

**President's ruling on proposed resolution to repeal  
the Country Parks (Designation) (Consolidation) (Amendment) Order 2010  
proposed by Hon Tanya CHAN**

Hon Tanya CHAN has given notice to move a proposed resolution to repeal the Country Parks (Designation) (Consolidation) (Amendment) Order 2010 ("Amendment Order") at the meeting of the Legislative Council ("LegCo") on 13 October 2010. In considering whether the proposed resolution is in order under the Rules of Procedure, I have invited the Administration to comment on the proposed resolution and Hon Tanya CHAN to respond to the Administration's comments, and sought the advice of Counsel to the Legislature ("Counsel"). I have also obtained a legal opinion from Senior Counsel Mr Philip Dykes.

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

2. According to the LegCo Brief on the Amendment Order, the latter seeks to amend the Country Parks (Designation) (Consolidation) Order (Cap. 208 sub leg B) to replace the original approved map in respect of the Clear Water Bay Country Park ("CWBCP") with a new approved map, for the purpose of excising the area to form part of the proposed South East New Territories ("SENT") Landfill Extension from the original approved map of CWBCP. The Amendment Order is to come into operation on 1 November 2010.

3. The Administration explains in the LegCo Brief that the SENT Landfill will be full by around 2013-2014. The Environmental Protection Department ("EPD") has proposed to extend the lifespan of the SENT Landfill by another six years by expanding it by 50 hectares ("ha"). The 50 ha extension includes an encroachment of about five ha of land of CWBCP<sup>1</sup>. EPD consulted the Country and Marine Parks Board ("CMPB") several times since December 2005 on the encroachment. Taking into account the advice of CMPB, the Director of Agriculture, Fisheries and Conservation, as the Country and Marine Parks Authority ("the Authority"), sought permission from the Chief Executive ("CE") in Council to invoke section 15 of the Country Parks Ordinance (Cap. 208) to refer the original approved map of CWBCP to the Authority for replacement by a new map so as to excise from the original approved map the encroachment area. A draft replacement map was prepared by the Authority in accordance with Cap. 208 and made available for public inspection<sup>2</sup>.

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<sup>1</sup> The other areas covered by the 50 ha extension are 30 ha of piggy-backing over the existing SENT Landfill and 15 ha of the adjoining Tseung Kwan O Area 137.

<sup>2</sup> The draft replacement map was made available for public inspection for a period of 60 days with effect from 14 November 2008.

4. According to the LegCo Brief, CMPB rejected all objections to the draft map on 30 March 2009 after having considered all the written objections, the opinions of those attending the hearing sessions, the Authority's representations and EPD's explanations. CE in Council approved the draft map of CWBCP on 30 June 2009 under section 13(1) of Cap. 208. In accordance with section 13(4) of Cap. 208, the Authority deposited the new approved map in the Land Registry on 17 July 2009. On 25 May 2010, the Executive Council advised and CE ordered that the Amendment Order should be made under section 14 of Cap. 208.

### **Hon Tanya CHAN's proposed resolution**

5. Hon Tanya CHAN's proposed resolution seeks to repeal the Amendment Order.

### **The Administration's comments**

6. The Administration submits that it is unlawful for a LegCo Member to propose a resolution to repeal the Amendment Order as to do so would be inconsistent with the power to make the Amendment Order under section 14 of Cap. 208. The Administration's view is based on its interpretation of the provisions of sections 28(1)(b) and 34(2) of the Interpretation and General Clauses Ordinance (Cap. 1). Section 28(1)(b) provides that "no subsidiary legislation shall be inconsistent with the provisions of any Ordinance", while section 34(2) 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.....". By virtue of section 3 of Cap. 1, the expression "amend" in section 34(2) includes "repeal".

