

**Submission to the Legislative Council's Subcommittee on Country Parks  
(Designation) (Consolidation) (Amendment) Order 2010 at the meeting on  
Tuesday 13 July 2010 at 4:30 p.m.**

***Introduction***

1. I submitted a *Written Submission to the Legislative Council's Subcommittee on Country Parks (Designation) (Consolidation) (Amendment) Order 2010* on 5<sup>th</sup> July 2010 along with an attachment which I lodged with the Town Planning Board on 6<sup>th</sup> July 2010 opposing three of its amendments to the approved Tseung Kwan O Outline Zoning Plan No. S/TKO/17.
2. In the said written submission, I had indicated my intention to make oral representation before the Subcommittee at the meeting at 4:30 p.m. on Tuesday 13 July 2010. This is a skeleton of my intended oral representation.

***Environmental implications***

3. The Government's proposal to construct an 50-hectares (ha) extension to the existing South East New Territories ("SENT") Landfill ("the Proposed Extension") has two major environmental implications.
4. First, the Proposed Extension encroaches 5 ha of land of the Clear Water Bay Country Park (CWBCP).
5. Second, the landfill and the refuse collection vehicles travelling to and from it are sources of persistent odour affecting residents of Tseung Kwan O. The aftercare process and thus the odour impact of the existing landfill were expected to end by 2029. With the Proposed Extension, the aftercare process along with the resultant odour impact will be significantly prolonged for another 20 years.

***Lai Pun Sung case: No excision of the country park unless it can be demonstrated that there is a need to do so***

6. For the excision of the proposed encroached area from the approved map, the Chief Executive in Council invoked s.15 of the Country Parks Ordinance

(Cap.208) (“the Ordinance”) to refer the original approved map of the CWBCP to the Country and Marine Parks Authority for replacement by a new map so as to excise from the original approved map the encroachment area (“the CE’s Decision”).

7. In *Lai Pun Sung v The Director of Agriculture, Fisheries and Conservation and Another* HCAL 83/2009 (the judgment in full is annexed hereto for Honourable Members’ easy reference) the applicant sought leave to judicially review against the CE’s Decision. In his judgment dated 13<sup>th</sup> August 2009, Justice Lam interpreted s.15 of the Ordinance and concluded that the CE’s Decision was not *ultra vires* because there was a need or an overriding need for use of the land as a landfill site.

“3. ... [Counsel for the Respondent] accepts that if one just **excised the piece of land for a new use without good reason that might be open to challenge on the ground of Wednesbury unreasonableness, or maybe in terms of more modern language of judicial review: the solution in terms of opting for the switching of the land from country park use to another public use must be proportionate to the problem.** As Mr. Stock submitted, the challenge of the Applicant in the present proceedings is not based on the ground that the switch of the use for the land to landfill site is not a proportionate response and we do not have the evidence in that regard.

4. Therefore, the only point that I need to consider in the present proceedings is whether, **assuming it can be demonstrated or it has been demonstrated that there is an overriding need for use of the land as a landfill site**, it is still beyond the power of the Chief Executive in Council under section 15(1) to refer the matter to the Authority for a replacement or amendment of the map for the country park designating its parameters. As I said, there is nothing in the Ordinance which suggests that this cannot be done.

5. Having considered Mr Chow’s submissions, I do not think, as far as the context of the ordinance or the scheme of the whole ordinance is concerned, there is anything to suggest that in this sort of situation, namely **where it has been demonstrated that it is a proportionate response to the problem of waste management to excise the land for landfill purposes**, the decision to do that is *ultra vires*. **Because of that it was within the power of the Chief Executive in Council to make such reference**, and it was also within the power of the Authority to prepare a draft amendment or replacement map pursuant to such reference and in accordance with section 8 of the ordinance.” [*emphases added*]

8. Further, Justice Lam made the following emphases in his judgment:

“13. Having said so, I wish to add that country parks are valuable natural heritage to be preserved for those living in Hong Kong. As I have said in the course of my judgement this morning, there is a legitimate expectation that they would not be excised unless it can be demonstrated that there is a need to do so. That may involve showing that the excise of

the country park is a proportionate response to the problem at hand. As I have said, as far as the present proceedings are concerned this is not one of the grounds of challenge and therefore it would not assist the Applicant.”  
[emphases added]

***The official justification for the excision and the Proposed Extension***

9. The justification put forward by the Government in support of the excision and the Proposed Extension can be summarized as follows:

