

Town Planning Appeal No.  
17/1993

Appeal under Section 17B by  
Shun Fat Container Terminal  
Limited

Lots No. 1797 BRP and other lots  
in DD 125, Ha Tsuen, Yuen Long

Date of hearing : 21<sup>st</sup>, 22<sup>nd</sup> and 24<sup>th</sup> March 1994  
Date of decision : 9<sup>th</sup> May 1994

Panel : Mr Justice Litton, OBE (Chairman)  
Mr David DaSilva, MBE  
The Rev. Sean P. Burke, JP  
Dr Robert M Kennard  
Mr Anthony Roy Upham

### **DECISION**

The appellant, Shun Fat Container Terminal Limited, is the occupier of various agricultural lots in DD 125, Ha Tsuen, Yuen Long measuring in total about 13,250m<sup>2</sup>. The site is located on the eastern side of Ping Ha Road, approximately 300m from its junction with Tin Ha Road.

2. The site falls within an "Unspecified Use" area on the approved Ha Tsuen Development Permission Area ("DPA") Plan No. DPA/YL-HT/2, gazetted on 12 July 1991. The total area of the Ha Tsuen DPA is 725 hectares, of which "Unspecified Use" comprises 410 hectares and "Green Belt" 225 hectares. The remaining designated uses are as follows: "Village Type Development" 84.5 hectares; "Government/Institution/Community" use 5 hectares. The object of the plan, as revealed in the Explanatory Statement, is as follows:

#### **"Object of the Plan"**

2.1 The object of the plan is to delineate the extent of the Ha Tsuen DPA and to set out the types of development and uses which are permitted at all times and such types of development and uses that

may be permitted with or without conditions by the Board on land within the Area.

- 2.2 The plan is to provide guidance for planning and to facilitate development control within the Area during the period required for detailed analysis of land use pattern, study of infrastructure provisions and examination of development options before the formulation of an outline zoning plan" (Emphasis added).

As regards the need for control, the Explanatory Statement states, inter alia as follows:

"Need for Planning Guidance and Control

- 5.1 With the improvement in accessibility provided by the New Territories circular road and the Yuen Long highway, there is a rapid and haphazard proliferation of open storage uses in the area, concentrating along Ping Ha Road and Tin Ha Road. Such uses have prejudiced the planning land use intention in the area. This existing open storage uses in the area include storage of building materials and equipment, timber, used and new motor vehicles, and containers.
- 5.2 The unregulated open storage uses have led to the degradation of the rural environment; directly or indirectly, they have created a number of problems, such as flooding, traffic congestion and visual blight."

The Explanatory Statement does not, of course, form part of the plan as approved by the TPB, but it does express the underlying intentions of the Planning Department and, as such, carry some weight.

3. The Notes to the Ha Tsuen DPA Plan relating to "Unspecified Use" do not permit the storage of containers as of right. Planning permission from the Town Planning Board ("TPB") for such use is therefore necessary.

4. The interim DPA Plan for the area was published on 17 August 1990, freezing all further development in the area except those in accordance with the plan. As at that date, a small portion of the site next to the Ping Ha Road was under

some form of development, but the rest of the site was covered with vegetation, as revealed in aerial photographs kept by the Planning Department as of that date. Since August 1990 the site has been turned into a container terminal, operated by the appellant as its depot B. The Planning Department accordingly took enforcement action under the Town Planning Ordinance, against both this appellant and other operators who have turned land covered by the DPA Plan into unauthorised use.

5. On 25 November 1992 the appellant applied to the TPB under section 16 of the Ordinance for permission to change the use of the site to the open storage of containers. The application included a plan showing proposals for land drainage.

6. The application was refused by the TPB under section 16 of the Ordinance. The appellant then submitted a detailed written application for review under Section 17 which was heard by the TPB at a meeting held on 25 June 1993 at which it was resolved that the application should be rejected. In his letter dated 20 July 1993 to the appellant, conveying the rejection, the Secretary to the TPB stated:

“After giving full consideration to your submission and to your written statement, the Town Planning Board (the Board) decided on review not to approve your application on the following grounds:-

- (a) the development is not in line with the planning intention for the area which is primarily to promote low-rise and low-density residential development so as to be compatible with the adjacent village type development;
- (b) the container vehicle traffic generated from the development has overloaded Ping Ha Road and caused serious traffic congestion to the local road network;
- (c) the written submission has not included drainage impact assessment and stormwater drainage proposal to demonstrate that the use of the site will not cause drainage problems and flooding hazards to the surrounding areas; and
- (d) the written submission has not included adequate information on landscaping and mitigation measures against the visual impact of the development on the surrounding areas.”

