

Case no. 04/93

Lot 1410A in DD 114

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Lot 1410B in DD 114

Panel : Mr Robert C. TANG, QC, JP (Chairman),
The Hon Marvin CHEUNG Kin-tung, JP,
Mr David C. DaSilva, MBE,
Prof. Peter Ronald Hills, and
Dr Margaret NG Ngoi-ye.

Date of hearing : 11th, 12th, 13th October and 7th December
1993

Date of decision : 22rd December 1993

The appellant appealed against the Town Planning Boards's decision on review to reject the application,

- (i) to build on Lot 1410A a proposed Columbarium comprising 15 structures; and
- (ii) to build a memorial garden at Lot 1410B.

Appeal dismissed.

V Patel for the Town Planning Board
Messrs Wong, Hui & Co., Solicitors for the appellants

DECISION

1. Treasure Base Development Limited ("Treasure Base") is the registered owners of Lots 1410A and 1410B in DD 114 ("the Site"). The Site is the subject of two separate s.16 applications and appeals to us.

2. They have been kept separate for some technical reason. Treasure Base believes that otherwise a new planning unit will be created which might prejudice what it regards as the existing use for Lot 1410A.

3. The Appeals were heard together and we will deal with them together.

4. One Appeal concerns a proposed Columbarium to be built on Lot 1410A comprising 15 structures of which 12 would be used to provide 8,000 niches for placement of urns containing cremated human ashes, 2 ceremonial halls for religious ceremonies and 1 administration building.

5. The other relates to a memorial garden at 1410B which will provide vehicular access, parking spaces and other supporting facilities to the Columbarium. A parking area with 44 car parking spaces and 11 coach parking spaces/drop off area will be provided. It will also provide access to the Columbarium from Kam Sheung Road. The memorial garden will contain fish ponds, play areas, sitting areas, trees and market gardening areas for agricultural use.

6. The Columbarium cannot function effectively without the memorial garden, and the latter is meaningless without the former.

PLANNING INTENTION

7. The Site is designated as an "unspecified use" area in the draft Shek Kong DPA plan. The permitted uses are agricultural use, ancestral hall, burial ground, plant nursery, police port/police reporting centre, post office, rural committee building, shrine, tree plantation.

8. The planning intention for the area is primarily to preserve and encourage agricultural activities as far as possible to reflect the intended use of the area, although low density residential development may also be allowed on both sides of Kam Sheung Road.

9. The Site has been included within the extension of the Agricultural Land Rehabilitation Scheme ("ALRS") and falls within an area designated as Rural Activity Area ("RAA") in the sub-region Land Use Plan adopted by the Land Development Policy Committee ("LDPC") on 24th November 1989.

10. The draft DPA plan is a stop-gap measure designed

"to provide guidance for planning and to facilitate development control within the DPA during the period required for detailed analysis of land use pattern, study of infra-structural provisions and examination of development options before the formulation of an outline zoning plan"

(para. 2.2, Draft Shek Kong Development Permission Area Plan No. DPA/YL-SK/1 Explanatory Statement)

11. Mr Wong, appearing for Treasure Base, contended that whilst we may have regard to such planning intention, we should not follow them slavishly.

12. Of course we will exercise our own judgment. But pending a detailed analysis of land use pattern, study of infra-structural provisions and examination of the development options, we believe we should be careful not to frustrate planning intention.

13. The ALRS as its name implies has as its object the bringing back of land to cultivation. According to Mr C.C. Chan from the Agricultural Development Division of the Agricultural and Fisheries Department, the scheme has proved successful since its implementation. A total of 29 hectares of fallow land has been brought back to cultivation and in Cheung Po, over 90% of fallow land has been rehabilitated.

14. Moreover, there is a definite work programme for the Yuen Kong area where the Site is situated. According to Mr C.C. Chan, under the latest New Territories Rural Planning and Improvement Strategy, \$1 million will be spent to improve the communal irrigation and field drainage facilities in Yuen Kong in 1995/96 to facilitate the extension of ALRS to this area around that time.

15. The Site had a strong agricultural background. An aerial photograph of the Site taken in 1990 showed that a considerable part of the Site was then under cultivation and there is evidence that much of the Site were under cultivation in the more recent past.

16. Nor should it be difficult to return much of the Site to agricultural uses though on part of the Site (where structures have been built) only hydroponic farming would be possible.

