Sime Darby Motor Services Ltd

and

Director of Lands

[2024] HKCA 207

(Court of Appeal)

(Civil Appeal No 408 of 2022)

Kwan V-P, Barma and G Lam JJA

17 November 2023, 8 March 2024

Administrative law — Director of Lands — decision rejecting application for in-situ land exchange in New Territories — rejection on ground of Government policy of not entertaining non-small house land exchange applications within village environ boundaries — decision made in contractual context of Government acting as private landlord — not amenable to judicial review

Administrative law — judicial review — amenability to judicial review — land matters — when Government's decisions concerning land susceptible to judicial review — approach

行政法 — 地政總署署長 — 拒絕新界原地的地換地申請的決定 — 以政府不受理村莊周圍範圍內的非小型屋宇換地申請的政策為由而拒絕 — 在政府作為私人業主行事的合約背景下作出的決定 — 不受司法覆核所管轄

行政法 — 司法覆核 — 受司法覆核所管轄之管轄性 — 土地事宜 — 當政府有關土地的決定容易受到司法覆核影響 — 做法

X was the Government lessee of five lots of land in Fanling contiguous with each other and capable of forming a single site (the Subject Lots). X applied to the Government for an *in-situ* land exchange that would have the effect of lifting the existing user restrictions in the Government leases so as to permit the development of a wholesale trade facility at the site. The Director of Lands rejected the application (the Decision) on the ground that the site fell within the "village environs" of two recognised villages in the New Territories and, as such, should be excluded from any land exchange in order to preserve land for small house development by indigenous villagers, under a long-standing internal guideline (the VE Guideline). X applied for judicial review against the Decision. The Judge below held that the Decision was amenable

to judicial review, quashed the Decision and remitted the application for land exchange to the District Lands Office for reconsideration. The Director appealed.

Held, allowing the appeal and setting aside the Judge's orders, that:

(1) The performance of planning functions by the Government through its powers as a landlord based on lease conditions had never been considered enough in itself to make the Government's decisions as a landlord reviewable in public law (*Anderson Asphalt Ltd v Secretary for Justice* [2009] 3 HKLRD 215 (CFI), *Anderson Asphalt Ltd v Secretary for Justice* [2010] 5 HKLRD 490 (CA) applied; *Shun Shing Hing Investment Co Ltd v Attorney General* [1983] HKLR 432 considered; *R (Weaver) v London and Quadrant Housing Trust (Equality and Human Rights Commission intervening)* [2010] 1 WLR 363 distinguished). (See paras.48–50.)

(2) The fact that the Government had a policy such as the VE Guideline to guide its decisions in relation to particular land matters, and that the decision in question had been made pursuant to that policy, did not in itself mean that there was a sufficient public element to move the decision into the public law domain (*Rank Profit Industries Ltd v Director of Lands* [2009] 1 HKLRD 177, *Tang Hoi Sang v Director of Lands* [2017] 4 HKC 230, *Wong Ho Tong v Director of Lands* [2018] 6 HKC 501 applied). (See paras.51–52.)

(3) Not any matter concerned or associated with the Small House Policy or its implementation was amenable to judicial review. The Decision concerned what could be done on the Subject Lots. The Decision was not one made by way of application or implementation of the Small House Policy, but rather a decision made in a contractual context. In reaching the Decision the Government was acting no differently from a private landlord of a large estate, in deciding what should be the long-term user and building restrictions applicable in defined parts of the land, thereby laying out the planned potential usage of land in the region. Whether the Government refused to relax the restrictions because it considered the Subject Lots should be kept potentially available for small house development or because it had a potential plan for building primary schools there in the longer term, did not alter the fact that these were the kinds of planning considerations that did not inject a sufficient public element into the Decision (*Hung Hing v Director of Lands* [2015] 5 HKLRD 516 applied; *Kwok Cheuk Kin v Director of Lands (No 2)* (2021) 24 HKCFAR 349 considered; *Koon Ping Leung*

v Director of Lands [2012] 2 HKC 329 distinguished). (See paras.53–55, 57–60.)

(4) This case was also distinguishable from those cases on application of the Government's policy as regards the extension of special purpose leases in the New Territories promulgated in 1987 against the background of all leases in the New Territories being due to expire before 30 June 1997, which were strongly coloured by public purposes (*Rank Profit Industries Ltd v Director of Lands* (FAMV 7/2009, [2009] HKEC 1021) considered; *Hong Kong and China Gas Co Ltd v Director of Lands* [1997] HKLRD 1291, *Kam Lan Koon v Secretary for Justice* [1999] 3 HKC 591 distinguished). (See para.56.)

(5) The intended use of the land for a public purpose was not sufficient to turn the Government's decision to terminate X's occupation of Government land into a decision in the domain of public law. There had not been any case in which intended use of land for the Government's purposes had been held to infuse a decision with sufficient public character so as to make it judicially reviewable (*Hung Hing v Director of Lands* [2015] 5 HKLRD 516, *Tang Chi Fai v Director of Lands* [2020] HKCA 339 applied; *Rank Profit Industries Ltd v Director of Lands* [2007] 2 HKC 168, *Rank Profit Industries Ltd v Director of Lands* [2009] 1 HKLRD 177 considered). (See paras.61–62.)

(6) Had the decision been amenable to judicial review, the Court would nonetheless have rejected the application on the basis that the substantive grounds were not made out. (See para.87.)

Appeal

This was the Director of Lands' appeal against the decision of Wilson Chan J allowing an application for judicial review of the Director's decision to reject the applicant's *in-situ* land exchange application concerning certain lots of land in the New Territories, quashing the decision and remitting the application for land exchange to the District Lands Office for reconsideration (see [2022] 4 HKLRD 714).

Mr Jin Pao SC and Mr Justin Lam, instructed by the Department of Justice for the respondent (appellant).

Ms Rimsky Yuen SC, Ms Anna Chow & Mr Martin Ho instructed by Reed Smith Richards Butler LLP for the applicant (respondent).

Legislation mentioned in the judgment

Basic Law of the Hong Kong Special Administrative Region arts.7, 40
Human Rights Act 1998 [United Kingdom] s.6(5)
Town Planning Ordinance (Cap.131) s.13

Cases cited in the judgment

Anderson Asphalt Ltd v Secretary for Justice [2009] 3 HKLRD 215 (CFI)
Anderson Asphalt Ltd v Secretary for Justice [2010] 5 HKLRD 490, [2011] 1 HKC 246 (CA)
Associated Provincial Picture Houses Ltd v Wednesbury Corp [1948] 1 KB 223, [1947] 2 All ER 680
Chan Chiu Wah v Housing Appeal Tribunal; sub nom Chan Chiu Wah v Hong Kong Housing Authority [2011] 3 HKLRD 259, [2011] 3 HKC 399
Chan Yan Cheong v Research Grants Council of University Grants Committee [2023] 1 HKLRD 808, [2023] 2 HKC 26, [2022] HKCA 1873
Chau Tam Yuet Ching v Director of Lands [2013] 3 HKLRD 169
Council of Civil Service Unions v Minister for the Civil Service [1985] AC 374, [1984] 3 WLR 1174, [1984] 3 All ER 935, [1985] ICR 14
Director of Lands v Yin Shuen Enterprises Ltd (2003) 6 HKCFAR 1, [2003] 2 HKLRD 399, [2003] 2 HKC 490
Durga Maya Gurung v Director of Immigration (CACV 1077/2001, [2002] HKEC 477)
H v Director of Immigration (2020) 23 HKCFAR 248, [2020] 4 HKC 454, [2020] HKCFA 22
Hang Wah Chong Investment Co Ltd v Attorney General [1981] HKLR 336 (PC)
Hung Hing v Director of Lands [2015] 5 HKLRD 516, [2015] 5 HKC 468
Kam Lan Koon v Secretary for Justice [1999] 3 HKC 591
Koon Ping Leung v Director of Lands [2012] 2 HKC 329
Kwok Cheuk Kin v Director of Lands (No 2) (2021) 24 HKCFAR 349, [2021] 6 HKC 795, [2021] HKCFA 38
Lo Kai Shui v HSBC International Trustee Ltd [2023] 6 HKC 411, [2023] HKCA 983
R (Weaver) v London and Quadrant Housing Trust (Equality and Human Rights Commission intervening) [2009] EWCA Civ 587, [2010] 1 WLR 363, [2009] 4 All ER 865, [2010] PTSR 1
Rank Profit Industries Ltd v Director of Lands (FAMV 7/2009, [2009] HKEC 1021)
Rank Profit Industries Ltd v Director of Lands [2007] 2 HKC 168 (CFI)

Rank Profit Industries Ltd v Director of Lands [2009] 1 HKLRD 177, [2008] 4 HKC 84 (CA)
Shun Shing Hing Investment Co Ltd v Attorney General [1983] HKLR 432
Tang Chi Fai v Director of Lands [2020] HKCA 339, [2020] HKEC 942
Tang Hoi Sang v Director of Lands [2017] 4 HKC 230
The Hong Kong and China Gas Co Ltd v Director of Lands (CACV 10/1998, [2006] HKEC 444)
The Hong Kong and China Gas Co Ltd v Director of Lands [1997] HKLRD 1291, [1997] 3 HKC 520 (CFI)
Wise Union Industries Ltd v Hong Kong Science and Technology Parks Corp [2009] 5 HKLRD 620
Wong Ho Tong v Director of Lands [2018] 6 HKC 501, [2018] HKCA 330
Wong To Yick Wood Lock Ointment Ltd v Singapore Medicine Co [2023] 3 HKLRD 311, [2023] 5 HKC 126, [2023] HKCA 740
Ying Ho Co Ltd v Secretary for Justice (2004) 7 HKCFAR 333, [2005] 1 HKLRD 135

Other materials mentioned in the judgment
Chan & Lim, *Law of the Hong Kong Constitution* Ch.29, para.29.027
Denis Bray, *Hong Kong Metamorphosis* pp.163–167

JUDGMENT

G Lam JA (giving the Judgment of the Court)

A. Introduction

1. The applicant is the owner (or, more accurately, government lessee) of five lots of land in Fanling contiguous with each other and capable of forming a single site. It applied to the Government for an *in-situ* land exchange that would have the effect of lifting the existing user restrictions in the leases so as to permit the development of a wholesale trade facility at the site. The Director of Lands (**Director**) rejected the application, on the ground that the site fell within the "village environs" of two recognised villages in the New Territories and, as such, should be excluded from any land exchange in order to preserve land for small house development by indigenous villagers (**Decision**).

