

Town Planning Appeal No. 5 of 2000

IN THE MATTER of the Town Planning Ordinance, Cap. 131

and

IN THE MATTER of an Appeal under Section 17B by New Eastcity Development Limited and Neweast Investment Limited

Town Planning Appeal No. 7 of 2000

IN THE MATTER of the Town Planning Ordinance, Cap. 131

and

IN THE MATTER of an Appeal under Section 17B by Team Harvest Limited

Dates of hearing : 15<sup>th</sup>, 22<sup>nd</sup>, 26<sup>th</sup>, 29<sup>th</sup> & 31<sup>st</sup> January, 2002; 2<sup>nd</sup>, 5<sup>th</sup> & 7<sup>th</sup> February, 2002 and 2<sup>nd</sup> March, 2002.

Date of decision : 14<sup>th</sup> June 2002

Panel : Mr Ronny F.H. Wong S.C. (Chairman)  
The Hon. Albert Chan Wai Yip  
Mr Charles Chiu Chung Yee  
Mr Man Mo Leung  
Mr Michael Robert Mann

## **DECISION**

### ***THE APPEALS***

There are 2 appeals before us. The Appellants in Town Planning Appeal No. 5 of 2000 [“Appeal No. 5”] are New Eastcity Development Limited [“Eastcity”] and Neweast Investment Limited [“Neweast”]. The Appellant in Town Planning Appeal No. 7 [“Appeal No. 7”] is Team Harvest Limited [“Team Harvest”]. Eastcity, Neweast and Team Harvest are all members of the Sun Hung Kai Group. The principal issues in both appeals are substantially the same.

2. Appeal No. 5 relates to a site [“the Eastcity Site”] in Lot 733 RP and

Lot 764 RP in D.D. 99 in San Tin, Yuen Long. Lot 733 RP is registered in the name of Man Sham Chung Wui whilst Lot 764 RP is registered in the name of Man Shui Tong Wui. Eastcity and Neweast are significant owners of the shares in each of these 2 wuis. They acquired their interests in the course of 1997. The area of the Eastcity Site is about 55 ha. The majority of the land consists of fish ponds. Some of these fish ponds are still in operation although a large number have been removed from production. The Eastcity Site is within the “Other Specified Uses” annotated “Container Back-Up Uses” [“OU(CBU)”] zone in the Draft San Tin Outline Zoning Plan No. S/YL-ST/1 [“San Tin OZP ST/1”]. By application dated 10<sup>th</sup> June, 1999, Eastcity and Neweast applied under section 16 of the Town Planning Ordinance (Cap. 131) [“the Ordinance”] for planning permission to use the Eastcity Site for “Container Storage and Parking of Container Vehicles”.

3. Appeal No. 7 relates to a nearby site [“the Team Harvest Site”] in Lots 743RP; 745RP; 746RP; 747RP and 748RP in D.D. 99. These lots are held by Man Un Uk Wai and Man Shin Kang Tong. The Team Harvest Site is about 85,480 sq. m. in area and is located within the OU(CBU) and “Other Specified Uses” annotated “Service Stations” [“OU(SS)”] zones in San Tin OZP ST/1. There were fish ponds in the Team Harvest Site until 1997. Those ponds had since been filled up. Part of the Team Harvest Site was previously used for container related activities. On 17<sup>th</sup> July, 1999 enforcement notices were served on the owners of the Team Harvest Site requiring them to discontinue the unauthorised development or to obtain planning permission by 17<sup>th</sup> October, 1999. By application lodged on 19<sup>th</sup> July, 1999, Team Harvest applied under section 16 of the Ordinance for planning permission to use the Team Harvest Site for “Temporary Container Storage and Container Vehicle Parking with Ancillary Workshop Facilities” for a period of 3 years.

### ***SAN TIN OZP ST/1***

4. This was gazetted on 24<sup>th</sup> June, 1994. It covers an area of 737 ha. situated in the northern part of North West New Territories. The area so covered is bisected by San Sham Road joining with New Territories Circular Road. The area to the west of San Sham Road is predominantly fish ponds with villages. According to the 1991 Census, the population of the area covered by this OZP was about 3,580 persons.

5. The Notes to this OZP set out the developments which are permitted and the uses which are and which may be permitted in the designated zones on the OZP. The “Schedule of Uses” identified various zones. Amongst them are the OU(CBU) zone; the OU(SS) zone and the “Conservation Area” [“CA”] zone. In relation to the OU(CBU) zones, Column 1 of the Notes provides for “Uses always permitted”. Column 2 of the Notes provides for “Uses that may be

permitted with or without conditions on application to the Town Planning Board”. “Cargo Handling Area” and “Container Storage” are amongst such uses. Similar provisions can be found in the Notes for the OU(SS) zone. In relation to the CA zone, “Agricultural Use” is one of the Column 1 uses that is always permitted.

6. The Explanatory Statement to San Tin OZP ST/1 provides in :

- (a) Para. 2.1 that “The object of the Plan is to indicate a broad land use zoning for San Tin area (the Area) so that development and redevelopment within the Area can be put under statutory planning control”.
- (b) Para. 3.3 that “To facilitate the submission of planning applications, the Board has also issued guidelines for considering application for various uses within different zones. Examples are ‘Guidelines for Application for Development within Green Belt Zone’ and ‘Guidelines for Application for Developments within Deep Bay Buffer Zones under Section 16 of the Town Planning Ordinance’. Copies of these guidelines are available free of charge from the Planning Information and Technical Administration Unit of Planning Department...”
- (c) Para. 6.1.2 that “Given the strategic location of San Tin and the improved accessibility as a result of the completion of the New Territories Circular Road (NTCR), there are ample opportunities for the Area to be developed as a container back-up area to facilitate the cross-border trade”.
- (d) Para. 6.2.1 that “In order to preserve and sustain Mai Po Reserve and the wildlife habitats in the vicinity of the Area, new development should not be allowed unless it can be demonstrated that it would have minimal adverse impact on the ecological well-being of the Mai Po Nature Reserve”.
- (e) Para. 7.1 that “the planning intention of the Area is to preserve and sustain Mai Po Nature Reserve which is suggested to be included as a Wetland of International Importance under the Ramsar Convention...To strike a balance between conservation and development, a gradation approach to development has been adopted for the Plan. In other words, the degree of control for development will be relaxed on areas further away from the Nature Reserve provided that any development/redevelopment should have insignificant impact on the Nature Reserve”.

