

Town Planning Appeal No. 12 of
1996

IN THE MATTER of the Town
Planning Ordinance Cap. 131

And

IN THE MATTER of an Appeal
under Section 17B of Rightlane
Investment Limited

Date of hearing : 21st, 22nd and 23rd October 1997
Date of decision : 12 November 1997

Panel : Mr Robert C. Tang S.C., J.P. (Chairman)
Mr Professor Lam Kin Che
Mr Wong Kai Man
Mr Jason K. Y. Yuen, MBE

DECISION

1. The appellant is the owner of Rural Building Lot No.691 R.P. (No. 12 Headland Road, Hong Kong) ("the Site").
2. Under the Shouson Hill and Repulse Bay Outline Zoning Plan No.S/H17/3, the Site is classified R(C)3 and development is restricted to "maximum 3 storeys in addition to 1 storey of carports" in height, 25% site coverage and plot ratio of 0.75.
3. The notes to the OZP provides that

"Minor relaxation of these restrictions, based on the merits of individual development or redevelopment proposals, may be considered by the Town Planning Board on application under section 16 of the Town Planning Ordinance"
4. Paragraph 6.3.1 and 6.3.2 in the Explanatory Statement provide

"6.3.1 This zoning is intended for lower residential developments where commercial uses are also not permitted"

unless otherwise approved by the Board through the planning permission system. In land use terms, it is similar to the 'Residential (Group B)' zoning. However, developments under this zoning are subject to specific building height control as well as site coverage and plot ratio restrictions. These restrictions are closely based on those imposed administratively by the Government in the Special Control Areas and are intended:

- (a) to preserve the existing amenity and character of the Area;
- (b) to preserve significant public views;
- (c) to avoid overburdening the access road system; and
- (d) to avoid excessive development.

6.3.2 To achieve these objectives, this zoning is divided into nine sub-areas. The appropriate restrictions for each of these sub-areas are shown in the Notes attached to the Plan. Minor relaxation of the stated restrictions may be considered by the Board on application under Section 16 of the Ordinance. The purpose of this provision is to allow the Board to consider proposals for building layout and design which, while not strictly complying with the stated restrictions, meet the planning objectives. It is hoped to encourage imaginative designs which are adapted to the characteristics of particular sites, and overcome the need for stilting or allow for the conservation of environmentally important natural features or mature vegetation. Each proposal will be considered strictly on its own merits" (emphasis added).

5. The applicant has applied for relaxation of these restrictions. Their s.16 and s.17 applications were unsuccessful. Hence this appeal.

6. Essentially, the relaxation sought relates to the plot ratio. The proposed development will result in a plot ratio of 0.825, an increase of 10%. Depending on whether the proposed development should be counted as 3 storeys or 4 storeys for residential use, the site coverage might be exceeded, since in the latter case, the permitted plot ratio is 22.5%.

7. According to Mr. Kenneth To Jap Kee, a Planning Consultant, who gave evidence on behalf of the appellant, the effect of the plot ratio and site coverage restrictions is that, if one were to build to the maximum permitted, the development will be a straight up and down 3 domestic storeys building over one

storey of carports. Since land is such a scarce commodity in Hong Kong, it is unrealistic to think that an owner would not build to the maximum permitted.

8. Mr. Michael Chiang Hong Man, the Architect responsible for the proposed development, told us that the proposed development is superior to the conventional development which one may find on similar sites in Hong Kong. No. 13 Headland Road is one example of a conventional development. In his opinion, the proposed development, which has been described as Scheme C in the appeal, is more aesthetically pleasing than 2 other schemes which were prepared for comparison.

9. Scheme A is a development of a block of 6 flats. It is functional but totally unimaginative. Indeed, one might think that it will be a shame if it should be built on such a rare site.

