

TOWN PLANNING APPEAL NO. 4 OF 2010

IN THE MATTER of the Town Planning

Ordinance Cap. 131

and

IN THE MATTER of an appeal under

Section 17B by Ms. Yeung Wai-chung

Dates of Hearing: 26 April 2012 and 29 June 2012

Date of receipt of submissions from TPB: 20 August 2012

Date of receipt of submissions from the Appellant: 3 September 2012

Date of Decision: 11 December 2012

Appeal Board: Mr. Yeung Ming-tai (Chairman)

Mr. Johnson Kong Chi-how (Member)

Ms. Susan Leung So-wan (Member)

Mr. Sin Ming-hei (Member)

Professor Tang Bo-sin (Member)

In Attendance: Ms Suan Man (Secretary)

Representation: Mr Tim Wong for the Appellant

Ms Jess Chan for the Respondent

DECISION

Background

1. The Appellant, Ms. Yeung Wai Chung, appeals against the decision made by the Town Planning Board (“**TPB**”) on 8 January 2010 which rejected the Appellant’s application for a planning permission for a temporary vehicle repair workshop in Lot No. 2431RP (Part), Lot No. 2429 (Part)¹, Lot No. 2440RP (Part) and the adjoining Government land in D.D. 130 in Lam Tei, Tuen Mun (“**the Appeal Site**”) for 3 years.
2. The permission was sought by the Appellant pursuant to Section 16 of the Town Planning Ordinance (“**TPO**”), Cap. 131.
3. The permission, if so granted, would enable the Appellant to continue the use of the Appeal Site for vehicle workshop including a paint-spraying workshop. At the time when the application was made, the Appeal Site had a paint-spraying workshop of 4.4m in height, vehicle repairing under a shed of 6.7m in height, 2-storey container-converted structures for storage of parts and tool, and a site office.

¹ The Appellant excluded the Lot No. 2429 (Part) from the Appeal Site as indicated in paragraph 1 of Mr Tam Hung Wah’s witness statement dated 16 April 2012.

4. Prior to 1993 when the draft Lam Tei and Yick Yuen Development Permission Area (“**DPA**”) Plan (No. DPA/TM-LTY Y/1) was first published, the Appeal Site (except Squatter no. 428D) was not used as a vehicle repair workshop. Thus, the use by the Appellant of the Appeal Site (except Squatter no. 428D) as vehicle repair workshop would not be considered as an existing use and was subject to planning permission and hence planning enforcement and prosecution action.
5. This is the second application (application no. TPB/A/TM-LTY Y/189) of the Appellant for a planning permission in relation to her vehicle repair workshop.
6. The Appeal Site is located in the long strip of land along Yuen Long Highway which is zoned as Green Belt (“**GB**”) under the approved Lam Tei and Yick Yuen Outline Zoning Plan (“**OZP**”) (No. S/TM-LTY Y/6), that was gazetted on 31 March 2006 and is the current statutory plan in force. The said long strip of land has been zoned as GB since the first draft OZP (No. S/TM-LTY Y/1) gazetted and published on 7 June 1996.
7. In the Notes to the approved OZP (No. S/TM-LTY Y/6), there was a Schedule of Uses of the GB zone. Uses in the Column 1 are uses always permitted and uses in the Column 2 are uses that may be permitted with or without conditions on application to the TPB.
8. Mr. Kan Kwok Chee (簡國治) (“**Mr. Kan**”), Senior Town Planner (Atg) of the Planning Department (“**PD**”) gave evidence on behalf of the TPB. He told the Appeal Board that “vehicle repair workshop” was neither in the Column 1 nor in the Column 2. Notwithstanding that, an application can still be made pursuant to

paragraph 11(b) of the Notes to the approved OZP for a temporary planning permission for a maximum period of 3 years.

9. There is no dispute that the Appellant had made an application (application no. A/TM-LTYY/11) in July 1997 (“**the 1997 Application**”). The application area in the 1997 Application included Lot No. 2431 (Part), Lot No. 2438RP (Part), Lot No. 2440RP, Lot No. 2441RP and the adjoining government land in D.D. 130, Lam Tei, Tuen Mun (“**original site**”). The original site which formed the subject of the 1997 Application is larger and included the Appeal Site.

10. The 1997 Application was rejected by the Rural and New Town Planning Committee (“**RNTPC**”) of the TPB on the grounds that:
 - (a) *the proposed development is not in line with the planning intention of the GB zone which is to define the limits of urban and sub-urban developments by natural features, to contain urban sprawl and to provide passive recreational outlets. There is a general presumption against development within this zone. There is no strong justification in the submission for a departure from the planning intention even on a temporary basis;*
 - (b) *the proposed development is incompatible with the surrounding areas which are rural in character and dominated by temporary domestic structures as well as agricultural and vegetated land;*
 - (c) *there is insufficient information in the submission to demonstrate that the proposed development will not create adverse traffic, drainage and environmental impacts on the surrounding areas; and*
 - (d) *the approval of the proposed development will set an undesirable precedent for other similar applications in the area, the cumulative effect of which will further degrade the environment of the area.*

11. The present application was rejected by the TPB on review on 8 January 2010 on similar grounds, namely:

(a) the proposed development is not in line with the planning intention of GB zone. There is a general presumption against development within this zone. No strong planning justification has been given in the submission for a departure from such planning intention of the GB zone, even on temporary basis;

(b) the development is not compatible with the surrounding green landscape and the residential dwellings in the close vicinity;

(c) there is no information in the submission to demonstrate that the development would not generate adverse environmental, landscape and drainage impacts on the surrounding areas; and

(d) the approval of the application would set an undesirable precedent for similar applications within these zones. The cumulative impact of approving such applications would result in general degradation of the environment.

