

IN THE TOWN PLANNING APPEAL BOARD

Town Planning Appeal No. 20 of 2006

BETWEEN

MEGA WELL LIMITED

Appellant

and

THE TOWN PLANNING BOARD

Respondent

Appeal Board : Mr. Patrick FUNG Pak-tung, SC (Chairman)

Ms. Lister CHEUNG Lai-ping (Member)

Dr. Joseph KWAN Kai-cho (Member)

Mr. Eric KWOK Tung-ming, SC (Member)

Dr. Eileen TSE Yuen-yee (Member)

In Attendance : Miss Christine PANG (Secretary)

Representation :

Mr. Hectar PUN (instructed by Messrs. Deacons) for the Appellant

Mr. Nicholas COONEY (instructed by the Department of Justice)
for the Respondent

Date of Hearing : 4th July 2007

Date of Decision : 31 July 2007

DECISION

History and Background

1. The subject-matter of the present appeal is a piece of land consisting of various lots known as Hung Hom Inland Lot Nos. 304, 305, 394, 428, 440 SA & RP, 443, 452, 455, 456, 462, 466 and 470 (“the Site”) held under 12 Government leases.
2. The Site was purchased by the Appellant, Mega Well Limited, on or about 24th May 1993.
3. The Site has a total area of about 10,204 sq. ft. (approximately 948 sq. m.).
4. Under the lease conditions applicable to the Site, there is no restriction against uses except for industrial purposes. The same also do not impose any limitation in respect of plot ratio.
5. At that time, the Hung Hom district was covered by the then current Outline Zoning Plan, OZP S/K9/6. The Site fell within an area zoned “Residential (Group A)”.
6. On 11th June 1993, the Appellant made an application to the Town Planning Board (“the TPB”) under section 16 of the Town Planning Ordinance Cap. 131 (“the Ordinance”) for permission to build an office/retail development at the Site.

7. The then proposed development was a Grade B office building with a total office gross floor area of about 9,125 sq. m. and retail areas with a gross floor area of about 2,250 sq. m.. The building height was 68.4m. The plot ratio was 12 with a site coverage of 65%.
8. On 23rd July 1993, the TPB approved the application whilst imposing, inter alia, the following condition :

“any subsequent material change of use and design of the building or part of the building should have prior approval of the Board”.
9. Subsequently, there were some minor amendments to the proposed development which were approved.
10. Eventually, the building which now stands on the Site (“the Existing Building”) was completed in 1996. It is also known as “No. 83, Wuhu Street, Hung Hom, Kowloon”.
11. The Existing Building is a 25-storey commercial/office building (including the basement) with a height of about 81m. above ground level. Four car-parking levels are located on B/F and 2/F to 4/F. The total floor area is 11,407.152 sq. m..
12. The plot ratio of the Existing Building is 12.033.
13. At the time of the application by the Appellant to the TPB and the approval by the latter in 1993, there was no plot ratio restriction imposed by the Notes in OZP S/K9/6.

The Approved Hung Hom Outline Zoning Plan No. S/K9/18

14. As at 2006, the Outline Zoning Plan for the Hung Hom area which covers, inter alia, the Site was (and still is) the Approved Hung Hom Outline Zoning Plan No. S/K9/18 (“OZP No. 18”).
15. Under OZP No. 18, the Site is designated as “Residential (Group A)” (R(A)).
16. Paragraph (3)(a) and (b) of the Notes which form part of OZP No. 18 provide as follows : -
- “(3) (a) No action is required to make the existing use of any land or building conform to this Plan until there is a change of use or the building is redeveloped.*
- (b) Any change of use, and any other development (except minor alteration) or redevelopment, in respect of the land or building must be permitted in terms of the Plan or, if permission is required, is in accordance with the permission granted by the Town Planning Board.”*
17. The Schedule of Uses which forms part of the Notes covers various categories of land including those designated “Residential (Group A)”.
18. Under the category designated “Residential (Group A)”, there are various uses of land which “may be permitted with or without conditions on application to the Town Planning Board”. One of such uses is “Hotel”.

