Town Planning Appeal Number 15 of 1996

IN THE MATTER of an Appeal under Section 17B of the Town Planning Ordinance by Thai & Metal Trading Company

Dates of hearings : 2nd September 1998
2nd, 3rd & 5th November 1998
8th, 10th& 11th March 1999
Date of decision : 18th June 1999

Panel : His Hon Judge G. J. Lugar-Mawson, (Chairman)
Mr. Albert Chan Wai-yip
Mr. Fan Sai-yee
Mr. Anthony Roy Upham
Mr. Wong Kai-man

DECISION

The appeal

This is an Appeal by Thai & Metal Trading Company against a refusal by the Town Planning Board to review the Board's earlier denial of permission under Section 16 of the Town Planning Ordinance for open storage of scrap metal at Lot 758 s.B R.P. (Part) and adjoining Government Land in D.D. 46, Sha Tau Kwok Road near Loi Tung, Fanling on a temporary basis.

The site

The proposed development covers a site area of 1,350 square metres situated on the north side of Sha Tau Kok Road. If permission is granted, 177 square metres (13% of the site area) will be covered up for office/staff resting, toilet and storing. The proposed stacking height of the scrap metal is 3.5 metres. The existing boundary wall on three sides of the site will be maintained and the frontage fenced off. A two metre wide planting strip and peripheral drains will be provided around the site. Two workers will be stationed there. Exhibit TPB3038 is the layout plan of the proposed development.

The application

The Application was originally made under paragraph (vi) (b) of the Notes to the Draft Man Uk Pin Outline Zoning Plan No. 5/NE-MUPII (the OZP) for open storage of scrap metal for a temporary period of 12 months.

The Town Planning Board rejected the application on 3 May 1996. The Appellant applied for a review of the Board's decision and the Board on review declined to alter its decision. The Appellant was informed of the decision on review by a letter from the Town Planning Board dated 18 September 1996.

The appeal to The Town Planning Appeal Board was made on 12 November 1996. On 27 August 1998 the Appellant amended the Notice of Appeal claiming that the proposed open storage use was an intensification of an existing use and therefore could be permitted either on a permanent or temporary basis. This application is said to be made under paragraph (ii) and (iii) of the Notes to the OZP.

The notes to the OZP

Paragraphs (ii) and (iii) of the Notes say:

> *"No action is required to change the use of any land or building in the area which was in existence immediately before the first publication in the Gazette of the Notice of the interim development permission area plan in relation thereto to conform to this Plan. An alteration and/or modification (the development) to the land or building referred to in this paragraph unless permitted in terms of the Plan, requires the permission of the Town Planning Board. Notwithstanding that the use or development is not provided for in terms of the Plan, the Town Planning Board may grant, with or without conditions, or refuse to grant permission to the development. Otherwise, any subsequent development or change of use thereto must be permitted in terms of the Plan or in accordance with the permission granted by the Town Planning Board, whichever is appropriate.*
>
> *A development permitted under an earlier draft or approved plan including interim development permission area plan for the area and undertaken during the effective period of that plan is always permitted under this Plan. Any alteration and/or modification to the completed development unless permitted in terms of the Plan, requires permission of the Town Planning Board. Notwithstanding that the use or development is not*

provided for in terms of the Plan, the Town Planning Board may grant, with or without conditions, or refuse to grant permission to the development."

The General Notes to the rural OZP say:

"Para.(ii) of the Notes

Uses and developments in existence immediately before the first publication of the IDPA plan, or the DPA plan if the subject area is not previously covered by an IDPA plan, fall within the definition of "existing use" under the Ordinance and are thus exempted from enforcement actions. In land use planning terms, these "existing uses" are merely uses/developments tolerated in the plan and should not be regarded as permitted uses as those listed in paragraph (v) of the Notes. In the Notes of rural OZP, it is intended to exclude "existing use" from the list of "permitted uses" to give a clear indication of its status. Under the Notes, carrying out of building and construction works ancillary to and incidental to "permitted uses" does not require the permission of the Board. By disassociating the "existing use" from "permitted uses", it would mean that all ancillary developments to an "existing use" would require planning permission. Therefore, extension, alteration or modification to "existing uses" to be carried out without permission would be enforceable. This would help overcome the previous enforcement difficulties in prosecuting unauthorized developments carried out under the pretext of ancillary and incidental developments to "existing uses."