12. According to the TPB, a vehicle repair workshop existed in 1993 on part of the Lot No. 2431 [PD's Plan AP-2a/A012] and the relevant land involved had already been resumed by the Government for the Deep Bay Link Project in 2003. After the land resumption, the remaining part of the Lot No. 2431 is described as the Lot No. 2431 RP [PD's Plan AP-2c/A014].

13. The Appeal Board notes that the parties are not in dispute about the land resumption limit for the Deep Bay Link Project and the renumbering of the Lot No. 2431 thereafter set forth in the above paragraphs.

The Current Approved OZP No.S/TM-LTY/6 and Planning Intention

14. There was an explanatory statement to the approved OZP No. S/TM-LTY/6 for Lam Tei and Yick Yuen (“**the Explanatory Statement**”).

15. The importance of the Explanatory Statement has been considered and explained by the Privy Council in Henderson Real Estate Agency Ltd. v Lo Chai Wan [1996] 7 HKPLR 1. Lord Lloyd of Berwick on behalf of the majority said the following at p.12 –

“Then what about the other documents on which the Town Planning Board rely? At this point a preliminary question arises. The plan and the Notes attached to the plan are obviously material documents to which the Appeal Board were bound to have regard; indeed they are the most material documents in the case. But what about the Explanatory Statement, and the subsequent guidelines? The Explanatory Statement is expressly stated not to be part of the plan. But it does not follow that it was not a material consideration for the Appeal Board to take into account, even though, as Mr. Read QC, for the appellants, pointed out, the Ordinance does not contain a provision, corresponding to s. 72 of the Town and Country Planning Act 1990, or cl 38(2) of the new Town Planning Bill, requiring the Town Planning Board and the Appeal Board to have regard to material considerations.

By the same token, the 1992 and 1993 guidelines are also material considerations to be taken into account. The Appeal Board was not bound to follow the Explanatory Statement or the guidelines. But they could not be disregarded.”

16. The planning intention of the GB zone, as defined under Section 9.11.1 of the Explanatory Statement, is primarily for defining the limits of urban and sub-urban development areas by natural features and to contain urban sprawl as well as to provide passive recreational outlets. There is a general presumption against development within the GB zone. The zoned areas may include foothills, lower hill slopes, spurs, isolated knolls, woodland, traditional burial ground or vegetated land

which occur at the urban fringe. Limited development may be permitted with or without conditions on application to the Town Planning Board, and each application will be considered on its individual merits taking into account the relevant Town Planning Board Guidelines.

17. At paragraph 3.1 of the Explanatory Statement, it is stated that the object of the Plan is to indicate the broad land-use zonings for the Lam Tei and Yick Yuen area so that development and redevelopment within the area can be put under statutory planning control.
18. At paragraph 5.5 of the Explanatory Statement, it is stated that the present conditions in the area are unsatisfactory because of the proliferation of container storage and other non-compatible uses, poor vehicular access, stream pollution and general visual squalor and urban sprawl.
19. At paragraph 9.11.2 of the Explanatory Statement, it is stated that the “GB” zone covers the northern, south-western corner and western portion of the Area. The strip of land along the western side of Yuen Long Highway is also zoned “GB” in order to provide a buffer area for the adjoining uses.
20. According to the TPB, the planning intention is that the strip of land (including the Appeal Site which falls within the area of Wo Ping San Tsuen) along the western side of Yuen Long Highway is zoned GB in order to provide a buffer area for the adjoining uses (including Residential, Village Type Development etc.).

21. The TPB also said that one of the general planning intentions of the planning scheme area (“**the Area**”) is to retain the countryside character of the upland portion of the Area. In the designation of various zones in the Area, considerations have been given to the natural environment, physical landform, existing settlements, land status, availability of infrastructure, local development pressures and so on.

22. Mr. Kan identified the fringe of a wooded knoll in the subject GB zone in the aerial photos taken in 1993 and 2011 and explained the purpose of having a buffer area for the adjoining uses. He also described that there were agricultural land (active or fallow), vacant land, residential dwellings, steep vegetated slopes, and vegetated land in the greater area of the Appeal Site. According to Mr. Kan, the purpose of the subject GB is to act as a buffer zone with a view to minimizing the environmental impact as a result of the traffic flow on Yuen Long Highway on the residential uses.

23. The first draft and the approved Lam Tei and Yick Yuen Development Permission Area Plans (No. DPA/TM-LTYYY/1 and No. DPA/TM-LTYYY/2 respectively) were gazetted on 18 June 1993 and 10 May 1996 respectively. Paragraphs 5.2 and 5.3 of the Explanatory Statement of the draft/approved DPA Plan stated that the unregulated open storage and other workshop uses had led to the degradation of the rural environment and that there was an immediate need for planning guidance and development control in the area.

