

Town Planning Appeal Board

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

And

**IN THE MATTER of an Appeal
Under Section 17B by
Mr. TANG Fook Cheung**

Composition of the Appeal Board:

The Hon Mr. Justice Lugar-Mawson, Chairman

Dr. Gary W J Ades

Mr. Au Chi Yuen

Dr. Larry Chow Chuen Ho

Mr. Leung Wo Ping J.P., Members

Date of hearing: 5 & 6 November 2003

Date of decision: 12 December 2003

Decision

Background

1. This is an appeal under section 17B(1) of the Town Planning Ordinance (the Ordinance) by Mr. Tang Fook Cheung (the Appellant) against the refusal by the Town Planning Board (TPB) of his application for planning permission to use a site at Lot No. 212sB2 in D.D. 129, Deep Bay Road, Lau Fau Shan, Yuen Long, New Territories (the site) as temporary warehouse (for storage of various items including soybean oil, glass bottles, washing powder, calcium

carbonate, soda, sand, cement, boards, traffic barriers and lights, plastic pipes and agricultural tools) for a period of three years.

The appeal site

2. The site is a private lot held under a Block Government Lease. It is demised for agricultural use. It is located at the inner section of Deep Bay Road and is about 2.9 km away from the Lau Fau Shan roundabout. Its area is approximately 1,280 square metres. There is a temporary structure on it. This is currently used as a warehouse for storing glass bottles, sand and soda powder as well as an ancillary workshop for processing soda powder by crystallization.
3. The area to the north of the site, on the other side of Deep Bay Road is a "Coastal Protection Area" ("CPA") zone comprising mainly vegetated, unused land directly fronting Deep Bay. A residential dwelling, a vacant pigeon shed, an open storage of construction materials and two warehouses of chemical products/carton goods are also in this area. The open storage yard and warehouses are operated without planning permission from the TPB.
4. To the west of the site are a number of pigeon farms. To its south, south-east and south-west are pigsties and vegetated, unused land.
5. The site is zoned as "Green Belt" ("GB") on the approved Lau Fau Shan and Tsim Bei Tsui Outline Zoning Plan No. S/YL-LFS/5 (the OZP).
6. The Appellant owns the site.

Planning history

7. On 22 July 2002, the Appellant submitted a planning application under section 16 of the Ordinance for permission to continue to use the site as a temporary warehouse (for storage of various items including soybean oil, glass bottles, washing powder, calcium carbonate, soda, sand, cement, boards, traffic barriers and lights, plastic pipes and agricultural tools) for a period of three years.
8. The Rural and New Town Planning Committee (RNTPC) of the TPB rejected this application on 13 September 2002, on the following grounds:

- (a) the proposed development was not compatible with the planning intention of the “GB” zone and there was no strong planning ground to justify a departure of the planning intention even on a temporary basis;
- (b) there was insufficient information in the submission to demonstrate that the development would not have adverse environmental, ecological and drainage impacts on the surrounding areas; and
- (c) the approval of the application would set an undesirable precedent for similar applications. The cumulative effect of approving such similar applications would result in a general degradation of the environment of the area.

9. The Appellant applied for review of the RNTPC’s decision to reject the application under section 17 of the Ordinance on 11 October 2002. The TPB considered the review application on 10 January 2003 and rejected it for similar reasons to those of the RNTCP.

10. The Appellant was informed of the TPB’s decision on 24 January 2003, whereupon he lodged this appeal on 20 March 2003.

The Lau Fau Shan and Tsim Bei Tsui Outline Zoning Plan

11. As stated, the site is zoned “GB” on the OZP. According to the Notes to that Plan, a warehouse is neither a permitted use under Column 1, nor a permissible use under Column 2 within a “GB” zone. Under paragraph (vi)(b) of the Notes, the temporary use or development of any land or building not exceeding a period of three years requires planning permission from the TPB. The TPB may, notwithstanding that the proposed temporary use or development is not provided for in terms of the Plan, grant permission (with or without conditions) for it to be carried out for a maximum period of three years, or may refuse to grant permission.

