

IN THE MATTER of the Town Planning Ordinance (Cap. 131)

And

IN THE MATTER of an appeal under section 17B by Man Ming Fai

Date of hearing : 18th March 2004 & 5th May 2004

Date of decision : 18th June 2004

Panel : Mr. Edward Chan King-sang (Chairman)
Mrs. Elizabeth Li Woo E Li
Mr. Tony Luk Ka-luen
Mr. Tam Kar-chuen
Mr. Herman To Yung-sing

Decision

This is an appeal by Mr. Man Ming Fai (the “appellant”) against the decision of the Town Planning Board (“TPB”) refusing planning permission to the appellant to use the subject site for the purpose of an open storage of construction materials.

2. The site in question is a piece of land at lot 194 in DD 128, Ha Tsuen, New Territories (hereinafter called the “Site”). From the information available to us, it would appear that this Site is owned by one Silver Photo Industrial Limited. We do not have any clear evidence on the exact relationship between the appellant and the owner of this Site. From the evidence of Ms. Chung Yee Sin, the agent of the appellant, it would appear that the owner company, Silver Photo Industrial Limited is beneficially owned by the appellant and his “brothers” which we interpret widely as including his cousins and distant cousins. Apparently, the owner company is prepared to allow the appellant to make use of the Site for the purpose of open storage of construction materials belonging to the appellant or Hop Shing Feed Mill Company, which is a partnership to which the appellant, Man Ming Fai is a partner.

3. The Hop Shing Feed Mill Company has been in operation since at least 1993. It has a place of business at lot 2080, DD 129, at Shun Wan Road, and it also has a correspondence address at 11 Main Street, Lau Fau Shan. According to Chung Yee Sin, whose evidence in this respect has not been seriously challenged, Hop Shing Feed

Mill Company had and still has a business of dealing of animal feed. However in the recent year, the animal feed business declined, and the company also carried on a business of dealing of construction materials. The Company has a godown at Lau Fau Shan, which is currently used to store both animal feed and construction materials. However, space was running short. The Company wanted to use its existing godown for animal feed only and would like to make use of the subject Site for storing its construction materials.

4. We pause to comment that apart from the oral evidence of Ms. Chung, and also the copies of the business registration certificates of the Company between 1993 and 2003, there is no other evidence before us on the business or activities of the appellant and also on the arrangement between the appellant and the owner of the Site in question. However, in view of the fact that there was no serious challenge on the evidence, we are quite prepared to make the finding as outlined in the paragraphs above.

5. The appellant also called Mr. Wong Shing Tong to give evidence. Mr. Wong grew up in the vicinity and he is very knowledgeable on the surrounding area of the Site. According to him, the area served by the Deep Bay Road from the round-about at Lau Fau Shan right down to Pak Lai has only some 800 residents, and many of them are old people and do not travel out of the area much. If they do, it is likely that they would take public transport. Thus, it is unlikely that the local residents would suffer much inconvenience by any additional traffic caused by the Site being used as an open storage yard. He also pointed out that the Hang Hau Tsuen, which was shown on the aero photo at page 0016 of the bundle, being the only residential place shown in the photo near to the Site, was largely demolished and indeed the residents there would not have to use Deep Bay Road. He also told us that the open storage yard seen on the aero photo at 0016 to the east of the Site has been there for over 11 years and that there were tombs to the right of the Site, although being covered by the thick vegetation, and were not visible from the photo itself.

6. It is not in dispute that to the north side of Deep Bay Road somewhat opposite to the Site, is a church cum kindergarten, and to the further north is a building which had previously been used as a child care centre. However, it has been pointed out and accepted that the child care centre is no longer in operation, and the kindergarten only has 3 children. Furthermore, the main entrance of the church and kindergarten is not facing Deep Bay Road, although it is possible to gain access to the kindergarten from Deep Bay Road through a flight of steps and the back door of the kindergarten. The appellant's contention is that the back door is usually locked, and we are not surprised that that is so, bearing in mind the number of children at the kindergarten and also there is no residential house near this part of Deep Bay Road. Thus there is little surprise that there is no objection from the local residents and from the District Office Yuen Long to this current application at all.