24. The Appeal Site (and also the previous Lot No.2431) fell within “Unspecified Use” areas under the draft/approved DPA Plan. Most of the “Unspecified Use” areas were occupied by squatter huts and stone houses intermingled with industrial workshops and open storage uses. It had been the planning intention at that time to

encourage the upgrading of temporary structures with permanent materials with a view to upgrading the environment. [para. 6.2.8 (ii) of the Explanatory Statement of the draft/approved DPA Plan at HB/9021 & 11021]

25. The “Unspecified Use” area within which the Appeal Site is located was zoned GB under the first draft OZP (No. S/TM-LTY/1) in 1996 and has since been so zoned under the current approved OZP (No. S/TM-LTY/6).

26. Mr. Kan explained to the Appeal Board the development control referred to in paragraph 5.3 of the Explanatory Statement of the draft DPA Plan. The development control included (i) conferring power upon the Planning Authority to take enforcement action against any unauthorized developments and (ii) the imposition of a requirement of a planning permission (except developments or uses in paragraphs (iii) and (iv) of the Notes which include an existing use).

27. Thus, the TPB submits that in processing the Appellant’s planning application, the major considerations are given to the planning intention of the GB zone. The proposed vehicle repair workshop is not in line with the planning intention of the GB zone.

The Appellant’s Grounds of Appeal

28. The Appellant’s grounds of appeal are three folded and can be summarized in paragraphs 29 to 34 below.

29. First, the Appellant and her husband, Mr. Tam Hung Wah (譚鴻華) (“**Mr. Tam**”), relied on an oral agreement or promise made with one Mr. Ho Tak Man (何德文) (“**Mr. Ho**”) of the Lands Department in the course of the land resumption for the Deep Bay Link Project in July 2003 that the “automatic planning permission” had been transferred to the new business location at the Appeal Site.
30. Further, part of the Appeal Site overlaps with the area then occupied by the Appellant’s existing vehicle repair workshop under the business name of Wah Tat (“**Wah Tat**” or “**the Workshop**”), and such overlapping part is in Lot No.2431RP. By reason of the aforesaid matters, the Appellant also claims existing use on such overlapping part, i.e. the location of a squatter marked “428D” in Exhibit A1.
31. Furthermore, according to the Appellant, there was a person namely Mr. Chan So Chau who was previously relocated within the GB Zone for the resumption of land for the construction of Yuen Long Highway despite the fact that no new development (whether residential or commercial) was permitted within the Zone.
32. The Appellant relied on the promise of Mr. Ho and relocated the Workshop to the Appeal Site and continued to operate the Workshop without any problem during the period between 2003 and 2008. (hereinafter referred to as “**the 1st Ground of Appeal**”)
33. Second, the Appellant challenges the zoning of the long strip of land as GB within which the Appeal Site is situated. According to the Appellant, there are other non-conforming uses in the surrounding areas of the Appeal Site including 4 vehicle repair workshops, 2 open storage yards for construction materials and machinery, 1

vehicle paint workshop, 2 car parks and 1 vehicle park for liquidified petroleum gas cylinder wagons near the Appeal Site as well as a refuse transfer station for Northwest New Territories within 200m of the Appeal Site which was within the zone before the land was changed back from GB. In view of those non-conforming uses, the area is not green. (hereinafter referred to as “**the 2nd Ground of Appeal**”)

34. Third, in respect of the environmental concern raised by the Environmental Protection Department (“**EPD**”), the Appellant relies on a certificate of registration of waste producer and the local residents’ supporting views and submits that she has already allayed EPD’s concern. The Appellant offers to improve the environment to make it more compatible with the planning intention of the GB zone, and agrees to comply with all 13 approval conditions suggested by the PD including limited operation hours, trees planting etc., if a planning permission is to be granted. (hereinafter referred to as “**the 3rd Ground of Appeal**”)

1st Ground of Appeal

The Evidence

35. In support of the averment that a promise had been made by Mr. Ho in 2003, the Appellant caused Mr. Tam and Mr. Lee Kwei Wah (李貴華) (“**Mr. Lee**”) to give *viva voce* evidence before the Appeal Board.

36. Mr. Tam said that he and his parents had been living in the lots adjacent to the Appeal Site since childhood. In around 1990, Mr. Tam and the Appellant commenced their vehicle repairing business at the location marked red in Plan AP-2a (“**the old location**”), which lied within the original site. At that time, the

original site had not been classified as GB zone. In about 1997, the Government changed the original site and the adjacent land to GB zone. Officials from the PD paid a visit to the old location and told Mr. Tam that since his vehicle repair workshop was shown in the aerial photos taken in 1993, Mr. Tam could continue to run his business according to the “automatic planning” (自動規劃) principle. Since then, Mr. Tam continued to run his workshop at the old location until 2003.

