

**Town Planning Appeal No. 8 of
2003**

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

**IN THE MATTER of an appeal
under section 17B by Thai and
Metal Trading Co. and Tsoi
Chuen Pan**

Dates of hearing : 30th June, 7th and 21st July, 2004

Date of Decision : 21st September 2004

Panel : Mr Ronny F.H. Wong, SC, JP (Chairman)
Ms Lam Yuet-ming
Mrs Elizabeth Li Woo E Li
Mr Michael Robert Mann
Mr Tam Kar-chuen

DECISION

Preliminaries

1. Mr. Tsoi Chung Hoi is the sole proprietor of Thai and Metal Trading Co. Mr. Tsoi Chuen Pan is the son of Mr. Tsoi Chung Hoi. This is their appeal against the refusal of the Town Planning Board to permit them to continue to use 758 sB RP (Part) and 767 sB (Part) in D.D. 46 [“the Site”] for temporary open storage of new and scrap stainless steel for a period of three

years.

2. Mr. Tsoi Chuen Pan acquired the Site by an agreement dated 20th March, 1990. The Site was conveyed to him by an instrument dated 11th September, 1990.

The Site

3. The Site is a small plot of land with total area of 1,350 sq. m. and is located along the northern side of Sha Tau Kok Road. It is fenced off and partially screened off from Sha Tau Kok Road by a strip of roadside tree planting. It is accessible via Sha Tau Kok Road and is currently being used for open storage of new and scrap stainless steel with several machines for processing of the stored materials.
4. To the east and north of the Site are fallow agricultural lands and further beyond is a cluster of domestic structures. A vacant plant nursery can be found to its immediate north. To its immediate west is a piece of vacant land. To its south across Sha Tau Kok Road are fallow agricultural land, plant nurseries, a parcels of vacant land and various scattered domestic structures.

The zoning of the Site

5. Mr. Tsoi Chuen Pan acquired the Site prior to the publication of the Man Uk Pin Interim Development Permission Area [“IDPA”] Plan No. IDPA/NE-MUP/1. The Site was not designated for any specific use in that

IDPA.

6. The Site was first included in an area zoned “Agriculture” [“AGR”] in the draft Man Uk Pin OZP S/NE-MUP/1 published on 27th May, 1994.
7. The applicable statutory plan for the purpose of this appeal is the Man Uk Pin OZP No. S/NE-MUP/6. The site remains within an area zoned “AGR” in that OZP.
8. According to the Explanatory Statement attached to OZP No. S/NE-MUP/6 :

“The intention of this [Agriculture] zone is to retain and safeguard good agricultural land for agricultural purposes. This zone also intends to retain fallow arable land with good potential for rehabilitation”.

“Some patches of fallow agricultural land are found scattering on the two sides of Sha Tau Kok Road. Although some of the land has been used for open storage of various types, it is not the planning intention to tolerate them in the long run. Besides, a large area of fallow agricultural land is found at the north-eastern side of the Area. This area mainly consists of flat land. However, it is geotechnically not suitable for development. Moreover, accessibility to this area is low. In view of this, the area is not suitable for intensive development. It is intended that with proper management, such land would be revitalised and

utilised for agricultural uses, e.g. cash crop growing, orchards and nurseries, etc.”.

The Guidelines for Application for Open Storage and Port Back-up Uses under Section 16 of the Town Planning Ordinance

9. The Site falls outside the “will-go”, “no-go” and “tolerated” areas in the Guidelines for considering applications for temporary open storage and port back-up uses. According to TPB PG- No. 13B, applications for sites falling outside these areas “would normally not be favourably considered unless with very strong justifications”.

State of the Site at the time of the IDPA

10. The state of the Site at the time of the IDPA was considered by Magistrate Mr. D.I. Thomas Esq. in enforcement proceedings brought by the Director of Planning against the two Mr. Tsois in February, 1994 for their use of the Site for open storage contrary to section 23(6) of the Town Planning Ordinance. The Learned Magistrate found as follows :

“...the mid-Autumn festival in 1990 fell on 3rd October, 1990. However, it was clear that, at that time, an amount of levelling work was going on over most of the land and ...that it was only at the periphery that the delivery and collection of metal took place. In addition, and despite a denial from D2 to a direct question on the subject in cross-examination, my very firm understanding of what D2 was telling me was going on at the land until the substantive building work was

completed was that it was being used as a site for cross-loading of metals from one lorry to another. On occasion the lorries would back up to each other and the task of unloading and loading would be completed. On other occasions, the metal would be kept at the land for a few hours after unloading until the next lorry came to collect it. In my judgment the land was not being used at that time for storage of the metal. That did not happen until the site was walled and concreted over and the various buildings or structures were installed. In other words storage as such did not occur until after 12th October 1990 when the land was then used as a depot.”