7. The Administration argues that section 14 of Cap. 208 is cast in mandatory terms by using the term "shall", which means "must" in this context. CE's power under the section is limited and he is bound to implement the decision of CE in Council under section 13 by making the Amendment Order. Further, it could not have been the statutory intention and the purpose of Cap. 208 to empower CE to repeal the Amendment Order and undo the elaborate statutory process for the designation which covers several stages, i.e. preparation of a draft map; public consultation; adjudication of objections; submission and approval of the draft map; deposit of the approved map; and designation of country park, as set out in sections 8 to 14 of Cap. 208. Hence, CE's power to make the Amendment Order does not include the power to repeal it. "Amend" in section 28(1)(b) of Cap. 1 in the context of Part III

(i.e. sections 8 to 15) of Cap. 208 does not include “repeal” as there is contrary intention in Cap. 208.

8. The Administration also argues that CE’s power to designate is expressed as a duty imposed by section 14 of Cap. 208. CE shall designate the area shown in the new map as it has been earlier approved by CE in Council and deposited in the Land Registry. 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 CE in Council under section 13 of Cap. 208. The Administration considers that if CE is allowed to refuse to order the designation resulting from the elaborate statutory process or to repeal it, it would lead to the absurd consequence that CE would be empowered to undo the statutory process and set at naught years of work carried out in accordance with the statutory provisions.

9. The Administration submits that CE cannot on his own initiative repeal the Amendment Order without going through the same statutory process. LegCo therefore equally has no power to stop altogether the area shown in the new approved map from becoming a country park, as LegCo’s power to amend the Amendment Order must be in a manner “consistent with the power to make such subsidiary legislation”, as provided in Cap. 34(2) of Cap. 1. While CE has the power to change the commencement date of the Amendment Order as this would not be inconsistent with section 14 of Cap. 208, any amendment on the commencement date cannot be made in such a way as to make the Amendment Order inconsistent with the statutory duty imposed by Cap. 208. Hence, although LegCo can amend the commencement date of the Amendment Order, LegCo cannot amend it in such a way as to negate the statutory duty imposed on CE by Cap. 208. Neither can LegCo amend the commencement date in such a way as to make the Amendment Order inconsistent with that statutory duty imposed by Cap. 208, or frustrate the statutory duty imposed by Cap. 208, or delay the date of commencement unduly.

10. The Administration has also advanced other supporting arguments in its submission which I shall not repeat here. A copy of the submission is in the **Appendix**.

### **Hon Tanya CHAN’s comments**

11. Hon Tanya CHAN submits that the Administration’s position that LegCo does not have the power to repeal the Amendment Order is premised solely on its interpretation of section 14 of Cap. 208, with which she does not agree. She further submits that the explicit limitations imposed by section 14 are that before CE could make any order to designate, two conditions must have been fulfilled, i.e. a draft map has been approved under section 13; and 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 shown in the

approved map to be a country park or to designate any area shown in the approved map not to be a country park. In this sense, CE has no discretion in the designation, and for this matter, CE must make the designation by order in the Gazette.

12. Miss CHAN considers that the statutory duty alleged to have been imposed on CE by the word “shall” in section 14 of Cap. 208 could not have overridden CE’s duty to decide on government policies under the Basic Law (“BL”). In her view, it is plainly absurd to see section 14 as having imposed an overriding duty on CE that requires him to ignore everything else.

13. Miss CHAN points out that section 15 of Cap. 208 allows CE to refer an approved plan under section 13 to the Authority for it to be replaced by a new map or amended. In such a case, provisions contained in sections 8 to 14 of Cap. 208 will apply, and there is no requirement that such a referral could only be made after a designation under section 14 has been made. She considers that it is lawful for CE to make the referral without making a designation after a map has been approved under section 13.

14. Miss CHAN also considers that the Administration has made an unwarranted assumption that any repeal of an order of designation whether in operation or not is a refusal to order designation and would undo the elaborate statutory process and set at naught years of work carried out in accordance with the statutory provisions. In her view, repeal of a designation will legally be no bar to the making of another order to designate the area shown in the same map approved by CE in Council under section 13 to be a country park.

### **My opinion**

15. By virtue of Article 66 of BL, LegCo is the legislature of the Hong Kong Special Administrative Region (“HKSAR”). Under Article 73(1) of BL, the powers and functions of LegCo include “to enact, amend or repeal laws in accordance with the provisions of this Law and legal procedures”. The difference of views between the Administration and the subcommittee formed to scrutinize the Amendment Order as represented by its Chairman, Hon Tanya CHAN, brings into focus the constitutional role and power of LegCo to intervene under the negative vetting procedure as stipulated by section 34 of Cap. 1.

