

Town Planning Appeal No. 5 of 2003

Name of Appellant : Wong Wing Sing  
(represented by Mr. Rock Tsang)

Respondent : Represented by Ms.  
Tinny Ho (and others)

Premises Affected : Part of lots 2211,  
2212, 2213, 2214, 2230, 2232 & 2233  
all in DD 118, Sung Shan New  
Village, Tai Tong, Yuen Long (“the  
site”)

Date of Hearing : 14<sup>th</sup> July and 17<sup>th</sup> July 2003

Date of Decision : 30<sup>th</sup> day of August 2003

Panel : Mr Edward Chan King-Sang (Chairman)  
Mr Richard Chan Kam-Lam  
Dr Chau Kwai-Cheong  
Mr Mak Ip-Sing  
Prof Lee Ngok

## **DECISION**

The appellant appealed against the decision of the Town Planning Board (“TPB”) of 10 January 2003 in rejecting his application for temporary shop for second hand electrical appliance and stainless steel kitchen-wares with ancillary facilities for a period of 3 years at the site. At the time of the application, according to the draft Tai Tong Outline Zoning Plan No. S/YL-TT/9 (“OZP”) and its Explanatory Notes, the site would fall within an area zoned as “Agriculture”. This draft plan was approved on 17 June 2003. There was no change in the “Agriculture” zoning of the site.

2. There is no dispute that the site is on land granted by a Block Government Lease, the terms of which are quite standard. In the witness statement of Mr. Simon Chan, it was said that the site was demised for agricultural use. By that we take it to mean that the schedule to the lease stated that the lots were used for agricultural purposes as it is general knowledge that the Block Government Lease does not contain any covenant confining the use of the land to any particular use. At any rate, we are not concerned with whether the proposed use of the site would be in breach of the terms of the Block Government Lease or not and any decision on our part would not have and is not intended to have any effect on any lease restriction at all.

3. The site is located at about 3 km to the south east of the Yuen Long New Town and about 300 metres to the north of a “Conservation Area” zone on the OZP. It is accessible via a local access road leading from Tai Shu Ha Road East. The site has an area of about 2,100 square meters and is currently fenced off from its surrounding areas. The site is also now leveled and paved. Entrance to the site is from a gate at its south and vehicular traffic could reach this gate. Of course in view of the width of the access road, which could be as narrow as about 2 meters only at certain parts, it would be reasonable to expect that only small trucks would be used for access.

4. At all material times, the appellant was a dealer of second hand electrical appliances and stainless steel kitchen-wares and utensils. Things he dealt with include commercial refrigerators, stainless steel kitchen cabinets, air conditioners etc. He had a shop in Yuen Long but apparently the size of this shop is rather small and would not be able to house all his stocks of second hand goods. It is not in dispute that unlike dealers of new products where often sales could be made on the basis of the information contained in a sales catalogue, dealers of 2<sup>nd</sup> hand product of this kind would be done on the basis of dealing with specific goods where the purchaser would be shown the actual piece of goods sold. Thus apart from the shop premises he had in Yuen Long, the appellant would still have to have other places to display his larger pieces of stocks and possibly also a workshop to carry out some necessary touch up or repair of the goods. For this latter purpose, he has a piece of land which is immediately to the north west of the site which he uses as a workshop and also for storage of some of his goods. There is no problem with the planning authority over this workshop because he had been using this piece of land as workshop even before the first draft plan was introduced.

5. Since about 1993, the appellant started to acquire the ownership of the land of the site. Gradually he became the owner of all the lands of the site. The site has been used by the appellant as a kind of show room for second hand electrical appliance and stainless steel kitchen-wares for quite some time. Of course as a show room, this would also mean that the goods would be placed or stored at the site available for inspection by potential buyers. There is no dispute that even up to the current moment, there are big pieces of the electrical appliance and stainless steel kitchen-wares being placed at the site. There are also smaller pieces of appliances and utensils being placed inside some containers on the site. This state of affairs existed for a number of years and certainly before January 2001. At the time the appellant’s use of the site was challenged by the authority and it then transpired to the appellant that his use of the land was against the uses permitted by the OZP. He then applied for permission to use the site as an open storage of air-conditioners, commercial refrigerators and stainless steel kitchen-wares. Obviously at the time, he thought that if permission was granted for the site to be used for open storage, that would enable him to use the site in the manner he did. His application was

refused by Rural and New Town Planning Committee (“RNTPC”) on 12 January 2001. He did not apply for any review, and thus the question of any change of use other than those permitted in the OZP had not been considered by the TPB and certainly not by any Town Planning Appeal Board. Accordingly even assuming that in fact his use then was the same as his use now, we do not consider that the fact that his application for permission to use the site for open storage had been rejected would have any strong probative value in assisting our decision on this appeal.