11. This issue was further explored before this Appeal Board in Town Planning Appeal No. 15 of 1996. An expert on aerial photograph was called to give her interpretation of photographs taken on 27th July and 12th October, 1990 at the hearing of that appeal. The expert pointed out that :

“From the 27 July 1990 photograph, her opinion was that about 1/3 of the site was under active cultivation. Furrows could be seen. She believed that vegetables were being grown on that part of the site. The rest of the site was covered with grass and shrubs. From the 12 October 1990 stereoscopic pairs of photographs, she was of the opinion that the 1/3 under cultivation on 27 July 1990 was still under cultivation. Of the remaining

2/3, about 50% was under site formation...”.

By its decision dated 18th June, 1999 [“the June 1999 Decision”], the Town Planning Appeal Board concluded that “there was no open storage in the proper sense of the term at the site on and before 12 October 1990. The site was in the process of site formation at that date”.

Previous planning applications in respect of the Site

12. The Site is the subject of 2 previous planning applications which were both unsuccessful.

13. Application No. A/NE-MUP/11 was made by Thai and Metal Trading Co. The application was for temporary open storage of scrap metal for a period of 12 months. This application was rejected by the Town Planning Board upon review on 2nd August, 1996. By the June 1999 Decision, the Town Planning Appeal Board dismissed the appeal of Thai and Metal Trading Co. The Town Planning Appeal Board stated that :

“We are of the view that the proposed development is against the planning intention for the area and is incompatible with the surrounding land uses. As proper sites for long term open storage is now available in the area, it is no longer necessary for the Town Planning Board, or the Appeal Board, to approve application in areas not designated for that purpose in order to implement stop-gap environmental protection measures.

We believe that our approval of the application would set a bad planning precedent.

We are satisfied that there would be no environmental gain in our approving the application, as the Appellant claimed. Open areas would be covered over; heavy machinery, including the weighbridge and cranes would be placed on the site and there would be unsightly stacking of metal there. Given the nature of the proposed use, the development would attract heavy vehicles to the site”.

14. Another application No. A/NE-MUP/36 for temporary open storage of new and scrap stainless steel for a period of 3 years submitted by the current Appellants was rejected by the Town Planning Board upon review on 1st February, 2002 for the same reasons as those advanced in rejecting application no. A/NE-MUP/11. The appeal against that decision was abandoned by those Appellants on 9th August, 2002. The current application was lodged shortly thereafter on 28th August, 2002.

Drainage Improvement Works in Northern New Territories - Package C - Channel No. MUP05 [“Package C”]

15. According to the evidence of Mr. Ip Po Kwong (Senior Town Planner of Sha Tin, Tai Po and North District Planning Office, Planning Department) :
 - (a) The Drainage Services Department commissioned the ‘Stormwater Drainage Master Plan [“DMP”] Study in Northern New Territories -

Hong Kong Government Agreement No. CE 9/97 in October 1997. The main objective of the assignment was to recommend improvement measures for the secondary and local stormwater drainage systems to meet the current standards and future needs. The study proposed the installation of a total of 42 rural drainage channels.

- (b) About 2.4 km long drainage channels have been proposed to upgrade the existing roadside drains and streams in the Man Uk Pin area. The improvement works will be implemented in 3 packages (A, B & C).
 - (c) Package C works are located at the upper Indus and Ganges catchments and its estimated project cost is HK\$338 million. No provision has yet been made for such cost.
 - (d) Package C is tentatively scheduled for commencement in June 2007 and for completion in June 2011.
 - (e) The average base width of these channels varies from 1m to 8m and the average base width of Channel No. MUP05 affecting the site is about 8m. The works limit of about 24m wide comprises not only the drainage channel itself, but also the works area required for the construction of the drainage channel.
16. The principal justification for the current application is the impact of Package C on the Site. Package C was however a matter expressly referred to in the Explanatory Statement annexed to S/NE-MUP/6 which pointed out

that “...the Drainage Master Plan Study in Northern New Territories was substantially completed in 1999 and a Public Works Programme Item No. 4119CD/B ‘Drainage Improvement in the Northern New Territories - Package C’ has been scheduled to start in 2006 for completion in 2010”.

