

Town Planning Appeal No. 1 of
1998

In the matter of the Town Planning
Ordinance Cap. 131

and

In the matter of an Appeal under
section 17B by the proprietor of
Kam To Sauna

Date of hearing : 8th June 1999

Date of decision : 30th July 1999

Panel : Mr Robert C. Tang S.C., J.P. (Chairman)
Mr Chow Chun Fai, B.B.S., J.P.
Dr Simon Kwan Sin Ming
Mr Stephen Lau Man Lung
Mr John Tong Chor Nam

DECISION

Kam To Sauna is situated on the 3rd floor of Hang Shing Building (“the Building”), 44 Kweilin Street, Sham Shui Po. The Building is a 12 storey composite commercial/ residential building.

2. Kam To Sauna has been operating on the same premises since 1995. It was given temporary permission to do so for 2 years on 22nd September 1995.

3. Shortly thereafter, TPB's Guidelines for Application for Commercial Bathhouse and Massage Establishment was promulgated in November 1995 (“the new Guidelines”).

4. Prior to promulgation of the new Guidelines, the old Guidelines (TPB PG - No. 14) provided

“Where the proposed uses are located within the non-domestic part of a composite commercial/residential building, it is preferable that the access (entrance) to these establishments be separated from that to the domestic parts

of the building by way of separate stairways and/or lifts/escalators exclusively serving the non-domestic parts of the building."

5. However, under the new Guidelines

"Where the proposed commercial bathhouse and massage establishment are located within the non-domestic portion of a composite commercial/residential building, access (entrance) to the application premises must be separated from that of the domestic portion of the building by way of separate stairways and/or lifts/escalators exclusively serving the non-domestic portion of the building so as to avoid causing nuisance to the occupants in the same building.

The views of local residents on the proposed commercial bathhouse and massage establishment will be taken into account in the consideration of the application.

The Fire Services Department and the Buildings Department should be satisfied with the proposals to comply with the fire safety requirements for the proposed commercial bathhouse and massage establishment in respect of the provision of fire service installations and means of escape, etc.

All other statutory or non-statutory requirements of relevant Government departments must be met"

6. However, both Guidelines

"are intended for general reference only. The decision to approve or reject an application rests entirely with the Town Planning Board and will be based on individual merits and other specific considerations of each case."

7. This is an appeal by Kam To Sauna against the refusal by the Metro Planning Committee ("MPC") of the Town Planning Board ("TPB") on 25th July 1997 to permit the continuation of its sauna establishment on the premises on the following grounds:-

"a. the development is not in line with the Town Planning Board Guidelines for Application for

Commercial Bathhouse and Massage Establishment in that, although the development is within the non-domestic part of a composite commercial/ residential building, there is no separate entrance by way of stairway and/or lifts/escalators to serve exclusively the non-domestic part of the building. This will cause inconvenience and disturbance to the residents in the domestic part of the same building; and

b. the approval of the application will set an undesirable precedent for similar applications".

8. On 15 August 1997, the appellant applied for a review of the MPC's decision.

9. On 14 November 1997, the TPB considered the review under s.17 of the Ordinance but rejected it for the same reasons.

10. The Building is situated in a busy part of Sham Shui Po. Across Kweilin Street from the Building is the well known Golden Building with its theatres and shops.

11. The application is supported by the Owners' Committee of the building. Mr. Siu Ha, the Chairman of the Owners' Committee gave evidence in the applicant's favour. To improve security for the building, Kam To Sauna has at its own expense employed a night shift watchman as well as installing a CCTV at the lobby. Also, the applicant is willing to restrict their operating hours from 1200 - 0130 hours.

12. We are told that within the Building, there is a lover's hotel and a mahjong club which operates 24 hours a day. At one time there was also a karaoke establishment within the Building.

13. The Police have no adverse comments to make about Kam To Sauna. Nor is there any difficulty about fire safety requirements.

14. We have no doubt that if this had been an application to establish a new sauna, the appeal will fail. However, we believe that in all the circumstances, it will not be fair not to renew the temporary permission. In this context, we note that although under the Guidelines for applications for massage establishments licence under the Massage Establishments Ordinance promulgated by the Commission of Police ("C of P") on 1st August 1997, no new licence will be issued to a massage establishment which is situated in a mixed residential/commercial building where

there is no independent access separating the premises from the residential portion of the building, the C of P has seen fit to renew Kam To Sauna's licence.

15. We believe the reason for this is plain. It is of cardinal importance for Hong Kong that our citizens and businessmen should be confident that, save in the most exceptional circumstances, their lives and businesses should not be affected by any laws or regulations retrospectively. That this is the guiding principle can be seen from the provisions of the Town Planning Ordinance itself, e.g. s.23(9) grand-fathering an existing use.

16. We are of the view that having regard to the fact that Kam To Sauna is an established sauna, we should allow the appeal. This application enjoys the support of the Incorporated Owners of the Building. There is no clear evidence of any substantial objection from the residents. We do not believe it will be right to deprive an establishment of its livelihood except on clear and cogent evidence of actual inconvenience and disturbance to the residents. The mere fact that the new Guidelines which came into force subsequent to its establishment require separate access is not a strong enough reason to refuse permission. The specific consideration of this case is that it is an established sauna. Nor do we think this will become an undesirable precedent. New establishments will be caught by the new Guidelines.

17. However, as was made clear to Kam To Sauna in 1995, their operation at the Building must be subject to the continued support of its residents.

18. That being the case, we grant a temporary permission for 12 months from the date of this decision.