However, again the list does not include warehouse use. The Notes to the OZP make it clear that the planning intention for OU(CDWRA) purpose is :

“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.”

7. The Property also falls within an area designated as Wetland Buffer Area (WBA) in the Town Planning Board Guidelines for Application for Developments within Deep Bay Area under Section 16 of the Town Planning Ordinance (hereinafter called “the Guidelines”). While the Guidelines are intended for general reference only and are not to be treated as binding on the Board, both the Board and this Appeal Board must have due regard to the provisions and policy statements contained in the Guidelines.

8. It is quite clear that the philosophy behind the Guidelines is to encourage the restoration of lost fish ponds and to provide a desirable wetland habitat around the Deep Bay and Mai Po Area. We set out below some of the provisions in the Guidelines relevant to our consideration :

“6.4. The intention of the WBA is to protect the ecological integrity of the fish ponds and wetland within the Wetland Conservation Area (WCA) and to prevent development that would have a negative off-site disturbance impact on the ecological value of fish ponds. ... As a substantial amount of the fish ponds within the WBA have already been lost over time through filling and certain areas have been degraded by the presence of open storage use, these degraded areas may be considered as target areas to allow an appropriate level of residential/recreational development so as to provide an incentive

to remove the open storage use and/or to restore some of the fish ponds lost.

6.5 Within the WBA, for development or redevelopment which requires planning permission from the Board, an ecological impact assessment would also need to be submitted. Development/redevelopment which may have negative impacts on the ecological value of the WCA would not be supported by the Board, unless the ecological impact assessment can demonstrate that the negative impacts could be mitigated through positive measures. The assessment study should also demonstrate that the development will not cause net increase in pollution load to Deep Bay. Some local and minor uses are however exempted from the requirement of ecological impact assessment. They are listed in Appendix A and include temporary uses.

6.6 Application for new open storage or container back-up uses including workshops within the WBA, 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. ... ”

9. As we have pointed out above, the Property was of a long narrow rectangular shape, with the 2 short sides at the north-east and south-west ends of the rectangle. The south-west side of the Property almost abuts the boundary separating the OU(CDWRA) and the Wetland Conservation Area. There was a riding school at the south and south-east of the Property. To the west and also along the north-west boundary of the Property, there was a big container vehicle park. There was also another container tractor and trailer park along the northern side of the south-eastern boundary of the Property, although the size of this container tractor and trailer park was smaller than the one on north-western side of the Property. To the further south-eastern side of the Property, there were a number of yards used for open storage of timber, bottles and construction materials. Access to the Property was from the north-eastern side. The north-eastern side of the Property in fact abuts the access road to the Property. On the other side of the road, there was yet another vehicle park and open storage yard for containers. The access road to the Property runs from Fairview Park Boulevard in a south-western direction and then turns north-westwards before it reaches the Property. It is fair to say that the lands along

both sides of the access road were mainly used for vehicle repairs, container storage or parks or open storage. There was no agricultural use. There were only 2 small interconnected pools lying between an open timber storage and an open storage of construction materials on the south-eastern side of the Property. The various uses of the lands surrounding the Property are set out in Plan S-2 annexed to the statement of Mr. Mok Ping Chiu. It is fair to point out that in many cases the use as open storage or container storage etc. is unauthorized development under the Town Planning Ordinance. However, there is also a sizeable amount of such open storage and parking use falling within the category of “existing use” under the Town Planning Ordinance.

10. We were also informed that since the commencement of the hearing of this appeal the Government had taken action against the occupier of the container vehicle park abutting immediately the north-western side of the Property and also the occupier of the open storage of timber yard at the south-eastern side of the Property. Both occupiers had made applications to the Board for permission to allow them to use their lands for their current use for a period of 3 years, and their applications would be considered by the RNTPC on 10 June 2005, i.e. after we have completed the hearing of this appeal.

