

IN THE TOWN PLANNING APPEAL BOARD
TOWN PLANNING APPEAL NO. 1 OF 2017 (1/17)

BETWEEN

Nam Sang Wai Development Company Limited
Kleener Investment Limited
Community Wetland Park Foundation Limited
Lut Chau Nature Reserve Foundation Limited

Appellants

and

Town Planning Board

Respondent

Appeal Board: Mr. CHUA Guan-hock, SC (Chairman)

Ms. Irene CHOW Man-ling (Member)

Ms. Imma LING Kit-sum (Member)

Mr. Lawrence ONG Tong-sing, B of H, JP (Member)

Dr. William YU Yuen-ping (Member)

In Attendance: Ms. Lesley LEUNG (Secretary)

Representation: Mr. Anthony Ismail and Ms. Katharine Olley,
Counsel for the Appellants,
instructed by Mayer Brown

Mr. Jenkin Suen SC and Mr. Justin Lam,
Counsel for the Respondent,
instructed by the Department of Justice

Dates of hearing: 16, 18, 20, 23, 26, 27, 30 November 2020,
13, 14, 15, 18, 19, 20, 21, 22, 25, 26, 27, 28, 29 January 2021, and
10, 11 March 2021

Date of Decision: 31 December 2021

DECISION

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A. Introduction

1. There were two appeals before us which were consolidated and heard together following this Appeal Board's directions of 19 December 2017:-
 - (1) TPA 3/14 ("the First Appeal") concerns the Town Planning Board's ("TPB's") rejection of the Appellants' application for planning permission No. A/YL-NSW/218 ("Application A") under *s.16, s.17 Town Planning Ordinance*, Cap. 131 ("TPO").
 - (2) TPA 1/17 ("the Second Appeal") concerns the TPB's rejection of the Appellants' second application for planning permission No. A/YL-NSW/242 ("Application B") under both *s.16, s.17 TPO*.

2. Both Applications relate to Lots 1520 RP, 1534 and 1604 in DD 123 and adjoining Government Land at Nam Sang Wai ("NSW" or "the NSW Site") and Lut Chau ("LC" or "the LC Site") in Yuen Long (collectively "the Appeal Site"). The Appeal Site has a total site area of about 177.35 ha (121.9 ha and 55.45 ha for the NSW and LC Sites respectively). The Appellants proposed residential development on the south-west part of the NSW Site with: (1) the remaining areas to be developed into a Wetland Enhancement Area ("WEA"); and (2) the entire LC Site to be developed into the Lut Chau Nature Reserve ("LCNR"). In particular:-
 - (a) The s.16 scheme for Application A proposed 1,600 residential units including 960 houses, 5 apartment blocks (17 storeys), a commercial centre and an elderly centre, on a development footprint of 49.2 ha (40% of the NSW Site, 28% of the Appeal Site). The intended population was 4,480 people. The s.17 scheme reduced the development footprint to 40 ha (33% of the NSW Site and 23% of the Appeal Site), with the same number of residential units including 960 houses, but with 10 apartment blocks (7 to 9 storeys).
 - (b) The s.16 scheme for Application B proposed to construct 2,531 residential units including 140 houses, 29 apartment blocks (19 to 25 storeys), a commercial centre and an elderly centre, on a development footprint of 11.6 ha (9.5% of the NSW Site and 6.5% of the Appeal Site). The s.17 scheme reduced the number of residential units to 2,521, and the number of apartment blocks to 28 (19 to 25 storeys), with a population of 6,500 people, on a development footprint of 11.6 ha.

3. The First Appeal involving Application A was withdrawn on Day 9 on this Appeal Board's prompting the day before. This was because all parties should narrow the issues, Application B on the Appellants' *own* case was much to be preferred, and in fairness to the TPB and this Appeal Board. And to avoid rendering a decision on Application A which may be academic, or hypothetical. Nonetheless, a comparison of Applications A and B is important, and why the Applications were made with their particular terms and features is considered below. An aerial photo of the Appeal Site is at **Appendix 1**. The Appeals have an unusual history, as related appeals were brought concerning largely the same site by appellants related to some or all of the Appellants, namely an appeal to the Privy Council heard in December 1996 in *Henderson Real Estate Agency Ltd v Lo Chai Wan* [1997] HKLRD 258, and to the Court of Final Appeal in January 2017 in *Town Planning Board v Town Planning Appeal Board and Ors* (2017) 20 HKCFAR 196. Given the history, and the changes in planning intention over the years after the Privy Council's decision, we have been greatly assisted by Counsel from both sides and their respective teams to ascertain the true planning intention. We have scrutinized the objective facts, contemporaneous documents, and inherent probabilities with over 50 box files of documents including transcripts and exhibits, and the assistance of a detailed chronology. We heard oral evidence with cross-examination from 12 witnesses (6 factual and 6 expert witnesses) over the 22 hearing days, and were referred to over 100 authorities.

4. This has not been an easy task for the Appeal Board and we pay tribute to the industry of both side's Counsel and teams. This case was very well argued by both sides. Mr. Anthony Ismail (with Ms. Katherine Olley) led the Appellants' team, while Mr. Jenkin Suen S.C. (with Mr. Justin Lam) led the team for the Department of Justice ("D.O.J.") and TPB. As we stated, there are important issues of public interest so we were assisted by submissions advanced on a fair and objective basis, without being partisan. Ultimately, for reasons summarized at Section L below, having assessed and heard all the witnesses, and evaluated and weighed up, all relevant evidence and factors, without being distracted by matters which are immaterial or peripheral, we came to a decision, albeit by majority - not for the first time in the history of related appeals concerning the Appeal Site. This Decision is of the majority of the Appeal Board to allow the Second Appeal. The dissenting decision of Dr. William Yu Yuen-ping and Ms. Irene Chow Man-ling will be provided in a separate document.

B. The Facts

B1. The parties

5. The 1st Appellant Nam Sang Wai Development Company Limited (“NSW Development”) owns the NSW portion of the Appeal Site. The 2nd Appellant Kleener Investment Limited (“Kleener Investment”) is a subsidiary of Henderson Land Development Company Limited (“Henderson”) and owns the LC portion of the Appeal Site. The 3rd Appellant Community Wetland Park Foundation Limited (“CWP Foundation”) is a potential manager for the proposed NSW WEA. The 4th Appellant Lut Chau Nature Reserve Foundation Limited (“LCNR Foundation”) is a potential manager for the proposed LCNR.

6. The Respondent the TPB has two main functions under the *TPO*. First, “with a view to the promotion of the health, safety, convenience and general welfare of the community”, the TPB “shall undertake the systematic preparation of draft plans for the lay-out of such areas of Hong Kong as the Chief Executive may direct, as well as for the types of building suitable for erection therein” and “draft development permission area plans of such areas of Hong Kong as the Chief Executive may direct” (s.3, “the plan making function”). Second, the TPB may grant permission for planning approval subject to “the extent shown or provided for or specified in the plan”, and consider on review its decision (s.16, s.17).

B2. Agreed facts

7. The parties agreed certain facts which are set out in the Agreed Statement of Facts dated 11 November 2020 which we extract below:-
 - “ **A. The Appeal Site**
 1. The Appeal Site falls within the “OU(CDWEA1)” zone of the Approved Nam Sang Wai Outline Zoning Plan No. S/YL-NSW/8 (the “**Approved NSW OZP**”) [CB1/2/92; A1/6/92], and the “SSSI(1)” zone of the Approved Mai Po Fairview Park Outline Zoning Plan No. S/YL-MP/6 (the “**Approved MPFP OZP**”) [CB1/1/24; A1/4/24].
 2. The total area of the Appeal Site is 177.35 ha [CB4/29/5700-5702; E9/102a/5700-5702], which consists of the following:
 - a. Nam Sang Wai Portion: 121.9 ha
 - b. Lut Chau Portion: 55.45 ha
 3. The key details regarding the Appeal Site as stated in Appendix 5 to Ian Brownlee’s Witness Statement [CB5/40/31-33; WA-2/4.5/33-35] and Annex III to Yip Chi Kwai’s Witness Statement [CB5/50/121-123; WR-B1/Annex III] are agreed.

B. The Approved Henderson Scheme / 1992 Application / Henderson Permission

4. The total area proposed for development (residential and 18-hole golf course) is: 98.3 ha
5. The total area proposed for wetland mitigation is: 41 ha
6. The key details regarding the Approved Henderson Scheme / 1992 Application / Henderson Permission as stated in Appendix 5 to Ian Brownlee’s Witness Statement [CB5/40; WA-2/4.5/33-35] and at §6.2 of the 242 RNTPC Paper [E5/84/4247] (as summarised in §3.3 of Mr Yip Chi Kwai’s Witness Statement [WR-A1/1]) are agreed, except with one clarification:
 - a. As stated at §17 of the Town Planning Appeal Board’s decision in Town Planning Appeal No. 13 of 1993 [CB1/12/638; B/20/638] and agreed by both sides, the area designated as a Nature Reserve at Lut Chau (i.e. the LCNR) in the Approved Henderson Scheme / 1992 Application / Henderson Permission is 41 ha [D1/38/954], comprising 21.9 ha on private land and 19.1 ha owned by Government. The Respondent’s figure of 21.9 ha [E5/84/4247] refers to the private land to be surrendered to the Government at Lut Chau, which was originally stated in the 1992 Application / Henderson Permission.
7. Following the Appellants’ withdrawal of their extension of time application on 8 September 2017, the 1992 Application / Henderson Permission expired on 19 December 2010 [WR-A1/1/6-8§3.5-3.9].

C. The 218 s.17 Application / Application A

8. The total area proposed for development is: 40 ha
9. The total area proposed for wetland mitigation is: 127.7 ha
10. The key details regarding the 218 s.17 Application / Application A as stated in Appendix 5 to Ian Brownlee’s Witness Statement [CB5/40; WA-2/4.5/33-35] and Annex II to Yip Chi Kwai’s Witness Statement [CB5/49; WR-B1/Annex II] are agreed, except for the following correction:
 - a. the figure for “*Development Site Area (at NSW)*” figure under column (b) “218 s.16 First Scheme” in Appendix 5 to Ian Brownlee’s Witness Statement [CB5/40; WA-2/4.5/33-35] should state 49.2 ha, consistent with the figure recorded in §2.5.1 of the 218 TPB Paper [CB2/19/2841; D8/60a/2841].

D. The 242 s.17 Application/Application B

11. The total area proposed for development is: 11.6 ha
12. The total area proposed for wetland mitigation is: 154.45 ha
13. The key details regarding the 242 s.17 Application / Application B as stated in Appendix 5 to Ian Brownlee’s Witness Statement [CB5/40; WA-2/4.5/33-35] and Annex III to Yip Chi Kwai’s Witness Statement [CB5/50; WR-B1/Annex III] are agreed.

E. Planning Issues

14. Under the Notes of the Approved NSW OZP:
 - a. The proposed development is subject to a maximum allowable domestic GFA of 306,581m² and a maximum allowable non-domestic GFA is 13,000m² [CB1/2/108; A1/6/108].
 - b. There is no building height restriction (“**BHR**”) on the development.
 - c. The planning intention is for conservation and enhancement of ecological value and functions of the existing fish ponds or wetland through consideration of application for development or redevelopment under the “private-public partnership approach”. Low-density private residential or passive recreational development within this zone in exchange for committed long-term conservation and management of the remaining fish ponds or wetland within the development site may be permitted subject to the “no-net-loss in wetland” principle and planning permission from the Town Planning Board. Any new building should be located farthest away from Deep Bay [CB1/2/107; A1/6/107].
 - d. Application for development in the zone shall be in the form of a comprehensive development scheme with minimum pond filling and no decline in the wetland function of the fish ponds within and near the development site. An applicant shall prepare a layout plan and any other documents showing the relevant information for consideration of the Town Planning Board (“**TPB**”) and these include a wetland conservation and enhancement scheme, an environmental impact study report including but not limited to ecological impact assessment and a visual impact assessment to examine any possible environmental, ecological and visual problems that may be caused to or by the proposed development during construction and after completion and the proposed mitigation measures to tackle them [CB1/2/107-108; A1/6/107-108].
15. The zoning of the Appeal Site without a BHR or site coverage restriction was established by the TPB through the plan-making process, so as to provide flexibility and an incentive for submission of an alternative comprehensive conservation and development scheme which better met the conservation objectives and planning intention as stated in the then TPB Guidelines No. 12B than the 1992 Application / Henderson Permission. The incorporation of the maximum GFA was to reflect the GFA of the 1992 Application / Henderson Permission which was valid and implementable when the TPB considered the rezoning in 1999.
16. It is further stated in the Explanatory Statement of the OZP [A1/6/125-126]:
 - a. The ecological value of the existing continuous and contiguous fish ponds should be conserved and the “precautionary approach” and “no-net-loss in wetland” principle shall apply [A1/6/125/§9.7.1].
 - b. The applicant shall submit a wetland conservation and enhancement scheme, including its detailed design, wetland buffer proposals to mitigate the potential impacts on the existing wetland, a maintenance and management plan with implementation details, arrangements of funding and monitoring programme to ensure the long-term management of the wetland [A1/6/125/§9.7.3].
 - c. The “OU(CDWEA1)” zone on the NSW OZP and the “SSSI(1)” zone on the Mai Po and Fairview Park OZP are primarily to facilitate the proposed

residential development at NSW with a nature reserve at LC granted by TPAB in 1994, taking into account the TPB Guidelines No.12B [A1/6/126/§9.7.6].

17. TPB Guidelines No.12C (TPB PG-No. 12C) (“**Guidelines 12C**”) [A1/11/216] set out the planning guidelines on application for development in the Deep Bay Area. The Appeal Site fall within the Wetland Conservation Area. The relevant planning and conservation principles including ‘precautionary approach’, ‘no-net-loss in wetland’, ‘private-public partnership approach’ as stated in the Notes and Explanatory Statement of the NSW OZP are elaborated in the Guidelines.
18. The location of the proposed developments in both the 218 Application / Application A and the 242 Application / Application B in terms of distance from the Deep Bay area is consistent with the planning intention / relevant requirement in the Approved NSW OZP [CB1/2/107; A1/6/107] and §6.3 of Guidelines 12C [CB1/3/220-221; A1/11/220-221], i.e. are located at the landward fringe of the Wetland Conservation Area and at the site farthest away from Deep Bay.
19. The private-public partnership scheme referred to in the Approved NSW OZP [CB1/2/107; A1/6/107] and in §6.3 of Guideline 12C [CB1/3/220-221; A1/11/220-221] is different in scope and application / relevant to the public-private partnership scheme under the New Nature Conservation Policy (“**NNCP**”), in so far as conservation management issues are concerned, in particular, the “Funding Requirement” and “Conservation Agent Requirement” as set out in *Tam Hoi Pong v Town Planning Board* (“**FLW Judgment / Tam Hoi Pong Judgment**”) [CB1/13.01; B/21.01]). (see also §25 below). Both share a similar intention for partnership of public and private sectors to allow development of an appropriate scale at certain part of a site of ecological importance in exchange for long-term conservation and management of the remaining part of the site by the private sector and are both relevant in the consideration of the applications.

F. Ecological Issues

20. According to the Guidelines 12C, the “no-net-loss in wetland” concept can be measured in terms of both area and function (see §113(5) of the FLW Judgment [CB1/13.01/688.48; B/21.01/688.48]). An ecological impact assessment should be conducted to demonstrate that a development would not result in any loss of the total ecological function of the existing wetland, and that the ecological impact be adequately mitigated.
21. The meaning of the term “wetland” is not defined in the Approved NSW OZP, the Approved MPFP OZP and Guidelines 12C. In the context of the current Appeals, it is considered that the following definition of “wetlands” in Article 1.1 of the Ramsar Convention [A1/1/2] viz: “*areas of marsh, fen, peatland or water, whether natural or artificial, permanent or temporary, with water that is static or flowing, fresh, brackish or salt, including areas of marine water the depth of which at low tide does not exceed six metres*”, is most appropriate because it is the same as the definition of “wetland habitat” in the “Definitions of Terms (Revised Edition)” issued by the TPB [AA/49] which is adapted from this definition.

22. §§(a)(iii) of the “Remarks” of the Approved NSW OZP [CB1/2/108; A1/6/108] and the Approved MPFP OZP [CB1/1/52; A1/4/52] require “*an ecological impact assessment ... to examine any possible... ecological...problems that may be caused to or by the proposed development or redevelopment during construction and after completion and the proposed mitigation measures to tackle them.*”. There is no detailed prescription of the contents of an ecological impact assessment. §6.8 of Guidelines 12C mentions that “*Potential applicants should seek advice from the AFCD on the technical requirements for the ecological impact assessment.*”
23. Under Resolution IX.1 of the Ramsar Convention the wise use of wetlands is defined as “*the maintenance of their ecological character, achieved through the implementation of ecosystem approaches, within the context of sustainable development*” [WR-B3/Annex 2/§22]. Further, under Resolution XI.9, all Contracting Parties to the Convention reaffirm their “*commitment to avoiding negative impacts on the ecological character of Ramsar Sites and other wetlands as the primary step in strategies for stemming the loss of wetlands*” [WR-B3/Annex 4/§14].

G. Conservation Management Issues

24. The current version of the Mai Po Inner Deep Bay Ramsar Site Management Plan was promulgated by AFCD in 2011 [A2/13/256]. The Management Plan reaffirms the government’s commitment to the implementation of the Ramsar Convention and the conservation of the Ramsar Site. The Management Plan further sets out the goals and long-term objectives which deliver on the commitments made by the government under their obligations to the Ramsar Convention.
25. Following the FLW Judgment / Tam Hoi Pong Judgment, the public-private partnership scheme under the NNCP is different in scope and application / relevant to the private-public partnership scheme referred to in the Approved NSW OZP [CB1/2/107; A1/6/107] and in §6.3 of Guidelines 12C [A1/11/220-221; CB1/3/220-221] (see also §19 above) in so far as conservation management issues are concerned, in particular, regarding the “the Funding Requirement” and “the Conservation Agent Requirement” as set out in the FLW Judgment / Tam Hoi Pong Judgment.
26. The Environmental Protection Department (“**EPD**”) is responsible for formulating the nature conservation policies in the NNCP and coordinating and overseeing the implementation of the NNCP, while the Agriculture, Fisheries and Conservation Department (“**AFCD**”) is responsible for providing advice from the ecological viewpoint on the implementation of the NNCP.
27. The planning intention of the “OU(CDWEA1)” zone i.e. the NSW Portion, as stated in the “Planning Intention” [CB1/2/107; A1/6/107] and reflected at §9.7.2 of the Explanatory Statement [CB1/2/125; A1/6/125] is for “*low-density private residential or passive recreational development ... in exchange for committed long-term conservation and management of the remaining fish ponds or wetland... may be permitted subject to the “no-net-loss in wetland” principle and planning permission*” from the TPB. §§(a)(ii) of the “Remarks” of the Approved MPFP OZP [CB1/1/52; A1/4/52] and the Approved NSW OZP [CB1/2/108; A1/6/108] also require a wetland conservation and enhancement scheme, including, inter alia, “*a long-term*

maintenance and management plan.” According to §9.7.3 of the Explanatory Statement of the OZP [CB1/2/125; A1/6/125], the applicant should submit a wetland conservation and enhancement scheme (see §16.b above).

H. Landscape Issues

28. The TPB has no objection to the 242 Revised Landscape Proposal [E8/92g/5409-5527] and 242 Final LIA [CB4/28/5554-5610; E8/92i/5554-5610]. In view of these documents, 242 Application / Application B is acceptable with mitigation measures from a landscape planning perspective.

I. Visual Issues

29. The TPB has no objection to the selection of viewpoints for the 242 Final Visual Impact Assessment (VIA) [CB4/27/5528-5553; E8/92h/5528-5553].
30. The TPB Guidelines No. 41 [G/145/6567-6580] is adopted as the basic standards/requirements for preparing VIA.”

B3. The Site and zoning

NSW Portion

8. The NSW Portion of the Appeal Site is located at the south and is not within the Ramsar Site. The stated planning intention of the “OU(CDWEA1)” zone in the Notes to the Approved NSW OZP is extracted in the Agreed Statement of Facts (at para 14c) (para 7 above).
9. It is noted:-
- (1) The NSW Portion is covered by a network of fish ponds and bunds, and partly on Government land (about 41%) and private land (about 59% owned by NSW Development).
 - (2) The area of Government land at the NSW Portion includes land leased for fish pond culture, i.e. commercial fish ponds, and is mainly in the north-east portion, with a small number in the north-west corner.
 - (3) There is also land used as an informal public park which was reclaimed and created along the Kam Tin Drainage Channel (“KTDC”) and the Shan Pui River as part of drainage channel improvements that Government undertook for flood protection purposes. The use of this part of Government land as a public open space is “passive recreational development”. Both Applications incorporated such public usage.
 - (4) Lot 1520RP is held under Tai Po New Grant No. 6413 and is restricted to agricultural and fish pond use. Lot 1604 in D.D.123 is held under new Grant No. 1089 which permits building. Since 1964, NSW Development has had the right to develop a low-rise 3-phased

residential/commercial development on part of the NSW Portion in return for land premium paid to Government. In the Approved Henderson Scheme in 1994, this part was proposed for low-rise residential development and a golf course, whereas in Applications A and B, it was proposed for residential development and wetland conservation. The area of private land at NSW is not leased but lies fallow. The fish ponds on the private land have been abandoned for some years, and degenerated into areas of marsh and reed beds. There are trees on the bunds, mainly Eucalyptus, some of which provide roosting for birds, especially Great Cormorants. These areas have apparently become important ecological resources as they have not been used for commercial fish farming.

10. The NSW Portion falls within the “Other Specified Uses” annotated “Comprehensive Development and Wetland Enhancement Area 1” (“the OU(CDWEA1)”) zone on the Approved NSW OZP and is mainly occupied by fishponds and reedbed with scattered temporary structures.

11. Para (a) of the “Remarks” includes:-

“Application for permission of use or development shall be in the form of a comprehensive development scheme with *minimum pond filling* and *no decline in the wetland function of the fish ponds* within and near the development site. An applicant shall prepare a layout plan and any other documents showing the following information for consideration of the TPB” (emphasis added).

Para (b) of the “Remarks” includes:

“No new development, shall result in a total development and/or redevelopment in *excess* of the *maximum gross floor area (GFA)* specified below:

<u>Sub-area</u>	<u>Maximum GFA</u>
OU(CDWEA1)	a domestic GFA of 306,581 m ² , a non domestic GFA of 13,000 m ² including a club house with GFA of 8,000 m ² .” (emphasis added).

Para (d) of the “Remarks” includes:

“Any development or redevelopment within the “OU(CDWEA1)” zone is ***required to be developed together with the “Site of Special Scientific Interest (I)” (“SSSI(1)”*** zone on the Mai Po and Fairview Park Outline Zoning Plan in *a comprehensive and integrated manner*. An applicant shall submit a layout plan covering *the whole* of the “OU(CDWEA1)” zone and the “SSSI(1)” zone for the consideration of the Town Planning Board in accordance with the provisions of the Notes of both zones.” (emphasis added).

12. Para 9.7 of the Explanatory Statement includes:

“9.7.1 Within the “OU(CDWEA)” zone, the *ecological value of the existing continuous and contiguous fish ponds should be conserved and the “precautionary approach” and “no-net-loss in wetland” principle shall apply.* According to the “precautionary approach”, these existing continuous and contiguous fish ponds are to be protected and conserved in order to maintain the ecological integrity of the Deep Bay wetland ecosystem as a whole. **“No-net-loss in wetland” can refer to both loss in area and function.** *No decline in wetland or ecological functions served by the existing fish ponds should occur.*

9.7.2 Having regard to the “precautionary approach” and “no-net-loss in wetland” principle, the planning intention of the “OU(CDWEA)” zone is *to conserve and enhance the ecological value and functions* of the existing fish ponds or wetland through consideration of application for development or redevelopment under a “private-public partnership approach”. Under the “**private-public partnership** approach”, the Board may, subject to the “no-net-loss in wetland” principle, allow *limited low-density private residential or passive recreational development* within this zone **in exchange for committed long-term conservation and management** of the remaining ponds or wetland within a development site. Development of this nature should involve *minimum pond filling and no decline in the wetland function* of the fish ponds within and near the development site. Any new development should be located to the *southernmost portion of the zone and as far away from the Mai Po Nature Reserve and the Deep Bay and/or adjoining to existing developments* in the area. Compensation for loss of wetland area and its ecological functions is required for any development involving pond filling.

9.7.6 The “OU(CDWEAI)” zone on this Plan and the “SSSI(1)” zone on Mai Po and Fairview Park OZP are *primarily to facilitate the proposed residential development at Nam Sang Wai with a nature reserve at Lut Chau, Mai Po granted by the Town Planning Appeal Board in 1994 and upheld by the Privy Council in 1996*, taking into account the Town Planning Board Guidelines for “Application for Developments within Deep Bay Area”. The proposed nature reserve at Lut Chau should form part of the above development at Nam Sang Wai” (emphasis added)

For present purposes, we note that the “private-public partnership approach above (“PPP”) is separate but related to the public-private partnership approach in the 2004 NNCP. Both approaches are concerned with ecological conservation of ecologically important sites.

LC Portion

13. The Appeal Site to the north includes the LC Portion which is within the Ramsar Site.

14. The LC Portion is partly on Government land (about 60%) and private land (about 40%) owned by Kleener Investment under Lot 1534 in D.D.123. The private land at the LC Portion is leased to fish farmers for intensive fish pond culture. Government land at the LC Portion is mainly used for intensive fish pond culture. Other small areas are unused or parts of roads and drainage channels and natural stands of mangroves (mangal).
15. In fact, LC has become subject to indiscriminate dumping of construction waste, other rubbish, and all types of dumping. We saw this for ourselves during the Site visit. All this dumping degrades the wetland as referred to in the Ecological Impact Assessments (“EcoIAs”) prepared.
16. The LC Portion falls within the “Site of Special Scientific Interest (1) (“SSSI(1)”) zone on the Approved MPFP OZP and is mainly occupied by fishponds and part of the Mai Po marshes. It is within the Wetland Conservation Area (“WCA”) and the Mai Po Inner Deep Bay Ramsar Site.
17. Column 2 of the Notes to the Approved MPFP OZP states that the uses which may be permitted with or without conditions on application to the Board include “Nature Reserve”.

The stated planning intention of the “SSSI(1)” zone in the Notes to the Approved MPFP OZP is as follows:

“ Planning Intention

The planning intention of this zone is *to conserve the ecological value and function* of the existing fish ponds within this zone and to deter development (other than those which are necessary *to sustain or enhance the ecological value* of the fish ponds within the zone or to serve educational or research purpose) within this zone” (emphasis added).

18. The Explanatory Statement includes:

“9.12.2 New development or redevelopment should be *in a comprehensive manner* and would require planning permission from the Board under section 16 of the Ordinance. Alternative ecologically beneficial uses to existing fish ponds in the form of *a nature reserve which would perform ecological functions similar to or better than the existing fishponds* and compatible with the conservation objectives of the wetland in Deep bay Area may be considered on application to the Board under section 16 of the Ordinance.

9.12.6 The “SSSI(1)” zone on this Plan and the “OU(CDWEA1)” zone on the Nam Sang Wai OZP are to **primarily facilitate the proposed residential development at Nam Sang Wai** with a nature reserve at Lut Chau in Mai Po allowed by the Town Planning Appeal Board in 1994 and upheld by the Privy Council in 1996, taking into account the Town Planning Board Guidelines for “Application for Developments within Deep Bay Area”. The proposed nature reserve at Lut Chau should form part of the above development at Nam Sang Wai” (emphasis added).

19. There is no dispute that the planning history is relevant to understand the planning intention, and whether such planning intention would be undermined.
20. On 26 August 1994, the Town Planning Appeal Board (by majority and chaired by Mr. Robert Tang QC as he then was), granted planning permission to Henderson Real Estate Agency Limited¹ in TPA 13/1993, subject to conditions, for a comprehensive development comprising 2,550 residential units to be accommodated in 7-8 storeyed garden apartments, 3-4 storeyed duplex houses and 2-2.5 storeyed single family houses, the total domestic gross floor area (“GFA”) was 306,581 m², a commercial GFA was 5,000 m², and a clubhouse with GFA of 8,000 m² – all identical to those in the NSW OZP at Remark (b): see Agreed Statement of Facts (at para 14a) (para 7 above). The plot ratio was 0.317 calculated over the NSW Portion, with site coverage of 12% of the NSW Portion for the residential portion and an 18 hole golf course at the NSW Portion and nature reserve at the LC Portion (“**the Approved Henderson Scheme**”). This decision was upheld by the Privy Council in December 1996, by majority decision.

Rezoning

21. On 10 December 1999, after considering TPB Paper 5514 (“TPB Paper 5514”) and hearing the Appellants’ objections under *s.6(5) TPO*, the TPB agreed with the Planning Department’s (“PlanD”) views and decided to propose amendments to the two Draft OZPs by rezoning the NSW Portion from “REC”, “CA” and “R(C)” to “OU(CDWEA)1”, and the LC Portion from “SSSI” to “*Other Specified Uses*” annotated “*Wetland Wildlife Reserve*”. After further representations, the LC Portion remained in the “SSSI” zone. The Agriculture, Fisheries and

¹ The RNTPC refused planning permission on 9 October 1992 (see 1992 RNTPC Paper and 1992 RNTPC Minutes. The TPB decided on review not to grant planning permission on 11 June 1993 (see 1993 TPB Paper and 1993 TPB Minutes.

Conservation Department (“AFCD”) initially objected to rezoning the NSW Portion to “OU(CDWEA)1”. Subsequently, AFCD indicated it had no objection as it considered the proposed rezoning may provide incentives for the objectors to redesign a scheme to conserve as much wetland as possible so that it can address the “no-net-loss of wetland” issue and comply with the TPB Guidelines.

B4. What is undisputed or undisputable

22. It is helpful to bear in mind what is undisputed or undisputable, including in the parties’ opening and closing submissions:-

- (1) The approved Henderson Scheme was “*an accrued right ... which would not be affected by any subsequent change*” (TPB’s Closing para 31(b), emphasis added). Thus, the domestic and non-domestic GFA in the NSW OZP are identical to those in the Henderson Approved Scheme. See **Appendix 2** hereto, and Agreed Statement of Facts (at para 14a) (para 7 above). This is relevant to scale and intensity considered later.
- (2) The Appellants’ proposed development within both appeals “*is located furthest from Deep Bay*” (“Mr. Yip’s Statement para 12.21, emphasis added).
- (3) Application B is “an improved scheme compared with Application A”. Moreover, the AFCD and the Appellants had many informal meetings in which the AFCD gave them comments. That is why “after Application A, the Appellants were able to come up with Application B, which is an improved scheme compared with Application A. That is *a result of all the dialogue and comments and advice given by the AFCD*” (TPB Closing para 57(a), emphasis added).
- (4) Government departments made reference to the FLW case (with a development site of about 5% of total site) as “*a relevant reference for considering the current proposal in NSW*” (TPB Closing para 50(c), emphasis added).
Given the matters in (1) and (3) above, this is relevant to among other things, height and visual impact, assuming the same GFA is used.
- (5) The AFCD on Application B has “no challenge to the ecological baseline in the EcoIA” (TPB Closing para 57(c)).
- (6) For the NSW OZP, under the planning intention “*ecological concerns may have more weight*” such that “if they are adequately addressed, there may be more leeway to the Applicant when assessing visual impact” (TPB Closing para 170, emphasis added).

- (7) The ecological function of fishponds can be increased by reprofiling at fishponds, and with measures such as pond drain-down.
- (8) If the Appellants obtain planning approval and effectively implement measures such as fencing off with appropriate security, there is less likelihood of illegal and harmful activity on Mr. Yip's evidence [T-14/175].
- (9) In cross-examination on the Appeal Board's Decision of 26 August 1994 (at para 23) in TPA 13/1993 chaired by Robert Tang, Q.C., that "wise use of the environment must recognize the essential need to integrate conservation and development", the AFCD's witness Ms. Chow agreed [T-20/98].

We consider below the significance of such matters.

B5. The objective facts, contemporaneous documents, and inherent probabilities

23. As with any legal proceedings, especially given the long history, we have carefully considered the objective facts, contemporaneous documents, and inherent probabilities to see whether and to what extent, these support or undermine, either side's case. For context, we have considered all documents and events in chronological order, in the Agreed Chronology. We highlight the following contemporaneous documents and events including from various Annexes to witness statements and Exhibits produced at the hearing:-

- 23.1. In 1965, the Fu family acquired the 1st Appellant NSW Development, which owns the NSW Portion of the Appeal Site. NSW Development concluded a land exchange with Government.
- 23.2. In the 1980s, Henderson purchased private land at LC from fish farmers. That private land is held by the 2nd Appellant, Kleener Investment. In 1986, the Fu family concluded a joint venture agreement with Henderson which acquired a 50% interest in NSW Development. In the 1990s, Henderson Real Estate Agency ("Henderson Real Estate") Ltd. spearheaded a project to develop the Appeal Site into a residential development with a golf course and nature reserve ("Henderson Scheme").
- 23.3. On 12 July 1991, the draft Nam Sang Wai Development Permission Area Plan ("NSW DPA Plan") and draft Mai Po and Fairview Park Development Permission Area Plan ("MPFP DPA Plan") were gazetted. The private land at NSW was designated as "R(C)" and "unspecified use", whereas that at LC was designated as "SSSI" zone for "Special Scientific Study Interest".

- 23.4. On 1 August 1992, Henderson submitted a *s.16 TPO* application for a scheme which was rejected. A *s.17* review submitted by Henderson on 12 December 1992 was rejected at a TPB meeting on 11 June 1993. Henderson appealed.
- 23.5. In November 1993, the TPB issued *Guideline 12* (“TPB PG-No. 12”) for applications for development in the Deep Bay area. Those guidelines were subsequently revised in *Guideline 12A* (in November 1994), *12B* (in April 1999), and *12C* (in May 2014).
- 23.6. On 3 June 1994, the draft NSW and MPFP Outline Zone Plans (“OZPs”) were designated. The former was designated as “R(C)”, “REC”, and “CA”; and the latter as “SSSI” respectively. On 3 August 1994, the Appellants lodged an objection to the draft NSW OZP.
- 23.7. On 26 August 1994, the Town Planning Appeal Board (“TPAB”) delivered its Decision in TPA 13/1993 chaired by Robert Tang Q.C. (as he then was) allowing by a majority, Henderson’s appeal with planning conditions, ie the Approved Henderson Scheme. On 26 November 1994, the TPB applied for judicial review (“JR”) of that Decision which was dismissed by the Court of First Instance on 28 April 1995. On 24 January 1996, the Court of Appeal allowed the TPB’s appeal on judicial review.
- 23.8. In September 1995, the Mai Po Marshes and Inner Deep Bay were formally designated as a Wetland of International Importance, as a Ramsar Site. The LC Portion is within the Ramsar Site. The NSW Portion is outside the Ramsar Site but included in the subsequent WCA. The Ramsar Site is an important site for thousands of waterbirds of the East Asian Australasian Flyway, and has accumulated a wide variety of plants and wildlife.
- 23.9. On 16 December 1996, the Privy Council in *Henderson Real Estate Agency Ltd v Lo Chai Wan* [1997] HKLRD 258 by majority, upheld the TPAB’s majority decision allowing the Approved Henderson Scheme with planning conditions.
- 23.10 In September 1997, the Fish Pond Study: *Study on the Ecological value of Fishponds in Deep Bay area* (“Fish Pond Study”), was completed after being commissioned by the PlanD. The Fish Pond Study confirmed the intrinsic ecological value of the fish ponds and wetland in the Deep Bay area. The Fish Pond Study is important background and context, for the subsequent OZPs and planning intention and is considered later.

23.11. In September 1997, the *Technical Memorandum on Environmental Impact Assessment Process Environmental Impact Assessment Ordinance, Cap 499 s.16* (“EIAO-TM”) was issued by the Environmental Protection Department (“EPD”). In April 1998, the Environmental impact assessment process was introduced under that Ordinance (“EIAO”) which new planning applications would have to undergo.

23.12 On 18 December 1998, there was an important TPB meeting which considered the 5022 TPB Paper regarding the Fish Pond Study. This meeting and Paper are also important background and context, for the planning intention considered below.

Unlike the full conservation approach recommended by the Fish Pond Study (to zone the NSW Site to “Conservation Area” (“CA”)) which would in effect, prohibit development, the PlanD recommended an alternative approach (i.e. PPP), described in the TPB Paper (at para 31):

“The partnership approach is to allow *limited* private development *by filling up a small portion of fish ponds say (5% - 10%) in exchange for a better management of the remaining ponds* within the development site. As the “no-net-loss” principle of the Study refers to both “area” and “function” of wetland, any proposal of this kind must demonstrate that the development would *not result in the loss of ecological function* of the original ponds in the site. A wetland enhancement scheme would be necessary to compensate the loss of wetland function and to mitigate the impact of the development. The developer could be required to surrender the wetland area and/or be responsible for the long-term management of the conservation/enhancement areas, either directly or possibly through investment in a trust arrangement” (emphasis added).

TPB Paper 5022 is noteworthy in several respects including:-

(1) It describes the “Modified Option” (at para 13):-

“In considering the way forward and the planning implications of the Study recommendations, the Administration *has to take into consideration other development needs* in the territory, the relevant recommendations in other ongoing and completed studies and committed developments such as the West Rail project. Where absolutely necessary, *a balance between conservation and development has to be found. Certain flexibility* in applying the Study recommendations *is therefore necessary*” (emphasis added).

(2) Concerning “An Alternative Approach” (at para 32):-

“The main advantage of this approach is that it does offer a situation for *conservation and development to be considered together*, and for *active sustaining enhancement/management* for the wetlands to be put alongside *carefully controlled housing development*” (emphasis added).

The Minutes of the TPB meeting are instructive in several respects:-

(1) On a private-public partnership (“PPP”) approach (at para 9):-

“the Partnership Approach was to allow *limited* private development *by filling up a small portion of fish ponds, say 5 to 10%, in exchange for the developer’s commitment to manage the remaining ponds* within the development site”.

(2) As to this 5 to 10% ratio (at para 49):-

“Another Member said that *the 5 – 10% area to be developed had to be large enough in order to be viable, and the remaining area had to be managed well*” (emphasis added).

There were slightly different descriptions but the same meaning in substance between 5 – 10% “of fish ponds” or “area to be developed”.

This important meeting and Paper were considered by Au JA in the important recent decision in *Tam Hoi Pong v Town Planning Board*, unreported 4 September 2020 HCAL 20 of 2014 (“the FLW Judgment”) considered later.

23.13. On 10 December 1999, an important TPB meeting considered the 5514 TPB Paper on the draft NSW and MPFP OZPs. The TPB agreed to a proposed amendment to meet the Appellants’ objections by rezoning the objection site in NSW to “OU(CDWEA1)”:-

(1) On the Appellants’ proposed zoning (at para 4.3(b)):-

“Although detailed EcoIA and other technical assessments have not been included in the FWR to compare the ecological and development impacts of the three options or to substantiate the objectors’ current request to rezone the objection sites to “OU(CDWEA)”, *similar assessments have already been undertaken for the NSW Development and accepted by the TPAB as indicating that there would be no insurmountable impacts*” (emphasis added).

(2) On the purpose of the proposed zoning (at para 4.3(d)(i)):-

“OU(CDWEA1)” zoning is *intended to encourage* the objectors to devise a new scheme *to fully comply with the “no-net-loss” principle* as well as *the criteria for private-public partnership approach stipulated in the TPB Guidelines*” (emphasis added).

(3) The PlanD’s views included (at para 6.1):-

“The proposed rezoning would allow the objectors’ *flexibility* to devise an alternative scheme which *would be ecologically friendlier and more compatible with the wetland functions of the area rather than strict adherence to the approved scheme*” (emphasis added).

(4) On the GFA and location of any development (at para 6.2):-

“*All* domestic and commercial development and ancillary recreational facilities should be located at the *landward fringe of Objection Site A farthest away from Deep Bay*” (emphasis added).

(5) The TPB meeting minutes are important and deal with the development intensity (at para 94):-

“.. to rezone Objection Site A to “OU(CDEWA)1” *with the same level of development intensity as that approved by the TPAB*;²

The extracts above are relevant to arguments of scale and intensity, location, and the planning intention which we consider later.

23.14. On 18 May 2001, the draft NSW and MPFP OZPs were gazetted.

23.15. On 7 February 2002, an Advisory Council for the Environment (“ACE”) meeting considered the KCRC East Rail Project – Sheung Shui to Lok Ma Chau (“LMC”) Spur Line. The meeting minutes include statements from two of the Appellants’ experts who subsequently gave evidence on ecological matters in these proceedings, Dr. Michael Leven (“Dr. Leven”) and Mr. Paul Leader (“Mr. Leader”). These contemporaneous Minutes, well before the First and Second Appeals, are instructive on:-

(1) The importance of bird numbers observed (at paras 2 to 3):

“A member asked why the enhancement of the fish pond at (LMC) was measured by the number of birds observed. In response, Dr. Leven explained that there were two main reasons. The first one was *because water birds were of primary ecological importance in the wetland system* at [LMC] and the second reason was that *bird number was a quantifiable and comparable unit for measurement*. There were *many examples in which the carrying capacity of a wetland habitat was measured by the number of birds observed ...* the objective was *to increase the carrying capacity of the fish ponds through enhancement measures in a sustainable manner to ensure that no less number of birds would continue to use the area in question*” (emphasis added).

² §94 of the TPB meeting [CB1/15/738]

(2) As to “Management measures on fish ponds” (at paras 4 to 5):-

“Dr. Leven said that the enhancement measures involved *simple work of ponds re-profiling, fish stocking in summer and progressive draindown of ponds in winter*. They have full *confidence in the effectiveness of the enhancement measures which were either new nor unique* and could be *carried out by any professional that possessed the expertise*. A further fallback action was to stock fish directly into the ponds in winter to provide adequate food for the birds. ... Dr. Leven said that *the ponds would be drained down sequentially to sustain* throughout the winter season” (emphasis added).

(3) As to commercial fish ponds (at para 7):-

“Dr. Leven said that the mitigation areas were currently used as *commercial fish ponds which would lose their ecological values as a habitat for birds, if unmanaged*, as they *would become too acidic for aquatic organism*” (emphasis added).

These contemporaneous statements in the ACE meeting minutes largely accord with the evidence of Dr. Leven and Mr. Leader in these proceedings.

23.16. In November 2004, the New Nature Conservation Policy (“NNCP”) was announced by Government. The NNCP is part of the background and context, leading up to the relevant OZPs being approved in February 2005 and October 2006:-

(1) As to Public Consultation (at para 4(b)), this included:-

“*practicable ways to better conserve ecologically important sites under private ownership within limited resources*. In this regard, we stated in the public consultation document that the *management agreement and the public-private partnership (“PPP”) options were more practicable* and hence should be further examined” (emphasis added).

As Mr. Suen S.C. rightly submitted in opening, Government’s approach was intended to be pragmatic.

(2) As to the NNCP and Implementation Programme (at para 8(c)):-

“the improvement proposals of management agreements with landowners (management agreements) and PPP will be adopted *to enhance conservation* of the priority sites identified under (b) above, and a pilot Scheme will first be implemented to evaluate the two new measures” (emphasis added).

The emphasis is not merely on conservation, but *enhanced conservation*.

(3) As to the “existing nature conservation measures” these include (at para 8(d)):-

“designation of *country parks, special areas, marine parks, marine reserves* and *conservation zonings*, and implementation of *conservation plans on important habitats and species* will continue and be enhanced where appropriate”.

We acknowledge Government’s many conservation measurements and efforts which we consider later.

(4) As to the public-private partnership approach (at para 17):-

“Under this new measure, developments ***at an agreed scale*** will be allowed ***at the less ecologically sensitive portion*** of a site provided that the developer undertakes to *conserve* and manage the rest of the site that is *ecologically more sensitive* on a long term basis. In order to provide potential proponents with ***the required flexibility***, proposals involving non in-situ land exchange for development with full justifications may also be considered” (emphasis added).

Several points are noted:-

- (a) The “public-private partnership” approach is different albeit related to “the private public partnership” (“PPP”) approach in the NSW OZP (para 12 above). The public-private partnership approach is concerned with 12 Priority sites of high ecological importance.
- (b) The reference to “an agreed scale” appears to include reference to agreed amount of GFA.
- (c) As to portions which are “less” or “more” ecologically sensitive, we consider this on the question of location.

(5) As to sustainability implications (at para 37):-

“The two new measures, viz Management Agreement and PPP, aim to ***encourage support and participation of key stakeholders, including landowners, developers*** and NGOs, in conserving ecologically important sites and are consistent with the “partnership” principle of sustainable development ... effective means have to be put in place to avoid possible abuse by private landowners or developers while ***incentives are provided to attract them into implementing*** the options” (emphasis added).

This document is important when ascertaining the true planning intention, and how it was intended to be implemented. For present purposes, we note that of the 12 “Priority Sites for Enhanced Conservation” (Annex C to the NNCP), the Ramsar Site including the LC Portion is ranked 1st. The Deep Bay wetland outside Ramsar (which includes the NSW Portion) is ranked 9th.

23.17. On 1 February 2005, the MPFP OZP was approved, whereby LC was designated as “SSSI(1)”. On 17 October 2006, the NSW OZP was approved whereby the private land at NSW was designated as “OU(CDWEA1)”.

After OZPs

24. We highlight the following facts, contemporaneous documents and events after the NSW and MPFP OZPs were approved:-

24.1 In 2011, KHI Holdings Group, a Fu family company, assumed the role of development manager and launched a fresh approach to develop the Appeal Site.

24.2. On **15 July 2011**, a TPB meeting (987th) endorsed the ACE Paper 9/2011/TPB Paper 8869 (“the ACE Paper”), “*Arrangements to Implement Conservation and Development Proposals Involving the Priority Sites for Enhanced Conservation*”.