- (1) It is predicted that the capacity of the SENT Landfill be exhausted by around 2012.
- (2) On a territory-wide basis, as mentioned in the waste policy document published by the Government in December 2005, “A Policy Framework for the Management of Municipal Solid Waste (2005-2014)” (“Policy Framework”), it has been estimated that the demand for landfill space from 2006 to 2025 is around 200 million tonnes, while the remaining landfill capacity, at the end of 2004 was 90 million tonnes. Therefore, the Government estimated that Hong Kong’s landfill will be exhausted by 2015.
- (3) On a region-wide basis:
  - (a) If the SENT Landfill is closed, waste will have to be diverted to the North East New Territories (“NENT”) and West New Territories (“WENT”) Landfills.
  - (b) Hong Kong would need to develop new waste transfer and/or handling facilities in the south-east region of the territory, such as new handling facility for construction waste (i.e. the Construction Waste Handling Facility (“CWHF”)) and new refuse transfer station for municipal solid waste (“MSW”) (ie the South East Kowloon Transfer Station (“SEKTS”)) which could possibly be in place by 2017 or thereabout.
  - (c) Without CWHF and SEKTS, vehicles collecting waste would have to travel a long way through the built-up areas to NENT and WENT Landfills every day, thus resulting in additional environmental impacts such as increased traffic movements, vehicular emissions and noise impacts on many more sensitive receivers en-route.
  - (d) The Proposed Extension is expected to extend operational lifespan of the SENT landfill by another six years until 2019, thus allowing a sufficient window of time for the CWHF and SEKTS to be constructed.

10. For the following reasons, I respectfully submit that the Administration has failed

to demonstrate that there is a need for use of the proposed encroached area as a landfill site. Nor was the excision a proportionate response to the problem of waste management to excise the land for landfill purposes.

***Problematic Estimation***

11. The Government estimated that the demand for landfill space from 2006 to 2025 is around 200 million tonnes, and that Hong Kong's landfills will be exhausted by 2015. I submit that these estimations do not accord with reality.
12. The government's estimation has assumed an average of 10 million tonnes per year. In reality, the amount of solid waste which needs to be disposed of at our landfills has been decreasing steadily since 2006. This may be caused by (i) the introduction of a charging scheme for Construction and Demolition Waste in 2006, and (ii) the increase in our domestic waste recovery rate from 14% in 2004 to 35% in 2009. In 2008, the solid waste actually disposed of at our landfills was only 4.93 million tonnes.
13. Even if I assume the amount of solid waste disposal remains unchanged from 2006 to 2025, the total solid waste which needs to be disposed of at our landfills will only be 98.6 million tonnes in the period 2006 to 2025. Taking into account the daily waste reduction brought by the Integrated Waste Management Facilities (IWMF), our landfills will only be full in 2025. Without take into account the IWMF, our landfills will not be exhausted until 7 year after 2015 (i.e. 2022).
14. It follows that there will be sufficient time for the CWHF and SEKTS to be constructed and that there is neither a need for the excision of the proposed encroached area from the approved map nor the Proposed Extension itself.

***MSW charging and Eco-Co-Combustion System of Green Island (GI)***

15. Further, there are feasible alternatives to the Proposed Extension.
16. **MSW charging:** In a paper entitled "Site Selection for the Development of the Integrated Waste Management Facilities" submitted by the Environmental Protection Department to the Legislative Council Panel on Environmental Affairs for information on 28 January 2008, it is stated that the Government is

studying the feasibility of MSW charging as a direct economic incentive to induce behavioural change so as to avoid or reduce waste.

17. It is my belief that the introduction of such charging will go a long way towards our efforts to reduce MSW, and that the Government should grasp the nettle and introduce such charging as a matter of urgency.
18. **GI's Eco-Co-Combustion System:** In the minutes of the meeting of the Advisory Council on the Environment held on 14 December 2009, there were discussions about the system of eco-co-combustion as a way to reduce ash disposal to landfill.
19. I learnt from my enquiries that GI has proposed to the Government that an Eco-Co-Combustion System be provided at GI's present site at Tap Shek Kok, Tuen Mun for the thermal treatment of MSW and sewage sludge. It is said that such system, which can treat 4,800 tonnes of MSW per day, will have synergy with GI's present cement plant and will hence yield lower costs, higher productivity and a net improvement in air quality.
20. The proposed IWMF of the Government can only treat 3,000 tonnes of MSW per day, which is about 1/3 of the 9,000 tonnes of MSW per day Hong Kong is producing. In view of this shortfall, I do not understand why the Government turned down GI's proposal, which will go a long way in solving Hong Kong's MSW problem.