Among all "existing uses", some of them may conform with the OZP but some are non-conforming. Although zoning designations on the rural OZP may provide up-zoning incentive to encourage change from a non-conforming "existing use" to a conforming one, some of the non-conforming uses may continue to operate for some time until the circumstances are ripe for redevelopment. In this regard, flexibility should be allowed to enable genuine alteration and/or modification works to these "existing uses" provided that they are intended to improve the environment and subject to the approval of the Board. Such improvement works may include the provision of noise mitigation measures and fire fighting installations. Any subsequent development or change of use to these

non-conforming "existing uses" must conform with the provision of the rural OZP.

Para. (iii) of the Notes

This paragraph makes a clear indication that the date of the first publication of the relevant IDPA/DPA plan in the Gazette is the date from which development and use of land within the OZP must be conformed with the terms of the rural OZP."

The date of the first publication in the Gazette of the Notice of the interim development permission area (IDPA) plan was 12 October 1990.

Definitions

As we understand the notes to the OZP, an existing use is always permitted under both the interim development permission area plan and draft development permission area plan for the Man Uk Pin area.

If an applicant wishes to alter and/or modify an existing use he must make application to the Town Planning Board under paragraph (ii) of the Notes to the OZP for permission to do so. In support of his application, the applicant has to satisfy the Town Planning Board that there was an existing use.

If the Town Planning Board grants permission, this is under paragraph (iii) of the to the OZP and is for 'alteration and/or modification to the completed development'. From this it follows that there must be a 'completed development' on the subject land before the Town Planning Board can grant permission for its alteration or modification.

The terms 'Development' and 'existing use' are defined in s.1A of the Town Planning Ordinance, as follows:

"'Development' means carrying out building, engineering, mining or other operations in, on, over or under land, or making a material change in the use of land or building.

'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."

The phrase ‘material change in the use of land or building’ is also defined in s.1A as:

> *“‘Material change in the use of land or building’ includes depositing matter on land, notwithstanding that all or part of the land is already used for depositing matter, if the area, height or amount of the deposit is increased."*

Lord Denning MR in **Parkes v Secretary of State for the Environment [1978] 1 WLR 1308** dealing with an identical definition of the word 'development' in the **English Town and Country Planning Act 1971** said at p. 1311 E:

> *"Looking at these various sections it seems to me that in the first half "operations" comprises activities which result in some physical alteration to the land, which has some degree of permanence to the land itself: whereas in the second half "use" comprises activities which are done in, alongside or on the land but do not interfere with the actual physical characteristics of the land.”*

Commenting on this definition Litton VP (as he then was) in **R v Way Luck Industrial Ltd [1995] 2 HKC 290** said:

> *"I draw attention to the two-pronged definition of 'development' in the Ordinance for this reason: Schedule II to the enforcement notice complains of 'site formation works, storage and open storage of furniture and household wares'. As a matter of language, I would have thought that 'site formation works’ would be engineering or other operations on and perhaps under the land. It would generally comprise a certain amount of digging, levelling and perhaps the addition of fill and other material. And yet, in this case, the 'site formation works’ complained of is said in the enforcement notice to be part of the 'material change in the use of the land' and the case has proceeded throughout on that* basis_."

\- *and later:*

> *"In the enforcement notice, the planning authority complained that 'site formation works' constituted part of the 'making of material change in the use of the land'. It seems to me that this is straining the definition of 'use'. 1 would have*

thought that site formation works as such come far more comfortably within the first limb of the definition of development: the carrying out of building, engineering, mining or other operations. But that is not the way the complaint is particularised in the enforcement notice."

The application for permanent use

The Appellant claims that there was an existing non agricultural use of the site before 12 October 1990 and that this enables it to apply to us - the Town Planning Appeal Board - for the grant of permanent permission to intensify it.

For their part, the Town Planning Board does not accept that there was an existing non-agricultural use before 12 October 1990. And even if there was, they contend that we have no jurisdiction to grant permanent permission to intensify that use.

