

Town Planning Appeal No. 12 of 1993

IN THE MATTER of an appeal by
Messrs Yook Tong Estate Ltd and Mr
Tsang Kam Lan

Proposed development at No. 446-448
Reclamation Street, Kowloon.

Date of hearing : 12th, 13th April 1994
Date of decision : 9th May 1994

Panel : Mr Justice Litton, OBE (Chairman)
Mrs Alice Piera Lam, OBE, JP
Mr Lee Man-bun, MBE, JP
Mr Fan Sai-yee
Mr Chung Wah-nan

DECISION

The appellants Yook Tong Estate Ltd. And Mr Tsang Kam Lan are the owners of Nos. 446-448 Reclamation Street Mongkok, Kowloon. The property consists of twin three-storey, pre-war buildings, the upper floors of which project over the pavement.

2. The total site area of the two properties is 160m². Assuming that any future development were to be set back to make the frontage in line with the other properties on Reclamation Street, the site area would be no more than 132m².

3. The site fell within an area zoned "Government/Institution/Community" in the Mongkok outline zoning plan. However, on 25 March 1988 the Town Planning Board (TPB) rezoned the area bound by Argyle Street, Portland Street, Shangtung Street and Reclamation Street a "comprehensive development area" ("CDA"). On 30 July 1990 the Land Development Corporation ("LDC") submitted a draft Development Scheme Plan together with a Land Use Diagram, Notes and Explanatory Statement to the Secretary for Planning Environment and Lands concerning land use and related matters within the CDA. After the normal consultation process was completed the draft Development Scheme Plan and Land Use Diagram were revised. On 1 March 1991 the draft Development Scheme Plan S/K3/LDC1/1 and Land Use Diagram S/K3/LDC1/D1/1 were exhibited for public inspection for two months. During this period a total of 188 valid objections were received. The appellants, however, were not among the objectors. The TPB, after having heard the objections, decided not to amend the plan. The plan has since been approved by the Governor-in-Council.

4. By virtue of section 14(3) of the LDC Ordinance, the Scheme Plan is deemed to be a draft plan prepared by the TPB.

5. The Notes to the Scheme Plan state:

- "(i) Not relevant
- (ii) Not relevant
- (iii) No immediate change of use of existing properties to make their use conform to this Plan is required and no planning permission is required for carrying out of works for the maintenance of existing properties Any subsequent redevelopment mustconform to this Plan
- (iv) Within the area covered by this Plan, the undertaking of any building works, as defined in the Buildings Ordinance, is prohibited without the prior permission of the Town Planning Board
- (v) Any development not compatible with the Land Development Corporation's scheme for the area is prohibited by virtue of section 13(3) of the Land Development Corporation Ordinance. The Land Development Corporation intends to develop the area covered by this plan in accordance with the attached Land Use Diagram."

6. Under the heading of "Remarks", forming part of the Notes, the following appears:

"On land specified 'comprehensive development area' any planning application to be submitted to the Town Planning Board shall be in the form of a master layout plan and shall include information in relation to :

- (i) the areas of proposed land uses, the nature, position, dimensions, and heights of all buildings to be erected on the area;
- (ii) the proposed total gross floor areas for various uses, total number of flats and flat sizes;
- (iii) the details and extent of Government/Institution/ Community and recreational facilities, parking spaces, and open space to be provided within an area;
- (iv) the alignment, widths and levels of any roads proposed to be constructed within the area;
- (v) landscaping proposals within the area;
- (vi) programs of building development in detail; and
- (vii) any other information as required by the Town Planning Board".

7. These "Remarks", which form part of the statutory Plan, make it quite clear that the TPB contemplates that only development proposals which cover the entire area can, in practical terms, be entertained. It is this which makes the development of the area "comprehensive". It would be difficult to envisage the owner of one or two small properties within, the CDA being able to make practical arrangements for the development of the whole area in such details as to satisfy the requirement of the master layout plan as envisaged by the "Remarks".

The application

8. On 9 October 1992 the appellants through their consultants Toco Planning Consultants Ltd submitted to the Town Planning Board a proposal to develop the appellants' site by the erection of a 16-storey composite building with shops on the ground and first floors and domestic flats on the upper floors. The proposal envisaged a set-back to enable Reclamation Street to be widened and realigned, with the site area occupying 132&. This was duly considered by the TPB under section 16 of the Town Planning Ordinance and the application was rejected.

