

63-73 Wo Yi Hop Road, Kwai Chung

Panel : Mr Justice Litton, OBE (Chairman),
The Hon. Howard YOUNG How-wah,
Dr Nelson CHOW Wing-sun, MBE, JP,
Mr David DaSilva, MBE, and
Mrs Alice Piera LAM LEE Kiu-yue, JP.

Date of hearing : 6th, 7th & 10th July 1992.

Date of decision : 28th July 1992.

The appellant appealed against the Town Planning Board's decision on Review to reject the application for the relaxation of development restriction for a godown facility at 63-73 Wo Yi Hop Road, Kwai Chung at a plot ratio of 15.

Appeal dismissed.

J. McNamara and V. Patel for the Town Planning Board.
John Y.H. Hsi & Associates for the appellant.

DECISION

Introduction

1. On 19 October 1990 the draft Kwai Chung outline Zoning Plan S/KC/7 ("OZP") was gazetted. It effected a number of amendments to the previous Outline Zoning Plan for Kwai Chung. Of relevance to this appeal is the change regarding maximum plot ratio for developments in areas marked "Industrial". Whereas prior to 19 October 1990 there were no plot ratio restrictions for development in such areas, now development is restricted to a maximum plot ratio of 9.5. The definition of "Industrial" use is very broad, and no distinction is made between general industrial use (such as the construction of multi-purpose flatted factories) and godown use.

2. On the same day as the publication of the OZP (19 October 1990) the Appellant submitted building plans to the Building Authority seeking approval for the construction of a 28-storeyed godown building with a plot ratio of 15. As the carrying out of the building works shown on the drawings would contravene the plot ratio restriction in the OZP the Building Authority refused to give his approval, as he was authorized to

do under section 16 (1) (d) of the Building Ordinance.

3. On 7 November 1990 the Appellant through its representative Mr John Hsi, an authorized person, lodged an application "under section 16 of the Town Planning Ordinance" for "permission to develop the lot in accordance with the plans submitted by their architect on 19.10.1990". It should be noted that this application made no specific reference to the Notes to the OZP providing for the grant of permission for any purpose. The application made strong submissions on environmental grounds: that the proposed godown development would cause no pollution to the surrounding areas, and would result in no discharges of pollutants into the atmosphere or the sewers. It also made the point that no greater amount of traffic would be generated by a godown building, constructed to a plot ratio of 15 than a factory built to a plot ratio of 9.5.

4. This application was considered by the TPB at its meeting on 4 January 1991. The minutes of that meeting read as follows:

"Member did not agree that the relaxation of plot ratio requested, namely, from 9.5 to 15 was minor and doubted the validity of the argument that godown use would generate less traffic than general industrial uses. It was therefore decided that the application be rejected on the following grounds:

- (a) The relaxation requested, from 9.5 to 15 in plot ratio, was not minor;
- (b) There was no strong justification to permit the proposed relaxation which would set an undesirable precedent and;
- (c) There was no proof that godown use will generate less traffic than general industrial uses."

5. The Appellant being aggrieved by that decision applied, within the 21 days specified under section 17(1) of the Ordinance, for a review of the Board's decision. The section 17 review hearing was conducted by the TPB on 25 October 1991. At that review hearing the Appellant was represented by Sir Oswald Cheung, Queen's Counsel, and by solicitors. By letter dated 11 December 1991 the secretary to the Town Planning Board informed the Appellant's solicitors that after giving full consideration to the submissions at the review hearing the TPB had decided to uphold the original decision. The Appellant then gave notice of appeal under Section 17B(1) of the Ordinance. Hence the present appeal before us.

Powers of the TPB

6. For the purposes of this appeal, it is important to understand the statutory scheme in the Town Planning Ordinance. The TPB, being a statutory board, has no powers and functions beyond those conferred by the Ordinance. For the purposes of this appeal, we distinguish between two separate functions:

- (a) The functions of the TPB under Section 3(1) of the ordinance to undertake the systematic preparation - of draft plans "for the layout of such areas of Hong Kong as the Governor may direct, as well as for the types of building

suitable for erection therein ..."; and

- (b) Its powers and functions under Section 16 of the Ordinance.