- (f) Para. 7.2 that “For San Tin area, as it is close to the Lok Ma Chau cross-border area, there is a planning intention to develop the area as a container back-up area in order to facilitate the cross-border trading activities”.
- (g) Para. 8.4.2 vis-a-vis the “OU(CBU)” Zone that “The area under this zoning is located to the southwest of the Lok Ma Chau Control Point. It is an area consisting of mainly fish ponds. Due to its proximity to the Lok Ma Chau Control Point, it offers opportunities to develop the area into a container back-up area which provides a range of services to facilitate the cross-border trading activities. Nevertheless, in order to have a better control of the impact of any development on drainage, traffic, sewerage, environment and ecology on the area which is located to the immediate east of Deep Bay Buffer Zone 2, permission of the Town Planning Board under section 16 of the Town Planning Ordinance would be required. In the submission, apart from the provision of a master layout plan, the applicant has to demonstrate that due regard has been given to the need to minimize the adverse impact of the development on the surroundings in particular the Mai Po Nature Reserve”.
- (h) Para. 8.7.2 that “The area covered by the ‘CA’ zone is intended to give added protection to the Mai Po Nature Reserve from urban development. Conservation Areas are designated in the northern part of the Area and they are predominantly fish ponds”.

***THE FIRST 2 SETS OF GUIDELINES FOR APPLICATION FOR DEVELOPMENTS WITHIN DEEP BAY BUFFER ZONES UNDER SECTION 16 OF THE TOWN PLANNING ORDINANCE***

7. Town Planning Board Guidelines PG-No. 12 [“Guidelines No. 12”] was first available to the public on 16<sup>th</sup> November, 1993. The planning guidelines set out therein were established by the Town Planning Board for the purpose of controlling development in Inner Deep Bay and its adjoining hinterland in order to avoid irreversible adverse impacts on the Mai Po Nature Reserve [“MPNR”] and Inner Deep Bay. 2 buffer zones [“Buffer Zone 1” and “Buffer Zone 2”] were delineated with a view to protecting the ecological value of MPNR and other sensitive areas in the vicinity. The planning intention for Buffer Zone 1 was primarily to protect the special ecological value of the Inner Deep Bay area, in particular, the MPNR. New development within this zone should not be allowed unless it is required to support the conservation of the area’s natural features and scenic qualities. Buffer Zone 2 was primarily to give added protection for the conservation of MPNR and Inner Dep Bay and to

enhance the visual appearance and landscape features within the Buffer Zone 2 area. New development within this zone would not be considered unless the applicant could demonstrate that the proposed development would have insignificant impact on environment, ecology, drainage, sewerage and traffic in the area including the Mai Po Nature Reserve and Inner Deep Bay.

8. Town Planning Board Guidelines PG-No. 12A [“Guidelines No. 12A”] was first available to the public on 21<sup>st</sup> November, 1994.

- (a) Para. 2 pointed out that “Fish ponds and gei-wais are an integral part of the Inner Deep Bay wetland system and therefore should be conserved as far as possible”.
- (b) Para. 3 made it clear that these Guidelines were established “To avoid the irreversible adverse impacts on the MPNR and Inner Deep Bay and the surrounding fish ponds and gei-wais”.
- (c) Para. 4 introduced the Precautionary Principle. Any proposed development which might pose a threat to the environment or ecology of the area will not be allowed even if there is no conclusive scientific proof linking that particular development to the environmental or ecological damage. It is up to the proposer of the development to demonstrate to the Board that the environmental and ecological threats to the area would be insignificant.
- (d) Para. 5 reaffirmed the Buffer Zones concept in order to give the MPNR and the areas around Inner Deep Bay added protection and to prevent them from becoming isolated islands of natural habitat encroached by urban type developments.
- (e) Paras. 6 & 9 made it clear in relation to Buffer Zone 2 that :
  - (i) Existing wetland should be preserved unless the applicant could demonstrate that the proposed development would enhance the ecological attributes of the areas within the Buffer Zones as a wetland wildlife habitat to a greater extent than and in a manner compatible with the existing fish ponds.
  - (ii) Existing fish ponds and gei-wais should be retained as far as possible and landscape buffers should be provided between any development and Buffer Zone 1.
- (f) Para. 10 outlined various factors that “will be taken into account” in considering development proposals within the Buffer Zones. One of

the factors is “ecological impact (for projects involving a significant piece of wetland, a field investigation covering a period of not less than 12 months should be included to provide baseline information of, and study effects on, existing wildlife habitats, flora and fauna, and their seasonal changes (e.g. abundance and requirements))”.

9. The Eastcity Site and the Team Harvest Site lie outside Buffer Zones 1 and 2 as delineated by Guidelines No. 12 and No. 12A.

***THE GUIDELINES FOR APPLICATION FOR OPEN STORAGE AND PORT BACK-UP USES UNDER SECTION 16 OF THE TOWN PLANNING ORDINANCE***

10. Town Planning Board Guidelines PG-No. 13 [“Guidelines No. 13”] was first available to the public on 10<sup>th</sup> November, 1994. It was superseded by Town Planning Board Guidelines PG-No. 13A [“Guidelines No. 13A”] published on 6<sup>th</sup> August, 1999. Its common ground that there is no material difference between Guidelines No. 13 and Guidelines No. 13A.

11. Guidelines No.13A provides :

- (a) By para. 2.2 that “In general terms, planning permission should not be granted in areas where the policy is to prevent the proliferation of either port back-up or open storage sites and/or encourage the relocation of such uses to more appropriate areas”.
- (b) By para. 2.7 that “Adequate screening of sites through landscaping and/or fencing should be provided where sites are located adjacent to public roads or are visible from surrounding residential areas”.
- (c) By para. 2.12 that “Traffic Impact Assessment (TIA) should be carried out for those port back-up and open storage uses generating substantial volumes of traffic”.

***THE 1995 FINAL REPORT OF THE PILOT STUDY ON PORT BACK-UP DEVELOPMENT AT SAN TIN [“THE PILOT STUDY”]***

12. This was a Government study on the suitability of a 68 ha. site [“the Designated Site”] in San Tin (which includes the Eastcity Site and the Team Harvest Site) for port back-up and/or open storage facilities. Part of the purpose of the Pilot Study was to identify constraints and opportunities; to prepare a Recommended Outline Development Plan and to recommend an implementation strategy. The Pilot Study recommended developing the Designated Site as a

comprehensively planned container back-up facility. It identified the following benefits to be targeted :

- (a) To help relieve pressures on the existing port areas where land for port back-up and other port-related uses is scarce;
- (b) To encourage investment in machinery/equipment, increasing site efficiency and helping operators to adopt longer term planning strategies for their operations;
- (c) To provide a solution space for accommodating port back-up activities displaced through enforcement in more sensitive environmental areas;
- (d) To reduce container-related trips and prevent proliferation of sites in countryside areas; and
- (e) To concentrate a range of support activities such as petrol filling stations, vehicle repair workshops and public transport in the immediate vicinity.

13. The Pilot Study proposed that there be a multi-storey lorry park on the Designated Site accommodating 1,250 lorry spaces, and surface container lorry parking areas accommodating a further 336 spaces. A 4 storey Container Freight Station building was also proposed.

