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Legislative Council

LC Paper No. LS 12/17-18

Ref: LS/A/05B

Finance Committee

Information note prepared by Legal Service Division on the legal and constitutional framework relating to the approval of funding for the purposes of the Government's capital works programme and related issues

Purpose

This paper provides information on the legal and constitutional framework relating to the approval of funding for carrying out the Government's capital works programme and related issues in order to assist members in their consideration of the legal issues raised in the letters of Hon CHU Hoi-dick dated 26, 27 and 30 October 2017 to the Chairman of the Finance Committee ("FC").

Establishment of Capital Works Reserve Fund ("CWRF")

2. CWRF was established under section 29 of the Public Finance Ordinance (Cap. 2) with effect from 1 April 1982 pursuant to a resolution passed by the Legislative Council ("LegCo") on 20 January 1982 ("CWRF Resolution"), which was enacted as subsidiary legislation made under Cap. 2.

3. According to the speech of the then Financial Secretary on 20 January 1982 in moving the motion seeking LegCo's approval of CWRF (**Annex**), prior to the establishment of CWRF, funds for carrying out the Government's Public Works Programme and acquisition of land were directly voted in the annual Estimates. This arrangement, however, created various problems such as the difficulty in estimating accurately the annual provision required for capital works which usually extended over several years. CWRF was established to overcome these problems by removing the expenditure on the Public Works Programme from the annual Estimates. With the establishment of CWRF as from 1 April

1982, public works would be financed through CWRP to be funded by transfers from General Revenue. The amount to be transferred each year will be considered in the context of the budget for that year starting with the budget proposals for 1982-1983, and appropriation would be sought from LegCo in the normal way. The existing Public Works Programme procedures would continue to apply and FC's control of expenditure on capital works would remain unchanged.

4. According to the Administration's letter dated 6 January 2014 to the Clerk to the Public Works Subcommittee ("PWSC") (LC Paper No. PWSC 33/13-14(01))¹, before CWRP was established in 1982, provisions for block allocations were sought in the context of the Estimates. After the establishment of CWRP on 1 April 1982, the Administration considered that to accord with the CWRP Resolution, members' specific approval should be sought each year for the funds to be shown in the Estimates for each block allocation. According to the above letter, the Administration has started seeking FC's approval for the provisions for CWRP block allocations² on an annual basis from December 1983, and since then, it has been the Administration's practice to seek members' approval of the provisions for CWRP block allocations on an annual basis.

Mechanism for approving expenditure for CWRP block allocation subheads

5. According to paragraph (c) of the CWRP Resolution, the Financial Secretary ("FS") may expend moneys from CWRP for various purposes, including the Public Works Programme and acquisition of land, in accordance with such conditions, exceptions and limitations as may be specified by FC.

6. In accordance with the CWRP Resolution, the Administration sought, and FC approved on 9 March 1983, delegation of powers to FS subject to specified conditions, exceptions and limitations as approved by FC. Such delegation included giving FS the power to create new subheads where necessary for approved projects in Category A of the Public Works Programme and the power to approve creation of new Category D items in the Public Works Programme with a project estimate

¹ Re-issued to members vide LC Paper No. FC 265/16-17 on 4 October 2017.

² Block allocations under CWRP refer to subheads approved by FC for funding minor works projects and studies, land acquisition, capital subventions and computerization projects.

not exceeding \$1.5 million.³ The financial ceiling has since been uplifted by FC on various occasions. The last revision was approved by FC on 13 July 2012 vide PWSC(2012-13)19, raising the financial ceiling for Category D items for 21 CWRP block allocation subheads from \$21 million to \$30 million to reserve the real value of the delegated power. Projects exceeding the above ceiling in cost are submitted to FC for funding approval on a project basis.

7. FC has also approved the creation of new block allocation subheads under CWRP. The latest creation was Subhead 7017CX (Signature Project Scheme) ("SPS") which was approved by FC on 10 May 2013 for funding items costing up to \$30 million each to support implementation of SPS projects by District Councils (PWSC(2012-13)59 refers).