After hearing argument from Counsel for the appellant and the Town Planning Board, we gave leave on 2 September 1998 for this issue to be argued before us.

The Appellant's witnesses

In support of the claim that there was an existing non agricultural use before 12 October 1990, the Appellant called four witnesses at the hearing before us.

The first witness was Mr Ngai Sik Keung, a Registered Town Planner. Mr Ng's first visit to the site was in 1995. His knowledge about its use in 1990 came from what the Tsoi family the Appellant's owners had told him. On the issue of the use of the site at 12 October 1990 we found Mr Ng to be of no assistance.

The second witness was Mr Tsoi Cliung Hoi the Appellant's main shareholder. Mr B told us that he had been in the metal business for 24 to 25 years. He imported metal, mainly stainless-steel, copper and brass. He did not deal with ferrous metals. In 1990 he had a factory at a flatted factory building in Kwai Chung. He still has it. Imported metals are stored there and at other people's warehouse.

He bought the site in March 1990. Before he did so he made no enquiry about the land use of the site. He bought the site because many of his customers had relocated to the Mainland.

When he bought the land it was already flattened. There was no terracing on it and it was covered with concrete or sand. Apart from some flower planting, there was no agricultural activity going on there.

He engaged a contractor to clear the site and in around August or September 1990 the contractor started work. Bulldozers and trucks were used to do the site formation work..

In October 1990 Thai & Metal were storing scrap metal at the periphery of the site.

A weighbridge is crucial for the Appellant's operations, so soon after he had acquired the site, he asked a contractor, Mr Chan Tong Kee, to install one there. Mr Chan did so in September 1990. This weighbridge was un-satisfactory. Mr Chan removed it and installed a replacement a few days later, this was twice as large as the first one. It was installed at the site after October 1990, Mr Chan Tong Kee made no charge for this because he was an old business friend of Mr. Tsoi's.

In October 1990 he only had a rough idea of the site's boundaries, he marked these with gravel. In doing so he made a mistake and installed the weighbridge on Government land, instead of on his own. The weighbridge was relocated a few years later to its present position on the site.

Mr Tsoi Chung Hoi marked on an aerial photograph of the site.

(a) its boundaries,

(b) the locations of the weighbridge on its first, second and third installations, and

(c) the areas where scrap metal was stored in October 1990.

He admitted that he knew there were open storage sites available in Ping Che and Ta Kwu Ling for. However, he considered these sites to be expensive and not as convenient for the Appellant's business.

The third witness was Mr Tsoi Chuen Pan, Mr Tsoi Chung Hoi's son. Mr Tsoi Jr. told us that The Appellant dealt with two types of scrap metal. The first type was scrap metal arising from the manufacture of metal items, the second type was scrap metal obtained from obsolete stainless steel items. The two types were also classified in another way: those weighing less than a thousand catties are called '*Yau Kwong' ('fine steel')* and those over a thousand catties are called '*Tsou Kwong'* ('*coarse steel*'). Before the Appellant acquired the site in March 1990, Thai & Metal was not able to deal with Tsou Kwong.

By the Mid-autumn Festival 1990 (3 October 1990) the site formation work was about 50% complete and a weighbridge was already a installed there. He could not tell us the date when this was done. It was replaced towards the end of December

1990, because the earlier one was too small for 40 feet trucks. The first weighbridge was removed from the site pending the installation of the second one for fear that it might be stolen.

Scrap metal would not be stored long at the site. In normal circumstances it would be there only for several hours or overnight. Trucks would transport the scrap metal to the site in the morning. The customers would pick it up there for export in shipping containers.

Mr Tsoi Jr. produced various purchase orders dated between 6 to 19 September 1990 and various drayage receipts dated between 1 to 13 October 1990.

In cross-examination, Mr Tsoi Jr. agreed that if there had been a container at the site on 12 October 1990, it would have been seen on the aerial photograph taken on that day.

The fourth witness was Mr Sin Chin Ming. Mr Sin had known Mr Tsoi Chun Hoi for almost 20 years and was engaged by him to transport metal.

