

TOWN PLANNING APPEAL
NO.13 OF 1993

IN THE MATTER of the Town
Planning Ordinance Cap.131

and

IN THE MATTER of an Appeal
under Section 17B by
HENDERSON REAL ESTATE
AGENCY LIMITED

Date of hearing : 14th, 15th, 16th March 1994, and
9th, 10th, 11th, 20th, 21st & 23rd May 1994

Date of decision : 26th August 1994

Panel : Mr Robert C. Tang Q.C., J.P. (Chairman)
Mr H.M.G. Forsgate C.B.E., J.P.
Mr Professor Peter Hills

DECISION

This is the decision of a majority of the Appeal Board. Mr. DaSilva's dissenting decision will be provided in a separate document.

Introduction

2. The Town Planning Board ("the Board") has 2 distinct functions under the Town Planning Ordinance:

(i) Under s.3, a duty to prepare plans

In the preparation of any plan, the Board is obliged to make such inquiries and arrangements as it may consider necessary for its preparation

(ii) Under s.16, a duty to consider application for permissions under any plan but only to the extent shown or provided for or specified in the plan

3. A person may
 - (i) under s.6 object to any plan prepared by the Board. As a result of such objection, the Board may amend or refuse to amend any such plan
 - (ii) apply under s.16 for permission under any plan prepared and published by the Board. There is a right of review (s.17) which is followed by a right to appeal to the Town Planning Appeal Board ("the Appeal Board")[s.17B]
4. On appeal to the Appeal Board, it may “confirm, reverse or vary the decision appealed against” s.17B(8)(b).
5. In considering an appeal, the Appeal Board has to take the plans as they are. It is its duty to see that permissions which should be given thereunder are given but

“only to the extent shown or provided for or specified in the plan” s.16(4)
6. In considering an appeal, the Appeal Board must not trespass upon the Board's plan making function. Whether the Appeal Board agrees with any plan or not is irrelevant. Its duty is to see that plans are faithfully implemented. If changes to any plan is desired, representations should be made to the Board. It follows that if permission should be granted under a plan, the Appeal Board has no right to refuse permission even if it does not like or agree with the applicable plan.
7. Sometimes, whether an appeal should be allowed will depend on a consideration of the planning intention. The planning intention should be gathered from the plan and its accompanying notes.
8. Subsequent explanatory statements issued by the Board may be considered by the Appeal Board but they cannot override the plan or its accompanying notes.

Appeal

9. This is an appeal by Henderson Real Estate Agency Limited against a refusal of planning permission for a proposed development at
 - (1) Nam Sang Wai and
 - (2) Lut Chau

Surrounding land use

10. This is uncontroversial and is taken from the Planning Statement.

"2.3.1. Nam Sang Wai lies to the northeast of Yuen Long New Town. The Yuen Long Industrial Estate is located to the west of the site just across the Shan Pui River. The Kam Tin River abuts the southern boundary of the site. Across the river are villages and fish ponds, and then some distance away the northern fringe of the New Town including Tung Tau Industrial Area and the Yuen Long Kau Hui (Old Market Place)

2.3.2. To the east and north of the site are mainly fish ponds. The area is located lies (sic) within the floodplain of the Kam Tin River. The river courses around the site are tidal and the fish ponds are protected from high tides by bunds at +3 metres to +4 metres PD. The area regularly suffers from flooding and as part of the Government's plans to alleviate this problem in the Yuen Long District, training of the Shan Pui River will be carried out, and a new channel is proposed for Kam Tin River passing north east of the site. Assuming all these works are carried out, the entire Nam Sang Wai Area will become an "island" bounded by new and existing water courses

2.3.3. Further to the northeast beyond the fish pond area, is a low density residential development - Fairview Park. Next to this, and due north of the subject site, is the Mai Po Nature Reserve which is a wildlife sancturay, and the Deep Bay Estuary Marshlands. Between the Nature Reserve and Nam Sang Wai is Lut Chau, which is an "island" surrounded by water channels"

11. At the hearing of the appeal, it soon became clear that the respondent's main objection to the proposed development at Nam Sang Wai is based on the alleged intrinsic importance of the fish ponds in Nam Sang Wai. It is the respondent's case that the fish ponds should be preserved.

Lut Chau Nature Reserve and the Nam Sang Wai
Development Described

12. The application site consists of 21.9 ha at Lut Chau and 115 ha at Nam Sang Wai. The Nam Sang Wai Development will occupy an area of approximately 98.3 hectares. The 98.3 ha consists of 76.4 ha currently owned by the appellant in Nam Sang Wai, and 21.9 ha of Government land which the appellant hopes to exchange for the 21.9 ha in Lut Chau owned by the appellant. Of the 76.4 ha (Lot 1520 RP, Lot 1604 both in DD123) currently owned by the appellant in Nam Sang Wai, about 16.6 ha is zoned "R(C)", the remainder is zoned "unspecified use" in the Draft Nam Sang Wai Development Permission Area Plan No.DPA/YL-NSW-1.

13. The Nam Sang Wai development will comprise a 18 hole golf course and 2,550 residential units (0.317 plot ratio). Of the 2,550 residential units, 1,080 units will be found in 25 residential blocks ranging from 7 to 8 domestic storeys, 500 units in 3 to 4 storey buildings with 2 duplex units, 970 units in 2 to 2 - 5 storey cover carport designed for single family. There will also be a commercial area with a gfa of 5,000 sq. m. There will remain 13 ha of open water (as opposed to the present 98.8 ha) and 14 ha of woodland as opposed to the existing 1 ha. In addition there will be 1 ha of scrape compared to none at the moment.

14. The 21.9 ha [Lot 1534 in DD123] in Lut Chau is zoned as a site of Special Scientific Interest ("SSSI") on the Draft Mai Po and Fairview Park DPA Plan No.DPA/YL-MP/1.

15. There are actively managed fish ponds in Lut Chau which tend to have low vegetation cover and steep banks. As such their value to wildlife is minimal.

16. On the other hand, many of the fish ponds (about 75%) in Nam Sang Wai have been abandoned. Some dumping has taken place in the area. It is in a state of neglect. But, abandoned fish ponds, if left undisturbed by people, can become good wildlife refuges. However, their value to wildlife is likely to diminish if active management is resumed. It is common sense that commercial fish ponds are not run for the benefit of wildlife.

17. In Lut Chau, the appellant will build an actively managed nature reserve which will be surrendered to Government. (We will refer to this as the Lut Chau Nature Reserve). The Lut Chau Nature Reserve will comprise 21.9 hectares owned by the appellant and 19.1 ha owned by Government. The management of the nature reserve will be funded by levy on residents of the Nam Sang Wai development.

18. The golf course at the Nam Sang Wai development will incorporate wildlife habitats. This will be by water channels and planted with appropriate

vegetation to create habitats which, we believe, will attract and support a wide variety of wildlife. An outer perimeter of Crown land will be planted by the appellant and handed back to Government.

19. The appellant also undertakes that it will:
- (a) use Integrated Pest Management which basically uses biological and mechanical means of pest control and would only use pesticides and fertilisers if EPD approval is obtained
 - (b) institute a habitat management of the fish ponds, lagoons, grassland, woodlands, shrubs, amphibian and dragonfly ponds and the wetland channels
 - (c) monitor water quality
 - (d) employ a Staff Ecologist
 - (e) retain an independent Auditing Ecologist who will make an independent report to the Environmental Advisory Group and to Government
 - (f) form an Environmental Advisory Group, which meets twice yearly, to which body the Staff Ecologist and the independent Auditing Ecologist will report

20. In addition, and as part of a package, it is proposed that two water screening facilities will be built at the Kam Tin and Sam Pui River by the appellant. This will result in much cleaner water flowing into Inner Deep Water thereby reducing pollution there. The present water quality in Inner Deep Bay, Yuen Long Creek (Shan Pui River) and Kam Tin River is extremely poor¹.

21. The Kam Tin Reed Bed treatment system has been the subject of a separate s.16 application which was approved by the Town Planning Board on 20th September 1993.

