

IN THE TOWN PLANNING APPEAL BOARD  
Town Planning Appeal No. 5 of 2004

Between

Mr. Law Wo-lun (Appellant)

- v -

Town Planning Board (Respondent)

Date of Hearing : 7 September 2005

Date of Decision : 30 November 2005

Composition of the Appeal Board:

Ms. Teresa Cheng Yeuk-wah, SC, JP (Chairman)

Mr. Au Chi-yuen

Dr. Chau Kwai-cheong

Mr. Tam Kar-chuen

Mr. Herman To Yung-sing

DECISION

1. This appeal relates to Lot 1274 in DD 39, Tai Long, Luk Keng, N.T. (hereinafter called "the Site"). The area of the Site is about 1,000 m<sup>2</sup>. The Appellant, Mr. Law Wo-lun (hereinafter called "Mr. Law") seeks planning permission under Section 16 of the Town Planning Ordinance to continue to use the Site as temporary open storage of metals and a metal workshop for a period of three years.
2. At the time of the application, 27<sup>th</sup> June 2003, the Site was used as an open storage for metal and metal workshop.
3. The application was refused by the Rural and New Town Planning Committee of the Town Planning Board on 19<sup>th</sup> September 2003. The reasons for the refusal were set out and a copy of the Town Planning Board paper in respect of that application as well as the relevant abstract of the minutes of the meeting were attached to the letter. The concerns of the Government departments regarding the lack of any assessment of the effects caused by the proposed use was made

known to the Appellant.

4. Pursuant to Section 17(1) of the Town Planning Ordinance, the Appellant sought for a review of the decision of 19<sup>th</sup> September 2003. The application was rejected by the Town Planning Board. The Appellant was notified of the decision on 2<sup>nd</sup> January 2004. On 28<sup>th</sup> February 2004, the Appellant appealed against the Board's Decision under Section 17B(1) of the Town Planning Ordinance.
5. The hearing was held on 7<sup>th</sup> September 2005. Mr. Law himself gave evidence and Ms. Liu Yee-chun gave evidence on behalf of the Respondent. The Respondent was represented by Mr. Enzo Chow and the Appellant acted in person. After the hearing, the Respondent submitted two additional documents:
  - (1) Privy Council Appeal No.54 of 1996 - Henderson Real Estate Agency Limited v. Lo Chai Wan From the Court of Appeal of Hong Kong – Judgement of the Lords of the Judicial Committee of the Privy Council. Delivered the 16<sup>th</sup> December 1996,
  - (2) Luk Keng and Wo Hang Interim Development Permission Area Plan No. IDPA/NE-LK/1, its Notes and Explanatory Statement.
6. From the photographs produced and the information provided, it can be seen that the Site is formed and leveled. It has also been fenced off with an entrance at its north-eastern corner. To the north of the Site is a container trailer park and vacant land. Further north, across Sha Tau Kok Road, there are 2 open storage yards for storage of construction materials and machinery. To the east and west of the Site is vacant land with greenery or wooded areas. Immediately south of the Site is a stream and immediately south of the stream is a pond. Whilst not revealed in the photographs, we note from the documents that there are some fishponds in the vicinity of the Site.
7. The history of the development of the relevant outline zoning plan S/NE-LK/6 can be summarised as follows:-
  - (1) On 12<sup>th</sup> October 1990, Luk Keng and Wo Hang Interim Development Permission Area Plan No. IDPA/NE-LK/1 was first published in the Gazette Notice. At that stage, it was zoned as “*Unspecified use*”<sup>1</sup>
  - (2) The Site remained being zoned as “*Unspecified use*” when Development Permission Area Plan No. DPA/NE-LK/1 was published under Gazette Notice dated 12<sup>th</sup> July 1991.
  - (3) The draft outline zoning plan S/NE-LK/1 was gazetted on 3<sup>rd</sup> June 1994.

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<sup>1</sup> According to the evidence of Mr. Law the Site was used as an open car park since 1988 and was so used as at the time of the IDPA/NE-LK/1.

The Site was zoned “Agriculture”.

