

**Minutes of the 1159th Meeting of the
Town Planning Board held on 15.12.2017**

Present

Permanent Secretary for Development
(Planning and Lands)

Ms Bernadette H.H. Linn

Chairperson

Professor S.C. Wong

Vice-chairperson

Mr Lincoln L.H. Huang

Mr H.W. Cheung

Professor K.C. Chau

Dr Wilton W.T. Fok

Mr Ivan C.S. Fu

Mr Sunny L.K. Ho

Ms Janice W.M Lai

Mr Dominic K.K. Lam

Mr Patrick H.T. Lau

Mr H.F. Leung

Mr Stephen H.B. Yau

Dr F.C. Chan

Mr Peter K.T. Yuen

Mr Philip S.L. Kan

Dr Lawrence W.C. Poon

Mr Wilson Y.W. Fung

Mr Alex T.H. Lai

Mr Stephen L.H. Liu

Miss Winnie W.M. Ng

Ms Sandy H.Y. Wong

Mr Franklin Yu

Principal Assistant Secretary (Transport) 3

Transport and Housing Bureau

Mr Andy S.H. Lam

Chief Engineer (Works), Home Affairs Department

Mr Martin W.C. Kwan

Deputy Director of Environmental Protection (1)

Mr Elvis W.K. Au

Director of Lands

Mr Thomas C.C. Chan

Director of Planning

Mr Raymond K.W. Lee

Deputy Director of Planning/District

Miss Fiona S.Y. Lung

Secretary

Absent with Apologies

Ms Christina M. Lee

Mr David Y.T. Lui

Dr Frankie W.C. Yeung

Mr K.K. Cheung

Dr C.H. Hau

Mr Thomas O.S. Ho

Dr Lawrence K.C. Li

Professor T.S. Liu

In Attendance

Chief Town Planner/Town Planning Board

Ms Doris S.Y. Ting

Senior Town Planner/Town Planning Board

Miss Anissa W.Y. Lai

Agenda Item 1

[Open Meeting]

Confirmation of Minutes of the 1157th Meeting held on 1.12.2017

[The item was conducted in Cantonese.]

1. The minutes of the 1157th meeting held on 1.12.2017 were confirmed without amendments.

Agenda Item 2

Matters Arising

- (i) [Confidential item] [Closed Meeting]

2. The item was recorded under confidential cover.

[Messrs Dominic K.K. Lam, Patrick H.T. Lau, H.F. Leung and Franklin Yu, Ms Janice W.M. Lai, Ms Sandy H.Y. Wong and Miss Winnie W.M. Ng arrived to join the meeting during the consideration of the item]

[Dr Wilton W.T. Fok and Mr Franklin Yu left the meeting after consideration of the item.]

Fanling, Sheung Shui & Yuen Long East District

Agenda Item 3

[Open Meeting (Presentation and Question Sessions only)]

Review of Application No. A/YL-KTS/732

Temporary Open Storage of Construction Tools, Machinery and Materials for a Period of 3 Years in “Agriculture” Zone, Lot 475 in D.D. 113, Kam Tin, Yuen Long (TPB Paper No. 10371)

[The item was conducted in Cantonese and English.]

3. The Secretary reported that RHL Surveyors Limited (RHL) was the representative of the applicant. The following Members had declared interests on the item:

Mr H.F. Leung - RHL had made donation to the Department of Real Estate and Construction in the Faculty of Architecture of the University of Hong where he was working

Ms Janice W.M. Lai - family member owning a house at Cheung Po Tsuen, Kam Tin South

4. Members agreed that Mr H.F. Leung and Ms Janice W.M. Lai could stay in the meeting as Mr Leung’s interest was indirect and the property of Ms Lai’s family member did not have a direct view of the application site.

Presentation and Question Sessions

5. The following representative of Planning Department (PlanD) and the applicant’s representatives were invited to the meeting at this point:

Ms Maggie M.Y. Chin - District Planning Officer/Fanling, Sheung Shui & Yuen Long East District

(DPO/FS&YLE), PlanD

Ms Anna Chow] Applicant's Representatives
Mr Nicky Tse]

6. The Chairperson extended a welcome. Given that the discussion of Agenda Item 2 had overrun and the applicant's representatives had to leave the meeting shortly, the Chairperson invited the applicant's representatives to elaborate on the review application first. Members noted that a replacement page updating the public comments on paragraph 6.7 of the Paper (page 12) was tabled at the meeting. The speaking notes of Ms Anna Chow, the applicant's representative, were also tabled at the meeting upon her request.

