

律政司  
民事法律科

香港金鐘道 66 號  
金鐘道政府合署高座 3 樓  
圖文傳真: 852-2869 0670  
852-2868 1068



DEPARTMENT OF JUSTICE  
Civil Division

3/F., High Block  
Queensway Government Offices  
66 Queensway, Hong Kong  
Fax: 852-2869 0670  
852-2868 1068

本司檔號 Our Ref.: ADV 92/00/1C  
來函檔號 Your Ref.: CB(3)/M/MR  
電話號碼 Tel. No.: 2867 2098

7 October 2010

Clerk to the Legislative Council  
Legislative Council Building  
8 Jackson Road  
Central  
Hong Kong

**Urgent by email**

(Attn : Ms Miranda HON)

Dear Ms Hon,

**Proposed resolution under section 34(2) of the  
Interpretation and General Clauses Ordinance**

I refer to your letter of 5 October 2010 inviting the Administration's comments on whether, according to the Administration's assessment, the proposed resolution to be moved by Hon Tanya CHAN to repeal the Country Parks (Designation) (Consolidation) (Amendment) Order 2010 will have any charging effect as described in Rule 31(1) of the Rules of Procedure.

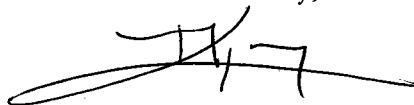
As explained to you over the phone yesterday, the Administration wishes to make detailed submission to the President of the Legislative Council not only on the charging effect but also on the other legal issues concerning the proposed resolution.

I attach herewith the English version of the Administration's detailed response which has been prepared in consultation with Mr Michael Thomas, Q.C., S.C. and should be grateful if you would place the same before the President for his consideration. As you may be aware, the Administration has, at the request of Hon Tanya CHAN, provided a summary of Mr Michael Thomas, Q.C., S.C.'s advice on this matter to the Subcommittee to facilitate its discussion at its meeting held on 6 October. A copy of the said summary is also attached for the President's reference.

As regards the point about charging effect, I confirm that it is the assessment of the Administration that the proposed resolution does not have any charging effect.

I take this opportunity of thanking you for your kind indulgence in extending the deadline until 2 p.m. today. We are still working on the Chinese version of our Submission and I will let you have same as soon as possible. Many thanks.

Yours sincerely,

A handwritten signature in black ink, appearing to be 'Cathy Wong', written over a horizontal line.

(Cathy WONG)

Deputy Law Officer (Civil)(Advisory)

Encl.

c.c. Director of Administration

## **Member's Proposed Repeal of the Country Parks (Designation) (Consolidation) (Amendment) Order 2010**

### **Administration's Submission to the President of the Legislative Council**

This submission addresses the following question:

Is it lawful for a Member of the Legislative Council ("LegCo") to propose a resolution to repeal the Country Parks (Designation)(Consolidation) (Amendment) Order 2010, L.N. 72 of 2010?

### **Summary of our submission**

The Administration as advised by Mr Michael Thomas, QC, SC is firmly of the view that the answer is in the "**Negative**" as to do so would be inconsistent with the power to make subsidiary legislation under s.28(1)(b) and s.34(2) of Cap. 1 -

- S.14 of Cap. 208 is cast in mandatory terms by using "shall" which means "must" in this context.
- The power of the CE under s.14 of Cap. 208 is limited and he is bound to implement the decision of the CE in Council under s.13 by making the Designation Order.
- It could not have been the statutory intention and purpose of Cap. 208 to empower the CE to undo the elaborate statutory process by repealing the Designation Order.
- The power of the LegCo to amend under s.34(2) of Cap. 1 the Designation Order must be in a manner "consistent with the power to make such subsidiary legislation".
- Power to amend under s.28(1)(c) and s.34(2) of Cap. 1 is subject to contrary intention of the specific Ordinance (i.e. Cap 208 in the present case) and "amend" does not include "repeal" upon a proper construction of the statutory context of Part III of Cap. 208.
- It follows that the LegCo's power to amend is no wider than the power the CE has under Cap. 208.
- There are fundamental flaws in the argument that since the Designation Order has not yet commenced, it can be repealed without affecting any designation.
- Any purported repeal of the Designation Order is a purported repeal of the designation of the country park.

- It is not disputed that the LegCo can seek to amend the commencement date of the designation for a reasonable period of time as the CE so can do and hence the negative vetting power of LegCo is not rendered nugatory.

