

Town Planning Appeal No. 16 of
1996

IN THE MATTER of the Town
Planning Ordinance Chapter 131

and

IN THE MATTER of an Appeal
under Section 17B by Wah Yuen
Metal Godown Limited

Date of hearing : 11th, 12th and 13th March 1998

Date of decision : 14th April 1998

Panel : Mr Robert C. Tang Q.C., S.C., J.P. (Chairman)

Mr Chung Wah Nan

Mr Angelina Lee, J.P.

Mr Joseph Lo

Mr Herbert Wong

DECISION

Wah Yuen Metal Godown Limited ("Wah Yuen") is the owner of Lots 1829BRP (Part) and 1813 (Part) in D.D.76 ("the Site") which borders Sha Tau Kok Road near Ma Mei Ha, Fanling, New Territories.

2. The Site has an area of about 2,792m². It is zoned "agricultural" under the draft Lung Yuek Tau and Kwan Tei South Outline Zoning Plan No.S/NE-LYT/1.

3. However, under (vi)(b) of the Notes

"... , temporary use or development of any land or building not exceeding a period of 12 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"

4. Such applications are to be assessed on their individual merits. See para. 12.3 of the Explanatory Statement.

5. On 25/1/96, Wah Yuen applied under s.16 for permission to use the Site for temporary open storage of scrap metal and construction materials for a period of 12 months. That application was rejected on 22/3/96.

6. The review was rejected by the Town Planning Board on 2/8/96.

7. The reasons for rejection are

- "(a) the subject open storage use was not in line with the planning intention for the area which was to retain and safeguard good agricultural land for agricultural purposes and to retain fallow arable land with good potential for rehabilitation and to encourage the re-cultivation of good arable land by providing improvements in irrigation, drainage and access. In this regard, no strong justification had been given in the submission to merit a departure from such planning intention even on a temporary basis;
- (b) the subject development was incompatible with the surrounding land uses which were predominately rural in character;
- (c) no detailed drainage proposal had been included in this submission; and
- (d) the approval of the application would set an undesirable precedent for the other similar applications, the cumulative effect of which would lead to further encroachment of the prime agricultural land and degradation of the environment"

8. This appeal was not brought on for hearing until 11/3/98 because an earlier hearing was adjourned because the Town Planning Board's main witness was not available. Eventually, he was replaced.

9. As will have been noted, Wah Yuen's initial application on 25/1/96 was for temporary use of the site for a period of 12 months. The application was made more than 2 years ago.

10. Although para.iv(b) is wide enough to cover successive applications for a total period in excess of 12 months, we believe 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.

11. Here, we note that Wah Yuen has been using the Site for open storage since 1992, notwithstanding that enforcement actions have been taken against them.

12. The planning intention for the Site can be gathered from para.7.2 of the Explanatory Statement:

"The primary planning intention of the area is to conserve the natural environment and to protect the active agricultural land, especially those located at Kwan Tei and Ma Mei Ha. Besides, with improved accessibility of the area, some areas will be designated for low density recreational uses"

13. Paragraph 8.1.1 and 8.1.2 provide

"8.1.1. The intention of this zone is to retain and safeguard good agricultural land for agricultural purposes, extensive active agricultural land are found in the Area. From agricultural point of view, all the active agricultural lots are worth preserving, particularly those located at Kwan Tei and Ma Mei Ha which are Grade A agricultural land. The zoned areas are well served by irrigation and servicing facilities as well as marketing facilities for intensive farming. The Agriculture and Fisheries Department (AFD) has extended their Agricultural Land Rehabilitation Scheme (ALRS) to these areas. Moreover, AFD has been maintaining the irrigation weirs and channels at Ma Mei Ha. Infrastructural improvements such as farm access are also implemented under the Rural Planning and Improvement Strategy (RPIS) to promote the agricultural activities in the Area.

8.1.2. This zone also intends to retain fallow arable land with good potential for rehabilitation to encourage

the re-cultivation of good arable land by providing improvement in irrigation, drainage and access. Certain areas along Sha Tau Kok Road which have been converted to open storage uses and areas in Tan Chuk Hang fall within this category"

14. We have, no doubt, after listening to the evidence of Mr T W Ng, the Senior Town Planner/North of Shatin, Tai Po and North District Planning Office, Planning Department, that the surrounding areas are still predominantly agricultural and rural in character. The photograph taken on 15th May 1997 showed this very clearly. Apart from one area of existing use for open storage, the area South of Sha Tau Kok Road where this Site lies is undoubtedly predominantly agricultural and rural. To the Northwest of the Site, there is a restaurant and to the immediate Southwest of the Site are clusters of residential dwellings. Otherwise, the Site is surrounded by agricultural land most of which are in active cultivation. To the immediate Northeast of the Site is a site vacated as a result of enforcement action against unauthorised open storage.