7. Ms Anna Chow, the applicant's representative, made the following main points:

- (a) at the time when the applicant submitted the s.16 application on 3.2.2017, the applicant had stated clearly in the application form that the application site (the Site) had been used for open storage of construction materials and tools since 1980's and such use had continued without any material change. However, the applicant received an Enforcement Notice (EN) on 1.9.2015 and subsequently a Summons dated 21.5.2016;
- (b) although the applicant always held the view that the storage use on the Site was an existing use ('EU'), upon receipt of EN and Summons, the applicant submitted a s.16 application to apply only for placing two containers in the site for storage use which might constitute material change in the use of land. The application was rejected and the s.17 review application was submitted before the completion of the trial;
- (c) in light of the decision of the Court on 20.6.2017 that the current storage use (inclusive of the two containers specified under the s.16 application) on the Site was an 'EU' under the Town Planning Ordinance (the Ordinance) which would be tolerated, the applicant considered that planning permission was no longer necessary. However, the applicant would only withdraw the s.17 review application on the condition that the Town Planning Board (the

Board) would substitute the decision of the Rural and New Town Planning Committee (RNTPC) of the Board by a decision that the planning permission sought under the current application was not necessary. That would avoid causing confusion in the planning record that the applied use on the Site was rejected; and

- (d) she then read out the relevant parts of the extract of the oral verdict handed down by the Court on 20.6.2017 to substantiate that the Court had accepted the applicant's evidence that the Site had been used for storage use since mid-1980s, thus the use was in existence before the publication of the first draft Interim Development Permission Area (IDPA) plan for the area and no planning permission was required.

8. As the presentation of the applicant's representative was completed, the Chairperson invited questions from Members.

9. The Vice-Chairperson and some Members raised the following questions to the applicant's representative:

- (a) noting the Court's judgement that the storage use on the Site was an 'EU', consideration of the review application appeared to be an academic exercise since the current use on the Site would be tolerated regardless of whether planning permission was granted. In the event that the review application was approved with conditions by the Board, whether the applicant was willing to comply with the approval conditions;
- (b) whether the applicant would withdraw the review application should the Board decide not to express its view on whether planning permission was required for the applied use;
- (c) what the underlying intention of the applicant was to proceed with the review application given that the applied use could be continued without the planning permission currently sought;

- (d) apart from the Court's decision on the 'EU' status of the applied use on the Site, whether the applicant had any further justification, such as those relating to the land use aspect, to support the review application;
- (e) whether the applicant could provide any plans/photos to demonstrate that the applied use on the Site had been in operation since the 1980's; and
- (f) whether the placing of two containers on the Site might be regarded as a material change to the 'EU'.

10. In response, Ms Anna Chow made the following main points:

- (a) the applicant was not requesting a planning permission but a confirmation from the Board that planning permission for the applied use was not necessary. Subject to obtaining such confirmation, the applicant was willing to withdraw the review application. Even if the application was approved by the Board, the applicant did not intend to comply with the approval conditions but would continue to operate the storage use on the Site based on its 'EU' status;
- (b) as the Court had already ruled that the storage use on the Site was an 'EU', the applicant understood that planning permission was not necessary. If the Board decided not to cast a view whether planning permission was required for the applied use, the 'EU' status of the open storage use on the Site would not be affected and the current use would still be allowed to continue on the Site;
- (c) the applicant was worried that if the s.17 review application was withdrawn, the record in the public domain would show that the applied use on the Site was rejected, which might lead to confusion that the current use on the Site was an unauthorised development. Given that the applicant was one of the listed contractors for carrying out minor rural improvement works of the Government and for the sake of maintaining a clean record for the Site, the applicant decided to proceed with the review application to complete the

planning process and to request the Board to substitute the RNTPC decision and confirm that planning permission for the applied use was not necessary;

- (d) the applicant's position on the review application was that the applied use was an 'EU' and there had not been any change in the use of the Site since 1980's, and hence there was no need for the Board to decide whether the review application should be approved or not;
- (e) relevant plan/photo to demonstrate the applicant's claim of the 'EU' status was not available at the moment, but all such information had been submitted to the court as evidence for the trial; and
- (f) the submission of the planning application was necessitated by the receipt of EN and Summons. While the applicant always considered that the current use on the Site was an 'EU', the applicant only suspected that the placing of two containers for storage use on the Site might constitute a material change of use which might require planning permission from the Board.

