

TOWN PLANNING APPEAL NO. 1 OF 2009

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

IN THE MATTER of an Appeal
under Section 17B by
Ms Sin Lau-yun (represented by
Thomas Tsang Surveyors Limited)

Date of Hearing: 10 September 2009

Date of Decision: 28 October 2009

Town Planning Appeal Board:

Professor Anthony M J Cooray (Chairman)

Dr. Eugene Chan Kin-keung (Member)

Ir. Ng Kwok-chun (Member)

Miss Winnie Ng (Member)

Mr. Louis Pong Wai-yan (Member)

DECISION

- (1) This appeal concerns a failed planning application for permission to build a 2-storey house with the benefit of a minor relaxation of the generally permitted plot ratio.
- (2) The appeal site is in area zoned 'Residential (Group D)', commonly referred to as 'R(D)', on the approved Pak Kong and Sha Kok Mei Outline Zoning Plan No. S/SK-PK/11.

- (3) This appeal arises from the second unsuccessful planning application that the appellant has made in respect of the development of the appeal site. Her first application in 2007 was for planning permission to build a 3-storey house of a plot ratio of 0.54 with the benefit of a minor relaxation of the building height and plot ratio. On 12.10.2007, this application was rejected by the Rural and New Town Planning Committee of the Town Planning Board (RNTPC) on the grounds that the proposed plot ratio and building height were excessive and that granting planning permission would set an undesirable precedent. The appellant did not seek a review of the decision by the Town Planning Board.
- (4) The appellant made a second application in which the number of storeys of the proposed house was reduced from 3 to 2 with a resulting reduction of building height from 8.23m to 6m. The plot ratio was reduced from 0.54 in the previous application to 0.36. This reduced plot ratio of 0.36 being still in excess of the prescribed plot ratio of 0.2, the appellant asked for a minor relaxation of the development restriction.
- (5) On 18.07.2008 this application was rejected by the RTNPC for the following two reasons:
 - (a) The proposed development was not in line with the planning intention of 'R(D)' zone which was for improvement and upgrading of existing temporary structures within the rural areas through redevelopment of existing temporary structures into permanent buildings. The proposed relaxation of plot ration from 0.2 to 0.36 was not considered minor in scale. No strong justifications had been provided to merit a departure from the planning intention; and
 - (b) The approval of the application would set an undesirable precedent for other similar applications within the 'R(D)' zone. The cumulative effect of approving such application would have adverse impact on the infrastructural provision in the area.
- (6) The appellant applied to the Town Planning Board (the Board) for a review of the RNTPC's decision and on 02.08.2008 the Board rejected the application affirming the rejection reasons given by the RNTPC.
- (7) The appellant in her appeal argued that the proposed development was a suitable development in the 'R(D)' zone; that a house of the proposed development density would have no serious impacts on the surrounding area; and that the approval of her application would unlikely set a bad precedent. She also claimed that her personal circumstances deserved special consideration for a favourable decision.

- (8) We begin our assessment of the merits of the present appeal with an examination of the planning intention of the 'R(D)' zone.
- (9) The planning intention of the 'R(D)' zone is set out in the Notes of the Zone as follows: 'This zone is intended primarily for improvement and upgrading of existing temporary structures within the rural areas through redevelopment of existing temporary structures into permanent buildings. It is also intended for low-rise, low density residential developments subject to planning permission from the Town Planning Board'.
- (10) Redevelopment of residential buildings is an 'always permitted' Column 1 use, whereas new residential buildings are Column 2 uses which may not be built without first obtaining planning permission. The proposed house is a new residential development which falls under Column 2.
- (11) Any new development or redevelopment of a 'House' or 'flat' must be within the building height and plot ratio restrictions prescribed in paragraph (b) of the Remarks Column of the Notes of the Zone, namely, maximum height of 6m and maximum plot ratio of 0.2 (except in the case of redevelopment of an existing house where the building area and height of the existing house prevail if greater than the restrictions prescribed in the Notes).
- (12) Paragraph (c) of the Remarks provides that minor relaxation of the height and plot ratio restrictions may be permitted by the Town Planning Board 'based on the individual merits of a development or redevelopment proposal.' The Explanatory Statement in paragraph 9.3.1 explains what the Board is looking for in terms of 'individual merits': *'To provide flexibility for innovative design adapted to the characteristics of particular sites, minor relaxation of the plot ratio and building height restrictions for residential development may be considered by the Board through the planning permission system. Each proposal will be considered on its individual merits'*.
- (13) The words italicized by us set out clearly the principle that governs the Board's discretion in permitting minor relaxation of building density restrictions. The appellant has not submitted any justifications, which are based on innovative design adapted to the characteristics of the appeal site, for minor relaxation. The only justification that her consultant offered related to the personal circumstances of the appellant.
- (14) The appellant's personal circumstances are (a) that her husband has limited mobility and will likely need private vehicular transportation to the proposed new house necessitating parking on site (b) that her daughter after marriage would not be able to afford a house of her own and could