19. In the “Remarks” under the category of “Residential (Group A)” (“the Remarks”), paragraphs (1) and (2) thereof read as follows :-

“(1) Except as otherwise provided herein, on land designated “Residential (Group A)”, no new development or addition, alteration and/or modification to the existing building(s) shall result in the plot ratio for the building(s) upon development or redevelopment being in excess of 7.5 for a domestic building or 9.0 for a building that is partly domestic and partly non-domestic, or the plot ratio of the existing building(s), whichever is the greater. Except where the plot ratio is permitted to be exceeded under paragraph (7) hereof, under no circumstances shall the plot ratio for the domestic part of any building, to which this paragraph applies, exceed 7.5.

(2) For a non-domestic building to be erected on the site, the maximum plot ratio shall not exceed 9.0 except where the plot ratio is permitted to be exceeded under paragraph (7) hereof.”

The Application to the TPB and this Appeal

20. On 2nd December 2005, the Appellant made an application under section 16 of the Ordinance for a hotel development at the Site.

21. The proposed development involved the conversion of the Existing Building into a hotel with 398 guestrooms. There would be no change to the gross floor area of 11,407.152 sq. m., plot ratio of 12.033 and the building height of 77.7 m. with 25 storeys (including 1 basement level). It was proposed that the Existing Building would be physically extended on 20/F to 24/F but the

extension floor spaces of 349.68 sq. m. would be included in the gross floor area of 11,407.152 sq. m.. The proposal would also involve the conversion of floor spaces of 570.351 sq. m. as back-of-house facilities on 5/F to 24/F which would not be included in the gross floor area calculation.

22. On 28th April 2006, the Metro Planning Committee (MPC) of the TPB decided to reject the Appellant's application on the ground that :

“there is no provision for the TPB to grant planning permission for the proposed hotel development, which has a non-domestic plot ratio exceeding the maximum plot ratio restriction for non-domestic building in “Residential (Group A)” zone.”

The Appellant was informed of such decision of the MPC on 19th May 2006.

23. The Appellant subsequently made an application to the TPB under section 17 of the Ordinance for a review of the decision of the MPC.

24. After the review hearing on 8th September 2006, the TPB decided to reject the Appellant's application for a review on the same ground as that relied on by the MPC as set out in paragraph 22 above. The Appellant was notified accordingly on 22nd September 2006.

25. On 6th November 2006, the Appellant lodged the present appeal under section 17B(1) of the Ordinance.

The Issue

26. The parties have advanced many points in support of or in opposition to the appeal.
27. In the view of this Appeal Board, ultimately, the main, if not the only, issue in this case is the true interpretation of the relevant parts of the Notes in OZP No. 18, in particular, paragraphs (1) and (2) of the Remarks as set out in paragraph 19 above.

The Case of the Appellant on Appeal

28. The arguments advanced on behalf of the Appellant from the time of its application to the TPB under section 16 of the Ordinance to the present appeal appear to have shifted somewhat along the way.
29. As far as the Appeal Board can discern, at the end of the day, its main arguments can be summarized as follows : -
- (i) Paragraph (2) of the Remarks does not apply to the Appellant's proposed conversion of the Existing Building into a hotel because that paragraph only applies to the case of the erection of a new building. The Appellant relies on the words "to be erected on the site" for such argument.
 - (ii) On the other hand, paragraph (1) of the Remarks applies to the Appellant's proposed conversion because of the opening words "Except as otherwise provided herein" and the fact that that paragraph then goes on to deal with developmental activities which do not cover the conversion of an existing building into a hotel. It is argued that, therefore, in the case of the conversion of an existing building into a hotel, the

plot ratio of the existing building can be retained.