7. The Site in question has an area of about 1,170 square metres. The land is part of lot 194 in DD 128 which is held under a Block Crown lease. There is no condition in the lease to restrict the land from being used for the purpose applied for. The land is situated on a formed platform which has been leveled and has been paved. It is in a rectangular shape with its longer sides running in a north-west to south-east direction. The north western side of the Site is pointing at the direction of Deep Bay Road and there is an access road leading from the Site to Deep Bay Road. The access road is about 30 metres long. In terms of vehicular traffic, the Site is accessible only from Deep Bay Road which is a single-lane, two-way traffic road. Deep Bay Road runs from the round-about at Lau Fau Shan in a south-west direction reaching Pak Lai. Although Deep Bay Road itself is rather narrow, the access road is very wide at its intersection with Deep Bay Road. There is no visibility problem between traffic along Deep Bay Road and that at the access road nor would there be any ingress and egress problems even for big container vehicles to and from Deep Bay Road. From the map at page 0014 of the bundle before us, the distance between the intersection and the round-about is slightly over 400 metres. In between there are a number of passing places.

8. The general area to the north, west and south of the Site is mainly a rural locality with quite heavy vegetation. The land to north-west, west and south-west sides of the Site is higher than the Site and is slopping down towards the Site. As we have pointed out earlier, the Site itself and its immediate surrounding land are leveled land and have been paved. The eastern side of the Site is also facing a slope, slopping downward towards the Fung Kong Tsuen Drainage Channel which runs from the south-east direction towards the north-west. The channel runs in the direction of Deep Bay Road and passes through the underneath of Deep Bay Road. As we have mentioned above, to the north side of Deep Bay Road is the church cum kindergarten. On the other side of the channel is a large number of sites used for open storage. From the photographs, there are a large number of containers being stored at those sites. Access to those sites is from Lau Fau Shan Road and not from Deep Bay Road.

9. The Site has been zones "CDA" since the gazetting of the draft Ha Tsuen OZP no. S/YL-HT/1 on 10 June 1994. According to the Notes of the approved Ha Tsuen OZP no. S/YL-HT/4, open storage of construction materials is not under either column 1 or column 2 of the Notes for the "CDA" zone. Of course, there is power on the part of the TPB to grant planning permission for temporary use or development of any land or building, with or without conditions, for a maximum of 3 years.

10. There were 2 previous applications for using the Site and its surrounding area for the purpose of car park and container trailer yard. In both instances, the applications had been rejected.

11. The current application was made by the appellant on 21 March 2003. The area affected by the application is smaller than that of the 2 previous applications. The purpose applied for was for the Site to be used for temporary open storage of construction materials for the period of 3 years. Apparently, the appellant sought to justify the current application as being for a purpose different from that of the 2 previous applications. We are given to understand that unlike the previous applications, the current application was made on the basis that the storage was only for the purpose of storing construction materials of the appellant's business and it was not for the purpose of operating an open storage business accepting for storage construction materials from the public. It is on this basis that we consider the appeal before us.

12. The appellant's application was rejected by the Rural and New Town Planning Committee on 16 May 2003. The appellant asked for a review of the decision by the TPB, and on 26 September 2003, the appellant was informed that the TPB likewise rejected his application. The grounds for rejecting the application given by the TPB and the Committee were rather similar. It is only necessary for us to recite the 3 grounds of rejection given by the TPB :

- (a) The proposed open storage of construction materials was not compatible with the surrounding land uses and the rural character of the area. To the north of the Site was a kindergarten which was a sensitive use, and to the west and south-west was a vegetated hill slope.
- (b) The proposed open storage of construction materials would attract heavy vehicles traveling along Deep Bay Road which is a single track road not suitable for use by heavy vehicles.
- (c) There was no technical assessment submitted to demonstrate that the proposed development would not cause adverse traffic and drainage impacts on the surrounding areas.

