

TOWN PLANNING APPEAL NO.
28 OF 1995

BETWEEN

FINE TOWER ASSOCIATES
LIMITED, Appellant

and

THE TOWN PLANNING BOARD,
Respondent

Dates of hearing : 22nd, 23rd, 24th & 26th April 1997

Date of decision : 16th June 1997

Panel : Mr Ronny F.H. Wong Q.C. (Deputy Chairman)
Mrs Pamela Chan Wong Shui, JP
Mr M. B. Lee, MBE, JP
Mrs Peggy Lam Pei Yu Dja, OBE, JP
Dr Ng Cho Nam

DECISION

Nomenclature used in this Decision

For the purpose of this Decision, the following nomenclature will be used.

NOMENCLATURE	FULL NAME
ABBP	Aldrich Bay public dumping barging point
CED	Civil Engineering Department
China Oil	China Oil Co. Ltd.
DPC	Development Progress Committee
EPD	Environmental Protection Department
I-O	Industrial-Office

LDPC	Land Development Policy Committee
MPC	Metro Planning Committee
OZP	Outline zoning plan
QBBP	The proposed barging point at Hoi Yu Street, Quarry Bay next to the appeal site
the appeal site	I.L. 8590 and I.L. 8723 at Hoi Yu Street, Quarry Bay
The I-O Guidelines	Guidelines issued by the TPB in January, 1994 in relation to application for Industrial-Office development
The Office Guidelines	Guidelines issued by the TPB in December 1990 in relation to application for office developments
TPB	Town Planning Board

The appeal

2. This is an appeal by the Appellant against the decision of the TPB of 16.6.1995 whereby the TPB decided on review not to approve an application by the Appellant on 2.11.1994 pursuant to section 16 of the Town Planning Ordinance for planning permission to erect a 27-storey office building on the appeal site.

3. The appeal site is located on the northern side of Hoi Yu Street. It has a site area of 2,985.9m² and a sea frontage of about 55 metres. To the east of the appeal site along the waterfront is a strip of land currently occupied by port works maintenance and repairing uses and open storage uses. It is planned for a public dumping barging point to be operated in mid-1998. A Eastern Harbour Crossing ventilation building and a cargo handling area are located further east along Hoi Yu Street, which is a cul-de-sac off the main transport routes of Java Road and King's Road.

4. To the immediate northwest of the appeal site one finds a small local open space, a piece of vacant land and an existing salt water pump house. Across the Island Eastern Corridor to the west is a high-rise godown building, namely the Eastern Harbour Centre at Hoi Chak Street. Along Hoi Chak Street to its south, one finds a temporary open car/lorry park, a temporary Water Supplies Department's open storage depot and a temporary Urban Services Department's vehicle depot.

5. On the other side of Hoi Chak Street one finds 2 industrial buildings (the Hongkong & China Gas Headquarters and the Hongkong Tobacco Co. building), a basketball court and a warehouse. Further down south are some residential buildings with retail uses on their ground floors.

Zoning of the appeal site

6. The appeal site has always been zoned for industrial use since its first coverage by the North Point OZP No. LH 8/35 in May 1975. In that OZP, a total of 13.64 hectares were designated for industrial use. Its explanatory statement pointed out that :

"Except for the proposed reclamation area to the east of the district, very little expansion of the industrial zones is envisaged. Efforts have been made to retain industrial land if suitably located, but where industry is located in areas, which are predominantly commercial/residential or residential, the zoning has been amended from that shown on the earlier plan. The district is essentially a dormitory suburb of Central and it is not considered desirable to encourage major industrial activity in the district by zoning more land for this use, particularly as the district is very short of G/IC uses needed to support the growing residential community".

7. The appeal site became part of the Quarry Bay OZP No. S/H21/3 which incorporated the construction of the Eastern Harbour Crossing. According to its explanatory statement of July, 1986, the total area zoned "Industrial" amounted to 6.39 hectares and "Most of the existing industrial sites have been developed into flatted factories mainly for general industrial uses. They are located mainly along Westlands Road and Shipyard Lane". The explanatory statement to Quarry Bay OZP No. S/H21/4 dated February, 1988 further pointed out that "Some development of these buildings is taking place and it is expected that this will assist in making the industrial area more compatible with adjacent areas."

