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Hong Kong Unreported Judgments

SHA LO TUNG DEVELOPMENT COMPANY LIMITED v THE CHIEF  
EXECUTIVE IN COUNCIL

HIGH COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE  
REGION COURT OF FIRST INSTANCE

HCAL 124/2000

**DECIDED-DATE-1: 9 JANUARY 2001**

P. CHEUNG, J

**CATCHWORDS:**

Administrative Law - Judicial review - Applicant challenging extension granted to Town Planning Board to consider objections and options forwarded by applicant in regards to plan to develop area under the approved Sha Lo Tung Development Permission Area Plan - Consideration of condition of inhabitants in the area - Consideration of the high ecological value of the area due to an extremely diverse community of dragonflies - Whether a case for judicial review has been made out - Town Planning Ordinance (Cap 131) preamble

**HEADNOTE**

On 24 January 1997, the Draft Sha Lo Tung Development Permission Area Plan was gazetted. The Chief Executive in Council approved the Sha Lo Tung Development Permission Area Plan on 20 April 1999. On 14 December 1999, the Chief Executive in Council extended the Plan for one additional year up to 24 January 2001. The purpose of the extension is to enable the Town Planning Board to consider objections and options put forward by the applicant on the development of Sha Lo Tung. The applicant challenged the extension by judicial review.

**HELD:**

1) The decision to extend the Plan is a lawful and rational one so as to enable the Town Planning Board to consider the options put forward by the applicant.

2)

The designation of the north-east area of Sha Lo Tung as a Site of Special Scientific Interest is not unlawful or irrational. There is evidence which is capable of enabling the Town Planning Board to form the view that the north-east area should be designated as a Site for Special Scientific Interest: the marshland in the north-east and the streams in the Sha Lo Tung form the ecological structure for

wildlife  
habitat.

3) The application is dismissed.

## JUDGMENT

### INTRODUCTION

Inevitably, with the growth of the population, nature has to give way to meet the demand for land to build new towns and other infrastructures. However, it is essential to maintain an ecological balance between development and conservation. After all, mankind is only a part, and a very small part indeed, of nature.

In Hong Kong, the Town Planning Board ("the Board") is one of the bodies entrusted with the task of maintaining such a balance. In the preamble of the Town Planning Ordinance, Cap.131 ("the Ordinance"), the purpose of the Ordinance is stated to be:

"To promote the health, safety, convenience and general welfare of the community by making provision for the systematic preparation and approval of plans for the lay-out of areas of Hong Kong as well as for the types of building suitable for erection therein and for the preparation and approval of plans for areas within which permission is required for development."

This judicial review arises out of the decision of the Board to designate Sha Lo Tung in the New Territories as a development permission area.

### SHA LO TUNG

Sha Lo Tung is an isolated valley at the foot of the Pat Sin Leng range and Cloudy Hill range. It is surrounded by the Pat Sin Leng Country Park. It is an abandoned agricultural area in an upper valley floor. The Sha Lo Tung basin was originally settled by two Hakka migrant clans, the Cheungs and the Leis in the late 1600s and early 1700s respectively. The population peaked in the late 1950s with a maximum number of residents of about 450. During the late 1960s, rice farming became non-viable in Hong Kong and the villagers began to leave the upland farming communities. There had been no villagers living in the villages since 1995. There are at present three groups of deserted village houses: the largest being the Cheung Uk, followed by the Lei Uk and Lo Wai. They consist mainly of one to two-storey structures with traditional Chinese architectural design such as tiled roof. Most of the village houses are in fair to poor condition. Some of the village houses have already collapsed. The village houses are Grade II historical buildings which are of architectural and historical significance.

The significance of the area is, however, its high ecological value because of the presence of an extremely diverse community of dragonflies, especially around the stream courses, which form part of the stream courses running through the Pat Sin Leng Country Park and consist of pristine water, and the nearby woodlands. The number of species recorded in the catchment area is more than any other site in Hong Kong. Currently, there are 68 species of dragonflies recorded in the area from a total of 106 species known from the whole territory. Many of the species recorded are rare stream species. The stream courses are also important habitats for other aquatic fauna such as fresh water fish and amphibian.