This led to the appeal before us brought under section 17B of the Ordinance.

### Notice of Appeal

7. The appellant gave notice of its intention to appeal by letter dated 15 September. The letter is headed "re: Notice of Appeal Pursuant to Section 17B of the Town Planning Ordinance". It refers to the Town Planning Board's letter of 20 July 1993 and goes on to state:

“...we are now exercising our statutory right of Appeal as notified to us by your Department in your letter of 20 July 1993.”

The letter was delivered by hand to the address indicated in the TPB's letter of 20 July 1993 as the address where the notice of appeal should be lodged, namely 20/F, Murray Building, Garden Road. The notice, however, was addressed to the Town Planning Board, not the Town Planning Appeal Board. The person at the inquiry desk therefore did not accept the letter and directed the representative to take the document to the 13/F of the same building, whereupon he did so. The offices of the Town Planning Appeal Board are located on 20/F Murray Building and the offices of the TPB are located on 13/F of the same building. The date, 15 September 1993, when the notice was first delivered to the 20/F, was well within the time limit of 60 days for appeals to be lodged under Section 17B. However, by the time the notice had been processed in the offices of the TPB on the 13/F and was redirected again to the 20/F the time limit had expired. On the first day of the hearing of the appeal, Crown Counsel Mr Thomas Law representing the TPB took a preliminary objection to our competence in entertaining the appeal, arguing that the appellant's notice had not been lodged within the statutory time limit. We rejected this submission. The appellant had clearly intended to exercise its statutory right of appeal and its notice headed "Notice of Appeal Pursuant to Section 17B of the Town Planning Ordinance" was lodged at the 20/F Murray Building, the address indicated in the TPB's letter of 20 July as the place where the notice of appeal should be lodged. If the person at the desk had opened the envelope, he would have seen that the notice was intended to go to the Town Planning Appeal Board: the fact that the notice asked for a stay of enforcement action pending the determination of the appeal did not rob it of its effect as a notice of appeal pursuant to section 17B. We rejected Mr Law's submissions and proceeded to hear the appeal.

### Ha Tsuen Area

8. The main vehicular access to the area covered by the Ha Tusen DPA is via Tin Ha Road and Ping Ha Road. Going north, Ping Ha Road eventually leads

into Lau Fau Shan Road and Deep Bay Road which serve the villages adjoining Deep Bay. These roads are narrow and were not designed for container traffic. Ping Ha Road is a single two-way road which, in places, is barely 6m wide and has sharp bends as tight as 14m radius. The Transport Department Guidelines for roads carrying container traffic require a minimum of 7.9m in width and 88m in radius at bends.

9. Whilst the area was, in the past, wholly rural in environment and the land was used mainly for agriculture and fish ponds, by August 1990, when the interim DPA Plan was published, much development, in particular for the purposes of open storage, had already taken place. The aerial photograph adduced in evidence shows large areas adjoining Ping Ha Road and Tin Ha Road cleared of vegetation for development. By that time, many sites for the storage of containers, dumping of old vehicles, storage of construction machinery, car repairing workshops and other environmentally-destructive operations had been established. No evidence was led before us, and none put before the TPB, as to the extent of "existing use" tolerated under the provisions of the Ordinance as having been established when the interim DPA Plan was published in August 1990. We note that under section 1A of the Ordinance, "existing use" is limited to the "use of a building or land that was in existence immediately before the publication in the Gazette of notice of the draft plan" and that "material change in the use of land or buildings" 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. We note also that, for the purposes of these statutory definitions, the date at which "existing use" is fixed is the date of the publication of the draft plan, which, of course, is about 11 months after the publication of the interim DPA Plan. Nothing, however, turns on this point.

10. In the Explanatory Statement for the Ha Tsuen DPA Plan, there is this statement as regards the planning intentions for the area with which this appeal is concerned:

"(ii) The area bound by Tin Tsui Wai New Town in the north and east and Ping Ha Road in the south.

This area is primarily to promote low-rise and low-density residential development which is compatible with the adjacent village type development. Comprehensive low-density residential development proposals with supporting facilities would be considered upon the submission of applications for planning permission. There are tentative proposals for open space development. However, these developments

will be guided by layout plans to be prepared by the Planning Department."

