

Town Planning Appeal No. 8 of
1995

IN THE MATTER of the Town
Planning Ordinance Cap. 131

and

IN THE MATTER of an Appeal
under Section 17B by Yin Nin
Savings, Mortgage Loan and Land
Investment Co. Ltd.

Date of hearing : 17th, 18th, and 20th October 1995

Date of decision : 27th October 1995

Panel : Mr Justice Litton, OBE (Chairman)
Mr Ronny WONG Fook-hum, QC, JP
Mr David C DaSilva, MBE

DECISION

Introduction

This appeal concerns a proposal to develop a very large site for residential purposes in the New Territories. It comprises various lots owned by the appellant in DD 109, Kam Tin. The configuration of the site is irregular and there is a small piece of land owned by the appellant. The total site area is said to be 67,344m². It lies to the north of Kam Tin Road and is accessible by a small village path which leads to Tai Kong Po Village lying to the north of the site. Much of the site at present is under cultivation for vegetable farming and for poultry rearing. There is some minor work-shop activity on parts of the site.

2. On 28 February 1994 the appellant submitted a written application under section 16 of the Town Planning Ordinance for planning permission to put up 35 apartment blocks accommodating 350 units and 48 town-houses, with a total gross floor area (GFA) of 27,760m². The apartment blocks and the town-houses were two-storeyed, erected over carports. 307 car-parking spaces were provided. The designed population was 1,000 persons. There was also to be a club-house and restaurant with a total GFA of 3,782m². Tennis courts and a swimming pool were planned. The proposed domestic plot ratio was said to be 0.41.

3. The site falls within an area designated "unspecified use" in the draft Kam Tin North Development Permission Area Plan No. DPA/YL-KTN/2(DPA plan), published on 12 July 1991.

4. On 22 April 1994 the appellant's s16 application was rejected. The appellant then sought a review of the application under s17(1) of the Ordinance. The master layout plan submitted in support of the review application was substantially different from the one first put forward. By letter dated 12 January 1995 the appellant was informed that the application on review was rejected. Hence this appeal.

Reasons for rejection

5. The reasons for rejecting the application on the s17 review are stated as follows:

- "(a) the proposed development is premature at this stage in view of the number of transportation network and drainage works being planned in the area and the fact that it may pre-empt a review of the land use in the general area with regard to the scale, location and phasing of future developments there;
- (b) the proposed development is not in line with the planning intention for the area as reflected in the approved Kam Tin North Development Permission Area Plan No. DPA/YL-KTN/2 which allows low-rise, low-density residential development provided that the proposed development will have insignificant drainage and traffic impacts on the area;
- (c) there is insufficient information in the master layout plan to demonstrate that the proposed development will not cause constraints to the proposed Main Drainage Channels for Yuen Long and Kam Tin; and
- (d) there is insufficient information in the master layout plan to demonstrate that the proposed development will not cause constraints to the

proposed Kam Tin Bypass and Kam Tin Road Improvements."

Planning intention

6. The total area of the Kam Tin North Development Permission Area is about 603 ha. The area, as described in the Explanatory Statement, is "essentially a flat plain comprising agricultural land, fishponds and villages". The population in the area, according to a 1991 census was around 7,680. Agriculture is described as a "major economic activity" in the area: See para 4.5 of the Explanatory Statement.

7. The "unspecified use" area in the DPA plan is about 474 ha. Obviously, in an area as large as this, the planning intention, even for the limited period of time for which the DPA plan is effective, cannot be entirely uniform. The Planning Department has, in the Explanatory Statement, divided it into four large sub-areas and the appellant's site falls within sub-area (i) as to which, in para 6.2.5(a)(i), the Explanatory Statement says:

"(i) The sub-area north of Kiu Tau Tsuen and Pang Ka Tsuen (Kong A Leng/Tai Kong Po area).

There are numerous temporary structures for residential use scattered around the sub-area. In line with the Rural Planning and Improvement Strategy (RPIS), it is not intended to clear these structures but to allow residents to undertake self-improvement and possibly some publicly funded schemes where priority for public expenditure permits. The general intention is to encourage the in-situ reconstruction of structures with permanent material with a view to improving the current situation."

Whilst this is not in law part of the plan, it provides good evidence of the underlying intention behind the statutory control.