### ***Conclusion***

21. For the above reasons, I object to the Country Parks (Designation) (Consolidation) (Amendment) Order 2010.
22. Honourable Members should pay heed to the precautionary principle – whether there is an overriding need for extending the SENT landfill. Once land has been turned into a landfill it will in effect be irreversible.
23. Honourable Members should repeal the 2010 Order,
  - (a) if you conclude that the Administration has failed to demonstrate that there is such overriding need now, or

- (b) alternatively, if you consider that time should be given for the measures at 3(c) above to work themselves out.

Dated this 12<sup>th</sup> day of July 2010.

Ho Man Kit Raymond

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

CONSTITUTIONAL AND ADMINISTRATIVE LAW LIST

NO. 83 OF 2009

---

BETWEEN

LAI PUN SUNG

Applicant

and

THE DIRECTOR OF AGRICULTURE,  
FISHERIES AND CONSERVATION

1st Respondent

THE COUNTRY & MARINE  
PARKS BOARD

2nd Respondent

---

Before: Hon. Lam J, in Court

Date of Hearing: 13 August 2009

Date of Judgment: 13 August 2009

---

## J U D G M E N T

---

1. Having heard submissions from counsel, with the benefit of having some clarification about the real point in dispute, I have to refuse leave to judicial review. As I see it, the crux of the matter is section 15 of the Country Parks Ordinance Cap.208. I shall assume, for the present purpose, that if I can be satisfied that there is a reasonable prospect of success in terms of the merits of the argument put forward to challenge the decisions, there would not be problem about standing and the timing of the application.

2. But, as I see it, there is no reasonably arguable point of challenge here. Mr Chow, appearing for the Applicant today, confirmed that the challenge is basically about the construction of the ordinance, in particular when consideration is given for replacement or amendment of the map for the country park, whether that can be undertaken for the purpose of switching land previously designated as country park to other land-use like landfill purposes in the present case.

3. Mr Chow submitted that because of the scheme of the ordinance an area can only be excised pursuant to section 15 when the land designated is no longer suitable for country park use by reason of contamination. But if one looks at section 15(1) of the ordinance, the legislation does not provide that sort of restriction in terms of the purpose for which replacement or amendment can be made. In the present case I do not need to consider the extent to which consideration should be given by the Chief Executive in Council as to whether there are other alternatives apart from



choosing this particular piece of land for that alternative use. Mr Stock accepts that if one just excised the piece of land for a new use without good reason that might be open to challenge on the ground of Wednesbury unreasonableness, or maybe in terms of more modern language of judicial review: the solution in terms of opting for the switching of the land from country park use to another public use must be proportionate to the problem. As Mr Stock submitted, the challenge of the Applicant in the present proceedings is not based on the ground that the switch of the use for the land to landfill site is not a proportionate response and we do not have the evidence in that regard.

4. Therefore, the only point that I need to consider in the present proceedings is whether, assuming it can be demonstrated or it has been demonstrated that there is an overriding need for use of the land as a landfill site, it is still beyond the power of the Chief Executive in Council under section 15(1) to refer the matter to the Authority for a replacement or amendment of the map for the country park designating its parameters. As I said, there is nothing in the Ordinance which suggests that this cannot be done.

5. Having considered Mr Chow's submissions, I do not think, as far as the context of the ordinance or the scheme of the whole ordinance is concerned, there is anything to suggest that in this sort of situation, namely where it has been demonstrated that it is a proportionate response to the problem of waste management to excise the land for landfill purposes, the decision to do that is ultra vires. Because of that it was within the power of the Chief Executive in Council to make such reference, and it was also within the power of the Authority to prepare a draft

amendment or replacement map pursuant to such reference and in accordance with section 8 of the ordinance.

6. As far as the process of objections is concerned, it was considered by the Board pursuant to section 11. Mr Chow confirmed today, as far as his challenge based on what happened at the objection hearing is concerned, it basically revolved around the objection (1) and (2) set out in paragraph 213/09 of the minute of the Board meeting on 30 March 2009. The two objections are: (1) The duty of the Authority to properly manage the country parks under the Country Parks Ordinance. Therefore to allow country parks to be used as landfills would reduce public enjoyment and amenities of the country parks; and (2) the Board should uphold its function to protect and conserve country parks. These are the objections that the Applicant seeks to rely upon and contend that they were not dealt with adequately in the objection process.

7. Mr Chow confirmed that the Applicant is not relying on the other objection, which is objection (4) in the paragraph, namely that the government should adopt the “no net loss” principle to compensate for the loss of 5 hectares of country park land. Therefore, this court does not have to consider whether the “no net loss” principle has been adequately dealt with in the objection process.

