

IN THE TOWN PLANNING APPEAL BOARD

Town Planning Appeal No. 13 of 2014

BETWEEN

MERCHANT HOLDINGS LIMITED

Appellant

and

TOWN PLANNING BOARD

Respondent

Appeal Board:	Mr. Eric Kwok Tung-ming, SC	(Chairman)
	Mr. Chan Kam-man	(Member)
	Mr. Marvin Chen	(Member)
	Professor Cheung Sai-on	(Member)
	Mr Cheung Tat-tong	(Member)
In Attendance:	Ms Suan Man	(Secretary)

Representation:	For the Appellant:	Mr. Anthony Ismail, Counsel
	For the Respondent:	Mr. Jenkin Suen, Counsel
		Mr. Brian Leu, Government Counsel

Date of Hearing: 2, 3, 4 and 31 March 2016

Date of Decision: 20 June 2016

DECISION

The Appeal

1. On 24 April 2013, the Appellant submitted a planning application under section 16 of the Town Planning Ordinance (“**the Ordinance**”) to seek planning permission for conversion of an existing building to a proposed temporary school (kindergarten) for a period of 3 years at 2 Essex Crescent, Kowloon Tong, Kowloon (“**the Site**”).
2. The Site falls within an area zoned “Residential (Group C) 1” (“**R(C)1**”) on the draft Kowloon Tong Outline Zoning Plan (“**OZP**”) No. S/K18/17 at the time of application. ‘School’ use in “R(C)1” zone requires planning permission from the Town Planning Board (“**the Board**”).
3. At the meeting on 21 March 2014, the Metro Planning Committee (“**MPC**”) of the Board rejected the application.
4. On 4 April 2014, the Appellant applied under section 17(1) of the Ordinance for a review of the MPC’s decision of refusal.

5. At the section 17 review hearing on 19 September 2014, the Board decided to reject the application of the Appellant on the following grounds:

(a) the previous temporary approval for kindergarten use was granted on sympathetic grounds on consideration that a temporary replacement kindergarten in the same area was urgently required in the middle of a school term to accommodate students displaced by another kindergarten in the area to be closed. There were no special circumstances that warrant the same sympathetic consideration of the current application;

(b) the application would involve the intake of additional students by the proposed kindergarten, leading to an overall increase in student population for the Kowloon Tong area hence increase in traffic. This would aggravate the existing traffic congestion in the vicinity of the Site during school peak hours and did not comply with the TPB PG-No.23A¹ in that the proposed kindergarten was not suitable in terms of the capacity of the roads in the locality and its surrounding areas; and

(c) the traffic congestion problem in the area near the Site was already serious. The approval of the application would set an undesirable precedent for similar applications in the area. The cumulative effect of approving such similar applications would aggravate the traffic condition of the Kowloon Tong Garden Estate.

6. On 1 December 2014, the Appellant submitted a Notice of Appeal to the Appeal Board Panel (Town Planning) (“**the Appeal Board**”) against the Board’s decision under section 17B(1) of the Ordinance.

¹ Town Planning Board Guidelines on “Application for Kindergarten/Child Care Centre in Kowloon Tong Garden Estate under Section 16 of the Town Planning Ordinance” (TPB PG-No.23A)

7. The Appeal Board heard the matter on 2, 3, 4 and 31 of March 2016. Mr. Anthony Ismail, Counsel, appeared for the Appellant whereas Mr. Jenkin Suen, Counsel, and Mr. Brian Leu, Government Counsel, appeared for the Board. The Appellant called two witnesses, Mr. Chin Kim-meng (“**Mr. Chin**”), a traffic consultant, and Mr. Tsang Kwok-ming, Rock (“**Mr. Tsang**”), a surveyor. The Board called Ms. Cheng Wan-ying, Johanna (“**Ms. Cheng**”), Senior Town Planner/Kowloon, of the Kowloon District Planning Office, Planning Department.

8. There is no dispute between the parties and it is clearly established in *Henderson Real Estate Agency Ltd v Lo Chai Wan [1997] HKLRD 258* that the Appeal Board must exercise an independent planning judgment based on the facts and law and the appeal is a de novo hearing.

