

IN THE TOWN PLANNING APPEAL BOARD

Town Planning Appeal No. 7 of 2008

BETWEEN

LAPSON DEVELOPMENT LIMITED

Appellant

and

TOWN PLANNING BOARD

Respondent

Appeal Board : Ms. Sylvia SIU Wing-yee JP (Chairperson)

Mr. CHUNG Chi-leong (Member)

Prof. Barnabas CHUNG Hung-kwan (Member)

Ms. Carolin FONG Suet-yuen (Member)

Ms. Ada IP Wai-ling (Member)

In Attendance : Ms Suan MAN (Secretary)

Representation :

Mr. Raymond LEUNG Yip Hung (Top Bright Consultants Ltd.) and
Mr. TANG King Kwong (Pansy Leung Tang & Chua, Solicitors), for
the Appellant

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

Dates of Hearing: 24th August 2010

Date of Decision: 31st December 2010

DECISION

This Appeal

1. This is an appeal by LAPSON DEVELOPMENT LIMITED (“the Appellant”) against the refusal of the Town Planning Board (“the TPB”) of an application to use a certain piece of land as a temporary office (“the Proposed Use”) for a period of 3 years.

The Appeal Site

2. The application by the Appellant to the TPB under section 16 of the Town Planning Ordinance (“the Ordinance”) and this appeal concerns the use of the appeal / part of a larger site registered and known as “Lot 1028B (Part) in D.D. 113, Kam Tin, Yuen Long, New Territories (“the Appeal Site”).

3. In the Application Form No. A/YL-KTS/422 received by the TPB on 19th March 2008, the Appellant stated that he is not the “current land owner”.

4. According to Mr. YUEN Shing-yip, Kepler (“Mr. Yuen”), Senior Town Planner/East of the Tuen Mun and Yuen Long District Planning Office, Planning Department, who gave evidence for the TPB, the Appeal Site falls within an area zoned “Agriculture” (“AGR”) (about 96%) with a minor portion zoned “Village Type Development”(“V”) (about 4%). It has an area of about 489 m², comprises one private lot, which is held under Block Government Lease and demised for agricultural use. It is located to the west of Kam Ho Road. The access to the Appeal Site is via a local track leading to Kam Ho Road to the east. On an inspection conducted on 8th July 2010, it was observed that :-
 - i) The Appeal Site was occupied by 4 one-storey container-converted structures, with one for office and kitchen/cooking area use, one for meeting facilities use, one for storage (including file racks) use, and one for eating room/rest room

use. The remaining portion of the Appeal Site was unused open area;

- ii) There were supporting frames of a porch covering an area of about 361 m² with the roof panels removed; and
- iii) Such evidence was not disputed by the Appellant.

5. Mr. Yuen described the areas surrounding the Appeal Site as:-

- i) Predominantly a mixture of cultivated and fallow agricultural land, scattered residential structures, plant nursery/orchards/ green houses, ponds, open storage/storage yards, a workshop, a parking lot and vacant/unused land;
- ii) To its west, cultivated and fallow agricultural land with scattered residential structures, green houses, ponds and vacant/unused land ;
- iii) To its north, open storage yards, a few residential structures and an orchard;
- iv) To its further north and northwest, cultivated and fallow agricultural land, an orchard, scattered residential structures and vacant/unused land;

- v) To its east and south, open storage yards and vacant/unused land;
- vi) To its southwest, an existing village settlement, Ho Pui Tsuen;
- vii) To the further south, a large woodland zoned “Conservation Area” (“CA”) and the Tai Lam Country Park ; and
- viii) All of the open storage/storage yards, the workshop and the parking lot in the vicinity of the Appeal Site are either unauthorized subject to enforcement actions being taken by the Planning Authority or suspected of unauthorized use subject to further investigation.

Plans and aerial photos were adduced by Mr. Yuen to support the above.

Zoning & Planning Intention of the Appeal Site

- 6. i) The relevant town plan is the approved Kam Tin South OZP No. S/YL-KTS/11 (“**the OZP**”) which was published in the Gazette on 6th July 2007. The Appeal Site falls within an area zoned “AGR” with a minor portion zoned “V ” on the OZP.

- ii) The applied use in this appeal is neither under Column 1 nor Column 2 of “AGR” and “V” zones pursuant to the Notes of the OZP.
- iii) The Planning Intention of “AGR” zone is primarily to retain and safeguard good quality agricultural land, farm and fish ponds for agricultural purposes, and to retain fallow arable land with good potential for rehabilitation for cultivation and other agricultural purposes. “V” zone is primarily intended for development of Small Houses by indigenous villagers.