10. Scheme B is a development of 6 houses. Effectively it is an attempt to show what the proposed development would look like if it is required to comply with the restrictions. Mr. Chiang offered a comparison of the 2 schemes:

Scheme B	Proposed development
House Type Design	House Type Design
(a) Uniform houses in a row with same roof levels creating a ‘wall effect’	Houses of different designs with different roof levels avoiding a “wall effect”. The interesting roof form creates a more harmonizing silhouette with the natural surroundings
Unimaginative Design	Imaginative design
(b) Building bulk and height are increased due to staircase hoods on the roofs	Building bulk is smaller since part of the G/F area is used, thereby creating an extended court yard on the ground floor level and a smaller floor plate as it goes up
(c) Typical village type house design more commonly found in New Territories due to the same shape of each floor plate, and not	Genuine 'Spanish style' villas matching the houses of high architectural quality in the area

matching the houses of
high architectural
quality in the area

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| (d) | Requires some stiling and treatment to suit the existing site profile | Does not require any stiling and treatment to respond to the existing site profile |
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11. On the part of the Town Planning Board, Mr. Li Chi Kwong, a District Planning Officer, gave evidence in support of the reasons given by the Town Planning Board in refusing the application. Mr. Li gave his evidence fairly. He frankly admitted that Scheme C has merits over Scheme B. It was left unsaid but we believe it was taken for granted that Scheme A had even less merit. However, he does not accept that Scheme C is substantially better than Scheme B. He described the power to relax the restrictions under para.6.3.2 of the Explanatory Statement as a carrot. He was prepared to accept that the merits in the proposed development might be rewarded with a carrot but not as big a carrot as the applicant seeks. He is of the view that 10% is too much and cannot be regarded as minor in the circumstances.

12. Ms. Stephanie Chung, a Senior Architect of the Architectural Services Department, also gave evidence. Her description of the 3 schemes are reproduced below

“Scheme A -

The carparking area is a common area located under the two building blocks. The overall building form is two symmetrical building blocks centrally connected by a common staircase which serves each block. Each block comprises one flat per floor.

Scheme B -

The carparking area for each house is located directly under each at ground level. The overall building form comprises 6 house units individually defined yet connected together to form an angled modulated row. The design of the internal spaces accommodates an internal staircase for the 4 differing levels of accommodation. Generally, the rooms are not as regularly shaped, i.e. rectangular as for Scheme A.

Scheme C -

The carparking area for each house is located directly under each at ground level. The overall building form comprises 6 house units individually defined in an angled modulated row with one end house not adjoined but closely located. The design of the internal spaces accommodates the internal staircase which serves up to 7 different levels of living areas, as well as a stair (circular) in the kitchen. Generally, the spaces are slightly more modulated than for Scheme B”

13. We have no doubt that Scheme C is far superior to Scheme A. We also note that far fewer trees will be saved or planted if Scheme A is built. We are also of the opinion that Scheme C has greater merits than Scheme B. One feature of Scheme C is that the garden is directly accessible from the living room. Each house has a small private garden. We are also of the opinion that a split level design provides better accommodation for elderly people who might lack the confidence or energy to tackle a full flight of stairs.

14. Moreover, Scheme B will result in a void, and stilts would be used. As the evidence show, although the GFA is greater in Scheme C, the houses are no bigger. Indeed, they are slightly smaller. There is a difference in the GFA because the void in Scheme B will be used as part of a double height living room (with direct access to the garden) and part of the carport floor would be used as a maid's room. Also a small part of the increase in the GFA is accounted for by the fact that some staircases which would not be counted towards GFA in Scheme B (because they only gave access to the roof) would be counted in Scheme C (because they gave access to a dressing room).

15. At the end of the day, it is a matter of judgment. As Counsel for the appellant (Mr. Ismail) reminded us, we must exercise an independent judgment. See Henderson Real Estate Agency Limited v Lo Chai Wan [1997] H.K.L.R.D.259 at 266.

16. Having regard to the evidence clearly presented to us by both parties, we have come to a different view from the Town Planning Board.

17. Headland Road is in one of the best known scenic areas in Hong Kong. If possible, developers should be encouraged to adopt imaginative designs. Good architecture can enhance natural beauty. Indeed, it can be a thing of beauty in itself.

18. We believe Scheme C is imaginative within the expectation of 6.3.2 of the Explanatory Notes. It avoids a "wall effect" with its continuous mass which will be a feature of both Schemes A and B. Scheme C's irregular facade presents a

more human scale. Scheme B also has the disadvantage of an unattractive stairs hood.

