

## **Town Planning Appeal Board**

**Town Planning Appeal No. 1 of 2004  
IN THE MATTER of the  
Town Planning Ordinance (Cap. 131)**

**And**

**IN THE MATTER of an Appeal  
Under Section 17B by  
Grace King International Ltd  
(represented by Mr. Li Kam Kwan)**

Date of hearing: 25<sup>th</sup> & 26<sup>th</sup> August 2004

Date of decision: 11<sup>th</sup> November 2004

Panel : The Hon Mr. Justice Lugar-Mawson (Chairman)

Dr. Gary William John Ades

Ms. Helen Kwan Po Jen

Professor Lee Ngok, JP

Mrs. Elizabeth Li Woo E Li

### **Decision**

#### **Background**

1. This is an appeal under section 17(B)(1) of the Town Planning Ordinance (the Ordinance) by Grace King International Ltd (the Appellant), represented by its director Mr. Li Kam Kwan, against the refusal by the Town Planning Board (TPB) of its application for planning permission to use a site in Kam Tin, Yuen Long (the Site) for the temporary open storage of furniture and commodities for a period of three years.

## **The Site**

2. The Site comprises Lots No. 1639RP and 1647 in DD106. These are private lots held under a Block Government Lease and demised for agricultural use. The Appellant owns the Site. The Site has an area of about 1,701m<sup>2</sup>. It is located to the west of Shui Tsan Tin and fronts Kam Sheung Road, having direct access from that road. It is fenced with corrugated steel sheets and paved with concrete. It is largely vacant, though there is a 2-storey village house (currently vacant) and some temporary metal canopies are on its eastern part.

3. The Site itself forms part of a large Agriculture Zone (“AGR”) zone lying to the south of Kam Sheung Road. The areas surrounding the Site are mainly fallow/cultivated agricultural land, vacant farm structures, residential structures and village houses.

## **Application history**

4. On 30 May 2003, the Appellant submitted a planning application (Application No. A/YL-KTS/296) under section 16 of the Ordinance seeking planning permission to use the Site for the temporary open storage of furniture and commodities for a period of three years.

5. On 25 July 2003, the Rural and New Town Planning Committee (RNTPC) of the Town Planning Board (TPB) rejected this application on the following grounds:

*(a) the proposed development was not in line with the planning intention of the “Agriculture” (“AGR”) zone which was to retain and safeguard good agricultural land for agricultural purposes and to retain fallow arable land with good potential for rehabilitation. There was no strong justification in the submission for a departure from such planning intention, even on a temporary basis;*

*(b) the proposed development did not comply with the TPB Guidelines for Application for Open Storage and Port Back-up Uses in that residential dwellings which were located in its close proximity would be susceptible to adverse environmental nuisances generated by the proposed*

*development;*

*(c) there was no information in the submission to demonstrate that the proposed development would not cause adverse drainage and environmental impacts on the surrounding areas; and*

*(d) approval of the application would set an undesirable precedent for similar uses to penetrate into the "AGR" zone. The cumulative effect of approving such similar applications would result in a general degradation of the environment of the area.*

6. On 30 August 2003, the Appellant applied for a review of the RNTPC's decision. On 28 November 2003, the TPB considered the review under section 17 of the Ordinance and rejected the application for the same reasons as the RNTPC had.

7. The Appellant was informed of the TPB's decision on 12 December 2003, and on 13 January 2004, the Appellant lodged this appeal.

### **The Kam Tin South Outline Zoning Plan**

8. The Site has been zoned "AGR" ever since the gazetting of the draft Kam Tin South OZP No. S/YL-KTS/1 on 17 June 1994. Under the approved Kam Tin South OZP No. S/YL-KTS/6, which was in force at the time the application was considered, open storage use in an "AGR" zone is neither a permitted use, nor a permissible use. Although there is no provision within the OZP for permanent open storage uses within the "AGR" zone, temporary use or development of any land or buildings for a period not exceeding three years may be permitted by the TPB with or without conditions.

9. On 4 June 2004, the draft Kam Tin South OZP No. S/YL-KTS/7 was exhibited for public inspection under section 5 of the Ordinance. Under this OZP the Site is still zoned "AGR" and, as before, it contains no provision for granting of permission for permanent open storage use within the "AGR" zone. However, and as before, the TPB may grant permission, with or without conditions, for temporary uses that are not provided for in the OZP for a maximum period of three years.