live on the proposed upper floor. It is a well accepted principle of planning law that personal circumstances of an applicant are generally not considerations relevant to a planning application. We do not see any compelling reason to deviate from that principle, keeping in mind that once planning permission is granted the appellant is free to do with the land as she pleases, including sale of the land to an outsider. Having said that, we note that the Town Planning Board had considered these personal circumstances and had decided that the refusal of planning permission would not cause any hardship to her (See paragraph 127 of the Minutes of the confirmed minutes of the 922nd meeting of the Town Planning Board held on 31.10.2008). We also note the uncontested submission of the respondent that according to the prevailing government policy the appeal site is not suitable for private vehicular access and parking, and, that as a result the appeal site may not address her husband's special need. As much as we appreciate that the appellant's request for sympathetic consideration may be genuine, we are unable to conclude that the appellant had made a convincing case for minor relaxation.

- (15) We now consider whether the appellant has made a compelling case that the proposed house of the proposed dimensions is a desirable development. The site itself is not ideally suited to a residential development and the appellant has to rely on the acquisition of some part of the adjoining government land to implement her development proposal. We noted above that it is not the relevant land development policy to permit vehicular access to and parking on the appeal site and similar sites in the area. We also note that the proposed building will necessitate the closing of a footpath which runs through the appeal site and provision of an alternative route. While the appellant has suggested an alternative route running through neighbouring government land, she has not submitted any firm proposal with the approval of the relevant government agencies and to the satisfaction of the affected local residents. In these circumstances we are unable to agree with the appellant that the proposed development is a desirable development in the 'R(D)' zone.
- (16) We now turn to the question of setting a bad precedent. So far, the Town Planning Board has turned down all previous nine applications in the 'R(D)' zone for similar residential developments, except one. That successful application concerned the redevelopment of an existing residential development, an always permitted development under Column 1, which came before the Board only because the developer was seeking permission for minor relaxation of prescribed building restrictions. The Board had consistently followed a policy of not allowing the 'R(D)' zone to be used as if it were a zone intended to promote new private houses. This is understandable: As clearly stated in paragraph 9.3.3 of the Explanatory Statement, 'R(D)' zone 'provides the opportunity and

incentive for private owners or developers to improve and upgrade the area' by encouraging the redevelopment of existing houses, but not the building of new houses. Had the Board granted permission for the presently proposed new development, in the particular appeal site with the relaxed planning restrictions, it will find it difficult to reject similar applications. The Board cannot be faulted for fearing that more of similar applications would follow if its strict stance is relaxed in the present case. We find against the appellant on this ground too, which is closely interwoven with the substantive objections to the application.

(17) In the result we dismiss the appeal without any order for costs.