14. By way of mitigation measures, the Pilot Study proposed to include a 50 metres buffer with moulding on the southern boundary of the Designated Site to visually screen the development from the San Tin villages nearby and to reduce noise impacts. It was further proposed that there be a 30 metres wide buffer along the western and northern boundaries to allow for physical containment of the site vis a vis surrounding countryside. It was envisaged that the proposed moulding would contribute to the flood mitigation works proposed for the area.

15. The Pilot Study identified various constraints in relation to its recommendations.

- (a) In relation to Transport : The Pilot Study pointed out that the major constraints relate to the requirement for access routes into the Designated Site from New Territories Circular Road. It recognised that a full Transport Impact Assessment [“TIA”] will be required as part of subsequent studies.

- (b) In relation to Ecology and Landscape : The Pilot Study adverted to the Study on Ecological Value of Fish Ponds in the Deep Bay Area [“the Fish Pond Study”] undertaken for the Planning Department. The Pilot Study recognised that given the importance of the Fish Pond Study, “the ecological impacts of the fish pond loss in San Tin should be considered in detail once the study is completed”. The Pilot Study further pointed out that “The study cannot as yet make any preliminary conclusions on the ecological value of the affected fishponds as ecological monitoring will take a full 12 months to complete”. The Pilot Study predicted that the Fish Pond Study “is likely to have a strong influence on future land use within these wetland areas”.
- (c) In relation to Drainage : The Pilot Study warned that “Infilling of a large area of land is likely to exacerbate floor problems in the area” and a full Drainage Impact Assessment [“DIA”] will be required for the port back-up development in the area.

16. The Pilot Study acknowledged the difficulties in the assembly of the land by the private sector for a project of this magnitude. It expressed doubts whether the Government could resume the land under section 4(2) of the Ordinance on the ground that the development is for public purpose.

### ***THE FISH POND STUDY***

17. After the publication of San Tin OZP ST/1 and other rural outline zoning plans covering Mai Po & Fairview Park; Nam San Wai; Lau Fau Shan & Tsim Bei Tsui in the Deep Bay area, a total of 23 objections were received in relation to these outline zoning plans. The Town Planning Board requested the Planning Department to undertake a study on the ecological value of fish ponds in the Deep Bay area. The study commenced work in March, 1995 and completed the same in late 1997.

18. The Fish Pond Study confirmed that the fish pond system is fundamentally linked with the Mai Po Marshes and is part of the Deep Bay Area wetland ecosystem. It concluded that the fish ponds are important sources of food and it is therefore desirable to eliminate, remove or relocate off site disturbance. It sets out the principles of “precautionary approach” and “no-net-loss in wetland” in order to enhance these natural resources. It recommended that, because of their high ecological value, all existing and



contiguous active/abandoned fish ponds should be conserved and designated as Wetland Conservation Area.

***THE THIRD SET OF GUIDELINES FOR APPLICATION FOR DEVELOPMENTS WITHIN DEEP BAY BUFFER ZONES UNDER SECTION 16 OF THE TOWN PLANNING ORDINANCE***

19. Town Planning Board Guidelines PG-No. 12B [“Guidelines No. 12B”] was made available to the public on 9<sup>th</sup> April, 1999.

- (a) Para. 1 points out that 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.
- (b) Para. 4 indicates that 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.
- (c) Para. 5 makes it clear that in considering development proposals in the Deep Bay Area, the Board adopts the Fish Pond Study’s recommended principle of “no-net-loss in wetland”. The no-net-loss can refer to both loss in “area” and “function”. 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.
- (d) Para. 6 signifies adoption of a two-pronged approach to landuse planning control through the designation of :
  - (i) Wetland Conservation Area [“WCA”] for all existing continuous and adjoining active/abandoned fishponds; and
  - (ii) Wetland Buffer Area [“WBA”] of about 500m along the landward boundary of the WCA to protect the ecological integrity of the WCA.
- (e) In relation to the WCA, the planning intention is to conserve the

ecological value of the fish ponds which form an integral part of the wetland ecosystem in the Deep Bay Area. New development 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 infrastructure project with overriding public interest. Any such development should be supported by an ecological impact assessment to demonstrate that the development would not result in a net loss in wetland function and negative disturbance impact. Such assessment must show that negative impacts on the ecological value of the WCA could be mitigated through positive measures. Field investigation normally covering a period of not less than 12 months should be included to provide baseline information of, and to study the effect on, existing wildlife habitats, flora and fauna, and their seasonal changes.

20. The Eastcity Site falls entirely within the WCA. The Team Harvest Site falls mostly within the WCA and partly within the WBA.

#### ***THE SECTION 16 APPLICATION BY EASTCITY AND NEWEAST***

21. Eastcity and Neweast's section 16 application was received by the Town Planning Board on 10<sup>th</sup> June, 1999, slightly over 2 months after promulgation of Guidelines No. 12B. Eastcity and Neweast proposed to fill up the Eastcity Site. They further proposed to construct a new access road leading to the drainage reserve and a buffer around the northwest and southern perimeter of the Eastcity Site. The buffer would consist of an earth embankment which would be formed to a height of approximately 5 metres. The embankment would then be planted with tall species of trees on the higher part of the mound. They made it clear that "The proposal submitted with this application is to provide certainty for the commencement of other detailed studies which would be submitted subsequent to any approval conditions that the Board may impose on an approval". They contended that Guidelines No. 12B "are in conflict with the statutory proposals on the Outline Zoning Plan and with [the Pilot Study]".

22. Eastcity and Neweast's section 16 application was first considered by the Rural and New Town Planning Committee ["RNTPC"] on 30<sup>th</sup> July, 1999. According to the minutes of that meeting, representative from the District Planning Office urged RNTPC not to pre-empt the outcome of the Town Planning Board's consideration of the objection against the OU(CBU) zoning of the Eastcity Site scheduled on 20<sup>th</sup> August, 1999. Concern was expressed by a member of RNTPC for deferring consideration on that basis. After deliberation, RNTPC decided to defer consideration and to request Eastcity and Neweast to submit various information including an ecological impact assessment in accordance with the provisions of Guidelines No. 12B; a detailed layout of the

proposed development to address the interface with the public roads and drainage works in the area and a comprehensive traffic impact assessment for the development in view of its significant traffic impacts.

23. By letter dated 13<sup>th</sup> August, 1999, the Town Planning Board informed Masterplan Limited [“Masterplan”] (Planning and Development Advisors of Eastcity, Neweast and Team Harvest) of the decision of RNTPC. By letter dated 18<sup>th</sup> August, 1999, Masterplan protested against the decision of RNTPC to defer. They maintained that “sufficient information was available in the application”. They pointed out that “The Government study has been used as a basis for this application. The applicant has undertaken to carry out additional detailed studies if the application is approved...”. No attempt was made to provide RNTPC with the assessments and layout as requested.

24. On 20<sup>th</sup> August, 1999, the Town Planning Board agreed to rezone the Eastcity Site to “CA”. The proposed CA zoning was gazetted on 24<sup>th</sup> December, 1999 in San Tin OZP S/YL-ST/2.