19. We are of the view that Scheme C is well adapted to the characteristics of the Site. It overcomes the need for stiling. It meets the planning objectives. Scheme C would preserve the existing amenity and character of the Area. Indeed, we think it might improve the Area. It would not result in excessive development. It is no bigger in bulk. It is more human in scale. It provides better quality housing.

20. It is said that this appeal, if successful, will create a precedent.

21. But under 6.3.2

“Each proposal will be considered strictly on its own merits”

22. All too often, we see uninspiring development even in some of our most scenic areas. They are often the product of strict adherence to planning restrictions. As Mr. Michael Chiang's evidence shows, planning constraints in Hong Kong leave very little room for imagination for architects; building to the maximum permitted would result in a box like structure. Hence, the power to relax restrictions under 6.3.2.

23. Thus, it will not be unacceptable if this decision encourages more developers to adopt imaginative designs. If, as Mr. Li puts it, imaginative designs may be awarded with a carrot. So be it.

24. We are of the view that the relaxation of plot ratio sought is minor. We do not believe relaxation of site coverage is necessary. But were it necessary, we would also consider it minor and grant it.

25. Lastly, we turn to consider an interesting though somewhat technical argument advanced by Mr. S.H. Kwok, Counsel for the Town Planning Board. According to Mr. Kwok, even if the relaxation sought is minor and has merits, we cannot permit it.

26. In order to appreciate this argument, we have to return to the Notes for Residential (Group C). They provide:

“On land designated ‘Residential (Group C)’, any new building(s), and any addition, alteration and/or modification to the existing building(s) should not result in a total development or redevelopment in excess of the maximum building height, plot ratio and site coverage set out below:

- (a) the maximum height of any building within each sub-area of the zone shall be limited to that stipulated below or the height of the existing building whichever is the greater:

<i>Sub-area</i>	<i>Restriction</i>
R(C)1	Maximum 2 storeys including carports not to exceed the height of the existing building
R(C)2	Maximum 3 storeys including carports and building height not to exceed the level of Island Road
R(C)3	Maximum 3 storeys in addition to 1 storey of carports
R(C)4	Maximum 4 storeys including carports and maximum building height of 10.67m and not to exceed the level of Repulse Bay Road
R(C)5	Maximum 4 storeys in addition to 1 storey of carports
R(C)6	Maximum 7 storeys in addition to 1 storey of carports
R(C)7	Maximum 10 storeys in addition to 1 storey of carports
R(C)8	Maximum 12 storeys in addition to 1 storey of carports
R(C)9	Maximum 14 storeys in addition to 1 storey of carports”

27. According to Mr. Kwok, R(C)3 restricts development to “maximum 3 storeys in addition to 1 storey of carports”. Since in the proposed development, part of the carport floor (which under Scheme B would be occupied mainly by a void) would be used partly for residential purposes, he said that amounts to rezoning because in the OZP only the sub-area R(C)5 may have "maximum 4 storeys in addition to 1 storey of carports". However, according to him, if the relaxation sought is to increase the 1 storey of carports to, say, 2 storeys, that

would not amount to rezoning. That is because there is no sub-area where 2 storeys of carports were permitted. He also frankly admitted that, even if only a small portion of the carport floor is used, say, for domestic purposes, but there are nevertheless 3 storeys of residential uses, then even if neither the plot ratio nor site coverage is exceeded, we still would not have any power to permit any relaxation. That is because it will result in a development which has more than 3 residential storeys.

28. Mr. Ismail disagreed. He submitted that the description "maximum 3 storeys in addition to 1 storey of carports" regulates the *height* of the development. The Notes support and we agree with Mr. Ismail's argument.

29. Nor do we believe it is right to construe the notes so technically. These notes have to be approached with common sense. With respect, Mr. Kwok's point is a pure lawyer's point. It was not a point taken by any of the witnesses from the Planning Department or in the proceedings before the Town Planning Board. Indeed in the evidence of Mr. Li, he said from a planning point of view, he would have no objection to, say, some accommodation on the carport floor for a driver. Although he did not say so, we believe he would have no objection if facilities were provided for a driver/gardener.

30. In all the circumstances, we are of the view that the minor relaxation sought by the appellant should be granted. The appeal is allowed.