17. The Appellants emphasised that drainage channel amounts to 933.3 m² or 2/3 of the area of the Site. Further, the works limit is 24 m wide. It is the case of the Appellants that the planning intention of rehabilitating the land for agricultural use in the long term would be constrained as the Drainage Services Department is likely to resume nearly half of the Site for the River Indus improvement works.

18. The Town Planning Board however contends that Package C is still tentative in nature as no funding has been ear-marked for that project. The Town Planning Board further submits that the remaining 1/3 of the Site could in any event be used for agricultural purposes.

Views of various Government Departments

19. The following Government Departments expressed no objection to the present application : the Transport Department, the Environmental Protection Department, the Landscape Planning Unit of the Planning Department, the Drainage Services Department, the Fire Services Department, the Territory Development Department, the Highways Department and the Water Services Department.

20. The views of 2 of those Departments are of particular relevance :
- (a) According to the Environmental Protection Department, the Site is not very large and from experience the operation of such application site with this size would not create adverse environmental impact by heavy vehicle traffic.
 - (b) According to the Chief Engineer/Mainland North of the Drainage Services Department, “A portion of the application site falls within the site limit of the channel MUP05 under the Project ‘PWP4119CD - Drainage Improvement in Northern New Territories - Package C’...Although the site encroaches onto the site limit of the project, he has no adverse comments on the application as the project will not commence construction within the next five years”.
21. The opposition came from 3 Government Departments :
- (a) The Director of Agriculture, Fisheries and Conservation took the view that “As there are active agricultural activities in the vicinity of the application site, he is not in favour of the application from agricultural development point of view”.
 - (b) The District Lands Officer/North, Lands Department reckoned that “The development under application is incompatible with the existing land uses of the surrounding area which are characterised by agricultural plots and rural village settlement”.
 - (c) The District Officer/North, Homes Affairs Department pointed out

that “The Chairman of the Sha Tau Kok District Rural Committee, the concerned North District Council Member and the Village Representative of Loi Tung have been consulted. Whilst one of them has no adverse comments on the application, the other two object to the application for the reason that Sha Tau Kok Road in the vicinity is too narrow and the use under application may cause potential traffic danger”.

Other similar applications

22. There are 17 similar applications for temporary open storage uses in the “AGR” zone in the vicinity.

23. The only approved application is A/NE-MUP/8. The approval for a period of 12 months was given by the Town Planning Board on Review on 10th November, 1995. This temporary approval was mainly to allow more time for identification of suitable alternative site for relocating the open storage of heavy machinery and equipment. This approval has lapsed.

24. The other application of note is A/NE-MUP/9. That was for a lorry and container trailer/tractor park for a period of 12 months. It was approved with conditions by the Town Planning Board upon review on 19th January, 1996.

Decision of the Town Planning Board

25. By letter dated 28th February, 2003, the Town Planning Board rejected the current application for the following reasons :
- (a) “the development is not in line with the planning intention of the ‘Agriculture’ zone for the area which is to retain and safeguard good agricultural land for agricultural purposes and to retain arable land with good potential for rehabilitation. No strong justification has been provided in the submission for a departure from the planning intention, even on a temporary basis”.
 - (b) “the development is not compatible with the surrounding areas which are largely agricultural and rural in character” and
 - (c) “the approval of the subject application would set an undesirable precedent for other similar applications. The cumulative effect of approving such similar applications would result in a general degradation of the environment of the area”.

Case of the Appellants

26. Mr. Ismail, in his thorough and able submissions on behalf of the Appellants, made the following points :
- (a) The Site is basically segregated from other land uses in the vicinity since it is sandwiched between Sha Tau Kok Road and an existing stream. Furthermore, it also provides its own infrastructure including an exclusive vehicular access directly from Sha Tau Kok Road and independent drainage system.