8. With the addition of Subhead 7017CX, there are a total of 26 block allocations under CWRP, of which 21 are subject to a financial ceiling of \$30 million in spending on each item. In relation to the three subheads, namely, Subheads 1004CA (Compensation for surrenders and resumptions: miscellaneous) and 1100CA (Compensation and ex-gratia allowances) under Head 701 – Land Acquisition, and Subhead 5001BX (Landslip preventive measures) under Head 705 – Civil Engineering, the authority delegated by FC does not impose a financial limit per project.⁴ In relation to the block allocations under Head 708 – Capital subventions and major systems and equipment and Head 710 – Computerization, according to LC Paper No. PWSCI(95-96)35 dated 7 February 1996, they do not form part of the Public Works Programme and thus, technically, are not a matter for PWSC to consider. However, the Administration has always sought funding approval for all the CWRP block allocations as a single annual exercise in one PWSC submission, and has adopted the practice of including the block allocations under Heads 708 and 710 as part of the CWRP block allocations exercise for administrative convenience. According to the Administration, Members may, if they wish, decide to have the block allocations under these two Heads to be considered separately by FC.⁵

9. The effect of the CWRP Resolution and the delegation of FC's powers to FS is that while expenditure items under CWRP, in general, are

³ Refer to paragraphs 16 and 20 of FC Item B.170 at Appendix III to LC Paper No. PWSC 33/13-14(01) re-issued to members vide LC Paper No. FC 265/16-17 on 4 October 2017.

⁴ Refer to paragraphs 19 and 20 of LC Paper No. PWSC(2016-17)37.

⁵ Refer to paragraph 41 of LC Paper No. PWSCI(95-96)35 re-issued to members vide LC Paper No. FC 265/16-17 on 4 October 2017.

required to be approved by FC on a project-by-project basis, FC has authorized FS to approve expenditure on individual projects under CWRP block allocation subheads, subject to the respective financial ceiling for individual items and the projects meeting the ambit of the relevant subheads. This means that FS may exercise the delegated authority to expend moneys and may not need to consult PWSC and FC on individual items. According to LegCo's records, since 1983, FC's control of expenditure on public works under the CWRP block allocation subheads has primarily been exercised through approving the proposals for the funding of the block allocations in form of lump sums every year with the relevant proposals set out in a single omnibus paper.⁶

Validity of FC's delegation of powers to FS before 1 July 1997

10. A resolution was passed by FC on 6 January 1995 to raise the financial ceiling of the delegated powers to FS to \$15 million for Category D projects. A question that may arise is whether this delegation continues to be valid after 1 July 1997.

11. As stated in paragraph 6 above, the delegation of powers to FS for Category D items was made in accordance with the CWRP Resolution. By virtue of Article 8 of the Basic Law ("BL"), the laws previously in force in Hong Kong including ordinances and subordinate legislation shall be maintained. Under section 26 of the Hong Kong Reunification Ordinance ("HKRO"), all powers and duties delegated to a public officer which were in force immediately before 1 July 1997 shall, where a corresponding power of delegation (whether express or implied) exists on and after that date, be deemed to have been delegated to the corresponding public officer in the Hong Kong Special Administrative Region ("HKSAR").

⁶ According to LegCo's records, there were two occasions where a different arrangement was adopted:

- (a) in February 1996, the Administration submitted to PWSC 11 proposals, each for one CWRP Head of expenditure, on block allocations (please refer to PWSCI(95-96)35); and
- (b) at the FC meeting on 10 January 2014, the Administration submitted a paper proposing to amend the original CWRP block allocations proposal for 2014-2015 by reducing the funding sought from the block allocations. The effect was that the projects covered in the reduced funding (for which expenditure had not yet been incurred and which would only be commenced upon the main construction works of the respective projects had been approved by FC) were taken out from the block allocations proposal. Please refer to the minutes of the FC meeting held on 10 January 2014 (LC Paper No. FC 59/13-14).

12. In the light of BL 8 and section 26 of HKRO, Cap. 2, the CWRP Resolution and the delegation of powers made by FC in accordance with the CWRP Resolution before 1 July 1997 continue to have effect after 1 July 1997. Since the delegation so made has the force of law, it remains valid unless and until subsequent changes are made and approved by FC.

