

IN THE TOWN PLANNING APPEAL BOARD

Town Planning Appeal No. 2 of 2007

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BETWEEN

CHEUNG CHI-KIN

Appellant

and

THE TOWN PLANNING BOARD

Respondent

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Appeal Board : Ms. Teresa CHENG Yeuk-wah, BBS, SC, JP (Chairman)  
Mr. Paul CHAN Kam-cheung, JP  
Ir. Dr. LI Chi-kwong  
Mr. Derek Emory YEUNG Ting-lap  
Mr. Stephen YIP Chun-nam, MH, JP

In Attendance : Miss Christine PANG (Secretary)

Representation : Mr. CHEUNG Chi-keung in person  
Mr. Gerald WU for the Respondent

Date of Hearing : 27<sup>th</sup> April 2009

Date of Decision : 28<sup>th</sup> September 2009

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## DECISION

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1. This is an appeal by the Appellant pursuant to Section 17B of the Town Planning Ordinance (“the Ordinance”) against the decision of the Town Planning Board (“TPB”) on an application for review of the TPB Decision not to entertain the planning application made by the Appellant under Section 16 of the Ordinance.

### **Background**

2. The site in question comprises Lots 287 (Part), 296 (Part), 298 (Part), 301 (Part), 302 S.A, 302 R.P., 303, 304, 306 and 307 (Part) in D.D. 119, Shan Ha Tsuen, Yuen Long (“the Site”). The various private lots were held under the Block Government Lease and demised for agricultural use. The Appellant leased the site from the land owners and has been using it since 2004.
3. In 2004, there was an application by the Appellant under Section 16 which was refused by the TPB and on application for a review of the TPB Decision, the application for review was also rejected. As a result, the Appellant appealed to the Town Planning Appeal Board (“Appeal Board”) and this was dealt with as Town Planning Appeal No. 6 of 2005. The Appeal Board in its Decision dated 23<sup>rd</sup> June 2006 dismissed the appeal by the Appellant.

4. The Site was used by the Appellant since 2004 for the same purpose and in the same modus operandi up until now. In this appeal, the Appellant suggested that the use was one of temporary recycling materials transfer station (循環再造物料轉運站). The application was for approval for the use to be allowed for a period of three years.
5. In the application under Section 16, the Appellant was represented by the Authorised Agent, E & S Management Consultants Ltd. The Appeal Board notes that this is the same consultant that represented the Appellant in the appeal under Town Planning Appeal No. 6 of 2005. Attached to Form No. S16-3 dated 19<sup>th</sup> July 2006 (application number: A/YL-TYST/331) is a supplementary statement prepared by the consultant.
6. The TPB rejected the application under Section 16 on the 15<sup>th</sup> of September 2006 and notified the Appellant in a letter dated 29<sup>th</sup> September 2006.
7. The Appellant applied for a review under Section 17 in its application for review dated 4<sup>th</sup> October 2006. The TPB reviewed its earlier Decision and dismissed the application for review on 22<sup>nd</sup> December 2006.
8. The Appellant was notified of the decision of the review on 12<sup>th</sup> January 2007 and on 17<sup>th</sup> of January 2007 the Appellant applied for an appeal to the Town Planning Appeal Board under Section 17B(1) of the Ordinance.

## The Site

9. The location of the Site has been described above and comprises about 12,500 square metre of land.
10. The use of the Site was described as temporary recycling materials transfer station with the Site divided into areas for storage, four trailer waiting bays and six loading/unloading spaces according to the Appellant.
11. The site falls within an area zoned Village Type Development ("V") on the Approved Tong Yan Sang Tsuen Outline Zoning Plan (OZP). The planning intention stated in the Schedule of Uses of the OZP is:

