

Sung Dynasty Village Site, Kwai Chung

Panel : Mr Justice Litton, OBE (Chairman),
The Hon. Marvin CHEUNG Kin-tung, JP,
Dr Margaret NG Ngoi-yee,
Dr LAM Kin-che, and
Mr FAN Sai-yee.

Date of hearing : 15th, 16th & 21st July 1992.

Date of decision : 29th July 1992.

The appellant appealed against the Town Planning Board's decision on Review not to approve the planning application for residential/commercial development at Sung Dynasty Site at Kau Wa Keng, Kwai Chung.

Appeal dismissed.

J. McNamara and V. Patel for the Town Planning Board.
Brian P. Clancy of Vincent T.K. Cheung, Yap & Co. for the appellant.

DECISION

Introduction

1. This is an appeal brought under s.17B(1) of the Town Planning Ordinance against a decision of the Town Planning Board (the Board) whereby the Board refused an application by the Appellant for permission to develop the Sung Dynasty Village site located at Kwai Chung for private residential and commercial purposes.

2. The Sung Dynasty site is located within Area 43 in the Kwai Chung Outline Zoning Plan No. S/KC/7 ("KC/7"), in an area marked Comprehensive Development Area ("CDA") on the plan. In the Notes to the plan there are no permitted uses, and an applicant for permission to develop within a CDA is required to prepare a master layout plan for approval by the Board, setting out a variety of matters such as the proposed land use, open space, parking space, landscaping etc.

3. On 20 April 1991 the Appellant through their consultants lodged an application for permission to develop the

site. This was supported by a great deal of material including a master layout plan and a concept plan showing details of an integrated residential/commercial development, providing 725 flats of an average size of 53.65 sq. m. and commercial space totalling 7,111.47 sq. m. There was also a total of 365 parking spaces.

4. On 7 June 1991, this application was considered by the Board in accordance with the provisions of section 16(3). The minutes of the meeting show that, apart from certain technical matters which are no longer of relevance in this appeal, the point of chief concern to the Board was the "comprehensiveness" of the development in the whole CDA. The application for permission to develop was accordingly rejected. The reasons were minuted as follows:

"... the application site is only part of a larger "CDA" zone which is planned mainly for public housing and home ownership scheme developments. The planning for these developments has not yet been finalized. As such, approval of the application might affect the comprehensiveness of the development in the whole "CDA" zone ..."

5. On 5 August 1991 the Appellant applied under section 17(1) for a review of the Board's decision and a review hearing took place on 25 October 1991. The Appellant's representative had, prior to the hearing, been supplied with the Planning Department papers concerning the Appellant's application. Of particular relevance to the review hearing are the following paragraphs in the Planning Department paper:

"12. The main purpose for establishing a CDA in Kau Wa Keng was to provide land for public housing. The intended site for the public housing is located to the North of Lai King Hill Road in the area currently occupied by the Kau Wa New Village and another site to the west of Happy Villa. Objections to the zoning of Kau Wa New Village to CDA have been received.

13. While the land-use disposition shown on the applicant's concept plan provides a useful context for the consideration of the application, it does not adequately address problems relating to the implementation of other development projects within the CDA. The Board may need consider alternative land-use proposals to those included on the Applicant's concept plan. The application is therefore considered to be not comprehensive enough, particularly in relation to implementation of the CDA as a whole.

15. The Planning Department is therefore of the view that the application be rejected as:

(a) the proposal is not comprehensive enough in relation to other land uses in the CDA zone and the co-ordinated implementation of these alternative land uses ..."

6. At the review hearing, the Appellant was represented by a number of persons. The minutes of the review meeting held on 25 October 1991 show that the Appellant's representative addressed the Board on the reasons for rejecting the application, namely, that approval of the Appellant's proposal would pre-empt the Board and planning for the CDA had in fact not yet been finalized. His argument was, in essence, that planning for the CDA had in fact been completed, and there was no incompatibility between the Appellant's commercial/residential development and the proposed public housing sites.

7. The Board came to no decision on the application for review at the conclusion of the hearing on 25 October 1991. The decision was deferred to the next meeting of the Board on 29 November 1991. At this meeting the Board decided to reject the application. The Board's conduct at that meeting, held in the absence of the Appellant's representatives, forms one of the grounds of appeal before us. We will therefore revert to this matter later on. For the purpose of this introductory narrative, we set out the minutes noting the Board's reasons for rejection as follows:

"Members noted that a decision on this application was deferred from the last meeting and it had been considered that decision prior to a comprehensive consideration of land use zoning for the surrounding areas would pre-empt the options of future land use for the area. After further discussion, the Board decided to reject the application on the ground that the approval of the application would affect the comprehensiveness of the development in "CDA" and would be in conflict with the Board's intention to develop the "CDA"."