13. Apart from the papers put before us, the respondent also called evidence from Mr. Mok Ping Chiu who had given 2 statements as well as oral evidence to expand on and explain his written statements. He also dealt with some of the allegations made by the appellant, particularly he dealt with the location along Fung Kong Tsuen Road where there are a number of sites which had been approved for open storage purposes. The relevance of those sites lies on the fact that likewise many of those sites are only served by a single lane traffic road and in some sections the road is unpaved. Mr. Mok also told us in his statement and evidence the grounds for the respondent's not supporting the application. Broadly speaking, the grounds were similar to those given by the TPB. However, it is fair to say that in ground (a), the respondent accepted that

the kindergarten has only 3 students and the emphasis of the objection was mainly on the fact that there is a natural barrier of the channel separating the heavy open storage use area to its east and the rural character to its west although in both instances, the area is zoned for “CDA” purposes.

14. It was also brought to our attention that a number of Government Departments had been asked to express their views on the application. The Lands Department did not have any objection. The Drainage Services Department also did not have any objection, notwithstanding that there was no drainage submission made by the appellant. The Department however expressed the view that if the application was approved, conditions should be imposed to require the appellant to propose and provide proper drainage facilities for the proposed development to the satisfaction of the Chief Engineer of that Department. It is however noted by us that the Site and its surrounding land have in fact been paved and are currently being used for the parking of container vehicles without planning permission. This would mean that the effect of paving of the Site has already been seen and there is no evidence that there is any flooding caused by the paving of the Site. The Environmental Protection Department and the Landscape Architect of the Planning Department both did not have any objection to the application. In fact, the view was expressed that no condition on landscaping was required.

15. In fact, there are only 3 Departments raising adverse comments or objections to the application. The Commissioner for Transport and the Commissioner for Police both raised the objection on the ground of the additional traffic attracted by the change of use of the Site. On the part of the Commissioner of Transport, it was said that the submission had not indicated the proper vehicular access arrangement leading to the Site, and there was no clear indication on the responsibility of maintenance of the vehicular access to the Site. On the part of the Commissioner of Police, it was said that Deep Bay Road was a relatively narrow road. The problem of vehicles encroaching onto the opposite lane when leaving the Site might not be solved simply by widening the intersection. Both the Commissioner of Transport and Commissioner of Police also raised the concern that the grant of the application would set a bad precedent.

16. The Planning Department also objected to the application. The grounds of objection were rather similar to those given by the TPB. Emphasis was laid on the fact that there was no proposal or technical assessment submitted to deal with the possible problems, such as on traffic and drainage which might be caused by the proposed use. The Planning Department also raised the point that there were 2 previous applications which were rejected and it was said that there was no material change of circumstances.

17. We have considered in details the evidence, materials and submissions

made before us. Although in many aspects the views of the members of the Appeal Board are unanimous, we are not able to come to an unanimous decision on whether the appeal should be allowed.

18. We approach this matter by first considering the question of planning intention and the possible adverse effect on the surrounding areas by the change of use. We note that the Site in question as well as the rural areas to its immediate west and south, and to its north across Deep Bay Road are all zoned for “CDA”. To its west, further up on the slope the area is zoned for “Residential (Group D)”. From the Notes to the Plan, for land zoned as “CDA”, there is no use set out in the first column of the Note to indicate that there is any particular use which would always be permitted. However, there is a long list of uses under the 2nd column which are uses which may be permitted with or without conditions on application to the Town Planning Board. Many of these uses are quite inconsistent with a rural outlook of the land, e.g. the use as cooked food centre, market, petrol filling station, place of public entertainment, public car/cycle/lorry/coach park, public transport depot or terminus or station, and service apartment etc. We however note that use for open storage is not amongst the uses on the list. Of course, we bear in mind that it is also up to the TPB to grant or refuse permission for land zoned for “CDA” to be used for any purpose even though such purpose is one of those set out in the 2nd column. However in our view, the range of purposes set out in the 2nd column does indicate that it is anticipated that there will be some developments at the area zoned for “CDA” and it is not the planning intention that such area would forever remain rural and green.

19. We also note that from the zoning point of view, the Site in question is in no way different from the area to the east of the channel where there is extensive use of the land for the purpose of open storage or container yard with the permission of the TPB. Thus, the majority do not take the view that the channel should be considered as an absolute barrier marking the extent of the area which should be used for any open storage purpose.