2. On the applicant's application for judicial review, Wilson Chan J held in his judgment dated 14 September 2022 (**Judgment**)[1] that the Decision was amenable to judicial review and that substantive grounds that vitiated it were made out. He therefore quashed the Decision and remitted the application for land exchange to the District Lands Office for reconsideration. Against this order the Director now appeals to this Court.

B. Background

B1. Acquisition of the Subject Lots by the applicant

3. The Sime Darby Group is an international group of companies involved in many facets of the automotive business in Asia Pacific. In Hong Kong, the group is known for its sole distributorship of BMW motorcars. The applicant company is a member of the group in Hong Kong.

4. In around November 2013, the applicant began to look for a site in the New Territories North/West to build an automobile dealership centre for the automotive operation of BMW. Five privately owned lots of land, and a small strip of government land lying among them and held under a short-term tenancy, all in Demarcation District 51, were introduced by Savills, the real estate agents, to the applicant. Site inspections were conducted from May to September 2014.

5. Eventually, on 17 September 2015, a related company in the group, Marksworth Ltd (**Marksworth**), purchased four of the lots (namely, Lot nos. 4250 RP, 4252 s A, 4272 RP and 4897 RP) from their owner, Venton Manufacturing Co Ltd (**Venton**), at the price of HK$329 million, and also purchased the fifth lot, namely, Lot no. 4273 s B RP, from its owners (who were three individuals all surnnamed "**Pang**") for HK$53.1 million.

6. On 29 April 2016, Marksworth transferred these five lots of land to the applicant by assignment. Since April 2016, the short-term tenancy (STT No 210) over the small plot of government land had also been granted to the applicant. We shall follow the terminology in the evidence and refer to the five lots of land so acquired as the "**Subject Lots**", either with or without the small plot held under STT No 210 as the case may be which should be clear from the context.

B2. Lease restrictions

7. Three of the lots acquired from Venton (namely, Lot nos. 4250 RP, 4252 s A and 4272 RP) as well as the lot acquired from

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1 [2022] 4 HKLRD 714, [2022] HKCFI 2809.

the Pangs are held under a Block Government Lease granted in 1907, which contains a restriction that no building thereon was allowed except for the purpose of occupying the land as agricultural or garden ground and even then only with the lessor's consent. Venton had been granted a temporary waiver dated 3 July 1987 for its three lots to be converted to building purposes conditional upon "no building on the premises being used for any purpose other than for a metal-ware and electrical goods factory".

8. The other lot acquired from Venton (Lot no. 4897 RP) is held under a New Grant made in 1958 with a lease condition that the land shall not be used for any purpose other than a camphor wood furniture factory. Venton had been granted a temporary waiver dated 14 September 1990 which permitted "the use of the building on the lot for the manufacturing of metalware and electrical goods and an additional roofed-over area on the lot".

9. Both temporary waivers were on their terms renewable and automatically renewed, subject to the requisite payment, on a quarterly basis. They were also terminable by either party by giving 3 months' notice in writing and no compensation would be payable upon such termination.

B3. Location of the Subject Lots within village environs

10. The Subject Lots are located to the north and north-east of Wo Hop Shek Village and Wo Hing Tsuen and to the south of Fanling Highway. Both villages are "recognised villages" for the purposes of the Small House Policy of the Hong Kong Government. Under that policy, as is well known, adult males descended through the male line from a resident in 1898 of a recognised village have certain privileges. As summarised in *Kwok Cheuk Kin v Director of Lands (No 2)* (2021) 24 HKCFAR 349 at [3], the policy allows such adult males to apply for three kinds of grant: (i) a free building licence, which is a licence to build on private land at a nil premium in the case of pre-1898 villages or a full premium in the case of villages recognised since that date; (ii) a private treaty grant of government land at a reduced premium; and (iii) an exchange, involving the surrender of an existing title in exchange for the grant of a new title at a nil premium so far as it was private land and a reduced premium so far as it was government land.

11. In general, subject to the constraints of local topography, applications for building a house under the Small House Policy may be allowed in a recognised village within a distance of 300 ft from the edge of the last village type house built before the implementation of the Small House Policy on 1 December 1972. The area within this 300 ft radius surrounding the village is known as the "village environs". The Subject Lots largely fell within the "village environs" of Wo Hop Shek Village and Wo Hing Tsuen.

B4. Zonings under Outline Zoning Plan

12. Under statutory plans, the Subject Lots, located within Fanling Area 48, were originally mostly zoned "I" (ie Industrial) in the Fanling/Sheung Shui Outline Zoning Plan (**OZP**) first published in October 1987 (no. S/FSS/1), though small areas in the southern and western parts of the Subject Lots[2] were zoned "V" (ie Village Type Development). These zonings remained in place up to the version of the OZP approved in June 2015 (no. S/FSS/20), which was the OZP in force when Marksworth acquired the Subject Lots.

13. In January 2016, the Planning Department proposed amendments to the existing OZP (no. S/FSS/20) including the rezoning of a site near Wo Hop Shek Village (covering a major portion of the Subject Lots) from "I" to "G/IC" (ie Government, Institution or Community) and the rezoning of a small portion of the Subject Lots together with adjoining land from "I" to "R(A)3" (Residential (Group A)3). The proposed amendment to "G/IC" was for providing two primary school sites in Fanling Area 48 to meet the demand of proposed public housing development in the proposed "R(A)3" zone and other demands of Fanling/Sheung Shui New Town.

14. On 23 March 2016, Marksworth made a representation to object to the proposed rezoning to "G/IC", and proposed instead an amendment to rezone a majority portion of the Subject Lots to "Other Specified Uses" annotated "Automobile Dealership Centre", having in mind the development intended by the applicant. On about 14 October 2016, the Town Planning Board (**TPB**) overruled Marksworth's objection. On 3 January 2017, the draft amended plan was approved by the Chief Executive in Council and became OZP no. S/FSS/22 (**OZP/22**).[3]

B5. Resumption under the Roads (Works, Use and Compensation) Ordinance

15. Shortly after Marksworth's acquisition of the Subject Lots, the Transport and Housing Bureau proposed to resume part of them for the purposes of road works. The initial proposal, published on 24 December 2015, involved resumption of land amounting in aggregate to about one-third of the total area of the Subject Lots. Marksworth raised an objection and negotiated with the Government. Eventually the alignment of the proposed road works was adjusted and the extent of resumption within the Subject Lots

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2 being a narrow strip of land along the southern lot boundary of Lot nos. 4897 RP and 4252 s A and another strip of land on the western part of Lot no. 4250 RP.

3 Further amendments were made to the Fanling/Sheung Shui OZP in 2020 to rezone additional land for residential development leading to another version of the OZP (no. S/FSS/24), but these amendments did not affect the Subject Lots.

was reduced accordingly. The resumption notice was issued in September 2019 and the resumed land reverted to the Government on 27 December 2019.

B6. The applicant's proposed wholesale trade facility

16. In view of the rezoning of a major portion of the Subject Lots to "G/IC" under OZP/22 and the proposed land resumption for road works mentioned above, in 2017 or 2018 the applicant abandoned its proposal to build an automobile dealership centre and instead decided to explore the possibility of erecting a wholesale trade facility (apparently for trading vehicles) within the parts of the Subject Lots not resumed under the proposed resumption. "Wholesale Trade" is a use listed under Column 1 of the Schedule of Uses to the OZP, meaning that it is a use always permitted.

B7. Land exchange application

17. To pursue the plan of building a wholesale trade facility, the applicant engaged CBRE Ltd (**CBRE**) to apply to the Lands Department for an *in-situ* land exchange. An *in-situ* land exchange is essentially a specific type of lease modification by the grant of a new title that includes, among other things, the modification of the physical boundaries of the land leased.

18. On 4 February 2019, CBRE submitted on behalf of the applicant an application for land exchange to the District Lands Office/North (**DLO/N**). The application, as revised by CBRE's letter dated 14 May 2019, involved the following proposals: (1) the applicant would surrender the Subject Lots with a total area of 7,047.3 m^2; and (2) the same land, with the exclusion of the land to be resumed for road works (1,080.4 m^2) and the addition of the small piece of government land the subject of STT No 210 (45 m^2) and a small piece of unallocated government land immediately to the west of the Subject Lots, would be re-granted to the applicant on terms that permitted building and running a wholesale trade facility. The total area of the land to be re-granted would be 6,134.2 m^2. The proposed wholesale trade facility was to be erected entirely within the parts of the re-granted land zoned "G/IC" under the OZP/22.

19. On 17 May 2019, DLO/N wrote in response to the land exchange application as follows:

> Having regard to the land status, the subject site was found to be located within the Village Environ Boundary (VEB) of Wo Hop Shek Village. Under the current policy, non-Small House Policy land exchange application should not normally be entertained within defined village environs in the New Territories.

