

Town Planning Appeal No. 5 of
1995

IN THE MATTER of the Town
Planning Ordinance Cap. 131

and

IN THE MATTER of an Appeal
under Section 17B by PLANET
UNIVERSAL LIMITED and
INFINITY VIEW LIMITED

Date of hearing : 6th, 7th, 8th, 11th, 12th, 13th, 14th September 1995
and 13th October 1995

Date of decision : 26th October 1995

Panel : Mr Justice Litton, OBE (Chairman)
Mr Joseph LO Sze-kuen
Mr David C DaSilva, MBE
Mr Anthony Roy Upham

DECISION

Introduction

This appeal is concerned with a proposal to develop a very large site near the Mai Po Nature Reserve (MPNR). The site consists of various lots in DD 104 held under a Block Crown Lease as "agricultural" land.

2. MPNR is a wildlife reserve of international importance. Hong Kong through the United Kingdom government is a party to the Convention on Wetlands of International Importance (RAMSAR) and, shortly before the hearing of the appeal, MPNR has been declared a "RAMSAR site". This means that the Hong Kong government has international obligations to safeguard MPNR and the surrounding area as a nature reserve, in accordance with the terms of the Convention. The RAMSAR site in fact extends beyond the confines of the nature reserve itself and incorporates Buffer Zone 1, into which part of the appellants' site falls (the significance of which will be explained later).

3. On 2 June 1994 the appellants made an application to the Town Planning Board under section 16 of the Town Planning Ordinance for planning permission to develop the site. At that time, the site fell within an area of unspecified use in the approved Nam Sang Wai Development Permission Area Plan No. DPA/YL-NSW/2 (DPA plan). The approved DPA plan replaced the draft plan which was gazetted on 12 July 1991, effective for three years pursuant to s20(5) of the Ordinance to enable further studies and examination of development options to take place, before the formulation of an outline zoning plan. The day after the section 16 application was submitted, the draft outline zoning plan for Nam Sang Wai No. S/YL-NSW/1 was gazetted. Under the Nam. Sang Wai Outline Zoning Plan the part of the site where the proposed residential development is to take place falls within an area marked "Recreation". Be that as it may, s20(6A) of the Ordinance required that the application, the s17 review and of course the present appeal, be considered as if the DPA plan were still effective, and the application for planning permission be granted or refused "to the extent as shown or provided for or specified" in the DPA plan.

The proposed development

4. The site covers 31.2 ha. In essence, the proposed development is divided into two portions: a residential development with a holiday centre for the elderly in the main part of the site (27.7 ha) and a nature reserve of about 3.5 ha to the north-west. The two portions will be separated by the proposed Ngau Tam Mei Drainage Channel which the Government is now in the course of constructing, to improve the drainage of surface water into Deep Bay.

5. The proposal, in detail, is as follows: The site will be approached by an access road leading from the New Territories Circular Road. There will be a total of 473 housing units (91 detached houses and 382 semi-detached houses), some of 3-storeys including carports (9m high) and some of 4-storeys including carports (12m high), with a total domestic gross floor area of 81,275 m² and a designed population of 1192 persons. The domestic plot ratio works out to be 0.299 and a site coverage of about 11%. There will be facilities such as tennis courts, a swimming pool, a club-house and a gymnasium (occupying a total of approximately 2,500 m²). There will be parking spaces for 710 vehicles, plus other spaces for coaches and visitors. The proposed holiday centre for the elderly, with a gross floor area of 3,000m² on about 0.6 ha of land, will comprise of a 2-storeyed structure with a range of recreational facilities and open space. There will be outdoor car-park facilities.

6. The features of the development upon which the appellants have placed particular emphasis are these. The entire residential development will be

surrounded by a perimeter wetland belt comprising of shallow water reed-beds and fresh-water marshes, with areas of open water and lily-ponds. There will be a central lake with five outlets into the perimeter wetland. The whole of the perimeter wetland belt will be separated from the rest of the site by a bund planted with trees and shrubs and protected by a fence. The central lake and wetland belt will take up about 10.5 ha of the site. The concept behind the proposal is that the water features will attract wildlife to the site. The nature reserve on the other side of the drainage channel (about 3.5 ha) will consist of a lagoon with shallow margins and a central island (for roosting wildfowl) and a "nursery" pond. The whole reserve will be screened by trees and shrubs, and fenced.

7. There are two further features worthy of note: a water treatment plant, to treat the stream-water flowing into the site, before it is fed into the perimeter wetland where the water will be further "polished" by the planted reed-beds, and a sewage treatment plant for the sewage generated within the site. Here, the solid waste will be systematically removed, and the waste water thus treated will eventually find its way into Deep Bay. The treatment plant has sufficient capacity to treat the sewage from the neighbouring Pok Wai Village as well - if the villagers should agree to the proposal.