¹[See EPD, Planning Department's Territorial Development Strategic Review, Environmental Profiles, Plan Ref. No.2.93.42, Date 6.93]

22. Miss Patel, Counsel for the respondent, submitted that although pollution is bad, Government is determined to improve the position and that we should wait for Government action. There is no telling how long one has to wait for the effective enforcement of the Water Pollution Control Ordinance which has been on the statute books for years.

23. Given the importance of the Inner Deep Bay, and given the acknowledged extremely poor water quality of the Shan Pui River and Kam Tin River, we must express surprise that so far nothing seems to have been done to deal with the problem. We believe the appellant's proposal regarding the water screening facilities to be part of a needed pro-active approach to environmental protection. Gone are the days when one can fold one's arms and leave the environment to look after itself. We believe wise use of the environment must recognise the essential need to integrate conservation and development.

24. The Lut Chau Nature Reserve is uncontroversial. It is clearly consistent with the planning intention for the area where only development which will support the conservation of the area's special interest will be permitted. The World Wildlife Fund Hong Kong's ("WWF") "Proposal for a managed conservation zone in Inner Deep Bay" supported the Appellant's proposal.

25. The evidence of Mr. Llewellyn Young, WWF's Manager for Mai Po Reserve ("MPNR") is that the Lut Chau Nature Reserve "can be engineered quite simply" and that it would be feasible.

Nam Sang Wai Development

26. (1) We are concerned with the Draft Nam Sang Wai Development Permission Area Plan No.DPA/YL-NSW-1 together with its accompanying notes (the "DPA Plan"). The s.16 application by the appellant from which the present appeal stems was made under the DPA Plan
- (2) On 3/6/94 (after the conclusion of the hearing of the appellant's appeal) the Draft Nam Sang Wai Outline Zoning Plan No.S/YL-NSW-1 ("OZP") was gazetted
- (3) Miss Patel who appeared for the Board urged us to have regard to the OZP. She had overlooked the recent enactment of s.20(6A) of the Town Planning Ordinance. After her attention was drawn to s.20(6A), she continued to submit that in deciding

the appeal we should have regard to the OZP rather than the DPA Plan. However, she was unable to provide any convincing reason why we are not bound by s.20(6A) to decide the appeal on the basis of the DPA Plan. Section 20(6A) is clear. It provides that notwithstanding that a DPA Plan has been replaced by an OZP, the DPA Plan

“shall continue to apply to application for permission submitted under section 16 during the effective period of 3 years ... until the right to be considered under section 16, right of review under section 17 and right of appeal under s.17B have been exhausted, abandoned or have expired: and the Board or the Appeal Board, as the case may be, shall consider under section 16, reconsider under section 17 or hear an appeal under section 17B in respect of the application to the extent as shown or provided for or specified in the (DPA Plan)”.

- (4) It is clear from Miss Patel's written final submission that she relied substantially on the fact that in the OZP, Government land in Nam Sang Wai would be zoned as "conservation area" and that the private land now zoned as "unspecified use" in the DPA Plan would be zoned "recreation"
- (5) We are of the opinion that Miss Patel's reliance on the OZP is misplaced. The clear intent of s.20(6A) is that we must proceed on the basis of the DPA Plan

27. Under the DPA Plan

"For the "R(C)" zone residential use is permitted as of right subject to restrictions on development intensity as stated in the draft Nam Sang Wai DPA plan"

28. Under the DPA Plan, for area zoned "unspecified use", residential and recreation uses are not permitted as of right but

“any development, ... requires planning permission from the Town Planning Board”

29. However, the following uses are always permitted:

Agricultural Use
Ancestral Hall
Burial Ground
Plant Nursery
Police Post/Police Reporting Centre
Post Office
Rural Committee Building
Shrine
Tree Plantation

But no filling or excavation works necessary to effect a change of use to "agricultural use" or "plant nursery" or "Tree Plantation" shall be undertaken without permission.

30. Paragraph 6.2.5(a)(iii) of the Notes which applies to this area, provides:

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

"(c) Agricultural uses in these areas will be encouraged 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 zoning are to identify non-urban areas where appropriate forms of agriculture and rural activities can be sustained as a means of avoiding 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 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 and Institution/Community use 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 the surrounding areas

- (e) For any development within this zone, 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 Plan, Landscaping Proposal, Environmental Impact Assessment, Drainage Impact Study and/or Traffic Impact Study may be required when the proposal is submitted to the Town Planning Board for consideration"

31. In October 1992, the Board published "Consideration of Section 16 application for Development in areas around Mai Po Nature Reserve". The document made it clear that it should not be construed as a set of guidelines for the preparation of s.16 applications. Nor is the Board bound by the contents in the consideration of such applications. However, it gives a helpful indication to applicants of the sort of matters which might influence the Board in its decision. There, under the heading of Basic Principles, the Board

"agreed that for the purpose of considering section 16 applications, the following principles shall apply to the two zones as shown in Plan 1 :-

- (a) Deep Bay Buffer Zone 1 is the area in the immediate vicinity of Inner Deep Bay including the MPNR. The planning intention is primarily to protect the special ecological value of these coastline areas and their surroundings, including intertidal biological community. New Development within this zone should not be allowed unless it is required to support the

conservation of the area's natural features and scenic qualities

- (b) Deep Bay Buffer Zone 2 consists of a much wider area which has a bearing on the overall amenity and water quality of MPNR and other SSSIs in the vicinity. The planning intention is primarily to restrict developments to agricultural and recreational uses only. New development within this zone would not be considered unless the applicant could demonstrate that the proposed development would have insignificant impact on environment, drainage and traffic in the area including the MPNR"

32. The Nam Sang Wai development falls within Buffer Zone 2. Thus, according to this Paper, development in the area zoned "unspecified use" is not precluded if the applicant could

"demonstrate that the proposed development would have insignificant impact on environment, drainage and traffic in the area including the MPNR"

33. As recently as November 1993, and after the s.17 Review, a fresh set of guidelines were published. It provides under para.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 Egrettry 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"

34. However, under para.7, it also had this to say,

"Within Buffer Zone 2, the following activities associated with the different types of land uses may be considered appropriate having regard to the criteria in para.5 above:

- (a) **Conservation - conservation of natural resources such as water bodies and landscape features should continue to be the planning intention within Buffer Zone 2.** More specifically, existing fish ponds and gei-wais, villages and woodlands should be retained as far as possible and a landscape buffers (water body, earth mounding, tree planting, etc.) should be provided between any development and Buffer Zone 1 [emphasis added]
- (b) Recreation - appropriate passive and active recreation may be considered within Buffer Zone 2. Consideration should be given to the compatibility of such use with the adjacent areas and their environmental implications such as pollution of underground water and discharge of waste water. Generally, areas adjacent to Buffer Zone 1, would be suitable for accommodating passive forms of recreation, whilst active recreation would be best located adjacent to built development along the main road"

35. This Guideline was published together with a Conceptual Guidelines for Developments within Deep Bay Buffer Zone 2 [as Figure 2] produced as Appendix 1 to this Decision. It will be noted that a development in accordance with this Conceptual Guideline will involve the disappearance of most of the existing fish ponds in Buffer Zone 2.

36. It will be noted that neither in the notes accompanying the DPA Plan nor in the October 1992 Guidelines was there any reference to the conservation of water bodies as being the planning intention for Buffer Zone 2. Moreover, the reference to the conservation of water bodies as being the “planning intention within Buffer Zone 2” is limited to a very small part of Buffer Zone 2. See Appendix 1 hereto. In any event, as Appendix 2 hereto shows, the appellant's proposal seeks to comply with the Board's Guidelines issued in November 1993.