25. Eastcity and Neweast’s application was reconsidered on 8<sup>th</sup> October, 1999. It was rejected for the following reasons :

- (a) The proposed development, which falls within Wetland Conservation Area (WCA), does not comply with [Guidelines No. 12B] in that it is contrary to the intention of WCA to conserve the ecological value of the fish ponds which form an integral part of the wetland ecosystem in the Deep Bay Area, and there is no Ecological Impact Assessment or wetland compensation proposal in the submission to demonstrate that the development would not result in, or be able to fully compensate for, the loss in wetland function;
- (b) There is insufficient information in the submission to demonstrate that the proposed development would not generate adverse traffic impact on the area;
- (c) There is insufficient information in the submission to demonstrate that the proposed development would not cause adverse impact including drainage, sewage, environment and ecology on the surrounding areas in particular the Mai Po Nature Reserve; and
- (d) The submitted layout is not acceptable in that it has not satisfactorily addressed the interface problems of the ‘Eastern Main Drainage Channel for San Tin’; the ‘Village Flood Protection Works for San Tin Villages’ and the ‘Construction of Access Road and Carpark at San Lung Tsuen’.

## ***THE SECTION 16 APPLICATION BY TEAM HARVEST***

26. Team Harvest's section 16 application was dated 19<sup>th</sup> July, 1999, slightly over 3 months after the public release of Guidelines No. 12B. The proposal was to develop the Team Harvest Site into a container storage yard with container trailer and tractor park which can provide container back-up uses. The yard will have its own ingress/egress, office, marshalling yard, container storage area and a small ancillary repair workshop. The open storage would normally load and unload container from truck vehicles between 8.30 a.m. and 6 p.m. Only empty containers would be stored in the proposed development. The marshalling yard would accommodate 63 nos. of container vehicles to be loaded or unloaded simultaneously. It was envisaged that 91 nos. of trailers and tractors would be parked in the southern part of the Team Harvest Site. A 50 metres wide landscaped buffer is proposed along the southern boundary which is closed to the San Tin Villages. Shrubs will be planted as visual screening to mitigate the low-level view towards the proposed development.

27. Team Harvest's section 16 application was considered by RNTPC at its meeting held on 10<sup>th</sup> September, 1999. RNTPC resolved to reject Team Harvest's application on the following grounds :

- (a) The proposed development, which falls within WCA, does not comply with Guidelines No. 12B in that it is contrary to the intention of WCA to conserve the ecological value of the fish ponds which form an integral part of the wetland ecosystem in the Deep Bay Area, and there is no Ecological Impact Assessment or wetland compensation proposals in the submission to demonstrate that the development would not result in, or be able to fully compensate for, the loss in wetland function;
- (b) The submitted Traffic Impact Assessment is not acceptable and there is insufficient information in the submission to demonstrate that a proper vehicular access to the site could be provided;
- (c) There is insufficient information in the submission to demonstrate that the proposed development would not cause net increase in pollution loading to Deep Bay during site formation and operation stages; and
- (d) The submitted layout is not acceptable in that it has not fully addressed the interface problems of the Eastern Main Drainage Channel for San Tin and the Village Flood Protection Works for San Tin Villages.

### ***THE SECTION 17 APPEAL BY EASTCITY AND NEWEAST***

28. By letter dated 4<sup>th</sup> November, 1999, Masterplan asked for a review under section 17 of the Ordinance. The review was scheduled to be heard on 7<sup>th</sup> January, 2000. By letter dated 17<sup>th</sup> November, 1999, Masterplan asked for postponement of the hearing as Eastcity and Neweast had commissioned additional studies into the ecological and traffic impacts of the proposed development. The hearing of the review was re-scheduled to 28<sup>th</sup> April, 2000. By letter dated 13<sup>th</sup> March, 2000, Masterplan requested the hearing be further deferred to 26<sup>th</sup> May, 2000.

29. By letter dated 15<sup>th</sup> April, 2000, Masterplan submitted a Planning Statement to the Town Planning Board in support of the section 17 review. A Traffic Impact Assessment and a Conservation Management Plan and Ecological Review were annexed as Appendix 2 and Appendix 3 to that statement.

30. The Conservation Management Plan and Ecological Review propounded for the first time the establishment of an ecological reserve [“the Proposed Ecological Reserve”] in land totalling 71.3 ha. in area [“the Reserve Site”] in the remaining portions of Lot 764 RP & Lot 733RP and Lot 763 in D.D. 99. The Reserve Site fell within the CA and Residential Group D zones in San Tin OZP ST/1. The area within the Residential Group D zone was rezoned as CA zone on 24<sup>th</sup> December, 1999. The Reserve Site was included within Buffer Zone 2 under Guidelines No. 12 and No. 12A. It is also included as part of the WCA under Guidelines No. 12B. The Proposed Ecological Reserve would be developed in tandem with the proposed container development. It would be managed on a long term basis to conserve habitats that are important to sustaining flora and fauna on the site in numbers and species representation greater than those currently found there. In order to achieve the goal of no net loss of wetland function arising from the infilling of the Eastcity Site of 53.4 ha., there would have to be a 75% increase in ecological value from the retained fish ponds in the Reserve Site of 71.3 ha. The Conservation Management Plan and Ecological Review concluded as follows :

*“No severe impacts were predicted for flora affected by the project. In contrast, fauna on the study area and nearby areas is diverse and abundant, and numerous species are predicted to be adversely affected locally, regionally, and, in the case of birds, possibly globally. Losses of wetlands are considered to be significant because the loss of Grade B fishponds account for 53.4 ha, or at least 23% of the remaining Grade B ponds in Hong Kong. Considering the large surface area of the container backup site, the area of affected wetlands is high.*”

*Impact mitigation is proposed in the form of a San Tin Ecological Reserve to be established on the 71.3 ha of ponds within the application site. A Conservation Management Plan is provided to guide administration and management of the Ecological Reserve. Establishment of an Ecological Reserve would enable wetland habitat enhancement that would compensate for habitat losses for some species, but not for others. The net impact of the development would lead to a loss of wetland habitat and wetland fauna in the San Tin area. This would contravene Hong Kong's obligations under international conventions for biodiversity conservation and wise use of wetlands".*

31. The owner of Lot 763 is System Link Development Limited ["System Link"], a company within the Henderson Group. By letter dated 17<sup>th</sup> May, 2000 addressed to the Town Planning Board, System Link expressed support for inclusion of Lot 763 "as an integral part of the proposed development within the proposed Ecological Reserve".

32. The Town Planning Board reviewed Eastcity and Neweast's application on 26<sup>th</sup> May, 2000. It decided not to approve the application. The grounds are similar to those in rejecting the section 16 application referred to in paragraph 25 above. There are the following differences. First, in relation to non-compliance with Guidelines No. 12B, no further reliance was placed on the absence of an Ecological Impact Assessment or wetland compensation proposal. The Town Planning Board concluded that "There is insufficient information in the submission to demonstrate that the development would not result in, or be able to fully compensate for, the loss in wetland function". Secondly, in relation to traffic, the Town Planning Board took the view that the submitted Traffic Impact Assessment "is not acceptable and there is insufficient information in the submission to demonstrate that a proper vehicular access to the site can be provided". Finally, the Town Planning Board placed no reliance on interface problems with the Construction of Access Road and Carpark at San Lung Tsuen.

