

Ma Miu Road, Yuen Long, New Territories.

Panel : Mr Justice Litton, OBE (Chairman),
Mr CHAN Pak-keung, OBE, JP,
The Hon MAN Sai-cheong,
Dr Margaret NG Ngoi-yee, and
Mrs Pamela CHAN Wong-shui, JP.

Date of hearing : 12th, 14th and 16th October 1992

Date of decision : 28th October 1992

The appellant appealed against the Town Planning Boards's decision on review to reject the planning application for Commercial/Residential development at the subject site.

Appeal dismissed.

V Patel for the Town Planning Board
Dennis CHANG for the appellant

DECISION

Introduction

1. Full Look Ltd. ("the appellant") is the owner of five lots of land held under a Block Crown lease in D.D. No. 120. They are at the western periphery of Yuen Long and measure a total 1,265 m². Some of the lots are classified as "house" lots and the others agricultural and garden lots.
2. In relation to the house lots the appellant is entitled to erect "New Territories exempt houses" of 3-storeys, with a covered area no greater than 700 square feet, without any application for the approval of plans being made to the Building Authority. These lots are situated close to Ma Miu Road but have no access to any public road without going over Crown land.
3. These lots were acquired by the appellant in November 1988. At that time there was no statutory plan under the Town Planning Ordinance applicable to the site but there was in existence a Yuen Long Layout Plan prepared by the District Planning Office, available to the public for sale, which showed the site to be within an area marked for Government, Institutional and Community ("G/IC") use.

4. In April 1991 the draft Yuen Long Outline Zoning Plan No. S/YL/1 was published and this showed the appellant's site within an area marked "G/IC". Another area on the opposite side of Ma Miu Road is also marked G/IC and these areas, as they exist at present, consist of low-rise Government offices, schools and a church. The area of Crown land between the appellant's lots and Ma Miu Road contains a number of mature trees.

5. The notes to the draft outline zoning plan relating to "G/IC" zones do not permit flats, offices, retail shops as of right but provide that those uses may be permitted (with or without conditions) on application to the Town Planning Board ("TPB").

Planning Application

6. In August 1991 the appellant made an application to the TPB seeking permission under section 16 of the Ordinance for a commercial/residential development comprising not only the five lots owned by them but also portions of Crown land. The application to the TPB stated :

"Upon planning approval, the developer will apply for a land exchange which will include existing Government plan to make up a total site area of about 2200 m²".

In effect, what the appellant contemplated was a private treaty grant to them of Crown land of about 935m².

7. The drawings submitted by the appellant showed a development immediately adjoining Ma Miu Road consisting of a podium with two towers on top; a 15-storey office tower with gross floor area of 3395 m² and a 20-storey domestic tower comprising 168 flats with a total gross floor area of 9213 m². The podium level showed shop space of 620 m². 30 carparking spaces were proposed.

8. In their written application to the TPB the appellant put forward the following justifications for the proposed commercial/residential development :

(i) Planning Blight :

Although the site is zoned for G/IC use, there is in fact no specific use designated for the site; if the application for C/R use is refused, the redevelopment potential for the site would, in effect, be sterilized for a long time.

(ii) Demand for C/R Accommodation :

There is a scarcity of buildings for commercial/residential use in Yuen Long.

(iii) Optimal Use of Rare Resources :

Many of the G/IC sites in the neighbourhood were "under utilised". To put up a high-rise commercial/residential development would be a "optimal use of rare resources".

(iv) Accessibility :

As the site is located "at the entrance of Yuen Long Town Centre" and also close to bus and LRT stops, it is suitable for commercial/residential use.

(v) Compatibility of Land Use :

There are commercial/residential buildings along Castle Peak Road close to the site. Also, in the "immediate vicinity" there are high density residential and G/IC facilities. The proposed development is therefore compatible with adjacent land use.

(vi) Compatibility of Building Forms :

At the northern part of Ma Miu Road there are medium and high-rise residential buildings. To the east along Castle Peak Road there are other high-rise residential/commercial buildings. The two proposed towers would not only harmonize with the existing building forms in the area but would improve the image of the district.

