

**President's ruling on
Forests and Countryside (Amendment) Bill 2006
proposed by Hon CHOY So-yuk, JP**

Hon CHOY So-yuk submitted to me on 9 June 2006 the Forests and Countryside (Amendment) Bill 2006 (the Bill) which she intends to introduce into the Legislative Council (LegCo). I am required to rule whether it relates to the restrictions prescribed in Rule 51(3) and (4) of the Rules of Procedure. Before making a ruling on the Bill, I had invited the Secretary for the Environment, Transport and Works (SETW) to offer her comments on the Bill, which were sent to me on 10 August 2006. I had also invited Hon CHOY So-yuk to offer her response to SETW's comments, which was sent to me on 27 November 2006. In addition, I had sought the advice of Counsel to the Legislature in this regard.

Rule 51(3) and (4) of the Rules of Procedure

2. Rule 51(3) and (4) reads as follows:

“51(3) Members may not either individually or jointly introduce a bill which, in the opinion of the President, relates to public expenditure or political structure or the operation of the Government.”

“51(4) In the case of a bill which, in the opinion of the President, relates to Government policies, the notice shall be accompanied by the written consent of the Chief Executive in respect of the bill.”

Purpose of the Bill

3. Hon CHOY So-yuk's Bill seeks to amend the Forests and Countryside Ordinance (Cap. 96) to provide for the protection of old trees (being trees of or over one hundred years old which are of preservative value), and of valuable trees (being large trees, trees of rare species, trees of historical, cultural or memorial significance, trees of special ecological or scientific research value and certain other specified trees which are of preservative value).

4. Under the Bill, the Director of Agriculture, Fisheries and Conservation (DAFC) shall prepare an old and valuable tree register. DAFC may declare a tree protection zone¹, in respect of an old or valuable tree, within which excavation, building works and other specified acts will be prohibited, subject to certain exemptions. The Bill also provides that a tree protection zone shall not be affected upon demise of the relevant Government land.

The Administration's views

5. The Administration considers that the Bill does not relate to political structure, but relates to Government policies, the operation of the Government and public expenditure for the purpose of Article 74 of the Basic Law.

Government policies

6. SETW points out that there are already a number of existing ordinances relevant to the protection of trees, such as the Forests and Countryside Ordinance, Country Parks Ordinance (Cap. 208) and Crimes Ordinance (Cap. 200), which provide the necessary legal framework for protecting trees on Government land from being wilfully damaged or illegally felled. The Administration has also implemented an array of administrative measures to protect trees. These include technical circulars, guidelines, and practical notes, which set out clearly the tree preservation requirements to be followed in government and private projects.

7. SETW considers that the Bill would affect the integrated approach adopted for maintenance of vegetation on Government land whereby an old or valuable tree is maintained together with the adjoining vegetation and facilities by one department, as far as possible. The Bill would also affect the existing Government policy on protection of trees through administrative measures introduced from time to time. These administrative measures are effective in terms of promoting tree protection and prohibiting indiscriminate tree felling, and additional administrative measures will be introduced where necessary to strengthen the tree preservation measures. Since a series of effective measures are currently available for tree protection, it is the Government's policy not to introduce new legislative measures at this stage. SETW points out that such policy was first stated by the then Secretary for the Environment and Food at the LegCo meeting on 23 May 2001, and reiterated by SETW herself at the LegCo meeting on 7 April 2005.

¹ A tree protection zone is a columnar zone with (i) the boundary of its area at the lowest point of the old tree or valuable tree at ground level at least 5 metres away from any point on the downward vertical projection, as at ground level, of the canopy of the tree; (ii) its highest level not below the perpendicular upward level of 5 metres above the tree measured from the level of its highest point; and (iii) its lowest level not above the perpendicular downward level of 5 metres from the level of the lowest point of the tree at the ground level.