According to the explanatory statement of the Draft Sha Lo Tung Development Permission Area Plan ("SLTDPA Plan"), it is important to ensure the integrity of the stream courses including the vegetation alongside and the adjacent woodlands in order to preserve the wildlife habitats. Any development which may lead to deterioration of the water quality of the streams and losses of riparian and nearby woodlands will threaten the survival of the fauna in particular the larval stage of the dragonfly community. In addition, as the Sha Lo Tung area is within an upper indirect water gathering ground, any development within 30m of the water courses should be strictly controlled.

The court carried out a site inspection at the request of the applicant. The visit was not for the purpose of finding facts but to observe the location. The area is indeed a beautiful scenic spot with clutters of village houses, now in ruin, mature woodland, running streams and marshland. The area is situated at a remote location. Vehicular access can only be gained through the existing sub-standard access road linking to Ting Kok Road in Tai Po. The access road is a single lane carriageway. There is no provision of public transport in the area.

## THE APPLICANT

About 25 hectare (about 44%) of the Sha Lo Tung area are under private ownership while the remaining 56% (about 32 hectare) is government land. The applicant holds the majority of the private land. The private land is mainly in the flat area along the stream courses in the central, northern and eastern part of the area. In late 1979, the applicant entered into agreements with the village representatives of Cheung Uk and Lei Uk to acquire their land for the purpose of carrying out a redevelopment project. In 1982, the applicant formally submitted its first proposal to the Government for a recreational and housing development. The plan included a golf course. There were negotiations between the applicant and the Government on the proposal. In later years, the applicant wished to expand the golf course into the country park area and approval was given for the use of the county park area by the authorities. This decision was, however, overturned in July 1992 by judicial review. The applicant decided not to develop the country park area and re-amended the scale of the golf course. From that time onwards, the applicant submitted environmental impact assessment reports on the area to the Government.

## THE STREAMS

According to historical records, there are four streams in the area. These streams would have formed tributaries to the principal water course that drains northwards to the Hok Tau Reservoir. The four streams are Cloudy Hill Stream, running from the west to the north; the Lei Uk Stream, running from the south to the north; the Sha Lo Tung Stream, which is the matter in dispute in this case; and the Ping San Chai Stream, running from the east to the west in the northern boundary of the area.

## EVENTS LEADING TO THE DECISION

### a) The Draft and Approved SLTDPA Plan

On 18 November 1996, the Agricultural and Fisheries Department ("AFD") circulated a proposal to designate the major streams in Sha Lo Tung as sites of special scientific interest ("SSSI"). On 23 December 1996, the Conference Paper on Sha Lo Tung was considered by the Shatin, Tai Po and North District Planning Conference. On 16 January 1997, the Planning Department submitted a paper on the proposed designation of sites of special scientific interest at Sha Lo Tung to the Committee on Planning and Land Development. On 17 January 1997, the Planning Department submitted the Draft SLTDPA Plan.

On 24 January 1997, the Draft SLTDPA Plan was gazetted. On 22 March 1997, the applicant submitted written objections to the Draft SLTDPA Plan to the Board pursuant to section 6(1) of the Ordinance. On 15 January 1998, the applicant submitted supplementary information paper on habitat sensitivity at Sha Lo Tung Development Permission Area to the Board. On 27 March 1998, the Board met to give preliminary consideration to the applicant's objection. It decided not to amend the Draft SLTDPA Plan and gave notice to the applicant of its decision on 23 April 1998.

On 16 September 1998, the applicant submitted further written statement to the Board to provide further scientific information on the ecological significance of the Sha Lo Tung Development Permission Area. On 20 November 1998, the Board met to consider further the applicant's objections under section 6(6) of the Ordinance. On 11 December 1998, the Board informed the applicant that it would not amend the plan at this stage "because views submitted by the objectors are conflicting and further studies will be required to resolve all the outstanding issues". The Board further informed the applicant that its objections will be included in the schedule of objections not withdrawn, which will be submitted together with the Draft SLTDPA Plan to the Chief Executive in Council.

