

Town Planning Appeal No. 2 of 2003

Between

C & P (Holdings) Hong Kong Ltd. :
Appellant

-v-

Town Planning Board : Respondent

Date of hearing : 10th & 11th June 2003 & 9th October 2003

Date of decision : 31st January 2004

Panel : Mr Edward Chan King-Sang (Chairman)
Prof. Fong Wang-Fun
Ms Agnes Hsia Sih-Ming
Ms Lam Yuet-Ming
Mr Lui Ping-Keung

DECISION

In 2001, the Appellant purchased the land known as Lots 1368A (part) and Lot 1368BRP(part) in DD 82, Ping Che, Fanling (hereinafter called “the site”). The intention of the Appellant was to use the site as an open storage for its own construction materials and equipments.

2. According to Mr. Lo of the Appellant, the site was apparently used as a workshop by the previous owner. After the Appellant bought the site, the Appellant cleared the site and put in additional drainage channels. It is fair to say that from the photographs taken of the site, the site appeared to be well paved and was reasonably neat and clean. It was also the case of the Appellant that when it purchased the site, it did not realize that there was planning restriction on the use of the site for open storage.

3. When the Ping Che and Ta Kwu Ling Interim Development Permission Area Plan was first published in the Gazette Notice on 17 August 1990, the site was zoned as for “Unspecified Use”. The site was subsequently zoned “Agriculture” on the draft Ping Che and Ta Kwu Ling OZP No. S/NE-TKL/1 which was gazetted on 4 July 1994. Since then, although there

were some minor revisions of the draft Plan, the zoning of “Agriculture” for the site has never been changed. The current position is that the draft Ping Che and Ta Kwu Ling OZP S/NE-TKL/6A had been approved by the Chief Executive in Council on 20 May 2003 and numbered as S/NE-TKL/7. The site remained zoned as “Agriculture”.

4. When a site is zoned as “Agriculture”, it would mean that the site could only be used for the purposes set out in column 1 under the heading of “Agriculture” in the schedule of uses annexed to the Notes of the Plan, or with the permission with or without conditions on application to the Town Planning Board, the purposes set out in column 2 under the heading of “Agriculture” in the schedule of uses annexed to the Notes of the Plan. The use for the purpose of open storage is not one of the permitted uses in either column 1 or column 2. This would mean that the Appellant may not lawfully use the site for its intended open storage purposes.

5. However, under section 16 of the Town Planning Ordinance, there is power on the part of the Town Planning Board to allow the site to be used for purposes other than those set out in the Plan for a short period of not exceeding 3 years. In pursuance of this section, the Appellant had made 2 previous applications for the site to be used for temporary open storage for construction equipments and/or materials. On both occasions the application was refused. On 24 June 2002, the Appellant submitted the present planning application to seek permission to use the site for temporary open storage for a period of 3 years. The application was rejected by the Rural and New Town Planning Committee of the Town Planning Board on 23 August 2002. The Appellant applied for a review of the decision. The review was heard on 6 December 2002 and 10 January 2003. The Town Planning Board rejected the application and affirmed the previous decision. The Appellant lodged an appeal before us on 4 February 2003.

6. The site has an area of about 700 square meters. It is at the eastern side of Ping Che Road. To the north west side of the site, there is an area which is being used for open storage and warehouse purposes. This is not a purpose specified on the Plan, however such use was permitted as this plot of land had been so used on the day of survey by the Planning Department on 10 April 1992. At the south western corner of the site there is a residential house with 2 sides abutting the site. To the south of the site there are also 5 houses in the close vicinity. To the south eastern side there is an orchard. To the east and north east across Ping Che Road, there is a vast piece of agricultural land.

A large part of it is fallow agricultural land but there is also a part of it with active agricultural activities. It is fair to say that other than the one to the immediate north west of the site, there is a lot of land nearby which is used as for open storage but these other pieces of open storage land are not authorized for such purposes and the usage would appear to be illegal.

