

## **TOWN PLANNING APPEAL NO. 3 OF 2008**

**IN THE MATTER** of the  
Town Planning Ordinance (Cap. 131)  
and  
**IN THE MATTER** of an Appeal under  
Section 17B by  
MTR Corporation Limited (represented by  
Messrs Deacons)

**Date of Hearing:** 11 and 12 May, 8 and 9 June 2010

**Date of Decision:** 28 June 2010

**Town Planning Appeal Board:**

Professor Anthony M J Cooray (Chairman)

Mr Paul Chan Kam-cheung, JP (Member)

Professor Chau Kwong-wing (Member)

Professor Barnabas Chung Hung-kwan (Member)

Mr Lo Pui-yin (Member)

### **DECISION**

1. This appeal arises from a decision of the Town Planning Board (TPB) to grant planning permission for the revision of an approved master layout plan for a Comprehensive Development Area (CDA) zone, known as the Union Square, situated in the West Kowloon Reclamation area, and served by the Kowloon Station for the Airport Express Line and Tung Chung Line.

## The Planning History

2. The appeal site is situated within an area zoned CDA on the draft South West Kowloon Outline Zoning Plan No S/K20/19, which was in place at the time of the present planning application.
3. The notes relating to the relevant CDA zone provides that the planning intention of the zone is to promote comprehensive development or redevelopment of the area for residential and/or commercial uses with the provision of open space and other supporting facilities. The intention of the zoning is to facilitate appropriate planning control over the development mix, scale, design and layout of development, taking into account various environmental, traffic, infrastructure and other constraints.
4. The notes of the CDA zone provides that an application for development in a CDA zone must be accompanied by a master layout plan, unless the TPB directs otherwise. It must be noted that there are no Column 1 Uses, or “always permitted uses” in a CDA zone. No development may be undertaken in a CDA zone unless the proposed development is listed in column 2 of the Notes of that zone and planning permission has been obtained for it.
5. The first planning application for the comprehensive development of the CDA zone in question, accompanied by a master lay out plan, was approved by the Metro Planning Committee (MPC) of the TPB in July 1994. That application envisaged seven development packages, including 4 residential

development packages, a hotel/service apartment package, a shopping mall package and a commercial development package. Only the commercial development, International Commerce Centre, remained under construction.

6. Since the approval of the original planning application, 26 revisions of the master layout plan have been approved by the TPB. This appeal relates to the 26<sup>th</sup> approved revision. The grievance of the appellant is that the grant of planning permission for the 26<sup>th</sup> revision is accompanied by certain conditions which they are unwilling to accept.

#### The present application

7. The present application was made in order to provide alfresco dining facilities annexed to the existing restaurants in Elements, the shopping mall, on the podium roof level. As outside seating accommodation would be in an area designated “private open space” on the master layout plan, the appellant was advised to apply for planning permission in order for it to facilitate alfresco dining.
8. On 18 January 2008, the MPC of the TPB approved the application, but only for a temporary period of three years. The permission was subject to two conditions, one of which related to the provision of fire service facilities. That condition has been complied with and is not in issue. The second condition restricted the operational hours of the alfresco dining service.

9. The appellant applied to the TPB by way of review to remove the three-year cap on the life of planning permission and the operational hours condition, which provided that:

“The operation hours of the proposed alfresco dining facilities should be restricted from 7:00 am to 11:00 pm daily during the planning approval period”

The planning permission further provided, by way of a condition, that if the operational hours condition was not complied with during the planning approval period—namely the three year temporary period—“the approval hereby given should cease to have effect and should be revoked immediately without further notice”.

10. The TPB refused the review application and affirmed the MPC’s conditional grant of planning permission for the following reasons:
  - a. the potential nuisance brought to the local residents is a major concern that needs to be addressed. The restriction on operation hours of the proposed alfresco dining facilities from 7:00 am to 11:00 pm under approval condition (a) is one of the appropriate measures to minimize the potential nuisance; and
  - b. in order to monitor the operation of the proposed alfresco dining facilities and the effectiveness of any management measures to minimize potential nuisance, it is considered appropriate to grant the approval on a temporary basis for a period of three years.