The existing site

8. In the course of the hearing, there was put before us a 1938 survey map showing the site consisting largely of gei wais with, perhaps, a small area of paddy fields. At the date of the publication of the interim DPA plan for Nam Sang Wai, 17 August 1990, the site was largely covered by fishponds with, however, some ponds filled in and used for the storage of lorries, containers and other material and, in a few small areas, used for light industry. Wing Kei Tsuen, a small settlement is located at the south-eastern corner of the site. Large overhead transmission lines cross the site. An area of fishponds to the south-west, some distance from Wing Kei Tsuen, has been filled since the publication of the interim DPA plan and is now essentially waste-land covered with tall grass, though encroached upon by the tipping of rubbish. There is also some vehicle storage in the area. Part of this waste-land area, as are some other parts of the site, is subject to enforcement action by the Director of Planning, unauthorised use having been undertaken since the publication of the interim DPA plan. There are temporary structures on the bunds, housing the people who work in the fishponds and their families.

9. As things stood at the time of the appellants' s16 application, and as they stand today, about two-thirds of the site (about 19 ha) remains covered by fishponds.

The application for planning permission

10. On 16 August 1994 the appellants' s16 application was refused. They then applied for a s17 review which duly took place and, by letter dated 16 December 1994, the appellants were informed of the refusal of their application. The grounds for the refusal were these:

- "(a) the proposed residential development is not in line with the planning intention for the area on the approved Nam Sang Wai Development Permission Area Plan which is primarily to protect and conserve the landscape and ecological value of the area and its scenic quality necessary to sustain Mai Po Nature Reserve (MPNR);
- (b) falling within Deep Bay Buffer Zone 2, the proposed residential development will not meet the Town Planning Board's Guidelines on Application for Developments within Deep Bay Buffer Zones in that there is insufficient information in the submission to demonstrate that the proposed development can support the conservation of MPNR and Inner Deep Bay or the development will have insignificant impact on the ecology including the MPNR and Inner Deep Bay;
- (c) the proposed development, with a plot ratio of 0.299, a site coverage of 13%, a design population of 1,192 and building height up to 3-storey plus one level of carport is too intensive and is not in line with the low-density residential development in ecologically sensitive area;
- (d) the Town Planning Board is not convinced that the proposed development will have insignificant adverse impacts on the area, including the MPNR and Inner Deep Bay Area;
- (e) insufficient information has been provided in the submission to demonstrate that the funding arrangement for maintaining the proposed nature reserve is feasible;
- (f) approval of the application will create an undesirable precedent. The cumulative impact of

developments in terms of human disturbance will adversely affect this ecologically sensitive area; and

- (g) approval of the proposed development will set an undesirable precedent for unco-ordinated conservation proposals leading to eventual fragmentation of the natural habitat within the Buffer Zone areas."

The Appeal Board's approach

11. What should be emphasized at the outset is this. It is no part of our function, as a statutory appeal body, to decide what might constitute "better" or "best" or "wise" use of the land in question: That is to say, whether, from an ecological point of view, the site should be left essentially undisturbed or whether it should be turned to predominantly residential use, with an area of "managed" wetlands and an additional 3.5 ha of "managed" nature reserve. Much evidence has been deployed from both sides on this "issue", and there are strong arguments both ways. By the very nature of the issue, these arguments cannot be conclusive. It is a matter of value judgment. Moreover, planning is an ongoing process. The rejection of planning permission today does not mean that the site is sterilised for development forever. All it means is that the development as proposed cannot proceed.

12. The importance of fishponds to wildlife is a subject of continuing study and debate. There was adduced in evidence, for example, an article by an acknowledged local expert Mr George Walthew (exhibit TPB3) published in August 1995, which says this: "the fishponds in Hong Kong have often been depicted, wrongly, as areas of little ecological interest or importance. However, over the past two years I have recorded a total of 136 species of birds using the commercial fishponds in the Deep Bay area for feeding, breeding or roosting". And Mr Walthew, in the same article, goes on to enlarge upon this statement by giving what appears to be convincing reasons. On the other hand, there is the proposition that fish farming is, by definition, an activity aimed at producing fish for human consumption and not for birds. We will, later on in this decision, go into the argument more fully, but it is important at the outset to bear this point in mind: This appeal turns not upon the marks scored on the debate on fishponds but on the planning intentions for land use in the area, as expressed in the Nam Sang Wai DPA plan which, for the purposes of this appeal, is the relevant plan. If, at the end of the day, we conclude that a residential development of the kind proposed is consistent with the planning intentions for the area, we must then find that the Town Planning Board has erred because, in essence, one of the principal reasons for rejecting the proposal was that the development was too intensive and "not in line with the low density residential development in ecologically sensitive area".

