

TOWN PLANNING APPEAL NO. 11
OF 1993

IN THE MATTER of the Town
Planning Ordinance Cap. 131

and

IN THE MATTER of an Appeal under
Section 17B by FIRST FINE LIMITED
a subsidiary of SHELL HONG KONG
LIMITED

Date of hearing : 11th, 12th, 13th January 1994

Date of decision : 21st March 1994

Panel : Mr Robert C. Tang Q.C., J.P. (Chairman)
Mr Stephen Cheng Wui Yau
Prof. Nelson Chow Wing Sun M.B.E., J.P.
Mrs Alice Piera Lam Lee Kiu Yue, O.B.E., J.P.
Mr Joseph LO Sze Kuen

DECISION

The Appellant, First Fine Limited, a subsidiary of Shell Hong Kong Limited, is the owner of Lot No.5 in D.D.125, Ha Tsuen Shi, Yuen Long, New Territories. The Appellant applies for permission to build a petrol filling station (PFS) at the site, which has an area of about 890 sq.m.

2. The site is on Tin Ha Road and located approximately 80 metres away from the junction of Tin Ha Road and Ping Ha Road.
3. To the North, Northwest and Northeast of the site are rows of village houses, several small shops, workshops, a village restaurant, a cafe and store, a local community carpark, Tze Tong and village open space and playground.
4. To its East, Southeast and Northeast across Tin Ha Road are some village houses, public latrines, a refuse collection point ("RCP"), car repairing workshops, a small piece of vacant land and a vegetable collection point.

5. The site falls within an area designated for "village type development" "V" zone on the draft Ha Tsuen Development Permission Area (DPA), Plan No. DPA/YL-HT-1 gazetted on 12th July 1991. The notes of the draft Ha Tuen DPA Plan provide that PFS use "may be permitted with or without conditions, by the Town Planning Board" upon application to the Board.
6. The Appellant acquired the site for development as a "neighbourhood" PFS to serve Ha Tsuen Shi and its hinterland. The proposed PFS will have a single storey kiosk of 59 sq.m. and two pump islands with canopies above.
7. The PFS has been designed to comply with all current Government requirements for PFS and to address all environmental issues. The EPD is satisfied with the design.
8. Indeed, the village drainage system as well as the Tin Ha Road drainage system will benefit from the drainage system which will be built by the Appellant.
9. The Appellant made a point to remind us that it acquired the site prior to the publication of the Ha Tsuen IDPA Plan and had obtained a Certificate of Exemption on 16th July 1990. But because the site was located within the "V" zone of the Ha Tsuen interim development permission area, development of the site into a PFS after 17th August 1990 required permission from the Director of Planning.
10. On 10th June 1991, the Director of Planning refused to grant permission under s.26 of the Town Planning Ordinance.
11. On 12th July 1991, draft DPA plan was exhibited under s.5 of the Town Planning Ordinance.
12. On 25th February 1992, an application was made under s.16 of the Town Planning Ordinance.
13. On 18th May 1992, the Board rejected the application.
14. On 23rd April 1993, the Board heard the application for Review.
15. On 28th May 1993, the Board decided on Review to reject the application.
16. On 26th July 1993, a Notice of Appeal was filed.
17. Mr Benjamin Yu of counsel who appeared on behalf of the Appellant submitted that the question we have to decide is not whether the site is ideal but whether it is a suitable one from a planning point of view. We are willing to proceed on that basis.

18. We have heard evidence from the Appellant as well as the Respondent and we can decide this appeal on the basis of such evidence and the helpful submissions which Counsel for the Appellant and the Respondent have addressed to us.

19. There are 2 main objections to the proposal. One is traffic related. The other relates to planning intention.

Traffic related objection

20. The evidence of Mr John E. Burton, a Superintendent of Police who is the staff officer, Traffic Management Bureau responsible for the New Territories Region is that Ping Ha Road and Tin Ha Road are both grossly overloaded, and there is serious congestion there. Moreover, because the site adjoins a bus stop, a refuse collection point, a vegetable collection point and 2 public toilets there is an obvious potential conflict with pedestrians. Also, the site is close to a junction (about 80m) and the road is narrow (about 7 m). Thus, traffic may be interfered with or interrupted if heavy vehicles were to execute left or right turns into the PFS. His conclusion, from a traffic management point of view is that the site is manifestly unsuitable for a PFS.

21. The Appellant has proposed

- (1) Construction of a new landscaped footpath/cycle track on the Northeast side of Tin Ha Road from Ping Ha road to the proposed bus bay and zebra crossing which would improve pedestrian safety and comfort as well as providing safer access for farmers to the vegetable collection point
- (2) Relocation of the latrine and refuse collection point to the position as shown on the Government Layout Plan No. L/YL-HT/IE for the convenience and well being of the villagers
- (3) Relocation of bus bay and zebra crossing so as to reduce the existing disruption to traffic and improve pedestrian safety along Tin Ha Road

22. Were it possible to relocate the latrine and the refuse collection point, it would have addressed part of our concern. Unfortunately, the relocation would require a resumption of land. Whether land should be resumed for the purpose and, if so, when it should be so resumed is a decision which only the Governor in Council can make. At the moment we have to proceed on the basis that the Appellant's offer to relocate these facilities may not be feasible. Moreover, their relocation will also require the construction of Road B15 (to provide

access). There is no programme for the construction of Road B15 for which resumption of land is probably also required.

