

IN THE TOWN PLANNING APPEAL BOARD

TOWN PLANNING APPEAL NO. 6 OF 2022

BETWEEN

CHIM KWAN WO

Appellant

and

TOWN PLANNING BOARD

Respondent

Appeal Board: Ms. LAM King-sze, Cissy (Chairman)

Mr. CHAN Yuen-king, Paul (Member)

Mr. CHENG Ka-kui, Arnold (Member)

Miss LEE Mo-kit, Rebecca (Member)

Professor TSE Kam-tim (Member)

In Attendance: Ms. Ivy LI (Secretary)

Representation: Mr. Tony KO, Counsel for the Appellant,  
instructed by Kenneth C.C. Man & Co.

Miss Sanyi SHUM, Senior Government Counsel; and  
Mr. Raymond TAM, Senior Government Counsel,  
for the Respondent

Date of Hearing: 4 December 2023

Date of Decision: 15 December 2023

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## DECISION

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1. This is an appeal by the Appellant under section 17B of the Town Planning Ordinance (Cap. 131) (“**TPO**”) against the decision of the Respondent refusing his application for planning permission to use the Appeal Site (see below) as warehouse (for storage of grain, cooking oil and grocery) for a period of three years (“**subject planning permission**”) in an Agriculture (“**AGR**”) zone.

### Background Facts

2. Site: The Appeal Site is located near the southwestern fringe of Lai Pek Shan San Tsuen in Ting Kok, Tai Po. It comprises Lots 626 (Part), 627 (Part), 629 (Part), 630 (Part), 631 (Part), 632, 634 (Part) in D.D. 23 and adjoining Government land, Ting Kok, Tai Po, New Territories. It is accessible via a local vehicular track leading to Ting Kok Road.
3. The Appeal Site is about 1,695 m<sup>2</sup> in area, including about 310 m<sup>2</sup> of Government land.
4. Zoning: On 7.9.1990, the Ting Kok Interim Development Permission Area (“**IDPA**”) Plan No. IDPA/NE-TK/1 was gazetted under s.26(1)(c) of the TPO. The Appeal Site fell within an area of “**Unspecified Use**” under the IDPA Plan.
5. On 8.7.1994, the draft Ting Kok Outline Zoning Plan (“**OZP**”) No. S/NE-TK/1 was gazetted under s.5 of the TPO. The Appeal Site fell within the **AGR** zone.
6. On 27.10.2015, the Chief Executive in Council under s.9(1)(a) of the TPO approved the draft Ting Kok OZP No. S/NE-TK/18, which was subsequently re-numbered as S/NE-TK/19. The Appeal Site remained within the AGR zone. This is the OZP currently in force.

7. Planning Intention: As per the Notes to the OZP (“Notes”), the “Planning Intention” of the AGR zone is:

“primarily to retain and safeguard good quality agricultural land/farm/fish ponds for agricultural purposes. It is also intended to retain fallow arable land with good potential for rehabilitation for cultivation and other agricultural purposes.”

8. S.16 Application: Under the Notes, warehouse use is neither a Column 1 (*uses always permitted*) nor a Column 2 (*uses that may be permitted with or without conditions on application to the Respondent*) use of AGR zone. By **paragraph (12)(b) of the Notes**, temporary use or development of any land or building not exceeding a period of three years requires permission from the Respondent. Notwithstanding that the use or development is not provided for in terms of the Plan, the Respondent may grant permission, with or without conditions, for a maximum period of three years, or refuse to grant permission.
9. On 24.1.2022, the Appellant represented by PlanArch Consultants Limited (“PlanArch”) submitted a planning application under TPO s.16 (No. A/NE-TK/745) to the Respondent for the subject planning permission which comprised a total of 7 structures with a total covered land area of 897m<sup>2</sup> and applied uses were “Storage, ancillary office, store and rest area”.
10. In the Planning Statement submitted by PlanArch in support of the application, it stated in paragraphs 2.3 and 4.1 as follows:

“2.3 EXISTING LAND USE AND HISTORY OF THE OPERATION

The application site is currently used as warehouse for the storage of grain, cooking oil and grocery by the applicant under the name of Yat Fung Food Logistics Co. Ltd. (Photos 1 & 2). Most of the application site was in fact formed and a number of structures were built for the same purpose before the gazette of [the IDPA Plan] on 7.9.1990. However, over the years, the operation has expanded and covered a larger area with bigger structures. ... ..