### **Planning intention**

10. Under both the approved Kam Tin South OZP and the current draft Kam Tin South OZP, the primary planning intention of the “AGR” zone is to retain and safeguard good quality agricultural land/farm/fish ponds for agricultural purposes. The zoning is also intended to ensure that fallow arable land with good potential for rehabilitation for cultivation and other agricultural purposes is retained.

### **Planning Considerations**

11. It is well recognised that the proliferation of open storage sites in the rural New Territories has led to a considerable degradation of the rural environment. They have also caused problems associated with noise impact, air pollution, flooding and road congestion and safety. “Open Storage” zones are designated in appropriate areas on statutory town plans and TPB Guidelines No. 13C for “Application for Open Storage and Port Back-up Uses under Section 16 of the Town Planning Ordinance” (the Guidelines) have been promulgated to facilitate the public’s understanding of the TPB’s assessment of planning applications for these purposes. The planning intention behind the Guidelines is to channel open storage and port back-up uses to appropriate areas and prevent the further uncontrolled sprawl of these activities. The intention is also to minimize the adverse environmental impacts that result from these uses.

12. The Guidelines have classified rural areas into four categories and set out the assessment criteria for planning applications for such uses. According to the Guidelines the Site falls within a Category 3 area. Pursuant to paragraph 2.4 of the Guidelines, applications within Category 3 areas are not normally favourably considered unless the application relates to a site that has received a previous planning approval. In those circumstances, sympathetic consideration may be given to the application if the applicant demonstrated genuine efforts in complying with the approval conditions set out in that approval and/or has included in the new application technical assessments and proposals demonstrating that the proposed use will not generate adverse drainage, traffic, visual and environmental impacts on the surrounding areas. If granted, permission for the proposed use will only be given on a

temporary basis for up to a maximum period of 3 years. The approval is also subject to there being no adverse departmental comments and local concerns.

13. Paragraph 2.6(a) of the TPB Guidelines No.13C also provides as one of its assessment criterion that port back-up sites and those open storage uses generating adverse noise, air pollution and visual intrusion and frequent heavy vehicle traffic should not be located adjacent to sensitive receivers such as residential dwellings, hospitals and schools.

### **TPB's reasons for not supporting the application**

#### **It is not in line with the planning intention of the "AGR" zone**

14. The proposed development is not in line with the planning intention of the "AGR" zone which is to retain and safeguard good quality agricultural land for agricultural purposes and to retain fallow arable land with good potential for rehabilitation. The Appellant has provided no strong justification for a departure from the planning intention of the "AGR" zone even on a temporary basis.

#### **It is incompatible with surrounding land uses**

15. The area in the vicinity of the Site is predominantly rural in character with fallow/cultivated agricultural land, vacant farm buildings and scattered village houses and the Site itself falls within a large "AGR" zone where there remain large areas of agricultural land. The proposed development is considered to be incompatible with these land uses. Further, it is feared that the residential dwellings located in close proximity to the Site would be susceptible to adverse environmental nuisances generated by the proposed development.

16. Except for a storage yard for containers and miscellaneous items to the north of the Site which is an "existing use" tolerated under the Ordinance, the other storage/open storage yards and workshops within the Site's surrounding area are all suspected to be unauthorised developments.

#### **There is no information on the drainage and environmental impacts**

17. The Chief Engineer/Mainland North of Drainage Services Department has advised that the Site is located in an area where there is no proper public drainage

system available in the vicinity. The area is probably served by existing local village drains. Despite it being a requirement of the Guidelines, the Appellant has failed to provide any information demonstrating that the proposed development would not cause adverse drainage and environmental impacts on the surrounding areas.

18. The Director of Environmental Protection, though having no objection to the application, is concerned about the environmental nuisances generated by the proposed development to the residents of the residential structures near to the Site if manufacturing activity is conducted at the Site.

**It would set an undesirable precedent for similar applications**

19. The RNTPC, or the TPB on review, has rejected all 3 previous applications for temporary open storage and public car park uses on the Site, as well as all of the 11 similar applications for temporary open storage and workshop uses within the same “AGR” zone. The reasons for rejection have been the same as those that led them to reject this application. The approval of this application will set an undesirable precedent for similar applications and lead to proliferate of open storage uses in this rural area. This would result in a general degradation of the area’s environment and defeat the planning intention of the “AGR” zone.

