

Town Planning Appeal No. 1 of 1994

IN THE MATTER of an Appeal  
under Section 17B by Tang Sai Hung

Lot No. 3251BRP etc. in DD 129, Ha  
Tsuen, Yuen Long

Date of hearing : 16<sup>th</sup> & 17<sup>th</sup> November 1994

Date of decision: 1<sup>st</sup> December 1994

Panel: The Hon Mr Justice Litton, OBE (Chairman)  
Mrs Alice Piera LAM LEE Kiu-yue, OBE, JP  
Mr LAM Hoi-ham  
The Hon Howard YOUNG How-wah, JP  
Mr Anthony Roy Upham

### **DECISION**

The Appellant, Tang Sai Hung, is nominally the owner of Lots No. 3251 BRP, 3251B1, 3251RP and 3251C in DD 129, Ha Tsuen, Yuen Long. In fact, as it transpired at the hearing, the actual owner is one Chan Kam-tim, but nothing turns on this. The site measures about 2,000m<sup>2</sup> and is located to the east of Fung Kong village. Access to the site is via an unpaved road leading from Fung Kong Tsuen Road which joins up with Ping Ha Road.

#### **Ha Tsuen DPA Plan**

2. The site falls within an area marked "unspecified use" in the Ha Tsuen Development Permission Area Plan No. DPA/YL-HT/1 which was first gazetted on 12 July 1991. Under the Notes to the DPA plan development in an area marked "unspecified use" is severely restricted, and use for purposes such as a warehouse requires planning permission from the Town Planning Board.

#### **Explanatory Statement**

3. Whilst the Explanatory Statement to the DPA plan does not constitute part of the statutory plan under the Town Planning Ordinance, an indication of the Town Planning Board's intentions, in exhibiting the plan, can nevertheless be gathered from it.

4. The situation as it existed in the area of the DPA plan as at the date of the plan is described as follows:

"4. The existing situation

4.1 .....

4.2 The Area comprises mostly low-lying flatland, with just a few small wooded hills near existing villages. .... Much of the area is covered by farmland, though a majority of it is lying fallow. Main farming activities (i.e. vegetable cultivation and livestock rearing) are concentrated in the area south of Deep Bay Road and in the vicinity of Sha Kong Tsuen and Fung Kong Tsuen. Fish ponds are found scattered all over the area. In recent years, agricultural land and fish ponds along Tin Ha Road and Ping Ha Road have increasingly been converted into open storage uses.

4.3 .....

4.4 In the Ha Tsuen area, the villages comprise rows of tightly packed traditional village houses of one to two-storeys high with a number of three-storey village houses scattered outside the village cores. Most of the settlements in the Area are residential in nature but a number of industrial workshops are also found.

4.5 The main vehicular access to the area is via Ping Ha Road and Tin Ha Road. Single lane carriageway roads and unsurfaced tracks, mostly very narrow, provide pedestrian and limited vehicular access to the villages and to the waterfront."

5. As regards the need for planning guidance and control, the Explanatory Statement says:

"5. Need for planning guidance and control

5.1 With the improvement in accessibility provided by the New Territories Circular Road and the Yuen Long Highway, there is a rapid and haphazard proliferation of

open storage uses in the area, concentrating along Ping Ha Road and Tin Ha Road. Such uses have prejudiced the planning land use intention in the area. These existing open storage uses in the area include storage of building materials and equipment, timber, used and new motor vehicles, and containers.

5.2 The unregulated open storage uses have led to the degradation of the rural environment; directly or indirectly, these have created a number of problems such as flooding, traffic congestion and visual blight.

5.3 .....

5.4 The Area is not far away from the Mai Po Nature Reserve and Deep Bay which are environmentally sensitive area. In order to protect these area, effective development control is essential.

5.5 In the light of the above, there is an immediate need for planning guidance and development control in the Area.  
"

### Previous use

6. Up to about mid-1991 the site was used for chicken-farming. When such use ceased, a structure was erected on the site unlawfully, and some time thereafter the site was used for the storage of steel rods. When enforcement action was initiated by the Planning Department in April 1993, the owner then reacted by a belated application for planning permission to the Town Planning Board ("the Board").

### Application for planning permission

7. By an application made under section 16 of the Ordinance, dated 10 September 1993, the Appellant applied to the Board for change of use, from agricultural to "warehouse for storage purposes". By that time, there was already on the site a structure 5m high, covering 750m<sup>2</sup>, used for the storage of steel rods. There was also a container - converted structure on the site for office purposes. In support of the application the Appellant stated that the operation of a farm on the site was not viable because of the "severe restrictions on livestock waste control" and there was no alternative except to change the use of the site to storage purposes. The Appellant pointed out the fact that in the vicinity there were many

sites used for the storage of containers and building material and that the vehicular traffic generated by the proposed use was not likely to be more than one or two lorries per week. The Appellant also stated that as the site would be used only for storage purposes, the adverse environmental impact was likely to be slight.

8. By letter dated 29 December 1993 the section 16 application was rejected upon the following grounds:

- "(a) the development is not in line with the planning intention for the area which is primarily to encourage the comprehensive improvement and retention of the existing residential community through physical upgrading and local environmental improvement;
- (b) the site coverage of 37.5% is excessive;
- (c) no drainage impact assessment and stormwater drainage proposals have been provided in the submission to demonstrate that the development will not cause drainage and flooding problems to the neighbouring areas;
- (d) no mitigation measures against the noise impact on the two village houses nearby have been provided in the submission;
- (e) the present vehicular access road is unpaved, sub-standard and unsuitable for heavy goods vehicles laden with steel rods; and
- (f) no landscaping proposals have been provided in the submission.

