

(Translation)

IN THE TOWN PLANNING APPEAL BOARD

Town Planning Appeal No. 11 of 2013

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BETWEEN

MAN FUNG WING

Appellant

And

TOWN PLANNING BOARD

Respondent

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Appeal Board : Mr. YEUNG Ming Tai (Chairman)  
Professor Lawrence LAI Wai Chung (Member)  
Dr. Teresa LAW Sui Chun (Member)  
Miss Phyllis SO Yee Ching (Member)  
Ir. Dr. Paul TSUI Hon Yan (Member)

In Attendance : Ms. Suan MAN (Secretary)

Representation : The Appellant, by his Authorised Representative Mr.  
MAN Hok Yin

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

Date of Hearing : 22<sup>nd</sup> October 2014

Date of Decision : 30<sup>th</sup> January 2015

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## D E C I S I O N

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This is the decision of a majority of the Town Planning Appeal Board. The dissenting opinion of Professor Lawrence LAI Wai Chung is provided in a separate document.

**1. This Appeal**

This is an appeal by the Appellant under section 17B of the Town Planning Ordinance (“**the Ordinance**”) against the refusal by the Town Planning Board (“**the TPB**”) of his application for planning permission for temporary retail of second-hand private cars for a period of one year in “Village Type Development” Zone, Lots 125 S.C RP (Part), 220 RP (Part), 231 RP (Part) and 306 RP (Part) in D.D. 102 and adjoining Government Land, San Tin, Yuen Long, New Territories.

**2. Background Information**

2.1 The appeal site is situated at Lots 125 S.C RP (Part), 220 RP (Part), 231 RP (Part) and 306 RP (Part) in D.D. 102 and adjoining Government Land, San Tin, Yuen Long, New Territories (“**the Appeal Site**”), with an area of about 1 141 m<sup>2</sup> (including about 422 m<sup>2</sup> of Government Land). At the time of application, the site falls within an area zoned “Village Type Development” (“**V**”) on the approved San Tin Outline Zoning Plan No. S/YL-ST/8 (“**the OZP**”) which is the current statutory plan in force.

2.2 On 20<sup>th</sup> February 2013, the TPB received from the Appellant's representative a planning application which sought planning permission to use the Appeal Site for temporary retail of second-hand private cars for a period of one year under section 16 of the Ordinance (Application No. A/YL-ST/431).

2.3 On 19<sup>th</sup> April 2013, having considered the application, the Rural and New Town Planning Committee ("**the RNTPC**") of the TPB rejected the application for the reasons below:

(a) *the planning intention of the "Village Type Development" ("V") zone was to designate both existing recognised villages and areas of land considered suitable for village expansion. Land within this zone was primarily intended for development of Small Houses by indigenous villagers. The development was not in line with the planning intention of the "V" zone. There was no strong planning justification provided in the submission for a departure from the planning intention, even on a temporary basis;*

(b) *the development did not comply with the TPB Guidelines for Application for Open Storage and Port Back-up Uses under section 16 of the Town Planning Ordinance ("**the TPB PG-No.13E**") in that the site fell within Category 4 areas where application for open storage use would normally be rejected. There were no exceptional circumstances that warranted sympathetic consideration of the application; and*

(c) *the approval of the application even on a temporary basis would set an undesirable precedent for similar application within the "V" zone. The cumulative effect of*

*approving such application would result in a general degradation of the rural environment of the area.*

- 2.4 On 3<sup>rd</sup> May 2013, the Secretary of the TPB informed the Appellant of the RNTPC's decision by way of a letter.
- 2.5 On 16<sup>th</sup> May 2013, the Appellant's representative applied, under section 17(1) of the Ordinance, for a review of the RNTPC's decision to reject the application (review application). However, no written representation was submitted by the Appellant. On 30<sup>th</sup> July 2013, the TPB received from the Appellant further information providing justifications to support the review application. On 18<sup>th</sup> October 2013, having considered the Appellant's justifications for review and relevant factors, the TPB decided to reject the review application for the same reasons cited by the RNTPC in rejecting the section 16 application as provided in the paragraphs 2.3(a) to 2.3(c) above.
- 2.6 On 1<sup>st</sup> November 2013, the Secretary of the TPB informed the Appellant of the TPB's decision on the review application by way of a letter.
- 2.7 On 24<sup>th</sup> December 2013, the Town Planning Appeal Board (“**the Appeal Board**”) received from the Appellant a Notice of Appeal under section 17B(1) of the Ordinance against the TPB's decision, together with documents setting out his justifications for appeal.

