

IN THE TOWN PLANNING
APPEAL BOARD CASE NO. 4
OF 1998

BETWEEN

MAK BING YEUNG, Appellant

-v-

TOWN PLANNING BOARD,
Respondent

Dates of hearing : 29th and 30th June 1999

Date of decision : 31st August 1999

Panel : Mr Ronny F.H. Wong S.C., Chairman
Mr Lee Man Ban
Mr Joseph Lo Sze Kuen
Mr Man Mo Leung
Mr Douglas Van

DECISION

Background

The subject matter of this appeal is Lots 64 s. A and 65 RP (Part) in D.D. 217 in Pak Kong, Sai Kung ["the Site"]. It is located about 30m to the west of Pak Kong Road separated by a streamcourse. It is accessible via an unpaved village track of about 5-10m wide, leading from Pak Kong Road. The Site is held under Block Government lease for use as agricultural land. The area of the Site is about 165m². It is fenced off and completely occupied by a metallic structure. Adjoining to the east of the Site are several domestic structures. To the north and west are tracts of fallow agricultural land with several scattered domestic structures. 3 metal workshops are found to the further north, which were in existence before 12th October, 1990. Immediate to the south of the Site is a piece of agricultural land under active cultivation. About 60m further south is a cluster of domestic dwelling houses. The Appellant is the registered owner of the Site.

2. On 6th September, 1978, the Appellant applied for registration of a business in the name of Sam Hing Iron Works ["Sam Hing"]. A Diamond Hill

address was given as the residential address of the Appellant. 20A, Por Law Cher, Sun On Village, Sai Kung, New Territories was given as the address where Sam Hing carried on its business. The business address of Sam Hing was amended on 3 separate occasions. We cannot ascertain from copies of the registration before us the precise dates of amendments. At no stage was the Site given as the business address of Sam Hing.

3. On 12th October, 1990, the Pak Kong Interim Development Permission Area Plan No. IDPA/AS-PK/1 ["the IDPA Plan"] was published in the Gazette. The Site fell within the "Unspecified Use" area on the IDPA Plan. Enlargement of extract of aerial photo No. A23198 taken on 12th October, 1990 by the Lands Department reveals extensive vegetation on the Site.

4. On 30th November, 1990, the Planning Department undertook a land-use survey ["the 1990 Survey"]. The 1990 Survey indicated that the Site was occupied by a structure ["the Structure"] for residential use and no metal workshop existed on the Site. According to the District Lands Officer/Sai Kung, the Structure was issued a Modification of Tenancy Licence ["the Licence"] in 1977 for agricultural storage purpose only.

5. The Appellant acquired the Site for \$70,000 by an assignment ["the Assignment"] dated 22nd December, 1990.

6. On 12th July, 1991, the draft Pak Kong Development Permission Area Plan No. DPA/SK-PK/1 ["the DPA Plan"] was published in the Gazette. The Site remained within the "Unspecified Area" in the DPA Plan.

7. On 1st July, 1994, the draft Pak Kong and Sha Kok Mei Outline Zoning Plan No. S/SK-PK/1 ["the OZP"] was published under section 5 of the Town Planning Ordinance ["the Ordinance"]. The Site fell within the "Recreation" Zone ["the REC Zone"] in the OZP. The OZP was approved by the Chief Executive in Council on 13th April, 1999. The REC Zoning of the Site remains unchanged on the approved OZP. Paragraph (ii) of the General Notes of the OZP states that :

"No action is required to change the use of any land or building in the area which was in existence immediately before the first publication in the Gazette of the Notice of the interim development permission area plans in relation thereto to conform to this Plan"

8. According to an enlargement of extract of aerial photo no. CN13373 taken by the Lands Department on 26th April, 1996, the Site was largely cleared of vegetation.

9. On 13th May, 1997, the Appellant submitted an application under section 16 of the Ordinance for permission to change the use of part of the Site (s.A in Lot 64) to that of Iron Works for a period of 1 year. The Appellant asserted that he commenced using the Site for iron works as from August, 1990. By letter dated 23rd May, 1997, the Appellant explained to the Town Planning Board ["the Board"] that he had submitted a previous application for change of use on 13th January, 1994 ["the Previous Application"] and that application was withdrawn on 31st January, 1994 pursuant to the advice of a Mr. Lee of the Planning Department. The application was amended on 16th June, 1997 to cover the entire Lot.

10. The application was considered by the Rural and New Town Planning Committee ["the RNTPC"] of the Board on 11th July, 1997. The RNTPC rejected the application for the following reasons :

- (a) the development was not in line with the planning intention of the REC Zone which was to designate suitable areas for the development of recreational facilities or uses. There were no strong justifications to merit a departure from such planning intention even on a temporary basis.
- (b) the continuation of the operation of the workshop would perpetuate industrial and residential interface problems.
- (c) the traffic generated by the metal workshop would aggravate the existing capacity problem of Hiram's Highway and there was no information in the submission to demonstrate that the development would have insignificant traffic impact.
- (d) insufficient space was available within the site to allow for safe manoeuvring of goods vehicles while entering or leaving the Site.
- (e) the approval of the application would set an undesirable precedent for similar applications which would result in cumulative adverse impacts on the environment and infrastructure of the area.