- (4) Since then, there are revisions to the draft plan but the zoning of “Agriculture” for the Site remained unchanged.
  - (5) The relevant plan for the purposes of this application is the outline zoning plan S/NE-LK/6 which was approved under Section 9(1)(a) of the Town Planning Ordinance on 5<sup>th</sup> February 2002. The plan was gazetted on 8<sup>th</sup> February 2002. On 8<sup>th</sup> July 2003, the CE in Council referred the approved plan to the Town Planning Board for amendment under Section 12(1)(b)(ii) of the Town Planning Ordinance. The draft plan S/NE-LK/7 was exhibited for public inspection on 31<sup>st</sup> October 2003. As noted above, the Site remained zoned as “Agriculture”.
8. Our attention has been drawn to the Notes forming part of the Plan S/NE-LK/6. Paragraphs (ii) and (vii)(b) of the Notes provide that :

(ii) *No action is required to change the use of any land or building in the area which was in existence immediately before the first publication in the Gazette of the Notice of the interim development permission area plan in relation thereto to conform to this Plan. Any alternation and/or modification (the development) to the land or building referred to in this paragraph, unless permitted in terms of the Plan, requires the permission of the Town Planning Board. Notwithstanding that the use or development is not provided for in terms of the Plan, the Town Planning Board may grant, with or without conditions, or refuse to grant permission to the development. Otherwise, any subsequent development or change of use thereto must be permitted in terms of the Plan or in accordance with the permission granted by the Town Planning Board, whichever is appropriate.*

(vii)(b) *Except the temporary uses for open storage and port back-up purposes which are prohibited in “Site of Special Scientific Interest” or “Coastal Protection Area” or “Conservation Area” zone, and subject to paragraphs (vi)(a) to (vi)(j) and (vii)(a) above, temporary use or development of any land or building not exceeding a period of three years requires permission of the Town Planning Board. Notwithstanding that the use or development is not provided for in terms of the Plan, the Town Planning Board may grant planning permission, with or without conditions, for a maximum period of three years, or refuse to grant planning permission.*

9. Apart from the history of the plans and the Notes forming part of the Plan,

another matter that is relevant to this application is the Town Planning Board Guidelines for Application for Open Storage and Port Backup Uses (TPBPG-No. 13C) (hereinafter called the “13C Guidelines”). This was promulgated on 11<sup>th</sup> April 2003 and for Category 3 area, which is relevant to the Site, it is provided that :

*Category 3 areas: applications will normally not be favourably considered unless the applications are on sites with previous planning approvals. Sympathetic consideration may be given if the applicants have demonstrated genuine efforts in compliance with approval conditions of the previous planning applications and included in the fresh applications relevant technical assessments/proposals to demonstrate that the proposed uses will 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.*

10. In paragraph 2 of the 13C Guidelines, it also provides, inter alia, that there will be a general presumption against development on sites of less than 1,000 m<sup>2</sup> for open storage uses to prevent further proliferation of small site in rural areas and minimize sprawl over countryside areas and that there is also a general presumption against conversion of agricultural land and fishponds to other uses on an ad-hoc basis in flood prone areas or sites which would obstruct natural drainage channels and overland flow.
11. The Appellant confirmed in his evidence that from 1988, the Site was used as an open car park. The use was changed subsequently to one of open storage and metal workshop due to a downturn of the need for car-parking facilities resulting in the close of business of the open car park at the Site. As a result, sometime in 2001, the Site was used as an open storage and metal workshop and has remained so since then. Mr. Law was not able to be precise as to the date when the change of use of the Site took place. However, he confirmed that the change of use took place after 1990, that is the gazettal of Plan IDPA/NE-LK/1. As will be seen below and as a result of paragraph (ii) of the Notes to S/NE-LK/6, the exact date of the change of use does not matter.<sup>2</sup>
12. By reason of paragraphs (ii) of the Notes to Plan S/NE-LK/6, the Site was previously permitted to be used as an open car park because such a use commenced in 1988, that is before the gazettal of Plan IDPA/NE-LK/1 in 1990. However the Appellant has not had any previous planning approvals to use the

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<sup>2</sup> Mr. Law said that he intended to call a second witness who would be able to explain the reasons and date of change of the use of the Site into an open storage and metal workshop but this witness was unavailable on 7<sup>th</sup> September 2005. He was aware of the options open to him such as to apply for an adjournment or to abandon his right to call this second witness. He decided that he would not call this second witness.

Site as open storage and metal workshop. Hence a Section 16 application has to be made.