17. Treasure Base responded to the obvious planning intention for the Site by providing for market gardening and some agricultural use in the memorial garden. We regard that as insufficient. The primary use of the memorial garden will not be agricultural. When it is taken together with the Columbarium it is obvious that it is merely an adjunct to the Columbarium.

18. Mr Wong contended that there is a presumption in favour of development which is the position in the United Kingdom.

19. Blundell and Dobry's Planning Appeals and Inquiries 4th edition refers to this general presumption in favour of development and conclude at p.12

"The presumption in favour of development is therefore important, but should not be overstated. The appellant must overcome any serious objections - aesthetic, technical and of policy; but, if he can do so, he does not have to establish need. He is entitled to a permission whether or not he can make out a positive case in favour. Furthermore, it may not be enough for the authority to rely on a literalistic application of the words of a policy if the latter's objectives would not be harmed".

20. There are obvious differences between town planning in Hong Kong and the United Kingdom. However, we are prepared to proceed on the basis that planning permission should be granted to the extent shown or provided for or specified in the plan, having regard to all material considerations, unless there are good reasons for refusal.

21. The Town Planning Board, in refusing permission, said

"the proposed development is not in line with the planning intention for the area which is to preserve and encourage agricultural activities as far as

possible"

22. With respect, we believe that conclusion to be well-founded.

COLUMBARIUM OR ANCESTRAL HALL

23. As an ancestral hall is a permitted use, Mr David Wong sought to argue that what Treasure Base proposes for the site is not a columbarium but an ancestral hall. We do not believe that to be right.

24. The explanatory statement relating to the draft Shek Kong Development Area Plan states at para. 3.2 that

"For general guidance a set of definitions explaining some of the terms used in the notes is available from ... Planning Department"

25. Although these definitions do not form part of the plan, they are helpful for interpretation.

26. According to the "Definition of Terms for Interim Development Permission Area Plans/Development Area Plans", columbarium use

"means any place or vault with niches or urns that contain ashes of cremated bodies"

whilst ancestral hall

"means a place for common worship or remembrance of the ancestors of the villagers"

27. But, even without a definition, we have no doubt that what is proposed by Treasure Base is a columbarium and not an ancestral hall or halls. Indeed, if Mr Wong is right no planning permission is needed.

28. We believe what Mr Wong was trying to do is to persuade us that a Columbarium is so similar to an ancestral hall that planning permission should be given. We are unable to agree. An ancestral hall is very much part of a rural scene. A Columbarium cannot be so regarded.

COMPATIBLE USE

29. Mr Wong further argued that the proposed use is compatible with neighbouring land uses. The surrounding land uses are predominantly agricultural.

30. The Appellant's Planning Consultant, Mr Chan Tat Choi, argued that "columbaria and cemeteries are commonly located near to residential areas" and that they are "normally regarded as institutional uses". The evidence of Mr Paul Ng from the Tuen Mun and Yuen Long District Planning Office is that these were located in such areas due to historical reasons and by force of circumstance. He denied that columbaria use is regarded as institutional uses for zoning purposes. He said it would be zoned as "other specified use". The comparison with burial grounds and tombs in the New Territories is also not a valid one since only indigenous New Territories villagers or a locally based fisherman are permitted to be buried in the New Territories. See Notes to the DPA Plan (para. (iii)(k)) whereas

the Columbarium would be open to the public.

31. We think Mr Wong uses the word "compatible" in the sense that different users can co-exist. Many users can co-exist. That does not necessarily mean that planning permission should be granted although users which cannot co-exist with existing users should be disallowed.

Here, the Town Planning Board was of the opinion that

"the proposed development is not compatible with the surrounding uses which comprise mainly agricultural activities"

32. Given the commercial nature and scale of the Columbarium, we agree that it is not compatible with the surrounding uses which are predominantly agricultural.

TRAFFIC IMPLICATION

33. Treasure Base realised that the location of a Columbarium at the Site will give rise to traffic difficulties. Thus, Mr Matthew Tang, a Director of Treasure Base, testified that strict control would be imposed on festival days. He said that no admission will be permitted to any person arriving by car or on foot. Only persons arriving by shuttle coaches provided by Treasure Base would be permitted to enter. Strict conditions would be written into licence agreements so that, for example, infringement may result in forfeiture of the licence. It is said that if an organisation (e.g. a religious body) obtains a licence over a number of niches, strict conditions would also be imposed requiring the licensee to impose similarly strict conditions on their sub-licensees.