### **Our detailed submission**

#### **Common grounds**

2. For present purpose, we assume the following propositions not to be in dispute:
  - (a) that L.N. 72 of 2010 is “subsidiary legislation” within the meaning of s. 34(1) of the Interpretation and General Clauses Ordinance (Cap 1) (“Designation Order”);
  - (b) that the power of repeal conferred by s. 34(2) upon LegCo is as broad in scope as, but is no broader than, the scope of the power of the Chief Executive (CE) under section 14 of the Country Parks Ordinance (Cap 208);
  - (c) that upon the tabling of any resolution proposing to repeal the L.N. 72 of 2010, the President of LegCo is bound to consider and to form an opinion on what is essentially a matter of law, namely whether the proposed repeal is consistent with the power of the CE to make the L.N. 72 of 2010; and
  - (d) that if the President forms an opinion that the proposed repeal is inconsistent, it will follow that no amendment can be lawfully proposed by a member.

#### **The issue**

3. The current issue to be addressed is, therefore, whether the proposed repeal of the L.N. 72 of 2010 is consistent with the power to make the L.N. 72 of 2010 within the meaning of s. 34(2) of Cap 1.

#### **Inconsistency with the power to make subsidiary legislation and section 34(2) of Cap 1**

4. S.28(1)(b) of Cap.1 provides that “no subsidiary legislation shall be inconsistent with the provisions of any Ordinance”. S. 34(1) of Cap. 1 empowers the LegCo to amend subsidiary legislation tabled before it “in any manner whatsoever consistent with the power to make such subsidiary legislation”.

5. The proposed repeal of the L.N. 72 of 2010 is objectionable because it is inconsistent with the provisions of s. 14 of Cap 208, and hence, is not “consistent with” the power to make the subsidiary legislation L.N. 72 of 2010 and goes beyond the power conferred by s. 34(2) of Cap 1.

### **The statutory scheme for the designation**

6. The designation by L.N. 72 of 2010 was an act of the CE performed pursuant to s. 14 of Cap 208.
7. S.14 of Cap 208 does not provide the CE with unlimited power to make an order designating any area in an approved map to be a country park nor an option to refuse to designate a new plan once it has been approved by the CE in Council.
8. The designation order only forms part of the statutory scheme provided under Part III of Cap 208, and any designation of any area in an approved map (including amendment/replacement of an approved map) as a country park must follow the statutory scheme.
9. The statutory scheme for the designation of a country park under Part III of Cap 208 comprises the following stages –

#### ***(A) Preparation of a draft map stage***

- (a) The Authority (i.e. Director of Agriculture, Fisheries and Conservation) shall consult the Country and Marine Parks Board on the preparation of a draft map (s. 8 of Cap 208).

#### ***(B) Public consultation stage***

- (b) A draft map prepared by the Authority shall be published by notice in the Gazette (s.9(2)(a) of Cap 208);
- (c) A copy of the notice shall be published in 3 issues of one English language and 2 Chinese language daily newspaper and be displayed in some conspicuous part of the proposed country park (s.9(2)(b) of Cap 208);
- (d) A copy of the draft map shall be made available for public inspection at the offices of the Government for a period of 60

days from the date of the publication of a notice (s. 9(3) of Cap 208).

- (e) Any new development to be carried out within the area of the proposed country park shall require an approval of the Authority (s. 10 of Cap 208).

***(C) Adjudication of objections stage***

- (f) During the 60-day public inspection period, any person aggrieved by the draft map may send to the Authority and the Secretary of the CMPB a written statement of his objection (s.11(1) of Cap 208);
- (g) The Secretary of the CMPB shall fix a time and place for the hearing of the objection by the CMPB (s. 11(4) of Cap 208);
- (h) The CMPB shall make a determination after hearing an objection whether it may –
  - (i) reject the objection in whole or in part; or
  - (ii) direct the Authority to make amendment to the draft map to meet such objection in whole or in part. (s.11(6) of Cap 208).

***(D) Submission and approval of the draft map stage***

- (i) The draft map (including a schedule of objections and representations made under s. 11) shall be submitted to the CE in Council for approval (s. 12 of Cap 208);
- (j) The CE in Council, upon submission of a draft map under s. 12, shall -
  - (i) approve the draft map;
  - (ii) refuse to approve it; or
  - (iii) refer it to the Authority for further consideration and amendment.(s. 13 of Cap 208)

***(E) Deposit of the approved map stage***

- (k) The map approved by CE in Council shall be signed by the Authority and be deposited in the Land Registry (s. 13(4) of Cap 208).