Definition of "works" under Category D

13. The word "works" is not defined in Cap. 2 or in the CWRP Resolution. While reference is made to "public works programme" in the CWRP Resolution, there is no provision therein on what types of works are included in the programme. When FC approved the delegation of financial powers to FS on 9 March 1983 in accordance with the CWRP Resolution, it is noted that in the relevant Administration's paper to FC seeking approval of the delegation,⁷ reference was made to "projects" or "items" instead of "works" and there was no definition of "projects" or "Category D projects". In the Administration's paper seeking FC's approval of block allocations under CWRP for 1984-1985, Category D projects or items in Category D were described as "minor building works".⁸ According to an information paper issued to FC by the Financial Services and the Treasury Bureau in April 2007 (FCRI (2007-08)2), Category D projects are essentially minor works projects or standalone studies funded by the 22 works-related block allocations under CWRP.⁹

LegCo's powers under BL 73(2) and (3)

14. Under BL 73(2) and (3), LegCo has the powers and functions to examine and approve budgets introduced by the Government, and to approve taxation and public expenditure. BL 64 provides, among others, that the HKSAR Government shall obtain approval from LegCo for taxation and public expenditure. Under section 8(1) of Cap. 2, no changes shall be made to the approved estimates of expenditure except with the approval of FC upon a proposal of FS. Paragraph 27 of the FC Procedure and paragraph 25 of the PWSC Procedure provide that

⁷ See Appendix III to LC Paper No. PWSC 33/13-14(01).

⁸ See paragraphs 9, 12, 18 and 22 of Appendix IV to LC Paper No. PWSC 33/13-14(01).

⁹ Except for Subhead 5001BX (Landslip preventive measures) under Head 705 – Civil Engineering, the other 21 works-related block allocation subheads are subject to a financial ceiling of \$30 million per item.

proposals to change the approved estimates of expenditure must come from FS, and members cannot amend FS's proposals which must be discussed and voted on as they stand. The above provisions reflect the constitutional principle in public finance that it is for the government to make the demand and for the legislature to grant.

15. The respective powers and functions of LegCo and executive authorities under BL have been considered by the Court of First Instance in *Leung Kwok Hung v President of Legislative Council*.¹⁰ In that case, Hartmann J, as he then was, considered that the principle of separation of powers is enshrined in BL and a reading of BL makes it evident that the executive, the administration and the legislature are each to perform their constitutionally designated roles in a co-ordinated and co-operative manner for the good governance of Hong Kong.¹¹ According to the Judge, what BL defines is the method of inter-action; that is, the nexus, both introductory and consequential, which connects the executive and administration on the one part with the legislature on the other. To put in another way, who carries responsibility for this inter-action, the manner in which it is to be executed and how the consequences are to be managed are fundamental matters defined in BL.¹² In the context of financial proposals, the Judge's view was that while the function of the executive and administration under BL is to formulate policy, expressing it in terms of legislation and financial proposals, it is for LegCo to enact that legislation and to approve those financial proposals. LegCo does not draw up and introduce budgets;¹³ it does not run any "mirror" Ministry of Finance. Instead, the function of LegCo is to examine and approve budgets introduced by the executive authorities and to approve (not create or decide upon) taxation and public expenditure.¹⁴

16. As far as CWRP block allocations are concerned, it can be seen from paragraphs 5 to 9 above that while FS, on the one hand, may expend moneys on individual projects under the CWRP block allocation subheads pursuant to the delegated powers conferred and subject to the conditions specified by FC, the Administration, on the other hand, has been seeking FC's approval of the proposed overall funding for the block allocation subheads on an annual basis. It could therefore be said that LegCo's exercise of its power and function of approving public

¹⁰ [2007] 1 HKLRD 387.

¹¹ Ibid, paragraph 66.

¹² Ibid, paragraph 68.

¹³ The power of drawing up and introducing budgets is vested in the Government: BL 62(4).

¹⁴ BL 73(2) and (3); *Leung Kwok Hung v President of Legislative Council* [2007] 1 HKLRD 387, paragraphs 67 and 68.

expenditure under BL 73 is effected through FC's above control and approval of expenditure on capital works.