33. Eastcity and Neweast lodged Appeal No. 5 by their notice dated 4<sup>th</sup> July, 2000.

### ***THE SECTION 17 APPEAL BY TEAM HARVEST***

34. Team Harvest asked for a review under section 17 of the Ordinance by letter dated 21<sup>st</sup> October, 1999. Similar requests were made for postponement of the scheduled hearing dates for the review.

35. By letter dated 7<sup>th</sup> April, 2000, Masterplan submitted additional

information in support of the section 17 review. Included in the submission was a Revised Traffic Impact Assessment and an Ecology Statement.

36. By letter dated 9<sup>th</sup> June, 2000, the Town Planning Board rejected Team Harvest's application on review. The grounds of rejection are similar to those relied upon in rejecting Team Harvest's section 16 application. However, there is no further reliance on the absence of Ecological Impact Assessment or wetland compensation proposals. The Town Planning Board took the view that there is "insufficient information to demonstrate that the development would not result in, or be able to fully compensate for, the loss in wetland function". The Town Planning Board also placed no further reliance on interface problems with the Village Flood Protection Works for San Tin Village.

37. Team Harvest lodged Appeal No. 7 by notice dated 4<sup>th</sup> August, 2000.

### ***SUBSEQUENT OZPs***

38. The Eastcity Site and a major part of the Team Harvest Site are within the CA zone in San Tin OZP S/YL-ST/3. Both sites are within the "Other Specified Uses" annotated "Comprehensive Development and Wetland Enhancement Area" ["OU(CDWEA)"] zone in San Tin OZP S/YL-ST/4. That latest zoning was confirmed under section 6(9) of the Ordinance on 1<sup>st</sup> February, 2002.

39. An alternative site for container back-up uses in Ngau Tam Mei ["the Alternative Site"] has been earmarked in San Tin OZP No. S/YL-NTM/3.

### ***EVIDENCE ADDUCED ON BEHALF OF EASTCITY, NEWEAST AND TEAM HARVEST***

40. Mr. Brownlee is a Registered Professional Planner and a director of Masterplan. He explained the history and nature of the applications. He went into considerable details on what he considers to be the planning intent for the subject sites. We regret the time spent in such debate as that issue is not within Mr. Brownlee's purview. Mr. Brownlee further asserted that his clients had paid "due regard" to the need to minimize the adverse impact of the proposed developments on the surroundings in particular the Mai Po Nature Reserve as "Consideration has been given to these factors". He maintained that Guidelines No. 12B is inapplicable as "it was really rezoning without using the provisions of the Ordinance". According to him Guidelines No. 12B is a document which has no status. He therefore took the view that an ecological report or review was unnecessary and it could be dealt with by way of condition. In his view, a 12 month study of the site was an impossible requirement in terms of processing this application. In relation to the buffer, they had adopted the same approach as

suggested in the Pilot Study. With trees planted the buffer could go up to 10 m high. He opined that the birds in the fish ponds area would not be able to see the activities in the container storage on the other side. In relation to traffic requirements, Mr. Brownlee pointed out that the basic requirement was that there should be identifiable access and his clients' proposals followed closely the suggestions in the Pilot Study. Mr. Brownlee argued that the Alternative Site was not as suitable as the Eastcity Site. Land ownership in the Alternative Site was very dispersed and in small holdings.

41. Mr. Nissim is the Manager of the Project Planning Department of Sun Hung Kai Properties Limited. He told us that Sun Hung Kai had spent about HK\$370 million and its joint venture partner Henderson had spent about HK\$446 million in relation to Appeal No. 5. Such expenditure was largely triggered by information that came out of the Pilot Study. He was not aware that the Pilot Study had not been presented to the Town Planning Board for its consideration. Mr. Nissim further told us of a meeting which he had with Mr. Wilson Fung, Principal Assistant Secretary in the Planning, Environment and Lands Bureau, in September, 1998. Mr. Wilson Fung asked Mr. Nissim to come to his office. Mr. Wilson Fung inquired how "the Appellants were getting on with the assembly for the Site and when were we going to implement our proposals". This was one of two topics discussed during that meeting. According to Mr. Nissim, it was Mr. Wilson Fung who raised this issue. Mr. Nissim emphasized the merits of the proposals under consideration which were largely spelt out in the Pilot Study commissioned by the Government. Mr. Nissim told us that when Guidelines No. 12B was published, Eastcity/Neweast and Team Harvest realized that the zonings for the sites were likely to change. The section 16 applications were lodged in anticipation of such rezoning. He accepted that it was after the section 16 rejection letters that his companies gave instructions to Mr. Dahmer to conduct an ecology impact assessment. Mr. Nissim pointed out that site assembly for the Alternative Site "will be equally complex, if not more". In view of the current attitude of the Government, he thought the likelihood of the private sector coming in for such project is extremely low. Mr. Nissim could see no difficulty in completing the site assembly in relation to the current applications. However, he would like to have the certainty of planning permission before proceeding further.

42. Mr. Dahmer is the Managing Director of Ecosystems Limited ["Ecosystems"]. Mr. Dahmer was trained as a wildlife biologist but he is now working more as an ecologist as opposed to a biologist. He has over 18 years of work experience in South and East Asia, where he was employed on international aid projects for biodiversity conservation through the establishment of protected areas in the PRC, Vietnam and Nepal. Mr. Dahmer also has over 7 years of work experience in government and private projects in the North West New Territories. His company was first instructed in late 1999 and a time frame



was given for conclusion of their report.

- (a) Mr. Dahmer accepts that for the purpose of his review, one has to establish a base line as one is interested in what is currently on site. He further accepts that such base line studies would normally involve literature surveys and field surveys. As far as field surveys are concerned, he recognizes that in the last few years “12 months has been the standard” in many cases. He said in relation to this case that “We would have done a bit of field survey and we would have done a bit of literature review. Both would have contributed to development of our initial proposal”. As far as field surveys are concerned, “we didn’t engage in quantitative survey on the site over long duration because we anticipated that there would be a need for an environmental impact assessment at a future point”. He did make site visits. Those visits were for the purpose of checking “on the existing status of the ponds and basically to get a general idea of land uses that were out there”. His report placed reliance on surveys conducted in 1997. As far as literature surveys are concerned, Mr. Dahmer accepts that some of the literature reviewed may not have been specific to the Eastcity Site but he points out that other literature considered would relate to the general nature of the surrounding area including the Eastcity Site.
- (b) Mr. Dahmer explained to us the concept behind the Proposed Ecological Reserve. The loss of the fish ponds in the Eastcity Site is considered important, particularly in light of their close proximity to the Ramsar site. The potential cumulative impacts on wetland habitats are considered to be severe. The proposal is to compensate for the permanent loss of the fish ponds by enhancing the area of the ponds included in the Proposed Ecological Reserve. Mr. Dahmer identified a series of management guidelines. During the initial enhancement process, ponds in the Proposed Ecological Reserve would be enlarged by deleting the fish pond bunds and erecting gently sloping banks. The water depths would be made shallower. There would be more topography in the bottom of the pond and bund vegetation would be differently managed. Pond management would aim at producing large number of small Tilapia for use as cormorant. Management would also aim at having high population of freshwater shrimp. On the basis of experience in the Shenzhen River Regulation Project, duck numbers increased to a range of 2<sup>1/2</sup> to 8 times higher than they were on surrounding ponds. On reflection, he reckons that such increase applies to wetland dependent avifauna. The conclusion of his review is that for some species, the increase would be to 75% but the increase for

