

IN THE TOWN PLANNING APPEAL BOARD

Town Planning Appeal No. 10 of 2010

BETWEEN

STONE TARGET LIMITED

Appellant

and

THE TOWN PLANNING BOARD

Respondent

Appeal Board : Ms. Teresa CHENG Yeuk-wah, GBS, SC, JP (Chairman)
Mr. Paul LAM Ting-kwok
Dr Ellen LAU Hat-lan
Ir. NG Kwok-chun
Miss Winnie NG Wing-mui

In Attendance : Ms. Suan MAN (Secretary)

Representation : Mr. Philip NUNN for the Appellant
Mr. Michael YIN for the Respondent

Date of Hearing : 5th, 6th and 7th July 2011

Date of Decision : 4th November 2011

DECISION

The Site and its surroundings

1. The subject site comprises of Lots 2095 S.B RP, 2096 S.B RP and 2097 S.B RP in D.D. 111, Kam Tin Road, Wang Toi Shan, Pat Heung, New Territories (the “Site”).
2. The Site is zoned as “Village Type Development” (“V”) on the approved Pat Heung Outline Zoning Plan No. S/YL-PH/11 (the “OZP”).
3. The Appellant applies for a permanent planning permission to use the Site as a petrol filling station (the “PFS”).
4. The area of the Site is about 400 square metre and the lots of which it is comprised are private lots. The lots are held under Block Government Lease and demised as agricultural or garden ground. Lot 2096 has a Building Licence, Lot 2095 was granted with a Short Term Waiver for temporary variation of use of the lot for office and installation of an oil interceptor ancillary to a PFS.
5. The Site is located along Kam Tin Road and was paved and fenced with a solid wall of about 3m high along its northern boundary, behind which are three residential buildings towards the north-east, and a metal workshop and warehouse towards the north-west.

6. The distance between the wall and the three residential buildings is about 3m. There is also on going construction works behind these buildings where more village type housing are being built. The three buildings are now occupied.

7. The metal workshop and warehouse have been in existence since 1991. Mr. YUEN Shing-yip, Kepler (“Mr. Yuen”), Acting Senior Town Planner of the Tuen Mun and Yuen Long District Planning Office of the Planning Department (“PlanD”) who gave evidence before the Appeal Board, said that the workshop and warehouse were suspected unauthorised developments subject to planning enforcement action to be taken. Yet, since 1991, no action has been taken whatsoever on these suspected unauthorised uses. They have been and are in existence with no sign of changing voluntarily. Put it another way, there is no evidence before us that the use as it is will change in the foreseeable future as no actions have been or going to be taken by the enforcing division of the government against such unauthorised use. Such is the prevailing situation before us.

8. Directly across the road, opposite the Site, are a number of open storage areas for vehicles to be sold and a home for the aged. Behind these road side establishments are currently other open storage areas and a car park. These areas either have building licences issued or they are lots with Small House Applications waiting to be processed. Yet the construction of potential residential buildings in these areas is yet to be decided. Mr. Yuen said they were village settlements zoned “V” on the OZP.

9. In other words, whilst at the moment the surrounding area is not fully built up as a residential area, there are signs which show its progressing that way. As to when that would be so developed is yet unknown as the lots opposite the Site have no definite plan as to when buildings will be constructed.

10. The zoning of the Site and its surrounding areas as “V” is an important factor to bear in mind, as urged upon us by Counsel for the Town Planning Board (the “TPB”). The Appellants emphasised the history and the existing surrounding of the Site. Both perspectives are relevant in the circumstances and facts of this case and we take them both into account.

The Procedural History

11. There have been previously ten applications for either temporary or permanent planning permissions for PFS. Director of Planning on 5.6.1991 approved an application with conditions on a temporary basis for 5 years instead of a permanent basis as applied. The other applications were mainly for temporary permissions which have been granted for generally 12 months up to 3 years between 1997 and 2005.

12. The application for a permanent planning permission for PFS was made and rejected in 2006 because the project of the Kam Tin Road Improvement Stage 2 was planned to commence after 2009.

13. The last of the permission granted lapsed on 23.12.2010. It was for a period of 2 years. Mr Yuen said that it was shorter than the three years applied for so as to allow the Director of Environmental Protection to

monitor the site situation in the light of the developments that was going on just north-east of the Site.

14. As to the current appeal, the events that happened are briefly set out below.

15. On 19.3.2009, the Appellant submitted an application under section 16 of the Town Planning Ordinance (the “Ordinance”) seeking a planning permission to use the Site for a PFS. Further information was submitted on 25.3.2009.

