



立法會主席

PRESIDENT OF THE LEGISLATIVE COUNCIL

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5 January 2011

Hon Miriam LAU Kin-ye, GBS, JP
Room 511, West Wing
Central Government Offices
Hong Kong

Dear *Miriam*

**Country Parks (Designation) (Consolidation)
(Amendment) Order 2010**

I understand that, in view of the Administration's position on matters relating to Legislation Council's resolution passed on 13 October 2010 that repealed the captioned Order, the House Committee has agreed to consider appointing a subcommittee to study matters relating to the power of the Legislative Council to amend subsidiary legislation.

The Chief Secretary for Administration wrote to me on 4 January 2011, reiterating the Administration's views on the issue. A copy of the letter is attached for Members' reference.

*Yours sincerely,
Jasper Tsang*

(Jasper TSANG Yok-sing)
President
Legislative Council

香港特別行政區政府
政務司司長辦公室



CHIEF SECRETARY
FOR ADMINISTRATION'S OFFICE
Government of the Hong Kong
Special Administrative Region

4 January 2011

The Honourable Jasper TSANG Yok-sing, GBS, JP
President of the Legislative Council
Legislative Council Building
8 Jackson Road
Central
Hong Kong

Dear President,

**Country Parks (Designation)
(Consolidation) (Amendment) Order 2010**

On 7 October 2010, the Secretary for Justice made a submission to the Legislative Council (LegCo) detailing our opinion that the proposed resolution to repeal the Country Parks (Designation) (Consolidation) (Amendment) Order 2010 (the Order), as put up to you by the Honourable Tanya Chan was unlawful. On 11 October 2010, you ruled that the Honourable Chan's proposed resolution was in order. Subsequently, at its meeting on 13 October 2010, the LegCo passed the resolution (the Resolution) and repealed the Order. The Administration and the LegCo hold different views as to the lawfulness of repealing the Order. We have since considered in detail and with great care how the Administration should respond to the Resolution. I now inform you and the LegCo of the Administration's position and decisions on this matter.

Legal Viewpoints of the Government

2. Regarding the relevant legal viewpoints and dispute, we have obtained opinions from two independent constitutional law experts Mr Michael Thomas SC and Lord Pannick QC. Both counsel agree with and support the view taken by the Government that, as a matter of law, the

Resolution passed by the LegCo on 13 October to repeal the Order lacked legal basis.

3. Both the Government and the LegCo agree that the LegCo has the same power as, but is subject to the same restriction as imposed upon, the maker of subsidiary legislation when the LegCo performs its function under s.34 of the Interpretation and General Clauses Ordinance (Cap 1). In this regard, you have affirmed in your ruling of 11 October 2010 the correctness of the former President's ruling and principles regarding the Public Revenue Protection Ordinance in 1999 and the effect of s.34(2) of Cap 1 on the LegCo's power to amend subsidiary legislation.

4. In the present case, the difference in legal viewpoints between the Administration and the LegCo lies in the construction of s.14 of the Country Parks Ordinance (Cap 208). According to s.14 of Cap 208, where the CE in Council has approved under s.13 a draft map (submitted in accordance with the elaborate statutory process laid down in Part III of Cap 208¹) and it has been deposited in the Land Registry, the CE shall make an Order to designate the area shown in the approved map to be a country park. Since the CE's power to designate under s. 14 of Cap 208 is expressed in mandatory terms as a duty imposed by the section, he has no discretion not to make the Order. He has to make the Order to discharge the legal duty stipulated in s.14. It follows that the CE has no legal power to repeal the Order.

5. In the circumstances, we consider that the LegCo does not have power under s. 34(2) of Cap 1 to repeal the Order for the following two reasons. First, according to s.2 of Cap 1, s.34(2) of Cap 1 does not apply in view of the contrary intention as appeared from the context of Cap 208. Second, even if s.34(2) applies, the provision stipulates that the LegCo's power to amend must be consistent with the power for making such subsidiary legislation. In this case, as the CE has no power to repeal the Order, the LegCo equally has no such power. All along, no one has suggested that the Order had to be repealed because of any legal flaw. Even if there were any legal flaw, it is not for the LegCo to assume the role of the Court to correct it by repealing the Order.