Decision of the Town Planning Board on Review

37. The decision was communicated to the appellant by letter dated 9th July 1993. The following grounds were given for refusing permission

- "(a) the proposed golf course and residential development is not in line with the planning intention for the area 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;
- (b) the intensity of the proposed development is excessive for low density residential development in this area;
- (c) the traffic assessment is inadequate and the problems related to the local traffic have not been properly addressed;
- (d) there are doubts on the proposed source of fill material and insufficient information on the environmental impact assessment on its haul routes in the submission;
- (e) the proposed grant of land in Nam Sang Wai in exchange for land in Lut Chau for development is not wholly consistent with the policy of conservation of the area;
- (f) there is no certainty that the proposed arrangement for the creation of the "Environmental Advisory Group" will be effective in implementing the "Habitat Creation and Management Plan"; and

- (g) the proposed "Environmental Advisory Group" and the "Habitat Creation and Management Plan" will impose a major role and responsibility on the Government which has no plan to participate in the proposals however"

38. Counsel for the appellant drew our attention to the Minutes of the meeting of the Board which decided on the Review. The Minutes recorded the Chairman as saying that

"the key issue in the consideration of the application was whether the Board would like to have about 9,000 persons living within the Mai Po Buffer Zone II area"

39. In arriving at those reasons (quoted above in the Board's letter of 9th July 1993), the Minutes show that

"the Board considered that it would. be difficult to establish a context for the consideration of this application and other applications in this area before the completion of the North-West New Territories Development Strategy Review early next year. In the meantime, the Board recognised the need to deal with each application on its individual merits"

40. The Board must, of course, decide each application on its merits. Although it may be difficult to do so prior to the completion of the North-West New Territories Development Strategy Review, the Board is required by s.16(3) to decide within 2 months of the receipt of a s.16 application. It goes without saying that any such decision must be based on the merits of the application and in accordance with the relevant plan. It is clear that was what the Board did since it went on to determine the application on its merits.

The Appeal

41. On the appeal, it soon became apparent that emphasis of the respondent's case had shifted from the importance of Nam Sang Wai as a buffer to the intrinsic importance of the fish ponds at Nam Sang Wai. In his evidence, Mr Paul W.P. Ng, the District Planning Officer, describes the appeal as the "battle of the ponds". Thus, much time was spent on the question whether the fish ponds are intrinsically important rather than whether the proposed development would affect Nam Sang Wai as a secondary buffer for MPNR.

42. We believe it is important for us not to lose sight of the fact that we must decide this appeal on the basis of the DPA Plan. We must gather the relevant planning intention from the DPA Plan. It is for the Board to decide if the fish ponds are intrinsically important such that they should be preserved. That is their statutory duty. Sections 3 and 4 provide the procedure upon which the Board must act. No doubt in forming a view they will take into consideration all relevant information including, if necessary, expert evidence. But experts do not decide plans nor planning applications. No matter how eminent and well intentioned they may be they cannot usurp the Board's function. Nor must we confuse Miss Patel's advocacy for the considered view of the Board. The considered view of the Board on the importance of Nam Sang Wai must be found in the statutory plan which is the DPA Plan in this appeal.

43. The shift of emphasis in the appeal to the intrinsic importance of the ponds is understandable. According to the WWF in their letter of 14th March 1994 addressed to the Board which was provided to the Appeal Board shortly before the hearing of the appeal,

“The value of fish ponds to Wildlife generally has been under estimated in the past, it is only very recently that academic study of fish ponds and their wildlife has started”

44. It may be that the value of the fish ponds to Wildlife had indeed been under estimated. But it does not help the respondent. It may explain why in the DPA Plan (and it is on the basis of the DPA that this appeal must be decided) the fish ponds were not regarded as of intrinsic importance. There, Nam Sang Wai's importance in planning terms was as a secondary buffer for MPNR. Indeed, the Conceptual Guidelines published in November 1993, **Appendix 1** hereto, indicated quite clearly, that disappearance of almost all the fish ponds in Buffer Zone 2 was envisaged.

45. The appellant's proposal is designed with the buffer concept in mind. See **Appendix 2**². If one compares Appendix 2 with Appendix 1, one can see how closely the appellant's proposal for Nam Sang Wai conform to the Conceptual Guidelines published by the Board as recently as November 1993.

² Diagrammatic Illustration of compliance with Town Planning Board Guidelines issued November 1993

46. The Board was impressed by the care with which the appellant had approached this development and they recorded that in its letter of 9th July 1993.

47. WWF was equally impressed. See

- (i) their letter of 29th March 1993 and a summary of their comments on the proposal (prepared for the Board). We quote from the summary

"3.2 General

We believe that Henderson Land is sincere in wanting to ensure that the development site at Nam Sang Wai is designed, developed and managed in an environmentally friendly manner, as evidenced by the level of detail in their proposals together with the proposal to establish the Environmental Advisory Group. However, the future management/owners of the site may have different priorities for the site. Therefore, we would like to see further details regarding legal safeguards which could be incorporated into the land grant documents by Government, deeds of mutual covenant for future home owners etc., to ensure that the high standards of environmental management being proposed will continue in future

Although the proposed habitat creation projects at Nam Sang Wai will increase species diversity at the site, it will not wholly compensate for the wetland habitats that will be lost from the Deep Bay area as a result of the project. This can, however, be mitigated by setting up the managed nature reserve at Lut Chau in Buffer Zone 1, to take up some of the species that would have been displaced from Nam Sang Wai

We welcome this move, whereby a developer sets aside a substantial amount of land in Buffer Zone 1 for conservation management and hope that, should this development be approved by government, other developers will also have to follow this example and set aside similar amounts

of land in Buffer Zone 1 for conservation management"

- (ii) WWF's letter of 30th September 1993 to the District Planning Officer [after the s.17 review]

"From the conservation point of view, the ideal situation is to keep all the remaining wetlands in both Deep Bay Buffer Zones, and actively manage the wetland area in Buffer Zone 1 for wildlife conservation and education. However, we feel that this is unlikely to be realistic in the long term since further loss of wetlands in Deep Bay Buffer Zone 2 is anticipated irrespective of which development scenario (or hybrid option) in the NWNT Development Strategy Review Second Consultation Document is finally adopted. Scenario C, whereby most areas in Buffer Zone 2 are zoned as "Recreation Priority Area", "Rural Activity Area" and "Recreation and Landscape Area" would certainly result in loss of wetland. In addition, the existing R(c) zone at Nam Sang Wai (which is current fish ponds) will still be developed even if the application is rejected"

"Unless Government is able to make available the necessary resources for the development and management of a Managed Conservation Zone in Inner Deep Bay in the near future, WWF Hong Kong respectfully suggests that Government gives consideration to the possibility of approving this application and incorporating it into the NWNT Development Strategy"

48. It is clear from these letters that the WWF was not unsupportive. They show quite clearly that WWF recognised a need to integrate conservation and development. However, shortly before the hearing of the appeal, their position seemed to have changed.

49. In WWF's letter of 14th March 1994 to the Board, after stating that the value of fish ponds to Wildlife generally has been under-estimated in the past, they concluded by saying

“WWF Hong Kong recognises the very considerable effort which has been put towards mitigating the environmental impacts of the proposed development, but nonetheless considers that there remain important questions regarding the acceptability of the proposed development under the Town Planning Board Guidelines for Application for Development within Deep Bay Buffer Zones under Section 16 of the Town Planning Ordinance, and thus the project should not be supported”

50. The reason why they felt they were unable to support the proposal is because

"In view of the local, regional and international importance of the Deep Bay wetlands WWF Hong Kong ideally wishes to see a situation where all further loss of wetlands in the Deep Bay area is prevented, and where existing wetlands are actively managed for wildlife conservation"

51. It is easy to be persuaded that they would be ideal. But we do not live in an ideal world. To bring all the fish ponds under active management for wildlife will require resumption of land which will cost hundreds of millions of dollars. There is no indication that Government is prepared to do that. More importantly, we live in a world in which every citizen is entitled to regulate his affairs according to law. Just as the Town Planning Ordinance protects the Community, it protects property owners as well. An owner is just as entitled to rely on a DPA Plan as the Government. That is the *raison d’etre* for the existence of the Board and the Appeal Board.