(vii) Environmental Considerations :

Whilst the residential block would be exposed to high noise level, the office block would act as a noise buffer and act as a screen for a majority of the flats facing the junction of Ma Miu Road and Castle Peak Road.

(viii) Impact on Social Infrastructure :

The increase in residential population (estimated at about 500) would have little impact on the existing infrastructure.

(ix) Traffic Impact :

To minimize traffic impact, only one carparking space for 5 flats is planned, and only 6 carparks are provided for the office and commercial portions of the development. On-site loading/unloading is provided.

9. The appellant's application was considered by the TPB at a meeting in October 1991 when the Board resolved to reject the application on the following grounds :

- "(a) the proposed high-rise commercial/residential development is not compatible with the adjoining low density low-rise "G/IC" development ;
- (b) the proposed development is not in line with the planning intention of the draft Yuen Long Outline Zoning Plan;
- (c) the area is not suitable for residential development due to its exposure to traffic

noise and no noise mitigation measures have been proposed in the submission; and

- (d) the proposed development would involve the cutting of well-grown trees."

Section 17 Review

10. Upon receipt of the TPB's decision to this effect the appellant then made a section 17 application for review. At the review hearing the appellant was represented by professional town planning consultants who, however, put forward no further written material in support of the application. The minutes of the review hearing records the appellant's representatives as saying:

"The present review was not to seek the Board's approval on the submitted scheme but to obtain a clear understanding of the Board's reasons for rejection so that a fresh application could be made to address the issues."

The accuracy of these minutes has not been challenged.

11. After deliberating on the matter the TPB decided to reject the application on review. Hence the appeal to this Board.

The Appeal

12. It will be recalled that when the TPB's approval was first sought under section 16, it was for a C/R development comprising two towers, one commercial and the other residential, standing on a podium. When the appellant went before the TPB on the section 17 review, the appellant seemed to have by then resiled from the original proposal: this much can be seen from the statement made by the appellant's representative as quoted in paragraph 10 above.

13. On appeal to us under section 17B(1) the appellant made clear its change of mind by putting forward what it called a "concept plan" for a commercial/residential development with a 25-storey residential tower standing on a commercial and carpark podium, without an office tower as originally proposed. In an "Appeal Statement" lodged pursuant to the Notice of Appeal, the appellants say this :

"If members of the Appeal Board support that high-rise commercial/residential development is suitable at the subject site, a fresh planning application will be made to address the remaining technical issue such as preservation of trees and mitigation of noise as illustrated in the concept plan".

14. As would be appreciated, this "concept plan" was not the proposal put to the TPB nor was it ever considered by the TPB. To pile hypothesis upon hypothesis, the appellant has also submitted a noise consultants' report which proposed that if the 25-storey residential block should be rotated 25 degrees, that would mitigate the impact of noise from Ma Miu Road and Castle Peak Road.

15. For our part, we cannot see the value of the approach adopted by the appellant. The TPB had rejected the appellant's proposal, as originally put forward, for sound planning reasons.

The first of these reasons were :

- "(a) the proposed high-rise commercial/residential development is not compatible with the adjoining low density low-rise "G/IC" development".

This, as it seems to us, is a valid conclusion upon the evidence. The area formed by the junction of Ma Miu Road and Castle Peak Road, marked GIC, forms a fairly natural planning unit, whether it be treated technically as the "entrance" to the town or not. To the south, at the junction formed by Yuen Long Tai Yuk Road and Castle Peak Road there are areas marked "G/IC" and "open space". The opinion expressed by the District Planning Officer Mr. Paul W.P. Ng, which we accept, is that an "ad hoc" high-rise commercial/residential development would be wholly incompatible with the adjacent development consisting mainly of low-rise buildings such as schools, a church, government offices and a police station.

16. At the hearing before us, counsel for the appellant argued that if one looked a little further, one would see that there are in fact high-rise developments "in the neighbourhood" - including a commercial/residential development to the west of the site, at the junction of Ma Wang Road and Castle Peak Road. Factually that is correct, but in our view, it is so far away that it is irrelevant to the planning considerations for the subject site.