On 20 April 1999, the Chief Executive in Council approved the Draft SLTDPA Plan. On 21 April 1999, the applicant petitioned the Chief Executive in Council and asked for the Draft SLTDPA Plan to be referred to the Board for further consideration and amendment. The Chief Executive in Council approved the Draft SLTDPA Plan. On 30 April 1999, the Approved SLTDPA Plan is gazetted.

### b) The extension

On 10 May 1999, the Secretary for Planning, Environment and Lands issued directive for the preparation of an Outline Zoning Plan under section 3(1)(a) of the Ordinance to replace the SLTDPA Plan.

In August 1999, AFD provided "Rapid Ecological and Habitat Assessment of Sha Lo Tung" to the Planning Department. On 10 September 1999, the applicant submitted a rezoning request together with the supporting environmental impact assessment to the Board. On 19 October 1999, members of the Board visited Sha Lo Tung. On 29 October 1999, the Planning Department forwarded to the applicant comments of relevant government departments on the applicant's rezoning request and environmental impact assessment.

On 12 November 1999, the Board met to consider the planning report and land use options for the Draft Outline Zoning Plan submitted by the Planning Department. Of the three options, the first is for conservation; the second option is a hybrid development approach, this option attempts to meet the development pressure for small houses and private residential developments while at the same time keeping the stream habitat intact; the third option is a development led approach, this option reflects the latest development intention proposed by the applicant in the rezoning request submitted in September 1999. The proposed development scheme comprises of three components, including private residential development, village development and public facilities. Five comprehensive development area zones are proposed for private residential developments in the north-eastern, central, southern, western and north-western parts of the area. The proposed total maximum domestic gross floor area is 66,300 square meters. The predominant building type will be two-storey single plot dwellings. At areas remote from the SSSI, there will be three-storey row houses and six-storey apartments.

The Board then decided to request the Planning Department to study the outstanding issues and proposed further land use options. The Board also agreed to seek the approval of the Chief Executive in Council to extend the effective period of the Approved SLTDPA Plan for one additional year under section 25(5) of the Ordinance. On 17 November 1999, the applicant requested the Board to defer consideration of the rezoning request.

On 14 December 1999, the Chief Executive in Council extended the Approved SLTDPA Plan for one additional year up to 24 January 2001.

## THE DECISION UNDER CHALLENGE

The decision that is challenged in this judicial review is the decision of the Chief Executive in Council of 14 December 1999.

## THE SLTDPA PLAN

In the SLTDPA Plan, the following land use zones are designated:

- 1 Site of Special Scientific Interest (Total Area 22.05 hectare).  
According to the explanatory statement to the Plan:

- (a) The planning intention of this zone is to prevent detrimental activities and/or developments within the SSSI (other than those which are necessary to sustain the site or to serve educational purpose and have approval from the Board) and to conserve the features of special interest.
  - (b) The stream courses together with the 30m buffer area on both sides of the streams are designated as SSSIs. The stream courses where the dragonflies lay their eggs and live through the larval stage are important habitats for breeding and development of an extremely diverse community of dragonflies. ...
- 2 Village Type Development (Total Area 1.97 hectare), this zone is primarily intended for development of Small Houses by indigenous villagers.
- 3 Unspecified Use (Total Area 33.11 hectare). The Plan stated that:
- (a) The areas comprise mostly abandoned agricultural land and existing vegetated areas. The planning intention of the areas is to conserve the rural characteristics, the existing woodlands, the existing natural features, the existing landscape and the amenity of the area. However, Small House developments, small scale recreational development and ancillary overnight accommodation may be considered upon application to the Board provided the applicant can prove that they will not adversely affect the ecological value of the nearby 'SSSI' zone; and that due regard has been given to preserve the existing environment and to minimise the adverse drainage and traffic impacts on the surrounding areas.

