

Lots Nos. 176A and Others in DD 103, Au Tau, Yuen Long.

Panel : Mr Robert C. TANG, QC, JP (Chairman),
Mr David C. DaSilva, MBE,
The Hon Howard YOUNG How-wah,
The Hon MAN Sai-cheong, and
Dr Margaret NG Ngoi-yee.

Date of hearing : 15th, 16th, 19th, 23rd & 24th March 1993

Date of decision : 18th April 1993

The appellant appealed against the Town Planning Boards' s decision on review to reject the application for building 88 duplex apartments in 44 "four storey" town house style structures.

Appeal dismissed.

V Patel for the Town Planning Board
Clement K C Lo & Company for the appellant

DECISION

1. The Appellant, Ultra Force Limited, is the owner of the abovementioned Lots ("the said site"), which has an area of 15,515 square metres. It is agricultural land apart from an area of 5,713.5 square metres where the Crown Lease permits a two storey residential development on 392.5 square metres (exclusive of car parks). The Crown Lease also requires a minimum of two carparking spaces to be provided and a set back for road widening purposes. The site is located about 120 metres to the East of Au Tau Roundabout. Part of the site fronts onto Kam Tin Road to the South.

2. The site falls within an area designated as an "unspecified use" area in the draft Kam Tin North Development Permission Area Plan No. DPA/YL-KTN/1 ("the draft Plan") which was gazetted on 12th July 1991. The notes to the draft Plan does not permit residential use as of right and planning permission from the Town Planning Board is required. The "unspecified use" area is sub-divided into several sub-areas each with its specific planning intentions. The site is within the Cheung Chun San Tsuen sub-area. There, the planning intention is to encourage agricultural use (especially pond fishing) and recreational uses

(including ancillary facilities) which are generally compatible with the rural environment and are unlikely to adversely affect local communities.

3. In any event, the site is subject to a maximum permissible plot ratio of 0.8 and coverage of 20% which is appropriate for R3 type development in the Kam Tin area.

4. The Appellant applied to the Town Planning Board for permission to build 88 duplex apartments in 44 "four storey" town house style structures, with a total domestic GFA of approximately 12, 411.7 square metres, with an average unit size of 141 square metres GFA.

5. In addition, there will be residential carparking at the rate of 1.5 per unit, (i.e. 132), 6 visitors' carparking spaces and 1 for loading and unloading purpose. The designed population is 325 persons. The open space to be provided will exceed 5,500 square metres and will include a swimming pool, a tennis court, landscaped gardens and children's play area. The ground and first floor duplex apartments will each have a private garden of various sizes at ground level.

6. The application was supported by a Master Layout Plan. It is apparent from the Master Layout Plan that the Appellant had tried to accommodate the various constraints on development at this site. These constraints include

- (1) the proposed Route 3 to the North of the site and as a result a 40 metre non building area at the Northern part of the site
- (2) a 20 metre non building area at the Southern side of the site for a possible widening of Kam Tin Road
- (3) no residential building immediately below the two 400 KV cables which dissect the site
- (4) traffic noise from the proposed Route 3 and Kam Tin Road. Noise sensitive areas of domestic accommodation such as bedrooms etc. will not face Route 3 and that tall noise barriers (ranging from 5 m to 9.5 m in height) will be built to mitigate traffic noise from Kam Tin Road

7. The s.16 application as well as the s.17 Review were unsuccessful. The Town Planning Board in rejecting the application gave two reasons:-

- "(a) The application site will be an island site surrounded by the proposed Route 3 and a slip road and the existing Kam Tin Road. A site with such constraints is not suitable for residential development, particularly of the

scale proposed; and

- (b) the submitted drainage impact assessment and the proposals on the discharge of service roundoff and treated sewage effluent to the existing stream courses are not acceptable"

8. The site forms part of a larger triangular shape area which is bound on its three sides by the Proposed Rout 3, Kam Tin Road and Castle Peak Road (at Au Tau Roundabout).

9. The Appellant was represented by Mr Ngai Sik Keung, a Town Planner of experience, before the Town Planning Board. The Appellant now appeals to us and is represented by Mr John McNamara. Two witnesses were called, Mr Ngai and Miss Gillian Castka, a professional Engineer who holds a Bachelor of Engineering Degree and also a Master of Science Degree in Advance Hydraulics and Hydrology.

