立法會
Legislative Council

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Paper for the House Committee meeting on 21 January 2011

Appointment of a subcommittee to study issues relating to the power of the Legislative Council to amend subsidiary legislation

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Chapter 1 - The Country Parks (Designation) (Consolidation) (Amendment) Order 2010

1.1 This chapter outlines legal issues raised in relation to the repeal of the Country Parks (Designation) (Consolidation) (Amendment) Order 2010 ("the Amendment Order") and sets out the opinion of the President in his ruling on Hon Tanya CHAN's proposed resolution to repeal the Amendment Order. It also provides the latest developments on the Administration's positions and decisions on the matter.

The Amendment Order

1.2 On 25 May 2010, the Executive Council advised and the Chief Executive ("CE") ordered that the Amendment Order should be made under section 14 of the Country Parks Ordinance (Cap. 208) ("CPO"). The Amendment Order 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 an area of five hectares from the original approved map of CWBCP to form part of the proposed South East New Territories ("SENT") Landfill Extension. The Amendment Order was intended to come into operation on 1 November 2010.

1.3 The Amendment Order was gazetted on 4 June 2010 and tabled in the Legislative Council ("LegCo") on 9 June 2010. At the meeting of the House Committee on 11 June 2010, Members agreed to form a subcommittee to study it. Under the chairmanship of Hon Tanya CHAN, the Subcommittee on the Country Parks (Designation) (Consolidation) (Amendment) Order 2010 ("the Country Parks Subcommittee") comprising nine members held seven meetings with the Administration, conducted a site visit to the SENT Landfill and received views from members of the public and deputations including the Sai Kung District Council.

1.4 The Country Parks Subcommittee had examined the environmental impact arising from the operation of the existing SENT Landfill including odour management and control measures, monitoring of such measures, the delivery of waste by refuse collection vehicles and the justifications for and alternatives to extending the SENT Landfill. Members of the Subcommittee considered that the Administration had not

effectively resolved the odour problem in Tseung Kwan O, and noted that local residents and the Sai Kung District Council objected to the proposed extension of the SENT Landfill. The Subcommittee passed a motion on 27 September 2010 requesting CE to repeal the Amendment Order.

1.5 In its response to the Country Parks Subcommittee, the Administration advised that according to section 23 of the Interpretation and General Clauses Ordinance (Cap. 1), "where an Ordinance repeals in whole or in part any other Ordinance, the repeal shall not revive anything not in force at the time at which the repeal takes effect". As such, if the repeal of the Amendment Order took effect before its commencement date on 1 November 2010, the original approved map of CWBCP would not be affected. However, pursuant to the statutory mechanism under section 13(4) of CPO, the new map CP/CWB^{D} approved by CE in Council and signed by the Country and Marine Parks Authority had been deposited in the Land Registry. There might be a problem unless a new map would be available under section 15 of CPO to replace the map CP/CWB^{D} deposited at the Land Registry.

1.6 The Country Parks Subcommittee did not subscribe to the Administration's view. The Subcommittee took note of the view of its legal adviser that the map CP/CWB^{D} deposited at the Land Registry was meant for public inspection and the depositing of the map itself had no legislative effect. The Amendment Order sought to replace the original approved map in respect of CWBCP with the new approved map. If the Amendment Order was repealed before the commencement date, the original approved map remained effective.

1.7 At its meeting on 4 October 2010, the Country Parks Subcommittee passed a motion resolving that a motion be moved by its Chairman to repeal the Amendment Order. On 5 October 2010, the Administration provided to the Subcommittee its written view on the legal implications concerning repeal of the Amendment Order. The Administration's view is based on its interpretation of section 14 of CPO which provides that -

> "Where the CE in Council has approved a draft map under section 13 of the Ordinance, and it has been deposited in the Land Registry, CE shall, by order in the Gazette, designate the area shown in the approved map to be a country park."

1.8 The Administration argued that since the provision is cast in mandatory terms, CE is bound to make the Amendment Order. According to the Administration, LegCo when exercising its power to amend under section 34(2) of Cap. 1 has the same power as the original maker of subsidiary legislation and is subject to the same statutory constraints as the original maker. As CE does not have the power to repeal the Amendment Order, LegCo equally has no such power. If the Amendment Order is repealed, the repeal would have no effect in law and the Amendment Order would remain in force.

1.9 In the view of the Legal Adviser ("LA") to the Council, by virtue of the interpretive provisions of Cap. 1, the expression "amend" includes "repeal". Section 34(2) of Cap. 1 gives LegCo the power to amend, and therefore repeal, subsidiary legislation. The limitations imposed by section 14 of CPO only apply to CE in making an order of designation and there is nothing in section 14 that rules out repeal. The arguments of the Administration would render the power of negative vetting by LegCo nugatory.

1.10 The Country Parks Subcommittee was concerned about the Administration's legal views, which seemed to suggest that CE but not LegCo had the ultimate power to make laws, and that LegCo might not have the power to vet or amend certain subsidiary legislation subject to the negative vetting procedure. As this would have constitutional and legal implications, the Subcommittee expressed grave reservations about the Administration's legal position on the matter. After deliberations, the Subcommittee reaffirmed its decision to move by its Chairman a motion to repeal the Amendment Order.

1.11 The Country Parks Subcommittee reported on its deliberations to the House Committee on 8 October 2010. The House Committee noted the decision of the Subcommittee to move by its Chairman a resolution to repeal the Amendment Order. Members also noted the different views held by the Subcommittee and the Administration on the legal effect of repealing the Amendment Order and the lawfulness of the repeal of the Amendment Order. Members of the Subcommittee expressed grave dissatisfaction with the Administration's way of handling the Amendment Order in that the Administration had not raised its legal views until the Subcommittee had decided to move a motion to repeal the Amendment Order. Members considered that such an approach had adversely affected the relationship between the Executive and the Legislature. The House Committee noted that Hon Tanya CHAN,

Chairman of the Subcommittee, had given notice to move a proposed resolution to repeal the Amendment Order at the Council meeting on 13 October 2010.

The President's ruling on the proposed resolution to repeal the Amendment Order

1.12 In considering whether Hon Tanya CHAN's proposed resolution was in order under the Rules of Procedure, the President had invited the Administration to comment on the proposed resolution and Hon Tanya CHAN to respond to the Administration's comments. The President also referred to the advice of LA and an independent legal opinion from Senior Counsel Mr Philip Dykes. Details of the views considered are provided in the President's ruling in **Appendix I**. The legal opinion given by Mr Philip Dykes is at **Appendix II**.

1.13 In gist, the President held the opinion 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 the Council has abdicated its control over the exercise of those powers.

1.14 In the President's opinion, the powers which CE should have, in the discharge of his duty under section 14 of CPO, include the power to determine when an order for the designation should be made and come into effect, and to initiate a motion in the Council to repeal the order which he has already made, if there are good reasons to do so. The repeal of the Amendment Order by the Council'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" in section 14 of CPO. Section 14 of CPO does not rule out CE's power to move a motion of repeal. The President was also satisfied that repeal of an order made under section 14 will not lead to non-compliance with the requirements in CPO or result in unreasonable consequences.

1.15 Based on the above analysis, the President was of the opinion that neither section 14 of CPO nor CPO when read as a whole expresses or manifests any contrary intention that the power of the Council to amend, and therefore repeal, subsidiary legislation under section 34 of Cap. 1 has been displaced. He ruled that Hon Tanya CHAN's proposed resolution was in order and could be moved.

Motion to repeal the Amendment Order

1.16 The proposed resolution to repeal the Amendment Order ("the Resolution") was moved and passed by the Council at its meeting of 13 October 2010. The extract from the Hansard of the debate on the proposed resolution is in **Appendix III**. The Resolution was published in the Gazette on 15 October 2010 as Legal Notice No. 135 pursuant to section 34(5) of Cap. 1.

1.17 At the House Committee meeting on 15 October 2010, Members discussed ways to follow up the issues arising from the Amendment Order, in particular the power of LegCo to amend subsidiary legislation. Members noted that the Chairman of the House Committee had conveyed on 11 October 2010 to the Chief Secretary for Administration ("CS") Members' request for the Administration to provide a list of subsidiary legislation which, in its view, could not be repealed by LegCo by virtue of the provisions under their principal legislation. CS had responded that the Administration would not provide such information as he considered it an arduous task and not necessary to do so. Moreover, the list could not possibly be exhaustive and would provoke unnecessary dispute. Nevertheless, CS had indicated that he recognized Members' concern and the Administration would consider the feasibility of informing Members clearly as to whether LegCo had the power to amend (including repeal) an item of subsidiary legislation upon its introduction into LegCo, in order to facilitate Members to take note of any restriction to LegCo's amending power.

1.18 At the House Committee meeting on 15 October 2010, Members requested the Secretariat to collate information relating to LegCo's power to amend subsidiary legislation, and agreed that Members would consider the appointment of a subcommittee under the House Committee to study the power of LegCo to amend subsidiary legislation after the information was available. Members noted that in view of the complexity of the issues involved, the collation of information would take about three months.

Latest developments

1.19 On 4 January 2011, CS wrote to the President informing the Administration's decision not to seek judicial review of the Resolution. In his letter, CS reaffirmed the Administration's view that the Resolution lacked legal basis. The Administration has decided not to take out judicial review application on the grounds that it attaches great importance to maintaining a good relationship between the Executive Authorities and the Legislature. CS also stated that the dispute between the Government and LegCo on CPO and the repeal of the Amendment Order relates mainly to the interpretation of CPO and does not involve any fundamental difference on the constitutional issue of LegCo's powers and functions under the Basic Law. Moreover, the Administration has decided to alter the proposal of the SENT Landfill Extension to dispense with the use of the country park land concerned as landfill site. CS has emphasized that the Administration's decision should not be taken to mean that the Government accepts what LegCo did has sufficient legal backing.

1.20 At the House Committee meeting on 7 January 2011, Members noted CS's letter and expressed grave concern over the manner in which the Administration questioned the legality of the Resolution. Members stressed that LegCo had, by virtue of the powers vested under Cap. 1, followed the due process in the passage of the Resolution to repeal the Amendment Order. The Resolution was published in the Gazette in accordance with section 34(5) of Cap. 1 and has the full force of law. Members considered it necessary that the President should write to CS and convey their concern. The President wrote to CS on 11 January 2011 to convey Members' concern. CS's letter to the President and the President's reply to him are in **Appendices IV and V** respectively.

Chapter 2 - Subsidiary legislation

2.1 This chapter provides an analysis of "subsidiary legislation" including its definition, the scrutiny mechanism, the meaning of "legislative effect", the responsibility for tabling subsidiary legislation and related issues and common formulations of empowering provisions of subsidiary legislation subject to negative vetting.

What is "subsidiary legislation"?

2.2 In the United Kingdom ("UK"), what is locally known as "subsidiary legislation" is called "delegated legislation" or "subordinate legislation"[1]. When contrasted with "primary" legislation enacted by the Parliament, they are also categorized as "secondary" legislation[2]. Delegated legislation has been defined as an instrument made by a person or body under legislative powers conferred by an Act[3]. This definition is of limited use because it is not always easy to decide whether the power conferred is legislative power.

2.3 In Hong Kong, "subsidiary legislation" is defined in section 3 of Cap. 1 as "… any proclamation, rule, regulation, order, resolution, notice, rule of court, by law or other instrument made under or by virtue of any Ordinance and having legislative effect"[4]. The statutory test for determining whether an instrument made under an Ordinance is subsidiary legislation is whether such an instrument has "legislative effect". It is important to determine whether a rule or an instrument is subsidiary legislation because only with some exceptions[5], a piece of subsidiary legislation is subject either to negative vetting under section 34 or positive vetting under section 35 of Cap. 1.

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1 Stanley de Smith and Rodney Brazier, *Constitutional and Administrative Law*, 6th ed., p. 334.

2 David Feldman, ed., *English Public Law* (2004) para. 1.133.

3 Francis Bennion, *Statutory Interpretation*, 5th ed., p. 241.

4 Under pre-1948 statutes, UK essentially has the same test as that used in Hong Kong in determining whether an instrument is "legislative". Subsidiary legislation made under post-1947 statutes is expressly provided for in the statutes as "Statutory Instruments". In New Zealand, it is defined in the form of a definition of "regulations" in the Regulations (Disallowance) Act 1989. The test is fairly mechanical. In Australia, "subsidiary legislation" is named "legislative instrument" and is defined in the Legislative Instruments Act 2003. The definition employs the concept of "legislative character" and sets out some features of such character. In Malaysia and Singapore, "subsidiary legislation" is defined essentially in the same way as in Hong Kong.

5 Where the principal ordinance disapplies section 34 (e.g. section 3 of the Fugitive Offenders Ordinance (Cap. 503), which provides for its own negative vetting procedure and section 3 of the United Nations Sanctions Ordinance (Cap. 537), which disapplies sections 34 and 35).

Scrutiny mechanism

2.4 Section 34(2) of Cap.1 provides that where an item of subsidiary legislation has been laid on the table of LegCo, the Council may, by resolution passed at a meeting held not later than 28 days after the meeting at which it was so laid, amend (by way of repeal, addition, or variation as defined in section 3 of Cap. 1) the subsidiary legislation "in any manner whatsoever consistent with the power to make such subsidiary legislation". The Council may also, by passing a resolution, extend the scrutiny period by 21 days, or to the Council meeting immediately following the 21 days if there is no Council meeting on the 21st day.

2.5 Under section 35 of Cap. 1, where any Ordinance provides that subsidiary legislation shall be subject to the approval of LegCo or of any other authority, or contains words to the like effect, then the subsidiary legislation shall be submitted for the approval of LegCo or other authority; and LegCo may by resolution or the other authority may by order amend the whole or any part of the subsidiary legislation

Meaning of "legislative effect"

2.6 There are situations in which it is obvious that an instrument has legislative effect and is therefore subsidiary legislation:

(a) where the instrument extends or amends existing legislation (or alters the common law)[6];

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[6] In *Queensland Medical Laboratory v. Blewett* (1988) 84 ALR, it was held that the making of a new pathology services table which was set out in Sch. 1A of the Health Insurance Act 1973 is a decision of a legislative rather than an administrative character. The Court held that while it might be true to say that the Minister's consideration of whether or not to exercise his power to substitute the new pathology Schedule was of an administrative character in that it was executing or maintaining a law of the Commonwealth, the making of the determination changed the content of the law with the same result as if the Schedule had been changed by an amending statute.

(b) where the instrument has general application to the public or a class of public as opposed to individuals. This is not conclusive, but if the instrument has general application to the public or to a class of the public, the instrument is more likely to be held to be subsidiary legislation[7]; and

(c) where the instrument formulates a general rule of conduct without reference to particular cases. A legislative act is the creation and promulgation of a general rule of conduct without reference to particular cases[8].

In other cases, it is necessary to examine whether an instrument has legislative effect having regard to a number of indicia.

2.7 The difficulty with the "legislative effect" test is that there is no statutory definition of the expression "legislative effect". To add to the problem is the fact that there is also no direct judicial pronouncement on the precise meaning of "legislative effect". The most recent Hong Kong case that has discussed this issue at some length is the Court of Appeal ("CA") decision in *Julita F. Raza & others v. Chief Executive in Council & others* [2006] HKCU 1199. In that case, CA had to decide whether CE's approval of the labour importation scheme was subsidiary legislation. It considered the question from the perspective of finding a principle or definition to distinguish a legislative decision from an administrative one. CA cited with approval the Australian case, *RG Capital Radio v. Australia Broadcasting Authority* (2001) 113 FCR 185, which comprehensively reviewed a list of suggested relevant indicia of a legislative decision, while agreeing that no one factor is likely to be conclusive as emphasized in the Australian judgment. The relevant indicia referred to are:

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[7] In the New Zealand case of *Fowler & Roderique Ltd v. the Attorney General* [1987] 2 NZLR 56, one of the issues was the status of a notice published in the New Zealand Government Gazette declaring a fishery to be a controlled fishery and limiting the number of boat fishing licences for the fishery to the number existing at the time of the notice. The Court of Appeal held that the notice was a general piece of delegated legislation as it had effect against the whole world notwithstanding that it significantly protected the 23 boats that previously did fishing there.

[8] For example, notice made under s. 17C of the Wild Animals Protection Ordinance (Cap. 170) (Wild Animals Protection (Approval of Hunting Appliances) Notice (Cap. 170A)), notice made under s. 7 of Cap. 170 (Prohibition of Feeding of Wild Animals Notice 1999 Cap. 170B). In *Commonwealth v Grunseit* (1943)67 CLR58 at 83, Chief Justice Latham of the High Court of Australia stated that: the general distinction between legislation and the execution of legislation is that legislation determines the content of the law as a rule of conduct or a declaration as to power, right or duty, whereas executive authority applies the law in particular cases.

(a) the most commonly stated distinction between the two types of decisions is that a legislative decision determines the contents of rules of general, usually prospective, application whereas an administrative decision applies rules of that kind to particular cases[9];

(b) a hallmark of legislation is parliamentary control, although its absence is not conclusive[10];

(c) whether the decision involves complex policy considerations for if so, that might suggest that the act, the determination, is one of a legislative character;

(d) whether there is a power vested in the executive to amend, vary, or control the plan or act in question, for if so that would tend to suggest a matter of an administrative kind; and

(e) whether the measure has a binding quality or effect as opposed to one that provides guidance only.

As none of the above stated indicia would by itself be conclusive and subsidiary legislation that does not fit one or more of these indicia are readily found, applying these indicia alone does not allow one to conclude definitively whether a rule or an instrument does, or does not, have legislative effect.

2.8 In view of this difficulty, since October 1999, in cases where a doubt may arise as to whether or not an instrument is subsidiary legislation, the Administration has adopted the approach of including in the legislation an express provision declaring or clarifying the character of the instrument. Once enacted, the provision can be regarded as expressing the legislative intent as to the nature of the instrument[11].

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9 In *Commonwealth v. Grunseit* (1943) 67 CLR58 at 83, Chief Justice Latham of the High Court of Australia stated that: the general distinction between legislation and the execution of legislation is that legislation determines the content of the law as a rule of conduct or a declaration as to power, right or duty, whereas executive authority applies the law in particular cases.

10 In *English Schools Foundation & Anor v. Bird* [1997] 3 HKC 434, CA held that notwithstanding that the regulations made by the Foundation were not required to be published in the Gazette and therefore not subject to scrutiny of LegCo under section 34 of Cap. 1, they were subsidiary legislation.

11 LC Paper No. CB(2)696/04-05(02).

Responsibility to table subsidiary legislation under section 34(1) of Cap. 1

2.9 Although section 34(1) of Cap. 1 does not specify the person responsible for tabling the subsidiary legislation, it must have been intended by the said provision that the public officer or another authorized person who makes the relevant subsidiary legislation shall be responsible for its tabling. The Legislature therefore may not, out of its own initiative, table any instrument which it considers as having legislative effect[12].

2.10 In 1999, LA advised at the House Committee meeting that it was the duty of the Administration to make sure that section 34 of Cap. 1 was complied with in that all subsidiary legislation were laid on the table of LegCo so that LegCo could perform its functions under section 34(2)[13].

Legal consequences of failure to table subsidiary legislation subject to section 34 of Cap. 1

2.11 Section 28 of Cap. 1 provides that a piece of subsidiary legislation comes into operation at the beginning of the day on which it is published in the Gazette. There is no specific requirement on whether the publication should be in the form of a Government Notice or Legal Notice. Section 34 requires all subsidiary legislation to be laid on the table of LegCo at the next meeting after the publication in the Gazette. Section 34, however, is silent on the consequences of failure to table subsidiary legislation. Section 34(2) provides that if LegCo passes a resolution to amend a piece of subsidiary legislation, the subsidiary legislation shall be deemed to be amended as from the date of publication in the Gazette of such resolution and anything done under the subsidiary legislation before it is amended by LegCo shall not be prejudiced.

2.12 The issue of the validity of an instrument which has not been laid before LegCo, or which has been published but not laid before LegCo has been examined in depth by the Subcommittee on the Ozone Layer Protection (Controlled Refrigerants) Regulation (Commencement) Notice 1998 (L.N. 391 of 1998) ("the Ozone Subcommittee"). The

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[12] LC Paper No. CB(1)1152/98-99.

[13] LC Paper No. CB(2)1169/98-99.

Ozone Layer Protection (Controlled Refrigerants) Regulation (L.N. 158 of 1993) ("the Regulation") was made in May 1993 and a Commencement Notice which appointed 1 January 1994 as the commencement date was published as a Government Notice (G.N. No. 4794) and was not laid on the table of LegCo under section 34 of Cap. 1. The Administration was of the view that the requirement of tabling is mandatory and that Commencement Notice was therefore ineffective. To give effect to the Regulation, the Administration published another Commencement Notice (i.e. L.N. 391 of 1998) which appointed 1 January 1999 as the day on which the Regulation was to come into operation.

2.13 After considering the legal effect of sections 28 and 34 of Cap. 1, the Ozone Subcommittee formed the view that the legislative process had been completed upon the publication of the subsidiary legislation in the Gazette, whether in the form of a Government Notice or Legal Notice. The tabling requirement under section 34 provides a mechanism for LegCo to scrutinize subsidiary legislation made pursuant to delegated authority conferred in primary legislation. The Ozone Subcommittee therefore concluded that G.N. 4794 was validly made[14].

2.14 Members of the Ozone Subcommittee also noted that the Regulation and some other 19 items of subsidiary legislation were inadvertently not laid before LegCo, contrary to section 34 of Cap. 1. Another subcommittee was formed to study issues relating to the tabling of subsidiary legislation in LegCo ("the Subsidiary Legislation Subcommittee"). This Subcommittee was of the view that the non-tabling of subsidiary legislation did not affect the validity of such subsidiary legislation[15]. However, to remove any doubt on its validity, the Government had enacted validation legislation to provide that the subsidiary legislation which had not been laid was deemed to have been tabled in accordance with the requirements of section 34(1) of Cap. 1 (Part XIII of the Statute Law (Miscellaneous Provisions) Ordinance 2000 (32 of 2000)).

2.15 There is no direct authority on whether an instrument is legally valid if it has not been laid before LegCo. Judges have expressed conflicting opinions on this issue. Opinions have been expressed by judges in England and Hong Kong that the requirement to lay an

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[14] LC Paper No. CB(1)857/98-99.

[15] LC Paper No. CB(1)1267/98-99.

instrument before the legislature is not mandatory but directory only[16]. According to these opinions, the legal validity of an instrument might not depend upon its laying before LegCo. On the other hand, there is a dictum to the effect that an instrument acquired legal validity only when it is laid before Parliament[17]. In a more recent Hong Kong case, judges of CA expressed the view that whether delegated legislation needs to be laid before the legislative body is a matter of procedure only[18].

Classification of Legal Supplement No. 2 in the Gazette into Part A and Part B

2.16 The Subsidiary Legislation Subcommittee and the Administration agreed that, for the purpose of ensuring that all subsidiary legislation that needed to be tabled were tabled, the Administration would put in place a new mechanism under which the Legal Supplement No. 2 in the Gazette would be divided into two parts, with one part containing items of subsidiary legislation which were required to be tabled at LegCo pursuant to section 34 of Cap. 1 and the other containing items which were not required to be tabled at LegCo[19]. The proposal was endorsed at the meeting of the Panel on Constitutional Affairs in July 1999[20] and had been put into effect since 11 June 1999.

Formulations of empowering provisions

2.17 For subsidiary legislation subject to negative vetting under section 34 of Cap. 1, common formulations of their empowering provisions are set out as in Part I of **Appendix VI**; formulations of empowering provisions which are expressed to be not subject to section 34 of Cap. 1 are in Part II. The following, which is not meant to be exhaustive, provides examples of subsidiary legislation in respect of which LegCo's power to amend varies.

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16 *Bailey v Williamson* (1853) LR 8 QB at 132; *Starey v Graham* [1899] 1 QB 406 at 412; *Jones v Robson* [1901] 1 KB 673, DC; *Auburntown Ltd. v Town Planning Board* [1994] 2 HKLR 272 at 289.

17 *R v Sheer Metalcraft Ltd.* [1954] 1 QB 586 at 590.

18 *English Schools Foundation v Bird* [1997] 3 HKC 434 at 439.

19 LC Paper No. CB(1)1267/98-99.

20 LC Paper No. CB(2)29/99-00.

Subsidiary legislation in respect of which LegCo's power to amend may not include repeal

Notice under section 55 of Eastern Harbour Crossing Ordinance (Cap. 215) ("EHCO") (e.g. L. N. 37 of 2005)

2.18 Under section 55 of EHCO, the tolls which may be collected shall be those specified in the Schedule to EHCO. The tolls specified in the Schedule may be varied by agreement between CE in Council and the New Hong Kong Tunnel Limited, or in default of agreement, by submission of the question of the variation of tolls to arbitration. Under section 55(5) and (6) of EHCO, the tolls shall be varied in compliance with such agreement or award. The Commissioner for Transport ("C for T") shall by notice in the Gazette, as soon as is practicable after such agreement or arbitration award, amend the Schedule to EHCO.

2.19 According to section 34(2) of Cap. 1, LegCo's amending power of subsidiary legislation has to be consistent with the power to make such subsidiary legislation. As the power of C for T to make the Notice is restricted by section 55(5) and (6) of EHCO and does not cover the determination of toll levels and the timing for implementation of new tolls, LegCo's power to amend this Notice is similarly restricted. In other words, there is little room for LegCo to amend the Notice other than minor technical amendments. Hence, LegCo may not repeal the Notice as the exercise of such power would be inconsistent with the power to make such subsidiary legislation[21].

Notice under section 36 of Tate's Cairn Tunnel Ordinance (Cap. 393) ("TCTO") (e.g. L.N. 67 of 2010)

2.20 The mechanism for toll variation under section 36 of TCTO was the same as that provided under section 55 of EHCO. Under section 36 of TCTO, the tolls specified in the Schedule may be varied by agreement between CE in Council and the Tate's Cairn Tunnel Company Limited, or in default of agreement, by submission of the question of the variation of tolls to arbitration. Under section 36(6) and (7) of TCTO, the tolls shall be varied in compliance with such agreement or award and C for T shall by notice in the Gazette, as soon as is practicable after such agreement or arbitration award, amend the Schedule to TCTO. Hence, there is little room for LegCo to amend the Notice except for minor technical amendments or to repeal the Notices as the exercise of such power would be inconsistent with C for T's power to make such Notice[22].

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[21] LC Paper No. CB(1)1384/04-05.

[22] LC Paper No. LS68/09-10.

Statutory provisions containing the expression "shall by notice in the Gazette" or "shall by order in the Gazette" and such notice and order having been treated and published as subsidiary legislation subject to amendment by LegCo[23]

Country Parks Ordinance (Cap. 208)

2.21 Section 14 of the Country Parks Ordinance (Cap. 208) provides that where CE in Council has approved a draft map under section 13 and it has been deposited in the Land Registry, CE shall, by order in the Gazette, designate the area shown in the approved map to be a country park. CE's order is considered the final step in an elaborate process for designating an area to be a country park. This process begins with the preparation of a draft map (section 8) which may be inspected by the public (section 9), followed by the hearing of objections (section 11) by the Country and Marine Parks Board and its submission of the draft map (together with a schedule of objections and amendments) to CE in Council for approval (sections 12 and 13). Once the draft map has been approved and deposited, CE is required to publish an order in the Gazette to designate the relevant area to be a country park (section 14). An order published by CE under section 14 is subsidiary legislation and is subject to amendment by LegCo.

Marine Parks Ordinance (Cap. 476)

2.22 A similar process for the designation of a marine park is set out in sections 7 to 15 of the Marine Parks Ordinance (Cap. 476). The process begins with the preparation of a draft map (section 7) which is available for inspection at the Land Registry (section 8). Any person proposing new development must seek approval from the Country and Marine Parks Authority ("CMPA") and may appeal to the Administrative Appeals Board against CMPA's decision (sections 10 and 11). Meanwhile, CMPA will consider objections by persons aggrieved by the draft map (section 12), and submit the draft map (together with a schedule of objections and amendments) to CE in Council for approval (sections 13 and 14). Under section 15, where CE in Council has

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[23] Searches of the Bilingual Laws Information System and LEXIS for the phrase "*shall by.....in the Gazette*" and "*must by.....in the Gazette*" have returned the legislative provisions identified below. The list below provides various examples for illustrative purposes only but is by no means exhaustive. By using the word *shall* or *must*, these provisions *require* (not simply *empower*) the relevant officer or body to do certain acts by publishing a notice, an order or other instrument in the Gazette.

approved the draft map and it has been properly deposited in accordance with the prescribed requirements, CE shall, by order in the Gazette, designate the area shown in the approved map to be a marine park or marine reserve. Section 16(8) imposes a similar requirement on CE in respect of an approved replacement map. An order published by CE under section 15 or section 16(8) is subsidiary legislation and is subject to amendment by LegCo.

Auxiliary Forces Pay and Allowances Ordinance (Cap. 254)

2.23 Section 5(1) of the Auxiliary Forces Pay and Allowances Ordinance (Cap. 254) provides that the Secretary for Security shall, by notice published in the Gazette, assign to each rank in the auxiliary forces one of the pay classifications specified in the Schedule. The Pay Classification (Hong Kong Auxiliary Police Force) Assignment Notice (Cap. 254 sub. leg. C) and the pay classification assignment notices for other auxiliary services (Cap. 254 sub. leg. D, G, H, J and K) made under section 5(1) are published as subsidiary legislation and are subject to amendment by LegCo.

Road Traffic (Construction and Maintenance of Vehicles) Regulations (Cap. 374 sub. leg. A)

2.24 Regulation 28(1)(a) of the Road Traffic (Construction and Maintenance of Vehicles) Regulations (Cap. 374 sub. leg. A) provides that the glass or transparent material used in all windscreens, windows and partitions of a motor vehicle shall be safety glass or safety glazing of a type approved by C for T. Regulation 28(3) requires C for T to specify, by notice in the Gazette, the type of safety glass or safety glazing approved by him for the purposes of Regulation 28(1)(a). The Specification of Safety Glass Notice (Cap. 374 sub. leg. H) made by C for T under Regulation 28 is published as subsidiary legislation and is subject to amendment by LegCo.