### **3. The Appeal Site and Its Surrounding Areas**

#### **The Appeal Site**

- 3.1 The Appeal Site is located on Old Scheduled Agricultural Lots

held under Block Government Lease, with a site area of about 1 141 m<sup>2</sup> (including about 422 m<sup>2</sup> of Government Land);

- 3.2 The site is accessible both from Castle Peak Road (San Tin Section) and Kwu Tung Road;
- 3.3 According to a site visit by the Planning Department (PlanD) on 29<sup>th</sup> July 2014, the Appeal Site was paved and fenced off, and was currently used for retail of second-hand private cars without valid planning permission. It was also revealed that there were 52 private cars and one goods vehicle at the Appeal Site, of which two private cars were indicated for sale, while the remaining 50 private cars and one goods vehicle were parked/stored there; and
- 3.4 The site is adjacent to the Wetland Buffer Area of Deep Bay.

### **The Surrounding Areas of the Appeal Site**

- 3.5 To the immediate north and northeast of the Appeal Site are two buildings for residential/office use, some domestic structures, the office of the Rural Committee, a shop, as well as some suspected unauthorised developments (“UDs”) that including car parks, vehicle repair workshops and vehicle sales operations, etc. To the north of Castle Peak Road (San Tin Section) are a school, a temple, some shops and a post office, which are existing uses, as well as some suspected UD including shops, a warehouse, a restaurant, a home for the elderly and car parks.
- 3.6 To the further southwest of the Appeal Site across Kwu Tung Road are a petrol filling station and a knoll.
- 3.7 To the southeast of the Appeal Site is San Tin Highway.

3.8 There have been no significant changes to the planning environment since the TPB's rejection of the review application.

**4. Planning Intention**

4.1 According to the Notes of the OZP, the planning intention of the "V" zone is to designate both existing recognised villages and areas of land considered suitable for village expansion. 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 TPB.

**5. The TPB PG-No.13E**

5.1 According to the TPB PG-No.13E, "open storage" uses 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. The definition also includes open storage use with on-site commercial activities, e.g. display and sale of vehicles. Having considered the nature of the application (with about 95.4% of the Appeal Site's area uncovered for storage of private cars for sale) and the circumstances of the Appeal Site, the development is akin to an open storage of vehicles prior to sale and the TPB PG-No.13E is therefore relevant to the application.

5.2 The Appeal Site falls within Category 4 areas under the TPB PG-No.13E. The following considerations in the Guidelines are relevant:

Category 4 areas: Applications for open storage and port back-up uses 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. A maximum period of two 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 merits.

## **6. Previous Applications**

6.1 The Appeal Site is the subject of six previous applications (Applications No. A/YL-ST/18, 127, 243, 334, 385 and 428). Only the last application (Application No. A/YL-ST/428) was rejected.

6.2 Application No. A/YL-ST/18 was for temporary public car park for private cars and submitted by a different applicant. It was

approved by the RNTPC on 20<sup>th</sup> December 1996 for a period of three years up to 20<sup>th</sup> December 1999. The major grounds for approval were that the proposed car park could supplement the parking provision for the villages. The applicant had not made any submission to explain how to comply with the approval conditions. However, there was no revocation clause imposed.