The Application

- 7. The Appellant lodged its application to the TPB under section 16 of Ordinance on 19th March 2008.
- 8. The Rural and New Town Planning Committee (RNTPC) of the TPB deliberated upon the Appellant’s application and decided to reject it on 9th May 2008. By a letter dated 23rd May 2008, the Appellant was informed by the TPB of the rejection for the following four reasons:-

- i) The development was not in line with the planning intention of the “AGR” zone which was to retain and safeguard good agricultural land for agricultural purposes. The zone was also intended to retain fallow arable land with good potential for rehabilitation. No strong justification had been given in the submission for a departure from the planning intention, even on a temporary basis;
- ii) The development was not compatible with the surrounding land uses which were predominantly rural in character with cultivated and fallow agricultural land and scattered residential structures;
- iii) There was insufficient information to demonstrate that the proposed development would not generate adverse landscape and drainage impacts on the surrounding areas; and
- iv) The approval of the application, even on a temporary basis, would set an undesirable precedent for similar applications within the “AGR” zone. The cumulative effect of approving such applications would result in a general degradation of the rural environment of the area.

9. On 4th June 2008, the Appellant applied to the TPB under section 17 (1) of the Ordinance for a review of the RNTPC's decision. The Appellant did not submit any written representation in support of the review.
10. On 23rd August 2008 after hearing the presentation by the Appellant, the TPB decided to reject the review application for the same reasons of the RNTPC and informed the Appellant by a letter dated 12th September 2008.
11. On 10th November 2008, the Appellant lodged the present appeal.

The Appeal

12. The Appellant has eight grounds of appeal, namely:
 - i) Part of the Appeal Site had been the site area for West Rail works for as long as 5 years;
 - ii) The proposed use would not adversely affect the surrounding

- land uses and nearby villagers/residents;
- iii) This case would not become the first precedent as TPB had earlier approved a vehicle park use in the neighborhood;
 - iv) The proposed use is on a temporary basis and would not contravene the planning intention;
 - v) Due to the previous paving of the area for West Rail works, the area would no longer be suitable for agricultural use;
 - vi) If the approval is to be given, the Appellant would submit technical reports on drainage, environment and traffic etc, to the satisfaction of the Government departments concerned;
 - vii) The proposed development would create employment opportunities for the nearby villagers in the economic downturn in Hong Kong; and
 - viii) Only one Yuen Long District councilor objected to the application and his objection was due to personal reason.

Re: Ground (i) Part of the Appeal Site had been the site area for West Rail works for as long as 5 years; and Ground (v) Due to the previous paving of the area for West Rail works, the area would no longer be suitable for agricultural use.

13. In the course of this appeal, Mr. Raymond Leung for the Appellant (“Mr. Leung”) emphasized that the Appeal Site and adjoining land had previously been used as work area during the West Rail construction and as such the Appeal Site and its surrounding areas had been permanently altered and rehabilitation to its original agricultural use is difficult. Mr. Leung presented aerial photos to show the Appeal Site is no longer “good” agricultural land. However, when asked by this Appeal Board whether those aerial photos reflect the present status of the Appeal Site, the Appellant admitted that they do not.

14. Mr. Yuen was able to present aerial photos taken on 24th November 2009 which shows the land immediately adjoining is under active agricultural use. He gave evidence that on his recent site visits, he saw vegetable fields and fruit trees surrounding the Appeal Site.

15. We accept the evidence adduced by Mr. Yuen, being later in time. We find that the Appeal Site & its adjoining land is capable of being rehabilitated for agricultural use.

Re: Ground (ii) The proposed use would not adversely affect the surrounding land uses and nearby villagers/residents.

16. i) Mr. Leung referred to TPB Paper No 8159 (HB/1005) p1005 and read out paragraph 4.3.3(a) of Comments of the Chief Town Planner/ Urban Design and Landscape (CTP/UD&L) in which it was stated “She has some reservations on the application.” Mr. Leung expressed concern that the application was rejected simply on that phrase.
- ii) Mr. Yuen gave evidence that the rejection was not based simply on the Chief Town Planner’s observations alone but upon many other factors.
- iii) Mr. Yuen pointed out that Mr. Leung read the sentence out of context, had Mr. Leung continued to read paragraphs 4.3.3 (b) to (d) of TPB Paper No. 8159 (HB /1006), he would have noted that the Chief Town Planner detailed her view on the application, namely:-

“ (b) The area surrounding the site is predominately rural and is characterized by mixture of undeveloped rural land and occasional village clusters with tree groups

scattered across this low-lying, open landscape.the area has a low to moderate urban influence and remains relatively tranquil...

- (c) *Although the site is relatively smaller than the site under previous application (No. A/YL-KTS/385), its scale and operation are similar to other smaller open storage yards with on-site office facilities, and therefore not compatible with the existing rural landscape character.*
- (d) *If the subject application is approved, it is likely that similar applications will be submitted for planning permission degrading the landscape quality in the area”
(emphasis underlined)*

17. We find that the proposed use will adversely affect the surrounding land uses and nearby villagers/residents.

Re: Ground (iii) This case would not become the first precedent as TPB had earlier approved a vehicle park use in the neighborhood.