- (b) The planning intention is to preserve “all the actively cultivated agricultural lots” in the zone. The Site was and is not an actively cultivated agricultural lot. Reinstatement under section 23 of the Town Planning Ordinance would only restore 1/3 of the Site for agricultural purposes but with 2/3 of the Site excavated and formed.
- (c) Since the application is for a period of 3 years, the grant of the application is in line with the planning intention of not tolerating open storage use “in the long run”. Open storage on 2/3 of the Site cannot continue once construction of the drainage channel starts in June, 2007.
- (d) According to the evidence of the Appellants’ expert Mr. Ngai Sik Keung, Registered Professional Town Planner, the section of Sha Tau Kok Road near the Site is characterized by a mixture of warehouse and open storage use as well as plant nurseries and fallow agricultural land. The neighbourhood of the Site is predominantly fallow/idle land without proper management. The Site is clearly compatible with the clusters of open storage uses on both sides of the same section of Sha Tau Kok Road in the vicinity which are unauthorised developments or suspected unauthorised developments.
- (e) Realistically there is no prospect of the Site being converted to agricultural use in the next 3 years. Any agricultural use on 2/3 of the Site will end once Package C is under way between June 2007 and June 2011.
- (f) As indicated by the decision of the Town Planning Appeal Board in

Town Planning Appeal No. 5 of 2003, not a lot of weight should be given to the undesirable precedent point. If an application is meritorious, it should not be disallowed simply because other people may make use of the success in the application in support of other applications in the future.

Case of the Town Planning Board

27. Mr. Lee for the Town Planning Board submitted as follows :

- (a) The Site was not fallow agricultural land on or before 12th October, 1990. Roughly 1/3 of the Site was under active cultivation.
- (b) The planning intention of the Site is not for a drainage project. The Site can be used for agricultural purposes prior to the tentative commencement date for Package C in June 2007. The Site can still be used for such purpose after commencement of Package C, although the area involved may be smaller.
- (c) The distances between the Site and other sites currently used for agricultural purposes are about 30 m to 100 m respectively. There are domestic structures in the vicinity, the nearest being about 50 m away.
- (d) If discretion is exercised in favour of the Appellants without good reasons, undue encouragement would be given to similar future applications. The area may then be infested with sites used for open storage destroying thereby the character of an “AGR” zone. As 139

ha. of land have been zoned “Open Storage” and “Industrial (Group D)” on the draft Ping Che and Ta Kwu Ling OZP No. S/NE-TKL/6, the discretion should not be exercised in favour of the Appellants.

Our Decision

28. Whilst we are unanimous in our views that limited weight should be afforded to the undesirable precedent point, we are divided in our overall assessment of this application.
29. The majority takes the view that there is no material change of circumstances between the date of the June 1999 Decision and the date of the current application. Having regard to the photos placed before us and in particular the photos produced by the second supplemental statement of Mr. Ngai Sik Keung, the majority concludes that the development is not compatible with the surrounding areas which are still largely agricultural and rural in character. Package C is not a new factor. It was referred to in the Explanatory Statement and must have been taken into account in arriving at the current zoning. The Appellants should be encouraged to restore the Site to its state as at 12th October, 1990 when at least 1/3 of the Site was under active cultivation. The majority further accepts the evidence of Mr. Ip Po Kwong that 1/3 of the Site could still be devoted for agricultural use after commencement of Package C. The majority therefore sees no justification to depart from the views expressed by the Town Planning Appeal Board in the June, 1999 Decision.
30. The minority is persuaded by the submission of Mr. Ismail that there is no

realistic prospect of the Site being reverted to its state as at 12th October, 1990 prior to the scheduled commencement date for Package C in June 2007. Weighing the options of either compelling the Appellants to revert to the messy state of the Site as at 12th October, 1990 or subjecting the Site to controlled use during the interim period prior to the commencement of Package C, the latter course should be the preferred option bearing in mind the fact that the Site had in fact been used for open storage for well over 10 years.

31. By a majority of 3:2, we dismiss the Appellants' appeal.

Mr. Anthony Ismail instructed by Andrew W.Y. Ng & Co. for the Appellants

Mr. Josiah Lee instructed by the Department of Justice for the Town Planning Board