

IN THE TOWN PLANNING APPEAL BOARD

Town Planning Appeal No. 1 of 2012

BETWEEN

TSOI CHUEN PAN

Appellant

And

TOWN PLANNING BOARD

Respondent

Appeal Board:	Ms Linda CHAN Ching-fan, SC	(Chairman)
	Mr Paul LAM Ting-kwok, SC	(Member)
	Ms Susan LEUNG So-wan	(Member)
	Ir Dr Paul TSUI Hon-yan	(Member)
	Ms Luciana WONG	(Member)
In Attendance:	Ms Suan MAN	(Secretary)

Representation: Mr S.K. NGAI, for the Appellant
Ms Jess CHAN, Counsel for the Respondent

Dates of Hearing: 19th June 2013

Date of Decision: 9th December 2013

DECISION

1. This is an appeal by Mr Tsoi Chuen Pan (“**Appellant**”) under section 17B of the Town Planning Ordinance (Cap. 131) (“**TPO**”) against the decision of the Town Planning Board (“**TPB**”) refusing his application for planning permission for temporary open storage of new and scrap stainless steel for a period of 3 years at Lot No. 758B R.P. (Part) and 767B (Part) in D.D. 46 and adjoining Government land, Sha Tau Kok Road, Fanling, New Territories (“**Site**”).

Background Fact

2. The following fact and matters relevant to the appeal are not in dispute.
3. The Appellant is the registered owner of the Site. He has since 1996 been applying for planning permission to use the Site for open storage purpose.
4. The Site falls within an area zoned as “Agriculture” (“**AGR**”) on the approved Man Uk Pin Outline Zoning Plan No. S/NE-MUP/11, which is the prevailing Outline Zoning Plan (“**OZP**”) applicable to the Site.
5. The Site has an area of about 915sqm of which about 60sqm is Government land, and is mainly held under Block Government Leases demised as agricultural land.
6. According to the Appellant, there is a single-storey covered structure of about 290sqm in area and 9m high in the eastern part of the Site for storage

and an office of about 35 sqm of 2 storeys (about 4.9m) near the south. The total non-domestic GFA is about 360sqm. The Site has been used as open storage of new and scrap stainless steel and its operation hours are from 8am to 5pm from Monday to Saturday.

7. The surrounding areas of the Site are predominately agricultural and rural in character. Major village settlements such as Man Uk Pin Village and Loi Tung Village are to the north and south-east of the Site respectively. To the immediate north and west is riverbank where the Drainage Services Department (“**DSD**”) has recently completed drainage works. Domestic structures are found further north across an area of fallow agricultural land. To the east is a plant nursery, an orchard and some domestic structures while to the immediate south of the Site are vegetated land, further south across Sha Tau Kok Road are domestic structures, a plant nursery and vacant land.

8. By an application dated 22 November 2010, the Appellant applied under s.16 of the TPO for planning permission to use the Site for temporary open storage of new and scrap stainless steel for a period of 3 years. The justifications put forward by the Appellant were as follows:
 - 8.1. The Site merits a temporary departure from the planning intention as (a) the chance for rehabilitation for cultivation and other agricultural purposes on the Site is remote and not economically viable, (b) the immediate neighbourhood of the Site and the area are undergoing a fundamental change in planning and land use as a result of the massive infrastructural projects, (c) the proposed use is entirely compatible with the environment of the area predominately occupied by “work area” and (d) the approval of the application would not frustrate the long-term planning intention of the area.