- (iii) Alternatively, if neither paragraph (1) nor paragraph (2) of the Remarks applies to the proposed conversion, the only restriction on plot ratio applicable to the Site is contained in the First Schedule to the Building (Planning) Regulations Cap. 123 for a non-domestic building whose height is over 61m. and located in a Class C site. In other words, the maximum permitted plot ratio is 15 (although the Appellant is voluntarily limiting it to 12).
- (iv) Further or in the alternative, if there is any ambiguity regarding the applicability of paragraphs (1) and (2) of the Remarks, the matter should be resolved in a way which does not infringe the constitutional right of the landowner, i.e., the Appellant.
- (v) The Appellant also seeks to rely on previous decisions of the Planning Department or the TPB in other cases where applications under similar circumstances were granted.
- (vi) In any event, there are ample planning justifications for the proposed conversion of the Existing Building into a hotel in all the circumstances. In this regard, it is to be noted that none of the relevant Government departments has raised any objection to the Appellant's application, e.g., on environmental or traffic grounds.
- (vii) In the event that the Appeal Board thinks that it should allow the appeal but only upon conditions, the Appellant would be happy to abide by any reasonable conditions which may be imposed.

These arguments will be dealt with below.

The History and Background relating to the relevant Outline Zoning Plans

30. Mr. Pun, Counsel for the Appellant, argues that the Notes to an Outline Zoning Plan should be given a strict interpretation in the same way as a statute because they have a statutory foundation.
31. We do not agree. It is to be borne in mind that the Notes to an Outline Zoning Plan would not have been formulated in the strict way in which the words of a statute would have been formulated. It is trite that a part of the Notes should be interpreted in the context of its entirety in the same way as a statute. It is, however, also legitimate and, indeed, necessary for the Appeal Board to look at other matters, such as the Explanatory Statement attached to an Outline Zoning Plan and the history and background leading to the relevant Outline Zoning Plans and the Notes to discover the planning intention so as to ascertain the meaning of the Notes in question.
32. In the case of **Wah Yick Enterprises Co. Ltd. V. Building Authority** [1999] 1 HKLRD 237, where the issue was whether the word “house” in an area for “village type development” in the New Territories covered the proposed development by the erection of a 33 storey block of flats, Nazarth V-P said at 246 J – 247 C : -

“Whether explanatory statements admissible for interpretation of the OZP as subsidiary legislation

It is submitted that no extrinsic evidence is admissible for statutory interpretation when the meaning is clear. The first proposition advanced here is that the OZP is subsidiary legislation. The authorities relied upon by both sides leave the position unclear. The point does not seem to me to be of sufficient significance to review those authorities. Suffice it to say that I am not persuaded that the OZP is

subsidiary legislation. In any case Mr. Wong submitted that even so it should be treated as subsidiary legislation whether technically so or not. I am equally not persuaded that this is right in the present context particularly when the object of doing so would be to exclude evidence that could be particularly valuable, given the nature of the OZP, which is far removed from the precise nature of the drafting and formulation of subsidiary legislation. Moreover, it is difficult to see why the OZP and its explanatory statement (not to mention the definition) should rate for assistance in construction so very differently.”

33. In the case of **Henderson Real Estate Agency Ltd. V. Lo Chai Wan** [1997] HKLRD 258, the Privy Council said this at 267C :-

“By the same token, the 1992 and 1993 guidelines are also material considerations to be taken into account. The Appeal Board was not bound to follow the Explanatory Statement or the guidelines. But they could not be disregarded.”

34. We, therefore, propose to look first into how the relevant Outline Zoning Plans and Notes came into existence.

35. The Respondent called as a witness Mr. Lau Cheung Ching (“Mr. Lau”), a Senior Town Planner who has worked in the Planning Department for about 24 years. According to Mr. Lau, in order to establish a new basis for the control of development density in Kowloon and New Kowloon following the lifting of the Temporary Control of Density of Building Development (Kowloon and New Kowloon) Ordinance at the end of 1993 and the ultimate lifting of all airport height restrictions after the relocation of the Kai Tak Airport, the Planning Department commissioned in 1991 a Consultancy Study, entitled the “Review of Building Density and

Height Restrictions in Kowloon and New Kowloon” (KDS). The KDS was completed in 1993. The KDS had identified the need to impose plot ratio control stricter than those contained in the Building (Planning) Regulations on all land uses in Kowloon and the only way to achieve this definitely was by specifying the revised plot ratios in the Outline Zoning Plans. The KDS recommended that a two-tier plot ratio control system for “R(A)” zone should be imposed in the Kowloon area. It also clearly stated that should the TPB wish to approve an application under s.16 of the Ordinance for office use (a column 2 use) on an “R(A)” site, this would be restricted to a maximum total plot ratio of 9.0. This should serve to lessen the demand for such change of use, which had been contributing to pressure on limited MTR capacity and reinforcing the need to impose restrictions on commercial plot ratio.