> Should you have any enquiry, please contact the undersigned …

20. On 28 May 2019, CBRE wrote to DLO/N, stating that they considered their land exchange application to be "a distinct case from typical land exchange applications". CBRE stated that the majority portion of the site was previously zoned "I" and now fell within "G/IC" zone; that although the site was within village environs, there was no evidence that the Planning Department or the TPB favoured a village house use on the site as it was not zoned "V". It was said that the proposed land exchange complied with the statutory planning framework and would enable the applicant to fully utilise land resources in the vicinity of the North East New Territories New Development Area, in line with prevailing Government land policy. CBRE considered that they had set out "a strong justification for a special consideration of the subject case".

21. On 15 August 2019, the DLO/N wrote to the applicant as follows:

> It is noted that you have put forward your justifications in supporting your application mainly concerning town planning matter and the rezoning exercise back to 2016. However, as explained in our previous correspondence and several tele-conversations between your Mr. Calvin MAK and our Mr. Kenneth KAM in July and August 2019, the major portion of the lots under application falls within the Village Environ Boundary (VEB) of Wo Hop Shek Village and Wo Hing Tsuen and having regard to the prevailing policy, VEB would normally be reserved for small house development. Moreover, you may notice that the area zoned 'Government, Institution or Community' ('G/IC') on the subject draft Fanling/Sheung Shui Outline Zoning Plan No. S/FSS/23, does not prohibit the development of small house.
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> Having said the above, the proposal as set out in the subject application may not be feasible and you may wish to review your proposal for further consideration by this office.

Both the letters of 17 May and 15 August 2019 were signed by Estate Surveyor Mr Kam.

22. On 24 September 2019, the applicant wrote to the Assistant Director (Regional 3) of the Lands Department, Mr Lo. The applicant pointed out that a major part of the site in question was previously zoned "I" and now fell within "G/IC" zone and that "Wholesale Trade" was always permitted for land within that zone. It was stated that industrial-related activities had long been taking place on the site since the 1950–60s, and that no part of the site had been occupied as a residence of villagers in the past 40 years

or more. The site had never been within a Village Type Development ("V") zone in an OZP. There was no objection from the Lands Department or from the residents of Wo Hop Shek Village to the 2015 rezoning. The applicant had therefore proposed a new and effective use of the land in line with this zoning change. The applicant said that the DLO/N had given neither response nor consideration to any of the special merits presented in CBRE's letter. The applicant could not see how the planning intention of the new "G/IC" zone could be fulfilled if a land exchange application for G/IC use could not even be entertained. The applicant said that its application was a unique case and should be treated differently by taking into consideration the special circumstances, and proposed a meeting for discussion.

23. On 11 October 2019, the applicant sent another letter to the Assistant Director, commenting that land in Hong Kong was a scarce and precious resource and should be utilised to the maximum extent. The Subject Lots, net of the land to be resumed, were not insubstantial in size and had been zoned "G/IC" but now lay idle. Land exchange was the only way to turn the situation around and permit the Subject Lots to be put to their maximum utilisation in the long run. The applicant asked for a meeting to discuss its application.

24. After a meeting in November 2019 and further correspondence between the parties, on 21 February 2020, DLO/N responded to the applicant, by a letter signed by District Lands Officer/North, Ms Pang, as follows:

> Your application for the proposed land exchange has been processed according to the established procedure. I would like to reiterate that land in village environs for recognized villages in the New Territories should be excluded from any land exchange primarily to preserve the land for small house development by indigenous villagers. In this connection, non-small house developments within village environs would not normally be entertained.
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> After consulting my headquarters and carefully re-considered the justification as contained in the letter, we would advise that the subject land exchange application with majority part of the site area fell within defined village environs would not be further processed. As discussed in the meeting of 20 November 2019, you may wish to review your proposal for further consideration by this office.

25. This letter (Decision) was treated by the applicant as a definitive rejection of its land exchange application and it decided to launch proceedings for judicial review. An application for leave

to apply for judicial review, in Form 86, was filed *ex parte* with the Court of First Instance on 19 May 2020.

26. Meanwhile, the applicant had written further to the Assistant Director on 5 March 2020, and also had email correspondence, via CBRE, with Mr Kam, Estate Surveyor. On 18 June 2020, by a letter signed by the Assistant Director himself, the Lands Department stated that the rejection of the applicant's application was maintained on certain grounds which were set out in the letter. In the evidence filed there was a debate whether that letter was an attempt to supply *ex post facto* reasons for the Decision or was simply written in response to further entreaties from the applicant. The Director however confirmed at the hearing below that he would not rely on the additional grounds stated in that letter.[4] It was therefore unnecessary for the Judge to deal with that debate.

C. Application for judicial review

27. Leave for judicial review was granted in March 2021. The applicant's case as presented to the court below was summarised at [3] of the Judgment as follows:

(1) First, the Decision is amenable to judicial review. Among others: (a) there is a public element of sufficient significance, touching on the existence (or otherwise) and rationality of a purported or asserted Government policy relating to the reservation of land for the Small House Policy; and (b) the Decision relates to the special arrangements pertaining to the New Territories land involving the consideration of rights of indigenous inhabitants, which plainly has an impact on the rights or interests of non-indigenous landowners.

(2) In other words, the implementation of the purported policy in specific cases concerns the Government's role as a protector of public interests, as opposed to an exercise of its rights as a private landlord.

(3) Second, the existence of the purported policy is called into question. Even with full evidence filed by both parties, there is no document which unequivocally records the existence and scope of the purported policy. If the purported policy does not exist, the DLO/N's purported reliance on the same in reaching the Decision would be impugnable on the basis of factual error.

(4) Third, the scope and ambit of the purported policy (even if it exists), and its particular application to the facts of the present case, is unlawful, illogical, and *Wednesbury*

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4 Judgment, [1].

unreasonable. In particular, the purported policy would result in the scenario where certain pieces of land in the New Territories (including the Subject Lots) may not be legally utilised or put to any meaningful use at all — a scenario which is plainly contrary to public interests.

(5) Fourth, by mechanically and rigidly applying the purported policy without due consideration of the specific circumstances of this case, DLO/N had impermissibly fettered its discretion and failed to take into account relevant considerations.

(6) Fifth, and in any event, by refusing to process the land exchange application, the Government had frustrated the applicant's substantive and procedural legitimate expectation.

28. The Director opposed the application for judicial review. His position advanced below was broadly as follows:

(1) The Decision, which was essentially a rejection of the request by a lessee for lease modification through an *in-situ* land exchange, was not amenable to judicial review.

(2) The judicial review served no practical purpose because even if the Director was ordered to re-consider the land exchange application, it could make any decision and was not obliged to give any reason.

(3) There was a long-standing internal guideline since at least 1994 that land in either village environs or "V" zones should be excluded from *in-situ* exchange to preserve land for small house development by indigenous villagers under the Small House Policy, although there may be justification for land exchange in exceptional circumstances.

(4) Neither the policy nor the Decision was *Wednesbury* unreasonable. Nor had the Director fettered his discretion. The applicant had no legitimate expectation for land exchange with the Government. There was in any event no clear and unambiguous representation for relevant purposes and no detrimental reliance by the applicant on any representation.

29. On 14 September 2022, the Judge issued the Judgment. On the question of amenability to judicial review, he found in favour of the applicant. He stated that the Director's evidence was hardly sufficient for the court to conclude that the relevant policy exists, though the Judge considered he did not need to make a final determination on this issue. The Judge granted the applicant's application for judicial review on the three substantive grounds referred to in [27(4), (5) and (6)] above.

30. Each of these conclusions is challenged by the Director in this appeal. For its part, the applicant has filed a respondent's notice

contending that the Judge should have ruled that the Director had failed to discharge his burden of proving the existence of the policy and raising additional reasons in support of the Judge's ruling that the Decision was amenable to judicial review.

D. Wholesale adoption of the applicant's submissions

31. One of the grounds of appeal advanced by the Director is that nearly the entire Judgment is constituted by the wholesale adoption of the applicant's written submissions with minor and stylistic revisions but few substantive expressions of the Judge's own (with the exception of [55]–[58], [67] & [88]–[90]). Further, Mr Jin Pao SC, who has appeared on behalf of the Director on this appeal but not below, submits that the Judgment did not deal with a number of important arguments of the Director, except to the extent and in the way they were addressed in the applicant's written submissions.

32. We acknowledge that, as submitted by Mr Rimsky Yuen SC for the applicant by reference to the transcript of the hearing below, it can be seen that the Judge actively engaged with counsel's submissions and demonstrated a keen understanding of the relevant issues at the hearing. But as explained in the recent decisions of this Court in *Wong To Yick Wood Lock Ointment Ltd v Singapore Medicine Co (a firm) & Ors* [2023] HKCA 740; [2023] 3 HKLRD 311 and *Lo Kai Shui v HSBC International Trustee Ltd & Ors* [2023] HKCA 983, where virtually the entire judgment is substantively constituted by the wholesale incorporation of one side's submissions, it may lead a reasonable observer to doubt whether an independent mind has been brought to bear in the judicial function and may also leave the other side with a justified sense of grievance. The Director has in our view a legitimate basis for objection in this case. But analytically this ground has little consequence for this appeal because, with the exception of the dispute over the existence of the policy, the questions arising are issues of law or of application of law to facts on which this Court will in any event come to a view of our own. As regards the existence of the policy, the Judge, without accepting the applicant's contention, concluded that he did not need to make a decision.[5] In any event it is a question of fact based solely on written evidence on which this Court is in as good a position as the Judge to arrive at a determination if necessary. As we indicated to counsel at the hearing, it is therefore on these substantive issues that we shall focus in our judgment.

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5 Judgment, [67].

