

Town Planning Appeal No. 12 of 2003

In the Matter of the Town Planning  
Ordinance, Cap 131

and

In the Matter of an Appeal under Section  
17B by Kin Si Construction Equipment  
Limited

Date of hearing : 3<sup>rd</sup> & 4<sup>th</sup> December 2003

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

Panel : Mr Edward Chan King-Sang (Chairman)

Dr. Larry Chow Chuen-Ho

Mr Thomas Ling Chi-Kong

Ms Sylvia Siu Wing-Yee

Mr Yip Chung-Yin

### **Decision**

This is an appeal by Kin Si Construction Equipment Limited (“Kin Si”) under section 17B of the Town Planning Ordinance against the decision refusing to permit Kin Si to use a certain site for the purpose of open storage. The site in issue forms part of lot 2483 in DD 104 at Ngau Tam Mei, Yuen Long.

2. The site had been zoned “V” since the gazetting of the draft Ngau Tam Mei OZP No. S/YL-NTM/1 on 24 June 1994. On 20 May 2003, the draft Ngau Tam Mei OZP was approved by the Chief Executive in Council under section 9(1)(a) of the Town Planning Ordinance and re-numbered as S/YL-NTM/8. The “V” zoning governing the site remains unchanged. The consequence of the “V” zoning is that the use of the site for open storage purpose would not be permitted unless the occupier had obtained the special permission of the Town Planning Board to permit it to be so used, and even then the permission could only be granted for a short period of no longer than 3 years.

3. To the north of lot 2483 is lot 2323 and to the north of lot 2323 are lot 2325 and lot 2326RP. To the north east of lot 2323 is lot 2468, and to the east of lot 2323 is lot 2471. The details of the layout of these lots are well set out

on page 7 of the Appellant's Bundle.

4. Kin Si is owned and controlled by Mr. Chiu Ping Kwan. He claimed that since about 1998, he was in occupation of the site. Neither Kin Si nor Mr. Chiu was the owner of the site. Kin Si's case was that the owner had let the site to it. It was also suggested that when Kin Si first occupied the site, it did so as a kind of sub-tenant or licensee of the then tenant. Apart from the site, Kin Si also said that it was in occupation of lots 2323, 2325 and 2326RP since at least 1998 or even before. It was not clear from the evidence before us, whether Kin Si also claimed to be in occupation of lots 2471 and 2468 since 1998. However, this is not really important for the purpose of this decision.

5. The Respondent, however, did not accept that Kin Si was in occupation of the whole of lot 2483 since 1998. The contention of the Respondent is that even if Kin Si was in occupation of the whole of lot 2483 since that time, the part of lot 2483 which formed the subject matter of this appeal, had not been used for anything other than agricultural purposes until after 2001. The Respondent's case is that until at least 29 March 2001 the site was used as a nursery. However, the Respondent does not dispute that a small strip of lot 2483 in the shape of a crescent at the northern part of this lot was being used for open storage or non-agricultural purposes since some time before 1998.

6. Since the history of the use of the site and its surrounding area is of some importance to our decision, we have asked the Appellant specifically to adduce evidence on his occupation and use of the land. Mr. Chiu explained that initially when the Appellant first occupied the land, it did not do so directly under the authority of the land owner. Hence we draw the conclusion that at the time when Kin Si first went into possession of the site and the lots to its north, it did so as licensee or sub-tenant. Mr. Chiu however, was unable to produce any written licence or sub-tenancy agreement in respect of the site covering any period before 2001. The oldest tenancy agreement which Kin Si was able to produce was an agreement for the lease of lot 2483 for a period of 3 years commencing 18 September 2001. Since this tenancy is about to run out, Mr. Chiu told us that the manager of the land owner had verbally agreed to renew the lease for another period of 3 years. In fact by the day of the adjourned hearing, Mr. Chiu was able to persuade the manager of the landlord to sign a tenancy for a period of 3 years commencing 18 September 2004. Kin Si was also able to produce the tenancy agreements in relation to the surrounding sites during the adjourned hearing. For instance, there was a tenancy agreement for the letting of lots 2323 and 2468 to Kin Si for a period of 2 years

from 1 October 2002. There was another tenancy in favour of Kin Si for a period of 3 years from 1 October 2002 in relation to lot 2471.

7. In relation to the site, i.e. lot 2483, Mr. Chiu was able to produce a demand note for water deposit which would show that Kin Si had applied for water supply in respect of the site on or about 28 January 2000. However, we are unable to derive from this water deposit demand note any support for the contention that Mr. Chiu or Kin Si was in occupation of the site in 1998 or at any time before 2000.

8. The most material point is not so much as to when Kin Si first started to occupy the site. The important point is since when the site had been used for its present open storage purpose. If the site had been used for its present open storage purpose for a long time, it would of course be an important factor for us to take into account in our deliberation.

9. It is common ground that on 8 January 2001, the Lands Department had written to the owners or operators of lots 2323, 2325, 2471, 2468, 2326RP and 2483 (sic) all in DD 104 in the following terms :

“The Task Force (Black Spots) (TFB) of the Lands Department is currently carrying out an exercise to require the business undertakings permitted under the Town Planning Ordinance in Ngau Tam Mei Open Storage Action Area (Phase I) to carry out environmental improvement. Your undertaking is found situated in this action area. ...