The ACE Paper³ stated its purpose and the background (at paras 1, 3):-

“This paper seeks to inform Members of the arrangements we would pursue *to implement the public-private partnership (PPP) scheme*. The scheme was promulgated under the New Nature Conservation Policy (NNCP) in **2004**. Under the PPP scheme, developments of *an agreed scale would* be allowed at the less ecologically sensitive portions of the priority sites provided that the developer *undertakes to conserve and manage the rest of the site that is ecologically more sensitive on a long-term basis*” (emphasis added).

It is noted:-

(1) While the NNCP was promulgated in **2004**, in **2011** some 7 years later, it had apparently not yet been implemented.

(2) The Approved NSW OZP did not expressly incorporate the public-private partnership scheme, nor the 2004 NNCP, which predated the Approved OZP.

Guidelines 12C in May 2014, did not expressly incorporate the public-private partnership scheme but the “Private-Public Partnership Approach” (PPP). See para 6.3:-

“Private-Public Partnership Approach

While the primary planning intention of the WCA is to conserve the ecological value of fish ponds, if there are strong planning justifications and *positive measures to enhance the ecological functions* of the existing fish ponds, the Board may consider development with conservation objectives within the WCA under a *private-public partnership approach*.

³ [CB1/6/534]

Having regard to the precautionary principle and the “no-net-loss in wetland” concept, the approach would allow consideration of *limited low-density* private residential/recreational development *at the landward fringe* of the WCA in *exchange for committed long-term conservation and management of the remaining ponds* within the development site. Development of this nature should require minimum pond filling and be located *as far away from the Deep Bay and/or adjoining to existing development site*” (emphasis added);

- (3) In the *Fung Lok Wai* (“FLW”) application, the PPP approach under the then Guidelines 12B⁴ (rather than the public-private partnership scheme) was applied. The AFCD considered that the “no-net-loss in wetland principle” could be met as the development site area or footprint was minimal - and thus also the need for minimum pond filling, and located furthest from the core of the WCA which the AFCD considered to be the least ecologically sensitive⁵.

If, which is not entirely clear, the public-private partnership scheme is part of the planning intention of the Approved NSW OZP, the words “*agreed scale*” would refer to the scale of the development in the Approved NSW OZP, i.e. the maximum GFA. This GFA was approved by the Appeal Board on 26 August 1994 in TPA 13/1993 and upheld by the Privy Council in December 1996. It was also agreed by the TPB in the rezoning of the NSW site to “OU(CDWEA)1” in 1999, and incorporated in the Draft NSW OZP in 2001, and the Approved NSW OZP. Indeed, in the *FLW Judgment*, Au JA said at [75]:-

“Hence, as the 2011 NNCP Arrangements *constitute part of the requirements under the PPP Approach* either generally or specifically for application in relation to the Fung Lok Wai, the TPB in considering whether to approve the Application *had to satisfy itself* that they had been so met” (emphasis added).

We consider this later under the planning intention.

- (4) The ACE Paper (at para 6) states on competent bodies and consultation agents:-

“To ensure that the conservation works are properly conducted, the developers will be required to identify *competent bodies* (e.g. green groups) as their *conservation agents to manage the ecologically sensitive portions* of the concerned sites” (emphasis added).

⁴ [A1/10/208-215] published in April 1999

⁵ See §10.1.3(a) of the FLW RNTPC Paper [B/28/756.17-756-18]

Conservation agents should of course, have necessary expertise. The reference to “green groups” is by example, and not exhaustive. As the NNCP is expressly intended to be “practicable”, the relevant expertise may include with a NGO, private company, or collaboration between one or more bodies with such expertise.

24.3. On 4 August 2011, Mutual Luck Investment Limited (“Mutual Luck”), a company within the Cheung Kong Group, submitted a planning application to the TPB for development at Fung Lok Wai (“FLW application”).

EIAO Study Brief

25. In May 2012, there was an important and comprehensive EIAO Study Brief for the Project at NSW and LC. We highlight the following:-

25.1. Background and purpose of the Study (at para 1.5):-

“The purpose of this EIA study is to *provide information on the nature and extent of environmental impacts* arising from construction and operation of the Project and related activities taking place concurrently. This information will contribute to decisions by the Director on:-

- (i) the *acceptability of adverse environmental consequences* that are likely to arise as a result of the Project;
- (ii) the *conditions and requirements for the design, construction and operation of the Project to mitigate* against adverse environmental consequences; and
- (iii) the *acceptability of residual impacts* after the proposed mitigation measures are implemented” (emphasis added).

On the Study’s Scope (at para 3.2.1):-

“The EIA study shall cover the Project and associated works proposed in the Project Profile and mentioned in section 1.2 of this EIA Study Brief. The EIA study shall address the *likely key issues* described below, together with any other key issues identified during the course of the EIA study. ...

- (vi) direct and indirect *terrestrial and aquatic ecological impacts*, in particular the *potential impacts of wetland loss, disturbance and fragmentation and important habitats such as fishponds, reedbeds, mangroves and intertidal mudflat, Kam Tin Main Drainage Channel and Shan Pui River, roosting sites of Great Cormorant and egrettries*, due to the construction and operation of the Project” (emphasis added).

25.2. The Requirements for Ecological Impact Assessment (terrestrial and aquatic) (Appendix C) include:-

- (i) The assessment shall include the “following major tasks” (at para 4):-
 - “(v) investigate and describe the *existing wildlife uses of the various habitats* with special attention to *those wildlife groups and habitats with conservation interests, including* but not limited to:
 - (b) Roosting breeding and/or feeding sites of resident and migratory birds *in particular* waterbirds and wetland-dependent species such as *Great Cormorant ...*
 - (e) *Bird flight lines over the project sites* and between roosting/breeding and feeding sites of resident and migratory birds as identified in Section 4(v)(b) in this Appendix;
 - (g) *Firefly species, Pteroptyx maipo;*
 - (vii) (p) propose *a conservation and management plan* for the proposed Lut Chau nature Reserve and Nam Sang Wai Wetland Enhancement Area in the project site, with particular attention to:-
 - (i) the *target species and conservation objectives* of the wetland;
 - (ii) the proposed design, layout, measures/actions for *creation, enhancement, maintenance and management* of the wetland” (emphasis added).

25.3. Requirements for landscape and Visual Impact Assessment (Appendix I) include (at para 2(iv)):-

“description of the severity of visual impacts in terms of distance, nature and number of sensitive receivers. The *visual impacts of the Project with and without mitigation measures* shall also be included so as to *demonstrate the effectiveness of the proposed mitigation measures* across time.”

Para 4 continues:-

“The mitigation measures may include provision of *screen planting, sensitive design* of structures, *colour scheme* and *texture of materials* used and any measures to *mitigate the impact on existing land uses*” (emphasis added).

We consider the EIAO Study Brief and the Appendices above when considering the significance of any alternative regulatory regime, and whether sufficient information is available to this Appeal Board.

The planning applications

26. The various planning applications which led to the appeals were as follows:-

26.1. On 19 October 2012, the Appellants submitted their s.16 Planning Application (Application A) with technical submissions including a landscape proposal, tree survey, landscape and visual assessment, EcoIA, CM Plan, and tree survey report. On 30

October 2012, the Appeal Board allowed the Appellants' appeal against the TPB Decision on 8 April 2011 refusing to review under *s.17 TPO* its decision to reject a 4th extension of time application for the Approved Henderson Scheme.

26.2. On 8 February 2013, the Appellants submitted revised reports including a revised EcoIA and revised CM Plan for Application A.

26.3. On 19 July 2013, a Rural and New Territories Planning Committee ("RNTPC") meeting was held to consider Application A which was rejected.

26.4. On 26 July 2013, the Appellants' consultants AEC Limited ("AEC") wrote to the AFCD requesting information on projects under Management Agreements ("MA's"). There was no written response although there was a telephone call between AEC's Mr. Leader, and AFCD's Ms. Chow.

Such MA's were relied on heavily by the TPB in resisting the appeals and we consider these later.

26.5. On 2 August 2013, the TPB wrote to the Appellants' Planning Consultant Masterplan Limited ("Masterplan") refusing Application A.

26.6. On 7 November 2013, the Appellants submitted the s.17 Review Application for Application A with technical submissions.

26.7. On 22 November 2013, a RNTPC meeting considered the FLW Application by Mutual Luck, which was preceded by three prior applications. This Application was approved with conditions.

The TPB's approach towards the FLW Application is relevant to the Appellants' arguments on consistency and fairness considered later:-

(1) The AFCD's views on conservation are set out at para 10.1.3(b):-

"The EcoIA has submitted in August 2011 under the current application was similar to that approved under the EIA in 2009. In this regard, DAFC does *not have any objection in principle to the development from the ecological prospective*" (emphasis added).

(2) Comments were also made on the Firefly Issue (at para 10.1.3(d)):-

"Since there were *concerns on the potential light impact on the firefly*, the applicant included a Light Simulation Report in the EcoIA to assess the potential light impact on the firefly due to the proposed development" (emphasis added).

(3) Paragraph 12.4 dealt with compliance with *TPB PG-No. 12B*:-

“All developments within the WCA should meet the requirements under the TPB PG-No. 12B. The relevant considerations of the Committee under the Guidelines are summarized in paragraphs 7.1 and 7.2 above. The applicant has demonstrated that he proposed scheme *largely meets the requirement* stipulated in the TPB PG-No. 12B as set out below” (emphasis added).

The PlanD’s position was not one of strict compliance, but whether the proposed scheme “largely meets” the requirements in the Guidelines.

26.8. On 14 February 2014, a TPB meeting was held to consider Application A and the s.17 Review Application which was rejected.

(1) The meeting minutes are important and para 46 states:-

“The FLW case, with development site of 5% of the whole development, was *a relevant reference for considering the current proposal* in NSW” (emphasis added).

(2) As to “limited development” with “minimum pond filling”, para 51 states:-

“A Member considered that what constituted “minimum” should be based on the merits of each case and whether the *proposed scale* of development would have a bearing on the achievement of the other objectives. If the proposed development would hinder the achievement of the other objectives, the proposal was not a “limited development”. The GFA stipulated on the NSW OZP reflected *only the maximum allowed, not an entitlement*” (emphasis added).

As to (1) above, the FLW case with a 5% site development was a “relevant reference”, we consider this below in the context of consistency and fairness.

As to (2) above, para 51 of the minutes largely reflect the TPB’s arguments considered later.

26.9. On 21 February 2014, a JR application was filed by Mr. Tam Hoi Pong against the TPB’s decision on the FLW Application.

26.10. On 28 February 2014, the TPB wrote to Masterplan that Application A’s s.17 Review Application was refused.

26.11. On 28 April 2014, the Appellants filed a Notice of Appeal in the First Appeal.

26.12. On **30 April 2014**, there was an important meeting between representatives for the Appellants, the PlanD and AFCD:-

- (1) According to the meeting notes prepared by Masterplan, the PlanD's Ms. Ophelia Wong considered that the GFA in the Approved NSW OZP⁶ "should be realized". But the AFCD mentioned that "**maybe the GFA was too much and shouldn't be realized**" (emphasis added).

For reasons below, the Appellants are entitled to use the maximum GFA, subject to satisfying the planning intention. The purpose of the maximum is to set a limit on the powers of the TPB and TPAB. We have no power to decrease or increase the maximum.

- (2) According to the notes of the same meeting prepared by the AFCD⁷:
 - (a) "In response to the Applicant's question on an "acceptable area of development", the **PlanD suggested that the Applicant should make reference to the 5% land-take of the Fung Lok Wai case**. A development footprint of *no more than 15% of the site area of NSW* ("OU(CDWEA)" zone) would sound more reasonable. The portion in Lut Chau (SSSI zone) should be excluded in the calculation."
 - (b) "As for building height, PlanD suggested development of around 8-16 storeys would be reasonable, subject to the overall master layout plan, other design factors and potential ecological impacts. It would be considered **reasonable to allow a taller building height if it would help to minimize the development area.....**"
- (3) "AFCD and PlanD reiterated **the need to reduce development footprint for a better chance of complying with the planning guidelines**. The Applicant agreed to re-consider the layout and would submit their proposal for Government's consideration again" (emphasis added).

This meeting is highly relevant to arguments concerning consistency and fairness - given AFCD's own guidance and advice on the "5% land take of the [FLW] case", which should be referred to. And a trade off with a smaller development area was taller building height.

26.13. On 29 January 2015, there was a further meeting between the Appellants' representatives with the PlanD and AFCD.

According to Masterplan's notes of this meeting:-

- (1) the 12-ha footprint of the development was agreed at a previous meeting;

⁶ See §(b) of the Remarks [CB1/2/108]

⁷ See §8, CWS-SWS [WR-A2/2/5] and [WR-B5/4]

- (2) the PlanD was not against development of the Appeal Site as it was in accordance with the Approved NSW OZP but the AFCD's concerns would need to be addressed satisfactorily; and
- (3) the AFCD was concerned that with this informal consultation process, there "may not be anything for them left to object to" and indicated that they would "try to have an objection over something even if it was trivial".

There was a difference in recollection between Masterplan's Mr. Brownlee and AFCD Ms. Chow on whether she said at the meeting words to the effect in (3) above.

26.14. On 19 March 2015, there was a further meeting between representatives of the Appellants and those from PlanD and AFCD. As appears from AFCD's meeting notes:

"AFCD also raised concern on potential light impacts on the bent-winged fireflies found in the wet grassland on the SW end adjacent to the development site. Although *screen planting was proposed to mitigate such light impact*, there might still be significant impact given the *proximity of the firefly habitats to the development site and the height of the buildings*. Besides, as there was still insufficient literature available to indicate/quantify how sensitive the fireflies were to light, it would *not be meaningful to do modelling on light simulation in order to assess the light impact of the development on the firefly*. Instead, *a precautionary approach should be taken with measures proposed to avoid and minimize light impact on firefly* (e.g. *orientation of buildings*).

AFCD opined that while the applicant adhered to the *maximum GFA* stipulated in the OZP, as had been considered in various previous development options (with different development footprints and building heights) in the past submissions, the *resulting development intensity and ecological impacts still appeared to be unacceptable*. Masterplan and AEC expressed that it would not be possible for the applicant to consider reducing the GFA in the development scheme. Dr Leven suggested that if the application would be rejected *because AFCD disagreed to the use of the maximum GFA*, they would apply for appeal" (emphasis added).

26.15. On 24 June 2015, the Appellants submitted Application B under *s.16 TPO* with various technical submissions including EcoIA, CM Plan, landscape, tree preservation, and visual impact assessments.

26.16. On 22 January 2016, a RNTPC meeting considered the 242 RNTPC Paper on Application B under *s.16 TPO* which was rejected. The meeting minutes are important:-

- (1) On the ecological baseline conditions of the site (at para 126):-

"The Chairman further asked whether the proposed location of the residential part of the development was *in the ecologically less sensitive*

area of the NSW site. In response, Dr Kwok said that though the proposed residential development, which *was located farthest away* from the Mai Po Inner Deep Bay Ramsar Site, and had *taken up the relatively least ecologically less sensitive area* with the NSW site, it still *encroached upon habitats of high ecological value*” (emphasis added).

Dr Kwok’s contemporaneous statements highlighted above as the AFCD’s Senior Wetland & Fauna Conservation Officer are in point on the proposed location. While the AFCD said the proposed development “still encroached upon habitats of high ecological value”, that is not the test under the planning intention considered later.

- (2) On development scale, and adequacy of proposed litigation measures (at para 127):-

“In response to the Chairman’s query on the appropriate scale of the proposed development, Dr Kwok said that it was *the permissible development intensity of the site that had been stipulated on the OZP*. From the ecological prospective, *minimum building footprint* for the proposed residential development that would affect minimum areas of wetland habitats was preferred *to minimize the possible ecological impacts*. Whilst the current scheme was based on the maximum permissible GFA on the OZP, whether the applicants had made sufficient efforts to compensate the loss of wetland (e.g. *by enhancing the ecological function of the remaining wetland*) due to the proposed development was the most important consideration.”

- (3) On building height and plot ratio (at para 128):-

“Apart from the building height (BH) of a development, its *plot ratio (PR)* was also one of the indicators for its development intensity. According to the proposed maximum GFA of 306,581m² which was stipulated on the OZP, the equivalent PR of the proposed development for the whole site was *about 0.179, which was comparable to the developments in the surroundings including a similar development at Fung Lok Wai approved by the Committee*. Besides, the proposed residential development in the NSW site was located *adjacent to the Yuen Long Industrial Estate and Tung Tau Industrial Area* to its west and southwest respectively, and was *close to Yuen Long New Town*. All these areas consisted of medium-to high-rise buildings. As such, *the proposed development intensity was generally considered compatible with the surroundings....*”

According to DAFC, the proposed mitigation measures to compensate the secondary loss of fishpond habitats and indirect

disturbance impacts were considered inadequate and thus the proposed development was considered failing to comply with the ‘no-net-loss in wetland’ principle as stipulated in TPB PG-No. 12C” (emphasis added).

It is noted:-

- a) On development intensity, Dr. Kwok correctly stated that the permissible development intensity “had been stipulated on the OZP”. And ecologically, minimum building footprint which would affect “*minimum areas of wetland habitats*” was preferred to minimize the possible ecological impact.

The meeting noted the plot ratio of about 0.179 was “comparable” to surrounding developments “including a *similar* development at FLW approved by the Committee”.

- b) As to the vicinity and visual impact, the proposed development in NSW was “adjacent to the Yuen Long Industrial Estate and Tung Tau Industrial Area”, and “close to Yuen Long New Town” - all of which consisted of “medium to high rise buildings”. Thus, the proposed development intensity “was generally considered compatible with the surroundings”.
- c) Nonetheless, AFCD considered that the proposed development failed to comply with the no-net-loss in wetland principle, by reference to mitigation measures and indirect disturbance impacts which we consider later.

26.17. On 5 February 2016, TPB wrote to Masterplan that Application B’s *s.16* application was rejected. On 14 April 2016, the Appellants submitted a *s.17*. Review application with technical submissions.

26.18. On 8 July 2016, there was a meeting between representatives from the Appellants and from PlanD and AFCD.

AFCD’s revised notes of the meeting on 8 July 2016⁸ are important and stated, *inter alia*:-

“3. *Firefly Mitigation*

- ***Proposed use of single aspect buildings to prevent light from the height of the towers was supported as an acceptable mitigation***

⁸ See §365, Dr. Leven’s Statement [WA-3/6/116]; §163, Mr. Brownlee’s Statement [WA-2/4/65-66] and [E/10/104/5773-5775] and §10, Ms Chow’s Supplemental Statement [WR-A2/2/5] and [WR-B5/4] The notes were drafted by Masterplan but Ms. Chow “*added some brief remarks in track changes*” for her internal reference: see footnote 1. It follows that what she did not track did not need to be changed.

- The height ~~and mitigation from the planting~~ of bamboo and additional planting for the eucalypts ~~was explained in detail and was generally acceptable, bamboo height~~ should be clearly shown on the Figure;
- **If this approach is taken then there is no need to have compensatory provision of mangroves at Lut Chau, and any improvements made in that location, if made, should not be considered for environmental mitigation as it is too difficult to quantify. It should just be part of the general tidying up and removal of waste;**
- Reduction of 1 block and loss of 10 flats was ~~not an issue noted~~;
- Photomontages affected by these block changes should be re-done...” (emphasis added).

This meeting is important on steps to be taken in relation to HKBWF mitigation, which we consider later.

26.19. On 25 November 2016, the Appellants submitted the Final reports for Application B’s EcoIA, CM Plan, VIA and LIA.

26.20. On 16 February 2017, the Court of Final Appeal dismissed the Appellants’ appeal against the Court of Appeal’s decision quashing the TPAB’s Decision that it has jurisdiction to review the 2010 decision under *s.17 TPO*.

26.21. On 24 February 2017, a TPB meeting considered the important 242 Paper for Application B’s review:-

(1) In stating (at para 5.16) that FLW was a “*similar development*”:-

“There is no similar application within the same “OU(CDWEA)” and “SSSI” zones on the two OZPs. For members’ information, application No. A/YL-LFS/224 for **a similar comprehensive residential development** with wetland nature reserve **at FLW**, where the Site is *also zoned* “OU(CDWEA)” on the approved Lau Fau Shan and Tsim Bei Tsui OZP No. S/YL-LFS/7 and **also subject to the requirements** under the then *TPB PG-No. 12B*, was approved with conditions by the Committee on 22.11.2013 (also see paragraph 7 of **Annex A**)” (emphasis added).

(2) In acknowledging (at para 7.2): that comments received from the public, 10,329 supported Application B, while 5,810 comments objected to or raised concerns.

This compares with the FLW application where from public comments received, 663 were against with only 82 in support.

On 10 March 2017, the TPB rejected Application B’s *s.17* Review application, for reasons considered in section C below.

26.22. On 31 March 2017, the Appellants submitted their Notice of Appeal for the Second Appeal.

26.23. On 19 December 2017, this Appeal Board gave directions to consolidate the two appeals, on the Appellants' application of 16 May 2017.

26.24. For discussion on 30 April 2018, the ACE had a discussion paper "*Overview of Nature Conservation Management Agreement Prospects*" (Exhibit R12, handed up by Mr. Suen S.C. on Day 19). The Discussion Paper is noteworthy:-

(1) On the MA Scheme (at para 3):-

"The MA Scheme was promulgated under the New Nature Conservation Policy in 2004 to *enhance the conservation of ecologically important sites* under private ownership, *i.e. the 12 priority sites* for enhanced conservation" (emphasis added).

(2) On the current MA Project summarized (at para 7) concerning 7 sites:-

"Since the launch of the MA Scheme in 2004, the ECF has approved a total funding of over \$135 million for implementing seven MA projects at seven sites, namely Fung Yuen; Long Valley and Ho Sheung Heung; **Ramsar Site; Deep Bay Wetland outside Ramsar Site**; Sai Wan; Lai Chi Wo and Sha Lo Tung" (emphasis added).

The 2 sites in **bold** above include the LC, and NSW Portions of the Appeal Site.

(3) On the MAs' performance (at para 8):-

"The performance of the MA projects is monitored regularly through their achievements in nature conservation in terms of the *diversity and abundance of target species* recorded, and achievements in raising public awareness in terms of the number of education programmes organized and participants engaged." (emphasis added).

The ACE and AFCD's monitoring of performance include "in terms of the *diversity and abundance of targets species* recorded" (emphasis added). This broadly accords with Dr. Leven's stance at the ACE meeting on 7 February 2002 on the LMC project (para 23.15 above).

26.25. There was further discussion on 19 October 2018 by the ACE on a discussion paper "*Applications under Nature Conservation Management Agreement Scheme*" (Exhibit R13). Like Exhibit R12, this was handed up on Day 19 on 20 January 2021, on this Appeal Board's prompting that it had *no* information on *the terms* of the MAs – to properly compare with the Appellants' proposed conservation and enhancement measures. This discussion paper is noteworthy:-

(1) On two fishpond Management Agreement Projects in Deep Bay (at paras 6, 7):-

“The Hong Kong Bird Watching Society (HKBWS) has been conducting two MA projects in the Deep Bay since 2012 to enhance the ecological value of fishponds *through collaboration with the fishpond operators*, with support of the Hong Kong New Territories Fish Culture Association. These two complementary MA projects, *covering the Ramsar Site Priority Site and Deep Bay Wetland outside Ramsar Site priority Site*, have jointly enhanced the ecological functions of fishponds *through wise use of the wetland, preserved traditional fish farming* as local cultural heritage, and increased the awareness on aquaculture and bird conservation in the Deep Bay area. ... *Over 90% of the eligible fishponds*⁹ in the area have been engaged in the fishpond MA projects through the years. ...

Monitoring data from 2012 to 2017 have indicated that the mean abundance of waterbirds has *increased 20-fold during drain-down* as compared to that beforehand, with the most significant increase found in ardeids (egrets and herons) and shorebirds.

The projects represent a win-win solution to bird conservation and local aquaculture while promoting the wise use of the wetlands” (emphasis added).

(2) The drain down referred to is *annual* (at para 8):-

“According to the HKBWS’ proposal, apart from conservation management to be conducted by the fishpond operators (*i.e. annual drain-down* of fishponds), HKBWS will continue to conduct bird surveys to monitor bird usage on fishpond habitats in Deep Bay” (emphasis added).

We will compare below annual drain-down with the Appellants’ proposals on drain-down and other reasons.

26.26. On 4 October 2018, the 1st Appellant and Wildfowl and Wetlands Trust (“WWT”), a leading international conservation organization dedicated to wetlands, signed a Memorandum of Understanding for partnership in the management operations of the NSW WEA and LCNR. Preambles (G)-(I) set out the parties’ missions:-

“(G) The Parties mutually recognize that the Project, consisting of the proposed housing development and associated nature conservation initiative going ahead, will set *a template standard for the Greater Deep Bay Area*.

(H) The Parties also mutually recognize that, in the absence of a wider holistic plan for wetland conservation and management in the Greater Deep Bay Area, the Project provides a genuine opportunity, albeit with a housing development, *to restore, enhance and preserve a large area of important unprotected wetland within the Greater Deep Bay Area, creating a*

⁹ Eligible fishponds refer to fishponds with operators registered under the Voluntary Registration Scheme of the AFCD, and located in the Priority Sites.

contiguous sanctuary with Mai Po Nature Reserve that is adjacent to the Lut Chau part of the Site.

- (I) WWT Consulting believes that with sensitive design and constructive dialogue, *a large area of wetland can be conserved for future generations.*
- (J) NSWDC intends to engage WWT, or a subsidiary to be incorporated under the laws of the HKSAR (“**HK Subsidiary**”) to manage the Wetland Centre and Wetland Nature Reserve upon Planning Approval being obtained” (emphasis added).

It was not put in cross-examination to any of the Appellants’ witnesses that the missions stated above were not possible or practical to implement.

26.27. On 4 September 2020, Au JA delivered the FLW judgment in HCAL 20/2014.

We consider this Judgment below and were informed that an issue on appeal is whether the TPB erred in imposing various conditions. We were provided with a copy of the Notice of Appeal filed by the TPB, and a Respondent’s Notice filed by the Applicant. As a decision of the High Court and of Au JA, the FLW Judgment is binding on this Appeal Board, unless and until it is set aside. It is not for this Appeal Board to speculate on the prospects of success of that appeal.

B6. The factual and expert witnesses.

27. The Appellants called the following 7 witnesses-

- (1) Mr. Fu Hau Chak, Adrian (“Mr. Fu”), a senior member of the Fu family, and director of the 1st, 3rd and 4th Appellants.
- (2) Mr. MY Wan (“Mr. Wan”), a Chartered Surveyor, land administration consultant and director of MY Wan and Associates Ltd and of the 3rd and 4th Appellants. Mr. Wan has been a director of Henderson.
- (3) Mr. Cheung Wing Kin, William (“Mr. Cheung”), the primary Architect for the Appellants’ architectural designs and master layout plans for the proposed development.
- (4) Mr. Ian Thomas Brownlee (“Mr. Brownlee”), Managing Director of Masterplan, the Appellants’ Town Planning Consultant, and primary author of the Appellants’ Planning submissions.
- (5) Ms. Iris Hoi (“Ms. Hoi”), Director of Urbis Limited (“Urbis”), the Appellants’ landscape and visual impact consultant, and primary author of the landscape and visual submissions for Application B.

- (6) Dr. Leven, Director of AEC, the Appellants' ecological consultant and primary author of the EcoIA's.
- (7) Mr. Leader, Director of AEC, the Appellants' ecological consultant and primary author of the CM Plans.

28. The TPB called the following 5 witnesses:-

- (1) Yip Chi Kwai Tom ("Mr. Yip"), Assistant Director of Planning/New Territories of the PlanD, and formerly the District Planning Officer/Fanling, Sheung Shui and Yuen Long of the PlanD.
- (2) Ms. So Yuet Sin Joyce ("Ms. So"), a registered Professional Planner, and Senior Town Planner/Urban Design 1 of the Urban Design and Landscape Section ("UDL") in the PlanD.
- (3) Ms. Ng Mui Fa Phoebe ("Ms. Ng"), a Senior Administrative Officer (Nature Conservation) of the EPD.
- (4) Mr. Robert John McInnes ("Mr. McInnes") as expert ecological witness, a Chartered Environmentalist and Professional Wetland Scientist, and Managing Director of RM Wetlands and Environmental Ltd.
- (5) Ms. Sunny Wing Sun Chow ("Ms. Chow"), as expert ecological witness, a Wetland and Fauna Conservation Officer ("WFCO") of the AFCD at the time of Applications A and B,

B7. Site visit

29. The Site visit was on 7 January 2021 shortly before the January hearings resumed on 13 January 2021. The Site visit was relevant to ecological and visual impact issues. The Appeal Board and both sides' representatives visited various locations at NSW, LC, and surrounding sites including the FLW site. The Site visit was the subject of an audio recording which was subsequently transcribed, and what was said by various witnesses was subsequently adopted as part of their evidence – by Dr. Leven and Mr. Leader for the Appellants; and by Ms. Chow and Mr. Yip for the TPB. The TPB's other expert ecologist Mr. McInnes was unfortunately unable to attend because of COVID-19 and stringent travel and quarantine restrictions.

30. We have brief observations on the Site visit which we expand on later:

30.1. The NSW Site was picturesque but in limbo from lack of proper management and upkeep. For instance, some trees had fallen as a result of typhoons (including Typhoon Mangkhut in September 2018) but were left decaying and uncleared. We saw a flock of Great Cormorants in full flight which was an impressive sight. When we approached a tree where some Cormorants were roosting, some flew away but others stayed, indicating they respond individually and are intelligent. The fish ponds we saw did not have many birds present, except one pond which was drained down where more birds were present feeding on fish left behind. We also visited a public park which was peaceful and popular with members of the public flying kites and model planes, or on picnic and relaxing.

30.2. We also visited the LC Site, a Ramsar site. As appears from photographs at **Appendix 3** taken on various dates from **November 2012** onwards, little has changed or improved over the years, until the date we visited. There was much dumping of waste including construction waste, several abandoned cars (and a minibus), and all manner of waste. Similar and more recent photos appear in Mr. Leaders' 1st Statement at Appendix 5 thereto. Of course, such waste and dumping have no ecological value and functions, or anything to do with fish ponds or wetland functions. The situation was most disappointing and shocking, especially for a Ramsar Site. Of the 12 Priority sites in the 2004 NNCP, the Ramsar Site is ranked 1st (para 23.16 above).

We intend no criticism of any Government department and have two observations on the LC Site. First, the lamentable state of the LC Site highlights that Government's resources in terms of manpower, time, and money are necessarily limited – hence the pragmatic PPP approach.

Second, the sorry state of the LC Site indicates that as a matter of common sense and fact, the Site is functioning well below its ecological potential, and there is significant room for enhancement of ecological value and functions. Our attention was also drawn to the fact that several hectares of land in LC had been unlawfully converted from mangrove areas to commercial fishponds, quite likely for commercial purposes. From the comparison at **Appendix 3** between **2005** and **2015**, some 2.4 hectares in total had been converted. By the time of the Site Visit in **January 2021**, at least 3.5 hectares in total had been converted. Therefore, the situation is deteriorating over time, and this is

continuing. On the evidence, mangroves are a preferred habitat for the HKBWF, and mangrove habitat can be created or restored which we consider later.

31. On the significance of site visits, in *Smart Gain Investment Ltd v Town Planning Board*, unreported 6 November 2007, HCAL 12/2006 and 12 of 2007, A. Cheung J (as he then was) said at [87]:-

“It is of course true to say, as has been pointed out by Laws LJ in *R (Khatun) v Newham London Borough Council* [2005] QB 37, 55 (para 35), that it is *for the decision-maker* and not the courts, subject to Wednesbury review, *to decide upon the manner and intensity of inquiry to be undertaken into any relevant factor* accepted or demonstrated as such. But *given the very different factual contentions of the parties and indeed of the experts* – both Mr. Brownlee and the representative of the Planning Department are planning experts in the area, and given the poor quality of the aerial photographs and other photographs supplied to the Board, the circumstances in the present case are such that one simply cannot decide the factual dispute without making further inquiries. And *a site visit would seem to be the simplest way to resolve the factual dispute*” (emphasis added).

We respectfully agree. We note for instance, that the AFCD’s Ms. Chow states (her Supplemental Statement para 18) on the LC site:-

“Mr. Paul Leader states that the current condition of the LC site is “extremely poor” from an ecological perspective (§ 73). I disagree with and *his view has little scientific support*” (emphasis added).

With respect to Ms. Chow, this Appeal Board with the advantage of the Site visit, considers her argument above as contrary to the evidence, and common sense.

C. TPB’s decision and reasons

32. The TPB notified the Appellants’ representative Masterplan of its decision on Application B by letter of 10 March 2017 rejecting Application B on review for five reasons:-

- “(a) the proposed development is *not in line with the planning intention* of the “Other Specified Uses” annotated “Comprehensive Development and Wetland Enhancement Area” zone (“OU(CDWEA)”) which is intended for conservation and enhancement of ecological value and functions of the existing fish ponds or wetland;
- (b) the proposed development is *not in line with Town Planning Board Guidelines* for “Application for Developments within Deep Bay Area” (TPB PG-No. 12C); The “*no-net-loss in wetland*” principle has not been complied with. The Ecological Impact Assessment and the proposed mitigation measures are inadequate. You have failed to demonstrate that the loss of ecological function can be adequately compensated by the proposed mitigation and habitat enhancement measures;

- (c) you have not prepared an Environmental Impact Assessment (EIA) report as required by the EIA Ordinance to address the ecological issues, and yet the submitted technical assessments have failed to demonstrate that the proposed development would not generate adverse traffic, ecological and visual impacts on the surrounding areas;
- (d) the proposed development does *not conform to “Private-Public Partnership Approach”* in that the proposed development is *not limited to the ecologically less sensitive portion* of the Site and you have failed to demonstrate how the long-term conservation and management of the Wetland Enhancement Area for the Nam Sang Wai Site and the Lut Chau Nature Reserve could be satisfactorily achieved; and
- (e) the approval of the application would set *an undesirable precedent for similar applications* within “OU(CDWEA)” zone, and its cumulative effect might have the undesirable effect of leading to the general degradation of the environment of the area.” (emphasis added).

33. Unlike the TPB’s decision dated 28 February 2014 on Application A, the reasons above make no mention of:-

- (a) minimum pond filling which it is common ground is met for Application B (Yip’s 1st Statement para 12.10).
- (b) development scale and intensity, that the development area is excessive, or not “limited development”
- (c) the precautionary approach.

34. We deal with the TPB’s reasons later and observe for present purposes:-

- (1) The TPB should provide at least the main reasons to ensure the Appeal Board and all parties are “*fully and fairly informed* of the grounds of appeal”: *Rule 3(1)(f) Town Planning (Appeal) Regulations* (emphasis added) – which grounds would flow from the TPB’s reasons.
- (2) On the materials, the main reasons include the matters at para 33 (b) and (c) above although not mentioned. But there is no substantial prejudice to the Appellants as such matters are fairly covered in the parties’ witness statements and submissions.
- (3) We are bound by the Court of Appeal decision in *Capital Rich Development Ltd v Town Planning Board* [2007] 2 HKLRD 155 where Cheung JA said at [87]:-

“It is “far more important to see *how the decision-maker articulated the reasons for decision* than the summary of discussions by members of the TPB as there would be “expression of ideas and views which may not be fully articulated or necessarily correct” (emphasis added).

D. Issues

35. Having regard to the key issues as helpfully summarized in the TPB's Opening (at para 35), and simplifying and changing the logical order of the issues, three main issues arise:-
- (1) What is the planning intention of the NSW OZP in zoning the NSW Site as "OU(CWEA1)" and in the MPFP OZP of zoning the LC site as "SSSI(1)"?
 - (2) Taking into account their ecological and visual impacts, does the proposed development conform with the planning intention?
 - (3) Will the approval of Application B set an undesirable precedent for future applications for development in other areas zoned "OU(CDWEA)"?
36. We do not propose to deal with every argument raised in the parties' opening and closing Submissions, and focus on the more important points summarized in their respective Executive Summary of Closing Submissions. Where we do not address a specific point, this does not mean it has not been considered or is accepted. Where particular arguments are raised in opening but not pursued in closing, it would appear that unless indicated to the contrary, such points are no longer pursued. While numerous areas of expertise are relevant including planning, law, and ecology, as we stated during the hearing, witnesses of fact should generally confine themselves to matters within their personal knowledge. Experts should generally confine themselves to evidence on matters within their area of expertise. Ultimately, it is for this Appeal Board to evaluate and weigh up, all relevant evidence.

E. TPO and TPB Guidelines – ascertaining the planning intention

E1. TPO

37. The key *TPO* provisions on this appeal are:-

“s.13. Approved plans to serve as standards. Approved plans shall be used by all public officers and bodies *as standards for guidance* in the exercise of any powers vested in them” (emphasis added).

“s.16(4) Applications for permission in respect of plans is ... The Board may grant permission under subsection (3) *only to the extent shown or provided for or specified* in the plan” (emphasis is added).

38. As to *s.13 TPO*, in *International Trader Limited of Town Planning Appeal Board* [2009] 3 HKLRD 339 (C.A.) Hartmann JA (as he then was) said at [31]:-

“As to the word “standards”, read in context, these ‘standards’ constitute appropriate criteria or recognized measures which are to be used as ‘guidance’ for public officers and bodies; that is, *to direct them as to the discharge of their duties*. The effect of the section, therefore, is to impose on all public officers and all public bodies *the statutory duty to have reference to approved plans as the recognized measure by which they are to be guided; that is, directed, in the exercise of their powers*” (emphasis added).

We are bound by and will apply *International Trader*.

E2. TPB Guidelines

39. The present version (Guidelines 12C) was issued in May 2014. As the appeal is a *de novo* hearing, the Appeal Board should have regard to *TPB Guidelines 12C*, which we set out later.

E3. Approach to interpretation

40. We were referred to many cases on interpretation, and focus on the more important principles. The difference between the parties is more in the application of established principles to the particular facts.

There is no dispute that a key distinction is drawn between an OZP and its notes on the one hand, and an OZPs’ Explanatory Statement and any TPB Guidelines on the other: see *Henderson Real Estate Agency Ltd* [1997] HKLRD 258 where the Privy Council advised (at 266A, 267 A-C):-

- (1) The Appeal Board’s function is to exercise independent planning judgment;
- (2) The Appeal Board is entitled to disagree with the TPB;
- (3) The plan and the Notes attached to the plan prepared by the TPB in its plan making capacity are material documents which are binding as “the most material documents in the case”;
- (4) The Explanatory Statement is a material consideration which the Appeal Board must take into account but is not bound to follow;
- (5) Guidelines prepared by the TPB are a material consideration which the Appeal Board must take into account but is not bound to follow; and
- (6) A misunderstanding of the planning intention is an error of law.

41. A question of interpretation is a question of law, which admits of only one correct answer. The question is not whether an interpretation is unreasonable: see: *Shiu Wing Steel Co Ltd v*

Director of Environmental Protection & Anor (2006) 9 HKCFAR 478 at [28]. There are many well-known factors or criteria in interpreting a statute or legal document:

- (1) the actual words used and their ordinary and natural meaning, construed objectively;
- (2) the context of the document, read as a whole;
- (3) context and purpose in the first instance and not only if there is some ambiguity;
- (4) the relevant background; and
- (5) common sense.

We will apply all these factors and criteria.

Interpretation of planning documents

42. At the same time, the approach to interpreting planning documents is not identical to interpreting a statute. The Notes and Explanatory Statement should be approached in a practical, down to earth way, and in a broader and untechnical sense – rather than a strict, overly technical, or literalistic approach. See:-

- (1) *International Trader Ltd v Town Planning Appeal Board*, unreported (HCAL 13/2007) (5 November 2007), where A. Cheung J. (as he then was) said at [98]:

“However, one must approach the Notes and Explanatory Statement on a *down-to-earth, practical manner*, and the language used is *not to be invested with more precision than it would naturally bear*. One is not reading a judgment, and still less, construing a statute” (emphasis added).

- (2) *HK Resort Company Limited v TPB*, CACV 432/2020, 10 September 2021 per Kwan VP in giving the Court of Appeal’s judgment at [21]:-

“Instead, the court should evaluate the merits in a broad manner, and be *vigilant against excessive legalism creeping in* as a planning decision is not akin to an adjudication made by a court and *planning policies do not normally require intricate discussion of their meaning*” (emphasis added).

We respectfully agree, and will apply the principles above.

43. Three points are noted at this stage:-

- (1) The TPB argued that if the Appellants fail to satisfy “any one” of the criteria for granting planning permission, the Appeal Board is bound to reject the Application in accordance with the plan as an application must meet “all of the criteria” under the OZP’s planning intention.

This argument is partly correct, and fails to distinguish between interpreting the OZPs and its Notes which are binding, and the Guidelines and Explanatory Statement which are material considerations which should be taken into account and can be departed from for good or cogent reason.

- (2) As we stated during the hearing, when there may be a tension between different clauses or parts of a contract as an analogy, effect should usually be given to every clause to see whether such clauses can fairly be read together; only if this is not possible and there is actual inconsistency should the question arise whether a particular clause or part should prevail over another: see *Ko Hon Yue v Chiu Pik Yuk* (2012) 15 HKCFAR 72 at [54]. This principle in a contractual interpretation context by analogy, was raised in argument without dissent from either side.

No one argued that any part of the OZP Plan and its Notes, or the Explanatory Statement and TPB Guidelines were inconsistent with another part or provision.

- (3) In the town planning context, a Court or tribunal may have to decide which policy is the dominant policy, or should be given greater weight: see *R (on the application of TW Logistics Ltd) v Tendering DC* [2013] 2 P. & C.R. 9 (C.A.) where Lewison LJ. said at [18]:-

“In a case in which different parts of the Local Plan point in different directions, it is for the planning authority to **decide which policy should be given greater weight** in relation to a particular decision. This, in my judgment, is established by the decision of Ouseley J. in *R. (on the application of Cummins) v Camden LBC* [2001] EWHC 1116 (admin) to which Mr Dove also referred us. In that case Ouseley J. said at [164]:

“It may be necessary for a Council in a case where *policies pull in different directions to decide which is the dominant policy*: whether one policy compared to another is directly as opposed to tangentially relevant, or should be seen as **the one to which the greater weight is required to be given**” (emphasis added).

For reasons below, the principle in (3) above is relevant. There is no serious dispute that the “no-net-loss in wetland” principle involving ecological conservation and enhancement is the dominant policy under the OZP and Notes, and given greater weight than visual impact.

F. Preliminary points

F1. Consistency and fairness

44. There is no dispute that the TPB as a public body has a duty to act fairly and reasonably, and it contends that it complied with this duty.

45. The TPB argued:-

45.1. The consistency principle does not advance the Appellants' case as Application B is distinguishable from the Approved Henderson Scheme and the FLW scheme in material respects.

45.2. On the duty to act fairly, as the appeal is a hearing *de novo*, the Appeal Board's function is to exercise independent planning judgment. Any alleged unfairness, impropriety or lack of reasons before the primary decision-maker is irrelevant as these would have been cured by the appeal hearing process where the parties could present full evidence and arguments afresh.

45.3. The FLW approved development and the TPB's stance towards it is *irrelevant*, each application is assessed on individual merits. The extensive references in the Appellant's arguments to the FLW application should be rejected as they are simply not useful to the Appeal Board in considering the instant applications. There are numerous differences between the FLW application and Application B:-

- (1) The FLW application involved a development site of 4 ha with a substantially smaller area and percentage of development footprint and conversion of 76 ha of fish ponds (95% of the site) into a wetland nature reserve.
- (2) The FLW application has a hilly backdrop, while the NSW Site is on flat terrain.
- (3) AFCD was satisfied that the FLW application met the "no-net-loss in wetland" principle and the revised EcoIA was acceptable. Pertinently, the FLW was a simpler case as there were neither Cormorant roosts nor HKBWF in the vicinity of the proposed development, and the site was mainly homogenous fishponds without reedbed or marshes etc.

46. The Appellants argued:-

46.1 As to consistency, the relevant Government departments failed to act consistently during the process with regard to the Approved Henderson Scheme, and changes to the planning intention - which were intended to encourage and facilitate, ecologically

friendlier schemes. And having regard to the FLW scheme which was intended and advised by the Government departments as a relevant and similar reference.

46.2 As to the duty to act fairly, the proper application of planning policy requires that it should be fairly administered. There would be exceptional situations where it would be proper to take into account the fact that a particular site had a planning history, requiring the grant of planning permission.

46.3 As to the FLW development, the AFCD and PlanD made clear to the Appellants to use the FLW and its 5% development as a “*relevant reference*” and similar development - which should be followed, within reason. Those Government departments failed to act fairly and consistently, for no good reason.

47. While consistency and fairness are related and both concern good public administration, with respect, the TPB’s arguments are not made on a sound basis on the facts, and the law on consistency and fairness.

48. As to the relevant law:-

48.1. As to consistency, while it is trite that consistency is a cardinal principle of good administration in that all persons in a similar position shall be treated similarly, the matter goes further:-

(1) Public bodies ought to deal straightforwardly, and consistently with the public: see *R (Nadarajah) and Anor v Secretary of State for the Home Department* [2005] EWCA Civ 1363 at [68] per Laws LJ:-

“What is the principle behind this proposition? It is not far to seek. It is said to be grounded in fairness, and no doubt in general terms that is so. I would *prefer to express it rather more broadly as a requirement of good administration, by which **public bodies ought to deal straightforwardly and consistently** with the public*” (emphasis added).

(2) The rationale for consistency is self evidently important to developers and development control authorities, and to instill public confidence in the development control system: see *North Wiltshire DC v. Secretary of State for the Environment and Clover* (1993) 65 P & CR 137 (C.A.) per Mann L.J. (at 145):-

“One important reason why previous decisions are capable of being material is that like cases should be decided in a like manner so that there is consistency in the appellate process. *Consistency is self-evidently*

important to both developers and development control authorities. But it is also important for the purpose of securing public confidence in the operation of the development control system” (emphasis added).