other species would probably not reach that level. Mr. Dahmer said this :

*“And this is where you get to the subject of defining very carefully the question that you want to ask. So, you have to break down the universe of wetland flora and fauna in the north-west New Territories of Hong Kong and say, okay, what is it, what species or species groups are we concerned with here and, of those, which do we feel we absolutely must have no net loss. And that’s an exercise that we haven’t...we haven’t yet taken that step...”*

- (c) Mr. Dahmer agrees with the suggestion that what he managed to achieve is an indication of the impact that the proposed use would have on the ecology without being able to identify or investigate further the effectiveness of the minimisation.
- (d) Mr. Dahmer takes the view that the proposed buffer or protective bund within the application sites are ecological mitigation measures. The concept of the bund is to intercept a lot of visual impact, visual disturbance, noise disturbance, motion disturbance that would take place within the back up area. The bund would preserve the wetland function of those wetland nearest to the source of disturbance.

43. Mr. Roger Lee is a Chartered Engineer and an Associate Director of MVA Hong Kong Limited [“MVA”]. MVA was instructed by Eastcity and Neweast to conduct a traffic impact assessment in support of their section 17 review. MVA proposed that the Eastcity Site be connected directly with the San Tin Highway and a new elevated road from San Tin Highway and Shek Wu Wai Road would be built passing over Castle Peak Road before running at grade when approaching the Eastcity Site. A pair of eastbound slip roads would be provided at the Shek Wu Wai Interchange in addition to the existing westbound slip roads. These proposals take the scheme envisaged in the Pilot Study one step further in that they entail elevating off the slip roads over Castle Peak Road. The access road would be 10.3 meters wide. The total two-way passenger car unit [“PCU”] was estimated to be 2,600. These proposals were also based on the assumption that the north junction of Shek Wu Wai Interchange would be saturated in 2006 resulting in improvements to be undertaken by the Government. On the basis of the Transport Design Manual, Mr. Roger Lee concluded that the width of 10.3 meters would be sufficient. Mr. Roger Lee said his proposals would reduce the extent of improvement required along local roads to accommodate the manouevre of container vehicles. The proposals would also

reduce the volume of container traffic on local road junctions and enhance the safety of other users on the road. The proposed road works would pass over Lot 768 in D.D. 99 held by Smartlane Developments Limited ["Smartlane"]. Smartlane is a subsidiary of the New World Development Company Limited, a joint venture partner of Sun Hung Kai in this proposed development. By a letter dated 31<sup>st</sup> January, 2002 addressed to this Board, Smartlane confirmed their willingness to grant a right of way for vehicular access. Eastcity and Neweast would meet the expenditure involved in these proposals.

44. Mr. Lee Kwok Leung, another Chartered Engineer, is a director of Ho Tin & Associates Consulting Engineers Limited ["Ho Tin"]. Ho Tin was retained to consider the drainage aspect of the Eastcity Site and the traffic aspect of the Team Harvest Site. In relation to the former, Mr. Lee Kwok Cheung stated that the drainage system for the Eastcity Site would incorporate appropriate measures to ensure that any oil spillage from any vehicle in the run-off would be retained within interceptors and disposed off properly off site. Storm water on site would be carried to the drainage channels to the east and west. Mr. Lee Kwok Leung noted that Government is going ahead with the construction of the eastern main drainage channel with works scheduled to commence in September 2002 and to complete in about 3 years. Government is also going to carry out an investigative study for the western main drainage channel. This latter channel is expected to be completed in 2008. If planning approval be forthcoming, he anticipated the Eastcity Site would be in use in 2005. He did not anticipate any major problem as the Eastcity Site is spatial. In relation to the traffic aspect of the Team Harvest Site, the proposal is to improve the existing track which serves as vehicular access to Castle Peak Road to a width of 7.3 meters with an additional footpath of 1.6 meters wide on one side of the carriageway. He reckoned that 7.3 meters would be sufficient for container vehicles notwithstanding that container trailer-tractor parks generate the highest traffic per unit area. He is of the view that there is not going to be any queuing problem because of the presence of a quite spatial marshalling yard. He was of the further view that the existence of 91 car parking spaces within the Team Harvest Site would be sufficient to absorb the influx of trucks.

#### ***EVIDENCE ADDUCED ON BEHALF OF THE TOWN PLANNING BOARD***

45. Mr. Mok Ping Chu is a Senior Town Planner of the Tuen Mun and Yuen Long District Planning Office of the Planning Department. He told us that the Pilot Study did not include an environmental impact assessment nor an ecological review. That study was not considered by the Town Planning Board. It was presented to the Committee on Planning and Land Development ["CPLD"] which is a high level decision making body of the Government with representatives from relevant bureaus including Housing; Transport; Works and

Planning and Lands. CPLD decided that the Pilot Study should be held back until the findings of the Fish Pond Study. Pending the conclusion of the Fish Pond Study, there was no justification to rezone the subject sites. He observed that the Proposed Ecological Reserve was put forward for the first time in Eastcity and Neweast's section 17 review. When the Town Planning Board conducted the review on 26<sup>th</sup> May, 2000, the Planning Department raised objections pointing out that it would not be appropriate to consider the proposals with such a major change and that a separate application has to be made in respect of the Reserve Site under San Tin OZP S/YL-ST/4. The Proposed Ecological Reserve does not fall within any user that may be permitted under that OZP. Whilst Government would encourage the establishment of such ecological reserve, support is dependent upon detailed proposals. The Alternative Site was identified by the Government after a desktop study. No environmental impact study and no traffic impact assessment was done prior to its selection. He does not accept that the planning intention in relation to the subject sites under San Tin OZP ST/1 is to promote as opposed to discourage use of land within OU(CBU) for container usage. He said the planning intent is to use the subject sites for port backup use subject to conditions. When the applications were submitted, Guidelines No. 12B had already been promulgated. Guideline No. 12B does not seek to discourage container usage. It merely imposes more stringent conditions.