36. In paragraphs 4.3, 4.4 and 4.5 of Mr. Lau’s Witness Statement which he has adopted as his evidence in the proceedings, he says : -

“4.3 On 3.12.1993, the TPB endorsed the recommendations of the KDS (minutes of meeting at pp. 10001-10011), which were used as the basis for proposing amendments to 16 OZPs in Kowloon and New Kowloon, including the Hung Hom OZP No. S/K9/7. In particular, paragraphs 22 and 28 of the minutes of the TPB meeting recorded the questions raised by Members on control on office use or commercial/office use in “R(A)” zone, and the response by the KDS consultant that the planning intention was to restrict the maximum non-domestic PR to 9.0 for commercial development approved by the TPB in “R(A)” zones (pp. 10008-10009). Though hotel use in “R(A)” zone was not specifically discussed at the meeting, the general practice is to treat it as a commercial use and thus, it should also be restricted to a maximum non-domestic PR of 9.0.

4.4 On 24.12.1993, the then Hung Hom OZP No. S/K9/7, incorporating the KDS recommendations and other amendments, was exhibited for public inspection under s.7 of the Ordinance. The Notes of the “R(A)” zone on the OZP No. S/K9/7 (**Appendix III**) were extracted as follows :

(1) Except as otherwise provided herein, on land designated “R(A)”, no new development or addition, alteration and/or modification to the existing building(s) shall result in the PR for the building(s) upon development or redevelopment being in excess of :

(i) 6.0 for a domestic building or 7.5 for a building that is partly domestic and partly non-domestic; or

(ii) the PR of the existing building(s)

whichever is the greater. Where paragraph (1)(i) applies, except where the PR is permitted to be exceeded under paragraph (4) hereof, under no circumstances shall the PR for the domestic part of any building exceed 6.0.

(2) For building or buildings to be erected on site having an area of not less than 400m², the maximum PR shall be 7.5 for a domestic building or 9.0 for a building that is partly domestic and partly non-domestic subject to :

(i) there being provided on the site upon development or redevelopment a minimum of one car parking space for every 4 flats or part thereof and a minimum of one loading/unloading

*bay for every 800 flats or part thereof;
and*

*(ii) there being and remaining available
vehicular access to and from the site.*

*Except where the PR is permitted to be
exceeded under paragraph (4) hereof, under
no circumstances shall the PR for the domestic
part of any building, to which this paragraph
applies, exceed 7.5.*

*(3) For a non-domestic building to be erected on
the site, the maximum PR shall not exceed 9.0
except where the PR is permitted to be
exceeded under paragraph (4) hereof.*

*4.5 In gist, the TPB implemented the KDS
recommendations in that development was restricted to
a maximum domestic PR of 6.0 or a maximum overall
PR of 7.5, or the PR of the existing building, whichever
was the greater. For sites with an area of 400m² or
greater and meeting the transport facilities requirement,
development intensity could be up to a maximum
domestic PR of 7.5 or a maximum overall PR of 9.0
(regardless of the PR of the existing building). For a
non-domestic building, the maximum PR should not
exceed 9.0 (regardless of the size of site and also PR of
the existing building). While the benefit of enjoying
the PR of the existing building was given to a domestic
building, or a building that is partly domestic and
partly non-domestic (or so-called composite building)
on sites less than 400m², it was not applicable to
domestic or composite buildings on sites not less than
400m², nor to non-domestic buildings. The KDS
made no recommendation that the PR of the existing
building in “R(A)” zone should be taken into account
for conversion or for redevelopment of non-domestic*

buildings, nor did it specify under what situation the non-domestic PR of 9.0 should not be applied. The above two-tier PR control system was imposed for all “R(A)” zone on the Kowloon OZPs in order to alleviate traffic congestion and to encourage amalgamation of small sites for redevelopment.”