37. Mr. Tam then said that in July 2003, the Government required the old location for the purpose of constructing the Hong Kong-Shenzhen Western Corridor and the Lands Department sent officials to visit him and to negotiate the land resumption arrangement. Mr. Ho, then Senior Land Executive, discussed with Mr. Tam about the compensation paid by the Government for resumption of land. Mr. Ho also allowed Mr. Tam to move his vehicle repair workshop to the Appeal Site in lieu of the compensation payable to Mr. Tam. Mr. Ho also promised that Mr. Tam could continue to operate the workshop at the Appeal Site and Mr. Ho would arrange the proper procedures to be carried out. In reliance upon the said promise, Mr. Tam and the Appellant moved to the Appeal Site. Indeed, Squatter no. 428D lied both at the old location and the Appeal Site. Up to now, Mr. Tam still uses this squatter together with other huts to run his workshop business. They had been running workshop business at the Appeal Site since 2003 and until 2008 when the TPB took photos and notified them that they could not run their vehicle repair workshop at the Appeal Site. By then they realized that there were problems with the transfer of site in 2003.

38. Mr. Lee is the village representative of Wo Ping San Tsuen. He owns an orchard which is just adjacent to the Appeal Site. According to Mr. Lee, Mr. Tam and his parents had been living at the lots adjacent to the Appeal Site since childhood. In

around 1990, Mr. Tam commenced his vehicle repair business at the old location. On a day in July 2003, Mr. Lee saw Government officials suddenly went to Mr. Tam's workshop at the old location. Mr. Lee then asked Mr. Tam about the Government officials' purpose of visit. Mr. Tam told him that the Government required to construct Hong Kong Shenzhen Western Corridor and hence needed to resume part of the old location. A Government official told Mr. Tam that, after his department (i.e. Lands Department) held a meeting, they approved Mr. Tam to continue his business by moving to Lot No. 2431 (Remaining Part), which overlapped with part of the Appeal Site. In doing so, there would not be any adverse impact on the environment as a result of the relocation of Mr. Tam's business.

39. In respect of the issue of whether there was an agreement/promise made by Mr. Ho of the Lands Department in July 2003, the TPB called Mr. Chung Kwok Wai (鍾國威) (“**Mr. Chung**”), a Senior Land Executive of the Lands Department to give evidence.

40. The Appeal Board notes that Mr. Chung was not involved in the discussion with Mr. Tam in 2003; nor was he working in the same unit as Mr. Ho. All Mr. Chung could do for the purpose of this appeal is to retrieve the records kept by the Lands Department and to depose of what he noted and also of the practice being adopted by the Lands Department had there been an agreement reached between an official of the Lands Department and an outside party.

41. According to Mr. Chung, he had gleaned those documents in the possession of the Lands Department and noted the following:

- (a) The land owner of Lot No. 2431 had received compensation in respect of the resumption of those parts affected by the construction of Deep Bay Link and Yuen Long Expressway;
- (b) According to the land resumption policy then implemented, the Government would not provide re-settlement for those proprietors running business in those land resumed. Should those proprietors wish to relocate their business to another suitable location, they had to apply to the relevant Government departments for permission and to ensure that the development at the new location would comply with the relevant legislation and the conditions of Land Grant.
- (c) Mr. Ho had retired. There was no record evidencing the existence of an agreement/permission made by Mr. Ho for the Appellant and Mr. Tam to relocate the vehicle repair workshop from the original site to the Appeal Site.
- (d) According to his 20 years' experience of working in the Lands Department, Mr. Chung said that any Land Executive of the Lands Department would not have made such a promise as now alleged by the Appellant as such promise was inconsistent with the land resumption policy.

The Appeal Board's Findings

42. The Appeal Board notes that the Appellant and her husband had made the 1997 Application to the TPB for permission to operate and run their vehicle repair workshop at the original site. The Appellant had received an enforcement notice for her unauthorized development. This prompted her to make an application to the TPB in 1997 for planning permission.

43. The 1997 Application was, however, rejected by the TPB. The Appellant and her husband were informed and should know the reasons for rejection. They also knew

that they would be liable for a fixed fine of HK\$500,000 and a daily fine of HK\$50,000 if they continued to run their vehicle repair workshop at the original site as a result of the 1997 Application. As such, the Appellant discontinued the unauthorized development at areas other than the old location (where their huts were erected before 1993) without appealing the decision of the TPB.

44. Thus, the Appellant and Mr. Tam should by then well know that running a vehicle repair workshop at the Appeal Site (which also lied within the original site) would require permission from the TPB. Thus, had there been an agreement or promise coming forth from an official with the Lands Department, not TPB, it should have aroused the doubt or concern of the Appellant and Mr. Tam as to whether that land official would have the authority to commit on behalf of the TPB. It would be logical that the Appellant and Mr. Tam would have asked for a written confirmation/agreement from Mr. Ho. This is particularly the case that there would be heavy penalty for such an occupation without the requisite planning permission of the TPB. The purported explanation by Mr. Tam that he did not have the requisite knowledge to ask for a written confirmation/agreement is, in our view, simply implausible.

45. The Appellant said that in 1997, she did not make any appeal or protest even though her application to the TPB was turned down. However, in the present case, she had made complaints to the Ombudsman, the Office of the Hon Albert Ho Chun Yan and the Appeal Board as well as posted their complaints on the fence to the Workshop. The recent acts of the Appellant show that she wished to fight for justice as she had acted upon the belief of Mr. Ho's promise.

