

**Town Planning Appeal No. 17 of 2003**

**IN THE MATTER of the  
Town Planning Ordinance (Cap. 131)**

**And**

**IN THE MATTER of an Appeal  
Under Section 17B by  
Mr. KWOK Wai Ming  
(represented by Mr. TO Ho Sum)**

Date of hearing: 12 & 13 May 2004

Date of decision: 9 August 2004

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

Ms. Lister Cheung Lai Ping

Mr. Kevin Law Chi Shing

Mr. Mak Ip Sing

Ms. Sylvia Siu Wing Yee

**Decision**

**Background**

1. This is an appeal under section 17(B)(1) of the Town Planning Ordinance (the Ordinance) by Mr. Kwok Wai Ming on behalf of Union Kind Ltd against the refusal by the Town Planning Board (TPB) of his application for planning permission to use a site at D.D. 130, San Hing Tsuen, Lam Tei, Tuen Mun, New Territories (the site) as a temporary office and open storage of cloths for a period of 3 years.

## **The site**

2. The site is about 919 m<sup>2</sup> in area and is located to the west of San Hing Tsuen village proper where it abuts San Hing Road. The immediate surroundings of the site are predominantly rural in character, inter-mixed with temporary and permanent structures for residential, workshop factory and storage uses. Some of these are now vacant; some were in existence before the gazetting of the draft Lam Tei and Yick Yuen Development Permission Area Plan No. DPA/TM-LTYYY/1 (the draft plan) on 18 June 1993 and are tolerated under the Ordinance, others are suspected unauthorized developments subject to enforcement action by the Planning Authority.

3. The site was originally let for agricultural purposes under a renewable Government lease, expiring on 30 June 2047. A modification of tenancy for private residential purpose was issued on 1 January 1985.

4. There are two temporary structures on the site. The structure on the south is used as an office while that on the west is used for storing construction machinery. According to the information provided by the Appellant to the TPB, these have been there since 1996. Part of the uncovered area is also used for storing construction machinery. The use of the site for the storage of construction machinery is a suspected unauthorized development.

5. The site falls within an area zoned “Residential (Group E)” (“R(E)”) on the approved Lam Tei and Yick Yuen Outline Zoning Plan No. S/TM-LTYYY/3 (the OZP).

## **Application history**

6. On 30 December 2002 the applicant submitted a planning application (Application No. A/TM-LTYYY/106) under section 16 of the Ordinance seeking

planning permission to use the site as a temporary office and open storage of cloths for a period of 3 years. The Rural and New Town Planning Committee (RNTPC) of the Town Planning Board (TPB) rejected this application on 21 February 2003 on the following grounds:

*“(a) the development of open storage was not in line with the planning intention of the “R(E)” zone, which was to encourage the phasing out of existing industrial uses by redevelopment to residential use and to provide incentives for redevelopment whilst allowing adequate planning control to address the industrial/residential interface problems. There was no strong justification in the submission for a departure from such planning intention, even on a temporary basis;*

*(b) the development was not compatible with the surrounding residential uses located to the north and east of the application site. There was insufficient information in the submission to demonstrate that the travelling of heavy vehicles along the access road to and from the application site would have no adverse noise and dust impacts to nearby sensitive receivers; and*

*(c) the approval of the application would set an undesirable precedent for other similar applications within the same “R(E)” zone. The cumulative effect of approving such similar applications would lead to degradation of the environment.”*

7. On 28 March 2003, the Appellant applied for a review of the RNTPC’s decision. On 20 June 2003, the TPB considered the review under section 17 of the Ordinance and rejected the application for the same reasons as the RNTPC had.

8. The Appellant was informed of the TPB's decision on 4 July 2003 and on 16 August 2003, the Appellant lodged this appeal.

### **The Lam Tei and Yick Yuen Outline Zoning Plan**

9. As stated, the site is zoned "R(E)" on the OZP. Open storage uses are not listed under Column 1 or Column 2 for a "R(E)" zone in the notes to the OZP. Despite this, the TPB may permit (with or without conditions) a temporary use or development of any land or building within such zones for a period not exceeding a period of three years.