Annex B to the Notes of the SLTDPA Plan consists of two columns. Column 1 is "uses always permitted"; and column 2 is "uses that may be permitted with or without conditions on application to Town Planning Board". There is no permitted use under column 1 whereas under column 2 the permitted uses are:

Agricultural Use

Aviary

Field Study/Education/Visitor Centre

Government Use (not elsewhere specified)

Plant Nursery

Picnic Area

Public Convenience

Public Utility Installation (including public utility pipeline, electricity mast, lamp pole and telephone booth)

Refreshment Kiosk

Shrine

Tent Camping Site

Tree Plantation

Utility Installation for Private Project

Wild Animals Protection Area

## THE STATUTORY SCHEME

The function of the Board is to prepare Draft Outline Zoning plan ("OZ plan") under section 3(1)(a) and Draft Development Permission Area plan ("DPA plan") under section 3(1)(b). Under section 4, the OZ plan and the DPA plan will make provisions for, among other things:

- (e) zones or districts set apart for undetermined uses;
- (g) country parks, coastal protection areas, sites of special scientific interest, green belts or other specified uses that promote conservation or protection of the environment.

After a draft plan has been prepared, it shall be exhibited by the Board for public inspection for two months (section 5). Any person affected by the draft plan so exhibited may within the period of two months make written objections to the draft plan (section 6(1)). Upon receipt of the written objection, the Board may give preliminary considerations to the objection and may propose amendments to the draft plan (section 3(3)). The Board has power at any time after exhibition of a draft plan and before approval by the Chief Executive in Council make amendments to the draft plan. After considering all objections, the Board shall submit the draft plan to the Chief Executive in Council for approval together with a schedule of the objections (section 8(1)).

Upon submission of a draft plan, the Chief Executive in Council may approve, refuse to approve or refer it to the Board for further consideration and amendment (section 9(1)). If the draft plan is approved, then it is to be referred to as an approved plan (section 9(3)). Any refusal by the Chief Executive in Council to approve the draft plan is without prejudice to the preparation of a new draft plan and the submission of the same.

A DPA plan, whether it becomes an approved plan or not, is effective for a period of three years after it is first published in the gazette, but on the application of the Board, the Chief Executive in Council may extend the period for up to one additional year (section 20(5)).

While a DPA plan is effective, no person shall undertake or continue development in the DPA unless:

- (a) the development is an existing use;
- (b) the development is permitted under the DPA plan; or
- (c) permission to do so has been granted under section 16 (section 21(1)).

Criminal sanction is provided for unauthorized development (section 21(2)). Under section 23, the Government may take enforcement proceedings in respect of an unauthorized development.

#### NATURE OF A DPA PLAN

A DPA plan is superceded by an OZ plan (section 20(6)). A DPA plan is an interim measure as Litton JA (as he then was) observed in *R. v Tang Ying Yip & Another* [1995] 2 HKC 277 at 282: "... The whole object of control through draft DPA plans -- authorized by s 3(1)(b) -- is to enable detailed analysis of land use and examination of development options to take place pending the formulation of outline zoning plans under s 3(1)(a). ...."

#### THE FOCUS

It is necessary to focus on the decision that is being challenged. The challenge is not on the decision of the Chief Executive in Council to approve the Draft SLTDPA Plan on 20 April 1999, instead the challenge is on the decision of the Chief Executive in Council on 14 December 1999 to extend the Approved SLTDPA Plan for one additional year up to 24 January 2001. The ambit of the challenge raised by the applicant, however, goes beyond merely the question of extension of time, but a more fundamental one, namely the north-east part of Sha Lo Tung should not be designated as a site for special scientific interest.

#### THE CHALLENGE IS DOOMED TO FAIL

This challenge, in my view, is doomed to fail because of the statutory scheme. Under section 12 of the Ordinance, the Chief Executive in Council may revoke in whole or in part any approved plan, or refer any approved plan to the Board for replacement by a new plan or amendment. While the Chief Executive in Council has the power to revoke part of the plan, to actually revoke the north-east area as the SSSI will be contrary to the intention of the legislation in development control. Revoking the north-east area as the SSSI would mean a hole will be left on the plan without any designation at all. This matter only needs to be raised to show the unsatisfactory consequence of revoking the designation.

