

IN THE TOWN PLANNING
APPEAL BOARD TOWN
PLANNING APPEAL NO. 12
OF 1997

BETWEEN

TAM WAI CHUNG, Appellant

and

THE TOWN PLANNING
BOARD, Respondent

Date of hearing : 12th, 13th and 15th October, 1998 and 11th November, 1998

Date of decision : 9th December, 1998

Panel : Mr Ronny F.H. Wong S.C. (Deputy Chairman)

Prof Nelson W.S. Chow

Dr Robert M. Kennard

Dr Wong Kam Din

Mr Jason Yuen

DECISION

The appeal

This is an appeal against the decision of the Town Planning Board dated 24th October, 1997 rejecting on review the application by the Appellant under section 16 of the Town Planning Ordinance for permission to use Lot No. 110 in D.D. 210 ("the Site") for 'House (Redevelopment only)'. When the application was first lodged on 9th March, 1997, the proposal was for 'Redevelopment of 0.02 acre (i.e. 80.93m²) into 2 semi-detached houses each of 40.46m² 3 stories under 8.22 m in height'. This was subsequently amended to 'Redevelopment of 65 sq.m. into one small house of 8.22 m in height with 3 stories with balcony of 1.2m x 6 m facing East on first and 2nd floor.'

The Site in Question

2. The Site is situated at the foothill of Ma On Shan Country Park ["the Country Park"] in Kei Pik Shan. It is about 200 m from the edge of the Country Park. It is located in an area uphill on the west of Tai Chung Hau. About 200 m to

the east of the Site are 2 two storeys houses ["the 2 Houses"]. Hiram's Highway is about 800 m from the Site. Village houses and low density developments in the general areas of Tai Chung Hau and Kau Sai can be found between the Site and Hiram's Highway.

3. The Site is held by the Appellant under a Block Crown Lease dated 27th March, 1905 ["the 1905 Crown Lease"] which described the same as 'House' (0.02 acres). The Appellant is also the owner of Lot 111 described in the 1905 Crown Lease as consisting of 'Padi' (0.58 acres); 'Waste' (0.01 acre) and 'Threshing floor'(0.01 acre).

4. The earliest aerial photo of the Site is photo no. 9670 taken on 19th February, 1963. Enlargements of that photo show that the Site was vacant. Save for traces said to show 'Ruins of house', no structure can be found on the Site. No cultivation can be found on Lot 111.

5. The Appellant visited the Site in 1994. She found slabs, old foundation stones, bricks and broken tiles on the Site.

6. According to a photograph taken by the Planning Department on 25th March, 1997 the site is overgrown with grass. Woodland lies behind this 'bushy' Site.

The Plans

7. By notice in the Gazette dated 12th October, 1990, the Director of Planning published the Pak Kong Interim Development Permission Area ["IDPA"] Plan No. IDPA/SK-PK/1. The Site fell within the 'Unspecified Use' area on this IDPA Plan.

8. By notice in the Gazette dated 12th July, 1991, the Town Planning Board published the Draft Pak Kong Development Permission Area ["DPA"] Plan No. DPA/SK-PK/1. The Site was zoned 'Green Belt' ["GB"] on the DPA Plan.

9. On 1st July, 1994, the draft Pak Kong and Sha Kok Mei Outline Zoning Plan ["OZP"] No. S/SK-PK/1 was published in the Gazette. This replaced the draft DPA Plan. The Site falls within the Conservation Area ["CA"] zone on the OZP.

10. According to the Notes which form part of the OZP :

- (a) 'House (Redevelopment only)' is a 'Use' that may be permitted in the CA zone with or without conditions on application to the Town Planning Board.

- (b) 'On land zoned "Conservation Area", any redevelopment, alteration and/or modification to an existing house, ie a house which is in existence on the date of first publication in the Gazette of the Notice of the interim development permission area plans, other than a "New Territories Exempted House", shall not result in a total redevelopment in excess of the plot ratio, site coverage and building height of the existing house.'

11. According to the Explanatory Statement which does not form part of the OZP :

- (a) '2.1 The object of the Plan is to indicate broad land use zonings for Pak Kong and Sha Kok Mei area (the Area)
- (b) '4.1 The Area covered by the Plan is about 566 ha. It is bounded by Hiram's Highway, Po Tung Road and Tai Mong Tsai Road in the east, the hillslopes of Buffalo Hill in the North, Ma On Shan Country Park in the west and its foothills in the south...
- (c) '4.2There are two large valleys in the Area, Pak Kong Valley and Sha Kok Mei Valley both of which stretch about 1.5 kilometres westwards into the hillslopes. The valleys are rural in character with scattered village developments on the valley floors and along the foothills of Ma On Shan Range. There are a number of stream courses running from the slopes onto the lowland areas. The Area has a high scenic value with large tracts of undisturbed woodland.'
- (d) '6.2 The western and northern parts of the Area comprise scenic hilly landscape in a relatively natural state. Such areas with significant landscape value are worthy of

conservation and should be protected from development.’