8. I.L. 8590 (2,600m²) was first granted to China Oil on 22.5.1985 in exchange for various old lots surrendered by that company. Having obtained I.L. 8590, China Oil began to plan the erection of oil tanks. The size of I.L. 8590 was not sufficient to build 3 oil tanks. As a result of further negotiations with the Government, I.L. No. 8723 (385.9m²) was granted in favour of China Oil on 20.12.1988. Under the current leases, both lots are restricted to industrial and/or godown purposes including the bulk storage and distribution of petroleum products and other petrochemical fluids. Marine access is permitted along the waterfront of

the appeal site but previous application by China Oil for building a pier was rejected by the Marine Department.

9. In January, 1991, the appeal site has been identified as one of the target areas for commercial activity to upgrade the existing urban fabric in the Target Areas for Reduction of Densities/Restructuring Plan attached to the Metroplan.

10. The appeal site is now within the Quarry Bay OZP No. S/H21/9. That plan covers an area of about 209 hectares with the industrial zone taking up 0.84 hectares. The appeal site falls within 2 designated zones under that plan. The major part of the site lies within the "Industrial" zone, whereas a small part in I.L.8723 is within the "G/IC" zone. According to the Notes which form part of this OZP, uses that are always permitted for an industrial site include, inter alia, ancillary car/lorry park; bus depot; canteen; cooked food centre; Government refuse collection point and industrial use other than those where planning approval is required. Uses that may be permitted with planning approval includes, inter alia, bank; dangerous goods godown; marine fuelling station; office not ancillary to the industrial use; restaurant and ship-building, ship-breaking and ship-repairing yard. The explanatory statement to OZP No. S/H21/9 of October, 1994 pointed out that "The development of Taikoo Shing has marked the gradual transformation of the Quarry Bay area from an industrial/dockyard area into a major residential and commercial community". The following is said about the industrial zone in the Quarry Bay district :

"Three industrial sites are found in the area. Two of them on Hoi Chak Street have been developed into a Hong Kong and China Gas Company depot and a godown/warehouse. The one in the waterfront is planned for oil depot purpose. These industrial uses are either non-polluting or located far away from residential and other sensitive uses."

The November, 1994 application for office development

11. In December, 1990, the Office Guidelines were issued by the TPB in relation to application for office buildings in industrial zone under section 16 of the Town Planning Ordinance. The main planning criteria for assessing such application include :

- (a) The proposed office building should be located in an industrial area where there is a demonstrated shortfall in the provision of office and other commercial floor space;

- (b) The proposed office building should be located in an industrial area where there is a known inadequacy in the capacity of infrastructural provision;
- (c) The proposed office building should be shown to induce significant improvements to the general amenity and environment of the district as a whole;
- (d) Favourable consideration may be given to redevelop an existing industrial building for office use where the building has created critical "interface problems";
- (e) The proposed office building should be at an easily accessible location;
- (f) The application site should be well served by public transport; and
- (g) Favourable consideration may also be given to redevelop the existing industrial site for office use where the size and dimension of the site is so small that it is difficult to provide loading/unloading and parking spaces for industrial vehicles.

12. The appellant's application is for the development of a 27-storey high office building with a building height of 92.66m. The ground floor of the building is mainly designed for office and main lobby purposes. The first floor is allocated for carparking and loading/unloading facilities and will accommodate a total of 26 carparking and 9 loading/unloading spaces. There will be another 68 carparking spaces on the second floor. All floors from 3rd to 26th floors are designed for office uses. With a plot ratio of 15, the proposed office building will provide a total gross floor area of 44,788.5m².

13. The application was opposed in 3 principal aspects : traffic; environmental and planning. On the environmental aspect, while the Director of Environmental Protection has no objection to the proposal, the Chief Engineer/Solid Waste, CED voiced its strong objection in these terms :

'The proposed office is strongly object as it would be incompatible to the adjacent public dumping barging point which will be in operation by mid-1996. This barging point is one of the most essential elements of the Public

Dumping Strategy endorsed by LDPC on 27 March, 1992. According to the Strategy, public dumping barging points are required for the barging of inert construction waste to public dumps. A site search has revealed that the existing Ports Works Depot in Quarry Bay is the only suitable site in the Eastern region of Hong Kong Island for setting up a permanent barging point. An environmental review carried by EPD has concluded that the proposed barging site is acceptable as the adjacent sites are zoned "industrial" and "G/IC". The proposed barging point was subsequently endorsed by DPC on 11 August, 1994. The proposed office development is therefore not acceptable'.