Furthermore, as apparent by section 12(1), the Chief Executive in Council, after revoking part of the approved plan, has no power to designate that part for some other purpose. All that the Chief Executive in Council can do is to refer the matter to the Board for replacement by a new plan or amendment. Under section 12(3), such new plan or amendment has to be prepared in accordance with section 3,

exhibited in accordance with section 5, considered in accordance with section 6, submitted to the Chief Executive in Council again for approval in accordance with section 8 and approved by the Chief Executive in Council in accordance with section 9.

It has to be realized that the purpose of the Board asking the Chief Executive in Council to extend the validity of the Approved SLTDPA Plan is to enable the Board to consider the various options put forward by the applicant on the development of Sha Lo Tung including the north-east area. This matter has been actively pursued since the plan was extended for one year. To require the Board at this stage to replace or amend the plan would be simply counter-productive and a waste of time. After all, a DPA plan is clearly intended to be an interim measure.

The applicant complained that nearly four years had passed since the Draft SLTDPA Plan was first gazetted and because of the designation of the north-east area as a SSSI zone, it has been precluded from developing that area. In my view, the length of time is provided by legislation and this is a fact that the applicant has to accept.

The applicant complained that the Draft SLTDPA Plan was gazetted without prior consultation. The explanation given by the Board on 27 March 1998 was that it was not in the public interest to have prior consultation on the Draft SLTDPA Plan because of the need to prevent the establishment of "existing use" before the gazetting of the Draft SLTDPA Plan. This is clearly a legitimate ground because under section 21, if a development is an existing use, then it is not a contravention of the DPA plan.

The statutory provisions relating to objection and approval by the Chief Executive in Council would apply to a draft OZ plan as well. In other words, the applicant will have further opportunities to challenge designations in the draft OZ plan. In my view, it is not permissible at this late stage to attack the designation of the north-east part as a SSSI zone in the Approved SLTDPA Plan. It is certainly not permissible to do so under the guise of attacking the extension of time by the Chief Executive in Council of the SLTDPA Plan. On no account can it be said that the extension is an unlawful or irrational one if the reason for the extension is to enable the Board to consider the options put forward by the applicant. The application can be dismissed on this ground.

#### THE CHIEF EXECUTIVE IN COUNCIL TO CONSIDER THE SSSI ZONING?

It is argued that the Chief Executive in Council should have considered the appropriateness of the SSSI zoning when they considered whether to extend the SLTDPA Plan or not. In my view, this argument is circuitous because it was precisely that the Board required further time to consider the applicant's proposals that extension of time was granted. The applicant had lodged objections to the Board and also petitioned to the Chief Executive in Council before the approval was given, the only appropriate decision was for the Chief Executive in Council to continue with the existing zoning. As Mr Tang, SC, counsel for the Chief Executive in Council, rightly pointed out, any other designation would have been

arbitrary because the extension was granted so that the appropriate zoning could be decided.

## MERITS

### Site of special scientific interest

Having decided on this ground that the application is to be dismissed, it is strictly not necessary for me to deal with the merits on the designation of the SSSI zone, however, as both parties had addressed the court on this issue, I would now deal with this topic. There is no statutory definition of site of special scientific interest. In England, under section 28(1) of the Wildlife and Countryside Act 1981, the Conservancy Councils are under a duty to notify as SSSIs those areas of land which are, in their opinion, of special interest by reason of any of their flora, fauna, or geological or physiographical features. The notification must set out why the land is of special interest and specify those operations (known as "potentially damaging operations") which appear likely to damage the flora, fauna or other special features of the land and thus fall within this scope of the SSSI controls. However, the Conservancy Councils may give permission to carry out the potentially damaging operations in the SSSI zoning: see Nature Conservation Law by Colin T. Reid, paras. 5.4.1 to 5.4.17.

### THE APPLICANT'S CASE

The applicant's case is that the Sha Lo Tung Stream identified in the original base maps is now found to be discontinuous in the fields and is an area of low sensitivity. The north-east section does not contain a stream course or cater for significant rare dragonfly population, and therefore it cannot be rated as SSSI zoning. The north-east SSSI zone covers an area of abandoned rice paddies that are wet in places, during some parts of the year. These abandoned fields are criss-crossed by small discontinuous irrigation ditches intermingled with filled patches. The ditches do not form a stream course and they do not link into the main stream course in the centre of the site: see written objections made by the applicant in March 1997 and Supplemental Information Paper lodged by the applicant in January 1998.

