

IN THE TOWN PLANNING APPEAL BOARD

Town Planning Appeal No. 9 of 2009

BETWEEN

TANG PING FAI

Appellant

and

TOWN PLANNING BOARD

Respondent

Appeal Board : Mr. Patrick FUNG Pak Tung, SC (Chairman)

Dr. HUNG Wing Tat, MH (Member)

Mr. David LAM Tai Wai, JP (Member)

Mr. Eddie LEE Chung Keung, BBS, JP (Member)

Dr. LI Ling Hin (Member)

In Attendance : Ms Suan MAN (Secretary)

Representation:

Mr. Harrison CHEUNG Chi Hung (instructed by Mr. LAU Yue Sum of Messrs. Y.S. Lau & Partners) for the Appellant

Ms Jess CHAN Yuk Ching, Government Counsel
(Department of Justice), for the Respondent

Date of Hearing : 7th and 29th June 2010

Date of Decision : 23 August 2010

DECISION

This Appeal

1. This is an appeal by Mr. TANG Ping Fai (**the Appellant**) against the refusal of the Town Planning Board (**the TPB**) of an application by him to use certain pieces of land as a temporary vehicle park for container vehicles and open storage of construction materials (**the Proposed Use**) for a period of 3 years.

The Application Site

2. The application by the Appellant to the TPB under section 16 of the Town Planning Ordinance (**the Ordinance**) and this appeal concerns several pieces of land registered and known as “Lots 894RP (Part), 895 (Part), 967, 968, 969, 970, 971RP (Part), 973RP (Part), 1299RP (Part), 1302 RP and Adjoining Government Land in D.D. 122, Ping Shan, Yuen Long, New Territories (**the Site**)” .
3. In the Application Form No. S16 - 3 which was received by the TPB on 11th September 2008 and given the Application No.

A/YL-PS/290, the Appellant stated that he was not a “current land owner” . He also stated that he had taken steps to obtain the consent or give notification to the owner(s) of the Site by sending by local recorded delivery mail to the Ping Shan Rural Committee on 13th August 2008 the application notice and also posted the same outside the Site on the same date. He further stated that his proposed development schedule involved, inter alia, about 8,127 square metres of uncovered land area.

4. According to Mr. Lam Wing-man (**Mr. Lam**), Senior Town Planner/Central of the Tuen Mun and Yuen Long District Planning Office, Planning Department, who gave evidence for the TPB, the Site could be divided into the northern and southern parts. Prior to 5th May 2010, the northern part was observed to be vacant and the southern part was used for the parking of container vehicles, trailers, tractors and private cars. On an inspection conducted on 5th May 2010, it was observed that :-

- (a) the northern part of the Site was fenced off. There were 6 single-storey container-converted structures placed at the southern and north-eastern corners. The remaining open area was left vacant; and

- (b) the southern part of the Site was used for the

parking of the same sorts of vehicles as before but, in addition, there were two single-storey container-converted structures for site offices and one vacant container located at its eastern edge near the entranced exit point of the Site.

Such evidence has not been disputed by the Appellant who also gave evidence. He plainly admitted that the Site or parts thereof has been used for the parking of container vehicles for quite a long time without permission from the relevant authorities.

5. The access to the Site is via a local track to the east which connects to Long Ping Road.
6. According to Mr. Lam, the areas surrounding the Site can be described as follows : -
 - (a) to its immediate north-west, west and south-west are residential dwellings. Further west are vacant land with residential dwellings intermixed with open storage yards, container vehicle parks, and a vehicle repair workshop. Most of them are suspected unauthorized developments subject to further investigation and enforcement action by the Planning Authority. To its north-west across the West Rail Viaduct is Wing Ning Tsuen and vacant land;

- (b) to its east across a local track are vacant land, a grave, a small trailer park, a residential dwelling and the West Rail emergency access point;
- (c) to its north across the West Rail Viaduct is a small container trailer park, residential settlements intermixed with cultivated land; and
- (d) to its south, it is bounded by Long Ping Road.