11. 6 days after rejection by the RNTPC an enforcement notice was served under section 23(1) of the Ordinance requiring the owners and occupiers of the

Site to discontinue the workshop on the Site or to obtain planning permission. There was no compliance with this enforcement notice.

12. On 2nd September, 1997, the Appellant applied to the Board for a review of the decision of the RNTPC. The review was considered by the Board on 9th January, 1998. The Appellant appeared together with Mr. Yeung Kwai Yau ["Mr. Yeung"] and Mr. Lee Lam. The Appellant made the following submissions :

- (a) The metal workshop had been in operation since 1988. This was before exhibition of the IDPA Plan.
- (b) The advice given by Mr. Lee of the Planning Department leading to withdrawal of the Previous Application entails acceptance by that Department of the legitimacy of his user.
- (c) There were several workshops larger than his workshop in the vicinity. The so-called interface problem therefore did not exist.
- (d) The traffic impact of the workshop had been exaggerated by concerned Government departments.
- (e) No heavy machinery was used in the workshop and there was no complaint from villagers nearby.
- (f) He would have no objection if his land be resumed for public project provided he is given appropriate compensation and a relocation site.

13. The Board took the view that whether the workshop was an existing use or an unauthorised development was a matter for the Court to determine and the Board should only assess the application from the land use planning point of view. The Board rejected the application for the following reasons :

- (a) the development was not in line with the planning intention of the REC Zone which was to designate suitable areas for the development of recreation facilities or uses. There were no strong justifications in the submission for a departure from such planning intention even on a temporary basis.

- (b) the continuation of the operation of the metal workshop would perpetuate industrial/residential interface problems.
- (c) the traffic generated by the metal workshop would aggravate the existing capacity problem of Hiram's Highway and there was no information in the submission to demonstrate that the development would have insignificant traffic impact;
- (d) insufficient space was available within the site to allow for safe manoeuvring of goods vehicles while entering or leaving the site; and
- (e) the approval of the application would set an undesirable precedent for similar applications, which would result in cumulative adverse impacts on the environment and infrastructure of the area.

The Appellant was informed of the decision and the 5 reasons of the Board on 3rd February, 1998. The Appellant was however not told that the Board regarded the question of existing use a matter for the Court.

14. On 20th March, 1998, information was laid by the Planning Department against for Appellant for non compliance with the enforcement notice of 17th July, 1997. The Appellant appeared before a Magistrate in Kwun Tong on 2nd April, 1998. According to the transcript of those proceedings, the Appellant initially pleaded not guilty to the summons. He explained to the Magistrate as follows :

“I started working in the temporary licensed house since 1988, and we have worked there for a long time - since 88 till now. When we arrived there the first time, everyone around us was working like that. In 88 I rented that place from others...”

His statement was cut short. The Presiding Magistrate then pointed out to him that "Normal practice is if you go through a trial ... and you are found guilty, then the fine will be substantially more than it would have been if you had pleaded guilty." The Appellant reversed his plea after hearing this explanation from the Magistrate. He then admitted to the following :

- (a) Aerial photographs taken on 12th October, 1990 revealed that the Site was a piece of vegetated land with mature trees.

- (b) Existing use survey carried out by staff of Planning Department on 30th November, 1990 revealed that there was a one-storey village house on the Site.
- (c) Site inspections carried out by the Planning Department on 30th December, 1992, 28th April, 1993 and 30th June, 1993 revealed that the Site was used by the Appellant for metal workshop.

The Appellant was convicted and fined \$22,300.

15. On 1st April, 1998, the Appellant lodged his notice of appeal against the decision of the Board. The Appellant challenged the reasoning of the Board on the ground that his workshop was in existence and commenced operation prior to 12th October, 1990.

Jurisdiction of this Appeal Board

16. The present appeal involves a bizarre application on the part of the Appellant. The crux of the Appellant's case is that the Site was in use as a metal workshop prior to the gazetting of the IDPA Plan on 12th October, 1990. If he be right, he is not required to take any action to change such use of the Site in order to conform with the OZP. If he is prosecuted for unauthorised development under section 21 of the Ordinance, he is entitled to put forward a defence of 'existing use'. However for the purpose of this appeal, his stance strikes at the root of his initial application under section 16 of the Ordinance. He is seeking permission when on his own case permission is not required. No one has ever explained to the Appellant this fine distinction.

17. The jurisdiction of the Board and this Appeal Board is premised on the requirement of permission. We do not find it satisfactory to adopt the Board's approach by treating the Appellant's case of existing use as a matter for the Court, assuming jurisdiction and then dismissing his application from a pure planning point of view. We are of the view that the question of jurisdiction is a matter of first priority and should be dealt with before other issues. Mr. Wong for the Respondent seems not adverse to this course in his closing submissions.

18. We would therefore put the Appellant to his election by this Decision. He is directed within 14 days from this Decision to indicate in writing to the Secretary of this Appeal Board whether

- (a) he wishes to maintain his plea of existing use in which case he should withdraw this appeal with possible implication as to costs or
- (b) he wishes to abandon his plea of existing use in which case we would proceed on the basis that permission is required and decide in the light of evidence adduced whether his application for permission should have been acceded to from the planning point of view.

Should the Appellant fail to make any indication within 14 days from the date hereof, we shall proceed on the basis of sub-paragraph (b) above.