46. Mr. Lo Sing Yi is a Senior Engineer in the Traffic Engineering Division (North-west New Territories) Division of the Transport Department. He held this rank for the past 11 years but he was only transferred to this division fairly recently. He explained to us the different roles performed by the Transport Department and the Highway Department. Transport Department plans new roads and improvements to the existing roads. It plays an active part in traffic impact assessment. The Highways Department is responsible for the work aspect of the projects. He is of the view that the TIA conducted on behalf of Eastcity and Neweast is not adequate. It did not cover areas like San Tin Highway and San Tin Interchange. It did not take into consideration possible problems that might be generated by cross-boundary vehicles. The proposals put forward on behalf of Eastcity and Neweast did not go into detail to say whether the highway infrastructure proposed by them is technically feasible; whether land held in private ownership and by the Government is available for the project and how Eastcity and Neweast are going to implement these substantial infrastructure. He pointed out that Mr. Roger Lee had proceeded on an erroneous assumption that Government would carry out improvement works around the Shek Wu Wai Interchange in 2006. In relation to the TIA submitted on behalf of Team Harvest, Mr. Lo opined that it failed to demonstrate that the proposed use would not cause traffic impacts on the surrounding roads and junctions. It did not cover the San Tin Highway; the San Tin Interchange and the San Sham Road which leads to Lok Ma Chau boundary. Mr. Lo pointed out that the access road proposed is

only 7.3 meters wide. If there is any traffic queuing back from the Team Harvest Site to the proposed access road, it will choke up the thoroughfare of this road to serve other sites in the vicinity. He accepts that if the proposed access road is 10.3 meters wide and if the problem of private land ownership is solved, most of his objections in relation to the Team Harvest Site would fall away.

47. Mr. Tong Ho Kwok is a Senior Engineer in the Drainage Services Department. He does not have any objection in principle against the drainage proposals of Eastcity and Neweast which involve diverting storm water into drainage channels and collecting oil in receptors. Mr. Tong however reckons that these proposals are inadequate as there is no information on the collected run fall and the manner of discharge. He says that the eastern main drainage channel is expected to be completed in 2004/2005 and the western main drainage channel is expected to be completed in 2008. In the absence of a DIA, it is difficult to know how the development will impact on the drainage pattern.

48. Mr. Chan Jee Keung, Senior Wetland and Fauna Conservation Officer of the Agriculture, Fisheries and Conservation Department is a trained forester. He commenced his employment with the Agriculture and Fisheries Department in September, 1981. He has been a conservation officer since October, 1993. His main responsibilities relate to implementation of the conservation management plan for the Mai Po - Inner Deep Bay Ramsar site (including the Mai Po Nature Reserve) and to ensure wise use of wetland on a territory wide basis. He explained to us that an ecological impact assessment involves assessment of impact relating to flora i.e. plant, fauna, animal and habitat. It is generally made up of 5 parts : information on the area affected as well as the surrounding area; identification of the impact arising from the proposal; evaluation of the impact; recommendation of mitigation measures to address the impact and recommendation of the monitoring program. Mr. Chan levied strong criticisms against the ecological review conducted by Ecosystems. He pointed out that most of the literatures relied upon by that review are general references. Whilst some of the literatures touched on the surrounding area, the data are 3 years old. They are not centered on the application sites. Mr. Chan contends that 12 month survey should have been done in support of these applications. In relation to the Team Harvest Site, the survey could have been conducted on the nearby ponds. The 12 months period would cover a full cycle. A habitat map showing the extent of different habitat types within the application sites and the Proposed Ecological Reserve should have been produced. Mr. Chan said that in the absence of such a map, it is difficult to guess what would be lost and how they relate to the fauna in the area. In the absence of such ecological impact assessment, he does not know whether any enhancement in function in the Proposed Ecological Reserve could replace the loss of function arising from destruction of the ponds in the subject sites. Mr. Chan was equally critical against the guidelines proposed by Ecosystems for the management of the

Proposed Ecological Reserve. He observed that the guidelines are very general in nature and can apply to any fish pond anywhere. In the absence of any baseline, guidelines such as those seeking to maintain high populations of freshwater shrimps and to produce large number of small Tilapia for use as Cormorant may not be applicable as one does not know whether there is freshwater shrimp in the lost fish ponds and whether the Cormorants are using the application sites. Mr. Chan was at pains to point out that the proposed development will cause severe impact and the degree of minimisation required is one of full compensation for loss of wetland function. He explained that one is not looking at area for area's sake but one is really looking at function. If a large area is lost, the function it performs will be great. When one comes to the size of enhancement required, then area is a matter to be taken into account. Mr. Chan expressed doubts whether the Shenzhen River Regulation Project provides relevant basis to assess the degree of enhancement. The river was widened as a result of that project. There was no loss of wetland. Clear strategies were also formulated for that project after various studies. Mr. Chan maintained that the degree of minimisation flowing from the proposed development is not adequate as for species of immediate conservation concern such as spoonbills, herons, egrets, bitterns, jacanas, the percentage gains would probably not reach the level predicted by Ecosystems.

### ***SUBMISSIONS OF THE PARTIES AND OUR DECISION***

49. There is no dispute between the parties that San Tin OZP ST/1 is the governing plan. Under section 16(4) of the Ordinance, the Town Planning Board may grant permission “only to the extent shown and provided for or specified in the plan”. As pointed out by Lord Lloyd in ***Henderson Real Estate Agency Ltd. v. Lo Chai Wan [1997] HKLRD 258 at 261F*** [“the Henderson Decision”], this appeal board is also bound by that section.

50. The Town Planning Board accepts that the planning intention of the “OU(CBU)” zone is to accommodate the anticipated increasing cross-boundary freight transport, and to provide a range of services to facilitate the cross-boundary trading activities” and the planning intention of the “OU(SS)” zone is to “provide support service facilities such as restaurants, petrol filling stations, etc. for the cross-boundary traffic and the container related facilities nearby”. We would however go further in 2 respects. First, we are of the view that the planning intention of San Tin OZP ST/1 is to promote areas within those 2 zones as container back-up areas. The references to “ample opportunities” and “opportunities” in paras. 6.1.2 and 8.4.2 of the Explanatory Statement are designed to encourage such user. Secondly, we do not detect any planning intention to conserve the ecological value of the fish ponds within both zones. The existence of the fish ponds is expressly recognized in para. 8.4.2 of the Explanatory Statement which gives no indication that the fish ponds should be

preserved. The onus of the applicant is “to demonstrate that due regard has been given to the need to minimize the adverse impact of the development on the surroundings in particular the Mai Po Nature Reserve”.

51. Lord Lloyd at p. 267C of the Henderson Decision pointed out that whilst Explanatory Statement or guidelines “could not be disregarded”, the Appeal Board is not bound to follow such statement or guidelines. We are not prepared to apply Guidelines No.12B. It is premised on a planning intention which we find absent in San Tin OZP ST/1. For like reasons, we disagree with the first of the four reasons given by the Town Planning Board in rejecting the sections 16 and 17 applications of Eastcity/Neweast and Team Harvest.