Whether and how FC can change the mechanism for approving expenditure for CWRP block allocation subheads

17. Paragraph (c) of the CWRP Resolution provides for the power of FC to specify conditions, exceptions and limitations in accordance with which FS may expend moneys from the Fund for the purposes specified in that paragraph. It is however silent on who could propose such conditions, exceptions and limitations. While paragraph (c) of the CWRP Resolution, as drafted, does not prohibit individual FC members from proposing conditions, exceptions and/or limitations, it is noted that it has been the practice for the Administration to put up proposals pursuant to paragraph (c) of the CWRP Resolution over the years by seeking FC's approval to delegate its powers to FS with specified conditions, etc. and to vary the relevant delegations.

18. Insofar as the funding proposal for block allocations relates to the use of public money, the constitutional principle in public finance that it is for the government to make the demand and for the legislature to grant should be relevant to FC's consideration as to how to deal with individual members' proposal to specify conditions, etc. and to vary the delegations to FS under paragraph (c) of the CWRP Resolution. Where it is considered that the present case warrants a departure from the practice of the Administration putting up proposals under paragraph (c) of the CWRP Resolution, it may be necessary to consider whether and how the proposals proposed by individual members, if passed by FC, would affect the continued operation of the delegation and/or conditions, etc. that are already in place.

Review of the operation of the block allocations mechanism

19. Apart from considering the matters mentioned in paragraph 18 above, FC may consider whether this is an opportune time to review the operation of the block allocations mechanism which has been implemented since 1982. If so, the following may be some of the matters that members may wish to consider:

- (a) how the proposals for the funding of block allocations should be presented: whether in form of a single omnibus paper as adopted in recent years, or in separate papers, each for one CWRP Head of expenditure, as adopted in February 1996;

- (b) whether it is necessary to impose a financial limit for projects under three subheads relating to land acquisition and landslip preventive measures mentioned in paragraph 8 above; and
- (c) in relation to the block allocations under Head 708 – Capital subventions and major systems and equipment and Head 710 – Computerization, as mentioned in paragraph 8 above, whether to review the practice of including the block allocations under these two Heads as part of the CWRP block allocations exercise or decide to leave them to be considered separately by FC.

Way forward

20. Hon CHU Hoi-dick has submitted 10 draft motions seeking to change the mechanism for approving expenditure for CWRP block allocation subheads and FC's previous delegations of powers to FS. Subject to the Committee's decision on how to take forward those proposals, the Legal Service Division would provide further assistance if necessary.

Prepared by

Legal Service Division
Legislative Council Secretariat
22 November 2017

PART 2

(Secretary for the New Territories to Regional Secretary, New Territories)

Air Armament Practice Ordinance (Cap. 194)
Defence (Firing Areas) Ordinance (Cap. 196)
Smuggling into China (Control) Ordinance (Cap. 242)

He said:—Sir, I rise to move the motion standing in my name in the Order Paper.

On 25 November last, I moved a motion in this Council to effect a transfer of certain principal statutory powers from the now defunct post of Secretary for the New Territories to the successor post of Secretary for City and New Territories Administration, in anticipation of the amalgamation of the Home Affairs Department and the New Territories Administration on 1st December.

Since that time, an exhaustive list of minor legal references to the defunct office of Secretary for the New Territories has been compiled. This motion proposes the transfer of these references to the Secretary for City and New Territories Administration or to the Regional Secretary, New Territories. Following the passage of this motion, all responsibilities previously devolving upon the Secretary for the New Territories by virtue of the laws of Hong Kong will have been at last redistributed.

Sir, I beg to move.

Question put and agreed to.

CAPITAL WORKS RESERVE FUND

THE FINANCIAL SECRETARY moved the following motion:—

- (a) That there will, with effect from 1 April 1982, be established a fund styled the Capital Works Reserve Fund;
- (b) that the Fund shall be administered by the Financial Secretary;
- (c) that there shall be credited to the Fund such appropriations from the general revenue of Hong Kong as may be approved by this Council;
- (d) that there shall accrue to the general revenue of Hong Kong all sums received by way of interest or dividends earned in respect of such unexpended balances as may be held in the Fund at any time;
- (e) that the Financial Secretary may expend moneys from the Fund for the purposes of the Government's Public Works Programme and for the acquisition of land, in accordance with such terms and conditions as are approved by the Finance Committee; and
- (f) that the Financial Secretary may from time to time transfer from the Fund to the general revenue of Hong Kong any balances in the Fund which are not required for the purposes of the Fund.

He said:—Sir, I move the motion standing in my name in the Order Paper.

