

IN THE TOWN PLANNING APPEAL BOARD

Town Planning Appeal No. 12 of 2008

BETWEEN

WONG KWOK WAH

Appellant

and

TOWN PLANNING BOARD

Respondent

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

Dr. Eugene CHAN Kin Keung (Member)

Dr. LI Ling Hin (Member)

Miss Winnie NG Wing Mui (Member)

Miss Mary Teresa WONG Tak Lan (Member)

In Attendance : Ms Suan MAN (Secretary)

Representation:

The Appellant, Mr. WONG Kwok Wah, acting in person

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

Date of Hearing : 24th November 2010

Date of Decision : 17th January 2011

DECISION

This Appeal

1. This is an appeal by Mr. WONG Kwok Wah ("**the Appellant**") against the refusal by the Town Planning Board ("**the TPB**") of an application by him to use certain pieces of land as a place for "Temporary Car Trading Use" for a period of 2 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 concern certain pieces of land registered and known as "Lot 582RP (Part) in D.D. 111 and Adjoining Government Land, Fan Kam Road, Pat Heung, Yuen Long, New Territories" ("**the Site**").
3. The Appellant is not the current owner of the Site but is the tenant thereof.
4. According to Mr. Kepler Yuen ("**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 Site is situated in San Lung Wai Village on Fan Kam Road with a total area of about 360 square metres which consists of private land with an area of about 256 square metres held under a Block Government Lease and adjoining Government land with an area of about 104 square metres. On an inspection carried out on 12th October 2010, it was observed that the Site was fenced off and had been paved. It was being used as an open storage for vehicles waiting to be sold without valid planning permission. It had two entrances. On the Site were parked 11 left-hand drive vehicles all without valid registration number plates approved by the Transport Department. Outside the Site next to Fan Kam Road were also parked two similar vehicles. On the south-west portion of the Site were three temporary structures with a zinc roof. These were apparently used as an office and for storage purposes. There was also a one-storey structure used as a toilet next to the zinc-roofed structures.

Zoning Of the Site

5. The relevant town plan is the approved Pat Heung Outline Zoning Plan No. S/YL - PH/11 ("**the OZP**"). The Site falls within an area zoned "Village Type Development" ("**V**") in the OZP.

6. We shall come back to the question of zoning and planning intention later.

The Application under the Ordinance

7. The Appellant lodged his application to the TPB under section 16 of the Ordinance on 9th April 2008.
8. 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 4th July 2008, from the TPB to the Appellant, he was informed of the rejection of his application and the reasons therefor were set out as follows : -

- (a) the continuous occupation of the site for temporary open storage use is not in line with the planning intention of the "Village Type Development" ("V") zone on the Outline Zoning Plan, which is to reflect existing recognized and other villages, and to provide land considered suitable for village expansion and reprovisioning of village houses affected by Government projects. There is insufficient justification in the submission for continuous departure from such planning intention, even on a temporary basis;
- (b) the development is also not in line with the TPB Guidelines No. 13D in that the site falls within Category 4 areas, the intention of which is to encourage the phasing out of such non-conforming uses as early as possible. Sufficient time has already been given to provide time to relocate the use to other location and there is no information in the submission to demonstrate why suitable sites within "Open Storage" ("OS") zones cannot be made available

for the applied use; and

- (c) approval of the application would set an undesirable precedent for other similar uses to proliferate into this part of the "V" zone. The cumulative effect of approving such similar applications would result in a general degradation of the environment of the area."

9. On 8th July 2008, 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.
10. Having considered the submissions by the Appellant at a review hearing, 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 17th October 2008.
11. On 16th December 2008, the Appellant lodged the present appeal.

The Appeal

12. The Appellant conducted the appeal in person and also gave evidence himself.
13. The points made by the Appellant can be summarized as follows :-
 - (i) The Site has been used only as a showroom and sales

office for left-hand drive cars and not as open storage.

- (ii) It just so happened that, when the Planning Department officials went to take pictures of the Site, there were 11 vehicles or more on the Site because those vehicles were waiting to be picked up at the Site by purchasers.
- (iii) Although the Site is within a "V" zone, it is also next to Fan Kam Road and nobody would want to build a house right next to the road.
- (iv) Furthermore, there is a large water pipe next to the Site and the area was within an area controlled by the Water Supplies Department so that it would not be possible to build a house there.
- (v) There does not appear to be a need for housing sites in the locality.
- (vi) He has tried to look for an alternative site for his business but has been unsuccessful.
- (vii) There has been no objection expressed by any Government Department to his application.
- (viii) In any event, he was asking only for an extension of 2 years (which period was reduced to 6 months when he made his final oral submission).