8. As far as the first two objections are concerned (as Mr Chow quite frankly admitted) they add nothing to the construction point because once the court is not with him on the construction of Section 15, there is nothing in them. Those

objections premised on the proposition that the land cannot be excised for other land use so long as it is suitable for country park use.

9. The same can be said about the challenge based on irrelevant consideration. Again that depends on the construction point and adds nothing to it. Once the construction point is gone, it is impossible to suggest that the matter considered by the Board were irrelevant. For the reasons I have given, I do not think the construction point is arguable.

10. As regards apparent bias in the process of dealing with objections, since the Applicant was not one of the objectors and the challenge of bias is basically a challenge to the fairness of that process, I do not think leave should be granted for that to be pursued by this Applicant.

11. In any event, the scheme of the ordinance is that there can be consultation by the Authority with the Board before the publication of the draft amendment map (see Section 8(4) of the Ordinance). When objections are received after publication, it is still within the remit of the Board to consider those objections under Section 11. And having regard to what has been actually considered by the members in the hearing dealing with the objections as set out in the minutes, I do not think there is any ground to challenge the propriety of that objection hearing on the ground of apparent bias.

12. For these reasons I have to refuse leave to apply for judicial review.

13. Having said so, I wish to add that country parks are valuable natural heritage to be preserved for those living in Hong Kong. As I have said in the course of my judgement this morning, there is a legitimate expectation that they would not be excised unless it can be demonstrated that there is a need to do so. That may involve showing that the excise of the country park is a proportionate response to the problem at hand. As I have said, as far as the present proceedings are concerned this is not one of the grounds of challenge and therefore it would not assist the Applicant.

14. Now we can deal with the question of costs.

(Submissions re costs)

15. I think I will make no order as to costs for today's hearing. Although I refuse leave to apply for judicial review, I do see that there is a strong public interest element in these proceedings. I do not think this is the proper occasion for me to say whether there should be separate consideration for environmental cases. As I understand it, the problem is still subject to debate in England, as can be seen from the latest English Court of Appeal decision in *Francis Morgan v Hinton Organics Limited* [2009] EWCA Civ 107, and also the preliminary report of Lord Justice Jackson on Cost, Chapters 35 and 36. I believe there are matters that will have to be canvassed at greater length before one can make a mature decision.

16. Likewise, I am not going to say too much on the topic of protective cost order. I can see there is room for similar development in Hong Kong as in England on such kind of order. Having said that, of course one must also recognise

that the development in England is still ongoing. I will leave that subject for debate in future cases. Since I refuse leave, the only question that I have to decide in the present context is whether I should make an order for cost for today's hearing.

17. I regard today's hearing as a matter in furtherance of public interest. I bear in mind the principles I have set out in *Chu Hoi Dick v Secretary for Home Affairs (No.2)* [2007] 4 HKC 428 and also the subsequent Court of Appeal decision in *Chan Noi Heung v Chief Executive in Council*, CACV197 of 2007, 16 March 2009. I recognise that the starting point is costs should follow the event. Therefore prima facie the Applicant has to pay the costs of the putative Respondent upon the refusal of leave. But the court has a discretion to depart from this usual order when the pursuit of the litigation is not for private gain but for clarification of the law. I have said in *Chu Hoi Dick* that whether this is in public interest is to be determined objectively. I have said that to pursue a litigation with no prospect of success is not in public interest.

18. However, as far as the present proceedings is concerned, I agree with Mr Chow that section 15 itself did not set out quite clearly under what circumstances the power to replace or amend the country parks map can properly be exercised. As far as the present proceedings is concerned, although I reject the construction point advanced by Mr Chow, it is also accepted by the putative respondent that the discretion cannot be unfettered. To that extent I believe this hearing serves some purpose in the clarification of the law and hopefully provide some guidance for the future. I accept that the applicant is not pursuing these proceedings for private gain and it has achieved some clarification of the law albeit in terms of the rejection of the

construction point urged upon the court by the Applicant. In other words, as far as the utility of this piece of litigation is concerned, it demonstrates that country park can be re-designated, the map can be amended or replaced, but there has to be a good purpose.

19. For these reasons I will make no order as to costs for today's hearing.

(M H Lam)  
Judge of the Court of First Instance  
High Court

Mr Enzo W H Chow, instructed by Messrs Lee Chan Cheng, for the Applicant

Mr Alexander Stock, instructed by the Department of Justice, for the 1st and 2nd Respondents