48.2. As to the duty to act fairly, there can be no dispute that the TPB as a public body, should enforce minimum standards of fairness, both substantive and procedural. Even assuming the Appeal Board gives the Appellants a fair hearing as a matter of procedural fairness, this does not remove any prior substantive unfairness which we consider below.

49. Having carefully scrutinized the objective facts, contemporaneous documents, and inherent probabilities, while the AFCD and PlanD acted in good faith at all times and were well intentioned, we do not consider with respect, that their stance towards the Appellants was straightforward or consistent, or fair for these reasons:-

- (1) The PlanD and AFCD took different positions from one another towards the proposed development at the same time. This was not straightforward and consistent, and did not inspire public confidence in the development control process.
- (2) While AFCD’s expertise is in ecological and scientific matters, it provided input and decision making on matters *beyond* such expertise: on matters of law and planning - such as the planning intention, scale and intensity, density, and the proposed number of floors and residents. But the key ecological consideration is the “no-net-loss in wetland” principle. That principle is distinct from such considerations. For the AFCD to provide input on matters *beyond* its expertise was inappropriate whether at the hearing, or beforehand in meetings, correspondence, and its witness statements. Unsurprisingly and as a result, AFCD’s stance was at times misdirected, and it took into account and provided input on matters beyond its expertise.
- (3) The PlanD initially took a different position from AFCD on the considerations in (2) above. But it later conveniently abdicated and delegated decision making on matters of planning judgment, and the planning intention to the AFCD.
- (4) The result was that the AFCD and PlanD adopted stances which were not consistent, or fair towards the Appellants. Thus, those departments were in effect albeit unintentionally, blowing hot and cold with the Appellants. Such stance was misdirected and circular. This contributed to substantial and unnecessary delays, and additional costs for all including at considerable public expense.

- (5) At *no* stage did the AFCD and PlanD have a stance that was properly co-ordinated. In particular, to tell the Appellants what would likely be an appropriate scheme in the interests of good public administration, and efficiency. The Appellants have the onus of proof on appeal. But the matter is not merely one of onus of proof (which arises in all legal proceedings), but of good public and planning administration.

50. We refer to the following key matters as relevant to consistency and fairness:-

50.1 Scale and intensity of proposed development:

- a. As the AFCD frankly states (Ms. Chow’s Statement para 138):-

“The fundamental problem is that development scale and intensity will cause significant ecological impacts which cannot be adequately mitigated by phasing the project” (emphasis added).

Mr. McInnes’ Statement (at para 163) is to similar effect:-

“Alternative sizes and scales of development which would not necessitate a change in ecological character at LC”:-
“should have been considered and evaluated in the November 2016 EcoIA” (emphasis added).

But scale and intensity are matters of planning judgment, and the planning intention. There is *no* sufficient basis to argue that scale and intensity *per se* fail to satisfy the “no-net-loss in wetland” principle; or that scale and intensity have impacts which cannot be sufficiently and practically avoided, minimised, and compensated. Scale and intensity include the maximum GFA in the NSW OZP, and plot ratio. We note that at the important **10 December 1999** TPB meeting (at para 94) (para 23.13 above)) on the then draft OZP there was clear reference that the objection site would be rezoned-

*“to “OU(CDEWA)1 with **the same level of development intensity** as that approved by the TPAB¹⁰”* (emphasis added)

In the **22 January 2016** RNTPC meeting minutes (at para 127) (para 26.16 above) the PlanD’s Dr. Kwok when asked about the appropriate scale responded:-

*“it was “**the permissible development intensity** on the site that had been stipulated on the OZP”* (emphasis added).

¹⁰ §94 of the TPB meeting [CB1/15/738]

- b. The maximum GFA under the NSW OZP was directly derived from and identical to the Approved Henderson Scheme. While this was *not* an *unconditional* right, the Appellants could reasonably expect to be able to use all the GFA if the proposed development fairly accorded with the planning intention. Moreover, the plot ratio for the proposed development under Application B is 0.179 – better than for the FLW approved scheme at 0.185: see **Appendix 2**.

There is no rational reason from the AFCD why it objects to the “scale and intensity” of the NSW development but not to the FLW development notwithstanding the latter’s higher plot ratio.

- c. AFCD and PlanD held different positions on scale and intensity, at the same time. For instance, at the important **30 April 2014** meeting between the Appellants and representatives from PlanD and AFCD (para 26.12 above), the PlanD considered that the GFA in the NSW OZP “should be realized”. But the AFCD’s recorded position was that “*may be the GFA was too much and shouldn’t be realized*” (emphasis added).

Indeed, the PlanD’s Mr. Yip accepted in evidence that if the GFA was reduced, an application “would *stand a better chance*” (emphasis added, [T-15/155]).

Therefore, AFCD and the PlanD preferred that the GFA be reduced - but with *no* sound legal basis for a discretion to reduce the approved GFA, let alone to what extent. Instead, properly understood, the GFA is part of the Appellants’ “accrued right” as rightly accepted by the TPB (para 22(1) above) under the Approved Henderson Scheme. While the Appellants could voluntarily reduce the GFA if they saw fit, it was uncommercial and unnecessary, to do so. Moreover, profits from sales of residential units would be used to fund ecological conservation and enhancement, and the CM Plan. Therefore, profits and development scale and intensity should be viewed together in context, and not in isolation. We find as a fact that while the AFCD’s (and the PlanD’s) stance on scale and intensity was well intentioned, it was misdirected, inconsistent with the planning intention, and unfair. With respect, it was not for the AFCD or PlanD to seek to amend or rewrite the planning intention.

50.2. The PlanD/AFCD’s advice and guidance on smaller (5% FLW) footprint as “*relevant reference*”, and “*similar development*”, and consequences

- a. From the contemporaneous documents, a similar “5% to 10%” of the ponds or site was envisaged for developments under the NSW OZP. This appears for instance, from the important **18 December 1998** TPB meeting and 5022 TPB paper referred to earlier (para 23.12). The logical consequences of a smaller development footprint assuming the maximum GFA was used, was (i) a smaller number of buildings, (ii) of greater height, and (iii) over a smaller area. We accept Mr. Brownlee’s evidence (his Statement para 128) that these were preferable from an ecological viewpoint. There are numerous references in the contemporaneous documents including the **30 April 2014** Meeting notes to the Appellants being asked to use the FLW footprint as a “*relevant reference*” which should be followed, and FLW as a “*similar development*” (see paras 26.12, 26.21 above). See also the 14 February 2014 TPB meeting minutes (at para 46) (para 26.8 above). Such advice and guidance was intended to be, and was acted on. Indeed, this is not disputed by the TPB (para 22(3) above).
- b. Therefore, on the contemporaneous documents including the TPB’s *own* documents, there is repeated reference to the similarities between the proposed development and the FLW development.
- The FLW site would involve development on 5% of the site on 4 ha, while the NSW Site would involve a development footprint of 6.5% overall and 11.6 ha. While these percentages and footprints are not identical, they cannot be viewed mechanistically. Both developments are well within “5 to 10%” of the site overall, as “limited private development” (para 23.12 above).
- c. The TPB stance concerning FLW and smaller development footprint is two-fold. First, it argues that reference to FLW is “irrelevant”. Second, “any impression that TPB had a preference for *a smaller development footprint and a higher form of development is also misplaced*” (Yip’s Supplemental Statement para 8.4) (emphasis added). With great respect, having carefully scrutinized the contemporaneous documents, and the *own* stance and guidance provided by AFCD/PlanD to the Appellants, both arguments are unfair, and contradicted by the documents. They also blow hot and cold.

Of course, the FLW site is not identical in terms of terrain, or in number of towers and height. But this misses the bigger picture. The PlanD and AFCDD did not have regard to considerations of consistency, and fairness. As stated at the hearing, it is not reasonable or logical to expect any part of a residential development to be underground to reduce building height.

50.3. Location:

- a. The NSW OZP states that the proposed developments should be located “*farthest away from Deep Bay*” (emphasis added).

The Explanatory Statement (at para 9.7.2) states the criteria of the “*southern most portion of the zone*” (emphasis added).

The TPB Guideline 12C (at para 6.3) provides that the proposed development should be “at the *landward fringe* of the WCA” “and/or *adjoining to existing developments site*” (emphasis added).

The 2004 NNCP under the related Public-Private partnership scheme states that developments would be located at the “*less ecologically sensitive portion*” of a site.

As a matter of logic and common sense, a site “farthest away from Deep Bay” under the OZP, should be “less ecologically sensitive”. There is no apparent inconsistency between the criteria above and none was suggested.

- b. It is accepted by the PlanD in the contemporaneous documents that the proposed development would be “farthest away from Deep Bay” and at the “southern most portion of the zone”. This appears for instance, in the 22 January 2016 242 RNTPC meeting minutes (at para 126) (para 26.16 above). The 242 TPB paper (at para 6.2.2(c)) for the 24 February 2017 meeting is to similar effect (para 26.21 above). The Agreed Statement of Facts (at para 18) is to similar effect (para 7 above).

- c. The TPB’s stance was that the proposed developments would nonetheless encroach upon habitats of “high ecological value”.

But this criteria appears nowhere in the planning intention. Nor is it stated to be a material consideration in the Explanatory Statement, and TPB Guidelines. As such, the TPB’s stance is misdirected, unfair, and not consistent with the planning intention.

- d. Insofar as the TPB argues that the proposed developments would not be on a “less ecologically sensitive” portion of the Site under the NNCP, we deal with this below and consider that this stance unintentionally, blows hot and cold.

The AFCD has also suggested that the proposed development location should be *moved* even if it satisfies the OZP criteria. For instance, in the 242 TPB paper (at para 6.2.2(c)), the AFCD is recorded to suggest:-

“the applicants should consider *different alternatives of the location* of the development to demonstrate that avoidance of encroachment on and disturbance to *habitats of high ecological value* has been adopted for the proposed development” (emphasis added).

With respect, AFCD’s stance is wrong and impractical. If adequate and practical steps are proposed to avoid, minimize, and compensate for ecological impacts, it is not to the point that *some* encroachment and disturbance may arise.

F2. Alleged defective reasons

51. The TPB argues that even if any of its reasons were defective, these are cured by the appeal process. In addition to our observations on the TPB’s reasons in Section C, this argument fails for two reasons.

52. First, while it is common ground there is a duty to provide adequate reasons, the cases (including those cited by the TPB) go further in the planning context:-

- (1) The reasons should enable disappointed developers to assess their prospects of obtaining some alternative development permission: see *South Bucks District Council v Porter (No. 2)* [2004] 1 WLR 1953 [H.L.] per Lord Brown at [36]:-

“The reasons need refer only to the main issues in the dispute, not to every material consideration. They should enable *disappointed developers to assess their prospects of obtaining some alternative development permission*” (emphasis added).

- (2) These principles accord with the Appeal Board’s Decision in TPA 13/1993 chaired by Robert Tang QC (as he then was) at [70-71]:-

“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 [sic] 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.

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*” (emphasis added).

We entirely agree.

53. Second, having regard to the rationale for adequate reasons, in planning cases as stated by the Court of Appeal in England and Hong Kong:-

- (1) Proper reasons are a means to achieve reasonably predictable decision making: see *R (Mansell) v Tonbridge and Malling BC* [2019] PTSR 1452 (C.A.) at [41] per Lindblom J.:-

“They should remember too that the making of planning policy is not an end in itself, but *a means to achieving reasonably predictable decision-making, consistent with the aims of the policy-maker*” (emphasis added).

- (2) Property owners are entitled to know how they can develop land, especially their own. The Court does not construe a statute to take away a property’s owner’s rights to put *full reliance on the terms of an approved plan*: see *International Trader Limited v Town Planning Appeal Board & Anor.* [2009] 3 HKLRD 339 (C.A.) per Hartmann JA (as he then was) at [50]:-

“As Mr Yu observed, that is consistent with the principle that the courts will not construe a statute as taking away the rights of a property owner – in this instance, *the right to place full reliance on the terms of an approved plan* – unless there is clear wording to that effect: see *Wah Yick Enterprises Co. Ltd v Building Authority* (1999) 2 HKCFAR 170 at 181B per Litton PJ, citing *Colonial Sugar Refining Co. v Melbourne Harbour Trust Commissioners* [1927] AC 343 at 359.” (emphasis added)

54. Applying these principles, with respect, the TPB’s reasons are inadequate. Quite apart from such reasons not referring at all to their fundamental objection to scale and intensity, and the precautionary approach as allegedly not satisfied:-

- (1) At *no* stage did the AFCD and PlanD indicate what scheme would likely be acceptable to *all* relevant Government departments. The TPB emphasized that the onus on appeal is on the Appellants. This is correct but disregards well established principles above on adequate reasons in the planning context. And the TPB’s duty of fairness as an important public body, to members of the public and developers as part of good public administration.
- (2) Instead, it appears from the contemporaneous documents that the PlanD and AFCD held stances towards the proposed development which were not consistent, including when meeting the Appellants’ representatives. Such different stances did not assist the Appellants to know how to assess their prospects of obtaining planning approval, or a

reasonably predictable decision. And how to exercise their right to place *full* reliance on all the OZP terms, including on scale and GFA.

With respect, the stance of PlanD and AFCD should have been properly coordinated. Each should have been careful to provide input within its proper area of expertise only. Instead, regrettably the AFCD and PlanD unwittingly, delayed and obstructed proper development and implementation of the NSW OZP.

F3. Delay and effectiveness of planning process

55. There has been inordinate delay of at least *24 years* between **late 1996** when the Privy Council upheld the Approved Henderson Scheme to this appeal hearing commencing in **November 2020**. We raised the question why matters took so long, and proceeded so inefficiently. There have of course, been changes in the planning intention, in the MPFP and NSW OZP's approval in February 2005 and October 2006 respectively.

56. The Appellants submitted that the TPB's stance was essentially to "do nothing", prefer the *status quo*, and move the goal posts.

The TPB argued that the fact there were numerous schemes and improved schemes did not of themselves, satisfy the planning intention. And that the Appellants are solely responsible for delays following the Approved Henderson Scheme. The Appellants made many changes to their proposals, which necessitated a new planning application, rather than applying for extensions of time repeatedly, to extend the Approved Henderson Scheme. That Scheme expired on 19 December 2010, but was the subject of four applications for extensions of time, which were ultimately withdrawn on 8 September 2017 (Agreed Statement of Facts para 7).

57. It would not be right to put all the blame on one side. In essence, both sides are to some extent to blame:-

(1) We have serious doubts whether Application A (although a substantial improvement over the Approved Henderson Scheme from an ecological viewpoint) accorded with the planning intention. Application B was much improved and an entirely new scheme. Hence, our indication at the hearing that Application A should be withdrawn and rightly so. For instance, it is far from clear whether Application A satisfies the criteria of "minimum pond filling".

- (2) Application B accords with the planning intention, at least as a matter of evaluation, and fact and degree. But approval of Application B was wrongly refused, and unwittingly delayed and obstructed by AFCD and the PlanD.
- (3) There is some force in the Appellants' argument on Government's stance of do nothing, and preferring the *status quo*. For instance, preferring that "wise use" continues, purportedly under the Ramsar Conservation, and of moving the goal posts.
- (4) The TPB is correct that devising more than one scheme or an improved scheme does not of itself, satisfy the planning intention. But this would disregard the key features and ecological benefits from Application B, and why these were proposed – especially after the PlanD's and AFCD's *own* advice and guidance referred to earlier. We compare Applications B and A later.

F4. Experts' duties

58. An expert's duties to a court or tribunal are well-established:-

- (1) An expert witness has an overriding duty to help a court or tribunal impartially and independently in any legal proceedings, on matters relevant to the expert's area of expertise.
- (2) An expert must be *aware* of his or her primary and overriding duty to help the court or tribunal and seek to comply with that duty. See for instance, *Field v Leeds C.C.* (1999) 32 H.L.R. 618 (C.A.) (at 623) which this Appeal Board brought to the TPB's attention. That case concerned an expert witness who was a party's employee or engaged "in house".
- (3) An expert must not be biased or reasonably perceived as not independent; must not be an advocate for a party; nor provide expert evidence that is incomplete or inaccurate without some stated qualification.

59. By oversight, while two of the TPB's experts, Ms. Chow and Ms. So each made three witness statements, none of these contained the usual and necessary expert declaration set out in the Expert witnesses' Code of Conduct at *Appendix D to the High Court Rules*. The witness statements of the TPB's other ecological expert Mr. McInnes, contained the necessary declarations. In other words, the TPB lodged a total of six experts' witness statements from two experts, all of which omitted an expert's usual and necessary declaration. Further, on the

face of such witness statements, it was not apparent that such experts were *aware* of the duties above and sought to comply with such duties, at the time they made such witness statements. The Appeal Board pointed out these surprising omissions during the hearing [T-10/5-8]. Such declarations were necessary, and not mere formalities. Any tribunal should be satisfied that an expert witness is *aware* of and seeks to comply with his or her overriding duty to help the tribunal on matters relevant to one's area of expertise, *when* he or she made a witness statement or expert report.

As we pointed out, even if an expert witness subsequently makes a corrective witness statement with the necessary declaration, this was not conclusive but would go to the weight to be attached. The TPB was invited to elect whether to produce a signed expert's declaration without amending any of the substance of such witness statements, or to seek to amend in any way the substance of such witness statements. The TPB elected for the former.

As stated during the hearing, we urge all parties to appeals before the TPAB to seriously consider obtaining advice from Counsel on the merits and evidence well *before* any appeal hearing – to avoid or minimize the risk that a particular point (as here, with the expert's declarations) may be overlooked, or only spotted at the hearing - whether on the evidence, procedure, the law, or the merits. And especially when as here, an appeal involves expert evidence, and is of some complexity. Parties and Government departments are usually careful with expenditure. If an advice on merits and evidence is obtained in good time, this may assist in the public interest, in some appeals being settled, or the issues narrowed – and to avoid the risks above. Conversely, without an advice on merits and evidence in good time, it may be too late at the hearing, to properly redress certain matters, e.g. gaps in the evidence. This may also impact on the Appeal Board's evaluation of the merits, and the weight to be attached to a particular witness' evidence. Independent Counsel instructed should form an overall view, well before the hearing. It may also be that if such an advice is obtained in good time, on mature reflection, certain arguments may not be taken or pursued at the hearing as less persuasive, or not credible.

60. As to the Appellants' expert witnesses (Dr. Leven, Mr. Leader and Ms. Hoi):-

- (1) Their witness statements contained the necessary expert's declaration. Again, this was not conclusive, but relevant to weight.

- (2) The TPB argued that the Appellants' expert witnesses were similar to employees (like Ms. Chow and Ms. So), and were presumably remunerated on a commercial basis.

With respect, we are not aware that it is usual or common for expert witnesses to act unremunerated. Or that it is a usual or good ground for objection that because such expert is remunerated, this is a ground for attacking independence or impartiality. The Appellants' experts did not make reports containing such declarations when they appeared before the TPB to present the Applications under *s.16 TPO* or on review under *s.17 TPO*. At those stages, such Applications were not on appeal. The Appeal Board pointed out by analogy, that the TPB's Counsel were likely remunerated on a commercial basis. But this was no logical basis for questioning Counsel's impartiality or independence.

- (3) It was never fairly put to any of the Appellants' expert witnesses that they were not independent or their independence was compromised – because they were retained on a commercial basis.

We conduct the weighing up process for all witnesses in section I below.

G. General approach to town planning appeals and permission

G1. Onus of proof and TPAB's role

61. As to onus of proof, an appellant has the burden of showing on a balance of probabilities, that an appeal should be allowed and there are no good reasons for refusing planning permission.

62. As to the TPAB's role:

- (1) The TPAB's role is to exercise independent planning judgment within the parameters of the approved plan. The Appeal Board is not bound by the TPB's decision, and an appeal is a *de novo* hearing.
- (2) It may substitute its own decision for that of the TPB even if the TPB did not strictly commit an error on the material before it. Hearings before the Appeal Board are normally much fuller and more substantial than before the TPB of a review under *s. 17 TPO*.
- (3) The TPAB's role is not limited to those on judicial review as it is concerned with the merits. Moreover, the TPAB should:-

- (a) ask itself the right and relevant questions and take reasonable steps to acquaint itself with the relevant information to enable it to answer them correctly;
- (b) take into account all relevant considerations and ignore irrelevant ones;
- (c) decide whether a proposed development is desirable in the public interest, within the parameters of the relevant plan: see *British Railways Board v Secretary of State for the Environment* [1994] J.P.L. 32, per Lord Keith (at p. 133):

“The function of the planning authority was to decide *whether or not the proposed development was desirable in the public interest.*” (emphasis added).

- (4) On appeal, an Appellant does not strictly need to show planning benefit, as opposed to lack of planning harm in view of relevant planning policies and material considerations, compared to nothing being done in the circumstances: see *R. (On the application of Mount Cook Land Ltd) v Westminster CC* [2004] 2 P and CR 405 (C.A.), per Auld LJ at [38]:-

“The Council had an obligation to consider Redevo’s application on its own merits, having regard to national and local planning policies and any other material considerations, and to grant it *unless it considered the proposal would cause planning harm in the light of such policies and/or considerations*” (emphasis added).

We seek to apply the principles above.

G2. Matters for planning judgment

- 63. As the Privy Council held in *Henderson Real Estate* (above), matters for planning judgment are for the Appeal Board and not the court which should not interfere (at 267H). Planning judgment includes what constitutes “low-rise, low-density development”; whether appropriate measures are taken to minimize impact on the environment (at 267G-H); the scale of any residential development (268F–G); and the mere number of floors or number of residents (at 266B).

- 64. There are statements to similar effect in appellate authorities which reflect the Court’s view on what constitutes matters for planning judgment, and why the Court is reluctant to interfere:-

- (1) *Mount Cook Westminster CC* [2004] 2 P and CR 405 (C.A.) per Auld L.J. at [33]:-

“When approaching the matter as one of likelihood or real possibility, as I have already indicated, it may often be *difficult to distinguish between the concepts* of

materiality and weight; and both, particularly weight, are essentially matters of planning judgment” (emphasis added).

(2) *Hysan Development Co Ltd v Town Planning Board* (2016) 19 HKCFAR 372 per Ribeiro PJ at [116]:-

“The Court may for instance, be satisfied that he had *special access to information; special expertise* in its assessment; or *an overview* enabling him to assess competing and possibly prior claims for scarce resources. The Court might also refrain from intervening because the measure reflects a *predictive or judgmental decision which it was the institutional role of the decision maker to take* and as to which *no single “right answer”* exists” (emphasis added).

G3. Material considerations

65. The Appeal Board should consider all material considerations, although matters of materiality and weight are essentially matters of planning judgment for the Appeal Board:-

65.1. TPB Guidelines: it is common ground these should be followed, unless there is good or cogent reason.

65.2. Distinction between plan making, and planning permission: this well established distinction appears in the cases. On appeal, the Appeal Board is concerned with the latter situation only.

65.3. Distinction between granting planning permission, and its implementation: this distinction is well established. See *British Railways Board v. The Secretary of State for the Environment* [1994] J.P.L. 32 (HL) at (p.38):

“... there was *no absolute rule that the existence of difficulties*, even if apparently insuperable, *had to necessarily lead to refusal of planning permission for a desirable development*. A would-be developer might be faced with *difficulties of many kinds* ... If he considered that it was in his interests to secure planning permission notwithstanding the existence of such difficulties, it was not for the planning authority to refuse it simply on their view of how serious the difficulties were” (emphasis added).

65.4 Preventive and mitigation measures: these principles are relevant:-

(1) Such measures should be practical and feasible: see the *EIAO – TM* (para 23.11 above) at §5.4.1¹¹:-

“the general policy for mitigating impacts on important habitats and wildlife, in the order of priority are:-

¹¹ [F/113/6186]

- (a) **Avoidance**
Potential impacts shall be avoided to the maximum extent *practicable* such as adopting suitable alternatives (i.e. change of site, design construction, method, alignment, layout, programme, etc.) ...
- (b) **Minimizing**
Unavoidable impacts shall be minimized by taking *appropriate and practicable measures* such as transplanting important plant specimens, confining works in specific area or season, restoration (and possibly enhancement) of disturbed areas, etc.
- (c) **Compensation**
The loss of important species (e.g. trees) and habitats (e.g. woodland) *may be provided elsewhere (on-site or off-site)* as compensation. Enhancement and other conservation measures shall always be considered, whenever possible” (emphasis added);

- (2) Such measures should be sufficient or adequate: see *FLW Judgment* at [116] per Au JA:-

“The assessment in this case was conducted on the basis of the factual situation of the site as known and the proposed development thereon, measuring the different impacts between the two scenarios, accompanied by proposed mitigation or compensation measures that would reduce the impacts (if any) identified. The decision-maker’s task was to assess the information pertaining to such scenarios *to see if they are adequate and feasible*. The approval was granted on the premise that the proposed mitigation or compensation measures would be implemented (by way of approval conditions in the context of the TPO and conditions in the environmental permit in the context of the EIAO). There is nothing wrong with the TPB accepting (on the recommendation of the DAFC) that the proposed development and the proposed measures in the Draft HCMP would be sufficient to ensure that there would be “no-net-loss in wetland” function in this case” (emphasis added).

- (3) The NSW OZP Explanatory Statement (at para 7.2.1) states there should be “*minimal* adverse impact” (emphasis added), not no adverse impact:

“The Mai Po Nature Reserve and the adjoining fish ponds form part of the wetland system and wildlife habitats in the Deep Bay Area providing an extensive area of undisturbed feeding and resting habitats for migratory birds. In order to preserve and sustain Mai Po Nature Reserve and the wildlife habitats in the areas surrounding the Deep Bay Area, new development proposals should not be allowed unless it can be demonstrated that it would have *minimal adverse impact* on drainage, sewerage, traffic, environment and ecology in the area” (emphasis added).

G4. Other regulatory regimes; sufficiency of information

Other regulatory regimes

66. The TPB argues it would be a “fundamental error” to defer consideration of essential requirements such as “no-net-loss” to another regime; that the situation in this case is fundamentally distinguishable from the English cases – there is no government policy that the *EIAO* regime should not duplicate the consideration of environmental issues at the planning stage, and the planning documents for the “OU(CDWEA1)” zone expressly require the TPB (and the Appeal Board) to satisfy itself that ecological issues are addressed and the “*no-net-loss in wetland*” requirement is met. It is part of the planning intention, and it would be a fundamental error to defer consideration of these requirements to other regulatory regimes.

But the position is more nuanced than the TPB argues. Having carefully considered the numerous cases referred to on the appropriate approach to other regulatory regimes, and sufficiency of information, some common sense principles are derived.

67. (1) First, planning authorities are entitled to rely on the operation of other statutory controls “with a reasonable degree of competence on the part of the responsible authority”. A planning authority should consider the likely significant effects, rather than every conceivable effect, as mistakes may occur in any system of detailed controls: *R v. Rochdale Metropolitan Borough Council, ex parte Milne* [2001] Env. L.R. 406 at [128] per Sullivan J:-

“In assessing the likely significant environmental effects of a project the authors of the environmental statement and the local planning authority are *entitled to rely on the operation of those controls with a reasonable degree of competence on the part of the responsible authority*. ... Mistakes may occur in any system of detailed controls, but one is identifying and mitigating the “likely significant effects”, not every conceivable effect, however minor or unlikely, of a major project” (emphasis added).

- (2) Second, material considerations are not rendered immaterial by the existence of another statutory control. The extent that matters arise for consideration in the exercise of another control regime may be treated as exclusively for the other regime, depending on the circumstances: see *Lethem v Secretary of State for Transport, Local Government and the Regions* [2003] 1P and CR 9 at [20] per George Bartlett Q.C.:-

“The essential point, in my judgment, is that a consideration that, in the absence of some other statutory control, would be a material consideration under s.70 is

not rendered immaterial by the existence of that other statutory control. The extent to which, on application for planning permission, matters that would arise for consideration in the exercise of some other control regime should be treated by the planning authority in determining the application as ones exclusively for that other regime *must depend on the circumstances*” (emphasis added)

Here, there is *no* serious suggestion that ecological or environmental matters before this Appeal Board should be *exclusively* dealt with by the relevant authority under the *EIAO*.

- (3) Third, it is permissible for a decision maker in planning decisions to contemplate the likely future decision that another statutory authority will take where they have the interests of the environment as one of their objectives: see *R (On the application of Blewett) v Derbyshire CC* [2004] Env LR 569 per Sullivan at [59] citing from the Court of Appeal decision in *Smith v Secretary of State for the Environment* 2003 EWCA 262:-

“Waller L.J. continued in para [33] of his judgment:-

“In my view it is a further important principle that when consideration is being given to the impact on the environment in the context of a planning decision, it is *permissible for the decision-maker to contemplate the likely decisions that others will take in relation to details where those others have the interests of the environment as one of their objectives.* The decision-maker is not however entitled to leave the assessment of likely impact to a future occasion *simply because he contemplates that the future decision-maker will act competently.* Constraints must be placed on the Planning Permission within which future details can be worked out, and the *decision-maker must form a view about the likely details and their impact on the environment*” (emphasis added).

Thus, the TPB (and TPAB) is not entitled to leave the assessment of likely ecological or environmental impact to a future occasion “simply because he contemplates that the future decision maker will act competently”. The TPB (and TPAB) should form a view of the likely decision of another statutory authority entrusted with environmental objectives, and of the likely environmental impact.

68. It follows from the analysis above:-

- (1) Any adverse environmental (or ecological) impact is at least a material consideration.

- (2) Similarly, the fact there is another regulatory regime entrusted with environmental objectives, and which operates outside the planning law regime, is also a material consideration on practical steps to avoid, minimize, and compensate for such impacts.

We will apply these principles to the particular facts.

Sufficiency of information

69. Two important principles are stated at the outset:-

- (1) First, it is generally a matter for the decision maker rather than the court, subject to *Wednesbury* review, to decide on the manner, and intensity of inquiry to be undertaken into any relevant factor: see *Smart Gain Investment Ltd v Town Planning Board*, unreported (6 November 2007) HCAL 12 of 2006 and HCAL 12 of 2007 per A. Cheung J (as he then was) at [87]:-

“It is of course true to say, as has been pointed out by Laws LJ in *R (Khatun) v Newham London Borough Council* [2005] QB 37, 55 (para 35), that it is for the decision-maker and not the courts, subject to *Wednesbury* review, **to decide upon the manner and intensity of inquiry to be undertaken** into any relevant factor accepted or demonstrated as such” (emphasis added).

- (2) Second, it is usually a matter of professional judgment, what information is required to be contained in an EIA report: see *Ho Loy v Director of Environmental Protection*, unreported, HCAL 20 and 21 of 2015, 22 December 2016 at [58] per Chow J (as he then was):-

“In this regard, one should also not lose sight of the fact that “although it is a matter of construction for the court to decide what is required by the [Technical Memorandum] or [Study Brief], it is **often a question of professional judgment what information is required to be contained in an EIA report** to enable the Director to perform her duties. In that case unless the judgment is *Wednesbury* unreasonable, the court is not entitled to interfere” (*per* Tang VP, as he then was, in *Chu Yee Wah v Director of Environmental Protection* [2011][5 HKLRD 469, at paragraph 84]” (emphasis added).

We respectfully agree. The same principle would apply on what information is required to be contained in an EcoIA.

70. As to the appropriate approach to sufficiency of information, there is English authority that the difficulty of assessing sufficiency of information for a project which requires a degree of

flexibility, is not a reason for frustrating their implementation: see *R. v. Rochdale Metropolitan Borough Council, ex parte Milne* [2001] Env. L.R.22_per Sullivan J. at [90]:-

“The assessment process may well be easier in the case of projects which are “fixed” in every detail from the outset, but *the difficulty of assessing projects which do require a degree of flexibility is not a reason for frustrating their implementation*” (emphasis added)

As seen below, the planning intention under the OZP’s PPP approach is intended to be pragmatic. Thus, some flexibility is necessary as a matter of principle and common sense, in assessing the sufficiency of information.

71. On the English courts’ approach in planning cases when regulations require “full information”, these propositions are relevant on sufficiency of information:-

(1) The focus is on such information as can reasonably be obtained at that particular stage, as to the likely significant effects, rather than an abstract threshold level of detail, or every conceivable scrap of information – which would not assist a planning authority, and would merely serve to obstruct development to no good purpose: see *R v. Rochdale Metropolitan Borough Council, ex parte Milne* [2001] Env. L.R. 22 per Sullivan J. at [94]:-

“The directive seeks to ensure that as *much knowledge as can reasonably be obtained*, given the nature of the project, about its likely significant effect on the environment is available to the decision taker. It is *not intended to prevent the development of some projects* because, by their very nature, “*full knowledge*” (in the sense of an abstract threshold level of detail) is not available at the outset” (emphasis added).

The focus is on a reasonable approach, and not a theoretical one.

(2) Environmental statements as to every environmental effect would be so voluminous there is a real danger to the public during consultation, and to the planning authority, of “losing the wood for the trees”: *R v. Rochdale* (above) per Sullivan J. at [113]:-

“An environmental statement that attempted to describe every environmental effect of the kind of major projects where assessment is required would be *so voluminous that there would be a real danger of the public during consultation, and the local planning authority* in determining the application, “*losing the wood for the trees*” (emphasis added).

- (3) It is for a planning authority to decide if it has sufficient information on material considerations. The courts usually defer to a planning authority's judgment "in all but the most extreme cases". *R v. Rochdale* (above) at [108]:

"It is for the local planning authority *to decide whether it has sufficient information in respect of the material considerations*. Its decision is subject to review by the courts, but the courts will defer to the local planning authority's judgment in that matter *in all but the most extreme cases*" (emphasis added).

- (4) Thus, decision-makers are entitled to have regard to a range of considerations, including how far down the chain of causation an impact may have; the probable level of impacts; and any relevant regulatory regime: see *Atkinson v Secretary of State for Transport* [2007] Env. L.R. 561 per G. Bartlett Q.C. at [33]:-

"It is to "significant effects" and "the main effects" that the ES is to be directed. What *effects are significant and what are the main effects are essentially matters of judgment*, and this question, as well as the question *whether the ES adequately provides the information* in relation to them, *is for the Secretary of State*: see *Berkeley v Secretary of State for the Environment* [2001] 2 A.C. 603. In making the judgment that he is required to make in determining the adequacy of the environmental information, the decision maker, it seems to me, *must be entitled to have regard to a range of considerations*. They would include *how far down the chain of causation* a possible impact might occur; the *probable level of impact*; and any relevant regulatory regime. All these matters, in my view, could properly be taken into account by the decision maker in forming a view as to the adequacy of the environmental information" (emphasis added).

These principles accord with the court's approach on matters for planning judgment, where the court does not interfere (paras 63 to 64 above).

72. These principles are relevant to whether Application B accords with the planning intention as a matter of fact and degree, and planning judgment.

73. We have carefully considered the EPD's EIAO-TM (para 23.11 above). In so doing, we have not deferred decision making to the EPD, but should have regard to the sufficiency of information and steps, that are envisaged under the EIAO-TM. We highlight several points from the EIAO-TM:-

- (1) As to Annex 16 "Guidelines for Ecological Assessment", para 1.2 states the objectives:-

"The main objective of ecological assessment is to provide *sufficient and accurate ecological data* to allow a complete and objective identification

prediction and evaluation of the potential ecological impacts. The *methodology used may vary from case to case depending on the natural environment to be affected and the nature and scale of the project*” (emphasis added).

- (2) On the appropriate approach on ecological evaluation in assessing impacts, as a matter of value or professional judgment, para 5.3 states:-

“Impact significance is a product of the magnitude and scale of an impact and the asserted importance of the species or habitat(s) likely to be affected. However, it shall be noted that *evaluating nature conservation interest is a difficult and complex process. Value or professional judgment are involved.* Nevertheless the conservation value of a site or species and hence the significance of an impact shall be evaluated as systematically *as practicable* using well defined criteria. The general criteria used are shown in Annex 8” (emphasis added).

- (3) As to impact mitigation, para 5.4. is set out (para 65.4(1) above), with emphasis on practical and feasible steps.

There are detailed substantive and other requirements which should be observed before an EIAO report may be approved. Hence, the comprehensive EIAO Study Brief for the project in May 2012 highlighted among the contemporaneous documents (para 25 above).

74. These *EIAO Guidance Notes* are relevant:-

- (1) No. 6 of 2010: “*Some Observations on Ecological Assessment from the Environmental Impact Assessment Ordinance Perspective*”.

As to the presentation target (para 4):-

“The EIA process in Hong Kong is very transparent and open. The ecological assessment should therefore be *written and presented in easily understandable language* such that *any member of the public could grasp the essence of the findings and participate* in the discussions. In short, the target of the presentation should *not be restricted to the experts*” (emphasis added).

The emphasis is on language easily understandable by the public, and not experts only.

- (2) No. 7 of 2010: *Ecological Baseline Survey for Ecological Assessment*. On underlying principles, para 2.1. states:-

“In addition, efforts should also be focused on locations or target taxa groups *where impacts are likely to be significant*. On the other hand, it would ***not be practicable or cost-effective*** for the baseline survey ***to provide exhaustive ecological information*** of the study site, as collection of a *great deal of data with little focus does not facilitate subsequent ecological assessment*” (emphasis added).

The enquiry is on location or target groups where “impacts are likely to be significant”, rather than unlikely, or not significant. And caution against too much data “with little focus”, which does not assist subsequent ecological assessment.

75. We bear in mind the principles above on another regulatory regime and sufficient information, which appear broadly consistent with the approach in the EIAO-TM.

G5. Planning conditions

76. There is no dispute that any planning condition must be for a planning purpose; fairly and reasonably relate to the proposed development; and be reasonable. The TPB argues that planning conditions are only appropriate for requirements which are not necessary or essential under the planning intention, citing *FLW*. The reason is to be practical and flexible, when more or updated information is appropriate.

77. Applying the *FLW judgment* which is binding as a High Court decision unless and until set aside:-

(1) The TPB’s argument above appears correct. We understand the TPB is arguing on appeal in *FLW* that there should be more flexibility, depending on the circumstances of each case. That is a matter for argument before the Court of Appeal.

(2) We note in *FLW*, Au JA referred at [78] to “mere implementation details that can be disposed of by way of conditions”.

We do not believe Au JA was saying that conditions can *only* concern such details, but as an example.

Any doubts on the effectiveness of the proposals are not relevant at this stage because of the well-settled distinction in planning law between the grant of planning permission and implementation.

Some conditions may not need to be imposed if the “no-net-loss in wetland” principle could be fully and effectively implemented, with no adverse impact.

(3) The Appeal Board does not have to decide if the proposed mitigation measures could be effectively implemented for the “no-net-loss in wetland” principle to be met: see *FLW judgment* at [116] cited above (para 65.4(2)).

In *FLW*, conditions were imposed concerning the HKBWF and their habitat. The TPB’s power to impose other conditions was not challenged, and may be imposed on this appeal, if we see fit. The *FLW* application was approved with 17 planning conditions (see [41] of *FLW* judgment, one of which related to the *HKBWF*, as here): see *FLW* at [38(2)]:-

“38. As for the DAFC:-

(2) She was also satisfied with the further information submitted with respect to the Hong Kong Bent-winged firefly, which had largely addressed the AFCD’s comments. It considered that the aforesaid responses *should be included in a revised environmental impact assessment, which should be addressed by way of approval conditions*” (emphasis added).

(4) The Final EcoIA,¹² the 242 Final CM Plan,¹³ 242 Final VIA¹⁴ and “Updated Firefly Study”¹⁵ have done much the same thing, i.e. contain sufficient or adequate and necessary details demonstrating on a balance of probabilities, that there will be “no-net-loss in wetland.” Any alleged inadequacies or further details should be dealt with by approval conditions. We deal with the HKBWF in detail later.

H. The planning intention

H1. Scale and intensity; location; context and purpose

Scale and intensity

78. We have already considered scale and intensity when considering consistency and fairness earlier.

79. We add two observations:-

(1) First, the NSW OZP has several different zones:

“Other Specified” uses – “OU”

“Green belt” – “GB”

“Conservation area” – “CA”

“Residential” – “R(D)”

¹² [CB3/25/5003-5289]

¹³ [CB3/26/5290-5376]

¹⁴ [CB4/27/5528-5553]

¹⁵ §7.6 of Appendix 1, MRL-FSWS [WA-7/1.1/24]

These are more detailed than the DA Plans, at the time of the Privy Council's Decision. NSW was not zoned "Conservation area" as this would not facilitate the approved development, and would be too prohibitive. Thus, the planning intention for other zones in NSW does not apply to the proposed development. The AFCD's Ms. Chow argues there is "an *urgent need to conserve fish ponds and aquaculture in Hong Kong*" (Supplemental Statement para 44, emphasis added).

With respect, this is not the planning intention.

- (2) Second, the NSW OZP has *no* site coverage, plot ratio, or height restriction (in terms of number of floors, or height). The rationale was evidently to improve design, flexibility, and minimize pond filling. As the PlanD's Mr. Yip frankly states (his Supplemental Statement, para 2.5):-

"Further, the fact that TPB did ***not impose specific restrictions on site coverage and building height*** on the zone was *to encourage the Appellants to minimize pond filling* as far as possible and ***to improve design flexibility***. This is because imposing restrictions on building height and site coverage would *constrain the options available to the Appellants* in designing a scheme which would meet the planning intention and minimize the filling of ponds, including the ***possibility of taller buildings with low site coverage to minimize the development footprint and extent of the pond filling***" (emphasis added).

Moreover, it was decided to maintain the same GFA as the Approved Henderson Scheme, and not a lower GFA because *if a lower GFA* was imposed:-

"it would ***not provide a sufficient incentive*** to the developers ***to devise a better scheme*** than the one approved under the 1994 Permission" (Mr. Yip's Supplemental Statement, para 2.3, emphasis added).

Two points are noted:

- (a) It was entirely pragmatic to have positive measures and incentives – there was no intention to blow hot and cold, or to apply an approach that was theoretical or impractical. If the planning intention was to have a maximum in site coverage, plot ratio, or height, this would have been expressly stated in the OZP, as with the maximum GFA.
- (b) The PlanD's acceptance of the reason above for a maximum GFA undermines Mr. Yip's assertion that *if* the GFA was reduced, there was a "better chance" of planning approval (para 50.1 above).

Thus, a “limited” development was in the context of the small percentage of the development footprint compared to the entire site: see **18 December 1998** TPB meeting (para 23.12 above, paras 88 to 89 below).

80. As to “low density” residential development in NSW under the OZP Notes:-

(1) The Appellants argue:-

- a. In context, “low-density” means the GFA up to those stated in the “Remarks” (at para (b)) and the Explanatory Statement (at para 9.7.4), i.e. “not in excess of the maximum GFA specified”: domestic GFA of 306,581 m², commercial GFA 5,000 m², and clubhouse with GFA of 8,000 m². Thus, there is “low-density” private residential development as these do not exceed the maximum GFA.
- b. The GFAs are the *same* as these permitted in the Approved Henderson Scheme which the Appeal Board decided was “... *low-density*”: see TPA 13/1993 (at paras 37(b), 74 to 76), affirmed by the Privy Council.
- (c) The “OU(CDWEA)” zone alone has an area of about 121.9 ha which produces a plot ratio of 0.262 for the NSW Portion. This is already lower than that in the Approved Henderson Scheme of 0.317, which was held by the Appeal Board to be “low-density”. Moreover, the plot ratio for the total Development Site is 0.179: see **Appendix 2**.

(2) The TPB argues:-

- a. The reference to maximum GFA is a cap on the amount of floorspace that can be developed under the NSW OZP and is subject to the Appellants demonstrating compliance with all the other requirements imposed by the NSW OZP.
- b. There is “no guarantee” that such maximum domestic GFA may be achieved or approved, especially as the Approved Henderson Scheme is no longer extant such that “circumstances pertaining thereto became spent”.
- c. The Appellants have treated the maximum GFA as an “entitlement” or “guarantee” and:-

“there is *no evidence* that they have *ever contemplated any form of residential development which provides less than 306,581 m² of residential floorspace*” (TPB’s Opening para 58, emphasis added).

d. Application B is not “low density” given the design population of 6,500 which “would be intrusive to the rural environment and give rise to adverse ecological impact” (TPB’s Opening para 63).

81. We prefer the Appellants’ arguments on the balance of probabilities, for reasons already given concerning scale and intensity. With respect, the TPB’s arguments mischaracterize the Appellants’ arguments and are not fairly advanced:-

- (1) While there is no absolute guarantee or unconditional entitlement that all the maximum GFA may be used, the key question is whether the planning intention is satisfied. If satisfied and appropriate practical steps are taken on impact mitigation (avoidance, minimizing and compensation) there is no rational reason to reduce the GFA. Conversely, if the planning intention is not satisfied, planning permission should be refused.
- (2) The argument that the Approved Henderson Scheme having lapsed is thereby “spent” is incorrect, for two reasons. First, it ignores the approved NSW OZP which provides the *same* maximum GFA. Second, it is undermined by the TPB’s *own* acceptance that the Approved Henderson Scheme gave rise to “an *accrued right ... which would not be affected by any subsequent change*” (para 22(1) above (emphasis added), TPB’s Closing para 31(b)).
- (3) The argument that the Appellants could and should have considered a development with less GFA misunderstands and departs from the planning intention.
- (4) The suggestion that a design population of 6,500 would not be “low density”, misunderstands the planning intention, read objectively. It would also result in unnecessary uncertainty, which cannot sensibly have been the planning intention. Indeed, a design population of 6,500 is significantly less than under the Approved Henderson Scheme of 9,129: see **Appendix 2**.
- (5) The TPB’s argument also falls foul of the Appeal Board’s Decision in TPA 13/1993 (at para 76) which we endorse:-

*“population is not the issue but **the management of human activity**”* (emphasis added).

82. As to height, the TPB argues it “does not matter” whether a scheme is “a la pancake” or “a la pencil”. The question is whether it satisfies the planning intention (TPB’s Response para 16).

With respect, this argument is unrealistic, and theoretical. It also ignores the contemporaneous documents showing the PlanD's and AFCD's advice and guidance to the Appellants which was intended to be, and was acted on (paras 22(3), 26.12 above). Those Government departments sought a smaller development footprint (as with FLW as a reference). Logically, they accepted there would be a smaller number of buildings, of taller height, and over a smaller area, which would be preferable from an ecological viewpoint (para 50.2 above).

