

Town Planning Appeal No.22 of
1995

IN THE MATTER of the Town
Planning Ordinance Cap.131

and

IN THE MATTER of an Appeal
under Section 17B by Lucky Gain
Development Limited

Date of hearing : 30th and 31st October 1996

Date of decision : 18 December 1996

Panel : Mr Robert C. Tang Q.C., J.P. (Chairman)
Prof Nelson Chow M.B.E., J.P.
Mr Fan Sai Yee
Mr Joseph Lo
Mr Anthony Upham

DECISION

This is an appeal by Lucky Gain Development Limited against a refusal of planning permission for a 30 storey commercial/office building with a plot ratio of 15 to be built on Aberdeen Inland Lots 278 and 280 ("the Site").

2. The Site is zoned industrial on the draft Aberdeen and Ap Lei Chau Outline Zoning Plan No.S/H15/6 and is part of the Wong Chuk Hang Industrial Area. As a result of planning application No.A/H15/119, an industrial - office (I-O) development was approved with conditions by the Metro Planning Committee on 5/3/93 in respect of A.I.L.278. On 24/2/95, the planning permission for the I-O development was extended for 2 years until 5/3/97.

3. The Town Planning Board refused the application on the following grounds:-

- (a) The Town Planning Board is not convinced that there is at this time a shortfall of commercial/office floor space in the area to justify the approval of the application for commercial/office uses;

- (b) There are insufficient environmental gains to justify the approval of the application as there are no environmentally sensitive uses nearby;
- (c) It is difficult to accept at this point that the location is a suitable secondary office/commercial centre; and
- (d) Approval of the application may set an undesirable precedent for pure commercial office uses which may lead to the wholesale conversion of the area and the permanent loss of industrial floor spaces in the area.

4. In or under the OZP, the Board has already made provision or approved a total of 131,440 m² commercial/office or industrial related office space in the Wong Chuk Hang Industrial Area. They are comprised of:-

- (a) 46,200 m² office floor space in the SouthMark at Yip Kan Street which is zoned OU (commercial development with multi-storey public lorry park). [This is the result of an amendment to the OZP in 1990 by rezoning a GIC site]
- (b) a total of 82,500 m² industry related floor space in composite I-O buildings was approved by the Board in 6 planning applications since 1990. One composite I-O building was completed in 1990 and another is under construction. The other 4 approved I-O developments have not yet been implemented and this include the one proposed on A.I.L.278
- (c) a total of 2,740 m² floor space for retail shops, showrooms, ancillary offices and Banks and industrial buildings was approved by the Board through 17 planning applications since 1989.

5. The TPB Guidelines for application for office building in industrial zone provided certain main planning criteria for permission, e.g. where there is a demonstrated shortfall in the provision of office and other commercial floor space, known inadequacy in the capacity of infra-structure provision and good accessibility, sites which offer environmental interface problems to adjoining environmentally sensitive uses.

6. In his helpful Final Submission dated 21/11/96, Mr. Anthony Ismail, Counsel for the Appellant, submitted that the Guidelines are for general reference and have no statutory effect. We accept that. However, we believe that the suggested criteria are based on common sense. They indicate what may be regarded as good reasons for permission. He reminded us that the purpose of the Town Planning Ordinance is to promote the health, safety, convenience and general welfare of the Community. He further submitted that if the proposed development promotes the health, safety, convenience and general welfare of the Community, permission should be granted even if the development does not satisfy the guidelines in whole or in part. With respect, we do not believe that necessarily follows. Each application must be considered in the context of the relevant statutory plan. For example, hospitals will promote the health of the Community but it cannot mean that permission must be granted for a hospital to be built whenever it is a column 2 use.

7. To bring the Appellants within the Guidelines, Mr. Ismail sought to persuade us that there is a demonstrated shortfall in the provision of office/commercial floor space in the area. He relied in particular on the evidence of Miss Gilletta Cheng, of Cheng & Lo Associates Limited, who has had 10 years experience in the Buildings and Lands Department and Territory Development Department in Government before going into private practice about 5 years ago.

8. According to Miss Cheng's statement dated 22/10/96, she said there was a 17.09% vacancy for flatted factories in Aberdeen at the end of 1995. However, we do not find her evidence on this aspect of the matter helpful. She accepted that the figure given in her statement was the average not only for Territory Planning Unit (TPU)175 (Wong Chuk Hang Industrial Estate is situated with TPU175) but also TPU173 and 174. But the vacancy for TPU173 as at the end of 1995 was 15.12%, TPU174, 73.54% and TPU175, 5.25%. Thus, the average of TPU173, 174 and 175 does not give a true picture of the vacancy level at TPU175 which is the relevant area.