### **Planning intention**

10. The Explanatory Statement to the OZP states that the planning intention of a "R(E)" zone is to encourage the phasing out of the existing industrial uses within that zone by redeveloping them to residential use. Existing industrial uses within the definition of "existing use" under the Ordinance are tolerated, but new industrial developments will not be permitted.

### **Planning history**

11. We were told that when the draft OZP was exhibited for public inspection on 7 June 1996. The area currently zoned "R(E)" was then zoned "Undetermined" ("U") and "Industrial (Group D)" ("I(D)"). The "U" zone was there to reserve land for the West Rail development. During the exhibition period, a total of 27 valid objections were received. Five were against the designation of the "U" and "I(D)" zones, the objectors requested to use those areas for Village Type Development and residential use.

12. A land-use review was undertaken in 1999, once it was known that the West Rail line would not run through the "U" zoned area. As the bleaching and dyeing factories in the area were considered sources of nuisance and were the subject of complaints, the opportunity was taken to review the suitability of both

the “I(D)” zone and the “U” zone. After consideration of the objections and the findings of the land-use review, the TPB decided to rezone part of the “U” and “I(D)” zones as “R(E)”. The outstanding objections were withdrawn and there were no further objections to the “R(E)” zone.

13. When it fell within the area designated “U” on the draft OZP an application was made for permission to develop three New Territories Exempted Houses on part of the site (Application No. A/TM-LTY Y/38). The TPB rejected this application on review on 23 October 1998, on the grounds that the proposed development was adjacent to the then “I(D)” zone and would be subject to an industrial/residential interface problem.

14. Within the same period of time, the RNTPC, on 14 June 1996, approved an application for a food factory for noodles and open storage of food in respect of another site located to the immediate southwest of the site (Application No. DPA/TM-LTY Y/105) and which fell within the “U” zone. This approval lapsed on 14 June 1999 and no further application was made.

15. Since the re-zoning in 1999, the TPB has not approved any application for open storage use within the “R(E)” zone. What existing industrial uses there are in the vicinity are either “existing use” tolerated under the Ordinance, or suspected unauthorized developments subject to enforcement action by the Planning Authority.

### **Planning Considerations**

16. 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. It is also recognised that such sites are economically necessary and to that end “Open Storage” (“OS”) zones are

designated in appropriate areas on statutory town plans. To prevent the further uncontrolled sprawl of open storage sites and minimize their adverse environmental impacts as well as helping the public understand the assessment of planning applications for open storage and port back-up uses, the TPB published guidelines - TPB PG - No. 13B for “Application for Open Storage and Port Back-up Uses under Section 16 of the Town Planning Board Ordinance” (Guidelines 13B). Under Guidelines 13B, the site was in an area classified as a “no-go” area. “No-go” areas are those areas close to environmentally sensitive areas, areas with ponds, or extensive vegetation, areas mainly used for residential/domestic purposes, areas near existing major residential settlements, or areas subject to extremely high flooding risk. Applications for open storage and port back-up uses are not normally allowed in “no-go” areas.

17. On 11 April 2003, Guidelines 13B were replaced by revised Guidelines TPB PG - No. 13C (Guidelines 13C). These are the guidelines the TPB took into consideration at the section 17 review. Under Guidelines 13C, “no-go” areas were renamed Category 4 areas. Guidelines 13C provide that where there has been a previous planning approval for such and subject to there being no adverse departmental comments and local objections, sympathetic consideration may be given to an application for open storage use on sites within Category 4 areas provided that the applicant has demonstrated genuine effort in complying with the conditions of the previous planning application and/or included in his application relevant technical assessments/proposals to demonstrate that the proposed use would not generate adverse drainage, traffic, visual and environmental impacts on the surrounding areas. However, as the intention is to phase-out such uses as early as possible, approval of open storage use on sites within Category 4 areas will only be granted for a shorter period than the maximum of 3 years allowed for Category 1, 2 and 3 areas. If granted the permission will do no more than provide the applicant with time to relocate to another more suitable location.