Operation of the Government

8. SETW considers that the Bill, if enacted, will affect the existing integrated approach for maintenance of vegetation, including old and valuable trees. For instance, the Leisure and Cultural Services Department (LCS D) is responsible for the maintenance of all the facilities and vegetation within public parks including any old and valuable trees. Under the Bill, however, the Agriculture, Fisheries and Conservation Department (AFCD) is going to maintain old and valuable trees within LCS D's parks, unless LCS D has obtained authorization from DAFC for maintaining such trees within its parks. Similarly, the Housing Department would need to apply for authorization from DAFC for maintaining old or valuable trees within housing estates. As such authorization is not required under the existing administrative arrangement for tree maintenance, the implementation of the Bill would have an obvious effect on the operation of government departments. Moreover, the effect would not be of a temporary nature because DAFC may need to issue authorization from time to time when he declares any trees to be old or valuable, where the trees are within the jurisdiction of other departments.

9. SETW also considers that the enactment of the Bill would unavoidably affect the daily operation of the relevant departments, such as the Highways Department and Water Supplies Department, in carrying out routine maintenance works and emergency work. SETW points out that for old and valuable trees declared by DAFC that are located on roadside, their tree protection zones are extensive and would likely encompass portion of carriageway, footpath, roadside slopes, or buried utilities. Under the Bill, a person shall not excavate land or carry out any building works within any tree protection zone unless such person has obtained a special permit from DAFC under the amended section 23 of the Forests and Countryside Ordinance.

Public expenditure

10. SETW points out that according to a preliminary assessment made by LCS D and AFCD, there are at least 1 500 trees growing on Government land, which may satisfy the criteria of old and valuable (i.e. registrable) trees in the Bill, and this figure does not cover registrable trees in country parks. As the Bill covers the whole territory of Hong Kong, hence once the Bill is enacted, DAFC would need to conduct a comprehensive territory-wide tree survey to identify all registrable trees in order to fulfill his duties in relation to the protection of these trees under the Bill.

11. SETW estimates that, based on a conservative estimate of 1 500 trees, the implementation of the Bill will result in an additional annual expenditure of \$11 million to \$13 million for the initial set-up costs and recurrent costs thereafter. The amount would include the costs for employing 30 new staff and administrative and equipment costs that would be required for undertaking the following duties to be imposed by the Bill –

- (a) to conduct a territory-wide survey to identify trees on Government land that meet the criteria as set out in the Bill and to update such survey regularly;
- (b) to prepare and update an old and valuable tree register;
- (c) to declare old and valuable trees as well as tree protection zones and, in respect of each tree protection zone, to display a notice and update the information therein from time to time;
- (d) to carry out additional tree maintenance works such as arboricultural treatments, improving and enhancing growing condition of the trees, installing and repairing fences within tree protection zones;
- (e) to order any person, as a result of whose act, an old or valuable tree is dying or dead, to replant another tree of similar size and species or, failing which, to pay compensation to the Government;
- (f) to prepare and provide a tree survey report for the consideration of the Director of Lands and his imposition of conditions in the demise instrument before demise of any Government land which includes tree protection zone; and
- (g) to undertake law enforcement duties and additional administrative work.

12. Under the Bill, any person aggrieved by a decision of DAFC, for instance, in relation to special permits granted affecting a tree protection zone, may appeal to the Administrative Appeals Board (AAB). SETW expects that many appeals might be filed against DAFC's decisions if the Bill is enacted. Moreover, an appeal case may drag on for a long time and substantial staff time would be required. The implementation of the relevant provisions would involve public expenditure, which includes but is not limited to the payment of honorarium and allowances to AAB members.

13. In view of the above substantial cost implications, SETW considers that the Bill relates to public expenditure.

Hon CHOY So-yuk's view

Government policies

14. Hon CHOY So-yuk has responded that her Bill is consistent with, and does not have substantive effect on Government policies, as protection of trees is the Government's standing policy. The Government has enacted

legislation on protection of trees, and the Bill is a continuation of that policy. The Bill only requires DAFC's authorization for maintaining old and valuable trees to be given in writing, and does not impose any restriction on the integrated approach adopted by the Government for the protection of vegetation.

15. Miss CHOY points out that at the LegCo meeting on 23 May 2001, the then Secretary for the Environment and Food stated that it was not opportune for law to be enacted for the conservation of old and valuable trees. In order to do that, there must be first of all a set of clear and objective criteria to define old and valuable trees that need to be conserved, and to put in place a mechanism for updating such criteria. Miss CHOY considers that the Register of Old and Valuable Trees which was compiled by the Government in September 2004 already provides the basic information about old and valuable trees for the implementation of her Bill.