On these facts, the applicant submitted that the designation of the north-east area as a SSSI was unlawfully and irrationally made. It was unlawfully made because the Board failed to consider whether the north-east area could properly be designated as a SSSI on ground of special scientific interest. It designated the north-east area as SSSI for a collateral purpose, namely to restrict development, and satisfy drainage requirements and also in order to protect other land. It was irrationally made because the Board failed to take into account that control of development can be achieved in other appropriate ways such as by devising a drainage system for the north-east area which would be similar to the existing drainage regime. Further, the Board failed to take into account that there is no evidence of the need for protection of downstream water courses in the form of evidence of ecological value, or that the drainage system in the north-east area

links more than marginally with the area said to need protection, namely the downstream. Further, the Board irrationally treated the SSSI zone as necessary to maintain "stable flows" when there is no evidence of any appreciable flow in the north-east area as a whole, or what counts as a stable or unstable flow, or more than marginal link between flow in the north-east and flow in the other land. Further, the Board had irrationally misdirected itself as to the existence of the continuous stream course in the north-east area.

## THE LAW

The law in this area is not in dispute. If a power granted for one purpose is exercised for a different purpose, that power has not been validly exercised, see *de Smith, Woolf & Jowell, Judicial Review of Administrative Action*, 5th Edn., para.6-059. The person so authorized cannot be allowed to exercise the powers conferred on them for any collateral object; that is, for any purposes except those for which the legislature has invested them with extraordinary powers.

On the question of finding of fact, in *R. v Criminal Injuries Compensation Board, Ex parte A* [1999] 2 AC 330, Lord Slynn of Hadley held that in judicial review, there is jurisdiction to quash the decision because it was reached on a material error of fact. See also a discussion on this topic in *Administrative Law* by Wade and Forsyth, 8th Edn., p.278 to 284. See also the judgment of Cooke J (as he then was) in *Daganayasi v Minister of Immigration* [1990] 2 NZLR 130 when he held that a failure to take into account the true facts can be a ground for judicial review.

## ERROR OF FACT

I would deal first with the question of error of fact relating to the continuous stream. The applicant referred to the Approved SLTDPA Plan and the proposed OZ plan in which the stream course in the north-east area is maintained notwithstanding its discontinuous. It also referred to the explanatory statement of the Draft SLTDPA Plan which referred to stream courses; the comment of the Director of Agricultural and Fisheries Department on the Environmental Impact Assessment Report prepared by the applicant referred to the streams at the north-east site; in the existing land use plan attached to the briefing notes for the Board's members site visit to Sha Lo Tung, a continuous stream is shown in the north-east area.

In my view, it is clear that the Board had clearly appraised of the true geographical situation in the north-east area. As can be seen from the minutes of the meeting of the Board held on 27 March 1998 in which the Board decided not to propose any amendments to the plan, among the reasons that were given was that the north-eastern part of Sha Lo Tung was identified as one of the fresh water wetland sites which needed protection, and it was inappropriate to re-designate the SSSI zone in that part as unspecified use area as proposed by the objector. Then at the meeting held by the Board on 20 November 1998, the following facts were drawn to its attention by Mr Keith Wilson of the AFD (paragraph 48 of the minutes):

- (a) the typical streamcourses in Sha Lo Tung area were of shallow-gradient

with small pool areas, which were unpolluted and not commonly found in Hong Kong;

- (b) in the Sha Lo Tung area, there were about 68 species of dragonflies including very unique species such as two *Macromidia* and *kelloggi* species;
- (c) the streams where the dragonflies were found fell within the western, north-western and southern parts of Sha Lo Tung area. The north-eastern part was covered by wet abandoned paddy fields;
- (d) the designation of 'SSSI' zoning for the north-eastern part of the Sha Lo Tung area was not due to the presence of diverse fauna and flora but mainly for maintaining stable flows of water in the streamcourses in the area especially during the dry season, bearing in mind that the stream fauna immediately downstream of the Sha Lo Tung basin had very high ecological importance;
- (e) to prevent pollution to the streamcourses and protect the integrity of downstream watercourse system, it was necessary to maintain a 30m buffer area on both sides of the streamcourses; and
- (f) apart from dragonflies, there were also a number of unusual amphibians in Sha Lo Tung area, which were endemic in Hong Kong.