- (e) ‘6.4 Development in the Area is severely constrained by the poor internal road networks. The majority of the access roads in the Area are narrow and tortuous with low design standards and limited capacity....’
- (f) ‘7.1 The general planning intentions for the Area are to conserve the intrinsic rural nature of the scenic hilly landscape on the western and northern parts of the Area through the designation of ‘Conservation Area’ and the promotion of recreation and productive agriculture on the valley floors of Pak Kong and Sha Kok Mei’
- (g) In relation to Conservation Area ‘CA’ with a total area of 248.05 ha:
 - ‘8.11.1 The intention of this zone is to retain the existing natural character. These areas often constitute topographic features in rural areas, and may be used to separate sensitive natural systems such as the “Site of Special Scientific Interest” from the adverse effects of active developments
 - ‘8.11.2 This zone comprises those hillslopes dropping towards the valley floors of Pak Kong and Sha Kok Mei. It also includes the foothills of Buffalo Hill and Ma On Shan. It covers water gathering grounds, steep terrains and footslopes which remain in a relatively nature state with vegetation and undisturbed woodland forming a spectacular and valuable scenic landscape.’

Consideration by the Rural and New Planning Committee [“RNTPB”]
and the Town Planning Board

12. The matter first came before the RNTPC on 2nd May 1997. The Assistant Commissioner for Transport/NT expressed reservation in supporting the redevelopment given the poor and substandard condition of the access track. The Director of Agriculture & Fisheries also expressed reservation on the redevelopment unless there are strong planning justifications for the use of the site. The Planning Department however had no objection. That Department took the view that ‘The proposal is small in scale and presents little impact on the local transport network and infrastructure’ and that the proposed redevelopment ‘would not affect the natural landscape of the surrounding areas.’

13. The application was rejected by the RNTPC on 12th June, 1997 on the following grounds :

- (a) the proposed redevelopment is not in line with the planning intention of the “Conservation Area” (“CA”) zone which is to retain the existing natural character and to protect the extensive woodland in the Ma On Shan Country Park, which is of landscape significance, from adverse impact of building development [“the Planning Intention Point”];
- (b) the existing track leading to the site is substandard and is inadequate to serve the proposed development [“the Access Point”];
- (c) approval of the proposed redevelopment will set an undesirable precedent for similar applications leading to adverse impact on the natural character for the area and cause adverse cumulative effects on the environment and infrastructural provisions in the area [“the Precedent Point”]; and
- (d) there is no information in the submission to demonstrate that there will not be any increase in plot ratio, site coverage and building height in the proposed redevelopment as compared to the house on the site, as stipulated in the Notes for the “CA” zone [“the Limits Point”].

14. The Appellant applied for a review of that decision under section 17(1) of the Town Planning Ordinance. Contrary to their stance before the RNTPC, the Planning Department did not support the application on review. That Department took the view that the proposed redevelopment is incompatible with the planning intention of the CA zone which is to retain the existing natural character.

15. By letter dated 24th October, 1997, the Town Planning Board rejected the Appellant's application on substantially the same grounds as those relied upon by the RNTPC.

The application in Che Keng Tuk, Pak Sha Wan

16. On 20th March, 1997, the Town Planning Board approved an application ["the Che Keng Tuk Application"] for permission to erect 3 New Territories Exempted Houses in Lots 284sAss1, 284 sAss 2 and 284 sARP in DD212 in Che Keng Tuk, Sai Kung.

17. The applicants in the Che Keng Tuk Application are indigenous villagers and the sites in question were zoned 'Village Type Development' at the time of application.

Evidence of the Appellant

18. Mr. Kwan Lim Ho ["Mr. Kwan"], solicitor and friend of the Appellant, produced photographs which he took when he visited the Site in 1994. It was a rainy day and he had difficulty in locating the Site which was then covered with bushes and shrubs at a height of 2.5 - 3.5m. He took some photographs of foundation stones and low walls. In his opinion, these remnants had been on the Site for a number of years. He could not locate the boundary of any building nor could he draw any inference as to the nature of the Site. Mr. Kwan also told us the outcome of inquiries that he made with the Sai Kung District Lands Office and the Planning Department. The Site marked "Tun" was probably a village or part of a village in the old days. Apart from the Site, there is only one other housing lot under the 1905 Crown Lease. Between 1994 to 1997, out of over 1,000 cases for planning permission in the whole of Sai Kung, the Che Keng Tuk Application is the only application to rebuild in a CA Zone. We accept Mr. Kwan's evidence in full.