6.3 Applications No. A/YL-ST/127, 243, 334, 385 and 428 were submitted by the Appellant. Applications No. A/YL-ST/127, 243 and 334 were for temporary retail shop for ironmongery. These three applications were approved by the RNTPC, subject to certain conditions, on 2<sup>nd</sup> June 2000, 25<sup>th</sup> July 2003 and 27<sup>th</sup> July 2007 respectively for a period of three years. The major grounds were that the proposed use could serve the local needs of the villagers and the approved use was considered not incompatible with the surrounding land uses. In respect of the first two applications, conditions in relation to landscape, drainage and vehicular ingress/egress points were complied with. The permissions lapsed on 3<sup>rd</sup> June 2003 and 26<sup>th</sup> July 2006 respectively. However, the planning permission for Application No. A/YL-ST/334 was revoked on 27<sup>th</sup> January 2008 due to non-compliance with approval conditions on submission of a condition record of the existing drainage facilities, and submission and implementation of fire service installations proposal.

6.4 Application No. A/YL-ST/385 was for temporary retail of second-hand private cars. It was approved by the RNTPC, subject to certain conditions, on 29<sup>th</sup> January 2010 for a period of two years instead of the three years sought. The major grounds for approval were that there were previous permissions at the site and there was no objection from Government departments or the local



community concerned. Since the site fell within the Category 4 areas of the TPB PG-No.13E, the approval of a temporary two-year permission was to allow time for the applicant to identify a suitable site for relocation. The Appellant was also advised that no further renewal of planning permission would be allowed unless under very exceptional circumstances. Approval conditions, including submission of the as-built drainage plan, implementation of compensatory planting, submission of fire service installations (FSIs) proposals and the provision of FSIs, were complied with.

- 6.5 Application No. A/YL-ST/428 was for temporary retail of second-hand private cars. It was rejected by the RNTPC on 21<sup>st</sup> December 2012. The considerations were that with most of the site area uncovered for storage of private cars for sale, the development was akin to an open storage of vehicles prior to sale; the site fell within Category 4 areas of the TPB PG-No.13E where open storage uses would normally be rejected except under exceptional circumstances. When granting planning permission for Application No. A/YL-ST/385, the RNTPC already advised the same Appellant that the planning permission was granted to allow two years' time for him to relocate the use to a suitable site.

However, during the section 16 application and the section 17 review application, the Appellant did not provide information to demonstrate that he had paid effort to identify suitable site to relocate the use. There were no exceptional circumstances that warrant sympathetic consideration. In view of the above, the RNTPC rejected the application on the grounds of not being in line with planning intention of the "V" zone, not complying with the TPB PG-No.13E and that approving the application would set an undesirable precedent for similar applications within the "V"

zones. The cumulative effect of approving such application would result in a general degradation of the environment of the area.

**7. Similar Applications**

7.1 Within the same “V” zone, there were three similar applications for temporary sale office for second-hand private cars (Applications No. A/YL-ST/261, 293 and 320).

7.2 Applications No. A/YL-ST/261 and 320 were approved by the TPB upon review on 4<sup>th</sup> June 2004 and 26<sup>th</sup> January 2007 respectively, mainly on the grounds that previous approvals for temporary uses had been given, there were no adverse comments from departments concerned and approval of the application would not affect Small House developments on the site within a period of time. These applications were approved for a period of 12 months in order not to frustrate the prospective Small House development on-site. The planning permissions for both applications were eventually revoked due to the applicants’ non-compliance with the approval conditions under the planning permissions.

7.3 Application No. A/YL-ST/293 was rejected by the TPB upon review on 10<sup>th</sup> March 2006. The major grounds were that there was an active programme for Small House development within the site and there was insufficient information in the submission to demonstrate that the use would not generate adverse drainage impact on the surrounding areas.

**8. Reasons for Not Supporting the Appeal Application**

The Respondent does not support the appeal application due to the following reasons:

## 8.1 **Not In Line with the Planning Intention of the “V” Zone**

8.1.1 The planning intention of the “V” zone is to designate both existing recognised villages and areas of land considered suitable for village expansion. Land within this zone is primarily intended for development of Small Houses by indigenous villagers. The proposed business of temporary retail of second-hand private cars is akin to an open storage of vehicles prior to sale and this applied use is not in line with the planning intention of the “V” zone. There was no strong planning justification provided in the application to justify a departure from the planning intention, even on a temporary basis.