16. In his legal opinion, Mr Philip Dykes, SC, has stated the applicable constitutional principle that “LegCo must have effective oversight of the exercise of all legislative power and relevant legislation governing the exercise of law-making powers, such as the IGCO [Cap. 1] should be construed so as to give effect to this principle”. He points out that the use of statutory provisions to delegate law-making power to third parties, such as government officials, public bodies and private bodies, is necessary for effective law making, and

that there should be no constitutional objection to CE or CE in Council possessing such devolved authority, as long as LegCo can scrutinize the laws made under such authority. In his view, “[t]o construe a statute in such a way as to permit the donee of a legislative function the power to legislate and be immune from such scrutiny would be to undermine the constitutional legislative authority of LegCo”. For this reason, section 34 of Cap. 1 is important because it is one of the means by which LegCo controls the product of a devolved legislative authority.

17. Mr Dykes also makes the point that it would be anomalous to the extreme if LegCo identified a legal flaw in the decision-making process leading to the making of subsidiary legislation but could not do anything about it. He considers that the legislature should be the body primarily responsible for quality control of the laws made in the legislative process, and that it should be able to rectify as of right perceived defects and not have to wait upon the courts for remedies.

18. My view is that LegCo has the constitutional duty to scrutinize subsidiary legislation and correspondingly has the power to amend or repeal when it is appropriate to do so. The statutory provisions in any ordinance which grant powers to make subsidiary legislation should not in the absence of clear words or manifest legislative intention be interpreted to mean that LegCo has abdicated its control over the exercise of those powers. It is only reasonable that Members will be wary if LegCo’s power to intervene in the process of law making under delegated authority were to be restricted beyond what is permissible under BL.

19. My view set out above is in agreement with my predecessor’s ruling made in May 1999 when the effect of section 34(2) of Cap. 1 on the power of LegCo to amend a piece of subsidiary legislation was considered. The issues then considered concerned the admissibility of a motion proposed to repeal certain clauses of a bill scheduled to an order made by CE under section 2 of the Public Revenue Protection Ordinance (Cap. 120). My predecessor has usefully set out the relevant principles that should apply: “[i]n a normal case where the Legislative Council is seeking to amend a piece of subsidiary legislation under section 34(2) of Cap. 1, as long as the proposed amendment conforms with requirements of the Rules of Procedure, the Legislative Council would be able to amend by way of repeal, addition or variation of the subsidiary legislation in question. However, because of the requirement in section 34(2) of Cap. 1 that an amendment to a piece of subsidiary legislation can only be made consistent with the power to make the subsidiary legislation in question, the true extent of the Legislative Council’s power to amend the Order has to be examined in the context of the .....Ordinance”.

20. The key question that I have to consider now is whether in the passage of Cap. 208, in particular section 14, LegCo had agreed to abdicate its control over the power for CE to make orders under section 14, which reads: “[w]here

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”.

21. To assist me in answering this question, I have made comparison with the relevant provisions of the Town Planning Ordinance (Cap. 131) which deal with the notification in the Gazette of plans submitted by the Town Planning Board and approved by CE in Council. Section 9(5) of Cap. 131 stipulates: “[o]n such approval being given [by CE in Council] the approved plan shall be printed and exhibited for public inspection at such place as the Board may consider suitable and the fact of such approval and exhibition shall be notified in the Gazette”. Counsel advises me that upon approval by CE in Council, the statutory process for approval of plans is complete. Such notices in the Gazette are not subject to section 34 of Cap. 1 and LegCo has no power of intervention.

22. I have asked myself whether in the case of section 14 of Cap. 208, LegCo similarly has no role to intervene when an order is made under section 14. I find that there is an obvious difference between the two cases. Unlike plans approved by CE in Council under section 9(2) of Cap. 131, the statutory process for the designation of a country park is not yet complete when CE in Council approves the draft map. The final step in the statutory process for the designation of a country park is for CE to make a designation order under section 14 of Cap. 208. Such designation is made by an order published in the Gazette which is subject to LegCo’s scrutiny under section 34(2) of Cap. 1. This is different from making a notification in the Gazette of the approved plans as in the case under Cap. 131. I am satisfied that the publication of an order made under section 14 of Cap. 208 is not merely for the purpose of notification.