19. Mr. Stanley Ng Wing Fai ["Mr Ng"], Registered Professional Planner and Director of City Country Consultancy Limited, outlined to us his views on the environmental aspect of the application. Mr. Ng pointed out that the Site is not within the 'Unique Area' or the 'Significant Area' in the plan prepared as part of the Consolidated Technical Report on the Territorial Development Review 1996.

Save for its status as part of the CA in the OZP, the Site does not fall within the ambit of any other environmental conservation ordinances. Visual impact analysis that he conducted indicates that the proposed house does not adversely affect 'the natural view character' from various observation points. The Appellant is prepared to cultivate the terraced fields in Lot 111 and is further prepared to use coloured surface tiles for the house. Screen planting along the toe slopes would also be provided if necessary 'to enhance landscape amenity and strengthen the screen buffer'. The application is not for a 'significant new development'. The Site can accommodate quality residential use without prejudicing more valuable conservation areas.

20. In cross examination, Mr. Ng agreed that in ascertaining the planning intention pertaining to the Site, the most important document is the OZP together with its Notes and its Explanatory Statement. He further agreed that 'There is a general presumption against development within declared areas of conservation use' and that 'Development should normally avoid declared or potential conservation sites.' He further agreed that the Site is within para. 6.2 of the Explanatory Statement. He reckoned that the cultivation, the gardening and the use of coloured tiles (which the Appellant is prepared to undertake if necessary) would go towards conserving the intrinsic rural nature of the scenic hilly landscape within para. 7.1 of the Explanatory Statement.

21. Mr. Chow Chung Kwong produced a traffic impact assessment for our consideration. He described to us that the Site is accessible via :

- (a) Hiram's Highway : This is a 7.3m wide single carriageway with two way traffic which serves as the link between Kowloon and the Sai Kung Peninsula.
- (b) Mang Kung Wo Road : This is a 3.5m to 4m wide single lane carriageway widened to 7.3m wide two-lane two-way local feeder at the junction with Hiram's Highway. It is paved with concrete with suitably located passing bays.
- (c) A village track : This is a 3.5m wide road paved with a thin layer of concrete. The track is widened at appropriate locations to provide passing bays and laybys. At some particular location, a short section of the track is narrowed down to 3m to cope with existing ground conditions. Whilst this is marginally below standard, it is still acceptable in the context of lands in the new Territories.

- (d) A dirt track : This is said to be of 3m wide and 200m long with overgrown vegetation on both sides. Using this dirt track, he drove across a bridge and had to walk 20m to the Site. In order to provide full vehicular access, the grass would have to be cut and the track paved.

He is of the view that the increased traffic as a result of the proposed house has minimal effect on the T-junction between Mang Kung Wo Road and Hiram's Highway. He did not take full account of the Home for the Aged that is being developed near Mang Kung Wo Road.

22. Mr. Mak Yiu Man, a site inspector of works, produced various photographs showing power supply poles to the west of the Site about 300m to 400m away.

Evidence of the Respondent

23. Ms. Phyllis C.M. Li ["Ms. Li"], District Planning Officer of Sai Kung and Islands District Planning Office, pointed out that the Site is surrounded by dense woodlands. The woodlands and the foothill slopes form part of the valuable and scenic landscape extending from Ma On Shan Country Park. They are an important green backdrop to Sai Kung Town and the valley floors in Tai Chung Hau. The Site and its surrounding areas are natural and rural in character. They are free from any development and human disturbance. The proposed development is not in line with the planning intention of the 'CA' zone which 'is to retain the existing natural character and to protect the natural environment including the nearby Ma On Shan country Park'. Ms. Li further explained that the 2 Houses 200m east of the Site were erected before publication of the IDPA. She described her visit to the Site. She estimated the dirt track to be less than 2m in width. She had to walk 100m to 150m before reaching the Site.

24. Ms. Li was subjected to very tough but fair cross examination by Ms. Ng, Counsel for the Appellant. Ms. Li explained that according to her understanding the natural character of any place is that place in the state of nature viz. free from man made things. She emphasised that the position has to be viewed as at the date of the IDPA and not the date of the 1905 Crown Lease. The Site is not within the valley areas of Pak Kong and Sha Kok Mei (see Para. 6.6 of the Explanatory Statement). We are concerned with the 'hillslopes dropping towards the valley floors of Pak Kong and Sha Kok Mei' (see Para. 8.11.2 of the Explanatory Statement). She disagreed with the previous view of the Planning Department that the proposed redevelopment 'would not affect the natural landscape of the surrounding areas.'

25. Mr. Peter Wong Pak Chow, Senior Engineer of the Transport Department, pointed out that the village track is substandard in terms of width and alignment. The condition of road surface is poor. The track has no passing place to accommodate two-way traffic. His Department does not support the application.

