

Town Planning Appeal No. 5/2001

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

And

IN THE MATTER of an appeal
under section 17B by Mr Tsang
Kwai

Date of hearing : 8th November, 2001

Date of decision : 3rd January, 2002

Panel : Mr Ronny F.H. Wong S.C., J.P. (Chairman)
Mr Christopher Chan Yiu Chong
Professor Lee Ngok J.P.
Mr Leung Wo Ping, J.P.
Mr Tony Luk Ka Luen

DECISION

The Background

This appeal relates to Lot 160B5 in D.D. 38 in Sha Tau Kok Road, Man Uk Pin, New Territories ["the Lot"]. The Lot is within an area zoned "Agriculture" ["AGR"] on the approved Man Uk Pin Outline Zoning Plan No. S/NE-MUP/4 ["the OZP"] which was subsequently replaced by the draft Man Uk Pin OZP No. S/NE-MUP/5 ["the Plan"] gazetted on 18th May, 2001.

- (a) Paragraph 8.2 of the Explanatory Statement of the Plan outlines the general planning intention for the Man Uk Pin area ["the Area"] as follows :

"The general planning intention for the Area is to promote the conservation of the rural character of the Area not required for urban development with a view to controlling urban sprawl and protecting and preserving agricultural land"

- (b) According to paragraph 9.4 of the Explanatory Statement, the planning intention of the AGR 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 ... 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."

- (c) According to the Notes of the Plan, any development, other than those developments and uses always permitted, requires permission of the Town Planning Board ["TPB"]. Open storage use is not a use always permitted nor within the AGR zone. However, the TPB may grant planning permission for temporary use for a maximum period of 3 years.

- (d) According to the "Town Planning Board Guidelines for Application for Open Storage and Port Back-up Uses under section 16 of the Town Planning Ordinance", the main planning criteria relevant to an application for temporary use are :

- (i) planning permission should not be granted in areas where the policy is to prevent the proliferation of either port back-up or open storage sites and/or encourage the relocation of such uses to more appropriate areas :
- (ii) those types of open storage generating adverse noise, air pollution and visual intrusion should not be located adjacent to sensitive

receivers including residential dwellings;

- (iii) favourable consideration may be given if the application site is adjoining industrial uses, port activities installations and open storage activities which are considered compatible in land-use terms;
- (iv) adequate screening of 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
- (v) there will be a general presumption against development on sites of below 1,000m² for open storage uses in rural areas, other than sites located in major road corridors, industrial/godown/working areas quarrying activities or where it is demonstrated that optimum use is made of the site.

2. The Lot, covering an area of about 1,530 m², is held under Block Government Lease and demised as agricultural land. The Lot is generally flat, paved, fenced off and accessible from Sha Tau Kok Road on its south-eastern side.

3. The surrounding area of the Lot are predominantly agricultural and rural in character. A domestic structure is located immediately adjacent to the Lot. To the north of the Lot is a piece of active agricultural land. Further to the north-west is an open storage yard of construction materials. To the east and west of the Lot is fallow agricultural land. To the south of the Lot across Sha Tau Kok Road are vacant land, some domestic structures and warehouses.

4. The Lot was the subject of 2 previous rejected planning applications :

- (a) Application No. A/NE-MUP/3 for 2 warehouses and open storage of ceramic ware (bathroom and kitchen) for a period of 12 months was rejected on

review by the TPB on 31st March, 1995 on the grounds, inter alia, that the application was not in line with the planning intention for the area; was incompatible with the surrounding land uses and might set an undesirable precedent.

- (b) Application No. A/NE-MUP/31 for open storage of ceramic ware (bathroom and kitchen) for a period of 3 years was rejected by the Rural and New Town Planning Committee ["RNTPC"] on 2nd June, 2000 on the grounds that the same was not in line with the planning intention for the area; was incompatible with the surrounding land uses and would set an undesirable precedent.

5. The Appellant acquired the Lot on 12th June, 2000 for \$1,450,000.

6. On 18th October, 2000, the Planning Authority issued a warning letter to the owner-occupier of the Lot in respect of the suspected unauthorised development on the Lot.