46. The Appeal Board does not find this argument convincing. There are many possible reasons why the Appellant took different stances in 1997 and in 2009 (in relation to the re-location of the vehicle repair workshop in 2003). In 1997, the Appellant was planning to expand the vehicle repair workshop business and occupied the land adjacent to the old location of her workshops. However, immediately after she moved into the adjacent land (which formed part of the original site), she was served with the enforcement notice for the unauthorized development. She then made the 1997 Application. After the same was rejected, she quit the adjacent land. However, in respect of the present appeal, the Appellant had been in the Appeal Site since 2003 and logically had invested a lot of her time and monies in the business being run at the Appeal Site. The requirement for her to vacate the Appeal Site would carry much more adverse financial consequences and impact on her than the situation in 1997.

47. Regarding the Appellant's purported reliance upon the promise of Mr. Ho and moving to the Appeal Site, the Appeal Board notes that Mr. Tam had started to move the vehicle repair workshop from the old location to the Appeal Site in March 2003, which is earlier than the alleged July 2003 agreement. Thus, in our finding, there is no reliance on Mr. Ho's promise by the Appellant and Mr. Tam.

48. The Appellant also submits that had there been no agreement, she and Mr. Tam would not have given up the right of compensation and relocated the vehicle repair business to the Appeal Site. The Appeal Board does not find this submission meritorious. There is no dispute that the Appellant and Mr. Tam were at the materials not the registered owners of the original site. Compensation had been paid by the Government to Mr. Mak Hing Lung, the registered owner of Lot No. 2431

and not to the Appellant or Mr. Tam. Further, according to Mr. Chung and we accept, Mr. Tam and the Appellant were not entitled to any land compensation as they were just operators at the old location and not the registered owner. The Government policy then was that there was no compensation paid to operator at the resumed land unless they fell within the ex-gratia payment policy which required that the uses of the structure by the operators corresponded with the use entered in the squatter registration records in 1982. According to a letter dated 22 February 2003 from the Housing Department to Mr. Tam, the Housing Department considered that the squatter registration record kept in 1982 showed that the squatter huts were not for business purpose and hence the subsequent use of the squatter huts as vehicle repair workshop at the old location would not confer a right of ex-gratia payment to Mr. Tam.

49. Mr. Chung said that in accordance with his experience of 20 years with the Lands Department, he thought that no officer of the Lands Department would make an oral promise not complying with the land resumption policy when dealing with the public.

50. On the other hand, the Appellant urges the Appeal Board to reject this averment in the light of falsity of Mr. Chung's evidence which is said to be manifest during his cross examination.

51. In this regard, the Appeal Board finds that Mr. Chung's account of how he was able to identify that the squatter huts marked as 428A, 428B and 428C belonged to Mr. Tam is not very satisfactory. Nevertheless, the Appeal Board does not find that the account of events given by Mr. Chung is false.

52. The Appeal Board notes that whether there was a planning permission to run vehicle repair workshop at the Appeal Site should be within the prerogative of the TPB and PD, not the Lands Department. Thus, it would be extremely unusual that an officer of the Lands Department would make an agreement or promise which is not within the power or purview of its own department. The Appeal Board finds that there is some force in Mr. Chung's averment that no officer of the Lands Department would make an oral promise not complying with the land resumption policy when dealing with the public.

53. As to the evidence of Mr. Lee on the agreement/promise made by Mr. Ho, the Appeal Board does not attach great weight to it as Mr. Lee was not present at the discussion between Mr. Tam and Mr. Ho. He just heard what Mr. Tam had told him. At the very most, Mr. Lee's evidence is hearsay. Since Mr. Tam gave evidence to the Appeal Board, the evidence of Mr. Lee would not add much value to Mr. Tam's evidence.

54. Having assessed the evidence and for the reasons aforesaid, the Appeal Board finds that there was no promise or agreement made by Mr. Ho of the Lands Department that the "automatic planning permission" had been transferred to the new business location. Even had there been such a promise or an agreement, there was no reliance on the said/agreement/promise by the Appellant.

55. Before leaving this issue, there is one matter which was raised by Mr. Lee in his evidence and which needs to be addressed to in this Decision for the sake of completeness. According to Mr. Lee, Mr. Chan So Chau ("**Mr. Chan**") was allowed to rebuild a house in another land lot when the Government resumed the land at No.

145 Wo Ping San Tsuen for construction of Yuen Long Highway. Mr. Lee said that he personally assisted Mr. Chan to rebuild the house and that the newly rebuilt house was assigned with a squatter number by the Squatter Unit.

56. Mr. Chung said that Mr. Chan's case is distinguishable from the Appellant's case as Mr. Chan's land was an agricultural one whilst the Appellant's old location was used commercially as vehicle repair workshop.

57. When being cross examined, Mr. Lee agreed that Mr. Tam's use of the land concerned was commercial and not residential.

58. The Appeal Board notes that the aforesaid averment of Mr. Chung was not rebutted by the Appellant albeit the Appellant's counsel submits that ordinary public would not know whether the re-site arrangement would not be applicable to land of commercial use.

59. The Appeal Board notes that it has never been the Appellant's case that he relied on Mr. Chan's case to come to a belief that he should also be similarly entitled to compensation for re-site arrangement. Mr. Tam did not say so in his evidence.