Location

83. We have dealt with the appropriate location at para 50.3 above when considering consistency and fairness. We focus on the proposed location, and it is strictly unnecessary to consider alternative locations.

Context and purpose

84. We highlight the following key documents in chronological order, in the period leading up to the OZPs, as relevant to context (factual or legal) and purpose of the approved OZPs:-

Fish Pond Study

85. First, the Fish Pond study in **September 1997**. We make two points by overview:-

- (1) It considered zoning "for conservation use" (para 3.2.26), such that there would be a presumption against development. Ultimately, the NSW Portion was not so designated and no such presumption arises.
- (2) The recommendations were "based purely on ecological considerations" (para 6.1.2). It was recognized:-

*"other planning implications (such as transport, infrastructure, **land management and development needs** etc. have **not been taken into consideration**" (para 6.8.4) emphasis added.*

86. Several additional points are noted:-

86.1 The primary objective was to ascertain the ecological value of fish ponds in the Deep Bay:-

*"to **wildlife, especially birds**, and to the wetland ecosystem" (para 1.3.2, emphasis added).*

86.2 As to the wildlife in question in the Fish Pond Study:-

- (1) The fishponds “support a *variety of wildlife*, including mammals, insects, and birds” (para 2.4.7, emphasis added).
- (2) Birds “have been *chosen as the key indicator*” (para 4.2.3, emphasis added). A distinction is drawn between Ardeids (such as Herons and Egrets) (para 4.2.4), and all other birds – the former being:-

“the main species dependent on the fishponds and are recognized as regionally important species” (emphasis added).

86.3. As to the appropriate approach, the precautionary principle is referred to in the then absence of scientific knowledge of detailed ecological functions such that the *status quo* should be maintained.

We deal with the precautionary approach later and note Dr. Leven’s evidence (his Statement para 68) that this approach was not intended to allow the *status quo* in perpetuity, especially when there are changes in the wetland. Importantly, the Study recognized:-

“the only use found to perform better than the existing ponds was a wetland wildlife reserve” (para 6.5.14, emphasis added).

86.4. As to habitats and locations, birds tend to visit fishponds in a very heterogeneous pattern which means:-

“different ponds are preferred by different birds species during specific seasons of the year” (para 4.4.2, emphasis added).

It was noted that the value of fishponds was measured:-

“not only by how they function as individual entities, but should be measured by how they all work together over time as one habitat” (para 4.8.2 emphasis added).

86.5. On the consequences of particular courses of action, it was noted that abandoned fishponds (there were 8 abandoned ponds at the LC site):-

“no longer serve the same ecological function as the operating ponds” (para 4.5.3, emphasis added).

On Dr. Leven’s evidence [T-11/12, 15] which we accept, having regard to the precautionary approach, the less the reduction of area, the better. Thus, the criteria of minimum pond filling, and to minimize potential impacts.

87. The Fish Pond Study is highly relevant to the “no-net loss in wetland” principle considered later. We highlight three points for present purposes:-

- (1) A precautionary approach was intended to protect valuable wetland environment provided by fishponds “*from irreversible damage*” (para 6.2.4, emphasis added.)
For reasons below, we consider that such damage would not arise given likely practical steps to conserve and enhance wetland functions. And sufficient feasible steps on impact mitigation (avoidance, minimizing, and compensation).
- (2) On how there would be no decline in ecological functions served by the fishponds, these were intended to provide “abundant and accessible foods” to Ardeids and other species (paras 6.2.4, 6.5.11), a key aspect of the “no-net-loss in wetland” principle. We consider this below in the context of fish pond enhancement, and long term management.
- (3) The Study also considered having regard to the precautionary principle, conservation of the continuous and adjoining fishpond habitats and “where appropriate *replacement with another wetland habitat* in line with the conservation objectives of wetland in the Mai Po/Inner Deep Bay” (para 6.2.8, emphasis added). This accords with the “no-net-loss in wetland” principle, and a practical approach.

18 December 1998 TPB meeting and 5022 TPB Paper on Fish Pond Study

88. Second, the **18 December 1998** TPB meeting which considered the 5022 TPB Paper on the Fish Pond Study. See para 23.12 above.

The partnership approach and rationale were intended to be pragmatic, by give and take.

89. The TPB meeting minutes for 18 December 1998 made clear that the partnership approach was:-

“to allow *limited private development by filling up a small portion of fishponds, say 5 – 10%, in exchange for the developer’s commitment to manage the remaining ponds within the development site*” (emphasis added).

The crux was on developing “a small portion” of the fishponds and site “say 5 to 10%”, rather than the precise number of apartment blocks or their height.

The meeting minutes (at para 49) acknowledged a member’s practical and common sense view:-

the “5 to 10% area to be developed *had to be large enough in order to be viable, and the remaining area had to be managed well*” (para 49, emphasis added).

The viability of a development impacts on good management for the remaining area, and these should be viewed together.

10 December 1999 TPB meeting

90. Third, the **10 December 1999** TPB meeting (para 23.13 above) considered TPB Paper 5514, the draft NSW OZP, and any objections and comments from the Appellants:-

- (1) The rationale of rezoning was to allow the objectors “*flexibility* to devise an alternative scheme which would be *ecologically-friendlier* and *more compatible with the wetland functions* in the area”, rather than strict adherence to the approved scheme (para 6.1, emphasis added).

Again, the approach and rationale were to be practical.

- (2) As to how much development was permitted and where, the Paper states (at para 6.2):-

“*All domestic and commercial development and ancillary recreational facilities should be located at the landward fringe --- farthest away from Deep Bay*” (emphasis added).

The intention was that *all* and not some, of the permitted GFA would be at that location. There was no hint of a discretion to reduce the permissible GFA, on what legal basis, and by how much.

The meeting minutes (at para 94) referred to rezoning:-

“with *the same level of development intensity* as that approved by the TPAB” (emphasis added).

This applied considerations of consistency and fairness, as a result of accrued rights arising from the Approved Henderson Scheme.

7 February 2002 ACE meeting

91. Fourth, how the “no-net-loss in wetland” principle is applied in practice, is usefully shown in the LMC wetland development summarized in the ACE meeting minutes on **7 February 2002**. See para 23.15 above.

The approach and objective was to increase the fish ponds “*carrying capacity through enhancement measures* in a sustainable manner to ensure that *no-less number of birds* would continue to use the area in question” (paras 2 to 3, emphasis added).

This is essentially the same approach as that used by the Appellants' ecological experts on this appeal, who attended that ACE meeting and advised KCRC, and is considered below.

November 2004 NNCP

92. Fifth, on the NNCP in **November 2004**, see para 23.16 above. We highlight:-

- (1) The approach and rationale was to be “practicable”, “more practicable” (para 4(b)).
- (2) A key objective was “*enhanced* conservation”, and not the *status quo*.
- (3) It was noted that various approaches were “impractical” (para 14):-

“In view of the financial *and land resources implications* and the implementation complexities and difficulties involved, we still consider that *land resumption, land exchange, and off-site mitigation measures are impracticable*” (emphasis added).

As these measures were impractical, more practical alternatives were pursued.

- (4) The reference to “less ecologically sensitive portion” and “more ecologically sensitive” (para 17) was for comparison, and did not refer to “least ecologically sensitive”. Objectively, more than one location may be “less ecologically sensitive”. It is unnecessary and impractical, for there to be only one location which is “less ecologically sensitive”.
- (5) Sustainability implications were noted (at para 37). These were “two new measures”, the “*public partnership approach*”, and *Management Agreements* which:-

“to ***encourage support and participation*** of key stakeholders, including *landowners, developers* and NGOs, in conserving ecologically important sites, and are consistent with the “partnership principle of sustainable development, ... ***incentives are provided to attract them into implementing the options***” (emphasis added).

Encouragement, incentives, and implementation are all part of a pragmatic approach.

H2. “No-net-loss in wetland” principle; TPB’s Guidelines 12C

“No-net-loss in wetland” principle

93. Two points are apparent from the NSW OZP, which are set out earlier from the Agreed Statement of Facts (at para 14c) (para [7] above).

94. First, the express aim of the NSW OZP in the Notes is the “*conservation and enhancement of the ecological value and functions of the existing fishponds or wetland*” (emphasis added).

We note:-

- a. The planning intention includes “enhancement” and “no decline in the wetland functions of the fishponds”, and not conservation only, the *status quo*, or any reference to the *Ramsar Conservation* and “wise use” thereunder.
- b. The crux is “the *ecological* value and functions of the fishponds and wetlands” (emphasis added) for wildlife, especially birds, in the context of the Fish Pond Study. There is *no* reference to the fish ponds’ *commercial* value, for sale of fish for human consumption.

95. Second, the express aim is to be achieved “through” several related ways below, in combination. In essence, development of a small part “in exchange” for ecological conservation and enhancement:-

- (1) The “private-public partnership approach”, i.e. *without* Government funding.
- (2) “Low density private residential development” or “passive recreational development” “in exchange for committed long-term conservation and management of the remaining fishponds and wetland”. This is an express *quid pro quo*.
- (3) “subject to the no-net-loss in wetland” principle, considered below.
- (4) Development in a “comprehensive and integrated manner” including with the LC Site and minimum pond filling. Any proposed development should be well planned and co-ordinated.

96. Given the history, and context and purpose examined earlier, the express aim and means were intended to provide incentives to encourage design in an ecologically-friendlier manner. This accords with the Explanatory Statement of the NSW OZP (at para 9.7.6):-

“The “OU(CDWEA1)” zone on this Plan and the “SSSI(1)” zone on Mai Po and Fairview Park OZP are ***primarily to facilitate*** the proposed residential development at Nam Sang Wai with a nature reserve at Lut Chau, Mai Po *granted by the Town Planning Appeal Board* in 1994 and *upheld by the Privy Council* in 1996, *taking into account the Town Planning Board Guidelines* for “Application for Developments within Deep Bay Area”. The proposed nature reserve at Lut Chau should form part of the above development at Nam Sang Wai” (emphasis added).

We note three points:-

- (1) One must have regard to the combined Appeal Site as a whole, and not the NSW or LC Portions in isolation.

- (2) As Mr. Suen S.C. rightly submitted in opening, the PPP approach was “just like a bargain or trading”, “in order not to be too stubborn”, and a “trade off” was necessary “to have a win-win situation”.

Thus, the correct and pragmatic approach under the PPP is not whether there may be *any* adverse impact or disturbance, but a proper balance achieved.

- (3) On Mr. Brownlee’s evidence [T-9/83] which we accept, the *incentives* for a better scheme were to be able to develop the property, using the maximum GFA, while the money to implement conservation and enhancement came from these incentives. Therefore, there was no legally sound reason to reduce the GFA. This would be arbitrary, and contrary to the planning intention, read in proper context.

97. On the key “no-net-loss in wetland” principle:-

97.1 The Appellant contends in *FLW* at [113-114] Au JA accepted the TPB’s argument that the “no-net-loss in wetland” principle refers to no-net-loss in *either* total area *or* ecological functions of the fish ponds.

97.2. The TPB argues that the principle of “no-net-loss” in wetland is objectively intended to refer to no-net-loss in either total area or ecological functions when existing fish ponds are affected by a proposed development in Deep Bay. The emphasis is on the requirement that there should be no-net-loss of the ecological functions: *FLW* at [113(5)].

There is no real difference between the parties on this principle.

TPB Guidelines No. 12C

98. TPB Guidelines 12C provide, *inter alia*, as follows (TPB’s underlining; our *italics* added):-

“INTRODUCTION

1. The Deep Bay, Mai Po Marshes and its adjacent area, [including Hoo Hok Wai] (collectively known as the Deep Bay Area) is recognised as a wetland of international importance. It is a habitat for a variety of species of waterbirds such as herons and egrets, and a stopover point for thousands of migratory birds. The Deep Bay Area comprises *natural and man-made wetlands (rivers, freshwater marshes, fish ponds, gei wais, mangroves and inter-tidal mudflats)* which provide a wide range of habitats to support a high diversity of biota (insects, reptiles, amphibian, birds and mammals). Five sites in the Deep Bay Area are designated as Sites of Special Scientific Interest (SSSI), respectively at Mai Po Village, Mai Po Marshes (including Lut Chau), Tsim Bei Tsui, Tsim Bei Tsui Egretty and Inner Deep Bay. The Mai Po Marshes, the Inner Deep Bay and the surrounding fish ponds have been listed as a “Wetland of

International Importance” (the “Ramsar Site”) under the Convention on Wetlands of International Importance especially as Waterfowl Habitat (the Ramsar Convention) since 1995. Such designation recognises the ecological importance of the Deep Bay Area as a wetland habitat and refueling station for thousands of migratory birds. Under the Ramsar Convention, if a party subsequently deletes or restricts a “Wetland of International Importance”, it should as far as possible compensate for the loss of wetland resources and recreate additional nature reserves for the purpose.

2. ...

PRECAUTIONARY APPROACH TO CONSERVE THE ECOLOGICAL VALUE OF FISH PONDS

3. The ecological value of a habitat is defined as its contribution in sustaining the wildlife communities and essential ecological processes of a wider ecosystem. The Study on the Ecological Value of Fish Ponds in the Deep Bay Area (the Study) completed in 1997 has confirmed the unique international and regional importance of the fish pond system in the Deep Bay Area particularly for ardeids (i.e. herons and egrets). It has established that fish ponds in the area have intrinsic value as they function ecologically as a substantial source of food supply for the birds and as an important habitat for roosting and foraging of waterbirds. The fish pond system is fundamentally linked with the Mai Po Marshes and is part of the Deep Bay Area wetland ecosystem... Different ponds are used preferentially by birds in different seasons, and it would be difficult to justify removal of certain individual fish ponds. Higher bird usage was observed to correlate with ponds which are contiguous to each other and with a greater and continuous area as against fragmented and isolated ponds. Developments resulting in the loss of fish ponds would reduce the food source to birds and certain developments adjoining or in the vicinity of fish ponds with disturbance impact, in particular open storage uses, industrial uses, dispersed village type development and roads, would lead to a reduction in bird usage.

4. A “precautionary approach” has been adopted by the Board in view of the known intrinsic value of fish ponds in ecological terms and the complex response of birds to future landuse changes and carrying capacity which has not been fully understood. The intention is to protect and conserve the existing ecological functions of fish ponds in order to maintain the ecological integrity of the Deep Bay wetland ecosystem as a whole. This “precautionary approach” is formulated with the support of scientific surveys and analysis as provided in the Study.

THE PRINCIPLE OF “NO-NET-LOSS IN WETLAND”

5. In considering development proposals in the Deep Bay Area, the Board adopts the Study’s recommended principle of “no-net-loss in wetland” which provides for the conservation of continuous and adjoining fish ponds. The no-net-loss can refer to both loss in “area” and “function”. No decline in wetland or ecological functions served by the existing fish ponds, especially as a source to provide abundant and accessible food and roosting grounds to ardeids and other species, should occur. As the fish ponds form an integral

part of the Deep Bay Area wetland ecosystem, alternative uses could be considered suitable only if it could be demonstrated that they would not result in the loss of ecological function of the original ponds and if they complement the ecological functions of the wetlands and fish ponds in and/or around the Deep Bay Area. It is important that the alternative wetland habitat to replace the fish ponds can *provide food supplies in a sustainable manner* so that birds, particularly, the egret and heron population, are not put at risk.

LAND USE CONCEPT AND DEVELOPMENT GUIDELINES

6. The fundamental landuse planning concept for the Deep Bay Area should be the avoidance of loss of fishponds and habitat fragmentation as well as mitigation of the negative impact from undesirable landuses and human disturbance. A two-pronged approach to landuse planning control is adopted through the designation of Wetland Conservation Area (*WCA*) *for all existing continuous and adjoining active/abandoned fish ponds* and the designation of Wetland Buffer Area (*WBA*) *to protect the ecological integrity of the WCA...*

Wetland Conservation Area (WCA)

- 6.1 The planning intention of the WCA is to conserve the ecological value of the fish ponds which form an integral part of the wetland ecosystem in the Deep Bay Area. It comprises the existing and contiguous, active or abandoned fish ponds in the Deep Bay Area, which should all be conserved. New development within the WCA would not be allowed unless it is required to support the conservation of the ecological value of the area or the development is an essential infrastructural project with overriding interest...

Private-Public Partnership Approach

- 6.3 While the primary planning intention of the WCA is to conserve the ecological value of fish ponds, if there are strong planning justifications and positive measures to enhance the ecological functions of the existing fish ponds, the Board may consider development with conservation objectives within the WCA under a private-public partnership approach. Having regard to the precautionary principle and the “no-net-loss in wetland” concept, the approach would allow consideration of limited low-density private residential/recreational development at the landward fringe of the WCA in exchange for committed long-term conservation and management of the remaining ponds within the development site. Development of this nature should require minimum pond filling and be located as far away from the Deep Bay and/or adjoining to existing development site. Adherence to the “no-net-loss” principle would be important to ensure no decline in the wetland functions of the fish ponds within the development site and surrounding ponds. Any such development proposal should be accompanied by an ecological impact assessment with an *acceptable and feasible wetland enhancement and management scheme* to demonstrate that the development would not result in, or be able to fully compensate for, any loss of the total ecological function of the original ponds on the site and that the development impact can be mitigated.

The proposal should also include a mechanism to ensure that the long-term management of the wetland could be ***practically implemented and monitored...***

99. We have these observations on the Guidelines:-

- (1) The Guidelines refer to “wetland” and state the Deep Bay area comprises “natural and man-made *wetlands (rivers, freshwater marshes, fishponds, gei wais, mangroves and inter-tidal mudflats)*” (para 1, emphasis added). There is a distinction between “wetland” and dry land, which for present purposes, concerns the Cormorant roosts where ecological impact (rather than the “no net loss in wetland” principles) must be considered. From an abundance of caution, both are considered below.
- (2) The crux is wetland habitats for waterbirds and migratory birds (para 1) – “as a substantial source of food supply for the birds and as an important habitat for roosting and foraging of waterbirds” (paras 3, 5 emphasis added). Nonetheless, the wetlands whether natural or man-made, provide “a wide range of habitats to support the high diversity of biota (insects, reptiles, amphibian, birds, and mammals)” (para 1).
- (3) “Higher bird usage was observed to correlate with ponds which are *contiguous* to each other and with *a greater and continuous area* as against fragmented and isolated ponds” (para 3, emphasis added). Thus, the preference is for “continuous and adjoining fish ponds” (para 3).

These considerations are important to ecological conservation and enhancement, and good design and management of the ponds.

100. As to the PPP approach, developments under this approach may be considered “if there are strong planning justifications and positive measures to enhance the ecological functions at the existing fish ponds” (para 6.3).

101. As to ecological impact, under the NSW OZP Explanatory Statement and TPB Guidelines 12C, we note:-

- (1) The NSW OZP Explanatory Statement (para 9.7.3) sets out material considerations which should be followed unless there is good or cogent reason. In principle, “full compensation” is satisfied if the “no-net-loss in wetland” principle is satisfied. There should be full, rather than partial compensation.

- (2) TPB Guideline 12C (at para 6.3) is set out above (at para 98). The PPP Approach is instructive on what is usually required: the ecological impact assessment requires an approach that is “acceptable and feasible”, i.e. practical on a wetland enhancement and management scheme.

H3. Long-term conservation and management

102. The OZP Notes require information including on “*a long-term maintenance and management plan, and monitoring and implementation mechanism*” (emphasis added).

103. The following points are highlighted on such matters from the Explanatory Statement and *TPG 12C*:-

- (1) There should be sufficient details of “arrangements of funding and monitoring programme *to ensure the long-term management* of the wetland” (Explanatory Statement, para 9.7.3 emphasis added).

- (2) On any management programme *TPG 12C* provides (at para 6.3):-

“the proposal should include a mechanism to ensure that the long-term management of the wetland could be *practically implemented and monitored*” (emphasis added).

Careful scrutiny and practical steps are required.

H4. Visual impact

104. The NSW OZP Notes require information on *inter alia* a visual impact assessment:-

“to examine any possible ... visual problems that may be *caused to or by the proposed development* during construction and after completion and *the proposed mitigation measures to tackle them*” (emphasis added).

The OZP contemplates potential visual problems, which should be mitigated, where practical.

TPBPG No. 41 – visual impact

105. *The Town Planning Board Guidelines on the Submission of Visual Impact Assessment for Planning Applications to the Town Planning Board (TPBPG No. 41)* is highlighted:-

- (1) The main aim of a visual impact assessment (“VIA”) (at para 1.1):-

“The main aim of VIA is to assess the potential visual impact of the proposed development to the surrounding areas, and *to present sufficient information* in a structured manner to facilitate the Town Planning Board (TPB) to *visualize the three-dimensional relationship* of the proposed development with *the*

surrounding context and to consider the visual effects in making a decision” (emphasis added).

(2) The primary considerations of a VIA are set out (at paras 3.1 and 3.2):-

“3.1 The primary town planning consideration of visual impact is *not so much* on the architectural design, *façade treatment, colour, texture, materials and finishes* of a building per se, which are matters for the individual architects. The emphasis is on *the impact* of the overall site layout, *development scale, form, massing, disposition and character* of the development and its spatial relationship with the overall townscape or surrounding landscape.

3.2 The foremost underlying principle of VIA would be, *balancing other relevant factors*, to avoid developments that will likely result in *major adverse visual impact* within the *existing and planned development context*, especially where visually sensitive areas, visual amenities, visual resources and/or public viewers are affected” (emphasis added).

(3) It is noted:-

(a) “The surrounding context”, both existing and planned, is important (paras 1.1, 3.2).

(b) The emphasis should not be on “façade treatment, colour ... materials and finishes”.

(c) “balancing other relevant factors”: what is relevant must depend on the facts of each particular case, and is not necessarily limited to visual factors.

In the present case, the ecological value and functions of the existing fish ponds or wetland are crucial. It is difficult to see how this can sensibly be said to be irrelevant. Indeed, *TPBPG41* refers to other relevant factors, not limited to visual impact, such as “it is not practical to protect private views *without stifling development opportunity*” (para 4.5, emphasis added).

(4) Thus, the visual envelope’s size increases with larger size of proposed development. As to Assessment Area, para 4.3 states:-

“The actual assessment area, i.e. the *visual envelope*, should be determined having regard to *the size of the proposed development, the distance* of the development and its *potential visibility* from the selected viewing points and the actual site and surrounding topographical conditions by ground inspection” (emphasis added).

(5) As to Viewing Points, para 4.5 includes:-

“In the *highly developed* context of Hong Kong, it is *not practical* to protect private views *without stifling development opportunity* and balancing other relevant considerations” (emphasis added).

Thus, relevant considerations include practicality, and not stifling development opportunity.

(6) As to Visual Elements, para 4.8 includes:-

“Different visual elements may *enhance, degrade or neutralize the overall visual impact* of the development being assessed.” (emphasis added).

For instance, facade treatment, color, or texture may enhance or neutralize overall visual impact.

(7) Evaluation of Overall Visual Impact is considered at para 4.11 which includes:-

“The resultant overall impact may be concluded and classified within a range of threshold:

- (a) **enhanced** – if the proposed development in overall term will improve the visual quality and complement the visual character of its setting from most of the identified key public viewing points;
- (b) **partly enhanced/partly adverse** – if the proposed development will exhibit enhanced visual effects to some of the identified key public viewing points and at the same time, with or without mitigation measures, exhibit adverse visual effects to some other key public viewing points;
- (c) **negligible** – if the proposed development will, with or without mitigation measures, in overall term have insignificant visual effects to most of the identified key public viewing points, or the visual effects would be screened or filtered by other distracting visual elements in the assessment area;
- (d) **slightly adverse** – if the proposed development will, *with or without mitigation measures*, result in *overall term some negative visual effects to most* of the identified key public viewing points;
- (e) **moderately adverse** – if the proposed development will, *with or without mitigation measures*, result in *overall term negative visual effects to most* of the key identified key public viewing points; and
- (f) **significantly adverse** – if the proposed development will in overall term cause *serious and detrimental visual effects to most* of the identified key public viewing points even with mitigation measures” (emphasis added).

The parties’ arguments on visual impact are whether Application B would be slightly adverse, moderately adverse, or significantly adverse which we consider later.

I. Whether Application B/Second Appeal accords with planning intention

II. Applications B and A compared

106. The Appellants say that Application B is much to be preferred and clearly performs better than Application A. Having carefully evaluated Application B and its differences with Application A, we make these observations.

107. First, the key features and differences between both Applications include:-

- (1) A significant reduction in development footprint from 40 ha (22.3% of total site area) to 11.6 ha (6.5% of total site area), well within the “5 to 10%” of site or fish ponds

contemplated in the **18 December 1998** meeting and 5022 TPB Paper following the Fish Pond Study. This is crucial to “limited private development” under the OZP.

- (2) The size of the NSW WEA is much enlarged from 70.9 ha to 99 ha for nature conservation and enhancement.
- (3) The minimum pond filling requirement is satisfied.
- (4) The mix of developments is significantly better for ecological purposes: the number of flats increases from 640 to 2,381, while the number of houses decreases significantly from 960 to 140.

108. Second, the effects of such differences and changes include:-

- (1) Application B is not a mere variation but an entirely new scheme. Of course, the fact it is a new scheme and improvement is not conclusive but is relevant.
- (2) Critically, much more weight is given to wetland conservation and *enhancement* as the *dominant* factor in the planning intention. The Appellants say it is “the optimum scheme” (Mr. Brownlee’s Statement para 245). This may be so but is unnecessary for this Decision. In principle, it is possible that more than one scheme (or variations thereto) accords with the planning intention.
- (3) While the total site is very large at 177.35 ha, the vast bulk (93.5%) is dedicated to *conservation and enhancement* of ecological value and functions of the fishponds or wetland - the NSW OZP’s express aim. There is no good reason to doubt the Appellants are willing and able to commit to ecological conservation and enhancement, as the key aim. It was never put to the Appellants’ witnesses that they were unable or unwilling, to accomplish such aim. Moreover, the total Wetland Mitigation area of 154.45 ha is 72% of Mai Po Nature Reserve (“MPNR”). That total area would be managed in perpetuity, for nature conservation and enhancement. This would be a significant achievement in the public interest, and we so find.

109. Third, the reasons for such changes are obvious:-

- (1) The Appellants wanted to ensure all ecological concerns expressed concerning Application A were fully addressed and resolved. On Mr. Brownlee’s evidence (Statement para 158) which we accept, the Applicants sought to provide everything the AFCD required within reason, so that the TPB would more readily grant approval if

AFCD considered the ecological component acceptable. In fairness to the Appellants, credit should be given for this realistic, and down to earth approach, which accords with the planning intention.

- (2) The FLW approval concerning a limited development area of 5% “was a relevant reference”, and genuinely followed - as the PlanD and AFCD intended. This significantly influenced the form of development, and percentage of land for development (Mr. Brownlee’s Statement para 147). As stated earlier, for the TPB to argue that the FLW development was “irrelevant” is unfair and contradictory.

12. Questions of fact and degree; value and planning judgments; evaluation of factual and expert evidence

Questions of fact and degree

110. During the hearing, we raised the point that while the meaning of statutory words or of a legal document (such as the OZPs) is a question of law, there are three possibilities: a proposed development may clearly fall within the planning intention, or be clearly outside the planning intention, or depends on the evaluation of such conduct by the tribunal of fact, often appropriately described as one of “fact and degree” referring to the House of Lords decision in *Ransom v Higgs* [1974] 1 WLR 1594 (at 1618 C-E) in a tax context.

111. Neither side disagreed with these three possibilities. Having considered all the evidence, we find for reasons below that Application B falls clearly within the planning intention, and in any event, does so as a matter of evaluation and fact and degree.

Value and planning judgments

112. There is the related principle that when considering whether: (a) a proposed development accords with the planning intention; or (b) there is sufficient required information and proposed steps on impact mitigation (avoidance, minimizing, and compensation) for ecological, environment, and visual impact, this is often a discretionary area of judgment, or professional judgment:-

- (1) In *Seaport Investments Ltd. Re Application for Judicial Review* [2008] Env. L.R. 23. Weatherup J. said at [26]:-

“The responsible authority must be accorded a *substantial discretionary area of judgment* in relation to *compliance with the required information for environmental reports*. The Court will *not examine the fine detail* of the contents but seek to establish *whether there has been substantial compliance* with the information required by Sch.2. It is proposed to consider whether the specified matters *have been addressed rather than considering the quality of the address*” (emphasis added).

- (2) In *R (on the application of Samuel Smith Old Brewery) v. North Yorkshire C.C.* [2020] 3 All ER 527 (UK Supreme Court) (handed by the Appeal Board to the parties on Day 1), Lord Carnwath at [21] cited *Tesco Stores Ltd v. Dundee City Council* [2012] UKSC 13 at [19]:-

“In addition, *many of the provisions of development plans* are framed in language whose application to a given set of facts *requires the exercise of judgment*. Such matters fall within the jurisdiction of planning authorities, and their exercise of their judgment can only be challenged on the ground that it is irrational or perverse ...” (emphasis added).

We seek to apply these common sense principles below.

113. Whether the planning intention is satisfied, or at least as a matter of fact and degree, and judgment, centres on two main areas:-

- (1) Whether the “no-net-loss in wetland” principle is satisfied on the conservation and enhancement of the ecological value and functions of the fishponds and wetland.
- (2) Whether sufficient and feasible steps are proposed to avoid, minimize, and compensate for impacts including (ecological and visual), on the evidence.

In our view, for reasons below, the answer to both questions is yes.

Unlike the pragmatic approach and required flexibility inherent in both the PPP, and the 2004 NNCP, the AFCD/PlanD’s position while always well intentioned, has not with respect, always been practical, and realistic. This concerns the two main areas above, and on the questions of scale and intensity; location; and the significance of the FLW scheme given these departments’ own advice and guidance to the Appellants to use FLW as a “relevant reference”.

Evaluation of factual and expert evidence

114. We were presented with a wealth of expert evidence. Our task was to assess and weigh up, the whole of the evidence and make appropriate findings and inferences, and with common sense. It was not for this Appeal Board to delegate or abdicate its decision making to any expert, however distinguished. In considering the expert evidence, we were not limited when

considering ecological matters, to the final EcoIA, and both sides' witness statements. We had the advantage of hearing and seeing all experts give oral evidence under cross-examination, and with extensive submissions.

115. Both teams' submissions sought to undermine or criticise the opposing side's expert evidence, ecological or visual. We make brief observations on the factual witnesses' evidence – as this may support or undermine either side's case and expert evidence. We were not assisted by any party seeking to mischaracterize the other side's submissions. For instance, the TPB submitted that the Appellants argued that the Appeal Board need only undergo a “broad brush” assessment of ecological impact, as some consideration was given to such matters during the rezoning. This mischaracterises the Appellants' submissions. Instead, we were more assisted by submissions put fairly and objectively, and given issues of public interest.

(1) Factual witnesses

116. We make brief observations on the Appellants' factual witnesses' evidence:-

116.1. Mr. Fu gave evidence as a Director of the 1st, 3rd and 4th Appellants and a senior member of the Fu family. He made a witness statement which was later revised with minor amendments following the *FLW* judgment. No one questioned the sincerity of his ecological concerns and other objectives, or that the Appellants are unable or unwilling to implement Application B, should planning approval be granted. He was a credible witness.

116.2. Mr. Wan gave evidence from his experience as a Chartered Surveyor and director of the 3rd and 4th Appellants. He had the advantage of having worked both in Government and the private sector, having been a director of Henderson. He has extensive community service, and was visibly frustrated by delays and inefficiencies in the planning approval process and implementation, and the lack of adequate housing supply. We make similar observations as for Mr. Fu. Mr. Wan made two witness statements, both with some amendments following the *FLW* judgment. We accept his evidence that the consultant AEC's experience at the LMC Nature Reserve was “treasured” and he asked that AEC repeat that successful experience for NSW and LC [T-11/70/11].

- 116.3. Masterplan’s Mr. Brownlee gave straightforward, detailed, and frank evidence from his experience in town and building planning. He made three witness statements of respectively 104, 47, and 8 pages. The 2nd Statement had some revisions following the *FLW* judgment. He had the advantage of having worked both in Government (for 16 years), and the private sector, and has some 35 years experience in urban planning. He was a credible and helpful witness, and we accept his evidence.
- 116.4. Mr. William Cheung is the main project Architect involved in the numerous schemes concerning the NSW Site to re-design these for Applications A and B, and the review applications. He has experience of comprehensive development projects and master layout plans. He was a credible witness and his evidence was not subject to serious challenge. He was asked on more than one occasion, if he had been asked to *reduce* the GFA under any scheme. Regrettably, this line of questioning was misdirected, and inconsistent with the planning intention. He made one witness statement which was uncontroversial.
117. The TPB had two factual witnesses:-
- 117.1. The PlanD’s Mr. Yip gave evidence as a very senior and experienced town planner having worked in the PlanD for at least 24 years:-
- (1) While he was generally a credible witness, his evidence was unsatisfactory in some respects. He was at times cagey, and a master of understatement. For instance, on the lack of effective enforcement action concerning illegal activity at the NSW and LC Sites, and on the most disappointing and shocking state of the LC Site (although a Ramsar site, and ranked 1st of the 12 priority sites of ecological importance in the NNCP), his evidence was to the effect that there was “room for improvement” [T-15/153].
 - (2) He sought to argue or dispute what was indisputable. For instance, as to the shocking state of the LC Site which we saw on the Site visit:-
 - (a) He did “*not see serious widespread dumping or very bad thing happening*” (emphasis added), and it was “not a *very serious* condition” [T-15/28-29]. From the Site visit and we so find, the conditions concerning dumping and ecological deterioration at the LC Site were “serious” or “very serious”.

- (b) He sought to dispute that Government enforcement action on illegal dumping and actively was not very successful [T-14/173].
- (3) The PlanD and he conveniently in effect, delegated or abdicated decision making on important matters of planning judgment to the AFCD. For instance, his first Statement (at para 12.16) states:-

“AFCD considers the Appellants failed to demonstrate that the proposed developments are limited to an agreed scale” (emphasis added).

We dealt with the PlanD’s stance on scale in the context of consistency and fairness, and have further observations below when considering Application B.

117.2. The EPD’s Ms. Ng gave brief evidence and made clear the EPD did not make technical appraisals of the nature conservation aspects as these were the AFCD’s responsibility and role. EPD relied on such assessments. She was a forthright and honest witness.

(2) Expert witnesses – ecology

118. We make these observations and findings on the Appellants’ ecological expert, Dr. Leven:-

- (1) His relevant qualifications include a BSC and PHD in Ecology, including from Hong Kong University
- (2) He had a wealth of expertise and experience as an Ecologist with experience in Hong Kong, and the Mainland. And as an Environmental Planner specializing in ecological impact assessments, and habitat design and management. These include at comprehensive developments with ecological concerns at Wo Shang Wai, Yau Mei Sun Tsuen, NSW, and at LMC concerning the KCRC Line, and LMC Ecological Enhancement Area (“LMC EEA”).
- (3) He was the author of many publications on ecological matters whether as sole or joint author, on birds, wildlife, and habitats.
- (4) He had primary responsibility for drafting the revised EcoIA. He made three detailed witness statements in these proceedings of 155, 57, and 14 pages excluding Appendices.
- (5) Dr. Leven and Mr. Leader have studied bird communities and reedbeds in Hong Kong for some 30 years, and studied managed reedbeds for about 20 years.
- (6) Having carefully considered and weighted up the revised EcoIA, in conjunction with his written and oral evidence, we find him to be a credible and forthright expert witness

who assisted this Appeal Board in giving impartial and independent evidence on matters relevant to his areas of expertise. He is a lover of birds and wildlife like Mr. Leader.

119. We have these observations and findings on the Appellants' other ecological expert, Mr. Leader:-

- (1) His experience and expertise is as a Avifauna specialist with particular experience of ecological impact assessments, wetland design and management, including of the comprehensive developments with ecological concerns referred to above with Dr. Leven. He was also on the management committee for the MPNR managed by WWF-HK. His experience includes comparable projects including wetlands and ecological conservation and enhancement, including at LMC.
- (2) He is an author whether sole or joint, of several articles and books concerning his areas of expertise.
- (3) He had primary responsibility for the CM Plan which was revised, and has the advantage of being involved in management of the LMC site, including on weekly visits. He made two detailed witness statements in these proceedings of 69 and 23 pages, excluding Appendices.
- (4) He took part in surveys in 1995-96, for the Fish Pond Study published in September 1997. He has first-hand knowledge over two decades, of changes in the ponds and habitats at NSW and LC.
- (5) Having carefully assessed and weighed up the latest CM Plan, and his evidence both oral and written, we find him to be a credible witness who gave impartial and independent evidence on matters within his areas of expertise.

120. As to the TPB's Environmental and ecological expert Mr. McInnes, we have these observations and findings:-

- (1) He has extensive expertise and experience of wetlands in various countries, whether of temperate or tropical climates including Hong Kong to some extent, and his evidence should be given due weight.
- (2) We accept Mr. McInnes is an independent expert who sought to give impartial evidence to this Appeal Board. Where his evidence conflicts with that of Dr. Leven and Mr.

Leader, we respectfully give his evidence less weight in the particular circumstances of this appeal, for three reasons:-

- a. Mr. McInnes has less experience with the NSW and LC Sites, and Hong Kong wetlands than Dr. Leven and Mr. Leader. On the questions of sufficiency of information, and of practical steps for impact mitigation (avoidance, minimizing, and compensation), these should be appropriate for local conditions. Mr. McInnes rightly accepted that he has never prepared an EcoIA for the purpose of any planning application in Hong Kong, or EIAO report for any Hong Kong development.
 - b. Mr. McInnes accepted that he made only one visit to both the NSW and LC Sites over the years, in January 2016. We do not consider that being provided with information on the sites by video or otherwise is comparable to a site visit to see all matters for oneself.
 - c. At times he was over dogmatic. For instance, his emphasis repeatedly, on the LC's Site's *designation* as a Ramsar site. But the LC Site's ecological value and functions - and *potential* are matters of fact and degree, and not mere designation.
- (3) Mr. McInnes' expertise was as an environmental and ecologist, and scientist of over 25 years experience. He has no qualifications or expertise in planning, and legal matters, although some of his evidence dealt with such matters. His evidence was well intentioned that alternative sizes and scales of development should have been considered. But these concerned planning and legal matters, outside the scope of his expertise. Such evidence while not inadmissible, affects the weight we attach to his evidence.
- (4) He made three detailed witness statements of 85, 42, and 19 pages respectively (without counting Appendices) which we have carefully considered and deal with some aspects below.
- (5) He was a frank and forthright witness. For instance, in informing the Appeal Board of the unsatisfactory state of many Ramsar sites internationally, such that the LC Site's state did not surprise him. Such evidence was helpful albeit at odds with his emphasis on the LC Site's *designation* as a Ramsar site.
- His evidence on the HKBWF was of assistance. In particular, as seen below, he proposed new or additional HKBWF habitat in or near the NSW Portion, in addition to that proposed for the LC Portion.

121. The AFCD's expert Ms. Chow's good intentions were never in question. She has worked with the AFCD since at least June 2012, shortly before Application A was submitted on 19 October 2012. We make these observations and findings on her evidence:-

- (1) Her qualifications were Environmental Diagnostics and as a Natural Scientist, and not in planning and the law. Some of her evidence concerned such matters beyond her expertise, and affects the weight we attach to her evidence.
- (2) As stated earlier for Ms. Chow (and Ms. So the TPB's visual expert), it was not apparent from reading her three detailed witness statements that she was *aware* of her overriding duty to assist the Appeal Board impartially and independently on matters relevant to her area of expertise and sought to comply with such duty, when she made her witness statements. By oversight, these also omitted the usual and necessary Declaration of compliance with an expert's obligations. The fact Ms. Chow (and Ms. So) subsequently made such declarations after these matters were pointed out by the Appeal Board, and without altering *any* of the evidence in their witness statements, is not conclusive but relevant. As stated, such Declarations are not mere formalities. In fairness to Ms. Chow, and as accepted by the Appellants in closing, she appeared to soften her stance in oral evidence compared to her witness statements.
- (3) She dealt with matters beyond her ecological expertise by various comments on excessive height, and on scale and intensity. For instance, her comments on 4 August 2015 on the inclusion of 29 blocks of 19-25 storeys adopting the maximum GFA allowed¹⁶:-

“Not only would the building of *such height [be] considered intrusive* to the surrounding environment that may *not be compatible with the rural environ of* the area, it is anticipated that such *large-scale and intensified* housing development would bring in a *population that would unavoidably impose pressure on the environment* and the ecosystem of NSW” (*emphasis added*).

We note:-

- a. Ms Chow's Statement above on height is beyond her expertise. She also ignored the TPB's decision on 10 December 1999 in its plan making function *not* to impose a building height (and site coverage) restriction to “*provide design flexibility and*

¹⁶ See §2(a)(iii) [E2/70/3634]

encourage the objectors to minimize pond filling as far as possible” on the PlanD’s own recommendation’ (para 23.13 above).

b. The PlanD had recommended the maximum GFA “*having regard to the development parameters*” of the Approved Henderson Scheme.

(4) She acted at times in effect, as advocate for the AFCD and PlanD, in objecting to the proposed developments’ “scale” and “intensity” although these were not ecological concerns. Thus, she lacked an objective and balanced view, including on matters outside her expertise. As such, some of her reasons and conclusions are unsupported.

(5) There are many examples from Ms. Chow’s witness statements of her acting as advocate, or being over dogmatic. For instance, her Supplemental Statement (at para 44) on:-

“the *urgent need to conserve* fish ponds and aquaculture in Hong Kong” (emphasis added).

But the site was not zoned “C.A.” for conservation. Such arguments ignore the planning intention and PPP approach.

122. Notwithstanding the TPB’s criticisms of Dr. Leven’s and Mr. Leader’s evidence in some aspects and alleged inconsistencies:-

(1) These criticisms do not detract from our finding as a matter of fact, that Dr. Leven and Mr. Leader both gave credible and impartial evidence on ecological matters.

(2) Some of the criticisms concern alleged insufficiency of information. We consider that the Appellants (including through Dr. Leven and Mr. Leader) provided sufficient information to us viewed on a practical level for lay readers, as opposed to a more theoretical approach, or more for experts. Even if there are any gaps in the information provided, this is a matter which should be dealt with by planning conditions.

(3) We also find that the TPB’s ecological experts Mr. McInnes and Ms. Chow largely sought to give evidence that was independent and of assistance, at least in oral evidence. For reasons at paras 118 to 122 herein, where there is any conflict between their evidence and that of Dr. Leven and Mr. Leader, we respectfully place more weight on the Appellants’ ecological expert evidence, on the balance of probabilities.

(3) Expert witnesses – visual impact

123. The Appellants’ visual expert Ms. Hoi made three detailed statements of 61, 33 and 17 pages respectively. We have these observations and findings:-

- (1) The TPB subjected her evidence to heavy criticism as unsatisfactory and which should be treated with caution. In particular, it argued:-
 - a. Ms. Hoi's answers in cross-examination reveal her fundamental misconceptions about the purpose and approach to a VIA, particularly her approach to take into account the PPP principle, nature conservation, and housing shortage.
 - b. She gave evidence beyond her expertise, for instance that ecological and landscape concerns outweigh visual concerns; that she usurped the TPAB's statutory role; and she was willing to give answers to advance the Appellants' case, for instance the visual impact of Application B was not worse than Application A.
- (2) We have weighed up such concerns and bear in mind:-
 - a. Experts can give evidence on the ultimate issue which includes evidence on "*any relevant matter on which he is qualified to give expert evidence*" (*s. 58 Evidence Ordinance*, emphasis added). And where not qualified to give expert evidence "if made as a way of *conveying relevant facts personally perceived by him*".
 - b. As stated, what is relevant must depend on the facts of each particular case. There is no rigid rule that matters not concerned with visual impact only are irrelevant, including when ecological considerations are a dominant consideration under the planning intention. In the circumstances, Ms. Hoi could give evidence that Application B was an improvement over Application A, including with a smaller development footprint. She rightly recognized that ecological considerations were dominant in the planning intention, in influencing the site considerations from a common sense reading of the planning intention (Ms. Hoi's Statement para 21).
- (3) On balance, her evidence was generally credible given her experience which was more impressive than Ms. So's over some 30 years in various award winning projects. These include landscape architecture where visual impact was important in Hong Kong and overseas; and comprehensive developments with open spaces. For instance, we note that Urbis provided landscape architecture services in two residential developments in Yuen Long District with both ecological and wetland conservation, at Wo Shang Wai and Yau Mei San Tsuen. While her evidence was not perfect, we weigh up her evidence further after considering Ms. So's evidence as the TPB's expert witness on visual impact.

124. Ms. So was a Senior Town Planner of the UDL with some 30 years planning experience.

We make these observations and findings on her evidence:-

(1) The Appellants' key complaints were twofold:-

- a. Ms. So showed she is not independent and impartial despite declaring herself to be an expert, which alone suffices to reject her evidence; and
- b. she was over dogmatic, and unprofessional in several respects.

First, it is said she provided photomontages with blank wall and bright single tone allegedly for "clear sight on the building bulk and mass". But she could simply have encircled buildings showing the proposed development. Moreover, in the FLW visual impact documents belatedly produced at the hearing upon our request, the FLW proposed development was visible *without* adjusting or highlighting the colour of the development.

(2) Second, it is said she was over dogmatic and biased in considering that planning conditions could not help visual impact, which would be unacceptable even with mitigation measures.

Moreover, at [T-16/26/19-25], she said:-

"A I think the fundamental issue for my visual comment is that *the application B scheme is fundamentally not acceptable*, and even though we take into account the mitigation measures proposed in the VIA, the visual impact assessment, I think there is *no real prospect for the applicant can address my concern* or the fundamental and essential visual comment or concern at the implementation stage. So the imposition of the planning condition can't help any much' (emphasis added).