11. The Chairperson, Vice-Chairperson and some Members raised the following questions to DPO/FSYLE:

- (a) what action would be taken by PlanD if the approval conditions of the planning permission were not complied with by the applicant;
- (b) whether PlanD had liaised with the applicant that the planning permission for the applied use under s.17 review application was no longer necessary after the Court's judgement was handed down in June 2017;
- (c) why an application could be submitted if the applied use was not a Column 2 use which required planning permission;
- (d) whether the 'EU' status of the applied use as claimed by the applicant during the s.16 application had been a material consideration of the RNTPC;

- (e) while it was the responsibility of the Board to focus on the land use aspect in considering the planning application, whether the Board would have the mandate to consider the 'EU' status of the applied use or whether it should be a matter to be determined by the Court;
- (f) the reason for previous enforcement action undertaken by the Planning Authority on the Site;
- (g) the rationale for the applicant to seek planning permission for the 'material change of use' on the Site; and
- (h) whether the Planning Authority had submitted an appeal application to review the Court's decision.

12. In response, Ms Maggie M.Y. Chin, DPO/FS&YLE, PlanD, made the following main points with the aid of some PowerPoint slides:

- (a) should the review application be approved with conditions by the Board, any subsequent non-compliance with the approval conditions would result in revocation of the planning permission. The Planning Authority, in considering whether enforcement action would be taken, would take into account a host of planning consideration including the Court's judgement on the 'EU' status of the Site;
- (b) noting that the applied use on the Site was an 'EU' as ruled by the Court, PlanD had already approached the applicant to draw his attention that the applied use was tolerated under the provision of the covering Notes and planning permission was not necessary. However, the applicant requested to proceed with the current s.17 review application;
- (c) although open storage was neither a Column 1 nor Column 2 use under the "Agriculture" ("AGR") zone of the draft Kam Tin South Outline Zoning Plan No. S/YL-KTS/14 (the Plan), according to the covering Notes of the Plan,

planning application could be made to the Board for planning permission for temporary uses of any land not exceeding a period of three years notwithstanding that the use or development was not provided for in terms of the Plan;

- (d) although the applicant had stated in the s.16 application that the applied use was an 'EU', the claim of 'EU' for the Site was not a material consideration when RNTPC rejected the s.16 application;
- (e) the 'EU' status of the Site had already been accepted by the Court in its decision handed down on 20.6.2017 and such information had been incorporated into the Paper for Members' information. The review application should be considered in accordance with the provision of the Ordinance;
- (f) during the site patrol of the area, the storage use on the Site was considered to be a suspected unauthorized development. Upon further investigation, enforcement action was taken by the Planning Authority and an EN was issued to the responsible persons in September 2015. On 3.2.2017, the applicant submitted a s.16 application to use the Site for temporary open storage. Although the applicant had claimed that the applied use was an 'EU', the RNTPC was not in a position to determine the 'EU' claim. The application was rejected by the RNTPC on 17.3.2017 taking into account various planning considerations such as whether the proposed use was in line with the planning intention and the relevant Town Planning Board Guidelines. The 'EU' status was only accepted by the Court on 20.6.2017 after the rejection of the application by RNTPC;
- (g) in accordance with section 23(9) of the Ordinance, it was a defence to a prosecution if the applicant could prove that the applied use had been approved by the Board or the use on the Site was an 'EU' ; and
- (h) she understood that the Planning Authority did not lodge an appeal on the

court's decision.

[Mr H.W. Cheung left the meeting at this point.]

13. On whether further enforcement action would be taken against the use at the Site, Mr Raymond K.W. Lee, the Director of Planning, supplemented that whether enforcement action would be taken rested with the Planning Authority who would make a decision based on the circumstances of each individual case.

14. As Members had no further question, the Chairperson said that the hearing procedure for the review application had been completed. The Board would further deliberate on the review application in the absence of the applicant's representatives and inform the applicant of the Board's decision in due course. The Chairperson thanked the representatives of the applicant and PlanD for attending the meeting. They left the meeting at this point.

