

立法會 *Legislative Council*

LC Paper No. LS62/07-08

Paper for the Subcommittee on Antiquities and Monuments (Withdrawal of Declaration of Proposed Monument) (No. 128 Pok Fu Lam Road) Notice

At its meeting on 29 February 2008, the Subcommittee discussed the following issues: (a) the power of the Legislative Council to amend the Antiquities and Monuments (Withdrawal of Declaration of Proposed Monument) (No. 128 Pok Fu Lam Road) Notice (L.N. 21 of 2008) (“the withdrawal Notice”) and the effect of such amendment (if any), and (b) whether the Grade III status accorded by the Antiquities Advisory Board (“AAB”) under its grading system could be reviewed. This paper sets out the views of the Legal Service Division on these issues.

2. The Antiquities and Monuments (Declaration of Proposed Monument) (No. 128 Pok Fu Lam Road) Notice (L.N. 59 of 2007) (“the original declaration”) declares the buildings and the adjoining land situated within the Rural Building Lot No. 324, No. 128 Pok Fu Lam Road, Hong Kong together with all structures erected on such land (“the subject building”) to be a proposed monument for a period of 12 months from 20 April 2007. The object of the withdrawal Notice is to withdraw the original declaration. The withdrawal Notice took effect on the day when it was published in the Gazette, i.e. 1 February 2008.

The power of the Legislative Council to amend

3. The withdrawal Notice is subsidiary legislation as defined in section 3 of the Interpretation and General Clauses Ordinance (Cap. 1). As such, the withdrawal Notice is subject to amendment by the Legislative Council under section 34(2) of the same Ordinance which provides that:-

“Where subsidiary legislation has been laid on the table of the Legislative Council under subsection (1), the Legislative Council may, by resolution passed at a sitting of the Legislative Council held not later than 28 days after the sitting at which it was so laid, provide that such subsidiary legislation shall be amended in any manner whatsoever consistent with the power to make such subsidiary legislation, and if any such resolution is so passed the subsidiary legislation shall, without prejudice to anything done thereunder, be deemed to be amended as from the date of publication in the Gazette of such resolution.”.

Members may note that under section 3 of Cap. 1, “amend” includes repeal.

4. As any amendment is required to be “in any manner whatsoever consistent with the power to make such subsidiary legislation”, it is relevant to consider what the powers of the Authority are under the enabling provisions.

The power of the Authority under the enabling provisions

5. According to section 2A(1) of the Antiquities and Monuments Ordinance (Cap. 53) (“the Ordinance”), a declaration of proposed monument must be for the purpose of considering whether or not any building etc. should be declared to be a monument, and a declaration could only be made after consultation with the AAB. Under section 2B(1) of the Ordinance, a declaration made under section 2A shall have effect for a period of 12 months from the making of it unless earlier withdrawn by the Authority. Under section 2B(2), the Authority may from time to time, after consultation with the AAB and with the approval of the Chief Executive, extend the period by 12 months but the power to extend does not apply to a proposed monument within private land. The case in hand relates to a proposed monument within private land and there is apparently no mechanism for any extension. In short, the power of the Authority is to make a declaration for the purpose of considering whether or not any building etc. should be declared to be a monument. The declaration could only be made after consultation with the AAB, and the declaration only has effect for 12 months from the making of it unless earlier withdrawn. In view of the power of the Authority, it would appear that in this case the only option for amendment is a repeal.

The effect of a repeal

6. Members may note that if a resolution is passed by the Legislative Council to repeal the withdrawal Notice under section 34(2) of Cap. 1, this should be without prejudice to anything done thereunder. As the withdrawal Notice has already taken effect on the day when it was published in the Gazette, i.e. 1 February 2008, the original declaration has already been withdrawn with effect from that day. It thus appears that a resolution to repeal the withdrawal Notice should not affect the withdrawal of the original declaration which has already taken effect under the withdrawal Notice.

7. Even if the withdrawal of the original declaration is not considered as “anything done” under the withdrawal Notice (within the meaning of section 34(2) of Cap. 1), the effect of a repeal as provided in section 23(a) of Cap. 1 should apply. The section provides that where an Ordinance repeals in whole or in part any other Ordinance, the repeal shall not revive anything not in force or existing at the time at which the repeal takes effect. Both a resolution passed by the Legislative Council and the withdrawal Notice fall within the definition of “Ordinance” under section 3 of Cap. 1. Therefore, should there be a resolution passed by the Legislative Council to repeal the withdrawal

Notice, such repeal would not revive the original declaration which would no longer be in force or existing at the time when the resolution takes effect. This is consistent with the effect of section 34(2) of Cap. 1 as analysed above in paragraph 6.

Status of grading

8. At the meeting, the Subcommittee discussed whether the Grade III status accorded to the subject building by the AAB could be reviewed. Members may note that the grading is only an administrative measure and does not have the effect of any statutory protection on the buildings graded.

9. Members may note that the AAB is established under section 17 of the Ordinance to advise the Authority (i.e. Secretary for Development) on any matters relating to antiquities, proposed monuments or monuments, or referred to it for consultation under section 2A(1) (declaration of proposed monuments), section 3(1) (declaration of monuments) or section 6(4) (exemption from acts prohibited in relation to proposed monuments or monuments). The Chairman and members of the AAB are appointed by the Chief Executive under section 17(1) of the Ordinance, and the procedure at a meeting of the AAB is to be determined by the AAB under section 17(5). According to paragraph 8 of the Legislative Council Brief issued by the Development Bureau in October 2007 (File Ref: DEVB(CR)(W) 1-55/68/01), the system of grading of buildings is only an internal mechanism practised by AAB to identify buildings with heritage value for proper conservation on an administrative basis¹.

10. Members may note that AAB's grading system is not provided for in the Ordinance. According to paragraph 7 of the Legislative Council Brief issued by the Development Bureau in February 2008 (File Ref: DEVB/CS/CR 4/1/83), the AAB's grading is administrative in nature. There is no provision in any statute on the review of such a grading.

Prepared by

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¹ The existing grading system classifies historical buildings into Grades I, II and III as follows-

- (a) Grade I: Buildings of outstanding merit, for which every effort should be made to preserve if possible;
- (b) Grade II: Buildings of special merit, for which efforts should be made to selectively preserve; and
- (c) Grade III: Buildings of some merit, but not yet qualified for consideration as possible monuments.