

21-27 Sha Tsui Road,
TWIL 32, Section A,
Tsuen Wan

Panel : Mr. Justice Litton, OBE (Chairman),
Dr. Nelson CHOW Wing-sun, MBE, JP,
The Hon. Howard YOUNG How-wah,
Mr. CHAN Pak-keung, OBE, JP and
Mr. Jason YUEN King-yuk.

Date of hearing : 2nd, 3rd and 5th March 1992.

Date of decision : 14th March 1992.

The appellant appealed against the Town Planning Board's decision on Review to reject the application to develop the proposed site to a plot ratio of 15 and to allow seven floors of the proposed building - 20-26 floors - to be used as "ancillary offices".

Appeal dismissed.

V Patel for the Town Planning Board.
Andrew Jean & Associates for the appellant.

DECISION

Introduction

1. This is an appeal by Alticosmic Ltd (Appellant) under the provisions of Section 17B(1) of the Town Planning Ordinance. It concerns a building site at 21-27 Sha Tsui Road, TWIL 32 Section A, Tsuen Wan.

2. The site falls within an area zoned "Industrial" in the draft Tsuen Wan Outline Zoning Plan No. S/TW/5 which was gazetted on 19 October 1990 under the provisions of section 5 of the Town Planning Ordinance. For areas zoned "Industrial", the Notes to the Plan list a variety of non-industrial uses which may be permitted on application to the Town Planning Board and these include "Office not ancillary to Industrial Use".

3. The Guidelines for applications for office use in industrial buildings located in industrial zones, made under the provisions of section 16 of the Town Planning ordinance, state the following general planning considerations:

- (i) Industrial buildings in industrial zones should be retained for industrial uses as far as possible;

- (ii) It is the Town Planning Board's intention that commercial uses should not proliferate in industrial buildings so as to cause unnecessary loss of industrial floor space adversely affecting the efficient operation of the industrial buildings;
- (iii) The Town Planning Board however recognizes that certain types of commercial activity on a limited scale provide a necessary supporting role to industrial undertakings and convenience for workers.

It is within these broad considerations that applications under section 16 for office use are entertained.

4. An "ancillary office" would, plainly, provide a "supporting role" to industrial undertakings. This is defined rather awkwardly in the Guidelines as one where "the office only serves the firm undertaking mainly industrial activities or where it serves other associated industrial operations in the same general industrial area". In such instances, no application for permission need be made under section 16 where the space to be occupied by the ancillary office does not exceed 30% of the usable floor space of the industrial building.

5. As regards plot ratio, the Notes to the Draft Outline Zoning Plan state this:

"On land designated Industrial, any new building and any addition, alteration and/or modification to the existing building should not result in a total development or redevelopment in excess of the maximum plot ratio of 9.5 or the plot ratio of the existing building whichever is the greater ... Minor relaxation of the stated restriction, based upon individual merits of each case, may be considered by the Town Planning Board on application under section 16 of the Town Planning Ordinance".

6. On 8 March 1991 the Appellant, through its architects, applied to the Secretary to the Town Planning Board for permission to develop the site to a plot ratio of 15 and to allow seven floors of the proposed building 20-26 floors - to be used as "ancillary offices". This application was rejected and at a hearing of the Town Planning Board held on 16 August 1991, upon a review conducted under section 17, the application was again rejected. Hence this appeal.

Background

7. Plans for the redevelopment of the site had been approved by the Building Authority some two years prior to the publication of the Outline Zoning Plan ("OZP"). There were changes in design from time to time and in June 1990 the Building Authority had approved plans submitted by the Appellant's present architects for a 26-storied godown building, designed to a plot ratio of 14.77. No provisions were made in these plans for office accommodation.

8. In March 1991, after the draft OZP had come into effect, the Appellant applied under section 16 for permission to have the top seven floors of the godown building designated for office use and to build to a plot ratio of 15.

Appellant's Case

9. In essence, the Appellant's case is this:
- (i) As far as the plot ratio of 15 is concerned, all that is sought is a minor relaxation of the stated restriction, since a plot ratio of 14.77 had already been approved by the Building Authority in June 1990 and all that the Appellant now wants is an increase of 0.23 to bring the plot ratio up to 15. In a previous design, approved on 7 March 1989, a plot ratio of 15 had been approved.
 - (ii) As regards the office, the business trend in Hong Kong is against basic industrial operations; there is need to consolidate the operations of industrialists in one location; many manufacturing processes now take place in China; it promotes efficiency to have the storage of goods (manufactured or semi-manufactured in China) repacking and re-export management all taking place under one roof.

Our Determination

10. As regards the increase of plot ratio, the Appellant's architect took the view that the permitted plot ratio was 15, so an increase from 14.77 to 15 represents an increase of only 0.27%. Mathematically this is of course correct. But is this the right way of viewing the matter when the application went before the Town Planning Board? This argument might be right if, at the time when the section 16 application was made to the Town Planning Board, there was an existing building on site with a plot ratio of 15. But that clearly was not the case. Construction work had, by March 1991 (when the section 16 application was made) already started, but there was plainly no "existing building" on the site at that time. The fact that some time before the OZP was gazetted the Appellant had plans approved by the Building Authority showing a plot ratio of 15 was irrelevant to this matter. When considering applications under section 16, the Town Planning Board must of course have regard to the Notes to the OZP which restricted the development to a maximum plot ratio of 9.5. Whilst the Town Planning Board was powerless to prevent the Appellant from building to a plot ratio of 14.77 in accordance with plans already approved by the Building Authority, it could not lawfully disregard its own Notes (which form part of the plan) when it entertained the Appellant's application under section 16. The Board was therefore plainly correct when it concluded that the application for increase in plot ratio could not be treated as "minor relaxation of the stated restriction".

11. As regards the question of office use, the plans submitted by the architects show that the seven office floors can be wholly segregated from the industrial portions; they can be sold off or rented for wholly independent office use. Further, in answer to a query from the District Planning Office in relation to the "ancillary use" of the office floors, the Appellant's architects gave answers which, in effect, confirmed the conclusion that the seven floors of office space could be independently used. For example, they said that in the event of sale of the development, their client the developer would "give priority" to purchasers who bought the warehouse units in the lower floors and certain categories of commercial users such as "doctors, retailers, barber shops etc" would be excluded. This

in no way gives assurance that the use of the office floors would be ancillary to the industrial use of the building.

12. There was evidence put before us that within the same area as the Appellant's site, there have been two instances where applications to the Town Planning Board for "ancillary office use" were successful. Both of these related to existing buildings where the prospective use could more easily be ascertained than in the circumstances of the present case.

13. The Guidelines set out a number of planning criteria used by the Town Planning Board when determining whether a particular use is considered to be "ancillary". One of them is in these terms:

"The need for an office to be located in an industrial building should be justified on operational needs, ie, the applicant should demonstrate that an office space of such size is closely related to the production process and could not be separately alienated".

14. In our view, the Appellant's proposals plainly do not meet the planning criteria for ancillary office use.

15. As regards office use which is not ancillary to the industrial use of the building, the Appellant's representative adduced evidence at the hearing that carparking space as shown in the drawings would in fact meet the planning requirement of one car parking space for every 240 sq. m. of office space. The representative argued that, if necessary, another car parking floor could be added to the building since this did not count for plot ratio purposes. But the argument totally missed the point: no case had been made out that the office space would in any way play either a supporting role to industrial undertakings or provide convenience for workers.

16. The Town Planning Board was right to reject the application. This appeal is accordingly dismissed.