On the other hand, if the predominant intention is to preserve the natural landscape features and to permit only minimal interference with those features, pending the period of three years necessary for the formulation of an outline zoning plan, the matter is not whether a change of use to a residential development, with a holiday home for the elderly and with "managed wetlands", is ecologically "better" overall or not: Even if it were, it would still be contrary to the planning intentions regarding land use, as expressed in the Nam Sang Wai DPA plan. We also bear this point in mind. A DPA plan is, by its very nature, interim; but once a development is on the ground it is, in effect, permanent. Other land use in the same area must then be tailored to it. A large residential development of the kind proposed has a most intrusive effect, from a planning point of view.

The planning intention

13. The total area of the Nam Sang Wai DPA is 598.53 ha and over 90% of that comes within the designation of unspecified use. Mr Benjamin Yu Q.C., counsel for the appellants, makes the perfectly valid point that if the intention had been to put an absolute "freeze" on development during the validity period of the DPA plan, that intention could have easily been expressed. We agree. Given the size of the "unspecified" area within the DPA, and the different land uses in existence when the interim DPA plan was first published, that would have been unrealistic. Plainly, within the "unspecified" area, some form of development was envisaged. The question is then one of degree. If we conclude that the TPB, by their refusal, has given effect to the predominant intentions as expressed in the DPA plan, this appeal must be dismissed.

History of statutory control of development

14. In considering the planning intention for the area, it is important to bear in mind the history of the legislative control. This is set out in paragraph 1 of the Explanatory Statement which, though not part of the statutory plan, was published with the draft plan and Notes, and considered by the Governor-in-Council when the draft plan was approved.

15. The draft Nam Sang Wai DPA plan was first gazetted on 12 July 1991, prepared on the basis of the interim DPA plan made by the Director of Planning and published on 17 August 1990. During the exhibition period of the draft DPA plan, objections were received and the Town Planning Board agreed to make two amendments to the draft plan. Notification of the proposed amendments was gazetted on 24 September 1993. Upon expiry of the exhibition period, no further objections to the proposed amendments was received.

16. A DPA plan is, as we have said, by its very nature interim. One of the primary objects of the DPA plan is to control development within the area during

the period required for detailed analysis of the land use pattern, study of infrastructure provisions and examination of development options leading to the formulation of an outline zoning plan: See para 2.2 of the Explanatory Statement.

17. Given these restraints, the Town Planning Board would obviously have to tread very warily when an application is received for permission to put up a substantial residential development within the "unspecified" area: Approval of such a proposal could seriously frustrate the objectives to be attained by means of future zoning, under an outline zoning plan; if planning consent for such schemes were to be liberally given, ad hoc development by private developers would then in effect dictate the pattern of land use in the area, pre-empting the efforts at zoning for land use by the TPB. Take this very case. The proposed residential development, with a site coverage of 11% and a plot ratio of 0.299, means, in effect, the use of over 20 ha for residential purposes. Counsel argues that this compares favourably in terms of density of development with the typical "R4" development under the Hong Kong Planning Standard and Guidelines. This may be so. But, under the Nam Sang Wai DPA plan, only 16.58 ha have been specifically ear-marked for residential development: Approval of this one proposal alone within the "unspecified area" would mean, in effect, more than doubling the area given over to residential development. There is nothing in the DPA plan which expressly prohibits this. But it demonstrates the need for a cautious approach, in ascertaining the planning intention in the DPA plan.

18. In para 4 of the Explanatory Statement, the Nam Sang Wai development permission area is described thus:

"4.2 The area is predominately low-lying alluvial flood plain draining into Deep Bay. It is largely rural in character with considerable amount of fish ponds and a few parcels of agricultural land. In recent years, larger number of fish ponds and agricultural land, particularly those located by or near Castle Peak Road has been filled up and used for open storages.

4.3 In 1991, the population of the Area was approximately 4,000 ..."

The development will bring nearly 1,200 more people to the area.

Need for planning guidance and control

19. There is then this statement:

"5.2 Not far away from the north west of Tai Sang Wai is Mai Po Nature Reserve which was designated by the Government as 'Site of Special Scientific Interest' (SSSI) on 15 September 1976. The Mai Po Nature Reserve contains the largest and most important area of dwarf mangrove in Hong Kong and is the only area in the Territory where a large variety of birds can regularly be seen. It is an ecologically-sensitive area of international importance and should be protected from incompatible uses in the neighbouring areas."

20. In para 6.2, there is a statement of the general planning intention for the Nam Sang Wai DPA in these terms:

"The planning intention for the Area is primarily to promote the conservation of the natural landscape features and to retain existing fish ponds and active agriculture land though rural industry and open storage uses have infiltrated into the Area. It is also planned to reserve sufficient area to meet the anticipated small house demand. Areas of 'fung shui' significance would also be left undeveloped."