***(F) Designation of country park stage***

- (l) After the approval of the map by CE in Council and deposit of such map in the Land Registry, the CE shall by order in the Gazette, designate the area shown in the approved map to be a country park (s. 14 of Cap 208).

10. It is clear from the above that designating a country park is the final stage of the statutory process, following preparation of a draft map of the proposed country park, public consultation on the draft map, consideration of any objections raised in respect of the draft map by the CMPB, adjudication of the objections by CMPB and consideration regarding the approval of the draft map by the CE in Council.

11. The designation power of the CE under s.14 of Cap. 208 is limited. All that the CE can do under s.14 of Cap. 208 is to implement the decision made by the CE in Council under s.13 of Cap. 208 by ordering that the area shown in the approved map be designated as a country park. This coincides with the statutory wording in s. 14 of Cap 208, which provides that –

“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”. (emphasis added)

12. Put simply, the CE is **bound** (and has no option but to proceed) to make a designation under s.14 of Cap 208 where the CE in Council has approved a draft map and that such map has been deposited in the Land Registry. If s.14 of Cap 208 were to be construed otherwise, thereby allowing CE to refuse to order the designation resulting from the elaborate statutory process or to repeal it, 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, and the public consultation through the objections system as well as the adjudication made by the CMPB in respect of any objections raised in relation to a draft map would also be rendered futile. Such a construction would lead to the

absurd consequence that the CE would be empowered to undo and set at nought years of work carried out in accordance with the statutory provisions. That simply could not have been the statutory intention and purpose of Cap 208.

### **LegCo's powers**

13. The factual background leading to the making of the L.N. 72 of 2010 is set out at the Annex for easy reference.
14. S. 34(2) of Cap. 1 provides that “[w]here 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 ... provide that such subsidiary legislation shall be amended in any manner whatsoever consistent with the power to make such subsidiary legislation ...”. Because of the definition in s. 3 of Cap. 1, ‘amend’ must include ‘repeal’.
15. Taken on its own, the phrase ‘amended in any manner whatsoever’ in s. 34(2) may suggest that LegCo has a wide power to stop or delay the newly mapped area from becoming a country park in the present case. But the very next words have a severely limiting effect on that power. LegCo’s resolution may only amend (or repeal) the L.N.72 of 2010 ‘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.
16. 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 the 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 and in fact, would be in defiance of the statutory scheme and in particular, the decision of the CE in Council under s. 13 of Cap 208. Similarly, without going through the same statutory process, the CE cannot on his own initiative repeal the Designation Order made under s.14 of Cap 208 in accordance with the decision made by the CE in Council in respect of an approved map under s. 13 of Cap 208.
17. The exercise of the LegCo’s power under s. 34(2) of Cap 1 in the present case shall be consistent with the power of the CE to make the L.N. 72 of 2010. Put simply, LegCo has no power to stop altogether the newly



mapped area from becoming a country park (by resolving to repeal the order). The simple reason is: CE could not do that and neither can LegCo.

18. Cap. 208 provides a mechanism for changing a designation of a country park under s.15. This involves going through the statutory procedure set out in ss. 8 to 14 including consultations and objections. The CE cannot simply repeal a designation order under s.14. He must follow the statutory procedure as required by s.15.

**Response to LegCo legal adviser's views (as contained in LC Paper No. LS99/09-10 dated 5 October 2010)**

***Statutory duty on CE to order the designation by gazette***

19. Under **s.28(1)(b)** of the Interpretation and General Clause Ordinance, Cap.1:

**“Where an Ordinance confers power on a person to make subsidiary legislation, the following provisions shall have effect with reference to the subsidiary legislation- .... no subsidiary legislation shall be inconsistent with the provisions of any Ordinance”.**

20. As stated in para. 12, s. 14 of Cap. 208 imposes a duty on the CE, as maker of the order in the Gazette to designate the area shown in the approved map to be a country park. The CE, as the maker of that order (as subsidiary legislation), cannot amend (or repeal) the order in such a way as to make it inconsistent with that statutory duty imposed by Cap.208, i.e. to designate the area approved by the CE in Council as country park.
21. LegCo's legal adviser accepted that: “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.” (*emphasis added*)
22. The CE clearly has the power to change the commencement date of the Designation Order as this would not be inconsistent with the provision in s. 14. But even so the amendment on the commencement date cannot be in such a way as to make the Order inconsistent with the statutory duty

imposed by Cap.208. For example, the Designation Order cannot be amended to commence only in the far distant future, for the CE has the statutory duty to designate the area by order in the Gazette within a reasonable period.