11. We should also mention that to the north of the Property was the very big development of Fairview Park. In terms of linear distance, the Property was at least some 200 metres from the nearest part of Fairview Park. However, it is also necessary to point out that both the Property and Fairview Park would have to share Fairview Park Boulevard as their means of access although the access road to the Property would branch off from Fairview Park Boulevard before the boulevard reached the main entrance of Fairview Park. Also along Fairview Park Boulevard and to the north of it before the junction between the boulevard and the access road to the Property was another residential development known as Villa Camellia which was a much smaller development. On the western side of the access road after the junction between the access road and Fairview Park Boulevard was a school. It is not too clear if access to the school could be gained from the access road leading to the Property. From the aerial photo S-3 it would appear that at least the main access to the school is from Bauhinia Road East from the side of Fairview Park. The nearest part of the building structure of the school to the access road should be about 15 metres. In term of distance from the Property, both the school and Villa Camellia were over 400 metres away from the Property even by linear measurement.

12. The Property was used for warehouse purposes by the appellant's predecessor in title since 1993. In 1994, the appellant acquired the Property and has been using the Property as a warehouse for the storage of stainless steel coils and sheets. There was a structure within the Property and the sheets and coils were placed inside the structure except on isolated occasions when for good reasons such as during the period of repair to the floor, some of the goods would have to be placed outside temporarily. There were certainly other occasions when pallets used for the loading of the sheets or coils were left on the open area pending collection or disposal. The roofed area was just over one third of the total area of the Property. The rest of the area was left as open area with its ground paved. There were some trees planted along the boundary of the open area. The open area was not used for storage purpose. It was used mainly as an access area for the loading and unloading of vehicles coming to the Property to deliver or withdraw the goods from the warehouse. We also accept that there were occasions that the appellant's lorry was parked in the open area. We do not consider that the open area should be regarded as being used as lorry park or for storage purpose.

13. The Property had been subject to a number of applications for permission for temporary use in the past. The first application No. A/YL-NSW/54 was rejected on 22 January 1999 by the RNTPC and it would appear that no further step was taken by the occupier. The second application No. A/YL-NSW/61 was also rejected by the RNTPC but the Board granted permission to use the Property as a warehouse for 12 months upon review on 17 September 1999. An important consideration for the grant of the permission was that the warehouse use was accommodated in an existing structure without significant environmental impact. The third application No. A/YL-NSW/88 was approved by the RNTPC on 13 October 2000. The permission was for a period of 12 months and was subject to 2 conditions viz. (a) there should be no open storage within the site; and (b) 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 the Board. Again it is to be noted that the relevant department viz. the Director of Agriculture, Fisheries and Conservation did not express any objection to the application, apparently taking the view that the proposed use as an indoor warehouse did not give rise to any significant environmental or ecological impact. It is notable that at the time of all these 3 applications the Property was zoned for Recreation purposes.

14. On 27 October 2000 the Property was zoned for OU(CDWRA) purposes. On 5 October 2001 the appellant's application No. A/LY-NSW/107 was rejected by

the RNTPC. The main reasons for the decision were that (a) the temporary warehouse for storage of stainless steel sheets and coils was not in line with the planning intention for area zoned OU(CDWRA); and (b) the local vehicular track (i.e. the access road from Fairview Park Boulevard) was not designed for heavy vehicular traffic and the development would attract heavy vehicle trips generating noise and environmental nuisance to the residents of Tai Sang Wai, Man Yuen Tsuen and Fairview Park in the vicinity. Indeed the application was opposed by the San Tin Rural Committee and also the Owners' Association of the Fairview Park because of the potential noise and traffic impacts on the area.

15. The appellant applied for review. On 18 January 2002, the Board upon review decided to grant the appellant permission to use the Property as warehouse for a period of 12 months on the terms of the application as submitted to the Board and subject to the following conditions :

- (a) no open storage use would be allowed on the Property;
- (b) the provision of drainage facilities proposed within 6 months from the date of planning approval to the satisfaction of the Director of Drainage Services or the Board;
- (c) if condition (a) is not complied with at any time during the approval period, the approval given shall cease to have effect and shall be revoked immediately without further notice;
- (d) if condition (b) is not complied with by 18 July 2002, the approval given shall cease to have effect and shall be revoked without further notice; and
- (e) upon expiry of the planning permission, the appellant is to reinstate the Property to an amenity area to the satisfaction of the Director of Planning or of the Board.

