

Town Planning Appeal No.21 of
1995

IN THE MATTER of the Town
Planning Ordinance Chapter 131

and

IN THE MATTER of an Appeal
under Section 17B by Cheung Hing
Lung

Date of hearing : 23rd, 24th May 1996 and 4th June 1996

Date of decision : 6th August 1996

Panel : Mr Robert C. Tang Q.C., J.P. (Chairman)
Mr H.M.G. Forsgate C.B.E., J.P.
Prof Peter Ronald Hills
Mr Patrick Fung Yuk-bun
Mr Denis S.T. Wong

DECISION

In this appeal, Mr Cheung Hing Lung seeks planning permission to develop a factory and warehouse for manufacturing and storage of plastic materials at Lot No.987 in D.D.106, Shek Kong, Yuen Long. His s.16 application was refused by the Town Planning Board on 4th March 1994, and the s.17 Review on 12th May 1995 ("the Board").

2. Lot No.987 in D.D.103 is about 3,970M² in area. It is held under a Block Crown Lease and demised as agricultural land. At the time of the application, Lot No.987 was within an area designated "unspecified use" on the draft Shek Kong Development Permission Area (DPA) Plan. The approved DPA Plan was gazetted on 20th May 1994.

3. Since then, and on 17th June 1994, the draft Shek Kong Outline Zoning Plan (OZP) has replaced the approved DPA Plan. The site falls within an area zoned "agriculture" on the draft Shek Kong OZP.

4. The relevant date for determination of existing use is 5th October 1990 when the Interim DPA Plan was gazetted.

5. The application was rejected by the Board upon Review on the following grounds:

- “(a) the proposed development was not in line with the planning intention for the general area which was to preserve and encourage agricultural uses;
- (b) the proposed development was incompatible with the surrounding landuses which were mainly residential and rural in nature;
- (c) insufficient information on vehicular access arrangement had been provided in the submission; and
- (d) inadequate provision of emergency vehicular access and water supply for fire-fighting purposes had been proposed in the submission”

6. The first objection which Mr Cheung took to the decision of the Board is that the Board had ignored the fact that he had been operating a factory and warehouse for manufacturing and storage of plastic materials on the adjacent Lots, namely, Lots Nos.988, 989, 900C and 990ARP (part), before 5th October 1990, in the name of Universal Chemical Enterprises (“Universal”).

7. Mr Cheung is supported by impressive evidence. For example, Mr Yip Mau Chong of the Tai Ping Insurance Co. Ltd. who told us he had visited Universal in 1985. His clear recollection is that Universal was situated on the adjacent Lots. Also, Mr Law Chak Yuen, a foreman and driver employed by Universal since 1987 testified to similar effect.

8. Miss Poon, who appeared for the Board, submitted that this appeal must be confined to Lot 987 because Mr Cheung's s.16 application covered only Lot 987. She also submitted that although at the s.17 Review Mr Cheung sought to include the adjacent Lots, the Board rightly refused to permit him to do so.

9. Mr Cheung on the other hand said that although on the s.16 application, only Lot No.987 was identified, he did indicate on the application form that the site in relation to which he was seeking permission had an area of approximately 8,000 m². He said it must be clear that 8,000 m² included not just Lot 987 but the adjacent Lots as well. Indeed, in the plan which he had annexed to his s.16 application, existing structures on the adjacent Lots, namely Lot 988 and 990C were shown.

10. Miss Poon referred to a letter written by Mr Cheung to the Board on 18th January 1994 where he indicated that the existing structures not within the boundary of the site were not included in his application.

11. Subsequently, on the s.17 application, Mr Cheung sought to include Lots Nos.990C, 990ARP (part), 988 and 989 but he was not permitted to do so by the Board.

12. It seems to us that whilst Mr Cheung's stance on the s.16 application was ambiguous, it has always been Mr Cheung's case that he had been operating a factory and warehouse on the adjacent Lots and he wanted permission to move part or all his operation from the adjacent Lots onto Lot 987.

13. For that reason, we decided to deal with the appeal on that basis.

14. Having regard to the evidence referred to above, we are of the opinion that Mr Cheung has made out a strong case that he had been operating Universal on the adjacent Lots prior to 1990.

15. Miss Poon submitted that this Appeal Board is not the proper forum to decide whether there were existing uses on the adjacent Lots. She submitted this may arise in subsequent enforcement proceedings and we should not prejudge the issue.