52. Given a choice in the matter, it may well be one would want Nam Sang Wai to be managed for wildlife. But does one truly have a choice? WWF's letters of 30th September 1993 quoted in para.46(ii) above recognises the reality of the situation. The value of the fish ponds to wildlife in Nam Sang Wai will diminish once they are actively managed. Indeed, under the DPA Plan and, as will be seen, even under the OZP, the appellants can legitimately drain the area now covered by fish ponds. Also, part of the area (16.6 ha) is zoned R(C) under either plan so some residential development is unavoidable. Appeals cannot be decided on the basis of one's subjective wish. They must be decided in accordance with the applicable plan, which in this case is the DPA Plan.

53. We are of the view that it is not apparent from the DPA Plan that the planning intention is that the fish ponds in Nam Sang Wai should be preserved. Some of the “uses always permitted” for the “unspecified use” area would entail

draining of the ponds which can be done with impunity. The prohibition against excavation or filling would not preserve the fish pond since some of those activities can be carried on without either. Rather we gather from the DPA Plan, a clear intention, which is implicit from the buffer zone concept, that the areas must not be so used as to adversely affect MPNR. A graphic support for this view is Appendix 1 hereto which was published by the Board as recently as November 1993. We read the first reason given by the Board in refusing planning permission on Review as affirming the buffer zone concept.

54. The so-called battle for the ponds, insofar as it must be fought on the DPA Plan, cannot succeed.

55. The respondent appreciated that and that explained why Miss Patel sought to rely on the OZP. The OZP was gazetted after the conclusion of the hearing. But we were told at the hearing that it would be gazetted in June 1994. So it was. Section 23(6A) requires us to decide this appeal on the basis of the DPA plan and not the OZP. But, we are bound to say we do not believe the OZP can help Miss Patel in the battle of the ponds. We cannot gather from the OZP an intention that all the fish ponds as such should be preserved.

56. In the OZP only land owned by Government has been zoned as "conservation area". On land e.g. owned by the applicant, the area previously zoned as "Unspecified" is now zoned "recreation". The area formerly zoned as R(C) remains as such.

57. In the Notes, under Recreation, under Column 1, **Uses Always Permitted**, one finds e.g. plant nursery, park and garden etc. See **Appendix 3**. One finds again the prohibition against filling or excavation. But neither is necessary for, say, "plant nursery".

58. The Column 2 uses include golf course, hotel, private club. See **Appendix 3**.

59. Even under the area zoned as Conservation Area, Uses Always Permitted include tree plantation and agricultural use. See **Appendix 4**.

60. So, how do they help in the battle of the ponds? We agree with Mr. Neoh that the OZP does not support the respondent's case that the intrinsic value of the fish ponds has been accepted by the Board. Rather we believe the emphasis on the intrinsic importance of the ponds on appeal, is the result of WWF's letter of 14th March 1994. At most, one can say the Planning Department accepts the intrinsic importance of the fish ponds. Whilst we would not lightly disregard any view of the Planning Department, the plan making function belongs to the Board. In any event, we must act in accordance with the applicable statutory plans. Even if

the applicable plan is the OZP, it does not support the respondent's case that the planning intention is that the fish ponds should be preserved.

61. But has a case been made out on the intrinsic importance of the fish ponds such that they should be preserved? In Mr. Lewellyn Young's evidence, he argued eloquently for the importance of the fish ponds. So did Mr. Clive Viney a local expert ornithologist of many years standing. Experts called on behalf of the appellants spoke persuasively to the contrary.

62. According to Mr. Wheatley of Eco Scheme Limited of England who has 18 years of experience in ornithological field work, Deep Bay is important for wintering and migrating birds and is of world importance for the Black-faced Spoonbill, Asian Dowitcher and Spotted Greenshank and Saunder's Gull.

63. He said that the scrapes proposed for Lut Chau Nature Reserve will provide additional undisturbed and safe feeding and roosting ground for wintering and migrating birds including threatened and near threatened species. Purpose built feeding ponds will provide a permanent and reliable source of food. Herons and egrets will be able to feed in the nearby created freshwater channels and marsh, which will also benefit other species over which the sites are not currently ideal. When drained during migrating periods, fish ponds will also attract shore birds and when filled during the winter months, they will become suitable for wildfowl. He predicts that the species diversity will increase.

64. We accept that birds, including some rare and protected species, have been seen feeding and roosting at Nam Sang Wai. As we understand Mr. Young's evidence, birds are likely to be found where food is plentiful. Abandoned fish ponds, with their collapsed bunds are attractive to a variety of birds. But as WWF recognises, the abandoned fish ponds in Nam Sang Wai will not remain abandoned forever. And that unless they are actively managed for wildlife, their importance to wildlife will diminish. Active management for wildlife will require resources from Government which has not been made available. But, in any event, we must say that we are not convinced that the loss of the fish ponds in Nam Sang Wai will not be adequately compensated for by the Lut Chau Nature Reserve and the wildlife habitat at the Nam Sang Wai Development. There is of course the additional planning gain in the 2 water screening facilities referred to in para.20 above.

The Board's reasons for refusing Permission

Reason (a)

65. We believe here the Town Planning Board is here re-affirming the buffer zone concept. The key question raised by the Chairman of the Board expressly refer to the area as the Mai Po Buffer area.

66. It is obvious from the shift of emphasis on appeal to the intrinsic importance of the fish ponds that the respondent found it difficult to object to the proposed development on the basis that it would adversely affect MPNR.

67. We have no difficulty in concluding that the proposal fully complies with the planning situation of the DPA Plan namely that any development at Nam Sang Wai must not have any adverse impact on MPNR. We believe the correspondence from WWF prior to March 1994 indicates their appreciation of the appellant's effort in that regard.

68. We agree with Mr. Neoh that

- (i) In intrinsic landscape terms, the proposals represent a substantial improvement to both Nam Sang Wai and Lut Chau, in the light of the Kam Tin Floodway Scheme and the existence of the Yuen Long Industrial Estate right next door
- (ii) In intrinsic ecological terms, the proposals in Nam Sang Wai and Lut Chau do not represent a threat to MPNR or to Deep Bay. They rather complement MPNR and enhance the habitats in the Deep Bay Area

Integrated Pest Control

69. It may be that under Reason (a) the Board also had integrated pest control ("IPC") in mind. We say it may be, because in the course of the deliberation, Mr. Robert Law is recorded to have said that

"some of the proposed mitigation measures against the environmental impacts were of experimental nature, e.g. the integrated Pest Management measures of the golf course. If the experiment proved to be failure, the community cost might turn out to be very expensive"

70. We must say we agree with Mr. Neoh that the Board should provide reasons with sufficient particulars so as to enable an applicant to make a new application in compliance. Nor do we agree with Mr. K.W. Cheung of the Agricultural and Fisheries Department that

"It should be the applicant of a project to provide convincing evidence to the satisfaction of the Government.

However, in this case, the appellant just fails to do so. The Government is not responsible for teaching the appellant how to correct his mistakes"

71. Surely, if any Government Department has any objection to an application, such objection must be stated with sufficient particularity to enable an applicant to deal with the objection or to make a new application in compliance.

72. Here, the Board has failed to make it clear whether the reservation expressed by Mr. Law formed part of its reason for refusing permission. It is unsatisfactory, but, for the present purpose, we will assume that it formed part of its first reason.

73. We see no reason why IPC should not work. It is said it has not been tried in Hong Kong. But that alone is not a good reason for refusal. Overseas, IPC has been tried and it worked. In any event, the appellant will accept that no chemical pesticide or fertiliser will be used without EPD approval. Thus, there should be no real risk of pollution from such chemicals. EPD approval may include a requirement of some containment system for the Tees and Greens so that run offs will be trapped. Moreover, since a re-grant will be necessary, no doubt, if thought fit, it can be a condition of the re-grant that no chemical pesticide or fertiliser should be used without EPD approval. Breach of such a term can result in re-entry by the Crown. We do not believe it is a proper application of the so-called precautionary principle, to assume that promises would not be kept. Or that Government would not strictly enforce the conditions of grant. Furthermore, the applicant is prepared to submit to a planning condition that no chemical pesticide or fertiliser would be used without EPD approval.