16. It is to be noted that the Board also recognised that the use as a warehouse was not in line with the planning intention of the OU(CDWRA) zoning. However, the Board considered that the permission for a temporary use might be granted because the environmental impacts of the warehouse use, which only involved storage of materials in an enclosed structure would be minimal when compared with

other types of open storage uses. The grant of the permission for a period of 12 months instead of 3 years was apparently for monitoring the operation of the temporary use.

17. The condition about the drainage facilities was duly complied with as evidenced by a letter from the District Planning Officer dated 2 September 2002. The 12 months permission having expired, the appellant made the present application for permission to use the Property as warehouse for storage of stainless steel sheets and coils for a period of 3 years. The application was rejected by the RNTPC and the Board (see paragraph 1 above).

18. The Board gave 2 main reasons for the rejection of the application, viz.,

- (a) the proposed development was not in line with the planning intention for area zoned OU(CDWRA), 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 through comprehensive residential and/or recreational development to include wetland restoration area.
- (b) there was insufficient information in the submission to demonstrate that the proposed development would not have adverse environmental and traffic impacts to the surrounding areas.

19. In accordance with the general practice, the appellant's application had been circulated to various Government departments for comments. The departments which expressed views not supporting the application were : the Planning Department, the Director of Environmental Protection, the Director of Agriculture, Fisheries and Conservation and the Commissioner for Transport. The Chief Engineer of Drainage Services Department had expressed the view that should the application be approved, the appellant should be required to undertake to provide and maintain the same drainage facilities previously erected. Likewise, the Senior Architect of the Planning Department had expressed the view that should the application be approved, the appellant should be required to replace trees required under the previous landscape proposals, which were either dead or missing, and also to implement the landscape proposals to the satisfaction of the Board.

20. The main reasons for the Director of Agriculture, Fisheries and Conservation not supporting the application were that the proposed use did not comply with the planning intention of OU(CDWRA) zoning and there was nothing to indicate that the proposed use would not have any negative off-site disturbance impact on the ecological value of the fish ponds within the WCA. This would represent a reversal of the views expressed in a previous application by the appellant. On the appellant's application for review before the Board, the Director of Agriculture, Fisheries and Conservation had modified his view and again took the same stance as in the case of the previous application, viz. that he would have no comment on the application provided that the appellant would continue to ensure that the warehouse use would not cause ecological impacts to the surrounding areas and that the appellant would take the relevant measures to avoid adverse environmental and ecological impacts as set out in the appellant's representation.

21. The Director of Environmental Protection did not support the application also on the ground that the intended use was not in line with the planning intention of the OU(CDWRA) zone. He was also concerned that the storage of the metal sheets at the Property and the heavy vehicles visiting the Property would cause adverse environmental and visual concerns to the residents along the access road.

22. There were also 4 objections from occupiers in the neighbourhood. They were from a District Council member, the school at the side of the access road, the Owners' Association of Fairview Park and also the Owners' Committee of Villa Camilla. In general terms, their concern was the impact of the increased traffic generated along Fairview Park Boulevard and the access road and its associated problems such as safety, nuisance and pollution. The school also raised the concern that the traffic may affect the health of the teachers and students and disturb their attention in classes.

23. We would like to point out that initially the concern of the Commissioner for Transport was not so much about the traffic along the access road or Fairview Park Boulevard, but was on the shape of the Property. He considered that because of the long narrow shape of the Property, big vehicles like container trailers delivering to the site would have to reverse out of the site into the access road and thus cause danger, nuisance or inconvenience. However, it is fair to say that Mr. Lee Bing Shum, a senior engineer of the Transport Department giving evidence before us, did also raise the concern about the danger and difficulties arising from heavy

goods vehicular traffic along the sub-standard access road, and also problems relating to the maintenance responsibilities of the access road.

24. It is fair to say that the application was not supported by the Planning Department because of a combination of the various reasons and concerns expressed by the various other parties opposing or not supporting the application. In particular, the Planning Department took the view that since the site had now been classified as a no-go area, it would require very exceptional circumstances for approval to be given for the intended warehouse use.

25. We have carefully considered the evidence given by Mr. Ngai Sik Keung for the appellant, and Messrs. Mok Ping Chiu, Tam Tze Hoi, and Lee Bing Shum and also the submissions made by counsel for the appellant and respondent. We have also considered the video presentation made by the appellant's counsel, and the materials placed before us including the various exhibits produced during the course of the hearing.