The members of the Board were clearly informed that the north-eastern part was covered by wet abandoned paddy fields. The minutes further recorded that:

- 56 In response to the Vice-chairman's enquiry on the ecological significance of the north-eastern portion of SLT, Mr Keith Wilson said that a comprehensive approach should be adopted in considering a stream system. Any stream populations downstream of the SLT basin would be affected by upstream development works and any alteration in base flows. The designation of the 'SSSI' zone in the north-eastern sector was based on this consideration rather than on the fauna and flora in the area.
- 61 In response to a Member's enquiry, Mr Tony Killeen supplemented that the north-eastern portion of SLT area was paddy fields with modified streamcourses for irrigation purpose. There was no evidence of any natural streamcourse in the lower portion of the north-east 'SSSI' zone. In the upper section, there were some traces of a streamcourse. Because of its flat topography, it was unlikely that a streamcourse would be formed in the north-east 'SSSI' zone.
- 63 In response to a Member's enquiry, Mr Keith Wilson said that the land within the 'SSSI' zone in between Lo Wai and Lei Uk was all paddy fields, through which the water streams flowed. All the plants there were permanent aquatic plants which represented a wetland system.

105 A Member remarked that the Agriculture and Fisheries Department had not presented a strong case to justify the designation of the 'SSSI' zone in the north-eastern part of the SLT area. Thus, consideration should be given to rezone the subject portion to other land uses.

Although in Item 63, Mr Wilson referred to the flowing of the water streams in the paddy fields, the word "stream" must be considered in a context in which the information was provided to the members. This clearly showed that the members of the Board were aware of the geography of the north-east area.

In Annex A of the petition presented to the Chief Executive in Council by the applicant in April 1999 which sets out the arguments on ecology, the wet paddy field in the north-east SSSI zone was again the subject of discussion. In the comments by AFD to the Environmental Assessment Report prepared by the applicant in 1999, Item G expressly referred to the rezoning of the "non-stream marsh habitat part of the SSSI zone in the north-eastern part". Again in the Government departments' response to the applicant's letter dated 3 November 1999, reference was made to the "Fields Survey on Study on Wetland Compensation" which indicated that "part of the inactive and abandoned agricultural land in the low lying areas of Sha Lo Tung has become predominately fresh water marsh with low scrubs". The comments further stated that "the north-eastern part of the current SSSI zone covers most of the fresh water marsh habitat, the streams and fresh water marsh habitat complement each other forming a wetland ecosystem. The SSSI zone in the north-eastern part is intended to keep a catchment area for providing water to the streams which are fresh water wetland sites that needed protection". These comments were tabled at the meeting of the Board on 12 November 1999. At the meeting, the officers from AFD further referred to the fresh water marsh habitat formed in the inactive and abandoned agricultural land. They further stated that: although the north-eastern part of SLT had no very rare species of international importance, it had been included within the 'SSSI' zone on the following grounds:

- it was identified as wetland and formed part of the ecosystem;
- it had a diverse community of fauna and flora;
- it had a 'sponge effect' by providing stable flow to downstream watercourses especially during the dry season; and
- it would prevent the downstream watercourses which were also of high ecological importance from being affected by detrimental activities such as construction works.

It is abundantly clear that members of the Board were fully appraised of the exact nature of the north-east area. It is accepted by the applicant that the documents I have referred to were placed before the Chief Executive in Council as well. Hence, the Chief Executive in Council must be fully appraised of the true nature of the north-east part.

