

Town Planning Appeal No. 3 of 1991

IN THE MATTER of the Town
Planning Ordinance (Cap.131)

and

IN THE MATTER of Nos. 29-35
Cadogan Street, Hong Kong.

Date of hearing : 23rd March 1992

Date of decision : 11th April 1992

Panel : Mr Robert C. Tang Q.C., J.P. (Chairman)
Dr Nelson Chow M.B.E., J.P.
Dr Lam Kin Che
The Hon Mr Man Sai Cheong
Mr Stephen Cheng Wui Yau

DECISION

This is an Appeal by Forethought Enterprises Limited and True Success Services Limited, the owners of Nos. 29, 31, 33 and 35 Cadogan Street against a Decision on Review of the Town Planning Board ("the Board") refusing to approve their application for permission under Section 16 to develop the properties into a commercial/residential building.

The reason given by the Board in refusing permission under Section 16 is:

"that the application site is within a larger area zoned for comprehensive development and the application, which is a piecemeal development, would frustrate planning intention for the comprehensive development area zone"

2. The owners now appeal to us under Section 17B.
3. Mr R.E. Thompson of R.E. Thompson and Associates appeared for the owners and Mr McNamara for the Board. We have heard representation from Mr

Thompson as well as evidence from the following witnesses called on behalf of the Board:

- (1) Mr Anthony T. K. Kwan, District Planning Officer/RK, Planning Department
- (2) Mr Franklin Chung, Principal Environmental Protection Officer, Environmental Protection Department
- (3) Mr Edwin Chan, Estate Surveyor/Acquisition Section, Building and Lands Department

There was no substantial factual dispute.

4. The properties are within an area covered by the draft Kennedy Town and Mount Davis outline zoning Plan No. S/H1/2 which was gazetted on 5th August 1988 amending an earlier draft Outline Zoning Plan No.S/H1/1. This area comprises two sites, a northern site and a southern site. The properties fall within the southern site.

5. The amendments which were made pursuant to Section 7 shows on item A that

"the site bound by Kennedy Town New Praya, Cadogan Street, Catchick Street and Davis Street at the site at No. 2-10A Davis Street, Nos. 88 – 96 Catchick Street, No. 25 - 35 Cadogan and the Kin Man Street area are re-zoned from 'open space' and 'Residential (Group A)' to 'Comprehensive Development Area'"

6. The amendment also incorporated the notes for comprehensive development area zone which reads as follows:-

“On land specified 'Comprehensive Development Area', the planning application is to be in the form of a master layout plan, accompanied by an explanatory statement, showing;

1. The areas of proposed land uses, the nature, position, dimensions, and heights of all buildings to be erected on the area ...”

7. The background to the zoning of the area as a Comprehensive Development Area ("CDA") is provided by Mr Anthony T.K. Kwan in his statement which was produced as Exhibit 1

- “4. Prior to the gazettal of the draft Plan No. S/H1/2, the Government reviewed the zonings and planning requirements in the area. It was found that most of the existing buildings in the area zoned residential " (A)" were old and in poor condition, and that there was inadequate provision for open space and community facilities. It was therefore recommended that the area be re-zoned "comprehensive development area" to achieve a better layout. To leave the zoning " residential (A) " would have been to invite piecemeal development with no proper provision for integrated open space and community facilities.
5. The amendment to the draft Plan No. S/H1/1 which resulted in a re-zoning to CDA was gazetted on 5th August 1988 in accordance with the provisions of Section 7 of the Town Planning Ordinance. No objections were received, either from the Appellant, or in respect of the land, the subject of this appeal.
6. Prior to the gazettal of the draft Plan No. S/H1/2, the Hong Kong Housing Society was consulted. It indicated it was prepared to undertake the comprehensive development of the subject area.
7. After the draft Plan was gazetted, development guidelines for the whole CDA were prepared and submitted to the Town Planning Board, and were endorsed by the Board on 9th December 1988.
8. These guidelines were subsequently issued to the Hong Kong Housing Society on 17th January 1989. The purpose was to assist the Society in drawing its comprehensive

development proposals for the whole CDA. The guidelines proposed that a large area of CDA be reserved as open space. The site, the subject of this appeal falls within this area.