26. The appellant argued that the use of the Property as a covered warehouse would not be against the planning intention of the OU(CDWRA) zoning because the Property was not degraded wetland. Furthermore, it was argued that the statement in the OZP on planning intention only referred to encouraging the phasing out of sporadic open storage and port back-up uses, and to provide incentive for restoration of degraded wetlands, and so it has no application to the present case because no port back-up use or open storage use was ever involved. We do not think that the statements on planning intention in the OZP should be construed as though they are words of a penal statute. We think that it must be one of the main aims for this zoning to encourage development which would help to restore or to create more wetlands. Thus we agree with the view that the intended use of the Property as a warehouse is not in line with the planning intention of the OU(CDWRA) zoning. We would also agree that in the long term the current use of the Property by the appellant should cease as we could not see how the continuous use of the Property as a warehouse could facilitate the restoration or recreation of degraded wetlands even though there is no policy statement to say that the warehouse use should be phased out. We also agree that in considering this appeal, we must pay due regard to the planning intention expressed in the OZP. However, all these do not per se mean that the appellant's application, which is for permission to use the Property temporarily as a warehouse for the storage of the stainless steel sheets and coils for a limited period of not more than 3 years, must be rejected.

27. Further, since the application was for temporary use of the Property, we do not consider that paragraph 6.5 of the Guidelines would apply to the present application so as to enjoin the appellant to submit an ecological impact assessment to support the application. In any event, in the light of the history of the use of the Property and the various previous applications, even if paragraph 6.5 of the Guidelines would apply to the present application, we do not consider that we are bound to insist on the submission of the ecological assessment before we would proceed with considering the appellant's appeal.

28. We note that the present application was for permission to use the Property for the purpose of warehouse storage of stainless steel sheets and coils, and that the sheets and coils were to be stored under cover of the structure erected at the Property. This is not a case of open storage or container back-up use nor is it a case of use as workshop. Accordingly, we do not think that the considerations set out in paragraph 6.6 of the Guidelines would apply to the present application.

29. We accept the appellant's submission that since the proposed use would only involve the storage of stainless steel sheets and coils within the warehouse structure in the Property, any adverse impact on the environment is much less than other forms of open storage. Furthermore, the nature of the goods stored would not normally give rise to any environmental or safety concern. From the visual point of view, the proposed warehouse use would make the Property look a lot more neat and tidy when compared with other surrounding sites used for open storage or container or vehicle parking purposes. From the point of view of ecological impact, the proposed use was rather neutral in that it would not create or improve any habitat for wild life nor would it make the present situation worse. In fact, it would appear that the Director of Agriculture, Fisheries and Conservation no longer maintains any objection to the application on ecological ground.

30. We accept the respondent's submission that the fact that the appellant had been granted successive permissions to use the Property as a warehouse in the past did not mean that it would have an automatic right to have the permission renewed even in the absence of any breach of the conditions for the grant of the permission. We take the view that the merits of the application must be considered afresh on each occasion in the light of the conditions prevailing at the time of the application. However, this does not mean that we should disregard the history of the use of the Property and the fact that the appellant had been given permissions in the

past. If there is no change or no material change in the surrounding circumstances, one should normally expect that the authority, be it the Committee, or the Board or this Appeal Board, would arrive at the same conclusion as before. Furthermore, all these matters are relevant to show that the appellant had invested in the Property and this should be put into the equation when considering whether permission should be given or refused. Moreover, the appellant's record on the use of the land is also relevant as to whether one could have confidence that the conditions imposed in the grant of the licence would be complied with.

31. The appellant has a good record in complying with the conditions imposed for the grant of permission for warehouse use. As we have mentioned before, while there were some days when some of the goods were placed outside the structure in the Property, we are satisfied that the same was necessitated by the repair of the subsidence of the ground inside the structure. Also, it would appear that the appellant had duly complied with the requirement of implementing proper drainage facilities to the Property.

