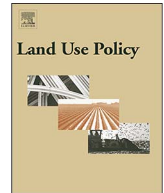
Land Use Policy 72 (2018) 341–353

Contents lists available at ScienceDirect

Land Use Policy

journal homepage: www.elsevier.com/locate/landusepol



Colonial History, Indigenous Villagers' Rights, and Rural Land Use: An Empirical Study of Planning Control Decisions on Small House Applications in Hong Kong

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ARTICLE INFO

Keywords:
Small House Policy
Indigenous villagers
Rural land
Land-use zoning
Planning control decisions
Hong Kong

ABSTRACT

The New Territories Small House Policy in Hong Kong has been controversial, in that the interests of male indigenous villagers in terms of housing are prioritized at the expense of the rest of the population. This colonial-era policy, currently under the protection of the Basic Law, has profound implications on how rural land outside the village environs should be used, particularly so when development pressures are mounting. How planning control decisions on small house applications are made under these conditions, thus, becomes an important and timely policy research topic. This paper, thus, studies these decisions in Greenbelt zone (GB), Agriculture zone (AGR), and Unspecified zone (UNSP), between January 1st, 1990 and June 30th, 2017, using non-aggregate planning statistics. The findings show that the Town Planning Board (TPB) is more likely to reject small house applications that propose a larger site area for each small house in AGR and GB zones, but not those that essentially propose a small-scale small house development (i.e. up to 5 houses). Also, land-use policies in these three zones are found to vary geographically. Further, the TPB's decisions are flexible in that they are subject to other exogenous factors, such as housing policies and housing market conditions.

1. Introduction

The New Territories Small House Policy, since its inception in December 1972, has been a unique yet controversial land-use policy. It, on the one hand, preserves the rights of (male) indigenous villagers descended through the male line from a resident in 1898 to build their own house on rural land within their village environs. On the other hand, as this policy is only applicable to a small fraction of Hong Kong's populace, it unavoidably becomes controversial, in that it highlights the innate conflict between the interests of these indigenous villagers and the interests of everyone else's in terms of housing.

The HKSAR government, under the confines of the Small House Policy inherited from the Colonial Era and of the Basic Law (i.e. Article 40), is being put in a difficult situation in that it, through its town planning and land-use policies, has to preserve the indigenous villagers' rights without compromising those of the rest of Hong Kong's populace. Nevertheless, this task has become increasingly difficult due to mounting development pressures in recent years. On the one hand, more land sites are needed for high-rise residential development to address the housing unaffordability issue (which has been a stated government policy objective in the past few years). On the other hand, more indigenous villagers become eligible for small house grants as they reach 18 years of age, meaning that small houses are consistently proposed to be built, many of which outside the village environs, in either Greenbelt zone or Agriculture zone (and to a lesser extent, the Unspecified zone). This prompts a fundamental problem as to how these undeveloped rural land sites should be used. Should they be developed or preserved? If development is the answer, then what should be built on these land sites? The government department responsible for making these decisions is the Town Planning Board (TPB). Nevertheless, as the innate characteristics of Hong Kong's planning control system allow for flexible interpretations of the Town Planning Ordinance, does this mean that the TPB's decisions are subject to exogenous factors such as government housing policies and housing market conditions?

Against this backdrop, this paper aims to identify the statistical patterns, if any, of the TPB's planning control decisions on applications for small house construction on rural land in three statutory land-use zones under the Town Planning Ordinance:

- "Greenbelt" zone (GB);
- "Agriculture" zone (AGR); and

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https://doi.org/10.1016/j.landusepol.2017.12.065
Received 15 January 2017; Received in revised form 20 November 2017; Accepted 28 December 2017
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- "Unspecified" zone (UNSP)

through an econometrical analysis of the planning statistics from January 1990 to June 2017.

The rest of this paper is presented as follows: The next section (Section 2) first provides some background information for both the Small House Policy itself and the three statutory land-use zones under study. It is followed by a literature review section (Section 3) in which previous qualitative and quantitative studies on the Small House Policy is discussed. Then, Section 4 details the research methodology and the data necessary for this study. Afterwards, Section 5 presents and discusses the empirical findings, and the final section (Section 6) concludes the study.

2. Background

2.1. The Small House Policy

Prior to the discussion of the Small House Policy itself, some historical background with regard to rural land in the New Territories should be presented. Before the Second Opium War, the area referred to as the New Territories after 1898 was under the governance of Chinese customary law which was part of the Imperial Chinese Law (Hayes, 1988). Back then, in order to encourage human settlement, as long as a person, who acquired land that was not under the ownership of either the government or the Imperial Court, paid taxes on what was produced by the land, he was permitted to develop that land freely.

