

IN THE TOWN PLANNING APPEAL BOARD

TOWN PLANNING APPEAL NO. 3 OF 2023

BETWEEN

CONCUT ENGINEERING LIMITED

Appellant

and

TOWN PLANNING BOARD

Respondent

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

Mr. CHIN Shing-hoi (Member)

Mr. LEUNG Man-kit (Member)

Professor LEUNG Yiu-cheong (Member)

Ms. WU Dan (Member)

In Attendance: Ms. Ivy LI (Secretary)

Representation: Conrad Tang & Associates Limited, Representative for the Appellant

Mr. POON Sze-chai, Louis, Government Counsel; and  
Mr. YIP Shu-kwan, Johnny, Government Counsel,  
for the Respondent

Date of Hearing: 27 November 2024

Date of Decision: 6 March 2025

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## DECISION

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1. This is an appeal by the Appellant under section 17B of the Town Planning Ordinance (Cap. 131) (“**TPO**”) against the decision of the Respondent (the Town Planning Board) (“**TPB**”) refusing its application for planning permission to use the Appeal Site as temporary warehouse (for storage of construction equipment) for a period of three years in a Village Type Development (“**V**”) zone.

### Background Facts

2. Site: The Appeal Site is located on Lot 936 in D.D. 118, No. 66 Nam Hang Tsuen, Yuen Long. It is accessible via an access road leading from Tai Shu Ha Road West. It is about 265.2 m<sup>2</sup> in area. The Appellant is the sole current owner of the Appeal Site and has for some years, without proper planning permission, been using it as a warehouse for construction equipment.
3. Zoning: The Appeal Site falls within an area zoned **V** zone on the Tai Tong Outline Zoning Plan (“**OZP**”), the currently applicable version being No. S/YL-TT/20. There is no material change in the different versions of the plan from the time the s.16 application was made to the present appeal.
4. Planning Intention: As per the Notes to the OZP (“**Notes**”), the “Planning Intention” of the **V** zone is:

“... to designate both existing recognized villages and areas of land considered suitable for village expansion. Land within this zone is primarily intended for development of Small Houses by indigenous villagers. It is also intended to concentrate village type development within this zone for a more orderly development pattern, efficient use of land and provision of infrastructures and services. Selected commercial and community uses serving the needs of the villagers and in support of the village development are always permitted on the ground floor

of a New Territories Exempted House. Other commercial, community and recreational uses may be permitted on application to [the TPB].”

5. Under the Notes, warehouse use is neither a Column 1 (uses always permitted) nor a Column 2 (uses that may be permitted with or without conditions on application to the TPB) use of the V zone.

6. The Appellant seeks to rely on paragraph (11)(b) of the Notes, which provides that:-

“... temporary use or development of any land or building not exceeding a period of three years requires permission from [the TPB]. Notwithstanding that the use or development is not provided for in terms of the Plan, [the TPB] may grant permission, with or without conditions, for a maximum period of three years, or refuse to grant permission.” [Document Bundle p.11053]

7. We have grave reservation whether the applied use is “temporary use/development” properly within the meaning of paragraph (11)(b). The fact that permission cannot be granted for more than three years at a time only means that permission is temporary; temporary permission does not per se convert a long-term use into “temporary use”.

8. As the Appellant’s representative, Mr. Yung Pak Yeung (容伯煬先生) (“**Mr. Yung**”) kept telling us, the Appellant has been using the site as a warehouse for some years. The Appellant has finally decided to seek to regularise its use only because the erection of the various structures is also in breach of the Block Government Lease (demised for agricultural use) and the unauthorised building works/uses are already subject to lease enforcement actions by the Lands Department (“**LandsD**”) [Document Bundle p.5014]. Mr. Yung claimed that the directors of the Appellant are elderly and might retire soon, but that was a bare assertion without proper evidence in support.

9. In *Anderson Asphalt Ltd v Town Planning Board* [2007] HKLRD 18, the Court of Appeal held, inter alia, that:

“32. In our judgment, the crucial issue is whether the application might have had the effect of frustrating the planning intention embodied in the Plan.