10. When the matter was before the Town Planning Board, the plans were that the proposed Route 3 would be an elevated structure and would run parallel and to the North of the site. Also there would be an interchange slip road to link up with Castle Peak Road and Kam Tin Road at Au Tau Roundabout. That slip road ("the old slip road") would run along the Northeast boundary of the site to the Au Tau Roundabout then loops back to join Kam Tin Road. After the decision of the Town Planning Board was delivered, Government published "an invitation for expressions of interest for the Country Park section of Route 3" ("the Invitation"). The latest plan (Appendix G in the Invitation) shows that the old slip road has been eliminated and is replaced by a slip road running along the Northeast of the site ("the new slip road"). As a result, the proposed Route 3 has moved further South and, if built, will cut across more of the site. A plan (produced as document 10) showing the alignment of the old and new slip road as well as Route 3 is annexed to this Decision as Annex 1. The shaded area on Annex 1 is the site.

11. Mr McNamara has argued that we should ignore the new slip road. He said it is sheer speculation. We do not agree. It is no more speculative than the proposed Route 3. As Mr McNamara must accept, we cannot ignore the proposed Route 3 so also we cannot ignore the new slip road.

12. As we have said, the Master Layout Plan produced by the Appellant shows that they had taken steps to accommodate the practical constraints on development at the site. Hence, all the car parks and a tennis Court will be placed in the 40 metre non building area to the North of the site and that the town houses are separated into two clusters and are divided by the area immediately below the 400 KV power cables which dissect the site. So far as the 20 metre non building area to the South of the site is concerned, it will be occupied by, it seems, some shrubs and plants. A swimming pool and gardens will be placed directly below the power cables.

13. Mr McNamara also argued that we must confine ourselves to the reasons given by the Town Planning Board. If those reasons are wrong then we must allow the appeal. With respect, we do not think that can be right. We should not allow

an appeal if there are other good reasons for refusing planning permission.

14. Mr McNamara submitted that the first reason given by the Town Planning Board is wrong because the site is not an island site and that in any event with the elimination of the old slip road, the site will not be an island site. Mr Paul Ng, a District Planning Officer, who gave evidence before us contended that the site can be regarded as an island site because it is situated within a larger triangular area which is bound on the three sides by Castle Peak Road, Kam Tin Road and the proposed Route 3. "An island site" is not a term of art. Mr Ngai has shown examples where island sites were permitted to be developed. We are not surprised. Indeed, a city block is an island too. We do not believe an island site is necessarily unsuitable for development. On the other hand, being in close proximity to a road or a highway can give rise to planning constraints. It is these constraints which are relevant. We believe the Town Planning Board described the site as an island site to indicate that the site is in close proximity to the proposed Route 3, the old slip road and Kam Tin Road. What really concerned the Town Planning Board must be these constraints. The Town Planning Board made that clear when it said "a site with such constraints is not suitable for residential development, particularly of the scale proposed". We accept that the latest plan shows that the old slip road has been eliminated. In its place is proposed the new slip road which would run parallel to the proposed Route 3 and to the South of it. Thus, only two roads may be affecting the site, namely, the proposed Route 3 (with the new slip road) and Kam Tin Road. Mr Paul Ng also mentioned Au Tau Roundabout and Castle Peak Road. We are prepared to ignore the Au Tau Roundabout and Castle Peak Road. There is no suggestion that any special measure had to be taken because of them.

15. But what about Route 3 and the possible widening of Kam Tin Road?

16. So far as the latter is concerned, it is now a Category C project. No funds have been provided for it in the next five years so it should pose no immediate threat to the site. Be that as it may, if and when Kam Tin Road is widened, resumption of all or part of the 10 metre non building area contiguous to it may be required. In that case, the reduction of the site will leave the development with a plot ratio exceeding 0.8 and a coverage in excess of 20%.