Para 6.3 of the Explanatory Statement deals with the various land use zones and with the intended use within "unspecified use" areas in these terms:

"In the designation of various zones in the Area, considerations have been given to the natural environment, physical landform, existing settlements, availability of infrastructure and local development pressures. The Area, located within the Deep Bay Buffer Zones formulated to protect the Inner Deep Bay area including MPNR, is in close proximity to this ecologically-sensitive area of international importance. In the 'Guidelines for Applications for Developments Within Deep Bay Buffer Zones' promulgated by the Board, emphasis is put on the need to protect and sustain the special landscape and ecological value of the Inner Deep Bay area including MPNR. In general, for all proposed developments it should be demonstrated that they would not adversely affect the natural habitat. More stringent control would be applied to areas adjoining and in close proximity to MPNR where new developments would not be allowed unless it is required to support the conservation of MPNR. Other than

the above, the preservation of historical buildings and archaeological sites is also a planning concern. Sites of historical and archaeological interests in the Area would be preserved and protected as far as possible. Pending further studies on land use development options, opportunities and constraints, the following types of zones are designated on the Plan

21 This then leads to para 6.3.5 which deals with "Unspecified Use", para(a) of which begins with this general statement:

"(a) Area without specific zoning on the DPA plan is intended to meet unforeseeable requirements in the longer term. Further detailed planning study is required to identify the most appropriate use of land. However, taking account of the development potential and existing situation of the areas, three broad sub-areas can be identified ... "

The sub-areas for planning purposes

22. The three sub-areas are then set out as (i), (ii) and (iii). At the hearing, there was an issue as to whether the appellants' site falls partly within sub-para (ii), as the appellants contend, or wholly within (iii), as the respondent submits. We have no doubt, having regard to the descriptions in the Explanatory Statement, it falls within sub-para (iii). This is what sub-para (iii) says:

"This sub-area is rural in character and mainly comprises of fish ponds with some ancillary structures. Since the sub-area drains into Inner Deep Bay and its proximity to Mai Po Nature Reserve, the planning intention is primarily to protect and conserve the landscape, ecological value and scenic qualities of the area."

23. Para 6.3.5 of the Explanatory Statement then goes on to make statements applicable to the whole of the area of 542.93 ha covered by the designation of "unspecified use". Paragraph (c) states thus:

“(c) Agricultural uses in these areas will be encouraged and recreational uses (including ancillary facilities) which are generally compatible with the rural environment and area unlikely to adversely affect local communities, may also be permitted. The

general planning intention for the "Unspecified Use" areas is for the appropriate forms of agriculture and rural activities to take place so as to prevent unwanted urban growth and to enhance the quality of the environment. Residential development in compliance with the contentions of the 'On-farm Domestic Structure' scheme may be permitted where it can be established that the dwelling is necessary to support the agricultural uses, or the dwelling is ancillary to the recreational uses."

24. Pausing here, and confining attention to what has been set out above, it would seem that a residential development, providing over 470 housing units and car-parking spaces for over 700 vehicles, with all the human disturbance this would entail, is incompatible with the planning intention for sub-area (iii), into which the appellants' site falls.

25. The appellants rely, however, upon the statements in para 6.3.5(d), and indeed their entire case virtually hangs upon it. Sub-para (d) says:

"(d) There may be areas where private initiatives may wish to provide comprehensive low-rise, low-density residential developments mainly through land exchange or lease modification. Applications should be made to the Board. If approved by the Board the development should be implemented in accordance with an approved master layout plan with adequate provision for government, institution and community uses and recreational facilities to serve these developments. Due regard should also be given to minimizing the environmental, drainage and traffic impacts of these developments on surrounding areas."

26. As is apparent from looking at the DPA plan, there are pockets of development within the "unspecified" area where houses or groups of houses with access to the Castle Peak Road already exist. These could well come within sub-paragraph (d). Further, as can be seen from the DPA plan, there is an existing cluster of buildings, to the north of the Pok Oi Hospital (though some distance away). It can be observed from the OZP that the TPB has, in fact, zoned it "R(D)", permitting small structures (not exceeding a building area of 37.2m² and 2-storeys) to be built. An application to develop this area under the DPA plan might well have been consistent with the "low-rise, low-density residential development" referred to

in sub-para (d): though we would not put too much weight on this as it is, to an extent, mere guess-work. Beyond this, it is difficult to see how sub-paragraph (d) could be used to justify a development of the size of the appellants' proposal, having regard to the Explanatory Statement as a whole. Sub-paragraph (d) cannot be construed as if it were free-standing, to justify the appellants' proposal.

