

TOWN PLANNING APPEAL
NO.9 OF 1994

IN THE MATTER of the Town
Planning Ordinance Cap.131

and

IN THE MATTER of an Appeal
under Section 17B by LEE YUI
KAM

Lot No.775 BRP in DD46, Man
Uk Pin, Fanling, New Territories

Date of hearing : 22nd & 23rd March 1995

Date of decision : 10 April 1995

Panel : Mr Robert C. Tang Q.C., J.P. (Chairman)
Mr Henry Chiu Sin-sing
Dr Lam Kin-che
Mrs Angelina Lee Pui-ling
Mr John F. McMeekan

DECISION

Mr. Lee Yui Kam ("the Appellant") is the tenant of Lot No.775 BRP in DD46 ("the Site") which is situated at Man Uk Pin, Fanling, New Territories. The site directly abuts Sha Tau Kok Road.

2. The Site has an area of about 770 sq.m. inclusive of a small area of Crown land.
3. There is a vacant single-storey pig shed on the Site. Apart from an area of about 181 sq.m, which is said to have been contaminated by chemical from a metal processing workshop to the south of the Site, substantial area on the Site is covered with vegetation.
4. The Crown Lease restricts user to

“agriculture or garden use excluding any noisy or offensive trades”

5. The Appellant applied under s.16 on 15th November 1993 to convert the pig shed to a warehouse for storage of building materials and the open area for open storage of building materials and for parking, loading/unloading and manoeuvring of goods vehicles.

6. At the time of the application, the Site was designated as an “unspecified use” area on the draft Man Uk Pin Development Permission Area ("DPA") Plan No.DPA/NE-MUP/1, which was gazetted on 12th July 1991.

7. At a hearing before the Town Planning Board on 10th June 1994, the Appellant was informed that in view of s.20(6A) of the Town Planning Ordinance, his application would be considered under the DPA Plan and that subsequent plans were irrelevant.

8. We agree with that view and will deal with the Appeal in accordance with the DPA Plan.

9. Under the DPA Plan, change of user requires planning permission from the Town Planning Board. Paragraphs 6.3.3 and 6.3.5 of the notes to the DPA Plan are relevant and they provide:

"6.3.3. Unspecified Use (Total Area 134.99 ha)

- (i) Areas without specified zoning on the DPA plan are intended to meet unforeseen requirements in the longer term. Further detailed planning study is required to identify the most appropriate use of land
- (ii) Considering the predominately rural character of the DPA, the planning intention is thus to encourage agricultural and recreational development which should be in keeping with the development site and its surrounding. Proposals which are likely to cause disturbance to the local communities will not be permitted and therefore open storage uses and rural industries will not be permitted with a view to avoiding unwanted urban growth and enhancing the quality of the environment.

Residential development may be permitted where it is established that a dwelling is necessary to support the agricultural use"

"6.3.5. For any other developments within this area, the owners/developers must demonstrate that their proposals would have insignificant adverse impacts on the environment, traffic and drainage of the areas or appropriate measures will be taken to mitigate such impacts to an acceptable level. The submission of Master Layout Plan, Landscape Plan, Environmental Impact Assessments, Drainage Impact Study and/or Traffic Impact Study may be required when the proposal is submitted for consideration"

10. At the Appeal, the Appellant appeared in person and presented his case clearly and objectively. We are obliged to him for his assistance

11. Prior to the hearing, the Appellant produced a new plan indicating the area on the Site which could be reserved for parking, loading and unloading of vehicles. Apart from a requirement that the run-in should be widened from 4m to 5.5m, we were told by Mr. Lee Yan Ming, Senior Traffic Engineer of the Transport Department, responsible for overseeing the planning and operation of the district works in Tai Po and North District, there is no in principle objection to the Appellant's latest plan. The Appellant is prepared to widen the run-in accordingly.

12. The Appellant also suggested that he would plant banyans and calliandras along Sha Tau Kok Road for beautification purpose. We believe the suggestion can work, though it may be that more land would have to be allowed for the purpose. Thus, if we are of the opinion that the application should be granted, we would go into greater detail as to how extensive the planting should be.

13. As the Appellant himself realises, the main stumbling block to his application is the clearly stated planning intention for the "unspecified use" area in the DPA Plan.

14. The evidence of Mr. Ng Yeung Shing, Thomas, an agricultural Officer in the Agriculture and Fisheries Department ("AFD"), is that the agricultural land covered by the DPA Plan is Grade A. 60% of the arable area is under active cultivation, and the site is ideally suitable for agricultural use. His view is that the Site can easily be rehabilitated for agricultural use. Indeed, since 1988, the AFD

has been implementing an Agricultural Land Rehabilitation Scheme (“ALRS”) to bring abandoned agricultural land back to cultivation.

15. Further, there is evidence from Mr. David O.Y. Wong, the District Planning Officer, that enforcement and prosecution actions are being taken against unlawful user of land in the neighbourhood who are using their land for storage and godown purposes. Once such actions are completed, the area will become overwhelmingly rural in character.

16. As we have said, it is the clear objective of the DPA Plan that agricultural land within the DPA should be used for agricultural purpose (though recreational use would also be encouraged). Indeed, 6.3.3(ii) stated quite clearly that

“open storage uses and rural industries will not be permitted with a view to avoiding unwanted urban growth and enhancing the quality of the environment”

17. Moreover, we should also consider whether the Appellant's proposed use is compatible with the neighbourhood and the planning intention therefor.

18. The Appellant realises this difficulty and has told us that it is not possible to use the Site for agricultural purpose. That is because, according to him, about 1/3 of the Site has been contaminated by chemical from the metal processing workshop. He said nothing will grow there anymore.

19. The evidence on this is not entirely satisfactory. But the Appellant, who is obviously a knowledgeable farmer, is convinced that unless the top soil is replaced, nothing will grow in the contaminated area.

20. Mr. Ng Yeung Shing said agricultural use is possible. Moreover, he said pig raising is possible. On the latter, we share the Appellant's doubt about whether it is really a practical alternative in view of stringent control on effluent.

21. But, even so, it is clear from the Appellant's evidence that even in the contaminated area horticultural use is possible, since many plants are grown in bags or pots. As for the rest of the Site, there is no reason why they cannot be used for agricultural purpose.

22. The Appellant also said that there is no water available. He said sinking a well would be useless because the water will also be contaminated. We do not accept that. There is nothing to show that contamination is such that even wells are poisoned. Indeed, just across the road from the Site there is active farming. Also there is lush vegetation on substantial parts of the Site.

23. Moreover, Mr. David O.Y. Wong also told us that the District Lands Office/North is considering taking lease enforcement action against the metal processing workshop. If so, then further contamination should be stopped.

24. The Appellant also said the Site is too small and cannot support the livelihood of one person. But even so, it is also his evidence that in the New Territories it is not uncommon for a farmer to farm more than one field because generally speaking fields are small. The real reason why little agricultural land is available is because rent is low (according to him about 4 to 5 picculs of rice a year) for about 700 sq.m. and owners find it unattractive to let land for agricultural use. But once it is realised that planning permission would not be granted to change the user, it may be that land owners will be more prepared to let land for agricultural purposes.

25. In our opinion the Appeal falls to be decided on the answer to the following questions. Is it consistent with the planning intention to permit the proposed change in user? Is the proposed user compatible with its rural environment?

26. We regret to say we believe the answer must be no to both questions. The proposed user is neither consistent with the planning intention for the "unspecified use" area in the DPA nor compatible with its rural environment.

27. Accordingly, we dismiss the Appeal.