## 8.2 **Non-compliance with the TPB Planning Guidelines**

8.2.1 During the section 16 application and the section 17 review application, the Appeal Site was already used as proposed in this application without valid planning permission. This application does not comply with the TPB PG-No.13E in that the Appeal Site falls within Category 4 areas where application for open storage use would normally be rejected except under exceptional circumstances. In view of the above, when approving the previous Application No. A/YL-ST/385 on 29<sup>th</sup> January 2010, the RNTPC already advised the Appellant that a shorter approval period of two years was granted so as to allow time for him to identify a suitable site for relocation and that no further renewal of planning permission would be allowed unless under very exceptional circumstances. The applicant has not provided any information to demonstrate that he strived to identify a suitable site to

relocate the development. There are no exceptional circumstances that warrant sympathetic consideration of the application.

8.2.2 Since the promulgation of the TPB PG-No.13E in 2008, the RNTPC has not approved other similar applications within the same “V” zone.

### **8.3 Undesirable Precedent**

8.3.1 The Appeal Site is in the vicinity of residential dwellings to the north and northeast. To the northwest across Castle Peak Road (San Tin Section) are a school (i.e. Tun Yu School) and a temple, and to the southwest across Kwu Tung Road is an open space. The area is of rural character; permission of open storage at the Appeal Site would set an undesirable precedent and attract similar applications for open storage within the “V” zone. The cumulative effect would cause degradation of the rural environment of the area.

8.3.2 Since 2008, the RNTPC has not approved other similar applications within the same “V” zone. Current open storage uses within the “V” zone are suspected UDs against which the Administration will take enforcement actions.

## **9. The Appeal Hearing**

9.1 At the appeal hearing on 22<sup>nd</sup> October 2014:

(a) The Appellant attended the hearing and made oral

submissions through Mr. MAN Hok Yin (“**Mr. MAN**”), his authorised representative.

- (b) The Appellant did not call any witness.
- (c) The Respondent was represented by Government Counsel Mr. Brian LEU Lap Yau (“**Mr. LEU**”) and called one witness: Mr. Ernest FUNG Chi Man (“**Mr. FUNG**”), Senior Town Planner/Yuen Long East 1, Fanling, Sheung Shui and Yuen Long East District Planning Office of the PlanD.

## **10. Justifications for Appeal and Responses of the Respondent**

10.1 Appeal Justification (1): The outlook and operation of the applied use are similar to those of the surrounding land uses. The development is situated in an area for village development and the two uses are compatible with each other, with the adjacent car park providing parking lots to villagers. The Appellant claims that the applied use will not affect the planning and development of Small Houses in the area. If the Appeal Board approves the application, the use will continue to serve residents in the area and keep the surrounding townscape tidy. The development will make full and rational use of the land to help local economy; and the business of the development will provide second-hand private car retail and vehicle licensing services to local residents, thus saving their time to travel to urban area to acquire the same services.

### Response of the Respondent

- (a) The Appeal Site falls within an area zoned “V” on the OZP. The development is not in line with the planning

intention of the “V” zone, which is to designate both existing recognised villages and areas of land considered suitable for village expansion. Land within this zone is primarily intended for development of Small Houses by indigenous villagers. Having considered the nature of this application (i.e. most of the area in the Appeal Site uncovered for storage of private cars for sale) and the circumstances of the Appeal Site as observed in the site visit earlier, the development is akin to an open storage of vehicles prior to sale and is not in line with the planning intention of the “V” zone. There was no strong planning justification provided in the review application to justify a departure from the planning intention, even on a temporary basis.

- (b) The Appeal Site is in the vicinity of residential dwellings to the north and northeast, with two car parks and another car sale outlet which are all suspected UDs. To the northwest across Castle Peak Road (San Tin Section) are a school (i.e. Tun Yu School) and a temple, and to the southwest across Kwu Tung Road is an open space. The area is of rural character; permission of open storage of vehicles at the Appeal Site would set an undesirable precedent and attract similar applications for open storage within the “V” zone. The cumulative effect would cause degradation of the rural environment of the area.