The action of the Task Force (Black Spots) covers two aspects. ... Our staff will contact you and provide assistance to you to draw up an in-situ environmental improvement (IEIW) proposal which is tailor made for your undertaking. You will then be requested to complete the works in accordance with the proposal within 3 months.

Secondly on satisfactory completion of the IEIW, Government will consider regularization of the irregularities under the lease that may exist in the undertaking. ... If structures are erected on leased land, a short term waiver (STW) may be offered to the lot owner at the payment of a waiver fee. ... ”.

On the face of it the letter suggested that the whole of lot 2483 was at

the time being used for business purpose which was permitted under the Town Planning Ordinance and which was not permitted by the lease conditions. At one stage, Kin Si would appear to rely on the terms of this letter to show that in fact the open storage use had extended to the whole of lot 2483 and this had been so since sometime before 1990, so that open storage use was permitted under the Town Planning Ordinance although the area in question was zoned for “V” purpose.

10. The plan showing the improvement work required of the various lots can be found on page 28 of the Appellant’s Bundle. It would appear that at the chord of the crescent shape northern portion trees were to be planted and these trees would act as a kind of boundary between the northern crescent portion of lot 2483 and the southern part, which is now the subject matter of the appeal. It is also clear from this plan that the site now in question is not within the area affected by the proposed improvement work.

11. It would appear that the improvement required of the owners of the various lots had been complied with. Hence in accordance with the terms of the letter, the Government was prepared to issue short term waivers to the owners of the various lots to allow the lots to be used for the business purpose of open storage. In relation to lot 2483, the offer of the short term waiver was made by a letter dated 23 July 2001. It would appear from the plan annexed to this offer letter that the waiver only extended to the northern part of lot 2483 in the shape of a crescent. It is thus fairly clear and we so find that notwithstanding the fact that in the letter of 8 January 2001, the Government would appear to be suggesting that the whole of lot 2483 was then being used for business purposes which was not permitted by the term of the Government lease but which was permissible under the Town Planning Ordinance, in fact this would only be so in relation to a small portion of lot 2483 in the shape of a crescent at the northern part of the lot.

12. Although Mr. Chiu agreed that the short term waiver eventually granted did not extend to the whole of lot 2483 but only the northern part of it, he maintained that the initial offer did extend to the whole of lot 2483 because the Government did not specify that only part of lot 2483 would be affected by the offer of 8 January 2001. From the plan of the improvement work and also from the offer of the waiver eventually made, we are of the view that notwithstanding the omission to mention expressly that only a portion of lot 2483 was to be affected, the offer contained in the letter of 8 January 2001 was only intended to affect the northern crescent portion of lot 2483.

13. Mr. Chiu however further maintained that in fact since about 1998 Kin Si had been using the site also for open storage purposes. To refute his suggestion, the Respondent produced the aerial photos covering the site taken on 27 July 1990 and 29 March 2001. The one taken in 1990 showed that the site was covered with plants and it was certainly consistent with the site being used as a nursery. To the north of the site the land was paved and would appear to be used as some kind of open storage area or workshop. The one taken in 2001 also showed that the site was covered with plants or vegetation and was certainly not consistent with the site being used for any open storage purposes. Mr. Chiu's explanation was that at the time when these photos were taken, Kin Si had not paved the site but nevertheless by 2001, Kin Si had in fact used the site for storage although the land had not been paved.

14. Having heard the viva voce evidence and having studied the aerial photographs, we find that in fact the site had not been used for open storage until sometime after March 2001. Certainly we do not find that the site had been used for open storage purposes before the draft zoning plan in 1994, so that the open storage use would be permissible at the site notwithstanding the site and the surrounding area were zoned for "V" purposes.

15. Even though we find that the site had not been used for open storage purpose until sometime after March 2001 when it should be clear to everyone that such use would not be permitted under the Town Planning Ordinance because the area was zoned for "V" purposes, we would still have to consider whether Kin Si had made out a case to justify permission to be given to it to use the site for open storage purposes for a period of not more than 3 years.

16. In this respect, it was argued on behalf of Kin Si that the use of this place for open storage did not impose any undue burden on the traffic, nor would it give rise to any problem to the environment, such as drainage or noise or other pollution. On the materials before us, we agree with such submission. However, we would like to point out that while it would be a strong reason for refusing to grant permission if the intended use would create problems on the traffic, drainage or pollution, the absence of such adverse factors would not per se justify the grant of the permission.

17. Kin Si's main argument is that the area surrounding the site is in such condition that the use of the site for open storage would not be incompatible with the surrounding area and furthermore, it is very unlikely that the site could

be used for the development of small houses for residential use. Hence in view of the need of Kin Si to use the site for open storage for its business, Kin Si should be granted the necessary permission for a short term of 3 years.