*Power of LegCo to amend the designation order gazetted*

23. It is common ground that the power of LegCo to amend the designation order gazetted must be **in a manner “consistent with the power to make such subsidiary legislation”** (s.34 (2) of Cap.1).
24. In other words, the power LegCo has to amend any subsidiary legislation must be consistent with, and therefore not wider than, the power the maker of the subsidiary legislation has.
25. Such a limitation on LegCo’s power pursuant to s.34 of Cap.1 is trite and is not disputed. See President’s ruling dated 3 May 1999 on proposed resolutions under s. 34(2) of Cap 1 to amend the Public Revenue Protection (Revenue) Order 1999 and advice of LegCo Assistant Legal Adviser in respect of the mechanism for toll variation under s. 36 of the Tate’s Cairn Tunnel Ordinance (Cap. 393) and s. 55 of the Eastern Harbour Crossing Ordinance (Cap. 215) contained in paras. 6 & 7 of LC Paper No. CB(1)2150/09-10 and para. 4 of LC Paper No. CB(1)2153/04-05.
26. Applying s.34 of Cap.1, in seeking to amend the designation order gazetted, LegCo’s power must be consistent with, and therefore not wider than, the power the CE has under Cap.208. Therefore, LegCo:
  - (1) cannot amend (including repeal) the order in such a way as to negate the statutory duty imposed on CE by Cap.208, i.e. to designate the area approved by the CE in Council as country park;
  - (2) can amend the commencement date of the order. But even so the amendment on the commencement date cannot be in such a way as to make the order inconsistent with that statutory duty imposed by Cap. 208. Even so, the amendment of the commencement date cannot be done in such a way as would frustrate the statutory duty imposed by Cap. 208, or delay the date of commencement unduly (i.e. beyond a reasonable time).

*The alleged distinction between “the order in the gazette” and “the designation”*

27. The argument put forward by LegCo’s legal adviser, as we understand it, is as follows:

- (1) The limitations on the LegCo’s power to amend the gazetted order imposed by section 14 of Cap.208 “only require that the consequence of a repeal is not to affect **any** designation of country park” (para.4 of LegCo’s paper).
- (2) The LegCo’s power to amend (including repeal) is subject to the limitations mentioned above. There is nothing in section 14 that rules out repeal so long as the limitations set out above are not infringed.
- (3) The arguments of DoJ would render the power of negative vetting by LegCo **nugatory**.
- (4) The gazetted 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<sup>B</sup> approved on 18 September 1979 by Governor in Council remains in full force.

*Not any designation of country park, but designation of the area approved by CE in Council as country park*

28. With respect, the above views of the LegCo’s legal adviser have ignored the statutory duty imposed by s.14 on the CE. It is not just to order in the gazette the designation of **any** area approved by CE in Council as country park (such as the designation of the approved plan back in 1979). The duty imposed by s.14 on the CE is to “**by order in the Gazette, designate the area shown in the approved map to be a country park.**” (i.e. **the map CP/CWB<sub>D</sub> approved on 30 June 2009 by the CE in Council**). If the LegCo purports to repeal the gazetted order, it would definitely affect and defeat the designation of **the area shown in the approved map** (approved by CE in Council on 30 June 2009) to be a country park.

*Gazetted order already effective to create the designation*

29. LegCo's legal adviser seems to take the view that **because the commencement date has not yet arrived**, the gazetted order is not legally effective to create the designation. Since the order is not effective to create the designation, the repeal of the gazetted order itself does not have the effect of repealing the designation. Therefore there is no infringement of the limitations on the power of the LegCo in making any amendment (including repeal).