10.2 Appeal Justification (2): All relevant Government departments had no objection to the application.

## Response of the Respondent

While the relevant Government departments had no objection to or no adverse comments on the application during the section 16 application and section 17 review application, PlanD does not support the application for the following reasons:

- i. The Appeal Site falls within an area zoned “V” on the OZP. The development is not in line with the planning intention of the “V” zone.
- ii. This application does not comply with the TPB PG-No.13E in that the Appeal Site falls within Category 4 areas where application for open storage use would normally be rejected. When approving the previous application to use the Appeal Site for temporary second-hand private car retail (Application No. A/YL-ST/385) on 29<sup>th</sup> January 2010, the RNTPC already advised the Appellant that the approval was to allow two years’ time for him to relocate the development to a suitable site. In view of the above, the RNTPC rejected the previous application (Application No. A/YL-ST/428) as the development was not in line with the planning intention of the “V” zone or the TPB PG-No.13E, and that approving the application would set an undesirable precedent. Moreover, the Appellant has failed to prove the existence of exceptional grounds to justify approval of this application during the section 16 application, section 17 review application and this appeal application. The Appellant’s representative has

stated at the TPB meeting on 18<sup>th</sup> October 2013 that there was no plan to relocate the business from the Appeal Site.

- iii. The area is of rural character. The permission of open storage of vehicles at the Appeal Site would set an undesirable precedent and attract similar applications for open storage within the “V” zone. The cumulative effect would cause degradation of the rural environment of the area.

10.3 Appeal Justification (3): The local District Council member and the Rural Committee supported the application.

#### Response of the Respondent

During the section 17 review application, the Administration received the comments from a Yuen Long District Council member in support of the review application, as well as the comments regarding the review application from the San Tin Rural Committee relayed by the District Officer (Yuen Long), Home Affairs Department. The reason for supporting the application is that the business of the proposed development provides much needed services to the residents in the area. However, apart from public comments, the TPB will also take into account the planning intention of the Appeal Site and other related planning factors in considering planning applications, such as the TPB Planning Guidelines, the nature of the development and its compatibility with the rural characteristics of the surrounding areas.



**11. The Appellant's Other Major Reasons for Appeal and Responses of the Respondent**

According to the document enclosed with the Notice of Appeal submitted by the Appellant on 24<sup>th</sup> December 2013, the Appellant's other major reasons for appeal can be summarised as follows:

- 11.1 Other Reasons for Appeal (1): Area development is compatible with the planning of Small Houses.

Response of the Respondent

- (a) The Appellant admits that "Tat Man Motor Ltd." (i.e. the second-hand private car retail shop at the Appeal Site) is situated in an area for village development, but he also claims that the retail shop will not affect the development of Small Houses. The proposed development is akin to an open storage and should not co-exist with development of Small Houses. The Appellant's claim is self-contradictory and incomprehensible.
- (b) In addition, whether area development and planning of Small Houses are compatible is not the only factor in the TPB's consideration of the Appellant's case. As far as this appeal is concerned, the Appeal Site falls within an area zoned "V" on the approved plan and also falls within Category 4 areas as specified in the TPB PG-No.13E. The development is not in line with the planning intention of the "V" zone and the TPB Planning Guidelines.

- (c) Accordingly, the Appellant's claim that "Area development is compatible with the planning of Small Houses" does not constitute a valid reason for appeal.

11.2 Other Reasons for Appeal (2): "Tat Man Motor Ltd." keeps the surrounding townscape tidy.

Response of the Respondent

- (a) Whether "Tat Man Motor Ltd." keeps the surrounding townscape tidy is not a factor in considering the Appellant's case. Even if the Appellant manages to prove his point (the TPB hereby denies that the Appellant has provided sufficient or valid evidence), it does not constitute a reason to reverse the TPB's decision, not to mention a valid reason for appeal.
- (b) The Appeal Site and the surrounding sites fall within an area zoned "V". The concept of townscape tidiness is not necessarily applicable to the Appellant's case as a factor in considering his application and does not constitute a valid reason for appeal.

