

Town Planning Appeal No.
12/1994

Appellant : Lai Sun Development
Co. Ltd.

Re : 789 Cheung Sha Wan Road,
Kowloon

Date of hearing : 7th June 1995, 1st, 2nd, 3rd, 4th, 5th, 7th and 9th August 1995
Date of decision: 14th September 1995

Panel : Mr Justice Litton, OBE (Chairman)
Prof Kung Shain-dow
Mr John F. McMeekan
Mr Patrick Fung Yuk-bun
Mr Jason Yuen King-yuk, MBE

DECISION

The appellant, Lai Sun Development Co. Ltd., is the owner of a property at 789 Cheung Sha Wan Road, Kowloon on which there stands at present a godown building. The site area is 1224.45 m². It falls within an area in the Cheung Sha Wan Outline Zoning Plan no. S/K5/10 zoned for industrial use. Outline Zoning Plan no. S/K5/10 was gazetted on 7 October 1994. In the previous OZP no. S/K5/9, gazetted on 24 December 1993, the site was likewise zoned "industrial".

Section 16 Application

2. On 19 February 1994 the appellant applied to the Town Planning Board (TPB) under s.16 of the Town Planning Ordinance for planning permission to develop a 19-storey office/retail building with the following features:

- (i) 2 basement floors for carparking;
- (ii) a podium consisting of 3 1/2 floors of retail shops, with some shop spaces and loading and unloading facilities on the ground floor;

(iii) an office tower from 5th to 17th floor.

3. The retail gross floor area (GFA) would occupy 4,733 m² (32% of the total (GFA) and the office tower (5th-17th floor) would provide GFA of 9,960 m² (67% of the total GFA).

4. The appellant is also the owner of Cheung Sha Wan Plaza: a large development erected over the Lai Chi Kok MTR station, consisting of a bus terminus and multi-storey car-parks, a large commercial/retail podium and two office towers. It is separated from the site by Tai Nam West Street. The appellant's proposal is to link the new development to Cheung Sha Wan Plaza by footbridges at the first and third floor levels and to name the new development "Cheung Sha Wan Plaza II".

5. It is worth observing at the outset that the area in which the site falls in the Cheung Sha Wan OZP is predominantly industrial. The site of the Cheung Sha Wan Plaza has been zoned under the category "other specified use" and is marked in the OZP as suitable for use as a "multi-storey car/lorry park", with office, restaurant and retail use being permitted on application to the TPB.

Section 17 Review

6. On 17 March 1994 the appellant's s.16 application was rejected. A s.17 review took place on 22 July 1994. The application was again rejected. The grounds for the rejection are stated as follows:

- “(a) the proposed development is not in line with the planning intention for the area which is to retain and upgrade the existing industrial buildings;
- (b) there are purposely designed office/retail buildings in the vicinity to meet the demand for office spaces in the area without having to sacrifice existing industrial land;
- (c) as the site is located in the midst of existing industrial buildings, there is no obvious planning gain through alleviating the industrial/residential interface problem; and
- (d) the approval of the proposal development may set an undesirable precedent for other similar applications, thereby resulting in cumulative loss of industrial floor space.”

Planning Intention

7. The first question for consideration is the planning intention for the area in which the site is located. Such intention is to be derived primarily from the plan itself (including the Notes) and the Explanatory Statement: the latter, although not a part of the statutory plan, was published with the OZP and must be taken to have guided the TPB in formulating the plan. Under the Notes to the OZP, forming part of the plan, the TPB has a discretion to permit the following uses in areas marked “industrial”: bank, fast food shop, office not ancillary to the industrial use, restaurant, retail shop etc.

8. Para. 6.4 of the Explanatory Statement says:

“6.4.1 Land zoned for this purpose is intended to provide for industrial developments including general industrial use, service trades and warehouses. However, some other industrial developments such as heavy industries, storage of dangerous goods and offensive trades may also be permitted through application to the Board. In addition, through the planning permission system, certain commercial uses such as banks and retail shops may be permitted in the industrial areas to cater for the needs of the industries and the industrial workers.”