- 8.2. The proposed use complies with all assessment criteria set out in the Town Planning Board Guidelines for “Application for Open Storage and Port Back-up Uses” (TPB PG-No. 13E) (“**Guidelines**”).
 - 8.3. The Site is surrounded by major road corridor (Sha Tau Kok Road) to the south with clusters of open storage uses found on both sides and infrastructural facilities under active construction to the north and west, and the proposed use is compatible with its surrounding uses in the short to the medium term and all major assessment criteria set out in the Guidelines and is subject to no adverse development impact.
 - 8.4. The precedent effect of approving the application is negligible or virtually non-existent because of the history and background of the Site which it was said is unique.
 - 8.5. With the proposed mitigation measures, i.e. to increase the height of the boundary wall along the northern and western of the Site to 3.5m tall, the noise level generated by the operation at the Site would satisfy the relevant noise criteria.
9. The application was considered by the Rural and New Town Planning Committee (“**RNTPC**”) of the TPB on 14 January 2011 and was rejected on 28 January 2011 on the following grounds:
 - 9.1. The proposed development was not in line with the planning intention of AGR zone, which was primarily intended to retain and safeguard good agricultural land / farm / fishponds for agricultural purposes and to retain fallow arable land with good potential for rehabilitation for cultivation and other agricultural purposes. There was no strong

planning justification in the submission for a departure from this planning intention even on a temporary basis.

- 9.2. The proposed development did not comply with the Guidelines in that no previous planning approval had been granted to the Site and the Appellant had failed to demonstrate that the proposed development would have no adverse environmental impact on the surrounding areas.
- 9.3. The proposed development was not compatible with land uses of the surrounding areas, which were largely rural and agricultural in character.
- 9.4. The approval of the application would set an undesirable precedent for other similar applications in the AGR zone. The cumulative effect of approving such proposals would result in a general degradation of the environment in the area.
10. On 2 February 2011, the Appellant applied under s.17(1) of the TPO for a review of the RNTPC's decision to reject the application. Further submission was made in support of the application.
11. By letter dated 25 November 2011, the TPB informed the Appellant that his review application was refused on similar grounds as those given by RNTPC (as stated in §9 above). It is against this decision that the present appeal is brought.

Applicable Principles

12. The following principles are relevant to this appeal.

13. First, in considering an appeal against the decision of the TPB, the Town Planning Appeal Board (“**TPAB**”) must exercise an independent planning judgement and is entitled to disagree with the TPB (*Henderson Real Estate Agency Ltd v Lo Chai Wan* [1997] HKLRD 258 (PC) at 261, 266A). The TPAB could substitute its own decision for that of the TPB even if the TPB had not strictly committed any error on the materials before it, as the hearing before the TPAB would normally be much fuller and more substantial than a review hearing under TPO s.17 (*Town Planning Appeal No. 18 of 2005*, unreported, 12 April 2007).

14. Secondly, the TPB’s independent planning judgement (as with the TPAB’s discretion) to grant planning permission must be exercised within the parameters of the relevant approved plan:-
 - 14.1. In *Henderson*, the Privy Council held that under s.16(4) of the TPO, the TPB may grant planning permission “only to the extent shown and provided for or specified in the plan” (at 261E-F).

 - 14.2. In *International Trader Limited v Town Planning Appeal Board & Anor* [2009] 3 HKLRD 339 (CA), the Court of Appeal considered the wordings of s.13 of the TPO, which provides that “Approved plans shall be used by all public officers and bodies as standards for guidance in the exercise of any powers vested in them”, and held that the effect of s.13 is to “impose on all public officers and all public bodies the statutory duty to have reference to approved plans as the recognised measure by which they are to be guided; that is, directed, in the exercise of their powers.” (at §§31-33, 38-42, 47-51).

- 14.3. It is the duty of the TPB (and hence the TPAB) to see that the relevant town plan is faithfully implemented (*Town Planning Appeal No. 13 of 1993*, unreported, 26 August 1994 at §§5-7).
- 14.4. The TPB (and the TPAB) has no authority to deviate from the plan “however compelling other material considerations to the contrary might be” (*Halsbury’s Laws of Hong Kong*, Vol. 48, at §385.270 at p.300).
15. Thirdly, the OZP and the Notes are material documents to which the TPAB is bound to have regard in exercising its independent judgement and, indeed, they are the “most material documents”. Whilst the Explanatory Statement is expressly stated not to be part of the plan, it does not follow that it is not a material consideration for the TPAB to take into account. Similarly, the guidelines are also material considerations to be taken into account. The TPAB was not bound to follow the Explanatory Statement or the guidelines, but they could not be disregarded (*Henderson*, at 267A-C); *Halsbury’s Laws of Hong Kong*, Vol. 25(2), 2009 reissue, §[385.270].
16. Fourthly, in determining the merit of an appeal, the TPAB should have regard to the principle of consistency, always bearing in mind that its decision in granting or refusal to grant planning permission would become a precedent for similar applications in the future. The principle of consistency was explained by the English Court of Appeal in *North Wiltshire District Council v Secretary of State for the Environment and Clover* (1993) 65 P & CR 137 at 145¹ as follows:-