16. The Rural and New Town Planning Committee of the TPB rejected the application at its meeting on 8.5.2009 on the ground of incompatibility and close proximity of the Site with village houses, thereby creating interface problem.

17. On 10.6.2009, the Appellant applied for a review under section 17(1) of the Ordinance and further information was submitted including some additional information tabled at the review meeting held on 26.3.2010.

18. The TPB rejected the application on review on reasons of incompatibility with the newly occupied village houses just to the north of the Site and those houses to be built in the vicinity.

19. On 1.6.2010, a Notice of Appeal was filed with the Appeal Board Panel (Town Planning) under section 17B(1) of the Ordinance.

Grounds of Appeal

20. The first ground of appeal relates to the existing circumstances of the Site and how permissions have been granted throughout the 19 to 20 years when the Site has been used as a PFS.

21. The second ground relates to the lease and the lawful use of the Site as a PFS and the consent and approval of District Lands Office/Yuen Long (“DLO/YL”) for the past 19 years. In short the Appellant contends that DLO/YL had full knowledge of the use and had made no objection.

22. The real argument pertaining to DLO/YL is apparent when the evidence of Mr. Chris Robinson (“Mr. Robinson”) is reviewed. In gist, what is being contended is that when the DLO/YL granted the building licences for the three houses in the close proximity of the Site, they were not concerned with the grounds now relied on by PlanD and the TPB. The government policies and practices, according to Mr. Robinson, would be that unless both DLO and PlanD consider that there would be no adverse influence, the building licence would not be issued. As the PFS has been an existing use at the time of the granting of the building licences, the planning permission for the Site could not now be reasonably refused, as that would, according to Mr. Robinson, be contrary to government policies and practices. The objection raised by DLO/YL now is “hypocritical” and “ill-founded”.

23. The third ground relates to environmental issues, noise and odour nuisance, which are the explicit grounds of rejection by the TPB. The Appellant pointed out that the only government department that objected to the application is Environmental Protection Department (“EPD”).

There is no definition of the term “noise nuisance” and there is no evidence to support the EPD’s objections. The Appellant on the other hand, it contends, has expert evidence to show that it is acceptable and there are many similar sites where the proximity of a PFS with residential blocks is close in Hong Kong.

24. Fourthly, the Appellant contends that the public comment relied on by the TPB was baseless as it came from someone who lives far way from the Site in the village of Ho Lik Pui in Wang Toi Shan and the complainant could not possibly have any proper grounds of objection.

25. The last two grounds are, the TPB failed to take account the following matters: the previous approvals, the inequity for the owner of the Site in the light of its long use as PFS, measures taken to address the noise and odour concerns raised by EPD, the history of the Site and its use, the owners of the neighbouring houses were aware of the Site and its use as PFS when they purchased; the ground of objection being principally environmental has no merit.

26. The last two grounds stand or fall with the earlier grounds and are repetitive.

Findings

27. The Appeal Board has a wide jurisdiction under section 17B of the Ordinance. We can confirm, reverse or vary the decision of the TPB that is being appealed.

28. This is a planning application and it is apt to begin by considering the OZP and the planning intent. The Respondent urges the Appeal Board to consider the land use compatibility and the planning intention behind the OZP. It contends that the other matters such as the local complaints and the environmental grounds are but alternative grounds of rejection.

29. There is no dispute that the existence of a PFS within a “V” zone is not objectionable per se.

30. The planning intention is clearly set out in the Notes of the OZP which reads:

“Land within [“V”] zone is primarily intended for development of Small Houses by indigenous villagers.”

31. The Respondent contends that from a planning perspective, the existence of the PFS within close proximity to residential houses is clearly objectionable. Further, it said, for a PFS to be in the middle of and not segregated by a reasonable distance or otherwise “buffered” from village houses in its surroundings must be objectionable. The occupation of the three village houses immediately close to the Site and the envisaged further development of small houses after the last temporary permission justify the Appeal Board in dismissing the appeal.

32. As to land use compatibility point of view, one should consider the visual impact and the psychological discomfort of having such a facility close to one’s home, the Respondent submits. It is further submitted that it is up to the Appellant to satisfy the Appeal Board given that the PFS use is one within Column 2 of the OZP. Further given the

likely village expansion, the continued use of the Site as PFS would not be compatible. Finally to refute the arguments raised by the evidence of Mr. Robinson, the Respondent submits that it matters not which use came first as it is the planning intention that has to be considered. The inexorable “tide” that the area will be occupied by village houses as it has the statutory backing, should not be overlooked. The Respondent submits lastly that the large number of non-compatible use or non-conforming use around is irrelevant and does not justify the Appeal Board in granting permission when viewed from the planning intention and the land use compatibility perspectives.