<u>Statutory provisions containing the expression "shall by notice in the Gazette" or "shall by order in the Gazette" and such notice and order having not been treated as subsidiary legislation and not been published as legal notices</u>

2.25 Provisions relating to appointments include:

(a) CE's notice appointing a public officer to be the Gas Authority under section 5 of the Gas Safety Ordinance (Cap. 51);

(b) CE's notice to appoint the Chairman or members of the Capital Adequacy Review Tribunal under section 101A of the Banking Ordinance (Cap. 155);

(c) CE's notice to appoint the Appeal Boards Panel under section 59 of the Education Ordinance (Cap. 279);

(d) a notice by the Secretary for Security to appoint a public officer to be the responsible officer under section 24B of the Organized and Serious Crimes Ordinance (Cap. 455); and

(e) CE's notice to appoint the Privacy Commissioner for Personal Data under section 5(3) of the Personal Data (Privacy) Ordinance (Cap. 486).

2.26 Provisions relating to electoral matters include:

(a) a notice by the Chief Electoral Officer designating polling, counting and sorting stations under section 28(1) of the Electoral Affairs Commission (Electoral Procedure) (Legislative Council) Regulation (Cap. 541 sub. leg. D);

(b) a notice published by the Clerk to LegCo declaring the existence of a vacancy under section 35 of the Legislative Council Ordinance (Cap. 542);

(c) a notice by the Returning Officer declaring an election to have failed under section 46 of the Legislative Council Ordinance (Cap. 542);

(d) CE's notice specifying a date for holding an election etc under section 38 of the District Councils Ordinance (Cap. 547);

(e) a notice by the Acting CE declaring a vacancy under section 5 of the Chief Executive Election Ordinance (Cap. 569); and

(f) a notice by the Returning Officer declaring the names of all candidates and those nominating them under section 18 of the Chief Executive Election Ordinance (Cap. 569).

2.27 In relation to codes of practice, a notice is required to be published in the Gazette by the relevant authority upon approving, revoking or withdrawing approval from a code of practice under:

(a) section 9 of the Gas Safety Ordinance (Cap. 51);

(b) section 78K of the Public Health and Municipal Services Ordinance (Cap. 132);

(c) section 15 of the Electricity Supply Lines (Protection) Regulation (Cap. 406 sub. leg. H);

(d) section 49 of the Amusement Rides (Safety) Ordinance (Cap. 449);

(e) section 12 of the Personal Data (Privacy) Ordinance (Cap. 486);

(f) section 10 of the Social Workers Registration Ordinance (Cap. 505);

(g) section 8 of the Merchant Shipping (Local Vessels) Ordinance (Cap. 548);

(h) section 3 of the Broadcasting Ordinance (Cap. 562); and

(i) section 42 of the Energy Efficiency (Labelling of Products) Ordinance (Cap. 598).

2.28 Miscellaneous provisions include:

(a) a notice by the Director of the Hong Kong Observatory to declare the times and days of commencement and cessation of a gale warning or a rainstorm warning under section 5(2) of the Judicial Proceedings (Adjournment During Gale Warnings) Ordinance (Cap. 62);

(b) an order by the Governor to specify the rate of the salary of the Director of Audit under section 4A(1) of the Audit Ordinance (Cap. 122);

(c) a notice by the Director of Lands to publish a statement that a plan has been deposited in the Land Registry pursuant to the vesting of land etc. under section 7A of the Kowloon-Canton Railway Corporation Ordinance (Cap. 372);

(d) notices by C for T publishing the specifications of mudguards and mudflaps approved by him under regulations 35 and 84 of the Road Traffic (Construction and Maintenance of Vehicles) Regulations (Cap. 374 sub. leg. A);

(e) a notice by the Director of Fire Services specifying the type of fire extinguishing apparatus approved by him under regulation 9 of the Road Traffic (Safety Equipment) Regulations (Cap. 374 sub. leg. F); and

(f) a notice by the Secretary for Commerce and Economic Development to designate a guarantee agreement under section 2(3)(a) of the Tung Chung Cable Car Ordinance (Cap. 577).

Statutory provisions containing the expression "shall by notice in the Gazette", "shall by order in the Gazette" or shall by other instrument and such notice, order and other instrument being expressed to be not subsidiary legislation

2.29 These provisions include:

(a) a notice by the Registrar of Marriage under section 5C(3) of the Marriage Ordinance (Cap. 181) publishing details about an approved code of practice (section 2A);

(b) a technical memorandum issued by the Secretary for the Environment under section 26G of the Air Pollution Control Ordinance (Cap. 311) (section 37B(6));

(c) a notice published by the Chinese Medicine Practitioners Board under section 94(3) of the Chinese Medicine Ordinance (Cap. 549) (section 94(4));

(d) a notice published by the Government Chief Information Officer specifying documentation requirements etc. under section 30(1) of the Electronic Transactions Ordinance (Cap. 553) (section 30(2));

(e) an exemption notice or a termination of exemption notice published by the Securities and Futures Commission under section 25 or 26 of the Securities and Futures (Investor Compensation-Levy) Rules (Cap. 571 sub. leg. AB);

(f) the Monetary Authority's notice of his intention to revoke the designation of a clearing and settlement system under section 5(2) of the Clearing and Settlement Systems Ordinance (Cap. 584) (section 58); and

(g) a code of practice approved or a notice published by the Telecommunications Authority under section 29 of the Unsolicited Electronic Messages Ordinance (Cap. 593) (section 29(10)).

Statutory provisions containing the expression "shall by notice in the Gazette" or "shall make regulations" and such notice and regulation being expressed to be not subject to section 34 of Cap. 1

2.30 These include:

(a) a notice by C for T to vary a toll under section 52 of the Western Harbour Crossing Ordinance (Cap. 436) (section 52(3));

(b) a notice by C for T to vary a toll under section 45 of the Tai Lam Tunnel and Yuen Long Approach Road Ordinance (Cap. 474) (section 45(3));

(c) a scheme for determining airport charges published in the Gazette under section 34(6) of the Airport Authority Ordinance (Cap. 483) (section 34(9)(b));

(d) a notice by the Director-General of Civil Aviation (e.g. L.N. 251/09) to revise the limits of liability under the Montreal Convention pursuant to section 21 of the Carriage By Air Ordinance (Cap. 500) (section 21(3)); and

(e) regulations made by CE to give effect to a relevant instruction under section 3(1) of the United Nations Sanctions Ordinance (Cap. 537) (section 3(5)).

Commencement notice not required to be tabled and not subject to amendment by LegCo - Technical Memorandum for Supervision Plans 2009 (Commencement) Notice (S.S. No. 5 on 8 October 2010) made under section 39A of Buildings Ordinance (Cap. 123)

2.31 Under section 39A of the Buildings Ordinance (Cap. 123) ("BO"), the Secretary for Development ("SDEV") may issue a technical memorandum in relation to those matters listed under section 39A(1). SDEV made the Technical Memorandum for Supervision Plans 2009 ("TM 2009") under section 39A of BO. TM 2009 was gazetted on 9 October 2009 and tabled in LegCo on 14 October 2009. TM 2009 supplements the provision of BO governing the supervision of building works and street works. It is stipulated in TM 2009 that it will commence to have effect on a date to be appointed by SDEV by notice published in the Gazette.

2.32 According to section 39A(7) of BO, the technical memorandum issued under that section is not subsidiary legislation, but such technical memorandum is subject to LegCo's scrutiny under a mechanism provided in section 39A of BO which is in substance the same as that provided in section 34 of Cap. 1.

2.33 No amendment was made to TM 2009 by LegCo within the scrutiny period as provided in section 39A (3) to (5) of BO. According to section 39A(9) of BO, SDEV is entitled to appoint in the memorandum or by notice in the Gazette a commencement date which is later than the date that is specified by section 39A(9)(a) or (b) of BO (i.e. upon the expiry of a period of 28 days after the sitting of LegCo at which a technical memorandum was laid or at the beginning of the day of the publication in the Gazette of a resolution of LegCo to amend the technical memorandum concerned).

2.34 On 8 October 2010, by the Technical Memorandum for Supervision Plans 2009 (Commencement) Notice (S.S. No. 5 on 8 October 2010) ("the Notice"), SDEV appoints 31 December 2010 as the day on which TM 2009 will come into operation. As for the reason why the Notice has not been tabled in LegCo, the Subcommittee formed to study three commencement notices relating to the Minor Works Control System (L.N. 118 to L.N.120 of 2010) has noted that while there are express provisions in section 39A of BO requiring a technical memorandum to be tabled and subject to amendment by LegCo, no such requirement is provided in relation to the commencement notice for the technical memorandum. Further, the Subcommittee has been advised by the Administration that the notice for commencement of the technical memorandum (which is not subsidiary legislation) is not subsidiary legislation and is published as a general notice in the Gazette.

Chapter 3 - Relevant past rulings of the President

3.1 This chapter gives an account of the President's past rulings relevant to the power of LegCo to amend subsidiary legislation since the reunification on 1 July 1997.

Cases relating to LegCo's power to amend subsidiary legislation

3.2 Since the reunification on 1 July 1997, the President has made rulings relevant to the power of LegCo to amend subsidiary legislation in relation to the following items of subsidiary legislation:

(a) Public Revenue Protection (Revenue) Order 1999;

(b) Employees Retraining Ordinance (Amendment of Schedule 3) (No. 2) Notice 2008;

(c) Land (Compulsory Sale for Redevelopment) (Specification of Lower Percentage) Notice; and

(d) Country Parks (Designation) (Consolidation) (Amendment) Order 2010.

Four proposed resolutions to amend, by way of repeal, certain provisions in the bill scheduled to the Public Revenue Protection (Revenue) Order 1999

Proposed resolutions

3.3 The Order which was made under the Public Revenue Protection Ordinance (Cap. 120) was gazetted on 30 March 1999 and tabled in the Council on 31 March 1999. Set out in the Schedule to the Order was a bill to amend certain ordinances to give effect to the revenue proposals in the 1999-2000 Budget.

3.4 Hon Albert HO gave notice to move four proposed resolutions at the Council meeting of 5 May 1999 to amend, by way of repeal, certain provisions in the bill scheduled to the Order.

The President's ruling

3.5 The President noted that the purpose of Cap.120 is to protect the Government from loss of revenue during the period when long-term proposals for increases in duty, tax, fees, rates and other items of revenue are being considered by the Council. Any order made under section 2 of Cap.120 should be intended to be a provisional and temporary measure (lasting for a maximum period of four months only) for preventing the avoidance of payment. Such an order should be distinguished from bills and resolutions which seek to bring in long-term revenue proposals for the Council's consideration.

3.6 The President also noted that the legal position of section 2 of Cap.120 is that CE is empowered to make an order to give "full force and effect of law to all the provisions of the bill" the introduction of which he has approved of. To be consistent with the power of CE to make the Order, the Council's power to amend the Order under section 34(2) of Cap.1 is therefore limited to repealing the Order where it considers appropriate.

3.7 The President ruled that Hon Albert HO might not move the four proposed resolutions. A copy of the President's ruling is in **Appendix VII**.

Two proposed resolutions to amend the Employees Retraining Ordinance (Amendment of Schedule 3) (No. 2) Notice 2008

Proposed resolutions

3.8 Under section 14 of the Employees Retraining Ordinance (Cap. 423), the amount of Employees Retraining Levy ("the levy") payable by each employer who employs imported employees is the sum specified in Schedule 3 to Cap. 423 multiplied by the number of months specified in the contract of employment. Section 31(1) provides that CE in Council may, by notice in the Gazette, amend Schedule 3.

3.9 On 1 August 2008, the Employees Retraining Ordinance (Amendment of Schedule 3) Notice 2008 ("Amendment Notice") was gazetted to reduce the sum of $400 specified in Schedule 3 to $0 for two years with effect from that date. The Amendment Notice was tabled in the Council on 8 October 2008.

3.10 On 11 November 2008, the Employees Retraining Ordinance (Amendment of Schedule 3) (No. 2) Notice 2008 ("No. 2 Notice") was gazetted to repeal the Amendment Notice and extend the reduction of the sum to $0 for five years, and revert the sum to $400 as from 1 August 2013. The No. 2 Notice was tabled in the Council on 12 November 2008.

3.11 Hon Mrs Regina IP and Hon LEE Wing-tat gave notice to move proposed resolutions to amend the No. 2 Notice at the Council meeting of 10 December 2008.

The President's ruling on Hon Mrs Regina IP's proposed resolution

3.12 The President noted that Hon Mrs Regina IP's proposed resolution sought to amend the No. 2 Notice to the effect that the levy in respect of each imported employee to be employed under the "Scheme for Importation of Foreign Domestic Helpers" shall remain at $0 from 1 August 2013 onwards, whereas the sum for each imported employee to be employed under any other labour importation scheme shall revert to $400. He noted that the proposed resolution would have the effect of dispensing altogether with the need to impose a levy on the employers of foreign domestic helpers for an indefinite period.

3.13 The President found no provision in Cap. 423 which restricts the power of CE in Council in amending Schedule 3 in such a way that it has to be for a definite period. It is entirely a question of public policy to be reflected in Schedule 3. Cap. 423 does not impose any restriction regarding the duration that a specified amount of levy should apply. The President considered that Mrs IP's proposed amendment was therefore not inconsistent with Cap. 423 and thereby not inconsistent with section 34(2) of Cap. 1.

3.14 The President ruled that Hon Mrs Regina IP might move her proposed resolution.

The President's ruling on Hon LEE Wing-tat's proposed resolution

3.15 The President noted that Hon LEE Wing-tat's proposed resolution sought to provide for the reversion of the amount of the levy to $400 to come into operation on a date to be appointed by the Secretary for Labour and Welfare subject to the approval of LegCo.

3.16 The President considered Mr LEE's proposed resolution to be ultra vires section 28(4)[24] of Cap. 1 as it contains no requirement that the appointment of the date be "by notice", which is essential to the valid exercise of the power to make such an appointment.

3.17 The President also accepted the Administration's argument that a notice made under section 31(1) of Cap. 423, including the commencement provision as set out in section 1 of the No. 2 Notice, is a form of subsidiary legislation which is subject to the requirement of section 34 of Cap. 1 that it be tabled in Council, i.e. the negative vetting procedure. He considered that Mr LEE's proposed amendment has the effect of making the commencement subject to section 35 of Cap. 1, i.e. the positive vetting procedure. The imposition of requirements of section 35 of Cap. 1 to the making of the subsidiary legislation, i.e. a commencement notice, under section 31(1) of Cap. 423 is beyond the powers given to CE in Council by the same section.

3.18 The President ruled that Hon LEE Wing-tat's proposed resolution was out of order.

3.19 A copy of the President's ruling on the two proposed resolutions above is in **Appendix VIII**.

Four proposed resolutions to amend the Land (Compulsory Sale for Redevelopment) (Specification of Lower Percentage) Notice

Proposed resolutions

3.20 The Land (Compulsory Sale for Redevelopment) Ordinance (Cap. 545) provides that CE in Council may, by notice in the Gazette, specify a lower compulsory sale threshold of no less than 80% in respect of a lot belonging to a class of lot specified in the notice. The Land (Compulsory Sale for Redevelopment) (Specification of Lower Percentage) Notice ("the Notice"), which was gazetted on 22 January 2010 and tabled in the Council on 27 January 2010, specified a lower application threshold of 80% for three classes of lot.

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[24] Section 28(4) of Cap. 1 stipulates that "A person who makes subsidiary legislation may provide for the subsidiary legislation to commence on a day to be fixed by notice to be given by him or by some other persons designated in the subsidiary legislation".

3.21 Hon James TO, Hon Albert HO, Hon LEE Wing-tat and Hon Audrey EU gave notice to move proposed resolutions to amend the Notice at the Council meeting of 17 March 2010.

The President's ruling

3.22 The four Members' proposed resolutions sought to introduce additional provisions to describe the classes of lot in respect of which the lowered threshold of 80% would apply. These Members proposed amendments to specify, among others, that for a lot to come within a class of lot as specified in the Notice, it has to be specified or designated by SDEV for priority redevelopment or the Lands Tribunal has to be satisfied that the lot is justified for redevelopment.

3.23 The Administration argued that section 3(5) of Cap. 545 requires classes of lot to be specified in the Notice. Any proposal which does not relate to an attribute or a particular nature of a class of lot or the buildings on it does not fit in with section 3(5) and may be considered as ultra-vires. For this reason, the Administration considered some of the Members' proposed provisions to be ultra-vires.

3.24 The Administration also argued that as section 3(5) of Cap. 545 empowers CE in Council to specify a lower application percentage in respect of a lot belonging to a specified class of lot, the proposals made by the four Members to include a reference to either SDEV having specified or designated a lot for priority redevelopment or the Lands Tribunal being satisfied that a lot is justified for redevelopment may amount to unlawful delegation of the power of CE in Council under section 3(5) of Cap. 545.

3.25 The President noted that "class of lot" is not defined in Cap. 545 or in any other Ordinance. In the President's opinion, the description in section 4(2)(b)(ii) of the Notice constitutes a condition which is in nature similar to the provisions proposed by the Members. He considered that the amendments proposed by the Members were consistent with the power of CE in Council under section 3(5) of Cap. 545 to make the Notice.

3.26 The President was of the view that the proposals in question relate to characteristics of a lot for it to belong to the class of lot as specified, i.e. SDEV's specification or designation for redevelopment and the Lands Tribunal being satisfied that a lot is justified for redevelopment. These are facts to be ascertained before the Lands Tribunal is to consider an application for an order for sale under section 4 of Cap. 545. The Administration's submissions nevertheless had not explained how these provisions would amount to unlawful delegation of the power of CE in Council under section 3(5) of Cap. 545.

3.27 The President ruled that the proposed resolutions of Hon James TO, Hon Albert HO, Hon LEE Wing-tat and Hon Audrey EU were in order. A copy of the President's ruling is in **Appendix IX**.

Proposed resolution to repeal the Country Parks (Designation) (Consolidation) (Amendment) Order 2010

3.28 The proposed resolution and the President's ruling are set out in paragraphs 1.2 to 1.15 in Chapter 1.

Chapter 4 – Relevant past discussions at committees

4.1 This Chapter summarizes past discussions at meetings of the committees on the power of LegCo to amend and repeal subsidiary legislation.

Past discussions

4.2 LegCo's power to amend and repeal subsidiary legislation has been discussed by various committees of the Council. These include:

(a) the Panel on Transport in 1998 and 1999 in the context of examining the legal procedures for the determination of maximum fares for licensed ferry services;

(b) the Bills Committee on International Organizations (Privileges and Immunities) Bill in 1999 and 2000;

(c) the Subcommittee to Examine the Implementation in Hong Kong of Resolutions of the United Nations Security Council in relation to Sanctions from 2004 to 2008;

(d) the Subcommittee on Antiquities and Monuments (Withdrawal of Declaration of Proposed Monument) (No.128 Pok Fu Lam Road) Notice (L.N.21/08) in 2008; and

(e) the Bills Committee on Minimum Wage Bill in 2009 and 2010.

Panel on Transport

4.3 Under section 28(1) of the Ferry Services Ordinance ("FSO") (Cap. 104), C for T may if he thinks fit grant to any person a licence to operate a ferry service between such points as are specified in the licence. Section 33(1) of FSO provides that C for T may by notice in the Gazette determine the maximum fares that may be charged for the carriage of passengers, baggage, goods and vehicles on any licensed service[25].

[25] LC Paper No. LS54/98-99.

4.4 In exercise of the power under section 33(1) of FSO, C for T had given two notices determining respectively the maximum fares for the licensed ferry service between Central and Tsuen Wan via Tsing Yi (G.N. 4547 gazetted on 18 September 1998) and the licensed ferry service between Discovery Bay and Chek Lap Kok (G.N. 5086 gazetted on 23 October 1998). G.N. 4547 and G.N. 5086 took effect from 20 September 1998 and 23 October 1998 respectively. As G.N. 4547 had not been published in the form of a legal notice, it was not laid on the table of LegCo. Accordingly, section 34 of Cap. 1 could not be brought into operation[26].

4.5 Mr LAU Chin-shek, a former LegCo Member, raised concern about the matter and requested the House Committee to discuss follow-up actions to be taken. Members agreed at the House Committee meeting on 30 October 1998 that it was more appropriate for the matter to be dealt with by the Panel on Transport[27]. The Panel on Transport considered issues relating to the legal procedures for the determination of maximum fares for licensed ferry services at its meetings on 27 November 1998, 9 February and 26 March 1999. The Panel noted the difference in legal opinions held by the Administration and LA on whether notices on the maximum fares for licensed ferry services issued by C for T under section 33(1) of FSO were subsidiary legislation.

4.6 According to the Administration, section 3 of Cap. 1 defines "subsidiary legislation" as ".... any proclamation, rule, regulation, order, resolution, notice, rule of court, bylaw or other instrument made under or by virtue of any Ordinance and having legislative effect". To determine whether a notice in the Gazette given by C for T under section 33(1) of FSO was subsidiary legislation, it was necessary to decide whether such notice had "legislative effect". The expression "legislative effect" was not defined in the laws of Hong Kong, nor was there any local case law on its meaning. However, based on case references in other common law jurisdictions, the following factors were considered by the Administration to be relevant in determining whether an instrument had legislative effect:

(a) whether there is an express statutory provision in identifying the instrument as being subsidiary legislation;

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[26] LC Paper No. LS54/98-99.
[27] LC Paper No. CB(2)543/98-99.

(b) whether the instrument extends or amends existing legislation;

(c) whether the instrument has general application to the public or a class as opposed to individuals;

(d) whether the instrument formulates a general rule of conduct without reference to particular cases; and

(e) the legislative intent that the instrument is subsidiary legislation[28].

4.7 The Administration held the view that notices under section 33(1) of FSO did not have legislative effect. They were published as general notices and needed not be tabled in LegCo. The Administration put forward the following arguments to support its view:

(a) there is no express provision in FSO identifying the instrument as subsidiary legislation;

(b) the determination by C for T of the maximum fares does not amend or extend FSO;

(c) a notice under section 33(1) of FSO does not have general application nor does it formulate a general rule of conduct; it only applies or extends to, or otherwise binds, the licensee. The rights and obligations of the user depend on the terms and conditions of the contract between them; such rights and obligations have neither been extended nor reduced by FSO; and

(d) the legislative intent of the provision is to empower C for T as the only person to determine the maximum fares for licensed services. The determination of maximum fares for licensed ferry services has been effected as executive acts since the passage of the Ferry Services Bill in 1982[29].

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[28] LC Paper No. CB(1)1152/98-99.
[29] LC Paper No. CB(2)1815/98-99.

4.8 In the opinion of LA, such notices had legislative effect and should be published in the form of legal notices and be subject to the "negative vetting procedure" of LegCo under section 34(1) and (2) of Cap. 1. LA had put forward the following points:

(a) the notice has the effect of determining or extending the content of section 33(1) of FSO as a rule of conduct or declaration as to the power, right or duty on the part of the licensee and members of the public who use or propose to use the service;

(b) the notice imposes a legal obligation on a licensee not to charge a fare exceeding the maximum fares as determined by C for T. Such notice confers an enforceable right, or at least a legitimate expectation, on members of the public to use the ferry service at a fare not exceeding the maximum fares determined by C for T. The relationship between a licensee and the users, insofar as the provision of service is regulated by statute, is not purely contractual. C for T, as a public officer, is under a duty to take necessary action to ensure that the ferry service is available to the public at a fare not exceeding the maximum level determined under section 33(1) and the licensee is liable to be prosecuted for charging in excess of the maximum fares. A notice under section 33(1) affects the interests of all members of the public who use or propose to use the service; and

(c) had the Legislature intended that the determination of the maximum fares to be administrative in nature, it would not have been necessary to include a separate section 33(1) when section 28(2)(b), which provides that a licensee shall be subject to conditions as C for T may specify, is sufficiently wide to include maximum fares chargeable as one of the conditions. Section 33(1) is drafted in a similar manner as section 19(1). Orders made under section 19(1) have been treated and published as subsidiary legislation[30].

[30] LC Paper No. CB(2)1815/98-99.

4.9 Regarding the five criteria cited by the Administration for determining whether an instrument has legislative effect, LA pointed out that these criteria are only drawn up on the basis of judicial decisions and views expressed by writers in some common law jurisdictions, and are not at all binding. Furthermore, LegCo had not discussed the criteria in detail nor had Members agreed on such "commonly adopted principle". Apart from the criterion of legislative intent which could be accepted beyond doubt, the remaining four criteria would have to be subject to detailed examination before they could be adopted[31].

4.10 Given the different legal opinions held by the Administration and LA, the Panel could not reach a consensus with the Administration on whether notices made under section 33(1) of FSO were subsidiary legislation. The Panel also noted that there were many provisions in current legislation which contained reference to "by notice in the Gazette" and that there had not been consistency in treatment in that some were published as legal notices while some as general notices. The Panel considered that a clear distinction should be made in the relevant legislation between instruments of a legislative character and those of an administrative character[32]. The Panel reported on its deliberations to the House Committee on 23 April 1999.

Bills Committee on International Organizations (Privileges and Immunities) Bill

4.11 The main aim of the International Organizations (Privileges and Immunities) Bill was to replace the part of the International Organizations and Diplomatic Privileges Ordinance ("IODPO") (Cap. 190) which dealt with privileges, immunities and legal capacities of certain international organizations. This was achieved by giving CE in Council power to declare, by order in the Gazette, the provisions relating to the status, privileges and immunities of an international organization (as defined in the Bill) and of persons connected with such an organization, contained in an international agreement to have the force of law in Hong Kong, and by repealing similar provisions contained in IODPO. Such repeal would have the effect of also repealing the 17 Orders made under IODPO[33].

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[31] LC Paper No. CB(1)1152/98-99.
[32] LC Paper No. CB(1)1152/98-99.
[33] LC Paper No. LS97/98-99.

4.12 The Orders made under the then existing IODPO were subsidiary legislation subject to negative vetting by LegCo. Under the Bill, Orders made by CE in Council were expressly excluded from the application of section 34 of Cap. 1, and were therefore not subject to the scrutiny of LegCo[34].

4.13 Members of the Bills Committee expressed concern about clause 3(2) of the Bill which specified that section 34 of Cap. 1 should not apply to an order made by CE in Council under clause 3(1) of the Bill. Members considered it a retrogressive step to deprive LegCo of the right to scrutinize subsidiary legislation relating to the conferment of privileges and immunities on international organizations and their personnel[35].

4.14 According to the Administration, under BL 13, the Central People's Government ("CPG") is responsible for the foreign affairs relating to the Hong Kong Special Administrative Region ("HKSAR"). The granting of privileges and immunities to international organizations as well as the conclusion of international agreements concerning privileges and immunities unquestionably fell within the scope of foreign affairs. It was therefore important that local legislation underpinning those privileges and immunities had to be consistent with the international rights and obligations of CPG.[36]

4.15 The Administration recognized the status and power of LegCo as the Legislature of the HKSAR as provided for in BL, and in the light of Members' concern on the disapplication of section 34 of Cap. 1, the Administration would introduce a Committee Stage amendment to remove clause 3(2) of the Bill so that section 34 of Cap. 1 would apply to orders made by CE in Council under clause 3(1) of the Bill. In making the amendment, the Administration recognized that section 34(2) of Cap. 1 already provided that LegCo could amend subsidiary legislation only "in any manner whatsoever consistent with the power to make such subsidiary legislation", and that LegCo would not act in any way that was ultra vires[37]. The relevant Committee Stage amendment was passed by the Council at the meeting of 1 March 2000[38].

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[34] LC Paper No. LS97/98-99.
[35] LC Paper No. CB(2)903/99-00.
[36] LC Paper No. CB(2)903/99-00.
[37] LC Paper No. CB(2)903/99-00.
[38] The Official Record of Proceedings of the Legislative Council on 1 March 2000.

Subcommittee to Examine the Implementation in Hong Kong of Resolutions of the United Nations Security Council in relation to Sanctions

4.16 Prior to 1 July 1997, resolutions of the Security Council of the United Nations ("UNSC") in relation to sanctions were implemented in Hong Kong by way of Orders in Council which were made by the UK Government and extended to Hong Kong. All such Orders in Council as applicable to Hong Kong lapsed at midnight on 30 June 1997. To put in place a mechanism to ensure the continued application and enforcement of UN sanctions in the HKSAR, the United Nations Sanctions Ordinance ("UNSO") was passed by the Provisional Legislative Council on 16 July 1997 and came into effect on 18 July 1997[39].

4.17 Pursuant to section 3(1) of UNSO, CE shall make regulations to give effect to the instructions of the Ministry of Foreign Affairs ("MFA") of the People's Republic of China in relation to the implementation of sanctions as decided by UNSC. It is also expressly provided in section 3(5) of UNSO that sections 34 and 35 of Cap. 1 shall not apply to such regulations. As such, they are not required to be laid before LegCo and are not subject to its approval or amendment[40].

4.18 The House Committee agreed at its meeting held on 8 October 2004 to set up a subcommittee to examine the arrangement for implementing in Hong Kong the sanctions imposed through resolutions of UNSC ("the UN Sanctions Subcommittee"). The Subcommittee had studied during the 2004-2008 legislative term a number of legal and constitutional issues relating to the arrangement of implementing UN sanctions in Hong Kong, including the constitutional basis of the current regulation-making power conferred on CE to give effect to MFA's instructions and LegCo's constitutional role or the absence of such a role under UNSO[41].

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[39] LC Paper No. CB(1)2051/07-08.
[40] LC Paper No. CB(1)2051/07-08.
[41] LC Paper No. CB(1)2051/07-08.

LegCo's constitutional role as the law-making body in the HKSAR

4.19 The UN Sanctions Subcommittee was gravely concerned that section 3(5) of UNSO might have deprived LegCo of its constitutional role in scrutinizing and, where necessary, amending subsidiary legislation, thereby placing the legislative powers in the hands of the executive government. As the purpose of the regulations made under section 3(1) was to fulfil Hong Kong's international obligations to implement UN sanctions, members were keen to ascertain the constitutionality of the current arrangement, lest the regulations made under UNSO might be challenged as being legally ineffective if the statutory basis on which they had been made was unconstitutional[42].