8. On 7 January 1992 the Secretary to the Board notified the Appellant of the decision made on 29 November 1991 to reject the application, and the reasons for that decision. The Appellant gave notice of appeal under s.17B of the Ordinance. Hence the appeal before us.

Background Facts

9. To appreciate the grounds of appeal advanced by the Appellant, it is necessary to go into some of the background facts.

10. Area 43 in OZP No. KC/7 covers, broadly speaking, the Kau Wa Keng Valley. On the flat land at the bottom of the valley, where it broadens out, is located the Lai Chi Kok Amusement Park and the Sung Dynasty Village. The land is agricultural land. Part of the land is owned by the Appellant or its associated companies and used on the basis of "short term waivers"; part of the land is leased from the Crown on short term tenancies. The valley is divided by a road, the Lai King Hill Road, which forms a loop around the Amusement Park and Sung Dynasty Village. North of the road is located the Kau Wa Old Village, with land titles going back to the beginning of this century, and also the Kau Wa New Village which is sited on Crown Land.

11. Prior to 19 October 1990, when the draft OZP No. KC/7 was gazetted, land use at Kau Wa Keng (Area 43) was governed by OZP No. S/KC/5. There, the land south of the Lai King Hill Road was zoned thus:

(i) The northern portion was zoned commercial, and

(ii) The area covered by the amusement park was zoned "Other Specified Uses: Amusement Park" which meant, in effect, that the only permitted use, for all practical purposes, was that of an amusement park.

12. The part of Kau Wa Keng north of the road covering Kau Wah old village and Kau Wa New Village was zoned "Undetermined" which, under OZP No. KC/5, meant that the development of the land must be subject to the Board's approval.

13. In January 1990 the Appellant appointed a firm of consultants Townland Consultants Ltd ("Townland") to seek the support of the Planning Department for a re-zoning request to the Board to enable residential and commercial development to take place on land owned by the Appellant south of Lai King Hill Road. The Appellant has put in evidence their consultant's minutes of a meeting with Mr Brownlee, District Planning Officer, on 24 January 1990. This is said to be the first recorded meeting with the Planning Department. From these minutes, it is clear that, from the beginning, the Planning Department was not simply focussing upon the area south of the road, to which the re-zoning application was directed, but was viewing the Kau Wa Keng Valley as a whole. Paragraph 3 of those minutes, in part, reads:

"Mr Brownlee explained that the villagers in both the Old and New Villages held differing views on the current land ownership on the land parcels both north and south of road 43/10 (Lai King Hill Road). He did not elaborate further on the issue, but hinted that this was a critical issue in any to comprehensive redevelopment in the area. He did state that the villagers in the new village had indicated to the District Officer that any public housing in the area should be on land south of the road 43/10, because they understood was substantially Government land."

14. From about January 1990 onwards the Appellant put together a team of consultants with a view to proposing to Government a scheme for the development of the area occupied by the Lai Chi Kok Amusement Park and the Sung Dynasty Village. There were many meetings and discussions between Townland, the District Planning Office, the Lads Department and the Housing Department both with regard to the Appellant's rezoning request and also details of the proposed commercial/residential development.

15. Eventually, the rezoning did take place and on 19 October 1990 OZP No. 2/KC/7 was published. This shows that the whole of the Kau Wa Keng valley, including the area occupied by the amusement park south of the road, zoned as "CDA". The amendment to the old plan S/KC/5 was indicated by bold broken lines, identified as Item D on the plan. The explanation for Item D in the schedule of amendments, published on 19 October 1990, states,

"The site to be rezoned from "Undetermined" and "Commercial" to "Comprehensive Development Area" and "Village Type Development"."

16. Although the area within the bold lines covered by

Item D is cut by the loop of Lai King Hill Road, the plan shows "CDA" on both sides of the road. A "hook" symbol links the areas on either side. The evidence of Mr Brownlee, which we accept, is that this is a well-known symbol to indicate that the area north and south of the road is linked from a planning point of view.

