

Town Planning Appeal No.2 of
1995

IN THE MATTER of the Town
Planning Ordinance Chapter 131

and

IN THE MATTER of an Appeal
under Section 17B By Charming
City Estate Limited

Date of hearing : 11th and 12th March 1996

Date of decision : 29th March 1996

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

Dr Robert M. Kennard

Mrs Angelina Lee

Mr Wong Kai Man

Dr Wong Kam Din

DECISION

This is an appeal by Charming City Estate Limited against a refusal by the Town Planning Board ("the Board") to permit a residential development in D.D.129, Lau Fau Shan ("the Site"). The Site has an area of about 80,880 m². The proposed residential development will have a plot ratio of 0.4, a site coverage of 13.4%, and will comprise 146 houses and 292 carparking spaces with a designed population of 438 persons. There will also be public recreational facilities on site with an area of about 1.3 hectare (16.1% of the total site area). The public recreational facilities will include a sports pitch and landscaped playground which will be built and managed by the developer at no cost to Government and will be open to the public.

2. The application was considered under a DPA Plan No.DPA/YL-LFS/2 which was approved by the Governor in Council on 6th May1994. The draft Lau Fau Shan and Tsim Bei Tsui Development Permission Area Plan No.DPA/YL-LFS/1 was gazetted on 12th July1991. The site is within an area designated as "unspecified use" on the DPA Plan.

3. The DPA Plan has been replaced by the draft Lau Fau Shan and Tsim Bei Tsui Outline Zoning Plan (OZP) No.S/YL-LFS/1 which was gazetted on 10th June 1994. The Site falls within an area zoned “Green Belt” on the draft OZP.

4. The application under appeal was submitted on 30th April 1994, namely, prior to the publication of the OZP and therefore falls to be considered under the DPA Plan.

5. On 24th January 1995, Chata (Hong Kong) Limited submitted a planning application for a residential development with public recreation facilities at the Site under the OZP. The proposed residential development has a plot ratio of 0.295. That application was eventually successful on a s.17 review on 17th March 1995. The appellant relies on that successful application.

6. According to the Court of Appeal in Lo Chan Wan suing for and on behalf of members of the Town Planning Board for an Order of Certiorari and Declarations v The Appeal Board and Henderson Real Estate Agency Limited, Civil Appeal No.150 of 1995, an OZP

“cannot curtail the scope of the power to grant the developers planning permission under the draft Nam. Sang Wai DPA plan. Nor can it be resorted to *against* the developers for the purpose of erecting any planning intention which is not to be gleaned from the sources accepted by Mr. Thomas.

OZPs can, on the other hand, be used *by* developers who apply for planning permission under DPA plans. If an OZP were to contradict any planning intention asserted against them, such developers could pray it in aid for the purpose of meeting that assertion.

The relevance, such as it is, of OZPs to applications for planning permission under DPA plans lies on OZPs being part of a scheme of things under which DPA plans are only interim measures. That might well make a difference in some cases. But I do not think that it matters at all in the present case” per Bokhary J.A.

7. In due course, we will have to consider whether the OZP supports the appellant's application.

8. This appeal was lodged on 13th January 1995 subsequent to an adverse decision by the Board on a s.17 review on 14th October 1994. It was originally scheduled to be heard on 12th June 1995 was adjourned on the application of the appellant. In September 1995, but the Town Planning Appeal Board was informed that the appellant would proceed with the appeal.

9. The application was rejected by the Board for five reasons:-

- “(a) the proposed development was not in line with the planning intention for the area on the approved Lau Fau Shan and Tsim Bei Tsui Development Permission Area Plan, which was primarily to encourage agricultural and limited suitable recreational uses;
- (b) the scale and intensity of the proposed development was excessive for the area;
- (c) the ecological impact assessment in the absence of a winter bird survey was inadequate to demonstrate that the proposed development would have insignificant adverse impact on the area which was located in close proximity to the environmentally sensitive area;
- (d) the proposed landscape plan was not satisfactory in showing the tree felling and preservation proposals; and
- (e) approval of the application might set an undesirable precedent”

10. Only (a) and (b) of those reasons remain relevant. (c) and (d) have been disposed of satisfactorily. Now that the DPA has been overtaken by an OZP and there is no other pending appeal under the DPA, no question of precedent would arise.

