Case no. 18/92

Lots No. 2248 in DD 76, Ko Po, Sha Tau Kok Road, New Territories.

Panel : Mr Justice Litton, OBE (Chairman),
Mr David C. DaSilva, MBE,
Mr FAN Sai-yee,
Dr Peter Ronald Hills, and
Mr Jason YUEN King-yuk.

Date of hearing : 17th and 18th May 1993

Date of decision : 28th June 1993

The appellant appealed against the Town Planning Boards's decision on review to reject the application for metal workshop at the subject site.

Appeal dismissed.

V Patel for the Town Planning Board
CHAN Chi for the appellant

DECISION

1. The Appellant Kingspeed Engineering Company is the tenant of a site comprising lot No. 2248 in Demarcation District 76. The total site area is about 418m^2. The site falls within an area designated for "unspecified use" in the draft Lung Yeuk Tau and Kwan Tei South Development Permission Area Plan No. DPA/NE-LYT-1 which was gazetted on 12 July 1991. The DPA plan, prepared by the Town Planning Board under the provisions of section 3(1)(b) of the Town Planning Ordinance, states that in any "unspecified use" area, any development, other than certain permitted development and uses not relevant to this matter, requires planning permission from the Town Planning Board. The expression "development" includes making a material change in the use of the land: see section 1A of the Town Planning Ordinance.

2. Prior to about July 1991 the site in question was "agricultural land". From about July 1991 the appellant started a metal workshop on the site. A metal-frame structure with canvas top and sides was put up to provide shelter for the workers and the machinery. The appellant had contracts to make tubular road barriers for government road contractors, and also lamp posts. The only access to the site is down a track leading

to Ko Po Village, off the Sha Tau Kok Road.

Section 16 application

3. When enforcement action was threatened against the appellant for its unauthorised change of use, it made application for planning permission to the Town Planning Board under section 16 of the Town Planning Ordinance to enable the site to be used for it's business purposes. This application was made on 21 February 1992.

4. On 10 April 1992 the Town Planning Board rejected the application. The grounds for rejection were as follows:

"(a) The proposed development is incompatible with the planning intention for the area which is to restrict developments to those which are unlikely to cause adverse impacts on the environment, traffic and drainage of the area;

(b) the proposed development will pose potential hazards to pedestrians and will result in further deterioration of the existing van track;

(c) the submission has not included proper assessments on the air, noise and liquid waste pollution arising from the proposed development, and no mitigation measures have been proposed;

(d) no proposal for drainage facilities has been included in the submission; and

(e) the approval of the application will set an undesirable precedent."

Section 17 review

5. Upon the rejection of its application, the appellant sought a review of the Town Planning Board's decision under section 17. In support of its case, the appellant advanced, in essence, the following points:

(a) The workshop is on a small scale.

(b) It poses no danger to pedestrians along track leading to Ko Po Village.

(c) The environmental impact of the business is minimal; it uses no noisy equipment or harmful chemicals.

(d) It uses no water; therefore drainage is not a problem.

(e) As it is only proposed to put up a canvas covered frame on the site, no undesirable precedent is set.

6. The application for a review under section 17 was heard on 21 August 1992. After hearing the appellant's representative the Town Planning Board decided to adhere to its original decision and rejected the application. Hence the appeal

to the Town Planning Appeal Board.

Environment pollution

7. The site is close to a number of houses, some substantial two-storey structures and some squatter huts. There is no doubt that the use of this site as a metal workshop will generate noise. The use of the track by goods vehicles will be at least a nuisance to the villagers of Ko Po; it might be hazardous.

8. On the other hand, the environmental impact of this business should not be exaggerated. The fact is that the immediate vicinity of the site has already been so degraded by ad hoc activities such as car dumping, storage of material, the operation of metal workshops etc. that the overall impact of this site will in truth be minimal. When the appeal was first opened before us, this fact did not become immediately apparent, as the photographs prepared by the planning department tended to exaggerate the tranquil rural aspect of the neighbourhood rather than its degraded nature. To this extent, those photographs are somewhat misleading.

Town Planning Board guidelines

9. Both at the section 17 review and at the hearing before us, much reliance has been placed on the guidelines for applications for "factory/workshop/warehouse use within unspecified used area on DPA plan". the guidelines set out the main planning criteria in broad terms, to ensure compatibility with the general land use in the surrounding area. One aspect of these guidelines which we find rather unsatisfactory is this: it seems to make no distinction between very large undertakings and minor ones. Accordingly, the applicant is, in general, expected to provide impact studies on things like traffic and drainage and to propose mitigating measures for reducing impact by such things as odour, dust, smoke, glare, noise etc. There is no flexibility in the guidelines.

10. Where a relatively small metal workshop is involved, and the operator has only a three year tenancy from the landowner in relation to the site, such requirements may be wholly unrealistic from an economic point of view.

Planning objectives of DPA plan

11. In considering this appeal, it is important to bear in mind the overall objective of the draft DPA plan.

12. Although the Explanatory Statement attached to the plan is not in fact part of the plan, it provides an insight into the Town Planning Board's objectives in preparing the plan under the provisions of section 3(1)(b) of the Ordinance. Paragraph 5.2 of the Explanatory Statement says:

> "Hitherto, the flat terrain, the relative accessibility and the lack of adequate land use control in the past have encouraged infiltration of undesirable open storage uses and informal industrial developments which cause much detrimental effect to the environment. Large areas near Ma Liu Shui San Tsuen, Po Kat Tsai, Ko Po and Lau Shui Heung Road have already been converted to open storage and industrial uses. To avoid continuation of this trend

and arrest further degradation of the Area, proper planning control and management are required."

13. It is worth recalling this fact: the designation of large areas under "unspecified use" is not intended to put a permanent freeze on all development. Paragraph 7.4 of the Explanatory Statement says:

> "It is intended that the DPA plan published by the Board will be replaced, within 3 years, by an outline zoning plan. Under the provisions of section 20(5) of the Ordinance, a draft DPA plan is effective for a period of 3 years after the gazette notification. Extension of 1 additional year may be given by the Governor in Council. The provisions of enforcement will continue to be applicable to the Area after the Plan is replaced by an outline zoning plan."

14. The appellant in this case did not seek the Town Planning Board's permission for change of use prior to setting up the workshop on this site. It only made an application after enforcement action was threatened. Clearly, as a matter of principle, unauthorised operators should not be allowed to dictate future land use in the "unspecified use" areas within the DPA plan by pre-empting the Town Planning Board. Ad hoc development motivated by self-interest cannot be an approach to town planning which the Board should encourage.

Conclusion

15. Because of the degraded condition of much of the area surrounding this site, we conclude that whilst there will be some adverse environmental effect caused by the operation of a workshop as proposed, the overall increase in environmental damage will not be great. The adverse impact on some of the residences nearby will, however, be considerable. The load on the use of the track leading to Ko Po Village will increase. But the paramount consideration is this : to approve the present application will clearly be to go against the planning objectives for the area as we have summarised above. There is plainly a public need for the kind of services rendered by the appellant's workshop. This is a matter which the planning department will doubtless bear in mind when putting its proposals forward for the consideration of the Town Planning Board when the preparation of an outline zoning plan is considered next year. To persuade the Town Planning Board that, despite these objectives, ad hoc industrial development should pending the preparation of an outline zoning plan be allowed, an applicant will, generally speaking, have to make out a very strong case on environmental and social grounds. The appellant here has fallen far short of such a case. The appeal is accordingly dismissed.