17. In the Explanatory Statement accompanying plan No. KC/7 there appears the following paragraph:

"6.4 Comprehensive Development Area: total area 10.76 ha

6.4.1 This zoning covers the Kau Wa Keng New Village and the Lai Chi Kok Amusement Park in Area 43. The area currently occupied by Kau Wah Keng New Village is proposed for a public rental housing estate. The portion south of the village will be developed into a Home Ownership Scheme estate. The existing Amusement Park is proposed to be redeveloped for commercial/residential uses".

One CDA or Two Separate CDA's?

18. When the Appellant made its section 16 application to the Board on 20 April 1991 the application was accompanied by a concept plan which encompassed the whole of the area south of the road. It showed the following:

- (i) The site of the Sung Dynasty Village for 3 residential tower blocks standing on a podium with car parks and commercial space. It also showed the leisure amenities and landscaping at the ground level.
- (ii) To the north of the Sung Village site area there is a site laid out for six residential blocks for the Home Ownership Scheme.
- (iii) A proposed access road serves both the Appellant's commercial/residential development and the Home Ownership Scheme site.
- (iv) To the South of the Appellant's site is an area, adjoining a bus terminus and the highway (Ching Cheung Road), earmarked for government institutional and community use. This is intended to form a noise buffer zone for the Appellant's development.
- (v) In the middle of the area is open space to be landscaped as a public park.

19. It is the Appellant's case that these proposals are totally in accordance with the policy set out in paragraph 6.4.1 of the Explanatory Statement in the OZP, referred to in para. 17 above. The Appellant further says that the proposal as shown in the concept plan is totally comprehensive, and the only CDA relevant in this case is the "southern CDA which lies to the south of the road". Thus, the argument runs, the rejection of the Appellant's plan based upon lack of "comprehensiveness" is fundamentally wrong.

20. The validity of this argument hinges largely, of course, upon the proposition that there were 2 CDAs, one to the north and a separate one to the south of the road. We cannot accept this argument. The rezoning with which this case is concerned is Item D in the schedule of amendments to the previous OZP. This area is clearly delineated by the heavy broken line and is rezoned to "Comprehensive Development Area" and "Village Type Developments". In paragraph 6.4 of the Explanatory Statement, the CDA is said to total 10.76 ha. This covers both the Kau Wa Keng New Village to the north and the Lai Chi Kok Amusement Park to the south. They form part of Area 43. It is difficult to imagine how anyone advising the Appellant could have been misled as regards the extent of the CDA, or could have thought that these were two separate zoning areas.

21. Further, in the minutes of the first meeting produced by the Appellant, Mr Brownlee, the District Planning Officer is recorded as saying:

"Government is planning to use Kau Wa Keng Area for major public housing development to rehouse population decanted from the existing public housing estates in Kwai Chung. In a proposed amendment to the present OZP, the western part of the Valley, and the "C" site north of the Amusement Park is rezoned as "CDA", and the eastern part of the Valley (currently housing the indigenous old village) is retained and rezoned "village type development", including some local open space. Such rezoning proposals have been submitted to the TPB and will be considered again on 9.2.1990".

The reference to the "western part of the Valley" is plainly a reference to the area of the New Village north of the road, whereas the reference to the "C" site "north of the Amusement Park" is a reference to an area south of the road.

22. Further in correspondence between the Planning Office and Townland adduced in evidence, there is reference to "the CDA at Kau Wah Keng" which plainly indicates that the parties were discussing one CDA, not two separate CDAs. We should add here in parenthesis that all the meetings and exchanges of correspondence with Townland seem to have been conducted with Mr Phill Black who, however, did not give evidence at the hearing before us. The witness from Townland who came forward to give evidence was Ms Seddon, Townland's Managing Director, who appeared not to have had first-hand knowledge of these matters. We attach little weight to her statements and opinions.

"Legitimate Expectations"

23. Another argument put forward by the Appellant in support of the appeal is this: para 6.4.1 of the Explanatory Statement in the OZP, whilst admittedly not part of the plan itself, is nevertheless a public statement of policy by the Board. It constitutes a representation as to the Board's current policy on approval or otherwise when dealing with s.16 applications within the four corners of its stated policy. Or, to put the proposition in another way, it runs thus: The policy statement in 6.4.1 raises "legitimate expectations" on the part of members of the public who are minded to make s.16 applications for development within the CDA that the application will be dealt with in accordance with the policy.