37. According to Mr. Lau, the Planning Department commissioned a KDS Review in 1999 to take into account the changes in planned infrastructure, population projection and planning assumptions over the years.

38. Mr. Lau then goes on to say in his Witness Statement in paragraphs 4.7 and 4.8 as follows : -

*“4.7 On 3.5.2002, the TPB considered the ‘Proposed Amendments to 16 OZPs in Kowloon to Implement the Final Recommendations of the KDS Review’ and agreed to amend the Notes for the “R(A)” zones of the 16 Kowloon OZPs according to the recommendations of the KDS Review (minutes of meeting at pp. 10019-10022). On 31.5.2002, the then Hung Hom OZP No. S/K9/16, incorporating the relevant recommendations of the KDS Review and other zoning amendments, was exhibited for public inspection under s.5 of the Ordinance. The Notes of the “R(A)” zone on the OZP No. S/K9/16 (**Appendix IV**) were extracted as follows:*

(1) Except as otherwise provided herein, on land designated “R(A)”, no new development or addition, alteration and/or modification to the existing building(s) shall result in the PR for the building(s) upon development or redevelopment being in excess of 7.5 for a domestic building or 9.0 for a building that is

partly domestic and partly non-domestic, or the PR of the existing building(s), whichever is the greater. Except where the PR is permitted to be exceeded under paragraph (7) hereof, under no circumstances shall the PR for the domestic part of any building, to which this paragraph applies, exceed 7.5.

(2) For a non-domestic building to be erected on the site, the maximum PR shall not exceed 9.0 except where the PR is permitted to be exceeded under paragraph (7) hereof.

4.8 No change had been made to the maximum PR restriction of 9.0 for non-domestic buildings in “R(A)” zone as stipulated in paragraph (2) of the Remarks of the Notes for the “R(A)” zone.”

39. Mr. Lau’s evidence is supported by the contemporaneous documentary evidence which he has produced. On the other hand, the Appellant has not called any factual or expert witness to contradict Mr. Lau’s evidence but has only sought to do so mainly by Counsel’s argument. We accept the evidence of Mr. Lau **in toto**.

40. In our view, the evidence shows clearly that part of the planning intention behind the succession of Outline Zoning Plans for Hung Hom and the Notes to the same since the latter part of 1993 has been to restrict the development of non-domestic buildings in areas in Kowloon, including Hung Hom, designated as “Residential (Group A)” to a plot ratio of 9, irrespective of whether the proposed redevelopment is by way of the erection a completely new building or the conversion of an existing building.

Our Interpretation

41. In our opinion, in view of the clear planning intention referred to above, it is inconceivable that the Remarks would have left the situation of the conversion of an existing building into a non-domestic one to be used for a purpose other than that of the existing building unprovided for.

42. It is to be noted that, when the approval of OZP No. 18 was gazetted on 27th February 2004, it was done in both English and Chinese. The Chinese version of paragraph (2) of the Remarks reads as follows :-

“(2) 建於該地盤的任何非住用建築物，其最高地積比率不得超過9.0倍，但根據下文第(7)段獲准超逾此地積比率者除外。”

The translation of the same as put forward by Mr. Lau reads as follows :-

“For any non-domestic buildings erected on the site, the maximum plot ratio shall not exceed 9.0 except where the plot ratio is permitted to be exceeded under paragraph (7) hereof.”

No different translation has been put forward by the Appellant. The Chinese version clearly covers the cases of both the erection of a new building and the conversion of an existing building. We might add that if the draftsman of the Chinese version had really intended paragraph (2) of the Remarks to cover only “buildings to be erected in the future”, all that he needed to do was to add one Chinese character 「將」 to the beginning so that the opening words would read 「將建於該地盤的任何非住用建築物」.

43. In our view, paragraphs (1) and (2) of the Remarks taken

together cover all situations. Paragraph (1) deals with the following :-

- (i) the erection of a domestic building;
- (ii) the conversion of an existing building into a wholly domestic building;
- (iii) the erection of a partly domestic and partly non-domestic building (a composite building);
- (iv) the conversion of an existing building into a composite building.