¹ Such statutory procedures include : the stage of consultation (by the Director of Agriculture, Fisheries and Conservation) with the Country and Marine Parks Board on the preparation of a draft map, the stage of public consultation, the stage of the Board hearing any objection(s), and the stage of submission of the draft map to the Chief Executive in Council for approval.

6. Under Article 73 of the Basic Law, the LegCo shall exercise the powers and functions to enact, amend or repeal laws in accordance with the provisions of the Basic Law and legal procedures. Both the statutory scheme to designate country parks as provided under Cap 208 and the requirement under s.34(2) of Cap 1 form parts of the "legal procedures". The LegCo must comply with them when exercising its powers and functions. This understanding of s.34(2) has been reflected in the previous rulings of LegCo (see paragraph 3 above).

7. As a matter of fact, it can be seen from some common law jurisdictions (e.g. the UK, Australia and Canada etc.) that their legislatures do not necessarily reserve the power to repeal all subsidiary legislation which the executive authorities concerned are empowered to make. Taking the UK as an example, some subsidiary legislation is not even subject to any parliamentary proceedings. The Administration of course respects the LegCo's power to scrutinise subsidiary legislation. However, the LegCo's power to repeal subsidiary legislation should not be considered as necessarily applicable on each and every occasion. Having regard to the rule of law in Hong Kong, whether such power applies to a particular piece of subsidiary legislation should be considered with reference to the relevant principal Ordinance and s.34(2) of Cap 1.

Decision after Consideration of All Factors

8. I would like to stress that, as always, the Government respects the Basic Law and the rule of law. Hence, we have taken great care in examining all relevant legal points and engaged the two eminent Leading Counsel to assist us to clarify the relevant important legal issues. Although we respect the viewpoints of the LegCo and yours on the issues, we find ourselves unable to agree to them in the end.

9. Such being the case, there has been suggestion that the Government should seek judicial review of the Resolution. After careful consideration, we believe that taking out judicial review application is not the best way to resolve this matter. Hence, the Government has decided not to do so. The reasons include the following three points.

10. First, the public in general would like to see a good relationship between the executive authorities and the legislature. The Government also attaches great importance to maintaining this relationship. Unless it is absolutely necessary, the Government and the LegCo should not lightly take

the other side to court as such actions will inevitably have negative impact on the community.

11. Second, we believe that the present dispute between the Government and the LegCo on Cap 208 and the repeal of the Order relates mainly to the interpretation of Cap 208. It does not involve any fundamental difference on the constitutional issue of the LegCo's powers and functions under the Basic Law.

12. Third, in the present case, the Government understands that there are considerable objections from the public to the proposed use of a portion of country park land as landfill site. The Environment Bureau has in the past two months conducted a comprehensive review and assessment of the ways as to how the solid waste disposal problem could be dealt with. Having taken all matters into account, the Government has decided to alter the proposal of the South East New Territories (SENT) Landfill Extension to dispense with the use of the 5 hectares of country park land as landfill site. On the basis of this decision, there is no longer any practical necessity for us to commence legal action to achieve the purpose of using these 5 hectares of land as landfill site.

13. However, I must emphasise that our decision on this occasion should not be taken to mean that the Government accepts what the LegCo did has sufficient legal backing. Nor should our decision on this case be treated as a precedent. If a similar situation occurs in future, the Government would certainly consider the particular circumstances of the case concerned, and would not rule out the possibility of seeking a ruling from the Court where necessary.

