

TOWN PLANNING APPEAL No.
6 OF 1994

IN THE MATTER of the Town
Planning Ordinance Cap.131

and

IN THE MATTER of an Appeal
under Section 17B by NG SIU
WING, NG KWONG WING, NG
SAI WING and NG HO LAM

Lot 89 in DD248, Tseung Kwan O,
New Territories

Date of hearing : 18th January 1995

Date of decision: 7th March 1995

Panel : Mr Robert C. Tang Q.C., J.P. (Chairman)
Mr Lester Kwok
Mr Christopher Cheng
The Rev Sean Burke
The Hon Mr Marvin Cheung

DECISION

The Appellants, who are 4 brothers, are the owners of Lot 89 in DD 248, Tseung Kwan O, New Territories, which have descended through generations to them.

2. The Lot measures 17.6 sq.m. The Appellants wish to build a 3 storey house there for their own use.

3. The site falls within an area zoned "Government/Institution/Community (G/IC)" on the draft Outline Zoning Plan No.S/TKO/3 gazetted on 21st May 1994. It was also zoned G/IC under the draft Tseung Kwan O Outline Zoning Plan No.S/TKO/1 ("the OZP") which was gazetted on 11th December 1992. On the approved Po Lam North Layout Plan No.L/TKO - 8/2) which provides more detailed land use proposals for the area covered by the OZP, the site falls within a

densely wooded area designated for "Local Open Space (LO)" use. According to para.(vi) of the Covering Notes to the OZP, "open space" is always permitted in all zones.

4. On 9th December 1993, the Appellants applied for planning permission to the Rural and New Town Planning Committee of the Town Planning Board ("the Board").

5. Before the Town Planning Board, the Planning Department objected to the application for the following reasons:-

- “(a) The site falls within an area zoned ‘LO’ on the approved Po Lam North Layout Plan which is intended for serving the residents in the vicinity and for acting as a green buffer area between the proposed 400 KV electricity substation and Tseung Kwan O Village. Development of a small house amid the densely vegetated area will undermine the ‘LO’ development. This is not in line with the planning intention of the area.
- (b) The application site with a site area of only 17.6 sq.m. is too small for the development of a modern 3-storey house which normally includes internal staircase, toilet, kitchen, etc;
- (c) The site is part of those agricultural lots where the provision of road access and connections of sewerage and stormwater is uncertain. Fragmented small house development without proper road access and service connections would be incompatible with the well planned developments in the new town and should not be permitted as an undesirable precedent”

6. In the result, permission was refused on the following grounds:-

- "(a) the proposed development was not in line with the planning intention for the area which was for government, institution and community uses, and was specifically designated for the development of local open space as shown on the adopted Po Lam North Layout Plan; and

- (b) the site area of about 17.6 sq.m. was small and it had not been demonstrated in the submission how a decent house could be accommodated on the site"

7. The subsequent review was also unsuccessful for the same reasons.
8. The Appellants have appealed to us. We are grateful to them for the meticulous care which they have taken in presenting their case.
9. We were told that there was once on the site an ancestral home, though it has not been inhabited since it was destroyed in the War. The Appellants have another ancestral home at Lots 111 - 112 in DD 248 where they grew up.
10. The Appellants rightly contended that although they are entitled, as male indigenous New Territories inhabitants, to village houses in their own right, that is irrelevant to their application to build a house on the site.
11. They contended that to prohibit them from doing so without compensation or offer of an alternative site amounts to expropriation and is unfair. They also wondered whether we have the rule of law in Hong Kong. We have, and the law which governs their application is to be found in the Town Planning Ordinance.
12. Our function is regulated by the Town Planning Ordinance. We have to decide whether from a planning point of view, permission should be granted. We are keenly aware that the Town Planning Ordinance imposes restraint on an owner without compensation. Thus, permission should be granted unless there are good planning objections.
13. The site was described as a latrine in the schedule to the Block Crown Lease. At the moment, there are remains of certain structures on the site. It is not possible to tell whether those structures were intended for human habitation. The Appellants told us that they were used as such until destroyed during the War. We will proceed on that basis.
14. The site is in a densely wooded area. There is no vehicular access nor footpath connection to the site from Wing Lai Road to its South. Wing Lai Road provides the only vehicular approach.
15. The Appellants had wanted to build on the site since July 1991. Initially, there was delay because of a disagreement over the site area. According to a letter from the District Lands Office, Sai Kung, dated 1st November 1991, their record showed the area as 13.5 sq.m.