4.20 In considering the constitutional role of LegCo, the UN Sanctions Subcommittee had made reference to BL 16, 17 and 19 on the separation of the executive, legislative and judicial powers respectively; as well as BL 73 which defines the function of LegCo as "to enact, amend or repeal laws in accordance with the provisions of this Law and legal procedures". The UN Sanctions Subcommittee also noted the view of Professor Yash Ghai, former Sir Y K Pao Chair of Public Law at the University of Hong Kong, that "while there is interaction between the executive and the legislature, each has its own institutional autonomy and that the principle of the separation of powers underlies BL". His conclusion was that "the power to scrutinize and if necessary, amend subsidiary legislation is vested with LegCo; and an Ordinance which takes away the power of LegCo to vet or amend subsidiary legislation is void"[43].

4.21 In its written response on Professor Yash Ghai's views to the UN Sanctions Subcommittee, the Administration agreed that there was a division of powers and functions among various organs of the HKSAR under BL, but took the view that "BL does not institute a rigid separation of powers". The Administration stated that before the reunification on 1 July 1997, neither the British nor the Hong Kong systems were based on a rigid separation of powers. The absence of a rigid separation of powers in BL was therefore consistent with the theme of continuity to ensure a smooth transition. The Administration referred to the CA's decision in *HKSAR v David Ma [1997] HKLRD 761* in which it was highlighted, inter alia, that both the Joint Declaration and BL carried the overwhelming theme of a seamless transition[44].

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[42] LC Paper No. CB(1)2051/07-08.
[43] LC Paper No. CB(1)2051/07-08.
[44] LC Paper No. CB(1)2051/07-08.

Delegation of legislative power and scrutiny of subsidiary legislation

4.22 Another issue of concern pursued by the UN Sanctions Subcommittee was whether it was proper for LegCo to delegate the regulation-making power to the executive government and to exclude itself from the vetting of subsidiary legislation made under UNSO. In this respect, members noted Professor Yash Ghai's view that the power to make laws was granted to LegCo and that "BL gives no power to make laws to CE, although it gives a considerable role to CE in the legislative process" such as the signing or veto on bills. In fact, those national laws as listed in Annex III of BL were to be applied locally by way of promulgation or legislation, not by direct application. In short, he considered that the intention for adopting this method was to "maintain the integrity and coherence of the Hong Kong legal system based on the common law. The implication is that all the normal processes of law making must be adhered to, including that relating to subsidiary legislation"[45].

4.23 As BL vests LegCo with the authority and the responsibility to keep control over subsidiary legislation, Professor Yash Ghai advised that "[A]n Ordinance that takes away from LegCo the ultimate control over the enactment of subsidiary legislation would therefore be unconstitutional. LegCo has been given its legislative responsibilities by the National People's Congress and it cannot divest itself of that power". He was of the opinion that the "exclusion by UNSO of sections 34 and 35 [of Cap. 1] is unconstitutional"[46].

4.24 The Administration, however, opined that while LegCo was entrusted with the power and function to enact laws, BL did not prohibit the delegation of law-making power/function to other bodies or persons to make subsidiary legislation. This exclusionary power predated 1 July 1997, was evidenced in section 3(15) of the Fugitive Offenders Ordinance (Cap. 503) which is similar to section 3(5) of UNSO. According to the Administration, the continuation or exercise of such exclusionary power after reunification was considered to be in line with the theme of continuity under BL[47].

4.25 Another argument put forward by the Administration was that since the regulations made under UNSO were to implement MFA instructions in respect of UN sanctions which were foreign affairs for

[45] LC Paper No. CB(1)2051/07-08.
[46] LC Paper No. CB(1)2051/07-08.
[47] LC Paper No. CB(1)2051/07-08.

which CPG was responsible under BL 13(1), it must be lawful and constitutional for LegCo to authorize the HKSAR Government to make subsidiary legislation without any vetting requirement. In the Administration's view, this also reflected the fact that although legislative authority derived from LegCo, the subject matter was outside the high degree of autonomy conferred on the HKSAR[48].

4.26 On whether the current arrangement would affect LegCo's constitutional role in exercising its powers and functions under BL 73(5) and (6) namely, to raise questions on the work of the Government and to debate any issue concerning public interests, the Administration considered that LegCo was at liberty to raise questions on, or debate, subsidiary legislation made under UNSO even if it had no power to vet it[49].

Implementation of UN sanctions before and after the handover

4.27 The Administration stated that implementation of UN sanctions had always been a matter of foreign affairs, both before and after the handover. Prior to 1 July 1997, UN sanctions were implemented in Hong Kong by the UK Government by way of Orders in Council under the United Nations Act 1946. The Orders in Council were required to be laid before the UK Parliament but were not subject to any parliamentary procedure to amend or repeal them. As far as Hong Kong was concerned, LegCo also did not have any vetting power over such Orders[50].

4.28 Members queried whether it was appropriate to compare the legislative framework for implementing UN sanctions as provided under UNSO with that which applied in Hong Kong before the handover for the purpose of determining the constitutionality or otherwise of the current arrangement because the two systems were totally different. They noted the observation of Dr Margaret NG, Chairman of the UN Sanctions Subcommittee, that before the handover, the Orders in Council took effect as UK legislation, not Hong Kong legislation. This was very different from the post-handover arrangement whereby regulations were made under UNSO, which purported to be Hong Kong legislation[51].

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[48] LC Paper No. CB(1)2051/07-08.
[49] LC Paper No. CB(1)2051/07-08.
[50] LC Paper No. CB(1)2052/07-08.
[51] LC Paper No. CB(1)2052/07-08.

4.29 On the parliamentary procedure, the Subcommittee noted that the Orders in Council were required to be laid before the UK Parliament. However, the Regulations made under UNSO were not required to be laid before LegCo. In this connection, members noted that after the Orders in Council made under the United Nations Act 1946 were laid before the UK Parliament, they would be studied by a Joint Committee on Statutory Instruments. The Joint Committee might make recommendations to the UK Government on the legal and drafting aspects of such Orders, but did not have power to annul them[52].

Vetting of subsidiary legislation by LegCo

4.30 The UN Sanctions Subcommittee was also concerned about the total absence of LegCo in the regulation-making process under UNSO. The Administration's view was that the disapplication of the positive or negative vetting procedure was permissible under the laws of Hong Kong and at common law. Examples cited by the Administration were the English Schools Foundation Ordinance (Cap. 1117), the Hong Kong Institute of Education Ordinance (Cap. 444), the Vocational Training Council Ordinance (Cap. 1130) and the Fugitive Offenders Ordinance (Cap. 503). Members did not subscribe entirely to the Administration's view and noted that for the former three Ordinances, the subject matters mainly concerned the internal regulation and management of the respective institution only. As for the Fugitive Offenders Ordinance, although section 3(15) had an exclusionary provision similar to section 3(5) of UNSO, the section merely provided for CE to make a Notice to reflect any changes of the parties to the relevant convention. The regulations made under section 3(1) of UNSO, however, often created new offences, purported to have serious penal effect and conferred vast investigation and enforcement powers. Members noted that normally, subsidiary legislation of such a nature should be subject to vetting by the Legislature[53].

4.31 At its meeting on 20 June 2008, the House Committee endorsed the following recommendations put forward by the UN Sanctions Subcommittee to improve the regulation-making process:

(a) the Administration should include more background information in the LegCo Brief in respect of each regulation made and gazetted under UNSO to facilitate scrutiny by Members; and

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[52] LC Paper No. CB(1)2052/07-08.
[53] LC Paper No. CB(1)2052/07-08.

(b) a dedicated subcommittee should be set up under the House Committee to deal with Regulations made under UNSO. Under this standing arrangement, gazetted Regulations in the future would be considered by Members at meetings of the House Committee, and where necessary, the Regulations would be referred to the dedicated subcommittee for further scrutiny[54].

Subcommittee on Antiquities and Monuments (Withdrawal of Declaration of Proposed Monument) (No.128 Pok Fu Lam Road) Notice (L.N.21/08)

4.32 The Antiquities and Monuments (Withdrawal of Declaration of Proposed Monument) (No.128 Pok Fu Lam Road) Notice was made by SDEV under sections 2A and 2B of the Antiquities and Monuments Ordinance ("AMO") (Cap. 53). The object of the Notice was to withdraw the declaration made by virtue of the Antiquities and Monuments (Declaration of Proposed Monument) (No. 128 Pok Fu Lam Road) Notice (L.N. 59 of 2007) gazetted on 20 April 2007. The latter Notice declared the buildings and the adjoining land situated within the Rural Building Lot No. 324, No. 128 Pok Fu Lam Road, Hong Kong together with all structures erected on such land as a proposed monument for the purposes of AMO[55].

4.33 The Subcommittee formed to study the Notice ("the Antiquities Subcommittee") had discussed the power of LegCo to amend the Notice and the effect of making amendment. The Subcommittee noted that the Notice was a piece of subsidiary legislation as defined in section 3 of Cap. 1. As such, the Notice was subject to amendment by LegCo under section 34(2) of Cap. 1, including repeal[56].

4.34 Under section 2A(1) of AMO, a declaration of proposed monument must be for the purpose of considering whether or not any building and other structures should be declared to be a monument, and a declaration could only be made after consultation with the Antiquities Advisory Board ("AAB"). Under section 2B(1) of AMO, a declaration

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[54] In the Fourth LegCo, Members agreed at the meeting of the House Committee on 7 November 2008 that a dedicated subcommittee should be set up in the light of the recommendation made by the former UN Sanctions Subcommittee. The Subcommittee was formed on 1 December 2008 to deal with Regulations made under UNSO and follow up the recommendations made by the former Subcommittee. LC Paper No. CB(1)2052/07-08.

[55] LC Paper No. LS44/07-08.

[56] LC Paper No. LS62/07-08.

made under section 2A shall have effect for a period of 12 months from the making of it unless earlier withdrawn by the Authority, i.e. SDEV. Under section 2B(2), the Authority may from time to time, after consultation with AAB and with the approval of CE, extend the period by 12 months but the power to extend does not apply to a proposed monument within private land. The case in question related to a proposed monument within private land and there was apparently no mechanism for any extension. In view of the power of the Authority, it would appear that the only option for amendment was a repeal[57].

4.35 The Antiquities Subcommittee had examined the legal effect of repealing the Notice. Although the Notice was subject to the negative vetting procedure of LegCo under section 34 of Cap. 1, the Notice had taken effect on the day of its publication in the Gazette on 1 February 2008, i.e. the declaration notice had been withdrawn with effect from that day. Section 23(a) of Cap. 1 provides that where an ordinance repeals in whole or in part any other ordinance, the repeal shall not revive anything not in force or existing at the time at which the repeal takes effect. Both a resolution passed by LegCo and the Notice fell within the definition of "ordinance" under section 3 of Cap. 1. Therefore, should a resolution be passed by LegCo to repeal the Notice, such repeal would not revive the declaration notice which was no longer in force or did not exist when the resolution took effect[58].

4.36 Nevertheless, the Antiquities Subcommittee considered it appropriate and necessary to repeal the Notice to reflect members' dissatisfaction with the way in which the Administration had handled matters relating to the declaration and withdrawal of the declaration of the Building as a proposed monument. Members stressed that the Administration should provide sufficient time for LegCo to complete the due process in making any legislative proposal. An item of subsidiary legislation subject to the negative vetting procedure of LegCo should not take effect until after the expiry of the scrutiny period, unless absolutely necessary[59]. The resolution to repeal the Notice was negatived at the Council meeting of 9 April 2008[60].

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[57] LC Paper No. LS62/07-08.
[58] LC Paper No. CB(2)1417/07-08.
[59] LC Paper No. CB(2)1417/07-08.
[60] The Official Record of Proceedings of the Legislative Council on 9 April 2008.

Bills Committee on Minimum Wage Bill

4.37 The Bills Committee on Minimum Wage Bill was formed to consider the Minimum Wage Bill the objects of which were to provide for a statutory minimum wage ("SMW") at an hourly rate for certain employees and to establish a Minimum Wage Commission ("MWC")[61].

4.38 Under the Bill, the prescribed minimum hourly wage rate was set out in a schedule. Some members of the Bills Committee were concerned that while LegCo could either approve or revoke the notice to amend the schedule, it was not given the power to amend the schedule. These members took the view that as CE in Council had the power to amend the prescribed minimum hourly wage rate recommended by MWC, LegCo should also be given the power to amend the schedule so that if CE in Council decided against the recommendation of MWC, LegCo as a gatekeeper could amend the schedule to adopt the recommendation of MWC.

4.39 According to the Administration, the SMW rate, which was to be prescribed in Schedule 3 by way of subsidiary legislation, was subject to the scrutiny of LegCo. MWC would adopt an evidence-based approach in coming up with a recommendation on the SMW rate through data research and analysis as well as extensive consultations with stakeholders, having regard to the need to maintain an appropriate balance between the objectives of forestalling excessively low wages and minimizing the loss of low-paid jobs, and to sustain Hong Kong's economic growth and competitiveness. Given the diverse interests of different stakeholders as well as the significant economic and employment implications of the SMW rate, safeguarding the evidence-based approach was of cardinal importance[62].

4.40 The Administration advised that it would consider the recommendation of MWC in a prudent and objective manner and prescribe the SMW rate in Schedule 3 by way of subsidiary legislation subject to the approval of LegCo. Its proposal that LegCo could approve or revoke, but not amend, the proposed SMW rate was intended solely to safeguard the evidence-based approach. The proposed SMW rate could not take effect if LegCo decided to revoke it. Regarding the power of CE in Council in amending the SMW rate recommended by

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[61] LC Paper No. CB(2)2035/09-10.
[62] LC Paper No. CB(2)2035/09-10.

MWC, as the Administration was responsible for introducing subsidiary legislation and MWC was established to advise CE in Council on the amount of the SMW rate, there should not be any question on the power of CE in Council in determining the prescribed minimum hourly wage rate[63].

4.41 The Administration further pointed out that the National Minimum Wage Act 1998 of the UK did not provide the Parliament with the power to amend the National Minimum Wage rates proposed by the UK government. Some members pointed out that neither House of the UK Parliament had the power to amend secondary or delegated legislation except in the small number of cases where the parent Act specifically provided for such amendment[64].

4.42 Hon Cyd HO moved a Committee Stage amendment to delete clause 15(4) of the Bill to the effect that LegCo might amend the SMW rate. The amendment was negatived at the Council meeting of 16 July 2010[65].

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[63] LC Paper No. CB(2)2035/09-10.
[64] LC Paper No. CB(2)2035/09-10.
[65] The Official Record of Proceedings of the Legislative Council of 16 July 2010.

Appendix I

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[1]. 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[2].

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[1] 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.

[2] 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

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7 October 2010

Urgent by email

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

(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,

(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.

<u>Our detailed submission</u>
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^{B} 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$_{D}$ approved on 30 June 2009 by the CE in Council**). If the LegCo purports to repeal the gazetted order, it would definitely affect and defeat the designation of **the area shown in the approved map** (approved by CE in Council on 30 June 2009) to be a country park.

Gazetted order already effective to create the designation

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

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

(1) It would be illogical to split the gazetted order from the designation. The CE designates a country park by making the order in the gazette. The only purpose and effect of the gazetted order is the designation of the country park as approved by CE in Council. There is nothing in Cap.208 supporting such a distinction or creating additional hurdles to clear before the gazetted order can effect the designation. There is nothing in Cap.208 or Cap.1 or elsewhere providing that the gazetted order can only effect a designation upon, say, completion of negative vetting by LegCo, or upon the order coming into operation on the commencement date.

(2) The designation of the country park is already complete, valid and effective in law once the CE's order is gazetted. The fact that it does not come into operation immediately upon publication of the gazette but only upon the commencement date on 1 November 2010 does not in any way affect its validity and effectiveness as the instrument to designate the area approved by CE in Council as country park.

(3) The provision in the gazetted order of a specific commencement date itself cannot possibly be the decisive factor creating a fundamental difference to the power on the part of the CE or the LegCo to amend (including repeal) the order or the designation.

(4) Whether the CE or LegCo can amend or repeal the Designation Order does not depend on whether the Designation Order has come into operation or not. For under Cap.208, the CE **shall** gazette the order to implement the decision of the CE in Council. He has no power to do anything to prevent the

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

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

> "(1) Where an Ordinance is to come into operation on a day other than the day of its publication in the Gazette, a power to do anything under the Ordinance may be exercised at any time after its publication in the Gazette.
>
> (2) An exercise of a power under subsection (1) is not effective until the provision in the Ordinance to which it relates comes into operation unless the exercise of the power is necessary to bring the Ordinance into operation."

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

> "(2) Where subsidiary legislation has been laid on the table of the Legislative Council under subsection (1), the Legislative Council may, by resolution passed at a sitting of the Legislative Council held not later than 28 days after the sitting at which it was so laid, provide that such subsidiary legislation shall be amended in any manner whatsoever consistent with the power to make such subsidiary legislation, and if any such resolution is so passed the subsidiary legislation shall, **without prejudice to anything done thereunder**, be **deemed to be amended as from the date of publication in the Gazette of such resolution**.

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

Negative vetting power of LegCo not rendered nugatory

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

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

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

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

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

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

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

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

Department of Justice

7 October 2010

#1078146v3

Annex

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$_D$ 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.

ADVICE CONCERNING A PROPOSED LEGCO MOTION TO REPEAL AN ORDER MADE UNDER S. 14 COUNTRY PARKS ORDINANCE

1. I have been instructed to advise the Secretariat of the Legislative Council ('Legco') on a topic of great importance and topicality. It is whether Legco has the power to repeal a statutory order made by the Chief Executive ('CE') under s.14 of the Country Parks Ordinance, Cap. 208 ('CPO').

2. That provision says: *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.*

3. The CE has made an order under this section. It is the 'Country Parks (Designation) (Consolidation) (Amendment) Order 2010 [L.N. 72 of 2010]' (the Order').

4. The Administration says that Legco cannot repeal the Order. The Legal Adviser to Legco disagrees. There is an impasse. It is in these circumstances that I have been asked to advise as a matter of urgency because a Legco member may move to repeal the order next Wednesday and the President of Legco will have to rule on the legal basis for such a motion before then.

The Factual Background

5. The background to the issue can be taken shortly because, as will appear below, this problem has arisen because of the way a delegate has been given the power to make subsidiary legislation. The problem could re-occur in another statutory context if the same statutory formula for delegation was used.

6. The Government wants to extend a landfill site in the New Territories by carving out space in the Clearwater Bay Country Park for waste disposal activities. In order for the Administration to excise the proposed landfill site from the country park it must follow certain procedures in order to change the map that currently delineates the boundaries of the country park.

7. Maps of country parks are drawn up, scrutinized by the Chief Executive-in-Council under s. 13 CPO and, if approved, then deposited in the Land Registry. The provisions of s. 14 then come into play. After the map has been deposited 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'. The Order is the end product of this process.

8. The proposed extended landfill has met with objections from persons living nearby to the site. Some Legco members are against it too and hence the proposal to amend the Order by repeal proposed by the Hon. Tanya Chan next Wednesday.

Status of the Order and Legco's Power of Repeal

9. The Administration and the Legal Adviser to Legco both agree that the Order is a type of subsidiary legislation within the meaning of s. 3 Interpretation & General Clauses Ordinance, Cap. 1 ('IGCO') and, as such, must be laid before Legco under s. 34(1) IGCO for approval.

10. Under s. 34(2), Legco may choose to amend the subsidiary legislation if it wishes. 'Amend' is defined in s. 3 so as to include 'repeal' and so Legco, if it wants to reject the Order, has only to pass the motion of the Hon. Tanya Chan.

The Administration's Argument

11. The Administration says that Legco's power to amend under s. 34(2) is subject to an important rider, namely that the power to amend must be exercised in a 'manner whatsoever consistent with the power to make such subsidiary legislation'. In other words, if the power to make subsidiary legislation is subject to certain manner and form requirements, Legco must abide by those requirements and not go further than the original power conferred on the delegate to make subsidiary legislation.

12. In this case the CE must make the order after the acts of approval and depositing in the Land Registry under s.13. Section 14 imposes a duty on him to make an order when those requirements have been met. The limitation in s. 34(2) IGCO means that Legco is in no different position than the CE and, because he cannot refuse to

make an order, Legco cannot repeal an order. Legco's power is limited to amending the implementation provisions only, i.e. it can choose a different date from the one selected by the CE as the CE is given a relatively free hand in this regard by virtue of the commencement provisions of s. 38(4) IGCO which allow him to choose a commencement date.

Analysis

13. The starting point of any analysis of the issue must be Chapter IV, Part III of the Basic Law. Articles 66 and 73(1) are relevant. Article 66 provides that Legco shall be the legislature of the HKSAR and Article 73(1) requires Legco to 'enact, amend or repeal laws in accordance with the provisions of [the Basic Law] and legal procedures'. Together, these articles make Legco the only source of written law- i.e. ordinances and subordinate legislation-in the HKSAR, subject only to the preservation of compliant laws made by the colonial legislature under Article 8 Basic Law.

14. The CE is on the other hand, only responsible for implementing the Basic Law and other laws that are consistent with the Basic Law: see Articles 48(2).

15. The constitutional principle is therefore 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 should be construed so as to give effect to this principle. (Section 2A(1) IGCO states this principle of conformity as regards laws existing before 1997, which includes the IGCO itself.)

16. It is not disputed that effective law making requires, in many cases, the use of statutory provisions to delegate law-making power to third parties. Delegates can be Government officials, public bodies and even private bodies. There is no constitutional objection to the CE or the Chief Executive-in-Council possessing such devolved legislative authority, so long as Legco can scrutinise the product of such devolved authority. To 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.

17. It is for this reason that s. 34 IGCO is important. It is one of the means by which the reserve legislative power of Legco--the power to recall the product of a devolved legislative authority is expressed. If the s. 34 IGCO scrutiny power cannot be construed to do this, then, in my opinion, it is inconsistent with the Basic Law. (In fact, I do not think that inconsistency exists, as will be made apparent below.)

Constitutional Anomaly: Judicial Power Wider than that of Legco

18. It is an accepted feature of our system of law that subsidiary legislation is amenable to judicial review on the ground that the donee of a limited legislative authority has exceeded the remit of the legislative power originally conferred. The principles on which courts operate are set out in Section 58 *Bennion Statutory Interpretation* (5th) at pages 254-262. Basically, the courts work on the principle that the will of the legislature, incorporating the will of an electorate, must be given recognition when delegates make subordinate legislative instruments and that the delegates must therefore keep within the boundaries set for them in the primary legislation.

19. It would be anomalous in the extreme if Legco identified a legal flaw in the decision-making process leading to the making of delegated legislation but could do nothing about it, but the judicial arm could intervene many months later on. The legislature should be the body primarily responsible for quality control of the product of its legislative processes and should be able to remedy as of right perceived defects and not have to wait upon the judiciary to exercise a remedial jurisdiction which is at bottom discretionary, meaning that a court may, because of delay and other factors, not always quash defective subordinate legislation which the legislature itself might have recalled by repeal or amendment when it was still in the legislative process.

20. The constitutional concern that the delegate has kept within his devolved legislative powers is one of the concerns of the UK Joint Committee on Statutory Instruments. This committee, established under Standing Orders of the House of Commons and House of Lords, is charged to consider subordinate legislation and one of the criteria in its terms of reference that calls for especial consideration of a piece of delegated legislation is that 'there appears to be a doubt whether it is intra vires or that it appears to make some

unusual or unexpected use of the powers conferred by the statute under which it is made' A judge in the Court of First Instance would use the same criterion when considering whether to grant an applicant leave to apply for judicial review. If satisfied that the donee of legislative powers had indeed overstepped the mark, the judge would normally go on to quash (but not always: see paragraph 19) the unlawful subsidiary legislation.

21. The same terms of reference contain other legal and non-legal criteria which are consistent with close oversight and retention of original authority, including criteria relating to fees and charges, limitations on rights of access to the courts, poor drafting and delay in bringing the particular piece of subsidiary legislation before Parliament. They likewise serve the wider public interest in ensuring that delegated legislation complies with the standards acceptable to legislators who entrusted the power to delegates in the first place. [The criteria used by this committee can be found at 6.2.16, *Craies on Legislation* (9th) at pages 310-311]

Legco Disapproval Inconsistent with Statutory Scheme

22. I see that the Administration makes the point that the process leading up to the making of the Order involved complex decision-making and public consultation and that it cannot have been the intention of the legislature to permit the CE to derail this process at the last minute by him not making the Order and, so the argument goes, Legco should not be able to do the same.

23. The answer to this is that if there are legal flaws in the decision-making process, then the end product of a complex administrative process may be quashed by a court. If Legco can intervene for the same reason at an earlier stage and before the delegated legislation is promulgated then that is all to the good.

24. There may be other good policy reasons for objecting to delegated legislation as identified in the criteria used by the UK Parliamentary body referred to in paragraph 20 above. The fact that these criteria exist does not mean that the power of amendment under s. 34(2) will necessarily be used. Legco can be trusted not to use the power unless there is a very good reason to use it. *Craies on Legislation* (9th) says that although it is common for resolutions for annulment of statutory instruments to be debated once or twice

in a Session of Parliament in the UK but they are very rarely passed and the last successful annulment that was contested was in 1979 (see 6.2.13.2 at page 308).

Close Analysis of Administration's Argument

25. The Administration's argument is that the 'manner' limitation in s. 34(2) is engaged. That is predicated on a 'power' to make subsidiary legislation. But, the Administration then says, the CE enjoys no discretion under s. 14 CPO. He has to make the order when the preconditions exist, i.e. approval of a map by the CE in Council, and its deposit in the Land Registry. He has a duty to make the Order.

26. If the CE makes the Order because he has to by virtue of a peremptory statutory rule in s. 14 then, arguably, no 'power' exists and, on the face of things, s. 34(2) is not engaged at all. However, I see that no one is suggesting that the Order is not subsidiary legislation as defined in s. 3 and I suppose that the reasoning for this may be that the word 'shall' in s. 14 CPO does not mean that the CE is absolutely required to make an Order in the sense that not making one would invalidate all that had gone beforehand. The requirement is directory only and not mandatory: see *Bennion* at Section 10, pages 44-57. This is, on one view, sufficient to categorise the making of an order under s. 14 as the product of a power and not a duty.

27. The alternative way of identifying a power is to treat the Chief Executive in Council and the CE together as authors of the Order. This accords with reality. If something was seriously amiss with the decision-making under s 13(1) CPO then, although the target of a judicial review would be the Order, the grounds of review would concentrate on the acts and omissions of the Chief Executive in Council. Putting it another way, it should not be possible for the real decision-maker behind a piece of delegated legislation to escape scrutiny by a purely formal statutory device whereby a third party is mandated to make the legislative instrument that incorporates the decision of the decision-maker.

28. The Administration may counter this argument by saying that it was the legislature that chose to construct sections 13 and 14 CPO in this way so that there was a formal separation between the decision to approve a draft map and the making of the legislative

instrument giving effect to that decision and, if that means that Legco has passed up the chance to scrutinize the Order, then that should have been foreseen when the CPO was before Legco in bill form.

29. The surrender of law-making powers to the executive may be permissible in countries where there are no clear constitutional rules on the respective functions of the legislature and the executive, but even then the devolution of legislative power without the possibility of recall is controversial and special oversight is required. In the United Kingdom, where Parliament is supreme and so can divest itself of law-making powers, provisions in an enabling Act that confer a power on a delegate to amend the enabling Act itself are called "Henry VIII clauses" because of their autocratic nature in by-passing Parliament. An important safeguard against their misuse is that it is accepted by the Government there that when such powers are used then the legislative products should generally be submitted to Parliament under the affirmative procedure to ensure a more exacting scrutiny: see *Craies on Legislation* at 6.2.3 at page 298 at fn. 41.

30. For the reasons outlined at paragraphs 13 to 17 above, I do not think that Legco could devolve the capacity to make written law and not retain the reserve ability to scrutinize the product of the delegate. If sections 13 and 14 CPO have that effect, then they are unconstitutional to that extent. However, as I will make clear later on in this advice, I do not think that it is necessary to go that far.

31. I agree with the Legal Adviser to Legco that if a power to make subsidiary legislation is engaged by s. 14 CPO then s. 28(1)(c) IGCO is engaged. That provision allows the maker of subsidiary legislation to amend it 'in the same manner by and in which it was made'. 'Amend' means repeal in this context.

32. The manner in which the Order was a simple executive act made was on the happening of the two conditions precedent, namely the approval of a draft and the depositing of it in the Land Registry. If the CE made the Order but, a week later, discovered that there had been serious non-compliance with the requirements of an earlier stage in the process, for example, at the s. 11 CPO objection stage, it is absurd to say that it is too late for him to do anything about it and that the Order must be promulgated and given effect, even though it is a sitting target for a later judicial review. In those

circumstances, the thing to do is either repeal the order or to encourage Legco to use its s.34 power to repeal it. (See 6.2.13.2 at fn. 75, page 308 in *Craies on Legislation* (9th) for a rare example of the Government moving that two orders should be annulled because it was conceded that they were defective.)

33. I have seen the Administration's counter-arguments on this point. They are at paragraph 32 of its submissions dated 7 October 2010. They are, with respect, somewhat convoluted and technical. The point made there is that the CE has a limited role as the donee of a simple subsidiary law-making power he can only make an order in the terms of a previous decision. That may be so but, as a delegate of legislative power, he is not a mere cipher.

34. If there are problems with the Order that only become apparent shortly after gazetting, I see no 'contrary intention' in the CPO that the CE must sit on his hands and let an unlawful legislative instrument sail on to a certain judicial review. Indeed, CE has a constitutional responsibility to implement the Basic Law and other laws under Article 48(2) Basic Law and that cannot mean that he has the responsibility to implement legislative instruments that are known by him to be legally defective.

35. There are two rules of interpretation in play here. Given the constitutional requirement that Legco should be the only author of written law in the HKSAR, there is a very strong presumption that that constitutional rule is engaged and that it was not the intention of the legislature to have the courts pick up the pieces if invalid subsidiary legislation slipped through the grasp of Legco because of the particular construction of a provision concerning the making of subordinate legislation. See Section 328 *Bennion* at 1042-1050: 'Unless the contrary intention applies, an enactment by implication imports any principle or rule of constitutional law (whether statutory or non-statutory) which prevails in the territory to which the enactment extends and is relevant to the operation of that enactment in that territory.' As I have said at paragraph 17 above, if this presumption appears to be displaced by a particular statutory provision then the legislation is almost certainly unconstitutional.