11.3 Other Reasons for Appeal (3): making full and rational use of the land to help local economy; helping villagers buy second-hand cars, thus saving their time to travel to urban area; and helping local residents handle all sorts of documents relating to Transport Department.

### Response of the Respondent

- (a) The Appellant's points are not factors in considering his application. Even if the Appellant manages to prove his point (the TPB hereby denies that the Appellant has provided sufficient or valid evidence), it does not constitute a reason to reverse the TPB's decision, not to mention a valid reason for appeal.
  
- (b) If the Appellant's points are to be accepted, then any reasonable use of the land that helps local economy, helps villagers buy second-hand cars and helps local residents handle all sorts of documents relating to Transport Department will need to be granted with planning permission. This will serve to totally disregard the planning intention of the "V" zone, which is also against the purpose of the approved plan and will severely impair its validity.

## **12. Reasons for Dismissing the Appeal**

Having considered the evidence and submissions from both parties, the Appeal Board decides to dismiss the appeal for the reasons set out in the paragraphs below.

- 12.1 The Appeal Board is of the view that the use of temporary retail of second-hand private cars at the Appeal Site is not in line with the planning intention of the "V" zone and that the development is incompatible with surrounding land uses, as

the surrounding area comprises mainly residential dwellings, open space, temple and school, and is of rural character.

12.2 The Appellant's application does not comply with the TPB PG-No.13E for Application for Open Storage and Port Back-up Uses .

12.3 The Respondent claims that approving the application would set an undesirable precedent that leads to a proliferation of other similar uses in the subject "V" zone, and the cumulative effect would cause degradation of the rural environment of the area. The Appeal Board is of the view that every application must be considered separately in the light of its individual merits and it will not refuse to consider the case for fear that the approval of such case will set an undesirable precedent.

12.4 **Exceptional Circumstances**

(a) The Appeal Board notes that throughout the process of the section 16 application, section 17 review application and this appeal application, the Appellant has not raised any exceptional circumstances that warrant sympathetic consideration of his application.

(b) The Appellant claims that the proposed use will continue to serve local residents and keep the surrounding townscape tidy; the development will make full and rational use of the land to help local economy; and that the business of the development will also provide second-hand private car retail and vehicle licensing services to local residents, thus saving their time to travel to urban area to acquire the same

services. The Appellant displayed relevant photos to support his point.

- (c) In respect of this point, the Appeal Board does not agree that it constitutes an exceptional circumstance. The Appellant's justification only proves that the second-hand private car trade business at the Appeal Site does provide services to nearby residents and that such services may indeed offer convenience to some residents. However, this is merely convenience brought about by general commercial services and is not an exceptional reason that warrants sympathetic consideration of this appeal.

#### 12.5 **Two-year Grace Period**

- (a) When approving the previous application to use the Appeal Site for temporary second-hand private car retail (Application No. A/YL-ST/385) on 29<sup>th</sup> January 2010, the RNTPC already advised the Appellant that the approval was to allow two years' time for him to relocate the use to a suitable site.
- (b) The Appellant has not provided any information to demonstrate that he, during that and the subsequent period, strived to identify a suitable site to relocate the second-hand private car trade business. To the contrary, the Appellant's representative stated at the TPB meeting on 18<sup>th</sup> October 2013 that there was no plan to relocate the business from the Appeal Site. In fact, the Appellant's representative also stated clearly at the appeal hearing on 22<sup>nd</sup> October 2014 that the business would be terminated if the appeal was dismissed.

(c) The Appeal Board would like to remind the Appellant hereby that the second-hand private car retail business at the Appeal Site is illegal; the Appellant may be subject to prosecution by continuing the illegal business at the Appeal Site. The Appellant should seek legal opinion in this regard.

**13. Conclusion**

The Appeal Board accepts the evidence of Mr FUNG of the PlanD and the submission made by Mr LEU on behalf of the Respondent, and decides that the Appellant has not shown sufficient reasons and evidence in support of the appeal. The appeal is therefore dismissed with no order as to costs.