33. We shall deal with the issues in the following order: (1) whether the policy exists; (2) whether the Decision was amenable to judicial review; (3) whether the Decision was *Wednesbury* unreasonable; (4) whether in coming to the Decision the Director fettered his discretion and failed to take relevant matters into account; and (5) whether the Decision frustrated the applicant's legitimate expectation.

E. Existence of the policy

34. In the judicial review proceedings, the applicant has questioned whether a policy to the effect as that referred to in the DLO/N's letters of 17 May 2019 and the Decision in fact existed.

35. In the affidavit of Ms Chan Oi Kwan Josephine, Senior Estate Surveyor/North 1 of DLO/N, which she was authorised by the Director to make, it was stated that there was a "long-standing internal guideline" (VE Guideline) that non-Small House Policy land exchanges are not normally entertained within defined village environs or "V" zones for recognised New Territories villages, although there may be justification for such a land exchange in exceptional circumstances. An internal circular called Technical Circular No. 620C (Circular 620C) was subsequently disclosed, pursuant to the applicant's request for discovery, as the document setting out the VE Guideline, the relevant part of which reads as follows:

> 3. Following further deliberations at LAM, in connection with land exchanges in village environs, it has now been confirmed that 'V' zones for recognized N.T. villages should also be retained primarily for cases under the Small House Policy. Para. 4(a) of TC 620, as amended in TC 620B, should therefore read:-
>
> > 'Land in either village environs or 'V' zones for recognized N.T. villages should be excluded from this exercise primarily to preserve the land for small house development by indigenous villagers under the Small House Policy. Non Small House Policy land exchanges should therefore not normally be entertained within defined village environs or 'V' zones for recognized N.T. villages. There may however be justification for a non Small House Policy land exchange in exceptional circumstances, in which case a LAM submission will be required.'
>
> 4. Save as the above, TC 620, 620A and 620B remain in force.

36. The evidence also shows that there were statements made on behalf of the Lands Department, recorded in TPB documents such as RNTPC[6] papers and minutes, that under "prevailing policy", land in village environs or "V" zones for recognised New Territories villages should be preserved for Small House development by indigenous villagers and that non-Small House Policy land exchange would not normally be entertained. Examples of such documents dated 2006, 2008, 2011 and 2015 were given in Ms Chan's affidavit. In particular, when an application was made in 2011 by Venton, the applicant's predecessor-in-title, to amend the zoning of the relevant lots it then owned to permit hotel development, DLO/N was recorded to have commented that the site fell mostly within the village environs of Wo Hop Shek Village and that as land within village environs was reserved for small house development, it was unlikely that the Lands Department would be prepared to entertain any application for non-small house land exchange.

37. The VE Guideline had not been published as such though it was suggested on behalf of the Director that it should be well-known to professionals in the industry including CBRE and that the applicant or its professional advisers should also have been aware of Venton's failed application for re-zoning in 2011. In reply, the applicant denied that either it or Marksworth was aware of Venton's re-zoning application and stated that it had yet to ascertain whether Savills had knowledge of it. The applicant said that it was not aware of the VE Guideline, but it was silent on whether CBRE was aware of it or its substance.

38. Leaving aside the question whether the VE Guideline was known to professionals in the industry, it seems to us on the evidence, especially Circular 620C, that such a guideline or policy (the label matters not) did exist. In so concluding we have taken account of the criticisms levelled by the applicant against the Director's evidence. First, Mr Yuen submits that a Senior Estate Surveyor, who signed Circular 620C, was too low a position to have issued a direction that could guide the Government's position on land exchange. But that Circular was a record of what was confirmed following deliberations at a land administration meeting, not a direction issued by the Senior Estate Surveyor himself. It was widely circulated within the Government. It was also consistent with the Lands Department's position as evidenced in the TPB documents referred to above. Secondly, Mr Yuen submits that the Circular referred to "this exercise" but there was no explanation what that was. Thirdly, he points out that the Director had only disclosed Circular 620C, but not 620 and 620B. We do have misgivings about the Director's disclosure, and it seems to us that

6 Rural and New Town Planning Committee.

Technical Circular Nos. 620 and 620B should have been disclosed (with suitable redactions if necessary), which would have provided a more complete picture of the provenance and evolution of the VE Guideline. Nevertheless, having regard to all the evidence available, it seems to us that the existence of the VE Guideline, in terms as set out in Circular 620C, cannot be in real doubt. Fourthly, Mr Yuen says that the wording of Circular 620C was different from the relevant wording of the Director's letters to the applicant. We do not see any significance in this, since the letters did not purport to quote the Circular. No difference in substance has been identified, nor has the applicant complained that the VE Guideline had been misunderstood by the Director.

F. Amenability to judicial review

39. The Director's opposition to the legal challenge was based, first and foremost, on the contention that the Decision is not amenable to judicial review.

40. There is a long line of authorities in Hong Kong, starting with *Hang Wah Chong Investment Co Ltd v Attorney General* [1981] HKLR 336, that show that when the Government as owner or lessor of government land makes a decision whether to grant, modify or terminate a lease or licence, the decision is often one taken in the domain of private law and as such not amenable to judicial review. Lord Millett put it pithily in *Director of Lands v Yin Shuen Enterprises Ltd* (2003) 6 HKCFAR 1 at [19] as follows:

> … in deciding whether to grant or withhold its consent to a modification of the terms of a lease, the Government does not exercise a public law function but acts in its private capacity as landlord: see *Hang Wah Chong Investment Co. Ltd v. Attorney-General* [1981] HKLR 336 (PC). It thus has an absolute right if it chooses to demand a premium, however large, for granting a modification of the terms of the lease, or to withhold its consent altogether, however unreasonably: see *Viscount Tredegar v. Harwood* [1929] AC 72.

41. It is unnecessary for present purposes to go through all the cases. In *Anderson Asphalt Ltd v Secretary for Justice* [2009] 3 HKLRD 215 at [57], A Cheung J summarised the principles as follows:

> [57] Having thus reviewed the relevant case law, it appears to me that:
>
> (a) Only a decision made in the public law domain is amenable to judicial review.

(b) Whilst the nature of the source of power or discretion is by no means irrelevant, it is the nature of the functions that the decision-maker was performing when making the decision under challenge that is of crucial importance.

(c) In the absence of fraud, corruption, bad faith and breach of law, a purely commercial decision, or a decision made in the performance of a purely commercial function, is most likely a private law decision, not amenable to judicial review.

(d) Put another way, the presence of a public element(s) of sufficient significance in the decision-making process could turn an otherwise commercial decision into a public law decision, amenable to judicial review.

(e) What is sufficient is a matter of fact and degree, depending very much on individual cases. No hard and fast rule can be laid down. It is, in a borderline case, very much a matter of overall impression and one of degree: *R v Legal Aid Board, ex p Donn & Co* [1996] 3 All ER 1 , p 11h, cited with approval by Mortimer V-P in *Matteograssi SpA v Airport Authority* at p 219C–D.

(f) In relation to decisions made in land transactions, the same legal principles apply. A complete statement of the *Hang Wah Chong* principle does not merely state that in lease modification cases, the Government's decisions on whether to grant a modification and on the amount of premium to be extracted (if any) are in the nature of private commercial or economic decisions of a private landlord, and therefore not susceptible to judicial review. A complete statement of the principle also says that where the Government official, in making the decision, acts in his role as protector of the public interest, his decision is almost certainly liable to judicial review.

(g) Thus understood, the so-called *Hang Wah Chong* principle is no more than a special application of the general principles on the distinction of public/private law to land matters in Hong Kong.

(h) In land matters, invariably, there are restrictive user covenants in the relevant leases or grants. Plainly, they serve the commercial and economic interests of the Government as landlord. But, equally plainly, they serve, to some extent, a purpose of town

planning, which, no doubt, any responsible government must be responsible for, whether directly or indirectly.

(i) Therefore, there is always a built-in town planning element in land grants and the system of land-holding in Hong Kong, leaving aside any specific town planning legislation.

(j) That, however, is not sufficient in itself to turn a decision made by the Director in relation to modifying a restrictive user covenant in a grant or demanding a premium for the modification into a public law decision, amenable to judicial review, according to the decided cases.

(k) This illustrates that the mere presence of some public element (namely, town planning consideration) may not be sufficient to render the decision a public law decision. The crucial question is whether some additional public element(s) of sufficient weight is/are present in the decision-making process to render the decision made a public one, amenable to judicial review. Put another way, the crucial question is whether the role played or function performed by the Government official is sufficiently public to render the decision a public one, susceptible to judicial review.

(l) Again it depends on the facts, and in a borderline case, it is really a matter of overall impression and degree.

42. ***Anderson Asphalt*** **was a case where several asphalt producers challenged a decision by the Director of Lands to grant short-term waivers for certain owners of agricultural land in Lung Kwu Tan, Tuen Mun to operate a competing asphalt production plant there. The applicants argued that the Director should take into account the Government's planning intentions evinced in a non-statutory administrative plan which included the lots in question within a "countryside conservation area". A Cheung J held that despite that in reaching the decision on the short-term waivers the Director took into account planning considerations and the views of many other Government departments, and was in doing so performing her task for the public benefit, her role and function were essentially private in nature and, both on authorities and on principle, her decision was not amenable to judicial review (see [72] & [78]–[79]). His**

Lordship's judgment was upheld by the Court of Appeal:[7] [2010] 5 HKLRD 490.

43. Seizing upon the sentence referring to the role of "protector of the public interest" in [57(f)] of A Cheung J's judgment, which harks back to the Privy Council's judgment in *Hang Wah Chong* at 341H–I, counsel for the applicant submit that the proper inquiry is the question whether the decision being considered is in the nature of the Government exercising its powers as a protector of public interests, and that if it is, "that alone" will render the decision susceptible to judicial review.