60. The Appeal Board does not find that Mr. Chan's re-site arrangement should have any bearing or relevance to the present appeal lodged by the Appellant.

2nd Ground of Appeal

The Evidence

61. Mr. Tam said on behalf of the Appellant that there are other non-conforming uses in the surrounding areas of the Appeal Site including 4 vehicle repair workshops, 2 open storage yards for construction materials and machinery, 1 vehicle paint workshop, 2 car parks and 1 vehicle park for liquidified petroleum gas cylinder wagons near the Appeal Site. The location of these non-conforming uses was pointed out by Mr. Tam during his evidence-in-chief.

62. Mr. Tam also pointed out that there is a refuse transfer station for the Northwest New Territories within 200m of the Appeal Site which was within the Zone before the land use was changed back from GB. All of the refuse trucks have to drive back and forth along Shun Tat Street which is a street within the Zone, in order to transfer the refuse inside the refuse transfer station. Further, there are residents living along Shun Tat Street.

63. Mr. Tam further said that the residential dwellings and the village type development zone is far away from the Appeal Site and there are other vehicle repair workshops in between.

64. In respect of the issue of “non-conforming” use, Mr. Kan on behalf of the TPB said that, most of the non-conforming uses are unauthorized developments subject to enforcement or further investigation.

65. With reference to the 25 photos provided by the Appellant, Mr. Kan provided information about the enforcement actions taken against the unauthorized developments in the Appeal Site and in the surrounding areas. Mr. Kan took the Appeal Board through the Appellant's photos and Annex 5 to his supplemental statement and told us in details the enforcement actions taken against those developments in the photos.

66. Mr. Kan also explained in his oral evidence that the TPB would consider the planning intention and the factual information provided by the applicant, but the fact that there are non-conforming uses nearby should not be a factor to be taken into account. Mr. Kan added that from the planning perspectives, the town planners tried to avoid residential uses in the close proximity of noise sources, such as heavy traffic, vehicle repair workshop or storage uses, for instance, for the purpose of the GB concerned, it was aimed to minimize the environmental adverse effect of Yuen Long Highway on the residential uses in the villages nearby. Another instance is "Residential (Group E)" zone which aimed at fading out the workshop and storage uses.

67. Mr. Kan also told us that when compared the current situation with that in 1993, there are more structures in the subject GB zone nowadays, and enforcement actions were being taken with an aim to reduce the unauthorized developments. These enforcement actions included site inspection, issuance of enforcement notices, and court prosecution.

68. Mr. Kan was cross examined by the Appellant's counsel as to how long it would take to eliminate the unauthorized developments and to restore the whole area to

“green” uses. It was suggested to Mr. Kan that the periods might be of 3 years and 1 year. Mr. Kan replied that it would be too speculative to make such a suggestion and could not give a reply. He pointed out that it was “the people” (the public members) who ran developments without a planning permission, and that the Planning Authority should need time to do the investigation and enforcement work.

69. Mr. Kan was also asked about the enforcement area under Enforcement Case No. E/MT-LYTT/196 (Enforcement Notice was issued on 1st December 2009) and such area within the Appeal Site was not covered by the Enforcement Notice. It was put to Mr. Kan that such area within the Appeal Site was of existing use. Mr. Kan replied that the area within the Appeal Site was provided by the Appellant, and the fact that such area was not subject to enforcement did not necessarily mean that there was no need for a planning permission (the enforcement area was the judgment of the enforcement team of the PD based on investigation findings). He highlighted that any existing use in a particular area in a large land lot would not render the whole land lot being entitled to the benefit of existing use.

70. Mr. Kan stressed that there was no guarantee that there would no longer be any unauthorized developments even after enforcement actions had been taken, but that should not mean that the unauthorized developments were tolerated.

71. In the cross examination, Mr. Kan described the different zones in the statutory plan and explained the planning intentions for each of the zones with aid of the OZP displayed at the hearing venue.

72. In respect of the refuse transfer station, Mr. Kan said that it was located in an area zoned as “Other Specified Use” (“OU”), which was located in an area distant from the residential uses, and should not have much impact on the residential uses in the areas. Mr. Kan told us that he was not certain as to whether the refuse transfer station handled rubbish from the whole North West district of the New Territories. Mr. Kan further supplemented that the refuse transfer station was situated at the end of a road and where there were no residential uses and close to the area zoned “Conservation Area” (“CA”) on the OZP.

The Appeal Board’s Findings

73. The Appellant submits that despite what was said by Mr. Kan that most of the developments in the GB Zone are unauthorized and subject to enforcement or other investigation, there is no evidence to suggest that 1 vehicle repair workshop, 1 open storage space for construction materials and machinery, 1 car park and 1 vehicle park for liquidified petroleum gas cylinder wagons are unauthorized.

74. The Appellant further submits that the area is not green despite that the Zone was zoned as a GB zone in 1996. It would be unlikely that these non-conforming features would disappear suddenly in the next 3 years.

75. In view of those non-conforming uses, the Appellant submits that the Workshop is compatible with the surrounding landscape of the Zone.

