

Town Planning Appeal No. 4 of  
2000

IN THE MATTER of the Town  
Planning Ordinance, Chapter 131

And

IN THE MATTER of an Appeal  
under section 17B by Mr CHEUNG  
Wan-kau

Dates of hearing : 26<sup>th</sup> & 30<sup>th</sup> October 2000  
Date of decision : 29<sup>th</sup> November 2000

Panel : Mr G.J. Lugar-Mawson, (Chairman)  
Mr Robert M. Kennard  
Mr Lee Man-ban  
Mr Lui Ping-keung  
Mr Tam Kar-chuen

## **DECISION**

### **The appeal site**

The appeal site (the Site), comprises Lots 1382-1383 in DD112 and Lot 1162 (Part) in DD106 located at Kam Tin, Yuen Long. It falls within an area zoned for agriculture ('AGR') on the Kam Tin South Outline Zoning Plan (OZP). It is held under a Block Government Lease and is demised for agricultural use. The Appellant Mr CHEUNG Wan-kau is its owner.

2. The Site is irregular in shape having an area of about 465m<sup>2</sup>. Access to it is from Kam Sheung Road via an existing car repairing workshop lying to its south. A number of domestic structures lie to its northwest. The areas to its east and west are vacant land. There are two workshops located to the south of the Site, both of which are tolerated as Existing Uses.

3. The areas surrounding the Site are predominantly rural in character with agricultural land, scattered clusters of village houses, and a number of open storage yards and workshops along Kam Sheung Road. These open storage yards and workshops are either tolerated as existing uses or are the subject of enforcement notices.

## Background

4. On 6 October 1999, the Appellant submitted a planning application (No. A/YL-KTS/187) under section 16 of the Town Planning Ordinance (the Ordinance) seeking permission to continue to use the Site for temporary open storage of vehicles for a period of 3 years.

5. On 3 December 1999, the Rural and New Town Planning Committee of the Town Planning Board rejected the application on the following 4 grounds:

- (1) The development was not in line with the planning intention of the 'AGR' zone, which was to retain and safeguard good agricultural land for agricultural purposes. This zone was also intended to retain fallow arable land with good potential for rehabilitation. No justification had been given in the submission for a departure from the planning intention of 'AGR' zone, even on a temporary basis.
- (2) The proposed development was not compatible with the surrounding areas, which were predominantly rural in character with agricultural land and village houses.
- (3) There was no information in the submission to demonstrate that the development would not have an adverse drainage impact on the surrounding areas.
- (4) The approval of the application would set an undesirable precedent for other similar applications in the area. The cumulative effect of approving such similar applications would result in a general degradation of the environment of the area.

6. On 21 December 1999, the Appellant applied for a review of the Rural and New Town Planning Committee's rejection of his application. The Town Planning Board considered the review application on 10 March 2000, and rejected it for the same 4 reasons as the Rural and New Town Planning Committee had. The Appellant was informed of the Town Planning Board's decision on 24 March 2000.

7. On 25 April 2000, the Appellant lodged the present appeal against the Town Planning Board's decision.

## The Grounds of Appeal

8. The Appellant argued that, as vehicle repair workshops, open and vehicle storage and air conditioner workshops surround the Site and the environment in which it lies has already been polluted and the soil of the Site has been contaminated, it is no longer suitable as arable land and has no potential for rehabilitation. Further, the workshops have blocked access to a source of water supply, which is needed for irrigation purpose.

## Planning Intention

9. As earlier stated the planning intention of 'AGR' zone is to retain and safeguard good agricultural land for agricultural purposes, and to retain fallow arable land with good potential for rehabilitation.

## Town Planning Board Guidelines

10. The Town Planning Board's guidelines governing applications for open storage and port back-up uses (TPB PG No. 13A) provide that planning permission should not be granted in areas where the policy is to prevent the proliferation of either part back-up or open storage sites and/or to encourage the relocation of such uses to more appropriate areas. Open storage uses generating adverse noise; air pollution and visual intrusion should not be located adjacent to sensitive receivers including residential dwellings. There is a general presumption against development of sites of below 1,000 m<sup>2</sup> for open storage uses in rural areas.