34. We do not believe that such control will be effective. It will be difficult to monitor. Since it is said that the Columbarium caters for the middle and upper middle classes, we would be surprised if they would be prepared to travel by coaches instead of in their own cars. Also, it will be difficult to control visitors who are not licencees.

35. Chief Inspector Kong gave evidence that the proposed Columbarium will place considerable strain on police resources and manpower. He said that a minimum of 40 Police Officers will be required to be deployed on a peak festival day. He said that there are other demands on police resources in the New Territories on the festival days such as at Wo Hop Shek Cemetery which would require deployment of 120 Police Officers and Lo Wu Cemetery which would require the deployment of 50 Police Officers. His view of the Appellant's proposals regarding non admittance on festival days except by scheduled coaches was that it was neither practical nor feasible in Hong Kong.

36. After the close of evidence, Mr Wong informed us that policemen may be available for private function on payment. However there is no evidence that they would be available on festival days. Nor was this put to Chief Inspector Kong. We cannot proceed on the basis that policemen would be available on festival days.

37. Also, shortly before the resumed hearing of submissions, Mr Wong produced by way of a letter together with 3 rough sketches from one LCT Associates Limited to Treasure Base Limited dated 29th November 1993 that it is technically feasible

to construct a 1 or 2 storeys underground car parking facilities underneath the unbuilt area of Lot No. 1410A and B and/or that there can be further utilisation of open space to enlarge temporary parking capacity on festival days. Miss Patel objected to such evidence and submitted that a new s.16 application should be made so that the Town Planning Board and the relevant departments can have an opportunity to consider them. We agreed. Moreover, the casual nature of such evidence militates against their admission.

38. We believe the location of a Columbarium at the Site is likely to lead to illegal parking on Kam Sheung Road which would result in both traffic hazard and pedestrian safety problems. Thus, we also agree with the Town Planning Board that this is another reason why permission should not be given.

EXISTING USE

39. The Site is held under a block Crown Lease granted in 1906. Lot 1410A is there described as graveyard/orchard waste. It is not a Lease Condition that the Site should be used as a graveyard.

40. Mr Wong said that it is an irresistible inference that the Site was actually used as a mass grave for people who died of the plague at the turn of the Century. With respect, this is sheer speculation. Indeed, as Mr Wong admitted, notwithstanding infra-structural work on the site, no human remains were discovered. It is incredible that if it had been used as a mass grave, there would have been no trace of any human remains. Mr Wong's suggestion that the human remains would have so rotted as to leave no trace cannot be right.

41. Nor is it permissible for any burial to take place on Lot 1410A except for indigenous population of the New Territories. Mr Wong argued that this contravenes Article 21 of the Bill of Rights. We have heard no argument on that. We cannot and do not decide that. We do not agree that Mr David Wong is right in saying that the existing use of Lot 1410A is graveyard. Or that it should lead to permission for a Columbarium.

EQUITY RIGHT

42. Mr Wong also relied on the so-called equity rights of the Appellant. This seems to be a reference to certain Certificate of Exemption given in respect of building works under s.5A of the Buildings Ordinance (Application to the New Territories) Ordinance, Cap. 121. This reads as follows:-

"5. Subject to the provisions of this Ordinance, the Director shall issue a certificate of exemption in respect of building works in the New Territories -

(a) for a building to be built by any person and to be used for non-industrial purposes;"

Section 6 provides

"6. Where the Director has issued a certificate of exemption under section 4 or 5 he may also issue -

(a) a certificate of exemption in respect of site formation works"

43. The Certificate of Exemption was in respect of buildings to be used for non-industrial purposes. They cannot imply that approval was given to build a Columbarium.

44. The fact that the Appellant has applied to the Town Planning Board under s.16 is a recognition that planning permission is required. Under s.16(4) the Board

"may grant permission under sub-section (3) only to the extent shown or provided for or specified in the plan"

45. Since there are substantial planning objections to the proposed development, we do not believe that the so-called equity consideration should prevail.

CONCLUSION

46. For the above reasons, we do not believe the proposed Columbarium and memorial garden are desirable from a planning point of view. Accordingly the appeals are dismissed.