8. The Explanatory Statement goes on to make some general statements concerning the "unspecified use" area as a whole in paras (c), (d) and (e):

"(c) Agricultural uses in these areas will be encouraged as far as possible and recreational uses (including ancillary facilities) which are generally compatible with the rural environment and are unlikely to adversely affect local communities may also be

permitted. The main planning objectives of this land use designation are to identify non-urban areas where appropriate forms of agriculture and rural activities can be sustained to prevent unwanted urban growth and to enhance the quality of the environment. Residential development in compliance with the conditions of the 'On-Farm Domestic Structure' scheme may be permitted where it is established that a dwelling is necessary to support the agricultural use.

- (d) There may be areas where private initiatives may wish to provide comprehensive low-rise, low-density residential developments (especially in the Pang Ka Tsuen area) mainly through land exchange or lease modification. Applications should be made to the Board. If approved by the Board the developments should be implemented in accordance with approved master layout plans with adequate provision for government, institution and community uses and recreational facilities to serve these developments. Due regard should be given to minimizing the environmental, drainage and traffic impacts of these developments on the surrounding areas.
- (e) For any development within these sub-areas, the owners/developers must demonstrate that their proposals would have insignificant adverse impacts on the environment, traffic and drainage of the area or appropriate measures will be taken by the applicants to minimize such impacts. The submission of master layout plans, landscaping proposals, environmental impact assessments, drainage impact studies and/or traffic impact studies may be required when the proposals are submitted to the Board for consideration."

9. It has to be borne in mind that planning control by means of the DPA plan was to be effective for, at the most, four years: see section 20(5) of the Ordinance. This allowed for detailed analysis of land use and the study of development options for the area to take place: see para 2.2 of the Explanatory Statement. A development as large as this, once authorized, might have the effect of pre-empting future patterns of land use. Obviously, the TPB had to tread warily

in dealing with applications such as the appellant's, pending the formulation of an outline zoning plan for the area: This is particularly so in an area like Kam Tin where, at the strategic territorial planning level and the sub-regional level, there were (and are) major infrastructural projects at various stages of planning such as Route 3 and the Western Corridor Railway. The future location of things like the Kam Tin railway station (if it materializes) will have a major impact on the pattern of land use in the area generally.

10. As things exist, however, at present, Kam Tin and the immediate environment remains largely rural. The substantial residential development as proposed by the appellant will add considerably to the population (which, by the 1991 census, was only 7,680) and will of course have significant impact on traffic in the area.

11. The DPA plan was, on 17 June 1994, replaced by the outline zoning plan (OZP) which zoned the portion of the site north of the drainage reserve "Agriculture" and to the south "Village Type Development". Whilst, of course, the s17 review and the appeal before us must proceed on the basis of the DPA plan - see s20(6A) - the zoning in the OZP underlines the need for a cautious approach at the DPA stage.

Impact of infrastructural projects

12. The reason why the master layout plan submitted to the TPB at the s17 review was substantially different from the earlier one was because, by that time, the alignment for the proposed drainage channel for Yuen Long and Kam Tin Stage II had changed. Moreover, the project as proposed was also likely to be substantially affected by the proposed Kam Tin Bypass.

13. In their written application for the purpose of the s17 review hearing (which took place on 25 November 1994) the appellant's representatives said:

“2.4 There are also a number of planned infrastructural developments in the vicinity of the site which at the time of the DPA planning application do not have concrete development program or detailed alignments. The major infrastructural developments include the drainage channel traversing the site, the improvement works of the existing Kam Tin Road, and the Kam Tin Bypass running to the south of the site and connecting Kam Tin Road at its both ends.

2.5 The program of these infrastructural provisions are fundamental to the implementation of the proposed development. The applicant is indeed willing to accept as a lease condition to proceed with the scheme after the completion of the government drainage works and the bypass

The representatives then set out the anticipated time-table as follows:

<u>Project description</u>	<u>Scheduled completion date</u>
Drainage channel	September 1998
Kam Tin Road improvement works	No program
Kam Tin Bypass	Mid-1999

The evidence before us indicates that there has, already, been "slippage" for these projects. As things stand, the drainage channel works are scheduled for completion in mid-2001; the Kam Tin Road improvements works are scheduled for completion in early "2000" and the Kam Tin Bypass is scheduled for completion in mid-1999.

14. Counsel for the appellant accepts that any planning permission given could only be conditional in these circumstances: that the development of the site would only commence after the completion of these infrastructural projects, and be subject to various conditions such as the set-back of the building lines and the approval of a master layout plan. As things stand today a delay of at least six years is envisaged - and, of course, many unforeseen changes can take place in the intervening six years.