6. On 26 July 2002, the appellant made a new application to the RNTPC for permission to use the site for temporary shop for second hand electrical appliance and stainless steel kitchen-wares with ancillary facilities for a period of 3 years. The application was rejected by the RNTPC on 13 September 2002. On 15 October 2002, the appellant applied for a review of the RNTPC’s decision. On 10 January 2003, the TPB affirmed the decision of the RNTPC to reject the application on the following grounds :

- (a) The usage was not in line with the planning intention of the “Agriculture” zone;
- (b) The use was not compatible with the surrounding rural land uses which were mainly residential structures, pigsties and fallow agricultural or vacant land; and
- (c) Approval of the application would set an undesirable precedent for other similar usages to proliferate into this “Agriculture” zone.

7. The starting point for our consideration is of course the permitted use and the planning intention applicable to the site. There is no doubt that on the OZP the site was zone for agricultural use. In paragraph 9.10 of the explanatory statement annexed to the plan which is intended to reflect the planning intention and objectives of the Town Planning Board, the intention and objective of the agricultural zoning is stated to be :

“9.10.1 The planning intention of this zone is to retain and safeguard good agricultural land for agricultural purposes. The zoned areas are usually well served by irrigation and servicing facilities as well as marketing facilities for intensive farming including livestock rearing, fish culture and horticulture. This zone also intends to retain fallow arable land with good potential for rehabilitation.

9.10.2 According to the Agriculture, Fisheries and Conservation Department, agricultural land in the Area is classified as good to

fair. Agricultural land in the less accessible areas is still under active cultivation for market gardening and plant nurseries. The active agricultural land is worthy of preservation. The areas to the south-east of Yuen Long Highway and east of Kong Tau San Tsuen, to the west of Shiu Tsiu San Tsuen and Hung Tso Tin Tsuen, at the south-western corner of the Area around Yeung Ka Tsuen and along the foothill of Tai Lam Country Park in the central and south-eastern parts of the Area are zoned “AGR”.”

8. Of course in deciding on whether to allow the use applied for, we must have due regard to the permitted uses on the OZP. However, it does not follow that we should never allow any use other than those permitted in the OZP, otherwise there is no point in having any provision to allow the land owners or occupiers to apply for permission to use the land in a way different from that specified in the plan for the limited period. We must of course also have due regard to the view of the TPB and also to the explanatory statement annexed to the OZP. At present it is of particular importance that we bear in mind that the intention of this zoning is to retain and safeguard good agricultural land for agricultural purposes and also to retain fallow arable land with good potential for rehabilitation.

9. On the evidence available to us, it would appear that the site was classified for unspecified purposes in 1990. The site was only subsequently zoned for agricultural purposes in about 1994. From the aero-photos produced (R0015), it would appear that on 5 October 1990 when the photo was taken, there was no active cultivation or other agricultural activities at the site and there is no reason to believe that at any time since October 1990 the site has ever been used for any active agricultural purposes. The site is currently classified by the Agriculture, Fisheries and Conservation Department as agriculture land of fair quality. This would mean that the land would have the following characteristics :

- (a) Generally inadequate agricultural infrastructures;
- (b) Physical constraints exist for agricultural development (e.g. fair water and soil quality, inadequate irrigation water);
- (c) Rehabilitation of fallow land may require major input; and
- (d) Intense development pressure exists.

10. From the plan at R0013, we can see that to the north west of the site is the land used by the appellant as his workshop. The area of this piece of land is very big and while we do not have the exact measurement, it would appear from the plan that the size of this workshop would be almost as big as the site.

To the north and north east of the site were also large areas (coloured purple on R0013) used for warehouse purposes. The use for these areas would be classified as open storage or warehouses. We note that it was suggested in the plan that the warehouse use on these areas was described as “suspected unauthorized development”. However, a reference to the aero photo at R0014 would indicate that there were certainly some structures shown in many parts of these areas. Thus it would appear that at least some of the unauthorized developments may have been there for quite some time. At any rate, the important point is that there is no indication as to when the Government is likely to take any action against such unauthorized development. On top of that there is also an area used for the purpose of open storage and warehouse to the west of the site and also to the south west of the site.

11. Apart from the uses as open storage and warehouse in the close proximity to the site, there is also a large area to the north of the site and to the west of the site being used for the purpose of fork lift training centres. Immediately abutting the west of the site and also abutting the south east of the site and also to the south of the site, there are large areas used for residential purposes. One can actually see from the plan that there are a number of houses having been erected on these areas. From the photos produced it would appear that these houses are not tall multi-storey buildings but are just small village type of houses of 2 or at most 3-storeys high. It is also fair to say that to the west of the site across the road and also to the south of the site across the road, there are also areas of fallow agricultural land.

