

IN THE TOWN PLANNING APPEAL BOARD

Town Planning Appeal No. 8 of 2009

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BETWEEN

ENTERPRISE INDUSTRIAL LTD

Appellant

and

TOWN PLANNING BOARD

Respondent

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Appeal Board : Mr. Eric KWOK Tung Ming, SC (Chairman)

Prof. CHAU Kwong Wing (Member)

Ms. Alexa CHOW Yee Ping (Member)

Dr. LI Ling Hin (Member)

Ms. UNG Mon In (Member)

In Attendance : Ms. Suan MAN (Secretary)

Representation :

Mr. KO Kim Ching, for the Appellant

Mr. Brian LEU Lap Yau, Government Counsel  
(Department of Justice), for the Respondent

Date of Hearing : 17<sup>th</sup> May 2011

Date of Decision : 18<sup>th</sup> August 2011

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# DECISION

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## This Appeal

1. The Appellant, Enterprise Industrial Limited sought planning permission for temporary warehouse and workshop for metal, plastic and construction materials for 3 years from Town Planning Board on 19.2.2009. The site involved comprises Lots 93 (part) and 94 (part) in D.D. 127 and adjoining government land at Hung Uk Tsuen, Ping Shan, Yuen Long, New Territories.
2. At that time, the governing plan was the approved Ping Shan Outline Zoning Plan No. S/YL-PS/11 which was approved by the Chief Executive in Council on 1.2.2005. The Chief Executive in Council referred the approved Ping Shan Outline Zoning Plan No. S/YL-PS/11 to the Town Planning Board for amendment. The Town Planning Board made amendments and exhibited the draft Ping Shan Outline Zoning Plan No. S/YL-PS/12 for public inspection between 5.11.2010 and 5.1.2011. The site falls within an area zoned "Village Type Development" in both plans.
3. In their application, the Appellant put forward, inter alia, the followings as justifications, namely -

- (a) they purchased the site in April 2007;
- (b) the previous land owner had erected a roof on the land and had used the land as a factory for the manufacturing of glassware;
- (c) the use of the land as a factory was approved by the District Office, Yuen Long, New Territories as temporary waiver was granted;
- (d) as the glassware industry was phasing out, the temporary waiver was not renewed and expired; and
- (e) they need the land urgently for their operation and sought approval from the Yuen Long District Lands Office and was told that they need to obtain planning permission from the Town Planning Board before their applications for short term waiver and short term tenancy could be considered.

4. The Rural and New Town Planning Committee of the Town Planning Board (“the Committee”) rejected the Appellant’s application on 17.4.2009. The reasons given by the Committee are –

- (a) the development was not compatible with the surrounding residential uses and no justification had been given in the submission to justify for a departure from the planning intention of the “Village Type Development” zoning, which was to designate both existing and recognised villages and areas of land considered suitable for village expansion, even

on a temporary basis;

- (b) there was no information to demonstrate that the proposed development would not pose adverse environmental impact on the surrounding areas; and
- (c) approval of the application would set an undesirable precedent for other similar uses to proliferate in the "Village Type Development" zone. The cumulative effect of approving such applications would result in a general degradation of the environment of the area.

5. The Appellant applied for a review of the Committee's decision on 26.5.2009. In support of their application, the Appellant submitted a written representation providing more justifications on the proposed development. The justifications in the written representation can be summarised as follows -

- (a) The structure at the site was existing when the Appellant purchased it in April 2007. Lot 93 was granted Short Term Waiver and Short Term Tenancy in 1976 and Lot 94 was granted Short Term Waiver for covered factories for manufacturing of glassware and steel furniture respectively. As these industries were phasing out, the previous owners did not proceed with the intended operation. As such, the site had been used for industrial purpose. The Town Planning Board rejected the application on grounds that the development was not compatible with the residential use in the vicinity. This is indeed unreasonable and unfair to the

- Appellant. Should there be any changes for the planned uses, the Government is liable to purchase the concerned site from the Appellant and made reasonable compensation;
- (b) Before the purchase, the Appellant learned that it was a damaged, dilapidated structure with a factory permit granted. But it was not until the Appellant wrote and met with the Lands Department that he was advised to obtain approval of the Town Planning Board before the application for Short Term Waiver and Short Term Tenancy could be processed;
- (c) The economy of Hong Kong depended mainly on rapid growing industrial market in the 1960s. Home workshops were very common then and the Government did not regularise temporary factories. There was an existing factory when the Government granted the temporary factory licence and now the Government insisted on planning the area under the "Village Type Development" zone. The policy was unfair to the Appellant, it would affect the development of the industrial sector which is not acceptable;
- (d) The various road closure incidents in Hung Uk Tsuen are organised by some villagers/land owners to extort money. They would raise objection whenever the Government considers to grant licences for industrial establishments. The planning of Hung Uk Tsuen area was not reasonable. The area had long been used by rural industrial operation. The adjoining metalware workshop had been in operation. It is not reasonable to zone the area as "Village Type