76. The Appellant also draws the Appeal Board’s attention to remarks made by some members of the TPB during the hearing on 8th January 2010 that “*As the application site and its surrounding areas were covered by many structures, it was doubtful*

whether the subject areas should be zoned “GB’ on the OZP”. The Appellant submits that most of the Zone and the surrounding area were neither covered by natural vegetation nor any other green features and that the Workshop is not incompatible with the existing surroundings when measured by reference to concepts such as visual impact and the like.

77. On the other hand, the Respondent submits that the Appellant is at liberty to make an application under section 12A of the TPO to amend the OZP by rezoning the area concerned if she considers that the long strip of land along Yuen Long Highway (which is now zoned as GB under the current OZP) should be zoned otherwise.

78. According to Mr. Kan, one should first check out the zone within which the intended business area is situated. If it is not within the Column 2 of the Notes to the OZP, he may apply to change the column uses under section 12A of the TPO for rezoning.

79. The Respondent submits that the presence of non-conforming uses in the surrounding areas of the Appeal Site is not itself a valid justification for a departure from the planning intention of the subject buffer GB Zone.

80. According to the Respondent, the questions put to Mr. Kan by the Appellant did not factor in the degree of cooperation of the public. While enforcement actions are taken, co-operation of the public is equally important, if not more, to the achievement of a planning intention, and a *fait accompli* will not assist any person with a planning application under section 16 of the TPO.

81. The Respondent further submits that if the Appellant purported to contend that the refuse transfer station has traffic and environmental impacts on the residential uses in the surrounding areas and it is in any event not suitable to zone the areas as GB zone, such contention is unsupported by evidence and should be rejected since:

(a) the Appellant has adduced no evidence to substantiate;

(b) the town planner Mr. Kan was not asked in detail about the planning considerations in zoning the location of the refuse transfer station as OU. Mr. Chung was questioned about planning aspects with regard to the refuse transfer station, such as the traffic flow in Shun Tat Street (every garbage truck would need to pass through Shun Tat Street before going to the refuse transfer station). The Respondent submits that those questions should have been put to Mr. Kan who is a town planner and not Mr. Chung ;

(c) in Mr. Kan's oral testimony, he described that the refuse transfer station was located in an area distant from the residential uses and close to the "CA" zone, and thus it should not have much impact on the residential uses in the areas; and

(d) this cannot be a valid ground in an application under section 16 of the TPO for a planning permission.

82. The Appeal Board accepts the Respondent's submissions.

83. First, the Appellant has the right pursuant to section 12A of the TPO to apply for re-zoning if she is aggrieved of the zoning of the area then made. Thus, if she

considers that the long strip of land along Yuen Long Highway (which is now zoned as GB under the current OZP) should be zoned as OU, she is at liberty to make an application for re-zoning. The TPB, not the Appeal Board, will then make its determination upon receipt of this kind of application.

84. However, in the absence of any application for re-zoning and for the purpose of this appeal, the Appeal Board has to accept that the zoning of the area under concern as GB is appropriate and justified and to construe the planning intention according to the zoning stipulated in the OZP. Indeed, the OZP had gone through the due process in plan making and approved by the Chief Executive in Council. It would not be right for the Appeal Board to question the appropriateness of the zoning/planning intention of the site.

85. Secondly, the fact that there are at present a number of areas in the GB zone of which the land use are non-conforming with the planning intention of GB would not *per se* render the zone not green. It is understandable and logical that the PD would require some time to investigate and take enforcement actions against those users who are in breach of the planned use. Further, the parties establishing “existing use” would also be allowed to continue with their use even though the use contravenes with the GB.

86. Thirdly, there is no strong justification or special circumstances advanced by the Appellant to show why there should be a deviation from the planning intention of the GB zone even though the permission sought is of temporary nature.

87. Therefore, even though there are some areas in the Zone which are being used for purposes other than GB, this does not justify a departure from the planning intention of GB zone.

3rd Ground of Appeal

The Evidence

88. Mr. Tam said that the Appellant would undertake to plant trees along the boundary of the Appeal Site in order to support the planning intention of GB.

89. Pursuant to section 16(2C) of TPO, a planning application will be made available for public inspection until it has been considered by the TPB in a meeting under subsection (3) thereof. Pursuant to section 16(2F), any person may make comment within a statutory period in respect of the application, and in case that comments are received, the TPB will proceed to follow the steps under the subsections thereof.

90. Mr. Tam said that no adverse public comment was received during the statutory public inspection period. On the other hand, there was a comment from the office of the Hon. Albert Ho Chun Yan that since the Appellant had been operating the workshop for years and the Lands Department had agreed to the operation of a vehicle repair workshop by her at the Appeal Site, he hoped that the planning application would be approved so that the Appellant's business could continue.

91. According to Mr. Lee, there is no objection or complaint from the residents of Wo Ping San Tsuen against the Workshop being run by Mr. Tam. He holds the view that the Workshop would not affect the residents of the village and other residents.

Further, the Appeal Site is also far away from the residential dwellings of Wo Ping San Tsuen and other village type development areas.

92. Mr. Lee also said that all the residents living in the residential dwellings of Wo Ping San Tsuen (i.e. within 100m of the Appeal Site) signed a confirmation stating that the Workshop does not affect their living and the environment.