Background

9. It is important to set out the events leading up to this appeal.

10. On 27 January 2011, the Appellant submitted an application for permanent permission to use the Site as a kindergarten. The reason for the application was to replace the existing kindergarten at No. 8 York Road which was to be closed in the middle of school term.

11. The Planning Department did not support the application and suggested to the MPC that if permission was to be granted, it should be on a temporary basis of one year in order to monitor the traffic conditions and the implementation of the proposed traffic mitigation measures.

12. The application was withdrawn and on 16 September 2011, the Appellant submitted an application for temporary planning permission to use the Site as a kindergarten for 18 months.

13. On 4 November 2011, the application was approved for a period of 18 months with the following conditions:

- (a) the school hours should be restricted from 9:30 am to 12:30 pm and 2:00 pm to 5:00 pm, Monday to Friday, during the school operation period;
- (b) the implementation of the traffic mitigation measures including “school bus only” campus and “loading/unloading within campus” during the school operation period to the satisfaction of the Commissioner for Transport (“**C for T**”) or of the Board;
- (c) the submission of bi-monthly monitoring reports on the implementation of the proposed traffic mitigation measures stated in conditions (a) and (b) above, during the school operation period to the satisfaction of the C for T or of the Board;
- (d) the provision of loading/unloading spaces prior to commencement of school operation to the satisfaction of the C for T or of the Board;
- (e) the provision of water supplies for firefighting and fire service installations prior to commencement of school operation to the satisfaction of the Director of Fire Services or of the Board;
- (f) the submission of a Sewerage Impact Assessment (“**SIA**”) within 3 months from the date of planning approval to the satisfaction of the Director of Environmental Protection or of the Board;
- (g) the implementation of the sewerage improvement measures identified in the SIA in condition (f) above within 6 months from the date of planning

approval to the satisfaction of the Director of Drainage Services or of the Board;

- (h) the submission of a landscape and tree preservation proposal within 3 months from the date of planning approval to the satisfaction of the Director of Planning (“**D of Plan**”) or of the Board;
- (i) the implementation of the approved landscape and tree preservation proposal under condition (h) within 6 months from the date of planning approval to the satisfaction of the D of Plan or of the Board;
- (j) the submission of quarterly tree monitoring reports to the satisfaction of the D of Plan or of the Board upon the commencement of site works and until the satisfactory implementation of the landscape and tree preservation proposal; and
- (k) if any of the above planning conditions (a) or (b) is not complied with during the school operation period, the approval hereby given shall cease to have effect and shall be revoked immediately without further notice.

14. On 28 February 2013, the Appellant submitted an application for renewal of the planning permission, which was valid till 4 May 2013, to continue the kindergarten use at the Site for 18 months.

15. On 15 April 2013, the Appellant received comments from various government departments on its renewal application. The C for T’s comments on the renewal application was “*The traffic mitigation measures implemented by the school are so far satisfactory and there is no obvious deterioration in traffic conditions at Essex Crescent since its operation*”. However, the Commission of Police (“**C of P**”) did not support the renewal application because:

(a) the mitigation measures as proposed by the applicant are not binding and the parents are at liberty to choose their mode of transport. Schools/kindergartens already around the location concerned and their existence have created undesirable traffic situation thereat which can proliferate to Waterloo Road, a strategic road network in the territory. It is apparent that the capacity of Kowloon Tong area for schools cannot allow more new schools. This is a structural problem that requires a structural solution; and

(b) the traffic situation in the vicinity is already very congested during school peak hours. There is still complaint of illegal parking and vehicle obstruction received at Essex Crescent in the last 6 months.

16. The Appellant withdrew the renewal application on 18 April 2013, the day before the Board considered the renewal application, and Mr. Tsang said the reason for withdrawal was to get more time to discuss the traffic issues with the C of P.

17. On 24 April 2013, still within the validity of the temporary planning permission previously granted, the Appellant submitted another renewal application for kindergarten use at the Site for 3 years (the “**Application**”).

18. On 25 April 2013, the Appellant wrote to the Board clarifying that the Application was a new application instead of an application for renewal of a planning approval. Mr. Tsang told the Appeal Board that the letter was written as a result of receiving a call from the Planning Department, in which Mr. Tsang’s staff was informed that the Application, which was submitted less than 2 months before the expiry of the temporary planning approval, could only be a new application rather than a renewal application.