## History of the Operation - 'Existing Use' Status

The father of the applicant, Mr. CHIM Moon Bor (alias CHIM Bor), started his own business for condiments and preserved food in the 1960s, ... . In view of the expansion of his business, in 1989, Mr. CHIM Moon Bor acquired Lots 627 and 631 in D.D.23 in Tai Po for warehouse/open storage purpose or his goods (Appendix 1). Mr. CHIM Moon Bor paid for the land rent for the subject site between 1.7.1988 to 30.6.1993 (Appendix 2). Meanwhile, he also rented the adjoining lots for the operation of the warehouse and open storage. ... .”

### “4. PLANNING JUSTIFICATIONS

#### 4.1 THE PROPOSED DEVELOPMENT IS AN EXPANSION OF AN 'EXISTING USE' OPEN STORAGE AND WAREHOUSE AND THIS S16 APPLICATION INTENDS TO RECTIFY THE STATUS AND SERVE THE NEEDS OF THE COMMUNITY

... . , it is evident that the operation of the open storage and warehouse for grain, cooking oil and grocery has been a long-term family operation. It is an 'Existing Use' which was in operation before the gazette of the IDPA Plan. Nevertheless, the operation has expanded to meet the needs of the increased population in Hong Kong and the operational needs of the family business. Therefore, this s.16 application intends to rectify the situation and allow the traditional business to survive to serve the community.”

#### 11. The Planning Statement concluded:

“The proposed warehouse is considered compatible with the surrounding land uses. A large part of the operation is an 'Existing Use' before the gazette of IDPA Plan which should be tolerated. It has however been expanded to meet operational needs. The proposed development will not cause any adverse impact on the traffic, environment and drainage as well as nuisances to the surrounding area. The applicant has demonstrated good practices and clean operation. In light of the above, members of the Town Planning Board are respectively requested to give favourable consideration to the application.”

#### 12. On 18.3.2022, the Rural and New Town Planning Committee (“**RNTPC**”) of the Respondent rejected the Appellant’s application:

“(a) The development was not in line with the planning intention of the “AGR” zone which was primarily to retain and safeguard good quality agricultural land/farm/fish ponds for agricultural purpose. It was also intended to retain fallow arable land with good potential for rehabilitation for cultivation and other agricultural purposes. There was no strong planning justification in the current submission for a departure from the planning intention, even on a temporary basis; and

(b) The applicant failed to demonstrate in the submission that the development would not result in adverse landscape impacts to the area.”

13. S.17 Review Application: On 19.4.2022, the Appellant represented by PlanArch applied under TPO s.17(1) for a review of the RNTPC’s decision.
14. PlanArch’s supplementary statement in support of the review submitted on 15.6.2022 largely repeated the previous planning statement.
15. The supplementary statement concluded as follows:-

“We have demonstrated that:

- the proposed development will not cause departure from the planning intention as it is not a piece of good quality agricultural land nor having great potential for agricultural rehabilitation;
- the planning intention of ‘AGR’ zone does not reflect the nature of the ‘Existing Use’ of the application site;
- there was no degradation on landscape value at the application site since its ‘Existing Use’;
- approval of this application will not set an undesirable precedence considering the uniqueness of the application site in terms of its ‘Existing Use’;
- the proposed development enables the survival of long-established family business and serves the needs of the community;
- the applicant has been demonstrating good practices in clean operation and it shall merit favourable consideration;

- the application site will not cause adverse drainage, traffic, fire safety and environmental impact to surrounding area; and
- there are no adverse comments/objections from other government departments apart from PlanD and AFCD.”

16. On 2.9.2022, after hearing the Appellant and his representatives, the Respondent rejected the review application for largely the same reasons as the RNTPC.

17. Subject Appeal: By Notice of Appeal Under Section 17B lodged on 25.11.2022, the Appellant appealed against the Respondent’s decision.

18. The grounds of appeal were as follows:

“The proposed use will not result in departure from the planning intention. There are no impact. Approval on this application will not set an undesirable precedence. No adverse comments or objection from other Government departments. There will be no adverse environmental degradation on landscape value at the site since ‘existing use’.”

19. The Appeal Statement concluded as follows:

“The warehouse and open storage is a family business handed down from the appellant’s father. The appellant understands that part of the Site is unauthorized and therefore applied to the TPB in an integral manner, and is willing to accept planning approval conditions to regulate the operation. It is demonstrated that: .... .”