36. The other is the presumption against absurdity in the sense used in *Bennion* in Part XXI (pages 969-1008), that is to say avoiding inconvenient, anomalous and impracticable results. If there is an obvious problem with a piece of subsidiary legislation, then a

construction of a statute that allows the problem to be cured earlier, rather than later, when persons may have acted to their prejudice in relying on the legislative provision, is the construction to be preferred.

Consequences of Repeal of Order

37. The Order has not yet come into operation. This means that the designation made under the Order is not yet legally effective. The effect of repeal of the Order would be a reversion to the *status quo ante*, i.e. to the lawful designation of a country park made as long ago as, I understand, 1979. It would not have the effect suggested by the Administration of undoing the entire legislative scheme underpinning the original designation of the Clearwater Bay Country Park as a country park under the CPO.

Conclusion

38. I am of the view that the CE, limited as his role is as the delegate of a subordinate law-making power, could recall the Order using powers of amendment under s. 28(1)(c) IGCO and, indeed, would be obliged to recall the Order if he was satisfied that the Order was legally defective because he has a constitutional duty to implement the laws of the HKSAR which must mean implementing laws that conform with the Basic Law and the relevant principles of public law.

39. I believe that Legco has the same power of recall using powers of amendment under s. 34(2) and that, for the reasons identified above, any legislation that purports to deny such a power is inconsistent with the relevant provisions of the Basic Law requiring Legco to be responsible for all written law in the HKSAR.

40. The consequences of Legco repealing the Order will not be to dismantle the original designation order but will result in a reversion to it. The draft map deposited in the Registry incorporating the revised boundaries may remain on the files but it is not effective as it has not been gazetted.

41. This advice deals with the existence of a power to amend. It does not attempt to say how the power of amendment under s. 34 IGCO should be used. If it is used to derail legislative instruments that are

the product of prolonged and complicated legal processes merely because of a disagreement with some underlying policy, the power may generate tensions with the executive arm of government. The need for self-restraint is obvious and the criteria used by UK Joint Committee on Statutory Instruments to scrutinize delegated legislation reflect recognition of the fact that delegates must have room to pursue political objectives through delegated legislation.

Dated this: 9th October 2010

P. T. Dykes

Philip Dykes, S.C.

Appendix III

Extract from the Hansard of the debate on the proposed resolution to repeal the Country Parks (Designation) (Consolidation) (Amendment) Order 2010 at the Council meeting of 13 October 2010

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MOTIONS

PRESIDENT (in Cantonese): Motions. Two proposed resolutions under the Interpretation and General Clauses Ordinance to amend the Country Parks (Designation) (Consolidation) (Amendment) Order 2010.

PRESIDENT (in Cantonese): Miss Tanya CHAN will move a motion to repeal the Amendment Order, while the Secretary for the Environment will move a motion to amend the Amendment Order.

As Miss Tanya CHAN's motion is to repeal the Amendment Order, so if Miss Tanya CHAN's motion is passed, the Secretary for the Environment may not move his motion to amend the Amendment Order.

This Council now proceeds to a joint debate on the two motions. I will call upon Miss Tanya CHAN to speak and move her motion first, to be followed by the Secretary for the Environment; but the Secretary may not move his motion at this stage.

PROPOSED RESOLUTION UNDER THE INTERPRETATION AND GENERAL CLAUSES ORDINANCE

MISS TANYA CHAN (in Cantonese): President, I move that the motion under my name be passed.

In my capacity as Chairman of the Subcommittee on Country Parks (Designation) (Consolidation) (Amendment) Order 2010 (Amendment Order), I now report on the deliberations on the Amendment Order. The Subcommittee has held seven meetings, one of which was to receive views from deputations. It also conducted a site visit to the South East New Territories (SENT) Landfill. The Subcommittee has received 4 350 submissions. Details of the deliberations of the Subcommittee are set out in the written report.

The Subcommittee has had in-depth discussions with the Administration about mitigating the environmental impacts arising from the current operation of the SENT Landfill, especially about the odour control and monitoring measures. At the Subcommittee meeting on 27 September 2010, the Subcommittee passed a motion requesting the Chief Executive to repeal the Amendment Order and to re-introduce it after the measures taken to address the odour problem have proven to be effective. The Government had responded that as there was an urgent need to extend the SENT Landfill to address the imminent waste problem, the Government considered it undesirable to repeal the Amendment Order. At the

meeting on 4 October 2010, the Subcommittee passed a motion resolving that a motion be moved by me on behalf of the Subcommittee to repeal the Amendment Order.

Subsequent to the meeting on 4 October, the Administration had provided its further view on the repeal of the Amendment Order. It was the view of the Administration that the Chief Executive and the Legislative Council did not have the power to lawfully repeal the Amendment Order. However, the Legal Adviser of the Legislative Council held the view that the expression "amend" included "repeal", and section 34(2) of Cap. 1 gave the Legislative Council the power to amend, and therefore repeal, any subsidiary legislation. Subcommittee members were gravely concerned that the Administration had not raised these issues until the Subcommittee had decided to move a motion to repeal the Amendment Order, and such an approach had adversely affected the relationship between the executive authorities and the legislature. As this would have constitutional and legal implications, several Members expressed grave reservations about the Government's legal position on the matter.

The Subcommittee had held special meetings on 6 and 7 October to consider and discuss the legal views raised by the Administration lately. The Subcommittee had eventually decided to proceed with its original decision of my moving a motion at the Council meeting today to repeal the Amendment Order.

The Administration gave notice just before the deadline (12 midnight on 6 October) to move a proposed resolution in relation to the Amendment Order, to defer the commencement date for 14 months from 1 November 2010 to 1 January 2012. At the special meeting on 7 October, Members were concerned about how the Legislative Council, in the event of passage of the Government's amendment, could act as a gatekeeper to prohibit the extension of the landfill should the Administration fail to address the odour problem effectively. In response to Members' concerns, the Secretary for the Environment undertook that the Administration would not submit the funding proposal for the landfill extension project to the Finance Committee during the 14-month period, and that the Administration would report to the Panel on Environmental Affairs the latest progress with regard to the operation of the SENT Landfill.

I am thankful to the President of the Legislative Council for his ruling to approve the Subcommittee to move a motion to repeal the Amendment Order. I implore Members to support the Subcommittee's motion.

I am now going to express my personal views.

In my personal capacity, I would like to thank the President again for giving me leave to move a motion to repeal the Amendment Order and for giving members of the Subcommittee and other Members the opportunities to speak today.

The issue on landfill extension has developed into a constitutional issue today, and I believe many Honourable Members share my view that this is something unexpected, and we may say that the Government has created the current situation single-handedly. These few days, to my surprise, I have heard the comment that, regarding the landfill issue, the interests of the majority should override those of the minority. Who are the majority? Who are the minority? The current Tseung Kwan O landfill issue is definitely not simply related to the interests of the minority, it concerns the destiny of our social environment for this generation and the next.

The Subcommittee has held seven meetings, at three of which all members unanimously supported the repeal of this government order. All steps taken by the Government in this incident have not only failed to resolve the issue, but also clearly revealed to Members and the public the policy blunders of the Government. I am going to talk about three of its blunders.

The first blunder, the Government has not well protected our country parks.

After the Tai Long Sai Wan incident, I believe the Government should have seen very clearly that all Hong Kong people treasure and cherish the country parks. Nevertheless, from this incident, we learn that the Government intends to designate 5 hectares (ha) of land within the country park for landfill purpose. Residents of Tseung Kwan O and even all people in Hong Kong have witnessed distinctly how the Government has taken the lead to do bad deeds.

In fact, this is not the first time that the Government has designated an area of land within a country park for landfill purpose. Let us take the Tseung Kwan

O landfill that we are discussing as an example. Back in 1992, the then Governor in Council designated 18.5 ha of land within a country park for the existing landfill under the pretext that the land was only temporarily on loan to the Government. At that time, the area of land was only "temporarily on loan", but do we have any idea how many plants and trees would be planted within the landfill? Will the area eventually be returned to the normal state of a country park? I trust that we all know too well, and the Government, in particular. Since the old debt has not been repaid, no new loans should be given. Yet, the Government is now asking for the designation of another 5 ha of land. Certainly, the Government has acted in strict adherence to the guidelines. Nevertheless, I believe Honourable colleagues know too well how much the public cherish the country parks.

The Chief Executive has just mentioned in his Policy Address that the uses of the private land in 50 country park sites may be properly handled. I am delighted to hear that because green groups and the public have actually been fighting for a long time. We really hope that the statutory plans for these 50 country park sites will be available soon, or these sites will be properly handled, for example, to include these sites into country parks.

President, I have conducted some surveys in relation to the current Order. At the Legislative Council meeting on 7 January 1976, when the Country Parks Bill was read the Second time, the then Secretary for the Environment briefed the Council on the need for legislation, which was, in fact the legislative intent. He mentioned that people had started to be aware of the rapidly increasing popularity of the countryside as a place of open air recreation, and he stressed the need for legislation for proper management and protection of the countryside. Given this legislative intent, I wonder why the Authority (that is, the Director of Agriculture, Fisheries and Conservation) responsible for the management of country parks and marine parks can give consent to the designation of 5 ha of land in the country park for landfill purpose. He should be responsible for protecting our country parks, yet he has handed over the country park land for landfill purpose. While we have not yet asked him to return the land previously on loan to the authorities, he is now going to designate another area of land for landfill purpose. This is really unacceptable. Mr Ronny TONG has also raised this point in the course of the Subcommittee's discussion, so I earnestly hope that the Secretary can explain to us what has happened when he replies later.

The second policy blunder relates to town planning. How many residents live in the vicinity of Tseung Kwan O? There are approximately 400 000 residents. Looking back, the present landfill site might be remotely located more than a decade ago, and there were only 50 000 residents in the area. Of course, the use of the area as a landfill might have fewer impacts at that time. However, Tseung Kwan O has now developed into a representative new town with a population of 400 000. The place is served by convenient transport, and there is also a large-scale residential development project which provides people with a happy and joyful environment. I really want to ask: since the Government has planned to open up a landfill in that area, why has it allowed so many people to move in? If the area is intended to be used for landfill purpose over a long period of time, it should even not be connected to the mass transit railway system, right? Today, a large number of people have already moved into the area, and the authorities concerned tell me, "We are sorry, the landfill site will not be closed down by 2013 because the extension project will continue until 2020." Regretfully, when we asked the Secretary if the landfill site would be closed down in 2020 should the Order be passed this time, he did not respond directly. In that case, how would the public have confidence? We are at a loss as far as the Government's planning is concerned. Furthermore, do not forget one point, we should not assume that if this 5 ha of land is not designated, the landfill site will be closed down in 2013 when it has reached its capacity. That is not the case because the Government is now saying that the proposed landfill extension project will cover more than 20 ha of land. Today, the landfill we are discussing about involves the designation of 5 ha of land in the country park, but there are another 15 ha of land in Area 137. Even if the motion to repeal the Amendment Order is passed, the authorities concerned should still be able to obtain that 15 ha of land. However, there is at least one other barrier, and that is, the consent of the Town Planning Board. Of course, the Finance Committee can still play the gatekeeper role. Actually, this 5 ha of land may just advance the date the landfill extension will approach its capacity, the Government's acquisition of the remaining 15 ha of land can, in no way, be stopped.

We are of the view that the third policy blunder is ineffective waste treatment. Back in 2005, the Government published A Policy Framework for the Management of Municipal Solid Waste (Policy Framework) outlining a blueprint for the coming 10 years. The Policy Framework sets out six policy tools and measures for achieving three targets. Let us take a look at what the authorities concerned have done. Take the product eco-responsibility bill as an

example, the Government was supposed to introduce the bill into the Legislative Council in 2006; even though the bill has now been introduced, it just provides a framework and only the first phase of the Environmental Levy Scheme on Plastic Shopping Bags has been implemented so far. Other issues have been brought up, such as the bill related to municipal solid waste charging, but we have not yet seen any trace of it.

In my opinion, today's discussion gives the Government, Honourable Members and the public a chance to engage in profound introspection and consider whether we should change our living habits in future. Should we do better in connection with source separation? Should we explore afresh the responsibilities to be borne by the public for the waste they generated?

Back to the previous issue, the Government has, in the past, acquired certain area of land on a temporary loan basis, and we are not sure how much land it has returned so far. Thus, I hope that the Secretary will later tell us the number of country parks in Hong Kong that have been designated as landfills for temporary use or are still being used as landfills, and when they will be returned to the public. Frankly speaking, upon their return, these areas of land can, at the most, be used as open space, and it would be impossible to return these areas to the normal state of country parks.

This whole incident has taught me and the Secretary a very important lesson. The way in which the Government handled this incident and this Order is really annoying. This incident has all along been an issue involving a small area, its scope has never gone beyond Tseung Kwan O until 3 October (Sunday) when Secretary Edward YAU took the initiative to contact the media and invited them to visit the landfill for personal experience. I have to thank the Secretary for making this a hot topic. The Secretary has also told us that as the ecological value of the 5 ha of land within the country park was not high, and it did not have a high visitor flow, not much problem would arise if the area was used for landfill purpose. All of us were really indignant after listening to his remark and we thought, why not use the land to build a shopping centre instead! I do not know that country parks should also have high visitor flows. After he has made such remarks, Under Secretary Dr Kitty POON said something different when she attended the Subcommittee meeting on 4 October. She said that designating this 5 ha of land was just like cutting off a piece of flesh from her body. If that was really the case, why should we cut off a piece of flesh from the body? Just leave the flesh on the body. Why not use the 15 ha of land first. In addition, the

public have seen very clearly, when Under Secretary Dr Kitty POON attended the Subcommittee meeting on Monday, she looked as though she had a well-thought-out plan. As it turned out, she had the legal advice which she considered as her trump card and the emperor's sword. Who would have expected that the presentation of the advice would have aroused greater and stronger aversion?

The Subcommittee was most furious that the authorities concerned assumed that the issue would be resolved once the legal advice was presented. As rightly asked by Mr IP Wai-ming, if that was the legal advice, why we had held all these meetings. What was the use of listening to so many opinions? Nothing has to be done if that was the case. Why have the authorities concerned not told us earlier? As the Secretary has told us, he has conducted consultations for five years but it now appeared as though all efforts have been written off at one stroke. I do not think the Secretary should be so pessimistic for the opinions are truly and wholeheartedly expressed by the public, and the authorities concerned have really formulated policies in response to public opinion. Nonetheless, I must say here that deferring for 14 months is just a deceptive act to defer the execution date by 14 months. Hence, Honourable Members must not be taken in and I trust that they will not be taken in.

I really hope that Honourable Members would support this motion not just for the environmental hygiene of Tseung Kwan O but also for the quality of life of the next generation. I implore Honourable Members to support the motion that I propose on behalf of the Subcommittee. Thank you.

Miss Tanya CHAN moved the following motion: (Translation)

"RESOLVED that the Country Parks (Designation) (Consolidation) (Amendment) Order 2010, published in the Gazette as Legal Notice No. 72 of 2010 and laid on the table of the Legislative Council on 9 June 2010, be repealed."

PRESIDENT (in Cantonese): I now propose the question to you and that is: That the motion moved by Miss Tanya CHAN be passed.

SECRETARY FOR THE ENVIRONMENT (in Cantonese): President, Honourable Members, the South East New Territories Landfill (Tseung Kwan O landfill) Extension project has been discussed for a number of years in society. Today, when a debate on the Country Parks (Designation) (Consolidation) (Amendment) Order 2010 (Amendment Order) is held by the Legislative Council, the focus should be placed on whether, in implementing the Tseung Kwan O extension project in future, it is appropriate to excise a slope of about 5 hectares (ha) of land of the Clear Water Bay Country Park from the country park area for landfill extension purpose.

However, with the formation of the Subcommittee on Country Parks (Designation) (Consolidation) (Amendment) Order 2010 (the Subcommittee) by the Legislative Council, and the discussion held at past meetings on the power of the Chief Executive in withdrawing the Amendment Order, the development of the incident is not what the Government wishes to see. This remark does not mean to lay the blame on any party. Indeed, we know that the public at large has a common aspiration towards the Government and the Legislative Council, hoping that both parties can make concerted effort to solve the problem. They do not wish to see the overshadowing of some outstanding problems by certain disputes. In the final analysis, since the Amendment Order has undergone prolonged consultation and amendments have been made before its introduction into the Legislative Council, we naturally hope that it can win the support of the legislature. It is hoped that more usable land can be vacated through realignment to address the problem of municipal solid waste disposal which requires advance planning.

At the outset of the debate today, I would like to provide some background information on a number of issues to facilitate the discussion of Members shortly.

First, the urgency of the extension of landfills. In the Policy Framework for the Management of Municipal Solid Waste (2005-2014) (Policy Framework) published in 2005, we pointed out unequivocally that a multi-pronged approach had to be adopted to deal with municipal solid waste produced by the community. The primary task is surely the reduction of waste at source, which should be accompanied by vigorous efforts in encouraging waste recovery. Also, the public should be encouraged to reduce waste under the producer responsibility scheme. On the other hand, we must proceed with the construction of

large-scale waste treatment facilities, including the waste-to-energy incineration facilities which funding had been approved by the Legislative Council last year.

In the past five years, with growing population, economic activities and development, as well as the increase in the number of tourists, the amount of municipal solid waste has still recorded a single digit slight increase in each of the past five years. However, with the increased effort in promoting waste recovery and the introduction of other waste management measures, the amount of municipal solid waste disposed of at landfills per annum and per day had decreased, though slightly, from 3.42 million tonnes in 2005 to 3.27 million tonnes in 2009. I am referring to the amount of waste disposed of at landfills for treatment. Despite the decrease, the daily amount of solid waste produced in Hong Kong still amounts to 18 000 tonnes. With the recovery of almost half of the waste, the amount of waste to be disposed of at landfills for treatment is about 9 000 tonnes per day. Since the three strategic landfills will approach their capacity one by one from 2013 onwards, there is a pressing need for the extension of landfills. This is a problem which we cannot dodge. Take Tseung Kwan O landfill as an example. At present, it receives about 1 000 vehicle loads daily. When this landfill reaches its full capacity and cannot be extended in time, the waste will have to be treated by other methods or to be transferred to other districts for treatment.

I put forth these figures, hoping to seek your consensus and understanding. After all, we must identify a suitable channel to properly treat the domestic waste we produce every day. Since the construction of relevant facilities, particularly new and modernized facilities, must be subject to specific procedures and extensive consultation, we must and are obliged to plan ahead, make proper preparation for the development of landfills and the formulation of other policies. After years of public consultation and discussion, we have now come to this point when the landfill will reach its full capacity in three years. In fact, there is still a lot of work to be done. Hence, the urgency of this project is self-evident.

Second, the role of landfills in the overall strategy for handling municipal solid waste. As we all know, Hong Kong now relies almost entirely, close to 100%, on landfilling in waste treatment. We all understand that this is not a sustainable option, for land is precious and expensive in Hong Kong. Besides, a lot of countryside area has been marked as conservation area, and Members are concerned about this. Hence, relying on landfilling alone in handling our daily

waste is not a long-term solution, no matter how well we perform in waste recovery. We must change the situation. For this reason, in the past few years, the Government has started working on this issue, aiming at a more diversified approach in waste management.

Certainly, the promotion of source separation of waste is an essential task, and more efforts have to be put in. President, let me quote a figure to illustrate my point. In recent years, with the extension of domestic waste recovery facilities, waste separation facilities are now provided in nearly 75% to 80% of housing estates. Hence, in the past five years, the recycling rate of domestic waste increased from 16% to 35% in 2009. This has largely facilitated a slight yet year-on-year reduction of waste disposed of at landfills per day, as I mentioned earlier. As mentioned by Miss CHAN earlier, the framework legislation on the producer responsibility scheme proposed by us and eventually implemented in 2008 was a milestone. As a start, we may extend the sharing of environmental protection responsibility in society through economic means or other alternatives. The imposition of plastic bag levy proves that we can roll out this policy. We are now targeting at the recycling of electrical and electronic waste. Upon the completion of the consultation, we will move on to the next step in preparation.

With the commissioning of the Ecopark, we have been working hard to maintain its operation, and with the concerted effort of other enterprises in society, we manage to extend in various degrees the recovery of metal, plastic bottles and glass. The Government has stepped up its effort in green procurement. Some environmental friendly and recycled materials used in Hong Kong and overseas are now included in the Government's procurement list as an effort to promote recycling.

An issue of concern to Members, which I believe will very likely be submitted to the legislature for discussion in the future, is the implementation of new and modernized methods for waste treatment. We must implement these methods. Last year, after various debate and discussion, the Legislative Council eventually granted $5.1 billion for the implementation of the project on integrated sludge treatment facility. As regards the location of the modernized incineration facility to be built in Hong Kong, we hope that a decision on one of the two sites will be made this year. Prior to making such a decision, we have accompanied the relevant committee to an overseas visit to examine the facilities concerned.

In fact, a multi-pronged and diversified strategy has already been introduced, and it is time for us to work in this aspect.

Third, the importance of the 5 hectares (ha) of country park area. In the dispute over the Amendment Order, the 5 ha of country park area involved is definitely the focus.

As officials in charge of conservation policy, we surely treasure every inch of land in country parks. It is thus difficult for us to make the decision to change the land use of certain areas in country parks. Any decision like this must be made in compliance with the overall interests of society and the assessment of ecology conservation. We only came to this decision after considering various aspects. However, I would like to point out that in the past few years, though we had to make the difficult decision on the use of the 5 ha of land, the overall development of country parks had been extended and enhanced by the Government both in terms of area and quality. A case in point was the inclusion of 2 360 ha of land in North Lantau as country park area in 2008. In respect of the 5 ha of land concerned, some ecological studies have been conducted to find out the possible impact on the ecology if the area is excised from the country park. According to the studies, the ecological value of the 5 ha of land is not very high. And since that part of land is located on the periphery of the country park, not many people can use that area at present. But if the 5 ha of land is made unavailable, the future extension of the Tsueng Kwan O landfill will be undermined both in terms of capacity and lifespan. In view of this, we have consulted and explained the case to the Country and Marine Parks Board (CMPB). After listening to our justifications and analyses, and upon our acceptance of certain divergent views, the CMPB eventually accepted our proposals and agreed to excise the area concerned.

Hence, I also understand the concern. I share Members' view that the acquisition of country park area for landfill extension is definitely not an ideal approach. However, in balancing the considerations of various parties, is this a feasible approach?

Fourth, the importance of the Amendment Order on the extension of the landfill. I must take this opportunity to clarify that the current Amendment Order submitted is actually the first step of the preliminary work related to the Tseung Kwan O landfill extension project, and giving consent to the Amendment

Order does not mean giving a green light to the extension project. After all, the Government has to consult the relevant committees of the Legislative Council on the implementation of the project, and the project can only be taken forward if funding is eventually approved by the Finance Committee. In the legislative process of the project, though this is the first step taken, Members may have noticed that many years have already been spent on the consultation work. If we have to start all over again, and taking into consideration the future scrutiny of the funding application, the work on the extension of landfills will be fraught with difficulties, and the handling of waste may be unduly affected. I hope Members can understand and appreciate this point.

Fifth, the legal interpretation of the Amendment Order. Regarding the use of the 5 ha of land for landfill extension, the Government hopes that it can be taken forward through strict and open statutory procedures.

Since December 2005, the CMPB had held eight meetings to discuss the Tseung Kwan O landfill extension project and a site visit had been conducted. The CMPB had also listened to the views of residents and detailed explanation of the Government. After a thorough discussion on the issue, and taking into account the necessity and urgency for the extension of Tseung Kwan O landfill, the environmental impact assessment of the extension project, the not-very-high ecological value of the area to be excised, as well as the overall strategy on municipal solid waste disposal and the progress of other measures, the CMPB agreed on 11 September 2008 to excise the 5 ha of land from the map of the country park for the extension of the Tseung Kwan O landfill.

In this connection, the Government prepared the draft replacement map of the Clear Water Bay Country Park under section 8 of the Country Parks Ordinance (the Ordinance). According to the procedures, the map was made available for public inspection for a period of 60 days with effect from 14 November 2008, and 3 000 petitions were received during the period. The CMPB acted in accordance with the statutory procedures by holding six hearing sessions in March 2009. After considering the views and explanations, the CMPB made a final decision on the new alignment on 30 March that year.

After that, the Government submitted the draft map and all the opposing views and petitions to the Chief Executive in Council for consideration according to the Ordinance. On 30 June 2009, the Chief Executive in Council approved

the map according to section 13 of the Ordinance; at the same time approval was given to deposit the map in the Land Registry on 17 July 2009.

The Chief Executive then acted in accordance with section 14 of the Ordinance and prepared the present Amendment Order in May 2010 to replace the original approved map with the new approved map. The Amendment Order was submitted to the Legislative Council for scrutiny on 9 June this year.

President, pardon me for dwelling at great length in repeating the abovementioned procedures. I hope Members will understand that in the past five years, we had been acting in accordance with the statutory procedures, where extensive consultation and scrutiny by the CMPB had been carried out. The public had expressed views on the country park area affected by the extension project of the Government, and lawful procedures had been carried out. During the process, certain people had initiated a judicial review against the procedure, which was eventually dismissed by the Court after the review.

Hence, I would like to reiterate that in the course of the formulation of the Amendment Order, we have been extremely cautious in monitoring the procedures and have implemented the project according to law. Regarding the legal explanation in this respect and the divergent views expressed by Miss CHAN earlier, colleagues from the Department of Justice have already provided their views in detail to the Legislative Council, and I will not repeat here.

My colleagues and the Subcommittee of the Legislative Council to study the Amendment Order had started to examine the issue on legal interpretation at meetings held since July. The incident has now developed into an issue involving the interpretation of the functions and powers of both sides. Eventually, the legislature has to vote on the motion today, which will inevitably affect the landfill project as a whole. Some people asked me whether I would feel helpless and whether I would encounter many difficulties. I believe we have to work together to settle a problem ahead.

In order to allow the early commencement of the preliminary work of the project, and in response to requests made by many Members on behalf of local residents during the scrutiny of the Amendment Order, we had proposed to squeeze our work schedule during the course of deliberation, so that the commencement date can be postponed to 1 January 2012. We hope that with

more time available, we may have more opportunities to enable local residents and other members of the public have a better understanding of the work of the Government. On the one hand, the public's demand to implement improvement measures on the landfill can be further responded to, so as to address their concerns; and on the other hand, the public at large can have a better understanding of the importance of landfill extension to the overall strategy.

Actually, in the past few years and even in the past few months, or just within the several weeks when meetings of the Subcommittee concerned were convened, the Government has never stopped responding to the aspirations of local residents, particularly on issues brought forth after communicating with District Councils. These measures include implementing improvement measures outside the landfill, which includes washing of vehicles and management of roads in the vicinity of the landfill, as well as the overnight parking arrangement for refuse collection vehicles. Apart from the abovementioned measures, we had also implemented additional measures for the Tseung Kwan O landfill earlier on; we hope that the public will realize that in managing landfills, the Government is willing to take extra steps to reduce the nuisance. Concerning the odour problem which is of grave concern to residents in Tseung Kwan O, we intend to adopt objective and scientific methods to identify the source of the odour. Scientific tests and monitors will be applied and extensive study will be conducted in the district.

The District Officer (Sai Kung) has, in collaboration with the District Council, set up an inter-departmental working group in the district to continue to carry out joint inspections and step up the effort in identifying the source of the odour and taking follow-up actions.

President, I have to stress that the Government attaches great importance to the concerns of Members and the proposals put forth by the public, and we will by all means give positive responses to these concerns and proposals. We definitely attach great importance to the aspirations of Tseung Kwan O residents, but at the same time, we must make timely and better preparation as the landfills will soon reach their full capacity. Only in this way can the municipal solid waste in Hong Kong be handled properly on a continual basis. The handling of waste does not only involve the expansion of landfills but also the implementation of other strategies. In this connection, thorough discussions surely have to be carried out in the legislature. Indeed, the legislature and the

Government share the collective responsibility of finalizing an approach for waste treatment, forging consensus and putting the approach into implementation. It will be difficult for us to take forward any policies without the support of the legislature, be it the present proposal on realignment or the future application for funding, or even any new policies and new legislation on waste treatment. All other environmental policies, legislation and funding require the support of the legislature. The Environment Bureau will continue to act sincerely, adopt responsible approaches and show the greatest sincerity in co-operation, hoping this will convince the legislature to give us room for manoeuvre and empower us with the required authority. We may then deliver our collective responsibility as soon as possible and minimize the scope of dispute, so that the problem will not deteriorate and affect society as a whole.

President, for the above reasons, though I know many Members have already made known their positions on the issue, I hope Honourable Members will, in consideration of the long-term policy for the proper treatment of municipal solid waste in Hong Kong, support the motion to extend the commencement date of the Amendment Order to 1 January 2012.

Thank you, President.

PRESIDENT (in Cantonese): Does any Member wish to speak?

MR KAM NAI-WAI (in Cantonese): President, whenever an environmental protection issue is discussed, the Secretary will usually spend 10 or 20 minutes, and sometimes even 30 minutes, to give an account of the work that has been done. He claims that a lot of work has been done.

However, with regard to this landfill issue, I can only say that the Secretary is nothing but a Secretary with "three failures". What is meant by "three failures"? In handling the policy on municipal solid waste, he has failed to perform his duty; in formulating the policy on the provision of unpopular facilities, he has failed to take the right actions; in the area of political lobbying, he has failed to attain success. The only comment I would made is that he is a Secretary with "three failures".

Why do I say so? Earlier on, some colleagues have pointed out the problems relating to the policy on solid waste disposal. We have also looked into the relevant Policy Framework and previous targets provided by the Bureau. The first target laid down by the Bureau is waste avoidance and minimization, which aims to reduce the amount of solid waste generated by 1% per annum up to the year 2014. I have done some projections for the Secretary and found from the relevant figures that the amount of waste generated in Hong Kong over the past few years actually did not meet the target as claimed by the Secretary just now. That target was laid down by the Bureau, it is indeed the Government's target to reduce the amount of waste generated by 1% per annum. When the 2005 figures are compared with that of 2009, the amount of waste generated has not been reduced. Should the reduction of 1% per annum be achieved, we should have at least recorded a drop of a few percentage points. Instead, there was an increase of 7.3%, with no sign of decrease. I would like to ask the Secretary, what has he done in respect of this policy?