17. Another point advanced by the appellant is this : There had been a proposal, back in about 1988, from the District Office that the site opposite to the appellants', occupied by the Yuen Long Jockey Club Clinic, should be vacated and sold for commercial/residential development to generate income for the Government. This, says the appellant, demonstrates that the District Office did not consider a high-rise commercial/residential development in the immediate area incompatible with its building forms. But, as Mr. Paul Ng explained, this was nothing more than a proposal, and it did not come from the Planning Office. In our view, this matter is irrelevant to the appeal.

18. Having heard the professional views of the District Planning Officer and considered all the evidence and submissions made to us we are satisfied that the decision of the TPB, as expressed in paragraph 15 above, cannot in any way be faulted.

19. The second, equally fundamental, view expressed by the TPB is this :

- "(b) The proposed development is not in line with the planning intention of the draft Yuen Long Outline Zoning Plan."

20. As mentioned in the Explanatory Statement to the outline zoning plan, control of land use is necessary to achieve the objective of "developing Yuen Long into a reasonably balanced new town and a regional centre for the northwest New Territories". For this purpose, it is necessary to set aside areas not only for specific "G/IC" use but also for undesigned G/IC use. There are four such sites within the area covered by the outline zoning plan.

21. The appellant's argument is that this, in effect, renders their site sterilized for redevelopment for the foreseeable future. This may be so. However, the hardship, objectively viewed, is not great, having regard to the fact that the potential for development under the Block Crown lease conditions is in any event limited.

22. The "planning intention" of the draft outline zoning plan is to develop Yuen Long into a "reasonably balanced new town and a regional centre for the northwest New Territories". To achieve this objective there must clearly be undesignated G/IC sites in order to cater for future unforeseen needs. An example cited by Mr. Paul Ng, in the course of his evidence before us, was an old people's home.

23. An argument hard pressed by counsel for the appellant was this : The appellant is entitled, in relation to the house lots, to put up 3-storey New Territories exempt houses without reference to the Building Authority; hence the Appellants are outside the control exercised through section 16(1)(d) of the Buildings Ordinance. Thus, counsel argued, it was better to allow the site to be used for commercial/residential purposes, subject to conditions imposed by the TPB, rather than for uncontrolled use under the New Territories exempt houses policy. When this point was put to Mr. Paul Ng, his answer was to this effect : the maximum development permissible under the New Territories exempt houses policy is a gross floor area of 463 m²; the houses would be low-rise; this is very different from the commercial/residential development put to the TPB which showed a plot ratio of 9.5. Such "ad hoc" commercial/residential use in a G/IC zone was, in the opinion of Mr. Ng, wholly incompatible with the planning concept for the area. We accept Mr. Ng's opinion in this regard.

Traffic Noise and Mature Trees

24. Much effort has been spent by the appellant in attempting to get round the third and fourth objections given by the TPB (as stated in points (c) and (d) set out in paragraph 9 above). A development proposal quite different from that put to the TPB has been put to us with a view to mitigating the impact of traffic noise on the residential block and in an effort to save at least some of the mature trees standing on the strip of Crown land adjoining Ma Miu Road. These matters seem to us wholly academic. This is not a case where the TPB has approved a commercial/residential development subject to conditions (such as adequate noise mitigation proposals and a scheme to preserve the mature trees), and the appellant is appealing against the imposition of those conditions. This is a case where the TPB has plainly rejected the proposal as fundamentally objectionable. We do not see the relevance of the material put to us concerning noise-mitigation proposals and efforts to save mature trees : unless we were to approve "in principle" the use of the site for high-rise commercial/residential development : which we do not.

25. In their "Appeal Statement" the appellant said : "In view of the observations we have made in this appeal, we sincerely hope that the Appeal Board would reconsider Town Planning Board's reasons for rejection and rule that in principle commercial/residential development of the nature and scale as proposed is acceptable within the current planning context".

It is perhaps worth emphasizing that under section 17B(8)(b), of the Ordinance the jurisdiction of the Appeal Board is to "confirm, reverse or vary the decision appealed against". The decision of the TPB was plainly to reject the proposal for commercial/residential development "of the nature and scale as proposed". As to this, we are in total agreement with the TPB.

26. For the reasons above, this appeal is dismissed.