### The Appellant's Case

11. The main thrust of the appellant's case on appeal is essentially this: On each side of the site adjoining Ping Ha Road, there is development wholly incompatible with the use of the site for low-rise, low-density residential development; such "agricultural" land as remains which lies at the back of the site is grossly degraded and is liable, at any time, to be cleared for further unauthorised use such as the storage of containers; a pond nearby has become stagnant, fit only for the breeding of mosquitoes. As regard the two sites adjoining the appellant's site, one of them which abuts the northern boundary has been in existence before the publication of the draft DPA and no enforcement action can therefore be taken against the operators; the respondent has not adduced any evidence as to what the level of "existing use" was when development was frozen; quite possibly, containers stepped up to 10 high might be permitted. As to the site abutting the southern boundary, the photographs show an unsightly junkyard, and no enforcement action seems to have been taken: at any rate, none has been effective. This makes the use of the appellant's site for residential purposes not only wholly unsuitable but arguably positively dangerous.

12. The appellant was, at the hearing, at pains to point out to us the extent to which the environment of the Ha Tsuen area has been degraded by ad hoc development, both "tolerated" as "existing use" and unauthorised. We accept the appellant's submissions on this point and find as a fact that the site, having regard to the adjoining incompatible uses, is at present wholly unsuitable for the purpose set out in the Explanatory Statement to the DPA Plan, namely, low-rise low-density residential development. We will revert to this point later.

### Traffic Congestion

13. There is no doubt that Ping Ha Road is unsuitable for heavy container traffic. It is far too narrow, and there are too many sharp bends. The road serves a wide variety of traffic: vans, private cars, buses serving the villages in the area, heavy lorries going to and returning from Lau Fau Shan. Because Ping Ha Road is so narrow, a container lorry emerging from a depot along Ping Ha Road is constrained to cross the double white line. When a bus pulls up at a bus stop, any overtaking vehicle must by necessity cross the double white line. Where the overtaking vehicle is a container lorry, or indeed any other heavy vehicle, the position becomes even more hazardous.

14. The appellant, however, says this: Assuming the appeal fails and depot B terminated its operations, the container traffic for that depot would simply be

diverted to the other two terminals which the appellant operates in the area. The appellant goes further. Depot B is used as a reserve facility for the other two depots, easing the congestion in the other two depots. Depots A and C are not subject to any enforcement action by the Planning Department; to dismiss this appeal would simply mean greater congestion in other sections of Ping Ha Road; indeed, from a safety point of view, it might be preferable to spread out the container traffic into three depots, rather than to concentrate it into two. These are formidable submissions. We would revert to them later.

### Drainage Problems

15. The case for the respondent is that Ping Ha Road is a “flooding black spot” caused by the filling up of low-lying land and ponds by developments along both sides of the road which has blocked natural drainage paths. The evidence is rather vague in this regard. The fact is that there are large drainage channels serving the area, to which any rain-water emanating from the appellant's site can technically be diverted. It is therefore simply a matter of the appellant putting forward proper proposals, for the objections of the Drainage Services Department to be removed. We find as a fact that if the site were otherwise suitable for the purposes of a container depot, the drainage problems are not such as would disqualify the appellant from such use.

### Landscaping Measures

16. This was the last of the reasons given by the TPB for rejecting the appellant's application, namely, that "landscaping and mitigation measures against the visual impact of the development" had not been satisfactorily put forward. If, by this, the TPB meant that the use of the site as a container depot is incompatible with the environment of the neighbouring villages, and with the planning intention of using the neighbouring area for low-rise low-density residential development, then the appellant does not, in fact, dispute this conclusion. It is, in fact, the main case for the appellant that the area has already become so degraded that the planning objective cannot, in practical terms, be achieved: therefore, the proposed use as a container depot should be allowed and the appeal should succeed.

17. Plainly, the question of "mitigation measures" to ameliorate the visual impact of development is something which, to a some extent, can be technically overcome. As an objection to the appellant's proposal, standing on its own, this weighs little in the scales.

### Planning Intention

18. We return to the main point of the appellant's case. The appellant asks in the alternative that if the appeal should not be wholly allowed, we should at

least partially allow it to the extent that pending the publication of the OZP for the area, the use of the site for a container terminal should be allowed. To put the appellant's case at its highest, it is this: plainly, the land cannot be presently used for the objectives stated in the Explanatory Statement; nor for agriculture; to "sterilise" the land and require it to lie fallow would be grossly unfair on the landowners, villagers of the district. The appellant goes on to ask this question: What if the OZP should, eventually, designate the site as suitable for open storage: a situation which is not inconceivable as the Planning Department might, in the end, throw up its hands and accept that the planning objective of using the area for high-class housing simply cannot be achieved?