16. That dispute was resolved after the Appellant paid as much as HK\$20,317 to have the site set out and surveyed on 23rd November 1992.

17. However, the draft OZP was gazetted on 11th November 1992 and planning permission became necessary.

18. We were shown a letter dated 15th November 1993 from the District Lands Office, Sai Kung, which informed the Appellants that planning permission would be required.

19. The draft plans were of course exhibited publicly and notice thereof advertised once a week in a local newspaper. See s.5, Town Planning Ordinance. The plans would have been exhibited at the District Lands Office, Sai Kung as well.

20. Be that as it may, the Appellants were not aware of it until they were told by the District Lands Office, Sai Kung, in 1993. Thus, they never objected to the OZP.

21. The fact that they had not objected does not in any way prejudice them in their application for permission under s.16, its review or the appeal to us. We should grant planning permission if there are no sound planning objections to the application.

22. The Appellants have complained to us that they were not forewarned of the OZP prior to 1993. Mr. Yan Kwok Wing of the District Planning Office, Sai Kung, told us that at least as from 23rd October 1991, the District Lands Office, Sai Kung, should already have been aware that the area may be covered by an OZP in due course.

23. However, this is irrelevant to the appeal to us and we have no jurisdiction to deal with the matter. That being the case, naturally we are not in a position to determine whether the Appellants were forewarned and if not, why not. All we can say at the moment is that the Appellants feel genuinely aggrieved.

24. We turn to consider whether there are good planning reasons against the grant of permission.

25. With respect, we find the first reason given by the Rural and New Town Planning Committee of the Board impossible to fault. To allow a house to be built on the site will frustrate the planning intention for the area, which has been designated as local open space, as clearly shown on the adopted Po Lam North Layout Plan.

26. As for the second reason, the Appellants contend that 17.6 sq.m., though small, is adequate for them. Indeed, they say it is much better than temporary housing provided by Government.

27. But we believe, the Board is right to have regard to planning requirements. It is no answer to say a 17.6 sq.m. house is suitable for one's purpose. The question to be addressed is, whether from a planning point of view, permission should be given. Thus, one has to have regard not only to individual requirements but what good planning would require. Thus, although we might have expressed ourselves differently, we also agree with the Board that the smallness of the site is a good planning reason why permission should be refused.

28. The Appellants also argued that a site should be offer to them in the area zoned as Village Type Development within the plan. The explanatory statement to the Tseung Kwan O Outline Zoning Plan No.S/TKO/1 states:

“6.6.1 This zone provides for the retention and expansion of existing villages as well as the reservation of land for the reprovisioning of village houses affected by Government projects. In order to ensure that any future development or redevelopment within these villages would retain the village character, a maximum building height of 3 storeys (8.23m) or the height of the existing building(s) whichever is the greater is imposed under this zoning.

6.6.2 This zoning covers the existing villages including Tseung Kwan O Village, Mau Wu Tsai Village, Boom Kin Village and the existing village houses along Hang Hau Road. It also includes Yau Yue Wan Village resite in Area 22 and Hang Hau Village resite in Area 31, both of which have been completed. Sites for village extension and/or resite purpose are reserved within Areas 7, 8, 31 and 35”

29. Mr. Yan explained that the land thus reserved is not meant to be used for the exchange which the Appellants have in mind. Rather the land is reserved to cater for the demand for village houses by indigenous inhabitants (a growing population) and when houses or villages have to be resited.

30. We are afraid we cannot help the Appellants. It is outside our jurisdiction. We can only determine whether permission can be granted. We have no power to offer the Appellants an alternative site. Nor are we in a position to order compensation.

31. It may be of little consolation to the Appellants, but they may wish to know that the object of the Town Planning Ordinance, as stated in its preamble is

"To promote the health, safety, convenience and general welfare of the community by making provision for the systematic preparation and approval of plans for the lay-out of areas of Hong Kong as well as for the types of building suitable for erection therein and for the preparation and approval of plans for areas within which permission is required for development"

32. Thus, planning is for the common good. Sometimes the burden on individual owners can be heavy. But, whether individual owners who are prejudiced by the Ordinance should be compensated is a question which only the Administration and the Legislature can answer.

33. Despite our sympathy for the Appellants, we have to dismiss the Appeal.