9. The Consultants then made an application for a review under section 17 and enclosed a revised master layout plan for the area which had the following startling features:

- (i) The public light bus terminus which, in the Land Use Diagram S/KS/LDCI/1/1, was zoned as being located to the west of Shanghai Street, near the appellants' site, was relocated to the southeast corner of the area;
- (ii) an area zoned as public open space was likewise relocated to the east of Shanghai Street;
- (iii) the road network was changed, with a new roadway joining Portland Street and Shanghai Street: a feature which simply does not appear in the Land Use Diagram.

10. The revised master layout plan, perhaps not surprisingly, failed to comply with the "Remarks" in that the details of the buildings to be erected, the extent of Government/Institution/Community and recreational facilities, the program of building development for the area have been totally omitted. It also conflicted with the Land Use Diagram. Since the appellants were putting forward their proposal in isolation, and sought permission simply to develop their two numbers on Reclamation Street, with no arrangements having been made with adjoining owners in the area, it is not surprising that the revised master layout plan should be so deficient in detail.

11. Moreover, the revised master layout plan indicated proposed building heights within the area far in excess of the current Airport Height Restriction applicable to the area. Mr. T.C. Chan, principal of the firm of consultants representing the appellants, in his evidence before us explained that he had put the building heights forward in anticipation of the lifting of the restrictions consequent upon the removal of the airport to Chek Lap Kok.

12. The Land Use Diagram formed part of the statutory plan. Since the master layout plan conflicted with the proposals in the Land Use Diagram, the appellants' proposals in the master layout plan were bound to be rejected by the TPB under s16(4) of the Ordinance. S16(4) says:

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

13. Not surprisingly, the TPB rejected the application on the section 17 review. In its letter dated 9 June 1993 the Secretary said:

"After giving full consideration to your submission and to your written statement, the Town Planning Board decided on review not to approve your application on the following grounds:-

- (a) the proposed development does not comply with the draft LDC Development Scheme Plan for Argyle Street/Shanghai Street and the relevant Land Use Diagram in the provision of Government/Institution/Community facilities, open space and improved traffic arrangement;
- (b) as the application site only forms a very small portion of the "CDA" the comprehensive development concept as indicated in the draft Development Scheme Plan will be defeated if the proposed development under application is allowed to proceed; and
- (c) the proposed building height exceeds the current Airport Restriction applied to the area."

Conclusion

14. The Town Planning Board has plainly arrived at a correct decision in this case. The appellants' site occupies less than one per cent of the entire CDA. Under section 16(4) of the Town Planning Ordinance, the TPB has the power to grant planning permission only to the extent shown or provided for or specified in the statutory plan. The appellants brought before the TPB a proposal to develop two numbers on Reclamation Street, without any indication as to how the completed development might harmonise with a comprehensive development of the area. It is quite possible, for instance, that the proposed building would interfere with the arrangement for the PLB terminus to be located at the street level. Furthermore, the revised master layout plan

submitted in support of the section 17 review clearly was in conflict with the statutory Land Use Diagram: for this reason alone, the proposal would have been rightly rejected.

15. This appeal must be dismissed and the decision of the TPB affirmed.

Costs

16. At the conclusion of the hearing before us, Mr. Cooney, on behalf of the TPB, submitted that we should exercise our powers under section 17B(8)(c) to award to the respondent its costs incurred in the preparation and presentation of the case. Mr Cooney proposed to submit to us a document setting out the costs which have been incurred on the TPB's behalf. We indicated at that stage that it was premature as we had not come to a decision and that, in any case, items of expenditure should either be agreed as figures with the other side, or proved in evidence before us.

17. We are provisionally of the view subject to further representations on behalf of the appellants that this is a proper case for awarding costs against the appellants. The application was doomed to failure and this should have been apparent to the appellants' professional advisers. The appeal borders on the frivolous. We would therefore be prepared to entertain an application for costs by the respondent, and will, if necessary, convene a separate hearing for the purpose.