11. As for "planning intention", essentially the Town Planning Board relies on the notes to the DPA relating to "Unspecified Use". The "Unspecified Use" area with a total area of 401.97 hectares was broadly divided into four geographical sub-areas. The Site falls within sub-area 3 and the notes provide

"the sub-area to the Northeast of Wan Fau Sin Koon
and to the Southwest of Tsim Bei Tsui Police

Station. This sub-area is mainly rural in character with large amount of abandoned agricultural land and some temporary structures. The planning intention for the sub-area is primarily to encourage agricultural and limited suitable recreational uses"

12. The notes also contain a provision under para.6.2.5 that

“(d) there may be areas where private initiatives may wish to provide comprehensive low-rise, low density residential developments mainly through land exchange or lease modification. Applications should be made to the Board. If approved by the Board the developments should be implemented in accordance with approved master layout plans with adequate provision of government and institutional uses and recreational facilities to serve these developments. Due regard should also be given to minimizing the environmental, drainage and traffic impacts of these developments on the surrounding areas.

(e) For any developments within these areas, the owners/developers must demonstrate that their proposals would have insignificant adverse impacts on the environment, traffic and drainage of the area or appropriate measures will be taken by the applicants to minimize such impacts. The submission of master layout plans, landscaping proposals, environmental impact assessments, drainage impact studies and/or traffic impact studies may be required when the proposals are submitted to the Town Planning Board for consideration”

13. It was argued by Mr. McNamara who appeared on behalf of the appellant that since the appellant has demonstrated that their proposals would have insignificant adverse impact on the environment, traffic and drainage of the area or appropriate measures would be taken by the appellant to minimize such impact, the application should be granted.

14. We agree with Mr. S.H. Kwok who appeared on behalf of the Board that approval does not follow automatically. Whether such an application should

be approved must depend on, for example, whether the proposed development is nevertheless consistent with the planning intention.

15. Here, the Board contends that the Site is suitable for agricultural use as well as limited suitable recreational uses.

16. Mr. McNamara argues that the fact that the land could be turned to agricultural use does not mean that agricultural use is suitable. There is no evidence from the Agricultural and Fisheries Department that the Site is prime agricultural land. Moreover, he has drawn our attention to the fact that there is an abandoned platform on site which was built some years ago. The area occupied by the platform cannot be used for traditional farming.

17. We must say that we agree with Mr. McNamara that although the planning intention for the sub-area is primarily to encourage agricultural uses, it is not a sufficiently strong reason to refuse permission given that the Site is not prime agricultural land and does not fall within an agricultural rehabilitation area. There is no evidence that agricultural use is realistic.

18. As for limited suitable recreational uses, we believe no doubt that was to be encouraged. We have been shown slides and photographs of the Site. They indicate to us that the general area is relatively unspoiled. The Site forms part of a rather lush country side. The Site also borders on buffer zone 2 to the Mai Po Natural Reserve.

19. Mr. McNamara has argued that limited suitable recreational uses cannot reasonably be sustained. We are not sure that limited suitable recreational uses cannot reasonably be sustained. It may well be that no owner would want to use the land for that purpose but on the evidence before us, we are not satisfied that limited suitable recreational uses cannot reasonably be sustained. But if this was the only objection to the development, we might be inclined to allow the appeal.

20. The second reason for rejection by the Town Planning Board is that the development at the proposed scale and intensity is unacceptable and that it was excessive for the area.

21. As we have said above, the Site falls within a relatively unspoiled part of the Lau Fau Shan/Tsim Bei Tsui area. The proposed 0.4 plot ratio is the maximum which would be permissible.