15. Mr Ma of the Agricultural and Fisheries Department told us that the Site is suitable for plant nurseries and that there are 28 plant nurseries on his waiting list.

16. The thrust of Wah Yuen's case is that there is an acknowledged shortage of land for open storage. They relied on a Government commissioned report "Study on Port back-up land and open storage requirements" in 1994 which predicted a territory wide shortfall of 42 ha (low growth scenario) and 116 ha (high growth scenario) by 1998. It is also submitted that it was because of this shortage that on the s.16 application, the Planning Department had no objection to the application. And that, on the s.17 review, although the Planning Department "in principle does not support the application..." they added "[Members may, however wish to consider whether a temporary period of 12 months can be tolerated pending the availability of the "Open Storage" ("OS") and "Other Specified Use (Container Trailer and Tractor Park)" ("OU (Container Trailer and Tractor Park)") sites as detailed in para.31 (c) and 3.2 below".

17. However, as the same Report shows, the Site falls within Area 19 and that the recommendation relating to this area is that "Notwithstanding the possible upgrading of the border at Sha Tau Kok and future road improvements, both port back-up and open storage users should be reduced to improve the environment and preserve the rural character of the area".

18. It was submitted on behalf of Wah Yuen that the present application will not open a floodgate because each case should be decided on its own merits.

We agree that each site should be considered on its merits and we asked Mr Chan what he could identify as the merits in this case.

19. Mr Chan was able to name two. First, hardship on the appellant because they are unable to find an alternative site. Secondly, that it is in the interest of Hong Kong that open storage should be permitted to continue because of a shortage of land for open storage purpose.

20. Mr T.W. Ng of the Planning Department does not accept that there is presently an acute shortage of land for open storage. According to him, of the 91 ha. zoned for open storage north of the Sha Tau Kok Road in the Ta Ku Ling/Ping Che area, there is approximately 22 ha still unoccupied. Moreover, potential areas (also north of the Sha Tau Kok Road) have been identified with an area of about 15.8 ha. These 15.8 ha was agreed to be re-zoned open storage recently. In anticipation of that, 6 applications have also been granted for open storage use in relation to this 15.8 ha of land. According to Mr Ng about 80% of this land is still available.

21. On the other hand the evidence from the appellant relating to efforts which have been taken by them to look for alternative site came in the form of the evidence of Mr Yip Fai. According to Mr Yip, since 1989, he has been working as an agent to look for open storage areas for customers but he has not been able to find one single site either for rent or for sale. He mentioned some well known difficulties about buying or renting land in the New Territories e.g. fragmented ownership and that land may be owned by a Tso or Tong and the agreement of its members are necessary before a sale or a lease could be obtained.

22. However, we are not satisfied that Mr. Yip's evidence is helpful. When asked about the market price for, say, 50,000 sq. ft. of land for open storage use in 1995. He said that the price would have been about \$130 per sq. ft. According to him, in 1997, the price would have been \$250. We find it difficult to believe that he could so readily give a market price if no land could be bought or leased. We rather got the impression from his evidence that he considered such prices to be high and that because of such high prices, users of land are not prepared to pay them. We do not believe no alternative site is available. We do not think it is right that Wah Yuen should be permitted to use agricultural land for open storage because it is cheaper than land which are zoned for open storage. It may make good commercial sense but it does not provide sufficient merit as would justify a temporary permission in this case. The more so, since Wah Yuen started to use the Site for unauthorised open storage in 1992 and if permission is granted by us, they would have used the Site for 7 years when such permission expires. In the circumstances, we cannot believe that it is in the interest of Hong Kong to permit Wah Yuen to use agricultural land for open storage purpose even temporarily.

23. For the above reasons, we do not believe that there are any merits in this appeal. It is unnecessary for us to consider whether for environmental or other planning reasons the application should also have been rejected.

24. The appeal is dismissed.