20. It then listed out the same factors as per the supplementary statement (see paragraph 15 above), but added that:

- “• the temporary nature of the application will not affect the long-term planning intention of the designated zoning;”

Paragraph (3) of the Notes to the OZP

21. Under paragraph (3) of the Notes, “**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 a draft plan including interim development permission area plan covering any such land or building conform to this Plan, provided such use has continued since it came into existence. Any **material change of such use** or any other development ... must be always permitted in terms of the Plan or in accordance with a permission granted by the [Respondent].”  
*[emphasis added]*

22. Under TPO s.17B(8)(b), an Appeal Board may “confirm, reverse or vary the decision appealed against”.
23. As per Town Planning Appeal (TPA) No. 11 of 1998, the Appeal Board’s jurisdiction is limited by s.17B of the TPO. The Board can only review decisions by the Town Planning Board over whether any permission which may be granted under any draft plan or approved plan should or should not be granted. If an appellant wishes to establish his claim that the use is an existing use, he has to resort to the law courts for a determination.
24. This decision has been followed in a number of subsequent decisions, including, TPA No. 4 of 2000, TPA No. 17 of 2003, TPA No. 1 of 2004 and TPA No. 7 of 2011.
25. Mr. Ko further referred to paragraph (13) of the Notes: “Unless otherwise specified, all building, engineering and other operations incidental to and all uses directly related and ancillary to the permitted uses and developments within the same zone are always permitted and no separate permission is required.”

#### The hearing on 4 December 2023

26. As can be seen from the above, under the s.16 planning statement, the s.17 review supplementary statement, the grounds of appeal and the statement of appeal, the argument of the Appellant regarding “existing use” was not that paragraph (3) of the Notes applied. Rather, they recognized that “over the years, the operation has expanded and covered a larger area with bigger structures”, that “the operation has expanded to meet the needs of the increased population in Hong Kong and the operational needs of the family business”, whereby the s.16 application was made

to “rectify the situation and allow the traditional business to survive to serve the community”, “with intention to regularize the enlarged covered area”.

27. The essential arguments made in those previous statements and in the grounds of appeal were not that no permission was required, but rather that the Appeal Site as existing before the IDPA Plan (i.e. over 30 years ago) was already formed land, clear of vegetation, used for warehouse and open storage purposes, and this made the subject application unique and distinguishable from other unmeritorious applications.
28. On the day of the hearing, however, Mr. Ko representing the Appellant informed the Appeal Board that he now argued that there was existing use with no material change so that paragraphs (3) and (13) of the Notes applied. That was not only a departure from the previous arguments, but also a contradiction, because if paragraph (3) applied, then “no action is required”, viz. no application for permission was required in the first place. There was no need for any s.16 application.
29. Mr. Ko accepted that following the aforesaid authorities, the Appeal Board had no jurisdiction to decide on the applicability of paragraph (3) and he applied for the appeal to be dismissed.
30. We indicated to Mr. Ko that we were prepared to continue to hear the appeal on the original arguments without prejudice to his argument under paragraph (3). Nonetheless, Mr. Ko maintained his position to ask for dismissal of the appeal.
31. Miss Shum for the Respondent had no objection to Mr. Ko’s application.
32. The Appellant is, of course, perfectly entitled to decide how best to proceed and what arguments best suit the facts. We went through the above authorities and we gave Mr. Ko a number of adjournments to allow him to take instructions from the Appellant. Mr. Ko confirmed the Appellant’s stance.



## Decision

33. In the circumstances, by consent, we make the following order:

Under s.17B(8) of the TPO, we confirm the decision of the Respondent and dismiss the appeal on the ground that the Appellant does not seek to prove the appeal, taking the view that no application for permission is required under paragraphs (3) and (13) of the Notes to the OZP.

## Costs

34. As we indicated to Mr. Ko at the hearing, we take a dim view of the way the proceedings were conducted. As said above, the Appellant is perfectly entitled to decide how best to proceed, but if he decided not to proceed with the appeal, he could and should have informed this Appeal Board well in advance. Under regulation 7 of the Town Planning (Appeals) Regulations, he could abandon the whole or any part of his appeal by giving not less than 7 days' advance notice in writing.

35. As Miss Shum rightly pointed out, she had included a number of authorities in her opening submissions which made it clear that the Appeal Board had no jurisdiction to decide on "existing use" under paragraph (3) of the Notes. There was no reason why the Appellant should choose to give no indication of their application until the first day of hearing. We agree that this was unacceptable and inappropriate conduct. Nevertheless, it is trite law that costs should be awarded only in exceptional circumstances; we do not consider that an award of costs is called for in the present case. We make no order as to costs.

36. We are grateful for Counsel's assistance.

(Signed)

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Ms. LAM King-sze, Cissy  
( Chairman )

(Signed)

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Mr. CHAN Yuen-king, Paul  
( Member )

(Signed)

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Mr. CHENG Ka-kui, Arnold  
( Member )

(Signed)

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Miss LEE Mo-kit, Rebecca  
( Member )

(Signed)

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Professor TSE Kam-tim  
( Member )