Guidelines for Applications

27. In para 6.3 of the Explanatory Statement there is a reference to the "Guidelines" promulgated by the TPB in relation to development within the Deep Bay Buffer Zones. These Buffer Zones, as is apparent from para 6.3, are intended to give MPNR and the areas around in Deep Bay "added protection and to prevent them from becoming isolated islands of natural habitat encroached by urban type development..." (para 3 of the Guidelines, emphasis added). The proposed nature reserve falls within Buffer Zone 1 and the rest of the proposed development, to the east of the Ngau Tam Mei Drainage Channel, falls within Buffer Zone 2. It is the appellants' case that the proposed development is consistent with the Guidelines for development within Buffer Zone 2 and, for this reason, the appeal should be allowed.

28. In looking at the Guidelines, a word of caution is necessary. These Guidelines are guidelines, not words in a statute which fetter the exercise of discretion and judgment by the TPB. The Guidelines start with two opening paragraphs as follows:

"Introduction

1. The Mai Po Nature Reserve (MPNR) and its adjacent intertidal mudflats is an internationally recognised wetland habitat for a variety of species of waterfowls such as herons and egrets, and a stopover point for thousands of migratory birds. It is for this reason that the MPNR and Inner Deep Bay have been designated as Sites of Special Scientific Interest (SSSI) in 1976 and 1986 respectively. A majority of the areas around MPNR is low-lying floodplains, gei wais and fish ponds which not only provide feeding and breeding grounds for the birds but also contribute to the scenic quality of the Deep Bay area. There have been proposals for including Mai Po Marshes and the Inner Deep Bay area as a Wetland of

International Importance under the Ramsar Convention.

2. In recent years, there has been an increasing number of development proposals in the North West New Territories (NWNT) particularly in areas around Inner Deep Bay. Most of the proposed developments would involve filling of fish ponds, extensive site formation and construction works, which may adversely affect the environmental quality of the Inner Deep Bay and its adjoining hinterland, in particular the MPNR. To avoid the irreversible adverse impacts on the MPNR and Inner Deep Bay, the Town Planning Board considered it necessary to establish a set of planning guidelines for the purpose of controlling development in the area. These guidelines are intended to provide guidance to the general public and potential developers on what kind of development would be considered suitable, and the factors that the Town Planning Board will be considering processing planning applications in Inner Deep Bay and its adjoining hinterland."

29. As regards development of land falling within Buffer Zone 2, this is what the Guidelines say:

"4(b) Buffer Zone 2

The planning intention for Buffer Zone 2 is primarily to give added protection for the conservation of MPNR and Inner Deep Bay and to enhance the visual appearance and landscape features within the Buffer Zone 2 area. New development within this zone would not be considered unless the applicant could demonstrate that the proposed development would have insignificant impact on environment, ecology, drainage, sewage and traffic in the area including the MPNR and Inner Deep Bay.

5. The proposed uses and developments within Buffer Zone 2 should not impose adverse impacts on the sustainability of the ecosystem of the MPNR and

Inner Deep Bay. The following criteria should be satisfied:

- (a) The proposed development should not add to the pollution loadings of the Deep Bay area, particularly the Buffer Zones 1 and 2.
- (b) An effective buffer should be maintained between the SSSIs (i.e. Inner Deep Bay, Mai Po Marshes, Tsim Bei Tsui, Tsim Bei Tsui Egretty and Mai Po village) and built developments.
- (c) A gradation of intensity in land use and activities, built form, density and height away from Buffer Zone 1 should be achieved to minimise the likely impacts on the natural environment. A diagrammatic illustration of the development concept for Buffer Zone 2 is shown in Figure 2.
- (d) The proposed use and development should be compatible with the conservation objective of MPNR and Inner Deep Bay. It should be appropriate to the area's rural setting and enhance the visual appearance and landscape character of the area."

Are the appellants correct when they say that the proposed development complies with these Guidelines?

Pollution loading

30. The Wing Kei Tsuen stream-course, which at present flows through the site and eventually discharges into Deep Bay, is often polluted, sometimes heavily polluted. At certain times of the year water hyacinths grow in profusion in parts of the stream. There is some dispute between the parties regarding the extent to which the water hyacinths are effective in reducing the amount of pollutants in the water. On the evidence before us, this dispute is not easy to resolve. The amount of water in the stream, and the rate of its flow, is seasonable. During the rainy season, the amount of pollutants in the stream would be far less than during the dry season; and, when flooding occurs, as it does from time to time, much of the water hyacinths which grow on the surface are liable to be washed away. There is however evidence to the effect that a fish farmer is rearing carp in the stream, at the

northern portion of the site, which suggests that, over the whole stream course, the pollution is not as grave as the appellants suggest, and that the water hyacinths do in fact perform an effective cleansing function. At a site visit we conducted on the morning of 13 October 1995 we were able to observe that the water downstream of the water hyacinths (trapped by a bridge) was visibly much cleaner than the water upstream. In fact the downstream water looked very clean: We realize of course that the position could be different after a long dry spell.

