

Town Planning Appeal No. 7 of
1995

IN THE MATTER of the Town
Planning Ordinance Cap. 131

and

IN THE MATTER of an Appeal
under Section 17B by Messrs
Delight World Limited

Date of hearing : 9th, 10th, 11th and 12th October 1995

Date of decision : 18th October 1995

Panel : Mr Justice Litton, OBE (Chairman)
Mr Christopher Cheng Wai-chee, OBE, JP
Mr David C DaSilva, MBE
Dr Margaret Ng Ngoi-yee
Mr Ronny Wong Fook-hum, QC, JP

DECISION

Introduction

On 31 March 1994 the appellant submitted a written application under section 16 of the Town Planning Ordinance for permission to develop a large site in the New Territories for residential purposes. Most of the land in the proposal belonged to the appellant, held under a block Crown lease as agricultural land. Some of the land covered by the proposal belonged to the government.

2. The site area as put forward in the proposal is 42,897m². The proposal involves 16 apartment blocks 4-storeys high, accommodating 384 flats and fifteen 2-storeys houses. Provision is made for 599 car-parking spaces at the basement level of the development. A club-house and a swimming pool is provided. The proposed plot ratio is 0.8 and the residential development will yield a total gross floor area of 34,318m², with 460m² for the club-house. The designed population of the development is 1,197 persons.

3. The site falls within an area designated "unspecified use" in the draft Kam Tin North Development Permission Area Plan No. DPA/YL-KTN/2 (DPA plan), published on 12 July 1991.

4. On 20 May 1994 the appellant's s16 application was rejected. The appellant then sought a review of the application under s17(1) of the Ordinance. By letter dated 12 January 1995 the appellant was informed that the application on review was rejected. Hence this appeal.

Reasons for rejection

5. The reasons for rejecting the application on the s17 review are stated as follows:

- "(a) the proposed development is premature at this stage in view of the number of transportation network and drainage works being planned in the area and the fact that it may pre-empt a review of the land use in the general area with regard to the scale, location and phasing of future developments there;
- (b) the proposed development is not in line with the planning intention for the area as reflected in the approved Kam Tin North Development Permission Area Plan No. DPA/YL-KTN/2 which is to encourage agricultural uses and recreational uses compatible with the rural environment and unlikely to adversely affect local communities. Low-rise, low-density residential development may be permitted provided that it can be demonstrated in the submission that the proposed development will have insignificant impacts on the drainage and traffic of the area, but you have not demonstrated this;
- (c) the proposed development intensity of a plot ratio of 0.8 is excessive in the rural area; and
- (d) the proposed development will be adversely affected by the proposed Kam Tin Bypass and the re-alignment of the Kam Tin Bypass as proposed in the submission is unacceptable from the road design and implementation programming points of view."

Use of site

6. When the draft DPA plan was published, the site was largely cultivated, with a fishpond at the north-western corner. The site remains green fields to this day, except that since the appellants purchased the land in parcels, about 2-3 years ago, it has not been cultivated. It lies fallow.

Planning Intention

7. The total area of the Kam Tin North development permission area is about 603 ha. The area, as described in the Explanatory Statement, is “essentially a flat plain comprising agricultural land, fishponds and villages”. The population in the area, according to a 1991 census was around 7,680. Agriculture is described as a "major economic activity" in the area: See para 4.5 of the Explanatory Statement.

8. The “unspecified use” area in the DPA plan is about 474 ha. Obviously, in an area as large as this, the planning intention cannot be uniform throughout. The land use over the whole "unspecified" area differs considerably. The Planning Department, in the Explanatory Statement, has divided the area into four large sub-areas and the appellant's site falls within sub-area (iii) as to which, in para 6.2.5(a)(iii), the Explanatory Statement says:

“(iii) Cheung Chun San Tsuen sub-area.

Agricultural uses (especially pond fishing) in these areas will be encouraged as far as possible and recreational uses (including ancillary facilities) which are generally compatible with the rural environment and are unlikely to adversely affect local communities may also be permitted.”