7. We have had the benefit of the written submissions from both sides and also the evidence given by Mr. Lo Yick Cheong and Mr. Lo Yuen Cheong for the Appellant and Mr. Ip Po Kwong and Mr. Saxon Sein for the Respondent. We have also had the benefit of the bundles of documents produced by the Appellant and the Respondent without any objection from either side.

8. It is fair to say that of the various government departments concerned, the only department which had raised any material comment on the proposed use of the site for open storage was the Environmental Protection Department (“EPD”). When the matter was being argued before the Town Planning Board on review, there were concerns as to whether the EPD had signified that in its view, there was “sufficient” or “insufficient” information in the submissions of the Appellant to demonstrate that the use under application would not have adverse environmental impact on the surrounding. In our view, the matter had since been cleared up and it was then the view of the EPD that the information was not sufficient, and that the point only arose due to some clerical errors. However, whatever was the position, since we had the benefit of the further information submitted by the Appellant on the environmental aspect and also the evidence of Mr. Sein, we consider that we should approach this appeal with reference to all the materials and evidence now available before us. Even if the EPD had previously considered that the information was not sufficient, and had later changed its views, it is merely one of the factors to be taken into account in assessing the credibility of the views expressed on behalf of the EPD. In the circumstances of this case, this factor carried very little probative value.

9. The concern of the EPD would appear to be centred around the noise created at the site if the Appellant were to be allowed to use the site for open storage of its construction materials and equipments. To ease the concern of the EPD, the Appellant said that while it was obviously necessary to have lorry access to the site, the Appellant would propose only to use small crane truck of 5.5 mt and would so arrange the access that the lorry would be parked with engine facing Ping Che Road near the entrance gate. This would mean that the truck would be parked and the crane worked at the distances farthest away from the adjoining domestic houses. Furthermore, the Appellant told us that the

operation would only be during the day time between 9 a.m. to 5 p.m. Since the site would be used for the storage of the Appellant's own construction materials and equipments, it is expected that the operation at the site would be only about once every 10 days and on each occasion, it would last only for about 3 hours.

10. In further mitigation of the noise created by the operation at the site, the Appellant also proposed to put in a mobile noise barrier of 2.5 m high and 4 m wide which would be positioned about 14 to 16 metres from the entrance. The south and south east side of the site facing the orchard and the 5 houses would be lined up with a row of containers for various storage purposes. It was submitted that this row of containers would also act as barrier for the noise.

11. The Appellant had carried out 2 surveys on the noise level at the site. One on 10 October 2002 and one on 27 May 2003. On the first occasion, it showed that the background noise level at the site without any operation at the site would be between 40.1 to 60.5 dB(A) and on the second occasion, the range was between 56.5 to 58.8 dB(A). The high background noise at 58.8 dB(A) was recorded at the time when there was a heavy vehicle passing through Ping Che Road. When the crane of the lorry was in operation, the range of the average noise level recorded on the first occasion was between 66.3 and 67.1 dB(A), and that for the second occasion was between 60.2 to 63.0 dB(A). The discrepancy on the results on the 2 occasions was partly due to the position of the lorry and the place where the noise receivers were placed.

12. The comment of the EPD on the result of the first survey was that the average noise level exceeded the noise standard recommended in the Hong Kong Planning Standards and Guidelines (HKPSG) which was 60 dB(A), and the Noise Control Ordinance which was 65 dB(A). Furthermore, there was no information on what kind of crane was used for the survey. The type of crane used for conducting the survey was important because according to Mr. Sien, the noise generated by a lorry crane as stated in the technical memorandum at a distance of 6 metres away from the crane was 90 dB(A). From the information stated in this standard material, Mr. Sien questioned the reliability of the data obtained in the survey. Mr. Sien also questioned about the reliability of the data taken on the second occasion because he considered that the datum of 56.5 dB(A) as background without the crane in operation was a very quiet environment for the day time. The normal figure for the rural area at night would be about 55 dB(A). He said that in the room where this hearing was held, the background would be about 50 dB(A) if no one was talking, and that

during the hearing with people speaking, the noise level should be around 60 dB(A).

