

Town Planning Appeal No.1 of
1996

IN THE MATTER of the Town
Planning Ordinance Chapter 131

and

IN THE MATTER of an Appeal
under Section 17B by Yolanda
Fan & Co.

Date of hearing : 17th July 1996

Date of decision : 30th August 1996

Panel : Mr Robert C. Tang Q.C., J.P. (Chairman)
Mr Douglas Van
The Hon Howard Young, J.P.
Mr Herbert Wong Wan-cham
Mr John F. McMeekan

DECISION

This is an appeal by Mr. Cheung Kam Hau, the sole executor of the Will of Cheung Kam Wing, deceased. The deceased was, prior to his death on 24/10/94, the Administrator of a Chinese temple known as "Kwok Wah Lin Che" ("the temple").

2. The temple occupies Flats 4 and 5 on the 13th floor of Yick Fat Building, Nos.1048 -1056 King's Road and Nos.2 - 32 Yau Man Street, Quarry Bay, Hong Kong.

3. Since the death of the deceased, the temple has been managed by his brother, Cheung Kam Yip, and a Madam Wong Lai Ying, a follower of the deceased.

4. Yick Fat Building is zoned "Residential (Group A)" ("R(A)") on the draft Quarry Bay Outline Zoning Plan No.S/H21/9 which was gazetted on 7/10/1994. It was similarly zoned on the first Outline Zoning Plan for Quarry Bay which was published on 29/10/1976. Since 29/10/76, planning permission is required for "religious institution" within the zone.

5. It is common ground that the deceased had operated a temple at Flat No.4 since 9/12/1972. In other words, so far as Flat 4 is concerned, user as a temple is of right.

6. The deceased acquired Flat 5 on 21/2/1989. Since then Flat 5 has been used together with Flat 4 as a temple. The appeal is concerned with planning permission to use Flat 5 as a temple. Whether or not the application succeeds, the Appellant is entitled to continue to use Flat 4 as a temple.

7. Yick Fat Building was built in 1972. It is a 20 storey high building with a total of about 717 flats. It is predominately occupied by residential users with retail users on the ground floor and basement.

8. There are 34 flats on the 13th floor. All except Flats 4 and 5 are used for residential purposes. The 34 flats are served by a long and narrow corridor of about 3 feet in width and built around a light well. The average size of each flat is about 400 sq. ft.

9. According to the Explanatory Statement of the draft Quarry Bay OZP No.S/H21/9, sites falling within the R(A) zones are intended for residential purpose. Commercial users such as retail shop, office and bank are also permitted on the lowest three floors of this development. Such users above the lowest three floors require planning permission from the Board.

10. "Religious institution" is a column 2 use and requires planning permission under s.16 of the Town Planning Ordinance.

11. The Appellant applied for permission to use Flat 5 as a temple. That was rejected by the Metro Planning Committee of the Board on 19th May 1995 for the following reason:

"The proposed Chinese temple is incompatible with the predominately residential use of the building and the proposed use will also generate nuisance and disturbance to other residents of the building resulting from the holding of ceremonial activities and burning of ritual papers"

12. The application for review under s.17 was unsuccessful because

"The proposed development is incompatible with the predominantly residential use of the building as the use, involving the holding of ceremonial activities and burning

of ritual papers, will generate nuisance and disturbances to other residents of the building".

13. On appeal, the Appellant seeks permission to use Flat 5 as a Chinese temple for two years. In addition, the Appellant is prepared to undertake as follows:

- (1) not to use the corridor on the 13th floor except for ingress and egress by followers of the temple to the said premises
- (2) to restrict the lighting of joss sticks in the temple to between 9:00 a.m. and 5:00 p.m.
- (3) not to permit the burning of incense coils at the said premises
- (4) to close all doors of the said temple and keep them closed when there are chanting in the temple
- (5) to restrict any chanting activities to between 9:00 a.m. and 5:00 p.m.
- (6) not to burn or cause to be burnt any ritual papers in the temple or in the Building
- (7) if a new lock operated by code is installed at the main entrance of the Building, either Cheung Kam Hip or Madam Wong Lai Ying will go down to the ground floor of the Building to admit visitors to the temple

14. Mr. Cheung Kam Yip gave evidence as well as Madam Wong Lai Ying for the Appellant. Essentially, their evidence related to their willingness to reduce the level of inconvenience to other occupiers of the Yick Fat Building. They also said in the last few months, they have ceased to burn ritual papers. They have also stopped using incense coils. Nor have they allowed any visitors to the temple to use the corridor otherwise than for ingress or egress.

15. At the request of the parties, we visited Yick Fat Building and, in particular, the temple. We have no doubt that the burning of ritual papers on the staircase landings by the temple can easily amount to a nuisance. We note that the Fire Services Department has no objection to the application.

16. So far as the burning of incense is concerned, we have noticed, for example, in the corridor on the 13th floor, outside the doors of some of the flats, there are receptacles for joss sticks. This is, of course, not unusual in a Chinese tenement building. No doubt some ritual papers would be burnt within some of these flats too.

17. It seems to be common ground that the level of religious activities in the temple is highest on Buddhist festivals as well as on the 1st and 15th day of a lunar month. Apart from these occasions, the temple would be looked after by Madam Wong. Until recently a lighted coiled incense would be placed next to an open window in Flat 5. This has now been discontinued. According to Madam Wong, attendance at the temple has fallen off significantly since the death of the deceased.

18. We have checked the visitors' book of the temple and found that consistently with the evidence of Mr. Cheung Kam Yip and Madam Wong there were few visitors to the Chinese temple.

19. The Appellant also called Mr. Wong Lap Ki of Townland Consultants Limited, planning consultants, who had attended the temple on several occasions.