The above can be clearly seen from the plans and aerial photos adduced in evidence.

Zoning of the Site

- 7. The relevant town plan is the approved Ping Shan OZP No. S/YL - PS 11 (**the OZP**) which was published in the Gazette on 18th February 2005. The Site falls within an area zoned “Undetermined” (“U”) in the OZP.
- 8. We shall come back to the question of zoning and planning intention later.

The Applications under the Ordinance

- 9. The Appellant lodged its application to the TPB under section

16 of the Ordinance on 11th September 2008.

10. The Rural and New Town Planning Committee (RNTPC) of the TPB deliberated upon the Appellant's application and decided to reject it. By a letter dated 9th January 2009, from the TPB to the Appellant, he was informed of the rejection of his application and the reasons therefore as follows : -

“ (a) the development is not compatible with the surrounding areas, in particular the nearby residential structures;

(b) the application is not in line with the TPB Guidelines No. 13E as there is insufficient information to demonstrate that the proposed development would not have adverse traffic and environmental impacts on the surrounding areas, and there are adverse departmental comments and local objections on the application; and

(c) the approval of this planning application would set an undesirable precedent for similar applications in the eastern part of the “Undetermined” zone. The cumulative effects of approving these similar applications would result in degradation of the environment in the area.”

11. On 28th January 2009, the Appellant applied to the TPB under section 17 (1) of the Ordinance for a review of the RNTPC's decision to reject his application.
12. After some deferment of the review hearing at the request of the Appellant, it eventually came on 11th September 2009. Having considered the new materials presented by the Appellant and his submissions, the TPB decided to reject the review application for the same reasons of the RNTPC. The Appellant was duly so informed by the TPB by letter dated 25th September 2009.
13. On 24th November 2009, the Appellant lodged the present appeal.

The Appeal

14. In the course of the appeal, a lot of emphasis was put by the respective parties on the questions of frequency of traffic, noise levels and disturbance to residents in dwellings in the neighbourhood.
15. The Appellant called Mr. Ho Kai-Cheung, Derek (**Mr. Ho**), an environmental consultant, to give evidence on his behalf. Mr. Ho produced environmental assessment reports and gave evidence to the effect that the noise to be produced by the activities on the Site and by the traffic to and from the Site

would not have any serious effect on the neighbours. In that regard, the Appellant has also offered to build a 2½-metre wall surrounding almost the entirety of the Site and also another one within the Site at the proposed loading and unloading area. The Appellant has further produced letters of support signed by a lot of the residents in the dwellings to the north-west, west and south-west of the Site and also letters of support from Mr. TANG Hing Ip, a Yuen Long District Council member, and Mr. TANG Yun Chor, the Vice-Chairman of the Yuen Long District Council and Chairman of the Ping Shan Village Committee. The Appellant has also offered to pave the surface of the Site so as to minimize the effect of dust. It is to be noted that we are not certain whether all the residents in the relevant neighbourhood have signed the letters of support produced by the Appellant.

16. On the other hand, the TPB has produced letters of objection by 8 villagers of Wing Ning Tsuen to the north of the Site who have objected to the proposed development on the Site on the grounds that it would damage the existing drainage facilities and thus liable to cause flooding and the breeding of mosquitoes. It has also been pointed out that whilst the Drainage Services Department has no objection in principle to the proposed development, it has set out a number of requirements which the Appellant would have to comply with before the application should be approved. The

Environmental Protection Department has expressed its concerns about noise nuisances which may be caused by the proposed development.

17. On reviewing all the evidence, especially the new evidence adduced by the Appellant at the adjourned hearing of this appeal, we feel that the Appellant has at least an arguable case against the points raised by the TPB regarding the environmental factors. If that had been the only consideration, we might possibly have allowed the appeal and allowed the Appellant's application to use the Site for the specified purposes for a limited period of time whilst imposing stringent conditions which the Appellant must comply with. This, however, is not the end of the matter.