11. As a result:
  - a. the appellant has planning permission from 19 January 2008 till 18 January 2011 for the purpose of providing alfresco dining in the appeal site;
  - b. alfresco dining facilities can be provided only during the hours 7:00 am to 11:00 pm; and
  - c. if there is a non-compliance with the operational hours condition, the planning approval ceases to have effect and is liable to be revoked immediately without further notice.
  
12. The key planning condition is the operational hours condition. The three-year cap on duration of planning permission and the immediate revocation condition were intended to monitor and control adverse noise impacts. It follows that if the operational hours condition is proved to be unsupportable, the other two conditions would fall with it. Therefore, we will pay attention mainly to the operational hours condition.

The need for a restriction of operational hours

13. Being an outdoor activity, alfresco dining has the potential to generate noise. Mindful of this, the appellant commissioned a noise impact assessment which it submitted to the MPC — a report which appears to have been accepted by both the MPC and the TPB.

14. We now turn to the views of the Planning Department as presented to the MPC. The Planning Department had no objection to the application, and indeed no agency — including the Environmental Protection Department— had any objection to the approval of the planning application (See paragraph 11.1 (e) of MPC Paper No A/K20/102). The Planning Department raised no objection to the application because:
- a. the proposed use was in line with the planning intention of the CDA zone;
  - b. the proposed use was compatible with the uses in the adjacent building;
  - c. the use of a small area of the private open space for alfresco dining had no impact on the provision of adequate private open space in the CDA zone;
  - d. there were no potential adverse noise impacts; and
  - e. there were no adverse traffic or infrastructural impacts. (See paragraph 11.1 (a) to (e) of MPC Paper No A/K20/102).
15. In relation to potential impacts—particularly noise impacts—the Planning Department made the following comments:

“The proposed dining area is located closer to the non-noise sensitive developments such as office and hotel/service apartments and is basically screened off by the 2-storey pavilion structure at the podium. The nearest residential cum hotel and service apartment development to its west . . . which has adopted curtain wall design would be about

30m away from the premises. All other residential developments would be at least 87m away. Based on the noise impact assessment submitted by the applicant, no adverse noise impact is anticipated. [The Director of Environmental Protection] also advises that noise emitted from isolated noisy events at places used for alfresco (outside) dining areas is amenable to the Noise Control Ordinance. (See paragraph 11.1 (d) of MPC Paper No A/K20/102)”

16. The Planning Department referred to comments—some favourable and some unfavourable—on the planning application that had been received from local residents and concerned citizens and concluded: “Since the alfresco dining area is small in scale and at a distance to the residential flats, nuisance would not be anticipated. Nuisance would be overcome by good management of the shopping centre”. (See paragraph 10.4 of MPC Paper No A/K20/102)
17. The Planning Department, though satisfied with the arrangements in place to control potential adverse noise impacts, proposed an operational hours restriction to allay public concerns. It stated: “However, to address public concerns and to ensure that the potential nuisance by the proposed alfresco dining facilities to the residents at night time would be kept to minimal, it is recommended that an approval condition to restrict the operation of the alfresco dining facilities from 7:00 am to 11:00 pm daily be imposed. As advised by Director of Food and Environmental Hygiene (DFEH), restriction on the operation hours of the proposed dining facilities can also be imposed through the application for liquor and/or restaurant licences”. (see paragraph 11.1 (d) of the MPC Paper No A/K20/102)

18. It appears from the minutes of the MPC that the committee decided to impose an operational hours condition—along with a three year limitation and an immediately revocation condition—because of local concerns regarding potential noise nuisance.
19. When the TPB reviewed the decision of the MPC, the Planning Department did not support the application for review because the operational hours condition was “one of the appropriate measures to minimize potential nuisance to local residents.”