## The Town Planning Board's reasons for opposing the appeal

11. The Town Planning Board advanced the following reasons for opposing the appeal:

- (1) Open storage use is not considered in line with the planning intention of the 'AGR' zone and the Appellant has provided insufficient justifications for a departure from the planning intention of the 'AGR' zone, even on a temporary basis.
- (2) The areas surrounding the Site are rural in character and predominantly occupied by fallow agricultural land mixed with scattered clusters of village houses. The workshops and open storage uses adjacent to the Site, are either unauthorized developments subject to

enforcement action taken by the Planning Authority or existing uses tolerated under the Ordinance.

- (3) There is an occupied domestic structure to the northwest of the Site; open storage use on the Site may cause nuisance to this 'sensitive receiver' and is not in compliance with the Guidelines.
- (4) As the Site forms part of a larger 'AGR' zone which is largely occupied by active and fallow agricultural land intermixed with scattered low-density residential developments, open storage use is incompatible with the rural character of the area.
- (5) In order to intercept all possible surface runoff, provision of drainage facility within the Site is necessary. The Appellant has provided no information to show that the proposed development would have no adverse drainage impact on the surrounding area.
- (6) No similar application has been approved in the vicinity of the Site. Introducing non-conforming open storage uses to the area by approving this application would defeat the Government's efforts in controlling the proliferation of non-conforming uses both in the immediate area as well as in the wider rural New Territories. As at September 2000, there were 12 planning applications (including the present appeal) for open storage uses within the 'AGR' zone on the Kam Tin South OZP along the same portion of Kam Sheung Road as the Site is. The Town Planning Board for similar reasons as those in the present appeal has rejected all of them. As at September 2000, 3 enforcement notices have been served on unauthorized storage uses within the same 'AGR' zone in the vicinity of the Site. Approval of this application would set an undesirable precedent for other similar applications in the area.
- (7) There are designated open storage zones in Pat Heung to cater for the demand for open storage uses.

- (8) There are adequate water supplies within the area. Agricultural activities can be carried out with the laying of sub-water mains to individual sites. A plant nursery is currently in operation to the east of the Site. The source of a water supply for agricultural purpose in the area is not considered to be a problem.

### Decision

12. The appeal is dismissed for these reasons:

- (1) We do not accept the Appellant's argument that the proposed development will not degrade the existing environment further because there are already workshops and open storage yards in the area.
- (2) We are satisfied that Appellant has failed to provide strong reasons (and realistic mitigation proposals for improving the environment of the Site) sufficient to justify us permitting a departure from the planning intention of the 'AGR' zone, even on a temporary basis.
- (3) We are satisfied that open storage use at the Site is incompatible with the adjacent occupied domestic structure and the surrounding rural and agricultural uses.
- (4) Although we realise that we are not bound by previous decisions of the Appeal Board and that each appeal must be dealt with on its own merits, we note that no similar application for open storage use has been approved in the same 'AGR' zone as that in which the site lies. We consider that to approve the application would set an undesirable precedent for other similar applications in the area.

### Existing use

13. At the appeal hearing the Appellant argued and sought to establish that open storage was an existing use at the Site. According to section 1A of the Ordinance the phrase 'existing use' in relation to a development permission area means a use of a building or land that was in existence immediately before the

publication in the Gazette of notice of the draft plan of the development permission area.

14. It was made clear by a differently constituted Appeal Board in TPA 11 of 1998 that the Town Planning Appeal Board has no jurisdiction to determine a claim that the use of an appeal site is an existing use. The Appeal Board's jurisdiction is limited by s.17B of the Town Planning Ordinance. We can only review decisions by the Town Planning Board determining whether any permission, which may be granted under any draft plan or approved plan, should or should not be granted. If an appellant wishes to establish a claim of existing use, he must apply to the courts for a determination. If he is correct in his claim then he does not have to apply for permission from the Town Planning Board.

#### Costs

15. We make no order for costs.