13. We had a difficult task in making any finding as to whether the data collected by the Appellant were accurate. The surveys were not conducted by any independent professional persons and certainly it was not done in the presence of someone representing the EPD or the Respondent. However, in the absence of any solid information to show that the figures were not accurate, we were inclined to accept the figures for the purpose of this hearing. We note of course the comments of Mr. Sien. However, even on the basis of the figures of the Appellant, we note that the noise level with the crane in operation still exceeds the recommendation of the Hong Kong Planning Standards and Guidelines. Furthermore, it is common ground that when the tests are done, there is no loading on the crane. It is also common ground that when there is loading, one would expect a higher noise level. Furthermore, in an actual operation, the source of the noise level would not be from the crane alone, as there would be other noise generated when heavy objects are unloaded onto the floor or on top of other objects. For instances, when I-beams are placed on a stack of I-beams, the noise generated might be considerable.

14. While it was of course possible to install measures to reduce the emission of the noise to outside the site, the effect of the measures proposed by the Appellant was not verified by the EPD. Before us, the building of a massive solid wall surrounding the site had been mooted. In our view, the building of such wall of sufficient height could certainly protect the neighbours from the emission of noise, however it may also give rise to other environmental problems, such as it would block up the views of the neighbours or may obstruct air flow etc. The Appellant had indicated that it was willing to adopt all reasonable measures suggested by the EPD.

15. In approaching this appeal, we are prepared to find that the Appellant's activities would be infrequent and would be done in day time and that we are prepared to find that the measures proposed by the Appellant would be sufficient to reduce the noise generated when the crane is in operation at the site to a reasonable level. Indeed we also accept the evidence that the immediate neighbours at the corner of the site do not appear to mind the operation and that there is no complaints from any one in the vicinity since 1994.

16. However, we do not think that non-disturbance to the neighbours would be sufficient for a special case to be made out for the purpose of the grant

of the permission for the use of the site contrary to the use specified in the Plans. Of course, if the operation would cause nuisance or disturbance to the neighbours then it would be a strong reason for refusing the application. However, the absence of such feature alone would not be sufficient to make out a special case. We accept the submissions of the Respondent that the planning intention should be respected unless there are strong reasons for allowing the site to be used for other purposes. The intention of zoning of this area as “Agriculture” in this case was to promote the conservation of the rural character so as to control urban sprawl, reduce flood risk and preserve agricultural land, and to achieve coherent planning and control of the open storage and industrial development. We agreed that there appeared to be no problem over the drainage at the site. We, however, did not consider that the Appellant had made out a special case for us to allow its appeal.

17. In arriving at our conclusion, we also took into account the fact that the site was small and that generally speaking, it would not be desirable to grant such application as this would lead to sporadic and non-uniform land use. We also noted that there was a proposal for some road widening scheme which would probably have taken up about 1/3 of the site. However from the evidence, such resumption for road work would not commence until 2006 or even 2007 and meanwhile we would consider that the planned use of the land should be preserved. We also took into account that there were some successful applications for relaxation in the area covered by the Plan. However, even taking into account the successful applications, there was not any material change of the neighbourhood to this site such would justify a special case for this site to be used for open storage purpose. We had some sympathy that the Appellant had purchased the site apparently thinking that the site might be used for open storage purpose. However, it was really the look out of the individuals and the duty of solicitors or estate agents acting for them in the acquisition to advise them of the permissible use. In any event, the result of our decision may well be that it would make the Appellant’s operation more expensive in the sense that the Appellant may have to find alternate locations for its storage. However, the evidence is that there is still plenty of areas zoned for open storage purposes.

18. To conclude, we would dismiss the appeal.