The Appellants say it is disingenuous to suggest a revised VIA if it can't help much - a new point not mentioned in any contemporaneous document or in her three witness statements. In the FLW application, the VIA concluded that the potential visual impacts were mitigated through sensitive design. An approval condition on the submission of a revised VIA was recommended to address the PlanD's concern and allow further improvement of the scheme¹⁷. According to Ms So, any improvement to Application B will be a waste of time, as far as she is concerned - another example of discriminatory treatment of Application B.

¹⁷ See §49(f)(viii) of the minutes of the RNTPC meeting B/29/777]

- (3) Third, it is said she was over dogmatic for no sound reason in insisting that one could not compare a VIA with another.

At [T-16/29/8-13], she said:-

“A. ... In general, yes. I think it’s *not logical and not appropriate to compare two VIAs*, for the Fung Lok Wai and the Nam Sang Wai, because of the different setting, different viewpoints, and different development scale. How can we compare one by one? This is totally not logical or professional to take [make] such a comparison” (emphasis added).

The Appellants contend it *is* logical and appropriate to compare two VIAs to see whether the PlanD acted fairly and consistently. Moreover, at [T-17/130/4-16] in answer to the Chairman’s question, Ms. So accepted there is *no* guidance or practice note from the TPB or any text to say that one cannot or should not compare the visual impact of one development with another. If it is not logical or professional, *TPBPG 41* would have said so. For instance, these Guidelines (at para 4.1) say it “is not necessary to adopt an elaborate assessment method as required for designated projects under the *EIAO*”.

- (4) Fourth, it is said she was able to see what she wanted to see but not otherwise:-

At [T-16/65/1-18], Ms. So said:

“Q. Exactly. So just from the visual impact perspective, are you saying the visual impact of a development on 11.6 hectares of land should outweigh the visual impact of having 154.5 hectares of land for ecology?

A. I think, when I assess the visual impact of a particular development, *my focus is not just on the percentage or the development footprint*. The more important thing is the overall layout, the mass, the development, including the building height and its spatial relationship with the immediate surrounding areas. For example, just for this case, Application B, you put forward your scheme, your scheme for me, with a scheme covering about 11.6 hectares with 28 towers with a building height up to 25 storeys, such a great amount. It will be a dominant visual element resulting in such rural wetland area. *I assess in this way, not just on the percentage of the site area*” (emphasis added).

The Appellants complain she completely ignored the context, and is being selective. One cannot ignore the fact there would be *no* adverse visual impact on 154.5 hectares of land, or at the LC Site.

- (5) Fifth, it is said that her focus is incorrect in focusing on building bulk and mass, *without* considering mitigation and enhancement measures. Moreover, *TPB Guidelines 41 TPB PG No. 41* (at para 4.8) makes clear the overall visual impact can be *enhanced* or *neutralized* with mitigation and enhancement measures. Ms. So’s illustrative materials are inaccurate because she presented no real buildings.

125. With great respect to Ms. So, having carefully considered and applied *TPBPG 41* as developed below, and weighed up the visual experts' evidence, there is force in the Appellants' criticisms. Therefore, we give greater weight to Ms. Hoi's evidence where her evidence conflicts with Ms. So's. Ms. So also appears unfortunately, to have largely made up her mind that Application B cannot be improved visually, even with mitigation measures. Thus, for planning conditions on visual impact considered later, another qualified person in the UDL should independently assess visual impact, and Ms. So should have no further involvement whatsoever in Application B.

13. Scale and intensity; location

Scale and intensity

126. We find that the scale and intensity of Application B accords with the true planning intention, and as a matter of fact and degree, and judgment for reasons at para 50.1 above in the context of fairness and consistency. And paras 79-81 above on the planning intention. Scale and intensity was a fundamental objection of the AFCD. However:-

- (1) Properly understood, it is a matter of planning judgment, and law in this case, and not ecological impact *per se*. Moreover, the Privy Council held in *Henderson Real Estate* which is binding on us, that matters of planning judgment include what constitutes "low density development", and the scale of any residential development (para 63 above).
- (2) The result is that both Ms. Chow and Mr. McInnes gave input and expert evidence on such matters beyond their expertise. There are many examples including Ms. Chow's Statement (at paras 148, 155) that the proposed development was not "a limited development" or "limited low density".
- (3) We have no doubt such views and purported expert evidence were given with the best of intentions.

127. On the relevance and logical consequences of a smaller development footprint leading to a smaller number of buildings, which are taller, and over a smaller area, we refer to para 50.2 above in the context of fairness and consistency. We add:-

- (1) As appears from the FLW development and the parties' exhibits (Exhibits A4 and R5), a smaller development footprint has the consequences above which were preferable from an ecological viewpoint.
- (2) It was unnecessary (and inappropriate) to slavishly copy the FLW 5% footprint or have only towers, without houses. Each case should be considered on its own merits. The NSW Site has its own considerations and constraints, including of avoiding, minimizing, or compensating impacts including on bird flightlines, and Cormorant roosts. It would not be right to slavishly copy a 5% footprint, or of the same shape as the FLW development.

Location

128. We find that the location of proposed development under Application B accords with the planning intention for reasons at para 50.3 above on fairness and consistency. We would add:-

- (1) The TPB argued without enthusiasm that the proposed development would not be at an area "less ecologically sensitive" under the 2004 NNCP - so any planning permission would be invalid. And that the proposed development should be on the public park which is "less ecologically sensitive". With respect, this argument ignores well established principles and factors on interpretation including context and purpose, and common sense. First, the Appellants are not required to locate the development in an area "least ecologically sensitive" but "less ecologically sensitive". Second, it is in the public interest, that there should be a public park and open spaces – as part of a well planned, "comprehensive and integrated development" under the OZP. Third, the planning intention refers to "low density private residential development" or "passive recreational development" - in exchange for ecological conservation and enhancement and good long-term management. Thus, it suffices if the public park is suitable for "passive recreational development".
- (2) The TPB's approach is also surprising because there is clear public feedback that the existing public park should be *retained* – for recreational, and visual reasons – an important reason why the majority of public comments received for Application B were positive: 10,329 for and 5,810 against (242 TPB Paper at para 7.2). This compares very favourably with the approved FLW development which received only 82 comments for

and 683 against. Thus, the TPB's argument ignores clear public feedback, and gives the unfortunate perception (albeit without intention) of playing games with the Appellants, and the public interest. We have no hesitation in finding that the Appellants are not required to build on any of the existing public park.

- (3) The AFCD also argued that high rise buildings would be "near the core of the wetland habitat" and "in close proximity" to retained wetland (Ms. Chow's Statement paras 86, 97). Again, the planning intention envisages a balance that is pragmatic, not strict or impractical. We note by comparison, the LMC EEA is adjacent to Shenzhen, one of the world's largest cities. At LMC on any sensible view, humans co-exist with nature and wildlife.

I4. "No-net-loss in wetland" principle

(1) General matters

129. Having regard to the planning intention, and background and context considered earlier, three points arise by overview:-

- 129.1. Core subject matter: these are the "existing fish ponds or wetland", rather than non-wetland areas. The latter are relevant to ecological and visual impact. From the Fish Pond Study as important context to the planning intention, and the *TPB Guidelines 12C*, the primary aim is ecological benefit to wildlife, especially waterbirds and migratory birds.

The TPB raised four areas of contention:-

- (1) Cormorant roosts.
- (2) HKBWF.
- (3) Alleged inadequate enhancement of fishponds.
- (4) Indirect impact on reedbed and wet grassland.

All of these except the Cormorant roosts concern the issue of "no-net-loss in wetland." As for the Cormorant roosts. i.e. trees or branches used by Cormorants to settle, rest, or sleep, these are relevant to ecological impact. As stated during the hearing, one cannot sensibly argue that such roosts are "fishponds" or "wetland". Nonetheless, from an abundance of caution, we also apply the "no-net-loss in wetland" principle to the Cormorant roosts.

129.2. Ecological conservation and enhancement: these concern the “existing fish ponds or wetland”, i.e. their ecological functions. From the Fish Pond Study, the importance of the fishponds or wetland to birds is three-fold: for adequate food supply, roosting, and foraging. The inquiry is on ecological or wetland functions, rather than commercial function to provide fish for human consumption. It is a question of fact and degree and common sense, what is an effective cause and consequence of ecological conservation and enhancement.

129.3. Extent of enhancement: strictly speaking, all that is necessary to satisfy the “no-net-loss in wetland” principle is “no decline in wetland function” of the “fishponds within and near the development site”, under the OZP Notes. This accords with “full compensation” referred to in *TPB Guidelines 12C* and the Explanatory Statement (para 9.7.3.). Of course, it is preferable for “ecological value and function” to be *significantly* enhanced, although this is not strictly the test under the OZP. Conversely, the planning intention does not envisage substantial degradation of fish ponds or wetland, as at the LC Portion.

Ironically, such degradation can affect the ecological baseline, and make it easier to satisfy the planning intention. We note the baseline and ecological survey were accepted by the AFCD (242 RNTPC meeting para 141).

130. We develop on ecological conservation and enhancement, and extent of enhancement.

Ecological conservation and enhancement of fish ponds and wetland

131. Having carefully evaluated the evidence, we find as follows:-

- (1) First, as a matter of principle and common sense, if fishponds or wetlands are solely or mainly managed for wildlife, rather than commerce, ecological conservation and *enhancement* should be more easily achieved. The AFCD’s Ms Chow agreed that the current detrimental activities at LC are not wise use of wetlands [T-20/24/3-4]. But she considered it appropriate to maintain commercial fishponds at LC as a “wise use” of wetlands under the Ramsar Convention which we consider later. With respect, the planning intention is clear and binding. The AFCD should put wildlife first. The Appellants proposed several management measures, in combination and for perpetuity, as part of the CM Plan referred to in Mr. Leader’s Reply witness statement (para 52).

These were much more comprehensive than manipulating water levels under MA's annually, during the 2-year contractual time frame.

- (2) Second, while Mr. McInnes emphasised the LC Site was a Ramsar site, as we saw during the Site visit, the question is not one of mere labels, but a question of fact – whether the Ramsar site is achieving its proper ecological value and functions and its *potential*. The Ramsar designation is relevant to ecological character, not ecological value and potential, and we accept the Appellants' submissions in this respect.

The TPB placed much emphasis on “wise use” under the Ramsar Convention, as defined in Ramsar Resolution IX.1 Annex A clause 22 as:-

“wise use of wetland is the *maintenance* of their ecological character, achieved through the implementation of ecosystem approaches, within the context of sustainable development” (emphasis added).

The focus is on maintenance, not *enhancement* or improvement, of ecological character. And as stated, “wise use” of wetlands and the Ramsar Convention are not the test nor referred to in the OZPs.

- (3) Third, the TPB criticized the Appellants' approach of mitigation and management measures which “rather than being exhaustive” are “targeted at delivery on the number of birds” (Mr. McInnes' Statement para 170). But we prefer Dr. Leven's evidence, well supported by the contemporaneous minutes of the ACE meeting on 7 February 2002 (at para 2) on bird numbers observed that the two reasons for this criteria were:-

“because waterbirds were *of primary ecological importance* in the wetland system at [LMC] and ... ***bird number was a quantifiable and comparable unit for measurement*** ... the objective was to increase the carrying capacity of the fishponds through enhancement measures in a sustainable manner ***to ensure that no less number of birds will continue to use the area in question***” (para 23.15 above, emphasis added).

Moreover, it is a matter of judgment, to use waterbirds or migratory birds as of primary ecological importance - consistent with the Fish Pond Study. On the evidence, the LMC EEA previously contained commercial fishponds, similar to those at the NSW and LC Sites. We accept the Appellants' expert evidence that the LMC EEA provides a useful template for enhancement and improvement to be adopted and adapted, on how to implement the PPP approach in the NSW OZP, and related public-private partnership approach in the NNCP. The LMC EEA is not of course, identical to the NSW and LC

Sites. The question is one of principle, and practical application, considered at section I below.

Sufficient information in EcoIA?

132. The TPB argued that the EcoIAs submitted by the Appellants discloses “fundamental flaws” on satisfying the requirement of “no-net-loss in wetland”. But we note the RNTPC Paper (at paras 10.2(c) and 12.12) stated that the AFCD’s Director considered that the ecological baseline information and ecological survey results were accepted. There is *no* convincing reason for the TPB’s subsequent *volte-face*.

133. We have carefully considered the revised EcoIA dated 21 November 2016 prepared by Dr. Leven. It is 136 pages in single space with 7 Annexures (of 91 pages), 26 tables or figures of 31 pages, and a revised Appendix 1 of Response to Government’s comments of 16 pages. The above total 282 pages.

Having evaluated the revised EcoIA, with the advantage of hearing and seeing all the ecological experts give evidence, we find as a fact that the revised EcoIA is an objective document which provides independent and impartial assistance to the Appeal Board.

134. It is helpful to set out the Executive Summary on several matters:-

134.1. As to the site, para S3:-

“Nam Sang Wai is primarily a fish pond area but most of the *ponds have been abandoned for many years* and have undergone *natural succession to reedbed and wet grassland*, with *succession now threatening the wetland character and function as habitats dry out* and are colonized by terrestrial vegetation including invasive *Mikania micrantha* and *Lucaena leucocephala*. Lut Chau largely comprises active fishponds, but also includes mangrove areas that are contiguous with the greater mangrove system extending along the south side of Deep Bay. Lut Chau has *also suffered from habitat degradation in recent years, due to illegal dumping and expansion of fish ponds at the expense of mangrove habitat*” (emphasis added).

134.2. As to relevant surveys. para S4:-

“Comprehensive *surveys of habitats, flora and fauna* were conducted in accordance with the Environmental Impact Assessment Study Brief and associated Guidelines; including targeted surveys *to address changes in bird numbers* in the tidal river habitats, *breeding and non-breeding season flight-lines* and egrets and *flight-lines, roost locations and flight-lines of wintering*

Great Cormorants and land and boat-based night-times surveys of fireflies” (emphasis added).

S6:- “Based on these surveys, *potential ecological impacts of the project were identified, the significance of potential impacts was evaluated and mitigation measures to address these impacts were designed.* These are summarized below:” (emphasis added).

134.3. As to the location and footprint, para S7:-

“In accordance with the guidance in TPB-PG No. 12C the development will be located in the ***extreme southwest of Nam Sang Wai, farthest from Deep Bay*** and ***adjacent to the existing Yuen Long urban area***, and will largely comprise medium and high rise residential towers, thus *minimizing the development footprint* and adverse ecological impacts on the important Deep Bay wetland ecosystem” (emphasis added).

134.4. As to the “no-net-loss in wetland principle”, para S9:-

“Under the proposed scheme this *loss is minimised to 10.5 ha 6.6% of the site*, in accordance with TPB Paper No. 5022 on the “Study on the Ecological Value of Fish Pond in the Deep bay Area) and, as is described below, *any loss of ecological function will be compensated by restoration, enhancement and conservation management* of the remaining wetland area. However, by *narrowing over-wide pond bunds with limited wetland or other ecological function*, there will be a net increase in the ‘net’ wetland area from 139.1 ha to 139.5 ha” (emphasis added).

134.5. As to potential impacts:-

(1) Consideration was given where available, to adjustment of the proposed development footprint but proved impractical. Mitigation measures to minimize or compensate for potential impacts are required where such measurements were feasible (paras 1.7.1 and 1.8.1).

(2) Mitigation is proposed where appropriate:-

“*well in advance* of the potential impacts to which they relate in order ***to ensure that there is no-net-loss or damage*** caused by the project to ecological habitats or species of conservation significance” (para 1.8.1, emphasis added).

134.6. As to proposed mitigation:-

(1) For wetland habitat and fauna, at para S13:-

“In summary, in regard to the both wetland habitats and fauna, it has been demonstrated that with the proposed mitigation measures in place there will be ***no significant ecological impacts***; indeed ***for many habitats there will be a net gain in function***; this is likely to result in a

significant increase in the numbers of species of conservation significance” (emphasis added).

(2) For the Cormorant roosts and HKBWF, at para S14:-

“As noted above, there are two species, Bent-winged Firefly and roosting Great Cormorants, for which Nam Sang Wai holds particular importance, and for which the *highest level of confidence that impacts will not be significant is required*. In the case of Bent-winged Firefly, the potential areas of concern are *direct habitat loss and light disturbance* (which can disrupt this species’ breeding cycle). There will be *no loss of the mangrove habitat used* by this species, while *comprehensive measures to avoid adverse light impacts are proposed*: the residential towers adjacent to firefly habitat will be *single aspect buildings* with no lights on the side facing the mangroves; *bamboo green walls, which will block all ground level light*, will be planted along the end of the mangroves, and *low level estate and road lighting will be directed downward* and will be the minimum necessary for public safety” (emphasis added).

134.7. In conclusion, the Executive Summary states at para S17:-

“In conclusion, the project is in accordance with the requirements and objectives of the OZP, TPBG 12C and NNCP and details *comprehensive and feasible mitigation measures to address all significant potential ecological impacts*. Furthermore, its implementation, presents a unique opportunity that will result in the *addition of 154.4 ha to the area of Deep Bay under nature conservation management* adding a large area (equivalent to 72% of MPNR) to the protected area network” (emphasis added).

135. Applying the principles considered earlier on an alternative statutory regime, and sufficiency of information, we are not persuaded by the TPB’s argument of “fundamental flaws” in the EcoIA for these reasons:-

(1) The TPB’s emphasis appears to be to obtain *full* information, akin to an academic article, rather than sufficient or adequate information for this Appeal Board.

With respect, the TPB’s approach appears over academic or theoretical, rather than seeking steps or information which are practical and feasible.

(2) The TPB’s approach is over dogmatic. For instance, its repeated emphasis on no “scientific substantiation” – when it is for us to weigh up all the evidence, including from the very useful Site visit.

(3) The TPB’s approach may be well suited to ordinary adversarial litigation, less so to this appeal given important issues of public interest. The Appeal Board’s role is to some

extent inquisitional, to investigate and examine the evidence. A fair and objective assessment of the evidence especially of expert evidence, would be of greater assistance.

- (4) Even if assuming for the purpose of argument, there are any gaps in the information before us, the appropriate course is to obtain up-to-date reports as directed in the Planning Conditions at **Appendix 9**.

136. We also highlight the following from the revised EcoIA:-

- (1) As to feasibility of Successful Implementation of Proposed Mitigation Measures, para 1.9.1 states:

“The EIAO-TM states that ‘all mitigation measures recommended shall be *feasible to implement within the context of Hong Kong*’. Whilst this is a large scale project in a Hong Kong and Deep Bay context in terms of the wetland area which is involved, ***all proposed mitigation measures are ‘tried and tested’ in a Hong Kong context***, either as mitigation measures for developments and/or as enhancement measures to improve the ecological function of protected areas” (emphasis added).

- (2) As to habitat enhancement measures, para 1.9.1 continues:

“Specifically, *pond creation and enhancement of a comparable scale* to that proposed in the current project have been *undertaken successfully at Hong Kong Wetland Park* by Hong Kong Government and at *Lok Ma Chau* by MTR Corporation; while *creation and active management of shallow tidal ponds* have been carried out both at Hong Kong Wetland Park and MPNR; and creation/restoration of reedbed and vegetated wetlands has been undertaken at all three of these sites as well as at smaller scale projects in the Deep Bay area. It is considered, therefore, that the ***feasibility of the proposed habitat creation, modification and enhancement works is demonstrated beyond reasonable doubt***” (emphasis added).

- (3) Para 1.10.1 and Table 74 set out a helpful Summary of Proposed Mitigation Measures and Evaluation of Residual Impacts. Table 74 includes:

“

Description of Potential Impact	Significance of Potential Impact	Proposed Mitigation Measures	Predicted Residual Impact
Loss of Pond/Open Water (Table 34)	Impact of loss of 22.1 ha at Nam Sang Wai would be of High Severity as pond area is moderate in the Project Site	Compensation: net loss of 22.1 ha of pond habitat will be compensated by <i>enhancement of remaining 56.5 ha of pond/open water,</i>	No significant residual impacts

	and Study Area context.	together with <i>creation of 4.1 ha of lily pond and 5.1 ha of shallow tidal pond.</i> The required enhancement has a proven track record in Hong Kong.	
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(emphasis added).

Although there would be a loss of 22.1 ha of NSW, there would be compensation “by enhancement of remaining 56.5 ha of pond/open water” plus creation of 4.1 ha of lily pond and 5.1 ha of shallow tidal pond.

Extent of enhancement

137. On the evidence, the LMC EEA achieved an enhancement factor of *5 times* when comparing the density of targets species compared to control areas (Mr. Leader’s Statement paras 38, 58).

138. The LMC EEA of 36 ha is considerably smaller than the NSW total wetland mitigation area of 154.45 ha: see **Appendix 2** hereto. Mr. Leader’s Statement states (at para 153):-

“It is true that no two wetlands are the same, but the fact that the LMC EEA is a project of a comparable scale and nature is relevant. The *former commercial fishponds* at the site of the LMC EEA were *similar to the existing fishponds at Lut Chau and Nam Sang Wai*. Although the size of the LMC EEA is comparatively smaller, *we have been able to achieve results in attracting the targets species and there is no reason to believe that the same cannot be achieved at the NSW WEA and LCNR*” (emphasis added).

We accept such evidence and make these findings:-

- (1) Under the planning intention, it suffices if there is no-net-loss in wetland by function.
- (2) There would be substantial enhancement of the NSW and LC Sites’ ecological and value and functions by several times, up to 5 times over a range of species on Dr. Leven’s evidence [T12/54/56-57]. We accept the Appellants’ evidence that there is considerable scope to *enhance* ecological value:-
 - a. there is a significantly larger area in terms of the total site, and ponds.
 - b. the total wetland mitigation area at NSW and LC of 154.45 ha has substantial fishponds and wetland with substantial potential for ecological enhancement.

Unlike the LMC EEA, the Site would have a Nature Reserve at LC of 55.45 ha - quite apart from the 99 ha of the NSW WEA.

- c. The LMC WEA albeit on a smaller site, has already recorded 50% of the 550 birds species in Hong Kong, i.e. 225 species. We infer that the NSW and LC Sites properly managed, would be able to achieve at the very least that number of species.

139. For these reasons, we reject the AFCD's (and PlanD's) criticisms of the extent of enhancement. With respect, such criticisms are mistaken and unsupported by the evidence:-

- (1) The PlanD's Mr. Yip states for instance, that the schemes "*cannot compensate fully*" for loss of ecological function (Mr. Yip's Statement para 12.15) such that the no-net-loss principle cannot be satisfied. But Mr. Yip is a factual witness, not an ecological expert.
- (2) AFCD's Ms. Chow argues that the room for further enhancement of the ponds at NSW and LC is "*limited and insufficient* to allow for adequate mitigation of total ecological impacts" (Ms. Chow's Statement para 134, emphasis added).

Such criticisms ignore the fact that baseline conditions at present, are affected by uncontrolled access; continuing disturbance by humans and dogs; extensive dumping of all manner of waste; and unauthorized pond filling.

We expand on enhancement of fishponds below.

- (3) On Mr. Brownlee's evidence [T-9/78-79], it is unnecessary to further reduce the development footprint and GFA. We accept Dr. Leven's evidence [Site visit transcript/98] that ecological enhancement, restoration, and digging out of ponds would be "quite aggressive".

(2) Cormorant roosts

140. The Appellants contend this is a bad reason or not sufficiently good reason for rejection because: (1) only 13% are potentially affected;¹⁸ (2) there is ample capacity elsewhere in

¹⁸ [E10/105/5868] and Appendix 4, Dr. Leven's 1st Statement [WA-3/6.4/13-18]. 1.2% of the southern cormorant roost in Nam Sang Wai was located within 200 m from their high-rise buildings but 87% was more than 400 m from the high-rise buildings: see §35(h) of the minutes of the 242 TPB meeting [CB4/32/5946]

NSW to accommodate any displaced birds;¹⁹ and (3) cormorants are not the only target wildlife species at NSW and LC.

141. The TPB argues: (1) Cormorants are highly sensitive to disturbance. Even on the basis of the Appellants' own survey, up to 35% of the overall count at NSW can fall within the 400m buffer zone, as exemplified by surveys on both 17 October 2011 and 12 February 2015; (2) there is "no scientific basis" for the Appellants' claim that there will be other trees available in the NSW Site for cormorants to roost; (3) the Appellants' adoption of 400m as the high rise construction buffer zone distance is problematic, particularly given inconsistent and contradictory answers given by their witnesses in attempting to justify such distance.

142. With respect, we prefer the Appellants' arguments (1) and (2) above, on the balance of probabilities. We reject the Appellants' argument (3) as irrelevant. We remind ourselves of the relevant extracts in the EcoIA before dealing with the TPB's arguments.

142.1. The Executive Summary states (at para S15):-

"With respect to the Great Cormorant roost, a comprehensive study has been undertaken of the roost and flight-lines, and the *development footprint has been designed such that none of the development is within 150m of the roost trees, a distance known from observations at MPNR and Fairview Park to have no effect on roosting cormorants.* In addition, all piling during the construction phase will be conducted using bored piles with a shroud, which will have the effect that piling noise will be reduced to less than ambient background noise levels as experienced at the roost trees. With these measures, disturbance to the cormorant roost will be kept a minimum."

As to high rise buildings (para S16) states:-

"... it is acknowledged that there is some uncertainty as to how cormorants will react to the proximity of high rise development. Accordingly, the proposed location of high rise buildings is such that almost all of the roost trees used in most years are *outside the 200m distance from which cormorants may be excluded and the main concentration of the southern roost is now more than 400m (the maximum distance at which any disturbance effect is considered at all likely) away.* Furthermore, it has been demonstrated that, even in a 'worst case' scenario in which some birds are displaced there is *ample capacity elsewhere at Nam Sang Wai to accommodate any displaced birds.* At worst, therefore, there may be a small residual impact on Great

¹⁹ There is adequate capacity in the northern roost at Nam Sang Wai to accommodate birds displaced from the southern roost by construction activities due to the project: see §1.7.45 of the 242 Final EcoIA [CB3/25/5100]; Table 54 [CB3/25/5101] and Appendix 6, Dr. Leven's 1st Statement [WA-3/6.6/21-22]

Cormorants resulting from the relocation movement of displaced birds to other parts of the roost area. In addition, a programme of planting of eucalyptus to replace the dying old trees will ensure that these trees continue to provide additional roosting opportunities further away from the residential development for the long term” (emphasis added).

142.2. On the EcoIA’s ecological baseline, we note that the numbers of Cormorants recorded at NSW as a percentage of those in Deep Bay overall between **2007/08** to **2014** varied considerably between 22.6 to 67.8% (para 1.3.15). This highlights that naturally, Great Cormorants are mobile. The situation is fluid every year, as to which site and roosts in Deep Bay they seek and occupy.

142.3. The results of the ecological survey on the Cormorants are at section 1.5. Para 1.5.29 states:-

“The changes in the number of birds using different parts of the roost suggest individual *birds may occasionally change between the major roost site during the winter*; this is supported by findings from a radio-telemetry study undertaken in 2011-12 (Ma 2014), in which the single tracked individual was recorded roosting *mostly at Nam Sang Wai but sometimes changed to roost at Mai Po*” (emphasis added).

As appears from Table 10 (para 1.5.28), there is considerable fluctuation annually, on where they roost from year to year. There is considerable interchange between NSW (northern or southern roosts) and MPNR. The precise reasons why Cormorants move between NSW and MPNR are unknown but we find that one cannot proceed on the basis or assumption, that Great Cormorants are limited to any one NSW site, or NSW as opposed to MPNR, and the LMC EEA.

142.4. On habitat evaluation, (section 1.6), para 1.6.34 makes clear that at NSW, the Cormorants tend to use Eucalyptus trees. Such trees would need to be replanted as part of long-term management:-

“Although the plantation on site was not found to contain a high diversity of floral or faunal species, it is important as a roosting site for Great Cormorant. The *large Eucalyptus trees are utilized by the vast majority of Great Cormorants roosting at Nam Sang Wai*. These trees are reaching the end of their biological life and *need to be replanted as a long term management exercise*” (emphasis added).

We agree with this prudent measure of replanting.

142.5. Potential impacts to Cormorants are considered in the EcoIA (at section 1.7), and we highlight:-

(1) Para 1.7.42 :-

“The development location has been adjusted to take into account the location of the cormorant roost trees, such that no part of the development is within the 150m distance within which it is predicted that cormorants would be disturbed during the operational phase. However, Great Cormorants may be more sensitive to disturbance during the residential construction phase, especially during construction of the high-rise buildings, when an exclusion zone is estimated at 0 – 200m and the zone of reduced density at 200 – 400m. Accordingly, the disposition of the residential towers has been adjusted so that no part of the roost in most years is located within the exclusion zone and most of the roost is located outside the zone of reduced density. The roost is *not located in exactly the same trees in each winter, with the roost location varying to some extent from year to year*, thus the number of birds that might be affected also varies” (emphasis added).

- (2) Para 1.7.43 refer to considerable variation in the location of the roost yearly:-
- “Specifically, in view of the *considerable variation in the location of the roost from year to year within Nam Sang Wai*, and in the knowledge that *most birds roosting at Nam Sang Wai fly out to Deep Bay to forage*, it is reasonable to conclude that the potential impact is of *low severity if the consequence of any disturbance is that birds alter their individual locations within the roost area*. Conversely, if displaced birds were unable to find alternative roost sites at Nam Sang Wai, the severity of the potential impact would be higher. It is therefore necessary to *establish whether there is capacity within the roost area to accommodate any displaced birds*”** (emphasis added).
- (3) As to adequate capacity in various roosts at NSW, para 1.7.45 states:
- “... under normal circumstances when around 40 – 60% of cormorants in the Deep Bay area are roosting at each of Nam Sang Wai and Mai Po, there is *adequate capacity in the northern roost at Nam Sang Wai* to accommodate *birds displaced from the southern roost* by construction activities due to the project”** (emphasis added).
- (4) As to bird flight lines of the Cormorants, para 1.7.50 states:-
- “Studies in Hong Kong have shown that houses of *up to three storeys have little effect on flight-lines*. Conversely, for most species, buildings of *more than five or six storeys form a barrier*. As a corollary, there is *likely to be little or no difference in the barrier effect caused by the lowest (19 storey) and highest (25 storey)* apartment blocks proposed in the current development”** (emphasis added).

142.6. The EcoIA (at section 1.8) on mitigation of impacts makes clear that while there will be no loss of trees known to be used by the Cormorants, 0.5 ha (of low ecological value) would be lost from the development (paras 1.8.23 to 1.8.24). Nonetheless,

tree and shrub planting is proposed at the NSW WEA for considerable potential benefit to the Cormorants.

143. We highlight from the Appellants' "Response to Government to Departmental Government" of 14 February 2017.

"2.1 EcoIA para 1.7.30:-

"There is currently unrestricted access to NSW and visitor numbers are likely to increase irrespective of any residential development or any bridge over the Shan Pui River. However, the *impacts of the construction* and operation of the bridge have been *thoroughly assessed and addressed in the EcoIA*. Furthermore, the proposed *measures to fence the WEA and provide additional buffer planting would actually reduce levels of disturbance there*" (emphasis added).

"2.2 Paras 1.7.42, 1.8.25, 1.7.45, 1.7.46 and Table 55.

All of these comments related to the Great Cormorant roost. We reiterate the following:

- at least *65% of the roosting Cormorants are outside of the exclusion and reduced density zone*
- On average *87% of the roosting Cormorants are outside of the exclusion and reduced density zone*
- That there remains *significant capacity of 2,000-3,000 individuals in the northern roost* as the number and location of trees in this are remained unchanged throughout the period
- That *fencing the WEA would increase the roosting capacity of some areas* within the WEA and would *address the issue of human disturbance* should this be the reason why numbers have dropped in the northern roost
- We would note that *roosting Great Cormorants are more tolerant of disturbance than foraging birds* (empirical observation at Mai Po for example shows that roosting birds flush²⁰ at much shorter distance than foraging birds) and that there is absolutely no evidence that roosting birds are more sensitive to disturbance than at other times" (emphasis added).

144. On balance, we find that the statements above in the EcoIA and Appellants' Response to Government are credible and established on the balance of probabilities. As to the TPB's arguments (para 141 above):-

144.1. As to argument (1) on sensitivity and up to 35% at NSW falling within a buffer zone less than 400m:-

²⁰ Fly away suddenly

- a. This argument uses the wrong approach. The correct question is whether sufficient feasible steps are proposed on impact mitigation (avoidance, minimizing, and compensation). On the evidence, including in the EcoIA (at paras S.15, S.16), the answer is yes.
- b. As to sensitivity, on the evidence the Cormorants are intelligent, and more tolerant of disturbance than foraging birds. As stated, during the Site visit when we walked towards a tree where many Cormorants were roosting, some flew away while others stayed. It is neither practical nor feasible, to protect this species from all “disturbance”, including when human beings nearby are no threat to their life or safety.
- c. As to “up to 35%” being within a 400m buffer, we attach little weight to that percentage as the situation is fluid for two reasons. First, Cormorants are naturally mobile, so are not limited to NSW, whether northern or southern roost. There are 3 main sites which they move between - NSW, MPNR, and LMC. One cannot view any of these 3 main sites in isolation – as Cormorants move between them, and between the NSW northern and southern roosts. Second, with proper control on access by human and dogs, many other trees would become available so the 35% figure and 400m buffer zone assume much less weight.
- d. As to a 400m buffer zone, at LMC the cormorants are some 300m away from taller buildings.

At the 242 TPB meeting, the AFCD’s Ms Chow accepted that Cormorants were found at LMC²¹, but stated that this did not mean Cormorants would move to any other places if their roosting sites were affected. Dr. Leven informed the TPB that Cormorants were attracted to the LMC EEA where the trees were big enough - even though the area was very close to the LMC station, and the high-rise buildings in Shenzhen were just about 300m away²².

144.2. As to argument (2) that there is “no scientific basis” that there will be other trees available at NSW for Cormorants to roost, this is a matter to be assessed on the

²¹ See §51(b) of the minutes [CB4/32/5962]

²² See §78(b) of the minutes [CB4/32/5977]. The proximity of the LMC EEA to Shenzhen is shown in the PowerPoint presentations at Appendix 1, to Mr. Leader’s Reply Statement.

evidence, and with common sense. One does not necessarily require scientific proof or basis:-

- a. In Dr. Leven's Statement at Appendix 8, the average height of trees used for roosts at MP and LMC is 12 to 14 metres and 14 to 16 meters. Both sites are fenced off from humans and dogs. But at NSW without such fencing, the average height of trees used by Cormorants is higher, at 18 to 23 meters. As a matter of common sense and inference, *if* the NSW WEA was fenced off from humans and dogs, and properly managed this would affect the Cormorants' safety and peace of mind on where to roost. Thus, we accept the Appellants' evidence it is "highly likely" that smaller or shorter trees will be used by Cormorants at NSW in future, with appropriate fencing and management (Dr. Leven's Statement para 447.)
- b. An obvious example is MPNR when fenced off. The wildlife there is safe and secure from humans and dogs, thus affecting where the Cormorants roost, on smaller or shorter trees, or even on the ground.
- c. Moreover, Ms. Chow's own evidence during the Site visit [Site visit/60/3-6] undermines the TPB's argument:-

*"But there are many factors that affect their choice of roost. **For example, human disturbance**, the location, the height and the surrounding environment in generally. So it's a full package of factors" (emphasis added).*

144.3. As to argument (3) on the Cormorants, we do not consider that a 400m high-rise construction buffer zone is problematic or that the Appellants' evidence was inconsistent or contradictory for reasons above concerning argument (1). Moreover:-

- a. On the evidence, the Tin Shui Wai Development (of multiple towers over 40 floors) is just next to HK Wetland Park where the Cormorant roost.
- b. While the Tin Shui Wai Development is already built, that development was constructed at some stage, and any Cormorants nearby or in the vicinity were adaptable and flexible.

145. For these reasons, we find that applying the "no-net-loss in wetland" principle to the roosts, there would be no loss in carrying capacity of the NSW roosts, and no less number of Cormorants would use the NSW roosts. Instead, these would likely be a significant increase in both carrying capacity and number of Cormorants roosting at NSW. The AFCD and TPB

made various criticisms on the Schemes' impact on Cormorant roosts. These criticisms are well intentioned but impractical on the key question of impact mitigation (avoidance, minimizing, and compensation). For instance, there was complaint that Cormorants displaced would be “disturbed *even if they could be accommodated elsewhere* in the roost” (Ms. Chow’s Statement para 102 emphasis added).

However:-

- (1) This approach is incorrect and impractical. The OZPs contemplate that humans would co-exist with wildlife on the same site, with a proper balance. One cannot sensibly require that the Cormorants absolutely be “undisturbed”.
- (2) On Dr. Leven’s evidence, a programme of tree planting would ensure Cormorant roosts in perpetuity, and on trees of different ages [T-10/87/8-11; Site Visit/61/15-18].

(3) HKBWF

146. Much ink was spilt on the impact of the development on a newly discovered Firefly species in Hong Kong, *Pteroptyx Maipo* or HKBWF, discovered in about 2010. While the primary focus of the Fish Pond Study was on waterbirds, the HKBWF habitat includes various wetland. We therefore apply the “no-net-loss in wetland” principle and consider ecological impacts on the HKBWF. The TPB’s focus during the hearing became primarily on the potential impact on the larvae; and ambient light rather than direct light from the development.

147. The Appellants argue that impact on HKBWF is a bad reason or not sufficiently good reason for rejection because: (1) the population declined by 62% since 2015;²³ (2) the Appellants proposed a comprehensive suite of mitigation measures;²⁴ (3) the degraded mangroves at LC can be restored as habitat for the HKBWF as contingency; and (4) HKBWF is not the only target wildlife species at NSW and LC.

148. The TPB makes these points:

²³ §6.6 of the “Updated Firefly Survey” in Appendix 1, Dr. Leven’s Further Supplemental Statement

²⁴ [E10/105/5858] and §7.10 of the “Updated Firefly Survey” (Appendix 1, MRL-FSWS [WA-7/1.1/24])

- (1) there is an admitted ambient light issue which impacts on HKBWF in NSW, which may cause an irreversible decline (or even extinction) of the HKBWF population in NSW, while the Appellants propose additional habitat in LC for colonization by HKBWF to address the adverse impact of ambient light on the HKBWF population in NSW. The Appellants failed to provide satisfactory scientific evidence on the habitat requirements of larvae and their light level tolerance, which is highly problematic as the larval stage constitutes 75% of the life cycle.
- (2) There is no evidence for the Appellants' claim of a decreasing trend in HKBWF population.
- (3) The Appellants failed to properly understand the true habitat characteristics for HKBWF, dismissing the NSW HKBWF population at *Brachiaria* marsh as opposed to mangrove associates as an "*interesting anomaly*", which compromises the Appellants' ability to create suitable compensatory habitat in LC.
- (4) The alleged example of HKBWF habitat creation in KTDC is unsubstantiated and demonstrates that such habitat will operate at a much lower effectiveness than existing HKBWF habitat in NSW.

Preliminary points

149. Two preliminary points arise:-

- (1) The HKBWF population may be influenced by environmental, weather, and heavy rain (Masahide YUMA's 2007 article, pg 241 (at Mr. McInnes' Further Supplemental Report, Annex 5).
- (2) Some of the articles referred to by the parties concern effects of fluorescent or artificial light, as opposed to light in close proximity.

As to (1) above, such natural factors should be distinguished from the site conditions, and ambient light. The inquiry is the effect of the proposed development's ambient light on the HKBWF, rather than natural factors which are separate and occur in any event.

As to (2) above, such articles do not deal with single aspect buildings as proposed, or the means of avoiding or mitigating the impact of fluorescent or artificial lighting.

Before dealing with the arguments, we set out relevant extracts for the EcoIA.

EcoIA concerning HKBWF

150. We highlight the following from the EcoIA:-

150.1. Executive Summary (at S14): see para 134.6 above.

150.2. The ecological baseline in the EcoIA concerns this species currently only known in the Deep Bay area, which “appears to be restricted to intertidal mangrove habitat”: EcoIA para 1.3.17.

150.3. The results of the ecological survey are at section 1.5. Para 1.5.49 is instructive:-

“Light levels recorded at sites used by *Bent-winged fireflies* in May 2015 were in the range of 0.01-0.49 lux (see Annex 4). Light levels measured at other sites where no fireflies were recorded ranged from 0.01-0.27 lux. Weather conditions seemed to affect the light level recorded, with higher light levels recorded on overcast nights than on clear nights, presumably because of light from nearby developments reflected off overhead clouds” (emphasis added).

Two points:-

(1) There appears to be no significant effect from light levels on HKBWF up to 0.49 lux. Conversely, light levels measured where no HKBWF were recorded ranged from 0.01 to 0.27 lux.

(2) From the updated Firefly survey considered below, the average light level was 0.41 lux when there was flashing, whereas light levels near traditional sodium vapour street lights did not inhibit HKBWF activity at 15 to 20m from such lights, if not directed towards the habitat: see Dr. Leven’s Further Supplemental report paras 19 to 20.

150.4. Habitat evaluation is considered at section 1.6. Para 1.6.24 is important on mangrove and wet grassland habitat:-

“The endemic Bent-winged Firefly *Pteroptyx maipo* has recently been described from mangrove stands around Deep Bay and present in mangroves at Lut Chau and along the Kam Tin Main Drainage Channel. It is also found in wet grassland adjacent to the Nam Sang Wai mangrove habitat. The ecological requirements of *Pteroptyx maipo* are *not yet fully known* (Ballantyne *et al.* 2011); however the findings of this ecological assessment suggest that *areas containing both mangroves and wet grassland may be an important habitat*” (emphasis added).

Two points arise:

(1) Although this passage states the ecological requirements of the HKBWF are “not yet fully known”, our enquiry is whether we have sufficient information at this stage, rather than comprehensive information.

(2) On the evidence, HKBWF habitat appears to be primarily mangrove and wet grassland.

150.5. Potential impacts are considered at section 1.7 where para 1.7.55 helpfully summarizes the level of light tolerance which depends on many factors:-

“The levels of tolerance of this species to increases in light levels (in terms of the *light levels tolerated*, the *distance from light sources* and the potential *benefits arising from natural screening from mangroves*) are still poorly understood and *a precautionary approach is taken here that any increase in light level may have an impact on the activity of this species*” (emphasis added).

While a precautionary approach is taken, for reasons below, an appropriate decision would depend upon whether there is sufficient information rather than avoiding any action whatsoever.

Para 1.7.70 put matters in context, as the residential towers would not contain large expanses of glass, reflective surfaces, or normally be “lit up” externally:-

“However, unlike many commercial buildings, the residential towers will *not contain large expanses of glass or reflective surfaces*. Similarly, unlike some commercial buildings, residential towers are *not normally “lit up” externally* in order to render them conspicuous, as such lighting would be unacceptable to residents. Again, such external lighting is not proposed in the current project” (emphasis added).

150.6. Mitigation of impact is considered at section 1.8 where paras 1.8.36 to 1.8.37 summarize the various “Mitigation for Disturbance (Light) Impacts on [HKBWF] in Mangrove/Wet Grassland to the southwest of the [NSW] Development Area”:-

“1.8.36. Despite this, the *species is known to occur in locations close to light sources* including the HKSAR Boundary security fence at Tsim Bei Tsui and Mai Po and Fairview Park (Yiu 2011), as well as the location at Nam Sang Wai (*which receives light from Yuen Long Industrial Estate*). Measurements of *ambient light at locations where the species was present* in May 2015 recorded flashing behavior at sites with light levels up to 0.49 lux, and ambient light levels at sites where the species was present showed little difference from those where the species was not recorded (see Annex 4). However, as a precautionary measure, it is proposed to *avoid shining, bright light directly onto sites* where *the firefly is present* and to *minimize the increase in ambient light levels arising from the development; especially during the firefly breeding season*. To this end, the following mitigation measures are proposed:

- a. Residential towers will be '*single aspect*' with no windows facing the Shan Pui River;
 - b. ***Solid opaque barriers 3.5m high*** to be erected along the interface between any project works area and the mangrove/grassland area and maintained for the duration of construction;
 - c. Bridge to be provided with a ***high parapet and low level lighting***;
 - d. Bridge and any other lighting of roads and public areas of the project to be ***directional and directed inwards to the development***;
 - e. ***Low level lighting to be used in public areas*** on the western side of the development;
 - f. A '*green wall*' to be formed by a ***dense hedge of bamboo Bambusa tuldoides*** (which grows to a height of 3 – 5m) to be planted and *maintained permanently on the southwest side* of the development area.
 - g. ***Existing plantation*** currently forming a strip between the mangrove/grassland area and the development site to be *maintained and enhanced*.
- 1.8.37. These mitigation measures are considered ***to address the impacts of lighting from both higher and lower levels, including low-rise buildings and street lighting***" (emphasis added).

From the above, relevant factors include distance to light sources: it appears that HKBWF is able to survive:-

- a. in large numbers "close to light sources", for example at Fairview Park.
- b. on how much light affects flashing: "up to 0.49 lux".
- c. A precautionary approach would involve avoiding shining bright lights onto HKBWF habitat, and minimizing ambient light.

Appendix 4 hereto shows the "Amended building design to single aspect buildings to avoid light pollution" in at least 3 tower blocks, such that no walls on that side of that development have windows.

Appendix 5 hereto shows Screening of Mangrove from Residential Development.

Having regard to the very dense bamboo planting of some 4 to 5 or 6m trees, and shrub Planting of 3 to 5m, we accept the Appellants' evidence that there would be no significant residual impact on Fireflies: see Appellants' Response to TPB's Closing para 87(a).

Appendix 6 hereto from the Revised CM Plan shows Retained and Enhanced and Restored Mangrove within the project site totalling 2.7 ha for NSW, 10.4 ha for LC, with a total of 13.8 ha mangrove in the site overall.