16. We make no decision on existing use so as not to prejudice any enforcement action which may be taken. On the other hand, for the purpose of this appeal, we will assume in Mr Cheung's favour that he had been operating Universal on the adjacent Lots before 1990. It is on that assumption that we now turn to consider whether permission should be given to him to move his operation onto Lot 987.

17. It is quite clear from the aerial photograph produced to us that on 5th October 1990, Lot 987 was under cultivation.

18. It is Mr Cheung's case that if the appeal is allowed, he will use the adjacent Lots mostly for parking but occasionally for loading and unloading purposes and storage. In other words, if the appeal is allowed, not only Lot 987 will be permanently lost to agricultural use, the adjacent Lots will continue to be used for non agricultural purposes. Mr Cheung is not offering to swap non agricultural use on the adjacent Lots for non agricultural use on Lot 987. Thus, although moving his factory further away from dwellings in the neighbourhood is an improvement, it has to be counter balanced by the loss of agricultural use on Lot 987.

19. Although it is not entirely clear, it seems Mr Cheung in his letter of 5th December 1994 is seeking permission to build a 2 storey workshop of 350m² per floor, one single storey warehouse of 13,800 square feet, and a 2 storey office of 100m² per floor on Lot 987.

20. It is also clear from the photographs produced to us that the surrounding area of Lot 987 are still predominantly rural in character with a lot of cultivated land, a number of fish ponds and some temporary domestic structures. The nearest villages, Shui Lau Tin Tsuen and Kam Tin Wai, are situated 400 metres to the East and 275 metres to the West of Lot 987 respectively. A stream course runs along closely to the southern side of the site and to its north across the nullah is Shek Kong Air Field Road and Shek Kong Camp. There is a 1.5 metres wide iron footbridge spanning over the nullah in front of Lot 987.

21. Lot 987, however, is accessible by traffic by a track which has a width of about 3 metres and leads from Kam Sheung Road. It has recently been paved by the Yuen Long District Office under the Local Public Works Programme.

22. Against this background we have to decide whether the Board is right that the proposed development is not in line with the planning intention for the area which was to preserve and encourage agricultural use.

23. According to para.6.2.4(a)(i) of the Explanatory Statement attached to the draft DPA Plan

“The north and north-eastern portions of this sub-area (i.e. south to Shek Kong Camp) has been included in the extension of Agricultural Land Rehabilitation Scheme (ALRS) and therefore agricultural use would be preserved and encouraged. The western part of this area is dominated by industrial buildings and temporary structures. In-situ upgrading and reconstruction of these temporary structures with permanent materials would be encouraged”

24. Lot 987 is located within the north and north-western portion of this sub-area and therefore it is clear the planning intention was to preserve and encourage agricultural use.

25. As shown on the draft DPA Plan, there were a number of temporary structures to the south-east of Kam Tsin Wai and this area falls within the western part of the sub-area. Lot 987 is, however, not included in this part of the sub-area. Mr Cheung relies on para.6.2.4(a)(i) and argues that what he is proposing is upgrading of existing structures. But para.6.2.4(a)(i) spoke of in situ upgrading and

reconstruction. What Mr Cheung proposes to do is to build new structure on Lot 987 and demolish the old structures on the adjacent Lots. That is not in situ upgrading.

26. Mr Cheung is seeking permission to form Lot 987 and to build permanent structures thereon. Lot 987 was on 5/10/90 under cultivation. Since then, he had, without permission, formed the site so that it is now covered by several inches of concrete. According to Mr Cheung, it is not possible now to return Lot 987 to agricultural use. We do not know if that is right. There is no evidence to that effect. But, even if it is true, we cannot allow a fait accompli to force us into granting permission which would otherwise not be granted.

27. Given the environment of Lot 987, given the clear planning intention, we are of the opinion the decision of the Board to refuse permission cannot be faulted, even if, as we assume, Mr Cheung had been operating Universal on the adjacent Lots on and before 5th October 1990.

28. Since we have come to a clear conclusion that the application was rightly refused by the Board on the first ground, it is unnecessary for us to deal with questions of adequate vehicular access or whether Lot 987 is suitable from a fire service point of view. Even if, they are satisfactory or can be made so, planning permission would still be refused.

29. The appeal is dismissed.