### Planning Intention

*The planning intention of this zone is to designate both existing recognized villages and areas of land considered suitable for village expansion. Land within this zone is primarily intended for development of Small Houses by indigenous villagers. It is also intended to concentrate village type development within this zone for a more orderly development pattern, efficient use of land and provision of infrastructures and services. Selected commercial and community uses serving the needs of the villagers and in support of the village development are always permitted on the ground floor of a New Territories Exempted House. Other commercial, community and recreational uses may be permitted on application to the Town Planning Board.*

12. In the Explanatory Statement to the OZP, the following provisions are to be noted :

7.2.1 *With the improvement in accessibility, there has been a rapid proliferation of open storage uses (e.g. storage of building materials, machinery) and car stripping yards in the Area, particularly along Castle Peak Road, Tan Kwai Tsuen Road and Kung Um Road. Such uses have prejudiced the Government's land-use intention in the Area.*

7.2.2 *The proliferation of open storage and workshop uses has led to a degradation of the environment and created a number of problems such as air and stream pollution, flooding, traffic congestion and visual blight. More orderly development of land for open storage uses that cannot be accommodated in conventional godown premises is necessary to cater for the growing demand.*

7.2.5 *Since there are three recognized villages in the Area, sufficient land has to be reserved for the future expansion of these existing villages.*

13. At the time of the application under Section 16, there was one objection filed by the villages in Shan Ha Tsuen (山下村). By the time of the application for review, another 11 objections were filed. These objections were in the same format and signed by different people.

### **Open Storage**

14. In order to determine which guidelines or principles should be applied, it is first necessary to ascertain the actual nature of the Site. Whilst the description of the use is that of temporary recycling materials transfer station, there is no dispute that there are only four covered areas and the vast majority of the Site was actually used as open storage. 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

(TPB PG-No. 13D), where a site contains storage areas exceeding 50% of the site in open space, it will be defined as open storage use. Furthermore, according to the description of the Appellant in relation to how the site was used, it was really to store the materials so that they can then be picked up and delivered to other areas. As a result, whether by definition or as a matter of fact, the Appeal Board has no hesitation in concluding that it is an open storage use.

15. This was also the finding of the former Appeal Board (“the Board”) in 2006.
16. This Appeal Board’s attention was drawn to TPB PG-No. 13D promulgated by the TPB in November 2005 where planning guidelines for open storage areas are laid down. It categorises areas used for open storage into four categories. The subject Site is designated as Category 4. The criteria governing whether an area designated as Category 4 can be used as an open storage are :

2.5 *Category 4 areas are areas with ponds or wetland or with extensive vegetation or close to environmentally or ecologically sensitive areas, areas which are mostly used for residential purpose or proposed for such purposes, areas near existing major village settlements or areas subject to extremely high flooding risk. Applications for open storage and port back-up uses in Category 4 areas would normally be rejected except under exceptional circumstances. For applications on sites with previous planning approvals, and subject to no adverse departmental comments and local objections, sympathetic consideration may be given if the applicants have demonstrated genuine efforts in compliance with approval*

*conditions of the previous planning applications and included in the applications relevant technical assessments/proposals, if required, to demonstrate that the proposed uses would not generate adverse drainage, traffic, visual, landscaping and environmental impacts on the surrounding areas. The intention is however to encourage the phasing out of such non-conforming uses as early as possible. Since the planning intention of Category 4 areas is to phase out the open storage and port back-up uses, a maximum period of 2 years may be allowed upon renewal of planning permission for an applicant to identify suitable sites for relocation. No further renewal of approval will be given unless under very exceptional circumstances and each application for renewal of approval will be assessed on its individual merit.*

### **No Special Circumstances**

17. The Appellant is unable to adduce any argument or evidence that there is any special circumstances which would justify the application. For instance, no area of similar category has been approved by the TPB for use as open storage, there were a number of objections from the villagers and importantly, the Appellant failed to submit the necessary assessment or proposal to justify that there is no adverse impact on the environment, the drainage and the traffic.
  