Mr Sin used a truck with a crane to take metal to the site. There the metal was transferred to a container truck. However, if a container truck was not at the site, and he could not wait, he would deposit the metal onto the ground and the container truck would come later to collect it. The metal would be left on the ground for a few hours only.

Mr Sin recalled that he first transported metal to the site in the summer of 1990. Due to lapse of time, he could not recall the exact date. The site was then still covered with grass.

He recalled seeing a weighbridge being installed on the site, but, he had never used a weighbridge there until 1991. Before that, he had to use another weighbridge.

Mr Sin marked on the aerial photograph the position of:

1. the place where vehicles parked to transfer metal at the site;

2. the place where he deposited the metal on the ground of the site; and

3. the weighbridge.

<u>The Town Planning Board's witnesses</u>

The first witness called on behalf of the Town Planning Board was Ms Ann Wong Oi Yee, she is an expert on aerial photograph interpretation, we accepted her expertise.

Ms Wong had studied aerial photographs of the site taken on 27 July 1990,12 October 1990, 3 December 1990 and 15 July 1991.

From the 27 July 1990 photograph, her opinion was that about 1/3 of the site was under active cultivation. Furrows could be seen. She believed that vegetables were being grown on that part of the site. The rest of the site was covered with grass and shrubs.

From the 12 October 1990 stereoscopic pairs of photographs, she was of the opinion that the 1/3 under cultivation on 27 July 1990 was still under cultivation. Of the remaining 2/3, about 50% was under site formation. A radiating pattern of tyre marks showed signs of excavation work. A van was parked at the western boundary of the site. A small heap of unidentifiable objects of a height of less than 1 foot were deposited at the south-western corner of the site.

The second witness called by the Town Planning Board was Mr. Lam Wing Yuen the senior town planner for the Sha Tin, Tai Po and North District Planning Office.

Mr. Lam had made two witness statements, which he adopted as his evidence. He also produced a map showing the supply of land for open storage in the region and a sample s.23 enforcement notice.

Determination of factual issue

Whether the sporadic nature of the occasional cross-loading and storage of scrap metal pending cross-loading at the site's periphery amounts to a change of use of the land from its previous agricultural use to the claimed open storage of scrap metal use on 12 October 1990 is a question of fact and degree.

This point is well made in **Way Luck. Way Luck** was an appeal from a Magistrate's conviction of the appellant for an offence contrary to 23(6) of the Town Planning Ordinance. The agreed facts were:

> *"Up to about October 1991 the site was lying fallow, unused for agricultural purposes. There were bushes, trees and shrubs on the land which was overgrown with weeds. The appellant's associated company for some years prior to July 1991 operated a warehouse business in a single-storey building west of the site. From time to time the company used part of the land nearest to the warehouse for transient*

storage: ie, containers and some goods would be placed there from time to time, sometimes as a spill-over from their own site. This was transient and sporadic and was wholly ancillary to the use of the warehouse. Lorries were also sometimes parked there. In May 1991, the company entered into agreements to buy some of the lots comprising the site. In July 1991 steps were taken to exclude public from the site. In October 1991 the vegetation was cleared and a hard surface was placed on the site. Fencing wand gate were erected and drainage pipes installed. From that time on the site was used as an enclosed storage depot."

Litton JA agreed with the trial magistrate that there had been a change of use at the site, saying, at page 295H to 296H:

"Mr Benjamnin Chain, counsel for the appellant, in the course of his able argument, draws attention to the statutory definition of existing use as follows:

> *''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. '*

Mr Chain puts emphasis on the expression 'a use'. He argues thus: since the enforcement notice referred to the whole of the site of approximately 20,000 square feet, the prosecution had to prove that that site - the 'planning unit' in question - had been put to unauthorised use. He concedes that if the notice had been confined to the areas previously covered with vegetation, his client would have no defence. But that is not so. Here, the requirement to discontinue use, as specified in the notice, included the area on the western side, near Fitgear's godown, where there was, in August 1990, an existing use. Thus, Mr Chain argues, the site as a whole had been used for open storage and storage generally: accordingly, the defence of existing use prevails.