9. Para 6.4 of the Explanatory Statement amplifies, in effect, the Notes to the plan. In column 1 of the Notes relating to “industrial” use, under the heading “Uses always permitted”, one finds uses directly related to industrial activities such as “canteen”, “cooked food centre”, “government refuse collection point”, “service trade”, “vehicle repair garage”, “warehouse (other than dangerous goods godown)” etc. Heavy industrial uses such as cement manufacturing, concrete batching plant etc., although clearly coming within the definition of industrial use, nevertheless require the planning permission of the TPB. It can therefore be concluded, broadly-speaking, that the area marked “industrial” in the OZP, occupying 10.31% of the total area of the plan, is intended for light industrial use. To support such use, certain services must be provided. One therefore sees in column 1 to the Notes things like “canteen”, “service trade” and “vehicle repair garages”. General office/retail use, unrelated to industry, is not contemplated. This view is also consistent with the somewhat restrictive wording in para. 6.4.1 of the Explanatory Statement which has identified banks and retail shops in the industrial areas as “catering for the needs of the industries and the industrial workers”.

10. Nothing on the face of the plan and the Explanatory Statement indicates that use of the site for a commercial/retail/office building is intended.

The Use of Government Reports to Identify Intention

11. In the course of developing the appellant's case, counsel has referred us to a number of reports prepared at different levels of planning:

- (i) the Territorial Development Strategy Review, conducted at a territory-wide strategic level;
- (ii) the Metro-plan 1991 and, in particular, the 1993 Study on Restructuring of Obsolete Industrial Areas ("ROBINA") dealing with urban renewal of old industrial areas within the metropolitan area of Hong Kong: studies conducted at a sub-regional level; and
- (iii) the West Kowloon Development Statement (November 1993), which is study conducted at a district level.

12. Other reports have also been referred to such as the "Office, Hotel and Retail Development Strategy for West Kowloon – Final Report" prepared by the sub-regional planning section of the Planning Department. Statements have been extracted from these reports suggesting that the idea of developing "office nodes" close to selected MTR or KCR stations in old industrial areas has been translated into planning strategies.

13. The problem with the use of these reports is that they look at land use on a very large scale and are not focussed on the planning intentions for the "industrial" area in the Cheung Sha Wan OZP. Moreover, many of the statements are equivocal. For instance, in the West Kowloon Development Statement: Final Technical Report, there is this statement: The "concept for distributing the proposed new supply" – of "office, hotel and retail functions" – is "shown by Figure 5.3". Figure 5.3, a very small scale plan, shows "retail nodes" and the Lai Chi Kok MTR station has been marked as a "retail node". But para 27 goes on to identify new commercial nodes at the Mongkok KCR and the Tai Kok Tsui MTR station, for the purpose of decentralization. There is no mention of the Lai Chi Kok MTR station where the Cheung Sha Wan Plaza is located. Moreover, in para. 32 there appears this statement:

"Development Control

3.2 In view of the substantial new supply from committed development, from the West Kowloon and Kowloon Point Reclamations and from the hinterland urban renewal action areas, there is a need to discourage future ad hoc land use changes to commercial use in less ideal locations....”

14. One interpretation of the above statement is that the area around the Lai Chi Kok MTR station, marked “industrial” in the OZP, falls into the category of “less ideal locations”. But this is guessing. It merely illustrates the danger of using these reports. They constitute at best background material. They are, by their nature, merely tools for the formulation of planning policies by the TPB. Many of them, such as ROBINA, are ongoing studies; observations, recommendations even statements of strategic intention in these reports are liable to change.

15. There is, perhaps, an even more fundamental objection to reliance upon these reports. We, as an appeal board, exercise appellate functions under s.17(B) of the Ordinance. We have no functions such as those exercised by the TPB under s.3(1)(a) of the Ordinance: To promote the “health, safety, convenience and general welfare of the community” by drawing up plans providing for different land uses. Whether, as a matter of territory-wide policy, there ought to be large retail nodes around MTR stations, particularly in the old industrial areas, is not something for our determination.

Town Planning Board Guidelines

16. Whilst much time was spent at the hearing of the appeal on the various reports, at the end of the day it was the TPB Guidelines which the appellant principally relied on for saying that the appeal should be allowed. These guidelines were published in December 1990, to regulate section 16 applications for office buildings in industrial zones. Whilst counsel for the appellant accepts that it is no part of our function as an appellate body to substitute our judgment and discretion for that of the TPB, counsel submits that where it can be demonstrated that the TPB had, in effect, departed from their own guidelines, then the appeal should be allowed.