9. Both the notes to the draft Plan and the guidelines provide for the submission of a Master Layout Plan including an implementation programme for the area zoned CDA. Because the Society is in a position to plan for the development of the whole area, it can comply with this provision. A developer dealing with only part of the area is unable to so comply"

8. For the above reasons, the explanatory statement attached to the draft Plan stated that the area

"is intended for comprehensive development by the Hong Kong Housing Society for commercial/residential use with some Government/institution/community facilities and a large public open space. Tentative programme for the commencement of the project is 1990/91"

9. Section 16(1) provides:

“where a draft plan or approved plan, whether prepared or approved before or after the commencement of the Town Planning (Amendment and Validation) Ordinance 1974 (59 of 1974), provides for the grant of permission for any purpose, an application for the grant of such permission shall be made to the Board”

Section 16(4) provides:

"The Board may grant permission under Section 3 only to the extent shown or provided for or specified in the Plan"

10. It is clear that Section 16 enables an owner to apply for the grant of permission if such grant is permitted by the draft Plan. Section 16 does not entitle a person to challenge the draft Plan. Such challenge must be by objection under

Section 6. Here, no objection was ever made. So insofar as Mr Thompson argued that the area was wrongly zoned as a CDA, we are unable to entertain the argument. Nor can this argument assist Mr Thompson. He argued that given the intended user the southern site should have been zoned as open space and the northern site, residential. If so, his application under Section 16 must also fail.

11. Mr Thompson made two further points.

12. First, he attacks the Comprehensive Development proposed for the CDA by the Housing Society whereby the southern site of the CDA including the properties, would be redeveloped into an open space. It is suggested by Mr Thompson that the southern as well as the northern site could be developed comprehensively in such a way as to provide for some open spaces on both sites. That was the position on the earlier draft Plan S/H1/1. In that case, the properties would fall outside the area designated as open space and could be redeveloped.

13. But as Mr Anthony Kwan said under cross-examination by Mr Thompson, both the northern and the southern sites were zoned CDA to provide flexibility so that the Housing Society may propose a different allocation of open space. More importantly, in our view, what we have to consider is not where the open space should be sited but whether the redevelopment proposed would be compatible with the letter or spirit of a comprehensive development within a CDA. With respect to Mr Thompson, we agree with the Board that to allow such piecemeal development would frustrate the planning intention behind a CDA classification.

14. The other point taken by Mr Thompson is that in the event that we do not permit the proposed redevelopment we should

“instruct the appropriate Government Department to enter into negotiation with the appellants for the immediate purchase of their interest in the site taking into account the full redevelopment potential subject to and with the benefit of any existing tenancies but disregarding the effect of the current Outline Zoning Plan”

15. Quite understandably if they cannot redevelop the properties, the owners wish the properties to be resumed without delay. Resumption has not taken place because the Housing Society has run into difficulty over its proposed development. The reason for that is that the site is only separated by Cadogan Street from the Abattoir, a notorious source of pollution. We understand that the Housing Society would be incorporating measures into their proposed Comprehensive Development which should reduce the impact of the proximity of

the Abattoir. We hope that with such measures, the development can go ahead without delay. Whilst we understand and share the concern of the Environmental Protection Department, we believe since the Abattoir is unlikely to be re-sited until the end of this Century or the beginning of the next, a Comprehensive Development undertaken by the Housing Society if permitted to go ahead is likely to improve the amenity of the neighbourhood by providing much needed open space and recreational facility. Furthermore the present old and not well maintained buildings would be replaced by new buildings incorporating sensible measures for the alleviation of pollution. The alternative to Comprehensive Development would mean that the existing residents will continue to suffer from pollution as well as poor housing and inadequate recreational facilities.

16. Mr McNamara submitted that under Section 16 we have no jurisdiction to direct or instruct Government to enter into negotiation with the owners. Mr Thompson is unable to suggest otherwise. Of course Mr McNamara is right that we do not have jurisdiction so to instruct Government. Our jurisdiction is clearly defined. Under Section 17B, we may

"(8)(b) confirm, reverse or vary the decision appealed against"

17. Since we agree with the Decision of the Town Planning Board, it follows that we must confirm the Decision of the Board and dismiss the Appeal.

18. However, Mr McNamara informed us that prior to the enactment of the Town Planning (Amendment) (No.2) Ordinance and when appeals were to the Governor in Council, there were in place administrative measures whereby in similar situations resumption would take place in the financial year following an unsuccessful Appeal. He did not know whether resumption would follow an unsuccessful Appeal under Section 17B. We are sympathetic to the owners who made the bulk of their purchase before the re-zoning and who, as a result of the re-zoning, have found it impossible to redevelop their land. Furthermore, but for environmental protection reasons, the Housing Society would have embarked on a Comprehensive Development which would have necessitated resumption of the properties. That being the case, we believe the owners' desire that their properties be resumed without delay deserves sympathetic consideration.

19. Lastly, Mr McNamara asks for the costs of the Appeal. In all the circumstances, we believe it would be fairer to make no order as to costs.

20. For the above reasons, we dismiss the appeal and make no order as to costs.