

TOWN PLANNING APPEAL NO. 2 OF 2008

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

IN THE MATTER of an Appeal
under Section 17B by
Larkincil International Limited
(represented by Haldanes Solicitors &
Notaries)

Date of Hearing: 13 & 20 November and 8 December 2008

Date of Decision: 25 February 2009

Town Planning Appeal Board:

Professor Anthony M J Cooray (Chairman)

Mr. Paul Chan Kam-cheung (Member)

Mr. Chung Chi-leong (Member)

Ms. Ellen Lau Hat-lan (Member)

Ms. Monin Ung (Member)

DECISION

1. The appeal relates to three New Territories Exempted Houses (NTEH) or what are commonly known as Small Houses, which are built together in one building, situated in an area marked "Village Type Development" zone ("V" zone") on the approved South Lantau Coast Outline Zoning Plan

(OZP) No. S/SLC/14. The appellant currently operates an international school on the ground floor of the three NTEHs in this building, for the purpose of which planning permission is not required because “school” use is always permitted on the ground floor of a Small House. The appellant wished to expand the school use to the first and second floors of this building and applied for planning permission, “school” use being a Column 2 use in relation to upper floors of an NTEH. The application was rejected by the Rural and New Territories Planning Committee (“RNTPC”) and the application to the Town Planning Board for review was equally unsuccessful.

2. The reasons given by the Town Planning Board for the rejection of the application for review were:
 - a. the proposed development is not in line with the planning intention of the “V” zone which is primarily for development of Small Houses by indigenous villagers. No strong justification has been provided in the submission for a departure from the planning intention; and
 - b. the three existing NTEHs are designed and built for residential use. There were technical concerns relating to the building structures and provision of means of escape. No sufficient information has been provided in the submission to demonstrate that the NTEHs are suitable for school use and there are proper facilities within the existing premises for school operation.
3. These rejection reasons are similar to the rejection reasons which had been given by the RNTPC in the first instance, except that the Town Planning Board added a new sentence in paragraph (b): “There were technical

concerns relating to the building structures and provision of means of escape”.

4. The appellant contested the validity of both reasons. In relation to the first reason, the argument was that there was no deviation from the planning intention and that there were no strong objections of a planning nature to the use of the building as a school. In relation to the second reason, it was argued that the technical concerns relating to suitability of the building for school use related to the implementation of planning permission and were not relevant in determining whether or not to grant planning permission.

Compatibility of School Use in a “V” Zone

5. We had the advantage of visiting the site and have formed the view that the operation of a school on the appeal site is not incompatible with its neighbourhood. The appeal site fronts the main road and faces a wide swathe of bare land of at least 400 meters, which falls within a preservation zone. If you stand facing the road you will see to your right several blocks of buildings fronting the road. These buildings are clusters of NTEHs and are put into commercial uses such as holiday bungalows. If you walk past these buildings you will reach a small parking bay for buses and other vehicles, where you will see a purpose built school (Pui O Primary School), a restaurant and a few shops.
6. To the left of the appeal site and behind it are several NTEHs. Many of these NTEHs have on their ground floor commercial uses such as an iron-mongery and a publishing business.

7. The appeal site itself—all three floors of the three constituent NTEHs—had been in the past used as a hotel, illegally converted to operate as one building, but later left vacant. There is no evidence that the appeal site has ever been used as NTEHs for residential purpose.
8. In this context, it is hard to believe that the use of the appeal site as a school is going to be a significant source of annoyance to the neighbourhood. The villagers seem to be oblivious to an iron-mongery, which is next to the appeal site, and “which operates daily with noisy machines” (see RNTC Paper No A/SLC/86, para. 9 “Public Comments During Statutory Publication Period”, item (d)).
9. The proposed school is what is called an international school and will not compete with the Pui O Primary School which is a local school.
10. What the appellant proposes is the expansion to the upper floors of a use which is always permitted on the ground floor, and it is difficult to accept the argument that mere intensification of such an acceptable use is contrary to the planning intention of the zone.
11. For these reasons, we are of the view that the proposed use is justifiable from a planning point of view.