17. The Guidelines begin with this statement:

“1. Scope and Application

1.1 Changes in land use pattern and improvements in public transport facilities have rendered some sites in existing

industrial areas suitable for redevelopment to office or office/commercial buildings. The Town Planning Board recognise that such development either in close proximity or within existing industrial areas may be complementary to the industrial activities, particularly in areas lacking in office/commercial floor space. The Board also recognises that redevelopment of some existing industrial sites into office buildings may help in the general thinning out of obsolete industrial activities from the main urban area, thereby achieving general environmental improvements, reduction of traffic congestion, and a better structure of urban land uses.

- 1.2 While conscious efforts are being made by the Town Planning Board to rezone suitable industrial sites for office (or other) development having regard to the overall supply and demand of industrial land and office floorspace in the whole Territory, the Board will also consider, through the planning permission system, proposals for office buildings in industrial areas.”

18. The Guidelines then go on to set out the main criteria for determining s16 applications as follows:

- “(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 to serve the industrial activities in the district;
- (b) The proposed office building should be located in an industrial area where there is a known inadequacy in the capacity of infrastructural provision, e.g. sewer, drainage and road network, such that the proposed office development will

help to alleviate such inadequacy significantly as compared with an industrial development;

- (c) The proposed office building should be shown to induce significant improvements to the general amenity and environment of the district as a whole, such as in localities where existing industrial buildings may have become a 'residual' use due to the gradual transformation of the character of the area;
- (d) In particular, favourable consideration may be given to redevelop an existing industrial building for office use where the building has created critical 'interface problems' in terms of air, noise and/or water/effluent pollution on nearby environmentally-sensitive uses such as residential developments, schools and hospitals;
- (e) The proposed office building should be at an easily accessible location which will be attractive to potential users;
- (f) The application site should be well served by public transport so that the generation of private car trips would be reduced in comparison with industrial development, thereby alleviating local traffic congestion problems;
- (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 adequate loading/unloading and parking spaces for industrial vehicles in accordance with the Hong Kong Planning Standards and Guidelines, and where further site amalgamation has been demonstrated impossible, to avoid the overspill of loading/unloading and parking activities onto nearby streets."

Availability of Office/Retail Buildings in the Vicinity

19. There are three buildings close to the site which are office/retail in nature. They are Cheung Sha Wan Plaza itself, Lai Sun Commercial Centre and Trade Square. None of these three sites fall within a zone in the OZP marked “industrial”.

20. Much material has been put before us by the appellant’s representatives tending to show that there is in fact a shortage of both office and retail space in the area. There is a waiting list for prospective tenants in Cheung Sha Wan Plaza, for both office and retail space. There has, however, been a softening in the level of rent for office space in the past year.

Future demand

21. The appellant has attempted to mount a case of continuing future shortage of both office and retail space, by calling two experts: Mr R A Pendleton (for office accommodation), and Mr T E Bellman (for retail).

22. The difficulty in accepting the opinions of Mr Pendleton and Mr Bellman without considerable reservations is this: Apart from the inherent inaccuracies of the exercises they conducted, based upon surmises and assumptions, there is this consideration: A new policy has recently been implemented for the upgrading of industrial areas, and the Town Planning Board has, up to April 1995, given planning permission for a new category of industrial-office building on 26 sites in the Cheung Sha Wan industrial area. One, at 910 Cheung Sha Wan Road, has been completed and is now fully occupied; another at 786-788 Cheung Sha Wan Road is close to completion. 17 other sites are in various stages of development.

23. The industrial-office (I-O) building is a dual purpose building designed for flexible use. Office functions relating to industrial operations conducted overseas would be permitted and it is possible that once these new buildings come on stream in the area, the demand for office space in the area would fall considerably.

24. Moreover, in other guidelines published in December 1990, in relation to office use in industrial buildings, 30% of usable floor space occupied by an industrial undertaking is permitted to be used for ancillary office purposes without application to the TPB.

25. We conclude therefore as follows: Whilst there is at present a demand for office space in reasonably high-class office buildings in the area, we are by no means satisfied that the future demand is likely to be as great as the appellant suggests. This view is reinforced when we consider the future demand for industrial space. Whilst, over the past few years, the number of industrial workers has substantially decreased, industrial production has in fact increased. What has

happened is that the territory as a whole has moved from labour-intensive processes to automation and high-technology production. The evidence as a whole does not suggest that demand for industrial space in the Cheung Sha Wan area is going to diminish in the years to come. The shift to new types of demand – offices associated with high-technology industries and industrial services – is intended to be met by the up-grading of existing industrial buildings and by the new I-O buildings. The appellant has, in the course of the hearing, emphasized the point that Cheung Sha Wan Plaza II is intended to be a “Grade A” office building. The appellant’s case is that the demand is in that class of building. Nothing would prevent the appellant from developing the site into an I-O building with a “Grade A” office component.