Planning Intention

12. Paragraph 9.9.1 of the Explanatory Statement to the OZP states that the planning intention of the “GB” zone in which the site is situated, is to define

the limits of urban development areas by natural features and to contain urban sprawl, as well as to provide passive recreational outlets. There is a general presumption against development within a “GB” zone. Limited developments may be permitted if they are justified on strong planning grounds. Developments requiring permission from TPB will be assessed on their individual merits taking into account the TPB’s relevant guidelines.

Planning Considerations

13. The TPB’s guidelines “Application for Development within Green Belt Zone under Section 16 of the Ordinance” (TPB PG-No. 10) provide for the following relevant assessment criteria in respect of planning applications in a “GB” zone:

- (a) there is a general presumption against development (other than redevelopment) in a “GB” zone;
- (b) an application for new development in “GB” zone will only be considered in exceptional circumstances and must be justified with very strong planning grounds;
- (c) the design and layout of any proposed development should be compatible with the surrounding area. It should not involve extensive clearance of existing natural vegetation, affect the existing natural landscape, and cause any adverse visual impact on the surrounding environment;
- (d) the proposed development should not overstrain the capacity of existing and planned infrastructure such as sewerage, roads and water supply. It should not adversely affect drainage or aggravate flooding in the area; and
- (e) the vehicular access road and parking provision proposed should be appropriate to the scale of the development and comply with relevant standards. Access and parking should not adversely affect existing trees or other natural landscape features.

Grounds of Appeal

14. The Appellant says that it is hard for him to make a living from running a farm. He has let out the warehouse on the site since 1980. This was before Environmental Protection Department offered lump sum compensation to farm operators for voluntarily ceasing the operation of farms. He has not applied for compensation. The Lands Department have not indicated that there is a problem with the warehouse during their regular site inspections over the years.

15. The Appellant is handicapped and wishes to live on his own means, from his own resources. Being a landowner he cannot obtain Comprehensive Social Security Assistance from the Government. He has been relying on the warehouse rent for a living and entered into a tenancy agreement for this on 1 July 2002 for a term of three years. He could not afford to compensate his tenant if the operation has to cease.

16. A temporary warehouse is more environmentally friendly and hygienic than a farm. The green metal sheet fencing he has recently erected around the site has enhanced its visual quality and this should also help reduce the noise impact generated from the loading and unloading of goods. Fire extinguishers will be installed. A lorry turning space will be provided within the site so as to allow lorries to drive safely off on to the main road. The transportation of goods will be reduced from daily to once every 2 days so as to help alleviate the traffic and vehicles less than 10 metres in length will be used. A drainage channel will be provided at the site to discharge the water and avoid flooding.

17. The site is maintained in a tidy manner. No sewage has been discharged from the site. Weeds growing on the site have been cleared frequently to avoid causing blockage to existing drains and no flooding has been caused.

18. There are many open storage yards, workshops and warehouses within the vicinity of the site on both sides of Deep Bay Road.

19. The Appellant questions whether the natural environment is more important than the livelihood of the under-privileged and whether any respect has

been given to his basic human rights?

Views of concerned Government Departments

20. The Director of Fire Services has advised that if dangerous goods, as defined in The Dangerous Goods Ordinance, Cap 295, are to be stored in the warehouse, the Appellant should notify his Department.

21. The Assistant Commissioner for Transport New Territories has advised that vehicles longer than 10 metres are prohibited from using the section of Deep Bay Road north of Lau Fau Shan roundabout and the transportation of goods to and from the site should be limited to the use of vehicles not longer than 10 metres.

22. At the application and review stages the Director of Environmental Protection raised concerns about the traffic noise impact arising from the additional heavy vehicular traffic and the possible ecological impact on the Tsim Bei Tsai Site of Special Scientific interest and the Ramsar Site in Inner Deep Bay that may be caused by the accidental spillage of chemicals from the site. Having considered the Appellant's current proposal to reduce the frequency of transportation of goods by half and that only light goods vehicles be used to make deliveries, the Director of Environmental Protection has no further comment on the application.