18. The TPB also pointed out that the use of the subject site as an open storage would not be compatible with the surrounding areas. To the northwest and west of the site is Shan Ha Tsuen; in the southeast, there is a few houses that have been built and some are actually completed. There are also other applications for village type houses which are being

processed. As a result, the Appeal Board accepts that the use of the subject site as an open storage area would hinder the orderly development of the village in the area.

19. The TPB refers back to paragraph 7.2.1 of the Explanatory Note of the OZP highlighting that the increased use of open storage in the area will prejudice the Government's land use intention in the Area.
20. There was a supplementary statement that was attached to the Section 16 application. However, that supplementary statement merely provides a sketchy plan showing the layout of the Site but fails to identify how the drainage within the subject Site would be connected to the public drainage system. The Appellant pointed out that since the Appeal Board Decision in 2006 was rendered, there was some change namely certain drainage works were being constructed to the southeast and east of the Site. There is, however, still no information provided to show that such drainage works was for public drainage as opposed to drainage works connecting certain houses to the public drainage system nor is there any evidence or explanation how that would be connected to the subject Site in any event.
21. There is also no assessment of the impact on transport save and except to point out that there would be six lorries being used per day.
22. Furthermore, insofar as the impact on the environment is concerned, and given that the materials that are being stored pending pickup and transferred to other locations include computer waste and other electronic waste products which may deteriorate in a way such as to contaminate the

water and soil, the Appellant also failed to provide any assessment to show that either such impact would not arise or that there are measures that would address them.

23. In the premises, the Appeal Board is not satisfied that there is any justifiable reason for granting this appeal.
24. There is also a concern about establishing a precedent for others similar situations such as a Category 4 area whereby open storage space is allowed in the absence of any special circumstances or justification on how the drainage, environment and traffic impact would be addressed.
25. The Appellant called one witness (張錦光) who gave evidence saying that he does not object to the development. He also pointed out that in fact one of the objection letter allegedly signed by one villager (張洪勳) was actually not signed by him. Be that as it may, the Appeal Board still considers that there are still a number of objections and importantly, the Planning Guidelines are not complied with in this application.
26. In the submissions of the Appellant, he pleaded that he has no more financial resources to fund any other studies as it has been used up in engaging the consultants (the Appeal Board notes that the consultant has been engaged in the 2004 as well as in this application). Whilst the Appeal Board sympathizes with the financial position of the Appellant, that is not justifiable in granting the appeal. The Appellant also suggested that if the appeal is allowed, he will then make submissions on how to

address the environment, drainage and traffic impact. The Appeal Board does not accept that, as without such justifications, the application and appeal could not be allowed. It is up to the Appellant to prepare such assessments and studies and provide proposals to address these possible impacts and submit them with the application rather than to provide them after an application is allowed. The Appellant ought to be aware of that given that he has been notified of the same points in his 2004 application and in this application.

27. The Appellant also pointed out that he could submit further new evidence regarding the support of his application from the villagers in due course. The Appeal Board reminded the Appellant that he had been notified of the need to file documentary as well as witness evidence well before the hearing. The Appellant accepted that he was aware of that but he has simply failed to do so. The Appeal Board is not minded to allow further evidence to be adduced because even if there were support from the villagers, the planning intention and guidelines would still have to be complied with. The objection or support from the villagers is one of the many factors that have to be considered and is not overriding.

### **Conclusion**

28. We dismiss the Appeal of the Appellant.

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Ms. Teresa CHENG Yeuk-wah, BBS, SC, JP  
(Chairman)

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Mr. Paul CHAN Kam-cheung, JP  
(Member)

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Ir. Dr. LI Chi-kwong  
(Member)

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Mr. Derek Emory YEUNG Ting-lap  
(Member)

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Mr. Stephen YIP Chun-nam, MH, JP  
(Member)

城市規劃上訴委員會  
城市規劃上訴個案編號：2007 年第 2 號

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有關

張子健先生

上訴人

與

城市規劃委員會

答辯人

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上訴委員會：鄭若驩女士，B.B.S.，S.C.，J.P.（主席）  
陳錦祥先生，J.P.  
李志光博士  
楊鼎立先生  
葉振南先生，M.H.，J.P.