#### Grounds of Appeal

20. The principal ground of appeal was that on the assumption that there was a need for a restriction of operational hours as a check on potential noise impact, there was an alternative regulatory regime, which was fairer and more efficient than the control imposed by way of a planning condition.
21. The unfairness of the operational hours condition arises this way: Having obtained planning permission, the developer of the Union Square lets restaurant operators use the appeal site for alfresco dining or outside seating accommodation. If any of the operators were to breach the operational hours condition the planning permission would cease to have effect and be revoked. As the appellant rightly pointed out, not only the defaulting restaurant operator, but all restaurant operators would lose the right to use the premises for alfresco dining any more. On the other hand, if the planning permission

is not subject to an operational hours condition, each individual restaurant operator would have operational hours conditions imposed on him by the licensing authority. If any operator were to act in breach of such conditions, the licensing authority would take enforcement action against such operator, leaving other compliant operators unaffected.

22. The appellant illustrated the efficiency of the control regime which operates outside the Town Planning Ordinance in the following manner. In 2002, the government introduced a scheme of Outside Seating Accommodation (OSA) in order to facilitate and regulate outdoor dining which had become very popular in Hong Kong. From the beginning the OSA scheme was regulated by the DFEH through licensing. The DFEH, in the exercise of his powers under the Public Health and Municipal Services Ordinance Cap 132, deals with applications for the use of an open area adjacent to a restaurant for alfresco dining. The DFEH may grant permission subject to conditions, including operational hours. He has the power to suspend or cancel such a licence for contravention of conditions. There is a right of appeal to a Licensing Appeals Board. (See Part XIB of the Ordinance.) The DFEH has adopted a number of key criteria to assess applications and one of them is that the operation of OSA should not create any environmental nuisance such as noise nuisance.

23. While the usual operational hours that are permitted by the DFEH for OSA purposes are 11:00 am to 11:00 pm, this condition may be modified on individual merits. In processing an application the DFEH takes into account comments made by various government agencies such as the Planning

Department, the Fire Services Department, the Buildings Department and the Transport Department regarding compliance with relevant statutes. The Planning Department advises the DFEH whether planning permission needs to be obtained for the purpose of providing OSA. The Environmental Protection Department advises the DFEH regarding any potential environmental issues. The Home Affairs Department consults the public and advises the DFEH on public views including any objections to the proposed OSA. If DFEH considers that it might reject an application because of public objections, the applicant has a right to make representations to the DFEH. Considering that there is a right of appeal against decisions taken by the DFEH, the regulatory regime centering around the DFEH appears to be efficient, effective and fair.

24. As regards the operational hours, we can see the following differences between the imposition of a planning condition and the exercise of control under the restaurant licensing system:
  - a. the planning condition lays down a strict limit on operational hours, 7:00 am to 11:00 pm, while the DFEH may relax the usual condition that operational hours must be between 11:00 am and 11:00 pm;
  - b. the Town Planning Ordinance does not provide for regular monitoring of the implementation of planning conditions and a statutory scheme for enforcement. (The Director of Planning has statutory enforcement powers in respect of unauthorized developments in a Development Permission area or an Outline Zoning Plan area which was previously

governed by a Development Permission Area plan. The appeal site is not in an area governed by such a plan);

- c. the immediate revocation condition, as shown above, may operate against the interest of all restaurant operators in the Union Square. The DFEH, on the other hand, issues licences to individual restaurant operators and exercises regulatory control over individual operators; and
- d. the OSA scheme provides a “one-stop” licensing service coordinated by the DFEH. Whereas, a planning condition is imposed by the TPB and monitored by relevant government agencies, with some coordinating role played by the Planning Department.

Does the TPB have power to impose a planning condition relating to operational hours?

25. The appellant conceded quite rightly that the TPB has statutory power to impose an operational hours condition, provided that it satisfies the common law rules relating to validity of planning conditions, such as necessity and reasonableness. The appellant contended that the operational hours condition was unreasonable because:

- a. the hours are inflexible, there being no provision for modification based on individual merit; and
- b. a breach of that condition by one operator will take away the livelihood of all OSA operators in the Union Square.

26. We have no doubt that the TPB may impose an operational hours condition on a planning permission it grants. However, in the present case we believe that the condition is unsustainable because of the existence of an alternative regulatory system which is efficient, effective and fair. The OSA scheme has been kept under review by the government and the system has been improved periodically based on extensive consultation.