(Signed)

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Mr. YEUNG Ming Tai

(Chairman)

(Signed)

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Dr. Teresa LAW Sui Chun

(Member)

(Signed)

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Miss Phyllis SO Yee Ching

(Member)

(Signed)

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Ir. Dr. Paul TSUI Hon Yan

(Member)

## **Town Planning Appeal No. 11 of 2013**

### **Appeal under Section 17B of the Town Planning Ordinance by**

**Appellant: Mr. Man Fung Wing**

### **Dissenting Opinion**

#### **Background**

1. This is an appeal against the Respondent's refusal to grant another temporary approval to temporarily use land for car retailing in a Village Type Development (VTD) zone. The use involves the open air display of a few vehicles and some office use within some structures.
2. I appreciate the line of reasoning of the majority of the most respected chairman and honourable members of the panel, which is consistent with the dominant views of the Appeal Board. However, I dissent and allow the appeal subject to the same conditions (but without the ban on repeated applications) the Respondent applied previously. Although the case is a small and simple one based on facts, it is an excellent example of how statutory government planning regulations affect ordinary people. Therefore, some matters of principle would be better demonstrated, as the case is free from complication due to emotional public reactions that may arise in response to the location, size, or nature of the use applied for.
3. While this decision is cold comfort to the Appellant, it would lay down several factors from my best professional knowledge and judgement for the Board and wider public because I believe the dominant views neglected some subtle interpretation problems of the notion of "planning intention" and the nature of Town Planning Board (TPB) Guidelines in general and Section 2.5 of the TPB Guidelines 13E of October 2008 in particular.



## Reasons for decision

4. My decision is based on the following considerations:

- (a) No technical grounds for rejecting the application: in this appeal, the Respondent witness, a Senior Town Planner with the Planning Department, confirmed before the panel that there was no oral or written objection from any government department over the matter of the environment, ecology, drainage, sewerage, traffic, police, local objections, land administration (including small house development), etc., except the Planning Department on the grounds that: (i) the application is against the planning intention for the VTD zone; (ii) the application is not supportable under the applicable Town Planning Board Guidelines; and (iii) approval would set a bad precedent.
- (b) Questionable planning intention: the witness for the Respondent is competent with extensive experience as a senior town planner in the Planning Department. Yet, even he could not affirm, upon questioning by the panel, that the planning intention for a zone would be limited to those under Column 1 or extended to those under Column 2 and any use that may be applied under the Town Planning Ordinance. He only affirmed that the Planning Department issued no internal corporate directive on the matter. His opinion is that the planning intention is limited to Column 1 uses. That can hardly be logical because in such a case, all s.16 applications would be considered to be against planning intention and, hence, should not be approved OR that such an intention can be discounted when there are good grounds to approve and/or insufficient grounds to reject an application. To assert that there is a contravention of planning intention without knowing what it really means or in the absence of any technical particular or explanation is an example of grossly and professionally unreasonable and unacceptable public administration. Suppose the planning intention is limited to such categories as village-type (especially “small”) houses, as the Respondent Witness asserted. Then one should take into account that the particular zone within the site under appeal is along Kwu Tung Road, which, at its narrowest stretch, is sandwiched by two highways (Castle Peak Road and San Tin Road) and would be unsuitable for housing if good environmental planning standards are followed. According to Table 4.3 under Section 4.4 of Chapter 9 of the Hong Kong Planning Standards and Guidelines (HKPSG) produced by the Planning Department and adopted by

government as a policy to bind all government departments, noise-sensitive uses (e.g. residential small houses) without noise screening must be 120m, 180m, and 300m away from a local distributor, a district distributor, and a trunk road, respectively. This means that the appeal is grossly unfit for any noise-sensitive use. Therefore, to me, a professional planner with experience working in the Town Planning Office and Environmental Protection Department, the site's proper long term local landuse should be for a local or district shopping/community centre, not housing. In any event, the way that planning intention was applied to refuse planning approval rendered the main reason for the decision to reject (in contradiction of planning intention) indistinguishable from the decision (a rejection of approval) itself. That means no real reason for rejection was given by a public body in respect of a decision affecting individual rights. The reasoning here is in line with the approach taken by this Board in paragraphs 8 to 12 in **Planning Appeal No. 5 of 2003**; **paragraphs 17 to 21 in Planning Appeal No. 11 of 2004**.