¹ Cited in *Halsbury’s Laws of Hong Kong*, Vol. 48, §385.270, footnote 47 (p.311)

“In this case the asserted material consideration is a previous appeal decision. It was not disputed in argument that a previous appeal decision is capable of being a material consideration. The proposition is in my judgment indisputable. One important reason why previous decisions are capable of being material is that like cases should be decided in like manner so that there is consistency in the appellate process. Consistency is self-evidently important to both developers and development control authorities. But it is also important for the purpose of securing public confidence in the operation of the development control system. I do not suggest and it would be wrong to do so, that like cases must be decided alike. An inspector must always exercise his own judgement. He is therefore free upon consideration to disagree with the judgement of another but before doing so he ought to have regard to the importance of consistency and to give his reasons for departure from the previous decision.” (Emphasis supplied)

17. Lastly, there is a clear distinction in principle between the grant of planning permission and its implementation. In this regard, ownership is normally considered an irrelevant fact (*TPA 13 of 1993*, at §§80-81; *TPA 13 of 2006*, at §§83(1) & 88; *Delight World Ltd v The Town Planning Appeal Board* [1997] HKLRD 1106, at 114H-115I and *Merritt v Secretary of State for the Environment, Transport and Regions and another* [2000] JPL 371, Lexis transcript, at p.10).

Grounds of Appeal

18. In the Notice of Appeal dated 20 January 2012, the Appellant advances the same grounds in support of his applications before the RNTPC and the TPB, which are summarised in §8 above. In addition, the Appellant contends that

in refusing his application, the TPB failed to take into account the following matters:

- 18.1. The Appellant is not a farmer and has no incentive to use the Site for agricultural purpose.
- 18.2. The Site and much of the adjoining land have not been put to agricultural use for over 2 decades. The presence of fallow / idle agricultural land without proper management in the area would only result in “planning blight”, and would lead to deterioration of environmental conditions and waste of valuable land resources.
- 18.3. The Site is under great development pressure as much of the land in the area has recently been resumed and used for large-scale, non-agricultural cross-border, regional and district infrastructural works in order to meet the “fundamental and revolutionary change in the planning circumstances of the area”.
- 18.4. The Appellant bought the Site and commenced business operation on it in 1990 “well before the gazettal of the IDPA plan of the area”. This we understand is a reference to the Man Uk Pin Interim Development Permission Area Plan No. IDPA/NE-MUP/1 (“**IDPA**”) published on 12 October 1990. However, in the same Notice of Appeal, the Appellant says that the IDPA was gazetted several months *after* he had purchased the Site which, he contends, has caused substantial hardship to him. We will refer to this ground as “**Existing Use Ground**”.

- 18.5. The first planning application made by the Appellant in 1996 was supported by the Planning Department, but was rejected by the TPB subsequently.
- 18.6. The Environmental Protection Department, DSD, Transport Department, Landscape Division of the Planning Department, Fire Services Department, the then Territory Development Department, Highways Department, Water Supplies Department have “no objection / comment” on the application and all technical issues of the application have been addressed to the satisfaction of all relevant Government departments. There has been no complaint from the public on the Site being used for open storage.
- 18.7. The Site is extremely small (915sqm) and the application will not have any adverse environmental or other impact on the area.
- 18.8. The Site is segregated from the area and has an independent / exclusive means of ingress and egress, and is separated from a neighbouring village by a wide drainage channel.
- 18.9. The Appellant is willing to carry out further landscaping improvements to the periphery of the Site to enhance the visual impact and environmental impact of the Site.
19. Apart from the witness statement of Mr Tsoi Chung Hoi, no other document was submitted by the Appellant in advance of the hearing of the appeal. Nor was any written submission lodged on behalf of the Appellant. Nevertheless, at the hearing, Mr S.K. Ngai, representative of the Appellant, seeks to introduce the following new documents during cross-examination of TPB’s witnesses:

- 19.1. 5 sets of photos taken by him of the Site, the structures in the vicinity of the Site, the existing nurseries in the vicinity, the AGR zone to the South of the Site and the open storage along Sha Tau Kok Road;
 - 19.2. the extract from the website describing a project announced jointly by the Government of Hong Kong and Shenzhen Municipal People's Government in September 2008 in respect of the implementation of a new Boundary Control Point at Liantang / Heung Yuen Wai in the North-eastern New Territories to serve the cross-boundary goods vehicles and passengers travelling between Hong Kong and Shenzhen East; and
 - 19.3. the press release dated 6 February 2013 in respect of the questions and answers in the Legislative Council of the same day concerning the agricultural land in the New Territories
- (collectively "**New Documents**").

20. Ms Jess Chan, counsel for the TPB, objects to Mr Ngai's attempt to introduce New Documents at the hearing. She submits that there is no justification for the Appellant's delay in producing the New Documents and it is unfair to admit them as neither she nor the witnesses of TPB has the opportunity to consider such Documents. Mr Ngai explains that the reason for his failure to produce the New Documents to the TPB earlier is because he is not legally qualified and is not familiar with the appeal procedure. This is surprising as we note from the papers relating to the Appellant's earlier applications for planning permission made in 1996 and 2003 and the subsequent appeals that Mr Ngai represented the Appellant in all previous applications and hearings. We consider that it is unfair for the Appellant to

withhold the New Documents until cross-examination, which appears to be a tactic adopted by Mr Ngai with a view to taking the TPB's witnesses by surprise. We therefore gives time to the TPB's witnesses to consider the New Documents and only allow Mr Ngai to conduct limited cross-examination based on such Documents.

Merit of the Appeal

Existing Use Ground

21. In support of the Existing Use Ground, in the witness statement of Mr Tsoi Chung Hoi, the father of the Appellant, it is asserted that:
 - 21.1. by a provisional sale and purchase agreement dated 20 March 1990 he acquired the Site on behalf of 泰英五金(香港)有限公司 and the Appellant. In April 1990, he began to use the Site for storage of crane, containers, iron and similar materials and sale of stainless steel. It is said that such fact can be seen from the aerial photos taken by the Government in October 1990;
 - 21.2. he and his company have since 1996 been applying for permission to use the Site for open storage purpose and the present application is for a temporary period of 3 years; and
 - 21.3. he is willing to comply with any request from the Government to resume the Site for public purpose.
22. Ms Chan submits that this Appeal Board has no jurisdiction to determine a claim for existing use as the jurisdiction of the TPAB is limited by s.17B of TPO, which provides that the TPAB can only review decisions of the TPB

on whether any permission, which may be granted under any draft plan or OZP, should or should not be granted. If an appellant wishes to establish a claim of existing use, he must apply to the courts for determination (*Town Planning Appeal No. 11 of 1998*, at §§4-8; *Town Planning Appeal No. 4 of 2000*, at §§13-14; *Town Planning Appeal No. 17 of 2003*, at §§28-29; *Town Planning Appeal No. 1 of 2004*, at §24).