Outline Zoning Plans

7. In discharge of the TPB's functions under Section 3 of the Ordinance (that is, to prepare draft plans and matters connected therewith), the Board has the duty as specified in sub-section (2) of that section to make such "enquiries and arrangements ... as it may consider necessary for the preparation of such drafts". This is to be expected since the task of setting aside zones for various land uses is necessarily very broad. Thus, in considering whether to impose a plot ratio restriction for land zoned for "Industrial" use, the TPB could take into account plot ratio studies, traffic reports, census enquiries and investigations of all kinds to come to a view whether the imposition of restrictions would promote the "health, safety, convenience and general welfare of the community".

8. However, once the zoning restrictions have been imposed, by means of diagrams, illustrations and notes etc. as shown in the draft plan and published under the provisions of Section 5, those restrictions bite, until they are amended under the provisions of sections 6 and 7.

Grant of Permission Under Section 16

9. The functions of the Board under section 16 are quite separate from those under section 3. They are also different. Here, the Board is not concerned with the general layout and land use of the entire area covered by the OZP, but is concerned solely with the grant or refusal of permission regarding individual sites, when the notes to the OZP allow for such permission to be given. It is plain from the scheme of the Ordinance that a Section 16 application cannot be used as a vehicle for an objection to the general zoning restrictions set out in the plan. Section 16(1) says:

"Where a draft plan... provides for a grant of permission for any Purpose, an application for the grant of such permission shall be made to the Board".

10. In the OZP in question, as in the case of all other plans made under section 3, there are many different provisions for the giving of permission by the TPB, for a variety of purposes. Thus, in areas zoned "Industrial" dangerous goods godowns may be permitted upon application to the TPB. This is one example of the grant of permission envisaged by the statutory scheme. The relaxation of plot ratio restrictions in very limited circumstances is another.

11. In dealing with a Section 16(1) application, the Board is limited as to its powers by the provisions of the statute. Section 16(4) says:

"The Board may grant permission under sub-section (3) only to the extent shown or provided for or specified in the plan".

Minor Relaxation

12. In the present case, the Notes to the plans state as

follows:

"On land designated "Industrial" any new building ... should not result in a total development in excess of the maximum plot ratio of 9.5 or the plot ratio of the existing building whichever is the greater. Ancillary vehicle parking, loading/ unloading and manoeuvring areas within the building are not accountable for plot ratio calculation.

Minor relaxation of the stated restriction, based on individual merits of each case, may be considered by the Town Planning Board on application under section 16 of the Town Planning Ordinance".

13. As is stated in paragraph 3 above, when the Appellant made its section 16 application to the TPB, its representative did not specify what provision in the OZP was invoked when "permission" to build in accordance with the drawings was being sought: he merely sought general "permission" to build in accordance with the drawings submitted to the Building Authority. However, in the context of the material submitted to the TPB, the only way whereby the application could sensibly be construed was to treat it as an application for "minor relaxation of the stated restriction". This is how the matter was viewed by the TPB.

14. As to this, it is difficult to see how in the circumstances of the case the TPB could have come to any other conclusion than that the relaxation sought was not "minor". The plot ratio restriction in the OZP was 9.5. What was sought was a plot ratio of 15 which represented a 58% increase over the maximum permitted under the draft OZP. In fact, prior to the section 17 review hearing, the Appellant had submitted to the TPB a written statement by its Queen's Counsel, Sir Oswald Cheung, in which Counsel referred to the limit to the Board's powers under Section 16(4) and stated:

"It is conceded that an increase of the plot ratio from 9.5 to 15 is not minor and that considered under 16(4) of the Ordinance, a relaxation to a plot ratio of 15 is at present beyond the power of the Board".

15. Whilst, obviously, the TPB is not bound in any way by the expressions of opinion of counsel, common-sense alone would have dictated that a "relaxation" of plot ratio restriction from 9.5 to 15 cannot possibly be regarded as minor. Since this was the only relevant matter concerning the grant of permission before the Board, the Board should in fact have dismissed the application on this sole ground. The consideration of any wider arguments, such as whether there should be an amendment to the Notes to give the Board greater flexibility to distinguish between general industrial use (which could be very polluting) and godown use (which was arguably less polluting or pollution-free), was beyond the powers of the Board to consider under a Section 16 application.