Secondly, regarding the Bureau's another policy on solid waste, that is, the target set for bulk reduction and disposal of unavoidable waste. The target is to reduce the total solid waste disposed of at landfills to less than 25% by 2014. The latest figure, however, indicated that the amount has only been reduced to 51% as at 2009, and there is still a long way to go before achieving the target of 25%. What has the Secretary done with the disposal of solid waste to ensure the success of this policy?

While a lot have been said about the relevant work in the past, Members have probably talked more on the producer responsibility scheme these days. We think that the progress in implementing the producer responsibility scheme is too slow. A colleague pointed out earlier that, apart from the levy on plastic shopping bags, a public consultation was also conducted recently on the recycling of electronic products, the consultation started in January and ended in April. Six months have passed, but the findings have yet to be released. Neither is there any mention of the progress. Such slow progress is indeed very disappointing, so I can only say that he has failed to perform his duty with regard to implementing the policy on solid waste.

How does the Secretary take forward the policy on the provision of unpopular facilities? Just as the Chief Secretary Henry TANG pointed out earlier on, the interests of the majority should override that of the minority.

How did the Government deal with the situation in the past? On the provision of unpopular facilities, how did the Government …… Regarding the landfill issue, I would like to highlight some figures and implore the Chief Secretary Henry TANG not to sacrifice the interests of the minority. What has the Government done to combat pollution?

I wish to draw Members' attention to the complaint figures that I have collected. In fact, the landfill issue was discussed in the Legislative Council as early as 2008, and the specific landfill discussed is Tseung Kwan O landfill. There were already 943 complaints when the issue was discussed at that time, and some 600 complaints were received in 2009. This year, when the same issue was discussed in this Council a few days ago, the Secretary dared not disclose in his letter the number of complaints received. How many complaints have been received? In fact, more than 600 complaints have been received in the first nine months of this year. While the pollution problem has yet to be resolved, the authorities told us that a lot of work has been done, including deodourization, washing of refuse collection vehicles and parking of refuse collection vehicles in the landfill area.

I do not understand why the authorities did not take such actions in 2008. Why did the authorities only implement the measures in a high profile manner after putting up a "big show" in the vicinity of the landfill. I really do not understand. What has the Secretary actually done to tackle the so-called pollution problem and minimize complaints from residents?

Certainly, a colleague has attributed this to the problem of planning. As we all know, while the Bureau is seeking an extension, another department has approved the building of the LOHAS Park on the same site. Government departments are always like this, whenever there are planning blunders, we Members are asked not to raise opposition. The columbarium in Shek Mun, Sha Tin, under discussion recently is a case in point. The Government moved public housing tenants to the area on the one hand, and constructed a columbarium in its vicinity on the other, this would certainly arouse local opposition. Why did the authorities not plan in advance to construct a columbarium on that site, and did not relocate any tenants there? This was a planning blunder on the part of the Government, but it then shirked its responsibilities by passing the ball to Members and the general public. I think both the Government and the Secretary

have made mistakes in the policy concerning the provision of these unpopular facilities, it is therefore inappropriate for them to shirk responsibilities.

The Secretary has also failed in his lobbying work. I do not have the slightest idea why he said that the lobbying work started in 2004, that many views were received and a number of procedures had been completed. In fact, after examining the previous records — in fact, I am a newcomer — In 2008, on 27 October mentioned just now, I only had one opportunity (I am just talking about myself and I do not know others) to discuss about the private property Metro City. At that meeting, I told the Secretary that although I live on the Hong Kong Island, and I am a Member from the geographical constituency of Hong Kong Island, I had received complaints from residents of Tseung Kwan O about the landfill problem whenever I visited the district. This is the only issue that they asked me to address. At the meeting, I pointed out that the Democratic Party had requested the Bureau to tackle the odour problem, and we would not accept the proposed extension project if the problem could not be resolved. This stance was clearly written in the minutes of the meeting on that day.

However, after the discussion, even though I am the spokesperson of environmental affairs of the Democratic Party, I have not received briefings by the authorities on the work to be done. Some time later, the legislation — that is, the Order — was tabled and came into effect. I have no idea what kind of support he has solicited at the district level. So far they have not got the support of the Sai Kung District Council which I mentioned in my speech at the meeting as essential.

While he has not secured district support, nor has he given an account of the work that has been done, he hastily announced that the frequency of street-cleaning would increase from twice a day to eight times a day, and refuse collection vehicles would also be included, and so on …… What has caused the sudden implementation of these measures? I am terribly surprised. To me, insofar as political lobbying is concerned …… Just now, I heard the Chief Executive say that — I remember very clearly what he said — "the new positions of Under Secretary …… has been effective in enhancing the political capacity of the Government." I find this very weird. The Bureau is now served by the Secretary, the Under Secretary and the Political Assistant, which is actually a full team. I wonder how the political capacity has been enhanced. Neither can I tell whether the Under Secretary and the Political Assistant can really help, will

too many cooks spoil the broth? Was his lobbying work in the past effective? What has he actually done? How did he lobby Members to support the proposed landfill project? How did he get his job done? I fail to see what he has done. At the last moment, all of a sudden, after the Subcommittee has held a number of meetings …… the Secretary attended the last meeting and told us that we have no right to repeal the Order. This is really nonsense, and how can things turn out to be like that? With regard to this legislation, I wonder what the Government …… Was the Government completely unaware of the situation? Has the Secretary not taken note of the prevailing political atmosphere? What kind of political sensitivity has he got? It was only until the very last moment when he learnt that Members wish to repeal the Order that he told us that it was impossible for us to repeal. How could he do so? This is the first time I realized that political tasks could be handled in this way. I can only conclude that, if this is not his deliberate act, I would say that he has handled this political task with a casual attitude. Is it because he thinks that the Order can be endorsed with enough votes? Is that what he thinks? In my view, the Secretary has completely failed in this regard and a review is therefore necessary.

Of course, the issue has attracted many criticisms. Some people may asked …… I noticed that some green groups have published some survey findings yesterday, highlighting the failure of the Democratic Party to indicate its support for the proposed weight-based waste disposal charge. Here, I wish to state clearly that the Democratic Party has all along supported the producer responsibility scheme. Yet, according to the survey concerned — I hope that the Secretary would respond later — "In March 2010, the Environment Bureau has released part of its consultancy report on waste disposal charge to the Advisory Council on the Environment" — I have never heard of such a report despite the fact that I am a member of the Panel on Environmental Affairs — "suggesting that a pilot scheme of waste disposal charge can be launched in commercial and industrial buildings, and three charging options have been set out, namely charge imposed per household based on the weight of waste; charge based on waste generated from individual commercial and industrial premises, or a fixed amount will be charged with reference to water bills and rates. The consultancy report considered that imposing a flat-rate levy lacked economic incentive and thus suggested imposing a weight-based charge." President, I think that if this kind of reports has been prepared, the relevant findings should be made public for discussion as soon as possible.

The Democratic Party has all along supported the "polluters pay principle", but whether a waste-based disposal charge should be imposed, I think that public discussion is necessary. President, the Environment Bureau and the Democratic Party have worked hand in hand on many occasions and, in particular, on issues concerning environmental protection. I consider that the Government …… Let me cite an example, say the producer responsibility scheme mentioned by me earlier on. Regarding the recovery and recycling of electronic products, the Government has acted too slowly; in banning idling vehicles with running engines, the Government is equally slow in actions. As for the problem of air pollution, I only learn today from the Chief Executive that the Government would pay the full costs for retrofitting catalyst converters on Euro II, Euro III and pre-Euro vehicles.

In fact, the Democratic Party has all along been urging the Government to implement expeditiously these green measures. Nonetheless, as we have said before, the imposition of levy requires tripartite co-operation. First of all, how much commitment will the Government make and how much resources will be allocated? Secondly, how much commitment will the trade make? Thirdly, how much commitment will members of the public make? I think that it requires negotiation of the three parties concerned. Take the abovementioned producer responsibility scheme as an example, when the issue of recovery and recycling of waste electrical and electronic products was discussed, the Government merely called on the trade to be held responsible and asked them to impose a charge at the retail level. In my opinion, however, apart from discussions on the matter, there is also a need to consider the responsibility of the Government, that is, to what extent the Government should be held responsible.

The Democratic Party adopts an open attitude and hopes to reach a consensus with different parties and groupings, and explore jointly on how solid waste should be disposed of, so as to combat and reduce waste production. As more and more problems related to waste treatment will emerge in future, I think the Secretary should give full play to his political capacity, as advocated by the Chief Executive, and join hands with different parties and groupings in the Legislative Council to promote environmental protection. He should not repeat the same mistakes and be a Secretary with "three failures", just like what has happened this time, he should not allow the incident to develop to a point that no one would want to see. Thank you, President.

MR CHAN HAK-KAN (in Cantonese): President, the extension project of the Tseung Kwan O landfill was originally only a local issue and the relevant legal provisions are very simple. However, after repeated discussions, the matter has escalated to the political and legal levels. I believe both the Government and the public do not expect this turn of the matter. The Democratic Alliance for the Betterment and Progress of Hong Kong (DAB) has earlier made our stance clear and we will support the repeal of the Country Parks (Designation) (Consolidation) (Amendment) Order 2010 (Amendment Order) which seeks to extend the landfill. Today I will speak on behalf of the DAB to explain some of our viewpoints.

President, the main reason for the DAB to oppose the landfill extension is the odour problem. Nowadays, if the word landfill is mentioned, we will naturally think of bad smell and then the three words "Tseung Kwan O" will pop up. The three have been inseparably linked together. In fact, the Tseung Kwan O landfill has been in operation for some 20 to 30 years. Why is the odour problem worsening? Apart from planning blunders with the construction of higher buildings located closer to the landfill, the indifference of the Government to residents' requests to tackle the odour problem of the landfill and its inadvertence to the hygiene problem caused by the refuse collection vehicles are more important reasons.

President, I recently visited Tseung Kwan O and I had an unforgettable experience. When I was driving to Tseung Kwan O, the preceding car happened to be a refuse collection vehicle. Since I had opened the windows instead of the air conditioning, "my spirit was revived" when an obnoxious odour suddenly drifted by. Even if I had fallen asleep, the odour would wake me up. I later learnt in a meeting that some refuse collection vehicles are cleaned only once a year. These vehicles stink even if they do not carry any refuse. Moreover, as the tailboard of the vehicle was not properly brought down, I noticed that the vehicle had been dripping leachate, worse still, a few bags of refuse were dropped onto the road and run over by the oncoming vehicles. One can imagine how annoying the situation is. In fact, these small incidents have boiled up much discontent among Tseung Kwan O residents about the landfill. Their discontent exploded during the discussion on the landfill extension project.

President, although the Environmental Protection Department (EPD) has done quite a lot of work in the landfill in recent years, it still failed to find the

so-called "source of the odour" mentioned by the Government, and has not started to tackle the odour problem. District Council Members of the DAB and I have been lobbying the Government to increase the frequencies of washing the streets and cleaning the refuse collection vehicles. However, these measures were only adopted one or two weeks ago when the Secretary visited the district. President, the residents have the impression that the Government will readily succumb to any requests of Members in return for their votes. If the motion is not so impending, the authorities may still maintain their perfunctory attitude. The odour abatement measures proposed by the Government several years ago have not been implemented, nor have the residents' request to tackle the odour problem been seriously considered.

I remember when the Sai Kung District Council supported the installation of "e-nose" years ago, the District Council members hoped to detect the source of the odour with an objective and scientific standard. However, after studying some analyses on the "e-nose", the authorities made some remarks, one of which was that the odour might come from many sources and it might not necessarily come from the landfill. This remark had aroused much discontent. First of all, subjectively, we all think that the odour definitely come from the landfill. But what I meant to say is, we have to look at the matter more objectively. If the Government has detected an obnoxious odour in the vicinity of the Tseung Kwan O landfill, even if the odour does not originate from the landfill, the Government cannot wash its hand off and takes no action to rectify the problem. This is exactly the case now. The Government knows about the odour, but it gives no thought to it; nor has it requested other government departments to follow up the matter. It simply closed the file and considered the problem solved. How can the public find this acceptable?

We note that the Secretary, in a bid to secure members' support, proposed at the final stage of the scrutiny by the Subcommittee on the Amendment Order to extend the commencement date to extend the landfill to January 2012. In other words, the commencement date will be postponed 14 months to allow an opportunity for the residents and Members to assess the effectiveness of the odour abatement measures. However, I think 14 months are too short. For the effectiveness of the improvement measures on environmental hygiene to be seen, should more time be given to observe the result; and should observation be made in a long-term and ongoing manner?

President, I wish to cite Shing Mun River in Sha Tin as an example. In the 1980s and 1990s, whenever we mentioned Shing Mun River, we would think of a stenchy and dirty river and you had to cover your nose when you passed by. However, with the concerted efforts of the District Council and many government departments for almost 10 years, you no longer need to cover your nose when you pass by the river now, and you can see many people rowing dragon boats or other boats there, or fishing at the riverside. From this we can see that for a simple problem such as the treatment of Shing Mun River, the authorities have taken 10 years to tackle. Now the Secretary said that the odour problem of the landfill can be addressed in 14 months. With the few measures mentioned, is this feasible? I believe Tseung Kwan O residents are not that optimistic and neither am I.

President, Secretary Edward YAU earlier wrote in a newspaper article that, apart from extending the landfill, the authorities would also start to construct other waste treatment facilities and formulate other waste treatment measures, such as sludge treatment plants and solid waste treatment facilities, and so on. In the article, the Secretary said, "With the commissioning of various large-scale waste treatment facilities, we expect the impacts of the landfill on the community in the vicinity will gradually be reduced. The changes will gradually appear in 2013."

President, from this we can see that the Secretary himself also said that the changes would not appear until 2013. Then, why did the Secretary propose to postpone the commencement date of the landfill to 2012? There is a gap of one whole year from 2012 to 2013, during which the landfill will continue to be extended and the odour problem will worsen. Can this address the concern of the public? I believe this will only worsen the problem and it is only a stopgap measure.

Opposing the extension of the landfill is a short-term goal of Tseung Kwan O residents. In the long run, they hope that the Government can permanently close the landfill. I wish to emphasize that Tseung Kwan O residents are not selfish; on the contrary, they are willing to commit, as they have been facing the problems of the landfill for almost a quarter century. I understand that asking the Government to immediately close the landfill is infeasible, but the Secretary should at least provide a concrete timetable to inform the residents when the Tseung Kwan O landfill can be closed, so that they can have a target to hope for.

President, recently, the Chief Executive and the Secretary have both complained that local residents are unwilling to accept unpopular facilities being constructed in their district. I wish to ask the officials to be honest with themselves, and consider the feelings of local residents if these facilities are constructed in their district. President, I wish to cite an example. We often ask the Government to provide more amenities, cultural facilities, parks, green belts, and so on in districts, and the Government often replies that careful consideration or consultation with other departments are required. At the end of the day, the proposals will be passed from one department to another, and nothing definite will be devised. On the other hand, if the Government wishes to take forward a proposal, it can quickly do so. The current proposal of designating 5 hectares of land in a country park for landfill purpose is a case in point. In other words, the Government can do whatever it wishes to do; but when it comes to the requests of local residents and Members, the Government has loads of reasons to turn down the requests. We are very disappointed about this.

President, we all know that extending the area of landfills is the downstream work of waste management. To relieve the pressure of waste treatment in Hong Kong, the most important task is waste reduction and separation at source. In the past few years, the authorities have only adopted a single means to treat waste. Food waste, household refuse, as well as industrial and commercial waste are all sent to landfills, not only overloading landfills, but also leading to the present need to examine the extension of the landfill. Although there is an increase in waste recovery in Hong Kong in the past few years, the waste generated has recorded an overall year-on-year increase from 6.16 million tonnes in 2007 to 6.45 million tonnes in 2009. We also note that factors such as increasing population, reviving economy and commencement of infrastructural projects will also increase the amount of waste generated in the coming few years. If we extend this landfill today, do we need to consider another extension after a period of time when the landfill has reached its capacity, or do we need to consider another method to tackle the problem?

President, we note that the only waste reduction measure which the Government could successfully implement in the past few years is the levying of tax on plastic shopping bags. As regards levies on other products under other producer responsibility schemes, such as electrical appliances and plastic bottles, it will probably take much longer period of time for their implementation. At present, most of the strategies on waste treatment under the Environment Bureau were formulated by the previous term of Government. I hold that many

measures need to be adjusted from time to time. As this landfill extension issue has attracted much public concern, the authorities should make use of this opportunity to discuss again with the public, Members and environmental groups and explore how to step up efforts to promote waste reduction at source and solid waste treatment. I believe the public, Members and environmental groups will be happy to see progress in these areas.

President, last but not least, I wish to say a few words on the legal wrangle arisen from this incident. In his article yesterday, the Secretary said at the beginning and at the end that he did not wish to see that the legal wrangle would become an excuse for disregarding waste treatment or a means to postpone the extension of the landfill. President, I am not a lawyer and I do not plan to show off my shallow knowledge in front of other experts, but I wish to say that the wrangle is originated from the Government's doubt about the authority of the Legislative Council. The DAB does not wish to see that the executive authorities and the legislature would take the matter to court. Should the Government seeks a judicial review, it will lead to a lose-lose situation. If the Government wins, it will shake the constitutional standing of the Legislative Council; if the Government loses, it will deal a blow to the governing authority of the Government. I urge the Government to think thrice.

With these remarks, President, I support the repeal of the Amendment Order to extend the landfill.

MS LI FUNG-YING (in Cantonese): President, the meeting today is very unusual in that we have to debate and vote on a controversial issue after listening to the Chief Executive delivering the Policy Address. Regarding the development of the Tseung Kwan O landfill extension issue into the present scenario, I hold that the Government should bear the whole responsibility. The resolution proposed by the Secretary for the Environment seeks to extend the relevant commencement date from 1 November 2010 to 1 January 2012. The Secretary explained that the amendment would allow residents time to experience the effectiveness of the odour abatement measures. His explanation is perplexing, the odour problem of the Tseung Kwan O landfill does not plague the residents today. They have been requesting the Government to rectify the problem for a long time. Moreover, the initiative to table this resolution lies in the Secretary.

President, as a western saying goes, "Not in my backyard". To be fair, it is understandable that Tseung Kwan O residents oppose the landfill extension. Even if the abatement measures are effective in abating the odour of the landfill and the landfill extension in the future will not affect the daily lives of the residents, as the Secretary has claimed, the residents are not quite willing to have a landfill located near their home. In order to reduce the resistance of the residents, a normal practice is that the Government should implement the odour abatement measures to address the concerns of the residents first, and then table the resolution to the Legislative Council for consideration, so that the resistance against the resolution will be lessened. However, the Secretary has acted the other way. He sought to secure the passage of the resolution in this Council before implementing the odour abatement measures. It was not until this approach has triggered widespread discontent among the residents that the Government eventually gave in and proposed the resolution to amend the commencement date. All I can say to the Secretary is that spilt water cannot be recovered. The measures which could have abated the discontent of the residents were completely offset because of the wrong decision made by the Secretary.

At present, we do not know how effective these odour abatement measures will be and the Secretary has emphasized that he will not seek funding approval from the Finance Committee of the Legislative Council for the extension of the Tseung Kwan O landfill in the next 14 months. As the concerns of the residents are not addressed and the nature of the resolution is not urgent, I do not see any strong reasons to support the Secretary's proposed amendment.

More important still, as the Government has escalated the controversy to the constitutional level by saying that the Legislative Council does not have the authority to repeal the resolution, I have no option but to oppose the Government's resolution. The issue is of great importance, as the executive authorities are challenging the authority of the legislature, we have no choice but to oppose the resolution proposed by the Government to demonstrate the authority of the legislature. If the executive authorities opine that the legislature is *ultra vires*, the executive authorities should lay the matter before the court to re-establish the powers of both parties.

President, a negative incident can also be turned positive. The controversy over the Tseung Kwan O landfill today has become a matter of

concern of the entire society. The positive side of it is that it awakes the entire community to the importance of municipal solid waste treatment again. I hope that not only the Government, but also the entire society will reconsider how to address our solid waste problem and formulate a long-term policy, so as to strike a better balance between urban development and environment protection, as well as between the overall benefits of society and the interests of the local community.

Thank you, President.

DR MARGARET NG (in Cantonese): President, why would a regional issue turn into a so-called constitutional crisis? The reason is simple. As the Government is incapable of handling the practical issues, it resorts to some sort of fictional legal arguments. The Government is like someone who is in the wrong but refuses to face its own responsibility. It always says it is going to sue someone and the whole incident finally turns into a judicial issue with everyone having to spend time to deal with the legal proceedings.

Actually, what is the nature of the Country Parks (Designation) (Consolidation) (Amendment) Order 2010 (Amendment Order) proposed by the Chief Executive? It is stated clearly in paragraph 10 of the Subcommittee's report that the objective of the Amendment Order is to amend the Country Parks (Designation) (Consolidation) Order by replacing the original approved map in respect of the Clear Water Bay Country Park with a new approved map. The Amendment Order is really that simple. What will be the consequence if the new map is repealed? In paragraph 39 of the report, our legal adviser has pointed out succinctly that if the Amendment Order is repealed before the commencement date, that is, 1 November 2010, the original approved map will remain effective. It is as simple as that. In order words, the present approved map will remain effective. It is just that simple.

The sky will not tumble down. The only consequence of not passing the revised Amendment Order is just that the Government will be forced to re-visit its original proposal, put in extra effort, get back on the right track and formulate a waste treatment measure which is generally acceptable to the public. That is what it is all about.

Instead, the Government has hurriedly proposed to amend the Amendment Order which, as put by Ms LI Fung-ying just now, is absolutely illogical. Our view is that the proposal to excise 5 hectares (ha) of land from the country park should have never been made in the first place, and the landfill should not be extended in such a way. The Government must reconsider the matter thoroughly and make a fresh start. However, the amendment to the Amendment Order simply changes the commencement date and if passed, it would mean that regardless of whether the relevant policy is correct or should be continued, we have made a decision to implement the same from 1 January 2012. That is illogical. If the Government gets its way, it will again delay in handling the matter, it will not face up to the problem and evade addressing the problem that requires a comprehensive solution.

President, as the department has raised a view point about the so-called constitutional crisis, we must consider whether a constitution crisis really exists and what the bases of its arguments are.

President, I am not a member of the Subcommittee. However, when I heard the Government's saying that we had no power to repeal a piece of subsidiary legislation, that is, an order made by the Chief Executive under his devolved authority …… The Amendment Order is a piece of subsidiary legislation subject to the negative vetting procedure. However, to say that we have no legal power to do so is beyond thinking. Therefore, I decided to explore whether I have misinterpreted the fundamental powers of this Council. That was why I attended the relevant meeting to listen to the views and legal opinion of the Government, as well as the views of our legal adviser.

In fact, after hearing the views of both sides, I am all the more certain that this is but a fictional argument. Nonetheless, President, since the Government has put forward this argument, I should perhaps make a brief response.

The so-called constitutional crisis actually involves two issues. The first one is whether this Council has the lawful power to repeal the present Amendment Order made by the Chief Executive in Council. On this issue, President, you have already explained clearly in your ruling and so, I will not repeat. Briefly, both the legal advisers of this Council and the department agree that the Amendment Order is a piece of subsidiary legislation within the meaning of Cap. 1, which is within the scope of our powers. In other words, it relates to

the discharge of our legislative functions under the Basic Law. Therefore, unless there is an express provision which clearly and explicitly states that we do not have the power to repeal, amend or likewise, we shall have the power to do so.

President, we do not lack precedent in this respect. I remember that before the summer recess a few months ago, I had moved a motion debate in relation to the United Nations Sanctions Ordinance. The principal legislation clearly states that while orders made by the Chief Executive according to instructions from the department under the Central Authorities responsible for judicial affairs to deal with resolutions passed by the Security Council of the United Nations are subsidiary legislation, this Council has no power to scrutinize or amend the same. This is a factual example illustrating the use of express provision.

President, of course the United Nations Sanctions Ordinance has made us abdicate our legislative power and I still hold different opinions from the department and other Members on the question of constitutionality. However, that is a separate issue. The important point is, if the power of the Legislative Council in this respect is to be removed, it must be written down clearly and explicitly. Even in the absence of an express provision, the implication that the Legislative Council does not have such powers should be readily understandable from the context of the legislation.

However, there is certainly no such express provision in the relevant principal legislation relating to country parks. Therefore, President, Members can rest assured that we certainly have the power to repeal. If we delegate a department of the executive authorities to make subsidiary legislation and in the end, we are only allowed to accept whatever is proposed even if there are inadequacies; and if this legislature, being a representative of public opinion, can do nothing but endorse the relevant subsidiary legislation like a rubber stamp, especially in the face of mass public opposition, is that not totally anti-intellectual? Moreover, it will do nothing to help improve the current situation and political environment. When there is a huge public outcry against the proposed course of action, yet the Legislative Council is saying, "Sorry, we have abdicated our powers and we have no power to repeal this Order", do you think it can help the Government resolve the problem? Obviously, it cannot.

The second issue is whether the executive authorities and the legislature will take to the court assuming that the Government decided that we do not have

this power and the motion proposed by Miss Tanya CHAN will have no legal effect even though it is passed today.

President, I think such a scenario is unlikely because section 23 of the Legislative Council (Powers and Privileges) Ordinance clearly states that the President or any officer of the Council or the Council shall not be subject to the jurisdiction of any court in respect of the exercise of their lawful powers. In other words, what really matters is that whether we are exercising lawful powers, and whether there are clear principles on that. President, today, Honourable Members just act in accordance with the Rules of Procedure to debate and vote on an item of business on the Agenda of the Council. We are but acting according to the President's ruling.*(Laughter)* Therefore, if the executive authorities have to sue somebody, they can only sue the President, your goodself.*(Laughter)* Therefore, we can feel at ease when we perform our duties as Members of the Legislative Council to debate on the matter and cast our votes according to our conscience. President, I think there is no problem with us, *(Laughter)* as they can only sue you. This is the first point.

However, is it possible to sue the President for wrongfully exercising his powers? First, I have serious doubt about that. Second, clear legal principles have already been established by precedent cases in respect of the court's jurisdiction on such a matter. Specifically, I am talking about the case of *Rediffusion v. AG* in 1970, in which Rediffusion sued the then Legislative Council for the purpose of stopping the passage of a bill by the Council through the court's intervention. The then Legislative Council had to be represented by the then Attorney General to object against the court having such a jurisdiction. Ultimately, the Privy Council ruled that as the Legislative Council was a non-sovereign legislature, it should be subject to restrictions constitutionally. Hence, the court had jurisdiction to intervene but the exercise of such power must be based on necessity, that is, the court should only intervene when it was necessary to do so. In that case, is it necessary for the court to intervene now? Is it necessary to seek the court's intervention, or even sue the President and apply for judicial review on the ground that the President has exercised his powers unlawfully? It is in fact totally unnecessary to do so. If the Government considers that it is unconstitutional or unlawful for the Legislative Council to pass the said resolution and that we have no statutory power to do so, all it needs to do is to seek a review on the resolution passed to confirm whether the original map of the country park is still valid. It simply does not need to touch on the relationship between the executive authorities and the legislature. Even if it

…… President, I think even if it intended to seek the court's intervention before a ruling was made, or after the ruling was made but pending the debate, the court would hold the same view. Because if the legislative process has yet to complete, the court will simply not intervene, having considered the urgency of the matter. If the issue passed by the Legislative Council has no legal effect, the Government can still seek a judicial interpretation from the court at a later stage. In making a judicial interpretation, the court will focus on whether the said resolution *per se* has any legal effect instead of whether the President of the Legislative Council has exercised his powers properly. Hence, as far as the timing and target of the litigation are concerned, it is groundless for the executive authorities to involve the Legislative Council or the President of the Legislative Council in a legal proceeding.

In fact, if this Council …… President, as I have just mentioned, the Legislative Council (Powers and Privileges) Ordinance has provided that "[T]he Council, the President or any officer of the Council shall not be subject to the jurisdiction of any court in respect of the lawful exercise of any power conferred on or vested in the Council, the President or such officer by or under this Ordinance or the Rules of Procedure." What is the meaning of "lawful"? Have we …… If we pass some motions which have no legal effect, or some motions which have no effect in law because they are unconstitutional or unlawful, does this render our work unlawful? The precedent case of Rediffusion which I mention just now clearly shows that we will not be deemed as exercising our powers unlawfully. In fact, there are cases where applications for judicial review have been made by members of the public who are affected by certain legislation enacted by either this Council or the former Legislative Council. In the end, the court ruled that these ordinances or part of the ordinances were unconstitutional and hence were null and void. A case in point concerns the Telecommunications Ordinance. The court has not ruled that this Council had exercised its powers unlawfully. These incidents are quite common. Indeed, no constitutional crisis will arise in cases where laws enacted by the Legislative Council are subsequently ruled by the court as unconstitutional, and hence null and void. This is a right normally enjoyed by the public and it is a function frequently discharged by the court.

Therefore, President, the so-called constitutional crisis is fictional. I would like to thank our Legal Adviser for giving Members timely and correct advice. I would also like to thank our Legal Service Division for reviewing the

work done by Members and the Council to ensure that every step we take is lawful and constitutional. That is most important. Going back to the core issue, it is really about the Government's lack of a long-term plan to tackle the problem and the determination to implement the plan. As mentioned by Mr CHAN Hak-kan just now, the Government is even reluctant to implement the measure of washing the refuse collection vehicles daily. It is reluctant to make such a small effort which can reduce the odour *(The buzzer sounded)* …… how can it say that the landfill problem is so urgent ……

PRESIDENT (in Cantonese): Dr Margaret NG, your speaking time is up.

DR MARGARET NG (in Cantonese): …… that the resolution must be passed? Thank you, President.

DR RAYMOND HO (in Cantonese): President, from the time I became a Member of the Provisional Legislative Council up to the present moment of being a Member of the fourth-term Legislative Council, I have been following the issue of municipal solid waste in Hong Kong closely. In handling this issue, I think that over the past 13 years, the Government has only been doing, so to speak, some minor patching and mending work which completely lacks any long-term and comprehensive plans. After all these years, apart from imposing the levy on plastic bags and spending $5.1 billion to build an expensive sludge incinerator in Tuen Mun, there are not too many successful examples in the other aspects. The Government has not been successful in source separation of waste, and it has not paid genuine efforts to promote the solid waste incinerator, which is commonly used around the world.