26. As regards retail, the evidence establishes a low vacancy rate for the retail segment of Cheung Sha Wan Plaza. But in the nearby Lai Sun Plaza, the vacancy rate is very much higher. In November 1994 it was 10.6%.

27. In considering both the existing and future demand for retail space, one point needs emphasis: the site is located in an industrial area, some considerable distance away from the residential areas. The main shoppers are those who work closeby. The main shopping time is the lunch hour. This necessarily limits the prospects for future retail demand.

28. Mr Bellman, the appellant’s expert witness, has estimated the future demand for retail space by looking at the “primary catchment area” and the “secondary catchment area” around the site. The potential shoppers from the secondary catchment area are those who would need to take public transport in order to shop at Cheung Sha Wan Plaza II. In our view, the number of shoppers from so far away would be likely to be very limited. Mr Bellman’s estimate of Cheung Sha Wan Plaza II attracting 50% of the additional household expenditure may be on the high side.

29. In estimating future demand, it is legitimate to consider what has been happening recently. The evidence shows that the waiting list for retail space in Cheung Sha Wan Plaza has dropped by half from the summer of 1994 to November 1994. When this was put to Mr Bellman in cross-examination, his answer was that there has been a general downturn in retail sales: it is, he said, a cyclical business. This also demonstrates, to some extent, the inherent unreliability of future projections.

30. Having regard to all the evidence, we concluded that whilst there might be a future shortfall in office and retail premises in the area, this is unlikely to be great: at least, not as much as the appellant suggests.

No Obvious Planning Gain

31. Para. (d) in the “planning criteria”, set out in the TPB Guidelines, states that favourable consideration may be given where an existing industrial building has created “critical interface problems” vis-a-vis nearby environmentally sensitive uses such as residential developments, schools and hospitals. An example where the TPB has given planning permission to alleviate such problems are two sites:

- (i) no. 44 Wing Hong Street; and
- (ii) 476 Castle Peak Road.

32. We wholly accept counsel’s submission that where there is no such “interface” problems – such as the position of the appellant’s site – this does not mean that no planning permission should be given. Otherwise, this factor would become an all-embracing one.

33. However, the TPB has not erred in this regard. In rejecting the appellant’s application, the TPB has simply stated this as one of the matters taken into account.

Conclusion

34. We have some sympathy for the appellant’s case. The proposed development is, in effect, an extension of Cheung Sha Wan Plaza. It could emerge, some indeterminate time in the future, that the correct approach for the renewal of old industrial areas near MTR stations is not the policy of industrial upgrading but a radical change to commercial/retail/office use: in which case an extension of Cheung Sha Wan Plaza by means of footbridges across Tai Nam West Street to the appellant’s site would make good sense from a planning point of view. We cannot, however, give effect to this for two reasons:

- (i) The evidence before us is unclear. We cannot conclude even on a balance of probabilities that the present policy of industrial upgrading will fail; in particular, that the new industrial-office buildings will not serve their stated purpose.
- (ii) To give effect to this view would be, to an extent, to usurp the functions of the TPB under s3(1)(a). In this regard it is worth observing that the TPB has, within the past two years, amended the Cheung Sha Wan OZP twice. It did not take those opportunities to re-zone sites such as the appellant’s to “other specified uses”.

35. In our view, Mr Kwok, counsel for the respondent, has put the key question for our determination correctly when he said:

“The question is: Did the appellant demonstrate sufficient merits in his proposal which could outweigh the stated planning intention for the site?”

36. The TPB plainly came to the view that the appellant had failed in this regard, and, in our judgment, the TPB was correct in its conclusion.

37. We also agree with Mr Kwok’s observation to the effect that even if the appellant had succeeded in demonstrating, clearly and convincingly, a future deficiency in office and retail space, this can be addressed systematically by planning. It would take a very strong case to persuade us that the TPB’s refusal of ad hoc development is wrong in this regard.

38. For the reasons we have given, this appeal must be dismissed.