While this is not in law part of the plan, it provides good evidence of the underlying intention behind the statutory control.

9. The Explanatory Statement goes on to make some general statements concerning the “unspecified use” area as a whole in paras (c), (d) and (e):

“(c) Agricultural uses in these areas will be encouraged as far as possible and recreational uses (including ancillary facilities) which are generally compatible with the rural environment and are unlikely to adversely affect local communities may also be permitted. The main planning objectives of this land

use designation are to identify non-urban areas where appropriate forms of agriculture and rural activities can be sustained to prevent unwanted urban growth and to enhance the quality of the environment. Residential development in compliance with the conditions of the 'On-Farm Domestic Structure' scheme may be permitted where it is established that a dwelling is necessary to support the agricultural use.

- (d) There may be areas where private initiatives may wish to provide comprehensive low-rise, low-density residential developments (especially in the Pang Ka Tsuen area) 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 for government, institution and community uses and recreational facilities to serve these developments. Due regard should be given to minimizing the environmental, drainage and traffic impacts of these developments on the surrounding areas.
- (e) For any development within these sub-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 Board for consideration.”

10. In para 7.3 of the Explanatory Statement, there is a statement to the effect that the TPB's consideration of planning applications will be guided by the adopted layout plan No. L/YL-KT/1E as well as other planning considerations. The adopted layout plan (a departmental plan to facilitate major infrastructural planning for the area available for public inspection) shows the site as designated for considerable infrastructural activities, including the “Kam Tin Bypass Stage 1” which cuts across the south-eastern part of the site. Nothing suggests that the site is ear-marked in the layout plan for residential development - except a minute portion being an extension of a village expansion area for Kam Tin.

11. It has to be borne in mind that planning control by means of the DPA plan is effective for, at the most, four years: see section 20(5) of the Ordinance. This enables detailed analysis of land use and the study of development options for the area to take place: see para 2.2 of the Explanatory Statement. A development as large as this, once authorized, may have the effect of pre-empting future patterns of land use. Obviously, therefore, the TPB must tread very warily in dealing with applications such as the appellant's. It seems to us beyond doubt that the substantial residential development as proposed by the appellant is totally contrary to the planning intention as set out in the DPA plan. It will add considerably to the population (which, by the 1991 census, was only 7,680) and will of course have significant impact on traffic in the area. Plainly, the TPB is right in concluding that the appellant had failed to satisfy the requirements in para 6.2.5(e) of the Explanatory Statement, even if a low-density residential development were compatible with the overall intentions - which it is not.

The appellant's case

12. The appellant's counsel, Mr McNamara, draws attention to the location of the site: bound on the east by Kam Tin Village and on the west by Ko Po Tsuen. He stresses the fact that the Government has recently resumed a big slice of land at the northern boundary of the site - about 6,700m² - for construction works on a drainage channel. Although no construction work has yet begun, when the works are completed the site will, in effect, be "an island lot", bound on the north by the drainage channel and on the south by the Kam Tin Road. Counsel therefore argues that, in these circumstances, the site is not - or, at least, will not be in the future - suitable for agriculture. In terms of locality, counsel argues, the site is much more part of the Kam Tin area than the Cheung Chun San Tsuen area - designated as sub-area (iii) - to which it has been assigned for planning purposes in the Explanatory Statement. Counsel reminds us that at the time of publication of the draft DPA plan - 12 July 1991 - the alignment of the drainage channel was not known. Therefore it did not appear in the plan. Now that it is known, counsel argues, we should treat the site as in effect an extension of Kam Tin Village.

13. Counsel for the appellant also draws attention to the Kam Tin North Outline Zoning Plan (OZP) gazetted on 17 June 1994 which replaced the DPA plan. In the Explanatory Statement to the OZP there is a statement (in para 7.1) to the effect that the future role of Kam Tin Shi is likely to change and there is a demand for "sub-urban type of low-density development in the area". At the territory-wide strategic planning level, there are proposals for a western corridor of the KCRC to be built, with the possibility of a station nearby. There is also

considerable development taking place south of Kam Tin Road - within areas covered by a different DPA plan.