44. We are unable to accept this submission as formulated, which seems to us to take that sentence out of its proper context. That context was emphasised in *Chau Tam Yuet Ching v Director of Lands* [2013] 3 HKLRD 169. There, the Court of Appeal held that the decision of the Director of Lands to terminate the government land licences over two plots of land in Sai Kung was not amenable to judicial review. Lam JA (with whom Stock V-P and McWalters J agreed) said that the mere presence of some public element in the decisions is not sufficient to turn what would otherwise be the Government's decisions as land owner or landlord into public law decisions.[8] Lam JA also said that whilst in *Anderson Asphalt* at [57(f)], A Cheung J referred to the reviewability of the decision of a government official acting in his role as protector of the public interest, that should be understood in the light of what was said at [57(h)–(l)] which emphasised that the mere presence of town planning or other public interest considerations in the decision-making process is not enough to render a decision on land administration *qua* land owner or landlord reviewable. The summary of principles in *Anderson Asphalt* at [57] was approved by the Court of Appeal subject to this qualification.[9]

45. Furthermore, at a high level of abstraction, as A Cheung J also pointed out in *Anderson Asphalt* at [40], it may be said that the Government exists for the benefit of the public, and that all the discretions and powers of the Government should be and are expected to be exercised in the public interest and for the public's benefit, citing *Rank Profit Industries Ltd v Director of Lands* [2007] 2 HKC 168 at [76] and *Ying Ho Co Ltd v Secretary for Justice* (2004) 7 HKCFAR 333 at [102]. But the fact that the Government acts and has to act for the benefit of the public does not mean, in Hong Kong, that all its land administration decisions are reviewable by the courts. On the facts of that case, his Lordship recognised that the fact that the Director was also pursuing public interests and

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7 Yuen and Hartmann JJA and Stone J.
8 [22]–[23].
9 [29]–[31].

benefit by taking planning and other considerations into account was insufficient to bring the case within the domain of public law.

46. In the present case there is no dispute that the source of the powers in question is the Government's status as landowner and landlord. In relation to the five private lots, the *in-situ* exchange would need the Government's agreement, as landlord, to accept a surrender and make a re-grant of the land on terms permitting the building of a wholesale trade facility. For the small piece of government land subject to a short-term tenancy, the exchange would need the Government's decision as landowner to grant the applicant a similar lease.

47. Counsel for the applicant rely on the English Court of Appeal's decision in *R (Weaver) v London and Quadrant Housing Trust (Equality and Human Rights Commission intervening)* [2010] 1 WLR 363 at [73]–[76] and emphasise that it is the nature of the functions being performed, rather than the nature of the source of power, that is determinative. They submit that in Hong Kong the Government regulates land use through various means including the statutory town planning regime and the Buildings Ordinance as well as through lease conditions; that while the sources of power may differ, the public functions performed are similar in nature; that irrespective of the source of power, it remains the Government's responsibility to ensure that limited land resources are used in the best interest of Hong Kong; that the Director controlled the use of the Subject Lots through the lease conditions for the purpose of land use planning and, in particular, for the preservation of land for the building of small houses; and that the Director's decision was made in performance of a public function or purpose and was as such susceptible to judicial review.

48. We agree that the nature of the functions being performed is an important consideration (see *Anderson Asphalt*, [57(b)]) but we are unable to accept the gist of the applicant's submission. It is true that to some extent the Government's control over land through its powers as landlord based on lease conditions has from time to time been used to achieve what may generally be called planning purposes. That is a peculiar feature of land administration in Hong Kong, as commented upon by Hunter J in *Shun Shing Hing Investment Co Ltd v Attorney General* [1983] HKLR 432 at 434A:

> A peculiar, if not unique, feature of life in Hong Kong, is that the Government is the sole ground landlord. It is the provider of land and can combine the functions of landlord and planning authority. Thus Hong Kong Government can do what many planning officers in the U.K. would give their eye-teeth to be able to do. They can charge developers a premium for the benefit of the permission they are giving them.

49. But this has never been considered enough in itself to make the Government's decisions as landlord reviewable in public law. In *Anderson Asphalt*, at first instance, A Cheung J said (at [62]–[68]) it was "too late" to argue that the performance of planning functions brought the Director's land decisions into the realm of public law. On appeal, Yuen JA said at [39]:

> In my view, the fact that there may well be an element of planning in a general sense in Government's decisions as landlord regarding the use of land does not turn the acts of the Director of Lands in granting [short-term waivers] from those of a private landlord into ones within the public domain. As Tang VP noted in *Rank Profit*, an enlightened landlord would incorporate an element of planning into leases in order to preserve the value of his estate. All the more so where the landlord is the Government and therefore acting ultimately in the public interest (it being well-established that that ultimate purpose does not turn *all* of Government's acts, including private contracts, into acts within the public domain: *Ying Ho*, para.102).

50. The function that was performed by the public body in *Weaver* is a very different one from the function performed by the Director of Lands generally in land matters. There the body was a registered social landlord under the (UK) Housing Act 1996, with the public function of providing housing at less than the market rate to those in need. The act of termination of the tenancy, which was the subject of challenge in that case, was therefore part and parcel of the determination of who should be allowed to receive the benefit of publicly-funded subsidised housing. It was held that such termination was not a "private act" within the meaning of s.6(5) of the (UK) Human Rights Act 1998. In Hong Kong, an equivalent decision to terminate the tenancy of a public housing estate unit would similarly be treated as a decision on the allocation of social welfare, and as such amenable to judicial review: see eg *Chan Chiu Wah v Hong Kong Housing Authority* [2011] 3 HKLRD 259. It may be noted that in *Weaver* itself (at [81]), it was said that if the tenants were paying market rents in the normal way, then it was not obvious they would be in any different position to tenants in the private sector.

51. As to the effect of the VE Guideline on the question of amenability, the first point to note is that the fact that the Government has a policy to guide its decisions in relation to particular land matters and that the decision in question has been made pursuant to that policy does not in itself mean that there is a sufficient public element to move the decision into the public law domain. In *Rank Profit Industries Ltd v Director of Lands* [2009] 1 HKLRD 177, it was argued that the Government had improperly

imposed additional conditions for the modification of a lease, contrary to the Government's published policies and procedures for the charging of premiums for modification. It was said that this should be subject to the supervisory jurisdiction of the court. The Court of Appeal rejected this submission. Tang V-P, with whom Le Pichon JA and Sakhrani J agreed, said:

> For good management, one might expect an owner of a large estate to have policies regarding modification of leases. One might also expect such an owner to make its policy known to its tenants, if only to reduce the number of meaningless applications. So in having a policy and publishing it, the government was doing no more than what one would expect a private landlord to do. Furthermore, it is probable that the government also has policies regarding circumstances under which modification of lease might be granted. Thus, if Mr Neoh is right, one might also argue that the government's decision whether or not to grant modification might also be reviewable. But the authorities which are binding on us say such decisions are not reviewable.

52. More recently, in *Wong Ho Tong v Director of Lands* [2018] 6 HKC 501, the Government decided to revoke the government land licences in respect of certain land in Yuen Long relating to certain structures previously tolerated under the scheme for squatter control. Although toleration of squatter structures was regulated by the Government's squatter control policy, the Court of Appeal said (at [45]) that they were "not persuaded that the origin of the policy and the purpose it served give rise to a sufficiently strong public element in the administration of such a scheme, including decisions to cancel the registration of SSTs, to render the same amenable to judicial review." See also *Tang Hoi Sang v Director of Lands* [2017] 4 HKC 230. The existence of a policy itself does not therefore necessarily provide a sufficient public element.

53. The applicant submits that the Decision in this case served the purpose of preserving the Subject Lots for the building of small houses, and refers to the observation in *Kwok Cheuk Kin v Director of Lands (No 2)* at [17] that "[t]he availability of Crown land for sale to indigenous villagers has always been an essential adjunct to the Small House Policy." It is submitted that the Decision was made for the implementation of the Small House Policy, which is connected with the Government's obligations under art.40 of the Basic Law with respect to the lawful traditional rights and interests of the indigenous inhabitants of the New Territories. Reliance is placed on the case of *Koon Ping Leung v Director of Lands* [2012] 2 HKC 329.

54. The present case is, in our view, quite different from *Koon Ping Leung*. In that case, an indigenous villager of a recognised village made an application to the Lands Department for building a small house. The Department rejected that part of the application which asked for the grant of a plot of government land by way of private treaty sale to enable the villager to build a small house, but informed him that he could still apply for permission to build a small house on a piece of private land owned by him. The Department refused the private treaty grant because the applicant did not meet the residence requirements for such a grant. Where a villager wished to apply for the construction of a small house on government land through a private treaty grant, the Small House Policy required him to be either living in Hong Kong or to satisfy the Government that he intended to return and reside in his village. The villager applied for judicial review to challenge the legality of the residence requirement under the Small House Policy as well as the application of that requirement in his case. Holding that the decision was amenable to judicial review, Lam J said:

> [17] Here I am concerned with the decision of the DLO on the grant of Government land by way of private treaty grant under the Small House Policy. As far as this particular aspect is concerned, it is my view that the decision has sufficient public character to render it amenable to judicial review: the DLO carried out a public function in making decision under a published policy of the Government dealing with the housing needs of the indigenous villagers of the New Territories.[10] Though the source of power is different, the Small House Policy intends to meet similar needs of members of the public as the public housing scheme. Admittedly, the solutions offered are different: an indigenous villager who obtains a private treaty grant can build on a piece of Government land at his own costs a small house for his residence whilst a public housing tenant only gets a tenancy in a public housing estate. But that does not detract from the public character of the function exercised by the DLO in this regard. …
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> [19] A fundamental difference between the type of decision under discussion and a decision with respect to modification of Government Lease is that in the latter case there is a contractual context governing the matter and the court has to ask whether there is any scope for a further fetter by way of judicial review over the