Updated Firefly Survey

151. We next consider the Updated Firefly Survey dated 30 September 2020 at Appendix I to Dr. Leven's Further Supplemental Statement and highlight:-

151.1. Various causes of light impact: these include increase in skyglow, and in ambient light levels from greater reflectance from clouds. See para 5.12:-

“Although the impact of light would be greater if directed towards suitable habitat, there may also be ***cumulative indirect impacts due to an increase in skyglow*** in the Deep Bay area. Many species of fireflies use ambient light levels as a cue to commence signaling in the evening (Owens & Lewis 2018). The increase in ambient light levels, especially on overcast nights when there is ***greater reflectance from clouds*** (Yiu 2012) may lead fireflies to start signaling later in the evening or even, on particularly bright evenings, to reduce or stop signaling activity” (emphasis added).

We exclude ambient light from cumulative indirect impacts from increase in skyglow, and greater reflectance from clouds – which arise independently of the proposed development and in any event.

151.2. Various measures to minimize light impact on HKBWF: these include locating lights at particular distances, directing lights towards developed areas, providing suitable screening of light, and using suitable light sources. See para 7.10:

“As the habitat used by MPBWF is not directly impacted by the Nam Sang Wai development, the ***main potential impact on MPBWF would be from night-time lighting***. Impacts of night-time lighting from the development on MPBWF populations should be minimized by locating lights ***[1] at least 20m from mangrove habitats, [2] directing lights towards the developed area, providing [3] suitable screening of light (using vegetation or built structures) and using [4] suitable light sources (preferably lights emitting longer wavelengths of light, such as sodium vapour lights or red LED lights)***” (emphasis added).

These proposed measures in combination, appear fairly comprehensive and practical, for avoidance, minimization, and compensation.

151.3. On where adults HKBWF are located: on Dr. Leven's Further Supplemental Statement (para 18), adults appear to be mangrove dependent, use intertidal habitats dominated by mangrove associates, or the terrestrial fringes of mangrove habitats rather than woody mangrove.

In essence, the importance of the Updated Firefly Study is that:

- (1) Application B can proceed without adversely impacting the existing HKBWF population, subject to detailed design and appropriate control of the type, location and direction of lighting; and
- (2) There is an opportunity to (re-)provide additional mangrove associate habitat for the HKBWF at LC in one of the Inner Deep Bay locations most remote from artificial lighting sources. Such provision may be regarded as compensatory, and provided on a precautionary basis to address the unlikely event that the proposed development does impact on existing HKBWF population, or in Dr. Leven's view, as a positive conservation initiative resulting from Application B:

We consider below additional HKBWF habitat at NSW.

FLW revised EcoIA

152. The FLW EcoIA dated 18 June 2014 was helpfully annexed to Ms. Chow's Statement (at Annex 17). Para 107 of her Statement refers to that EcoIA in the context of the Cormorants exclusion distance, and various distances, without referring to the passages on light disturbance to HKBWF.

Any document provided by a party or authority cited may be double edged, and should be fairly read as a whole. To the TPB's credit, the FLW revised EcoIA was rightly disclosed.

Paras 8.6.2 – 8.6.9 are illuminating:

“8.6.2. Current literature is conflicting as to whether increases in ambient light levels can impact on populations of fireflies (Lall et al, 1980; Longcore & Rich, 2004).

8.6.3. On the one hand, Longcore and Rich (2004) highlight that night lighting can potentially interfere with visual communication within and between species. Using fireflies as an example, they note that “... the complex visual communication system of fireflies could be impaired by stray light ...”. However, no additional data are included in this paper about the actual effects of night lighting on communication by insects.

8.6.4. On the other hand, Lali et al. (1980) highlights the adaptations in North American firefly species with respect to the colour of light they emit and their spectral sensitivity. The authors of this paper express no view on the potential for impact caused by artificial lighting, nor do they present any evidence for it. Rather the data presented in this paper highlight how specific the adaptations are in these species to maximize their chances of efficient communication.

8.6.5. In addition, a recent local study (Yiu, 2012) studied the effect of artificial light on firefly flashing activity, showing that when the light intensity was increased to 0.3-2.0 lux by application of fluorescent lamp, the flash counts of this firefly species dropped

significantly and the successful mating rate may largely be reduced. However, Dr. Alex Ramsey, Fellow of the Royal Entomological Society (United Kingdom), comments that the dataset utilized in Yiu (2012) study should not be used to draw conclusion about local light effects on *Pteroptyx maipo* populations due to the flawed experiments design, methodology and data treatment. Dr. Ramsey explained that there are three known populations of *P. maipo* present in Deep Bay, one of which occurs ***within 15m of Fairview Park, and is already subject to light spill from the residential area there.*** The proposed development is 280m from the nearest *P.maipo* population and light spill effects, given proposed mitigation to minimize these on site, should be considered to be minimal and no significant.

8.6.6. The light condition of various confirmed *Pteroptyx maipo* habitats, namely transects S11 and S12, and survey locations at Tsim Bei Tsui and Sheung Pak Nai, indicate that ***the firefly is well adapted to a certain degree to light disturbance of human dwellings.*** The highest illuminance level measured in these three sites during the surveys were all 0.32 Lux, resulting from the cumulative luminance of all light sources, including nearby huts, road lamps, direct light from Tin Shui Wai high-rise development and cloud reflection for light from Tin Shui Wai and other districts close to this area (see record sheet for illumination in Appendix 18). Transects S11 and S12 have the highest firefly population amongst the survey transects. It is close to existing village huts in a distance of approximately 50 to 100 meters. All those observed village huts emitted lights during night time reaching the firefly habitat. The survey area at Tsim Bei Tsui is illuminated by the road lamps along Deep Bay Road and the survey area at Sheung Pak Nai is located only a few metres from nearby village houses (see Appendix 17).

8.6.7. There will be ***no construction activity during the night.*** Illumination ***within the construction site will be minimal*** and designed to be just adequate for security and safety purposes. No lighting will be installed along hoardings and barriers around the perimeter of the site. Therefore, ***no significant light impacts from construction activities on bent-winged firefly are anticipated.***

8.6.8. The relatively sedentary nature of bent-winged firefly means that it rarely travels more than 50m from its core mangrove habitat (Ballantyne et al., 2011). The fact that ***adults rarely fly higher than 1.5m*** (Ballantyne et al., 2011) suggests that ***adults are less vulnerable to light spill effects*** than other related species which occur higher in trees and at high densities. An example of this is the related species *Pteroptyx malaccae* in Malaysia (Ballantyne et al., 2011), where adults in taller trees are more vulnerable to light spill effects, as light cues from non-natural sources are more likely to disrupt breeding due to the ease with which they can be seen from higher elevations.

8.6.9. Given that bent-winged firefly ***adults occur relatively low down in the vegetation*** and the nearest populations are far from the development, it is considered that the ***effects of light on the population are likely to be low***” (emphasis added)

153. These passages in the FLW revised EcoIA are clearly relevant. We highlight several points:-

153.1. Distance: the HKBWF is found within 15m of Fairview Park, and is subject to light spill from that well populated residential area. While there would be a distance of

280m between the HKBWF closest to FLW, it is not of course, necessary for there to be a 280m distance between a proposed development and HKBWF habitat - given the tried and tested distance of 15m at Fairview Park. There the HKBWF population is very close and has coexisted with that residential area for many years.

Indeed, Mr. McInnes' Supplemental Report (at para 10) provides support:-

“Some *Pteroptyx* species can congregate and flash ***within close proximity*** to white fluorescent street lamps (between 7 and 14 lux)” (emphasis added).

153.2. Light intensity: the HKBWF is well adapted to light. When light intensity increased to 0.3-2.0 lux the flash count of the HKBWF dropped significantly. This contrasts with the 0.49 lux referred to in the Appellants' EcoIA (at para 1.5.49). Indeed, Ms. Chow's 2nd Supplemental Statement (at para 17) comments on the Appellants' additional firefly survey in 2019:-

“the result showed that the “average” light level among the 141 locations where any *P.maipo* was recorded was 0.41 lux ... 0.41 lux is possibly the average maximum limit of *P.maipo*, above which none could thrive (emphasis added).

153.3. Height: Adults rarely flew above 1.5m as they occur “*relatively low down in the vegetation*”. As such and on the evidence, the larvae would be at an even lower level.

153.4 Mitigation for HKBWF: as to mitigation in operation stage, the FLW revised EcoIA is instructive (at paras 9.8.10 – 9.8.15):-

- 9.8.10. ***Minimizing the use of uplighting*** by using ***full cut-off lighting*** design
- 9.8.11. ***Avoiding use of floodlighting and spotlights***, and ensuring all lighting installed for safety and security purposes is ***directed inwards*** onto buildings within the development;
- 9.8.12. ***Avoiding ultraviolet (UV) and fluorescent lighting***, particularly in the 500-600nm light spectrum;
- 9.8.13. Using ***low intensity lighting in landscaping*** areas (e.g. pavement lighting);
- 9.8.14. Providing ***buffer planting*** along the northern margin of the Development Area to ***disrupt light onto the wetland*** to the north and ***minimise light spill***;
- 9.8.15. Providing ***landscaping/screen planting of approximately 3m*** above existing bund levels along the western boundary of the site adjacent to the identified breeding habitats of bent-winged firefly;” (emphasis added).

These measures accord with the proposed mitigation measures for the NSW Site.

153.5. While the FLW revised EcoIA necessarily does not incorporate later scientific literature, this does not prevent us from evaluating all evidence before us.

Mr. Suen S.C. complained that Mr. Ismail did not cross-examine Mr. McInnes or Ms. Chow on the FLW revised EcoIA. The purpose of cross examination is to provide fair notice of any major adverse points. *If* the Appellants sought to rely on a document which the TPB did not possess, and had no notice, we would agree. But the TPB had notice of its own Annexes to witness statements. With respect, no party can cherry pick which parts of its own document disclosed are helpful and disregard the rest. As a matter of courtesy, Mr. Ismail could have raised the FLW revised EcoIA with the TPB's witnesses but was not obliged to do so.

154. Having weighed up all the evidence on HKBWF, which is much more extensive than before the TPB's decision letter of 16 March 2017, we accept the Appellants' case that disturbance to HKBWF at NSW is not a sufficiently good reason for rejection, on the balance of probabilities. Having said that, we reject their argument (4) (para 147 above). In addition to the matters above, we have specific observations on the TPB's arguments on the HKBWF. Properly read, the Appellants' concerns were of potentially serious light impact without mitigation measures. The AFCD has stated from time to time its concern on light impact due to the development's scale.

For instance, TPB's 242 Paper (at para 6.2.2(d)ii):-

"However, even if the light from the towers and remaining buildings/houses/lighting in public areas is not directed towards the habitat of the fireflies in the revised scheme, the applicants did not provide further information and detailed evaluation on whether the proposed development would result in any insurmountable impacts on the fireflies due to the overall increase in ambient light level of the area, which *could remain relatively high given the large scale of the proposed development*" (emphasis added)."

With respect, the TPB's position in the last 2 lines highlighted is speculation, unsupported by the evidence. And without proper account of the proposed steps on avoidance, minimizing, and compensation.

155. As to the TPB's first argument (para 148 above), on ambient light at NSW and larvae habitat requirements and light tolerance:-

- (1) On Dr. Leven's evidence, HKBWF habitat is either deep in the mangroves or at the bottom of the vegetation column where there is much less light, such that ambient light would not affect the larvae [T12/103/9-21]. On his evidence, the larvae cannot be found

in wet grassland – “*they are either in the mangrove edge or they’re deeper in the mangroves, or both*” and “*they’re not anywhere else*” [T11/121/7-18].

We accept Dr. Leven’s evidence after extensive cross examination. On the evidence:-

- a. much HKBWF were found in mangrove associates at LC;
- b. nearly all the HKBWF population were found in or near Braccharia marsh at NSW; and
- c. a smaller amount of the HKBWF population was found in mangrove associates at NSW.

(2) The larvae’s tolerance to light appears academic on the particular facts, because on the evidence, they are even lower down than the adults. As a matter of evaluation, we find that sufficient practical steps are proposed for avoidance, minimization, and compensation of light impact concerning the adults and larvae.

(3) The HKBWF are well adapted to *some* light up to around 0.41 lux or 0.49 lux as seen above. Indeed, their population is substantial in areas which are lit or more illuminated, than less illuminated. For instance at Fairview Park, there is a substantial population only 15m away, and at Yuen Long Industrial Estate and HK Wetland Park.

Nonetheless, there is scope to increase the habitat at LC as an element of proposed restoration of degraded mangroves at the east of the site.

(4) From Table 8 of the Updated Firefly Survey, we infer from the data that the decrease in the populations in the unlit area suggest that HKBWF are not that sensitive to light impact. This accords with the FLW revised EcoIA which was accepted by the RNTPC. It also appears there are fluctuations naturally, in the HKBWF population.

(5) As to both adults and larvae, the TPB did not take issue with the mitigation measures for direct light impact on adults and larvae. Such measures are also to minimize any increase in ambient light from the development: see the Final EcoIA (at para 1.8.36) and Dr. Leven’s evidence [T-10/75/18-77/1; T-12/93/24-94/7; T-12/96/9-23]. The TPB confirmed it will affect the adult flying HKBWF most because the *larvae are low in the vegetation*. The TPB did confirm that the issue of larvae is more about compensatory habitat at LC.

We also accept Dr. Leven’s evidence on mitigation and compensation [T-11/123, 135-28, 137] to the effect:-

- a. One only mitigates or compensates if there is an impact;

- b. The impact is small for the larvae following the proposed measures to the adults;
- c. The larvae are not impacted such that mitigation is not strictly necessary as they are deep in the vegetation, in the mangrove trees or on the soil. They do not like light shining on them, and do not want to be seen as opposed to grow up;
- d. The proposed compensation measures at LC is to recreate mangrove edge that was destroyed. In essence, compensation for adults is mangrove associates or Brachiaria marsh whereas that is also for larvae who comprise 75% of the life cycle.

156. As to the TPB's second argument (para 148 above) on no evidence of a decreasing trend in HKBWF population:-

- (1) The HKBWF population in NSW fluctuates naturally, from year to year and time to time, rather than necessarily decreasing. On Dr. Leven's evidence, this was a concern and not intended to lower the bar for mitigation requirements.
- (2) The HKBWF locations in NSW also fluctuate naturally, from year to year and time to time. One cannot proceed on the basis or assumption, that these are static. This is apparent on comparing their locations between **2015** and **2019** (Site Visit bundle pg 38). In the southern area of the NSW site in **2015**, there was a substantial HKBWF population but substantially less in **2019**.

In essence, the HKBWF population and locations in NSW are variable naturally, in any event. Therefore, the Appellants can only take practical and feasible reasonable efforts to avoid and minimize ecological impact on the HKBWF because their population and locations at NSW alter naturally, and are not fixed.

157. Next, the TPB argued that the Appellants do not properly understand the HKBWF habitat. This comprises the ability to create suitable compensatory habitat in LC. This argument is unpersuasive:-

- (1) On the evidence, their habitat is primarily in the mangroves, or mangrove dependent, and may include Brachiaria marsh.
- (2) The enquiry is appropriate compensatory habitat. There is no evidence that for HKBWF, there is only one type of appropriate habitat.
- (3) As to habitat, on Ms. Chow's own evidence, she agreed and noted:-

- a. the proposed provision of habitat for HKBWF at LC should be done [T-19/139/17-21].
 - b. A Nature Reserve at LC is in line with the OZP and Ramsar Plan [T-19/147/2-5].
 - c. HKBWF is found at the HK Wetland Park, close to Tin Shui Wai [T-20/12].
- (4) The *timing* of compensatory habitat is also important. The amendments to the Final CM Plan support the findings of the 2020 HKBWF Study:-

“It is recommended therefore that compensatory habitat should be provided ***at least two years in advance*** of any adverse impacts to fireflies as a result of night-time lighting, ***to allow time for a population to establish in the mitigation habitat***” (emphasis added).

We accept that recommendation as prudent and feasible.

The question also arises of compensatory HKBWF habitat at NSW as discussed below, which undermines the TPB’s argument (3).

158. As to the TPB’s fourth argument that HKBWF habitat creation at KTDC is “unsubstantiated” (and less effective), this argument fails. Indeed, such habitat creation was accepted by the TPB’s own witnesses:-

- (1) Ms. Chow agreed that the KTDC is man-made habitat and supports HKBWF [T-19/138/2-6].
- (2) Mr. McInnes accepted such creation, albeit he said at a “much lower” effectiveness.

159. It is important to emphasise that Mr. McInnes as an independent expert, frankly and helpfully proposed further compensatory habitat for HKBWF at the NSW Site (quite apart from at LC):

- (1) Although Mr. Leader did not propose such habitat in NSW given its proximity to the development, on Mr. McInnes’ evidence an area of fish ponds to the south of NSW may be suitable for conversion to HKBWF habitat. Those ponds are zoned for Village Type development [T-17/186/20-25]. The Appellants contend there would be no major technical or ecological difficulties in creating HKBWF habitat in these ponds if planning or land ownership issues were resolved.

We accept and find that Mr. McInnes’ evidence provides adequate and feasible steps:-

“that would be *a sensible and suitable use*, to *reinstate them back to the mangroves they were*, and hopefully if that supports the fireflies, that could be seen as a *positive outcome*” [T18/107/911-14] (emphasis added).

- (2) As to the LC Site, Mr. McInnes accepts that creating HKBWF habitat at LC in areas where mangroves were destroyed would be valuable from a conservation perspective [T-18/74/23 to T-18/75/5]

(4) Alleged inadequate enhancement of fish ponds

160. The Appellants propose several measures to enhance the fish ponds including:-

- a. removal of unwanted structures, aboveground wires etc.,
- b. strengthening of bunds and installation of grasscrete track,
- c. installation of water control structures,
- d. drain down and re-profiling of ponds using backhoes and swampdozers,
- e. refilling with water from other ponds/rainwater,
- f. fish stocking following reprofiling,
- g. drain-down cycle (at least 2 ponds monthly throughout the year, but adaptive if required to meet targets),
- h. fish restocking if monitoring reveals fish numbers need to be bolstered to attract target bird species and creation of fish-free lily pond: see EcoIA para 1.8.83.

161. The Appellants contend: (1) the AFCD failed to disclose to the TPB (and to the TPAB until requested), the terms and conditions of the MA’s²⁵ for commercial fish ponds “*not run for the benefit of wildlife*”²⁶ and of the important differences in the drain-down practice proposed in the Final CM Plan; (2) there is *no* ecological increase in functions of commercial fish ponds as a result of the MA’s relied on by the AFCD; and (3) a nature reserve would perform ecological functions similar to or better than the existing fish ponds.

162. The TPB placed much emphasis on the MAs, and ‘wise use’ under the Ramsar Convention. Its arguments were: (1) given the secondary loss of active fish ponds by the creation of compensatory habitats where they are located, to achieve “*no-net-loss in wetland*”, the

²⁵ see Respondent’s Exhibit R-14

²⁶ see §16 of the Decision in *TPA 13 of 1993* [CB1/12/638]

Appellants need to enhance the ecological function of the 56.5 ha of fish ponds by about 1.4 times to reach the same level of ecological function of the existing 78.6 ha of fish ponds; (2) the effectiveness of the Appellants' enhancement measures is overestimated as they did not account for the MA project implemented by Government which are already in place and involve implementation of "substantially similar" drain-down measures; and (3) the Appellants' reliance on the LMC EEA example is problematic as the primary measure to enhance bird numbers there is fish stocking, which the Appellants do *not* propose to implement in Application B. In any event, this does not serve to increase *ecological* function of fish ponds (as opposed to their *human* function, as admitted by Mr. Leader).

MA's

163. The MA is a key document. A sample of the standard form MAs with translation was produced to us on Day 19 as part of Exhibit R14, on our prompting. The question of "no-net-loss in wetland" necessarily involves comparing the ecological value and functions of fish ponds under the existing MAs, compared to the Appellants' proposals. The TPB argued that the Appellants could have applied for disclosure beforehand. That is partly correct, but even in adversarial litigation (which this is not), all relevant documents should be disclosed in good time— so the tribunal and any party are not unwittingly misled, to avoid surprise, and to enable all to focus on the real issues.

In future, for the fair disposal of all appeals to the Appeal Board, we urge all parties when there are relevant documents which are in one's possession, that these are voluntarily produced, or a request or application for disclosure should be made in good time – without waiting for the Appeal Board's prompting. This would avoid the risk of adjournments, and unnecessary time and costs wasted. This Appeal Board notes with respect, that there were several gaps in the TPB's evidence, including the non-provision of the MA, and to procure the necessary expert declarations by Ms. Chow and Ms. So – until this Appeal Board's prompting. The MAs are clearly a relevant and important document. With busy and very able external Counsel and at the DOJ, it is unlikely such gaps would have arisen if an advice on merits and evidence was sought and obtained, in good time.

164. From the standard form MA produced, these are for a 2-year period between Party A (fish pond operator) and Party B (the Hong Kong Bird Watching Society ("HKBWS")):-

164.1. We note from the MA's terms and conditions (clause 5):-

- “1. During the Contract Period, Party A must carry out *specified management works* at the Sites in accordance with the requirements and rules stipulated in Annex III; *Party B will pay the concerned management fees to Party A* as per Annex II upon inspection of the work done to the satisfaction of Party B;
4. Party A shall abide by the Wild Animals Protection Ordinance under all circumstances, and shall ***not intentionally disturb or hunt any wild birds*** at the Sites; During the Contract Period, Party A must ensure that there are no devices set up by any third parties which ***will endanger birds at the Sites, such as snares, fish hooks or vertical nets***” (emphasis added).

164.2. Annex III: Requirements and Rules under the Agreement are important:-

- “2. During the First and Second Periods, Party A must drain-down the Sites (fishpond) by at least 1 meter or drain-down to a depth of not more than 1 meter. When the water level is drained to the designated depth, Party A *shall maintain such depth for at least 7 days*; the date of draining-down is to be proposed by Party A, but Party A must notify Party B of such arrangement at least 3 days prior to the draining-down;
3. *During the 7-day period* when the water level drops to the designated depth, party A shall ***not use any measures to disperse, disturb or deter birds from roosting and feeding*** at the Sites, and shall not carry out any digging or leveling of fishponds;
6. During the Contract Period, Party A must ensure that there are no devices at the Site which will ***endanger birds, such as snares, fish hooks or vertical nets***; if there is a breach, Party B is entitled to, depending on the circumstances consider *withholding payment of management fees* or *terminating this Agreement immediately* by written notice to Party A, and not to pay the concerned management fees;
8. If any devices which will endanger birds are found at the Sites, Party B shall take the following actions:
 1. Contact Party A by phone, and make enquiries and document the situation;
 2. Notify the relevant government departments for follow-up immediately and remove the illegal hunting tools if such tools are found;
 3. If Party A is suspected to be in breach of the Wild Animals Protection Ordinance or any other laws and regulations of HKSAR, Party B is *entitled to withhold payment of management fees or terminate this Agreement concerning the fishpond in question immediately*” (emphasis added).

165. Three points are obvious from the MAs:-

- (1) First, the fishpond operator's obligations include: a) not to “intentionally disturb or hunt any wildbirds”, or to b) “endanger birds at the sites” by any “device” “such as snares, fish hooks or vertical nets”. Otherwise for b) above there may be a breach of the *Wild Animals Protection Ordinance*, and management fees may be withheld and/or the MA terminated.

The obligations above supports the position that as a matter of common sense, commercial fish ponds operators may otherwise commit or be tempted to commit, such conduct.

- (2) Second, the duration of fishpond draining to a depth of “not more than 1m” is “for at least 7 days” in any one year.

Thus, such draining would not occur regularly, or monthly.

- (3) Third, during the 7 days drain-down period, the fishpond operator shall use not any measures and “*disperse, disturb or deter birds from roosting and feeding*” (emphasis added) at the sites.

As accepted by Ms. Chow, outside that 7-day period, fishpond operators are perfectly entitled to do so.

Final EcoIA re enhancement of fishponds

166. Next, we highlight from the final EcoIA on this issue:-

166.1. Executive Summary:-

“S10. There is a proven track record in Hong Kong, including at *Hong Kong Wetland Park, MPNR and MTR Corporation’s mitigation wetland at Lok Ma Chau*, of the ***enhancement and management of fish pond habitat*** in order ***to achieve a significant increase in wetland function;***” (emphasis added).

“S12. The number of birds of conservation significance that require to be supported have been ***calculated in order to generate the ‘target’ numbers*** and evidence (from Lok Ma Chau WEA and MPNR) is presented to demonstrate that even if a very conservative and precautionary approach is taken, there is ***ample evidence to demonstrate that the target numbers of birds are eminently achievable***” (emphasis added).

166.2. Habitat evaluation is considered at section 1.6, and para 1.6.5 states that:-

assessment of the ecological value of these active fish ponds (and indeed abandoned ponds) includes an evaluation of the bunds, which are an integral part of the pond structure and thus are a key element of wetland function.

- (1) Thus, bunds are included in this evaluation, although not strictly fishponds or wetland.

- (2) As to ecological evaluation of active fish ponds, these have “considerable potential” as highlighted in para 1.6.8 and Table 20 on ecological evaluation of ponds:-

“**Moderate to High Ecological Value** Given the location of the site and the *ecological linkages* to MPNR and the intertidal mudflats, there is *considerable potential to improve these ponds* and taking this potential value into account these ponds are of **High Ecological Value**” (italic added).

This contrasts with inactive ponds which are “of Moderate to High ecological value.”

166.3. Mitigation of Impacts: see section 1.8. We highlight:-

- (1) Enhancement measures at para 1.8.8 include a comprehensive suite of measures.

“1.8.8 Enhancement of pond/open water habitat will be achieved at NSW WEA and LCNR by *reduction of disturbance, reprofiling* of ponds, conversion of some ponds to *tidal* pond, *management of vegetation* (especially bund vegetation, encouraging roosting and foraging by large waterbirds), *management of fish populations* of suitable numbers and species to provide food for waterbirds, and *management of water levels to include regular drain-down*” (emphasis added).

Para 1.8.80 is important as ponds would be drained on a *monthly cycle* (unlike MAs *annually*):-

“Ponds will be drained on a *monthly cycle (i.e. two ponds drained per month throughout the year)* to encourage use of the site by large waterbirds. Draining ponds provide an important resource for a number of target bird species, notably ardeids and spoonbills as *fish and shrimp become trapped in shallow water and thus become more accessible*” (emphasis added).

LMC Environmental Impact Assessment Report (“Enviro IA”)

167. We next consider this Report dated January 2002 (Ms. Chow’s Statement Annex 16). It is helpful in evaluating enhancement of fish ponds albeit for an area materially smaller than the NSW and LC Sites combined. The potential for enhancement would be greater the larger the area:-

- 167.1. This Report is referred to in Ms. Chow’s Statement (at para 127) where she compares the “management intensity of other smaller mitigation wetlands” (e.g. LMC) and

contends the Appellants' proposed conservation measures are "*less intensive*" (emphasis added).

The TPB did not put in cross-examination that any of the measures in the LMC Enviro IA are not feasible or practical.

167.2. Of particular note:-

(a) On number of ponds, drain-down, and duration: at para 4.11.45:

"However, these food resources are generally *only readily available* to birds when the ponds are drained down for *fish harvesting during the winter*. Furthermore, ***only a small proportion of fish ponds are drained at one time and only for short periods***. Consequently, a large area of fish ponds is required to support the bird populations and avoid 'feeding bottlenecks'. (emphasis added).

(b) On how many birds are affected by proposed enhancement measures, and which birds species, at para 4.11.47:-

"The management regime proposed is expected to *benefit other species of conservation importance that currently use fish pond habitats*. For example, the managed wetlands, at Mai Po which include areas of former fish ponds have been shown to ***support significantly higher densities of Greater Spotted and Imperial Eagles than occur in commercial fish ponds*** (refer to Baseline Report Appendix A4.2). *Both are globally threatened*. In addition, the provision of a ***less homogenous wetland area*** and the ***resultant increase in habitat diversity*** within the Lok Ma Chau fish ponds will provide ***habitat for other species that are generally rare within commercial fish ponds***" (emphasis added).

(c) The main mitigation enhancement and measures are summarized at para 4.11.50:-

"To provide these habitat *requirements for target species* and to *meet the objectives for the enhancement* of fish ponds it is proposed that main mitigation measures would be:

- ***Enlargement of small fish ponds to reduce enclosure effects*** (as small ponds are avoided by many birds)
- ***Re-profiling*** of fish pond bunds and the immediately adjacent areas to provide *shallow sloping margins* (and a *variable bottom topography*) that provide increased structural diversity. Shallow sloping margins will also increase feeding opportunities and the availability of fish and invertebrate prey to birds.
- Establishment of ***marginal emergent vegetation***, including reedbeds and other species, *to support and provide cover for* invertebrates, amphibians, reptiles, passerine birds and mammals. Such vegetation

may also provide screening of disturbance sources from feeding herons and egrets.

- **Reductions in water depth** during the winter, i.e. when deoxygenation problems are unlikely to occur, to *increase the availability of fish and invertebrates to wading birds*. This is considered to be *a potentially very important enhancement*. Observations of some fish ponds in the Deep Bay area by members of the study team have revealed that *some abandoned shallow ponds are frequently used for feeding* by various waders, herons and egrets, often including substantial numbers of the globally threatened Black-faced Spoonbill.
- Manipulation of the *fish stocking, feeding/fertilizer regime and drain-down* to optimize the food availability for birds” (emphasis added).

- (d) Removal of vegetation opens up viewing corridors for birds: and attracted large numbers of Black-faced Spoonbills to the site (at para 4.11.62):-

“The effect of controlled vegetation management on the use of Lok Ma Chau area by large waterbirds was illustrated during November 2001 when bund repairs necessitated the cutting back of vegetation along most of the bunds in the proposed Lok Ma Chau fishponds compensation area. The **removal of vegetation opened up viewing corridors previously hidden**, and this **change attracted large numbers of Black-faced Spoonbills** to the site, despite the lack of suitable foraging conditions in the area. Other factors, such as **the lack of disturbance**, also attracted these sensitive waterbirds to the area, as described in subsequent sections” (emphasis added).

- (e) Reduction in human activity: from common sense and observation, bird numbers increased as observed at para 4.11.64:-

“A further advantage of the change from commercial fish ponds to wetland mitigation area is the **associated lower levels of human activity on site**. This is considered in part at least to **contribute to the higher numbers of large waterbirds roosting** within the resumption area during the 2000/2001 winter period. It is considered that these birds were roosting in the area due to, in part at least, the low levels of human disturbance on the site. Thus in the past two winters, and in direct contrast to previous winters when the site was operated as commercial fish ponds, large concentrations of Black-faced Spoonbills have been present within the resumption area” (emphasis added).

- (f) Duration of drain-down is important: this is *20 days*, much longer than the normal commercial operation of *3 to 7 days* (at para 4.11.70):-

“Extension of the draindown period to a *length of around 20 days* is *much longer than the normal commercial operation of 3 to 7 days* and provides the second benefit of this management system. *Extended feed*

times in selected ponds will *further reduce potential feeding bottle-necks*” (emphasis added).

- (g) Extent of increase in carrying capacity, doubling was considered to be “highly conservative”. Para 4.12.7 states:-

“Table 4.43 shows that there is *an increase in functional value of the overall area after compensation is complete*. This assumes **a doubling of the carrying capacity of the ponds** which is *considered to be highly conservative*” (emphasis added).

Para 4.12.8 on construction stage compensation:-

“As is discussed further below, the capacity of the undisturbed ponds within the compensation area **can be much more than doubled in terms of their functional value** for the target species of large waterbirds by means of active management measures” (emphasis added).

The position is well summarized at para 4.12.14:-

“It is considered that by a **combination of fish pond enhancement** and the creation of a **more intensively managed reedbed and marshland** area it is **realistic to predict that at least a doubling in the carrying capacity** of the current fish pond habitat can be achieved overall, thus **eliminating residual impacts** to Species of Conservation Importance from habitat loss and disturbance” (emphasis added).

We accept that the statements above in the LMC Enviro IA are objective and feasible. There is *no* good practical reason why the extent of enhancement at the LSW and LC Sites combined would not be at least double.

FLW revised EcoIA relevant to fish pond enhancement

168. Finally, the FLW revised EcoIA is relevant on this issue. The “no-net-loss in wetland” principle was applied to fish pond enhancement. In particular, at para 8.1.4 :-

“However the loss of water body is **compensated by re-profiling** the ponds in the WNR area. This **creates ecologically enhanced and enlarged ponds**, and **recreated marshland habitat**. The **construction and ongoing management** of these habitats (as outlined in the HCMP) is anticipated **to fully compensate any potential loss of wetland ecological function** arising from the effects of the residential development” (emphasis added).

And at para 8.2.17 on summary of potential impacts on habitats during construction:-

“There will be no net loss of water body in the WCA or WBA. Permanent habitat loss of aquaculture ponds due to the development footprint will be **compensated by re-profiling existing aquaculture ponds**, thus **creating enlarged ponds of higher**

ecological value, and *freshwater marsh, also of higher ecological value*” (emphasis added).

In our assessment, there is no good reason (and given considerations of consistency and fairness) why such statements should not also apply in principle, to the proposed conservation and enhancement at the NSW and LC Sites combined – which are much larger than the FLW site.

Evaluation of TPB’s arguments on fishpond enhancement

169. Having weighed up all the evidence including the matters above on fish pond enhancement, we find on the balance of probabilities, that Application B would involve significant enhancement of the fish ponds’ ecological value and functions. This would be at least double, and up to some 5 times. In response to the TPB’s three main arguments (para 162), we make these observations and findings.
170. As for argument (1) that enhancement of ecological function is necessary for 56.5 ha by 1.4 times for the same ecological function as the existing 78.6 ha of fish ponds:-
- (1) We find as a fact that this would at least be achieved.
 - (2) The Appellants do not dispute this calculation but contend that enhancement would be by some 5 times. They contend that LMC achieved a 5.1 times increase in ecological function after a calculation was made: see Mr. Leader’s Statement para 58 and [T-12/153/4 to T-12/155/4] and [WA-6/5.1.38].
171. As for argument (2) that the proposed enhancement is “overestimated” by not taking proper account of the MAs which have “substantially similar” drain-down measures, the TPB’s argument concerning MAs is incorrect and overstated:-
- (1) Having carefully examined the MA terms and their purported performance, neither of these are substantially similar to the proposed measures for Application B.
 - (2) Drain-down frequency is significantly different: *monthly* or so under Application B, but only *once yearly* under the MAs.
 - (3) Drain down duration is also significant different: of up to *20 days*, compared to *7 days* under the MAs.

- (4) The rationale of drain down is also very different – to benefit wildlife, as opposed to commercial purposes to catch fish for human consumption. For the former, the number and diversity of waterbirds would be increased compared to the *status quo* for traditional fish farming. On Dr. Leven’s evidence which we accept [T-10/65-67] if one retains any element of normal fish farming:-

“we will be ***compromising the ecological objectives*** in order to do so” (emphasis added).

- (5) For the MAs, for the whole year of 365 days (except 7 days) fish pond operators are perfectly entitled to use “*any measures to disperse, disturb or deter birds from roosting and foraging ...*” (emphasis added) (MA Annex III, clause 3).

This cannot sensibly be in the best interests of wildlife and ecological enhancement.

- (6) On the evidence, enforcement action in various respects has been difficult and unsuccessful, to say the least. Once the NSW WEA and LC Sites are fenced off from access by humans and dogs, and properly managed, no question should arise of humans and dogs *endangering* or *disturbing* waterbirds. And at present, there is always the risk of offences under the *Wild Animals Protection Ordinance* being committed – but without detection, prosecution, or sufficient evidence. For instance, if a witness cannot be located or is unwilling to give evidence.

172. We accept Dr. Leven’s evidence that drain-down under the proposed measures is different from under the MA for several reasons [T12/63-64]:-

- (1) The draindown leaves much more smaller fish for the birds e.g. tilapia. Under the MA’s, the effect of draindown would be that big fish would be sent to the market.
- (2) While draindown under the MA’s involves most of the fish being removed for the market, under the proposed measures *all* fish will be left for the birds “so that *is a quantum factor of difference*” (emphasis added).
- (3) The ponds would be reprofiled. In essence, for commercial fishing, the ponds have steep sides and flat bottoms so there is little shallow water accessible, especially for large waterbirds.

Under the CMP, the ponds would have gentle sides, so new areas are available for birds to forage. And there would be shallow margins throughout the year - so ecological value would be enhanced all year.

- (4) “The *key distinction is about “freedom from disturbance”* (emphasis added). Commercial fishing involves much more human activity in the vicinity or nearby, disturbing the birds. Under the CMP for managed wetlands, “you *deliberately keep away from the ponds* when they are being drained down” (emphasis added).

Therefore, there is no sound foundation for the AFCD’s assumption, that the MAs would result in significant enhancement of ecological function. Indeed, in cross-examination this was not disputed by Ms. Chow.

173. We have no doubt that the AFCD and its experts have the best intentions concerning commercial fish ponds. For instance:-

- (1) Ms. Chow’s Supplemental Statement (at para 42):-

“The major difference between the two is that drain-down under the MA project may be *less frequent* (fish would take up to a year to reach marketable size), but fish farming has an *extra dimension of food provision for people* in addition to birds, an example of wise use under the concept of sustainable development” (emphasis added).

- (2) Mr. McInnes’ Supplemental Report (at para 100) is to similar effect:-

“However, the ecosystem benefits/services relating to the *commercial, food production*, cultural and social ecosystem services of fish ponds at LC will be lost in perpetuity. This represents a human-induced adverse alteration of the ecological character of the Ramsar site and therefore does *not represent wise use*” (emphasis added).

As stated, notwithstanding such observations concerning “wise use” and commercial purposes, wise use and food provision for people are not mentioned in the OZPs nor part of the planning intention.

- (3) In essence, “*enhancement of ecological value and functions*” of the fishponds or wetland is the key aim under the planning intention, for the benefit of wildlife. And especially given the Fish Pond Study as important context.

We have no doubt that Government is well intentioned in considering the socio-economic impacts of wise use, and the livelihoods of fish pond operators. We acknowledge such efforts and honourable intentions. Nonetheless, we are bound by the clear planning intention. Should Application B be implemented, fish pond operators may provide valuable assistance and input, for instance on enhancement of fish ponds.

174. As for argument (3) that the Appellants' reliance on the LMC EEA is problematic as the "primary reason" is fish stocking, we disagree:-

- (1) While the LMC EEA is a smaller area, a combination of measures (of which fish stocking is only one) for ecological enhancement should be applied. Fish stocking is *not* the sole or dominant measure for ecological enhancement at LMC, but only one of a range of measures.
- (2) The use of fish stocking is a contingency, and should be unnecessary at the NSW and LC Sites which are much larger than the LMC EEA, and with greater ecological value and potential.

175. We also bear in mind the Fish Pond Study (at para 6.5.14):-

"the only use *found to perform better than the existing ponds* was *a wetland wildlife reserve*" (emphasis added).

We respectfully agree. In essence, MA are not the only or most appropriate way for ecological conservation and enhancement.

(5) Indirect impact on reedbed and wet grassland

176. It is common ground that reedbeds are important as a source of food (e.g. insects), for breeding, and safe roosting for waterbirds.

177. The Appellants argue: (1) ecological succession is taking place at NSW and at least some of the successional changes particularly those resulting in loss of reedbed are negative; implementation of Application B will remedy such negative successional changes; (2) the Appellants' proposals to address indirect impacts are similar to the proposals for FLW which the RNTPC accepted.

178. The TPB contends: (1) the Appellants proposals on existing reedbed and wet grassland habitats are adjacent to the proposed development and subject to indirect disturbance impact, lowering their ecological function; (2) the claim that only a small number of birds will be displaced by the development is unsubstantiated and affects carrying capacity; (3) the claim that any disturbance impact to reedbed will be compensated by converting all areas into permanently wet reedbed is unsubstantiated as a mosaic of wet and dry reedbed habitat is

preferable; and (4) the claim of unidirectional succession changes (in alleged magnitude and speed) is unsubstantiated, while the methodology in the Updated Vegetation Survey is inconsistent and flawed.

Final EcoIA on impact on reedbed and wet grassland

179. First, we consider the final EcoIA on this issue:-

179.1. Executive Summary (at S10) states on ecological function:-

“... it is proposed to reprovide reedbed and wet grassland *to compensate for loss due to the development*, such that there will be no net loss in the area of these habitats; there will be a *net loss of pond habitat of 12.9 ha (16.4%), but comprehensive measures are proposed to enhance the remaining pond area to compensate* for this loss and ensure that there will be *no net reduction in the numbers of waterbirds using* this habitat” (emphasis added).

Para S11 sets out the timing, and location of relevant measures:-

“Disturbance impacts to reedbed and wet grassland habitat and fauna using these habitats will be addressed by ensuring that the reprovided areas of these habits will be formed *in advance of any impacts taking place*; the reprovided areas will be *largely or entirely unaffected by construction and operation phase* disturbance. Disturbance impacts on waterbirds using the Shan Pui River (outside the project site) during construction of road bridge and thereafter will be addressed by providing *shallow pond habitat at Lut Chau in advance* of any impacts taking place” (emphasis added).

On Dr. Leven’s evidence which we accept, the number of birds in reedbed to be displaced would be very low. Before disturbance, reedbed habitat would be provided at the north east of the NSW Site [T-11/158-60].

179.2. Habitat evaluation: is considered at section 1.6. As to permanently wet reedbed, para 1.6.11 states:-

“*Permanently wet reedbed is generally of higher value to wildlife*, especially birds (Poulin *et al.* 2002); *seasonally wet reedbed* is also *more likely to be successfully invaded* by terrestrial fauna” (emphasis added).

From para 1.6.13 and Table 21, the reedbed at NSW is of high ecological value.

179.3. Potential impacts from the proposed development are considered:

(1) At para 1.7.3, while Table 31 extracted where relevant below sets out the current and proposed relevant habitats in the Project Site (ha):-

“

Habitat ¹	Current Area (ha)	Proposed Area (ha)	Net Change (ha) ²
Reedbed ³	49.5	50.7	+1.2

Wet Grassland ³	15.6	16.0	+0.5
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(2) At para 1.7.10 and Table 33 on Direct permanent habitat loss under the Development Area footprint of 11.6 ha and states where relevant:-

“Table 33. *Direct permanent habitat loss under the Development Area footprint of 11.6 ha and due to conversion of wetland habitats.*

Habitat ¹	Under development footprint (ha)	Converted to other wetland habitats (ha)	Total loss (ha) ²
Reedbed ³	7.1	0.0	7.1
Wet Grassland ³	3.0	0.0	3.0

Thus, there will be total loss of 7.1 ha of reedbed, and 3.0 ha of wet grassland.

179.4. Mitigation of impact: is considered at section 1.8. Para 1.8.15 is noteworthy on compensation concerning reedbed and wet grassland:-

“Of the 49.5 ha of reedbed currently present, 7.1 ha is under the proposed Development Area footprint. The loss of this area will be ***compensated by the conversion of ponds in the northeast of Nam Sang Wai to reedbed***, thus *ensuring that there is no net loss in reedbed area*; following implementation of the project ***reedbed area will increase to 50.7 ha***, all of which will be managed as ***permanently wet reedbed of Very High ecological value***. Thus, overall there will be *a net functional gain as permanently wet reedbed is generally of higher ecological value than seasonally wet reedbed* (e.g. Poulin *et al.* 2002)” (emphasis added).

Para 1.8.16 continues:-

“Enhancement of reedbed habitats will be achieved by ***converting seasonally to permanently wet reedbed through active management*** of water levels, by providing a *continuous block of reedbed in the WEA* to reduce habitat fragmentation from bunds or other habitats, ...” (emphasis added).

180. Having examined the evidence and the matters set out above, we prefer the Appellants’ contentions. For completeness, we deal with the TPB’s arguments (para 178):-

181. As for argument (1) on such habitat “adjacent” to the proposed development, and subject to indirect disturbance impact, the planning intention envisages ecological conservation and

enhancement and residential development – on the same site. There would necessarily be some impact near or adjacent to certain habitats. It is impractical to expect otherwise.

182. As for argument (2) that the claim only a small number of birds will be displaced is “unsubstantiated”, and those disturbance sensitive species would not use the habitat which impacts on ecological function and carrying capacity:-

- (1) At the LMC EEA, there are different management compartments for different bird species, depending on which are more tolerant to disturbance. Compartments A and B are for those more shy (e.g. Great Cormorants, Chinese Pond Heron), while Compartment C is for those less shy and so closer to the station (e.g. Eurasian Teal or Coot).
- (2) It is inappropriate to focus on a particular habitat, in isolation. Instead, one considers which birds are more tolerant of disturbance or otherwise, in the Site overall, bearing in mind that birds are mobile naturally, and not limited to a particular area or site – especially given the proposed NSW WEA and LCNR.
- (3) As stated earlier, we have found that waterbirds’ increased carrying capacity under Application B would involve the overall site’s ecological value and functions being significantly enhanced.

183. As for contention (3) that permanently wet reedbed is less preferable to a mosaic of wet and dry reedbed:-

- (1) On the evidence, wet reedbed is preferred by migrant species, and wetland dependent species, as wet reedbed has greater ecological function than dry reedbed. There is ample literature to this effect. For instance, the article co-authored by *inter alia* Dr. Leven and Mr. Leader “Permanently inundated Phragmites reedbed supports higher abundance of wetland - dependent birds species than drier reedbed during southward migration through Hong Kong” (Exhibit A7). And a joint article with authors including Dr. Leven and Mr. Leader exhibited at Mr. Leader’s Reply Statement Appendix 2b.
- (2) Ultimately, there can be fine-tuning of design. Mr. McInnes accepted that fine-tuning of design (e.g. proportions of wet and dry reedbed) could be looked at later [T-17/190/11-14].

184. As for contention (4) that succession changes are “unsubstantiated”, we disagree:-

- (1) Whether there is succession is a question of fact and degree, and not expert evidence only. Having considered the evidence, we accept Dr. Leven and Mr. Leader’s evidence in this respect, corroborated from what we saw during the Site visit.
- (2) We note that Mr. McInnes substantially agrees that ecological succession has occurred. On this evidence, the underlying pattern is towards dry or drier habitats. If left unchecked, succession to non-wetland habitats will continue, albeit the rate is uncertain and differs in different parts of NSW. [T-17/164/18 to T-17/165/17 and T-17/166/11-15]).
- (3) On the evidence, Typha is a particular plant which is undesirable and part of succession: Mr. McInnes accepted that Typha is not a plant we want in reedbeds in Hong Kong. [T-18/28/24 to T-18/32/24 and especially T-18/31 to T-18/32].