52. We would follow and apply the Explanatory Statement for San Tin OZP ST/1. We have to decide whether Eastcity/Neweast and Team Harvest have demonstrated to our satisfaction that due regard has been given to the need to minimize the adverse impact of the development on the surroundings in particular the Mai Po Nature Reserve. In relation to this issue, we reject the submission of the Town Planning Board that we should take into account the latest zoning of the subject sites. The latest zoning signifies a different planning intent. It would not be a proper exercise of our discretion under section 16(4) of the Ordinance to take into account such intent.

53. Eastcity/Neweast and Team Harvest contend that they had given due regard to the need to minimize the adverse impact of the development as “due regard” mean “paying attention to or taking into account”. They further contend that it is not necessary for them to demonstrate that the development would have no significant adverse impact and all appropriate measure will be taken to minimize such impact. The Town Planning Board however contends as follows :

*“If the sites, their surroundings, the Mai Po Nature Reserve, have a high ecological value, then the need to minimize the impact is going to be a matter of high consideration, that due - meaning proper or adequate - regard must be given to demonstrating how that minimisation will be achieved and the degree of that minimisation. And the Town Planning Board argues that, given the high ecological value of the site surroundings, Mai Po Nature Reserve, the degree of that minimisation should be to the extent of no net loss in wetland function”.*

54. We are of the view that the contentions of Eastcity/Neweast and Team Harvest failed to give any weight to the word “due” as used in the context of para. 8.4.2 of the Explanatory Statement. As defined in the New Oxford

Dictionary of English, the word “due” means “of the proper quality or extent; adequate”. *Slinn v. Nominal Defendant (1964) 112 CLR 334* also makes it clear that this word “...accommodates to the circumstances of the case the nature and the extent of the inquiry”. Paying lip service to the need to minimize adverse impact may well be paying attention to such need but can hardly be regarded as paying due regard. The point can best be illustrated by the attitude of Eastcity/Neweast and Team Harvest in relation to their section 16 applications. Those applications were lodged for tactical gains. The materials submitted were rudimentary. Whilst it can be said that attention was paid to the onus imposed by the Explanatory Statement, it is clear that the attention so paid was wholly inadequate.

55. On the issue of drainage, we are satisfied that due regard has been given to the need to minimize the adverse impact of the development on the surroundings in particular the Mai Po Nature Reserve. The Town Planning Board expressly abandoned any reliance on the fourth reason given in rejecting the sections 16 and 17 applications. Mr. Tong Ho Kwok has no objection in principle against the proposals of Eastcity and Neweast. We accept the evidence of Mr. Lee Kwok Leung that the difficulties identified by Mr. Tong Ho Kwok are not insurmountable.

56. On the issue of traffic, we are also satisfied that due regard has been given to the need to minimize the adverse impact of the development on the surroundings in particular the Mai Po Nature Reserve. As far as the Team Harvest Site is concerned, Mr. Lo Sing Yi concedes that most of his objections would fall away if a 10.3 meters wide access road is provided. Team Harvest has indicated a willingness to construct such an access road. As far as the Eastcity Site is concerned, we accept the evidence of Mr. Roger Lee. We are of the view that he proceeded on reasonable assumptions and had paid due regard to the exigencies of that site. The technical details sought by Mr. Lo Sing Yi are matters of implementation. No reason has been furnished as to why Government would not grant the requisite right of way given the intrinsic merits of Mr. Roger Lee’s proposals.

57. On the issue of ecology, we are of the view that due regard has not been given by Eastcity/Neweast and Team Harvest to the need to minimize the adverse impact of the development on the surroundings in particular the Mai Po Nature Reserve. The Eastcity Site is huge. Mr. Chan Jee Keung described that site in these graphic terms :

*“The size of the container facility of 55 hectares, if we make a comparison of area, in terms of area, it is equivalent to one Hong Kong Park, one Hong Kong and Zoological Garden, one Victoria Park, one Kowloon Park.*



*And we can still build another 11 soccer fields, each one of it is one hectare. So, that's how big the impact is".*

The fish ponds in the Eastcity Site were highly graded as A and B ponds in 1995. Removal of those fish ponds would obliterate 23% of the total Grade B fishpond area remaining in Hong Kong. Whilst we appreciate that size does not amount to function, these figures bring home to us that we are not dealing with a run of the mill type of application and the sites should therefore be afforded with careful as opposed to stop gap treatment in the planning process.

58. Mr. Dahmer does not dispute the need to establish a baseline. Neither does he dispute the 12 months standard adopted for field surveys to establish such baseline. Given the magnitude of the projects under consideration, one would expect a very high level of attention being devoted to the ecology issue and the norm being followed if not improved. No convincing reason has been furnished as to why the 12 months norm was not observed in this case. That norm has nothing to do with the application of Guideline 12B. That norm is no more than a useful benchmark to consider whether "due regard has been given". Eastcity and Neweast commenced acquisition of their interests in 1997. Had proper planning been on foot, the requisite field surveys could have commenced well before the section 16 applications. The Proposed Ecological Reserve is an afterthought put forward belatedly as part of the section 17 review. We accept the evidence of Mr. Chan Jee Keung. We find his criticisms of the Conservation Management Plan and Ecological Review submitted on behalf of the appellants trenchant and compelling. It is no answer to say that their proposals are based on the Pilot Study. The Pilot Study did not include an environmental impact assessment nor an ecological review. It expressly recognised the importance of the Fish Pond Study. Given the conclusions of the Fish Pond Study, it is obvious that due regard to the ecology issue entails early attention and full investigation.

59. We are not impressed by the suggestion that the Team Harvest Site should be considered in its present state. Such an approach would only encourage reckless disregard of the fish ponds. The Conservation Management Plan and Ecological Review and the evidence of Mr. Dahmer were put forward as part of Team Harvest's case. We see no basis to differentiate the 2 appeals on the issue of ecology.

60. Mr. Nissim referred to his meeting with Mr. Wilson Fung in September, 1998. Mr. Wilson Fung is not a member of the Town Planning Board. Any comment from Mr. Wilson Fung could not have been intended to have any legal effect. But the relevance of that encounter is this : had the appellants been duly encouraged by Mr. Wilson Fung, early steps should have been taken to properly investigate the ecology issue.

61. We are not persuaded that we should grant planning permission and impose as a condition the conduct of the requisite ecological survey. The onus of the appellants is to demonstrate that “due regard has been given”. They have to discharge that onus vis-a-vis this Appeal Board and not as part of any subsequent exercise in discharge of their duties under other relevant legislation.

62. For these reasons, we dismiss the appeal of Eastcity, Neweast and Team Harvest.

Mr. Denis Chang S.C. and Mr. Anthony Ismail for the Appellants  
Mr. Nicholas Cooney for the Respondent