The Planning Intention Point

26. The Appellant purchased the Site in early 1995. This was after publication of the OZP in July 1994. She knew the state of the Site and the restrictions under the OZP. Her entitlement under the 1905 Crown Lease is therefore not an unfettered one. Her entitlement is curtailed by the planning intention in the OZP.

27. We accept the evidence of Miss Li that the Site is part of the hillslopes dropping towards the valley floor Sha Kok Mei (Para. 8.11.2 of the Explanatory Statement) and is not related to agricultural land in the valley areas of Pak Kong and Sha Kok Mei (Para. 6.6 of Explanatory Statement). The planning intention pertaining to this Site 'is to retain the existing natural character'.

28. We further agree with Miss Li that the existing natural character is to be viewed in the light of conditions existing at the date of the IDPA Plan (12th October, 1990). The aerial photo of 19th February, 1963 shows no structure and no cultivation. We have no doubt this condition continued till 12th October, 1990. Mr. Kwan had difficulties locating the Site when he visited the same in 1994. The photograph of the Planning Department dated 25th March, 1997 shows the Site in a 'relatively natural state with vegetation'. It is part of the 'scenic landscape' described to be 'valuable' by para. 8.11.2 of the Explanatory Statement.

29. Mr. Ng accepted that there is a general presumption against development within declared areas of conservation use. He laid emphasis on the cultivation, the gardening and the coloured tiles which the Appellant would undertake and use if necessary. We do not see how any of these steps would serve to 'retain the existing natural character.' They do not make positive contribution to environmental quality. We prefer the evidence of Miss Li to the evidence of Mr. Ng and disagree with the previous view of the Planning Department that the proposed redevelopment 'would not affect the natural landscape of the surrounding areas.'

The Access Point

30. We are not persuaded by the Respondent's evidence that the house as developed would materially affect the traffic along Hiram's Highway, Mang Kung

Wo Road or the Village Track. The Village Track may be substandard but it is not unacceptable in the context of roads in the New Territories.

31. Our concern relates to the dirt track. We accept the evidence of Miss Li as to the state of this track. Substantial work would have to be undertaken in order to render it fit for vehicular access to the proposed house. The appellant furnished no concrete proposal. We do not know what impact such road work would have on the environment.

The Precedent Point

32. The Appellant's previous reliance on the Che Keng Tuk application might have fuelled the concern that approval of this publication could have a domino effect. Miss Ng has correctly pointed out that each application has to be considered on its merits. There is only one other house lot under the 1905 Crown Lease. The Che Keng Tuk Application was the sole application between 1994 and 1997. We attach no weight to this factor in considering this application.

The Limits Point

33. Miss Ng submitted that in order to avail the permissive use of the Site for 'House (Redevelopment only)', it is not a pre-requisite that there should exist on the Site a structure within the meaning of the word 'House' as at the date of first publication in the Gazette of the notice of IDPA Plan (12th October, 1990). She further submitted that there is jurisdiction to grant permission if a structure within the meaning of 'House' existed on Site at any time prior to the application. The restrictions that the total redevelopment should not be in excess of the plot ratio, site coverage and building height of an existing house are confined to the situation where the 'House' was in existence on 12th October, 1990. Where no such house existed, the Town Planning Board can relax those restrictions in the light of the merits of individual redevelopment proposals. Mr. Kwok, Counsel for the Respondent, has not seriously challenged these assertions.

34. Whilst we have serious reservations whether this is a proper construction of the Notes of the OZP, given the stance of Mr. Kwok, we are prepared to consider the case on the basis that the Appellant has crossed the jurisdiction threshold.

35. This is a case where the structure in question had long gone. There is no evidence dealing with the plot ratio, site coverage and building height of that structure. There is no base line for the Town Planning Board to consider 'minor relaxation'. We have been asked to assume that the old structure is within the meaning of 'New Territories Exempted House'. Quite apart from the absence of any certificate of exemption from the Director of Lands, that assumption would

give the Appellant the right to determine the plot ratio, site coverage and building height. It is no longer a matter of 'minor relaxation' by the Town Planning Board.

Our Decision

36. The Site had lain fallow and unbuilt for at least 35 years. It became integrated as part of the rural scenic landscape which is valuable to our community. That was its state when the IDPA Plan was prepared on 12th October, 1990. The Appellant came onto the scene in 1994. Her current application is for reversion of the Site to a state before 1963. What that state was is now wholly uncertain. We see no convincing planning gain in permitting the Appellant as a new comer to take a plunge back to the unknown. Accordingly we dismiss the appeal on the basis of the Planning Intention Point, the Access Point and the Limit Point.

37. We would like to express our gratitude to both Counsel for their assistance.