The problem with this argument is that it conflicts to an extent with the definition of 'unauthorised development' in the Ordinance. 'Development' includes any material change in the use of the land and it is not easy to reconcile the statutory

defence in s.23(9) with the sweeping definition of 'material change in the use of land or building' in s. 1A where such change includes:

> *'Depositing matter on land, notwithstanding that all or part of the land is already used for depositing mater, if the area height or amount of the deposit is increased.'*

I can envisage a case where the 'development' - that is, the depositing of 'matter' - remains on a very small scale and the use of the land has not, broadly speaking, changed in character: that might come within the defence of 'existing use' in s.23(9), despite the sweeping definition in s.1A. Or, as suggested in argument, where the use is wholly ancillary to the existing use.

Ultimately, the question is one of degree. The question for the magistrate was simply this: Looking at the land broadly, as referred to in the enforcement notice, that is to say, the 'planning unit', has there been a material change in the use of the land since the publication of the draft DPA plan? On the facts as found by the magistrate, the use of the site had radically changed: from the sporadic placing of cartons and containers on a portion of the open land, and the occasional barking of vehicles there, with the existing trees, bushes and vegetation intact, to the conversion of the land into an enclosed commercial storage depot, stripped of vegetation with a hard surface laid over the whole area. In my judgement this is not a border-line case where the precise scope of the statutory defence merits closer examination. On all the evidence before the magistrate, the statutory defence had clearly been negatived."

After considering the evidence we believe, on the balance of probabilities, that on 12 October 1990 roughly 1/3 of the site was still used for agriculture and the remainder was in the process of excavation and site formation. Vehicles were only able to park at the site's outer boundaries and the depositing of metal, if this was done, could only be done at the outer boundaries. In reaching this conclusion we are assisted by the drawings made on the aerial photographs by the two Mr. Tsois and Mr Sin and the aerial photographs themselves.

The aerial photographs taken on 27 July and 12 October 1990 show no weighbridge on, or near the site. Mr Sin said he did not use a weighbridge at the

site until 1991, this reinforces our conclusion that there was no weighbridge at the site on 12 October 1990.

We are satisfied that there was no open storage in the proper sense of the term at the site on and before 12 October 1990. The site was in the process of site formation at that date. Although we are prepared to accept that the periphery of the site may have been used occasionally for the transfer of metal between the Appellant's trucks and its customer's container lorries, we believe that this use was minimal and that the metal was merely deposited on the ground for a short time pending collection by the purchaser's container lorries.

We are satisfied that the site formation work that was being carried out at the site on 12 October 1990 is not a '*use*' within the meaning of the Ordinance and for the purpose of the paragraphs (ii) and (iii) of the Notes to the OZP. We agree with Litton JA that to do so would be straining the definition of that word.

Neither do we find the site formation work to be a *'development'* for the purposes of paragraphs (ii) and (iii) of the Notes to the OZP. This is because paragraph (iii) qualifies the word *'development'* by the word *'completed'* and ongoing site formation such as was taking place at the site on 12 October 1990 is not completed development.

Here we find the facts to be the antithesis of those in **Way Luck.** At 12 October 1990 only a small part of the site was used sporadically for depositing scrap metal pending cross-loading. Just as much as **Way Luck** was not in Litton JA's words *'a border-line case',* this too is not a border-line case, it is a clear case where there was no existing use at the site at the material date of 12 October 1990.

Mr Anthony Ismail, for the Appellant, argued the proposed development is an intensification of the existing non agricultural uses of the site that were in existence immediately before the IDPA came into effect on 12 October 1990 and that it is an extension, alteration and/or modification, or an "ancillary" and "incidental" development to such non agricultural uses for which he accepts permission is needed.

Ingenious though it is, to accept this argument would be to negate the whole scheme of planning control. Taken to its logical conclusion, Mr Ismail is saying that as the 12 October 1990 use was a non agricultural use, any use that is non agricultural has to be permitted under paragraph (ii) of the Notes to the OZP. As Mr Kwok, for the Town Planning Board, said to us, that conclusion would lead to the absurd situation of requiring the Town Planning Board to give permission for the site to be used as a nuclear power plant as that is a non agricultural use. Such a conclusion is plainly absurd and cannot be the meaning and intention of the Notes.