15. As regards the drainage channel project, the ancillary road-works for that were gazetted under the Roads (Works, Use and Compensation) Ordinance, Cap. 370 on 24 March 1995. 14 objections were received and the hearing of those objections under the Ordinance has not yet taken place. Further, the road-works for the Kam Tin Bypass are scheduled to be gazetted under the same Ordinance in January 1996. This means, in effect, that the alignment for both the drainage channel (including the ancillary road works) and the Kam Tin Bypass (including the slip roads) cannot be treated as finalized.

The master layout plan

16. As mentioned earlier, the master layout plan, setting out the layout of the development, changed substantially at the s17 review stage. When it became

clear to the appellant that even that layout plan failed to accommodate the proposed drainage work, yet another master layout plan was produced, for the purpose of the appeal before us. But this third master layout plan was also defective: it failed to accommodate the area to be resumed by the Crown within the appellant's site for the Kam Tin Bypass. So, on the first day of the hearing of the appeal, a fourth master layout plan was produced, showing a shrinkage of part of the common area south of the drainage reserve (identified as "site A" on the plan) to accommodate the slip road for the bypass. This final master layout plan shows the edges of two of the town-houses abutting onto the resumption line for the bypass and some of the apartment blocks touching the line of resumption for the drainage channel works. No evidence has been led as to whether a proposal which shows some of the buildings touching the site boundary at these points would be acceptable to the government departments concerned.

17. In the original s16 application for planning permission, the site area was shown as 67,344m². With a domestic GFA of 27,760m² that worked out to a plot ratio of 0.41 and the domestic site coverage at 13.7%. This was, however, based on a site area which included the proposed drainage reserve. Throughout these proceedings, the appellant's case has been presented on this basis. This, however, is misleading because large areas of the site will be resumed by the Crown for the drainage channel and ancillary works. Likewise, a portion of land at the south-western corner of the site will be resumed for a slip-road for the Kam Tin Bypass. The effect of the land resumption for the drainage-channel is that there will, in effect, be two substantially reduced sites (sites "A" and "B") divided by the channel which has a wide verge on both sides: on the south side, there will be the maintenance road (3.5m wide) and then a 10m verge. No figures have been produced for the areas of the two truncated sites 'A' and 'B', but clearly, the domestic plot ratio for each of the two sites will be much higher than 0.41 and the site coverage will likewise be far higher than 13.7%, if the same GFA and the same building heights are to be maintained.

18. Further the position of the vehicular bridge linking sites A and B, as shown in the master layout plan, does not line up with the bridge as proposed by the government.

19. Counsel for the appellant argues that the master layout plans are merely for "illustrative purposes": the layout can change: the essential matters, he says, are the "broad issues" such as "use, gross floor area, number of units, population and traffic and environmental matters". Counsel further argues that all the concerns which have been expressed over the master layout plan can be met by making planning consent conditional upon the approval of a master layout plan by the Director of Planning. We reject these submissions for a number of reasons:

- (i) The master layout plan is not for "illustrative purposes only". It is the basis of the development proposal rejected at the s17 review and is the foundation of the proposal now under appeal.
- (ii) The master layout plan as finally submitted to us, in relation to the two sites (sites "A" and "B") will result in a development with a higher plot ratio than that of 0.41 and a higher site coverage than 13.7%, once the areas to be resumed are taken out of the calculation. if the other factors like GFA, height etc. are to be maintained.
- (iii) Further, the master layout plan as put before us shows a road through the development which does not meet up with the vehicular bridge across the drainage channel as proposed by the government. The appellant hopes to persuade the government to change the position of that bridge. If, however, the appellant fails in this regard, the layout for sites "A" and "B" will have to be further modified.
- (iv) To authorize a development now, for implementation in the year 2001 or beyond, when so many factors are uncertain would be fundamentally wrong. It is contrary to the statutory scheme for the control of development by means of the DPA plan.

Conclusion

20. Having regard to all the uncertainties which surround the land use in the area, it is no wonder that the TPB concluded that the proposed development was "premature at this stage" (para (a) of the letter of 12 January 1995) and that there was insufficient information in the layout plan to demonstrate that the development would not cause "constraints" to the proposed drainage channel and the Kam Tin Bypass (paras (c) and (d) of the same letter).

21. We agree with all the reasons for rejection set out in the letter of 12 January 1995. This appeal has no merits and must be dismissed.