20. We also note that according to the TPB guidelines TPB PG-no. 13C, the Site falls within the Category 2 areas. Category 2 areas are mostly those areas without clear planning intention or fixed development programme, to be affected by major upcoming infrastructural projects, within or close to open storage or port back-up sites which are regarded as “existing uses” under the Town Planning Ordinance, and areas *not subject to high flooding risk*. For Category 2 areas, planning permission could be granted on a temporary basis up to a maximum period of 3 years, subject to no adverse departmental comments and local objection, or the concerns of the departments and local residents could be suitably addressed through the implementation of approval conditions. We also note that normally speaking, technical assessments where appropriate, should be submitted to demonstrate that there is no adverse effect on drainage, traffic and other

environmental impacts on the surrounding areas.

21. We are of the unanimous view that the risk of flooding at and surrounding the Site is minimal. The Site is at a slightly higher altitude compared with the land on its east and north. The Site has been leveled and paved, and there is never any suggestion that this paving has any material adverse effect to the Site and its surrounding areas. No doubt the paving of the land and possibly the placing of materials stored at the Site may cause some diverting of the water flowing down but it does not take a lot of study for one to realise that the bulk of any water landing on the Site or flowing through the Site will end up in the channel running along the north-eastern side of the Site. Furthermore, the majority consider that this concern could be adequately addressed by the imposition of suitable conditions for the grant of permission.

22. In relation to the damage to the environment, the majority pay heed to the comments from the Environment Protection Department. We note that all along the western side of Lau Fau Shan Road and Ping Ha Road, there is a large number of sites being used for open storage and container storage. In the light of the vast area to the eastern side of the Site having been used for open storage purposes, the majority consider that there would be little effect to the environment even if this Site is allowed to be used for open storage of construction materials. We note from the photographs (at page 0018) that in the surrounding areas, in some instances, the containers were stacked up to 6 layers. Even though the Site is at a higher altitude than some of the sites used for open storage to its east, we consider that the question of impact on the environment could be suitably addressed by imposition of condition on the stacking height at the Site.

23. As to the concern about the increase in the traffic load on Deep Bay Road, the majority do not think that this is a real and substantial ground of objection. On the basis that the permitted use of the Site is for the storage of construction materials of the appellants' business, the majority do not consider that the traffic load so generated by such use would be a heavy one. The position may well be different if the Site is to be used as a public open storage godown, in which case, one would expect that there would be a lot more traffic created by the number of occasions where access would be made to the Site for depositing and withdrawing goods stored at the Site. We accept the evidence of Mr. Wong that if the Site is to be used as a private storage area for the appellants' construction material business, it is likely that there would be only one round of depositing and withdrawal made per day, and although there may be a few lorries involved in each round, it would be unlikely that there would be any substantial increase in the traffic. Furthermore, the majority also note that at the moment and possibly for some time in the past, the Site has in fact been used as a parking area for container vehicles, and yet there has never been any suggestion from the Police or the Commissioner of Transport that the existing traffic load on Deep Bay Road is overstressed. The majority take the view that compared with using the Site for the purpose

of parking of container vehicles, the use of the Site for the private storage of construction materials would generate less traffic of heavy vehicles on Deep Bay Road. To say the least if the Site is used for parking container vehicles, there would be a lot more and frequent traffic generated by container vehicles. Furthermore, the majority also take into account the fact that the length of Deep Bay Road between the intersection of the access road and the round-about at Lau Fau Shan is only just over 400 meters, and there are a number of passing areas in between.

24. The appellant had also submitted a record of traffic survey along Deep Bay Road on 29 February 2004, which was a Sunday. From the survey, it would appear that the traffic along the road was relatively thin. This is so for both vehicular traffic and also pedestrian flow. Of course, we note that the day of the survey was a Sunday and as such, one would not expect a lot of commercial vehicles running along the road. On the other hand, one would expect a heavier traffic load from public light buses and private cars and pedestrian traffic along the road. At any rate, the undisputed evidence before us is that there is no suggestion of any traffic congestion whether on Sundays or any other week days. Certainly, given the rather thin pedestrian flow of only 148 pedestrians passing even on a Sunday between 07:00 hrs to 19:00 hrs, any suggestion that there would be any material increase of risks of safety to pedestrian if the Site is to be used for open storage appeared to the majority to be contrived.

