

立法會

Legislative Council

LC paper No.LS99/09-10

Comments on the paper of the Department of Justice on Repeal of the Country Park (Designation)(Consolidation) (Amendment) Order 2010

The views expressed in the paper of the Department of Justice (DoJ) (LC Paper No. CB(1)2976/09-10(01)) turn on the interpretation of section 14 of the Country Parks Ordinance (Cap. 208). The Administration's arguments rely heavily on taking the word "shall" to have imposed on the Chief Executive (CE) a statutory duty to designate the area shown in the approved map to be a country park. Section 14 provides—

“Where the Chief Executive in Council has approved a draft map under section 13 and it has been deposited in the Land Registry, the Chief Executive shall, by order in the Gazette, designate the area shown in the approved map to be a country park.”

2. It is clear that before CE could make any order to designate, two conditions must have been fulfilled, namely, (a) a draft map has been approved under section 13; and (b) the approved map has been deposited in the Land Registry. Under section 14 CE has no power to designate any area other than an area in the approved map to be a country park or to designate any area not to be a country park. In this sense, CE has no discretion in the designation. For this matter, CE must make the designation by order in the Gazette. These are the explicit limitations imposed by section 14.

3. The procedural provision for the exercise of the power of designation under section 14 is the making of an order in the Gazette. Such an order is subsidiary legislation and therefore comes within the ambit of section 34 of the Interpretation and General Clauses Ordinance (Cap.1). The question is the scope of this power to make an order.

4. By virtue of the interpretive provisions of Cap.1, the expression “amend” includes “repeal”. Section 28(1)(c) of Cap. 1 expressly empowers the maker of a piece of subsidiary legislation to amend it in the same manner in which it was made. It follows that as CE has the power to make, he also has the power to repeal. The limitations imposed by section 14 only require that the consequence of a repeal is not to affect any designation of country park.

5. Section 34(2) of Cap.1 gives the Legislative Council (LegCo) power to amend, and therefore repeal, any subsidiary legislation consistent with the power to make the subsidiary legislation. Hence, LegCo has the same power to repeal subject to the same limitation as stated above. There is nothing in section 14 that rules out repeal so long as the limitations set out in paragraph 2 are not infringed. The arguments of DoJ would render the power of negative vetting by LegCo nugatory.

6. Further, it must not be overlooked that the Country Park (Designation)(Consolidation)(Amendment) Order 2010 (the Amendment Order) has not yet come into operation. The commencement date stated in section 1 is 1 November 2010. This means that the designation made under the Amendment Order is not yet effective. Any repeal of the Amendment Order will not be a repeal of any designation. The designation made in respect of plan CP/CWB^B approved on 18 September 1979 by Governor in Council remains in full force.

7. On the basis of the above analysis, unless more compelling evidence is advanced, it is submitted that DoJ has not made out its case that CE, and consequently LegCo, has no power to repeal the Amendment Order.

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