

**SUMMARY OF THE ADVICE
GIVEN BY MR MICHAEL THOMAS, Q.C.,S.C.
ON THE POWER OF THE LEGCO TO REPEAL THE
COUNTRY PARKS DESIGNATION ORDER 2010**

The designation

1. The designation by L.N. 72 of 2010 was an act of the CE performed pursuant to s. 14 of Cap 208. That section is expressed as imposing a duty upon the CE for he 'shall' designate the area shown in an 'approved map' as a country park. An 'approved map' in that context means a map that has been approved by the CE in Council following the process begun by an earlier reference to the Authority under s. 15(1) of Cap. 208 for the replacement or amendment of an existing map (in this case the 1979 map) by a new map.
2. The ensuing replacement process is governed by the same provisions (ss. 8 to 14) as applied to the approval of the original map, providing for input from the Authority and from public consultation. The final stages are: (1) the CE in Council's approval of a draft map under s. 13(1); (2) its signature by the Authority and deposit in the Land Registry under s.13(4); (3) the notification by Gazette of the deposit of the approved map under s. 13(5); and only after that (4) the CE's designation of the area shown in that approved plan to be a country park by order in the Gazette under s. 14.
3. If the CE were not to proceed with a designation after stage (3), as he is bound to do, there would be an unfortunate discrepancy at the Land Registry between the last designation of the 1979 area of the country park, and the recently deposited newly approved area plan. This may fortify the conclusion that the intention of the Ordinance, not only by its clear wording ('shall'), but also by its contextual purpose, is that the CE has no option but to proceed to designate the newly approved area plan as a country park by means of a gazetted order.

Legislative effect?

4. There can be no doubt that the CE's act of designation has 'legislative effect'. The whole scheme of Cap. 208 (for control and management, control of land use, regulations and the like) depends upon there being a 'country park'. And the definition of a 'country park' (s. 2 of Cap. 208) is 'any area designated as a country park under section 14'. Without

designation by the CE's order in the gazette, the work of the Authority in preparing, and of the CE in Council in approving a draft map, and also the deposit of the signed map in the Land Registry would have no legal effect. So in this case, the Clear Water Bay country park would continue to be the area shown in the 1979 map.

Subsidiary legislation?

5. From this conclusion, it follows that the act of the CE in designating the newly mapped area by order in the Gazette, constitutes 'subsidiary legislation' within the definition given in s. 3 of Cap. 1. The CE's designation is promulgated in the form of an 'Order' and also as a legal notice. Both terms are within the express terms of the definition. The gazetting of CE's designation is also an 'instrument' as defined ('any publication in the Gazette having legal effect') and 'subsidiary legislation' includes any 'instrument made under or by virtue of any Ordinance and having legislative effect'.

LegCo's powers

6. That being so, s. 34(1) of Cap. 1 provides for the CE's Order to lie on LegCo's table because it is 'subsidiary legislation'. S. 34(2) provides (subject to time limits) for the Order to be amended by resolution at a sitting of LegCo. Because of the definition in s. 3 of Cap. 1, 'amend' must include 'repeal'. Taken on its own, the phrase 'amended in any manner whatsoever' in s. 34 might suggest that LegCo has a wide power to stop or delay the newly mapped area from becoming a country park. But the very next words have a severely limiting effect on that power. LegCo's resolution may only amend (or repeal) the CE's Order 'in a manner consistent with the power to make such subsidiary legislation.' 'Consistent' must mean in this context 'compatible'. So the intention is that LegCo can only do what the CE is himself empowered or enabled to do.
7. That takes one back to s. 14 of Cap. 208 and its context. First, the CE's power to designate is expressed as a duty imposed by the section. The CE shall (which means in the context 'must') designate the newly mapped area as it has been earlier approved by CE in Council, and shown in the signed and deposited plan. If he were not to do so, it would be contrary to his duty, quite apart from defeating the CE in Council's decision to refer to the Authority envisaged changes to a country park, and the legislative scheme for those changes to be considered and settled through a process

involving the Authority and consultation with the public. He therefore has no power to decide not to designate the newly mapped area.