22. Mr. Paul Ng, who gave evidence on behalf of the Town Planning Board, said that a gradation concept in terms of land use has been adopted in the Lau Fau Shan/Tsim Bei Tsui area, development is normally not allowed around the area near the SSIS and the MPNR. The area stretching westward in between Wan

Fau Sin Koon and the Tsim Bei Tsui Police Station where the site is located is mainly intended for agricultural and recreational use. The area further westward in between the Lau Fau Shan roundabout and the Wan Fau Sin Koon is mainly for agricultural and recreational uses. However, due to the close proximity to the Lau Fau Shan roundabout, some low rise and low density development could be allowed subject to the approval by the Board, whereas development including residential and commercial activities are allowed in areas around Lau Fau Shan roundabout. Above all, the maximum plot ratio envisaged for residential development in the area around the Lau Fau Shan roundabout is 0.4. As such, the degree of control for development would be relaxed on areas further away from the SSSIS and the MPNR with no development to development at a maximum plot ratio of 0.4 in area around Lau Fau Shan roundabout. As the site is located immediately adjacent to Deep Bay Buffer Zone 2 (separated by the Deep Bay Haul Road), but farther away from the Lau Fau Shan roundabout area, the proposed development with a plot ratio of 0.4, a site coverage of 13.4%, 146 houses, 438 people and 292 carparking spaces is not contemplated under the DPA Plan and hence are considered excessive.

23. The appellant complained that the concept of gradation has not been expressly stated in the notes to the DPA. That may be so. But in our opinion it is only common sense. Either one takes a blanket approach to development and always allow the maximum or one has to differentiate between areas. The closer one comes to the buffer zones, there may have to be a reduction in intensity. Whether there should be reduction in intensity must depend on all the circumstances. Although the gradation concept is not expressly referred to in the notes to the DPA, the fact that the "Unspecified Use" area is divided into four sub-areas supports the view that in the opinion of the Board, it would not be right to regard the entire area as the same.

24. Mr. McNamara relies on the fact that even under the OZP where the site is zoned "Green Belt", a development to an intensity of 0.295 has been approved. He says visually there is no difference in impact between the development which has been approved under the OZP and the development rejected under the DPA and he contends that

"lack of adverse visual impact is an indicator of acceptable scale and intensity"

25. The evidence of Mr. Stephen Kirkpatrick, a Landscape Architect is to that effect. It is however not right to say that his evidence is not challenged. It is clear from Mr. Ng's statement that intensity of the proposed development is very much a live issue.

26. We turn to consider whether there is anything in the OZP which supports the appellant's case. We bear in mind that according to the Court of Appeal, an OZP can be used to support an application. We note that to the North of the site, the area within Buffer Zone II has been zoned CA (conservation). The land to the South of the Site has also been zoned CA. They were zoned "Green Belt" or "Unspecified Use" respectively in the DPA. According to the notes to the OZP in areas zoned CA

"new development will normally not be allowed unless it is required to support the conservation of the area's natural features and scenic qualities" 8.9.3.

27. In our opinion, the OZP does not support the appeal. The appellant is correct that in a Green Belt, development to the intensity of 0.4 plot ratio may be permitted. There is nothing to stop the appellant from applying for a development of that intensity under the OZP. Of course, we cannot and will not prejudge any such application. However, we are bound to say the fact that the appellant (or persons with similar interest) has chosen to apply for a development with a lower intensity under the OZP (and succeeded) cannot support an application for a more intense development under the DPA.

28. Another matter which Mr. McNamara has urged upon us is the fact that in the OZP a large area within Buffer Zone II has been zoned VC (Village Type Development). We do not think that helps at all. For obvious reasons, land must be found to permit growth of indigenous villages in the New Territories. Due allowance must be given to the rights of indigenous people in the New Territories.

29. Returning to the Board's reason for rejecting the application because the scale and intensity of the proposed development was excessive for the area, whilst opinion on the subject may differ, we are unable to say that the Board is wrong.

30. It follows that, despite the attractive arguments of Mr. McNamara, we agree with Mr. Kwok that the appeal must be dismissed. We thank Counsel for the care they had taken in preparing their written submissions and the efficient disposal of the appeal.