However, after Imperial China lost the Second Opium War to Great Britain, the *Convention Between Great Britain and China Respecting an Extension of Hong Kong Territory* (better known as the Conventional of Peking) was signed on June 9, 1898, according to which the British leased the New Territories for 99 years starting July 1, 1898. Under British occupation, the old customary law was replaced by British common law. All land, including those being privatized (via occupation) by villagers prior to the signing of the Convention of Peking, was taken away from them, only to be regranted to them as leasehold interests for 75 years[1] under the Block Crown Lease established in 1905. Under this arrangement, the land-holding villagers were stripped of some of their customary rights as all new development of their land required permission from the Colonial government (see Lai and Lorne, 2013).

Later, in the 1970s, in response to the rapid growth in Hong Kong's population, the Colonial government commenced the development of new towns in the New Territories. This inevitably compromised the interests of the indigenous villagers even further. According to Lai (2000), in order to appease them, some of their customary rights, with regard to the use of their land currently under the leasehold system, were returned to them, through the introduction of the New Territories Small House Policy in December 1972[2].

Under this policy, male indigenous villagers over the age of 18, who are descended through the male line from a resident in 1898 of a recognized village within one of the nine districts of the New Territories (i.e. Islands, North, Sai Kung, Shatin, Tuen Mun, Tai Po, Tsuen Wan, Kwai Tsing, and Yuen Long)[3], are eligible for the application for a grant to build a small house, at their own expenses, on rural land within the Village Type Development Area (V) zone and the environs or the village extension area (VE), up to 300 feet of a recognized village (Lands Department, 2014).

For those who own land within these areas, they can apply for either 1) a building licence at zero premium or 2) a land exchange for a land site owned by the government should the private land in question not be suitable for house construction. By contrast, for those who do not own land in these areas, they can apply for a government land site at a concessionary premium of two-thirds of the full market value. This is known as a private treaty grant (PTG). Regardless of the ownership status of land sites on which small houses are proposed to be built, however, all small house grants are subject to varying degrees of alienation restriction (Table 1), with the expressed purpose of preventing indigenous villagers from "cashing in on their eligibility for the small house grants" (Audit Commission, 2002).

Officially, a small house is known as the New Territories Exempted House [NTEH]). The reason a small house is "exempted" is because, unlike other types of residential development (i.e. flats and ordinary houses), the construction of small houses is not subject to the regular Buildings Ordinance (and the Building (Planning) Regulations). Instead, the Buildings Ordinance (Application to the New Territories) Ordinance (Cap 121) provides the blueprint as to how small houses should look like. Under this Ordinance, a small house shall 1) have three storeys or less; 2) not be higher than 27 feet (or 8.23 metres); and 3) not have a roofed-over area of more than 700 sq. ft. (or 65.03m^2) (Lands Department, 2014). In other words, under the Small House Policy, an indigenous villager is entitled to the right to build a house with a maximum allowable GFA of 2100 sq. ft. (195.09m^2)[4], which is by no means "small" (Lai, 2000).

Despite its "exempt" status, the construction of small house, like other types of development, is subject to the Town Planning Ordinance. While the development of small houses completely inside the V zone is always permitted (as a Column 1 use), planning permissions are necessary when 1) more than 50% of the proposed small house's footprint falls outside the V/VE zone or 2) the land site in question encroaches on conservation-related zones, greenbelt zone, open space zone, water-gathering grounds, and areas shown as "road" (Town Planning Board, 1991).

While a male indigenous villager, under the New Territories Small House Policy, is entitled to one small house grant in his lifetime, the property rights to which he is entitled over his small house had been rather ambiguous since the introduction of the policy. It was until the 1990s that this was legally clarified. In a Court of Appeal verdict made for the case *Sung Wai Kiu and Li Pui Wan vs. Wong Mei Yin* (H.C. No. A 3979/94) on January 17, 1997, it reads "Despite the fact that sale and purchase of small house is in breach of conditions of grant, the government has never taken any positive action against such activities. From the angle of public interest and public policy, it is not really necessary to deem it illegal." If anything, this court decision constitutes an institutional change, in that it legalizes the resale of small houses (to non-indigenous villagers) and proffers a clearer delineation of indigenous villagers' property rights.

2.2. The statutory zones

As mentioned in the previous section, the Colonial government, upon "leasing" the New Territories from Imperial China in 1898, introduced the Block Crown Lease under which previously occupied (i.e. privatized) agricultural/village house land was turned into leasehold interests, thereby restraining the landowners' rights to develop. Rural land in the New Territories was divided into different Demarcation District (DD) plans which are in effect to this day. Under the Block Crown Lease, development of land sites within these DD plans required permission by the Colonial government.

Nevertheless, on paper, the Block Crown Lease appears to have

[1] This is renewable for another 24 years minus three days at a reassessed Crown Rent, making the expiry date June 28, 1997 (i.e. 3 days before Hong Kong's handover to China).

[2] Another possible reason for the establishment of the Small House Policy, in accordance with Nissim (1998), is to compensate the villagers for keeping the peace during the 1967 riot.

[3] Currently, 642 villages are recognized under the Territories Small House Policy.

[4] According to the definition used by the Rating and Valuation Department, a small house should belong to Group E, which consists of the largest residential properties in Hong Kong.

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