33. We are of the view that when there is material suggesting that the applicant may apply for a renewal, it is relevant to consider the applicant’s real intention regarding the duration of use.

34. In so holding, we are not saying that no permission could be granted under paragraph (vi)(b) if the Board finds that an applicant has an intention to apply for a renewal. But that is something the Board must take into account in assessing the overall compatibility of such application with the planning intention embodied in the plan. The Board may also consider imposing restrictions on renewal applications as a condition for the grant of a first permission in order to preserve the long-term integrity of planning intention under the plan.”

10. It is unfortunate that Mr. Poon Sze Chai (潘思齊先生) (“**Mr. Poon**”) of the Department of Justice for the TPB did not refer us to such a relevant Court of Appeal judgment and did not explore fully in cross-examination the Appellant’s real intention regarding the duration of use. As such, we do not think it is fair to, and we do not seek to, rely on this judgment, but we hope that the TPB will bear this Court of Appeal judgment in mind for future references.
11. S.16 Application: On 3.11.2022, the TPB received a planning application from the Appellant represented by Conrad Tang & Associates Limited (“**CTA Limited**”) under TPO s.16 (No. A/YL-TT/578) for the subject planning permission. An amended application was received on 10.11.2022. The amended application comprised the followings:

Proposed Use	Temporary warehouse for construction equipment
No. of Structures	5 (4 structures under canopies + 1 canopy for storage of construction equipment, including drilling equipment and forklifts, and ancillary office and toilet)
Total Covered Land Area	189.1 m <sup>2</sup> (71.3% of site area)
Height of Structures	One-storey (Min. 2.9m to Max. 4.03m)

Parking Space	1 for private car (5m x 2.5m)
Loading/Unloading Space	1 for light van (5m x 2.5m)
Operation Hours	8:00 a.m. to 6:00 p.m., Monday to Saturday (excluding public holidays)

12. On 23.12.2022, the Rural and New Town Planning Committee (“RNTPC”) of the TPB decided to reject the application for the following reasons:
- (a) The applied use was not in line with the planning intention of the V zone, which was primarily for development of Small Houses by indigenous villagers. No strong planning justifications had been given in the submission for a departure from the planning intention, even on a temporary basis.
- (b) The applied use was not compatible with the surrounding residential character.
13. S.17 Review Application: On 2.2.2023, the Appellant applied under TPO s.17(1) for a review of the RNTPC’s decision with supplementary information. On 26.6.2023, the Appellant submitted Further Information to provide further justifications and responses to departmental comments in support of the review application.
14. On 15.9.2023, after hearing the Appellant and his representatives, the TPB rejected the review application for the same reasons.
15. Subject Appeal: By Notice of Appeal under s.17B lodged on 8.11.2023, the Appellant appealed against the TPB’s decision.
16. The grounds of appeal were as follows:-

“城市規劃委員會未有充分考慮申請人提出的理據 (包括申請地點的位置、與附近用途的協調度、場地運作的整潔度和同樣位於住宅用途附近的露天存放申請卻獲批等) 而作出否決的決定。”

17. Under TPO s.17B(8)(b), an Appeal Board may “confirm, reverse or vary the decision appealed against”.

Justifications put forward in support of the application

18. The Appellant’s justifications in support of the review application was conveniently summarised in paragraph 7.2 of the paper put before the TPB [Document Bundle p.5006]:

- (A) approval of the applied use on a temporary basis would not jeopardise the long-term intention of the “V” zone given that the Site was not subject to Small House application or approval;
- (B) it is not uncommon to find industrial buildings (where warehouse use is always permitted) in the vicinity of residential and “V” zones on New Town OZPs which demonstrate that warehouse and residential uses are not incompatible uses;
- (C) there are two approved applications for temporary warehouse use in the “V” zone on the Pat Heung and Tong Yan San Tsuen OZPs;
- (D) no adverse traffic impact will be caused by the applied use;
- (E) same planning consideration for the nearby “Other Specified Uses” annotated “Rural Use” (“**OU(RU)**”) zone under the latest Town Planning Board Guidelines No. 13G (“**TPB PG-No. 13G**”) should be adopted; and
- (F) the applied use has been in existence for many years without causing any complaint or adverse impact on the surroundings and hence sympathetic consideration should be given to the current application.