Development". The occupants are not indigenous villagers and not entitled for small house development. It is suggested that the Planning Department should conduct a land use review for the area and reconsider industrial development in Hung Shui Kiu so that factory owners could develop their industries; and

- (e) It was unfair to the Appellant as the Town Planning Board rejected the application on the grounds of 2 local objections from the villagers. According to the documents of the Town Planning Board, most of the government departments had no adverse comments on the subject application including Lands Department, Drainage Services Department, Transport Department and Water Supplies Department. Approval of the application could keep the workshop in operation and employment opportunity would then be generated to benefit the society.

6. The Appellant, represented by Mr. Ko Kim Ching, appeared before the Town Planning Board in their review application and submitted orally the following -

- (a) he had been involved in the manufacturing business for about 47 years. His factory for home electric appliances used to operate in the Mainland but, due to environmental regulations tightened, he needed to seek an alternative site to continue his business. He had renovated the existing dilapidated warehouse at the site to continue his business

- and provide job opportunities for his 1,150 employees;
- (b) the economy of Hong Kong in 1960s depended mainly on the industrial sector. Rural workshops and factories were commonly found in the Hung Uk Tsuen area in 1950/60s. Throughout the years, the industrial activities would have been changed to suit the market need. The Government should not stop the business if it had complied with the environmental regulations on noise impact or sewage discharge;
  - (c) the site was occupied by a factory but was suddenly zoned "Village Type Development" by the Government in 1996. As the occupants were not indigenous villagers, the site could only be left vacant and the environment would deteriorate if other uses were not allowed;
  - (d) although Planning Department claimed that there was land reserved for industrial use to the north, the land was not owned by the Appellant. The Appellant only made use of the existing warehouse already built and the application was made to regularise the use. It was unfair to penalise the Appellant who tried to comply with the law by making an application whereas those unauthorised development in the adjoining area could continue their operation without planning permission;
  - (e) as the factory had been operating since 1950s, it was unfair for the Government to reject the application on traffic, environmental or drainage grounds. It should be the responsibility of the Government to improve the road

network and drainage system to overcome the problem in the Hung Uk Tsuen area; and

- (f) the Government should recognise the importance of the industrial sector as a nurture ground for young people and provide more support to this sector.

7. The Town Planning Board rejected the review application of the Appellant and upheld the decision of the Committee on the same grounds. The Appellant feeling aggrieved by the decision of the Town Planning Board lodged an appeal with the Appeal Board Panel (Town Planning) on 15.10.2009. In their Notice of Appeal, the Appellant repeated their earlier submissions made to the Town Planning Board. In their written submission, dated 29.4.2011, the Appellant commented on all the nine reasons which have been used by the Town Planning Board in similar applications. However, not all nine reasons were advanced by the Town Planning Board in refusing the Appellant's application/review. For those relevant reasons advanced by the Town Planning Board, the Appellant's written submission added nothing new to what have already been submitted to the Town Planning Board in their application/review and to the Appeal Board Panel (Town Planning) in their Notice of Appeal.
8. The Appeal Board sat on 17.5.2011 to consider the appeal by the Appellant. The Appellant was represented by Mr. Ko Kim Ching and acted in person whereas Mr Leu Lap Yau, Government Counsel, appeared for the Town Planning Board.



9. As the Appellant is not represented, we decided to allow the Appellant to call evidences if it wishes despite the Notice of Appeal disclosed no such intention. In this event, the Appellant called Mr. Ko to give evidence on behalf of the Appellant.
  
10. Mr. Ko's evidence is as follows -
  - (a) He is the Director of the Appellant;
  - (b) The Appellant purchased Lots 93 and 94 in 2007;
  - (c) He was aware of town planning control since the end of 80s or early 90s;
  - (d) He did not check Outline Zoning Plan when the Appellant purchased the site;
  - (e) He saw factories operating in the vicinity of the site;
  - (f) He was aware that the site had been used as factory;
  - (g) He believed that Yuen Long District Lands Office would grant Short Term Waiver and Short Term Tenancy;
  - (h) He was not aware that planning permission has to be obtained first before Yuen Long District Lands Office considers the Appellant's application;
  - (i) He was not aware that the site falls within "Village Type Development" zone in the Outline Zoning Plan No. S/YL-PS/11;
  - (j) He was aware that these plans were exhibited for public inspection and comment; and
  - (k) He said it is wrong for the Town Planning Board to include

the site in "Village Type Development" zone.

11. Under cross-examination, he admitted that he had erected a roof structure to cover almost the whole of the site and it was let to a third party for a period of 2 years since May this year.
  