7. On 30th October, 2000, the Appellant submitted an application under section 16 of the Town Planning Ordinance to seek permission to continue the use of the Lot for open storage of building materials for a period of 3 years.

8. On 22nd December, 2000, the RNTPC rejected the Appellant's application on the following grounds :

- (a) the development was not in line with the planning intention of the AGR zone for the area which was to retain and safeguard good agricultural land for agricultural purposes and to retain arable land with good potential for rehabilitation. No strong justification had been provided in the submission for a departure from the planning intention even on a temporary basis.
- (b) the development was not compatible with the surrounding areas which were largely agricultural and rural in character. The Appellant had not demonstrated that the storage of building materials at the Lot would not cause environmental nuisance to the adjoining areas; and

- (c) the approval of the 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.

9. The Appellant applied for a review by the TPB of the decision of the RNTPC. On 27th April, 2001, the TPB rejected the Appellant's application for the same reasons as those of the RNTPC.

10. This is the Appellant's appeal against the decision of the TPB.

The Appellant's case before us

11. Mr Lee Siu Ming was the spokesman for the Appellant. He wanted to know the circumstances whereby temporary permission for open storage may be granted. He laid considerable emphasis on the reduction of farming activities in the New Territories. He told us that the Appellant would like to effect a swap with the Government in order to continue his business.

12. The Appellant told us that he commenced his building materials business in about 1986. He would collect abandoned materials such as wash-basins from demolished sites. He would send the materials so collected to his workshop. The materials would then be grouped, cleaned and sold to buyers in Hong Kong and abroad. He has to vacate his existing storage in favour of a local developer. He was assured by the Vendor of the Lot that he could use the Lot for storage provided the amount of materials stored is not excessive. He has recently entered into a contract for the discarded materials from a building site. He expects 20 to 30 lorry loads of materials from this contract. He was cross examined at length as to his state of knowledge when he acquired the Lot. He told us that no explanation was given to him by his solicitor as to the user restrictions attached to the Lot. He urged us to accede to his application as he has no other venue to continue his operation.

13. Mr Or Wai Man and Mr Ng Shui Yee are members of the Appellant's staff. They assured us that the business of the Appellant is clean and tidy and would have no detriment on the environment.

The Case of the TPB

14. Mr Ip Po Kwong [“Mr Ip”], Senior Town Planner of Sha Tin, Tai Po and North District Planning Office, Planning Department pointed out that the Lot

is surrounded by active and fallow agricultural land and is served by farm access and irrigation facilities. The Director of Agriculture, Fisheries and Conservation is not in favour of the application as the Lot is considered to be good quality agricultural land. The Director of Environmental Protection does not support the application as the operation of open storage in the Lot would generate environmental nuisance, in particular noise impact, to the domestic structure to the north-east of the Lot and would downgrade the environmental quality of the area.

15. Mr Ip also drew our attention to the fact that there were 14 similar applications for temporary open storage uses in the AGR zone in the vicinity of the Lot 13 of those applications were rejected. The only exception was the grant on 10th November, 1995 of temporary approval for a period of 1 year so as to give the applicant more time to locate suitable alternative site.

Our decision

16. We accept the evidence of the Appellant that he was not told by his solicitor of the restrictions attached to the Lot when he acquired the same. On the basis of the Appellant's evidence, he may well have grounds of complaint against his vendor or his solicitor. However, this is not a factor which carries weight in our deliberation.

17. It is clear from the number of rejected applications that the policy in relation to areas adjoining the Lot is to prevent the proliferation of open storage sites. The Lot is not situated next to any industrial user. On the contrary, the Lot is surrounded by active and fallow agricultural land with farm access and irrigation facilities. The lorry loads of abandoned buildings materials ear-marked for the Lot are likely to generate environmental nuisance. The operation of the Appellant is wholly contrary to the planning intention for the area. We see no justification whatsoever to disturb the decision of the TPB.

18. For these reasons, we dismiss the Appellant's appeal.