

Town Planning Appeal No. 18 of
1995

IN THE MATTER of the Town
Planning Ordinance Chapter 131

and

IN THE MATTER of an Appeal
under Section 17B by Jetway Civil
Limited

Date of hearing : 26th June 1996

Date of decision : 25th July 1996

Panel : Mr Robert C. Tang, Q.C., J.P. (Chairman)

Mr Lam Hoi Ham

Prof S.D. Kung

Prof Lam Kin Che

Dr Simon Kwan

DECISION

This is an appeal by Messrs. Lau Chung Kuk and Kan Tat Yeung (“the appellants”), both indigenous New Territories persons, against a decision to refuse permission to build two New Territories exempted houses at Lot No.465B in D.D.92 Kwu Tung North, Sheung Shui, New Territories.

2. The site falls within an area zoned "agriculture" on the draft Kwu Tung North Outline Zoning Plan No.S/NE-KTN/1 (OZP). The site has an area of about 283m². The two New Territories exempted houses will comprise six flats with a total covered area of 132m². They will be 3 storeys high.

3. The application was rejected by the Town Planning Board for the following reasons:-

- (a) the proposed development was not in line with the planning intention for the area as stipulated in the OZP which was to retain and safeguard agricultural land; and

- (b) the approval of the application would set an undesirable precedent for other similar applications which would defeat the planning intention for the area.

4. The site is located on the northern side of Castle Peak Road - Kwu Tung, and is situated between the villages of Tsung Pak Long and Yin Kong (about 320m to the west and 250m to the southeast of the "V" zones of Tsung Pak Long and Yin Kong respectively). The site is occupied by 2 1/2 temporary structures (the other half is located outside the site) which were formerly used as chicken sheds. One of them is currently used for domestic purpose and the others are vacant.

5. It is quite clear from the evidence that the surrounding areas are mainly rural and agricultural in character. To the site's immediate west and north are some temporary structures, some of which are for storage of farm tools, while some are for domestic use ancillary to the adjacent agricultural activities. Further north and west of the site are agricultural land under active cultivation. An open air car repairing yard is located to the immediate east of the site (an existing use for the purpose of the Town Planning Ordinance). Further east is a traditional burial ground which falls within a "green belt" zone on the draft OZP.

6. According to the notes to the OZP, on farm domestic structure (which is ancillary to agricultural use) is permitted as of right under the "agricultural" zoning. The proposed New Territories exempted house user may be permitted on application.

7. The planning intention for the area is stated in para.8.1.1 of the Explanatory Statement. It is

"to retain and safeguard good agricultural land, and to retain fallow arable land with good potential for rehabilitation"

a total of 137 hectares of land was zoned "AGR" on the OZP for this purpose.

8. The appellant argued that the site is unsuitable for agricultural use because decomposed coarse ash crystal tuff of the Tai Mo Shan rock formation had been used to level the site before the construction of the original pig/chicken farm and thus arable farming is out of the question. That was the evidence of Professor Charles J. Grant, Professor Emeritus of the University of Hong Kong, Department of Geography and Geology. Professor Grant also said that the site is not large enough to justify the expenditure needed to comply with EPD Regulations. Thus, it

is uneconomical and not practical to continue with chicken farming on the site. Also, according to Professor Grant, because of the size of the site, it is also uneconomical to have a mushroom farm on the site.

9. We have also the evidence of Mr. Thomas Ng Yeung Shing of the Agriculture and Fisheries Department that the site qualifies as Grade B prime agricultural land and should be preserved accordingly. Moreover, according to him, the temporary structures on the site could be converted to other non polluting agricultural users such as plant nursery, mushroom growing etc. Mr. Ng provided calculations to show that mushroom farming on even such a small site could be economical.

10. Whilst we accept that the site is not suitable for arable farming, we do not accept that the site cannot be used for plant nursery or mushroom farming. On this, we prefer the evidence of Mr. Ng.

11. Moreover, in our opinion, when considering whether an intended development is consistent with the planning intention, one should not have regard only to the site in question. It may be that a site, say, of only a 100m² in area is uneconomical for any form of agricultural use. But that does not mean that in an area zoned agricultural which has a total area of, as here, 137 hectares, any applicant who can confine his application to plots of 100m² each should be given permission to use such plots for building purposes. We must have regard also to the area as a whole when considering the planning intention.

12. Mr. Stanley Tsui of Jetway Civil Limited, who appeared on behalf of the appellants, urged that we should be sympathetic to the application. That is because Mr. Lau and Mr. Kan are indigenous villagers of Tsung Pak Long who had been frustrated many times in their attempt to build their own New Territories exempted houses. While we have every sympathy for the appellants, we believe the paramount consideration must be whether as a matter of planning, the application should be granted.

13. So far as housing for indigenous persons are concerned, we agree with Mr. David O.Y. Wong, District Planning Officer of the Shatin, Taipo and North District Planning Office of the Planning Department, that the shortage of land for exempted houses should be dealt with comprehensively and systemetically and that suitable land for small house development should be provided as a matter of planning. That, of course, is the function of the Town Planning Board under s.3 of the Town Planning Ordinance and is outside our jurisdiction.

14. According to Mr. Wong, to allow this application would result in an inefficient use of land resources and dispersed residential development. That it would adversely affect the long term sustainability of agricultural activities in the

area. It is quite clear from the evidence that much of the area in the neighbourhood is still under active cultivation.

15. For the above reasons, we can see no reason to disagree with the Town Planning Board and accordingly this appeal is dismissed.