I remember when I was a member of the Provisional Legislative Council Panel on Environmental Affairs, I participated in the discussion on items proposed by the Government, such as the policy on waste management and waste reduction plan. More recently, in December 2005, the relevant authorities published the Policy Framework for the Management of Municipal Solid Waste (2005-2014) (Policy Framework). This Policy Framework was also discussed by the Panel on Environmental Affairs.

However, after all these years, Hong Kong still mainly relies on landfills as disposal facilities for solid waste. The three landfills (namely, the West New Territories Landfill at Nim Wan, the South-East New Territories (SENT) Landfill in Tseung Kwan O and the North-East New Territories Landfill at Ta Kwu Ling) account for a total of 270 hectares (ha) of land in Hong Kong, and the Government has already invested a large amount of resources. According to the projection of the Administration, the three landfills are expected to reach their capacity one by one from mid to late 2010s, landfill extension is thus necessary. However, why did the Government just let the time slip by year after year? In the past decade or so, why were the Governments of the previous few terms reluctant to genuinely roll out some long-term solid waste measures?

Since 2008, the Panel on Environmental Affairs of this Council has commenced discussion on the environmental impact of the Government's proposal to extend the SENT Landfill into Clear Water Bay Country Park. Members also noted that the Sai Kung District Council and Tseung Kwan O residents objected to the proposal. The District Council opined that if the landfill kept extending, the problem of odour nuisance would definitely continue to worsen. Regarding the encroachment of the SENT Landfill extension upon the boundary of Clear Water Bay Country Park, members unanimously expressed reservations on the proposal and urged the Administration to work out a solution to tackle the issues of waste management and odour nuisance together. However, the Government paid no respect to this Council's view and Tseung Kwan O residents' objection, and insisted on taking 5 ha of land from Clear Water Bay Country Park for landfill extension.

The disposal of solid waste by landfilling is an option which is both environmentally unfriendly and utterly against the principle of "sustainability". First, such an option brings out the future problem of shortage of land which makes it difficult for landfills to extend any further. Land has always been regarded as a valuable asset, we need land to cope with different demands, including those arising from the growing population, economic development, recreation and others. The amount of waste that has to be treated keeps rising in Hong Kong, increasing by one fold every 20 years. When the Government constructed the Tseung Kwan O landfill in mid-1990s in the last century, it had already borrowed 18 ha of land from the country park. With no other choice available, the Government has its eye on the country park again despite strong opposition of the nearby residents. I can hardly understand how the Country and

Marine Parks Board and the Country and Marine Parks Authority, being the gatekeepers, could so easily excise our precious land from the country park one piece after another for landfill purpose.

I can completely understand why residents living near or in the vicinity of the SENT Landfill in Tseung Kwan O objected against the Government's proposal to extend the landfill into the boundary of Clear Water Bay Country Park. Take LOHAS Park, a large-scale private housing estate in the vicinity, as an example. Its English name LOHAS is the acronym of "Lifestyle Of Health And Sustainability", which means healthy and sustainable lifestyle. Yet the landfill next to the housing estate takes up a larger and larger piece of land. How ironical it is!

Landfills will certainly have adverse impact on the nearby environment. Landfills will lead to environmental and hygienic problems such as odour nuisance and breeding of flies. Apart from the odour emitted from refuse, the bad smell in the Tseung Kwan O landfill mainly comes from sludge. Although the Government has reiterated that the odour problem in Tseung Kwan O will be improved steadily and that odour abatement measures have already been introduced, the local residents still have to bear the odour nuisance for at least three years. The odour problem will only be alleviated with the commissioning of the highly expensive sludge incineration facility in Tuen Mun in 2013 at the earliest. However, we have to understand that usually sludge is dug out during drainage works and laying of pipes. What is more, food waste has to be tackled too. Thus, odour nuisance may still not be entirely eliminated after 2013.

This incident has completely exposed the Government's lack of long-term strategy in treating solid waste. As mentioned just now, in 2005 the Government put forward the Policy Framework for the Management of Municipal Solid Waste (2005-2014), but the result was not satisfactory. The Government should be fully responsible for the predicament which Hong Kong now faces in the treatment of solid waste.

I have suggested for years that the Government should use high-technology incinerators to tackle the problem of waste treatment at root. In the past, when the incineration technology was not that advanced, incineration of waste often generated dioxin, exhaust gas or ashes, causing environmental pollution problems. However, with technological advancement, the new generation of incineration facilities can meet the strict emission standards nowadays. As a

result, a number of modern cities such as Tokyo in Japan, Hamburg in Germany, Singapore, Paris in France and many other cities adopt the incineration technology for waste treatment.

In 2001, three members of the Legislative Council Panel on Environmental Affairs (namely, Prof NG Ching-fai, Mr LAU Ping-cheung and Mr Tommy CHEUNG) and I went to the United Kingdom, Germany and France to conduct an overseas duty visit. During the visit, we noticed that some incinerators were actually highly popular tourist spots, and residential buildings were located quite close to the walls of the incinerators. We even saw an incinerator beautifully designed as a ship. We did not see anything emitted from its small chimney, not even any white smoke. Hence, I think the Government has not taken serious efforts in promoting the merits of high-technology incinerators to the community, it has not dispelled the public's prejudice against all incineration facilities owing to the environmental pollution caused by the old type incinerators. I believe the great majority of the seven million Hong Kong people are rational. I do not believe they have higher demands than people in other countries. With the people's support, will the Legislative Council and the District Council raise any objection?

In fact, speaking of Singapore in our neighbourhood, in order to reduce the demand for landfill, the relevant authorities have also adopted the strategy of treatment by incinerators. Incineration facilities are used to dispose of all the waste which can be treated by incineration. Through the incineration process, the volume of waste can be reduced by 90%, while the heat released during the course of incineration can be used to generate electricity, contributing to about 2% of the power supply for the place. Many places on the Mainland also produce electricity by way of incineration.

On the other hand, under the "polluter pays" principle, governments of more and more countries have started to charge a fee based on the amount of waste produced by the people. Such a practice helps to reduce the amount of dumped waste. Besides, a number of countries have adopted a producer responsibility scheme to mitigate the environmental impact of their products. In general, the scheme requires manufacturers, importers, wholesalers, retailers and consumers to share the responsibility so as to recover, recycle and properly dispose of certain products. All these measures help to reduce the solid waste generated.

In my opinion, the Government has always lacked the commitment and courage to deal with such relatively controversial issues. Actually treatment of solid waste is a territory-wide issue which is related to our sustainable development in the future and the people's health. So long as the policy put forward by the Government is reasonable, it should be able to gain the support of the general public. This mentality is applicable not only to the current-term Government but also the future Government.

What arouses our bigger concern is that in this dispute, an environmental issue has triggered a constitutional crisis. According to the opinion of the Department of Justice, under the Country Parks Ordinance, once the Chief Executive in Council has approved the new map drawn up by the authorities, neither the Legislative Council nor the Chief Executive has the power to stop the designation of 5 ha of land from Clear Water Bay Country Park as part of the Tseung Kwan O landfill. The Government's attempt to enforce the order high-handedly on a legal basis has once again shown its executive hegemony. Setting aside the dispute on the legal views, the approach adopted by the Government in handling the matter has paid no regard to the importance of the relationship between the executive authorities and the legislature. It can be said that this is a total disregard of the constitutional role of the Legislative Council in Hong Kong.

According to the Basic Law, the Legislative Council is the legislature of the Hong Kong Special Administrative Region. Article 73 of the Basic Law provides for the powers and functions of the Legislative Council, among which sub-clause (1) states, "to enact, amend or repeal laws in accordance with the provisions of this Law and legal procedures".

In fact, Members of Parliaments of most countries in the world, the National People's Congress deputies of our country and legislators of the Hong Kong SAR have two important tasks. One is to scrutiny the law (which means to legislate) while the other one is to monitor the Government. If we have to play the role of monitoring the Government but the decision we make after scrutiny of the law is denied, I believe this is not what we wish to see. I hope the Government will learn a lesson from this incident, strive to improve its relationship with the Legislative Council, and make joint efforts for the benefit of the general public and the future development of Hong Kong.

President, I so submit and support the resolution.

MS MIRIAM LAU (in Cantonese): President, I think Miss Tanya CHAN, in proposing the motion to repeal the Country Parks (Designation) (Consolidation) (Amendment) Order 2010 (Amendment Order) on behalf of the Subcommittee in this Council today, intends to convey a clear message to the Government, that is, unless the Government has firstly done a good job in the odour abatement work, landfill extension is out of the question. This is the unanimous stance of Tseung Kwan O residents. It is also the unswerving stance of the Liberal Party.

First, I would like to expound on what this Order is about. It is about the Government's intention to excise 5 hectares (ha) of land from the country park to serve as part of the extension of the Tseung Kwan O landfill. Actually it is not the first time that the SAR Government has done so. In fact, when the Tseung Kwan O landfill was built years ago, the Government had already adopted the "temporary loan" tactic to occupy 18.5 ha of country park land. So far the land loaned has not yet returned, and the Government is going to acquire five more ha of land. Apparently, the authorities seem to regard country parks as a "land reserve" for landfills. This situation can be described by a Chinese saying "LIU Bei borrowing Jingzhou", meaning once borrowed, never return. Hence, earlier on when a Government official said sorrowfully that acquiring country park land to serve as landfill was as painful as cutting off one's own flesh, the words sounded a bit absurd. Secretary, they did not sound convincing at all. They were simply not words spoken from the heart.

Besides, the Government keeps misleading the people. Country parks are important public assets which belong to the general public, in fact public interests are involved. However, government officials repeatedly described this territory-wide issue as a district issue, implying that local communities objected for the sake of their own personal benefits. This was indeed unfair.

Recently, the Secretary for the Environment published an article in a number of newspapers, stressing that if there was any delay in the waste disposal arrangements, eventually the whole society would suffer. Let me quote his words: "The legal issue is a serious issue which must be handled seriously. However, if the Legislative Council regards this dispute over the legal provisions as a means to defer the landfill extension and casually shelves the pressing waste disposal problem, it will not do any good to Hong Kong at all."

After reading Secretary Edward YAU's article, I really felt very angry. The dispute on the legal provisions was blatantly stirred up by the Government, but now he frames this Council for using this as a means to defer the landfill extension. Actually, in the initial stage of the scrutiny of the relevant Order by the Subcommittee, I already requested the Government to withdraw the Order. Later, the Government's legal adviser said that the Order could not be withdrawn. I then proposed to repeal it if it could not be withdrawn, and this suggestion gained the consent of the whole Subcommittee. We put forward this request, asking the Chief Executive to repeal this Order himself. However, at that time we also made it clear that if the Government did not take any action to repeal the Order, the Subcommittee — or if the Subcommittee did not wish to, I myself — would propose this motion to repeal the Order. However, a week after this decision was made, upon learning that the Government would not take any action, the Subcommittee decided to take action and requested the Chairman, Miss Tanya CHAN to propose the motion, on our behalf, to repeal the Order. Only then did the Government indicate that according to its legal advice, the Legislative Council did not have the power to repeal the Order. As such, how can one say that the Council used the legal dispute as a means to defer the landfill extension?

The Secretary criticized that this Council had casually shelved the pressing waste disposal problem. I would like to tell Secretary Edward YAU seriously, "You are wrong." In fact, we are making you accountable for the pressing waste disposal problem. Why do Tseung Kwan O residents have to put up with the stinks from the landfill every day for some 10 years? Why are the odour abatement measures put forward right now, such as washing the vehicles and roads and moving the refuse collection vehicles away from the residential area, not implemented some 10 years ago? How can the Government, which has done such a lousy job in waste reduction, criticize Members for delaying the waste disposal arrangements instead?

Regarding waste reduction, in late 2005, the Government published the Policy Framework for the Management of Municipal Solid Waste (2005-2014) (Policy Framework), setting out the waste reduction targets and timetables in three aspects, namely "waste avoidance and minimization", "reuse, recovery and recycling" and "bulk reduction and disposal of unavoidable waste". However, five years have passed and none of the targets was reached. First, the Government's target was to reduce the amount of waste generated by 1% every

year. From 2005 to 2009, not only was the amount of waste in Hong Kong not reduced, it even increased gradually year-on-year from the original 6.01 million tonnes to 6.45 million tonnes. The original target was to reduce the waste to 5.47 tonnes in 2009. Not only was the amount not reduced; on the contrary, it increased by one million tonnes, which was near 18%. This part alone was enough to shorten the lifespan of the Tseung Kwan O landfill by six months. On this point, not a single word was mentioned by Secretary Edward YAU in his masterpiece published in the newspaper yesterday. He even bragged that waste reduction at source was gradually taking effect. It was simply a distortion of reality, passing off the sham as the truth.

The Phase I of EcoPark, which played an important part in the areas of waste recovery and recycling, has been seriously delayed. This leading project should have come into operation in 2006, yet due to repeated delays, up till now, no tenants in Phase 1 have started operating. The project has been postponed for almost four years, seriously affecting the economic development in domestic recovery and recycling of waste. Which party causes the delay after all?

According to the target originally set out in the Policy Framework, by 2014, only 25% of the municipal solid waste in the territory would be disposed of at landfills, but now we still need to send more than 50% of the refuse to the landfills. At first the authorities intended that, by 2014, the "Integrated Waste Management Facilities" (commonly known as "super incinerators") with incineration as the core technology will be put into operation to treat about half of the municipal waste which would otherwise be disposed of at landfills. In yesterday's article, Secretary Edward YAU causally mentioned that the completion date would be postponed for two years to 2016. However, since the construction site has yet to be decided, who can guarantee that this project will not be postponed again with further delays? The two-year delay would mean that more than two million tonnes of refuse will be dumped at landfills. How will landfills not be overloaded, how will expansion not be required? How can the Secretary not think of landfill extension all the time?

With the authorities' numerous poor records in waste reduction work and repeated delays in constructing waste treatment facilities, how can members of the public believe that the Government, after acquiring the country park land to extend the lifespan of the landfill by six years, will not keep prolonging the lifespan of the landfill for another six years, and then another six years, thereby

allowing continuous landfill extension with never-ending nuisance? Consequently, we consider that only by repealing the Amendment Order can the authorities be forced to put forward a "genuine option" and make a "genuine undertaking" to review the various waste reduction targets and timetables set previously, and get to the root of the waste problem through reduction of waste at source.

President, I would like to stress that we do not blindly object to the Government's landfill extension project. Our concern is not restricted to the narrow sense of district interests. Rather, we demand the Government to put forward a genuine solution instead of doing some cover-up tricks in an attempt to muddle through. For example, on alleviation of the odour problem, the waste disposal industry, including drivers of refuse collection vehicles — let me declare here that they are my voters — had proposed many feasible options a long time ago. They requested the authorities to provide hoses for washing refuse collection vehicles, but the Government told them that there was no water. They requested parking spaces for refuse collection vehicles further away from the residential area, but the Government said that there was no land. They also requested the provision of suitable places or facilities for refuse collection vehicles to treat the leachate on the vehicles. The leachate from food waste was rather smelly. Yet the Government said that there were no such facilities. The trade has repeatedly raised these suggestions, but the Government has paid no heed to these proposals. Finally, when Members were going to support the repeal of the Order, the Government suddenly said that these measures were feasible and could be discussed. Arrangements could be made for drivers to wash the vehicles and parking spaces could be provided too. Everything was possible and negotiable. The most important thing was to support this Order.

However, as traders pointed out, the Government lacked sincerity in implementing the so-called "new initiatives", and these measures were not the most effective means to solve the problem. Take vehicle washing as an example. The trade originally hoped that the Government would follow the practice of foreign countries and set up a formal "vehicle washing house" which could accommodate four vehicles so that refuse collection vehicles could be thoroughly cleaned. Now the Government only designates a temporary place with several hoses and a few workers to give the vehicles a sloppy scrub and a quick rinse. That is completely perfunctory. Even in the future, it will only upgrade the existing wheel washing facility to a full-body vehicle washing

facility. Whether the refuse collection vehicles can be thoroughly cleaned after all remains unknown.

Apart from that, refuse collection vehicles usually have leachate receivers. However, since food waste has not been separated, it is difficult to estimate the quantity. As the capacity of the leachate containers is limited, to prevent leachate from spattering owing to overloading of refuse during transportation, the traders have always hoped that the authorities can provide a place, for example, at refuse collection points, for refuse collection vehicles to discharge the leachate before entering the residential area. Even if not all of it can be discharged, at least most of it will be. Then the leachate will not overflow during transportation. In this way the odour can be abated. However, once again the authorities responded to the trade perfunctorily, saying that such an approach would involve a lot of work. It would rather adopt a straightforward measure of "treating the head when it aches and treating the foot when it hurts", by simply washing the streets and that was all. On hearing it, the traders did not know whether they should cry or laugh. What is more, the Government also stated clearly that if any refuse collection vehicle was found spattering leachate, it would be prosecuted. This really made the trade at a loss as to what to do. The authorities offer no help to traders to clear the leachate, and when leachate is spilled out, the Government would rather wash the streets than offer traders assistance. It even goes so far as to prosecute traders for spilling leachate. Is this an active way to tackle the problem? The authorities should respond to the modest request of the trade and should not act in such a slipshod way. Now that the Government requests us to postpone the commencement date for 14 months, if the Government treats the trade in such an attitude, how can we believe that it can, in a 14-month period, solve this problem which it has failed to address for some 10 years? It is simply wishful thinking. In fact, earlier on when I attended the Tseung Kwan O residents' meeting, the residents told me clearly that they had absolutely no confidence in the Government's ability to eliminate the odour nuisance. As a result, they firmly objected to the landfill extension.

President, we need to adopt a long-term and steady approach to tackle the solid waste problem. All along the Liberal Party has advocated source separation of dry and wet waste. Through recovery of food waste and other organic waste, the odour emitted from mixed dry and wet waste can be abated effectively, while the efficiency and amount of domestic waste recovery can be raised. The problem is that the Government has never worked proactively in

this regard. Speaking of waste disposal by applying new incineration technology, the Liberal Party has been its strong advocate. Such a practice has been commonly adopted in overseas places like London, Taipei, Seoul, Singapore and Tokyo. In Japan, as much as 70% of the refuse is treated by incineration. A number of incineration facilities, as mentioned by Dr Raymond HO just now, are in urban areas and have even become tourist attractions. How come after years of preparation, the authorities still cannot implement in Hong Kong the successful models in foreign countries? When I look at some of our figures, I really feel rather ashamed. In overseas places like Singapore, Taipei and Tokyo, a large percentage of refuse is treated by way of incineration, whereas in Hong Kong, the percentage is zero. I guess other people will think that Hong Kong is a very backward place. I believe we should stay vigilant ourselves. Actually the private sector has proposed treating waste by vaporization and the result is highly satisfactory. The authorities should actively look into this approach.

The crux of the matter is, in fact, that the authorities really need to adopt some policies and measures to proactively explain to the public the effectiveness of the new incineration technology to dispel their doubts. The authorities should also propose a satisfactory compensation package. In foreign countries, it is also a very common practice to offer compensation in exchange for local support. Do not just "hard sell" policies, thus arousing public discontent. The Government should also reflect on its way of handling solid waste. It should never shift the blame onto somebody else and shirk the responsibility. This is the Government's responsibility.

Here let me also state clearly, even if, unfortunately, Miss Tanya CHAN's motion is voted down today — I believe it will not be so — even if it is really voted down, the Liberal Party will not support the "false concession" option of the Secretary for the Environment, as I have mentioned earlier. I must point out that supporting the Government's amendment is tantamount to supporting the landfill extension, just that the project will be postponed for 14 months. Actually during that 14-month period, no one can guarantee that the Government will be able to accomplish the odour abatement work. Fourteen months later, the landfill will be extended even if the odour nuisance still exists. This is absolutely unacceptable to Tseung Kwan O residents.

To maintain the dignity and constitutional status of the Legislative Council, to protect the welfare of all Hong Kong people, and to safeguard the interests of

Tseung Kwan O residents, I implore Members to support the motion proposed by Miss Tanya CHAN today.

MRS REGINA IP (in Cantonese): President, I have heard the views expressed by a number of colleagues. I think many colleagues have made much criticism on the way Secretary Edward YAU handled this controversy, and he has heard them already. I do not want to join the attack on Secretary Edward YAU. However, being a …… actually I have lived in Sai Kung for 19 years, I also have friends and relatives who live in Tseung Kwan O, therefore I would like to make a few comments too.

President, first, I have heard some different opinions. To my understanding, places suffering from the most unbearable odour include Wan Po Road, LOHAS Park and Clear Water Bay Peninsula. Actually last night I talked with a resident of Park Central, who said that the residents nearby did not have any big objection. Of course, regarding these problems, just like dumping sites and ventilation shafts, "no one but the wearer knows better where the shoe pinches". If these facilities are built next to your home, giving off bad smell from time to time and affecting your property price, local residents will inevitably raise strong objection, and I have received a number of such petitions too.

(THE PRESIDENT'S DEPUTY, Ms Miriam LAU, took the Chair)

I am not an environmental expert. Yet in studying this issue, I notice from some figures that the Government indeed has room for improvement in its way of dealing with municipal solid waste. Just now Secretary Edward YAU already mentioned some options, such as incineration, and we have allocated funds for the construction of an incinerator with new technology in Tuen Mun. The Secretary also mentioned the levy on plastic bags. Should we employ taxation means to encourage members of the public to produce less waste? I have mixed feelings in this regard because recently, I have read information of the Environmental Protection Department. I found that comparing 2008 with 2009, in 2008 putrescibles accounted for 38% of the municipal solid waste, whereas in 2009, they accounted for 41%. Most of them were actually food.

The Secretary should know this better than me. His document also mentioned that in 2009, 37% of the solid waste was food.

I think city dwellers will notice that many white-collar workers, ladies in particular, will ask for a less portion of rice in their meal boxes, since many people only eat vegetables and meat but not rice in order to stay slim. Those who are smart will ask for less rice because they will not be able to finish them. Hence, for city dwellers, with regard to food or commodities such as electrical appliances, used batteries, furniture and so on, actually the more developed a society is, the more sophisticated our lives will become, and an increasing amount of waste will be generated by each person. Consequently, this has created more problems for Secretary Edward YAU.

I am a bit disappointed by the Government's work in civic education in this regard. The Government should educate us to minimize the generation of waste at source or encourage members of the public to remind themselves not to order too much food that they cannot finish. I am an old-fashioned kind of person. Since I was a child, my parents had told me to treasure food and eat all the rice. Otherwise when I grew up, I would marry a guy with a freckled face.

However, nowadays, a lot of our food, appliances and clothes have indeed been wasted, all of which have created municipal solid waste, which require the attention of the Secretary. So, I will support Miss Tanya CHAN's motion, because I have also received the views of many residents of LOHAS Park, who indicated that they would — I am sorry to say — oppose Secretary Edward YAU. Yet I also hope that the Secretary will make more efforts in civic education to remind members of the public that presently, while most people are living in affluence …… of course we have also heard that in Sham Shui Po, when boxes of leftovers are thrown away, many old ladies will scramble for them right away. To the general public, we should remind them not to order excessive food, not to buy so many stuffs which they do not need to use. Every time they throw away a new gadget, they have to consider that this will create a lot of waste in the city. At the same time, it is necessary to encourage the recovery of more waste, or support recovery companies and adopt new technology.

Speaking of new technology, I would like to say something. I believe that many colleagues, like me, have received a letter from a company called "Green Island Cement". It told us that it had an incineration method which could

convert waste into energy with the use of new technology. I heard the Environment Bureau say that this was not feasible. Is it really not feasible? Has any test been conducted? We also wish to have more new technologies introduced. I hope that the Secretary will not refrain from making any study so as to save trouble and avoid the accusation of collusion between the Government and the business sector just because this company belongs to a certain consortium.

With these remarks, may I implore Secretary Edward YAU, apart from solving the problem that the landfill will soon reach its capacity, he should also work out new options, such as adopting new technology, encouraging separation and recovery of waste, and most important of all, encouraging members of the public to minimize the generation of municipal solid waste in their daily lives.

I so submit.

MR JEFFREY LAM (in Cantonese): Deputy President, this incident relating to the expansion of the Tseung Kwan O landfill, in which the Administration is going to include 5 hectares (ha) of land from the Clear Water Bay Country Park into the landfill extension area, has already aroused wide concern in society over the past two weeks. Furthermore, owing to different interpretation and bases adopted by the Legislative Council and the Administration regarding the legal provisions and exercise of power, both sides hold divergent views.

However, in my opinion, such a dispute is unnecessary. We hope that Members from the different parties or groupings in the Legislative Council can share the same objectives and aspiration with the SAR Government, that is, to serve the interests of the public and take Hong Kong's sustainable development into account on a long-term basis.

Deputy President, in the final analysis, this dispute was triggered by the question as to whether the Tseung Kwan O landfill should be extended. According to the information, the existing three landfills in the territory are going to reach capacity one after another in the next few years. The Tseung Kwan O landfill will be the first to be filled up in 2013 or 2014. Even if 15 ha of land from Tseung Kwan O Area 137 and 5 ha of land from Clear Water Bay Country Park are used for landfill extension, as proposed by the Environmental Protection

Department (EPD), the lifespan of the landfill can only be extended for a few more years. However, with increase in population and urban development in Hong Kong, the amount of municipal waste keeps increasing. How to deal with the waste problem has become a pressing issue. In fact, in the present stage we have already sensed the seriousness of the problem. We cannot wait until all landfills have been filled up to consider our next step. If that is really the case, it will be too late to do anything by then.

Although landfill extension is one of the expedient ways to buy time with space, it is not a long-term foolproof tactic. Neither can it satisfy the need for waste disposal on a long-term basis. Hence, there are not sufficient reasons for the Economic Synergy to support the Government's plan to further expand the Tseung Kwan O landfill.

According to the EPD, the option of acquiring country park land to serve as landfill is the only choice left. Having taken the overall public interests into consideration, it is the most cost effective approach which can achieve the highest efficiency in the utilization of land. Nevertheless, we also have to listen to those residents who live near the landfill. We must understand that the landfill will directly affect local residents; whereas residents in other districts can never personally feel the impact. We hope that when the Government makes planning for landfills or identifies sites for the construction of refuse incinerators later, it will sincerely explain to the public its long term policy on waste treatment. Moreover, it should put in place a series of environmental protection measures and try to find a solution which will be understood by the residents.

Just now I mentioned the establishment or construction of refuse incinerators. Actually at present, a number of foreign places have succeeded in this regard. The SAR Government has also looked into the incineration facilities in Japan and learnt some of the advanced experiences. According to the Government's progress report, the environmental assessment report for the selected site should be completed in the middle of this year, but so far it seems that no news have been heard. If such delay goes on, and taking into account factors such as public consultation, policy explanation and construction time, I am afraid the original plan to have the construction work completed in 2016 to 2017 will only be delayed again and again, thus adding to the pressure on the landfills.

Deputy President, actually the mentality of "each sweeping the snow before his own door and ignoring the frost on his neighbour's roof" is understandable. Obnoxious facilities such as incinerators, landfills and columbarium, or even the site for setting up a drug rehabilitation centre-cum-school have triggered controversies one after another in recent years. Nevertheless, I believe that Hong Kong people are very understanding. After all, we must find a way to solve the increasingly serious waste disposal problem. As residents living near the suitable sites may have to make certain sacrifices, the Government should provide supporting facilities so that these residents' interests are sacrificed on reasonable grounds for a worthy cause.

All in all, this incident of landfill extension has reflected the slow progress of the Government in the implementation of integrated waste management. It only goes one step at a time passively, and fails to put forward to the community any convincing long-term policy.

In my opinion, presently, the Government should continue to maintain communication with the Legislative Council, environmentalists and local communities and expeditiously work out a solution to tackle the waste disposal problem in the long-term interests of Hong Kong. So long as the approach is appropriate, I believe that the people will understand and co-operate.

Deputy President, I so submit.

MS EMILY LAU (in Cantonese): Deputy President, I speak in support of Miss Tanya CHAN's motion to repeal the Country Parks (Designation) (Consolidation) (Amendment) Order 2010 (Amendment Order).

When Ms LI Fung-ying spoke earlier on, she said that today's debate is extremely uncommon because there should not be any other business after the delivery of the Policy Address. To our surprise, a long tail has emerged.

Deputy President, when I was travelling on a bus a few days ago, I saw our "Great President" appearing on an unknown TV programme to introduce the Policy Address. He said that the Policy Address would be delivered on the 13th, which was the only business on the agenda of that Legislative Council meeting. However, nothing is absolute in this world. I was laughing while I was

watching the programme on that day, wondering how one could be so sure. It turns out that there is more than one agenda item.

Deputy President, no one want to have this additional agenda item, but how come we have to handle this item today? We may refer to the clear record on the sequence of events prepared by the Clerk. Just now, the Secretary has briefed us on the work done by him, so let us trace the date the authorities published this Amendment Order in the Gazette. It was published on 4 June, that is the very day of the 4 June incident, and the decision to form a Subcommittee was made at the House Committee meeting on 11 June. Later, on 30 June, a resolution was passed by the Legislative Council to extend the period of scrutiny of this subsidiary legislation to 13 October, that is, today. That is why we have such an "uncommon" debate today.

Deputy President, a colleague just said that we should attack the Secretary jointly. I definitely do not agree, and after listening to the speeches of many colleagues, I believe they do not agree to do so as well. And yet, the Secretary should really do some serious thinking. Among the many speeches that I have listened to so far, excluding those made while I went out for an interview, none of them support him. Of all the political parties and groupings, as well as independent Members whose independence may be doubtful in the Legislative Council, none of them has expressed support to him. What is the problem then? Although the Secretary has spoken so eloquently to the best he could, he still failed to gain support. Now, there are many people outside the Legislative Council Building and they want us to bring the debate to the streets. Deputy President, it has recently been a common practice for debates of hot issues to be carried out beyond this Chamber, but be heard throughout Central. How did the situation get into such a state?