24. It would be right, of course, to assume that when the Board published OZP No. KC/7 on 19 October 1990 (containing as it did the Explanatory Statement paragraph 6.4.1) it was proposing at that time to entertain planning applications for private residential/commercial development in the Amusement Part area in accordance with the Statement. If that was not its intention, then para 6.4.1 would indeed have been misleading. The real question is whether, under the statutory scheme of the Town Planning Ordinance, the Board is forbidden to change its mind without either a formal amendment of the Explanatory Statement or a formal re-zoning and re-publication of further amendments to the OZP under s.7(1) of the Ordinance.

25. What must be borne in mind is this: Once the OZP is published under s.5, persons affected by the plan are entitled as of right, under s.6(1), to object "to anything appearing in the draft plan" including, obviously, the designation of an area as "CDA". It would be quite legitimate, for example, for one of the inhabitants of the New Village to propose that the area north of the road be rezoned commercial/residential. Acceptance of the objection under s.6(4) might then have a "knock-on" effect on the area south of the road, and the Board might have to reconsider the land use to accommodate public housing for people "decanted" from redevelopment elsewhere in Kwai Chung.

26. The Board has a statutory duty to give proper consideration to valid objections to the plan. This means that it must consider each valid objection upon its merits and, until the statutory remedies for objections have been exhausted, the Board must keep an open mind. The notion that the Board must adhere to a stated "policy" which, under the statutory scheme, does not form part of the plan itself, is plainly wrong.

27. When the Appellant first made its application for planning permission under s.16 on 20 April 1991, the objections to the plan had by no means been disposed of. Whether the Appellant knew this or not at that time is not clear, but by the time of the review, this must have been perfectly apparent to the Appellant's advisors. For instance, in the Planning Department paper (a copy of which was given to the Appellant before the review hearing) there was a section under the heading "Planning Intention - the Comprehensive Development Area (CDA)" which dealt with a Planning Department proposal for a "generalized framework of land uses for the CDA zone at Kau Wah Keng". The paper referred to this "framework" being used by the Board "as a basis for the consideration of the objections to the zoning, and for the consideration of any s.16 applications".

28. The paper went on to say that "the general land use proposals may have to be revised should the Board decide to amend the plan after consideration of outstanding objections to the CDA zone".

29. Once the Appellant was aware of the possibility of objections, it must then have realised that any application made under section 16 to develop the Sung Village Site would be subject to the resolution of those objections by their dismissal. In other words, for the Appellant to succeed, the Board would have to adhere to the statement in paragraph 6.4.1 in the Explanatory Statement. It is difficult to imagine that the Appellant would have been advised by its advisors to expect such an outcome as a matter of right.

30. Ms Seddon in her written statement tendered in

evidence said: "it is evident to me that the Objections of others in relation to another CDA (that is, the "northern CDA") were allowed to have a knock-on effect resulting in the rejection of the Appellant's proposal". Apart from the error of treating the CDA as split into two separate CDA's (which we have addressed above), the fundamental mistake in Ms Seddon's approach is to assume that no "knock-on" effect is permissible under the statutory scheme. As Mr McNamara, counsel for the TPB, observed in the course of the hearing before us, the Board has separate functions under the Ordinance: (i) the preparation of draft plans for the health, safety convenience and general welfare of the community (section 3) and (ii) the grant or refusal of permission which may be required under any plan (section 16). The Board must sometimes, having regard to the statutory time limits, exercise their two separate functions during the same period of time. The Board cannot ignore its primary functions when exercising the other: that is what the Appellant is suggesting it should do in this case. We agree with this observation.

31. The reality of the position is simply this:

- (i) The Explanatory Statement accompanying the OZP No. KC/7 represented the thinking of the Board at the time of its publication ie. October 1990;
- (ii) By the very process of objections to published draft plans the Board is liable to modify its views concerning land use after the OZP is published;
- (iii) An applicant who puts forward proposals for approval under s.16, before all the objections to the OZP have been dealt with, is taking a risk; it must realize that by the time the s.16 application or the s.17 review comes along, the Board's thinking on land use might have changed;
- (iv) For the Board to subordinate the "health, safety, convenience and general welfare of the community" in the discharge of its functions under s.6 to the private interests of an individual applicant for planning permission under s.16 would be to act contrary to the intent and spirit of the Ordinance.

32. In fact, as things transpired, the Board did re-zone Area 43 in OZP S/KC/8 published on 3 July 1992. The Explanatory Statement now says, in relation to the CDA totalling 10.42 ha at Kau Wah Keng, that it is the area north of the road which is earmarked for private residential development. The area occupied by the amusement park south of the road is proposed for public rental housing and home ownership scheme, development of the area to be carried out by the Housing Authority. One can readily understand the Appellant's disappointment, but such considerations have no place in this appeal.