Reason (b)

74. It is not clear what is meant by intensity of the proposed development. It may be a reference to the so called key issue identified by the Board, namely, whether one wants 9,000 people living in Nam Sang Wai. But, if so, it is not easy to understand the reference to "excessive for low density residential development". Low density development, namely a R4 development should result in no fewer inhabitants. R4 would permit a plot ratio of 0.4 and site coverage of 20% and a population of 100 per ha. The Nam Sang Wai Development will have a plot ratio of 0.317, site coverage of 12% and a population of 93 per ha (based on 3.58 persons per household) or 64 per ha (based on 2.45 persons per household). It was tentatively suggested by Miss Patel that in calculating plot ratio the area to be used for golf course should be disregarded. She relied on Hingewell v A.G. 1988 HKLR32. But Hingewell v A.G. does not assist her. There, the question was, what is a site for the purposes of the Building Planning Regulations. It decided that it is

“a question of fact in the case of each development. It means, in addition to the land on which it is proposed to erect building, any land which the developer bona fide proposes to include in the development”

75. Here the golf course will be an integral part of the Nam Sang Wai development and can only be owned in common with the whole site. We do not see why the area occupied by the golf course should be excluded for the calculation of the plot ratio.

76. It is, of course, possible that by intensity, the Board was referring to the proposal that the Nam Sang Wai Development will include some 8 storey buildings. Reading the Minutes together with the stated reasons, we believe intensity in context refers to the estimated number of people there. With respect, we do not accept that mere numbers is objectionable. There is no evidence that they will adversely impart MPNR. We agree with Mr. Neoh that population is not the issue. It is management of human activity. There is a Habitat Creation and Management Plan which specifically addresses the issue of management to ensure minimal disturbance to wildlife. Nor do we find 8 storey buildings objectionable in themselves. Certainly, the proposed development is much more attractive than what one finds at Fairview Park. The appellants can create a Fairview Park type development at Nam Sang Wai. That is an unattractive proposition. Times have changed. We believe a well planned residential/recreational estate is what the Community wants. Each development must be decided on its merits. Here we have no doubt the proposed development is far more attractive than one planned in the traditional (we are tempted to say, outdated) mode.

Reason (c)

77. No longer in issue

Reason (d)

78. (i) We agree with Mr. Neoh that these doubts cannot be a fundamental issue and can be dealt with in the course of the detailed Environmental Impact Assessment to be submitted at the Master Layout Plan Stage
- (ii) Fill can only be addressed nearer the time of commencement of construction as applications for borrow sites will not be entertained until there is a committed development

Reason (e)

79. (i) The Town Planning Board's own Explanatory Statement for the Nam Sang Wai DPA Plan envisages land exchange or lease modification. Paragraph 6.2.5(b) provides:

"There may be areas where private initiative may wish to provide comprehensive low-rise, low density residential development mainly through land exchange or lease modification"

- (ii) Land exchange is irrelevant to "Land use" in the context of the Town Planning Ordinance

80. Of course, planning permission alone will not secure the appellant's objective but the appellant also requires Government's cooperation, e.g. on lease modification and exchange of land.

81. Whether such cooperation will be forthcoming is beyond our control. Nor does it concern us. Our task is to determine purely from a planning point of view whether the Appellant's proposal should be permitted. This approach is consistent with the views expressed in British Railways Board v Secretary of State for Environment, The Times, 29th October 1993. There Lord Keith of Kinkel said in the House of Lords:

"A would-be developer may be faced with difficulties of many different kinds, in the way of site assembly or securing the discharge of restrictive covenants. If he considers that it is in his interests to secure planning permission notwithstanding the existence of such difficulties, it is not for the planning authority to refuse it simply on their view of how serious the difficulties are"

Reason (f)

82. We agree with Mr. Neoh that

- (i) The Environmental Advisory Group is not necessary to the effective implementation of the "Habitat Creation and Management Plan". It is merely a management device which has worked well in the U.K. and North America

- (ii) Planning and Crown lease conditions can be put in place to ensure the successful implementation of the Habitat Creation and Management Plan

Reason (g)

83. Again we agree with Mr. Neoh

- (i) The participation is minimal: 2 meetings a year
- (ii) In any event, if Government does not wish to participate, it may simply decline the invitation to join
- (iii) Enforcement of the planning and lease conditions is in any event the work of the Planning Department and the Lands Department respectively

Conclusion

84. With respect, we are of the opinion that none of the reasons provides a satisfactory basis for refusal of planning permission.

85. **We will allow the appeal.** The Planning Conditions we will impose are those suggested by Mr. Neoh (to which no serious objection was taken by Miss Patel. See Appendix 5 hereto.

Costs

86. Mr Neoh asks for costs. Our practice is that normally costs do not follow the event. Mr. Neoh observed that on appeal the respondent advanced a new case based on the alleged intrinsic value of the fish ponds. He said that amounted, in effect, to "moving the goalpost" between the time when the grounds of appeal were given and the hearing of the appeal and is unfair. But, fortunately, the appellant was able to deal with the new case in its stride. Given the novel nature of the appellant's approach which combines development with environmental and ecological enhancement, we think it right to allow the respondent greater latitude.

87. Mr. Neoh also criticised that the approach adopted by Mr K.W. Cheung of the Agriculture and Fishery Department that

"It should be the applicant of a project to provide convincing evidence to the satisfaction of the Government. However, in this case, the appellant just fails to do so. The

Government is not responsible for teaching the appellant how to correct his mistakes"

88. We think that the correct approach must be that if AFD considers any suggested measures to be inadequate and inappropriate, it should particularise the reasons. Certainly speaking for ourselves, we will not be impressed by an objection which is not supported by reason and evidence. Having said that, in all the circumstances of this appeal, we are of the view that we should not depart from our usual practice. We therefore make no order as to costs.