## UNLAWFUL PURPOSE

### The starting point

Mr Hockman, QC, counsel for the applicant, argued that a distinction has to be drawn between the plan-making stage and the permission to develop stage. By designating the north-east part as SSSI at the plan-making stage, the applicant is effectively precluded from seeking permission to develop that part because of the limited use that may be permitted under such a designation.

In my view, the starting point must be that there must be a legitimate basis for designating an area to be SSSI zoning. If there is in fact such a basis, then it is inevitable that plan-making and permitted uses would go hand-in-hand because the permitted uses are as a result of a specific designation in the plan-making stage. If there is a proper basis for designating the land as SSSI zoning, then it would be inappropriate to designate it for "unspecified use" so as to enable the applicant to seek permission to develop later on. Furthermore, in relation to unspecified use, there are categories of "uses always permitted" such as agricultural use. This use would not require permission from the Board. Under section 4, although the plan may make provisions for "any matter whatsoever", the starting point must be whether there was any proper basis for designating the plan as SSSI zone.

### Available evidence

As to the argument that the Board had designated the north-east area as SSSI zone unlawfully, in my view, there is evidence which is capable of enabling the Board to form the view that the north-east area should be designated as SSSI zone as well. Mr Tang referred to the guidelines for selection of biological SSSIs issued by the U.K. Nature Conservancy Council of 1989 and reprinted in 1995. It referred to the idea of buffer land which is a surrounding zone over which control is essential to ensure full protection for an important site. The commentary on this idea is found in *Environmental Law* by Richard Bernard Ho 1995 Edn., in which the author stated that the proposal was deemed inappropriate as the English Act allows SSSIs to include only land of "special interest". However, as discussed in *Ball & Bell on Environmental Law* (4th Edn.), page 502, the case of *Sweet v Secretary of State and Natural Conservancy Council* [1989] JEL 245, appears to show that it is permissible for land of lesser intrinsic scientific interest to be notified if it is part of the same environmental unit as land which is of interest.

In my view, this court is clearly not the appropriate forum to consider detailed arguments on the designation of the SSSI zone. However, the "holistic" approach suggested by AFD is clearly something that the Board was entitled to adopt in designating the north-east part as SSSI zone as well. In other words, it is the streams and the wetlands as a whole which would form part of the ecological system for Sha Lo Tung. The north-eastern marshland is not merely a buffer land, it, together with the streams, formed the backbone of the ecological system of the Sha Lo Tung natural habitat. As Lord Wilberforce observed in *The Secretary of*

State for Education and Science v Tameside MBC [1977] AC 1014, the evaluation of facts for the making of a decision rests with the decision-maker alone.

It seems to be accepted that in the north-east area, there is a discontinuous stream. It is interrupted in the plateau in front of the Lei Uk by man-made irrigation channels. These channels were for the purpose of the paddy fields, the paddy fields are abandoned and now formed the wetland. Water which drains into the plateau re-emerges after passing through the plateau and joins with the other streams. The court, of course, is not making any finding of fact that this is the case. However, even according to one of the options proposed by the applicant on the rezoning of Sha Lo Tung, it appears that the stream that emerges from the plateau would be drained into an area which the applicant recognizes to be SSSI zone.

As to the question of the drainage of the north-east area, the Drainage Service Department commented that the drainage impact assessment prepared by the applicant "is unsatisfactory and fails to fully identify and address the project's potential drainage impact". It sets out the areas that the applicant should address in a detailed report. This comment was supplied to the applicant together with other comments of Government Departments by a letter dated 29 October 1999.

Clearly the decision to designate the north-east as SSSI zone cannot be said to be based on wrong facts or for the purpose of achieving some collateral purposes.

#### IRRATIONAL DECISION

What I have said earlier on unlawful decision applies equally to arguments on irrational decision. The decision cannot be said to be an irrational one.

#### CONCLUSION

In my view, the applicant has not made out a case for judicial review. The application is dismissed with costs nisi to the respondent.

Mr Stephen Hockman, QC, Mr Clive Grossman, SC and Mr Clemence Yeung,  
instructed by Messrs Koo & Partners, for the Applicant  
Mr Robert C. Tang, SC and Mr S.H. Kwok, instructed by Department of Justice, for  
the Respondent