18. As we have pointed out earlier, the site and the surrounding lots were zoned for “V” purposes. The site also falls within the “no go” area in the TPB guidelines. Of course “V” use, i.e. village type development, does not mean that no commercial or non-residential use or non-agricultural use would be permitted. Although agricultural use is always permitted when land is zoned for “V” purposes, other non-agricultural use which would also be permitted under column 1 of the schedule and this would include use for New Territories Exempted Houses and also Rural Committee Building or Village Office, etc. Uses that may be permitted with or without conditions on application to the Town Planning Board set out under column 2 of the schedule would include fast food shop, retail shop and public or lorry car park. However, open storage is not included in either column. Since the definition of “New Territories Exempted House” would permit the use of the ground floor of such exempted houses for retail purposes, this would mean that certain commercial retail activities may be conducted at the site.

19. In relation to the use of the land in the vicinity of the site, subject to one exception, the parties are in broad agreement that the plan on page 25 of the Respondent’s Bundle correctly set out the usage of the various lots around the site. The site has an area of approximate 700 square metres. To its north is the piece of land referred to in the Lands Department’s letter of 8 January 2001 which is being used for open storage purposes. To the south of the land is an area used as a godown for storage of coal and construction material. However, it would appear that such use is not a permitted use under the Town Planning Ordinance and thus this godown may be subject to enforcement action. To the further south of the godown is a vast area of vacant land and/or pond area. From a plan P-5 produced by the Respondent, it would appear that there are quite a number of applications for the erection of small exempted houses on this piece of land. To the north east of the site is lot 2471 which is used lawfully as open storage and to its further north east is a canteen. There is also an open car park which appeared also to be an unauthorized development. However, we take note that car park is under column 2 of the schedule. To the east of the site, the predominant use of the land is for residential use consistent with the “V” zoning.

20. Where the parties are in hot dispute is the use of the piece of land to the

west and north west of the site. In the plan on page 25 of the Respondent Bundle, this piece of land, consisting of B/L 11, lot 2324RP and lot 2322 SARP, is described as for residential use. From the aerial photographs taken in 2003 (page 26 of the Respondent's Bundle), the majority part of this piece of land had been paved. There are 4 structures erected on this piece of land. There is no dispute that the 2 at the north western corner of this piece of land are being used as offices. The main dispute relates to the use of the 2 structures at the south eastern side of this piece of land. These 2 structures are just next to the western boundary of the site. The building at the north is a 3-storey building occupied by the Hung Fai Group. In the plan on page 25 of the Respondent's Bundle, this structure is described as being used for residential purposes. However, from the evidence of the photographs produced in the hearing, there could be little doubt that the ground and the first floor of this building are being used for office purposes. As to the 2<sup>nd</sup> floor, both parties produced photographs indicating that the place could have been used for residential use. We find that in fact the 2<sup>nd</sup> floor is being used for residential purposes. As to the building at the south there could be no real dispute that the same is not being used for residential purposes. Taking into account what we can see from the photographs and the aerial photographs, we do not think that it would be justified to describe the whole of the piece of land at the west and north west of the site and coloured yellow on page 25 of the Respondent's Bundle as being used for residential purposes, as only one floor on a 3-storey building is being used for residential purposes. The rest of the land is paved and there is no doubt a lot of commercial activities going on at other part of this piece of land. Thus on the whole, we come to the conclusion that this piece of land is not being used in conformity with the "V" purpose zoned in the plan.

21. However, even though it would appear that this piece of land to the west and north west of the site is being used in contravention to the zoning plan, there is no evidence that there is any acquiescence on the part of the Government for such unauthorized use. In other words, such unauthorized use may be subject to enforcement action on the part of the Government. At any rate, the use of the land for office purposes is quite different from the use of the land as an open storage.

22. We accept the evidence of Mr. Chiu that Kin Si intended to use the site for the purpose of storing its own machinery. The business of Kin Si is the buying and selling of construction machinery and equipment. Kin Si would import such machinery and equipment from abroad, test them and then re-sell them or export them. We accept that since Kin Si has the use of the land to the

north of the site for its open storage purposes it would be convenient for Kin Si to use the site as an extension to its existing open storage yard at the north. However, we do not see any compelling reason to say that Kin Si could not make use of any other land other than the site for the expansion of its business. While it may be a bit inconvenient, there is no reason why Kin Si could not lease other area in the vicinity which is zoned for open storage purposes.

23. As to the suggestion that the site could hardly be used for the purpose of village type development because it is land locked and there would be access problems if the same is to be used for the purpose of New Territories Exempted Houses, our view is that there must be a way of solving the problem of access. In this respect the evidence before us does show that in the past this site had been used as plant nursery while the northern part of it was used as open storage, and there did not appear to be any problem of access for the plant nursery in the past.

24. Thus on the whole, we are of the view that the use of the site as open storage is not compatible with the planning intention. We are not convinced that there is any special reason to allow the site to be used for any purpose departing from the purpose for which the site is zoned for. The mere fact that the intended use only has a small impact on the surrounding area is not per se sufficient to justify the departure from the zoned purpose. We are also mindful that if the application is allowed on such flimsy grounds, it would set an undesirable precedent.

25. Thus to conclude, we would dismiss the appeal.