Paragraph (2) deals with the following : -

- (i) the erection of a non-domestic building;
- (ii) the conversion of an existing building into a non-domestic building.

44. At this juncture, it is worthy of note that in the Skeleton Submissions For The Applicant by Mr. Pun dated 4th August 2006 which was presented to the TPB on the application for review under section 17 of the Ordinance, the following paragraphs appear : -

“V. PARAGRAPH (1) OF THE REMARKS IS NOT APPLICABLE

24. The Applicant now accepts that paragraph (1) of the Remarks does not apply to non-domestic buildings. It only applies to domestic and composite buildings.

VI. PARAGRAPH (2) OF THE REMARKS IS EQUALLY NOT APPLICABLE

25. Nevertheless, the Applicant maintains that Paragraph

(2) of the Remarks is equally NOT applicable in the case of the Applicant.”

Such arguments are of course not quite the same as those advanced before the Appeal Board now (see paragraph 29 above).

45. We are of the clear view that a development by way of a conversion of an existing office building into a hotel is covered by paragraph (2) of the Remarks and is subject to a plot ratio restriction of 9 notwithstanding the fact that the existing building was built with a plot ratio of over 9.

46. Of course the developer has no obligation to redevelop his existing property, but if that is what he wishes to do, he will have to sacrifice part of the plot ratio.

47. Section 16(4) of the Ordinance provides as follows : -

“(4) The Board may grant permission under subsection (3) only to the extent shown or provided for or specified in the plan.”

48. In the circumstances enumerated above, the TPB simply had no power to grant permission to the Appellant to carry out a development by way of conversion of the Existing Building into a hotel which would result in the finished building having a plot ratio of more than 9.

49. Both the MPC and the TPB were, therefore, correct in rejecting the application by the Appellant under section 16 of the Ordinance.

The Other Arguments of the Appellant

50. In light of our interpretation of the Remarks as set out above, it is strictly not necessary for us to deal with the other arguments advanced for the Appellant. Nevertheless, we have decided to address them briefly below.

The Precedent Cases

51. Mr. Lau in his evidence has dealt with the precedent cases relied on by the Appellant. Of the 16 cases cited by the Appellant, Mr. Lau gave a satisfactory explanation regarding them except for 3 cases in the Yau Ma Tei and Mong Kok areas. He admitted that in those cases it would appear that the Planning Department (he had no personal involvement) and/or the TPB did not act in accordance with the plot ratio restrictions laid down in the relevant Outline Zoning Plans.
52. On the other hand, Mr. Lau has also cited another case in which an application involving a hotel on Temple Street was rejected on the same ground as that relied on by us now.
53. It is not for us in this appeal to go into the merits or correctness of the decisions in the previous cases cited. We can only decide the matter according to what we think is correct in law.

Planning Justifications and Conditions

54. In view of our decision above, the fact that there are ample planning justifications, the fact that no Government department has raised objections to the Appellant's application and the offer by the

Appellant for suitable conditions to be imposed have all become irrelevant. We simply have no power to grant permission for the development which will result in the finished building having a plot ratio of over 9.

55. At the end of the hearing, in response to a question by the Chairman as to exactly how much plot ratio the Appellant would be giving up if it were to proceed with the proposed conversion by limiting the plot ratio to 9, after taking into account the gross floor area for back-of-house facilities which would not be counted for total gross floor area calculation, Mr. David C. Lee, the Appellant's consultant, indicated that the Appellant had in fact initiated negotiations with the Planning Department along those lines. It would, of course, be gratifying to see the Appellant and the Planning Department being able to work out a solution which is acceptable to both parties and which will also serve the needs of society in the circumstances now prevailing in Hong Kong. This is, however, not something which is within the power of the Appeal Board to direct or arrange to take place. It is up to the relevant parties themselves to do what they think is best.

Conclusion

56. In all the circumstances, we have no alternative but to dismiss the appeal of the Appellant.

Patrick FUNG Pak-tung SC
(Chairman)

Lister CHEUNG Lai-ping
(Member)

Joseph KWAN Kai-cho
(Member)

Eric KWOK Tung-ming
(Member)

Eileen TSE Yuen-yee
(Member)