20. According to Mr. Wong, on the 15th day of the first lunar month after the Chinese New Year, namely the Lantern Festival, there was a ceremony in the temple which started at about 11:15 a.m. and finished at about noon. There were only seven persons there. The ceremony included a procession inside the temple where Buddhist musical instruments were used and there was also chanting. There were about ten joss stocks. There was no burning of ritual papers. By then, ritual papers burning had been banned.

21. On Ching Ming Festival, there were three ceremonial sessions and he observed the first two. The first started shortly after 10:05 a.m. and finished at about 10:50 a.m. The second was held between 11:00 a.m. and 11:30 a.m. The third session, he was told, would take place after lunch and would take about 45 minutes. There were ten people for the first session and twelve for the second. There was a procession, musical instruments were played and there was chanting. There was no burning of ritual papers and less than a total of thirty joss sticks were burned during the ceremony but at any one time during the ceremony, the number of burning joss sticks was less than ten.

22. According to Mr. Wong, the noise generated by the ceremony was low in volume and acceptable when heard from the corridor outside the premises. He noticed that some of the neighbours left their doors open while the ceremony was being conducted. That suggests that the noise was not intolerable.

23. His conclusion, based on what he was told and on his observation is that

- (a) ceremonial activities are held about four times a month on average
- (b) the ceremonies are held in late mornings and only about six ceremonies per year would extend into the early afternoon
- (c) most ceremonies last between forty five minutes and an hour. On occasions when the ceremonies extended into the early afternoon, the total time for the ceremonies would still be less than four hours
- (d) the number of participants at each gathering is usually below twenty
- (e) there is no burning of ritual papers and burning of joss sticks is minimal
- (f) the noise generated by the ceremony is low in volume and appeared to be tolerable to the neighbours

24. The Respondent called witnesses from the building. The first is Mr. Yip Ping Chi who is the owner and occupier of Flat 6 on the 13th floor. Both he and his wife have been living in the flat for eight years. Flat 6 is next to Flat No.5.

25. According to Mr. Yip, the temple usually performed religious rites on the 1st and the 15th day of the lunar month. The preparation for the ceremony usually started at about 7:00 a.m. About four to six square shaped folding tables would be placed in the corridor outside Flats 4 and 5, holding flowers, ingredients for making vegetarian food, bowls and dishes. Chairs would also be placed in the corridor for the devotees to rest and in the morning some people in robes would chant and play Buddhist musical instruments. The noise level is high enough for it to be heard in his flat. After the ceremony, a vegetarian meal would be eaten and some of the followers would eat them in the corridor. There would be twenty to thirty people at most and about ten on average. The tables and chairs would block the narrow corridor reducing its width from about 3 feet to barely wide enough for a person to pass through and that has caused inconvenience to the residents. He also said that once a visitor to the temple rang his doorbell to ask where vegetarian food was available. He also said although the temple did not perform religious rites everyday, joss sticks are burnt there daily. The smoke (presumably from a coiled incense placed next to the window in Flat 5) would drift out of the window and can be smelt in his flat if he opened the window on the left side of his flat near the

temple. He used to keep that window open. But because he found the smell irritating and suffocating and his wife who had nasal allergy is particularly sickened by it, he would keep the windows near the temple closed except when he had to hang out laundry. He once asked Madam Wong to close the window. That was complied with on that day but on the next day, it was left open as usual.

26. According to Mr. Yip, he had noticed some improvements in the last couple of months.

27. Mr. Li Ka Hon, who occupied Unit 31 on the 13th floor, also gave evidence. According to him, he had been inconvenienced because of the tables and chairs blocking the narrow corridor.

28. Lastly, there was the evidence of Madam Miu who does not live in the building but is a member of its Management Committee. According to her, there had been various complaints against the temple, in particular, relating to smoke and the burning of ritual papers and noise. She also said that they intended to install a combination lock at the main entrance to the residential portion of the building, but with no remote control. They were afraid that if there are visitors from the outside to the temple, then the security of the combination lock would be breached.

29. Mr. Lee Tin Yan, Counsel for the Appellant, in a very helpful submission, drew our attention to the fact that under the relevant plan, users always permitted on the upper floors of this building include: "private club".

30. He rightly pointed out that a private club would be as objectionable as a temple so far as security is concerned.

31. We believe that it is important not to forget that the temple is entitled to continue as of right in Flat 4. Thus, even if planning permission is not given for Flat 5, so far as Flat 4 is concerned, the temple will remain.

32. Refusal of planning permission for Flat 5 would only mean the temple would have to operate with less space. That would increase the risk of followers venturing out into the corridor. Nor would it stop the burning of incense (including coiled incense) inside Flat 4 though that would be further away from Unit 6 so that would be an improvement so far as Unit 6 is concerned. However, it might affect Flat 3. Nor can one stop the temple in Flat 4 from burning some ritual papers.

33. That being the case, we believe that it will be of some advantage to the residents if in return for planning permission to use Flat 5 as a temple, the undertaking stated in para.13 above were given. Moreover, if planning permission were given for two years only, the Appellant would know that their conduct would

be under close scrutiny by the residents. The Appellant should know that if the undertakings were breached, that would affect the chance of a renewal of the permission in two years' time.

34. For these reasons, we will allow the appeal and grant permission for Flat 5 to be used together with Flat 4 as a temple for two years from the date of this decision. This permission is given against the undertaking in terms of para.13 above. Counsel has informed us and we accept that the same undertaking applies to Flat 4 as well.

35. Lastly, we wish to record our appreciation for the clear, fair and sensible evidence given by witnesses from both sides. In particular, Messrs. Yip and Li showed a commendable degree of tolerance and neighbourly goodwill. We also thank the parties for their efficient and fair presentation of the evidence and arguments.