14. These matters put by counsel are all very interesting. They do not advance the appellant's case one whit, as far as this appeal is concerned.

15. The reality is that in the draft OZP the zone in which the appellant's site falls remains agriculture. This is consistent with the conclusion we have reached, in construing the DPA plan, that the intention with regard to the appellant's site is, by and large, for agricultural use. The OZP simply serves to emphasize the intention expressed in the draft DPA plan first published in July 1991. Planning is, by its nature, an ongoing process, depending on the strategic planning of the Government as regards basic infrastructural projects like railways and roads. It may well be that, in the future, having regard to projects like the western corridor of the KCRC and Route 3 coming to fruition, re-zoning of the appellant's site (and the area to the north, towards Cheung Chun San Tsuen) would be appropriate. There is no guarantee that, if that should occur, the site will necessarily be zoned "residential". The TPB, in the discharge of its statutory function to prepare plans for "the health, safety, convenience and general welfare of the community" (see s3(1) of the Ordinance) must look to the public interest as a whole. It has no obligation to please prospective developers like the appellant.

16. The appellant has in fact objected to the "agriculture" zoning in the OZP. Much of the argument which has been put forward on this appeal will, presumably, be deployed before the TPB at the s6(5) hearing (if there is one) and it will then be a matter for the TPB, in the exercise of their statutory function to decide whether the site should be re-zoned.

The Kam Tin drainage channel

17. In fact, the development as set out in the appellant's written Notice of Application for planning permission and illustrated in the master layout plan they produced before the TPB cannot be built. This is common-ground. The reason is simple. The resumption of land for the purpose of the drainage channel will directly affect five of the 16 apartment blocks and this will, in turn, have a knock-on effect for the entire scheme as proposed. Counsel for the appellant therefore concedes that if the appeal is to be allowed, it cannot be allowed unconditionally, but only subject to the approval of the Director of Planning or of the TPB of a fresh master layout plan. In other words, we are not being asked to say that the TPB had erred in refusing planning permission for the proposal as sought in the appellant's written application of 31 March 1994: The appellant asks us to make an order under s17B(8)(b) of the Ordinance, the effect of which would be that the appellant is to be given planning permission for a residential scheme

which, even now, has not been set out on paper. This we cannot do. In this context Ex A1, a scribbled sketch, is of no value to anyone whatsoever. It cannot be seriously suggested that the Director of Planning can form any judgment on the basis of Ex A1.

The Kam Tin Bypass

18. There is, in our judgment, another insuperable difficulty facing the appellant. The proposed Kam Tin Bypass cuts across the site and makes the proposed development impossible. This project is at an advanced stage. The scheme is scheduled to be gazetted in January 1996 under the Roads (Works, Use and Compensation) Ordinance, Cap. 370. Following publication, objectors have 60 days to object to the scheme. How can planning permission be properly given for the site in the meanwhile?

19. The appellants, realizing their difficulty, have put forward an alternative route for the bypass which brings it much closer to Kam Tin Village. To attenuate the nuisance of the proximity of such a highway to the inhabitants - in particular to a school nearby - they have put forward amelioration proposals such as a noise barrier. The appellants say that their proposal for the bypass is far better than the Highway Department's proposal, which of course brings the bypass some distance away from the populated area. It is not for us to judge which is the better proposal. One can easily envisage the inhabitants of Kam Tin, affected by the appellant's proposal, strongly objecting to it. If the appellants are right in their assertions, their objections to the scheme under s10 of the Roads (Works, Use and Compensation) Ordinance will presumably succeed. But so long as there exists a real possibility that the bypass may in fact cut across the site, requiring resumption of a substantial part of the site, the development proposal clearly cannot go ahead. Putting the appellant's case at its highest that possibly clearly exists.

Conclusion

19. In our judgment, the TPB was plainly right in rejecting the application. This appeal is without merit and must be dismissed.