Technical Objections to the Proposed Extension of School Use

12. The appellant argued that the task of the Town Planning Board is only to determine whether a proposed Column 2 use is acceptable from a planning point of view and that the Town Planning Board must not be concerned

with considerations which are within the jurisdiction of other government agencies such as the Buildings Department or the Environmental Protection Department. We do not agree. Over the years, the phrase “considerations material to the determination of a planning application” has acquired a wide meaning, encompassing within it any considerations relating to “use and development of land.” Indeed, the practice of the Town Planning Board has been to consult the relevant government agencies such as the Transport Department and Environmental Protection Department to determine whether there are any objections to the application.

13. The Town Planning Board not only may, but must, take into account all relevant considerations, such as in this case, suitability of the building for the proposed use, likely environmental, traffic, drainage, public safety impacts and other similar impacts. If there is a likelihood of such impacts which seriously militate against the grant of planning permission, the Town Planning Board must consider whether such impacts can be altogether avoided or adequately mitigated. It is only where such impacts are unavoidable or uncontrollable that rejection of planning permission is justified. Of course, the applicant has a responsibility—we judiciously avoid using the litigation language of burden of proof—of satisfying the Town Planning Board that he is able to take adequate preventive or mitigation measures.
14. There do not seem to be universal objection to the proposed development: the Buildings Department appears to say that in order to give its approval, it needs some clarifications regarding some fundamental technical issues and that if a lease modification is granted, it would review the application for certificates and notices which are required under the Education

Ordinance; the Transport Department has no in-principle objection to the application; the Director of Fire Services has no objection but requires certain requirements to be met; other government agencies, including the Environmental Protection Department, have no comments or objections.

15. In the present case, as appearing from the second rejection reason, the Town Planning Board identified some obstacles to the favourable consideration of the application:

- a. technical concerns relating to the building structures and provision of means of escape;
- b. inadequacy of information to demonstrate that the block of three NTEHs is suitable for school use;
- c. inadequacy of information to demonstrate that there are proper facilities within the existing premises for the school operation; and
- d. if the three NTEHs are enjoined with common access, they will cease to be NTEHs. Such conversion is illegal, unless a lease modification is granted.

16. Having carefully considered the arguments raised by both parties and having evaluated the evidence of the expert witnesses, it appears to us that:

- a. it cannot be said with firm certainty that the concerns relating to building structure and provisions of means of escape are insuperable;

- b. there is a likelihood that the applicant may be able to satisfy the Education Bureau that the three NTEHs together are suitable for school use;
- c. there is a likelihood that the applicant may be able to satisfy the Education Bureau that adequate school facilities can be provided; and
- d. there is no definite statement from the Lands Department that a lease modification will not be granted for school use, even if all other obstacles to the operation of a school are overcome.

17. The appellant appears to us to be an experienced school operator. Several measures have been taken to address concerns relating to building safety, recreational facilities and to accommodate genuine concerns of the villagers. A short term tenancy for the use of government land for use as school playground has been granted, which would not have been possible if there were serious environmental concerns. The appellant has evidence to show that the building is structurally suitable for school use—which the Buildings Department is free to reject if they are not convinced—and the appellant has a proposal for fire exits, which appears to be acceptable under the Buildings Department's Practice Notes for Authorized Persons and Registered Structural Engineers—again, the Buildings Department has discretion to reject the application, unhindered by this grant of planning permission.

18. Even if the appellant overcomes all the technical difficulties, the Education Bureau has to permit the extension of the school to the upper floor—again, a discretion which is not affected by this grant of planning permission.

19. The relevant authorities, such as the Buildings Department, Fire Services Department and the Education Bureau are able to determine the suitability of the building for school use, taking the information provided by the appellant into account together with any other relevant considerations. In order to facilitate a quick resolution of these technical issues as well as the settling of the question of whether the Education Bureau should permit the use of the building for a school, we hereby grant planning permission for the use of the appeal site (all three floors of the three adjoining NTEHs) as a school.

20. We also wish to record that if planning permission is refused, there is no real likelihood that the upper floors of this building will be put to residential use by indigenous villagers. This building was vacant, after an initial period of its use as a hotel, until the appellant acquired it. The upper floors are likely to remain vacant if planning permission is refused. We also wish to note that there do not appear to be other alternative sites nearby to which the appellant can relocate.

Professor Anthony M J Cooray
(Chairman)

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(Member)

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