23. Ms Chan also points out that the Appellant and his father had raised a defence of “existing use” in previous enforcement proceedings brought by the Director of Planning against them for failure to comply with the enforcement notices issued under s.23(1) of the TPO in respect of the unauthorised development at the Site. It was found by the Magistrate in those proceedings that the Site had not been used for storage of metal on or before 12 October 1990 (at p.44 of the Judgment dated 17 March 1994, FLS 11788/93 and 11789/93).
24. We note that in the extract of the confirmed minutes of the TPB meeting held on 2 August 1996 at which the Appellant’s review application was considered, Mr Tsoi Chung Hoi tried to raise the same point as the Existing Use Ground. Mr Ngai, who was the Appellant’s representative, acknowledged that the Court had already determined that the Appellant’s development at the Site was not an “existing use” before publication of the IDPA in October 1990.
25. The issue of “existing use” was further explored by the TPAB in Town Planning Appeal No. 15 of 1996. By its Decision dated 18 June 1999, the TPAB concluded that “there was no open storage in the proper sense of the term at the site on and before 12 October 1990. The site was in the process of site formation at that date”.

26. In Town Planning Appeal No. 8 of 2003, the TPAB noted the finding of the Court in the enforcement proceedings as well as the conclusion of TPAB in Town Planning Appeal No. 15 of 1996.
27. In light of the above finding and conclusion, we have no hesitation in rejecting the Existing Use Ground. It seems to us that it is an abuse of process for the Appellant to try to raise the same ground which has already been decided against him by the Court and the TPAB.

Compatibility with vicinity

28. As regards the Appellant's contention that the character of the surrounding areas of the Site has been changed and become predominantly "work area", we do not agree. As can be seen from the following matters, the areas in the vicinity of the Site are primarily agricultural and rural in character:
 - 28.1. From the aerial photo taken in January 2013, the large AGR zone is in the vicinity of the Site.
 - 28.2. As stated in §7 above, the Site is surrounded predominantly by agricultural and rural land with village settlements. Dr Chen Yi-min, the Agricultural Officer (Development) of the Agriculture, Fisheries and Conservation Department, in his evidence describes the crop farms and plant nurseries with facilities similar to a green house in the vicinity of the Site, some of them are sophisticated and well-managed. In one active crop farm about 150m away, there is farming area of about 20,000 sq.ft.

- 28.3. The DSD's project has already been completed and the ex-work area to the north and west of the Site is now the riverbank of Ng Tung River.
- 28.4. The work areas of Liantang / Heung Yuen Wai project, which has not commenced, is about 70m away from the Site.
- 28.5. Although there are some open storage uses on both sides of Sha Tau Kok Road, none of them has been approved by the Planning Authority. In this regard, Mr Otto Chan, Senior Town Planner of the Planning Department, confirms in his evidence that enforcement actions were taken against unauthorised uses of the areas for open storage on both sides of Sha Tau Kok Road with successful prosecutions.
29. In light of the agricultural and rural character of the area, we do not accept the Appellant's suggestion that the use of the Site for open storage is compatible with the character of the surrounding areas.

Planning Intention

30. The Appellant contends that the Site merits a temporary permission from the planning intention for the AGR zone. We disagree.
31. The Site lies in a wider AGR zone in the area on both sides of Sha Tau Kok Road. The AGR zone is primarily to retain and safeguard good quality agricultural land / farm / fish ponds for agricultural purposes and to retain fallow arable land with good potential for rehabilitation for cultivation and other agricultural purposes.

32. The Director of Agriculture, Fisheries and Conservation does not support the application as he found active agricultural activities in the vicinity of the Site including 2 crop farms and 3 plant nurseries. In this regard, we accept the opinion of Dr Chen that the Site has high potential for agricultural rehabilitation, in that it can be used for building greenhouses for crop production with hydroponic technology or setting up a plant nursery with potted plants.
33. As the Site can be used for agricultural purpose, which is in line with the planning intention of the AGR zone, it should be retained for rehabilitation for cultivation and other agricultural purposes.
34. The fact that the Appellant is not a farmer and has no incentive to use the Site for agricultural purposes is not a factor in favour of granting planning permission. Nor is the Appellant's suggestion that if planning permission is refused, the Appellant will leave the Site idle, thereby leading to deterioration of environmental conditions and waste of valuable land resources. As Dr Chen points out, the Appellant may rent out the Site so that it can be used by others for agricultural purposes. The Appellant will have incentive to do so as he can generate rental income from the Site, rather than leaving it idle.