16. In the course of the argument before us it was suggested that the TPB by using the expression "minor relaxation" in the Notes (as set out in para. 12 above), was not simply confining the grant of permission to a mere mathematical calculation; the Notes, so the argument runs, envisage a relaxation of the plot ratio restriction even to the extent of an increase of 58% where there are overwhelming environmental considerations in favour of the relaxation. As to this, we express no views, for the matter

is academic as far as the case is concerned, for there are simply no "overwhelming" points of merit in favour of the Appellant. Plainly, in considering "minor relaxation" there must be "individual merits" in the case before the TPB could envisage increasing the permitted plot ratio. That is what the Notes say. Whilst expressing no firm or binding view on this matter of interpretation, we finding the argument put by Mr McNamara, counsel for the TPB, attractive when he said: the minor relaxation must relate to the restriction of 9.5; it is only when the relaxation sought is minor, in relation to the plot ratio of 9.5, that the Board can go on to examine the merits of the particular case.

Section 7 Power of Amendment

17. Section 6 of the Ordinance makes provisions for persons affected by the OZP to object to matters appearing in the plan, within two months of the date of publication. Under Section 6(3) the Board is empowered to propose amendments to the plan to meet objections lodged.

18. In addition to the power of amendment contained in section 6, the Board has also the power under section 7 to amend the OZP, otherwise than consequent upon an objection, before it is approved by the Governor in Council. Every amendment made pursuant to section 7(1) must then be exhibited by the Board for public inspection, and notified in the newspapers and in the Gazette, and the procedure for objections under section 6 then applies all over again in relation to such amendment.

19. What happened at the TPB's review hearing on 25 October 1991 was this :- after counsel for the Appellant had conceded that the TPB had no power to "relax" the plot ratio from 9.5 to 15, he submitted that the Board had the power nevertheless to permit the godown development built to a plot ratio of 15 by amending the Notes to the OZP under section 7 of the Ordinance. The submission was that the Notes should be amended in such a way as to allow for godown development exceeding a plot ratio of 9.5 with the permission of the Board. If the Appellant had succeeded in that, presumably it would have then made another section 16 application for permission to build the 28-storeyed godown, in accordance with the amended Notes.

20. In short, what happened was that the Appellant, at a section 17 review hearing, sought to change the proceedings from one where the Board was considering the individual merits of a particular case to one where the Board had to apply its mind to a matter of general zoning, affecting not only the Appellant's site but every other site covered by the OZP which is zoned "Industrial". The TPB refused to do that. This is not surprising, particularly considering the fact that prior to the section 17 review hearing (which took place on 25 October 1991) the Appellant had lodged an objection to the plot ratio restriction under section 6 and the Board had given preliminary consideration to that objection and had decided that it should not be upheld. The argument put to the Board at the review hearing on 25 October 1991 was essentially the same as the argument in its section 6 objection. We should add that since the TPB disposed of the section 17 review, there has been a hearing under 6(6) of the Ordinance (which took place on 14 February 1992) when, having considered the Appellant's further submissions, the Board decided not to amend the OZP to meet the objection. The Appellant can hardly complain that it has not been heard.

Broad Environmental Considerations

21. It is clear that there is, and has been for some time, serious strain in the Kwai Chung area upon the infrastructure generally. The restriction on plot ratio to 9.5 for "Industrial" zones was decided upon after studies in the Tsuen Wan and Kwai Chung areas commencing in 1988. The TPB had before it the findings of the "Tsuen Wan and Kwai Chung Industrial Plot Ratio Study" which found, for example that in Kwai Chung Area 27A (where the site in question is located), an increase of 80% from existing industrial floor-space would be possible upon redevelopment should there be no statutory control. Even with the imposition of a 9.5 plot ratio restriction, an increase of 35.3% over the existing level of industrial floor-space would be possible, as there are a larger number of unrestricted leases in the area. Accordingly, the imposition of a plot ratio control would clearly have a major effect in diminishing the stresses and strains exerted on the infrastructure generally in terms of noise, fumes, discharges into the sewers and traffic circulation.