## **Grounds of appeal**

18. The Appellant's grounds of appeal may be summarised as follows.

19. The site was the subject of a previous application for New Territories Exempted Houses. This was rejected by the TPB because the area was zoned for industrial use. The current application for temporary office and warehouse was again rejected by the TPB because the area is now zoned for residential use. This creates severe difficulties for Union Kind Ltd, the owner of the site, as it is uncertain how the site can be developed.

20. One of the reasons for the rejection of the application was because the proposed use of the site would have adverse noise, dust and traffic impacts on the surrounding areas. However, there is now a new access road to the site from Hong Po Road, which could solve those problems. Transport of cloths between the site and the Appellant's adjacent dyeing factory will be by forklift trucks and not lorries.

21. The site has been used for office and temporary storage use since 1996. This has not caused nuisance to the neighbouring properties and no complaint has been received from their owners. There are other industrial uses, such as garages, dying factories and warehouses, in the vicinity of the site, which have operated in conjunction with the temporary warehouse on the site for many years.

22. The approval of the subject application would not set an undesirable precedent for other similar applications in the area.

## **The TPB's reasons for opposing the appeal**

23. The TPB have four main reasons for opposing the appeal.

24. Firstly, the proposed open storage use at the site is not in line with the planning intention of the "R(E)" zone, which is to encourage the phasing out of the existing industrial uses by redevelopment to residential use and to provide incentives for redevelopment whilst allowing adequate planning control to address the industrial/residential interface problem. Allowing the appeal and granting the application would set an undesirable precedent for other similar applications, the cumulative effect of which would lead to further degradation of the environment in the area and defeat the planning intention of the "R(E)" zone.

25. Secondly, the conditions for short-term approval of open storage use on a site falling within a Category 4 area under Guidelines 13C are not met.

26. Thirdly, although the Appellant claims that the new access road leading to the site from Hong Po Road can be used for the purpose for which he seeks permission, it is considered that this road is inadequate for that purpose. The Chief Engineer/Mainland North, Drainage Services Department has advised that a section of this road, which ranges from 3m to 5m in width, was constructed by his Department to replace the original local village access. It was designed and constructed as a local access for villagers and is not built to Highways standards and cannot sustain heavy traffic loadings. It is in a zigzag form, its entrance at Hong Po Road is narrow and does not provide a proper run-in/out for heavy vehicles. It has no crash barriers and road markings. The Chief Highway Engineer/NT West, Highways Department has advised that the road is not a standard access road and is not maintained by his Department. The Highways Department has no plans for improving the village access roads in the near future.



27. Fourthly, the proposed open storage use is incompatible with the nearby residential uses. Contrary to the Appellant's claim otherwise, the passage of heavy vehicles along the access road to and from the site is likely to cause noise nuisance and dust impact on the nearby sensitive receivers. The Director of Environmental Protection has pointed out that there is a village house located very near to the access road and there are also other existing residential dwellings near to the site. The Appellant has not addressed the issue of off-site traffic noise and dust impact and the Director of Environmental Protection does not support the application.

### **Existing use**

28. At the appeal hearing the Appellant argued and sought to establish that open storage was an existing use at the site. 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. According to the draft plan, the existing use of the site on 18 June 1993 was residential in nature. This was ascertained after an aerial survey and a land use survey carried out by Survey Officers of the Planning Department.

29. It was made clear by differently constituted Appeal Boards in TPA 11 of 1998 and TPA 4 of 2000 that the Town Planning Appeal Board has no jurisdiction to determine a claim that the use of an appeal site is an existing use. 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.

## **Decision**

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

31. The proposed development of a temporary office and the open storage of cloths for a period of three years at the site is not in line with the planning intention of the "R(E)" zone and the Applicant has been unable to provide any strong justification supporting a departure from the planning intention.

32. The conditions for short-term approval of open storage use on a site falling within a Category 4 area under Guidelines C are not met.

33. We agree with the TPB that the open storage use is incompatible with the nearby residential uses and the passage of vehicles, of any description, along the wholly inadequate access road to and from the site would be likely to cause noise nuisance and dust impact on nearby sensitive receivers. The Appellant provided no evidence to support his claim that the office and temporary storage use of the site since 1996 has caused no nuisance to the neighbouring properties and that no complaint has been received from their owners.

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

35. The appeal is dismissed.

## **Costs**

36. We make no order for costs.