23. The Director of Agriculture, Fisheries and Conservation does not consider that the development would pose significant risks to the nearby ecologically sensitive areas in Inner Deep Bay.

24. According to the Chief Engineer/Mainland North of the Drainage Services Department, the site is in an area where no proper drainage system is available. The existing local village drains may not have adequate capacity. The Appellant has provided no information demonstrating that the development will not cause an adverse drainage impact on the surrounding areas. In particular, he has failed to demonstrate that all existing flow paths as well as runoff falling onto and passing through the site will be intercepted and disposed off via discharge points. It is also feared that possible discharge from the processing of soda solution at the site may adversely affect the surrounding areas.

The TPB's reasons for opposing the appeal

25. The TPB have five main reasons for opposing the appeal.

26. Firstly, the Applicant is incorrect when he says that there has been a warehouse on the site since 1980. According to the Chief Town Planner/Central Enforcement and Prosecution of the Planning Department, the site was not used as a warehouse before the gazetting of the Lau Fau Shan and Tsim Bei Tsui Interim Development Permission Area Plan No. IDPA/YL-LFS/1 on 17 August 1990. In fact, the warehouse is suspected to be an unauthorised development and is now subject to enforcement action by the Planning Authority.

27. Secondly, from a land use planning point of view, the potential financial hardship to the land user caused by a refusal of planning permission is not a material consideration. The TPB considered the impact of a refusal on the Appellant's livelihood when they rejected the review application. In land use planning terms, the planning intention and general character of the site and its surrounding and the impacts of the development in question are the main considerations. The development of a warehouse for storage of the listed items is incompatible with the general setting of the area, as it would spoil the rural environment of the "GB" and the "CPA" zones. There is a general presumption against development within a "GB" zone and no strong justification has been put forward justifying a departure from this intention, even on a temporary basis.

28. Thirdly, the TPB share the Director of Drainage Services concerns about the inadequacy of the drains at the site and in the surrounding area. These concerns have not been adequately addressed. Although the Appellant claims that a drainage channel will be provided, no detailed technical proposal has been submitted to demonstrate that all existing flow paths as well as runoff falling onto and passing through the site will be intercepted and disposed off via discharge points.

29. Fourthly, the approval of this application would set an undesirable precedent for similar applications. No previous similar application has been approved in this "GB" zone. The cumulative effect of approving this and other similar

applications would result in a general degradation of the environment in that zone.

30. Fifthly, of the seven sites, which Appellant argues are comparable with the site, sites A and D are a pigsty and a residential structure respectively. The other five sites include three open storage yards (sites B, C and G) a warehouse (site E) and a brick factory (site F). Only one of them (site C) is located in the vicinity of the site. All the others are more than 2 kilometres away from the site, in different localities that have different land use zonings and planning considerations. Further all are operated without planning permission from TPB.

Decision

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

32. There is a general presumption against development within a "GB" zone and the Appellant has been unable to prove strong justifications for a departure from that planning intention.

33. The development of a warehouse, even for a temporary period of three years, is incompatible with the surrounding rural character of the area in which the site is situated. The Appellant has failed to demonstrate that the proposed development would not generate adverse environmental and drainage impacts to that surrounding area, or that the potential adverse impacts to it could be mitigated satisfactorily.

34. The Appellant has failed to address the drainage problems associated with the proposed development.

35. We agree with the TPB that the approval of this application would set an undesirable precedent for other similar applications in the "GB" zone. The cumulative impact of the approval of similar applications would lead to further degradation of the rural environment in that zone.

36. The Applicant's human rights have been respected. His

application has been considered by three bodies established by law and in accordance with law. He has been afforded a full right of hearing at every stage of the procedure.

37. The appeal is dismissed.

Costs

38. We make no order for costs.

(Signed)

The Hon Mr. Justice Lugar-Mawson
Chairman

(Signed)

Dr. Gary W J Ades
Member

(Signed)

Mr. Au Chi Yuen
Member

(Signed)

Dr. Larry Chow Chuen Ho
Member

(Signed)

Mr. Leung Wo Ping J.P.
Member