13. Various government departments and the local community have commented on the application. In relation to traffic, the Transport Department does not support the application because although there is a vehicular access arising from the current use, it is not a proper vehicular access and no dimensional plans for such access and parking and loading/unloading facilities or arrangement has been provided.
14. The Drainage Services Department also noted the absence of any drainage proposal to ensure that the use of the Site as an open storage and metal workshop will not cause adverse drainage impact on the adjacent area, in particular, discharge of polluted water into the adjacent stream.
15. Given that the Site was located amongst a wooded rural area as seen from the photographs, the Planning Department's Senior Landscape Architect expressed reservations on the application as it would create adverse visual impact on the surrounding environment.
16. As for the local community, there was previously a concern about the encroachment of access of the footpath leading to the permitted burial ground of Ha Wo Hang. This reservation was found to be unjustified by the Respondent and therefore was not relied upon. However, there remain objections from the local community arising from the environmental pollution to the adjacent stream and the access road if the application was to be permitted.
17. These concerns or adverse impact were raised since the first application and they are relied upon by the Respondent before us.
18. The Appellant confirmed that there was no study or analysis in relation to the impact that the proposed change of use may cause. This remains so since the application was first made on 27<sup>th</sup> June 2003.
19. According to Plan S/NE-LK/6, the Site is zoned as "*Agriculture*"<sup>3</sup>. It is clear, in our view, that the proposed use does not meet the planning intent of zoning the Site as "*Agriculture*". The Appellant does not seek to argue otherwise.
20. From the evidence of Mr. Law, the use of the Site now as an open storage and metal workshop involve not only the provision of storage space but also activities such as welding and other mechanical work to be done to the materials stored on site. There is, in our view, a significant difference between the use of the Site as an open car park from 1988 to around 2001 and the use as an open storage and metal workshop since around 2001.

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<sup>3</sup> This remains so even in the latest Plan S/NE-LK/9.

21. From a visual perspective, it is clear that the change of use would not be consistent with or compatible with its surroundings. The east and west of the Site is all rural greenery with a stream on the south side. The fact that the Site is surrounded on all three sides by rural woodland is best seen from the aerial photographs. It is only to the north that the Site abuts a lot which is used as open car park. The transport arrangement is also a valid concern. Even assuming that as Mr. Law stated,<sup>4</sup> there is a mutual agreement between the owner of Lot No.1275 and himself for the mutual use of each other's site for the purposes of access, the Appellant did not provide anything as to the alignment/details of the access, a matter that has been raised with the Appellant since the time the first application was rejected. Furthermore, there is still an apparent lack of provision of loading/unloading facilities at the Site. The Appellant also did not provide any assessment on the environmental impact of the activities if the proposed use were to be allowed. Measures to ensure that activities such as welding is to be controlled and would not cause adverse impact on the environment was not provided. There is much weight in the concerns raised by the local community regarding the noise and environmental impact created by the change of use.
22. The Appellant argued that the use of open storage and metal workshop is no worse, or even better than its previous use as an open car park. The Board does not find favour with such argument. It is not difficult to conclude that the use of the Site as a metal workshop would involve activities which would not only create detrimental impact on the environment but also potential dangers such as fires caused by sparks resulting from welding activities. In any event, quite apart from this opinion of ours, there is no evidence that has been placed before us to conclude that the proposed use would be the same as or even better than its previous use.
23. Whether the adjacent site that is being used as open car park has drainage or transport problems is irrelevant. There may be facts surrounding the adjacent site of which this Appeal Board is not aware and it is inappropriate to express any views based on the arguments of the Appellant. More importantly, the Respondent informed this Appeal Board that pursuant to an inspection conducted on 22<sup>nd</sup> July 2005 at the adjacent lot, that is Lot Nos. 1273 and 1275, no contravention was noted.
24. A similar argument was raised in relation to 2 other lots north of Sha Tau Kok Road which were in fact used as open storage for construction materials. Similarly, the Appeal Board is not aware of the circumstances surrounding those 2 sites. Most importantly, the Respondent informed the Appeal Board that the open storage use in the sites north of Sha Tau Kok Road was in fact an "*existing use*" that existed prior to the Plan IDPA/LK-NE/1, thereby resulting in its

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<sup>4</sup> There is no documentary evidence in support of this mutual agreement.

permitted usage by reason of Note (ii) of Plan N/LK-NE/6. Further, the usage in those lots is for open storage of construction materials and machinery only. It does not involve the use of the Site as metal workshop which include, inevitably, activities such as welding.

25. Having considered the evidence placed before us and the submissions of the parties, the appeal is dismissed.