Jurisdiction of the Appeal Board to Entertain the Application

We are satisfied that we have no jurisdiction to grant a permanent permission for open storage of scrap metal at the site.

The application must be made to, and processed by, the Town Planning Board. This is because section 16 of the Ordinance provides:

> *"(1) Where a draft plan or approved plan, whether prepared or approved before or after the commencement of the Town Planning (Amendment and Validation) Ordinance 1974 (59 of 1974), provides for the grant of permission for any purpose, an application for the grant of such permission shall be made to the Board.*
>
> *(2) Any such application shall be addressed in writing to the secretary to the Board and shall be in such form and include such particulars as the Board thinks fit.*
>
> *(3) The Board shall within 2 months of the receipt of the application consider the same in the absence of the applicant and, subject to subsection (4), may grant or refuse to grant the permission applied for.*
>
> *(4) The Board may grant permission under subsection (3) only to the extent shown or provided for or specified in the plan.*
>
> *(5) Any permission granted under subsection (3) may be subject to such conditions as the Board thinks fit.*
>
> *(6) The secretary to the Board shall notify the applicant in writing of the Board's decision on an application under this section, and where the Board refused to grant permission shall also notify the applicant of his right to a review under section 17.*
>
> *(7) For the purposes of section 16(1)* (d) *and (da) of the Buildings Ordinance (Cap 123), anything permitted by the Board under this section shall not be a contravention of any approved plan or draft plan prepared under this Ordinance."*

The Applicant never made an application with particulars to the Town Planning Board for the permission it is now seeking from us.

Our jurisdiction is given in s.17B(8) of the Ordinance in these terms:

> *"At the completion of the hearing of parties appearing at an appeal or at any adjourned hearing, an Appeal Board may-*
>
> *(a) adjourn for such period as it considers necessary to reach its decision;*
>
> *(b) confirm, reverse, or vary, the decision appealed against;*
>
> *(c) award to a party such costs legal or otherwise as it considers reasonably incidental to the preparation and presentation of an appeal."*

Of our jurisdiction, the Judicial Committee of the Privy Council observed in **Henderson Real Estate Agency v Lo Chai Wan (1996) 7 HKPLR 1**:

> *"In addition to preparing draft plans, the Town Planning Board also considers applications for planning permission with areas covered by draft plans. Under 5 16(4) the Board may grant permission 'only to the extent shown and provided for or specified in the plan'. There is provision in ss. 17A-C for the hearing of appeals by an Appeal Board. It is common ground that the Appeal Board, like the Town Planning Board, is bound by s.16(4).*
>
> *The Appeal Board were, of course, entitled to disagree with the Town Planning Board. Their function was to exercise an independent planning judgment."*

As their lordships observed, we exercise an independent planning judgement and have the power to confirm, reverse or vary a decision of the Town Planning Board. What we don't have is the power to take over the original jurisdiction of the Town Planning Board. Every application for permission must be made, with particulars, to the Town Planning Board, it cannot be made directly to the Appeal Board as we have no jurisdiction to entertain an application at first instance.

<u>Temporary open storage use for 12 months</u>

In its application to the Town Planning Board, the Appellant sought permission for the open storage of scrap metal for a period of 12 months.

The material parts of paragraph (vi) (b) of the Notes to the OZP say this about temporary uses:

> *"Temporary use or development of any land or building not exceeding a period of twelve months requires permission of the Town Planning Board. Notwithstanding that the use or development is not provided for in terms of the Plan, the Town Planning Board may grant, with or without conditions, or refuse to grant permission."*

Open storage is not a permitted use provided for in the Plan.

As stated earlier, the application was rejected by the Town Planning Board on 3 May 1996 and the Board on review declined to review its decision.

The reasons for the rejection were:

> *"(a) the subject open storage use is not in line with the planning intention for the area which is to retain and safeguard good agricultural land for agricultural pru poses and to retain fallow arable land with good potential for rehabilitation. In this regard no strong justification has been included in the submission to merit a departure from such planning intention even on a temporary basis;*
>
> *(b) the subject development is incompatible with the surrounding land uses which are predominantly rural in character; and*
>
> *(c) the approval of the application would set an undesirable precedent for other similar applications and would result in a general degradation of the environment."*

The general planning intention for the Man Uk Pin area is stated in paragraph 7.2 of the Explanatory Statement of the OZP in these terms:

> *"The planning intention for the Area is to promote the conservation of the rural character of the planning scheme area not required for urban development with a view to*

controlling urban sprawl and protection and preserving agricultural land."