Course of the application and previous reasons furnished by the TPB for its rejection

14. On 16.12.1994, the application was considered and rejected by the MPC of the TPB on the following grounds :

- (a) the proposed office development is not compatible with the adjoining site which will be used as a public dumping barging point;
- (b) the traffic impact study submitted is not considered acceptable as it has not demonstrated satisfactorily that there will be no adverse traffic impact on the local roads and the Island Eastern Corridor;
- (c) the subject site is one of the very few industrial sites in the urban area with water frontage. As such kind of site is rare and difficult to be replaced, the site should be retained for industrial uses, which require sea transport; and
- (d) the subject site is relatively isolated and not close to the major transport routes of Java Road and King's Road. It is also relatively remote from the MTR station.

15. On review, the TPB decided on 16.6.1995 not to approve the application for the following reasons :

- (a) the proposed office development is not in line with the planning intention for the site which is

for water front industrial development. The subject site is one of the very few industrial sites with marine access. As such sites are rare and difficult to be reprovisioned, the site should be retained for industrial uses requiring marine access [“the Planning Intention Point”];

- (b) the proposed office development is not compatible with the proposed public dumping barging point at the adjoining site [“the Compatibility Point”]; and
- (c) the subject site, being isolated in location and relatively remote from the MTR station and major public transport routes, lacking supporting facilities and having a tortious pedestrian route, is not suitable for office development [“the Accessibility Point”].

The submission and approval for an I-O development

16. On 28.1.1995, the Appellant submitted another section 16 planning application for an I-O development with provision of a ground-level waterfront cargo handling area at the appeal site. The proposed development consists of a 24-storey I-O building on top of three podium levels. The building height of the development proposed is 97mAPD. The ground floor of the building is mainly designed for office/workshop, carparking and loading/unloading facilities and the main lobby purposes. It will house a total of 1 container bay, 5 loading/unloading and 9 carparking spaces. The first and second floors are allocated for carparking and loading/unloading facilities and will accommodate a total of 25 carparking and 20 loading/unloading spaces. There will be another 60 carparking spaces on the third floor (podium roof). All floors from 4th to 27th floors are designed for office/workshop uses.

17. The concept of an I-O building is directed to meet the increasing demand for dual-purpose accommodation from the manufacturing sector of Hong Kong arising from its structural transformation with emphasis on high-technology; reliance on Mainland China for labour-intensive processes and vertical integration between production process with the supporting functions. Heavy and noxious industrial operations would not be permitted inside an I-O building in order to maintain a reasonably clean and comfortable internal environment. Pure office activities unrelated to any industrial operation would also not be permitted. An I-O building must therefore comply with all relevant building regulations applicable to both industrial and office buildings. In contrast to an industrial building where the

maximum office portion is confined in the absence of planning permission to 30% of the total usable floor areas of the unit owned by an industrial firm, there is no maximum limit for the office portion in an I-O building.

18. In January, 1994, the I-O Guidelines were issued by the TPB in relation to application for composite I-O buildings in industrial zone under section 16 of the Town Planning Ordinance. The main planning criteria for assessing such application include :

- (a) Every unit within the composite I-O building should be designed, constructed and made suitable for both industrial and office uses; that is to say, a pure office building or a pure industrial or a building with discrete horizontal and/or vertical segregation into purely office and industrial portions will not be allowed. The general principle is that where building design requirements for industrial and office buildings differ, the more stringent requirements must be adopted.
- (b) Separate entrances and lift lobbies for goods and passengers must be provided.
- (c) Car and goods vehicle parking, loading/unloading requirements must be provided as if the whole building were an industrial building.
- (d) Spaces for the parking of private cars for office users must also be provided.
- (e) The application sites must be easily accessible to public transport.

19. The appellant's application for an I-O building was approved by the MPC on 17.3.1995 with a number of planning conditions. Those conditions are standard conditions relating to I-O applications and none of them is related to the proposed public dumping barging point at the adjoining site.

The approach

20. We do not think there is any real difference between the parties as to the proper approach that we should adopt in this appeal. In ***Henderson Real Estate Agency Ltd. v. Lo Chai Wan [1997] HKLRD 258 at 266A*** Lord Lloyd of Berwick pointed out that :

"The Appeal Board were, of course, entitled to disagree with the Town Planning Board. Their function was to exercise an independent judgment".

21. Our attention has also been drawn to *Town Planning Appeal No. 16 of 1993* where the Chairman Mr. Robert Tang Q.C. stated that:

" ...we believe our approach should be that planning permission should be granted unless there are good reasons for refusal."