10 See para.29.027 of *Chan & Lim, Law of the Hong Kong Constitution*

> contractual right of the Government as landlord. The same cannot be said in respect of a decision on an application for Government land under the Small House Policy. The concern of the Court of Appeal at para.60 in *Anderson Asphalt* [11] would not arise in the present context. There is no contract between the Applicant and the Government and if the matter is not amenable to judicial review, it is difficult to see what private law remedies he can seek.
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> [20] [Counsel for the Director] submitted that leaving the Applicant with no remedy is neither here nor there because the Government, in par with a private landlord, was not obliged to grant any benefit to the Applicant. I cannot accept this submission. Bearing in mind the history leading to the implementation of the Small House Policy[12] and the function that it intended to serve, there is a strong public element in its due administration which distinguishes the role of the Government from that of a private landlord. (original footnotes)

55. It can be seen that the Lands Department's decision in *Koon Ping Leung* was a direct application of the Small House Policy to the villager in that case, and a direct determination of whether that villager should be given the benefit of a plot of government land under that policy for building a small house. The grant of government land pursuant to that policy, whether by exchange or by private treaty, is at a reduced premium: *Kwok Cheuk Kin v Director of Lands (No 2)* at [3], [21] & [22]. At one level, therefore, what the Lands Department did in that case was analogous to the function performed by the Housing Authority in deciding whether to grant or to terminate a tenancy for a public housing unit. Furthermore, the critical feature was the question of the entitlement of the villager to a land grant under the Small House Policy. As the Court of Final Appeal confirmed in *Kwok Cheuk Kin v Director of Lands (No 2)* at [39], the villager has a "right", which is protected by art.40 of the Basic Law, to have his application dealt with in accordance with the Government's statements of current policy, subject to the lawfully exercised discretion of the Lands Department which is not unlimited but governed by the principle of law that

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11 In that paragraph, Yuen JA said, "To place [the Director's] decisions under the scrutiny of judicial review would be to place the Government at a disadvantage over players in the private sector who are able to react to demands for land with far greater speed and flexibility."

12 See the discussion in *Chan & Lim, Law of the Hong Kong Constitution*, Ch.29. In addition, the memoir of a retired senior civil servant contained interesting background information about the introduction of the Small House Policy: see *Denis Bray, Hong Kong Metamorphosis*, pp.163–167.

requires such statements to be honoured unless there is good reason not to do so.

56. Likewise the well-known cases of *The Hong Kong and China Gas Co Ltd v Director of Lands* [1997] HKLRD 1291[13] and *Kam Lan Koon v Secretary for Justice* [1999] 3 HKC 591 are both decisions directly applying the Government's policy as regards the extension of "leases for special purpose" in the New Territories promulgated in 1987 against the background of all leases in the New Territories being due to expire before 30 June 1997. In both cases the Government refused to extend the lease even though the published policy was that leases for special purposes "will be extended unless the land is required for a public purpose or is no longer being used for the purpose for which it was originally granted". In both cases the court held the decisions to be amenable to judicial review. In *Rank Profit Industries Ltd v Director of Lands* (FAMV 7/2009, [2009] HKEC 1021, 25 June 2009) at [11], Ribeiro PJ said of these two cases:

> We do not consider it necessary to express a view in these Reasons as to whether those two cases were or were not correctly decided. It is however important to note that they were both cases involving special purpose leases, that is, leases granted by the government for defined special purposes subject to a permanent prohibition against assignment. Both cases arose out of the passage of the New Territories Leases (Extension) Ordinance and the government's stated policy of considering extensions of such special purpose leases on a case-by-case basis, with the decision whether to extend being dependent on investigation into whether the land was no longer being used for its original purpose or unlikely to be so used for the full period or whether the land was required for a different public purpose. The decisions relating to the grant and extension of special purpose leases in the aforesaid context were therefore strongly coloured by public purposes. (footnotes omitted)

57. In contrast, the Decision in the present case is not one made by way of application or implementation of the Small House Policy. It was a decision made squarely in a "contractual context" where the Government, as landlord, had contractual rights under the existing leases to prevent the land from being developed and used in any manner inconsistent with the user and building restrictions, and the concomitant freedom to decide whether to release those rights. In relation to the government land the subject of the short-term tenancy, there was no right or expectation on the part

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13 The decision of Keith J at first instance was upheld by the Court of Appeal (CACV 10/1998, [2006] HKEC 444, 22 May 1998) without discussion of this point.

of the applicant, arising from any contract or policy, that it would be granted the land on similar terms.

58. *Koon Ping Leung* may be contrasted with *Hung Hing v Director of Lands* [2015] 5 HKLRD 516. There, a number of villagers had applied to the Lands Department for approval for the erection of small houses on plots of land owned by them. There was no vehicular access to their land, which was separated from the nearby main roads by certain lots. Those lots had been resumed by the Government over a decade ago as part of a village expansion plan. With a view to providing vehicular access to the small houses to be built on their land, the villagers applied to the Lands Department for the purchase of part or all of the resumed land. The proposed purchase was said to be in furtherance of the Small House Policy and the related policy on the provision of emergency vehicle access which was needed if a house was situated within a cluster of 10 or more houses. When the Lands Department rejected the request, the villagers sought to challenge the refusal by way of judicial review. On the question of amenability to judicial review, Cheung CJHC (with whom Cheung and Kwan JJA agreed) said:

> [17] Typically, whether the government sells a piece of land or makes a land grant to an individual is purely a private law matter not amenable to judicial review. In a place like Hong Kong where land is a scarce resource and all land is State property, this is a principle of great importance, for otherwise there would be no end to litigation involving government's use or disposal of land as landowner or landlord which, for obvious reasons, is not conducive to good governance. …
>
> [19] On the footing of *Koon Ping Leung*, and bearing in mind that we are only at the leave stage, I am prepared to proceed on the basis that some decisions made by the District Lands Officer in the implementation of the Small House Policy may be amenable to judicial review.
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> [20] However, it does not follow that each and every matter concerned or associated with the policy or its implementation is amenable to judicial review.

59. His Lordship went on to hold that the Small House Policy does not include any assurance that the small house will have vehicular access, so that the proposed purchase of government land in that case did not engage that policy. At [29]–[30], Cheung CJHC returned to the question of amenability, stating:

> [29] In my view, the law is quite clear on what is and what is not amenable by way of judicial review when it comes

to land leases and related matters in Hong Kong. As mentioned, a whole line of cases have long established that generally speaking, land leases and related matters, and the land policies behind, are exclusively matters for the government as landowner or landlord, as confirmed by article 7 of the Basic Law. It is for the government to formulate its own land policies. The court has no business with it for very good reasons. The sort of policy that one is concerned with here is one that is dependent on social, economic as well as political considerations, which the court is neither constitutionally positioned nor institutionally equipped to deal with. Take the present case as an example. The land sought to be acquired by the applicants is in fact land earmarked by the government for a village expansion project involving the making of land grants to indigenous villagers to erect small houses. Acceding to the applicants' request for purchase of land would mean less land available for the building of small houses in the expanded village, to the detriment of those who may be interested in applying for a land grant. As has been demonstrated by *Koon Ping Leung*, a decision to make or refuse such a land grant is amenable to judicial review. Does it mean, therefore, that potential or actual applicants for land grants of the resumed lots should be allowed to intervene in the present proceedings if leave were to be granted? How is the court going to decide what sort of policy the government should have or what sort of policy is reasonable or not irrational in the public law sense when faced with competing claims to scarce resources? As the judge put it below, whilst the present case is in relation to vehicular access, a need considered by the applicants and perhaps many others to be reasonably necessary for a substantial development, what about, for instance, the need for a medical clinic or facilities for young children or the elderly given the size of the residential development? And can someone come forward and say that more land in the vicinity should be resumed in order to cater for that need in furtherance of the policy?

[30] All these hypothetical questions, and it is not difficult to think of many others, simply demonstrate that there is wisdom in holding, as the cases have consistently decided, that as regards land leases and related matters, the government's decisions as landowner or landlord are generally speaking not amenable to judicial review.

60. Although the factual context in *Hung Hing* is different from the present case, much of what was said there is relevant for answering the question of amenability here. The Decision was made pursuant to the VE Guideline which serves to preserve land within village environs for small house development. But as pointed out in *Hung Hing*, it does not follow from *Koon Ping Leung* that any matter concerned or associated with the Small House Policy or its implementation is amenable to judicial review. The Decision concerns what can be done on the Subject Lots. In reaching the Decision the Government was acting no differently from a private landlord of a large estate, in deciding what should be the long-term user and building restrictions applicable in defined parts of the land, thereby laying out the planned potential usage of land in the region. Whether the Government refused to relax the restrictions because it considered the Subject Lots should be kept potentially available for small house development or because it had a potential plan for building primary schools there in the longer term does not alter the fact that these are the kinds of planning considerations that, on the authorities, do not inject a sufficient public element into the Decision.