16. Miss CHOY also considers that there is little difference between the criteria for including trees in the Register and those set out in the Bill for including trees in the statutory old and valuable tree register she proposes. The Government is not against introducing legislative measures for the protection of old and valuable trees. Its concerns are about having a set of clear and objective criteria for defining old and valuable trees, as well as a mechanism for updating such criteria. Miss CHOY points out that she has met with officers of the Environment, Transport and Works Bureau, and the Administration agrees with her that an old and valuable tree committee should be set up to work out such criteria and the mechanism. She also welcomes the Administration to propose Committee Stage amendments (CSAs) to her Bill to specify that the criteria and mechanism are to be drawn up by the committee.

17. Miss CHOY has informed me that she has written to the Chief Executive (CE) seeking his written consent for the Bill to be introduced, as SETW claims that the Bill relates to Government policies.

Operation of the Government

18. Hon CHOY So-yuk considers that her Bill does not have an obvious or substantive effect on the integrated approach for maintenance of vegetation. All DAFC has to do is to give authorization for its maintenance to the relevant department at the same time he declares a tree old or valuable. Moreover, as the Government has already compiled a Register of Old and Valuable Trees, DAFC could give a general authorization to the relevant departments for the maintenance of trees at the initial stage of the implementation of the Bill; hence even if the Bill does have an obvious effect, it will only be of a temporary nature.

19. Miss CHOY believes that under the present integrated approach, there is no lack of internal correspondence between the relevant departments confirming which department is authorized to maintain certain vegetation.

Miss CHOY also points out that owing to division of work or legal requirement, it is common for matters within a department to fall within the jurisdiction of another department. Miss CHOY does not agree that the jurisdiction of government departments is a matter relating to the operation of the Government. On the contrary, the Bill introduces a control mechanism for the Register of Old and Valuable Trees which is conducive to clarifying the respective powers and responsibilities of government departments and beneficial to the operation of the Government.

20. In relation to SETW's point that the effect of the Bill would require government departments, such as the Highways Department and Water Supplies Department, to apply for special permits for excavating land or carrying out any building works within any tree protection zones, Miss CHOY is of the view that since government departments already have to apply for special permits under section 23 of the Forests and Countryside Ordinance to perform certain acts (e.g. plucking or damaging any tree in respect of any forest plantation or the countryside) prohibited by the Ordinance, the requirement to apply for permission in respect of excavation and building works prohibited by the Bill would not add any obvious or substantive problem operationally.

21. Miss CHOY makes reference to the power given to DAFC to adjust the boundary of a tree protection zone under certain conditions. Should any government department consider that a tree protection zone is affecting its daily operation, a request may be made to DAFC who may then vary the dimensions of a tree protection zone or make an exemption declaration. Miss CHOY points out that for excavations on unleased land, there is already a requirement under the Land (Miscellaneous Provisions) Ordinance (Cap. 28) to apply for excavation permits. Moreover, any works which require plucking or damaging trees in forests or plantations, i.e. acts prohibited under the Forest and Countryside Ordinance, will require special permits granted by DAFC. The prohibition of excavation and building works and other restrictions which only apply to tree protection zones do not contradict the Administration's usual operation. Where needed, the Administration may consider combining the application for an excavation permit and a special permit by administrative means.

22. Miss CHOY has indicated that she does not intend to add any difficulty to the trade in the laying and maintenance of pipes. She has assured the trade that she would be happy to address the concerns of the trade and to balance them against the protection of old and valuable trees by introducing amendments during the scrutiny of the Bill.

Public expenditure

23. Hon CHOY So-yuk does not agree that her Bill has the effect of either increasing or decreasing public expenditure and the amount is so substantial that it could not be ignored. Miss CHOY points out that the Bill does not require a comprehensive territory-wide tree survey to be conducted.

In addition, the Administration has not indicated nor is there evidence that there would be an increase of 1 500 old and valuable trees every year. Even if a territory-wide survey has to be carried out at the initial stage of the implementation of the Bill for preparing the old and valuable tree register and carrying out additional tree maintenance works, etc., the amount of work in subsequent years would not be the same as that required at the initial stage. Miss CHOY welcomes the Administration to move CSAs to her Bill confirming that a territory-wide survey is not necessary for the implementation of the Bill.