23. The Administration contends that because of the use of the word “shall”, section 14 of Cap. 208 has imposed on CE a duty that he must discharge without any discretion. CE must make an order when the two aforesaid conditions specified in the section have been met, and cannot do anything to stop or amend the designation, including moving a motion to repeal an order he has made under that section. The Administration argues that the power to repeal under section 28(1)(c) of Cap. 1 is thus displaced by contrary intention in section 14. These interpretations clearly render the negative vetting procedure ineffective and deprive LegCo of its function of overseeing the exercise of powers in relation to subsidiary legislation. I have to be satisfied that section 14 does manifest a contrary intention that the statutory provisions that empower CE and LegCo to amend, and therefore repeal, an order made under the section should not apply.

24. In my view, the word “shall” in section 14 of Cap. 208 means three things. First, it stipulates that CE must make the designation, when the two

conditions in the section have been met. This is the duty that the Administration has emphasized. Second, it prescribes the only way the designation should be made i.e. by order in the Gazette. Third, CE must designate the area shown in the approved map to be a country park. He cannot designate any area other than an area shown in the approved map to be a country park or to designate any area shown in the approved map not to be a country park.

25. Counsel advises me that any statutory duty should carry with it powers incidental to the discharge of that duty unless such powers are displaced by clear wording in or necessary implication of the statute which imposes such duty. The authority responsible for discharging the duty has to ensure that the duty is properly discharged in pursuance of the purposes of the relevant statutory provisions. In my opinion, the powers which CE should have, in the discharge of his duty under section 14, include the power to determine when an order for the designation should be made and come into effect, and to initiate a motion in LegCo to repeal the order which he has already made, if there are good reasons to do so. Moreover, the repeal of the Amendment Order by LegCo's exercise of its power to amend under section 34(2) of Cap. 1 will not go against the mandatory obligations of CE as signified by the expression "shall". I am not convinced that section 14 of Cap. 208 rules out CE's power to move a motion of repeal.

26. I have also asked myself whether repeal of an order made under section 14 of Cap. 208 will lead to non-compliance with the requirements in Cap. 208, or result in such unreasonable consequences that any reasonable person would construe that retaining the power to repeal such an order could not have been the original intention of LegCo. The Administration argues that the repeal of the Amendment Order would put the statutory process for the designation that has gone before to naught. Counsel advises me that if the Amendment Order is repealed by LegCo, the Amendment Order would be taken as if it had never been made, and CE may make another order under section 14 of Cap. 208.

27. I note that section 15(1) of Cap. 208 allows CE in Council to refer an approved map made under section 13 to the Authority for it to be replaced by a new map or amended. In such a case, provisions in sections 8 to 14 of Cap. 208 will apply. Counsel advises that there is no requirement in Cap. 208 that such a referral may only be made after an order under section 14 has been made by CE. In view of Counsel's advice, I am satisfied that repeal of an order made under section 14 will not lead to non-compliance with the requirements in Cap. 208 or result in unreasonable consequences. If the Administration fails to persuade LegCo not to exercise its power to repeal an order made by CE under section 14 for the designation of a country park, referrals may be made under section 15(1) after taking into account the views of LegCo. Such a scenario may be considered as an example of how LegCo may effectively oversee the exercise of delegated legislative power by the

executive authorities.

28. As a result of my above analysis, I am satisfied that neither section 14 of Cap. 208 nor Cap. 208 when read as a whole expresses or manifests any contrary intention that the power of LegCo to amend, and therefore repeal, subsidiary legislation under section 34 of Cap. 1 has been displaced.

### **My ruling**

29. I rule that Hon Tanya CHAN's proposed resolution is in order under the Rules of Procedure and may be moved at the LegCo meeting on 13 October 2010.

(Jasper TSANG Yok-sing)  
President  
Legislative Council

11 October 2010

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>B</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

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**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.