25. We note that there had been two unsuccessful applications in the past for permission to use a site much bigger than the subject Site for the purposes of use as container trailer park and vehicle park. We were told that the previous applications were rejected on grounds similar to the present one. We do not know whether there was any appeal or review of the decision to reject the previous applications. At any rate, the majority feel that the present application could be distinguished from the previous two in that the intended use for storage of construction materials belonging to the appellant's business would not generate the same amount of vehicular traffic, particularly those from heavy goods vehicles like container trailers as would be the case if the Site is being used as a container trailer park. Furthermore, the site area of the present application is much smaller than the site area of the previous applications.

26. It is a pity that we could not reach an unanimous decision on whether the appeal ought to be allowed in this case. The majority consider that provided that suitable conditions are imposed (which are discussed and set out below), the appeal ought to be allowed and the appellant be permitted to use the Site for the purpose of storage of construction materials for a period of 3 years. The minority is concerned with the objection raised by the Police and the Commissioner for Transport and considers that there is insufficient material to show that the concern and objection raised are not well founded. The minority is of the view that the planning intention consideration should lead to the conclusion that the area to the west of the channel

should not be allowed to be used for open storage purposes, notwithstanding that the Site is zoned for “CDA” purposes and that the Site is in Category 2 areas. Furthermore, the minority also considers that there is insufficient material to show that the present application is different from the previous two and in the light of the two previous rejections, the present appeal should not be allowed. The minority is of further view that approving the application will set an undesirable precedent for similar applications and would have adverse cumulative traffic impact on Deep Bay Road

27. On the question of the conditions to be attached to giving permission for the use of the Site for open storage purpose, we are able to come to an unanimous view on the conditions to be attached. In this respect, the minority also considers that if the appeal is to be allowed, then the conditions proposed by the majority should be attached.

28. As it is plain from the reasons given above that the decision of the majority is affected by the consideration that the appellant’s application is predicated on the Site being used for the purpose of his business or the business of Hop Shing Feed Mill Company, the grant of the permission to use the Site for the purpose of open storage of construction materials is subject to the condition that the materials stored at the Site shall be construction materials dealt with by the appellant’s business or the business to which the appellant has a beneficial interest. In particular, the Site is not to be used for the purpose of a general godown for storage of anything for reward.

29. Secondly, to address the concern of the environment, there shall be a condition that the height of the goods stacked at the Site shall not exceed 5 meters.

30. The third condition relates to the question of drainage. This condition requires a series of acts to be performed by the appellant and they are in the nature of condition subsequent in the sense that if the appellant should fail to perform this series of acts, the grant of the planning permission shall terminate. First, the appellant is to inform the Drainage Services Department of the change of the use of the Site within 14 days of the notification of the result of this appeal asking the Department for all the requirements of the Department in relation to the drainage of the Site. Secondly, the appellant is to comply with all the requirements laid down by the Department and received by the appellant within 3 months from the date of the notification by the appellant to the Department. The appellant is to comply with such requirements of the Department within 6 months of the date of the appellant’s being informed of such requirements or within such other longer period of time which the Department would consider as reasonable for the compliance of such requirements. We would also direct that for the purpose of deciding whether this condition imposed by us has been complied with, if the appellant has done any act in compliance or in purported compliance with the requirements of the Department and has notified the Department of the same, then if within three months of such notification by the appellant to the Department, the

appellant does not receive any notification from the Department to the effect that the Department does not consider that the requirements have been complied with and specifying the particulars of the aspects of non-compliance, the appellant is to be deemed to have complied with the requirements of the Department.

31. To conclude, by a majority of 4 to 1, we will allow the appeal and grant permission to the appellant to use the Site for the purpose of open storage of construction materials subject to the conditions set out in paragraphs 28, 29 and 30 above.