12. In our view, having regard to the actual situation at the site and the condition of the site and its vicinity in the past few years, it would not serve the purpose of retaining and safeguarding good agricultural land for agricultural purposes by refusing the appellant’s application. Although one of the stated purposes of zoning land as “Agriculture” is to retain fallow arable land with good potential for rehabilitation, we do not think that there is much chance of the site being used for agricultural again even if the permission for change of user is refused. Certainly we do not see much prospect of the site being converted to actual agricultural use again in the next 3 years. Thus realistically this is a case where the agricultural zoning purposes would not be advanced by refusing the application.

13. Another reason given for opposing the application is that the intended use is not compatible with the surrounding land use. It was said that the surrounding land use is mainly residential structures, pigsties and fallow agricultural land. As a matter of factual observation of the current state of affairs, we do not agree with this contention. As we have pointed above, there is a large area being used as open storage and workshop to the north west of the site, and also to the north and north east of the site, there is a very large area being used for storage and warehouse purposes. We recognize that large

stretch of land used for storage and warehouse purposes at the north and north east of the site is said to be unauthorized development. However, what we are concerned with is whether a change of the use for the period of 3 years ought to be allowed, and so in assessing the merits of any contention on whether the use applied for is compatible with the surrounding area, we should concentrate on the reality of the situation which could be foreseen in the next 3 years. The reality is that those large chunks of area are being used for storage and warehouse purposes and there is no evidence or any suggestion that any effective action would be taken to ensure that these areas are to be reinstated for agricultural purposes.

14. Even ignoring the unauthorized development was in the area coloured purple on the plan (R0013) we are still not convinced that the intended use of the site is incompatible with its immediate surrounding. The site is in a long narrow shape running from north to south. As we can see from the plan (R0013) and also from the photographs, the whole boundary along the eastern side is abutted by land either used as workshop or storage, or built up for residential use or as vacant site with no agricultural activity. Along the western boundary, at least for one third of the western boundary on the southern side, the boundary is abutted by land built up for residential purposes. It is common ground that for land zoned for residential use (R(A)), normally it is considered that it would not be incompatible to allow the lower 3 floors of any building to be used as shops. Thus mixing shops and residential accommodation is not really considered as inherently objectionable from a planning point of view. Of course we realize and appreciate that in the present case, the use of the site as a kind of show room is different from the typical cases of having shops at the lower 3 floors of a block of multi-storey building with residential flat on the upper floors. However, if it is considered not to be incompatible to have shops immediately below residential flats, we see little incompatibility in having shops immediately adjacent to a cluster of residential houses.

15. Furthermore, we also note and have regard to the comments raised by the various other Government departments as summarized in paragraph 5.2 of the presentation of Lanbase Surveyors Ltd. in November 2002 on behalf of the appellant. It may be fair to summarise that there is no other Government department raising any adverse comment to the use of the site proposed by the appellant. In particular we note that there is no adverse comment from the Environmental Protection Department, the Transport Department and also from the nearby neighbours whose views had been expressly solicited. During the hearing before us, the respondent laid particular emphasis on the transport problems created by the use of the site as a show room or shop. We consider that the so-called problems are more theoretic than real. We do not think there would be more problems created by the traffic if the site is used for the intended purpose than if the site is to be used for such agricultural purposes as vegetable growing or as poultry or pig farms.

16. As regards the argument that allowing the appellant's application would create an undesirable precedent for other similar uses to proliferate into this agricultural zone, we accept that this is a factor that we ought to bear in mind. However, we do not consider that a lot of weight should be given to this factor. If an application is meritorious, we do not see why it should be disallowed simply because other people may make use of the success in the application in support of their applications in the future. At the end of the day, each application should be considered on its own merits.

17. We appreciate that the burden is on the applicant to show that his application should be allowed despite the departure from the use specified in the OZP. In this regard we also take into account the need and the convenience to the appellant, and also the need of having a large show room for the particular kind of products he is dealing. While it was at once stage argued that the appellant could have made use of other area zoned for open storage purposes for his show room, in the course of the argument, it transpired that areas zoned for open storage could not be used as shop and the appellant could only make use of areas zoned as village type development for this purpose. At any rate although it was said that there were some 6 ha of land within this OZP zoned for open storage which had not been used up, it is by no means clear that those available open storage areas are accessible and suitable for the appellant's purpose even assuming that areas zoned for open storage would be suitable for the appellant's purpose.

18. Having considered the submissions of the appellant and respondent in all the circumstances of this case, we consider that the appellant's appeal should be allowed. We consider that the appellant ought to be given the permission to use the site for the purpose he proposed for a period of 3 years from the date of notification of this decision.

19. However, we consider that this is a case that we ought to impose condition. While we consider that the site ought to be allowed to be used as the appellant's show room or shop for the sale of 2<sup>nd</sup> hand electrical appliance and stainless steel kitchen-wares, we think that we ought to ensure that the site would not be so changed such that it would be incompatible with its surroundings. With this in mind we consider that permission should be subject to the condition that there shall not be any structure (whether permanent or temporary, and whether the same is in the form of building structure or container) or any goods or other things placed within the site, which is higher than 8.23 meters from the mean floor level of the site.