19. Though the Appellant stated in the letter dated 25 April 2013 that the Application was a new application and attached a revised “Executive Summary” thereto, in fact, nothing new was submitted. In the revised Executive Summary, only the word ‘renewal’ was changed to ‘new’.

20. As stated above, the Application was refused.

New or Renewal Application

21. One of the main issues between the parties is whether the Application is a new application or a renewal application. While an application for renewal of planning approval for temporary use or development is in nature an application for planning permission and will be processed in accordance with the provision of the extant statutory plan under s.16 of the Ordinance, the Appeal Board is aware that if it is a new application, TPB PG-No.23A applies. If it is a renewal application, TPB PG-No.34B² applies.

22. Having considered the events leading up to the Application and the explanations given by Mr. Tsang, the Appeal Board considers that the Application was in essence and in substance a renewal application despite the letter dated 25 April 2013 mentioned in paragraph 18.

23. The Appeal Board took such a view because the Application was submitted within the validity of the temporary permission for 18 months in respect of the same site and for the same purpose (that is, to continue using the Site for a kindergarten).

² Town Planning Board Guidelines on “Renewal of Planning Approval and Extension of Time for Compliance with Planning Conditions for Temporary Use of Development” (TPB PG-No.34B)

Though paragraph 3.3 of TPB PG-No.34B stated that “...*applications should be submitted to the Board no less than 2 months before the expiry of the temporary approval so as to allow sufficient time for processing... Applications submitted less than 2 months before the expiry of the temporary approval may not be processed for consideration of the Board.*”, an automatic rejection of the application by reason of it being out of time is not mandatory. The use of the word “may” confers a discretion on the Board. Moreover, despite the description given to it, the subject of the Application and the supporting materials submitted were the same as those submitted in the withdrawn renewal application. The Appeal Board is aware that the Application is for 3 years whereas the temporary permission granted earlier was for 18 months only. Paragraph 4.2 of TPB PG-No.34B stated that, “*under normal circumstances, the approval period for renewal should not be longer than the original validity period of the temporary approval. In general, the Board is unlikely to grant an approval period exceeding three years unless...*” Mr. Tsang has explained that he put 3 years instead of the 18 months asked for in the withdrawn renewal application because it is not prohibited and there is no harm in trying.

24. As the Appeal Board has decided that we shall treat the Application as a renewal application, TPB PG-No.34B applies.

Merits

25. In the course of the hearing, it was suggested that the Appellant had misled the Board in granting the temporary approval for the 18-month period from 4 November 2011 to 4 May 2013 and the Board granted such approval on sympathetic grounds. The Appeal Board is not satisfied that the Appellant has misled the Board in granting the temporary permission. Though the Board might have been moved to grant the temporary permission on sympathetic grounds, this is not a criteria required under TPB PG-No.23A.

26. The Appeal Board has taken into consideration that the planning intention of R(C)1 is primarily for low to medium-rise, low-density residential developments. Such planning intention remains unchanged on the draft Kowloon Tong OZP No. S/K18/18 which was in force when the section 16 application and the section 17 review application were considered and on the approved Kowloon Tong OZP No. S/K18/19 (“**the Approved Plan**”) currently in force.

27. The Notes to the Approval Plan has included “School” as a use that may be permitted with or without conditions on application to the Board. The Appeal Board is of the view that the primarily planning intention of R(C)1 as a low to medium-rise, low-density residential developments and school use are not mutually exclusive. It simply means that in granting use as a school, one has to bear in mind that primarily planning intention.

28. Paragraph 4.1 of TPB PG-No.34B stated that “*the criteria for assessing applications for renewal of planning approval include:*

(a) whether there has been any material change in planning circumstances since the previous temporary approval was granted (such as a change in the planning policy/land-use zoning for the area) or a change in the land uses of the surrounding areas;

(b) whether there are any adverse planning implications arising from the renewal of the planning approval (such as pre-emption of planned permanent development);

(c) whether the planning conditions under previous approval have been complied with to the satisfaction of relevant Government departments within the specified time limits;

(d) whether the approval period sought is reasonable; and

(e) any other relevant considerations.”