24. Miss CHOY considers that the Administration could make use of the existing Old and Valuable Tree Register as the basis for preparing the statutory old and valuable tree register required by the Bill. Miss CHOY argues that the declaration of old and valuable trees by DAFC is a statutory power and not a statutory duty. Moreover, as the Government should, under its present operation, update the existing Register from time to time, the additional expenses for updating the new register under the Bill would only represent a minimal continuing demand on public expenditure which can be ignored.

25. Regarding the expenditure on such duties as displaying notices in respect of tree protection zones as well as undertaking law enforcement duties and administrative work, Miss CHOY points out that similar duties are being carried out at the moment. As regards the carrying out of additional maintenance works, Miss CHOY also argues that it is a statutory power and not a statutory duty. She considers that the additional expenses for carrying out the above duties would only represent a minimal continuing demand on public expenditure which can be ignored.

26. As regards preparing tree survey reports for consideration by the Director of Lands, Miss CHOY considers that as only Government land on which there are tree protection zones is involved, the number of such reports would not be too many. Moreover, the expenditure for preparing the survey reports could in no way compare to the land premium.

27. Concerning the expenditure relating to the handling of appeals by AAB, Miss CHOY considers that any person aggrieved by an administrative decision may petition, complain, appeal or apply for judicial review. Even if there was to be no administrative appeal mechanism, the overall amount of work resulted from petitions against the administrative decisions will not be reduced. On the other hand, with the administrative appeal mechanism in place, the relevant complaints could be dealt with together and if the number of litigation could be reduced, the overall volume of work and expenditure could be reduced.

Advice of Counsel to the Legislature

Government policies

28. Counsel to the Legislature advises that the Bill seeks to establish a new legislative scheme for the protection of old and valuable trees declared by DAFC as such in accordance with the criteria provided in the Bill. The legislative scheme is proposed to be added to the Forest and Countryside Ordinance, which has clearly been enacted for implementing Government's policy on the protection of forests and countryside. The legal effect of the Bill, if enacted, is to extend the protection scheme accorded to forests and countryside covered by the Ordinance. In the view of Counsel, such extension may be considered as relating to the Government policy as reflected in the Ordinance in that it would have substantive effect on the policy.

29. Although the Administration has referred to a number of ordinances being relevant to the protection of trees, Counsel considers that for the purpose of forming the opinion of whether the Bill relates to Government policies, the only ordinance relevant is the Forests and Countryside Ordinance which the Bill seeks to amend. This is because the protection of trees, as a policy objective, is only incidental to the other Government policies that are implemented through the other ordinances respectively.

30. It is also the view of Counsel that a bill that contains legislative proposals, which are similar to or even if exactly the same as what is being carried out as administrative measures for implementing a certain policy must, in principle, be considered as one that relates to Government policy. The reason is simple. The relevant measures would be changed from being administrative measures to statutory requirements. Counsel advises that there is no doubt that the Bill relates to Government policies within the meaning of Rule 51(4) of the Rules of Procedure.

Operation of the Government

31. Counsel considers that the Administration's assessment of the legal effect of the proposed new Part II of the Bill, if enacted, on the maintenance of old and valuable trees by LCSD and the Housing Department may not be correct. Counsel points out that section 16A(2) under the proposed new Part II of the Bill provides that in case of any inconsistency between provisions of this new Part and any other ordinances, the latter shall prevail. The Director of Leisure and Cultural Services is given the statutory power to manage and control public pleasure grounds under section 107(1) of the Public Health and Municipal Services Ordinance (Cap. 132). The Housing Authority has the power "to manage any housing, and any premises, structures and grounds ancillary thereto, and any common parts, having regard to the interests, welfare and comfort of the tenants, owners or occupiers thereof" under section 4(2)(e) of the Housing Ordinance (Cap. 283). The Housing Department, if so delegated by the Housing Authority, may rely on this section to decide how

best to manage the grounds in housing estates, the control and management of which is vested on the Housing Authority.

32. Counsel advises that these provisions of the Public Health and Municipal Services Ordinance and Housing Ordinance may be considered as inconsistent with those establishing the proposed legislative scheme in the Bill and may prevail over these latter provisions. Counsel therefore does not consider that the Bill would have obvious effect on the operation of LCSD and the Housing Department.