30. With respect, there are fundamental flaws in this analysis:

- (1) It would be illogical to split the gazetted order from the designation. The CE designates a country park by making the order in the gazette. The only purpose and effect of the gazetted order is the designation of the country park as approved by CE in Council. There is nothing in Cap.208 supporting such a distinction or creating additional hurdles to clear before the gazetted order can effect the designation. There is nothing in Cap.208 or Cap.1 or elsewhere providing that the gazetted order can only effect a designation upon, say, completion of negative vetting by LegCo, or upon the order coming into operation on the commencement date.
- (2) The designation of the country park is already complete, valid and effective in law once the CE's order is gazetted. The fact that it does not come into operation immediately upon publication of the gazette but only upon the commencement date on 1 November 2010 does not in any way affect its validity and effectiveness as the instrument to designate the area approved by CE in Council as country park.
- (3) The provision in the gazetted order of a specific commencement date itself cannot possibly be the decisive factor creating a fundamental difference to the power on the part of the CE or the LegCo to amend (including repeal) the order or the designation.
- (4) Whether the CE or LegCo can amend or repeal the Designation Order does not depend on whether the Designation Order has come into operation or not. For under Cap.208, the CE **shall** gazette the order to implement the decision of the CE in Council. He has no power to do anything to prevent the

implementation of the approved plan by designation, though he has power to select an appropriate date on which the change shall take effect.

- (5) The legislative process to designate must have been completed at the time when the Designation Order is published in gazette. It is valid and effective in law, albeit not having yet come into operation. Otherwise, there is no point to talk about amendment or repeal. One amends or repeals a piece of legislation which is already complete in law, not something in the making. This is also borne out by s.32 of Cap.1, which shows that postponing the operation of an Ordinance does not mean the Ordinance is incomplete or ineffectual.

“(1) Where an Ordinance is to come into operation on a day other than the day of its publication in the Gazette, a power to do anything under the Ordinance may be exercised at any time after its publication in the Gazette.

(2) An exercise of a power under subsection (1) is not effective until the provision in the Ordinance to which it relates comes into operation unless the exercise of the power is necessary to bring the Ordinance into operation.”

- (6) Nor can the fact that the gazetted order is subject to negative vetting affect the validity and completeness of the gazetted order as subsidiary legislation. This is clear from the wording of s.34(2) of Cap.1 itself:

“(2) 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.**

- (7) Any purported repeal of the gazetted order is a purported repeal of the designation of country park.

*Negative vetting power of LegCo not rendered nugatory*

31. Negative vetting power of LegCo is not rendered nugatory. As mentioned, without being inconsistent with the provisions of s.14 of Cap.208, LegCo can seek to amend the commencement date of the designation.

*“Amended” in s.28(1)(c) of Cap. 1 does not in the context of Part III of Cap. 208 include “repealed”*

32. LegCo’s legal adviser further argues that the CE, as the maker of the Designation Order, has power to repeal because of s. 28(1)(c) of Cap 1. This argument fails to take into account that the exercise of the power of s. 28(1)(c) of Cap 1 is premised on the original power of the specific ordinance and is in fact subject to any contrary intention as provided in such specific ordinance (see s. 2(1) of Cap 1 and s. 28(1)(b) of Cap 1). In the present case, the exercise of the power in s. 28(1)(c) by the CE (if required) is subject to the intention of Cap 208. S.15 provides a statutory mechanism for changing a designation of a country park and replacement of an approved plan which displaces any general power. In any event, any power of repeal derived from ss. 28(1)(c) or 34(2) would still be subject to the restriction imposed on the CE, as maker, under s.14 and the statutory framework of Cap. 208. Consequentially, “amended” in s.28(1)(c) and “amend” in s.34(2) do not in the context of Part III of Cap. 208 include “repealed” or “repeal”.

*Whether “excision” of land from country park a permissible exercise of power under s.15 of Cap. 208 ?*

33. It has been suggested that according to the construction of Cap 208, land within the boundary of a country park can only be extended, but not excised. With respect, we do not agree. It is clearly provided in s. 15 that the CE in Council may refer any map approved by him under s. 13 to the Authority for replacement of a new map or for amendment and there is nothing in Cap. 208 which suggests that such replacement or amendment can only be used for the extension of the boundary. Hence, such replacement or amendment of the map can be for the extension or excision of any map approved under s. 13 of Cap 208.

34. A similar issue was dealt with in the case *Lai Pun Sung v the Director of Agriculture, Fisheries and Conservation and the Country and Marine*

*Parks Board*, HCAL 83/2009. In that case, the applicant challenged that the land previously designated as country park could not be switched to other land-use, like landfill purpose. The court in considering the construction of s. 15(1) of Cap 208 said that -

“...the only point that I need to consider in the present proceedings is whether, assuming it can be demonstrated or it has been demonstrated that there is an overriding need for use of the land as a landfill site, it is still beyond the power of the Chief Executive in Council under section 15(1) to refer the matter to the Authority for a replacement or amendment of the map for the country park designating its parameters. As I said, there is nothing in the Ordinance which suggests that this cannot be done.”