The Planning Intention

18. The Site is situated within an area which has been zoned "U" in the OZP.
19. It is trite that both the Plan and the Notes thereto form part of the OZP. Paragraph (13) of the Notes reads as follows : -

 “(13) In the “ Undetermined ” zone, all uses or developments except those specified in paragraphs (8) and (11)(a) above require permission from the Town Planning Board.”

Paragraphs (8) and (11)(a) of the Notes have no relevance to the present case.

20. It is also trite that the Explanatory Statement accompanying an outline zoning plan also has relevance when an application or an appeal is being considered by the TPB or the Town Planning Appeal Board respectively. In **Henderson Real Estate Agency Ltd. v. Lo Chai Wan** (1996) 7 HKPLR 1, Lord Lloyd of Berwick in the judgment of the majority of Judicial Committee of the Privy Council said at p. 13D as follows :-

“The Explanatory Statement is expressly stated *not* to be part of the plan. But it does not follow that it was not a material consideration for the Appeal Board to take into account, even though... the Ordinance does not contain a provision, corresponding to s 72 of the Town and Country Planning Act 1990, or cl 38(2) of the new Town Planning Bill, requiring the Town Planning Board and the Appeal Board to have regard to material considerations.

By the same token, the 1992 and 1993 guidelines are also material considerations to be taken into account. The Appeal Board was not bound to follow the Explanatory Statement or the guidelines. But they could not be disregarded.”

21. In the Explanatory Statement accompanying the OZP, the following paragraphs appear :-

“8. GENERAL PLANNING INTENTION

8.1 A large portion of the rural area in Ping Shan has been subjected to “urban transition” uses such as open storage, godown and workshop uses. As the Corridor Area falls outside new towns and has not been given priority in Government’s overall development strategy, public expenditure on the provision of major infrastructure facilities in the Area will be limited. With improvement in accessibility due to committed and planned transport links, these areas have potential in the long run for more comprehensive and orderly sub-urban development through public and private initiatives. As such, the general planning intentions for Ping Shan area are:

- (a) to encourage upgrading of the environment through comprehensively planned developments;

.....”

“9.13 Undetermined (“U”) : Total Area: 53.45 ha

9.13.1 This zone denotes areas where detailed planning studies are required as these areas were affected by the WR alignment.

9.13.2 Within the “ U ” zone, any developments or redevelopments are required to prepare MLPs for approval of the Board to ensure that the future planning of the area would not be jeopardized, the environment would not be adversely affected and the infrastructure, GIC facilities and open spaces are adequately provided. The MLPs should take into account the railway alignment. The type of development should be compatible with the surrounding area and the development intensity should take into account the rural characteristics of the area. Environmental Impact Assessment should be undertaken to address the possible environmental impact from the WR. Necessary

mitigation measures should also be provided to minimize the adverse impact generated by and/or on the proposed development.

9.13.3 The areas to the west of Tin Sam, to the east of Hung Tin Road and south of Ping Ha Road, and to the south of Tin Fuk Road and east of Long Tin Road are zoned “U” . At present, the sites are mainly occupied by temporary structures, abandoned farmland, open storage of containers, workshops and village houses. ”

22. Thus, it is quite clear that the planning intention on the part of Government is to upgrade the environment in Ping Shan through comprehensively planned developments and the area which has been zoned “U” would be subject to such comprehensive planning.
23. In May 2010, the Planning Department produced a consultation paper in Chinese entitled 「屏山鄉的土地用途檢討及相關建議」 (**the Proposal**) to the Yuen Long District Council for its discussion and comments. Paragraph 3 thereof reads as follows : -

“3. 土地用途檢討”

屏山鄉土地用途檢討資料及初步建議簡介如下：

土地 A (圖 A1 和 A2)

- (a) A1 項 – 擬把庸園路珠穆朗瑪多元文化社區中心改劃為「政府、機構或社區」地帶

珠穆朗瑪多元文化社區中心，發展落成至今已運作數年。此發展項目成為促進社會交流，並為少數族裔提供教育和培訓的地點。改劃為「政府、機構或社區」地帶的建議旨在反映核准計劃和該地點的現有用途。