32. We must also have due regard to the area surrounding the Property in deciding whether to grant any permission to the appellant. We take note of the fact that in the area surrounding the Property, there were many sites used for open storage, container trailer parks and other port-back up purposes. In many instances, the use for such purposes was not authorized under the Town Planning Ordinance. It appears to us that the Government was rather slow in taking action against those unauthorized uses, although we also accept the respondent's contention that the Government is nowadays more determined than before in taking enforcement action. In any event, in view of the fact that in many instances the use was an existing one, it would appear that there was very little that the Government could do to stop the use. Further, as it would appear that the lands surrounding the Property were under different ownership, it would be unrealistic to expect that within a short time in the future, there would be any plan for any comprehensive development under the Guidelines. In short, we consider that within the next 2 or 3 years, there is little hope that there would be any substantial change in the use of the lands surrounding the Property. From the point of view of achieving the planning intention, it would serve little purpose by stopping the appellant's use of the Property as a warehouse at this juncture by rejecting its application.

33. In relation to the concern over the traffic along Fairview Park Boulevard and also the access road, we are prepared to accept that there was an increase of the

traffic load along those two roads since the Board last granted its permission in January 2002. However, we are not convinced that the increase in the traffic load was due to the operation of the appellant. Since the warehouse was only used to store the goods of the appellant, the number of lorry and container vehicle trips generated by the appellant's warehouse house was relatively small. We accept the evidence that the access road was not up to the standard of a normal highway for 2 way traffic. However, there was no hard evidence to show that the road could not cope with the traffic and there was no record of any serious road accident along the 2 roads.

34. Having seen the video presentation on how a container vehicle could U turn inside the open yard of the Property, we are not convinced that there was any need for the big lorry or container vehicle to back out from the Property into the access road after delivery of goods. In any event even if the space within the confines of the Property was not sufficient to enable the container vehicle or the lorry to make a U turn inside the Property, we do not see why the vehicle concerned could not back into the Property to deliver the cargo thus avoiding the inconvenience and danger of having had to back out from the Property.

35. We note the concern and interest of the school and also the owners of Fairview Park and Villa Camilla. While no doubt every one would like to have a quiet environment with no outside traffic, this is often not achievable. We consider that there was no substantial increase in the traffic generated by the appellant's use of the Property over the last 10 years and we do not think that we should reject the appellant's application because of the concern over any traffic increase generated by some other people.

36. Having regard to all the circumstances of this case, we are of the view that we should allow the appellant's appeal. Our decision is that the appellant should be granted permission to use the Property as a warehouse for the storage of stainless steel materials for a period of 2 years subject to the conditions set out below. In deciding to grant the permission for 2 years we are conscious of the fact that in the past permissions were granted for one year. We consider that 2 years are appropriate for the following reasons :

- (a) We do not see any real prospect of any material change in the neighbourhood of the Property in the next 2 or 3 years, and as such we do not anticipate that there would be such material

change of the circumstances that would require a reconsideration of whether the Property should continue to be allowed to be used as a warehouse in the next 2 or 3 years.

- (b) We note the time taken between the date of the application and the final disposal of the application is disproportionately long when compared with the one year permission period.
- (c) The costs and efforts in the making and disposal of an application are substantial. This would not be just the costs of the appellant. On the part of the respondent, substantial work and resources are involved in the consideration and disposal of the application too.
- (d) The appellant had a good record in complying with the conditions imposed.

37. The permission granted is subject to the following conditions :

- (a) No open storage use would be allowed within the Property.
- (b) The warehouse shall only be used to store stainless steel goods, owned or dealt with by the appellant or any company belonging to the same group of companies as the appellant or any company under the same beneficial ownership as the appellant.
- (c) The appellant shall properly maintain the drainage facilities previously approved by the Director of Drainage Services or the Board.
- (d) The appellant is to (i) reinstate and implement the landscaping proposal previously approved by the Board including the replacement of any trees or vegetation within 2 months from this decision; or (ii) to submit a new landscape proposal for the approval of the Board within 4 months from the date of this decision and to implement such proposal within such reasonable time as may be allowed by the Board.

- (e) Upon the expiry of the planning permission, the appellant shall reinstate the Property to an amenity area to the satisfaction of the Director of Planning or the Board.
- (f) This permission is personal to the appellant and upon the disposal of the Property or any part thereof or any interest therein by the appellant, this permission shall automatically determine even though the 2 years have not yet expired.

Andrew W.Y. Ng & Co for the Appellant

Ms Jenny Fung of the Department of Justice for the Respondent