19. The Appellant put forward similar justifications in this Appeal.

## Witnesses

20. The Appellant's representative, Mr. Yung of CTA Limited gave evidence on behalf of the Appellant. Ms. Cheung Ling Chi (張齡芝女士), Senior Town Planner of the Tuen Mun and Yuen Long West District Planning Office of the Planning Department, gave evidence on behalf of the TPB.
21. Mr. Yung also sought leave to call Mr. Poon Wai Sun (潘偉新先生) (“**Mr. Poon**”) of the Appellant as a second witness. The witness statement of Mr. Poon was not filed until 30.10.2024, in breach of the Appeal Board's order and directions given on 19.3.2024. The TPB objected to the application. Upon hearing both parties, we considered that the TPB was prejudiced by the late filing as the TPB was deprived of the opportunity to conduct a site visit to verify Mr. Poon's statement. Further, Mr. Poon's evidence was about certain forklift trucks stored in the Appeal Site. We did not consider the evidence to be material. We rejected the application.

## Relevant Legal Principles

22. We refer to Town Planning Appeal No. 15 of 2011 (unreported 27.2.2014) [item 4 of the TPB's List of Authorities] §§18-26 for a summary of the applicable legal principles. For the purpose of this Appeal, the followings are pertinent:
  - (1) The Board must exercise an independent planning judgment and is entitled to disagree with the TPB. The Board can substitute its own decision for that of the TPB even if the TPB had not strictly committed any error on the materials before it, as the hearing before the Board would normally be much fuller and more substantial than a review hearing under TPO s.17.
  - (2) The Board's discretion to grant planning permission must be exercised within the parameters of the relevant approved plan.
  - (3) The OZP and the Notes are material documents to which the Board is bound to have regard to in exercising its independent judgment and, indeed, they are the “most material documents”.

- (4) It is relevant to consider whether the proposed development would result in an additional gain to the community. Conversely, if the proposed development is likely to have adverse impacts on the vicinity, the applicant has to satisfy the Board that it is able to take adequate preventive or mitigation measures to mitigate such impacts.
- (5) The Board should have regard to the principle of consistency, always bearing in mind that its decision in granting or refusal to grant planning permission would become a precedent for similar applications in the future.
- (6) The onus of proof is on the Appellant to demonstrate that the TPB's decision was wrong and should be reversed or varied. It is also incumbent upon the Appellant to satisfy the Board that the application is in line with the planning intention of the "V" zone and that there is sufficient justification to warrant the Board granting planning permission for it.

### The Board's Decision

23. Applying the above legal principles, we note that by the Tai Tong OZP, the area within which the Appeal Site is situated is zoned V zone. By the Notes to the OZP, the planning intention of the V Zone is clear – for village expansion and for development of Small Houses by indigenous villagers (see §4 above). The applied warehouse use is totally incompatible with the planning intention of the V zone. Not only does warehouse use fall outside the Column 1 and Column 2 uses of the V zone, it is not a use that serves the needs of the villagers or supports the village development. It has no commercial, community or recreational benefit. It provides no "additional gain to the village community".
24. The evidence of Ms. Cheung is that the area where the Appeal Site is located is a predominantly village/rural area. There are village houses and Small Houses in the immediate vicinity. This is borne out by the photographs and the plans submitted in evidence.