8. What additional powers does CE possess or exercise in performing the act of designation? Under s. 28(4) of Cap. 1, he has express power to declare the date of the coming into operation of the order. (Counsel has some doubt as to whether CE has power to choose a 'period of operation' in this case because there is nothing in Cap. 208 to suggest that a designation should have temporary rather than permanent effect.) The power to choose a commencement date cannot be an unfettered or absolute power, for (by necessary implication, but see also s. 28(1)(b) of Cap. 1) any chosen date for commencement must be one that reasonably fulfils the particular statutory purpose: not too soon, to take the public by surprise, or to prevent necessary changes to be put in place; and not so far off as to frustrate the public purpose of having a newly delineated country park with the area shown by the deposited plan. In this case, the comparatively urgent need to ease the problem of the adjacent landfill site can also be taken into account. CE also has (also by necessary implication) power to settle the wording of the order. But all that (choice of date and choice of language) seems to me to be the extent and limit of his power. That being so, LegCo can have no greater power under s. 34(2).
9. It is the opinion of Senior Counsel (just as this Department has also concluded) that LegCo has no power to stop altogether the newly mapped area from becoming a country park (by resolving to amend or repeal the order) or to postpone indefinitely, or for a very long time, the commencement date of the designation. LegCo certainly has no power to make any changes of its own to the area of the country park, because the CE could not do that. LegCo would have power to select a different commencement date, provided it matched the extent of the CE's own power as described above ('not too soon...not too far off...'). To complain that LegCo had no involvement at the stage when a possible revision of a country park was referred to the Authority by the CE in Council under s. 13(1) of Cap. 208 is to complain at the terms of an Ordinance which they or their predecessors were content to pass into law.

The problem that has arisen

10. LegCo appear to be opposed to any reduction of the area of the Clear Water Bay country park, or at least to be unwilling to see the CE's Order take effect without some concession in response to their opposition. Members may have another legitimate objective: to see 'odour problems'

in Sai Kung resolved before approving the changes. As it is understood, the reduction in area of the country park is intended to ameliorate the problems of the landfill site, suggesting it is more, not less urgent to implement the changes. Some amendment to the commencement to give time to deal with the odour may well be within LeCo's powers, depending on the factual circumstances.

11. On the other hand, LegCo presently appear more interested in having the Order withdrawn. They have been inquiring whether a member of the Administration could move a resolution to 'withdraw' the Order from LegCo. Senior Counsel does not consider that is a course lawfully open to LegCo, whether moved by the Administration or by an elected member. The Order must be laid before LegCo because of s. 34(1). No statutory power is available for LegCo to withdraw it from its own table, particularly if the purpose is to deny LegCo its statutory right to exercise its powers of scrutiny and amendment under s. 34(2). Furthermore, as the CE could not decline to designate the newly mapped area it would be inconsistent with his power 'to make subsidiary legislation' for any LegCo resolution to propose the withdrawal of L.N. 72/2010 from LegCo. That would have the effect of defeating his designation for all practical purposes, and maintaining the 1979 area of the Clear Water Bay country park, when the statutory purpose of the CE's designation is to bring about a country park with a different mapped area.
12. CE in Council is also not in a position to resolve the problem. They have done what the Ordinance requires them to do under s. 13(1), made applicable by s. 15(2). Their role has been performed: *functus officio*. Moreover, that outcome has been already partially implemented by proceeding through the stages (1) to (3) set out in para. 3 above. There is nothing found in the Ordinance that enables the CE or anyone at this stage to refer the same plan back to the CE in Council to perform once again their function under s. 13(1). On the contrary, the CE's duty and only option is to proceed with the final stage to designate the country park in accordance with the newly approved plan.

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