

6-10B Conduit Road, Hong Kong

Panel : Mr. Justice Litton, OBE (Chairman),
Mr. FAN Sai-yee,
The Hon. MAN Sai-cheong,
Mr. H.M.G. Forsgate, CBE, JP, and
Dr. P.R. Hills.

Date of hearing : 26th and 29th June 1992.

Date of decision : 31st July 1992.

The appellant appealed against the Town Planning Board's decision on Review to reject the application for minor relaxation of the plot ratio restriction.

Appeal dismissed.

J McNamara and V Patel for the Town Planning Board.
A B Lawrence & Associates for the appellant.

DECISION

Introduction

1. This appeal is concerned with the Mid-Levels West Outline Zoning Plan No. S/H11/4 ("the OZP") which gazetted on 7 September 1990 in accordance with the provisions of section 5 of the Town Planning Ordinance, chapter 131. The Appellant is the developer of a site at 6-10B Conduit Road and is in the course of building two tower blocks standing on a decked podium. The site is affected by the matters set out in the OZP.

2. In the Notes to the plan regarding areas zoned "Residential (B)" there appears the following statement:

"on land designated "Residential (Group B)" any new development and any additional alteration and/or modification to the existing building(s) should not result in a total development or redevelopment in excess of a maximum plot ratio of 5 or the plot ratio of the existing building(s) whichever is the greater. Minor relaxation of the plot ratio restriction, based on the merits of the individual development or redevelopment proposals, may be considered by the Town Planning Board on application under section 16 of the Town Planning Ordinance. For the purpose of

the calculation of plot ratio, carports, recreational facilities and caretakers office and accommodation ancillary to a development or redevelopment may be excluded".

3. By early 1991 work on the decked podium had begun, in accordance with plans approved some considerable time before the publication of the OZP. These plans show a development to a plot ratio of 8. On 12 February 1991 building plans were submitted to the Building Authority for approval in respect of additional building works. These were, in essence, to provide for additional recreational facilities such as a clubhouse, gymnasium, saunas, changing rooms and the like. The proposal, if approved, would have added a total of 185.4 m² of gross floor area to the development. The additional plot ratio was 0.104. The effect of the proposal would have been that the development would have a plot ratio of 8.104.

4. These proposals were rejected by the Building Authority under section 16(1)(d) of the Building Ordinance on the ground that the carrying out of the building works shown on the drawings would contravene the plot ratio restriction in the OZP.

5. On 17 April 1991 the Appellant made an application under section 16 of the Town Planning Ordinance for "minor relaxation" of the plot ratio restriction. The material submitted by the Appellant's representative in support of the section 16 application showed, of course, that the residential development then in progress was being built to a plot ratio of 8: what was sought was permission to build to a plot ratio of 8.104, by the addition of the recreational facilities referred to in paragraph 3 above. This application was rejected by the Board on the ground that:

"....The relaxation sought, to a plot ratio of 8.104, could not be considered minor vis-a-viz the restriction under the Notes of the Mid-Levels West Outline Zone Plan under the "Residential (Group B)" zone ..."

6. The Appellant then applied to the TPB under section 17 for a review of its decision. The review hearing was conducted on 25 October 1991 and pursuant thereto the Board confirmed its original decision not to grant the permission applied for upon the grounds that:

"(a) The proposed relaxation could not be considered minor and

(b) approval of this application would set a precedent".

7. The Appellant then exercised its right of appeal under section 17(B) of the Ordinance. Hence the hearing before us.

The TPB's Statutory Functions

8. It is important to note that the TPB, constituted under the provisions of the Town Planning Ordinance, has no functions and powers beyond those conferred by statute. In exercising its powers under section 16 in relation to the grant of permission in respect of building plans, the Board is limited as to its powers by the provisions of section 16(4) which says:

"(4) The Board may grant permission ... only to the extent shown or provided for or specified in the plan".

The Notes form, of course, part of the plan. The question here, therefore, is simply this: Where the Notes to the OZP have imposed a maximum plot ratio restriction of 5, was the Board entitled to grant permission to build in accordance with the amended plans, showing the additional recreational facilities, the effect of which meant that the Appellant would be allowed to build to a plot ratio of 8.104? The answer seems to us plainly to be No.

9. The wording in the Notes is clear. What may be permitted under section 16 is "minor relaxation of the plot ratio restriction" which, in the context of the Notes, must mean the plot ratio restriction of 5. Whilst the Board was powerless to prevent a current project being completed in accordance with approved plans showing a plot ratio of 8, the Board could not lawfully accede to an application which plainly went beyond the scope of section 16(4) of the Ordinance.

The "Merits" of the Case

10. It seems clear on the evidence before us that if the Board were empowered by section 16 to grant the permission sought by the Appellant it would probably have done so. The "relaxation" related to the provision of additional recreational facilities for the use of the occupants of the residential block. The additional 37.1 m² of covered area, increasing the plot ratio of the development by 0.104, came about because of an arrangement for road widening made with the Government in 1988. By an agreement dated 12 February 1988 the Appellant agreed to surrender to the Crown a small slice of the site adjoining Conduit Road for road widening purposes. The building project was accordingly designed to take into account the required set-back. In the formal agreement for surrender dated 12 February 1988, the consideration given to the Appellant for such surrender was "the benefits which will accrue to the registered owner by reason of certain road improvements to be carried out upon or adjoining the premises ...". The "benefits" were, in effect, the bonus plot ratio which the Building Authority is permitted to allow under the provisions of Regulation 22(2) of the Building (Planning) regulations. The building plans for the development, showing a plot ratio of 8, were approved by the Building Authority in 1987 and there is little doubt that had the plans for the additional recreational facilities, bringing the plot ratio of the development to 8.104, been submitted to the Building Authority prior to 7 September 1990 (when the OZP was gazetted) the Building Authority would have approved the plans to give effect to the concession allowed by Regulation 22(2) of the Building (Planning) Regulations.

11. This, however, is a matter of history and in no way affects the exercise of discretion by the TPB under the provisions of section 16. Once the plot ratio restriction of 5 came into effect, plainly the TPB was bound in the exercise of its powers and discretions by that restriction. A "relaxation" of plot ratio restriction from 5 to 8.104 is plainly not "minor".

Conclusion

12. What we have said above is sufficient to dispose of this appeal. It is, of course, not our function to advise the

Appellant concerning its affairs but a point did emerge in the course of the hearing which is worth mentioning. It is this. In the "Remarks" under the heading "Residential (Group B)" the TPB said this:

"For the purpose of calculation of plot ratio ... recreational facilities ... ancillary to a development ... may be excluded".

Since the plans submitted to Building Authority on 12 February 1991 related to recreational facilities ancillary to the development, for the use and enjoyment of the residents, those proposals would seem excluded from any calculation of plot ratio, in accordance with the wording of the "Remarks". It may well be, therefore, that the Building Authority was wrong in rejecting the plans on the grounds he did, namely, alleged contravention of the OZP, under the provisions of section 16(1)(d) of the Buildings Ordinance. This, however, is not a matter for us.

13. For the reasons stated above, the appeal is dismissed.