18. i) Mr. Leung quoted Planning Application No A/YL-KTS/414, submitted by Top Bright Consultants Ltd. for a temporary open storage of private vehicles located to the south east of the Appeal Site, which was approved by the TPB (“the approved site”) upon review on 11th July 2008 for a period of 2 years.
- ii) Mr. Yuen’s explanation is that the location and characteristics of the approved site are distinguishable in that the approved site is closer to the main road (Kam Ho Road) and is encircled by local road and vacant land, whereas the Appeal Site as described by Mr. Yuen and particularized in paragraphs 4 & 6 above is currently predominated by cultivated and fallow farmland with scattered residential structures.
- iii) From the minutes of TPB’s meeting held on 11th July 2008, it is noted that the Planning Department did not support the application under No. A/YL-KTS/414 and the TPB in approving the application had granted a shorter period (2 years) to monitor the use of the approved site.

- iv) TPB expressed its view that regard should be given to planning circumstances particularly to each case and approving this application may set an undesirable precedent for temporary office use on similar sites.
- v) We find that the intended use would set an undesirable precedent.

Re: Ground (iv) The proposed use is on a temporary basis and would not contravene the planning intention.

19. When asked by a member of the Appeal Board whether the Appellant would continue to apply for extension at the expiration of the 3 years, Mr. Leung confirmed in no uncertain terms that the Appellant will continue to apply for the temporary use to be extended upon the expiration of 3 years if this appeal is successful.

This means the use will not be on a temporary basis.

Re: Ground (vi) If the approval is to be given, the Appellant would submit technical reports on drainage, environment and traffic, etc. to the satisfaction of the Government departments concerned

20. We find that the Appellant should have submitted the various reports to the satisfaction of the Government departments concerned without waiting for the planning approval.

Re: Ground (vii) The proposed development would create employment opportunities for the nearby villagers in the economic downturn in Hong Kong.

21. No evidence was adduced by the Appellant to support this ground, which in any case is not a valid ground.

Re: Ground (viii) Only one Yuen Long District councilor objected for personal reason.

22. As to the comments by Mr. Lai Wai Hung, Yuen Long District Councilor, we note that the two public comments were issued respectively on 3rd April 2008 and 17th June 2008 (HB/1067 and 1082) in his official capacity and not as a village representative for his own personal reasons as alleged by Mr. Leung. In any event, this is not a valid ground.

Other factors

23. The Planning Authority has been taking enforcement and prosecution actions on the unauthorized development in the vicinity of the Appeal Site. Those unauthorized developments/uses include the sites of the Appellant's two other appeals under TPA No.8/2008 and TPA No. 9/2008 which are to the further south of the Appeal Site. The Appellant has abandoned the two appeals shortly before the hearing of this appeal.

24. During the hearing of this Appeal, Mr. Leung boasted about the Appellant's committing repeated breach and payment of fines for the unauthorized use of the Appeal Site as an office. The Appeal Board finds such conduct unacceptable.

25. Despite the Appellant's assertion that it has occupied the Appeal Site since August 2006, Mr. Leung could not explain why site photos taken in March and June/August 2008 (at HB/1074 & 1016 respectively) showed that the Appeal Site was occupied by “簡明農業貿易公司” (Kan Ming Agricultural Trading Co). It was only from

paragraph 5 of the Appellant's Written Closing Statement that we learned that Kan Ming Agricultural Trading Co and the Appellant belong to the same operator.

26. The Appellant had advanced various versions of the "proposed use", which ranged from:

- i) "to support the business in providing new farming techniques and distributing farm products to the local market" (At the s.16 and review stages);
- ii) "the proposed office was for management of agricultural land and trading of agricultural products" (From the Appellant's statement submitted on 17th August 2010); and
- iii) "The proposed office would be used for, inter alia, buying and selling of agricultural land which was akin to providing real estate agency." (During the Appeal Hearing)

Conclusion

27. Having read the submission and heard the evidence, we reject all the grounds of appeal and accept that:-

- i) the applied use is not in line with the planning intentions for “AGR” and “V” zones under the OZP;
- ii) the Appellant had not been able to show that there are strong planning justifications for a departure from the planning intentions, even on a temporary basis;
- iii) the proposed office use is not compatible with the use of the surrounding land which is predominately rural, agricultural in character with scattered residential structures; and
- iv) given the location and characteristics of the Appeal Site, if office use within “AGR” zone is approved, it would set an undesirable precedent for similar applications to follow.

28. In all the circumstances, we dismiss the appeal.

29. We thank both Ms Chan and Mr. Leung for their assistance.

Ms. Sylvia SIU Wing-yee JP
(Chairperson)

Mr. CHUNG Chi-leong
(Member)

Prof. Barnabas CHUNG Hung-kwan
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