61. *Tang Chi Fai v Director of Lands* [2020] HKCA 339 is illustrative of the principle in that regard. In that case, certain land in Sha Tau Kok had been occupied by the applicant's family since 1965 under various licences or short-term tenancies, first as a bone crushing factory, and subsequently for lard processing. In 2017, the Government considered the land suitable for allocation to the Drainage Services Department for use as a site office or for storage purposes in relation to its sewage treatment works at Shek Wu Hui. Accordingly the Director decided to issue a notice to quit to the applicant (who had been occupying the land after the death of his mother, the tenant under the short-term tenancy, since 2011). The applicant sought leave to apply for judicial review, contending that the decision was irrational because, *inter alia*, the sewage treatment works at Shek Wu Hui were situated far from the land and there were other more suitable sites for storage of related materials for the project. At first instance Chow J refused leave on the ground that the decision was not amenable to judicial review. The judge also stated that the Director was entitled to recover the land for use by another Government department, and that whether the land was suitable for that department's purposes, and whether there were other more suitable sites for those purposes, were matters for the Government (and not the court). The Court of Appeal, in refusing leave to appeal,[14] agreed with Chow J's decision on the

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14 Lam V-P and Barma JA. The decision was an application out of time for leave to appeal from Chow J's decision refusing to extend time for the application for leave to apply for judicial review. Although the Court of Final Appeal subsequently held in *H v Director of*

non-amenability of the Director's decision to judicial review. The intended use of the land for a public purpose was not sufficient to turn the Government's decision to terminate the applicant's occupation of government land into a decision in the domain of public law.

62. In fact a decision by the Government to recover occupied land or not to grant new land will, we suspect, not infrequently be motivated by a desire to use or preserve the land for the Government's purposes (though the reasons for the decision may not be disclosed at all). There has not been any case in which this has been held to infuse a decision with sufficient public character so as to make it judicially reviewable. So to hold would indeed bring into play the intractable difficulties referred to by Cheung CJHC in *Hung Hing* at [29] (quoted above), and completely undermine the certainty in this area of administrative law the importance of which was emphasised by both Hartmann J at first instance[15] and the Court of Appeal[16] in *Rank Profit*.

63. For the reasons explained above, we take the view that the Decision does not fall into the domain of public law and is not amenable to judicial review. For completeness, though not strictly necessary, we shall consider the substantive grounds for judicial review below.

G. Whether the Decision was *Wednesbury* unreasonable

64. The applicant's argument on *Wednesbury* unreasonableness broadly runs as follows. Since approval for building a small house under the Small House Policy will only be given if the land falls within a "V" zone under the relevant statutory plan or if specific planning permission is given by TPB, a piece of land within the village environs of a recognised village cannot be used for building small houses if these conditions are not satisfied. This may mean that such a piece of land cannot be utilised at all where the use permitted under the government lease is not allowed under the applicable statutory plan (eg where it is zoned for "I" use), since the VE Guideline will prevent modification of the lease terms. This will inhibit the optimal use of land, contrary to the avowed objectives of the Government.

65. The applicant submits that the unreasonableness of the VE Guideline is highlighted in its application to the Subject Lots in this case. The Subject Lots are owned by the applicant. Under the Small House Policy, the Government will not appropriate private land

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Immigration (2020) 23 HKCFAR 248 that no leave to appeal was required in such a situation, this does not affect the point under consideration.

15 [2007] 2 HKC 168 at [62].

16 [2009] 1 HKLRD 177 at [38].

owned by others for indigenous villagers to build small houses. The major part of the Subject Lots was zoned for "G/IC" use and cannot be used for building small houses. An application to TPB for specific planning permission for building small houses does not fall within a category that will be given sympathetic or favourable consideration.

66. On behalf of the Director, counsel submit that there is justification for the VE Guideline, whose purpose is to facilitate the implementation of the Small House Policy, so that indigenous villagers may apply to construct small houses within their village environs under that policy. It seeks to ensure that land within village environs will not be made permanently unavailable for the construction of small houses through lease modification. As for its effect on the utilisation of land in the New Territories, the VE Guideline expressly allows for exceptional cases, where land exchanges can be considered and approved even though the land is located within village environs. It is not uncommon that the use permitted under the terms of the Government lease is not consistent with the use permitted under the applicable statutory plan, and any purchaser must be taken to be fully aware of these restrictions when he acquires the land. In any event, the owner may choose to: (1) apply to the Lands Department for lease modification; (2) apply to TPB for rezoning or specific planning permission (if so provided for under Column 2); (3) apply for short-term waivers from the Lands Department, as the applicant's predecessors-in-title did; or (4) continue with the existing use of the land, since that is permitted under the OZP.

67. As for the application of the VE Guideline to the Subject Lots, the Director points out that the estimated demand for small houses within Wo Hop Shek Village in the 10 years from 2017 was 160 indigenous villagers, and that as at November 2019, there were a total of 51 outstanding small house applications for Wo Hop Shek Village. The building land required for the 51 and 160 small houses would amount to 3317 m^2 and 10405 m^2 respectively (though the extent of overlap between these figures is unclear), leaving aside the agricultural land surrounding each small house which would typically be sought as part of the application. It is submitted that there is insufficient land in the village environs to meet such demand. Under the applicable OZP, the bulk of the Subject Lots is zoned "G/IC", under which "house" is a Column 2 use, so that small houses may be built there provided specific planning permission is obtained on application to the TPB. As to the fact that the Subject Lots are owned by the applicant now, the Director submits that the possibility that the indigenous villagers may try to purchase land in the village environs to build small houses cannot be discounted, and that if the proposed land exchange was granted, those lots would

permanently be excluded from land available for building small houses.

68. In our view, there is force in the submissions made on behalf of the Director. It is important to bear in mind that generally a government lessee has no right to a land exchange, and a purchaser of land can have no more than an expectancy that the lease restrictions may be relaxed by the Government after his purchase. That expectancy may in some cases be significantly diminished by the circumstances or by relevant practices and policies of the Government. The fact that a purchaser finds himself unable to obtain a land exchange or lease modification does not necessarily mean that those practices and policies are irrational.

69. The VE Guideline serves an intelligible purpose in relation to the Small House Policy which has been a long-standing policy in the New Territories. The evidence shows a need for land for small house purposes in the village environs in this case. The applicant's submission that an internal memorandum of July 2015 shows that the DLO/N advised that there was sufficient land within the "V" zone to meet the current outstanding small house applications is based on a misreading of that memorandum. In fact the DLO/N, apparently disagreeing with the Planning Department's suggestion that there was sufficient land to meet the outstanding applications, pointed out that the 10-year demand forecast provided by the villagers' representatives should be taken into account. The logic of the VE Guideline — to refrain from conducting *in-situ* land exchanges save in exceptional cases, so as to prevent private land in village environs from being made permanently unavailable for building small houses — is internally coherent. As to any conflict between the OZP and the lease conditions, it can be dealt with by one or more of the routes suggested by Mr Pao. The Planning Department apparently takes the view that sympathetic consideration may be given to an application for planning permission for a small house to be built if not less than 50% of the footprint of the proposed house falls within the village environs of a recognised village and there is a general shortage of land in meeting the demand for small house development in the "V" zone of the village.

70. It needs to be recalled that in judicial review, the court is not concerned with the merits, wisdom or desirability of a policy or an administrative decision. The threshold of an unreasonableness challenge is necessarily high, for it is not for the court to usurp the role of the administrative decision-maker — in this case the powers and responsibilities over land and natural resources in Hong Kong entrusted under art.7 of the Basic Law to the Government. *Wednesbury* unreasonableness, or irrationality as it is also called, refers to a decision "so unreasonable that no reasonable authority could ever have come to it" (see *Chan Yan Cheong v Research*

Grants Council of University Grants Committee [2023] 1 HKLRD 808 at [69], applying *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1948] 1 KB 223 at 230), a decision "so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it" (see *Durga Maya Gurung v Director of Immigration* (CACV 1077/2001, [2002] HKEC 477, 19 April 2002) at [60], applying *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 at 410). For the reasons given above, we are not satisfied that either the VE Guideline itself or the Decision in this case can be so described.

H. Whether the Director fettered his discretion

71. There is no dispute on the principle against placing an unlawful fetter on a discretion. It was put in these terms by A Cheung J in *Wise Union Industries Ltd v Hong Kong Science and Technology Parks Corp* [2009] 5 HKLRD 620 at [31]:

> It is legitimate for a decision-maker with whom a discretion has been entrusted to adopt a policy to guide his exercise and implementation of the discretion. This is particularly so if the discretion involved is a wide one. Such a course would promote, amongst other things, consistency and efficiency. However, a decision-maker must not allow his policy to 'fetter' his decision. In other words, he must not apply his policy blindly and rigidly. The policy must not preclude the decision-maker from departing from it or from taking into account circumstances and merits of the particular case in question. Put another way, the decision-maker must always be 'willing to listen to anyone with something new to say': *British Oxygen Co Ltd v Minister of Technology* [1971] AC 610, 625E. The policy adopted must fairly admit of exceptions to it. There has to be 'an exceptions procedure worth the name': *R v London Borough of Bexley, ex parte Jones* [1995] ELR 42, *per* Leggatt LJ.

72. The applicant, relying on *Durga Maya Gurung v Director of Immigration*, *supra*, submits that the burden rests on the respondent to adduce convincing evidence to show that exceptions did exist and that there had been proper operation of the exceptions. We do not think that the applicant can derive such a general proposition out of that case. It should be noted that the parts relied on by the applicant are from a dissenting judgment, in a case unlike the present where the policy or guideline is set out expressly in a circular and, as formulated, expressly allows for exceptions. What Le Pichon JA actually said (at [25]) was that "where the existence of an exception to a general policy is asserted, it should be made

good by sufficient evidence" — an unexceptionable statement consistent with the principle that he who asserts must prove. Depending on the facts of the particular case, there can of course arise an inference, perhaps even a strong inference, that the policy in question has been applied over-rigidly, and correspondingly cogent evidence will be needed if that impression is to be dispelled. But it would be a mistake to extrapolate a general requirement from the particular burden in individual cases.