22. We also accept the submission of Mr. S.H. Kwok, Counsel for the TPB, that the application for the I-O Building must be clearly distinguished from the application now under appeal. Whilst both applications share the same starting point, namely, a site zoned as "industrial", each application has to be considered in the light of the relevant guidelines issued by the TPB for such application.

The Planning Intention Point

23. Under the current OZP, the appeal site is mainly zoned "I" with a small strip of land zoned "G/IC" on the eastern side. It has always been zoned for industrial use since its first coverage by the North Point OZP No. LH 8/35 in May 1975. Together with 2 other sites, it survived the process of rezoning of industrial sites by successive North Point and Quarry Bay OZPs as their "industrial uses are either non-polluting or adequately separated from residential or other sensitive uses".

24. In contrast to the other 2 industrial sites, the appeal site is the only industrial site in Quarry Bay with marine access. It was then planned "for oil depot purpose". Whilst this unique feature of the appeal site would render it suitable for industrial uses requiring such access, we agree with the evidence from Ms. Iris Tam for the appellant that neither the explanatory statement nor the history of the site supports the view that the planning intention pertaining to the same is to use it for waterfront industrial development.

25. The evidence of Mr. Steven Chung for the appellant indicates that only 2 groups of businesses, namely cargo handlers and concrete batching who would still be seeking marine access sites. Between January, 1992 to October 1996, he had only 1 enquiry from cargo handler and 2 enquiries from concrete batching businesses. By virtue of various drawbacks relating to the appeal site, he would not recommend the same to those businesses. Furthermore there are other sites with marine access in Yau Tong and Kwun Tong at more competitive price.

26. Mr. Li Chi Kwong, District Planning Officer called on behalf of the TPB, says that "There is a locational requirement for a site of such a nature to be in that part of Hong Kong Island". Mr. Warren Chan, Leading Counsel for the appellant, repeatedly called for particulars in support of this assertion. None was forthcoming. Given the fact that the Industry Department raised no objection to the application in question, we find it difficult to accept Mr. Li's assertion.

27. For these reasons, we disagree with the TPB in the first reason they gave for rejecting the application.

The compatibility point

28. The evidence of Mr. Chan Chi Yan, Senior Engineer of the Public Dumping Strategy Section and Secretary of the Public Dumping Sub-Committee, brought home to us the considerable public interest in this application. He explained that Government has for many years carried out reclamation by means of public dumping. These dumps are important as they provide the public with outlets for inert construction waste and thereby avoid the disposal of such materials at landfills designed to accommodate municipal refuse. Public dumping barging points operate as transfer stations to serve these dumps. They are suitably located to achieve an adequate geographical spread of such facilities in the territory. At present there are 2 public dumps in Tseung Kwan O and Tuen Mun. There is a public dumping barging point at the Aldrich Bay Reclamation which has been in operation since October 1995. About 600 truckloads of public dumping material are collected each day at the ABBP and transported to the public dump at Tseung Kwan O for disposal by marine barging. ABBP is the only outlet for disposal of inert construction waste on Hong Kong Island. However it is a temporary collection point and is intended to be replaced by the QBBP next to the appeal site. "If the QBBP project is not accepted, it will end up with no public dumping facilities in Hong Kong".

29. The appellant relies heavily on the fact that the Director of Environmental Protection raised no objection to the proposal. The appellant seeks to reinforce their case by the evidence of Mr. James Wong, a chartered engineer with 3 years experience in the EPD. Mr. James Wong considered the impact of noise by reference to the Technical Memorandum issued by the Secretary for Environment and the impact of dust by reference to the Air Pollution Control Ordinance. He emphasised that "Since the Town Planning Board has approved an I-O use for the subject site, there is therefore no reason to assume that there is any difference in the environmental impacts caused by the public dumping barging point on the proposed O building from that of the approved I-O building." He also drew attention to 2 dumping sites adjacent to luxury residential areas and environmental sensitive uses : a) Fortune Gardens at Ting Kok Road, Tai Po and b)

The HK Institute of Biotechnology Laboratory at Pak Shek Kok, next to the Chinese University of Hong Kong.