23. There is also a vegetable collection point located opposite the site across Tin Ha Road. Ha Tsuen Shi's vegetable collection centre is opened only for a limited time in the morning between 7:30 a.m. and 9:15 a.m. to collect vegetables. At 9:15 a.m., the cooperatives' trucks would take all the produce to Cheung Sha Wan market. The volume of vegetables would only fill half a truckload. We are told that the proposed landscaped footpath/cycle track would improve pedestrian safety and provide safer access for farmers to the vegetable collection point.

24. The Appellant would also provide the following additional measures to ensure pedestrian safety

- (a) The Appellant would construct a barrier along the back of the footway adjacent to the site to prevent vehicles from crossing the footpath other than the points of entry or exit
- (b) The Appellant would provide adequate lighting to illuminate the entrance and exit
- (c) The Appellant will provide a minimum setback of 2.75 metres from kerb line of Tin Ha Road and
- (d) The runout would not exceed 8 metres in width at the kerb line adjacent to the carriageway

25. We found strength in Miss Patel's submission that the Appellant's offer to bear the cost of a new RCP and public latrines, the relocation of the bus bay, the provision of a bicycle path/cinder track etc., laudible though it may be, just serve to demonstrate the unsuitability of the site for PFS in the first place.

26. The Appellant described the proposed PFS as a neighbourhood PFS and compared it with PFS in Sydney, Australia. We doubt very much whether the proposed PFS can fairly be described as a neighbourhood PFS. Mr Norman King, who testified on behalf of the Appellant, said they would be relying on passing trade and back-up trade for the PFS. He agreed that Ha Tsuen Shi alone would not justify even one pump. The PFS of course will supply leaded and unleaded diesel. It is quite clear from the photographs produced to us and from the evidence of both Mr Burton and Mr Paul W.P. Ng, District Planning Officer/Tuen Mun and Yuen Long, Tin Ha Road is heavily used by lorries and container trucks. We believe it is inevitable that any PFS on the site would attract these vehicles and in view of the state of the road, the Police objections are well founded.

27. The Appellant relies on the CTS-2 Report. The Commissioner of Police DD Traffic's view is that the traffic studies for CTS who took no account of the traffic generated by the fact that over the past few years, the Ha Tsuen area has been transformed into container storage depots and therefore the CTS-2 Report is not reliable as a guide. We do not believe that we can rely solely on this and disregard the clear evidence of Mr Burton and Mr Ng on the subject and the photographs which have been produced showing traffic conditions on Tin Ha Road.

28. We are quite satisfied on the evidence that Tin Ha Road is now heavily congested. Moreover, there is no programme for any road widening work in the immediate future for Tin Ha Road. Although the completion of the West Access in late 1995 should provide some improvement, it is doubtful whether it would provide sufficient improvement such that Tin Ha Road would be less heavily used by lorries and container trucks. We fear that for as long as the container depots remain in the neighbourhood, which seem likely, Tin Ha Road will continue to be heavily used by lorries and container trucks.

29. For the above reasons, we are of the view that there is a valid planning objection to a PFS on the site.

Planning Intention

30. Another objection made by Mr Ng to the proposed PFS is that the planning intention for the "village type development" area is to concentrate village development within the "V" zone to achieve a more orderly development pattern, the economic and efficient use of land and the provision of infrastructure and services. Village expansion areas and other infra-structural improvements would be guided by detailed layout plans.

31. According to Mr Ng, the small house demand in the area in the next 10 years is such that about 880 small houses would be required. However, only about 760 small houses could be provided in this area upon full development of the area covered by the adopted Ha Tsuen Layout Plan. As there is still a shortfall of land for 120 small houses, land within the "V" zone should, as far as possible, be retained for small house development. The Appellant's site is located at the village core of Ha Tsuen Shi, approximately 50 metres from the Ha Tsuen Shi Tze Tong. It is surrounded by 3 storey village houses on two sides. It is an ideal site for village extension.

32. It is obvious that the planning intention is that the site should be reserved for village extension. Its location makes it a natural choice for such extension. There is a difference of opinion on the evidence before us as to what the likely demand for small houses. On the basis of natural population growth, Mr Yuen Wai Hong of Yuen Wai Hong Architects and Planning Consultants, told us that there is far too much land reserved within the "V" zone. However, Mr Paul W.P. Ng explained that under the small house policy, every 18 year old male indigenous villager is entitled to a house site with a GFA of 700 sq. ft. Nor does it matter whether he is still residing in the village. His right to a small house does not depend on

it. The Appellant has suggested that to allow absentee villagers to build a small house is an abuse of the small house policy. Whether it is so or not is not for us to decide. We cannot ignore the policy. (However, we must not be taken as agreeing with the suggestion that the policy is an abuse of the policy).

33. We are of the view that the proposed development is incompatible with planning intention.

Bill of Rights

34. Lastly, the Appellant invokes Article 10 of the Bill of Rights which provides that

“all persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law”

It is said that the Appellant's rights under Article 10 has been violated in that the Chairman and some of the members of the Town Planning Board are not independent.

35. Under s.6 of the Hong Kong Bill of Rights Ordinance, Cap.383, in the event of a breach, we can grant such relief as we have power to grant or as we consider appropriate and just in the circumstances.

36. Whether the composition of the Town Planning Board may violate Article 10 is a question which is best answered by the High Court after full argument. We do not find it necessary to deal with this issue. On the evidence adduced before us, we have come to the view that a PFS should not be permitted on the site because of traffic objection and incompatibility with planning intention.

37. The appeal is therefore dismissed.