May a Planning Authority leave regulatory matters to other government agencies in place of imposing a planning condition?

27. It is now a well settled principle of planning law that a planning authority must, in determining whether to grant planning permission, consider the existence of other regulatory regimes relevant to the implementation of the planning permission if granted. This does not mean that the TPB must slavishly defer to other regulatory regimes. In *Gateshead MBC v Secretary of State for the Environment* [1994] Env LR 11 the Secretary of State had granted planning permission for a clinical waste incinerator. The Secretary of State was satisfied that the incinerator complied with all statutory requirements and observed that the environmental control regime could address any remaining concerns relating to adverse environmental impacts. Referring to the controls available under the Environmental Protection Act 1990, he said that in his view it was not the role of the planning system to duplicate controls under the Environmental Protection Act. Upon a challenge of the grant of planning permission, Deputy Judge J Sullivan QC considered when a planning authority is justified in refusing planning permission on account of environmental considerations. At page 23 he said:

“It is clear beyond doubt that the environmental impact of emissions to the atmosphere is a material consideration at the planning stage. ... But, just as the environmental impact of such emissions is a material consideration, so also is the existence of a stringent regime under the EPA [Environmental Protection Act] for preventing or mitigating that impact and for rendering any emissions that impact and for rendering any emissions harmless. It is too simplistic to say ‘the Secretary of State cannot leave the question of pollution to the EPA’”.

28. The present appeal does not relate to a refusal of planning permission. It concerns a grant of planning permission subject to conditions. Adopting the *Gateshead* approach the right questions to ask in the present case would be these:

- a. Is the proposed development desirable in the context of land-use planning?
- b. If so, does the TPB consider that while the proposed development merits approval there is a likelihood of adverse impacts, which could be prevented or mitigated?
- c. If so, who has the power to monitor and regulate the proposed use when approved?
- d. If both the TPB and some other agency have such power, should the TPB exercise such power or leave it to be exercised by the other agency?

29. In the present case the TPB opted to assume authority to monitor the implementation of the planning permission for alfresco dining. The appellant argues that there is a regulatory regime which is more appropriate than the planning law regime to monitor the provision of alfresco dining — a use which is in line with the planning intention of the CDA zone.
30. After careful consideration of the effectiveness and appropriateness of the licensing regime, we are of the view that if planning permission is granted unconditionally, there is no risk of unregulated noise impacts. The removal of the operational hours condition does not lead to an uncontrolled use of the appeal premises for alfresco dining. The licensing regime will step in and impose conditions, including those relating to operational hours, and provide an efficient, effective and fair system of control, taking account of local objections.
31. We wish to make it clear that it is not our view that the TPB should as a matter of course defer to other regulatory regimes.
32. In *R (on the application of Blackwood) v Birmingham Magistrates and Birmingham City Council and Another* [2006] EWHC 1800 (Admin), the Court considered whether it was appropriate for a planning authority to leave matters of operational hours to the licensing authority. At para 59 Deputy Judge Kenneth Parker QC said: “There are, of course, dangers in laying down any hard-and-fast rule, for the field is complex and there is likely to be a multiplicity of situations. Naturally, I am not saying that the planning authority may not, in appropriate circumstances, impose conditions on

granting planning permission for licensed premises that concern operational matters. But there may be many circumstances where the planning authority could properly leave such matters to be regulated by the licensing authority. If the planning authority has not dealt with an operational matter, such as opening hours, the licensing authority, having regard to licensing objectives, has the primary task of determining what conditions should be imposed. Each case has to be considered upon its own facts”.

33. We hold as follows:

- a. planning permission is granted on the terms of the planning application, without any condition regulating operational hours;
- b. following from the removal of the operational hours condition, the immediate revocation condition is otiose and, therefore, removed; and
- c. since the regulatory control relating to the observance of licensing conditions is in the hands of the licensing authorities, limitation of the life of the planning permission to three years serves no useful purpose. That condition too is removed.

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Professor Anthony M J Cooray  
(Chairman)

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