列席者：彭燕卿女士（秘書）

代表：張子健先生（親自應訊）  
吳旭峰先生（答辯人的代表）

聆訊日期：2009 年 4 月 27 日

裁決日期：2009 年 9 月 28 日

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## 裁 決

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1. 這宗上訴是上訴人依據《城市規劃條例》(下稱「條例」)第 17B 條提出，反對城市規劃委員會(下稱「城規會」)對覆核申請所作的決定，即決定不受理上訴人根據條例第 16 條提出的規劃申請。

### 背景

2. 有關地點涵蓋元朗山下村第 119 約地段第 287 號(部分)、296 號(部分)、298 號(部分)、301 號(部分)、302 號 A 分段、302 號餘段、303 號、304 號、306 號和 307 號(部分)(下稱「有關地點」)。有關地點的各個私人地段是根據政府集體租契持有並批租作農業用途的。上訴人自 2004 年起向土地擁有人租用有關地點。
3. 2004 年，上訴人依據第 16 條向城規會提出的申請遭拒，而覆核城規會裁決的申請亦遭拒絕。因此，上訴人向城市規劃上訴委員會(下稱「上訴委員會」)提出上訴，個案列為城市規劃上訴個案編號 2005 年第 6 號審理。上訴委員會於 2006 年 6 月 23 日作出裁決，駁回上訴人的上訴。
4. 有關地點自 2004 年起至今一直由上訴人按同一用途及同一運作模式使用。在本上訴中，上訴人申請批准把有關地點作臨時循環再造物料轉運站用途，為期三年。
5. 在依據第 16 條提出的申請中，上訴人由獲授權代理的嘉順管理顧問有限公司代表。上訴委員會注意到這是城市規劃上訴個案編號 2005 年第 6 號的上訴案中代表上訴人的同一間顧問公司。隨日期為 2006 年 7 月 19 日的第 S16-3 號表格(申請編號:A/YL-TYST/331)付上的說明書由該顧問公司擬備。
6. 城規會於 2006 年 9 月 15 日拒絕上訴人依據第 16 條所提出的申請，並於 2006 年 9 月 29 日致函通知上訴人。
7. 上訴人在 2006 年 10 月 4 日提交覆核申請書，依據第 17 條申請覆

核。城規會覆核之前的裁決，並於 2006 年 12 月 22 日駁回覆核申請。

8. 上訴人於 2007 年 1 月 12 日獲告知覆核的裁決結果，並於 2007 年 1 月 17 日根據條例第 17B(1)條向上訴委員會提出上訴。

### **有關地點**

9. 有關地點的位置已載於上文，有關地點佔地約 12 500 平方米。
10. 據上訴人所述，有關地點作臨時循環再造物料轉運站用途，並分為貯物、4 個拖車等候位及 6 個上落客貨車位等範圍。
11. 有關地點在唐人新村分區計劃大綱核准圖(下稱「分區計劃大綱圖」)上坐落「鄉村式發展」地帶。該分區計劃大綱圖的土地用途表內所訂明的有關規劃意向如下：

#### 規劃意向

*此地帶的規劃意向，是就現有的認可鄉村和適宜作鄉村擴展的土地劃定界線。地帶內的土地，主要預算供原居村民興建小型屋宇之用。設立此地帶的目的，亦是要把鄉村式發展集中在地帶內，使發展模式較具條理。而在土地運用及基礎設施和服務的提供方面，較具經濟效益。在新界豁免管制屋宇的地面一層，有多項配合村民需要和鄉村發展的商業和社區用途列為經常准許的用途。其他商業、社區和康樂用途，如向城市規劃委員會申請許可，或會獲得批准。*