25. Even though isolated patches of vacant/unused land, car parking areas and open storage yards are found dotted in various parts within the area, the predominantly rural residential character of the area stands out. While it is not unknown that some villages in the New Territories are spoiled by mismanagement and exploitation, this has not happened to Nam Hang Tsuen. The rural residential character remains prominent.
26. Moreover, as pointed out by Ms. Cheung, there is no evidence that the isolated patches of car parking areas and open storage grounds are permitted under the TPO. One cannot rely on one unauthorised usage to support another unauthorised usage.
27. Further, we have been referred to a similar application made in the same V zone which was rejected. Although it happened in 2003, we cannot dismiss it simply because it was not recent.
28. That application was for temporary storage of furniture and miscellaneous items for a period of three years. It was rejected for the following reasons [Document Bundle p.2039]: -
  - (a) not in line with the planning intention of the V zone.
  - (b) not compatible with the surrounding residential and rural character with village houses and fallow agricultural land.
  - (c) there was no information to demonstrate why suitable sites/units within “Open Storage” zones/flatted factories could not be made available for the development.
  - (d) approval of the application would set an undesirable precedent.
29. These four reasons are equally applicable to the present application. Even though the site in question in that application is far from the Appeal Site in terms of physical distance, it is within the same V zone and is highly relevant to our present considerations.

30. We asked Mr. Yung if there is any reason why the Appellant cannot move its operation to a proper industrial warehouse. He said that the Appellant had used the land as its warehouse for a long time and the Appellant's directors are now elderly and thinking of retiring, so they have no plan to move the operation. But the fact that the Appellant has used the site without proper authorisation for a number of years is not a justification that it should be allowed to continue such unauthorised use.
31. We asked Mr. Yung whether there is any ground for us to distinguish the present application from the 2003 application. He was not able to give any. Having regard to the principle of consistency, we do not see how we can justifiably depart from this previous application.
32. Turning to the justifications put forward by the Appellant (see §18 above), re (A), the fact that there is no current application does not mean that the land is not in demand for future Small House applications.
33. Re (B), at the hearing, Mr. Yung referred to New Town OZPs in Sha Tin and Tai Po. Given the limited land resources of Hong Kong, there are bound to be examples where industrial buildings are found in the vicinity of residential and village sites, but it does not follow that industrial/warehouse use of land within, as opposed to adjacent to, a residential/village zone is compatible or permissible. We do not consider general references to OZPs in completely different areas to be helpful.
34. Re (C), in the review application, references were made to one approved application in Pat Heung (八鄉), namely A/YL-PH/844; and one approved application in Tong Yan San Tsuen (唐人新村), namely A/YL-TYST/1123. In his witness statement for this Appeal, Mr. Yung referred to a further application in Tong Yan San Tsuen, namely A/YL-TYST/1128.
35. Like his examples in Sha Tin and Tai Po, Pat Heung and Tong Yan San Tsuen are both far from Nam Hang Tsuen and lay well outside the Tai Tong OZP. We fail

to see how applications in other parts of Yuen Long in completely different OZPs is relevant. As we pointed out to Mr. Yung, the New Territories is very big. To search territory-wide for isolated approved applications but ignoring all the rejected applications is not a helpful exercise. Far more relevant to our present consideration must be the previous application in the same V zone which was rejected (see §§27-31 above).

36. Further, Ms. Cheung has painstakingly taken us through the history of these other applications. It is clear that their backgrounds are very different from our present application.
37. For the Pat Heung Application A/YL-PH/844, there were two previous approved applications. The latest application was granted on sympathetic consideration in light of the previous approved applications and of the fact that the site was mainly surrounded by the Shek Kong Stabling Sidings so that the warehouse would allow the residual land parcel to be better utilised.
38. For the Tong Yan San Tsuen Application A/YL-TYST/1123, there had been five previous approved applications relating to the same site for various temporary uses. In the five previous applications, the site fell within the “Undetermined” (“U”) zone of the relevant OZP. It was only due to an intervening re-zoning that the site fell into partly “Village Type Development(1)” (“V(1)”) zone and partly “Open Space” (“O”) zone in the latest application. The area surrounding the site comprises predominantly open storage/storage yards and warehouses with scattered residential structures, parking of vehicles, shrubland and vacant land/structures. Indeed, one can see from the photograph P7 produced by the Appellant that Tong Yan San Tsuen is far from being a rural village. Furthermore, the latest application was actually within the three years permitted by the previous application, but the previous permission was revoked due to non-compliance with approval condition prohibiting the use of medium good vehicles. Further, the site would be resumed by the government for Yuen Long South Development in due

course. It is apparent that that application has little in common with our present application.