33. The Appeal Board accepts that there is a lot of force in the arguments so well put forward by Counsel for the Respondent. The Appeal Board however takes the view that the “inexorable tide” for village houses within the vicinity of the Site may have started but not quite imminent nor in the predictable near future so far as arrival to the immediate surroundings of the Site is concerned.

34. There are a number of lots that have been granted building licences but no action has been taken to implement those rights. There are also a number pending applications. As it is and in the immediate future, the surroundings of the Site may well and more likely than not remain as it is with no real changes. No enforcement actions have been taken for all these years against the unauthorised use. Whilst the unauthorised use of a site/lot does not justify the use of another when that may be incompatible with its surroundings, it is nonetheless a factor to be taken into account when considering whether or not to grant a temporary permission. One can only comment that it is unfortunate that no enforcement has been taken for all these years when it has clearly been suspected by the PlanD

that they were unauthorised uses. It makes a mockery of the system if those who make a proper application be faced with refusal when others who blatantly breached the OZP would escape sanction simply due to lack of action by the enforcing arms of the PlanD.

35. In order for the Appellant to discharge its burden in satisfying the Appeal Board that permission should be granted by reason of its use being in Column 2 of the OZP, specific issues have to be considered. It is not therefore an alternative that EPD's grounds are considered as submitted by the Respondent. In the view of the Appeal Board, planning considerations are not entirely abstract and theoretical, but they have to be sufficiently particular so as to give certainty to citizens and government departments alike on what to do. It is exactly considerations or grounds of objections raised by departments such as EPD that allows the Appeal Board, and for that matter the TPB, to apply their minds in a rational and fair manner to the case at hand.

36. Before we turn to the specifics, we observe that whilst the PFS on the Site has been operating for nearly 20 years, it was not present at the time of the gazette of the OZP. But as the parties pointed out, it is not for this Appeal Board to make a declaration as to whether it was an "existing use" and both parties expressly asked the Appeal Board to refrain from considering this point.

37. We further observe that both parties accept that whilst the application was for a permanent planning permission, the Appeal Board has jurisdiction to grant temporary approval with conditions.

38. The general operation of the PFS was explained by Mr. Terry TANG Man-Kit. He pointed out that at the time of the start of the operation of the PFS, there were only three houses opposite the PFS. He said he had not received any complaint.

39. Mr. TANG Che-yin, Chairman of the Wang Toi Shan Village Committee came to give evidence to explain about the written objection that was filed. He said he spoke to the complainant and that he lived in a village not in the vicinity of the Site. He also explained how he informed villagers of the application by posting notices on the board where information about the village would usually be published. The Appeal Board notes that the system by which he collected complaints was not organised and a bit haphazard. But we accept his evidence on his discussions with the complainant.

40. Mr. Robinson who had experience by which small house grant and building licences were dealt with in the government gave evidence that there were a number of factors to be taken into account by the DLO when deciding to grant the licences such as suitability of the site, future resumption issues, objections from the local etc. These factors had to be balanced. In effect he said as the DLO had granted the licences for the three houses to be built in the proximity of the PFS, it ought not be a ground of rejection now.

41. The Appellant contends that the principle of caveat emptor should therefore apply. The Appeal Board is not persuaded and the point was not pressed further at the closing. What DLO/YL considered at the time of the grant of the building licences for the three houses cannot be inferred.

In any event, the Appeal Board's consideration of the case now should not be dictated by the decisions of DLO/YL.

42. The Appellant called Mr. CHENG Kam-wing ("Mr. Cheng") to give expert evidence on the noise effect arising from the operations of the PFS. The readings he took were done in accordance with recognised standards that have been used in other situations. He had chosen a relatively "quiet" period by which the readings were taken. Upon further explanation, it was appreciated by the Appeal Board that such would be the times when the noise emanating from the PFS would be more significant. One can consider the situation of a truck passing at night compared to when the same happened during the day. The former would be more prevalent and would have a larger impact on the recipients. Following the established methods he showed to the Appeal Board the readings for the absolute level of the noise generated by the operations of the PFS and that it was insignificant and acceptable.