93. Mr. Tam also produced a certificate of registration of waste producer issued by the EPD and said that the way of handling of chemical waste produced by Wah Tat in the course of business had satisfied the EPD's requirements.

94. On the other hand, Mr. Kan referred to the EPD's Code of Practice on Handling the Environmental Aspects of Temporary Uses and Open Storage Sites ("CoP") and said that the Director for Environmental Protection does not support the application.

95. According to Mr. Kan, the sensitive users within 100m from the Appeal Site boundary in the CoP should refer to the "residential buildings" instead of the "residents". Mr. Kan highlighted the two words "民居" (and not "居民") at paragraph 7.6 of his witness statement where he reproduced the EPD's comments on this application, and the flowchart in CoP which referred to the residential buildings instead of residents who could move in and out from time to time.

96. Further, the PD did receive public complaints through another channel.

97. Nevertheless, Mr. Kan said that while EPD's comments were given consideration, the planning intention of the GB zone should be the major consideration of the TPB in reviewing the application.

98. In response to the registration of Wah Tat as a waste producer, Mr. Kan made enquiry with EPD and obtained its reply that (i) the registration of waste producer is not a license or permission for chemical waste processing or production at a particular place; (ii) the registration of waste producer is only the first step of chemical waste processing as required under EPD's Chemical Waste Control Scheme ("**the Scheme**"); (iii) the Appellant has to comply with the requirements stipulated in the other steps of the Scheme, and (iv) EPD also indicated that the Appellant would need to observe other legislation, for instance, TPO.

The Appeal Board's Findings

99. The Appeal Board finds that there is little objection from the Appellant's neighbours on the vehicle repair business run by the Appellant at the Appeal Site. Although the PD said that it had received one objection, it is not known precisely the details and basis of objection. The Appeal Board does not place weight on this objection.
100. However, the Appeal Board finds that there is some force in the Respondent's submission that the absence of complaints by the existing occupants does not mean that there would be no objection in the future.
101. In the present case, although there are no adverse public comments received by the TPB in processing the application, it cannot preclude objection from future occupants. The present occupants may not object to the existence of the vehicle

repair workshop. Yet, after they are vacated and move to other areas, the new occupants may have strong objection against the presence of the vehicle repair business.

102. As the Respondent submits and rightly in our view, the vehicle repair workshop is not in line with the planning intention of the GB zone, and this is the paramount consideration and major reason for refusal.

Existing Use

103. Before concluding this appeal and in fairness to the parties, the Appeal Board considers it necessary to express our view on the issue of “existing use”.

104. The Appellant’s case is that she had occupied and used Squatter no. 428D as the vehicle repair workshop prior to 1993 and hence the present use of this hut should be considered as “existing use”.

105. The Appeal Board has studied the sketches prepared by the parties for the purpose of this appeal. The Appeal Board finds that Squatter no. 428D is located and forms part of the Appeal Site.

106. Section 1A of the TPO provides that “existing use” in relation to a development permission area means a use of a building or land that was in existence immediately before the publication in the Gazette of notice of the draft plan of the development permission area.

107. In the present case, an existing use shall mean the use in existence of the publication in Gazette of the draft Lam Tei and Yick Yuen Development Permission Area Plan (No. DPA/TM-LTY/1) on 18th June 1993. Pursuant to the Notes to the said draft DPA plan, existing use was one of the permitted uses that required no planning permission. Paragraph (3) of the Notes to the OZP states that 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 to the draft DPA Plan conform to the OZP, provided that such use has continued since it came into existence.

108. The Respondent has in its legal submission dated 26th June 2012 addressed the question of whether the Appeal Board has the jurisdiction to determine a claim of existing use.

109. In TPA No. 11 of 1998, the Appeal Board then constituted ruled that the Town Planning Appeal Board has no jurisdiction to determine a claim that the use of an appeal site is an existing one. The Appeal Board's jurisdiction is limited by section 17B of the TPO. The Appeal Board can only review decisions by the TPB determining whether any permission, which may be granted under any draft plan or approved plan, should or should not be granted. If the Appellant wishes to establish a claim of existing use, she must apply to the courts for a determination. If she is correct in her claim then she does not have to apply for permission from the TPB.

110. We accept and concur with the aforesaid ruling.

111. The Appeal Board finds that it is outside the jurisdiction of both the TPB and the Appeal Board to determine a claim that the use of part of the Appeal Site by the Appellant is an existing use.

Conclusions

112. The Appeal Board finds that the proposed use of the Appeal Site as vehicle repair workshop does not accord with the planning intention of GB zone and that no strong justifications have been shown by the Appellant to justify a departure from the planning intention even on temporary basis.

113. For the reasons set out above, the appeal is dismissed.

114. The Appeal Board wishes to take this opportunity to express our gratitude to Mr. Tim Wong, Counsel for the Appellant and Ms. Jess Chan, Counsel for the Respondent for their able assistance.

Mr YEUNG Ming-tai
(Chairman)

Mr Johnson KONG Chi-how
(Member)

Ms Susan LEUNG So-wan
(Member)

Mr SIN Ming-hei
(Member)

Professor TANG Bo-sin
(Member)