9. Nor is her evidence on the so-called effective conversion of industrial buildings into commercial office use convincing. It is quite clear from the statement of Mr. Cheuk Hau-kwan of Hong Kong District Planning Office, Planning Department, that the 6 offices specifically mentioned by her in her statement as being used for commercial (office) use were in fact largely used as warehouses. And that such office portion of the companies identified by her were only ancillary operations to the warehouses which were the pre-dominant use and hence are permitted as of right under the industrial zone. The evidence of Cheuk Hau-kwan was unchallenged. Thus, we found this aspect of Miss Cheng's evidence again unhelpful.

10. It is argued that in a letter dated 1/3/95 which was referred to by her in her statement, she had referred to a total of 1,301 offices. However, the 6 offices which she had specifically mentioned in her statement had been refuted by Cheuk Han-kwan and unchallenged by her. Given that record, and her unhelpful evidence regarding vacancy rates referred to in para.8, we are doubtful about the allegation in relation to other 1,295 offices. Indeed, she only identified 65 of the 1,301 offices in her letter of 1/3/95. In any event, unauthorised conversion of industrial buildings into commercial office use should be the subject of enforcement action. Nor does such use necessarily mean lack of demand for industrial use. It may simply mean that a higher return is available for office use. One purpose of planning is to ensure adequate and affordable supply of premises deemed desirable for planning purposes.

11. According to the evidence of Mr. Wilson Siu Kam-wai, a Senior Valuation Surveyor of the Rating and Valuation Department, the vacancy rate in respect of flatted factory, office and industrial office properties in TPU175 at the end of 1995 were 5.25%, 97.04% and 4.76% respectively. The 97.04% is largely due to SouthMark. However, even a year after completion, an on-site survey undertaken by the Survey Officer of the Planning Department in May 1996, has revealed that only 50% of the floor space of SouthMark has been sold off or occupied.

12. In our opinion, there is no evidence that there is a demonstrated shortfall in the district. If anything, the evidence points strongly to the contrary.

13. It is said that there is high vacancy rate for retail or office because SouthMark is only available for sale. But one cannot expect all purchasers to be owner occupiers. No doubt, if there is a demand from tenants, premises would be purchased for letting purpose. We are of the view that the evidence demonstrates a healthy demand for industrial space or I-O space and much less demand for commercial/office space in Wong Chuk Hang. In our opinion, this must be a good reason for refusing planning permission.

14. Mr. Ismail argued that the fact that there is a vacancy rate of 5.25% for flatted factory means that there is a surfeit of industrial premises in the area. We do not agree. One cannot expect full occupancy. In any event, 5.25% vacancy rate is very healthy compared with the vacancy rate for commercial space in the area.

15. It is said that the District Lands Officer/Hong Kong South has no objection to the proposed development and supports the idea of retail space on the ground floor as there is a need for retail space in the area; and that only the Director General of Industry and the Planning Department object to the proposed development. Indeed, other Government Departments have no objection to the application.

16. We do not regard the lack of objection or support by some Government Departments as conclusive. Here, the Site has been zoned as industrial. In respect of A.I.L.278 permission has been given for an I-O development. The fact that there is a surplus of office/commercial premises must be a good reason for refusing permission.

17. It is said that an office/commercial building would alleviate traffic congestion because an industrial development requires 12 bays for lorries whereas a commercial office development requires 5 bays. That may be so but we do believe that the improvement is likely to be significant. Indeed, although there may be less lorry traffic, a commercial office development may well generate other kinds of vehicular traffic.

18. The Aberdeen Technical School is situated close to the Site. Mr. Ismail argued that the proposed development will induce significant improvements to the general amenity and environment of the district as a whole. However, there is already an existing buffer between the Aberdeen Technical School and the Site in the form of a football field and the trees which are planted there. It is also said that because the Aberdeen Technical School and the football field are environmentally sensitive uses, a commercial/office building will be beneficial. We do not believe the Appellant has even begun to show that there would be any significant or meaningful improvement.

19. Nor do we agree with Mr. Ismail that the proposed provision of some retail floor space a significant improvement or that it would justify the planning permission sought.

20. For the above reasons, we have no doubt that the decision appealed from is correct. The appeal is dismissed.