43. The Appeal Board accepts that a judgement on when and how a noise sampling exercise should take place is subjective, but when such judgment was made by an expert like Mr. Cheng we see no reasons or basis that is placed before us to doubt that. We accept a fair and proper judgment has been made and as a result, the readings and conclusions set out in his report are accepted. The Appeal Board notes that no witness from the EPD has been called by the Respondent to give any evidence. The night time figures of the noise levels is a projection based on what he was told as to the likely users and we accept that it was a fair projection. He explained also how the measurements are to be interpreted, ignoring the abnormally high level readings was proper and by taking the background noise level as being 70 with the target source giving a

reading of 56, the final reading to be considered was 70 and that was within the acceptable range. There is no counter expert evidence and we do not find that there is any basis by which we should reject his report and conclusions and we do accept them.

44. As to the odour sampling that was done, his sampling was attacked on the basis of it being arbitrary and based only on his judgment. He took the odour samples at a height of 1.5m from the ground. It was suggested that the vapour may disperse at different heights. Mr. Cheng has explained satisfactorily to the Appeal Board that dispersion or migration of the vapour is possible but he opined that 1.5m is the most appropriate height to take the samples as that would be the average level by which passers by would be most affected. The Odour test he has done was qualitative. There is a quantitative “odour unit” that can be measured as set out in the Environmental Impact Assessment Ordinance. He explained and it was accepted by the Respondent that the method of testing he has adopted was in accordance with the only objective and transparent guideline, the Hong Kong Planning Standard and Guidelines. As a result whilst no quantitative analysis was done, Mr. Cheng’s explanation and report was not successfully challenged primarily because there was no counter-evidence adduced and Mr. Cheng’s evidence was not so unreasonable as to be rejected in the absence of such counter expert evidence, and we accept his report.

45. From the evidence tendered, the Appeal Board is satisfied that the EPD’s concerns were not justifiable. The noise and odour levels were within acceptable range. As to the suggestion that there was no definition for noise nuisance, the Appeal Board does not agree. There are objective and transparent levels by which noise levels are to be measured. It is not a

subjective test as different recipients may have different level of acceptance depending on their resilience to noise and personal circumstance. In any event, we do not find that there was noise nuisance and do not need to proffer any further definition of this term for the purpose of this case and will refrain from so doing.

46. The public objection relied on by the TPB was a complaint but was not made from those who would be affected but from someone living far from the Site and so the weight of the objection is nominal or even negligible. Had the objection emanated from an occupier of the three houses behind the PFS, the position may well be very different.

47. In all, whilst the area has a potential to become predominantly residential, it has not achieved that status at this stage. It is accepted that the village houses should have priority in a “V” zone in this OZP. As a matter of planning, there is also a lot to be said about the reasoning of the TPB of rejecting the application. But this is a hearing *de novo*. The Appeal Board has to make a fresh decision. Given the lack of any relevant complaint from the public, the evidence of Mr. Cheng and his analysis and report, and that the existence of the PFS is not incompatible with the existing surroundings, the Appeal Board, on balance, prefers the Appellant’s arguments.

48. We must however add that we are not for a moment suggesting that the PFS is a compatible land use in a “V” zone. But that at this moment in time and in the light of the circumstances of how the PFS has been in use, we are of the view that a temporary planning permission can be given. The reason for the permission to be temporary is that the PlanD can further monitor the situation and with proper evidence and reasons

enable the TPB to refuse to grant further permission when the “inexorable tide of residential development” arrives. Indeed we do not envisage any further applications should be entertained if there are further residential developments but that is not a matter for us now.

49. As it is, we are of the view that the continued operation of the PFS will not cause any noise or odour nuisance, nor is it incompatible with the existing surroundings when measured by reference to concepts such as visual impact and the like. Had the operation of the PFS not been granted temporary permission over these years and the overall surroundings as it is now always been in place, we would have been more reluctant to grant the temporary planning permission. The PlanD will hopefully take enforcement measures against suspected unauthorised use in the near future thereby allowing the planning intention of developing this area in line with the “V” zoning to materialise.

50. As to the length of the permission, we direct that it be granted from the time when the last permission expired up to the date of this Decision and for a further 12-month period. The Appellant should have enough time to consider alternative arrangements for its operation if the permission is refused after the expiration of the 12-month period. Further it will also enable the PlanD to take such measures as had been outstanding for a very long time, based on what Mr. Yuen has told us, so that no unauthorised use remains.

Ms. Teresa CHENG Yeuk-wah, GBS, SC, JP

(Chairman)

Mr. Paul LAM Ting-kwok

(Member)

Dr Ellen LAU Hat-lan

(Member)

Ir. NG Kwok-chun

(Member)

Miss Winnie NG Wing-mui

(Member)