As such, we find the argument on succession changes as “unsubstantiated” difficult to understand.

- (4) We do not accept that the methodology in the Updated Vegetation Survey is inconsistent and flawed. The Updated Survey was not and did not purport to be, an updated EcoIA. Instead, it was intended to update this Appeal Board on habitat changes. In essence and on balance, we find that the proposed habitat map of NSW WEA and LCNR (**Appendix 7** hereto) is a reasonable and pragmatic balance, to address indirect impact on reedbed and wet grassland, and adequate enhancement of fish ponds.

(6) The Precautionary approach

185. The TPB and its ecological experts rely heavily on the precautionary approach, especially concerning the HKBWF and Cormorants roosts.

As Mr. Suen S.C. rightly submitted in opening, the precautionary approach is manifest in several ways:-

- a. the “no-net-loss in wetland” principle;
- b. in “minimum pond filling”; and
- c. detailed assessments required under the OZP Remarks.

It is unnecessary for this Decision to decide if the precautionary approach goes beyond the “no-net-loss in wetland” principle, and b) and (c) above. The Appellants caution against “double counting” but it is unnecessary to decide if this is permissible or could arise in this case.

186. Properly understood and applied, the precautionary approach is correctly set out in the *Appellants' Response to Comments* in February 2013 for the *s.16 Application* (at paras 8.2 – 8.4):-

“8.2 The precautionary approach does *not mean that the best course of action is to do nothing other than to retain the status quo*. It really requires the decision-maker to make the best decision on the basis of the best information available to avoid a deterioration of an important situation.

8.3 The precautionary approach was adopted by the Town Planning Board as there was still some uncertainty as to whether the scientific information available at the time of the “Fishpond Study” was sufficient. There was a potential threat of serious or irreversible damage to the environment, and the *lack of full scientific certainty and consensus was not used as a reason for postponing the imposition of controls*, which made the conservation of the ecology of the wetlands a high priority. The precautionary approach is often seen as softer than applying a precautionary principle, as it *takes into account local circumstances and it calls for cost-effectiveness* in applying the approach, e.g. taking economic and social costs into account (Recuerda, 2008). This later point is *evident in the TPB taking the PPP approach as an economical means for implementing the conservation process.*”

8.4 Under the precautionary approach the burden of proof is shifted to the proponent *to show that the perceived risk has been properly addressed and adequately removed*. In the case of Nam Sang Wai it could be considered that the ecological situation is now at risk from doing nothing. The present un-managed and uncontrolled situation is *subject to threats and negative events, such as that arising from fires, dumping of waste material and increased human access*. The ecology is also at risk if commercial fish farming was to be re-introduced as is permitted” (emphasis added).

187. While the precautionary approach was expressly raised by the TPB’s letter concerning the First Appeal but not the Second Appeal, from an abundance of caution, we have three observations:-

(1) In *FLW* at [98], Au JA considered that the precautionary approach “has *already been embodied in and manifests itself in the “no-net-loss in wetland principle”* (emphasis added).

We are bound by that decision and tend to agree.

(2) The planning intention is not ecological conservation only, but ecological *enhancement* also.

It is a cogent reason for departing from the “precautionary approach” if it means inaction or doing nothing because this would lead to a situation “where a species is

becoming endangered or habitats are becoming degraded”: see *R v LB Tower Hamlets* [2013] 4 All ER 237 (C.A.) where Maurice Kay LJ said at [28]:-

“....if there are particular local circumstances which suggest that some aspect of the guidance ought not to apply, that may constitute *a cogent reason for departure*” (emphasis added).

(3) In any event, the precautionary approach is a material consideration in the Explanatory Statement, rather than strictly a matter one is bound to follow under the planning intention.

If necessary, given (1) above, this would be a good reason for not following it.

188. We accept the Appellants’ case on the precautionary approach and its application as follows:-

(1) On Dr. Leven’s evidence, if there is a high degree of certainty of outcome, the precautionary approach need not be applied in a very conservative manner [T10-/100, 101]. In this case, wet reedbed is preferable to dry reedbed, and on HKBWF habitat creation in mangroves and mangroves associates.

(2) As to the Great Cormorants, as the tall buildings at LMC are some 400 m away, that distance is used on a precautionary basis on Dr. Leven’s evidence [T12/70-72].

(3) As to HKBWF, the TPB was prepared to accept mitigation measures at FLW, and the Appellants should have similar treatment.

15. Long-term conservation and management – Revised Conservation Management Plan (“CM Plan”)

Final CM Plan

189. The Final CM Plan dated 21 November 2016 comprises a plan over 45 pages, 11 tables, over 10 Figures of 16 pages, and Annexures A to E of 19 pages. These together total 80 pages. It is a comprehensive and well reasoned document. On balance, we find it is credible, impartial and independent. Having also heard and seen all the ecological experts give evidence, the Appellants’ expert evidence largely accorded with the Final CM Plan.

190. These points are noteworthy from the CM Plan:-

190.1 Control of human access and disturbance: at para 1.13.2:-

“Public access to the WEA and LCNR will *need to be restricted to avoid disturbance to wildlife*. The fencing of the perimeters of both areas will play a major role in restricting access” (emphasis added).

All this is common sense.

190.2 On long term management:-

(1) As to supplemental stocking, para 1.16.11 states:-

“However, fish stocks will be monitored on a routine basis, and supplemental stocking undertaken as required. Supplemental stocking may simply involve the *transfer of fish from fish ponds with high fish numbers* within the LCNR or WEA or involve the *purchase of fish* from active fish pond operators” (emphasis added).

This is an appropriate mechanism, for ecological conservation and enhancement, without decline in wetland function.

(2) On the potential increase in bird numbers by suitable management, para 1.16.12 states on the Fish Pond Study:

“The same study noted that food availability may be limiting the populations of ardeids using fish ponds and that there is *potential for increase of ardeid numbers if suitable management is in place*, such as the *controlled draining of fish ponds for birds* in times of insufficient food supply” (emphasis added).

Para 1.16.13 is important in emphasizing a “more consistent food supply for ardeids throughout the year”:-

“The proposed management regime, aims to control drain-down of fish ponds to provide *a more consistent food supply for ardeids throughout the year*. In doing so there will be an increase in ardeid numbers in the fish ponds at Lut Chau and NSW” (emphasis added).

(3) As to feeding ardeids, and a nursery for juveniles, para 1.16.14 states:-

“... fish ponds drained during the breeding season have the *potential to provide significant feeding resources for foraging adult birds feeding young* still in the nest and also *as nursery grounds for juvenile ardeids*, especially Little Egrets and Chinese Pond Herons” emphasis added).

This envisages substantial ecological enhancement, way above that under the MA’s already discussed.

(4) As to stocking trash fish, this would not be routine but a backup, if required.

See para 1.16.18:-

“Regular stocking of ‘trash fish’ to attract large waterbirds will *not be part of the routine management* of the LCNR or WEA. However, this

will be undertaken as and when required, if number of target piscivorous waterbird species do need achieve target levels” (emphasis added).

This appears to be a prudent, fallback measure.

Final CM Plan re Great Cormorant Roosts

191. The following points are noted on Cormorants:-

191.1. Preservation of existing roost trees as buffer, strict control of access: at para 1.4.5 :-

“Protection of Great Cormorant roost was thus considered to be entirely dependent on the **preservation of existing roost trees at NSW**. A *buffer of 150m will be provided around all the roost trees to minimize potential disturbance*; and the area within this buffer will be retained as wetland habitats and *access to these buffer areas will be strictly controlled*” (emphasis added).

191.2. AFCD’s steps taken towards Cormorants: these have not always been helpful. See para 1.10.23:

“Studies of the wintering ecology of Great Cormorants and measures to reduce their impact on active fisheries including diversionary feeding and *wiring of fish ponds to prevent cormorant access have been sponsored by AFCD*” (emphasis added).

191.3. On how and where Cormorants feed or loaf at para 1.10.23:-

“Unlike the other target species, Great Cormorants feed by *catching fish whilst swimming (usually underwater)*. Accordingly, they only *utilize fish ponds when they are full or partly full of water*. During the day, when not feeding, some birds may return to the night time roosts whilst others use daytime loafing sites; *usually on isolated trees or tree groups or even bare bunds or banks*, especially those which are **isolated from disturbance and ground predators** by being surrounded by water” (emphasis added).

As a member of common sense and inference, safety is key to the Cormorants. They do not necessarily roost on trees only, but even on bare bunds or banks - especially those isolated from disturbance and ground predators.

We have no hesitation in finding that with proper control of access, safety and good management, the Cormorants will use roosts on shorter trees, or even on bunds or banks.

191.4. Timing of enhancement work at para 1.11.10:-

“However, at NSW, due to the presence of the Great Cormorant roost, habitat and enhancement works will be *prohibited during the period 1st October to mid-April* in order to prevent disturbance to the roost” (emphasis added).

Timing is key, and this measure is well timed.

Final CM Plan re HKBWF

192. These points are noted on the HKBWF:-

- (1) Extent of habitat to be retained, enhanced, or restored: **Appendix 6** hereto shows the mangrove to be retained or enhanced, would be a total of 13.1 ha with 0.7 ha restored and created, with a total of 13.8 ha.
- (2) Timing: having regard to the updated CM Plan, such habitat would be in place at least *2 years in advance*.

193. In our evaluation, the CM Plan accords with the planning intention that the areas for ecological conservation and enhancement shall be well managed and sustainably, for the benefit of wildlife.

194. We add these observations on committed long term conservation management:-

- (1) Competent body: a conservation agent should have sufficient relevant expertise and experience. The TPB (and this Appeal Board) should not be fettered, by limiting the choice to a non-profit body, or green group. Given the PPP’s pragmatic approach, those who provide such professional services and advice should be appropriately remunerated. We have no objection to WWT as a highly reputable conservation body, of international reputation - the Appellants’ preferred NGO partner together with AEC, a local expert in wetland management. WWT as a leading conservation charity established in 1946, has ample experience in managing wetlands in the U.K., and internationally.
- (2) Appropriate donation: the Appellants agreed to donate to the Environment and Conservation Fund (“ECF”) sufficient funds to cover the long-term management and maintenance costs. The Appellants confirmed they withdrew their alternative proposal for a private trust fund to be set up for the purposes of the Appeals, and re-confirmed their commitment to making an upfront lump sum donation to the ECF. The TPB has rightly not pursued the argument that the Appellants failed to demonstrate that the

details of the funding requirements and identification/approval of a competent body are inadequate, uncertain, or of doubtful effect.

- (3) AFCD's Ms. Chow did not dispute: that the Final CM Plan proposes other measures that the MAs lack [T-20/60/14-17]; that the approach in the Final CM Plan would have greater benefit to black-faced spoonbills and other large/disturbance sensitive species [T-20/67/20-25]; and that the proposals in the Final CM Plan would minimize issues with poorly managed ponds such as those seen at NSW on the Site visit [T-20/80/6-11]. AFCD's Ms. Chow also sensibly agreed with the proposed mitigation measures in the Final CM Plan in terms of mitigation measures for the HKBWF; management of human disturbance; contingency for trash fish; and Eurasian otter habitat.

In essence, we conclude that with implementation of the CM Plan with any appropriate modifications, the entire Site would be much better managed. It could become a prominent example of integration between development and wetland conservation and enhancement, in Hong Kong and the Greater Bay Area - which are all matters of public interest. Mr. McInnes frankly accepted that the state of many Ramsar sites internationally was unsatisfactory, as here. This strongly reinforces our conclusion that the question cannot be one of mere *designation* as a Ramsar site, but of a Ramsar site's ecological value and functions – and its *potential* under the PPP's enlightened approach.

I6. Visual impact

195. Two preliminary points. First, it is unnecessary to deal with the question of visual impact at length, as there is no serious dispute that as a matter of weight, ecological concerns under the planning intention are of greater weight than visual impact. Second, while the TPB's reasons dated 10 March 2017 referred to visual impact, there was no mention of building height. Nonetheless, visual impact and height are related and we consider them together.
196. The Appellants argued: (1) the proposed development is not incompatible with the surroundings; (2) the TPB's suggestion that scale and building height of the proposed development should blend in with the "*planning*" building height profile is not a requirement under the OZPs, and in any event is a matter for the TPB's plan-making role (not its plan-permitting stage); (3) the proposed development has no visual impact on LC which must be developed with NSW; (4) the TPB made an informed decision in

December 1999 when amending the NSW OZP, not to impose *any* height restriction; and (5) the visual impact is better or no worse than that of the approved FLW development.

197. The TPB argued that the visual impact of the proposed development is substantially adverse and clearly unacceptable: (1) some visual impact (VP4, 9) is obviously highly substantial and the proposed development will fundamentally alter the original “rural” view. Yoho Town occupies only a very small portion of the field of vision and has no significant impact on the assessment. The FLW VIA is also “irrelevant” and clearly distinguishable; (2) in respect of other disputed viewpoints, the visual impact should be rated moderately to substantially adverse; (3) the overall visual impact should be rated as substantially adverse - Hoi’s expert opinion is self-contradicting and unreliable, especially when she contradicts her own previous evidence that the visual impact for Application B should be more adverse than Application A; and (4) the Appellants’ position to “completely subjugate” visual issues under the ecological issues is untenable as the OZP specifically requires the applicant to prepare a VIA for TPB’s consideration as a separate, independent requirement; while ecological concerns may carry more weight in the context of the planning intention and afford more leeway to an applicant when assessing visual impact, it does not mean the planning intention envisages or allows buildings “as tall as 25 storeys in a rural context”, particularly at NSW.
198. On balance, we prefer and give more weight to the Appellants’ arguments having weighed up the visual experts’ evidence earlier, and taking into account the following matters in particular.
199. First, the FLW development next to Yuen Long Industrial Estate, was referred to by the PlanD/AFCD as a “*relevant reference*” for the Appellants. As stated, a smaller development footprint for ecological reasons, had the trade-offs of a smaller number of buildings, of taller height, and over a smaller area. This accords with the planning intention, that there be *no* building height restriction (in number of storeys or height) – to allow flexibility, for pragmatic reasons. Therefore, the TPB cannot blow hot and cold in complaining on building height, in isolation from the logical consequences above of a smaller development footprint

- “a result of all the dialogue and comments and advice given by the AFCD” (TPB’s Closing para 57(a) emphasis added; para 22(3) above. Indeed, on the evidence AFCD intended that the Appellants follow such comments and advice, which was acted on (para 109 above). While no two settings will be identical, visual impact is a material consequence of the AFCD’s own guidance and advice to the Appellants. We therefore reject Ms. So’s purported expert evidence that it is “illogical and unreasonable” to compare the VIAs for the NSW and FLW sites. Instead, as a matter of consistency and fairness and on the facts, it is both logical and reasonable to do so. We note the following from the VIAs of the FLW site (Exhibit R5), belatedly produced at the hearing:-

- (1) There was extensive screening, for instance by trees and buildings.
- (2) The VIAs included the visual impact at Years 1 and 10 of the operational phase.
- (3) The FLW VIAs make the common sense point that “*façade treatment soften the building mass*” (emphasis added: Exhibit R7 - Figure A3.1).
- (4) The PlanD’s photomontages for the FLW site (Exhibit R8) encircle the proposed developments – instead of the numerous bold colours to emphasise the NSW development of white (VP1, 5), blue (VP3, 4, 9) and purple (VP8) – all without any attempt to soften the facade treatment. As stated, such emphasis was unnecessary, and inconsistent with its treatment of the FLW development’s visual impact.

Conversely, the “5%” FLW site cannot be taken literally: if applied to NSW there would be 31 towers of 20 floors (Mr. Brownlee’s Statement para 132). At another extreme, if visual impact was key and buildings were not above “tree level” of 7 storeys, the development area would be about 15% if the same GFA was used, with 88 towers of 8 floors - a large monolithic collection of buildings.

200. Second, we have carefully considered and applied *TPBPG 41*, and have these findings and observations, with the benefit of the Site visit:-

- (1) The “surrounding context” (para 1.1) is not “rural” only, but mixed use including industrial, semi-industrial, and rural. From the material before us, we accept that the towers proposed for Application B in terms of number of storeys would not be out of character with that area “and the planning intention and known planned developments of the area” (para 4.11) - given the high rises in Yuen Long Town, and other

developments in Yuen Long plain, including at FLW. Indeed, the **22 January 2016** RNTPC meeting minutes (at para 128 thereof) stated that the proposed residential development was “*adjacent to Yuen Long Industrial Estate and Tung Tau Industrial Area ... and was close to Yuen Long New Town. All these areas consisted of medium to high rise buildings. As such, the proposed development intensity was generally considered compatible with the surroundings*” (emphasis added, para 26.16(3) above). Moreover, urban development is encroaching closer to the NSW site, well within the zone of visual influence. For instance, Twin Regency nearby is 24 floors compared to the 19 to 25 storeys on this appeal.

- (2) As to “the impact of the overall site layout, development scale, form, massing, disposition and character of the development” (para 3.1) this involves “*balancing other relevant factors* (para 3.2, emphasis added)”. In the context of the NSW OZP, it is difficult to conceive of a factor more relevant than ecological conservation and enhancement – hand in hand with the PPP approach. Thus, while *some* adverse visual impact may be reasonably foreseeable and expected, we do not consider this would be a “*major* adverse visual impact within the *existing and planned development context*” (para 3.2, emphasis added). Nor is it practical to protect views without “stifling development opportunity and balancing other relevant considerations” (para 4.5).
- (3) On our evaluation, appropriate and feasible steps would be taken to “*enhance or neutralise* the overall visual impact of the development being assessed” (para 4.8, emphasis added), as considered in the Final revised VIA considered below.
- (4) Overall, while the overall impact may be “slightly adverse”, we do not consider it would be “moderately adverse” insofar as this refers to the proposed development with or without mitigation measures, resulting in “*overall* term negative visual effects to *most* of the key identified key public viewing points” (para 4.11(e), emphasis added).

201. Third, we find the Final VIA is a credible and objective document, and accept the statements therein and highlight:-

- (1) Operational Stage Visual Mitigation Measures: para B.5.2. states:-

“The Proposed Development will integrate the following visual impact mitigation measures into the architectural and landscape designs:

OM1 *Spacing of towers* to enhance the degree of visual permeability to avoid “wall” effect; stepping down of building height from south to north;

OM2 *Sensitive architectural and chromatic treatments to buildings and engineered structures sympathetic to the landscape context;*

OM3 *Tree and shrub planting along the Proposed Development boundaries to screen the building tower layout and integrate the Application Site with adjacent rural landscape framework;*

OM4 *Tree and shrub planting within the Proposed Development in accordance with the Landscape Master Plan to soften and screen the perceived built forms and enhance the overall greening and*

OM5 *Enhancement of the pond area on northern and western margin of the Nam Sang Wai Proposed Development Site to provide visual buffer and visual integration with existing fish ponds to the south east and Kam Tin River to the north.*

OM6 *Preserve existing trees to screen the residential development and maintain the site's integration with adjacent rural landscape framework” (emphasis added).*

We consider such mitigation measures are reasonable and practical.

- (2) Effect of Visual Change on Visual Composition: para B.6.1 states:-

“To the west, there are large flat-roofed industrial buildings and a sewage treatment plant. The proposed residential buildings (maximum 25 storeys) are **lower than the high-rise developments in Yuen Long to the south** as well as the *recently constructed high-rise residential estates at the Approved Residential Development (Application No. A/YL-KTN/118-2)* to the southeast (within 1300m of the site)” (emphasis added).

The “surrounding context” (para 1.1) is key, and includes the above.

- (3) Appraisal of Visual Composition: para B.7.1 states:-

“It is considered that the Proposed Development is *generally compatible with the existing visual composition*. The Proposed Development is **compatible with the urban fringe visual context** which has *similar mixed-scale/residential, industrial, developments to the south and southwest towards Kam Tin and Yuen Long*. In addition, recent residential developments, such as the one in Sha Po North (Approved Residential Development A/YL-KTN/118-2), *contain extensive numbers of block layouts (42 blocks)* developments. In comparison to the approved residential development as well as adjacent industrial estate, the *scale and massing* of the Proposed Development is both in footprint and area coverage as shown in Annex B.3 comparable. *Extensive greening* including peripheral tree planting and large water body on the north and west side of the southern portion of the site will help integrate the development with the surrounding landscape” (emphasis added).

We accept Ms. Hoi's evidence that there is sufficient public space between the buildings for recreation, and visual relief (Hoi's Statement para 162).

- (4) Effect on Visual Resources: para B.7.4 makes clear the area is in transition:-

“The Proposed Development is situated in an **urban fringe** area *on the edge of the major urban area of Yuen Long and Kam Tin* to the south. With the new residential developments recently completed in West Yuen Long and two new proposed

residential developments to the southeast (Approved Residential Development A/YL-KTN/118-2) and northwest (Approved Residential Development A/YL-LFS/224F) of the Application, *this rural/urban fringe area is undergoing a transition* to become an urban city” (emphasis added).

We note from the Scale and Disposition Comparison at **Appendix 8** hereto that the surrounding context is crucial: the NSW site boundary is adjacent to Yuen Long Industrial Estate to the west, Yuen Long Driving School to the southwest, other urban developments to the south, and the southeast includes Approved Planning Application No. A/YL-KTN/118-2 (Park Yoho) – of 42 blocks. Therefore, one cannot sensibly argue that the context is “rural”, or mainly rural.

17. Weight to relevant matters

(1) Overall

202. The Appellants argue that assuming the visual impact, disturbance to Cormorants and HKBWF are relevant planning considerations, greater weight should be given to having 154.45 ha of land at NSW and LC:

(1) protected from further waste, dumping, fire damage, non-wetland uses, mangrove destruction and vandalism, especially when various Government departments failed to do so; and

(2) actively managed for all wildlife on a long-term basis.

And that the balance is clearly tilted in favour of the protection and active management of NSW and LC for the long-term. The proposed residential development of only 11.6 ha (6.5 ha of the total combined site) up to the maximum GFA is a reasonable trade-off for active wetland mitigation at NSW and LC of 154.45 ha in total long-term, and even more reasonable than the FLW development.

203. The Respondents argue: (1) the effectiveness of enforcement actions by Government should not be a consideration in deciding whether to grant planning permission, while trespass/dumping will be addressed by criminal sanction, if necessary; (2) while it is accepted the balance is tilted in favour of the protection and active management of NSW and LC on a long-term basis, this should apply to an acceptable scheme. The Appeal Board must scrutinise each application on its merits to determine whether it satisfies the planning intention.

The TPB is correct that the key question is whether the planning intention is satisfied. If it is not satisfied including as a matter of fact and degree, and value judgment, the lack of effective enforcement action is not a good reason to allow the appeal. But if the planning intention is satisfied as we find, the lack of effective enforcement action becomes more relevant.

204. Overall, we prefer the Appellants' arguments and add:-

- (1) As a matter of principle and common sense, and consistent with the Fish Pond Study, a nature reserve for the benefit of wildlife would clearly be of greater ecological value and functions than ponds for commercial fishing.
- (2) The state of the LC Site is wholly unacceptable. This includes illegal mangrove destruction.

The AFCD's Ms. Chow agreed there was mangrove destruction at LC which was illegal [T-19/116/22-25], and that these ponds were under the MAs. She also acknowledged that if the AFCD was doing its job, the destruction would not take place. [T-19/117/1-3].

These admissions are frank, and damaging to the TPB's case.

- (3) Applying *TPG 12C* (at para 6.3 thereof) for all the reasons above, we consider there are strong planning justifications and positive measures to enhance the ecological functions of the existing fish ponds and wetland. As such, development with conservation objectives within the WCA under the PPP approach should be approved.

(2) Planning gains

205. In essence, the Appellants have three aims: ecological conservation and enhancement; to provide housing including affordable housing; and to provide for the community. These aims are commendable. In the spirit of the PPP and NNKP, such aims should be encouraged and implemented, where possible and practical.

206. Again, we agree with the TPB that the crux is whether the planning intention is satisfied. If not, these aims would not be implemented. But if the planning intention is satisfied as we find, the three aims in combination, reinforce the case for planning permission. Hong

Kong's housing supply and crisis are well-known, and have caused huge problems for Hong Kong and the community. These are not sufficient of themselves, to allow the appeal. But if the planning intention is satisfied, the fact the Second Appeal involves provision of at least 2,521 homes in total is relevant – and cannot be said to be a mere drop in the ocean. In any case, whatever can legally and practically be done to redress the housing supply and crisis should be seriously considered and done, as appropriate.

(3) Alternative Schemes? Fallback?

207. There is no dispute that our focus must be on Application B, rather than other schemes.

208. The question of fallback is relevant for two reasons. First, Fish pond culture on the NSW Portion is a fall-back use that will do more harm than managed wetland mitigation, especially when it covers 99 ha. By definition, it is not a conservation use. Second, other fall-back uses that will do more harm are the on-going and real prospect of ecological degradation of the public open space from excessive unmanaged public access; continued commercial fish farming; unauthorized removal of mangroves; more dumping of construction waste at LC and NSW; and the natural degradation of wetland on private land. These are relevant considerations should the planning intention be satisfied, as we find.

(4) Effect of TPA13/1993, affirmed by Privy Council

209. The TPB submits correctly that because the Henderson Scheme was the subject of different planning intention and zoning, no issue estoppel or abuse of process arises merely because there is some similarity in argument before this Appeal Board and that in TPA13/1993. We are not concerned with an issue which was a necessary or essential foundation of that Decision.

210. We accept such submissions. At the same time, various aspects or reasons in TPA13/1993 are convincing as a matter of principle and common sense – and do not depend on the precise planning intention and wording. This applies to these findings and observations in TPA 13/1993:-

- (1) the density of the residential development up to the permitted GFA was low density: at [37(b)]²⁷ and [74]²⁸ and p. 226 of the Privy Council in *Henderson Real Estate*.
- (2) “It is common sense that commercial fish ponds are not run for the benefit of wildlife”: at [16]²⁹;
- (3) “Gone are the days when one can fold one’s arms and leave the environment to look after itself. The wise use of the environment must recognize the essential need to integrate conservation and development”: at [23]³⁰;
- (4) “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”: at [42]³¹;
- (5) “...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”: at [51]³²;
- (6) unless fish ponds 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*”: at [64]³³ (emphasis added);
- (7) the TPB “should provide reasons with sufficient particulars so as to enable an applicant to make a new application in compliance”: at [70]³⁴;

²⁷ [CB1/12/646]

²⁸ [CB1/12/655]

²⁹ [CB1/12/638]

³⁰ [CB1/12/640]

³¹ [CB1/12/648]

³² [CB1/12/651]

³³ [CB1/12/653]

³⁴ [CB1/12/654]

- (8) 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”: at [71³⁵];
- (9) it is not a proper application of the so-called precautionary principle, to assume that promises would not be kept: at [73³⁶];
- (10) “population is not the issue but the management of human activity”: at [76³⁷].
The Approved Henderson Scheme was for a population of 9,000³⁸: at [74³⁹] over a development site area of 49.3 ha⁴⁰. The population in Application B is 6,500 over a development site area of 11.6 ha⁴¹ but with the same GFA;
- (11) land exchange is irrelevant to land use in the context of the *TPO*: at [79(ii)⁴²]; and
- (12) whether Government’s cooperation e.g., on lease modification and exchange of land will be forthcoming is beyond the control of, and does not concern, the Appeal Board because its task is to determine purely from a planning point of view whether the proposal should be permitted: at [80] and [81⁴³].

211. The AFCD referred repeatedly, to questions of “scale and intensity” as a reason for refusing planning permission. But this was a matter of planning judgment, beyond its area of expertise. Moreover, this Appeal Board is concerned with the same maximum GFA, as the Approved Henderson Scheme – but with a substantial *decrease* in planned maximum population from 9,129 to 6,500.

³⁵ [CB1/12/655]

³⁶ [CB1/12/655]

³⁷ [CB1/12/656]

³⁸ The actual number is 9,129 or 2550 households: see §1.2(ii)(d) of TPB Paper 2387 [CB1/10/593]

³⁹ [CB1/12/655]

⁴⁰ excluding the area of the golf course of about 49 ha: see §§1.2(i)(a) and (ii)(a) of TPB Paper 2387 [CB1/10/592]

⁴¹ Appendix 5, ITRB-WS [WA-2/4]

⁴² [CB1/12/657]

⁴³ [CB1/12/657]

(5) Public comments

212. The 242 TPB Paper (at para 7.2) referred to public comments received in favour of Application B of 10,329 for and 5,810 against. This is much better than for the FLW Scheme where there were only 82 public comments for and 663 against.

Nonetheless, the FLW Scheme was approved. In our view, the fact there was a substantial majority of positive comments for Application B is another factor in support of planning approval, in the public interest.

There is also the related point that the overwhelming feedback on the public park which we visited on the Site Visit was that it be retained, for both recreational and visual reasons. This was a major factor in public support, and in the public interest. Such positive comments concerning the public park weaken the TPB's literalistic argument that development (if any) should proceed on the park as a "less ecologically sensitive" portion.

(6) Residential mix

213. The Approved Henderson Scheme involves the same maximum residential GFA (306,581 m²) as Application B. There are two important differences at least concerning houses:-

(1) The Approved Henderson Scheme involved 167, 226 m² for houses. compared to 47, 530 m² for Application B houses - a very substantial drop in GFA for houses, of only 28.4% of the previous GFA for houses.

(2) The number of houses also dropped substantially from the Approval Henderson Scheme's 970 to 140 for Application B - only 14.4% of the previous number.

We consider that the substantially reduced number and total area for houses in Application B is reasonable under the PPP approach. Moreover, being pragmatic, the provision of houses depends ultimately on supply and demand. Profits from the sale of houses would go towards more funds for committed long term conservation and management.

(7) Government's ecological conservation efforts

214. On Ms. Chow's evidence, Government is involved in many conservation measures and efforts in Deep Bay [T-20/137-138, 147]:-

- (1) At MPNR operated by the WWF;
- (2) the MA's;

- (3) Government deals with intertidal mud flats and intertidal mangroves at the Ramsar Site to remove exotics.
- (4) Continuous long term monitoring of the whole of Deep Bay.
- (5) The waterbirds monitoring programme for the entire Deep Bay which includes liaising with Futian Nature Reserve in Shenzhen, and collaboration with HKBWS.
- (6) Baseline environmental monitoring including of water quality, and sediment.
- (7) Enforcement action and complaints including under the *Wild Animals Protection Ordinance*;
- (8) Restricting access to certain areas, e.g. MPNR by patrolling and enforcement action and minimizing human disturbance.

There is no doubt that Government puts in considerable measures and efforts in ecological conservation. Credit should be given to Government for these measures and efforts. But any government has limited resources in manpower, efforts, and funds. Thus, the pragmatic PPP approach that ecological conservation and enhancement be effected *without* Government funding, for a win-win situation in the public interest.

J. Alleged undesirable precedent

J1. Applicable principles

215. It is trite that planning applications are assessed on individual merits, and no two cases are alike. Particular applications turn on the application of the planning intention of a site with particular zones, and case by case justification for development. Accordingly, setting a precedent should normally not be an issue. In *Fox Land & Property Ltd v Secretary of State for Communities and Local Government and another* [2014] EWHC 15 (Admin), Blake J said at [40]:-

“I accept that the question of *setting precedents is normally not an issue* for planning inquiries that turn on the application of particular policies to particular sites and case by case justification for the development” (emphasis added).

216. These principles are also relevant:-

- (1) The focus is on like cases with the same or similar characteristics having regard to the locality:
 - a) *Smart Gain Investment Ltd v TPB* per A. Cheung J (as he then was) at [108 – 112], especially at [110-111]:-

“When one talks about setting an undesirable precedent, *one must compare like with like*. Approving the rezoning request in relation to Site 1 would only set a precedent for approving *applications involving similar sites with similar characteristics in future*. It would not set a precedent for acceding to rezoning *requests regarding sites of different characteristics*.

In the absence of further information on the actual characteristics of the 19 hectares of privately owned land falling within the CA zoning, the Town Planning Board simply does *not have sufficient materials* to conclude that approving the rezoning request in relation to Site 1 would set an undesirable precedent” (emphasis added).

b) *Hong Kong Resort Company Limited v Town Planning Board*, CACV 432/2020 per Kwan VP in giving the Court’s Judgment at [61]:-

“It is common ground that for a precedent to be relevant, *there must be similarity in the previous and subsequent applications*” (emphasis added).

(2) It is important to bear in mind that a good or desirable precedent may in fact be set by granting planning permission: see *TPA No. 12 of 1996* at [20 to 23].

217. The TPB argues: (1) if the Appellants cannot demonstrate all the requirements and principles under the NSW OZP and related documents are met, allowing the Appeal would set an undesirable precedent for future applications in such areas, with an adverse cumulative impact on the area including Deep Bay; (2) if proposed development of the designated development parameters (which fail to meet the planning intention and respect the “no net loss in wetland” principle and feature substantial building volume or tall building height) are allowed on the NSW Site, it would encourage further planning applications for residential development, with cumulative effect of more applications with further loss of reedbeds and fish ponds, degrade the natural environment, and compromise the integrity of the ecology, landscape and environment in the vicinity including Deep Bay. In short, approval of Application B would encourage “copycat applications” in future.

J2. Applying the principles

218. With respect, we are not persuaded that an undesirable precedent would be set on the facts, and in law, for several reasons:-

(1) In the present case, there are no identified similar sites that are identical or with similar characteristics.

- (2) No other site in the “OU(CDWEA1)” zone in the Approved NSW OZP has to be developed with LC in the “SSSI(1)” zone in the Approved MPFP OZP and vice versa.
- (3) No other zone is “*primarily to facilitate*” the proposed residential development at NSW with a nature reserve at LC (granted by the Appeal Board in August 1994 and upheld by the Privy Council in 1996), taking into account the *TPB Guidelines 12C*.
- (4) There is *no* visual impact on 154.45 ha of total wetland in the NSW WEA (99 ha) and LCNR (55.45 ha).
- (5) FLW is a precedent on ecological conservation and enhancement with development approval, and is not an undesirable precedent.
- (6) The Appellants’ three aims of ecological conservation and enhancement, to provide 2,521 homes (including affordable housing), and providing for the community, are laudable aims. Moreover, the proposed development under Application B and these aims accord with the planning intention and PPP approach. Therefore, it is not easy to discern a rational basis for arguing that an undesirable precedent would be set. As stated, the Sites are not zoned “CA” which would involve a materially different approach, rationale, and consequences.

219. Applying the Court of Appeal’s recent decision in *Hong Kong Resort Company* which is binding on us, the undesirable precedent argument fails because the TPB has failed to identify similarity in either previous and subsequent applications.

K. Approval conditions

220. We refer to the applicable principles at paras 76 to 77 above.

221. There is substantial agreement between the parties on approval conditions. Conditions (a) to (m) set out in **Appendix 9** were proposed by the TPB and agreed by the Appellants. There was a difference in the length of time during which planning permission granted would be valid – the Appellants propose 5 years and the TPB proposes 4 years. Given this matter’s long history, flexibility is sensible, and we prefer a 5 years period. The Appellants also agree with the advisory clauses at Annex L of TPB paper No. 10248 [E9/102c/5764-5768].

222. It is common ground that the sequence of works should be conservation *before* construction

work. There are minor differences between the parties on conditions (n) to (o). We prefer the Appellants' version at Conditions (n) to (o) set out in **Appendix 9**. The intention behind splitting condition (n) and defining "construction" is to ensure the construction involved in wetland conservation proposals should start as early as possible, and be implemented before construction of the residential portion.

L. Conclusion

Summary

223. We summarize our Decision by majority on the issues:-

(1) On preliminary points:-

a. As to consistency and fairness, while well intended, the stance of the AFCD and PlanD was not straightforward and consistent, coordinated and fair, in three respects:-

- (i) As to scale and intensity, this is a matter of planning intention and judgment, not ecological impact *per se*. The AFCD provided input on matters of scale and intensity, outside its area of expertise, on which it was not qualified to give expert input and evidence. Such input and evidence was regrettably, misdirected and inappropriate. The PlanD's position was initially to disagree with the AFCD on matters of scale and intensity, but later to abdicate or delegate its area of responsibility for such matters to AFCD – such that the latter provided input on matters beyond its expertise, resulting in unnecessary delay, and costs.
- (ii) Second, the PlanD and AFCD provided guidance and advice to the Appellants to use the FLW 5% development site as a "*relevant reference*", which advice and guidance was intended to be, and was acted on. In essence, this meant a smaller development footprint, with the consequences of a smaller number of buildings, which were taller, and over a smaller area. It is thus unfair and contradictory, and blowing hot and cold, for the TPB to argue that the FLW development was "*irrelevant*".
- (iii) Third, on the proposed location of the development, it was accepted by the AFCD/PlanD that the proposed location is farthest away from Deep Bay, on the southern most portion of the zone, and on a less ecologically sensitive

portion of the site. The AFCD/PlanD's argument that the location is nonetheless on a location of "high ecological value" was misdirected, inconsistent with the acceptance above, and the planning intention.

- b. As to alleged defective reasons, the reasons advanced by the TPB were incomplete and defective: the main reasons should have included scale and intensity, and the precautionary approach, all relied on heavily by the TPB. Nonetheless, these were cured during the appeal process. The TPB's reasons should in future, be adequate in all respects, to avoid unnecessary confusion and delay, to instill public confidence in the planning process, and to enable owners and developers to place full reliance on all the terms of an approved OZP.
- c. As to delay and effectiveness of the planning process, for various reasons, although the Approved Henderson Scheme in August 1994 was affirmed in late 1996 by the Privy Council, the planning intention changed and some 25 years later, the parties are still in dispute. The reasons for such delay and lack of effectiveness in the planning process are multifaceted, and the blame lies with both sides to some extent. The Appellants should have made a new application earlier, to comply fully with the NSW and MPFP OZP, rather than make four applications for time extensions for the Approved Henderson Scheme – when there were substantial changes to the proposed development plans (necessitating a new planning application) and to the planning intention. The AFCD/PlanD was not consistent and fair, and their approach and reasons were flawed, as stated above.
- d. An expert witness' duties are well established and set out in the Code of Conduct at Appendix D to the Rules of *High Court*. These apply to all legal proceedings, whether or not in court. While all experts witnesses sought at the hearing, to comply with such duties, two TPB expert witnesses, the AFCD's Ms. Chow and the UDL's Ms. Joyce So each made 3 witness statements before the hearing which for no good reason, omitted the necessary and usual declaration by expert witnesses under the Code of Conduct. Further, it was not apparent that such expert witnesses were *aware* of their duties as experts and sought to comply with such duties, at the time they made such witness statements. Such omissions while relevant and weighed up, are not conclusive. They sought to rectify the position by each making an additional statement with the necessary declaration, during the

hearing but without any amendment to the substance or form of their witness statements. Again, this was not conclusive, but relevant to the weight to be attached.

- (2) The express planning intention of the NSW OZP is clear - the “conservation and *enhancement* of ecological value and functions of the existing fish ponds or wetland” (emphasis added). This would be achieved “through” four main related steps. First, the PPP approach, without government funds. Second, “low-density-private residential or passive recreational development” “in exchange for committed long term - conservation and management of the remaining fishponds or wetland”. Third, subject to the “no-net-loss in wetland” principle and planning permission from the TPB. Fourth, a “comprehensive” and “integrated” development scheme for both the NSW and LC Portions to be developed together.

In essence, the planning intention is pragmatic: ecological conservation and enhancement, with some development up to a maximum stated GFA, on the same site. The planning intention envisages an appropriate balance, with humans and nature and wildlife co-existing, on the same site. And appropriate and feasible steps on impact mitigation (avoidance, minimising, and compensation) for any impacts, including ecological and visual.

- (3) Application B satisfies the planning intention, and in any event, as a matter of fact and degree, and value and planning judgment for these reasons:-
- a. There would be limited low density private residential development –the development footprint is limited, within 5 to 10% of the overall site; the maximum GFA (domestic and non-domestic) will not be exceeded; the plot ratio of 0.179 is reasonable and less than FLW (0.185); and the estimated number of units and residents is less than under the Approved Henderson Scheme.
 - b. The proposals include committed long-term conservation and management of the remaining fish ponds and wetland.
 - c. The “no-net-loss in wetland” principle properly understood, is satisfied. There would be a *significant* increase in ecological value and functions of the fishponds and wetlands in the NSW and LC Sites, whether viewed in isolation or correctly viewed as one overall site.

- d. The potential impacts (including ecological and visual) involve practical and feasible steps to avoid, minimise, and compensate for such impacts.
 - e. Application B is a substantial improvement over Application A which was rightly withdrawn during the hearing. It suffices if Application B complies with the planning intention, including as a matter of fact and degree, and value and planning judgment. It is unnecessary to find that Application B is the “optimum” scheme. Although changes may be possible to Application B whether minor or substantial, it is unnecessary to consider such changes – our focus is on Application B.
- (4) The TPB raised arguments in four areas on the “no-net-loss in wetland” principle:-
- a. Effect on Cormorant roosts
 - b. HKBWF
 - c. Alleged inadequate enhancement of fishponds
 - d. Indirect impact on reedbed and wet grassland.

Having carefully evaluated the documentary and oral evidence, and heard and seen all witnesses from both sides (factual and expert) give evidence under cross-examination, and with the benefit of the Site visit, we prefer the Appellants’ evidence and arguments overall, on the balance of probabilities. We find that Application B satisfies the “no-net-loss in wetland” principle.

We also consider we have sufficient information and material before us to make our findings and conclusions. Even if there are any gaps in the information and material before us, this should be supplemented on matters of detail by updated reports as part of revised impact assessments and approval conditions.

- (5) No undesirable precedent would be set out in allowing the Second Appeal. The appeal is unusual and unique, in involving the combined and integrated development of both the NSW and LC Sites, in two separate zones. The TPB has not identified any similar site with similar characteristics, and such that an undesirable precedent would be set.
- (6) Appropriate approval conditions are set out at **Appendix 9**.

Orders

224. By majority, we allow the Second Appeal on the Conditions set out in **Appendix 9**.

225. As to costs, we make an *order nisi* which is final upon 21 days of this Decision that there be the usual no order as to costs. The Second Appeal involved matters of public interest. While the Appellants were successful on the Second Appeal, they rightly withdrew the First Appeal following this Appeal Board's prompting, such that the overall outcome is to some extent a draw. Both sides largely sought to put their cases fairly and professionally, and parties in Town Planning appeals should be so encouraged.

General

226. We reiterate our gratitude to Counsel and both teams for their meticulous preparation and presentation which has been of great assistance to us.

227. We grant liberty to apply to the Town Planning Appeal Board for directions as to carrying the aforesaid conditions into effect.

(Signed)

Mr. CHUA Guan-hock, S.C.

(Chairman)

(Signed)

Mr. Lawrence ONG Tong-sing,

B of H, J.P.

(Member)

(Signed)

Ms. Imma LING Kit-sum

(Member)

Town Planning Appeal No. 1 of 2017

Appeal under Section 17B of the Town Planning Ordinance by

Appellant: Nam Sang Wai Development Company Limited
Kleener Investment Limited
Community Wetland Park Foundation Limited
Lut Chau Nature Reserve Foundation Limited

Dissenting Opinion

A. Background

1. The appeal site includes both NSW and LC where LC is part of the Mai Po Marshes and Inner Deep Bay, which falls within the Ramsar Convention. The TPAB's duty is to determine the planning intention and faithfully implement the plan. Planning permission can only be granted for a development which complies with the planning intention. If the application fails to satisfy any one of the criteria, the TPAB is bound to reject the application.

B. Ecological concerns

2. The appeal site is very unique with its high ecological values and we subscribe to the view that conservation and protection of the wetland is paramount, and it is also in the public interest in doing so.
3. All appropriate and practicable steps must be undertaken to first avoid and then minimize adverse impacts to ecological resources, prior to recommendations of compensatory measures.

B1. Hong Kong Bent-winged Firefly

4. A very special firefly species unique to Hong Kong was discovered as recently as in 2010. The proposed development is adjacent to known HKBWF habitat on the southern portion of the NSW site. Disturbance from human activities will be difficult to avoid.
5. Despite mitigation to remove direct disturbance, how the impact of ambient light and general background light has on the HKBWF population, especially during the larval stage, remains an issue in view of inadequate studies. For comparison, we note Fairview Park is only 2 to 3-storey low-rise houses, meanwhile, the light source from Tin Shui Wai and FLW developments is farther away from known HKBWF observations.

6. Recolonization to LC as a compensatory solution is yet to be proven given lack of scientific evidence. The likelihood of having an adverse impact on the existing HKBWF population in NSW is great and we do not feel comfortable about it, meanwhile, the success in creating a new HKBWF habitat in LC is uncertain.

B2. Fish ponds

7. The proposed development footprint will result in a secondary loss of 22.1ha of active fishponds. The decline in ecological functions would need to be fully mitigated through the enhancement of the ecological functions of the remaining fishponds.
8. There was a difference in opinion as to whether the MAs for commercial fishponds currently in place are effective. Although the MA is not perfect, the commercial fishponds, during annual drain-down, do perform the functions of providing foraging opportunities and roosting grounds to waterbirds. The ecological benefits should not be dismissed and should be included as part of the baseline valuation.
9. Trash fish stocking to meet target birds levels should not be considered even as fallback/contingence measures.

B3. Reedbed

10. We agreed with the comment made by Mr. McInnes that the reedbed habitats, which are immediately adjacent to that human habitation, will be seriously affected by a new and large human population and their activities in terms of disturbance of noise and light. Unfortunately, the ferl species, such as, cats and rats, following humans will also be a disturbance. The indirect disturbance from humans will reduce the ecological value of those reedbed habitats. And related overall evaluation of those impact has not been taken into account by the appellants.
11. We should appreciate the very unique habitat type – a mosaic of different wetlands intermixed together in Hong Kong, which supports a greater diversity of wildlife. For example, the bittern uses dense reed for cover and breeding, but needs open water within the reedbed to hunt. Some birds do prefer drier habitats than the wet ones. Therefore, to ignore the values of dry reedbeds, and preference to the conversion to wet reedbeds with higher ecological value is not substantiated.