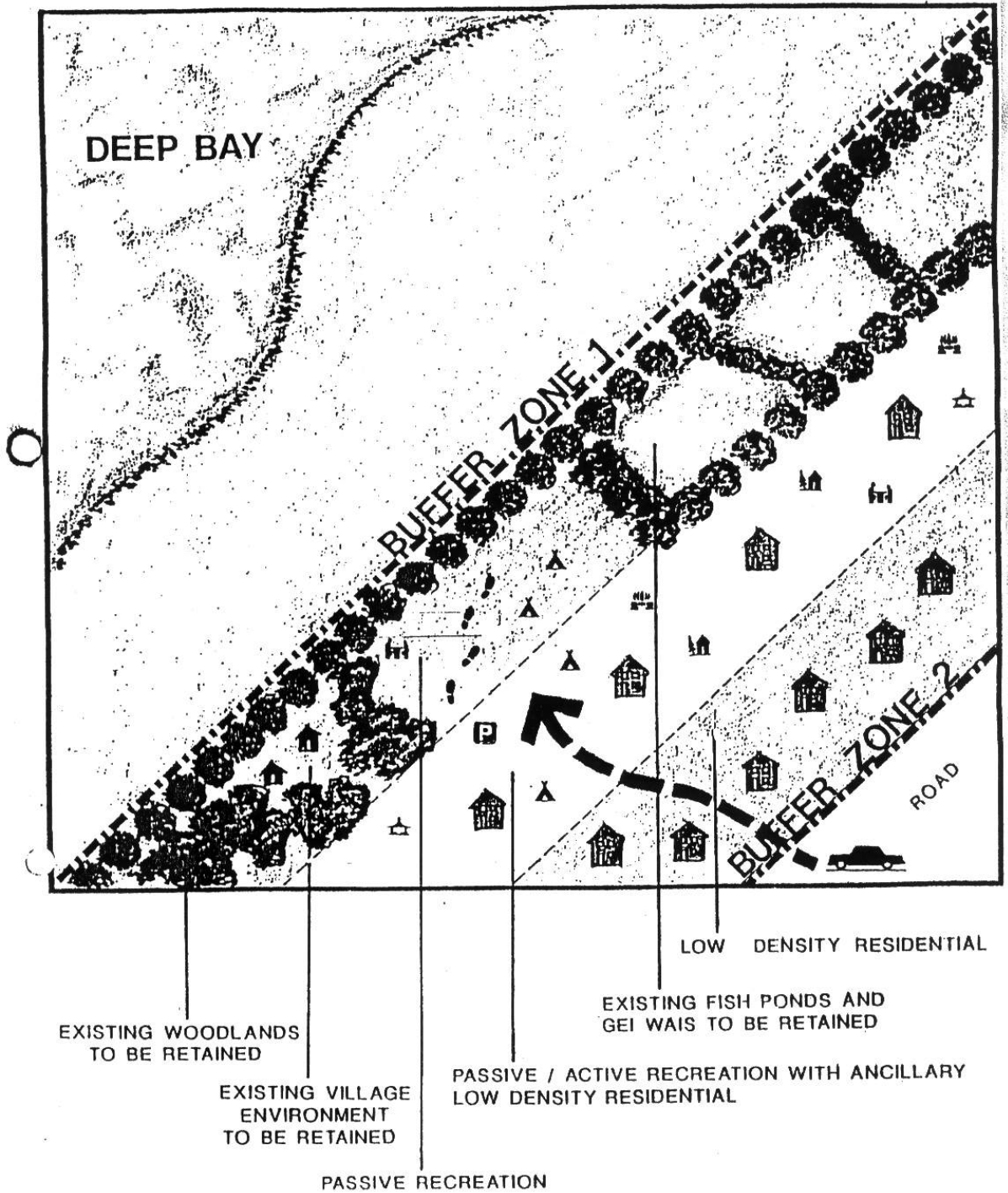
General

89. We wish to thank Counsel and the parties for their careful preparation and presentation of their case which has been a great help to us.

90. We must end by apologising for the length of time it has taken us to deliver our Decision. Unfortunately, some or other of us was away from Hong Kong at different times, and for that reason more time was taken in deciding this appeal than we would have wished.

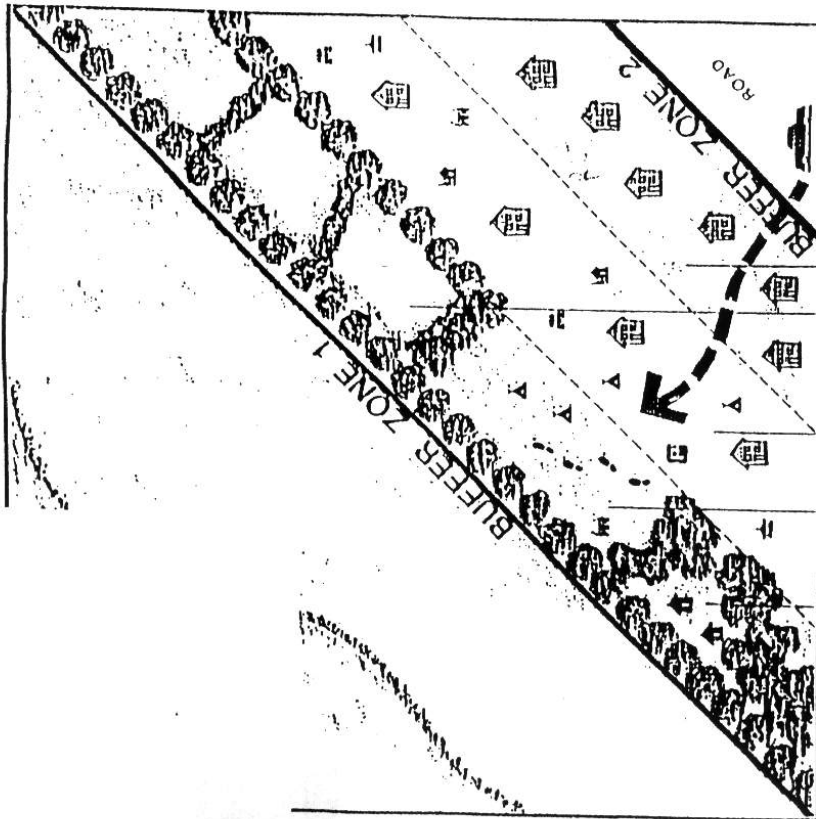
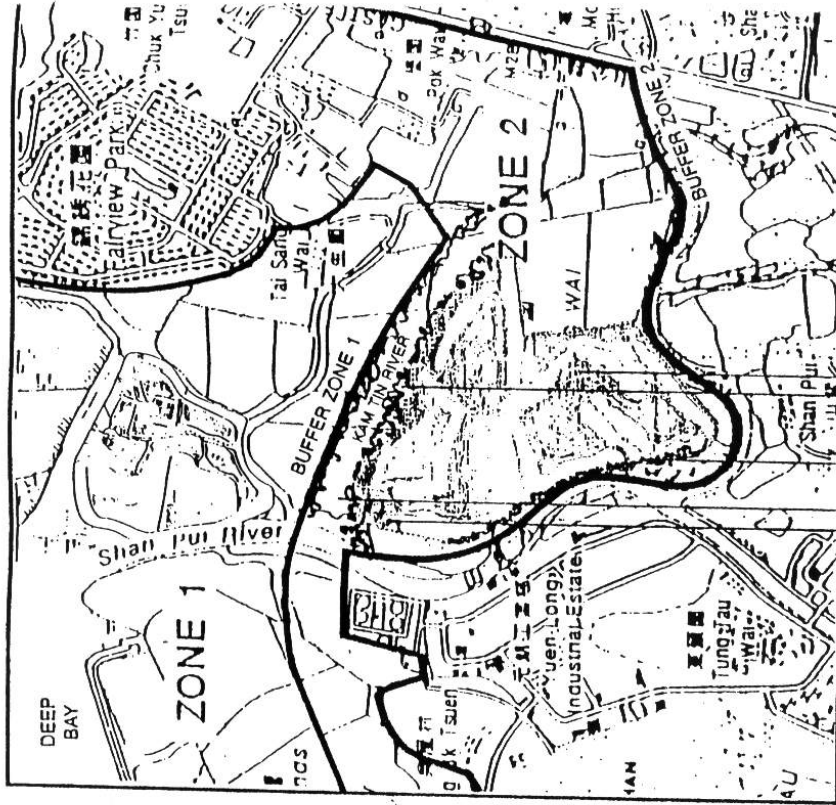
I N D E X

Appendix 1	Conceptual Guidelines For Developments Within Deep Bay Buffer Zone 2
Appendix 2	Diagrammatic Illustration of Compliance with Town Planning Board Guidelines issued November 1993
Appendix 3	Notes under "Recreation"
Appendix 4	Notes under "Conservation Area"
Appendix 5	Planning Conditions



**CONCEPTUAL GUIDELINES FOR DEVELOPMENTS
WITHIN DEEP BAY BUFFER ZONE 2**

APPENDIX 2



DIAGRAMMATIC ILLUSTRATION OF COMPLIANCE WITH TOWN PLANNING BOARD GUIDELINES ISSUED NOVEMBER 1993

RECREATION

Column 1 Uses always permitted	Column 2 Uses that may be permitted with or without conditions on application to the Town Planning Board
Agricultural Use	Amusement Park
Aquarium	Boating Centre
Aviary	Broadcasting/Television/Film Studio
Barbecue Spot	Flat
Field Study Centre/Education Centre/Visitor Centre	Golf Course
On-Farm Domestic Structure Park and Garden	Government Refuse Collection Point Government Use (not elsewhere specified)
Picnic Area	Helicopter Landing Pad
Plant Nursery	Holiday Camp
Playground/Playing Field	Horse Riding School/Centre
Police Post/Police Reporting Centre	Hotel
Public Convenience	House
Refreshment Kiosk	Place of Public Entertainment
Rural Committee	Place of Recreation, Sports and Culture
Building/Village Office	Private Club
Shrine	Public Car/Lorry/Coach Park
Tent Camping Ground	Public Swimming Pool
Tree Plantation	Public Transport Terminus or Station
	Public Utility Installation (excluding public utility pipeline, electricity mast, lamp pole and telephone booth)
	Residential Institution
	Restaurant
	Retail Shop
	Service Apartment
	Sports Training Ground
	Stable
	Theme Park
	Utility Installation for Private Project
	Zoo

Remarks

- (a) On land zoned "Recreation", any residential development shall not result in a total development in excess of a plot ratio of 0.2, a site coverage of 20% and a building height of 2 storeys (6m). Minor relaxation of these restrictions, based on the merits of individual development proposals, may be considered by the Town Planning Board on application under section 16 of the Town Planning Ordinance.