31. There was evidence adduced before us, from Miss Castka, a consultant engineer, to the effect that the overall result of the appellants' treatment plants is a net reduction of pollutants discharged into Deep Bay, despite the pollution load caused by the substantially increased population following the development. We accept this evidence. This means, in effect, that the criterion set out in para 5(a) of the Guidelines might well be satisfied by the appellants, assuming that the managers of the developed estate will continue to keep the treatment plants in good working order, with the solid waste in the sewage disposal plant periodically removed. If however the housing units are to be sold off to individual owners later on, there is no certainty that such a state of affairs will always prevail, or is even likely to prevail. The appellants have sought to overcome this point by conditions to be attached to the planning permission: the submission of arrangements for a detailed management plan to the Director of Agriculture and Fisheries or the TPB to ensure that the objectives of a managed wetland environment will be achieved. We will deal with this proposal later on.

The concept of a "buffer" and "gradation of intensity in land use"

32. The Guidelines in paras 5(b) and (c) introduce the concept of an effective buffer and a gradation of intensity in land use and activities, in order to protect MPNR and Inner Deep Bay.

33. The appellants argue that they have, in effect, complied with this concept because the proposed nature reserve, occupying 3.5 ha, together with the Ngau Tam Mei Drainage Channel and the wetland belt, provide the necessary buffer between the SSSIs and the proposed built development. They also draw attention to the fact that Fairview Park, an extensive low-rise development, stands between MPNR and the site. In this regard, it is of interest to note what Mr Simon Rawle, the appellants' town planning consultant, is reported to have said at the s17 review when this question was raised. Para 140 of the Minutes of that meeting records as follows:

“140. Another Member remarked that the proposed residential development spanned over the entire application site which was in the Deep Bay Buffer Zone 2 and enquired why the gradation concept as stipulated in the 'Town Planning Board Guidelines for Application for Developments within Deep Bay Buffer Zones' had not been adopted. In reply, Mr Simon Rawle said that as the subject site was far away from MPNR and separated from Deep Bay Buffer Zone 1 by a wide drainage reserve, it was considered that the proposed development would have insignificant impact on the area and therefore the application of the gradation concept was inappropriate. He considered that adopting a wetland concept for the subject site was more appropriate. He also pointed out that the need to have the proposed residential units set back from the New Territories Circular Road due to environment concern also made the application of the concept impossible. Furthermore, he considered that the creation of wildlife habitats on site thereby improving the ecological value of the area would equally serve the function of the gradation concept. Mr Gary Grant added that the purpose of the gradation concept was to keep development away from the Deep Bay. As the site was very far away from it, the concept did not apply in the ecological sense.”

34. It would appear from these minutes (the accuracy of which has not been disputed) that, at that stage, the appellants were not contending that the proposed development complied literally with para 5(b) and (c) of the Guidelines, but they relied heavily instead on the “planning gain” to be achieved by the development of the nature reserve and the wetlands as habitats for wildlife.

35. Looking at the proposed development as a whole, it is difficult to see how the "buffer" and "gradation" concepts will be met, having regard to the intensity of that development over the greater part of the site.

Compatibility with conservation

36. In a nut-shell, the appellants say as follows:

- (i) From an ecological point of view, the site is in a degraded state. The fishponds, some abandoned and some actively farmed, are not used by the vast majority of birds which visit the Deep Bay area.

Whilst the appellants accept that the fishponds are of some value for birds, for they are visited by common fish-and-shrimp-eating species, the fact remains that the fishponds are not managed for nature conservation purposes. Moreover, some of the fishponds will be destroyed by the Ngau Tam Mei drainage works; fishponds will also be taken up by the temporary works area, with no guarantee that any of the ponds in those areas will be reinstated after the project is completed. As regards the waste-land of about 3 ha in the south-west of the site, whilst this is of some value at present to wildlife, continuing encroachment by use as a rubbish dump will make it increasingly unattractive.

- (ii) The Wing Kei Tsuen stream is heavily polluted.
- (iii) What they propose is a development which will attract wildlife and will be of a higher ecological value than the existing fishponds which occupy approximately two-thirds of the site (about 19 ha). Accepting that there will be a net loss of wetlands, the environment which the appellants will create and will thereafter actively manage will result in ecological gain. Together with the managed nature reserve of about 3.5 ha, the development will attract to the site a greater diversity of species of birds amphibians and reptiles than exist at present on the site.
- (iv) Human activity resulting from the development will be confined to the built-up area, as the perimeter wetland belt and the nature reserve will be fenced off and screened by planting.
- (v) The quality of the water discharging into Deep Bay will be improved by the proposed treatment works.
- (vi) In summary, the appellants propose, in Mr. Benjamin Yu Q.C.'s words, “the eradication of wetland with no regard to whatever value [such] wetland has” and to “seize the opportunity to

improve land use in the site with a stable environment for man and nature to co-exist”.

