Summary of Judgment

Hong Kong Resort Company Limited (the "Applicant")

v

Town Planning Board (the "TPB")

HCAL 645/2017; [2020] HKCFI 1956

Decision	**: Application for Judicial Review allowed**
Dates of Hearing	**: 22 – 23 November 2018**
Date of Judgment/Decision	**: 7 August 2020**

Background

1. The Applicant is a developer of Discovery Bay, the development of which is governed by an Outline Zoning Plan (the "**OZP**"). By an application under s. 12A of the Town Planning Ordinance (Cap. 131), the Applicant asked the TPB to amend the OZP by rezoning Area 6f therein (the "**Site**") from "Other Specified Uses" annotated "Staff Quarters (5)" (OU(SQ)) to "Residential (Group C)(12)" (the "**Application**").

2. The Application was considered by the TPB at a meeting held on 23 June 2017. By its decision on the same date (the "**Decision**"), the TPB refused the Application for the following two reasons:

   (a) There is scope for further residential development under the OZP, as the total maximum domestic gross floor area ("**GFA**") allowed has yet to be realized (the "**Unused GFA**" factor); and
   (b) Approval of the Application would set an undesirable precedent for other similar rezoning applications, the cumulative impact of which would further depart from the original development concept and overstrain infrastructure capacities (the "**Undesirable Precedent**" factor).

3. Since 2001, the development of Discovery Bay is subject to the dual control of the OZP by the TPB, and the Master (Layout) Plan (the "**MP**") by the Lands Department (the "**LandsD**"). In 2001, while preparing the first draft of the OZP, the Government had agreed in principle to the Applicant's proposed additional GFA of 124,000m^2. Later in June 2002, the Applicant submitted a draft MP to the LandsD to incorporate the additional GFA of 124,000m^2 reflected in the OZP, but such draft MP remained unapproved. Hence, the Applicant had not been able to undertake any development utilizing those additional GFA.

Main issues in dispute

4. In seeking to have the Decision quashed, the Applicant put forward the following grounds:-

   (a) the TPB had taken into account an irrelevant consideration, i.e. the Unused GFA factor ("**Ground 1**");
   (b) the TPB had failed to take into account relevant facts and planning considerations ("**Ground 2**");
   (c) the TPB had failed to discharge its *Tameside* duty to investigate whether the proposed increase in the total planned population by 1,190 was consistent with the planning intention of the Discovery Bay ("**Ground 3**");
   (d) the TPB had misapplied the concept of "undesirable precedent" to the Application ("**Ground 4**"); and
   (e) Whether the TPB had abdicated its function by the wholesale copying of the reasons suggested by the Planning Department (the "**PlanD**") ("**Ground 5**").

Department of Justice's Summary of the Court's rulings

(Full text of the CFI's judgment at *https://legalref.judiciary.hk/lrs/common/search/search_result_detail_frame.jsp?DIS=130050&QS=%2B&TP=JU*)

5. The judicial review was allowed on Grounds 1 to 4, but not Ground 5.

Grounds 1 and 2

6. On Ground 1, while the TPB should assess the Application in the context of general planning intention of the development for Discovery Bay, the Court did not agree with the TPB that the Unused GFA factor was a relevant planning consideration. (Paragraphs 56-57)

7. The TPB did not reject the Application on the basis that it was inconsistent with the planning intention. Instead, the TPB was concerned with the implementation programme of the zoned areas allocated with the Unused GFA, which were matters concerning implementation of the plan, not proper planning considerations. Hence, the TPB's reliance on the Unused GFA factor was an irrelevant consideration. Accordingly, the Applicant succeeded on Ground 1. (Paragraphs 58 and 62-63)

8. For the same reasons, the Applicant also succeeded on Ground 2 in that the TPB had failed to take into account matters relating to the planning intention. In particular, the TPB had not, in its deliberations, dealt with the point that there would be no infrastructure or environmental capacities issues. (Paragraph 70)

Ground 3

9. The *Tameside* duty established by case law requires the TPB to ask itself the right question, and take reasonable steps to acquaint itself with the relevant information to enable it to answer correctly. (Paragraph 99)

10. The Applicant argued that the TPB had not made proper inquiry into 3 matters raised by the Applicant (the "**Matters**"), namely (1) whether the planned total population of 25,000 at Discovery Bay was an absolute control figure, (2) whether the approval of the Application would have jeopardized the 25,000 figure, bearing in mind that the Unused GFA had not yet been utilized and the total population of Discovery Bay had yet to reach 25,000, and (3) whether the prevailing circumstances could warrant the lifting or relaxing of the 25,000 figure. (Paragraph 101)

11. The Court agreed with the Applicant's submissions that in proper discharge of its *Tameside* duty, the TPB should have asked (1) whether the rezoning was consistent with the planning intention, and (2) whether it met the feasibility study of infrastructure and environmental capacities. As the TPB failed to make these inquiries, it had failed to discharge its *Tameside* duty. Hence, the Applicant succeeded on Ground 3. (Paragraphs 108-110)

Ground 4

12. The Court agreed with the Applicant's contention that there was no basis for the TPB to say that the Application would form an undesirable precedent for "other similar applications", as the TPB had failed to appreciate the difference between the Site and the other five sites which were also zoned for staff quarters use. The Applicant had made representations that the other five sites were different from the Site, and the Applicant had no present intention to rezone the other five sites. However, these representations had not been challenged or disputed, nor had they even been discussed by the members of the TPB. Therefore, the TPB did not have proper factual or reasonable basis to conclude that the Application to rezone the Site would be "similar" to any subsequent applications. (Paragraphs 81-83 and 88)

13. Further, if and when the Applicant does make another subsequent rezoning application in the future, the baseline and circumstance would have been changed. That would involve different considerations as to whether the subsequent application (and the materials presented) could meet the existing infrastructure and environmental capacities. As the present Application had involved an increase in the estimated population from 25,000 to 26,190, any future applications would be harder to meet such requirements and succeed. Thus, there was no proper legal basis for the TPB to say that approval of the Application would constitute an undesirable precedent for other similar applications. (Paragraphs 90-91)

14. Further, the Court did not accept on the facts that the Undesirable Precedent factor was a separate and stand-alone reason for rejecting Application. Hence, Ground 4 was accepted. (Paragraphs 94-98)

Ground 5

15. The Court rejected this ground and held that although the practice of copying reasons should be strongly discouraged, the mere fact that the TPB had adopted the PlanD's reasons was not by itself objectionable, as long as it could be shown that it had independently considered the application before it, which had been done by the TPB considering the minutes of its meeting as a whole and in context. (Paragraphs 111-116)

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