39. For Application A/YL-TYST/1128, first of all, it was an application for open storage, not warehouse storage, thus subject to specific guidelines<sup>1</sup> which are not applicable to our present case. Secondly like Application A/YL-TYST/1123, there had been six previous applications relating to the same site for various temporary uses. In the previous applications, the site fell within the U zone. It was only due to the intervening re-zoning that the site fell into partly V(1) zone, partly O zone and partly (about 2.6% of it) V zone in the latest application. Like 1123, that application has little in common with our present application.
40. Re justifications (D) and (F), Mr. Yung claimed that the daily operation of the Appeal Site involved the transport of goods by a light goods vehicle only, the traffic flow was low, the site was kept clean, and the operation had been carried on for some years and no complaint had been received. There was no objection from the Director of Environmental Protection.
41. We note from the TPB paper in the review application that there is no adverse comment from the Highways Department, the Director of Environmental Protection and various other government departments (except the LandsD, see §8 above). We accept that there is no evidence of substantial adverse impacts on the traffic or the environment. But it does not follow that there is no adverse impact. To operate a functioning warehouse that involves daily transport of goods within a residential area is bound to have some impact on the residence in the vicinity. In this regard, we note that public comments received during the application stage and the review stage were all unsupportive [Document Bundle p.5006].
42. Re (E), Mr. Yung claimed that the Appeal Site sits on the border of the V zone and to its immediate east is an area zoned as OU(RU).

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<sup>1</sup> TPB PG-No. 13G (or its previous version TPB PG-No. 13F) for “Application for Open Storage and Port Back-up Uses under Section 16 of the Town Planning Ordinance”

43. Be that as it may, no part of the Appeal Site falls within the adjacent zone. The fact that it lies on the border does not give the Appellant the liberty to adopt the usage of an adjacent zone. Furthermore, the key question is whether the applied use is compatible with the planning intention and the character within the V zone, not whether it is compatible with an adjacent zone. And we do not see any logic in applying here planning consideration given to a completely different land use zone just because the zone is nearby or adjacent.
44. Lastly, Mr. Yung has made some vague attempt to argue that the warehouse use has been carried on even before the Appellant bought the site and is an existing use under paragraph (3) of the Notes. It is clear from a long line of cases starting with Town Planning Appeal No. 11 of 1998 that the Appeal Board has no jurisdiction to decide whether there is an existing use. If the Appellant wishes to pursue this point, it should have brought proper proceedings in the High Court. Besides, existing use without material change has to be proved by solid evidence, not some vague assertions. Judging by the photographs, changes in the site pre- and post-1990 (when the OZP was first published) is visible. We see little evidence of existing use.

### Conclusion

45. In conclusion, for the foregoing reasons and looking at the facts and evidence as a whole, we agree with the TPB that the application should be dismissed as the applied use is not in line with the planning intention of the V zone and is not compatible with the surrounding rural residential character of the area. No strong planning justifications had been given for a departure from the planning intention, even on a temporary basis. In addition, we consider that approval of the application would set an undesirable precedent.
46. In the premises, we confirm the TPB's decision of 15.9.2023 and dismiss the appeal.

47. The question of costs was not argued. We make no order as to costs.

(Signed)

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Ms. LAM King-sze, Cissy  
( Chairman )

(Signed)

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Mr. CHIN Shing-hoi  
( Member )

(Signed)

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Mr. LEUNG Man-kit  
( Member )

(Signed)

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Professor LEUNG Yiu-cheong  
( Member )

(Signed)

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Ms. WU Dan  
( Member )