37. In short, the appellants' argument is that the conservation objective, expressed in the Guidelines, will be more than met by their proposal.

Fishpond farming

38. Inevitably, because the fishponds occupy the greater part of the site, much evidence adduced at the hearing was focussed upon the fishponds. There is no doubt in our minds, upon the whole of the evidence, that fishponds, as they are managed at present, bring considerable incidental benefit to wildlife conservation and are for that reason important. The appellants say, forensically, that being now the owners of the fishponds, they are not bound to renew the farmers' leases. The respondent says, in effect: "So be it. The fishponds will then become abandoned, and may become even better habitats for wildlife. What the appellants cannot lawfully do is to fill in the fishponds." We might add in parenthesis that if the appellants should act so destructively - there is no evidence that they will - as to drain the ponds, these will, within a short time, be re-filled naturally by rain-water and flood-water: the evidence is that the 1,300 ha of fishponds in the Deep Bay area absorb approximately 25% of the annual rainfall in the area.

39. Fishpond farming, as an activity, is economically viable. We accept the evidence of Mr Keith Wilson, an officer with the Agriculture and Fisheries Department, that whilst there is some evidence of decline in the fishpond business over the years, it is not in sharp decline. Territory-wide, the production of fresh water fish in 1990 was 6130 tonnes; in 1994 it was 5500 tonnes. It is possible that with the enormous and continuing loss of fishpond across the border as a result of building development in southern China, fishpond farming in the New Territories will gain in economic importance. The average fishpond of about 2 ha produces a net income to the operator of approximately HK\$85,000 per year. Fishpond management is not labour intensive and family operators are generally able to earn additional income from other activities such as duck rearing. There is strength in the proposition, put forward in Mr Wilson's evidence, that fishpond farming represents the most appropriate and economically viable option for the area adjacent to MPNR and Deep Bay.

40. The evidence adduced by the appellants, which we accept, is to the effect that a well-managed fish farm, with steep sides cleared of vegetation, is not particularly attractive to birds. But, even then, there is evidence also that large numbers of herons and egrets frequent these ponds, and when these ponds are drained, generally once a year, they become "bonanzas" for birds, which

congregate at the shallow end, gorging on small non-commercial fish such as mosquito fish and shrimps, whilst the workers are gathered some distance away at the deep end, harvesting the carp and other large commercial fish. But, of course, not all fishponds are well maintained and the sides of some fishponds get over-grown. They can then become very attractive habitats for wildlife. In fact, evidence adduced by the appellants of a year-long avifauna survey shows three pairs of little grebes breeding on the site. Moreover, the survey shows an abundance of cattle egrets on the site: these birds seem to feed almost exclusively from fishponds. On the visit we made on 13 October, we saw many egrets, herons, kingfishers, a few cormorants and other birds we could not identify. Virtually all the ponds we saw had sloping sides, to some degree or another. We saw many waders feeding from the sides.

The "managed" environment

41. The appellants place emphasis on the difference between the managed conservation scenario they are proposing and the present unmanaged environment. They say, for instance, that the water level of the proposed nature reserve will be controlled seasonally to make them suitable for migrating shore-birds and the water level in the perimeter wetland belt will likewise be controlled.

42. As regards the nature reserve the proposal is to hand the management over to the government (possibly the "RAMSAR Management Authority") together with a trust fund provided by the appellants. There is not a scrap of evidence that any government department is willing to undertake such a task. The government's response is that a small fragmented nature reserve of 3.5 ha is of no value. It is therefore difficult to see a project like this getting off the ground. Moreover, the proposed income from the trust fund, between HK\$30,000 - \$40,000 per year, seems grossly inadequate for the purpose. The area proposed - 3.5 ha - as a fragmented "nature reserve" is, we conclude, useless for the purpose proposed.

43. As regards the perimeter wetland belt and the central lake, the up-keep cost will obviously be very considerable. The pressure of people, including young children and domestic pets, on the adjacent wildlife will be substantial. The appellants propose to meet the cost of maintenance through service charges to the residents of the estate. Whether the residents will be prepared to meet these charges from their pockets is unknown. We are by no means convinced that, in the long run, the concept of managed wetlands created by the destruction of the existing fishponds is an "environmental gain". On the present evidence, the opposite would appear to be the case. Moreover, the ratio of created wetlands to natural wetlands lost through development is less than 1 to 1. There is authority, at least in the U.S.A., to the effect that a "3 to 1 mitigation should be required on an acre-to-acre basis" (Ex TPB 2).