**Appeal grounds**

20. Before us Mr. Li for the Appellant argued that before he bought the Site in 1992, it was already used for warehousing and partly open storage purposes. He submitted two aerial photos taken by Lands Department on 5 October 1990 and 28 April 1992 as evidence of this claim. He also called two witnesses, who claim to have been living next to the Site for over 40 and over 50 years respectively who claimed that the Site was already paved and used for open storage and covered warehousing for large machinery, ironware, restaurant utensils and miscellaneous goods before the Appellant bought it.

21. Mr. Li also questioned the need to zone the area in which the Site lies as “AGR” as it lies near to the KCRC West Rail system, and contended that the neighbouring residents had no objection to the proposed use as it would bring employment to the area.

## **Discussion**

22. According to section 1A of the Ordinance, the phrase “existing use” in relation to a development permission area means a use of a building or land that was in existence immediately before the publication in the Gazette of notice of the draft plan of the development permission area. The Draft Plan covering the area in which the Site lies was the Kam Tin South Interim Development Permission Area Plan No. IDPA/YL-KTS/1 (the Draft Plan), which was gazetted on 5 October 1990. According to the Draft Plan, the existing use of the Site on 5 October 1990 was “ARG”. This was ascertained from the aerial survey photo taken on 5 October 1990, on which the Appellant relied, and a subsequent land use survey carried out by officers of the Planning Department. Only those uses that were in existence immediately before 5 October 1990 and have continued since then will be tolerated.

23. The 5 October 1990 aerial survey photo shows that, although there were some structures in its eastern portion, the majority of the Site was vacant. No open storage of goods is shown on photo. A later aerial photo taken on 16 July 1991 shows the condition of the Site to be similar to that shown on the 5 October 1990 photo. Yet another aerial photo taken on 28 May 1993 shows that some of the structures had been demolished and that vehicles were parked on the Site. We were also told that the Site was the subject of an enforcement prosecution in Fanling Magistrates Court in 1996, which led to the occupier of the Site being convicted and fined for the unauthorised use of the Site for open storage of vehicles and vehicle parts

24. It is, however, outside the jurisdiction of both the TPB and the Town Planning Appeal Board to determine an appellant’s claim that the use of an appeal site is an existing use. This was made clear by differently constituted Appeal Boards in TPA 11 of 1998, TPA 4 of 2000 and TPA 17 of 2003. The Appeal Board’s jurisdiction is limited by section 17B of the Town Planning Ordinance. We can only review decisions by the Town Planning Board determining whether any permission, which may be granted under any draft plan or approved plan, should or should not be granted. If an appellant wishes to establish a claim of existing use, he must apply to the courts for a determination. If he is correct in his claim then he does not have to apply for permission from the Town Planning Board.

25. We regret to say that too many appellants fail to realise this and mount an appeal, hoping that the Town Planning Appeal Board will do what it cannot, and find that their use is an “existing use”. This is a waste both of the Appellant’s time and money, as well as a waste of public money. We recommend that the Town Planning Department provide written guidance to such appellants, reminding them of their right to bring an action for judicial review in the Court of First Instance if they genuinely believe that they have a valid claim of “existing use”.

26. The fact that the Appellant has received no complaint from the nearby residents does not necessarily mean that the Site is suitable for the proposed use from a land use planning perspective and whether or not the proposed use will improve employment prospects within the immediate area of the Site is not a planning consideration that has to be taken into account in assessing whether it should be permitted.

27. The area in which the Site lies is not planned for open storage purposes. It is in fact over 1.8 km from the KCRC West Rail Kam Sheung Road Station and over 1.1 km from the Pat Heung Maintenance Centre. It falls within an area that still is predominantly rural in character. Approving the proposed use for open storage of furniture and commodities will be contrary to the planning intention of the “AGR” zone and incompatible with the surrounding rural land uses.

## **Decision**

28. We are unanimously of the view that the TPB’s decision rejecting the application should be upheld.

29. We are satisfied that the proposed open storage development at the Site is not in line with the planning intention of the “AGR” zone and the Applicant has been unable to provide any strong justification supporting a departure from the planning intention.

30. We are satisfied that the conditions for short-term approval of open storage use on a site falling within a Category 3 area under the Guidelines are not met.



31. We agree with the TPB that the open storage use is incompatible with the nearby residential uses.

32. We also agree with the TPB that the approval of application would set an undesirable precedent for other similar applications within the same zone.

33. The appeal is dismissed.

**Costs**

34. We make no order for costs.