9. The application was further rejected upon the section 17 review by the Board on the same grounds. Hence the present appeal before us.

#### Peripheral points

10. It would be helpful at the outset to dispose of some of the peripheral points relied upon by the Board for rejecting the application. Firstly, the question of noise impact: ground (d). Evidence was led at the hearing, which we accept, that the noise impact of a chicken-farm on the occupants of the neighbouring village houses was far greater than that of the warehouse. The same could be said of harmful effects like smell. If the appeal turned on this point alone, we would have been in favour of allowing the appeal. Secondly, the question of site coverage: ground (b). The Board's guidelines for warehouse use in "unspecified" areas

restrict the site coverage generally to 25%: the present structure, for which planning permission is sought, has a site coverage of 37.5%. If all the other factors were favourable to the Appellant, this is a deviation from the guidelines which is curable. Thirdly, the question of drainage: ground (c). We have not gone into this question in depth at the hearing of the appeal. It would, however, be fair to infer that if all other points of objection could be resolved, the question of drainage might not be insuperable. Plainly, however, the Board was right in drawing attention to the lack of any drainage impact assessment from the Appellant, in an area which is prone to flooding. This was a valid point for the Board to take in rejecting the application. Fourthly, the question of landscaping proposals: ground (f). The Appellant's proposals, to plant some bamboo and to paint the fencing green, were plainly inadequate. However, if there were no other fundamental objections to the application, it would be reasonable to infer that the landscaping objections might be overcome: for instance, by a setback to the perimeter fence so that adequate planting outside the fence could take place.

#### Planning intentions for the area

11. As we see it, the fundamental objection to the Appellant's application is that the proposed development goes contrary to the planning intentions for the area. The site is close to Fung Kong Village and the aim for the sub-area around Fung Kong Village is to "encourage the comprehensive improvement and retention of the existing residential communities through physical upgrading and local environmental improvement": see para 6.2.4(a)(iv) of the Explanatory Statement under the heading "unspecified use".

12. Miss Tang, the owner's representative at the hearing, attacks the "planning intention" as expressed in the Explanatory Statement, and in particular para 6.2.4(a)(iv), in this way: since the Notes, which are part of the statutory plan, leave the permitted use of areas marked "unspecified" flexible-by leaving the matter to the discretion of the Board generally – the "de facto" limitation of use by means of the Explanatory Statement is "bureaucratic" and unlawful. We cannot accept this submission.

13. It must be borne in mind that under s20(5) of the Ordinance, a DPA plan is valid for a period of three years after notice of the draft plan is first published in the gazette, subject to extension for one more year by the Governor-in-Council. As stated in para 2.2 of the Explanatory Statement:

"2.2 The plan is to provide guidance for planning and to facilitate development control within the Area during the period required for detailed analysis of land use pattern, study of infrastructure provisions and examination of development options before the formulation of an outline zoning plan."

14. The Board has a wide discretion to grant or refuse permission for development

within an "unspecified" area, but this discretion can only be properly exercised having regard to the object of the publication of the draft DPA plan in the first place. No discretion can properly be exercised in a vacuum: the Explanatory Statement gives guidance to the manner in which such discretion would generally be exercised. At the end of the day, the responsibility of the Board is to plan: it is important that ad hoc development should not pre-empt the options open to the planners, and to the Board, before the formulation of an outline zoning plan.

15. In fact, the draft Ha Tsuen Outline Zoning Plan No. S/YL-HT/1 was published on 10 June 1994. If the proposals in the OZP were objectionable to the Appellant, he had the right to make those objections heard by the Board under section 6 of the Ordinance.

#### Precedent case

16. The Appellant has drawn attention to another case where warehouse use for the storage of steel products was permitted by the Board in November 1991, on a temporary basis for three years. This, however, came within a different sub-area referred to in the Explanatory Statement: it was the sub-area east of Tin Ha Road and south of Ping Ha Road which was primarily to promote rural industries, of low density, not causing environmental damage and not generating a significant amount of traffic. As at the date of the interim DPA, August 1990, that area was already used to a significant degree for the purposes of open storage and temporary workshops, in contrast to the sub-area we are concerned with which in August 1990, was mainly rural. We cannot therefore see how this case established a precedent for allowing the Appellant's application.

#### Road access

17. The question of vehicular access is also, in our view, a fatal objection to the Appellant's application: para (e) of the letter of 29 December 1993. Fung Kong Village Road is used by pedestrians and school minibuses serving the village. It is narrow and has no pavement. Whilst we accept that lorries, laden with steel bars, only go to and from the site no more than about twice a week, such traffic is nevertheless incompatible with the use of the road by the villagers. There are proposals to upgrade Fung Kong Village Road but this is not scheduled to start until 1995, for completion in August 1996. As things stand, the use of Fung Kong Village Road by heavily laden lorries, however infrequent such traffic might be, pose a danger which the Board rightly took into account in rejecting the application.

#### Conclusion

18. For the reasons above, this appeal is dismissed.