Traffic Congestion

22. One of the main arguments put forward by the Appellant at the hearing before us was that a godown development is "environment-friendly" and godown use should be viewed separately from general industrial use.

23. There could well be merit in such an argument, but this does not mean that the TPB should then go about willy-nilly to amend the OZP, without considering the matter in depth. The difficulty, of course, focuses upon the question of traffic congestion: whether, in truth, a godown development built to a plot ratio of 15 would not generate much more traffic than a general industrial development built to a plot ratio of 9.5. From a commonsense point of view, it appears to us that one cannot generalize on this issue. There could well be factories producing high-value compact products which would generate far less traffic than a warehouse storing general merchandize and vice versa.

24. The TPB, in recognizing this problem, has in fact asked the Planning Department in September 1991 to conduct a traffic study to see whether there was a case for relaxing the plot ratio restriction for godown use as opposed to general industrial use. A study has commenced in January 1992 covering some 200 sites. This study has not yet been completed. Until the TPB has firm data in hand, it is plainly in no position to effect amendments to the OZP under the provisions of section 7 of the ordinance.

25. As regards the traffic studies which the Appellant's consultants have conducted, we are not impressed by the results. The consultants themselves have only chosen three sites for study, namely an industrial site in Kwai Chung and two godown sites, one in Tsuen Wan and other in Tsing Yi. Taking the data from the industrial site in Kwai Chung built to a plot ratio of 9.5, and comparing it with the data from the godown site in Tsuen Wan built to a plot ratio of 15, what the consultants seem to have demonstrated is that the traffic generated from the godown site is far greater than that generated from the industrial site. This is the reverse of the conclusion which the Appellants urge upon us. There are, further, other oddities shown by the consultant's studies, such as, for example, the fact that based

upon the data relating to the godown sites 40% of the traffic is generated during one hour of the day. The TPB was not impressed by this evidence. We cannot see how they can be faulted in this regard.

26. We note in passing that the Planning Department, in commenting upon the section 17 application, said this:

"... Whilst there are merits in the proposal [for godown development] in terms of less noise and air pollution and less demand on the sewerage system, these are more than outweighed by its adverse traffic implications".

We do not think it is possible to weigh the considerations in the scales in this way. The Appellant's case, putting it at its highest, is that the godown development might in the future generate less traffic than an industrial building with a plot ratio of 9.5 - or it might not. Moreover, a godown building could be turned later on into factory use. What it boils down to is that the case, as put forward by the Appellant, is highly speculative. It has, in terms of the Notes to the OZP, little "individual merit".

Conclusion

27. In concluding this decision, we revert to the beginning. Upon a section 17 review, the TPB is empowered by the Ordinance to grant permission only to the extent provided for in the plan. The Notes to the plan do not provide for minor relaxation of the stated restriction generally: if it were otherwise, it would mean, in effect, that the restriction of 9.5 is no restriction at all, but is merely the springboard for "minor relaxations". Accordingly, the Notes only permit minor relaxation based on the individual merits of each case. By this formulation, the Board has ensured that minor relaxation is not the sole test, and no general "precedent" is established by any successful application.

Costs

28. We are empowered by section 17B(8)(c) to award costs to the successful party on an appeal. Mr McNamara, on behalf of the TPB, asked for such an order in the event of our dismissing this appeal, and submitted a statement of the respondent's costs incurred on this appeal. On its face, the amounts incurred appear reasonable and the question is whether, as a matter of principle, we should exercise our powers under section 17B(8)(c) in the respondent's favour. We conclude that, generally-speaking, we should not. The Appellant is exercising a right conferred by statute to appeal against a decision of the TPB where, by the nature of things, the TPB cannot be expected to state fully its deliberations and reasons for refusing the application. The appeal on behalf of the Appellant has been conducted with dignity and restraint and there are no exceptional circumstances in this case which suggest that we should award costs against the Appellant and, in effect, deter future appellants from pursuing what, on its face, is an unfettered right of an aggrieved party.