Professor Anthony M J Cooray
(Chairman)

Dr. Eugene Chan Kin-keung
(Member)

Ir. Ng Kwok-chun
(Member)

Miss Winnie Ng
(Member)

Mr. Louis Pong Wai-yan
(Member)

(譯 本)

城市規劃上訴個案編號：2009 年第 1 號

有關香港法例第 131 章《城市規劃條例》

及

有關單柳潤女士(由曾家裘測量師有限公司代表)
根據條例第 17B 條提出上訴事

聆訊日期： 2009 年 9 月 10 日

裁決日期： 2009 年 10 月 28 日

城市規劃上訴委員會：

Professor Anthony M J COORAY (主席)

陳建強醫生 (委員)

吳國俊先生 (委員)

伍穎梅女士 (委員)

龐維仁先生 (委員)

裁 決

- (1) 本上訴關乎一宗規劃申請不獲批准的個案，案中上訴人申請批准興建一幢兩層高的屋宇，並略為放寬地積比率的限。
- (2) 上訴地點坐落在北港及沙角尾分區計劃大綱核准圖編號 S/SK-PK/11 上的「住宅(丁類)」地帶。
- (3) 上訴人由於第二次提出發展上訴地點的規劃申請不獲批准而提出本上訴。她於 2007 年首次申請規劃許可，以興建一幢三層高及地積比率為 0.54 倍的屋宇，並略為放寬建築物高度和地積比率。2007 年 10 月 12

日，這宗申請被城市規劃委員會鄉郊及新市鎮規劃小組委員會(小組委員會)拒絕，理由是擬議的地積比率及建築物高度過高，批給規劃許可會立下不良先例。上訴人沒有要求覆核城市規劃委員會(城規會)的決定。

- (4) 上訴人第二次提出申請，將擬建屋宇的層數由三層降至兩層，樓高由 8.23 米降至 6 米，地積比率亦由上次申請時的 0.54 倍降至 0.36 倍。這個降低了的地積比率(0.36 倍)仍高於訂明的地積比率(0.2 倍)，因此上訴人要求略為放寬發展限制。
- (5) 2008 年 7 月 18 日，小組委員會基於下述兩個理由拒絕這宗申請：
 - (a) 擬議發展與「住宅(丁類)」地帶的規劃意向不符，該地帶旨在透過把現有的臨時構築物重建作永久建築物，以改善鄉郊地區現有的臨時構築物。建議把地積比率由 0.2 倍放寬至 0.36 倍，幅度並不算小。上訴人並無提供充分理據，足以令城規會偏離規劃意向；以及
 - (b) 批准這宗申請，會為「住宅(丁類)」地帶內的其他同類申請立下不良先例，如這類申請均獲批准，累積影響所及，會對該區的基礎設施造成負面影響。
- (6) 上訴人向城規會申請覆核小組委員會的決定。在 2008 年 8 月 2 日，城規會拒絕有關申請，並確認小組委員會所給予的拒絕理由。
- (7) 上訴人在上訴中辯稱，擬議的發展是「住宅(丁類)」地帶內適合的發展；以擬議的發展密度興建一幢屋宇不會對周圍環境造成嚴重影響；以及批准她的申請不大可能立下不良先例。她亦聲稱其個人境況應獲城規會特別考慮，作出對她有利的裁決。
- (8) 我們在審理本上訴時，首先就「住宅(丁類)」地帶的規劃意向作出研究。
- (9) 「住宅(丁類)」地帶的規劃意向列載於該地帶的《註釋》內，現載述如下：「此地帶的規劃意向，主要是透過把現有的臨時構築物重建作永久建築物，以改善鄉郊地區現有的臨時構築物。設立此地帶的目的，亦是要作低層、低度的住宅發展，但這類發展須獲得城市規劃委員會的規劃許可。」
- (10) 重建住宅樓宇屬於第一欄「經常准許的用途」，但新建住宅樓宇則屬第二欄的用途，未事先獲得規劃許可不得興建。擬建的屋宇是新住宅發