12. Ms Lam Sau Ha, Senior Town Planner, gave evidence on behalf of the Respondent, the Town Planning Board. She adopted her witness statement filed earlier with the Appeal Board and elaborated on the following –
  - (a) The site is now being used as a warehouse for storage of construction material and approval for such use had not been sought;
  - (b) There were 10 similar applications for change of use within the "Village Type Development" zone between 1998 and 2007 and all were rejected;
  - (c) In the vicinity of the site, there are a number of warehouses, open space storages and factories. They are all unauthorised uses with the exception of 2 which have been existed since 1993 and were therefore allowed by the Town Planning Board;
  - (d) In the Draft Ping Shan Development Permission Area Plan No. DPA/YL-PS/1 gazetted on 18.6.1993, the site falls within the "Village Type Development" zone and has been remained in that zone since then;
  - (e) There are 2 developed villages and 2 developed residential

estates in the vicinity of the site;

- (f) There are 13 applications for small house in the vicinity of the site;
- (g) There are other plots of land in Ping Shan area designated for industrial use;
- (h) There was no detail of manufacturing process in the Application Form but it was disclosed in the Notice of Appeal that the production line intended to be carried out are electro-painting and paint spraying;
- (i) There was no assessment report on environment submitted by the Appellant;
- (j) Before the Draft Ping Shan Development Permission Area Plan No. DPA/YL-PS/1 was issued, the Town Planning Board had considered a number of matters, such as, existing residence, village area, landscape and future needs of residential use. Furthermore, the plan was exhibited for public inspection and objections may be put forward;
- (k) The Short Term Waivers concerning the 2 Lots were terminated in October 1983 and November 1993 respectively. As to the Short Term Tenancy, it was terminated in January 2003; and
- (l) The permitted covered area by the Yuen Long District Lands Office in the site was 73.39 and 222.6 square metres, however, the present application by the Appellant is about 752 square metres.

13. Note 3 of the Notes of Outline Zoning Plans No. S/YL-PS/11 and

S/YL-PS/12, which form a part of the Plans, provided –

“No action is required to make the use of any land or building which was in existence immediately before the first publication in the Gazette of the notice of the Lau Fau Shan and Tsim Bei Tsui Interim Development Permission Area (IDPA) Plan / draft Ping Shan Development Permission Area (DPA) Plan conform to this Plan, provided such use has continued since it came into existence. Any material change of such use or any other development (except minor alteration and/or modification to the development of the land or building in respect of such use which is always permitted) must be always permitted in terms of the Plan or in accordance with a permission granted by the Town Planning Board.”

14. As a result, the Town Planning Board would tolerate a use in non-conformity with the Plan if such use existed before the draft Ping Shan Development Permission Area Plan and has continued. According to the evidence of Ms. Lam, the use of the site as a factory had stopped. In fact, Mr. Ko in his evidence accepted that the factory operation had stopped because of the decline in industry. Therefore, we find that the Appellant cannot rely on ‘existing use’.
15. Furthermore, as noted above, the Appellant’s application involved a covered area of about 752 square metres whereas the area

allowed to be covered by the Yuen Long District Lands Office was less than 300 square metres. This cannot be said to be a minor alteration.

16. In the Schedule of Uses of the Plans, it is provided that –

“The planning intention of this zone (Village Type Development) is to reflect existing recognised and other villages, and to provide land considered suitable for village expansion and re-provisioning 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.”

17. We are mindful of the fact that there are 13 applications of small house in the vicinity of the site which are in conformity with the planning intention and needless to say that industrial operation nearby is undesirable. We are also mindful that there are other plots of land designated for industrial use in Ping Shan area. In the end, we conclude that the Appellant’s application is incompatible with the surrounding residential uses.

18. We have taken into consideration that 10 other similar applications had been rejected by the Town Planning Board. We agree that we

cannot consider the Appellant's application in isolation and we have to consider the consequence of allowing the Appellant's application. If we grant the Appellant's application, it will set a bad precedent for future applications and the Town Planning Board may find it difficult to refuse similar future applications. If such is allowed to happen, it will foul the planning intention of Ping Shan area.

19. We, for the aforesaid reasons, dismiss the Appellant's appeal and uphold the decision of the Town Planning Board.
  
20. Before leaving the present appeal, we would like to express our concern on the enforcement action, if any, taken by authorities. We are surprised to learn that unauthorised use of land is allowed to be there for a long period of time. We feel that those concerned government departments should be more vigilant in enforcing the law. Had the authorities been more vigilant in enforcing the law, the Appellant would not have been aggrieved.

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Mr. Eric KWOK Tung Ming, SC  
(Chairman)

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Prof. CHAU Kwong Wing  
(Member)

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Ms. Alexa CHOW Yee Ping  
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