The Secretary told us earlier that they have been working on the issue for five years, and deliberation by the Country and Marine Parks Board (CMPB) has also started many years ago. A draft map was later published for public consideration in November 2008 and a period of 60 days was allowed for receiving views. Deputy President, what was the result then? The CMPB had received 3 105 submissions. What was said in the submissions? They objected to the Government's act to excise country park land for landfill purpose, they criticized the Government's policy on waste management and conservation, as well as its poor management of the Tseung Kwan O landfill. So, what has the

CMPB done? It rejected these views in March 2009. Although there were 3 000-odd submissions expressing opposing views, the CMPB did not give a damn to them. It is really surprising to have any government which remains unalarmed after all these incidents have happened. Has it really turned a deaf ear to everything?

A number of Members have mentioned the District Council, so when did the District Council start discussing the issue? Although colleagues have touched on it, I have also examined the relevant records and found that discussion on the odour problem actually started in 2004, and the CMPB was set up in 2007 to conduct investigation. How many complaints relating to odour nuisance have been received from 2007 to last month (that is, September) of this year? The answer is more than 2 600 cases. It is reported that the problem is most serious between May and September when the temperature is the highest and rainfall is abundant. If those 2 600-odd complaints and 3 100-odd submissions expressing opposing views still fail to alarm the authorities, honestly speaking, there is nothing I can do.

I have been advising the authorities for years to conduct thorough discussions with various political parties and local authorities in handling controversial or thorny issues. For me, whether I was a member of the Frontier or after I have joined the Democratic Party, I have all along been willing to discuss with the authorities. Just now, many Members have indicated in their speeches their readiness for discussion, but Deputy President, have the authorities ever approached us for discussion? Certainly not, for initially, it thinks that enough votes have been secured. I cannot agree with the Deputy President more in saying that when a couple of things need to be dealt with …… At the meeting on that day, I had clearly warned Members not to think that the matter would be shelved after the Amendment Order is rejected. Certain tasks are actually pretty simple, like street cleaning and car washing, but the authorities just do not bother to take actions.

Deputy President, parking space is another issue. Can you still recall why owners of the LOHAS Park were so angry at that meeting? They have just moved into their new flats and the obnoxious odour enveloped the area. That was why they were so furious. Why is the odour problem particularly serious there? The reason is that an area of land next to the building on the other side of the road has been designated as parking space. There is actually nothing wrong

about it. The problem lies in the refuse collectors, that is, the electors of the Deputy President. Yet, they do have their difficulties, as the landfill is already closed when they finish collecting refuse at 11 pm or midnight. So, where should they park the refuse collection vehicles? Should they drive the vehicle home? They have to leave their vehicles there, meaning that a vehicle loaded with refuse will be parked there. What is more, there are several vehicles, which foul the air. The residents then lodged a complaint, hoping that the authorities would help solve this problem. The authorities responded by claiming to close the parking area, and I was stunned. People who need to park their cars there would definitely kill me. I then suggested designating some areas in the spacious landfill as parking space for refuse collection vehicles since the loaded refuse would have to be delivered to the landfill anyway. However, the authorities still considered this proposal unacceptable. It was only until many people became so enraged that the authorities agreed to reserve some area in the landfill as parking lots.

Washing of the refuse collection vehicles is another issue. In fact, the vehicles should be thoroughly cleaned. It is not enough just to reserve some parking area and provide a water hose. Refuse collection vehicles are washed only once a year, and this information is provided by Dr Ellen CHAN Ying-lung. It is evident from the above that even minor tasks were not properly handled, not to mention such major tasks as solid waste disposal. Deputy President, residents do not consider the postponement of the effective date to early 2012 a solution to the problem as no one knows how the issue should be handled. What makes everyone so lack of confidence? This is because the cause of the odour problem is still unknown even though the matter has been discussed by the District Council since 2004. There are sayings that the odour might not be attributable to the landfill. Just as I have stated at each meeting, regardless of the source of odour, be it from the landfill, the sewages, the sludge or anything else, so long as there is a bad smell, the Government should tackle the problem for the residents' sake. How can we call ourselves an Asia World City when even the odour problem cannot be resolved? Is our technology or skills really that backward, or is it because we do not have the determination to solve the problem?

There is a resident who once lived in a certain housing estate, he sold his flat and moved to a new unit at the other end of the street. Yet, the foul smell is equally strong there. No matter where he lives, he is still affected by the foul smell. Can you tell me how local councillors like us can hold our temper? I

guess the Secretary will not be able to respond today for I believe he does not have a solution in mind. No matter what, issues concerning how the odour problem should be dealt with and how solid waste should be disposed of should be discussed by the whole community.

When Donald TSANG spoke on columbarium niches the other day, he said that people tended to mind their business only, and one should not move all unpopular facilities to Tuen Mun. A member of the public immediately asked me if I knew who tended to mind their business only. It is actually the government departments which have the strongest intention to mind their business only. Cases are often transferred from one department to another without being handled jointly.

Ever since I joined the Legislative Council in 1991, I have strongly opposed the Government's practice of placing all unpopular facilities in Tuen Mun. It is outrageous to do so. No wonder Tuen Mun residents are so furious, they have every right to get angry.

Joint commitment is necessary in many cases, so columbarium facilities must be built in various districts. Many people always ask why certain facilities are either built in the New Territories West or the New Territories East, but not on the Hong Kong Island, in the Southern District, the Peak or elsewhere.

Two years ago, we went to Japan to study its incineration facilities and waste disposal methods. In Japan, there are many small incinerators and they can be found in many regions. Different regions are required to dispose of the waste generated within the area. How do they do that? At first, members of the Parliament strongly opposed to such a proposal and were rather antagonistic. And yet, the discussion must carry on. They have spent seven years to study a small city, in which an incinerator was finally built. There is a heated swimming pool on its roof top and a dining area on the side. Also, there is a giant park next to the incinerator and a community hall has also been built. This is precisely the agreement made between the local authorities and the Parliament, which enables local residents to swim and dine happily on the roof top of the incinerator after work.

A Member mentioned the need of offering compensation to residents earlier on. When we discussed the construction of a chemical waste treatment

centre in Tsing Yi and the compensation arrangements a few years ago, guess what kind of compensation did the authorities make? Just some flowers and grasses. Even though public money was involved in these cases, the authorities were reluctant to pay. As representatives of public views, we opine that certain expenditure is worth spending. The authorities, however, are so reluctant to pay, while certain expenditure is "ill gotten, ill spent". No one knows where the money goes, and this is really outrageous.

I think compensation should be offered and joint commitment is required. These issues should be discussed altogether, and all political parties and groupings should get involved in the discussion. If only one political party is consulted while others are not given the opportunity to discuss, should residents raise opposition, only the opposition voice would be supported in the end. Who else is willing to raise supporting views?

Secretary, while you will remain in office next year and the year after next, the waste disposal capacity of landfills is on the verge of saturation. What should we do then? I think the matter must be brought up for discussion. Should we aimlessly extend the landfills? Should we construct incinerators? How to reduce waste production? How to exericse self-discipline? Are we going to impose a waste disposal charge just as some Members have suggested? Each of the above is a thorny issue.

Yet, these are problems that most civilized societies need to deal with, and are capable of tackling. Being the Secretary of the Environment is no easy task, the responsibilities are heavy. Some recent surveys showed that one of the greatest concerns of Hong Kong people is environmental protection. This is not surprising because as a society becomes increasingly well-off, more people will certainly be more concerned about their own health and that of their families and siblings, despite the fact that millions of people are still living in poverty.

Therefore, Secretary Edward YAU bears a very heavy responsibility. Unfortunately, he is unwilling to discuss with the political parties and groupings to find a solution. Instead, he has brought up another issue. While we were discussing waste disposal, he demanded an abolition of our power. Although the Clerk to the Subcommittee has already completed the report, the authorities suddenly deployed its ultimate stroke and demanded an abolition of our power.

Deputy President, there were actually quite a number of subsidiary legislation to be dealt with at the House Committee meeting held last Friday. Our Secretariat has been so considerate that not only the names of the relevant legislation are clearly listed, but also legal notices that are not required to be tabled and not subject to amendment by the Legislative Council. Why is such specification necessary? Because this is provided in the law and we must therefore accept it. And yet, there was no mention of this regulation when the Amendment Order was examined in June.

All of a sudden, we were provided with the advice given by Mr Michael THOMAS. I wonder how many thousands of dollars or even more have been wasted for this. This is really outrageous. We were provided with this piece of information for no reason, but in fact, other opinions could be sought if resources are available. The question is which opinion should be adopted in the end. The authorities must use its brain and be decisive. Nonetheless, they still refuse to admit up till today, they still insist that the Legislative Council does not have such power. This is why members of the public are so outraged, many Members also considered that the authorities have gone too far.

Therefore, Deputy President, I definitely support the repeal of the Amendment Order. I also raised a question on that day: Should we succeed in repealing the Amendment Order, the authorities will be obliged to publish this decision in the Gazette within 14 days in accordance with law. Will they do so? The authorities speak evasively without giving any positive response. It they keep wrangling with the Legislative Council, it would not help solve the waste disposal problem. I believe the way forward is clear enough, and Members have also indicated their willingness to negotiate and work in conjunction with the authorities to tackle this thorny but very important issue. It is now time to see if they have the wisdom to settle such a frivolous conflict.

With these remarks, I support Miss CHAN's motion.

MR VINCENT FANG (in Cantonese): Deputy President, you have already explained just now on behalf of the Liberal Party why we will support Miss Tanya CHAN to propose this motion to repeal the Country Parks (Designation) (Consolidation) (Amendment) Order 2010 (Amendment Order). I wish to emphasize again that even if Miss Tanya CHAN's motion is vetoed, we will still

oppose the amendment proposed by the Government which seeks to extend the commencement date for 14 months.

Some people may reproach us for our opposition, asking us why we still have to oppose the Government as it is willing to spend more time to rectify the odour problem of the Tseung Kwan O landfill, and whether this is unfair to the residents living in the vicinity of the landfill. However, I am of the view that the Government is definitely duty-bound to resolve the hygiene and odour problems of the landfill, whether or not its Amendment Order is passed today. This is the responsibility of the Government. Honourable Members, do not let the Government's sleight of hand mask your eyes.

As for myself, why do I oppose the legislative proposal of the Government and support repealing it? The main reason is that I simply cannot accept the Government's current waste treatment policy, or should I say, the Government simply does not have any policy on waste treatment?

At present, the Government only has two measures in relation to solid waste treatment: first, the landfills; and second, the product eco-responsibility system which imposes a prohibitive tax. However, in the past six years, I have spoken countless times in the Legislative Council that dumping wastes at landfills is not the most effective solution to solve the waste problem, and this measure incurs great waste.

To begin with, it wastes the land which is the most precious resources in Hong Kong. If we do not adopt a more civilized and sophisticated means to tackle the waste problem, our descendents will eventually have to live on landfills. Second, it wastes the useful resources on earth because a lot of refuse dumped at landfills now can be reused and recycled as useful resources. The tension in the supply of natural resources at present has led many scientists to conduct studies on and find substitute products. If we do not use resources wisely, how are we going to explain to our future generations? Third, dumping wastes at landfills is wasteful in that it wastes the investment spent on constructing landfills. If the Government could listen to our suggestions or those of the pioneers sooner, that is, six years ago, and comprehensively take forward the 3Rs, namely Reduce, Reuse and Recycle, the lifespan of the Tseung Kwan O landfill would be able to extend beyond 2013. If so, today, the Legislative Council would not have to challenge the Government.

Moreover, Hong Kong is yet to implement waste separation and recycling. Even food waste is allowed to be dumped at landfills, which will inevitably generate strong odour in the course of waste decomposition and lead to other hygienic problems.

What worries me more is that when the first of the two government measures, which is dumping waste at landfills, has met with opposition, the Government will naturally turn its attention to the second measure. That is, it will speed up the implementation of the product eco-responsibility system, and expand the scope of prohibitive tax. The Government will, through imposing environmental levies force the public to use less products which may be dumped at landfills. Last year, the Government started imposing an environmental levy on plastic shopping bags and the result has been satisfactory, as the actual tax received so far is only some $20 million to $30 million, which is far less than the $200 million plastic bag tax originally expected to receive. This proves that the public have used much less plastic bags.

However, this is again a misleading figure. According to the retail industry, the Government has substantially exaggerated the number of plastic shopping bags consumed by supermarkets. In addition, the Government has not collected any data on the increase in the sales of garbage bags after supermarkets have reduced their use of plastic bags. Neither has it collected any data on the increase in other packaging materials which have been tossed away.

The most conserving approach to deal with waste is to comprehensively implement the 3Rs waste reduction measure, particularly considering that Hong Kong lags behind other developed economies worldwide in respect of waste recycling. At present, large amount of recyclable waste materials are dumped at landfills because they are not recovered for recycling. Even if useful waste materials are recovered, 90% of them are exported to other countries. But these countries cannot keep collecting our waste. One day they will stop importing our waste. By then, the only exit for our waste is the landfills. Thus, I have, in this Council, requested the Government to make reference to the standing practices of other countries. By directly subsidizing private enterprises or providing them with incentives such as tax relief, land, technology support, grants and priority procurement of their products, the Government can encourage the business sector to join the waste recycling business and in turn alleviate problems brought by landfills and protect the resources of the earth.

As regards the waste which cannot be reused or recycled, reference should be made to the practice adopted in Japan, that is, incineration. Although there is much controversy over waste incineration in society and in respect of environmental protection, many countries are very experienced in waste incineration. I thus do not see why this is not feasible in Hong Kong.

The Government has announced today a $10 billion poverty alleviation plan. While I absolutely welcome it, I hope the Government would not rely on these hastily-made economic measures alone to regain its popularity. A popular policy address should be forward-looking and able to pioneer Hong Kong's sustainable development. Hence, no matter what the voting result of today's Amendment Order on landfill extension will be, I earnestly hope that the Government can review the existing waste treatment practices and the direction of the recycling industry, so as to map out a waste treatment policy which is long-lasting, effective and conducive to Hong Kong as well as the planet.

I so submit. Thank you, Deputy President.

MR RONNY TONG (in Cantonese): Deputy President, an accommodating government can turn controversial issues into less controversial ones, or even foster consensus in society. However, an autocratic and arrogant government can blow up an issue, which is already controversial in nature, indefinitely into a highly contentious incident that could result in a rift between the executive authorities and the legislature. A good example is the issue we are discussing today.

Deputy President, this so-called "no power" theory has created an argument that is absolutely unnecessary, meaningless and heartbreaking. What is more worrying is that — Deputy President, I do not know if you have noticed — when the Government representative first spoke on the issue during our scrutiny of the Country Parks (Designation) (Consolidation) (Amendment) Order 2010 (Amendment Order), his attitude was not like, "Alas! I learn from the legal opinion that the Legislative Council does not really have the power. What then can be done?" It was nothing like that. Instead, he looked complacent, as he has "finally caught us". Deputy President, legal opinion aside, this is in fact a political issue. Even though the Government is packaging it as a legal opinion, it remains a political issue.

Deputy President, while I do not want to criticize the Government's lawyers, I consider their opinion very superficial. Yesterday, even the Department of Justice came out to say that they might have missed out something in certain areas. I can tell you, when my son (who is now reading law) and I talked about this issue the day before yesterday over our meal, he said, "Daddy, the first thing I learned in my first year of study was that laws should be interpreted not merely from the wording of the provisions but the overall spirit of the legislation." Well, my son has only started to study law.

Second, when constitutional order is involved in the interpretation of a particular legislation, there is indeed a more important principle, that is, whether the outcome derived from the constitutional order or the relevant constitutional principles meets with the spirit of the constitution. The Government's lawyers have not touched upon this question at all. I find it absurd that the Government has not engaged a counsel conversant with constitutional law for his legal opinion. As the question under discussion is whether the legislature has the relevant power, is that not a constitutional question?

Deputy President, simply put, just look at the argument adopted by the Government's lawyers. The phrase in the Interpretation and General Clauses Ordinance quoted, which is also firmly hold by the Government is: "…… [such subsidiary legislation] shall be amended in any manner ……", that is, the Legislative Council can amend the relevant subsidiary legislation in any manner whatsoever provided that it is "consistent with the power to make such subsidiary legislation". The Government has interpreted this to mean whether the Chief Executive has the power to repeal the order. However, it never occurs to the Government that the said power can refer to other things, such as whether the power to make the subsidiary legislation is consistent with the theme and spirit of the governing legislation. If it is not consistent, it will have no power to make any subsidiary legislation irrelevant to the governing legislation. If there is indeed more than one interpretation, it should consider which one will yield an outcome that is least absurd in terms of legal principles so that an appropriate interpretation in line with the legislative intent will be adopted. If an outcome is just too ridiculous and illogical, it is almost 100% certain to be wrong. Therefore, if anyone was to start studying law from tomorrow, this might have been his first lesson.

So, Deputy President, where can we find the theme and spirit of the principal legislation? It is clearly provided under the Country Parks Ordinance (Cap. 208) (the Ordinance). The Ordinance mentions the designation of country parks and the establishment of a Board in relation to the country parks. Under section 4, the duties of the Country and Marine Parks Authority (the Authority) include making recommendations to the Chief Executive, developing and managing country parks, taking such measures in respect of country parks as the Authority thinks necessary to encourage their use and development for the purposes of recreation and tourism, protecting the vegetation and wild life, preserving and maintaining buildings and sites of historic or cultural significance within country parks and special areas, and providing relevant facilities and services. Deputy President, nothing has been mentioned about building landfills. There is nothing at all. Can the size of country parks be reduced for the purpose of building landfills? This is obviously a legal question. Then why has the Government not sought a legal opinion on whether it is feasible to do so? Am I right? If the Chief Executive himself or upon the advice of the Authority, has designated the Central area as a country park, is it a must for the Chief Executive to make the relevant order which cannot be repealed? Is this a ridiculous conclusion which is hardly acceptable to anyone? If so, is the Government's interpretation completely wrong?

Deputy President, as I mention, this is not a legal question but a political question, a constitutional question. What will be the consequence after we cast our votes on this motion today? The responsibility will then fall on the Government and its response will be crucial. However, apart from the legal dispute, there is in fact a more …… I am sorry, not "more" but "equally" important dispute. When addressing this dispute, there is no need for us to take opposing stands. This dispute is really just about addressing the odour problem and striking a balance in the disposal of solid waste. While this matter is controversial in nature, it is not as controversial as the constitutional issue I mention just now. Why has the Government not tackled this odour problem?

Deputy President, I have received a lot of complaints lately. Perhaps I can, on this occasion, talk about a complaint raised by a local resident. This complainant has thoughtfully drawn up a table, indicating the time he suffered from odour nuisance. I will read them out briefly: on 28 August, from 10.20 pm to 3 am; 30 August, from 10 pm to 6 am the following day; 31 August, from 7 pm

to 9 pm and from 1.30 am to the following morning; 9 September, from 10.40 pm to early morning; 11 September, from 1.45 am to the following morning; 13 September, from 2.15 am to 7 am; 15 September, from 3 am to 9 am on the same day.

According to a survey undertaken by some tertiary students engaged by the Government in 2007, the actual situation was not like that. The residents were just being sensitive and there was no odour. Now, the Government has finally installed the "e-nose" in the district. Has the "e-nose" proved that Tseung Kwan O residents are neither over sensitive nor talking nonsense, and that a bad smell has enveloped the district? If you visit the district as we do, and like Mr CHAN Kak-kan just said, if you open the windows or walk around, especially when it is night time with easterly wind blowing, you will know what it is about.

Deputy President, in handling the problem, the words and actions of Government officials are sometimes infuriating. Deputy President, the Chief Secretary for Administration said a few days ago that the interests of the majority should override that of the minority. Deputy President, I find his words insulting.

Deputy President, it is the minority who rules in the Legislative Council and in this Chamber. Why does the Government not tell Members returned by functional constituencies (FC) that the interests of the minority should not override that of the majority? This motion today is probably a good example as I do not know how FC Members will cast their votes. According to the newspapers, the motion proposed by Miss Tanya CHAN is supported by most Members. But nobody knows how things will turn out, say, whether anyone will suddenly disappear or abstain from voting. This can be a very good example.

Moreover, the Government is being totally irresponsible for the things it said because as other Honourable colleagues have told the Government, Tseung Kwan O residents have shouldered the burden of the odour problem for more than 20 years. How much longer does the Government want them to shoulder this burden? At first, the Government said the landfill would be closed down, but now, there is no definite date. Just now, Ms Emily LAU made a very interesting suggestion about commissioning a landfill in each district so as to stabilize property prices. I think it can really help stabilize property prices which,

incidentally, is a topic mentioned in the Policy Address today. By that time, flats will not be selling for $20,000 or $30,000 per square foot. It will definitely not be the case then. Why has the Government not put this into action?

Deputy President, the problems of odour abatement and solid waste disposal are nothing new. On 8 December 2005, the Government published the Policy Framework for the Management of Municipal Solid Waste (Policy Framework). The title sounds very good indeed. Under the Policy Framework, target has been set to reduce the amount of waste generated in Hong Kong by 1% per annum and a basket of measures were proposed to address the problem of increasing solid waste in the coming 10 years. These measures include the introduction of mandatory producer responsibility schemes through legislation, a municipal solid waste levy and landfill disposal bans, the development of solid waste management facilities with incineration as the core technology and EcoPark, as well as the promotion of environmental and waste recycling industries in Hong Kong.

Notwithstanding the Government's high profile at that time, how many of these measures have been implemented? When will we see the legislation of mandatory producer responsibility schemes through legislation or the introduction of a municipal solid waste levy? When will we see the promotion of environmental and waste recycling industries in Hong Kong and the allocation of resources to help their development? Has the Government mentioned this point in today's Policy Address? Has the Chief Executive mentioned anything about assisting the waste recycling industry to develop in full bloom? Deputy President, nothing whatsoever is mentioned.

Turning to the issue of odour abatement, the Government at one time said that the stench was from the landfill and, at the other time, it said that the stench was from sewage. I do not care whether it is from sewage or the landfill. A stench is a stench and it is obnoxious no matter where it comes from. Should the Government be responsible for odour abatement? Do not tell me that if the odour comes from the landfill, it is the Government's responsibility; if the odour comes from sewage, the Government bears no responsibility. I dare the Government to say such words in Tseung Kwan O and see what reaction it will bring. If the Government says it will bear full responsibility, can it tell us when the odour problem will be resolved? During the scrutiny of the Subcommittee — although I am not a member of the Subcommittee, I had attended its meetings

— the Government still could not give us an answer. It was most shocking that the Deputy Secretary finally told us that even she could not guarantee that the odour problem could be resolved within three years. The most important thing is: what if the Government's assumption is wrong? What if the Government's assumption is wrong and the stench really comes from the landfill but not the sewage? What measures will the Government adopt to reduce this heavy burden of Tseung Kwan O residents?

Deputy President, the Government has finally proposed many measures and a lot have been said. However, these are all …… Apart from agreeing to allow refuse collection vehicles to park inside the landfill — we have appealed for so long, almost begging with tears before the Government finally acceded to our request — other measures such as washing refuse collection vehicles, reducing traffic flow and procuring enclosed refuse collection vehicles, Deputy President, have been raised before, and for many years, but without attaining effective results. This is because the source of odour has yet to be identified after all these years. The measures proposed by the Government have all been implemented to various degrees, but the problem has yet to be resolved. In that case, how can the Government tell Tseung Kwan O residents that the odour problem would finally be resolved? Would the problem be resolved only when the several hundred thousand residents of Tseung Kwan O all move away? I do not think that should be the case. If, as the Government has said, the problem is caused by sewage, I think it will be easier to resolve. However, I think it is irresponsible for the Government to ask the Legislative Council pass this resolution for extending the landfill before the source of the problem is identified.

When the Government ignores the spirit behind the legislation of the Country Parks Ordinance, we must steadfastly guard the principle of protecting the country parks. The Government's decision to designate part of the country park land as the landfill is irresponsible and it contravenes the fundamental principle of the legislation. We cannot accept the Government's request of endorsing this Order before these problems are resolved.

Under the Government's present proposal, it merely seeks to extend the commencement date by 14 months. This is also not a solution because obviously, if the Government takes no action or maintains its present style without any change, the problem will still exist after 14 months and the stench

will persist. However, the Government's Order will become effective automatically. In that case, how can we face the people of Hong Kong and how can the Government face the residents of Tseung Kwan O?

Deputy President, I think we have been forced into a dead end today, and all we can do is to vote in support of repealing this unreasonable, unlawful and unconstitutional Order.

MS CYD HO (in Cantonese): Deputy President, our discussion today does not only involve issues relating to country parks, landfills and residents of Tsueng Kwan O who have to put up with the offensive smell. The situation today is indeed a typical example of ineffective and incapable governance. I hope that apart from landfills and the offensive smell in country parks, Members will notice from the present situation why the governance of Hong Kong has now been fraught with so many problems and why it will be so difficult for residents to accept certain controversial policies. We need to understand this point.

First, with regard to the present situation, the authorities have no long-term planning at all. Second, immediate remedial measures, though possible, cannot be implemented due to the lack of co-ordination among departments and bureaucratic red tape. Third, in the face of opposition from Members of the Legislative Council when the legislation is submitted to the Legislative Council, the executive authorities presumptuously exploit the loopholes in laws to ensure the implementation of the proposed measures. However, today, we know that Members from different parties and groupings of the Legislative Council and society do not support this approach adopted by the executive authorities.

Insofar as long-term planning on waste treatment is concerned, in 2004, when Secretary Dr Sarah LIAO came to the Legislative Council to apply funding for the expansion of landfills, she had already sounded this warning. She said that the landfills would reach their full capacity in 2016, and by that time, the amount of waste involved could fill up a certain number of football courts in Happy Valley and be piled up to a certain floor. On 2 October 2004, she said at the time that the existing landfills would reach full capacity in seven to 11 years' time. In other words, the landfills will reach full capacity in 2011 or 2015, which means that planning on waste recycling or other waste management measures have to be carried out as soon as possible.

In 2005, Secretary Dr Sarah LIAO also expressed the hope that 80% of the members of public would participate in the Source Separation of Domestic Waste Programme by 2010, which is this year. We all know too well about the progress of programmes on source separation and waste recycling. As regards legislation on the producer responsibility scheme, no progress has been made. Concerning the treatment of domestic waste, apart from placing three-colour recycling bins in large housing estates, no other measures have been implemented. Worse still, at present, some organizations still find that certain items recycled or separated are eventually mixed together and transported to landfills for disposal instead of being recycled properly.

Later on, the Secretary will definitely say that 49% of waste has now been recycled, which is a higher percentage in comparison with other regions. However, we have to examine one point. In Hong Kong, a lot of waste is produced by business organizations, which are mainly paper or furniture, and a lot of construction waste is produced from the demolition of buildings. Since construction waste is relatively large in volume, does the waste recovery rate only reach 49% because this type of bulk waste is counted? As for domestic waste, every household know that not much progress has in fact been made.

Deputy President, apart from the lack of long-term planning, not much effort had indeed been made since the warning was issued in 2004 and 2005. In handling this Order, we held two meetings during the recess of this Council in July. Members from various parties and groupings have expressed their concerns and have put forth certain short-term measures that could be implemented immediately. We stated clearly that there was a leeway of one to two months, departments and bureaux might make use of the summer recess to discuss among themselves how those immediate measures could be implemented. Those immediate measures were actually very simple measures. A number of colleagues have also mentioned them earlier. The first measure was related to the washing of refuse collection vehicles. We even resorted to primitive approaches like increasing the number of water hoses, as mentioned by the Deputy President earlier, to ensure that more than 10 refuse collection trucks could be washed daily. No additional manpower was required.

The other measure was to identify some parking spaces further away from residential area for refuse collection vehicles, so that these vehicles would no longer be parked opposite to residential premises. However, at the last meeting

before the recess on 27 September, we received a six-page paper that gave no account of the progress of the proposed measures, it only stated the reasons why those simple measures, such as increasing manpower and resources, could not be implemented. However, when Members had reached a consensus to repeal the Order on 3 October, the Secretary issued a letter to us. He gave affirmative response to the measures and said there was room for negotiation. He said that the washing of refuse collection vehicles could be made mandatory and that parking spaces for refuse collection vehicles could be arranged. By that time, Members realized that in fact, the authorities can take actions but are unwilling to do so. How come such simple measures …… it might be difficult to have an incinerator constructed immediately, yet for these short-term measures that could be implemented immediately, the officials took no actions during the summer recess. The Secretary did not pay any site visit nor follow up the inter-departmental co-operation. We were told by low-ranking officials that the Highways Department considered the measures impracticable, that the contractor of the landfill also considered the measures unfeasible and dangerous. We were held back by these trivial reasons. It was not until all parties and groupings of the Legislative Council jointly supported the repeal of the Order did the authorities had the determination to implement these petty measures.

Deputy President, I cannot represent all Members, at least for myself …… though I reprimand the authorities for failing to make any effort in the past six years in the area of long-term waste treatment, I understand that it is now time to take actions. The authorities should at least immediately implement these measures to improve the situation though a temporary increase in manpower and resources are required.

These interim measures include the modification of refuse collection vehicles to ensure that refuse will not be dropped and smelly leachate will not be dripped on the roads in the course of refuse collection. If immediate funding is provided for these interim measures and the projects are implemented right away, and we are told that the projects can be completed in three months' time, it will provide a basis for us to consider the issue. However, if the authorities fail even to implement these short-term and immediate administrative measures, we can in no way support the proposal. What has the Government done in the face of such a situation? It presumptuously exercises its power to exploit the loopholes in laws, trying to prevent the Legislative Council from repealing the Order. The Government employed Michael THOMAS, S.C. to provide legal advice. He

mentioned in his advice that it was impossible to project, in the legislative intent in 1976, that the Legislative Council might repeal the Order. When it comes to legislative intent, Deputy President, I would like to read out the remarks made by the incumbent Secretary for the Environment at the First and Second Readings of the legislation in 1976, and his remarks at the resumption of the Second Reading of the legislation. At that time, the Country Parks Ordinance was discussed. At the Second Reading, he said — since he delivered his remarks in English at the time and no Chinese verbatim record was available, Deputy President, I have to use mixed language of Chinese and English.