14. The points made by Mr. Yuen in evidence and Ms. Jess Chan in submission in reply to the points made by the Appellant can be summarized as follows : -
- (i) The grounds on which the Appellant's application and review application were rejected are justifiable.
 - (ii) The activities of the Appellant on the Site are incompatible with a "V" zone.
 - (iii) There are dense village houses in the locality and there is a need for more village houses there.
 - (iv) There are other suitable sites available in "Open Storage" zones not far away from the Site.
 - (v) Despite the presence of the water pipe, it would still be possible to build two village houses on the Site.

Our Finding

15. We generally accept the evidence of Mr. Yuen and the submissions of Ms. Jess Chan and do not accept the evidence and submissions of the Appellant. In particular, we make the following findings : -
- (i) We find as a fact that the Site has in substance been used as an open storage for left-hand drive vehicles rather than as a showroom and sales office for the same. We do not think that the copy sales

documents and car delivery documents produced by the Appellant really assist his case. We are not convinced that having a showroom and sales office for left-hand drive vehicles on a country road such as Fan Kam Road without any advertisement (as alleged by the Appellant) can generate much sale of such vehicles.

- (ii) We do not find the allegation by the Appellant that no one would want to have a village house built on the Site right next to Fan Kam Road convincing. We can see from the various plans produced that there are many village houses built right by the roadside on various stretches of Fan Kam Road.
- (iii) We also find that the water pipe in question is no obstruction to the building of one or two village houses on the Site.
- (iv) We find on the evidence produced by the TPB that there is a need for housing land in the broad area close to Site.
- (v) We are not convinced that the Appellant has really made any serious effort in looking for alternative accommodation.
- (vi) Most important of all, we find that the activities carried on by the Appellant on the Site in respect of which he seeks approval by the TPB is against the

relevant planning intention as entailed in the applicable OZP. We shall deal with this in greater detail below.

The Planning Intention

- 16. The Site is situated within an area which has been zoned “V” in the OZP.
- 17. It is trite that both the Plan and the Notes thereto form part of the OZP. The relevant parts of the Notes relating to “Village Type Development” read as follows :-

VILLAGE TYPE DEVELOPMENT

Column 1 Uses always permitted	Column 2 Uses that may be permitted with or without conditions on application to the Town Planning Board
Agricultural Use	Burial Ground
Government Use (Police Reporting Centre, Post Office only)	Eating Place
House (New Territories Exempted House only)	Flat
On-Farm Domestic Structure	Government Refuse Collection Point
Religious Institution (Ancestral Hall Only)	Government Use (not elsewhere specified) #
Rural Committee/Village Office	House (not elsewhere specified)
	Institutional Use (not elsewhere specified) #
	Market
	Petrol Filling Station
	Place of Recreation, Sports or Culture
	Private Club
	Public Clinic
	Public Convenience
	Public Transport Terminus or Station
	Public Utility Installation #
	Public Vehicle Park (excluding container vehicle)
	Religious Institution (not elsewhere specified) #
	Residential Institution #
	School #
	Shop and Services
	Social Welfare Facility #
	Utility Installation for Private Project

In addition, the following uses are always Permitted on the ground floor of a New Territories Exempted House:

Eating Place
Library
School
Shop and Services

Planning Intention

The planning intention of this zone is to reflect existing recognized and other villages, and to provide land considered suitable for village expansion and reprovisioning of village houses affected by Government projects. **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."

[emphasis added]

18. As Mr. Yuen has pointed out, the type of "Shop and Services" in respect of which permission would most probably be granted by the TPB should be for the purpose of serving the needs of the villagers, such as a store. Such would be compatible with the stated "Planning Intention". We agree.
19. 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, in 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.”

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

“8. GENERAL PLANNING INTENTION

8.1 The planning intentions for the Area are to channel suburban type of relatively low-density residential development to appropriate areas, to regularize some less undesirable open storage uses currently operating within the Area, especially along the major access roads, and to conserve the dense vegetation adjoining the Lam Tsuen Country Park and good-quality agricultural land as far as possible.

9. LAND-USE ZONINGS

9.2 Village Type Development (“V”) :

Total Area 117.94 ha

9.2.1 The planning intention of this zone is to reflect existing recognized and other villages, and to provide land considered

suitable for village expansion and reprovisioning of village houses affected by Government projects. 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 Board."

21. Thus, it is quite clear that the planning intention on the part of Government is to maintain the "V" zone areas covered by the OZP for the purpose of village housing development, including by clearing out undesirable and incompatible uses such as open storage in such areas, and to conserve the dense vegetation adjoining the Lam Tsuen Country Park and good-quality agricultural land as far as possible.