29. Guided by the criteria mentioned above, the Appeal Board is of the view that the Application by the Appellant should be granted. The Appeal Board has taken into consideration the comment of the C of P stated above. On the other hand, we have also considered the view expressed by C for T and the evidence given by Mr. Chin as well as the comments on the survey conducted by the Board. The Appeal Board is not convinced that the traffic problem would deteriorate if permission to use the Site as a kindergarten is granted.

Conclusion

30. The Appeal Board allows the appeal by the Appellant and grants permission to use the Site as a kindergarten for 3 years from 1 August 2016 with the conditions and advisory clauses at **Annex**.

31. Having considered all the circumstances, the Appeal Board makes no order as to costs.

(Signed)

Mr. Eric Kwok Tung-ming, SC
(Chairman)

(Signed)

Mr. Chan Kam-man
(Member)

(Signed)

Mr. Marvin Chen
(Member)

(Signed)

Professor Cheung Sai-on
(Member)

(Signed)

Mr Cheung Tat-tong
(Member)

Town Planning Appeal No. 13 of 2014 – Decision

Temporary School (Kindergarten) for a Period of 3 Years

in “Residential (Group C)1” zone, 2 Essex Crescent, Kowloon Tong

Approval Conditions

- (a) The maximum number of students to be accommodated within the Site shall not exceed 216 for each morning and afternoon school session.
- (b) The school hours shall be restricted from 9:30 am to 12:30 pm and 2:00 pm to 5:00 pm, Monday to Friday, as proposed by the Appellant, during the school operation period.
- (c) The implementation of the traffic mitigation measures including ‘school bus only’ campus and ‘in-campus pick-up/drop-off’, as proposed by the Appellant, during the school operation period to the satisfaction of the Commissioner for Transport (“**C for T**”) or of the Town Planning Board (“**the Board**”).
- (d) The design and provision of parking facilities, loading/unloading spaces and carpark layout for the proposed kindergarten to the satisfaction of the C for T or of the Board.
- (e) The submission of bi-monthly monitoring reports on the implementation of the proposed traffic mitigation measures stated in conditions (b) and (c) above during the school operation period to the satisfaction of the C for T or of the Board.
- (f) The existing landscaping planting within the site boundary shall be maintained at all times during the planning approval period.

- (g) The provision of fire service installations and water supplies for firefighting to the satisfaction of the Director of Fire Services or of the Board.
- (h) If any of the above planning conditions (a), (b), (c), (e) or (f) is not complied with during the school operation period, the approval hereby given shall cease to have effect and shall be revoked immediately without further notice.

Advisory Clauses

- (a) The Appellant to consult the Registration Section of the Education Bureau on the school registration process for the proposed kindergarten under the Education Ordinance and Regulations.
- (b) The Appellant to apply to the District Lands Officer/Kowloon East, Lands Department (“**LandsD**”) for the proposed development under the lease. However, the Appellant should note that there is no guarantee that such application will be approved by the Government. Such application, if approved, will be subject to such terms and conditions (including but not limited to the payment of a waiver fee) as imposed by the LandsD at its discretion.
- (c) The approval of the application does not imply any compliance with the Buildings Ordinance (“**BO**”) and Regulations. The applicant should appoint Authorized Person and Registered Structural Engineer to submit building plans to the Buildings Department (“**BD**”) for approval in accordance with the requirements of the BO.
- (d) The Appellant to note comments of the Chief Town Planner/Urban Design & Landscape, Planning Department to monitor the condition of the *Magnolia graniflora* at the southwest corner of the site and apply appropriate treatment where necessary to avoid further deterioration of the tree.

- (e) The Appellant to note that non-compliance of approval conditions will lead to revocation of planning permission.
 - (f) The Appellant to note comments of the Director of Fire Services to arrange emergency vehicular access in compliance with Code of Practice for Fire Safety in Buildings 2011 which is administered by BD.
 - (g) The Appellant to note comments of the C for T and Commission of Police to strictly implement the proposed traffic mitigation and monitoring measures.
 - (h) The Appellant to note that the planning permission is valid until 31 July, 2019. It should not be assumed that application for extension in future will be given by the Board.
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