Furthermore, it is a fact that nearly all planning permissions granted after reviews by the Respondent were free from the stigma of contravening planning intentions, which imply that planning intention is not an absolute standard and can be dropped upon reconsideration by the Respondent. In fact, the Respondent's "change of intention" happened in many planning reviews as in the review of **application No. A/YL-ST/261**, which contained similar facts and was approved upon review, although the application was ruled to contradict the planning intention when it first came before the Respondent. I see no valid reason why any intention must be retained for this appeal or how such an intention could be defended in the absence of any technical particular.

- (c) Misinterpretation of administrative Town Planning Board Guidelines: it is doubtful if the mere contravention of the general provisions of TPB Guidelines 13E *per se*, simply because the site falls within a general land category in a set of administrative guidelines, is sufficient grounds to reject the application in the absence of any particular objection by any department. Discretion must be made and, in this instance, the Planning Department applies the guidelines mechanically without due regard for the idiosyncratic features of the site, which is unfit for housing development. Section 2.5 of the TPG Guidelines 13E of October 2008 was the sole reason relied on by the Respondent to reject the case. The Respondent's argument was that the last planning permission

was final unless some very special circumstances advanced otherwise. However, this section actually suggests that such a rejection is only “probable” rather than “always”. If the latter, then the administrative circular would attempt to revoke the right of the Appellant to make a further application. This attempt, if real, would be an invalid *attempt to amend the statutory town plan* by an administrative circular. (See **Building Appeal No. 1113 of 2008, paragraph 30 of Planning Appeal No 08 of 2004**; and paragraphs referring to a departmental circular in the two dissenting opinions of the jointly heard **Planning Appeal Nos. 9 of 2004 & 5 of 2005**.) The Chinese version of this circular expressly states under “important reminder” that it is “for general reference only” on its first page immediately below the title. It was established by the advice of the Privy Council in respect of **Appeal No.13/1993** that the administrative TPG Guidelines were relevant considerations but they were not binding. In this case, it would be unreasonable not to allow an appeal in light of another set of guidelines with greater authority, i.e. the HKPSG referred to above, which inform on the true planning intention.

- (d) Ignoring relevant special environmental circumstances of the site: there is a need to take particular note of the special circumstances that, but for the Town Planning (Amendment Ordinance) 1990, nullifies the ruling in *Melhado*, the open storage use that would have been part and parcel of the private property rights of the Appellant (cf, for instance, **Planning Appeal Nos.13/1993; 01/1998**). As the amendment provides for no compensation, there is a particular need to be careful to not unduly disturb legitimate businesses with abstract planning concepts (doubtful in this case) not backed by competent technical considerations. In this appeal, a well-established local business employing local people has caused no public harm or public objection. Planning is for people, not the other way around, regardless of the intention.
  
- (e) Setting a bad precedent an irrelevant consideration: the bad precedent concern of the Witness is that there are many suspected unauthorised uses in the vicinity and the granting of another temporary approval would encourage them to continue. I see no logic in this submission, as every case should be decided on its own merits.

Observation

5. Progress in planning often occurs slowly. Many years after the Town Planning Ordinance was implemented and plans were prepared by the Town Planning Board, the court declared in the *Singway case* that all town plans prepared so far were null and void. It took some years before the notion of “planning intention” found its way into the Notes of the statutory town plan. Amazingly, until now, even very experienced town planners in the Planning Department fail to explain satisfactorily to the Appellant and the Appeal Board where planning intention lies. This is surely an area that would continue to generate litigation. To approve an application for a temporary use, in the absence of any demonstrable public harm, and grant a temporary extension is reasonable government. To rely on an elusive “planning intention” to throw out a simple case is rationalization, if not irrational.

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(Signed)

Professor Lawrence W.C. Lai

30<sup>th</sup> January 2015