

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

BETWEEN

MAK BING YEUNG, Appellant

-v-

TOWN PLANNING BOARD,
Respondent

Date of hearing : 29th and 30th June 1999

Date of decision : 31st August 1999 and 29th October 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

We refer to our previous Decision in relation to this appeal dated 31st August 1999 ["the previous Decision"]. The Appellant failed to give any indication within 14 days of the Previous Decision as to his intention. We shall therefore proceed on the basis that the Appellant accepts that permission is required and consider as a matter of planning law whether the Board is correct in rejecting the Appellant's application on 9th January, 1998.

2. 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.

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

5. 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.

6. 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.

7. 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.

8. 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.

9. 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 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 use. 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.

10. At the hearing before us, Mr. Ip Po Kwong, Senior Town Planner/Sai Kung gave evidence on behalf of the Respondent. Mr. Ip explained that the planning intention of the "REC" zone for the area is to designate suitable areas for the development of recreational facilities or uses for the general public. Paragraph 8.1 of the Explanatory Statement of the approved OZP outlines the general planning intention for the Pak Kong and Sha Kok Mei area ["the Area"] as follows:

“The general planning intentions for the Area are to conserve the intrinsic natural character of the scenic hilly landscape on the western and northern parts of the Area through ... the promotion of recreation and productive agriculture on the valley floors of Pak Kong and Sha Kok Mei.”

In particular, the planning intention of the “REC” zone, as stated in paragraph 9.8.1 of the Explanatory Statement of the approved OZP, is as follows:

"to designate suitable areas for the development of recreational facilities or uses which could be commercially operated for the benefit of the general public. Developments within this zoning will mainly be restricted to those of recreational nature with related or ancillary use."

11. Our attention has been drawn to the decision of Town Planning Appeal Board in Appeal No. 16 of 1996. The Appellant in that case used the site in question for open storage for 4 years prior to making an application for temporary use for a period of 12 months. The Town Planning Appeal Board pointed out that :

"...any such application must be scrutinised with great care lest what is meant to be a temporary permission will become long term. It is important not to allow such discretionary power to frustrate the stated planning intention."

12. The evidence of the Appellant centres around 2 main points :

- (a) The Appellant contended that he used the Site as a metal workshop prior to the publication of the IDPA on 12th October, 1990.
- (b) There is no severe traffic problem. Other metal workshops in the vicinity are using motor vans

bigger than his. He has no difficulty in manoeuvring his own vehicle whilst entering or leaving the Site.

13. Given the position of the Appellant as summarised in paragraph 1 of this Decision, we must proceed on the assumption that the Site was not used as a Metal Shop prior to 12th October, 1990. We do however, accept that the Appellant had been using the Site as a metal workshop since the assignment in his favour dated 22nd December, 1990. The impression we gain from his evidence is that he is at the twilight of his career. Business has not been good since the downturn of the economy. His principal concerns relate to compensation and parity of treatment. He is prepared to move if similar action is taken against other metal workshops in the vicinity.

14. As further pointed out by the decision in Town Planning Appeal No. 16 of 1996, each application should be considered on its merits. What are the merits in the present application that can be relied upon to justify inroads being made to the clear planning intention referred to in paragraph 10 above? We see none. The Appellant's use of the Site as metal workshop, albeit long, is in contravention of the planning intention. The weight of that factor is further reduced by the extent of current use. Whilst we accept the Appellant's evidence that he could manoeuvre his own vehicle within the Site, we share the disquiet of the Respondent in relation to traffic in the vicinity and over Hiram's Highway.

15. For these reasons, we affirm the decision of the Board and dismiss the appeal.