33. As regards SETW's assessment that the Highways Department and Water Supplies Department would have apply for a special permit from DAFC under the amended section 23 of the Ordinance to excavate land or carry out building works on land which is situated in a tree protection zone, Counsel points out that section 10 of the Land (Miscellaneous Provisions) Ordinance provides that any person who wishes to make excavation in unleased land has to obtain an excavation permit issued by the Director of Lands. Counsel's view is that the effect of the Bill on government departments, such as the above-mentioned departments, is to impose an additional requirement under proposed new Part II of the Bill of obtaining a special permit from DAFC for excavating land or carrying out building works in tree protection zones. It does not appear to Counsel that this additional requirement is inconsistent with the relevant provisions in the Land (Miscellaneous Provisions) Ordinance; hence section 16A(2) of the Bill would not apply. (Section 16A(2) provides that in case of any inconsistency between provisions in the proposed new Part II of the Bill and any other ordinances, the latter shall prevail.) That being the case, Counsel would agree with the Administration's assessment in this regard, i.e. the Bill would have the effect of requiring the above-mentioned government departments to apply for an additional permit under the proposed amended section 23 of the Ordinance.

34. Counsel points out that it appears from Miss CHOY's response that she acknowledges that the Bill would impose new restrictions on government departments but would not cause fundamental variations to the existing integrated approach to maintain vegetation or in performing their duties which involve acts prohibited by the Bill. Miss CHOY believes that through declarations and authorisations made or given at the early days of the implementation of the Bill, many of the current arrangements under the integrated approach can be retained. Miss CHOY seeks to convince the President that these effects on the Government are not obvious or are only temporary.

35. Counsel is of the view that when assessing the effect of the Bill on the operation of the Government, the key question is whether the proposed new statutory requirements would result in changes in the organization structure of the Government, which includes distribution of responsibilities among government departments and their procedure or working process, in implementing the new requirements contained in the Bill.

36. Counsel agrees with SETW that government departments, such as the Highways Department and Water Supplies Department, would have to apply for special permits under amended section 23 of the Ordinance to excavate land or carry out building works on Government land which is situated in a tree protection zone. Counsel advises that the Bill would have effect on the operation of the Government, and that such effect is obvious and not temporary in nature as the requirement to apply for special permits under the proposed amended section 23 would be provided by law.

Public expenditure

37. Counsel points out that the basis for the Administration performing the existing activities, such as preparation of an old and valuable tree register and updating of the register and notices on old trees and valuable trees, etc., would be different upon enactment of the Bill. Whereas at present, the Administration may at its own discretion decide whether to continue with the performance of such activities subject to the availability of resources, it will no longer be able to do that without a change to the law if the Bill is enacted.

38. Counsel, in particular, points out that in relation to the processing of applications for special permits under the amended section 23 and the taking of law enforcement actions, which are being performed under existing law, they are entirely different from those arising from the implementation of the Bill. The Administration's performance of these activities would become a new mandatory requirement upon the enactment of the Bill. Hon CHOY So-yuk's argument that the additional expenditure incurred for the Bill should be considered as representing a minimal continuing demand on public expenditure cannot be established because the demand is not a continuing demand but a new one.

39. Regarding the assumptions for the computation of the amount of public expenditure that would be incurred for the implementation of the Bill, Counsel points out that there is conflicting information over the number of new and valuable trees that may be discovered annually. Since the information is crucial for calculating the estimated amount of public expenditure to be incurred for the implementation of the Bill, Counsel advises that perhaps I should consider inviting the Administration to comment on Miss CHOY's views on this issue before I form an opinion on this issue.

My opinion

Does the Bill relate to Government policies?

40. I have stated in my previous rulings my view that "Government policies" include, among others, policies reflected in legislation, policies that have been decided by CE or CE in Council, and those that have been

promulgated in LegCo or its committees by public officers designated by CE. Moreover, the fact that a bill does not run contrary to or substantially deviate from existing policies does not necessarily mean that the bill is not related to Government policies.

