

Town Planning Appeal No. 3 of 2002

IN THE MATTER of the Town  
Planning Ordinance, Cap. 131

and

IN THE MATTER of an Appeal  
under section 17B by Mr. Wong  
Chuen Yuen

Date of hearing: 5<sup>th</sup> & 7<sup>th</sup> November 2002

Date of decision: 19<sup>th</sup> November 2002

Date of publication of decision: 16<sup>th</sup> January 2003

Panel : The Hon. Mr Justice Lugar-Mawson (Chairman)  
Professor Lee Ngok  
Mr Leung Wo Ping  
Mrs Elizabeth Li Woo E Li  
Ms Gidget Lun Kit Chi

## **DECISION**

### **Introduction**

This is an appeal under section 17B(1) of the Town Planning Ordinance (the Ordinance) by Mr. WONG Chuen Yuen (the Appellant) against the refusal by the Town Planning Board (the Respondent) to grant his application for planning permission to use a site in San Tin, Yuen Long, New Territories as a temporary container trailer/tractor park with an ancillary office for a period of 3 years (the proposed development).

### **The appeal site**

2. The appeal site (the Site) is in San Tin, Yuen Long. It has an area of about 3,600 m<sup>2</sup> and comprises of Lot 769 (part) in D.D. 99 and Lots 3 (part) and 4 (part) in D.D. 105. These are private lots held under a Block Government Lease and are demised for agricultural use. The Site has 2 vehicle accesses to a local track that connects to Castle Peak Road - San Tin. A container vehicle park and a tyre repair workshop occupy the northern and southern most parts of the Site; the rest of the Site is vacant land.

3. There are other container vehicle parks, vehicle repair workshops and open storage yards to the immediate north, northeast, and further southeast of the Site. Most of these are suspected to be unauthorized developments. There is

vacant land to the immediate west and east of the Site. There is a furniture storage yard to the further west of the Site beside the vacant land. There are a number of residential dwellings along Castle Peak Road to the southeast and northeast and one to the immediate west of the Site. Lin Barn Tsuen and Tsing Lung Tsuen respectively are 550m and 600m away to the northwest and east of the Site. There are four continuous fishponds (6.6 hectares in total) to the immediate northeast of the Site and a vegetated knoll to the south of the Site.

4. The Appellant is the tenant and not the owner of the Site.

5. The Site falls within the Wetland Buffer Area in the Respondent's revised guidelines for 'Applications for Developments within Deep Bay Area' (TPBPG-No. 12B) (GL12B), promulgated in April 1999.

### **The history of the appeal**

6. On 23 November 2001 Lanbase Surveyors Ltd submitted a planning application (A/YL-ST/182) on the Appellant's behalf under section 16 of the Ordinance seeking planning permission for the proposed development. At that time, the Site was zoned 'Other Specified Use' annotated 'Comprehensive Development to include Wetland Restoration Area' (OU(CDWRA)) on the draft San Tin Outline Zoning Plan (OZP) No. S/YL-ST/4 (OZP4), which came into force in May 2001. The approved San Tin OZP No. S/YL-ST/5 (OZP5), which came into force on 30 April 2002, has now superseded OZP4. However, there is no change in the OU(CDWRA) zoning of the Site.

7. The Respondent's Rural and New Town Planning Committee rejected the application on 11 January 2002, on the following grounds:

- (a) the proposed development was not in line with the planning intention of the OU(CDWRA) zone, which was to encourage the phasing out of sporadic open storage and port back-up uses, and to provide incentive for the restoration of degraded wetlands adjoining existing fish ponds;
- (b) there was insufficient information in the submission to demonstrate that the proposed development would not have adverse environmental and drainage impacts on the surrounding areas;
- (c) the proposed development did not comply with GL12B in that there was no information in the submission to demonstrate that the development would not have adverse disturbance impacts on the ecological integrity and ecological value of the fish ponds within the Wetland Conservation Area in the Deep Bay area; and

- (d) the approval of the application would set an undesirable precedent for other similar applications within the OU(CDWRA) zone. The cumulative effect of approving such similar applications would result in a general degradation of the ecology and environment of the area.

8. On 8 February 2002, the Appellant applied for a review of the Rural and New Town Planning Committee's decision to reject the application. On 3 May 2002, the Respondent considered the application on review under section 17 of the Ordinance and rejected it for the same reasons as the Rural and New Town Planning Committee had.

9. The Appellant was informed of the Respondent's decision on 24 May 2002 and on 15 July 2002, he lodged this appeal under section 17B(1) of the Ordinance against the Respondent's decision.