Time for Action in Implementing the Waste Management Strategy

14. Hong Kong is facing an imminent waste management problem. Even after waste recovery, about 13 300 tonnes of waste is disposed of at the three strategic landfills every day. These three landfills will be exhausted in 2014, 2016 and 2018 respectively. We must act in time; otherwise our waste problem will soon become a crisis with consequences that Hong Kong can hardly bear. In short, we have to implement a three-pronged strategy comprising enhancement of waste reduction at source; adoption of modern waste treatment facilities and extension of landfills.

15. Reducing waste at source is our top priority and progressive results have been achieved. Between 2005 and 2009, our per capita

municipal solid waste (MSW) disposal has decreased by 7%, and the MSW recovery rate has risen from 43% to 49%. The Administration will continue to promote waste reduction in the community, including to explore promotion by economic means. We will also encourage waste recovery. Our objective is to achieve a recovery rate of 55% by 2015.

16. This Administration has made considerable efforts in introducing modern waste treatment facilities. These include the Sludge Treatment Facility which is now under construction, the planning of the Organic Waste Treatment Facility (OWTF) and the Integrated Waste Management Facilities (IWMF). The planning work involves site selection, environmental impact assessments, engineering design as well as public consultation etc. Even assuming funding approval could be obtained from the LegCo within 2012, the first OWTF and, depending on the site selection, the first IWMF could only be commissioned in 2014, and 2016 or 2018 respectively.

The Practical Need for Landfill Extension

17. Even with the successful implementation of modern waste treatment facilities, landfill extensions are still indispensable in order to cater for non-combustible waste such as construction waste, as well as incineration ashes. Currently, we need to prepare for sufficient landfill space to cater for over 13 000 tonnes of waste disposed of at the landfills daily. In the medium to long term, assuming that all the above-mentioned modern waste treatment facilities could be commissioned by 2016 or 2018 and taking account of the enhanced waste recovery rate, our preliminary estimation is that there will still be some 8 000 tonnes of waste and incineration ashes daily that need to be landfilled.

18. Among the three landfills, the SENT Landfill is expected to be exhausted by 2014. The Administration understands the strong sentiment of the public against extension of the landfill into the country park. Therefore, despite the immense pressure to extend the landfill space, we decide to exclude the 5 hectares of country park land from the extension. We are also mindful of the proximity of the SENT landfill to the residential area. As such, the Environmental Protection Department will not only implement the mitigating measures as committed, but also respond positively to the concern on odour by seeking to designate the use of SENT landfill for the reception of construction waste only. Based on these revised arrangements, we have carefully reassessed the volume of landfill space required. As a result, the Administration will scale down the SENT landfill extension into

Tseung Kwan O Area 137 to 13 hectares, which may allow the continuous handling of the construction waste delivered to the South-East New Territories until 2020 so as to tie in with the planning of the long term construction waste transfer facility. We will engage in dialogue with the District Council, the LegCo Panel on Environmental Affairs and the trades on the revised proposal. We will also present it to the Town Planning Board and invoke amendment to the relevant legislation on waste with a view to implementing the above measures as soon as practicable.

19. The Secretary for the Environment will soon explain details of the Administration's comprehensive strategy and initiatives to the public and the LegCo.

A Joint Responsibility of Our Society

20. Hong Kong is a well-developed and densely populated city. Proper handling of the waste generated from our everyday life and economic activities is fundamental to the maintenance of public health and quality environment. I hope that the community's discussion about waste management would guide us to take the policies forward in a pragmatic and constructive manner. We could not accomplish proper waste management without the support and participation of the entire community, including the executive authorities and the legislature, as well as the community as a whole and individual citizens. I hope that the LegCo would support our various proposals. With the concerted efforts of different stakeholders for the overall well-being of our society, we should be able to resolve the potential crisis and handle our waste problem properly. This will benefit all and serve the long term interests of Hong Kong.

Yours sincerely,

A handwritten signature in black ink, appearing to be 'Henry Tang', written in a cursive style.

(Henry Tang)
Chief Secretary for Administration