TPB Guidelines For Application For Open Storage And Port Back-Up Uses Under S.16 Of The Ordinance (TPB PG - No. 13D (Revised November 2005))

22. We have further been referred to the abovementioned Guidelines for the purpose of looking at the Appellant's application from the angle of an application for use as "Open Storage".
23. The relevant provisions in the abovementioned Guidelines are as follows :-

"1. Scope and Application

- 1.1. The Town Planning Board (the Board) recognizes that the proliferation of open storage activities in the New Territories has led to considerable degradation of the rural environment and caused serious problems related to impacts of noise and air pollution, flooding and visual intrusion as well as road congestion and safety. In order to prevent further uncontrolled sprawl of activities and minimize adverse environmental impacts resulting from these land uses, "Open Storage" ("OS") and "Other Specified Uses" annotated "Port Back-up Uses" ("OU(PBU))" zones are designated in appropriate areas on statutory town plans with a view to meeting the demand for open storage and port back-up sites and to regularizing the already haphazard proliferation of such uses within these zones. The intention is to provide for the rational development of open storage of materials which cannot be accommodated in conventional godown premises.

Open Storage Uses

- 1.4 “Open Storage” uses considered here relate to activities carried out on a site for which the greater part of the site (i.e. generally assumed to be more than 50%) is uncovered and used for storage, repair or breaking other than container-related uses. Storage activities ancillary to industrial, workshop and warehousing on the same site are excluded from this definition. The definition however includes temporary structures such as those found on dumping and vehicle repair sites (for example galvanized sheeting used for carports), as these do not radically differ from the appearance, nature or impact of operations carried out in open accommodation. **It also includes open storage use with on-site commercial activities, e.g. display and sale of vehicles.**
- 1.5 Examples of open storage activities conforming to the above definition include :
- Storage of rattan and bamboo
 - Storage of logs and timber
 - Storage of ceramic/pottery products
 - Storage of processed agricultural products
 - Storage of used electrical appliances/scrap metal
 - Storage of cans/tanks
 - Storage of paper and general rubbish
 - Storage of cement/sand
 - Storage of construction material
 - Storage of construction equipment
 - Storage of chemical products
 - Storage of dangerous goods
 - Storage of vehicles for stripping/breaking or repair

- **Storage of vehicles and vehicle parts for sale or disposal**
- Vehicle depot

Category 4 areas

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.”

[emphasis added]

24. The Site is situated within a Category 4 area and is exactly covered by the parts of the abovementioned Guidelines quoted above.
25. In the circumstances enumerated above, the Appellant’s application should also be rejected from the point of view of an application for use of the Site for “Open Storage” for vehicles waiting to be sold.

Conclusion

26. In all the circumstances, we are of the view that the grounds upon which the TPB rejected the Appellant’s application and review application are all justifiable. We therefore dismiss the Appellant’s appeal.

The Justice of the Matter

27. We feel no qualms in dismissing the Appellant’s appeal in the circumstances enumerated below.

28. According to the Appellant, he started renting the Site in 2007 and started his present business.
29. It transpired that either the Appellant's landlord or the Appellant's predecessor had in 2006 made an application to the TPB under Application No. A/YL - PH/514 for permission to use the Site as a temporary open storage for new vehicles (light goods vehicles and private cars) waiting to be sold for a period of 3 years. In June 2006, the TPB granted permission for the same but only for a period of 12 months. **It was expressly noted and made known to the applicant that no further extension would be granted.**
30. According to the Appellant, when he entered the Site in 2007, he was told that the use of the Site for open storage required permission but he was not told for how long permission had been granted. We do not accept this. We believe that the Appellant must have known about the fact that the permission was granted for only 12 months and that it was expressly stated by the TPB that no further extension would be granted.
31. Hence, in the latter half of 2007, the Appellant made an application under Application No. A/YL - PH/541 for permission to use the Site as temporary open storage for private cars waiting to be sold for a period of 3 years. The TPB rejected the review application on 9th November 2007. The Appellant did not appeal.

32. He then made the present application in 2008 and applied for permission to use the Site for “Temporary Car Trading Use”. We take the view that this is just changing the label without changing the substance and that the facts remain the same as before.
33. As matters have turned out, the Appellant has in fact gained at least another three years in the unauthorized use of the Site. He simply cannot complain.

Mr. Patrick FUNG Pak-tung SC
(Chairman)

Dr. Eugene CHAN Kin Keung
(Member)

Dr. LI Ling Hin
(Member)

Miss Winnie NG Wing Mui
(Member)

Miss Mary Teresa WONG Tak Lan
(Member)