#### **Previous planning decisions relating to the site**

10. On 28 January 2000, the Respondent's Rural and New Town Planning Committee granted (subject to conditions) an earlier application (A/YL-ST/108) made by the Appellant for permission to use the Site for a temporary container trailer/tractor park. This was a temporary approval for a period of 12 months. At that time the Site was zoned Residential (Group D) on the San Tin OZP No. S/YL-ST/2 (OZP2). The Respondent tells us that during the validity period of this permission the Appellant only complied with the condition relating to paving of the Site. The Drainage Services Department considered his drainage proposal to be unacceptable and he failed to submit landscaping proposals. This application pre-dated the rezoning of the Site as OU(CDWRA) under OZP4.

11. We are told that since the approval of the Appellant's January 2000 application, the Respondent has rejected two subsequent applications made by him: A/YL-ST/161 to use the Site as a temporary container trailer/tractor park with a tyre repair workshop and A/YL-ST/171 to use the Site as a temporary container trailer/tractor park. The dates of rejection were 2 February 2001 and 7 July 2001 respectively. Each was rejected on the grounds that the development was not in line with the planning intention of the OU(CDWRA) zone; that insufficient information had been provided to demonstrate that there would be no adverse environmental, drainage and traffic impacts; that the development did not comply with GL12B in ecological terms and that approval of the application would set an undesirable precedent for similar applications.

12. We are also told that since the promulgation of the Respondent's guidelines 'Applications for Open Storage and Port Back-up Uses' (TPBPG-No.13B) (GL13B), promulgated in October 2001, the Respondent's

Rural and New Town Planning Committee has rejected all similar applications within the OU(CDWRA) zone, save for one (A/YL-ST/186), which related to a boundary regularization in respect of an extension of an existing use.

### **The San Tin Outline Zoning Plans**

13. According to the Notes to the outline zoning plans (OZP4 & OZP5), a container trailer/tractor park is neither a Column 1 nor Column 2 use within the OU(CDWRA) zone. Under paragraph (vi)(b) of the same Notes, a temporary use or development of any land or building for a period not exceeding 3 years requires the Respondent's permission. The Notes also provide that, notwithstanding that the use or development is not provided for in terms of the outline zoning plan, the Respondent may grant planning permission, with or without conditions, for a maximum period of 3 years. Alternatively it may refuse to grant permission.

### **The planning intention of the OU(CDWRA) zone**

14. Paragraph 9.4.1 of the Explanatory Statement to OZP4 states that the planning intention of the OU(CDWRA) zone is to encourage the phasing out of sporadic open storage and port back-up uses, and to provide an incentive for the restoration of degraded wetlands adjoining existing fishponds. This is to be achieved through comprehensive residential or recreational development, including wetland restoration area.

15. Paragraph 9.4.5 of the same Explanatory Statement says that, while open storage and port back-up uses, which existed immediately before the first publication in the Gazette of the Notice of the San Tin Interim Development Permission Area Plan, as well as those that have planning permission from the Respondent, are tolerated within the OU(CDWRA) zone, the Respondent will not allow new temporary open storage and port back-up uses.

### **Planning considerations followed by the Respondent**

16. We are told that in assessing the application, the Respondent took into account criteria contained in both GL12B and GL13B. In GL12B, the relevant criteria applicable to sites within the Wetland Buffer Area are that:

- (a) the intention of the Wetland Buffer Area is to protect the ecological integrity of the fish ponds and wetland within the Wetland Conservation Area and prevent development that would have a negative off-site disturbance impact on the ecological value of fish ponds;
- (b) the Respondent will not support developments within the Wetland Buffer Area which may have negative impacts on the ecological

value of the Wetland Conservation Area unless the applicant's ecological impact assessment demonstrates that those negative impacts can be mitigated through positive measures. An ecological impact assessment needs to be submitted with applications for planning permission within the Wetland Buffer Area. However, by virtue of paragraph 6.5 and Appendix A of GL12B, this requirement is dispensed with in the case of (among other uses) a temporary use for a period not exceeding 3 years.

- (c) applications for new open storage or port back-up uses (and in particular uses that involve the filling-in of contiguous ponds) within the Wetland Buffer Area, whether for temporary or permanent use, will normally not be allowed in view of the adverse disturbances that such activities may cause to the wild birds native to that area. However, open storage or container back-up uses that are located close to the Lok Ma Chau Border Crossing and which do not involve filling-in a pond may be sympathetically considered in view of the genuine need to facilitate cross-boundary movements of goods within the area.

17. GL13B states that the Site is in a 'no-go' area for open storage and port back-up uses. Applications for open storage and port back-up uses are not normally granted in 'no-go' areas. 'No-go' areas are defined as those close to environmentally sensitive areas; areas with ponds or extensive vegetation; areas mostly used for residential/domestic purposes; areas near to existing major residential settlements; or areas subject to extremely high flooding risk. The site is within the Wetland Buffer Area and is close to areas that are considered to be environmentally sensitive.