And specifically, the planning intention of the "ARG" (agricultural) zone is stated in paragraph 8.1.1 and 8.1.2 of the same Explanatory Statement as:

> *"Extensive areas in the Man Uk Pin area are devoted to agricultural use with the majority clustering around the 3 recognised villages, viz., Man Uk Pin, Loi Tung and Tai Tong Wu Villages. These areas are well served by irrigation. Director of Agriculture and Fishery (DAF) advises that all the actively cultivated agricultural lots are worthy of preservation, particularly those located at Loi Tung and Tai Tong Wu. Moreover, with the completion of the NENT Landfill Access Road, the accessibility of these agricultural activity will be much enhanced.*
>
> *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 2 sides of Sha Tau Kok Road. Although some of these land have been used for open storage of various types, it is not the planning intention to tolerate them in the long run."*

The site is within the "ARG" (agricultural) zone of the OZP. We are satisfied that it was under active cultivation before it was converted into open storage.

The site is in the general area of Man Uk Pin, which is an established agricultural area. It is classified as good quality agricultural land. There is adequate water supply for irrigation. It is well served by good farm access and market facilities. Since 1990, the Agriculture and Fisheries Department has promoted an agricultural land rehabilitation scheme in the area and, so far, 4 hectares of agricultural land have been rehabilitated in the area.

It is clear that the planning intention for the area is to conserve its rural character and to preserve agricultural land, and not to tolerate any type of open storage.

We have no doubt that the application is not in accordance with the planning intention for the area.

Surrounding Land Uses

The surrounding land uses of the site are predominantly agricultural and rural. The site is among the village settlements of Man Uk Pin and Loi Tung. Adjacent to the

site are large tracts of agricultural land, most of which are still under active cultivation.

Open storage causes environmental impact to the surrounding areas. We are informed that the village representative has expressed strong objection to all open storage application in the area.

Precedents

We are told that there have been ten other applications for temporary open storage in the area. Only one of these was approved. This was due to a lack of supply of land for open storage purposes at that time. This use has now ended with expiry of the time limit on the approval. Suitable land that is available for use open storage purposes has now been designated and zoned within the area.

We note that on 14 April 1998 in **Town Planning Appeal No.16 of 1996** a differently constituted Appeal Board dismissed an appeal against the Town Planning Board's decision to reject an application for open storage of scrap metal and construction materials for a period of 12 months at a site in Sha Tau Kok Road, Ma Mei Ha, Fanling, which had been used for open storage since 1992. This was on the grounds that there was no evidence to show that an alternative site was unavailable. The Appeal Board considered that there was insufficient merit to justify a temporary permission and observed:

> *"Any such application must be scrutinised with great care, lest what is meant to be a temporary permission will become long term. It is important not to allow such discretionary power to frustrate the stated planning intention."*

The Appeal Board's views on the proposed development

We are of the view that the proposed development is against the planning intention for the area and is incompatible with the surrounding land uses. As proper sites for long term open storage are now available in the area, it is no longer necessary for the Town Planning Board, or the Appeal Board, to approve applications in areas not designated for that purpose in order to implement stop-gap environmental protection measures. We believe that our approval of the application would set a bad planning precedent.

We are satisfied that there would be no environmental gain in our approving the application, as the Appellant claimed. Open areas would be covered over; heavy machinery, including the weighbridge and cranes would be placed on the site and there would be unsightly stacking of metal there. Given the nature of the proposed use, the development would attract heavy vehicles to the site.

Although issues of hardship and compensation are outside our purview, we note that even though the site is now leveled and paved - see the 6 November 1997 aerial photograph of the site - it could still be used for agricultural purposes, for example, a plant nursery, or a poultry farm. Such uses would conform with the planning intention of the area and be compatible with the surrounding land uses.

Final determination

Both the Appellant's appeal and application for permanent use for open storage are dismissed. We make no order for costs.