30. We recognise the force of the appellant's contention in relation to the stance of the Director of Environmental Protection. However, we are of the view that such stance is not conclusive on the issue of compatibility. The stance was taken without the benefit of an environmental impact assessment and on the basis that the target recipient of the pollutant is to be taken as inside the building. No account was taken of recipient outside the building. Given the evidence that 600 truckloads of public dumping materials are being collected at ABBP, the environmental impact to recipients outside the building cannot be ignored. According to the evidence of Mr. Li Chi Kwong for the appellant, there would be 2,300 workers working in the approved I-O building. If the application for office development is to be approved, the number of workers would be increased to 3,000. The curtain wall and the air-conditioning of the proposed development would give these workers little comfort when they venture outside the building.

31. The 2 examples given by Mr. James Wong are of limited assistance. Fortune Gardens is situated next to a landfill site which is in the process of being closed down. Dumping at Pak Shek Kok is by means of open bottom barges. This method has substantially reduced the problem of dust pollution. Our attention has also been drawn to a letter dated 9.2.1996 from the Government Secretariat to the Chinese University whereby the Government undertakes in favour of the Chinese University to implement all mitigation measures required to ensure that the impact of the public dump "is controlled within the environmental standards established by the [Environmental Impact Assessment] study or the prevalent EPD recommended standards whichever is the higher or the more stringent". This letter serves to highlight the point that the normal EPD standards may not be sufficient. We do not know the distance between Fortune Gardens/the Chinese University and the landfill/dump. The appeal site is right next to the QBBP where the impact from its operation is likely to be most marked.

32. We are of the view that the appellant has overstated their case in asserting that in reality the approved I-O development would be devoted exclusively to office use. The example cited by the TPB in relation to the I-O development at No. 31, Wong Chuk Hang Road (the Lee Fund Centre) illustrates that user in such development can be industrial orientated. The approval of the I-O application in this case has injected an element of flexibility. It accords with the planning intention of the appeal site as a site zoned "industrial". It would be wrong to test the issue of compatibility on the basis that the I-O development would be used exclusively as office unrelated to any industry and in breach of the planning approval so granted.

33. We are of the view that the grant of this application would result in a development that is incongruous with the QBBP. Such incongruity would carry the

risk of hampering if not jeopardising the operation of the QBBP. We recognise the public interest in the setting up and maintenance of the QBBP. We are in agreement with the TPB in rejecting the application on the incompatibility ground.

The Accessibility Point

34. In terms of transportation, the appellant says that the appeal site is close to Java Road and King's Road. Quarry Bay MTR Station is within 5 minutes' walk at a comfortable pace. 14 bus routes, 2 green minibus routes, other minibus routes and trams are within 3 to 4 minutes' walk. In terms of supporting facilities, the appellant says that there are many restaurants and shops within the adjacent buildings. Furthermore, restaurants and retail shops can readily be found in Java Road and King's Road. The appeal site enjoys a very good seaview and the appellant is unlikely to commit \$1,800 million in an office development that is unattractive to potential users.

35. The TPB however says that the proposed office building would sit alone on the waterfront of Quarry Bay. One would not reach another building for human occupation until one reaches Lei King Wan which is approximately 1 kilometre away to the east. To its north it is cut off by the sea and to its south it is cut off by the Island Eastern Corridor. The nearest groups of buildings that could be reached from the subject site are those in North Point around King's Road to the west of the subject site. To pass to and from the subject site to King's Road one would have to pass through warehouse, godown and funeral home. It is about 8 minutes' walk from Quarry Bay MTR Station. The occupancy rate of office developments near Tai Koo Shing indicates the importance of proximity to an MTR station.

36. We share the TPB's view that the appeal site is at a relatively isolated location. Transportation and supporting facilities are not within easy reach.

37. We would therefore attach some but not heavy reliance on this factor in rejecting this appeal.

Any demand ?

38. Mr. Steven Chung of Richard Ellis Ltd. says that due to the low vacancy level, there is a pent up demand for office space in the area. We are not persuaded by this part of his evidence. Our attention has been drawn to several sites along King's Road where construction for commercial office buildings is in progress. A report in the 20th April, 1997 edition of the Sing Dao Yat Pao also indicates that 3 commercial buildings offering 220,000 sq. ft. (Hong Kong Telecom Building); 300,000 sq. ft. (Tai Cheong Hong) and 600,000 sq. ft. (Tai Koo Shing) respectively would shortly be in the market.

Our conclusion

39. For these reasons, we would dismiss the appeal.

40. We wish to record our very sincere appreciation for the extensive help given to us by Mr. Warren Chan, Leading Counsel for the appellant.