18. We are also told that the Respondent had regard to the following other planning criteria, set out in both guidelines:

- (a) there is a general presumption against development on sites of less than 1,000 m<sup>2</sup> for open storage uses and 2,000 m<sup>2</sup> for port back-up uses in rural areas, other than for sites that are located in major corridors, or industrial/godown/workshop areas, or for quarrying activities, or where it is demonstrated that optimum use is made of the site. This is to prevent the further proliferation of small sites in rural areas and minimize sprawl over countryside areas and reduce travel trips;
- (b) types of open storage uses generating adverse noise, air pollution and visual intrusion and frequent heavy vehicle traffic should not be located adjacent to sensitive receivers such as residential dwellings, hospitals, schools;

- (c) port back-up uses are major generators of traffic, with container trailer/tractor parks generating the highest traffic per unit area and, in general, port back-up sites should have good access to the strategic road network, or be accessed by means of purpose built roads;
- (d) adequate screening of the site through landscaping and/or fencing should be provided where sites are located adjacent to public roads or are visible from surrounding residential areas; and
- (e) there is a general presumption against the conversion of agricultural land and fishponds to other uses on an ad hoc basis in flood prone areas or on sites which would obstruct natural drainage channels and overland flow.

### **The grounds of appeal**

19. In summary, the Appellant's grounds of appeal are:

- (a) the Site is rather akin to a 'tolerated' area in terms of its site characteristics;
- (b) there is sufficient information in the submission to demonstrate that the development would not have adverse environmental impacts on the surrounding areas;
- (c) the Site has been used as a container trailer/tractor park since 1992 and the development would neither impose any additional adverse impact on the ecology, nor lead to any further loss of wetland in the area;
- (d) the application is not a new application; and
- (e) as earlier planning permissions for development on the Site have been granted, the approval of the application would not set an undesirable precedent for other similar applications.

### **The Respondent's reply**

*That the Site is rather akin to a 'tolerated' area in terms of its site characteristics.*

20. According to GL13B, 'tolerated' areas are mostly those where there is no clear planning intention, or a fixed development programme, and which are within, or close to, open storage or port back-up sites regarded as an existing use

under the Ordinance. The Site is not shown as being within a 'tolerated' area on Plan 1 attached to GL13B.

21. The areas where planning permissions for such uses have previously been given are areas that are not subject to high flooding risk, the Site is considered to be subject to such a risk.

22. Most of the open storage and port back-up uses within the neighbourhood of the Site are unauthorised developments and subject to enforcement action. There are only a few developments which are covered by planning approvals obtained when the application sites fell within the Residential (Group D) zone on the previous versions of the San Tin Outline Zoning Plan, or are ones where the development is a minor extension of an existing/permitted use.

23. According to the guidelines GL12B and GL13B, sympathetic consideration will only be given for developments falling within 'tolerated' areas if there are no major adverse comments from concerned government departments and the concerns of the departments concerned and the local residents can be addressed through the implementation of planning conditions. The Director of Environmental Protection does not support the application because it is feared that the development will contribute to the adverse off-site cumulative noise impacts on local sensitive receivers and these impacts are incapable of being alleviated by on-site mitigation by way of planning conditions. In addition, a local resident has raised an objection to the proposed development claiming that it will cause adverse traffic impact and noise pollution.

*That there is sufficient information in the submission to demonstrate that the development would not have adverse environmental impacts on the surrounding areas.*

24. The guidelines GL12B and GL13B provide that port back-up sites and open storage operations generating adverse noise and air pollution, visual intrusion and frequent heavy vehicle traffic should not be located adjacent to sensitive receivers such as residential dwellings, hospitals, schools and other community facilities. The Site is not only close to the wetland within the Wetland Conservation Area, but there are residential dwellings to its immediate west, northeast and southeast and along Castle Peak Road, the closest being 10m away. It is feared that the movement in and out of the Site by heavy vehicles would generate air and noise pollution to these dwellings.

25. The Appellant submitted a noise impact assessment at the section 17 review showing that the proposed development would cause insignificant noise levels at the noise sensitive receivers close to the Site. Although the Director of Environmental Protection accepts that traffic to and from the site would only contribute about 0.1 dB(A) to 0.2dB(A) to the traffic noise impacts on those noise

sensitive receivers. He is however concerned about the cumulative impacts. The noise sensitive receivers to the south of the Site on the other side of Castle Peak Road would be subject to a cumulative traffic noise impact of 81.9dB(A). The Director therefore does not consider that the development would have no adverse impacts on the surrounding areas and does not support the application.