73. In the present case the applicant contends that the Director unlawfully fettered his own discretion by blindly and mechanically applying the VE Guideline to the Subject Lots. It is said that by fettering his discretion, the Director (1) failed to take into account that neither the DLO/N nor any villagers' representatives objected to the rezoning of the bulk of the Subject Lots from "I" to "G/IC" on the ground that the land should be preserved for small house development; (2) failed to take into account that refusing the applicant's land exchange application would mean that the bulk of the Subject Lots could not be put to any meaningful use; and (3) failed to consider the overall picture from a holistic perspective, including whether there was a real demand for small houses in the area, whether there were any legitimate competing demands for the land and the benefits that they would bring about, and how land resources should be used in the overall interest of Hong Kong.[17]

74. On behalf of the Director, Mr Pao submits that the VE Guideline expressly contains a built-in provision for the consideration of the merits of any individual case as an exception. The VE Guideline was mentioned to the applicant in correspondence not as a rigid rule but as a guide as to what would "normally" be done. The applicant recognised the possibility of an exception and made representations accordingly. The application was in the end rejected because it was not considered an exceptional case.

75. We agree with Mr Pao's submissions. Circular 620C expressly states that there may be justification for a land exchange (not for building small houses) "in exceptional circumstances". Plainly the VE Guideline as formulated does not preclude the Director from departing from the general policy or from taking into account circumstances relevant to the particular case.

76. In both of Estate Surveyor Mr Kam's letters to the applicant dated 17 May and 15 August 2019 respectively, he stated that under the existing policy, non-small house land exchange application would not "normally" be entertained within defined village environs. In the latter letter he stated that the proposal as set out in the

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17 In the Form 86, it was said that the DLO/N had also failed to take into account that the Small House Policy had been held to be unconstitutional and unlawful. This was superseded by the decision of the Court of Final Appeal in *Kwok Cheuk Kin v Director of Lands (No 2)*.

application might not be feasible and that the applicant might wish to review its proposal for further consideration by the District Lands Office. The Decision, signed by District Lands Officer/North Ms Pang, also stated that non-small house developments within village environs would not "normally" be entertained, and that the application was rejected after consulting her headquarters and careful reconsideration of the justification put forward by the applicant.

77. It seems to us that, on its part, the applicant recognised the possibility of an exception to what would normally happen under the existing policy. The applicant's letters to the Lands Department prayed in aid special justifications in its case. Thus CBRE's letter dated 28 May 2019 stated the application to be "a distinct case from typical land exchange applications" with "a strong justification for a special consideration". The applicant's letter to the Assistant Director dated 24 September 2019 defended the application as "a unique case" which "should be viewed and treated differently by taking into consideration ... the special circumstances". Its letter to the Assistant Director dated 11 October 2019 asked for a meeting so that the applicant could discuss and explain its application and supplement information to facilitate the processing of the application. In fact, even after the Decision, CBRE wrote on 1 April 2020 asking the Lands Department to "reconsider the special merits of our case as presented in our previous correspondences".

78. On the contemporaneous evidence itself, it seems to us clear that the applicant had sought to put forward special justifications for its land exchange application. The Lands Department was prepared to and did receive written and oral representations from the applicant. The matter was considered at a high level within the Lands Department and found not to justify exceptional treatment.

79. As regards the merits of the application for land exchange, it was pointed out in the Lands Department's affirmation evidence that the relevant planning intention as stated in the Schedule of Uses for "G/IC" in the OZP was as follows:

> This zone is intended primarily for the provision of Government, institution or community facilities serving the needs of the local residents and/or a wider district, region or the territory. It is also intended to provide land for uses directly related to or in support of the work of the Government, organisations providing social services to meet community needs, and other institutional establishments.

It was also pointed out that para.7.8.3 of the Explanatory Statement of the OZP states that planned developments included primary schools in Planning Area 48. The Lands Department's view was that the intention behind the "G/IC" zoning was to reserve the

Subject Lots for facilities serving the local community, in particular, primary schools. The wholesale trade facility was intended to be for trading vehicles. On this basis the Lands Department's view was that the land exchange application was essentially a commercial project to further the applicant's own commercial interests, with no particular benefit to the local community, and was not in line with the long-standing plans for development of the area.

80. The applicant disagrees with the suggestion that its proposed development was not in line with the land policy or rationale behind the "G/IC" zoning. It is not for the court to adjudicate on this dispute. For present purposes the crucial point is that the Lands Department engaged with the applicant in relation to the special justifications it put forward but in the end did not approve the land exchange. On the evidence we do not consider that the applicant has made out a case that the VE Guideline had been applied by the Lands Department "blindly and mechanically" without regard to the possibility of an exception.

81. In light of our rejection of the fettering point, the allegation that by blindly following his policy, the Director failed to take into account relevant factors, also falls away. In any event, as regards the three matters referred to in [73] above, the Director has in the evidence responded as follows:

(1) As regards the absence of objection by DLO/N and villagers' representatives to the rezoning, DLO/N actually did provide comments to the Planning Department on several occasions in 2015 prior to the relevant RNTPC Paper to suggest that the "V" zone should tally with the village environs of the two villages as far as possible, having regard to the existing and forecast demand for small houses. As to the villagers, since the building of houses is not a permitted use under "I" but is a Column 2 use under "G/IC" (ie a use that may be permitted on application to the TPB), the rezoning actually improved the position of any villager who might wish to build a small house within the Subject Lots.

(2) As to the allegation that rejection of the proposed land exchange would mean that the majority of the Subject Lots could not be put to any meaningful use, this has been addressed in the discussions on unreasonableness above.

(3) As to the alleged failure to consider the overall picture from a holistic perspective, the fact is that the Lands Department disagreed with the applicant on the merits of its application and did not consider it to be an exceptional case. There is no basis to suggest that the Lands Department failed to consider relevant factors in this regard.

I. Whether the applicant's legitimate expectation was frustrated

82. The applicant contends that by the decision to rezone the majority of the Subject Lots from "I" to "G/IC" use, the Government had implicitly but distinctly promised the applicant and the general public that (1) the Government's planning intention in respect of the Subject Lots would accord with the OZP, ie the majority of the Subject Lots would be reserved for "G/IC" use rather than for small house development; and (2) any deviation from such planning intention would require consultation of those affected or potentially affected. It is submitted that the Government's planning intention as manifested in OZP/21 and OZP/22 distinctly and substantially affected the applicant's interest, and the applicant was reasonably entitled to rely on its continuance, so that it ought to be consulted before the Government changed its planning intention in respect of the Subject Lots. It is further submitted that the applicant had relied on the Government's representation in that after the rezoning (1) the applicant gave up its original intended plan to develop an automobile dealership centre on the Subject Lots, (2) it instead explored the option of erecting a wholesale trade facility there and in the process incurred substantial expenses, and (3) it forbore from mounting a public law challenge to the rezoning process.

83. In our view this ground fails for the short reason that no representation can be read into a zoning decision by the TPB that the Lands Department would consider applications for lease modification or land exchange in accordance with the zoning or planning intentions under the OZP. The town planning regime is separate and distinct from the leasehold system of land ownership. The TPB is a statutory body set up under the Town Planning Ordinance whereas the Director heading the Lands Department represents the Government in its dealings with land as owner or landlord. Statutory plans can be amended from time to time, but conditions of government leases are permanent in the sense that they cannot be unilaterally changed against the will of either party. The point was indeed common ground in *Anderson Asphalt*, where it was accepted that a statutory plan could not regulate how the Government's contractual powers as landlord should be exercised. But because the land in that case was not regulated by any *statutory plan* and there had instead been an *administrative plan* for the area prepared by the Government, it was argued that this distinguished the *Hang Wah Chong* line of cases. Rejecting that argument, Yuen JA said at [33]:

> … since Government's contractual powers of modification are not reduced by statutory plans binding in law, it would be invidious for the same contractual powers to be reduced by its own plans

> which it was at liberty to alter. As was observed by Deputy Judge Cruden in *Mexx Consolidated (Far East) Ltd v Attorney General* [1987] HKLR 1210 in an *obiter* passage (at p.1213), 'no matter what approval the Town Planning Board may have given under its statutory powers, that would not have … reduced the Crown's contractual powers under the Crown lease. They are two quite distinct concepts'. If the Applicants are right, one would have the anomalous situation where Government could demand a premium for modification (however large) or refuse consent (however unreasonable — see *Yin Shuen* para.19), even though the land use is regulated by statutory zoning plans binding on all as a matter of law, and yet find its hands tied by plans which it had itself made and which it could alter at any time. That would be illogical.

84. The applicant relies in addition on s.13 of the Town Planning Ordinance (Cap.131) which provides:

> Approved plans and approved parts of partly approved plans must be used by all public officers and bodies as standards for guidance in the exercise of any powers vested in them.

85. In practice in dealing with applications for lease modification the Government pays attention to the relevant approved plan in that it would not even entertain an application unless the intended development accords with the use permitted under the approved plan: see *Anderson Asphalt* (CFI) at [66]. Counsel are unable however to cite any authority that suggests that an applicable approved plan would give rise to an expectation in favour of approval of an application for lease modification. That is not surprising, for if accepted that submission would entirely subvert the principle established by all the authorities on the Government's discretion in relation to lease modification.

86. Since the expectations put forward are not established, it is unnecessary to discuss whether detrimental reliance is necessary as a matter of law or whether there was detrimental reliance as a matter of fact in this case.

J. Conclusion

87. For the above reasons, the application for judicial review fails on the amenability issue. Had the Decision been amenable to judicial review, we would nonetheless have rejected the application since the substantive grounds for review are in our view not made out. Accordingly, we allow the appeal, set aside the Judge's orders, and substitute an order that the originating summons be dismissed.

88. **There will be an order that the Director do have the costs here and below with a certificate for two counsel.**

Reported by Emily Ting