19. These, in our judgment, are formidable arguments, and are not wholly counter-acted by the contention that Ping Ha Road is unsuitable for container traffic. If the area were, by its proximity to the border with China, or for any other reasons, highly suitable for use as container depots and related activities, why not widen the road - by taking, if necessary, resumption proceedings for that purpose?

20. Evidence was put before us on the appeal that the Government is currently carrying out studies with a view to identifying the demand for land for container and port back-up uses and that a total of 89 hectares of land in the northwest New Territories have been designated for "open storage" use in DPA Plans. Moreover, the TPB has approved a number of section 16 applications for open storage of containers, trailer parks and related developments which are in line with the planning intention for the relevant areas and have minimal adverse impact on the surroundings in terms of traffic and the environment generally. Whilst we accept this evidence, the fact remains that in the Ha Tsuen area there is plainly a massive and unfulfilled demand for use for such purposes and, unless enforcement action was vigorously pursued, the proliferation of unauthorised container depots would simply grow.

#### Evaluation of appellant's case

21. We can understand the feelings of frustration on the part of the appellant in this case. If one took a short term point of view, what damage to the environment of the Ha Tsuen area would be caused by the continued operation of the appellant's terminal? In what way would its temporary use frustrate the stated planning objective? How would container traffic in the area be diminished if the appellant's depot B be closed?

22. However, this crucial point must be grasped: to allow the appeal, even to the limited extent of permitting the present use until the publication of the OZP, would have a disastrous knock-on effect for enforcement action taken against unauthorised use in the meanwhile. The primary objective of the Town Planning Ordinance is to "make provision for the systematic preparation and approval of



plans for the lay-out areas of Hong Kong" thereby promoting the health, safety, convenience and general welfare of the community: see the long title to the Ordinance. If the appellant's unauthorised use were legitimised even on a temporary basis, there would be no logical ground for resisting the applications of all the other unauthorised users in the area. The effect would be, from a planning point of view, that ad hoc use by individual owners and occupiers would dictate the land use of the area. This would frustrate the statutory objective of the Ordinance and, as a matter of principle, plainly cannot be allowed.

### Conclusion

23. As we see the position, the appellant's argument, as put to us, would be put with greater force to the Town Planning Board as an objection to the OZP, should the OZP designate the appellant's site later-on as zoned for low-rise low-density residential use. The Town Planning Board can, at that stage, look at the problem as a whole. It would obviously receive evidence from the Planning Department as to how far enforcement action has in fact been effective, or ineffective, in controlling land use. It would have evidence regarding the expected demand for land for container use, and how far the Government has been able to satisfy this demand by designating areas within either the OZP for this area, or in other adjacent areas, for container depots and related purposes.

24. Whatever the Planning Department might intend by way of zoning as set out in the future OZP, conceivably the TPB could, eventually, throw up its hands and conclude that ad hoc land use in the past together with government's failure to take effective action have created a situation where the "reality" of market forces must prevail and the planning intentions in the Explanatory Statement cannot be achieved. That lies in the future. This grim outcome may not eventuate. In dealing with this appeal, it would be wholly wrong for us to anticipate such an event.

25. Ultimately, as we see it, to avoid this situation, there must be legislation introduced to phase out the "existing use" of land in the area which is incompatible with the overall planning objective. If such legislation does not materialise, it is difficult to see how the objective of using the area for low-rise low-density residential development could sensibly be achieved. Even village type development could be prejudiced.

26. In theory, unauthorised development in the area has been "frozen" since August 1990. In practice, this is not so and degradation has continued. One of the important functions of this Appeal Board, constituted under the Town Planning Ordinance, is to scrutinise the planning intentions of the Town Planning Board for a particular area, as expressed in the relevant plan, even if the Explanatory Statement does not, technically, form part of the plan. Where a draft

plan has been approved and an applicant goes to the TPB under s.16 with a proposal which goes contrary to the planning intentions for the area, he will have to put up a very strong case on individual merits, on environmental and social grounds, before he can hope to succeed.

27. Should it emerge one day that the "planning intentions" have become nothing more than a pious hope, an illusion, it is possible that a Town Planning Appeal Board may say: "The planning objectives have not and can never be achieved; let market forces alone dictate land use in the area and let the appeal be allowed".

28. We are not, as yet, close to that point. We would therefore dismiss this appeal and confirm the decision of the TPB on the first of the four grounds stated in the letter of 20 July 1993, namely, that the development is not in line with the planning intentions for the area.