"Moratorium"

33. As can be seen from what is said above, there was a period of over 8 months between the date of the s.17 review and the published amendment to the OZP.

34. The Appellant's argument is this: the Ordinance lays down a statutory time-table for the Board to deal with applications for planning permission: The Board must within two months grant or refuse s.16 applications, and must within three months hear applications for review. What the Ordinance does not allow, so the argument runs, is for the Board to defer a decision on the s.17 review pending the resolution of objections. We cannot accept the validity of this argument, in the context of this case. It is plain that as early as 7 June 1991 when the Board first considered the Appellant's application the Board was concerned about the competing priorities of public housing and private development: the minutes of 7 June 91 say that the "application is only part of a larger (CDA) zone which is planned mainly for public housing and home ownership scheme developments. The planning for these developments has not yet been finalized".

The Ordinance does not require the Board to make a decision on the day of the s.17 review; but, on the facts before the Board, if the Board were to make a decision on that day, the only decision it could have made was to reject the application; because, once permission is granted to develop the Sung Dynasty site (measuring 8,540 sq m) for private residential development, the flexibility for other solutions for the rest of the CDA would have been greatly prejudiced.

Breach of Natural Justice

35. It was on 16 August 1991 that the Board heard the objectors at a meeting under the provisions of s.6(6). After hearing the objections, the Board decided to defer a decision on the objections so as to examine, among other things, the availability of suitable alternative sites for public housing development. At the same time, the Board decided that a site visit should be organised before further consideration be given to the objections, and the site visit was subsequently scheduled for 29 November 1991.

36. When the Board met, ultimately, on 29 November 1991 and made the decision adverse to the Appellant, it was after the site visit and after the Board had given further consideration to the objections. At that meeting, the Board finally came to the view that, in effect, the "policy" set out in Explanatory Statement para. 6.4.1 should be changed. The minutes of that meeting read:

"80 After further discussion, Members were generally of the view that to satisfy the pressing need to provide decanting sites to facilitate redevelopment of public housing estates in Kwai Chung, the southern portion of the "CDA" together with the bus terminus should be developed for public housing. This was to ensure that sites would be made available quickly".

37. Then later, under a different agenda item, but at the same meeting, the Board gave further consideration to the Appellant's application and decided to reject it.

38. The matter of which the Appellant now complains is this: The minutes, under the agenda item when further consideration was given to the Appellant's application, state that Mr Brownlee was invited to the meeting. Mr Brownlee has testified before us that in fact no information additional to

that presented at the review hearing was given to the Board. We accept his evidence in this regard.

39. The Appellant now argues that had the Appellant been given an opportunity to appear before the Board on 29 November 1991, it would, or at any rate could, have produced evidence to the effect that there was "more than ample space to make everyone happy". In elaboration of this point, the Appellant, through Ms Seddon, argues that part of the area south of the road, together with the CDA portion of the area north of the road, as designated under OZP No. KC/8, would be more than sufficient for the Housing Authority's original plans for 3,774 flats. She further argues that the Appellant's proposal makes better sense from a planning point of view than the Board's proposals as set out in the Explanatory Statement in KC/8.

40. It is difficult for us to judge, upon the limited materials before us, whether the Appellant's argument makes good sense or not from a planning point of view. But, in any case, it seems to us that the argument is misplaced. The re-zoning of Area 43 and the proposals for land use within Area 43 have now been published under OZP No. KC/8. The Appellant is entitled to object to the plan under s.6(1) of the Ordinance. Upon hearing those objections, all the matters concerning land use and planning generally concerning Area 43 can then be entertained by the Board. We are a statutory appeal board, not a planning authority. Unless the arguments and the material before us are such as to convince us that the Board's decision on the s.17 review was wrong, we have no jurisdiction to interfere. The arguments and material fall far short in this case.

41. As we understand the position, all that the Board did on 29 November 1991 with reference to the Appellant's application was to have confirmed its original decision that the planning application should be rejected because to allow it would have affected the comprehensiveness of development in the CDA as a whole and would conflict with the Board's then intentions to develop the CDA. Those "intentions" have now become more concrete and are set out in OZP No. KC/8. If the Appellant objects to the proposals, as it plainly does, it has the opportunity to further change the Board's mind by lodging timely objections.

Conclusion

42. We agree with the decision made by the Board and, under the provisions of s.17B(8)(b) of the Ordinance, hereby confirm the decision appealed against.