- (b) A2 項 – 擬把庸園路兩座小圓丘連同北緣西鐵高架鐵路下的狹長土地改劃為「綠化地帶」(約 4.36 公頃)

該區中部兩座小圓丘，主要位於政府土地上 (1.16 公頃)，長滿樹和草木，還有一些果樹。把兩座小圓丘改劃為「綠化地帶」，便更妥善保育其自然環境。

西鐵下方狹長土地長約 900 米，闊約 36 米 (約 3.2 公頃)，亦建議改劃為「綠化地帶」，以提供美化市容設施，以及作為西鐵與毗連民居的緩

衝區。

- (c) A3 項 - 擬把土地兩個西鐵緊急出入口改劃為「道路」用地 (約公頃)

建議把此地點顯示為「鐵路／道路」用地，以反映現有用途。

- (d) A4 項 - 擬把土地 A 餘下部分改劃為「綜合發展區」地帶 (約 22 公頃)

該區東部和西部的土地主要用作臨時停車場、露天貯物場，環境質素欠佳。中部有夾雜工場的住屋群。由於未必能立即淘汰所有不相協調用途，因此，建議把該區改劃為三個「綜合發展區」地帶 (約 8.3、5.1 及 8.6 公頃)，作低層和低密度發展，以便全面提升該區的質素和納入適當的規劃管制。發展商日後須提交總綱發展藍圖並進行所需的技術評估，供「城市規劃委員會」審批。建議在該地帶發展可獲最高地積比率 0.4 倍以提供發展誘因，但最高建築物高度限制為三層高，配合鄉郊環境。”

24. The intention of the Planning Department is to clear the area within the “U” zone of undesirable elements such as temporary vehicle parks and open storage lots and have the zone consisting of about 22 hectares divided into 3 Comprehensive Development Areas (CDAs) for upgraded and low-density development. Such areas are to blend in

with proposed “Green Belt” and “Government, Institution or Community” zones.

25. In evidence, Mr. Lam said that the consultation period was not long and that the Planning Department was intending to submit the Proposal to the TPB for approval in June or July this year.
26. In such circumstances, we feel that it is inappropriate for us to accede to the application of the Appellant, otherwise it will have an obstructive effect on the proposed comprehensive development of the area.
27. We should add that we also feel some discomfort about the fact that the north-eastern tip of the Site appears to be quite close to the MTR emergency access point of the West Rail. However, since there does not appear to be any adverse comment by any government department and the TPB does not seem to place much reliance on the point, we will say no more about it.
28. The Appellant relies on two decisions of this Board (differently constituted from the present) delivered in 2008, namely, those in Town Planning Appeal No. 19 of 2005 and Town Planning Appeal No. 20 of 2005 which were both delivered on 28th March 2008, in which the Board by a majority of 4 to 1 granted permission to the appellants in those cases to use certain land in the same locality as the Site but quite far away from it as temporary container vehicle and

lorry parks upon conditions. Suffice it for us to say that the facts in those cases are not the same as in the present. What is more important is that, at the time when those Decisions were made, there was no concrete proposal by the Planning Department about the use of the “U” zone. Now, we have the Proposal which may be implemented quite soon. It should also be pointed out that those two Decisions were the only ones approved out of a total of 13 applications.

29. It has further been pointed out by Mr. Lam that there are adequate legal container vehicle parks not far away from the Site near the Yuen Long Industrial Estate. Thus, the needs for such facilities have been sufficiently catered for.

Conclusion

30. In all the circumstances, we dismiss the appeal by the Appellant. The parties are agreed that there should be no order as to costs one way or the other. We therefore do not need to consider that question.
31. It remains for us to thank Counsel on both sides for their detailed and helpful submissions.

Mr. Patrick FUNG Pak Tung, SC
(Chairman)

Dr. HUNG Wing Tat, MH
(Member)

Mr. David LAM Tai Wai, JP
(Member)

Mr. Eddie LEE Chung Keung, BBS, JP
(Member)

Dr. LI Ling Hin
(Member)