12. 在該分區計劃大綱圖的《說明書》中，須注意下列條文：

*7.2.1 由於交通日益便利，該區的露天貯物場(存放建築物料、機器等)及拆車場急劇增加，難於控制。這個情況尤以青山公路、丹桂村路及公庵路一帶最*

為明顯。上述用途妨礙政府為該區訂立的土地用途意向。

7.2.2 違例的露天貯物及工場用途湧現，令該區的環境惡化，並造成若干問題，例如空氣及河流污染、洪泛、交通擠塞及景觀受破壞等。為了應付需求的上升，作露天貯物用途的土地須更有條理地發展，以供貯存不能存放於一般倉庫的貨物。

7.2.5 該區有三條認可鄉村，當局須預留足夠土地，供這些現有鄉村日後擴展之用。

13. 上訴人依據第 16 條提出申請時，當局接獲一份由山下村村民遞交的反對書。當提出覆核申請時，當局另接獲 11 份格式劃一並由不同人士簽署的反對書。

### **露天貯物**

14. 在決定應採用什麼指引或原則時，首先需確定有關地點的實際性質。雖然根據有關用途的描述，該地點用作臨時循環再造物料轉運站，實際上該處只有 4 個有蓋範圍，而大部分地方已用作露天貯物，這一點無庸置疑。根據「擬作露天貯物及港口後勤用途而按照城市規劃條例第 16 條提出的規劃申請」的城市規劃委員會規劃指引(城規會規劃指引編號 13D)，如某地點用作露天貯物的土地超過總面積的 50%，則該地點會被界定為作露天貯物用途。此外，據上訴人所描述有關地點的使用情況，有關地點確實用作貯存物料，然後把物料裝運送往其他地區。因此，不論根據定義或事實，上訴委員會均毫不猶豫地裁定這是露天貯物用途。
15. 這也是前上訴委員會於 2006 年所作出的裁斷。
16. 上訴委員會留意到城規會於 2005 年 11 月所頒布的城規會規劃指引編號 13D 內，所訂定有關露天貯物方面的規劃指引。該指引把露天貯物地區分為 4 個類別，有關地點屬於第 4 類地區。屬於第 4 類地區的土地可否用作露天貯物受下述準則規管：

- 2.5 第4類地區是指有魚塘或濕地或植物茂盛或毗鄰環境或生態易受破壞的地區；大部分用作或擬議用作住宅用途的地區；位於現有主要鄉村民居附近的地區；或水浸機會極高的地區。除非情況特殊，否則第4類地區內的露天貯物及港口後勤用途申請通常會遭否決。如果申請地點先前曾獲批給規劃許可，各政府部門又沒有負面意見，以及附近居民亦不予反對，而申請人確曾盡力履行先前規劃許可的附帶條件，並且因應需要在提交申請書時一併附上相關的技術評估／建議，以證明擬議用途不會對附近地區的排水、交通、視覺、景觀和環境造成不良影響，則城規會或會從寬考慮有關申請。然而，第4類地區的規劃意向是鼓勵盡早取締這類不協調的用途。由於第4類地區的規劃意向是逐步取締露天貯物及港口後勤用途，因此城規會在考慮規劃許可的續期申請時，可能只會批給有效期最長2年的規劃許可，讓申請人有時間另覓合適地把有關用途遷往別處。除非常特殊的情況外，否則規劃許可不會再獲續期。城規會會按個別情況審批每宗續期申請。

### **沒有特殊情況**

17. 上訴人未能提出任何論點或證據，顯示有任何特殊的情況足以支持這宗申請。舉例來說，過往並沒有類別相若的地區獲城規會批准作露天貯物用途；有多份村民提交的反對書；而重要的是，上訴人未能提交所需的評估或建議，以證明有關發展不會對環境、排水及交通造成不良影響。
18. 城規會亦指出，把有關地點用作露天貯物與附近地區不相協調。有關用地的西北及西面是山下村，東南面有幾間已經興建甚至已建成的屋宇。當局亦正處理其他興建村屋的申請。因此，上訴委員會接納，如把有關地點用作露天貯物用地，會妨礙該區的鄉村