41. I consider that Hon CHOY So-yuk's Bill relates to Government policies on protection of trees. The Bill, if enacted, will extend the protection scheme accorded to forests and countryside covered by the Forests and Countryside Ordinance to old and valuable trees. In addition, the Government has stated in LegCo that since a series of effective measures are currently available for tree protection, it is the Government's policy not to introduce new legislative measures for tree protection at this stage.

Does the Bill relate to operation of the Government?

42. As regards whether the Bill relates to the operation of the Government, I have stated in my previous rulings that if I am satisfied that the implementation of a proposed bill would have obvious effect on the structure or procedure of the executive authorities, and that the effect would not be of a temporary nature, then I will form the opinion that the bill relates to the operation of the Government.

43. Under the Bill, DAFC is given powers to declare, in any Government land, a tree to be an old or valuable tree and its neighbouring land zone to be a tree protection zone. For old and valuable trees that are located on roadside, their tree protection zones would likely encompass portion of carriageway, footpath, roadside slopes, or buried utilities. The Bill provides that certain acts are prohibited from being done to tree protection zones, and such acts include the excavation of land or the carrying out of building works. The Bill also provides that special permits may be granted by DAFC for such prohibited acts to be carried out.

44. Counsel to the Legislature advises me that at present, any person who wishes to make excavation in unleased land has to obtain an excavation permit issued by the Director of Lands under the Land (Miscellaneous Provisions) Ordinance. If the Bill is enacted, government departments, such as the Highways Departments and Water Supplies Department, will be required to also apply for special permits from DAFC for carrying out such works if the Government land concerned is situated in a tree protection zone. Applying for special permits is an additional statutory requirement to that of applying for excavation permits.

45. Hon CHOY So-yuk argues that any works which require plucking or damaging trees or performing other prohibited acts in forests or plantations under the Forest and Countryside Ordinance will require special permits granted by DAFC. The requirement to apply for DAFC's special permits for carrying out excavation or building works in tree protection zones would not add any obvious or substantive problem operationally, or contradict the

Administration's usual operation.

46. I note Miss CHOY's view. However, I take Counsel's advice that when assessing the effect of the Bill on the operation of the Government, the key question I should consider is whether the proposed new statutory requirements would result in changes in the organization structure of the Government, which includes distribution of responsibilities among government departments and their procedure or working process, in implementing the new requirements contained in the Bill. My answer to the question is that imposing an additional statutory requirement of applying for special permits from DAFC to carry out excavation and building works in tree protection zones clearly changes the present procedure for carrying out excavation or building works on Government land.

47. I am therefore of the view that the Bill would have effect on the operation of the Government. Such effect is obvious because the requirement of obtaining a special permit from DAFC in respect of tree protection zones is a new requirement provided by law. The effect is also not a temporary one because this requirement, once enacted, will remain in force until it is amended or repealed.

Does the Bill relate to public expenditure?

48. I have stated in my previous rulings my view that a bill will relate to public expenditure if its implementation has the effect of either increasing or reducing public expenditure, and the amount involved is so substantial that I cannot ignore.

49. The Administration has estimated that the Bill will result in an additional annual expenditure of \$11 million to \$13 million for the initial set-up costs and recurrent costs thereafter, based on an estimate of 1 500 trees. Counsel advises that there is conflicting information over the number of old and valuable trees that may be discovered annually, and perhaps I should invite the Administration to comment on Hon CHOY So-yuk's views on the issue. Since I have already formed the opinion that the Bill relates to the operation of the Government within the meaning of Rule 51(3), I deem it not necessary to deal with this issue any further for the purpose of this ruling.

Ruling

50. Having taken into account the views of the SETW and Hon CHOY So-yuk, together with the advice of Counsel to the Legislature, I rule that the proposed Forests and Countryside (Amendment) Bill 2006 does not relate to political structure. The Bill, however, relates to the operation of the Government and Government policies within the meaning of Rule 51(3) and (4) of the Rules of Procedure. Hon CHOY So-yuk may not introduce the Bill.

51. Since I have ruled that the Bill relates to the operation of the Government and Hon CHOY So-yuk may not introduce the Bill, I do not consider it necessary to form an opinion on whether the Bill relates to public expenditure for the purpose of this ruling.

(Mrs Rita FAN)
President
Legislative Council

18 January 2007