Conditional planning consent

44. The appellants, through counsel, have put forward over 20 conditions to be attached to the planning permission which we might impose in allowing the appeal. We find this approach unsatisfactory. Take as an example condition (h):

"(h): Submission and implementation of a detailed Habitat Creation Plan for the Wing Kei Tsuen Development to the satisfaction of the Director of Agriculture and Fisheries or of the Board."

Clearly, in rejecting the appellants' proposal, the TPB was not satisfied that the "habitat creation plan" (covering the 3.5 ha nature reserve and the wetland belt with the central lake) would, in the context of the development as a whole, support the conservation of MPNR and Inner Deep Bay. That was, in effect, what they said in para (b) of the letter of 16 December 1994 (see para 10 above):

"(b) ... there is insufficient information in the submission to demonstrate that the proposed development can support the conservation of MPNR and Inner Deep Bay or the development will have insignificant impact on the ecology including the MPNR and Inner Deep Bay."

45. The evidence we have received in the course of the hearing supports this conclusion. How, in these circumstances, the Director of Agriculture and Fisheries might be "satisfied" with the "detailed Habitat Creation Plan" to be submitted is difficult to imagine. And if the appellants were to submit to the Director a plan which truly supports the conservation of MPNR and Deep Bay and is aimed only incidentally at residential development, one thing is certain: It would not be a plan for a residential development of over 81,000m² gross floor area with a designed population of nearly 1,200 persons.

46. To make sense of condition (h) we would, in effect, have to do the following

- (i) conclude that the TPB was fundamentally wrong in rejecting the appellants' proposal;
- (ii) conclude that the proposal shown in the master landscape plan (page 28 vol. 1) is consistent with the planning intent for the area;

- (iii) treat condition (h) as simply a device for fine-tuning the appellants' proposal.

But how, in these circumstances, the Director is supposed to exercise his judgment in entertaining the plan has not been explained. What if the Director should conclude for instance that the wetland belt is too narrow to attract wildlife in any meaningful way? Is the Director, in effect, to be bound in the exercise of his judgment by our determination as an appeal board, so that he cannot legitimately conclude that the wetland belt is too narrow? Where are the statutory provisions which permit us to act in this way?

47. And take condition (m):

“(m) The establishment of the Wing Kei Tsuen Nature Reserve and the implementation of the plans referred to in conditions (k) and (l) above before the commencement of building works in the Wing Kei Tsuen Development.”

Condition (k) refers to the submission and implementation of (i) a detailed habitat creation plan (ii) a habitat management plan and (iii) a pest management plan for the plants trees and other landscape features at the nature reserve, to the satisfaction of the Director.

At the hearing we asked counsel whether it is suggested, in effect, that the main development should be postponed not only until after the construction of the lagoon, central island, "breeding pond" etc. (i.e. the "nature reserve") but also after the period of time necessary for wildlife to be established there. The answer was No. So "implementation" in condition (k) does not mean the practical carrying out of the proposal so that its effect can be tested; we are asked in effect to accept upon trust that the "nature reserve" of 3.5 ha will work as a nature reserve in the way intended. "Implementation" in condition(m) means nothing more than implementation on paper. What if the Director of Agriculture and Fisheries, under condition (k) says No: he is not satisfied with the mere construction of the nature reserve; he requires a period of time for implementation, to see if it is in fact an "environmental gain" - in terms of the number and variety of birds attracted to the reserve. Is the main development then to be postponed?

48. Conditional planning consent, in the circumstances of this case is, in our view, unworkable. It leaves to others, such as the Director of Agriculture and Fisheries, the task of assessing the value of the appellants' ecological "package" in a way which has not been - and probably cannot be - defined. We would, in allowing the appeal, have approved in principle the putting up of a residential

development of 81,000m² gross floor area, with parking spaces for over 700 vehicles, and a holiday centre of 3,000m² GFA: what sort of "habitat creation plan", "habitat management plan" etc would suffice to mitigate the impact of such a large development on wild-life? No one can say with confidence. What then does conditional planning permission mean in practical terms? Once this point is reached, the conclusion is inevitable that the appellants' submission, made through counsel, that we should allow the appeal conditionally must be rejected.

Conclusion

49. Our conclusion in summary is as follows:

- (i) The proposed development is contrary to the planning intention set out in the Nam Sang Wai DPA plan.
- (ii) We are far from being satisfied that the proposed development will result in net ecological gain, as contended for by the appellants.

50. Viewing the evidence as a whole, we agree with each of the grounds for refusing planning permission as set out in the TPB's letter of 16 December 1994 and reproduced in para 10 above. It follows that the appeal must be dismissed.