展，屬於第二欄的用途。

- (11) 任何新發展或重建計劃內的「屋宇」或「分層樓宇」，其建築物高度和地積比率不得超逾該地帶的《註釋》內「備註」一欄(b)段所訂明的限制範圍，即最高高度為 6 米，最高地積比率為 0.2 倍；但如重建現有屋宇，而現有屋宇的建築面積及高度已超過《註釋》所訂明的限制範圍，則重建屋宇以有關面積和高度為準。
- (12) 「備註」(c)段規定，城規會「可按個別發展或重建計劃的情況」，批准略為放寬有關高度和地積比率的限制。《說明書》第 9.3.1 段闡釋了城規會如何判斷屬「個別情況」：「為了提供彈性讓發展項目能採用較具創意的設計以配合個別地盤的特點，城規會可透過規劃許可審批制度，考慮略為放寬住宅發展的地積比率及建築物高度的限制；城規會會按個別發展計劃在規劃上優越之處，作出考慮。」
- (13) 上文我們以斜體表示的部分，清楚訂明規管城規會行使酌情權批准略為放寬建築物發展密度限制的原則。上訴人並非以發展項目採用較具創意的設計以配合上訴地盤的特點，作為申請略為放寬發展限制的理據。上訴人的顧問所提出的唯一理據，只關乎上訴人的個人境況。
- (14) 上訴人的個人境況如下：(a)她的丈夫行動不便，很大可能需要把私家車泊在擬建新屋的地點，以方便出入；及(b)她的女兒婚後無法獨力置業，她將可住在擬建屋宇的上層。根據規劃法規，一個廣為接納的原則是申請人的個人境況一般不會被視為規劃申請的考慮因素。我們看不到有任何具說服力的理由足以偏離這個原則，而尤其須注意的是，一旦批出規劃許可，上訴人便可隨意使用有關土地，包括向外人出售土地。雖然如此，我們得悉城規會曾考慮這些個人境況，並裁定拒絕批出有關規劃許可並不會令申請人陷入困境（見城規會於 2008 年 10 月 31 日舉行的第 922 次會議已獲通過的會議記錄第 127 段）。我們亦注意到，答辯人在其不具爭議的陳詞中指出，根據政府的現行政策，上訴地點不適合作私人車輛通道及泊車，因此在上訴地點建屋或未能解決上訴人丈夫的特別需要。縱然我們相信上訴人要求恩恤考慮其申請所提出的理由屬實，但我們不能就此作出定論，認為上訴人已提出充分理據，足以讓當局批准略為放寬限制。
- (15) 我們現考慮上訴人提出的理據是否足以說服我們擬議興建的屋宇屬於適當的發展。該地點本身不是住宅發展的理想地點，上訴人須透過收購毗鄰一部分政府土地才能落實她的發展建議。我們在上文已備悉，相關的土地發展政策並不准許車輛進出及停泊在上訴地點及區內同類地點。我們亦注意到，如興建該屋宇，則須關閉穿越上訴地點的一條

(譯 本)

行人徑，再另闢一條通道。雖然上訴人建議在鄰近的政府土地闢建另一條通道，但她沒有提交任何已獲有關政府機關批准並令受影響的本地居民滿意的實質建議。在這個情況下，我們未能同意上訴人所指，擬議的發展項目是「住宅(丁類)」地帶內適當的發展。

- (16) 我們現轉談立下不良先例的問題。到目前為止，城規會已全部駁回有關在「住宅(丁類)」地帶內進行同類住宅發展的九宗申請，只有一宗例外。該宗成功的申請關乎重建現有住宅發展，屬第一欄「經常准許的用途」，而有關發展商只是向城規會申請批准略為放寬所訂定的建築物限制。城規會一向遵循的政策，是不讓「住宅(丁類)」用途的地帶被用作供人興建新私人屋宇。這點可以理解：正如《說明書》第 9.3.3 段所述，設立「住宅(丁類)」地帶為私人業主或發展商提供機會，鼓勵他們透過重建現有屋宇而非興建新屋宇，改善和提升區內的居住環境。倘若城規會批准上訴人在上訴地點進行擬議的新發展項目，並放寬有關的規劃限制，城規會將難以拒絕其他同類申請。城規會如對本案不堅守一貫立場，恐怕更多同類申請會隨之而來，城規會有此憂慮亦屬合理。我們亦基於此理由駁回上訴人提出的上訴，有關理由與其他實質反對理據息息相關。

- (17) 結果，我們裁定駁回上訴，並不作出訟費方面的命令。

(已簽署)

Professor Anthony M J COORAY

(主席)

(已簽署)

陳建強醫生
(委員)

(已簽署)

吳國俊先生
(委員)

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伍穎梅女士
(委員)

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