Department of Justice

7 October 2010

#1078146v3

**Factual background leading to  
the making of the L.N. 72 of 2010**

1. The making of the Designation Order in the L.N.72 of 2010 in the present case forms the last step of the statutory scheme for the designation of the area in the map approved by CE in Council as the Clear Water Bay Country Park (CWBCP).
2. After many many rounds of discussion with the District Council and CMPB (including site visits to SENT Landfill) and numerous items of improvement works done by the Administration, the CMPB on 11 September 2008 recommended the excision of the proposed encroached area from the approved map of the CWBCP by invoking the statutory procedure under section 15 of Cap 208.
3. Pursuant to section 15 of Cap 208, CE in Council on 21 October 2008 referred the original approved map of the CWBCP to the Authority for replacement of a new map to excise the relevant 5 hectares of land affected by the proposed SENT Landfill Extension from the approved map.
4. In accordance with sections 8 and 9 of Cap 208, the draft replacement map was prepared and made available for public inspection for a period of 60 days with effect from 14 November 2008.
5. A total of 3,105 objections (the bulk of them are proforma objections) were received during the objection period. By exercise of the power of the CMPB under section 11(6) of Cap 208, the hearing of the objections to the draft map took place in six sessions in March 2009. After considering all the written objections, the views of those attending the hearing sessions, the Authority's representations and the explanation of the Environmental Protection Department (EPD) as the project proponent, the CMPB agreed to the excision of the 5 hectares of land from the CWBCP and rejected all objections on 30 March 2009 and issued a position statement to objectors while notifying them in writing of its decision. In response to the CMPB ' s



recommendation for enhancing the facilities of the CWBCP to provide better enjoyment for park visitors as compensatory measures for the loss of five hectares of country park land, the Authority has suggested, and EPD has agreed to, implement the following enhancement measures -

- (a) Ecological enhancement by inter-planting of native species in some 5 hectare of exotic woodland in the CWBCP to support various forms of wildlife;
  - (b) Upgrading of educational displays in the CWBCP Visitor Centre;
  - (c) Setting up of interpretative signs at Tai Hang Tun to provide better education facilities for park visitors; and
  - (d) Provision of guided tours at the Visitor Centre for the public.
6. Pursuant to section 12 of Cap 208, the draft map with the five hectares of land excised from the approved map together with the schedule of objections and representations made under section 11 were submitted to CE in Council for consideration.
7. On 30 June 2009, after considering the submission made under section 12 of Cap 208, CE in Council in exercise of the power under section 13(1)(a) of Cap 208 approved the draft replacement map.
8. According to section 13(4) of Cap 208, the replacement map approved by CE in Council under section 13(1) was deposited in the Land Registry on 17 July 2009.
9. On 25 May 2010, the CE ordered that the Country Parks (Designation)(Consolidation)(Amendment) Order 2010 should be made under section 14 of Cap 208 to designate the area in the replacement map approved by CE in Council as the CWBCP. The Designation Order in the legal notice (LN72/2010) was accordingly made and published in the Gazette on 31 May 2010.
10. The statutory scheme under Part III of Cap 208 (see paragraph 10 above) has all along been followed in the making of the Designation Order. In other words, the draft map had gone through the stages of

public consultation and adjudication of objection by the CMPB. It was also approved by the CE in Council and was deposited in the Land Registry. It comes to the last stage of the statutory scheme that designation shall be made by the CE in relation to the area in the map approved by the CE in Council as the CWBCP.

11. The foregoing reinforces our submission that the CE at this stage is bound, as he so did, to make a designation under s.14 of Cap 208 in respect of the area shown in the map no. CP/CWB<sub>D</sub> approved by the CE in Council as the CWBCP and it is not open to him nor the LegCo to undo the entire statutory process by repealing the Designation Order at this stage.
  
12. It is understood that no person would be pleased to have a waste disposal facility built or extended in his/her backyard. However, it is the hard fact that the SENT Landfill would reach its full capacity in the next 3 to 4 years and there would be a real waste disposal problem in Hong Kong as the SENT Landfill would reach its full capacity in 2013-14 and the alternative long term waste disposal facilities (such as the construction waste management facility) has yet to be in place. The Administration faces an imminent need to extend the SENT Landfill (including encroaching 5 hectares of land of the CWBCP situated next to it) so that the SENT Landfill extension could operate for six more years pending the introduction of alternative long term waste disposal facilities.

**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.

Department of Justice  
October 2010