17. The more immediate problem is Route 3. The indications are that Route 3 will be built and as a matter of priority. Of course, it is not certain yet but we cannot agree with Mr McNamara that it is speculative to have regard to Route 3 or that we should ignore the new slip road which will enroach on the site. Mr Ngai said in evidence that it is unlikely or even inconceivable that Government would resume all of the 40 metre non building area. It is suggested either nothing would be resumed or at most only a 10 metre wide strip would be resumed. It has also been suggested that it is possible that Government may not need any of the area permanently and some arrangement can be made whereby Government can use part or all of the non building area during the construction of Route 3 which will then be returned to the applicant after construction. In the meantime, during construction, the applicant can use the non building area to the South for carparking purposes. Mr Ngai said and I think probably correctly that there is unlikely to be any or any substantial overlap between the building of Route 3 and

the possible widening of Kam Tin Road.

18. Mr Paul Ng has drawn our attention to the Chief Highway Engineer's comments which were placed before the Town Planning Board:

"Non building area is not just a buffer zone but may be physically required as working space or permanent construction of Route 3 ..." (emphasis added)

19. Mr McNamara complained that no witness from the Highways Department was called despite his invitation and suggested that we should ignore the Chief Highway Engineer's comments. Section 17(B)(6)(c) of the Town Planning Ordinance, Chapter 131, provides

"prior to or at the hearing of an Appeal an Appeal Board may -

(c) admit or take into account any statement, document, information or matter whether or not it would be admissible as evidence in a court of law'

20. We do not think it right to ignore the Chief Highway Engineer's comments.

21. Mr McNamara said that there is no evidence that the 40 metre non building area will be required permanently. He is right on that. But the fact that it may be required for the permanent construction of Route 3 cannot be ignored. Nor do we think the possibility that some arrangement may be made between Government and the Appellant for a temporary use of part or all of these 40 metre non building area helps. Such private treaty with the Appellant and possibly other land owners along Route 3 may well delay the construction of Route 3. Nor would it be attractive from a town planning point of view for part of the land along Route 3 to be resumed by Government (where e.g. trees may be planted) and for other parts to be in private ownership which may, for example, be used as carparking spaces.

22. Once one accepts (as we must) the possibility of a resumption of all or part of the 40 metre non building area then we cannot allow this appeal even if we are satisfied that the Town Planning Board is wrong.

23. Nor are we satisfied that the Town Planning Board is wrong. The Town Planning Board did not refuse the application because the site is an island site. We think, Miss Patel is right when she said that what the Town Planning Board has in mind were the constraints placed on development by Kam Tin Road and the proposed Route 3. In passing we should also mention that, as is apparent from Annex 1, if the new slip road is built, more of the site will be occupied by Route 3. The 40 metre non building area will eat deeper into the site. Whilst the Appellant relies on the current plan to show elimination of the old slip road, no account has been taken of the new slip road's impact on the site.

24. Furthermore, 400 KV power cables run across the site which resulted in the houses being separated into two clusters. Although we invited submissions on whether it is hazardous to health for any residential building to be built so close to such cables, no submission was made. We note that the Town Planning Board was told that there is no conclusive evidence that exposure

to such low frequency electro-magnetic fields is hazardous to health. We doubt whether conclusive evidence is needed. We note that the Town Planning Board has requested the Planning Department to prepare an information paper on the subject. We hope the information paper can be produced quickly.

25. Other objections were taken to the site. For example, the fact that sound barriers would have to be built. They are unattractive and may have to be 5 to 9.5 metres tall. The Town Planning Board expressed no opinion on this. We do not believe the sound barriers, by themselves, should preclude planning permission.

26. We should also mention the question of emergency vehicular access ("EVA"). The Director for fire Services required the provision of EVA of at least 6 metres in width to reach at least one major face of each and every residential blocks within the development. The Project Managers/N.W. New Territories, commented that "most of the units in the Western cluster are not accessible by fire appliance". The Town Planning Board did not give this as a reason for refusing the application. Mr McNamara has urged us to ignore it. We do not agree. The provision of EVA is a matter of importance and it is a pity that the Town Planning Board had not dealt with it. It may be the Town Planning Board felt that the two grounds they had given were sufficient. But a more comprehensive statement of reasons would be helpful and may reduce the number of appeals. Certainly Appellant will have less reason to feel aggrieved if all possible adverse points were dealt with at once. Otherwise, an applicant may well feel that he has to deal with a moving target.

