

Town Planning Appeal No. 2 of 1994

IN THE MATTER of the Town  
Planning Ordinance Chapter 131

and

IN THE MATTER of an Appeal  
under Section 17B by Mr SO Cho  
Cheung

Draft Shatin OZP No. S/ST/5

Application for use as fast food shop

Date of hearing : 19<sup>th</sup> October 1994

Date of decision : 28<sup>th</sup> November 1994

Panel : Mr Justice Litton, OBE (Chairman)  
Mrs Pamela CHAN WONG Shui, JP  
Dr Robert Moir Kennard  
Mr Lee Man-ban, MBE, JP  
Mr Anthony Roy Upham

## **DECISION**

The appellant, Mr So Cho Cheung, is the owner of a unit on the Ground Floor of Wah Luen Industrial Centre located at Fo Tan, Shatin. It is a corner unit, at the junction of Wong Chuk Yeung Street and Yuen Kong Au Street. The appellant has, for some time, been operating a local provision store at the premises, such use having been approved by the Town Planning Board on 25 November 1988. Being a local provision store, a variety of drinks and food products are sold on the premises and the appellant also supplies to his customers a certain amount of cooked food.

### **Section 16 application to TPB**

2. In August 1993 the appellant applied to the Town Planning Board under section 16 of the Town Planning Ordinance for permission to use the premises as a fast food shop. The premises fall within an area zoned "industrial" in

the draft Shatin OZP No. S/ST/5. In the Notes to the outlining zoning plan use of premises as fast food shop is permitted if approved by the Town Planning Board, with or without conditions.

#### Reasons for rejection

3. On 18 April 1994, following a s17 review, the Town Planning Board rejected the appellant's application. The reasons are stated as follows:

- "(a) There is no strong justification to use the industrial ground floor space for a fast food shop as there is a good supply of eating facilities in the industrial area; and
- (b) The approval of the application will set an undesirable precedent for similar applications."

4. Being dissatisfied with this decision, the appellant appeals to us under s17B of the Ordinance.

#### Three salient points

5. In dealing with this appeal, three salient points emerge:

- (i) The distinction between the use of the premises as a local provision store and as a fast food shop is somewhat blurred: they both provide "take-away" food and beverages. The difference is, perhaps, one of degree. In a fast food shop, a greater variety of cooked food would be provided; there might be limited facilities for consumption of food and drinks within the premises.
- (ii) It is common ground between the parties that the appellant's application does, in fact, fall within the Town Planning Board guidelines for commercial use in industrial buildings within industrial zones.
- (iii) The proposed change of use does not, in any way, mean the diminution of industrial space within the area covered by the outline zoning plan, since the appellant's present commercial use of his

premises as a local provision store is with the Board's approval, permission having been granted in November 1988.

#### Planning department's view

6. One of the points made by the Planning Department before the Board was this: there have only been a total of seven other applications for use as a fast food shop in industrial premises within the Fo Tan industrial area; of these, six were rejected by the Board; the only one approved was not on the ground floor but on an upper ground floor, and was made at the time when the commercial centre for the area had not yet been developed. This must have influenced the Board heavily and led to their conclusion that the approval of the appellant's application would "set an undesirable precedent". In fact, as is now conceded by Mr Wingrad, Counsel for the respondent, this point is misconceived. Those seven rejections related to applications for a radical change of use, from industrial to commercial. In other words, none of those rejected applicants had permission, as the appellant has, for use of their units as local provision stores or similar commercial purpose.

7. The Planning Department's point, as expressed by Mr Kelvin K W Chan, Senior Town Planner/Shatin, in his evidence before us, is that ground floor space in an industrial building should generally be reserved for industrial purposes, having regard to the capacity of such space to accommodate heavy floor loading; and ground floor industrial space gives immediate access to the street, with attendant advantages. Moreover, ground floor space would normally have a higher ceiling, and is convenient for the movement of goods; it should therefore not be converted to commercial use without very good reason. Accepting the validity of this point as a general proposition, we would emphasize that it has in fact no impact on the appellant's appeal. His commercial use of the ground floor space has already been authorised by the Town Planning Board. His proposed change of use involves only a change of a minor degree and does not breach the principle adverted to by Mr Chan.

#### Proximity to commercial centre

8. The appellant's premises are located near the edge of Area 16 and is, in fact, a considerable distance from the commercial centre where there are cooked food stalls, fast food shops, and restaurants. The commercial area is centred on a big development called Shatin Gallereia. To get to this area from Wah Luen Industrial Centre, where the appellant's premises are located, one would need to cross two main roads. It would take nearly 10 minutes on foot. The Fo Tan industrial area has about 37,300 workers employed on a daily basis. They all need access to food suppliers in the course of the working day. To suggest that the workers in the vicinity of the appellant's premises should walk all the way to the

commercial centre for their meals, and then walk back again, on a daily basis, seems to us to be unrealistic, particularly in hot or rainy weather. It is true that there are a number of canteens located in the industrial buildings in the area, but these are on upper floors, and accessible only by lift. These factory canteens are not intended to operate as restaurants for the general public and are not suitable for that purpose. In fact a canteen on the 13<sup>th</sup> floor of Wah Luen Industrial Centre has closed recently. In our view, the evidence points strongly to the need for fast food outlets in the vicinity of the appellant's premises, particularly on the ground floor. We would therefore reject as unsound the Board's conclusion that "there is a good supply of eating facilities in the industrial area", at least as applied to the area where the appellant's premises are located. That conclusion is not supported by the evidence.

#### "Undesirable precedent"

9. What has caused us some anxiety in entertaining this appeal is the Board's finding that the appellant's application, if allowed, would "set an undesirable precedent". An appeal board must, of course, in considering the matter at hand, have regard to the wider implications of its decision and to the possibility of similar applications within the area if the appeal were allowed. In considering this point, what must be emphasized is this: To allow this appeal does not mean that the use of industrial space for the purposes of a fast food shop would generally be allowed. What we are concerned with here is a change from one approved commercial use to another closely allied use. The evidence before us shows that in the Fo Tan industrial area, there are a total of 13 other local provision stores, apart from the appellant's, 12 of which are operating with the Board's approval. The "precedent", if the appeal is allowed, applies at most to these 12 and no more. Of these, some are in fact already serving take-away food and beverages. We have not studied the circumstances of each of these 12 cases, beyond what is said above and it may well turn out that some or indeed all of these local provision stores are unsuitable for conversion to fast-food shops. We note that some of these 12 are located much closer to the commercial centre than the appellant's premises: this might provide strong reasons for the Town Planning Board not allowing those applications. We cannot, in the circumstances of the present case, see how any undesirable precedent would be set if the appeal were allowed.

#### Conclusion

10. In our view, the Board erred in the view they reached. The evidence points overwhelmingly in favour of allowing the appellant's application. The application is wholly within the Board's own guidelines and, contrary to the Board's views, to allow it would set no undesirable precedent. We would

emphasize that we view this case upon its own merits; no general statement concerning the merits of similar applications can, or ought, to be implied.

11. In allowing this appeal, it would be desirable to allow room for the Town Planning Board to look at the overall situation again, after a period of three years.

12. We allow the appellant's appeal, and grant permission for the use of the premises as a fast food shop, with the condition that the permission will expire on 31 December 1997, unless renewed by the Board.