



## Summary of Judgment

### Tam Hoi Pong v Town Planning Board & Anor HCAL 20/2014

**Decision** : **Application for Judicial Review Allowed**  
**Date of Hearing** : **15.11.2018**  
**Date of Judgment/Decision** : **4.9.2020**

#### Background

1. The Applicant is the chief executive of Green Sense, an environmental concern group. The Applicant sought to quash the decision (“Decision”) of the Town Planning Board (“TPB”) made on 22 November 2013 in approving an application (“Application”) for planning permission (“Permission”) by Mutual Luck Investment Ltd (a subsidiary of Cheung Kong (Holdings) Ltd).
2. The Permission was granted in respect of a proposed comprehensive residential development with a wetland nature reserve (“WNR”) in an area in Fung Lok Wai, Lau Fau Shan, Yuen Long (within the Deep Bay Area) which is zoned “Other Specified Uses / Comprehensive Development and Wetland Enhancement Area” on the approved Lau Fau Shan and Tsim Bei Tsui Outline Zoning Plan (“OZP”). The development proposal entails 19 blocks of flats, up to 15-19 storeys above 1 basement car park (totalling a maximum of 1,958 flats).
3. In granting the Permission, TPB imposed, inter alia, a planning condition (“Condition”) requiring the submission and implementation of a funding arrangement proposal for ensuring the long-term maintenance and management of the proposed WNR to the satisfaction of the Director of Environmental Protection (“DEP”) and the Director of Agriculture, Fisheries and Conservation (“DAFC”), or of the TPB itself.
4. The main grounds for judicial review are as follows:-
  - (a) The Decision was tainted with illegality as the TPB acted *ultra vires* or made an error of law in approving the Application;
  - (b) The Decision was made in breach of the Applicant’s legitimate expectation in that the TPB did not adhere to the relevant policy in approving the Application; and
  - (c) The Decision was tainted with procedural irregularity as the TPB circumvented the necessary and relevant public consultation requirements.
5. The substantive hearing of the judicial review took place on 15 November 2018. On 4 September 2020, the CFI:-
  - (a) allowed the JR application on part of the illegality ground and the legitimate expectation ground (rejecting all the other bases of challenge); and
  - (b) remitted the matter to the TPB for reconsideration.



### **Main issues in dispute**

6. The key issues in dispute were as follows:-

- (a) Was the Decision unlawful on the basis that it contravened established principles under its own Policy / Guidelines, based on which the TPB may consider granting planning permission under the OZP? In particular, was the TPB entitled to approve the Application by way of imposing the Condition?
- (b) Did the TPB circumvent the requirement for public consultation in arriving at the Decision?

### **Department of Justice's Summary of the Court's rulings**

(full text of the CFI's judgment at [https://legalref.judiciary.hk/lrs/common/search/search\\_result\\_detail\\_frame.jsp?DIS=130589&QS=%2B&TP=JU&ILAN=en](https://legalref.judiciary.hk/lrs/common/search/search_result_detail_frame.jsp?DIS=130589&QS=%2B&TP=JU&ILAN=en))

7. On whether it was unlawful for the TPB to approve the Decision subject to the Condition, CFI looked at whether the Permission was correctly granted having regard to three established principles under the TPB's own Policy / Guidelines, namely (a) the "Public-Private Partnership" ("PPP") approach, (b) the "precautionary approach" and (c) the "no-net-loss in wetland principle.
8. Regarding the PPP approach, the relevant requirements were originally set out under the Government's New Nature Conservation Policy ("NNCP") in 2011, namely (a) a funding arrangement (in the form of a statutory trust); and (b) identification of competent bodies (e.g. green groups) as conservation agents to manage the ecologically sensitive portion of the concerned sites. CFI held that when the TPB promulgated its own PPP approach, it must have adopted those requirements. Those requirements were essential requirements (not merely "implementation details") which the TPB was under an obligation to decide on its own, and which could not simply be dealt with by way of the Condition. Even if those requirements only relate to "implementation details", they must be required to be included for the TPB's consideration as expressly stated in the Explanatory Statement to the OZP as implementation details of the "maintenance and management plan". By approving the Application by way of imposing the Condition, the TPB had acted *ultra vires* its powers by deferring its own duty to satisfy that the Application met the PPP Approach to the DEP and the DAFC.
9. Consequently, CFI also accepted that the TPB had breached the Applicant's legitimate expectation that the TPB in making the Decision would ensure the arrangements under NNCP had been satisfied as part of the requirements under the PPP approach.
10. CFI did not accept the Applicant's arguments that according to international conventions and guidelines, the TPB had misinterpreted or misapplied the "precautionary approach" by granting the Permission on the basis of the



Habitat Creation and Management Plan (“HCMP”) and the Environmental Monitoring and Audit (“EM&A”) in draft form, despite uncertainties about underlying ecological threats. Reading the TPB Guidelines as a whole and in context (namely the Fish Pond Study, a consultancy study commissioned by the Government on the fish ponds in the Deep Bay Area), the precautionary approach had been applied through the “no-net-loss in wetland” principle. The draft HCMP and EM&A being considered acceptable by the relevant Government departments, there was also no question of them raising any “uncertainties” as to ecological threats in the first place.

11. Regarding the “no-net-loss in wetland” principle, the Applicant argued that this referred to the preservation of wetland in terms of both the area and ecological function of the existing fishponds. CFI held that, when looking at all the relevant documents (the TPB Guidelines, the Notes to the OZP, and the Explanatory Statement), the TPB had correctly applied the principle, which merely refers to there being no net loss in *either* the total area *or* ecological functions of the fish ponds.
12. Finally, as regards the TPB’s alleged circumvention of the requirement for public consultation, the Applicant argued that the TPB erroneously granted an exemption in respect of publishing the proposed funding arrangement (which was required to be submitted as part of the PPP approach). CFI held that this ground was misconceived as the present challenge was made against the Decision, and in making the same there was in fact no submission of further information which needed to be made available for inspection.

**Civil Division**

**Department of Justice**

**September 2020**