27. The other reason given by the Town Planning Board for refusing permission relates to drainage.

28. The site comprises a flat grassy land at a level of around +7.6 mPD to +8.0 mPD. There is a large storage pond on the site. The pond occupies about 0.44 HA. The levels of the sections of Kam Tin Road beside the site varied from about +10.5 mPD to +8.0 mPD, sloping downwards towards Kam Tin. The site is generally higher than the adjoining land from about 1 metre to about 3.5 metres except the section of Kam Tin Road fronting the site and the piece of land on the Southwest side of the site. The site is not shown as a local flood plain but the areas adjacent to the section of the Kam Tin River at the Northern side of the site are on a flood plain. There is no public drainage.

29. The application is supported by a preliminary drainage impact assessment prepared by Miss Gillian Castka in which she had identified three options. She has given evidence before us. It seems to be her evidence that of the three options, the one which provided for drainage into a stream identified as stream A is the most practical. She has done a preliminary analysis. For that purpose it was assumed that 100% of the rainfall on roads and buildings are converted to run off as compared with 70% from grassed and general rural areas and 0% from ponds. The effect of this is that the run off from the site after development will increase by about 70%. Also after development, because the site would be served by well defined, engineered channels and pipes, the response time is significantly reduced to 3 - 4 minutes. To compensate, it is proposed that a storage tank with a storage capacity of 3,000 cubic metres should be built for all rainfall on the site. The release from the tank would be controlled so that at any one time no more and indeed less should be discharged into stream A. The discharge from the

storage tank may be by gravity on pumped discharge and control can be in the form of a level control device located in stream A.

30. Mr Choi Ka Kai of the Drainage Services Department seemed prepared to accept that Miss Castka's concept can work. However, he is not satisfied with only a preliminary study. Nor is he happy that there is no indication how the proposal can be implemented since to discharge into stream A may require access through Government or private land. Further, he said the applicant should consider the possibility that conditions may change so that discharge into stream A is no longer feasible.

31. There is also the question of maintenance of steam A. This last point was adverted to during the hearing before the Town Planning Board. We quote from the record, para. 21,

"Failure in the maintenance and operation of this system after the completion of the proposed development would cause flooding problem in the area and its surrounding. At this stage, there was no evidence to indicate that DSD had no objection to the drainage proposals as claimed by the representative of the applicant"

32. We think Miss Castka agrees that her study is preliminary and that further study would be required. The question is when that further study should be done. Should it be done prior to permission being given so that the Town Planning Board can decide whether or not the proposed drainage is feasible or should it only be done (as the Appellant contends) after permission in principle has been given; such permission being conditional upon submission of detailed drainage assessment and implementation of flood mitigation measures to the satisfaction of the Director of Drainage Services or of the Board.

33. We do not wish to add any unnecessary burden on an applicant. A rough estimate given by the Appellant of the cost of this further study is HK\$250,000. It is not an insubstantial sum. But we wonder whether it is too onerous a burden to place on this Appellant in the special circumstances of the site. The development will be a multi-million dollar project and the site is next to a flood plain and drainage from it is bound to affect the flood plain. Nor do we regard the suggestion that some clearer indication should be given as to how stream A would be maintained to be unreasonable. We accept, of course, given Miss Castka's hypothesis that discharge from the site as developed should be no greater than natural discharge from the site without development so that if stream A were to be blocked, there will be flooding with or without the development anyway. But what one must also consider is the consequence of flooding to the residents if the site is developed. When one takes that into consideration, it becomes at once apparent that an applicant for planning permission must satisfy the Town Planning Board that such legitimate concern has been adequately addressed. We do not believe the Town Planning Board can be faulted for refusing to give a conditional permission. The approach adopted by the Appellant can lead to a massive waste of time. As it is, just the hearing before us lasted five sessions. Is it right for so much time and effort to be spent when there is a not insignificant chance that given the circumstances of this site the drainage problem may not be solved?

34. Mr McNamara referred us to the Invitation and said that the drainage impact assessment had not been completed

either. So he argued: Why can't the go-ahead be given subject to a drainage impact assessment here. With respect, there is a difference between Route 3 and this application. There, a decision in principle has been made to build Route 3. It is a major and important project. Given Government's power of resumption, there is no reason why drainage problems cannot be solved. Here, the Appellant has to satisfy the Town Planning Board that planning permission should be given. And unless there will be no adverse drainage impact, it is difficult to see why permission in principle should be given first.

35. For the above reasons, we are of the view that the decision of the Town Planning Board is correct. This appeal is dismissed.