- (b) On land zoned "Recreation", any filling of ponds or excavation necessary to effect a change of use to any of those specified in Column 1 above shall not be undertaken or continued on or after the date of first publication in the Gazette of the Notice of the interim development permission area plan without the permission of the Town Planning Board under section 16 of the Town Planning Ordinance.

CONSERVATION AREA

Column 1 Uses always permitted	Column 2 Uses that may be permitted with or without conditions on application to the Town Planning Board
Agricultural Use Field Study Centre/Education Centre/Visitor Centre On-Farm Domestic Structure Tree Plantation	Government Refuse Collection Point Government Use (not elsewhere specified) House (Redevelopment only) Park and Garden Police Post/Police Reporting Centre Public Convenience Public Utility Installation (including public utility pipeline, electricity mast, lamp pole and telephone booth) Radar, Telecommunication Electronic Microwave Repeater, Television and/or Radio Transmitter Installation Refreshment Kiosk Shrine Tent Camping Ground Utility Installation for Private Project

Remarks

- (a) on land zoned “Conservation Area”, any redevelopment, alteration and/or modification to an existing house, i.e. a house which is in existence on the date of first publication in the Gazette of the Notice of the interim development permission area plan, other than a ‘New Territories Exempted House’ shall not result in a total redevelopment in excess of the plot ratio, site coverage and building height of the existing house. Minor relaxation of these restrictions, based on the merits of individual redevelopment

proposals, may be considered by the Town Planning Board on application under section 16 of the Town Planning Ordinance.

For the purpose of plot ratio and site coverage calculations, carports, recreational facilities, utility structure, plantroom and caretaker's office and caretaker's accommodation ancillary to the development or redevelopment are excluded.

- (b) on land zoned "Conservation Area", any filling of ponds or excavation necessary to effect a change of use to any of those specified in Column 1 above shall not be undertaken or continued on or after the date of first publication in the Gazette of the Notice of the interim development permission area plan without the permission of the Town Planning Board under section 16 of the Town Planning Ordinance.
- (c) 'New Territories Exempted House' is defined in paragraph (xiv) of the Notes.

Planning Conditions

Definitions and coverage

- (a) For the purpose of these Planning Conditions, the following words shall bear the respective meanings set out below:
- (i) The '**Nam Sang Wai Site**' shall mean the site marked and labelled as such on the Plan appended as Annex 1 hereto
 - (ii) The '**Nam Sang Wai Development**' shall mean the development to be built on the Nam Sang Wai Site which shall include residential units, golf course, commercial/transportation centre, club houses, roads, open spaces, woodlands and wetlands and other associated estate facilities
 - (iii) The '**Lut Chau Nature Reserve**' shall mean the Nature Reserve to be established on the site marked and labelled as such on the Plan appended as Annex 1 hereto
 - (iv) The '**Lut Chau Nature Reserve Levy**' shall mean the levy for the management and maintenance of the Lut Chau Nature Reserve to be contributed by owners for the time being of the Nam Sang Wai Development from the time the Lut Chau Nature Reserve is accepted and taken over by the manager nominated by Government to manage and maintain the said Reserve
 - (v) The '**Kam Tin Reed Bed Treatment System**' shall mean the system to be built on the site marked and labelled as such on the Plan appended as Annex 1 hereto
 - (vi) The '**Yuen Long Nullah Screening Plant**' shall mean the plant to be built on the site marked and labelled as such on the Plan appended as Annex 1 hereto

- (vii) **Gross Floor Area and Site Coverage** shall bear the respective meanings set out in the Building (Planning) Regulations Cap.123 and '**Domestic Site Coverage**' refers to the site Coverage of the residential units in the Nam Sang Wai Development
- (viii) The '**Board**' shall unless the context otherwise requires mean the Town Planning Board
- (b) This Planning Permission shall cover the Nam Sang Wai Site, the Nam Sang Wai Development, the Lut Chau Nature Reserve, the Kam Tin River Reed Bed Treatment System and the Yuen Long Nullah Screening Plant

Master Layout

- (c) Submission and implementation of a detailed master layout plan including phasing/programming of development, schedule of housing type and parking spaces to the satisfaction of the Director of Planning or of the Board

Master Landscaping

- (d) Submission and implementation of a detailed master landscape plan to the satisfaction of the Director of Planning or of the Board

Partitioning of Nam Sang Wai Site

- (e) The Nam Sang Wai Site shall not be partitioned as to enable the 'Golf Course' to form a separate sub-division

Density and height

- (f) The Nam Sang Wai Development shall not exceed a Domestic Site Coverage of 12% and the following restrictions on Gross Floor Area ("GFA")
 - (i) Domestic GFA : 306,581 m²
 - (ii) Commercial GFA : 5,000 m²
 - (iii) Club Houses GFA : 8,000 m²

- (g) No building in the Nam Sang Wai Development shall exceed 8 domestic storeys

Environmental Impact

- (h) Provision of a comprehensive environmental impact assessment covering all relevant environmental issues associated with the construction and operation of the development (including effluent disposal, construction impacts, impacts of the haul route and material transportation, leaching of pesticides/fertilizers/chemicals, if used, ecological impacts, and the layout and design of development before the commencement of works, and implementation of all recommendations of the EIA study to the satisfaction of the Director of Environmental Protection of the Board

Conservation Plan

- (i) Submission and implementation of a detailed Habitat Creation Plan for the Nam Sang Wai Site to the satisfaction of the Director of Lands or of the Board
- (j) Submission and implementation of a Habitat Management Plan for the Nam Sang Wai Development, including the establishment of an Environmental Advisory Group and the qualifications for and appointment of an auditing ecologist, to the satisfaction of the Director of Lands or of the Board
- (k) Submission and implementation of a Pest Management Plan for the greens, trees, fairways, practice range and other areas of the Golf Course, to the satisfaction of the Director of Environmental Protection or of the Board
- (l) Submission and implementation of detailed plans for the Lut Chau Nature Reserve to the satisfaction of the Director of Lands or of the Board
- (m) Submission and implementation of a detailed management plan for the Lut Chau Nature Reserve, including enforcement arrangements for the Lut Chau Nature Reserve Levy on owners for the time being of the Nam Sang Wai Development, to the satisfaction of the Director of Lands or of the Board
- (n) Provision and maintenance of open Perimeter planting at Nam Sang Wai Site to the satisfaction of the Director of Planning or of the Board

Off-site pollution control

- (o) Submission and implementation of detailed plans for the Kam Tin River Reed Bed Treatment System, to the satisfaction of the Director of Environmental Protection or of the Board
- (p) Submission and implementation of detailed plans for the Yuen Long Nullah Screening Plant to the satisfaction of the Director of Environmental Protection or of the Board
- (q) Submission and implementation of management plans for (o) and (p) above, including arrangements for a management levy on owners for the time being of the Nam Sang Wai Development, terms of operation, and re-instatement upon removal, to the satisfaction of the Director of Environmental Protection or of the Board

Drainage

- (r) Provision of a detailed drainage impact assessment and construction of drainage mitigation measures to the satisfaction of the Director of Drainage Services or of the Board

Traffic

- (s) Provision of a detailed traffic impact assessment and detailed design on internal and external access arrangement to the satisfaction of the Commissioner for Transport or of the Board
- (t) Provision of an access road and its junction with Castle Peak Road including diversion of underground utilities and implementation of such to the satisfaction of the Commission for Transport and the Director of Drainage Services or of the Board
- (u) Submission and implementation of detailed plans for improvement to the Fairview Park Roundabout and the underpass to the south of the development to the satisfaction of the Commissioner for Transport or of the Board
- (v) Provision of emergency vehicular access and street fire hydrant to the satisfaction of the Director of Fire Services or of the Board