有條理地發展。

19. 上訴委員會引述《說明書》第 7.2.1 段，其中強調把該區更多土地作露天貯物用途會妨礙政府為該區訂立的土地用途意向。
20. 上訴人隨第 16 條申請夾附了一份說明書，但該說明書只提供有關地點的平面草圖，沒有標示有關地點內的排水渠如何接駁公共排水系統。上訴人指出，自上訴委員會於 2006 年頒布裁決以來，情況有些變化，有關地點的東南和東面正進行若干排水工程。然而，上訴人仍沒有提供資料以顯示有關排水工程是屬於公共排水工程，而不是把某些屋宇的排水系統接駁至公共排水系統的工程；無論如何，上訴人根本沒有提供任何證據或解釋該等排水工程會如何接駁至有關地點。
21. 上訴人亦沒有提交有關的交通影響評估，只提到每天會使用 6 架貨車。
22. 此外，在環境影響方面，正在貯存有待裝運送往其他地方的物料，包括廢棄的電腦及其他電子產品可能會進一步損壞，致使水質及泥土受污染，在這方面上訴人亦未能提供任何評估，以顯示不會造成這類影響，或有措施可解決有關問題。
23. 基於上文所述，上訴委員會不認為有充分理由判本上訴得直。
24. 上訴委員會亦擔心會為其他同類情況立下不良先例，例如在缺乏任何特殊情況或理據以解釋如何解決對排水、環境及交通問題的情況下，容許例如第 4 類地區作露天貯物。
25. 上訴人傳召證人張錦光作供，張先生表示他不反對該項發展。他亦指出其中一封聲稱由一位署名張洪勳的村民簽署的反對信其實並非由他本人簽署。即使是這樣，上訴委員會仍認為尚有多份反對書，而重要的是，這宗申請不符合規劃指引。
26. 上訴人在其陳詞中申辯，為了財委聘顧問公司(上訴委員會注意到，上訴人在 2004 年及本申請中均委聘該顧問公司)，所有資金均已用罄，所以已沒有財力進行任何其他研究。對於上訴人的財政狀況，上訴委員會表示同情，但這不能成為判上訴得直的理據。

上訴人亦提議如上訴得直，他會提交建議書，交代如何解決對環境、排水及交通的影響。上訴委員會不接納其提議，因為如沒有這方面的理據，上訴委員會不能批准申請並判上訴得直。上訴人理應擬備有關的評估及研究報告，並提交建議書，以交代如何解決這些可能造成的影響，有關文件應連同申請書一併提交，而非在申請獲得批准後才提供。上訴人應已知悉有關程序，因為他在2004年的申請及這宗申請中均獲告知這一點。

27. 上訴人亦指出，他可於稍後提交新證據，證明村民支持其申請。上訴委員會提醒上訴人，村民們已獲告知須於聆訊前呈交文件及證人供詞。上訴人承認他知悉有關程序，只是他沒有這樣做。上訴委員會不擬批准上訴人呈交進一步的證據，因為即使有村民對申請表示支持，有關申請仍須符合規劃意向及指引。村民表示反對或支持是眾多考慮因素之一，但這不具凌駕性。

## 結論

28. 本會決定駁回上訴人的上訴。

(已簽署)

鄭若驊女士，B.B.S.，S.C.，J.P.

(主席)

(已簽署)

陳錦祥先生，J.P.

(委員)

(已簽署)

李志光博士

(委員)

(已簽署)

楊鼎立先生

(委員)

(已簽署)

葉振南先生，M.H.，J.P.

(委員)