12. The succession is very dynamic, changing from year to year, from dry to wet or the other way round, depending on hydrology changes. The appellants' claim of unidirectional succession changes is unsubstantiated.
13. The re-classification of the wetland habitats by vegetation and re-evaluation of the reedbed habitats in the Updated Vegetation Survey are misleading and inappropriate.

B4. Migratory birds

14. Different migratory birds are using different habitats. For example, most of the shore birds will choose the intertidal mudflats. As for the Cormorant roosts, i.e. trees or branches used by Cormorants to settle, rest, or sleep, these are relevant to ecological impact. As stated during the hearing, one cannot sensibly argue that such roosts are “fishponds” or “wetland”. Nonetheless, from an abundance of caution, we also apply the “no-net-loss in wetland” principle to the Cormorant roosts.
15. Cormorants arrived in three main roosts, including Nam Sang Wai, Mai Po Nature Reserve and Lok Ma Chau in the Deep Bay area. Nam Sang Wai roost is the largest, covering 60 percent of the cormorants in Hong Kong.
16. The development within the pond area and certain off-site uses will affect the bird populations. However, an understanding of the complex responses of the bird populations to future land use changes and carrying capacity can only be fully understood with further substantial data on bird population dynamics and a detailed understanding of the inter-relationship between different components of the Deep Bay Ecosystem. For example, how easily will egrets be displaced to the MPNR if fish ponds are filled cannot be predicted because very little is known about the density dependent processes. The actual response to changes in the amount and distribution of resources to birds is also a function of their behaviour and population process which are still not well understood. Displacing the birds to other suitable habitats is still an uncertain issue.
17. It remains unknown/uncertainty that the cormorants will automatically move 500 meters from current to future location for roosting to avoid disturbance in the worst-case scenario when the development started.

B5. EcoIA

18. In any scientific study, it is crucial to adopt a consistent survey method so as to ensure that the results between different surveys are comparable. However, the two EcoIAs and the Updated Vegetation Survey adopt inconsistent methodologies to survey the habitats and assess the abundance of species.
19. Regarding the final EcoIA, the ecological function was defined in a way as to be represented by the number of birds belongs to a disproportionately reductionist approach. This reflects the fundamental problem in the EcoIAs in failing to define the distinct ecological functions served by different habitats as identified in the survey. It treats ecological function as a single measuring unit without delineating the individual ecological functions under investigation and hence fails to comprehensive analyse the real ecological functions of the wetland.
20. Thus, it is difficult to accept that the revised EcoIA is an objective document, which provides independent and impartial assistance to the Appeal Board.

C. Ecologically less sensitive area

21. The grassland where the public park currently located is considered as plantation and landscaped area with low ecological value. The location stands out clearly as the least ecologically sensitive portion of the entire NSW and LC combined. Comparing between the public park and the development site, the public park is located on less ecologically sensitive portion.
22. During the site visit, we saw members of public fly drones and radio-controlled aircrafts, these are already existing disturbances to nearby wildlife to a certain extent. Retention of the public park for public recreation may not be necessary, the priority should be given to avoidance of loss of wetlands with high ecological value first in choosing the development site.

D. Visual impact

23. Visual impact is required to be assessed under the express terms of the NSW OZP. We consider that the relevant factors envisaged by 3.2 and 4.5 of TPBG41 should be related to visual effects such as overall site layout, development scale, form, massing, disposition and character of the development and spatial relationship with the overall townscape or surrounding landscape. In assessing this criteria, we consider what we actually saw during the

site visit including buildings from distance afar, the photomontages provided by both parties and the relevance of FLW.

24. Using VP3 as benchmark where both parties agreed to be Moderate, we consider that as VP9 is the nearest to the development, the scale and mass of the development is very dominating to the viewers, we tend to lean on the Respondent's side in agreeing that VP9 should be rated as Substantial. Meanwhile VP4 is also rated as moderate by the Appellant but we consider that the building bulk is very jarring to the eye in a rural landscape, hence, we prefer Respondent's rating as Substantial. We consider that the overall visual impact as Substantially adverse.

E. Conclusion

25. We respectfully dismiss the Appeal.
26. Let us reinstate that the appellants are required to fully demonstrate to the TPB and the Appeal Board that there is no net loss in wetland and the mitigation measures can fully compensate any adverse impacts arising from the development.
27. We agree housing supply shortage in Hong Kong should not be neglected. However, it is not ideal trying to address one issue and at the same time creating a new one to our unique natural environment in the affected area of which the ecological and environmental impact is irreversible.
28. Seeing the current degradation of the wetlands left unattended, the status quo of do nothing is certainly not an ideal option. At the same time, any adverse impact is irreversible once the development has started. Why couldn't we consider carrying out proactive conservation work first (for example, fencing off the area possibly as soon as immediately) to protect the wetland habitats (for example, from illegal dumping and unauthorized structures) and to build sufficient ecological capital prior to any development?

(Signed)

Ms. Irene CHOW Man-ling

(Member)

31 December 2021

(Signed)

Dr. William YU Yuen-ping

(Member)

31 December 2021

APPENDICES

		<u>Bundle/exhibit reference (if any)</u>
Appendix 1	Aerial photo of NSW and LC sites	CB5 - 126
Appendix 2	Development parameters of various Schemes and comparison against Henderson approved Scheme; comparisons of plot ratio and site coverage (including of FLW scheme)	CB5 – 032, 033; Exhibit A1
Appendix 3	Revised CM Plan Annex A: photos of LC site; and Distribution of Pond/Open Water and Mangrove at LC (2005 and 2015)	CB3/26/5340 - 46
Appendix 4	Second Scheme s.17 MLP showing amendments including single aspect buildings, and 400m distance from Cormorant roosts	CB5 – 013
Appendix 5	Revised Eco 1A: Screening of mangrove from Residential Development (Figure 25b)	CB3/28/5288
Appendix 6	Revised CM Plan: Retained and Enhanced and Restored Mangrove within project site (Figure 10g)	CB3/26/5375
Appendix 7	Proposed Habitat Map of NSW WEA and LC Nature Reserve	CB5 – 043
Appendix 8	Scale and Disposition comparison re visual impact	CB5 – 078
Appendix 9	Planning Conditions	

Appendix 5

Development Parameters of the Various Schemes and its Comparison against the Henderson Approved Scheme							
Major Development Parameters	(a) Henderson Approved Scheme (A/DPA/YL-NSW/12) ¹	(b) 218 s. 16 First Scheme ²	(c) 218 s. 17 First Scheme ³	(d) Difference (c)-(a)	(e) 242 s. 16 Second Scheme ⁴	(f) 242 s. 17 Second Scheme ⁵	(g) Difference (f)-(a)
Total Application Site Area	139.3 ha	178.7ha	178.7 ha	39.4 ha	178.7 ha ^(See footnote 6)	177.35 ha ^(See footnote 6)	38.05ha
Area of NSW Site	98.3 ha	121.9 ha	121.9 ha	23.6 ha	121.9 ha	121.9 ha	23.6 ha
Area of Lut Chau Site ^(See footnote 6)	41 ha	56.8 ha ^(See footnote 6)	56.8 ha ^(See footnote 6)	15.8 ha	56.8 ha ^(See footnote 6)	55.45 ha ^(See footnote 6)	14.45 ha
Total Wetland Mitigation • Lut Chau Nature Reserve (LCNR) • Nam Sang Wai Wetland Enhancement Area (NSW WEA)	41 ha • 41 ha • 0	112.5ha • 56.8 ha • 55.7 ha	127.7 ha • 56.8 ha • 70.9 ha	86.7 ha • 15.8 ha • 70.9 ha	155.8 ha • 56.8 ha • 99.0 ha	154.45 ha • 55.45 ha • 99.0 ha	113.45 ha • 14.45 ha • 99 ha
Change in Wetland Area (% of total site area) *	-85.3 ha (61.2%)	-8.2 ha (4.59%)	-8.2 ha (4.59%)	+77.1 ha	+0.3 ha (0.17 %)	+0.4 ha (0.23 %)	+85.7 ha
Development Site Area (at NSW) • Development Site Area	• 98.3ha	• 49 ha	• 40 ha	- 58.3 ha	• 11.6 ha	• 11.6 ha	- 86.7 ha
GFA • Domestic GFA • Non-domestic GFA	• 306,581 m ² • 13,000 m ²	• 306,581 m ² • 12,965 m ²	• 306,581 m ² • 12,965 m ²	• No Change -35 m ²	• 306,581 m ² • 13,000 m ²	• 306,581 m ² • 13,000 m ²	• No Change No Change
Total No. of Units	2,550	1,600	1,600	- 950	2,531	2,521	- 29
Apartments • GFA • No. of Storeys • No. of Blocks • No. of Units • Ave Unit Size • Main roof Level	• 83,613 m ² • 7 to 8 storeys • 25 • 1,080 • 77.4 m ² • N/A	• 35,655 m ² • 17 storeys above and 1-basement carpark • 5 • 640 • 55.7m ² • +56.4 mPD	• 35,655 m ² • 7-9 storeys above and 1-basement carpark • 10 • 640 • 55.7 m ² • +29.4 to +35.4 mPD	• - 47,958 m ² • 0-2 storeys and 1-basement carpark • - 15 • - 440 • - 21.7 m ²	• 259,051 m ² • 19-25 storeys above and 1-2 storey basement carpark • 29 • 2,391 • 108.3 m ² • +66.6 to +82.35 mPD	• 259,051 m ² • 19-25 storeys above and 1-2 basement carpark • 28 • 2,381 • 108.8 m ² • +66.6 to +85.5 mPD	• 175,438 m ² • 12-18 storeys and 1-2 basement carpark • 3 • 1301 • 31.4 m ²
Houses • GFA • No. of Storeys • No. of Units • Av. Unit Size • Main roof Level	• 167,226 m ² • 2 to 2.5 storeys (over car port) • 970 • 172 m ² • N/A	• 270,926 m ² • 3 storeys (over basement car-park) • 960 • 282 m ² • 17.5mPD	• 270,926 m ² • 3 storeys (over basement car-park) • 960 • 282 m ² • +17.5mPD	• 103,700 m ² • 0.5-1 storeys • - 10 • 110 m ²	• 47,530 m ² • 3 storeys (over basement car-park) • 140 • 340 m ² • +16.7mPD	• 47,530 m ² • 3 storeys (over basement car-park) • 140 • 340 m ² • +16.7mPD	• - 119,696 m ² • 0.5-1 storeys • -830 • 168 m ²
Duplex Units • GFA • No. of Storeys • No. of blocks • No. of Units	• 55,742 m ² • 3 to 4 storeys • 250 • 500	• N/A • N/A • N/A • N/A	• N/A • N/A • N/A • N/A	Not included	• N/A • N/A • N/A • N/A	• N/A • N/A • N/A • N/A	Not included
Residents Club House GFA	2,000 m ²	2,000 m ²	2,000 m ²	No Change	3,441 m ²	3,441 m ²	1,441 m ²
Commercial GFA	5,000 m ²	900 m ²	900 m ²	- 4,100m ²	1,575 m ²	1,575 m ²	- 3,425 m ²
GIC facilities • Elderly Centre & Residential Home for adults with intellectual or cognitive disabilities and other special needs • Kindergarten • Primary School • Secondary School	• N/A • 9 classrooms • 1 • 1	• 6,754 m ² GFA • N/A • N/A • N/A	• 6,754 m ² GFA • N/A • N/A • N/A	• 6,754 m ² GFA • Not included • Not included Not included	• 6,754 m ² GFA • N/A • N/A • N/A	• 6,754 m ² GFA • N/A • N/A • N/A	• 6,754 m ² GFA • Not included • Not included Not included

Development Parameters of the Various Schemes and its Comparison against the Henderson Approved Scheme							
Major Development Parameters	(a) Henderson Approved Scheme (A/DPA/YL-NSW/12) ¹	(b) 218 s. 16 First Scheme ²	(c) 218 s. 17 First Scheme ³	(d) Difference (c)-(a)	(e) 242 s. 16 Second Scheme ⁴	(f) 242 s. 17 Second Scheme ⁵	(g) Difference (f)-(a)
Public Areas • Total Public Site Area • Parkway Public Park • Other Public Areas • Visitor Centre	N/A	• 3,311m ²	• 3,311m ²	3,311m ²	• 1,230m ²	• 1,230m ²	1,230m ²
Open Space Provision • Public Open Space • Private Open Space • Open Space for Residential • Open Space for Commercial Centre, Elderly Centre and Visitor Centre • Open space for other areas	• N/A • N/A • N/A • N/A • N/A	• 26,198m ² • 341,241.5m ² • 273,306m ² • 2,182m ² • 65,753m ²	• 22,978m ² • 351,961m ² • 280,806m ² • 2,182m ² • 68,973m ²	• 22,978m ² • 351,961m ² • 280,806m ² • 2,182m ² • 68,973m ²	• 33,436m ² • 30,899m ² • 29,346m ² • 1,553m ² • N/A	• 33,436m ² • 30,899m ² • 29,346m ² • 1,553m ² • N/A	• 33,436m ² • 30,899m ² • 29,346m ² • 1,553m ² • N/A
Golf Course	18 hole course spread over whole NSW site • Golf Course Area 49 ha • Clubhouse 6,000 m ²	N/A	N/A		N/A	N/A	
Design Population (excluding GIC)	9,129	4,480	4,480	-4,649	6,500	6,500	-2,629

*Net Water Area

¹ See Table 9.1, 218 s.16 Planning Statement [D/38/954]

² See the Table at §1.6 and the Table at §1.8 of the 218 RNTPC Paper [D/49/2383-2385]

³ See the Table at §2.3 and the Table at §2.5.3 of the 218 242 TPB Paper [D/60/2840-2842]

⁴ See Table 1 at §1.7 and Table 2 at § 1.9 of the 242 TPB Paper [E/84/4240-4242]

⁵ See Tables 1 and 2 at §3.18 of the 242 TPB Paper [E/102/5700-5702]

⁶ Shortly before the 242 TPB Meeting, the area of the Lut Chau portion of the Appeal Site was revised (see note * under Table 1 of the 242 TPB Paper [E/102/5702])

**Comparisons of the Plot Ratio and Site Coverage for the Henderson Scheme,
NSW s.17 First Scheme, s.17 Second Scheme and the FLW Scheme**

	Henderson Scheme	s.17 First Scheme	s.17 Second Scheme	FLW Scheme
Zoning	R(C) ¹	OU(CDWEA1)	OU(CDWEA1)	OU(CDWEA)
Plot Ratio	0.317 ²	0.17 ³	0.179 ⁴	0.185 ⁵
Site Coverage	12% (of the Nam Sang Wai portion) ⁶	13.4% ⁷	6.5% ⁸	5% ⁹

¹ "The Notes of the draft NSW DPA Plan for "R(C)" zone1 stipulated a maximum PR of 0.4, SC of 20% and a BH of 2 storeys over 1 level of carport" [E/84/4246]. See also Footnote 1 to Annex IIa of the 242 RNTPC Paper [E/84/4312] and §3.1(g) of TPB Paper No. 2387 for the Henderson Scheme [B/18/587]

² See §3.1(a)(ii) and the Table under §3.2 of TPB Paper 5514 [B/24/714 & 717] and §16.1(k) of TPB Paper No. 2387 for the Henderson Scheme [B/18/614]

³ See table under §5.3.10 of the 218 s.17 Review Statement [D/54/2666].

⁴ See §128 of the RNTPC Meeting [E/85/4471] and Comment 4 [E/92/5018].

⁵ See table under §1.6 of the FLW TPB Paper [B/28/756.2].

⁶ See table under §3.2 of TPB Paper 5514 [B/24/717]

⁷ See Response to Comment 4 [E/92/5018].

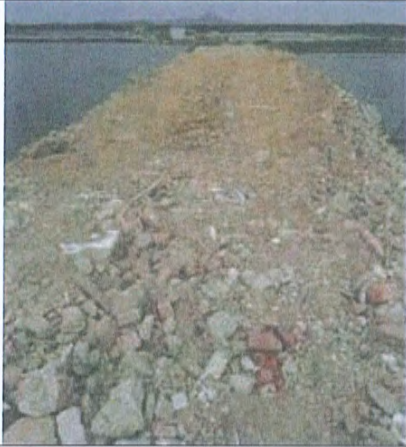
⁸ See footnote 7

⁹ See table under §1.6, §2(a) and 12.3 of the FLW TPB Paper [B/28/756.2, 756.8 & 756.28].

Annex A Photographs relevant to Section 1.2.

Dumping of waste	
14 November 2012	
	
	
18 September 2015	8 January 2013
	
15 March 2013	
	

25 February 2013



18 Sept 2015



15 March 2015

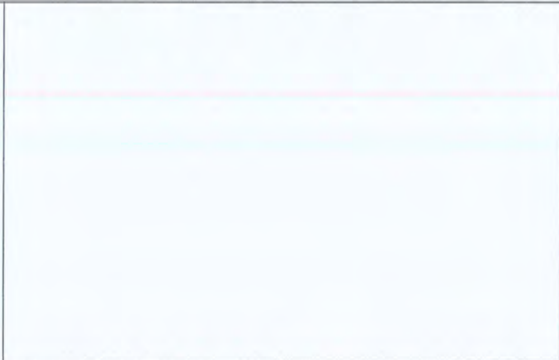


Suction dredging of fishponds into tidal creeks

8 January 2013



25 February 2013



15 March 2013





Conversion of mangrove to fishpond

8 January 2015

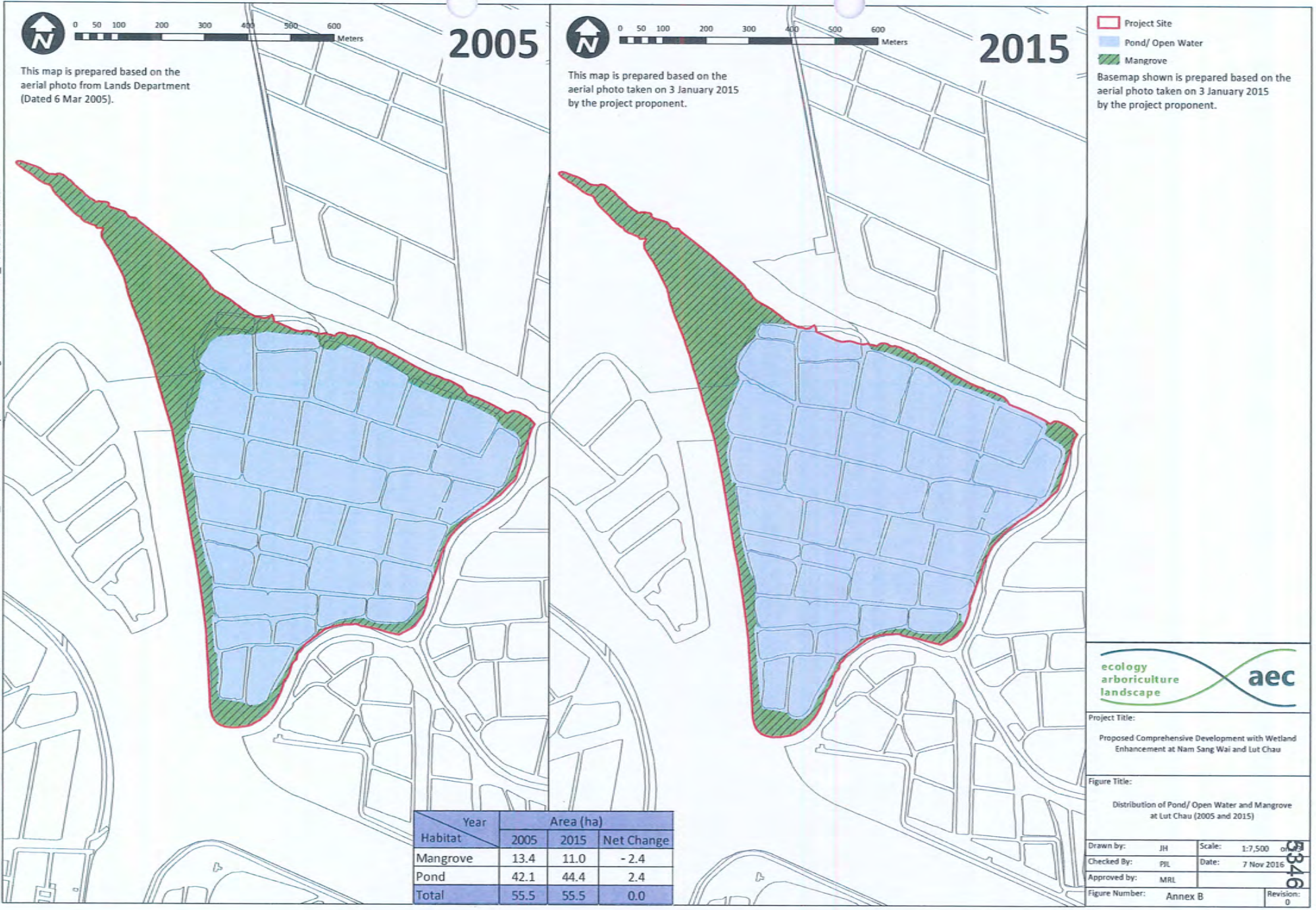


25 February 2013



15 March 2013





2005

This map is prepared based on the aerial photo from Lands Department (Dated 6 Mar 2005).



2015

This map is prepared based on the aerial photo taken on 3 January 2015 by the project proponent.

□ Project Site
□ Pond/ Open Water
▨ Mangrove
 Basemap shown is prepared based on the aerial photo taken on 3 January 2015 by the project proponent.

Habitat	Year		Net Change
	2005	2015	
Mangrove	13.4	11.0	- 2.4
Pond	42.1	44.4	2.4
Total	55.5	55.5	0.0



Project Title:
Proposed Comprehensive Development with Wetland Enhancement at Nam Sang Wai and Lut Chau

Figure Title:
Distribution of Pond/ Open Water and Mangrove at Lut Chau (2005 and 2015)

Drawn by: JH Scale: 1:7,500
 Checked By: PFL Date: 7 Nov 2016
 Approved by: MRL

Figure Number: Annex B Revision: 0

5346

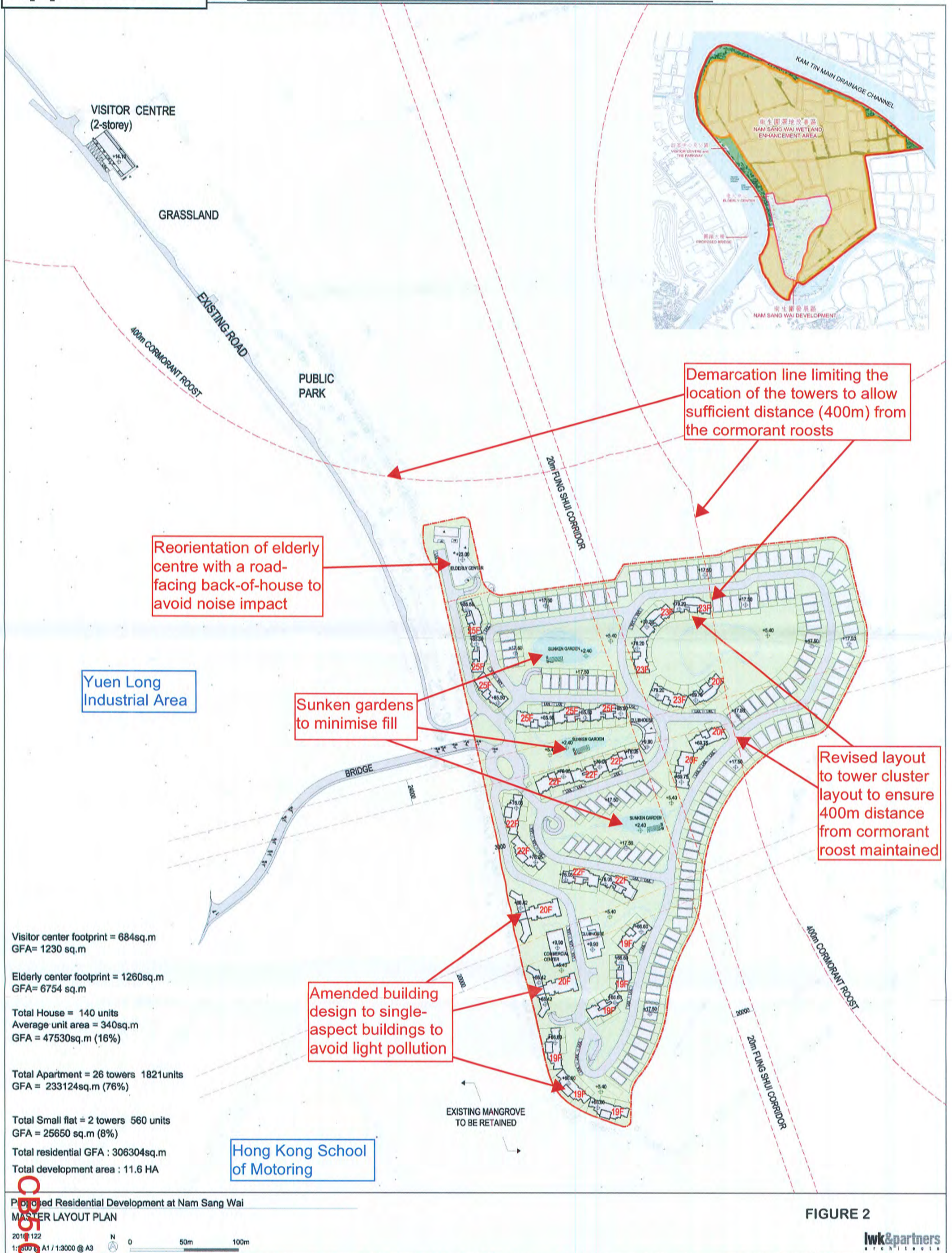
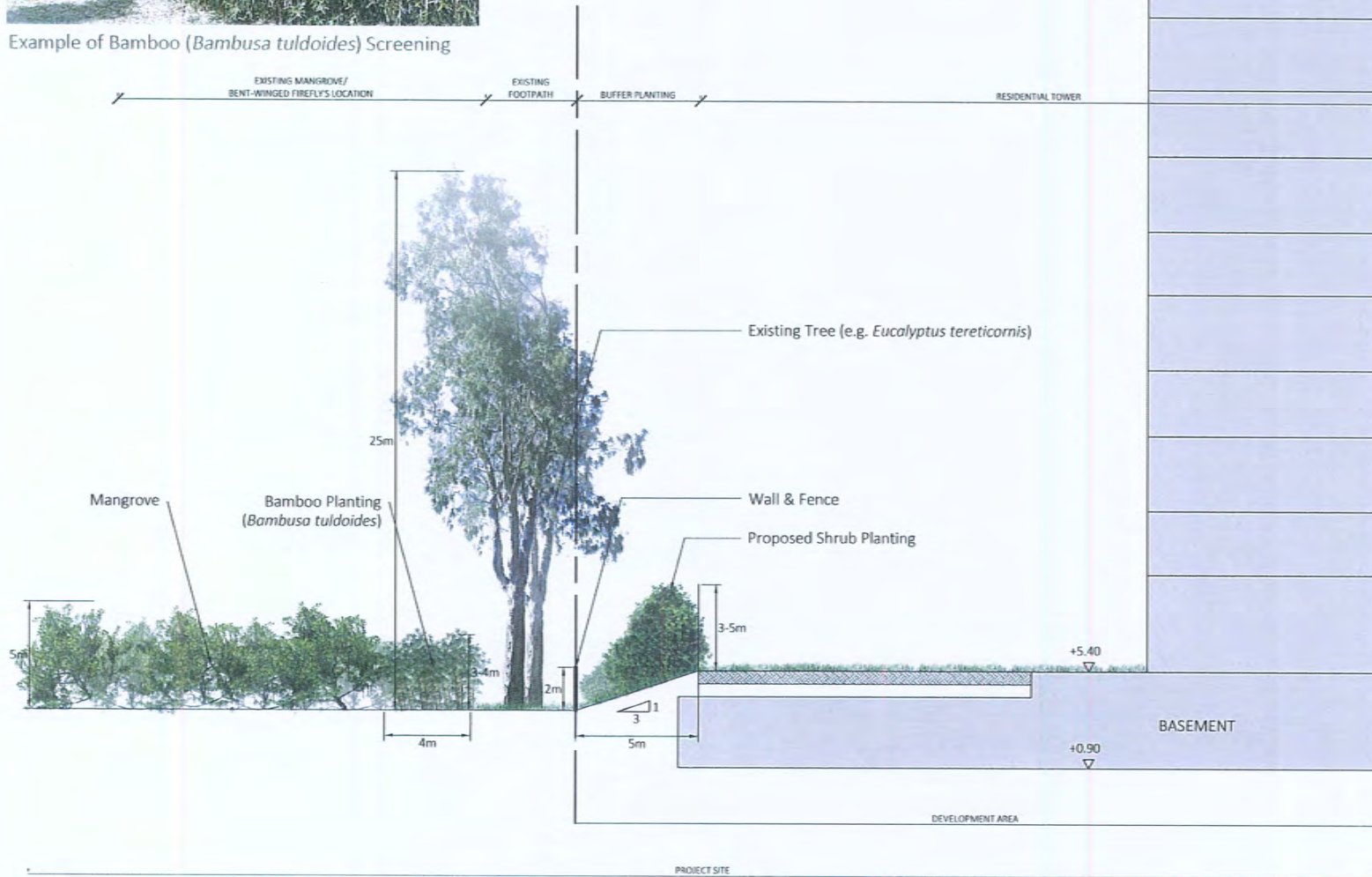


FIGURE 2

085 013



Example of Bamboo (*Bambusa tuldooides*) Screening



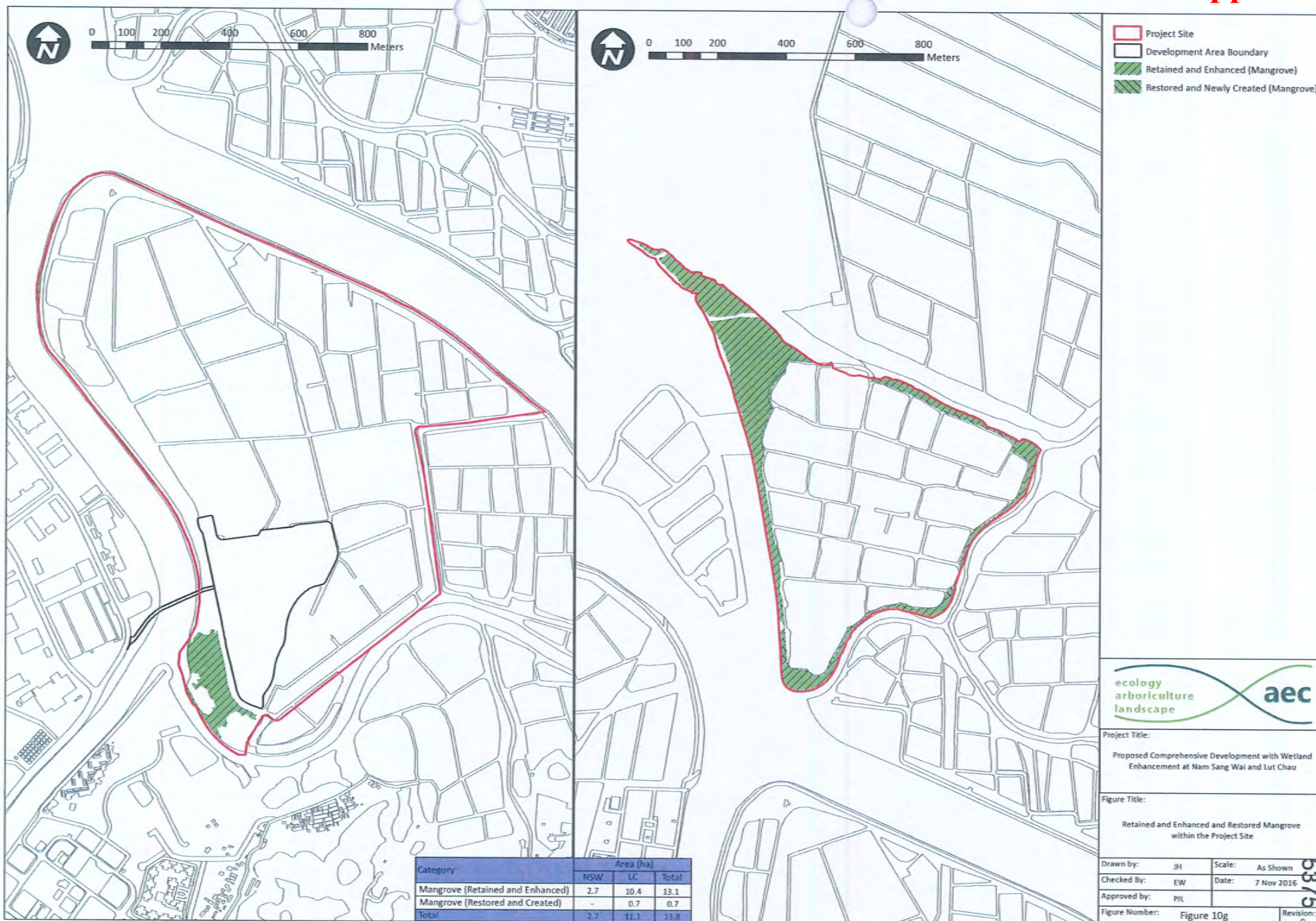
Indicative Location of Screen Planting



Project Title:
Proposed Comprehensive Development with Wetland Enhancement at Nam Sang Wai and Lut Chau

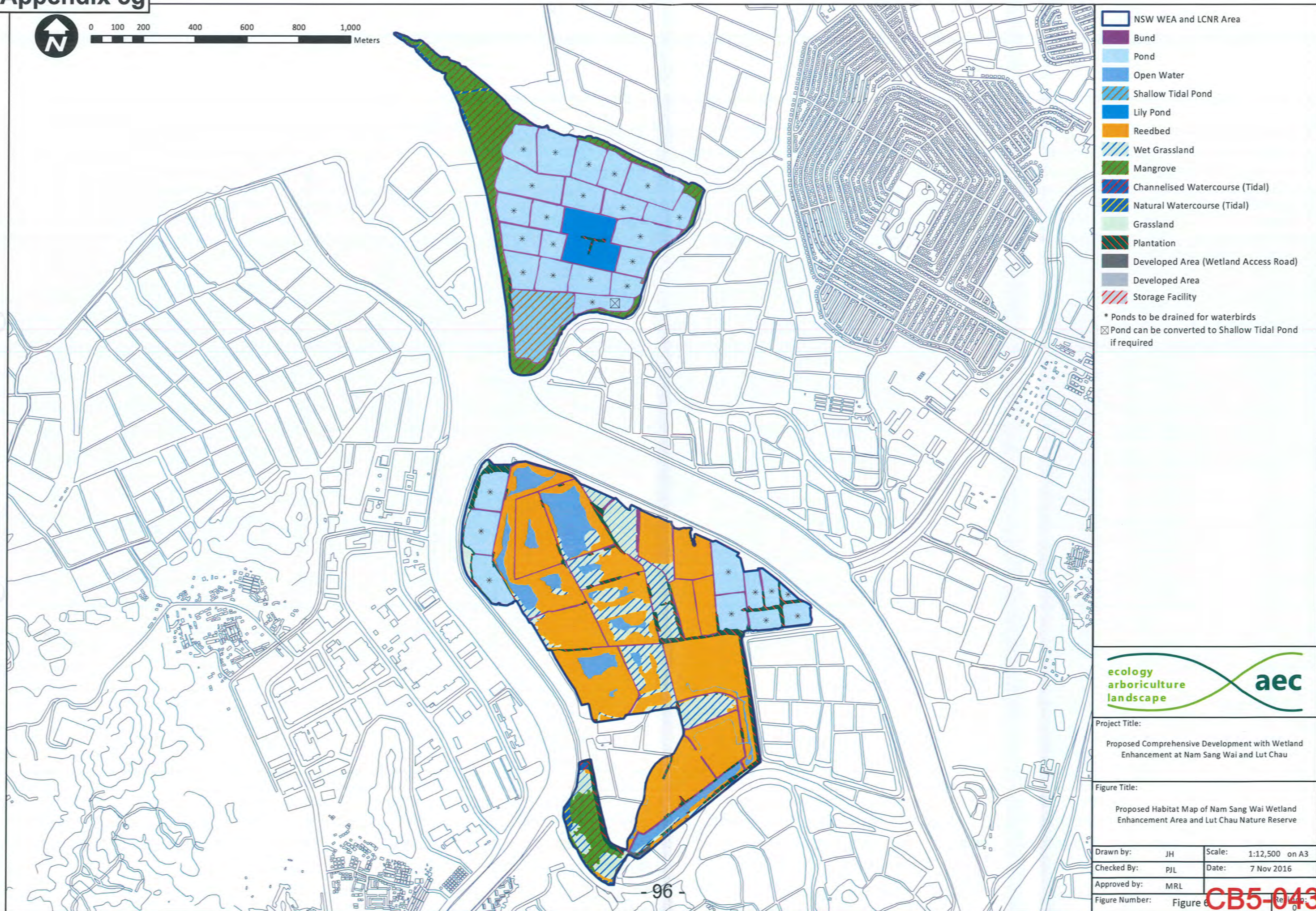
Drawing Title:
Screening of Mangrove from Residential Development

Drawn by:	OY	Scale:	1:200
Checked by:	EW	Date:	Aug2016
Approved by:	MRL	File:	5208
Number:	Figure 25b		Revision:

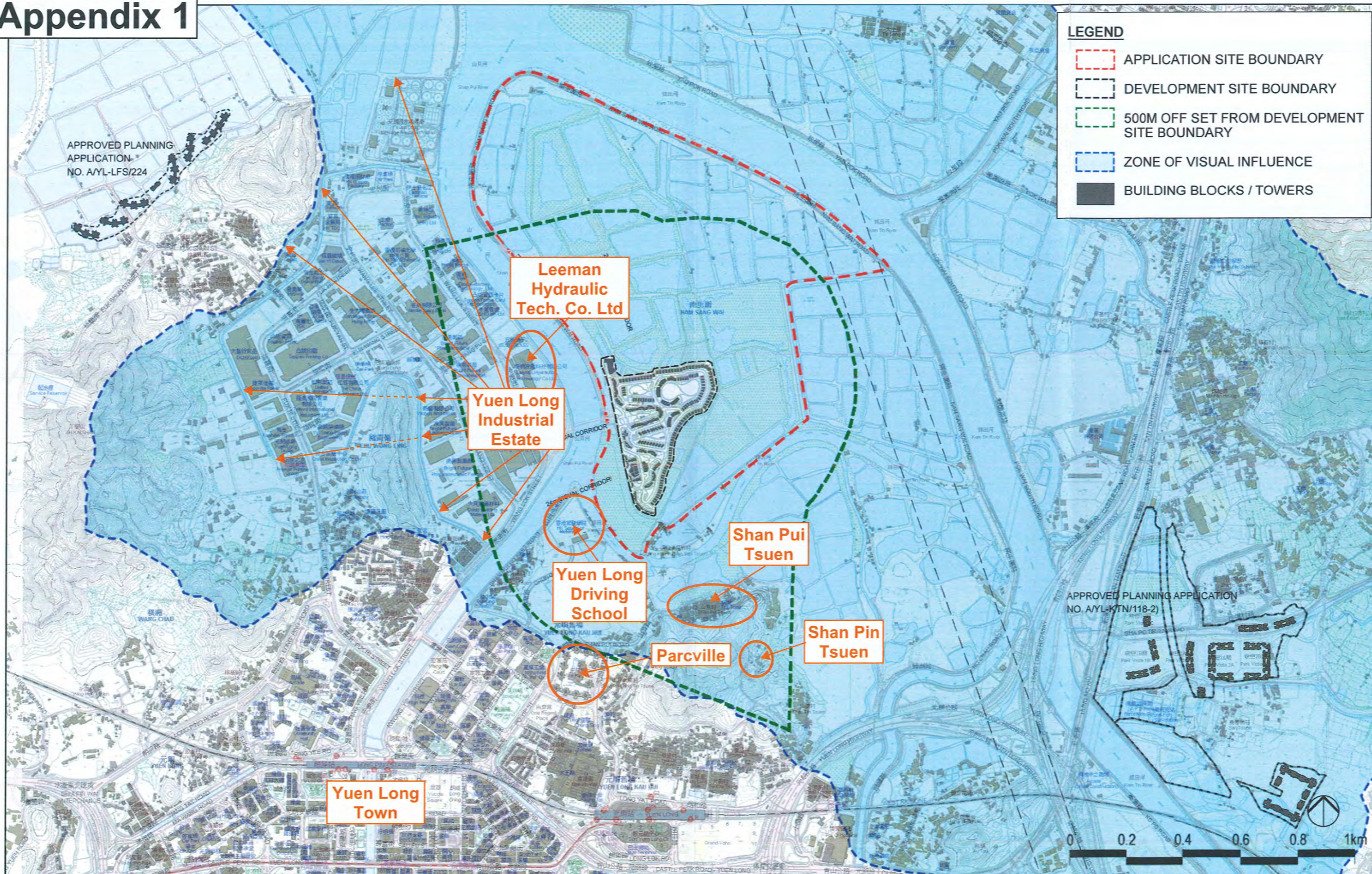


5375

Appendix 3g



Appendix 1



LEGEND

- APPLICATION SITE BOUNDARY
- DEVELOPMENT SITE BOUNDARY
- 500M OFF SET FROM DEVELOPMENT SITE BOUNDARY
- ZONE OF VISUAL INFLUENCE
- BUILDING BLOCKS / TOWERS



TITLE: **SCALE AND DISPOSITION COMPARISON**

PROJECT: PROPOSED COMPREHENSIVE DEVELOPMENT WITH WETLAND ENHANCEMENT (CDWE) AT NAM SANG WAI AND LUT CHAU, N.T

ANNEX: **B.3**

REVISION: C

DATE: OCT 2018

Appendix 9

Planning Approval Conditions

Any planning permission granted is valid for 5 years from the date of the Appeal Board's decision herein. After the said date, the permission shall cease to have effect unless before the said date, the development permitted is commenced or the permission is renewed – with the following Approval conditions:

- (a) the submission and implementation of a revised Master Layout Plan to take into account conditions (b) to (o) below to the satisfaction of the Director of Planning or of the Town Planning Board;
- (b) the design and provision of the vehicular bridge over Shan Pui River, as proposed by the Appellants, to the satisfaction of the Commissioner for Transport or of the Town Planning Board;
- (c) the submission of a revised Traffic Impact Assessment and the design and provision of traffic improvement works identified in the revised Traffic Impact Assessment, as proposed by the Appellants, to the satisfaction of the Commissioner for Transport or of the Town Planning Board;
- (d) the design and provision of vehicular access, vehicle parking, motorcycle parking and loading/unloading facilities for the proposed development to the satisfaction of the Commissioner for Transport or of the Town Planning Board;
- (e) the submission of a revised Ecological Impact Assessment (EcoIA) and the implementation of the mitigation measures identified therein to the satisfaction of the Director of Agriculture, Fisheries and Conservation or of the Town Planning Board;

- (f) the submission of a revised Environmental Assessment (EA) and the implementation of the mitigation measures identified therein to the satisfaction of the Director of Environmental Protection or of the Town Planning Board;
- (g) the submission of a revised Sewerage Impact Assessment (SIA) and the implementation of the mitigation measures identified therein to the satisfaction of the Director of Environmental Protection or of the Town Planning Board;
- (h) the submission of a revised Drainage Impact Assessment (DIA) and the provision and maintenance of the drainage mitigation measures identified therein to the satisfaction of the Director of Drainage Services or of the Town Planning Board;
- (i) the submission and implementation of a revised Landscape Master Plan to the satisfaction of the Director of Planning or of the Town Planning Board;
- (j) the submission of a revised Visual Impact Assessment (VIA) and the implementation of the mitigation measures identified therein to the satisfaction of the Director of Planning or of the Town Planning Board;
- (k) the submission of a Water Supply Impact Assessment to the satisfaction of the Director of Water Supplies or of the Town Planning Board;
- (l) the provision of emergency vehicular access, water supplies for fire-fighting and fire service installations to the satisfaction of the Director of Fire Services or of the Town Planning Board;
- (m) the submission of an implementation programme with phasing proposal of the proposed development (including the conservation of Lut Chau Nature Reserve and Nam Sang Wai Wetland Enhancement Area) to the satisfaction of the Director of Planning or of the Town Planning Board;

- (n) prior to the commencement the construction of the residential portion of the proposed development on the site of about 11.6 hectares identified at the Southern part of Nam Sang Wai (“**the Residential Portion**”):
- (i) the submission of a revised Conservation and Management Plan (“**Revised CM Plan**”) (to include, inter alia, implementation details and the estimated annual recurrent costs with breakdown as required) to ensure the long-term maintenance and management of the Lut Chau Nature Reserve and Nam Sang Wai Wetland Enhancement Area to the satisfaction of the Director of Agriculture, Fisheries and Conservation or of the Town Planning Board;
 - (ii) the implementation of those parts of the Revised CM Plan involved in the early phases of the wetland conservation (on the other site areas of up to 154.45 ha), which are programmed (under the implementation programme and phasing proposal to be approved under condition (m) above), to be completed prior to commencement of construction of the Residential Portion, to the satisfaction of the Director of Agriculture, Fisheries and Conservation or of the Town Planning Board; and
 - (iii) the submission and implementation of a funding arrangement proposal to include details of the lump sum payment to the Environment and Conservation Fund and identification of a competent body as conservation agent, to the satisfaction of the Director of Environmental Protection and the Director of Agriculture, Fisheries and Conservation, or of the Town Planning Board.
- (o) any land exchange and/or lease modification for the proposed development, if considered and approved by the Director of Lands, shall not be executed prior to the compliance with conditions (n)(iii).