Compliance with Guidelines

35. Under the Guidelines, the Site falls within Category 3 where "existing" and approved open storage and back-up uses are to be contained and further proliferation of such uses is not acceptable. Applications within Category 3 areas would normally not be favourably considered unless the applications are on sites with previous planning approvals. Moreover, subject to no adverse departmental comments and local objections, or the concerns of the

departments and local residents can be addressed through implementation of approval conditions, planning permission could be granted on a temporary basis up to a maximum of 3 years.

36. Although Mr Ngai takes issue with the categorisation and contends that the Site falls within Category 2, he has not put forward any basis in support of his contention. We do not accept Mr Ngai's assertion.
37. The Appellant has in the past 17 years repeatedly applied for planning permission to use the Site for open storage but without any success. The present application is the 4th application.
38. Moreover, there are local objections to the application from the Sha Tau Kok District Rural Committee and indigenous inhabitant representative of Man Uk Pin primarily on the grounds of damage to the tranquil environment, "fung shui" and road safety. There is a further public comment that the application is not in line with the planning intention of the area and the use of the Site for open storage would cause environmental blight.
39. Further, both the Planning Department and the Agriculture, Fisheries and Conservation Department have stated that they do not support the application.
40. As the Site has never been granted with planning permission and there are local objections and adverse departmental comments to the application, we do not consider that the Appellant has demonstrated compliance with the Guidelines.

Planning Department's support in 1996

41. We are unable to see how the Planning Department's support to the Appellant's application made in 1996, which was ultimately rejected by the TPB, can have any bearing on the appeal.

Similar applications and precedent effect

42. There are 17 similar applications along both sides of Sha Tau Kok Road. Except Application No. A/NE-MUP/8, which was approved with conditions on review on 10 November 1995 for a period of 12 months taking into account the difficulties in identifying suitable alternative open storage sites for storing heavy machinery and equipment, and the presence of open storage and workshop uses in the immediate vicinity, all the other 16 applications were rejected primarily on the ground that the application was not in line with the planning intention of the area, the possible adverse traffic impact on Sha Tau Kok Road, possible adverse drainage and visual impact on the area and setting of undesirable precedents.
43. The Appellant has not been able to identify any difference between the Site and the other 16 unsuccessful applications. The suggestion that the Site is segregated from the area and has an independent or exclusive means of ingress and egress, in our view, does not make the Site different from the other unsuccessful applications.
44. Nor do we consider the stated willingness on the part of the Appellant in carrying out further landscaping improvements to the periphery of the Site to enhance its visual and environmental impact, even if true, would make any difference sufficient to justify treating the Site differently from the other

sites in the vicinity. In any event, no details of the landscaping improvements have been provided by the Appellant.

45. We do not accept there is any real difficulty on the part of the Appellant to identify alternative site to operate its business, should he genuinely wish to do so. As Mr Tsoi Chung Hoi acknowledges in his evidence, in as early as 1996 when he and the Appellant applied for temporary permission to use the Site for open storage for 12 months, he told the TPB that the temporary permission was necessary for them to find an alternative site to operate their business. It is inconceivable that the Appellant has not been able to find an alternative site to operate his business in the past 17 years.
46. For the above reasons, we do not see any material difference between the Appellant's application and the other 16 unsuccessful applications along Sha Tau Kok Road.
47. In our view, the approval of the application would set an undesirable precedent for other similar applications in the AGR zone. This, in turn, would lead to gradual degradation of the environment in the area.
48. For the reasons set out above, the Appellant's appeal is dismissed.

(Signed)

Ms Linda CHAN Ching-fan, SC

(Chairman)

(Signed)

Mr Paul LAM Ting-kwok, SC

(Member)

(Signed)

Ms Susan LEUNG So-wan

(Member)

(Signed)

Ir Dr Paul TSUI Hon-yan

(Member)

(Signed)

Ms Luciana WONG Wai-lan

(Member)