Water Supply

- (w) Provision and implementation of water mains along Castle Peak Road to the satisfaction of the Director of Water Supplies or of the Board
- (x) No mains water shall be used for on-site irrigation

Schools

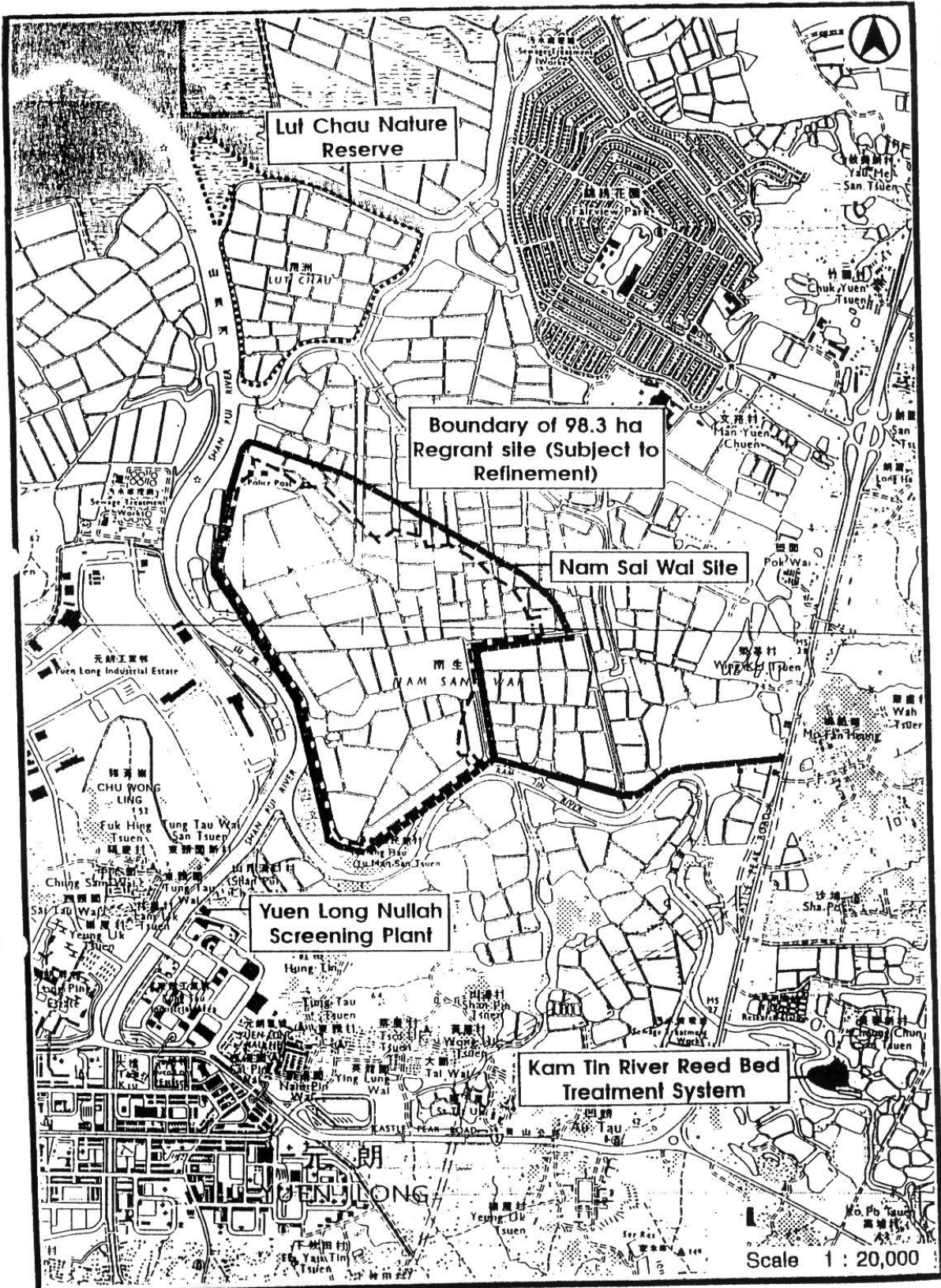
- (y) Provision and reservation of sites for the construction of primary and secondary schools to the satisfaction or of the Director of Education or of the Board

Expiry of permission

- (z) The permission of the application shall cease to have effect 5 years from the date of giving of planning permission unless prior to the said date either the permitted development is commenced or the permission is renewed

Liberty to apply

- (aa) There shall be liberty to apply to this Appeal Board for directions as to carrying the aforesaid conditions into effect



All site boundaries are subject to refinement at the stage of detailed design and land exchange or licensing

ANNEX 1

TOWN PLANNING APPEAL NO. 13 OF 1993

Appeal under Section 17B by
HENDERSON REAL ESTATE AGENCY LIMITED

DECISION OF DISSENT

Despite the majority view of the Appeal Board panel I consider that the appeal should be dismissed for the following reasons :-

- (1) once wetlands are lost, they are lost forever: The proposed development will result in the loss of many hectares of fish ponds and that means a substantial reduction in feeding and resting grounds for waterfowl and other wildlife. Fish ponds once filled and built over, cannot readily be replaced.
- (2) The Nam Sang Wai (NSW) site and the appellant's land holding at Lut Chau (L.C.) are restricted leases. For NSW only Lot 1604 in DD 123 is a new grant lot for private residential and non-industrial purposes, whereas Lot 1520 was granted for fish pond and agricultural purposes. The rest of NSW is Government land. At L.C. appellant's lot 1534 is a new grant lot for fish pond purposes. Lot 8A & 1740 AARP in DD 107 which form part of the proposed access road from Castle Peak Road leading to the application site are held under Block Crown Lease and demised as agricultural land. In my opinion, appellant bought the L.C. lot, not for fish ponds or agricultural uses. But for the ulterior motive of swap for Government land at NSW bordering their land. In order not to lose fish ponds, let appellant have managed fish ponds or unmanaged, if they so choose. Both the NSW site and appellant's land holding at L.C. are an integral part of the wetland areas including the areas around the Inner Deep Bay, the Mai Po Nature Reserve (MPNR) and adjoining fish and shrimp ponds (gei-wai). Therefore we must preserve, conserve

and protect what Hong Kong has as much as possible.

- (3) The proposals in NSW and L.C. do represent a big threat To MPNR or to Deep Bay.
- (4) Integrated pest control (IPC) is not proven in Hong Kong. Neither was it in many parts of the Western World. If it was so good, every golf course would quickly use it. Mr Law of Environmental Protection Department said should IPC NOT work, the consequences would be very serious. We should follow precautionary principle Herbicides, insecticides, pesticides and fertilizers are used in most golf course, some are more toxic than others. For vegetables, fruits and other edibles, only mild usually non tonic types are used. However for golf course they use different ones and some are quite toxic. In many, including Fanling, after spraying, one can see many dead insects, rodents, snakes, etc. the next day, IPC may be alright in some countries, but we are in Hong Kong, also the site is too close to Deep Bay, - MPNR. So we should not take chances.
- (5) A golf course should not be used in calculating plot ratio with the development. It has to be separate. In Appendix 3 of the majority decision, any residential development shall not result in a total development in excess of a plot ration of 0.2, a site coverage of 20% and a building height of 2 storeys. So that should not be mixed with development. R4 would permit a plot ratio of 0.4, etc, but R4 only applies to lot 1604 in DD 123. The other portions of appellant's land are only for fish pond and agricultural use.
- (6) The trees they may plant under "plant nursing" etc, may not be suitable for Hong Kong, they are not Hong Kong species.
- (7) I agree with Messrs Viney & Young. The UK experts are alright for UK. They do not have the local experience and data. After all, after a few

visits they cannot know everything there is to know. This situation is not a technical, mechanical or legal question where an expert can apply his expertise in another location.

Because of these reasons, I stand by my decision that this appeal should be dismissed.

Date this 5th day of August 1994

David C. DaSilva, MBE