At present funds for carrying out the Public Works Programme and for the acquisition of land are directly voted in the annual Estimates. This longstanding arrangement now creates problems because, unlike most other Government expenditure, capital works usually extend over several years, while due to the vagaries of the weather, the submission of bills, or a contractor's capacity to complete the work, it is difficult to estimate accurately the provision required for any particular year. Furthermore in the past the total approved provision in any year for capital works has been taken as the Government's declared intention to spend the full amount, and steps have thus been taken to counter any shortfall in expenditure by injecting new projects into the Programme to take up the slack. This procedure has helped to ensure that the total funds voted have been fully expended, but it has also led to an increase in the carry forward commitment for future years thereby reducing the opportunity to introduce new items into the Programme. Finally because of the sums involved, over or under-spending on the non-recurrent heads of expenditure can materially affect the Government's total surplus or deficit for a given year. This can be misleading if viewed in isolation, and not seen in relation to the size of the outstanding commitment in respect of capital works. At the end of March 1982, for instance, the overhang will be more than \$22,000 millions covering works that will take more than four years to complete.

In order to overcome these problems I propose that expenditure on the Public Works Programme and on land acquisition should be removed from the annual Estimates, and in future should be financed through a Capital Works Reserve Fund to be funded by transfers from General Revenue. The amount to be transferred each year will be considered in the context of the budget for that year starting with my budget proposals for 1982-83, and appropriation will be sought from this Council in the normal way. The existing Public Works Programme procedures will continue to apply, and Finance Committee's control of expenditure on capital works will remain unchanged. We shall of course discipline starts, but otherwise ensure that work once begun proceeds expeditiously to completion. It is almost (though not quite) inconceivable that major works will need to be halted in mid-stream.

This proposed arrangement has been approved by the Public Works Sub-Committee and by Finance Committee. The purpose of the Motion is to establish the Capital Works Reserve Fund so that the arrangement may be reflected in the draft Estimates for 1982-83 and take effect from 1 April 1982.

I must draw particular attention to clause (f) of the motion which provides that the Financial Secretary may from time to time transfer from the Fund to General Revenue any balance in the Fund. The purpose of this clause is to allow any accumulated surplus in the Fund in excess of requirements to be credited back to General Revenue should the need at any time arise. I hope that the need will indeed never arise. But it is not the intention of the proposed

arrangement to hypothecate revenue: this clause is thus necessary to ensure that funds are not sterilized in the Capital Works Reserve Fund should (for reasons that cannot be anticipated) the recurrent budget run into difficulties. Of course no expenditure will still be possible without the approval of the Finance Committee.

I hope moreover that the public will view the sums appropriated for this reserve, most of which will come from land sales, as evidence that we are returning to investment in Hong Kong the surpluses that arise from land sales which are often lumpy and unpredictable. There is a ridiculous suspicion that General Revenue Account surpluses held in our reserves are not really intended for Hong Kong ends. I hope that the creation of this reserve fund will tell the true story and lead to a more businesslike procedure with regard to the huge Public Works Programme.

Sir, I beg to move.

Question put and agreed to.

~~RATING ORDINANCE~~

THE FINANCIAL SECRETARY moved the following motion:—In exercise of the powers conferred by section 18(1) of the Rating Ordinance that, for the period 1 April 1982 to 31 March 1983, for every tenement in a specified area set out in the first column of the Schedule, the general and Urban Council rates shall be computed on the basis of the respective percentage of the rateable value of such tenement set out opposite that area in the second and third columns of the Schedule.

SCHEDULE

<i>Specified Area</i>	<i>General Rates</i>	<i>Urban Council Rates</i>
A	3½%	8%
BC	3½%	8%

He said:—Sir, I move the motion standing in my name in the Order Paper.

Under section 18(1) of the Rating Ordinance, general rates and Urban Council rates are computed on the basis of such percentages of the rateable value of tenements as this Council may by resolution determine. The existing percentages are 7½% for the urban areas and 11% for the New Territories in respect of general rates, and 4% in respect of Urban Council rates.

These percentages have been in effect since 1 April 1977. There has been no change in rateable values or in the percentages since then. Thus the yield from rates has remained fairly static since 1977, apart from increases resulting from interim valuations of new properties. This has presented no particular problem