*That the Site has been used as a container trailer/tractor park since 1992 and the development would neither impose any additional adverse impact on the ecology, nor lead to any further loss of wetland in the area.*

26. The purpose of the Wetland Buffer Area in which the Site lies is to protect the ecological integrity of the fishponds and wetland within the Wetland Conservation Area and to prevent development that would have a negative off-site disturbance impact on the ecological value of the fishponds. Immediately before the gazettal of the San Tin Interim Development Permission Area Plan No. IDPA/YL-ST/1, on 17 August 1990, the northern part of the Site was a fishpond while the southern part was vegetated land with structures on it. The pond was filled and used for the parking of vehicles in 1991 and the area in the south was first used as an open storage yard in 1992. The proposed development is therefore not an existing use as it postdates the San Tin Interim Development Permission Area Plan.

27. There are four large continuous ponds within the Wetland Conservation Area on the other side of the local track to the immediate northeast of the Site. The Appellant has provided no ecological valuation of these ponds as required by GL12B showing that the proposed development would have no adverse disturbance impacts on the ecological integrity and ecological value of these ponds. We comment that we find this part of the reply difficult to follow as this requirement is dispensed with in the case of (among other uses) a temporary use for a period not exceeding 3 years. See paragraph 6.5 and Appendix A of GL12B referred to earlier in this decision at paragraph 16(b).

28. The Director of Agriculture, Fisheries & Conservation does not support the application as he considers the appellant's claim that the development would not pose any additional adverse impact on the ecology nor lead to any further loss of wetland in the area to be unsubstantiated. We make the comment that the fishpond was filled in 1991, when the Appellant's use of the Site started, and any adverse impact to the ecology would have occurred then. So far as we can see, the proposed development will involve no additional adverse impact on the ecology, nor involve a further loss of wetland.

*That the application is not a new application.*

29. The application is regarded as a new one and its consideration has to take account of the planning circumstances prevailing at the time it was made.



*As earlier planning permissions for development on the Site have been granted, the approval of the application would not set an undesirable precedent for other similar applications.*

30. It is feared that approval of this application will set an undesirable precedent for other similar applications within the OU(CDWRA) zone and that the cumulative effect of approving such similar applications will result in the general degradation of the ecology and environment of the area. All similar applications, save one, within the OU(CDWRA) zone have been rejected by the Rural and New Town Planning Committee since the promulgation of GL13B.

## **Decision**

31. Whilst we appreciate the Respondent's objectives in seeking to control development within the Wetland Buffer Area, we are of the unanimous view that the appeal should be allowed and temporary permission for the proposed development granted, but not for the 3 years sought by the Appellant.

32. The Appellant has run his business at the Site for over 10 years and may have some difficulty in relocation to a site where he may reasonably expect planning permission for his land use to be granted. To that extent, we believe that he should be given a reasonable period of time in which to find that site without detriment to his business.

33. We take into account the fact that the general area in which the Site lies is degraded and that its rehabilitation as an area of working fishponds is highly unlikely. At the hearing, the Respondent suggested that suitable alternative uses for the Site were commercial plant and flower gardens or low-density housing. There was however no evidence before us that anyone was interested in using the Site for either of these uses (or indeed any of the uses for which permission 'will always' or 'may be' granted under the terms of OZP4) at the present time.

34. Exercising our powers under section 17B of the Ordinance, we vary the Respondent's decision and grant the Applicant permission to use the Site as a temporary container trailer/tractor park with an ancillary office for a period of one year from the date we reached our decision: 19 November 2002. This permission will expire on 19 November 2003.

35. We impose the following conditions, which are those suggested by the Planning Department to the Respondent at the review hearing on 3 May 2002:

- (a) there are to be no night time operations on the Site between the hours of 11p.m. to 7a.m.;

- (b) the Appellant has to implement accepted landscaping proposals at the site within 6 months from 19 November 2002 to the satisfaction of the Director of Planning or of the Respondent;
- (c) the Appellant has to implement accepted drainage proposal at the site within 6 months from 19 November 2002 to the satisfaction of the Director of Drainage Services or of the Respondent;
- (d) the Appellant has to fence the Site within 6 months from 19 November 2002 to the satisfaction of the Assistant Director/Task Force (Black Spots), Lands Department or of the Respondent;
- (e) if condition (a) is not complied with at any time during the planning approval period, the approval hereby given shall cease to have effect and shall be revoked immediately without further notice;
- (f) if any of conditions (b), (c) or (d) are not complied with by 20 May 2003, the approval hereby given shall cease to have effect and shall on the same date be revoked without further notice; and
- (g) upon expiry of the planning permission, the Appellant is to reinstate the Site to an amenity area to the satisfaction of the Director of Planning or of the Respondent.

### **Costs**

36. We make no order for costs.

### **Representation:**

The Appellant, Mr. Wong Chuen Yuen, in person

Ms. Yasmin Mahomed, Senior Government Counsel Department of Justice, for the Respondent