Deliberation Session

15. The Chairperson, Vice-Chairperson and some Members had the following major views:

- (a) the applicant was well aware that planning permission was no longer necessary for the applied use, the applicant's rationale to proceed with the current s.17 review application was doubtful;
- (b) with the Court's decision that the storage use on the Site was an 'EU' and in the absence of any material change of use on the Site, the Board was not in a position to confirm the 'EU' status of the applied use. If the applicant chose to submit a planning application and in so doing took the view that an application was required, the Board would take into account various planning considerations. The 'EU' status was not a material consideration on whether planning permission should be granted by the Board;
- (c) the decision on whether the review application should be withdrawn rested

entirely with the applicant. The applicant's stance on conditional withdrawal of the review application was noted but was considered unacceptable. Given that the review application had not been withdrawn, the Board should proceed to consider the review application based on the relevant planning considerations of the application;

- (d) according to the Ordinance, the provision for the s.17 application was to review the Board's decision of the s.16 application. The Board might confirm or reverse the decision, or substitute for the decision in question any decision it could have made under the s.16 application. It was not appropriate for the Board to accede to the applicant's request to confirm the existing use status of the applied use as it was not provided for under s.17(6) of the Ordinance. Moreover, it was the role of the Board to consider the s.17 review application unless it was withdrawn; and
- (e) given that the applicant had not submitted any further justification to respond to the rejection reasons of the s.16 application and to substantiate the s.17 review application, and the 'EU' status of the applied use was not a material consideration of the Board in considering whether planning permission should be granted upon review of its decision made under s.16, the planning considerations and assessments of the subject application should remain the same as those in the s.16 application.

16. Regarding a Member's query on whether more weight would be given by the Board in its consideration of the planning application if sufficient evidence was provided by the applicant to substantiate his 'EU' claim, Members noted that the 'EU' status was normally not a material consideration of the Board in considering whether planning permission should be granted.

17. A Member asked whether there was other similar application as the current one in that the applicant provided no justification for the application but merely stated that the applied use was an 'EU'. In response, the Secretary said there was an application for proposed in-situ conversion of 1/F to 7/F of an existing building for office use in a site zoned "Residential (Group A)4" in Hung Hom (application No. A/K9/267). Upon detailed

checking, PlanD found out that the site had a set of approved building plans for non-residential use. As office use in the purpose-designed non-residential portion of an existing building was always permitted in accordance with the covering Notes of the concerned OZP, and that the minor encroachment into an area shown as 'Road' might be accepted as minor boundary adjustment, the Metro Planning Committee on 13.1.2017 agreed to PlanD's recommendation that planning application was not required for the proposed office use at the premises. However, for the present case, planning permission was required for the applied use at the time of the s.16 application.

[Messrs Alex T.H. Lai, H.F. Leung and Patrick H.T. Lau, Miss Winnie W.M. Ng, and Ms Janice W.M. Lai left the meeting during the deliberation.]

18. The Chairperson summed up the above discussion. While noting the Court's decision that storage use at the Site was an 'EU', the applicant had chosen to proceed with the s.17 review hearing. In the circumstances, Members decided to proceed with the review of RNTPC's decision on the application based on the relevant planning considerations in accordance with the provision of the Ordinance. As there was no new justification provided by the applicant to substantiate the review application and there was no major change in planning circumstances since the rejection of the s.16 application, there was no strong planning justification for a departure from the previous decision of the RNTPC.

19. Members then went through the reasons for rejection as stated in paragraph 7.3 of the Paper. On consideration that there was no major change in planning circumstances for the Site, the reasons for rejection made by the RNTPC, as stated in paragraph 1.2 of the Paper, were still valid. Accordingly, the Board decided to reject the application on review. The reasons for rejection were:

- “(a) the development is not in line with the planning intention of the “Agriculture” (“AGR”) zone which is to retain and safeguard good agricultural land for agricultural purposes. This zone is also intended to retain fallow arable land with good potential for rehabilitation. No strong planning justification has been given in the submission for a departure from the planning intention, even on a temporary basis;

- (b) the application does not comply with the Town Planning Board Guidelines No. 13E on 'Application for Open Storage and Port Back- up Uses under Section 16 of the Town Planning Ordinance' in that there is no previous approval granted at the Site and there are adverse departmental comments on the application;
- (c) the applicant fails to demonstrate that the development would not generate adverse landscape and environmental impacts on the surrounding areas; and
- (d) the approval of the application, even on a temporary basis, would set an undesirable precedent for similar applications within the "AGR" zone. The cumulative effect of approving such applications would result in a general degradation of the rural environment of the area."

Agenda Item 4

[Open Meeting]

Any Other Business

[The meeting was conducted in Cantonese.]

20. There being no other business, the meeting was closed at 12:40 p.m.