At the First and Second Readings, he said "To sum up, Sir, this Bill is to provide enabling legislation for the Government to give comprehensive protection to the countryside and to develop it for open-air recreation". At that time, the incumbent Secretary for the Environment said that the legislation was enacted for the protection of the countryside, but not for the reduction of the area of country parks. At the resumption of the Second Reading, he said, "When the Bill was first drafted, it was decided that the administration of the legislation should be kept as simple as possible so that protective measures could be introduced quickly". The Ordinance did not seek to empower the authorities to reduce the area of country parks rapidly but on the contrary, as read out by the incumbent Secretary for the Environment, it was made to protect our countryside for open-air recreation of the public. The present Order proposed by the Government in excising the 5 ha of land from the country park runs completely against that objective. So when it comes to legislative intent, I hope Members may refer to the remarks made in 1976. At that time, the Legislative Council was composed of 15 official Members and 15 non-official Members. The meeting commenced at 2.30 pm and adjourned at 4.40 pm. Only two Members had spoken on the Bill, and no one had confirmed at the time that the Legislative Council would not repeal the subsidiary legislation.

We see how the society has progressed. There is no comparison between the present situation and the past. But the executive authorities must understand this. In the past, there was no civic society, the concept of environmental protection was not well-developed, and climate changes had not yet taken place. In the past, the meetings of the Legislative Council lasted only two hours, but this is not the case today. Deputy President, today, green groups are very powerful. The policy studies conducted by green groups are more extensive and thorough than those conducted by many political parties. Today, residents know their

rights well. When their rights are jeopardized, they will come forward to reflect their views clearly to the public and the Government. Today, half of the Members of the Legislative Council are returned by direct election. At least, these Members should be fully accountable to the public. Moreover, political parties which intend to stand for direct election in the future also have to be accountable to the public. Hence, the Government should never ever think that it could simply invoke a certain sentence in any provision and exploit the loophole to state that we have no power to repeal the legislation. Certainly, as many colleagues mentioned earlier, we have to consider the overall framework of the whole set of legislation. It is stated unequivocally in the Basic Law that the powers and functions of the Legislative Council include scrutinizing, enacting, amending and repealing laws. These are our obligations. The executive authorities are responsible for the drafting of laws, which are subject to the approval of the Legislative Council and will come into effect after signing by the Chief Executive. The repeal of the Order is absolutely one of the functions of the Legislative Council.

Regarding the political system at district level, there is a significant difference between the situation today and that back in 1976. In fact, the power of District Councils (DCs) should be enhanced, so that a lot of issues relating to district administration can be settled at the district level. In particular, with regard to the administrative measures seeking to mitigate the influence on residents, the authorities should respond to the DCs concerned in the first instance. It should first enlist the support of DCs on those measures and then submit the proposals to the Legislative Council. This will achieve better results. However, the authorities fail to do so. The world has changed and society has changed, yet the executive authorities are still unaware of the changes. It still thinks that it can exercise its power to suppress everything. We learn from many reports in newspapers that the Government will initiate a judicial review and the judicial review will target at those Members who have voted for the repeal of the Order. We do not consider the Government has the power or the legal backing to do so. Hence, I hope that the Government can exercise more self-restraint in making comments or disclosing information in private. It should be aware that the present society, the present constitutional system and political culture are significantly different from those in 1976, and it can no longer govern Hong Kong today with the mindset of the past.

It is easy to criticize the Government, but our society should also bear the responsibility to reduce waste. Environmental protection policies always entail

a price. However, we hope that in handling these essential yet unpopular community facilities, the authorities may adopt democratic procedures in launching the proposals to enable discussion. The Government and its supporters — people who impede the development of the constitutional system — always claim that democracy means inefficiency. Yet, I am sorry to say that, the present situation rightly reflects that democracy means efficiency. Certainly, we need time to conduct consultation and allow the public to discuss the issue. On highly controversial subjects, complete openness is required to allow all stakeholders to consider who should bear the cost, what should be done to alleviate the adverse impact suffered by those affected, and how to strike a balance among various strata of society and various districts. Only by holding a completely open discussion and implementation of full democracy can the problem of overstatement of interests of certain districts be addressed to.

Deputy President, we definitely do not hope that democracy will turn into populism. But insofar as the constitutional system is concerned, the Government has been relying solely on the "pie-sharing" approach, dishing out power to their fellow man and pro-government persons. As you can witness today, these people cannot help the Government solve problems on governance. Hence, I hope the Government will realize that society has changed completely. Today, the only approach in dealing with controversial subjects is full democratization, so that the whole community can have the opportunities to get involved in the formulation of controversial policies.

Thank you, Deputy President.

MR IP WAI-MING (in Cantonese): Deputy President, we are actually at a loss about why the Tseung Kwan O landfill extension incident has developed into the present scenario, and we do not understand why the Government has allowed the incident to develop into such a state. In our view, the Government has not properly addressed the impacts of the landfill on local residents, yet it claimed that the opposition of Members and residents of Tseung Kwan O to the landfill extension project put the interests of the minority above public interests. We hope the Government would revise this saying.

Deputy President, today we support the motion to repeal the Amendment Order for the sake of public interests. In our view, if we do not send the

Government a strong message and let it understand that the public …… I think this issue is not just related to Tseung Kwan O, because there are also landfills in Tuen Mun and Ta Kwu Ling apart from Tseung Kwan O …… does the Government still solely rely on landfills for waste treatment? We think that the Government had not done anything in the past and it just relied on landfill extension to solve the problem of waste treatment. This motion to repeal the Amendment Order is precisely intended to compel the Government to seriously discuss with Members from various parties and groupings and also with the public on how waste should be treated and how the consensus reached should be conscientiously put to work. Therefore, we cannot accept the Government's saying that we have put the interests of the minority above public interests.

Deputy President, it has been more than 10 years since the South East New Territories (SENT) Landfill came into operation in 1994, in the meantime, Tseung Kwan O has developed into a new town with a constantly increasing population. In 2001, Tseung Kwan O had a population of more than 270 000, and we projected that the population of that district would increase to 490 000 in 2011. Along with population growth, the trend for transport demand by local residents has been on the increase. If the Government is determined to extend the landfill, a large number of refuse collection vehicles will inevitably travel to and from the area, causing inconvenience to local residents and seriously affecting the local environment.

As a matter of fact, the residents have suffered from odour nuisance for many years, as many Honourable colleagues have just mentioned. However, despite many years of efforts, the Government has all along failed to find out where the problem lies. Sometimes, we will inevitably doubt whether the Government has failed to find out where the problem lies or whether it has found out where the problem lies but is unwilling to make any announcement because it may be even harder to handle the problem afterwards. I believe the public can hardly identify with the Government if it does not proactively handle the odour problem. And, I can foresee that the odour problem does not only exist in the Tseung Kwan O landfill, the other two landfills also have the same problem. If the Government still fails to seriously handle the odour problem, I believe that it will most probably run on rocks in the future when dealing with the issue of landfill, be it in Tseung Kwan O, Ta Kwu Ling or Tuen Mun.

I hope that government officials and Secretaries present in this Chamber can put themselves in others' shoes. Just imagine, if you are residents of Tseung

Kwan O, can you tolerate this situation over the years, and the Government seems to be incapable to doing any rectifications. This is actually not the first time that the Tseung Kwan O landfill has extended, it has already extended a few times. We believe that the Government has to be accountable to Tseung Kwan O residents. I have asked this question many times and I will keep on asking this question at meetings: assuming that Honourable colleagues think that the relevant social responsibilities should be borne in respect of the current extension order, what should be done after the completion of the extension project in 2020? Does the Government have a definite target and a timetable for closing down this landfill? At many meetings or in private conversations, the Government just gave evasive replies and was not willing to make things clear. I trust that these questions do not just apply to the Tseung Kwan O landfill, they also apply to the other two landfills. That is exactly the reason why we sometimes find it hard to support the Government. In the long run, how is the Government going to reduce waste and how is it going to mitigate the impacts of the landfill on the lives of the residents nearby? Indeed, the Government has not given us a clear picture.

Just as a number of Honourable colleagues have said, it seems that we have to make pitiful pleads before the Government agreed to wash refuse collection vehicles more frequently, or to designate areas in the landfill for refuse collection vehicles to park in the evening. Nonetheless, we cannot help asking how the Government will make improvements so that refuse collection vehicles will not give out odour nuisance or spill out leachate in the future. Regarding the relevant concrete measures, the Government has not provided a timetable to show us how determined it is to put these measures in place. We think the Government is not resolute enough on this matter. More often than not, the Government will not do anything unless it is cornered, or if Members from various parties and groupings are …… forced to bully it into doing so, even though we are actually very refined and cultivated. Let us think this over: How can we have confidence in the Government?

As some Honourable colleagues have said, we know that a few years ago, that is, in 2005, the Government published the Policy Framework for the Management of Municipal Solid Waste (2005-2014) (Policy Framework) to lighten the burden on three landfills. What is the present situation? Facts have proven that the results are not conspicuous. Figures from the surveys conducted by some green organizations showed that 6.23 million tonnes of municipal solid

waste were generated in 2006 while 6.45 million tonnes were generated in 2009, thus we have seemingly failed to achieve the target stated in the Policy Framework of reducing the amount of municipal solid waste generated by 1% per annum. We consider the results as inconspicuous, yet according to the Secretary and other government officials, the results are highly satisfactory because the amount of waste generated has been substantially reduced. Regarding the amount of waste generated, we have not reached a consensus with the Government about the actual amount reduced or increased, and it seems that we are speaking on different things and do not match at all. In that case, we doubt what the Government has actually done. Simply put, as far as I remember, the Government gave considerable publicity to the three-colour bins a few years ago, that is, source separation of waste for treatment; but we have not heard about the bins any more later on. As I have observed, there is seemingly a decreasing number of three-colour bins on the street or in housing estates. I am not sure why, have three-colour bins already been abolished. Is it similar to the case of the provision of 85 000 flats each year which, if not mentioned, is scrapped? In fact, the Secretary should tell us whether the use of three-colour bins, that is, source separation of waste has been abolished.

According to our perception or understanding, the Government frequently starts out well but finishes off poorly. In promoting a policy, the Government seems ever victorious, yet in implementation, it lacks the energy, and very often, the policies are scrapped for no good reason. If the authorities concerned indicate that incineration or other waste separation methods will be adopted or the producer responsibility scheme will be implemented, I believe many Honourable colleagues will be supportive and they will be willing to discuss with the Government about the specific implementation details so that the measures would be acceptable to all. Nevertheless, the Government often makes a fine start but a poor finish, and no measures have been taken, how then can we be accountable to the public? For this reason, we hope the Government would make more concrete suggestions to show us its commitment, and the Government should tell us how it is going to handle waste treatment in the future. Otherwise, the Government will only give me an impression that, should we give the green light this time, it will extend the landfill indefinitely next time on the same grounds. In my opinion, the Tseung Kwan O landfill or the other two landfills would be unhealthy and undesirable for local residents and all Hong Kong people.

Deputy President, when the SENT Landfill was developed years ago, the Government had already borrowed 18 ha of land from the Clear Water Bay

Country Park for landfill purpose. As the common saying goes, "people who return what they have borrowed are upper class people", but the Government has still not returned this 18 ha of land, and now it is going to borrow another 5 ha. I would like to ask the Government when it will return the land. If it is going to return the land, will there be any interests incurred? Will the Government, in returning the land to us in the future, also pay the interest? We hope that the Government would no longer think of excising land from the country park, as the Clear Water Bay Country Park has rare geological features, we do not want the Government to ruin its geological conditions. We do not want the Government to advocate conservation on the one hand and ruin our natural environment on the other hand. The Government should not say one thing and do another.

Deputy President, though many Honourable colleagues have already spoken, I still need to say something. The Government said that it has conducted a number of consultations on the proposed landfill extension and it has received more than 3 000 submissions raising opposing views. I hope that the Government would take these opposing views seriously and we also hope that the Government would not use double-faced tactics. It should not, in turn, extend the other two landfills because we oppose the extension of the Tseung Kwan O landfill, thus dividing up Hong Kong people in different areas. This is an issue that I am most worried about. I think that the Government should regard this issue a territory-wide problem and conduct comprehensive consultation again. Our current discussions about the landfill extension have provided a desirable opportunity for the community as a whole to discuss issues on waste treatment. Yesterday, I talked with some local residents in Sha Tin and they sympathized with residents of Tseung Kwan O, they also considered that it was time to discuss issues on waste treatment and they should bear certain responsibilities. This is a positive message I received when I talked with local residents in Sha Tin. I find this incident offers a good chance for civic education, and allows us to seriously and carefully think over how we should reduce waste in the future. We should earnestly work towards waste reduction and be ready to bear responsibilities.

Lastly, I would like to talk about the legal disputes concerned. Many Honourable colleagues have already expressed their views and I do not want to go through the details here. I wish the Government would reconsider the matter because momentary slips are very common. After the motion to repeal the Amendment Order has been passed, I hope that the Government would not take the relevant actions because these actions may create a lose-lose situation as some

Honourable colleagues have just said. I hope that the Government would take our advice and consult the public afresh so that we can make rational choices as to how waste can be reduced.

Thank you, Deputy President.

MS AUDREY EU (in Cantonese): Deputy President, when Mr IP Wai-ming spoke just now, he asked us if we know why the matter has developed to this present state, he is somewhat at a loss. Deputy President, I can very explicitly say that the Government is the only party to blame for the present scenario. There are two areas concerned, namely, solid waste and administrative hegemony.

Deputy President, many Honourable colleagues have talked about the Policy Framework for the Management of Municipal Solid Waste (Policy Framework) today and I have brought with me this Policy Framework published by the Government a few years ago. When Honourable colleagues go through this paper, they will know why I am saying that the Government has single-handedly caused the matter to develop to its this present state. When the Government issued the Policy Framework, it stated that Hong Kong had an imminent waste problem, and the paper also set out the strategies, targets and timetable. Mr IP Wai-ming has just said that the Government only gave evasive replies when he raised questions relating to the timetable concerned. Of course, the Government has to give evasive replies because it has not implemented the timetable, it has not achieved the targets set and it has not put the strategies into practice. So, when we ask the Government today what will be done in the future, the Government fails to give us an answer. This is precisely the reason why we are having a discussion now.

Deputy President, at that time, the first target set by the Government was to reduce the amount of waste generated. According to the Government, its target was to reduce the amount of waste generated by 1% per annum up from 2004. Deputy President, I have drawn up a chart for the Government. It showed that from 2004, from 2005 to 2009, the current year is 2010, if the amount of waste generated is to be reduced by 1% per annum, the amount of waste should have constantly decreased from 5.71 million tonnes to 5.65 million tonnes, and then to 5.6 million tonnes, 5.54 million tonnes and 5.49 million tonnes as shown by the

green line in the chart. However, what actually happened is that the amount of waste has been increasing from 6.01 million tonnes to 6.22 million tonnes, and then to 6.25 million tonnes and 6.60 million tonnes as shown by the red line. The amount of waste in 2009 should be 6.40 million tonnes. Hence, the Government has failed to achieve the first target. As regards the third target, that is, to reduce the total waste disposed of in landfills to less than 25% by 2014, certainly the Government can in no way achieve this target, thus, the landfills have to be extended.

Deputy President, let us take a look at the strategies of the Government. The Government had many strategies at that time and it also formulated timetables for these strategies. Deputy President, the Government said that we could consider introducing landfill disposal bans (which disallowed waste disposal at landfills). The Government also proposed introducing legislation on waste charging by 2007. Back then, the Government told us that consultations should be conducted to find out how charging could be implemented, and whether charges should be imposed on the basis of the amount or frequency of waste collected, or on other basis. These issues were extremely controversial. Deputy President, the Government proposed to introduce legislation on waste charging in 2007 and now, it is 2010; however, the Government has even failed to conduct consultations throughout these years. In fact, Friends of the Earth has recently conducted a survey to find out if various parties and groupings within the Legislative Council would support the mode of charging according to the volume of the waste collected. In fact, some parties and groupings (including the Civic Party) have indicated that this practice should be considered and adopted. This is because waste management is the responsibility of each and every person, including the Legislative Council and political parties. Yet, the Government must take the lead to do something. As explicitly stated in this paper, we should offer incentives and consider direct charging in order to reduce waste. As a matter of fact, a lot of public money is spent on waste treatment each year. So, one of the methods is to legislate on waste charging. Yet, the Government has never conducted consultations in this connection.

Besides, concerning advanced treatment facilities (that is, incinerators), there have all along been empty talks without actual implementation. Deputy President, the Government also had a timetable for the implementation of the producer responsibility scheme a few years ago, and I have brought the timetable with me today for illustration. According to the legislative timetable, the producer responsibility scheme should be implemented in 2007, 2008 and 2009.

As we can see, according to the timetable, the producer responsibility scheme for electrical and electronic equipment, vehicle tyres and plastic shopping bags should be implemented in 2007; the producer responsibility scheme for packaging materials and beverage containers should be implemented in 2008; and the producer responsibility scheme for rechargeable batteries should be implemented in 2009. From the above timetable, we have only implemented the scheme for plastic bags.

Deputy President, only phase one of the scheme for plastic bags has been implemented. According to the Government, phase two will be implemented after a review but we have not heard any news yet. Deputy President, this explains why I have said that the Government has been procrastinating on the issue of municipal solid waste, it has not worked according to the timetable set out in the Policy Framework, leading to the present situation.

Deputy President, I am not going to talk about the use of polyfoam meal boxes by many schools, nor the recovery of glass bottles. A number of Honourable colleagues have talked about the problems after the recovery procedure. Actually, we are not having a comprehensive discussion about the policies on solid waste today. As we have noticed, the controversies today have arisen because the Government has always failed to tackle the matter seriously, and it has kept extending the landfill without given much thought. Furthermore, as many Honourable colleagues have talked about the landfill issue, I am not going to repeat what they have said. The Government has not dealt with the odour problem since 2004, even though it realized long ago that this subsidiary legislation would be highly controversial.

When the Government really introduced this subsidiary legislation into the Legislative Council, a subcommittee was set up to discuss the subsidiary legislation and a consensus was reached. We told the Government that this course of action would get us nowhere. What did the Government do? It adopted hegemonic administrative measures, this is the second reason why I said that the Government had created the present situation. All of a sudden, the Government relayed to us the legal advice that the Legislative Council did not have the authority to repeal the subsidiary legislation. Deputy President, I have been working as a lawyer for so many years and I have always have such an impression: when a person presents me with a legal advice, telling me that it is a legal provison and that is what is stated in the law, ordinary people or those who

do not know the law may wonder, after listening to his remarks, if there is anything wrong because it seems not quite normal and is a bit anti-intellectual.

Deputy President, such a legal advice must be highly problematic. Legal advice should be reasonable, rational and have a sense of justice. If ordinary people cannot understand it, the legal advice should be highly problematic. If Honourable colleagues do not believe that, you can talk with ordinary people. The Government has introduced a piece of legislation into the Legislative Council and it tells us that the Legislative Council does not have the power to repeal it; even if the legislation is not in order, the legislation must still be passed and it is going to force it through. Even though the Chief Executive knows that the legislation is not in order, he can only introduce but not withdraw the legislation. Even the common folks will query about this and doubt if this is what the law is about.

Deputy President, my understanding is very simple. It is specified in Article 62 of the Basic Law that the Government of the Hong Kong Special Administrative Region shall exercise the powers and functions "to draft and introduce bills, motions and subordinate legislation"; and Article 73 specifies that the Legislative Council shall exercise the powers and functions "to enact, amend or repeal laws" in accordance with the provisions of this Law. Since these powers have been very explicitly stated in the Basic Law, why can the Government not withdraw the subsidiary legislation it has introduced; why can we not repeal it, and why must it be forced through? This also sounds irrational to ordinary people.

Deputy President, it is even more irrational that, in respect of the country parks boundaries, the Government borrowed another 5 ha of land after it had previously borrowed 18 ha of land. When Miss Tanya CHAN, Mr Ronny TONG and Ms Cyd HO just spoke, they pointed out that the legislative intent and spirit of the Country Parks Ordinance were to protect the natural environment. All of a sudden, the Government has introduced a legislation to use a part of a country park area for landfill purpose. It has also told us that we cannot repeal the legislation and we have to accept the use of 5 ha of land for landfill purpose. Ordinary people who have heard this would be at a loss and they would ask why that is the case. If the Government is telling us that we cannot do something rational or something that has a sense of justice under such circumstances, I think that we would rather go without the legal advice.

Deputy President, it is reported in the press that the Government may sue the President of the Legislative Council and Members who vote in support of this motion to repeal the subsidiary legislation. Many people have earnestly implored the Government not to do so. Deputy President, I welcome the Government's act and I will just say "come on". I am going to vote in support of Miss Tanya CHAN's motion and I welcome the Government's act of suing us. In my view, only a very foolish government will do so because the Government is going to lose after all, regardless of whether it wins or loses the lawsuit. This will not solve the problem, Deputy President. It is crystal clear that we must tackle the solid waste problem.

Deputy President, as I have just mentioned, this is not just the responsibility of the Environmental Protection Department or the Environment Bureau, it is actually the responsibility of the Government, political parties and the Legislative Council. Waste treatment is the responsibility of each and every person. A lot of things are agonizing, Deputy President, and a lot of environmental protection legislation involves arduous work. A simple issue such as switching off idling engines has gone through numberous consultations throughout the years, and a lot of time has been spent on it. All of us are responsible for implementing these environmental protection policies, but we should also consider the people affected during the process. Hence, not only the Environment Bureau should be responsible, as I have just mentioned, the Education Bureau should also help to handle the use of disposable meal boxes by schools; the Lands Department should help in solving problems relating to land, amongst others, in the course of waste recovery, and other bureaux should also help to solve the various problems related to the EcoPark.

Deputy President, I absolutely agree that we should sit down to discuss how to deal with this major issue. After the delivery of the Policy Address, I expect the departments in charge of different policies will have discussions with Members. As solid waste treatment will be one of the very important issues, I hope that discussions can be held at meetings of the Panel on Environmental Affairs. As the Order concerning the subsidiary legislation on country parks has already aroused the concern of all Hong Kong people on problems of odour nuisance and waste treatment, the Government should make good use of this opportunity to work out an overall plan as soon as possible.

As I have just said, the Government is seriously lagging behind the Policy Framework formulated a few years ago, as the timetable and various policies

have not been put into practice. The Government should put in extra efforts and expeditiously submit a new policy framework to us, and provide a new timetable telling us its overall plan to reduce waste. Recycling involves "recovery" and "reuse". The Government should not just consider landfill extension. When the extension of the Tseung Kwan O landfill is unfeasible, it should not consider the extension of landfills in Nim Wan or other places. It should also consider incineration and waste charging. The Civic Party and the relevant experts whom we know are very pleased to present our views and discuss with the Government. We do not want to go to court later to find out if we have the right to repeal the legislation because we will get nowhere. If the motion moved by Miss Tanya CHAN is passed and the subsidiary legislation is subsequently voted down, the Government must also consider how waste will be treated. On the contrary, if the subsidiary legislation is passed, the Government also needs to consider how it will submit a funding application to the Finance Committee for the landfill, which is going to be a difficult problem to be solved. Thus, instead of arguing with us about constitutional issues, the Government might as well deal with the waste problem practically.

Deputy President, I would also like to put on record, after listening to Honourable colleagues' remarks, I think that Miss Tanya CHAN's motion to repeal the subsidiary legislation would be passed. Should the motion not be passed, and if anyone changes his mind or momentarily disappears or has stomach ache so that he cannot vote to support Miss Tanya CHAN's motion to repeal the Amendment Order, the Civic Party will walk out and we will not participate in the subsequent discussion on the Government's motion about deferring the commencement date of the Amendment Order to 2012 because we do not think the problem can be solved by deferring the commencement date.

MR ALBERT CHAN (in Cantonese): Deputy President, the Tseung Kwan O landfill problem has fully reflected that the SAR Government has serious flaws in handling social policies, as far as administration, policy or legal aspects are concerned. In terms of handling skills, as Mr IP Wai-ming has put it, the Government has acted very foolishly. Considering the period of time which Mr IP Wai-ming has served in the Legislative Council, I think it is a classic example for him to use such strong words in the Legislative Council to criticize the Government's foolish act. The Government should learn from the bitter experience, it should solemnly and seriously reflect on why a functional constituency Member from the Hong Kong Federation of Trade Unions would

raise such a strong criticism. He has used the word "foolish" for at least five to six times. If I were him, I would use much vulgar words, words which are unsuitable to be used in the Chamber at the moment, but I will later use such words in online radio station.

Deputy President, as regards the Tseung Kwan O problem, I must first speak highly of Tseung Kwan O residents, in particular residents of LOHAS Park. They have mobilized other residents to send emails to Members, so that every one of us can have a thorough understanding of the problems faced by the residents. Otherwise, the Government would have briefly brushed aside the problem with a few words, or with some plausible replies and misleading information. I hope that in the end, many Members will be persuaded by the residents and support the repeal of the legislation, that is, support the motion proposed by the Subcommittee to repeal the Order.

I wish to talk about three aspects, one of which is about the Government's blunders. The Subcommittee has repeatedly discussed the administrative blunders. Over the past decade or so, many people have complaint about the problem, but the Government has taken them lightly and dealt with the matter perfunctorily. It was not until the matter was under the scrutiny by the Subcommittee did the Government start making more concrete commitments. Actually, if the Government had adopted a serious and sincere attitude and if the Secretary (in particular the Under Secretary) had handled similar problems seriously instead of making window-dressing gestures, and had they made more site visits in person, the departments concerned would not be able to muddle through their jobs. Right?

The Secretary and the Under Secretary may occasionally be present in some places for "putting up a show", but they do not really understand the problems the residents are facing. It is thus very easy for some departments to muddle through the improvement measures without solving the problem at all. If the departments as well as the Secretaries of Departments and Directors of Bureaux could be more serious with their jobs, the measures might have already been properly carried out and the problem would not have turned into a political crisis and a disgrace to the Government. Right?

I believe since the establishment of the SAR Government, today is the first time that the Legislative Council seeks to repeal an Order made by the Chief Executive by means of vetoing a piece of subsidiary legislation. This can be

taken as a slap on the face of Secretary Edward YAU, or a slap on the face of Donald TSANG by Secretary Edward YAU. Actually, under the accountability system, the Secretary concerned should resign to take on the blame. Right? Being the Secretary, he has created this problem and then he claimed that this act might possibly be illegal. He has resorted to different means, including administrative means, policy means, the legal wrangles, in order to assume a high profile. If the motion is passed by the Legislative Council and the legislation was successfully rescinded in the end, the Secretary and the Under Secretary should both resign to assume the responsibility because they have turned the matter into the point of no return. Right? I am already being decent by not asking them to commit hara-kiri. Hence, as far as this issue is concerned, it is caused by the stupidity and foolish acts of the Government. I thus hold that Donald TSANG may not need to resign, but the Secretary and the Under Secretary should definitely resign.

Let us return to the question of how the entire Government has handled the waste and refuse problem. In fact, I have repeatedly pointed out at meetings of the Subcommittee and on other occasions that we have been dealing with environmental problems for many years. I have dealt with many such problems in the Legislative Council since 1991. Whenever a new Secretary of Department, Director of Bureau or Permanent Secretary took office, they learnt everything afresh as if they were a novice. Some issues have been discussed time and again for one or two decades. But when a new Permanent Secretary, Secretary and Under Secretary assumed duty, they acted as if they have just learnt the ABCs of the issues.

When we discuss how to deal with wastes, we are talking about incineration and landfill disposal. The discussion started as early as the mid-1980s. In the area of waste treatment policy, the Hong Kong Government lags far behind other advanced regions in the world.

A readily example is that, back in 1988 when I was not yet a Member of the Legislative Council, I had already put forth proposals in this regard and Mr LAU Kong-wah knew very well about my proposals. At that time, Members of the Regional Council made a duty visit to Japan. We saw that incinerators in Japan could generate electricity for heated swimming pools and all government buildings in the region. That was in 1988. After coming back from the duty visit, I asked at a Regional Council meeting whether incinerators operated under the Regional Council could generate electricity. The Government's reply was

negative, saying that electricity supply was franchised to the electricity supply companies. I was not saying selling the electricity. I was only saying electric power generation. In the 1980s, the Hong Kong-British Government had pledged to protect the interests of the two electricity supply companies. Thus, the Regional Council, as a statutory body, could not even propose the construction of incinerators to generate electricity.

After that, the Hong Kong Government changed its policy from waste incineration to landfill disposal. At that time, some European countries had already begun to question the effectiveness of landfill disposal. Moreover, there was also information then on the environmental impacts of incineration, indicating that incineration could be more environmental friendly and had more environmental benefits. Thus, proposals were made to request the Government to consider the approach of waste incineration instead of landfill disposal.

However, the Secretaries of Departments and Directors of Bureaux of the Government at that time had been changing one after another. I do not remember whether the officer in charge at that time was Bowen LEUNG or someone else, but his successors had been changing and the incumbent Secretary is Mr Edward YAU and the Under Secretary is Dr Kitty POON. The same situation also applied to the Permanent Secretary for the Environment. At one time, the Permanent Secretary was transferred from the Leisure and Cultural Services Department, his scope of duties changed from sports to environmental affairs. As a result, issues which were discussed before have to be discussed all over again.

Some time ago, when Secretary Edward YAU made a policy update at a relevant committee, he said that this problem was new, but I pointed out that this problem had been discussed in the early 1990s, so I asked him why he found this new. Hence, in discussing these problems …… Maybe, we are getting old, and old people have the problem of repeating themselves. The same is true for me. I am becoming garrulous and I am repeating the problems which we have discussed many times. However, to those new public officers, these problems are new to them and they feel very excited; in fact these problems are old issues and can be discarded like trash.

The problem of incineration has been discussed over a decade. While many developed regions overseas have successfully changed their mode of waste

treatment from landfill disposal, Hong Kong is still studying this mode of treatment. Can there be a change?

As regards the issue of waste separation, it has been discussed for many years. In 1986, for the first time, I …… at that time, schools and recycling companies were working hand in hand to collect old newspaper at local districts at the price of $0.10 per catty by weights. That was in 1986. Under Secretary Kitty POON, we started doing this in 1986. We proposed at that time that the Government could implement waste separation. Unfortunately, there is no concrete answer to date.

Although waste separation is somewhat implemented now, sometimes those waste separation companies really drive you crazy. The three waste separation bins are found in many places to collect aluminum cans, glass bottles and waste paper *(some Members in the Chamber reminded him that it should be collecting plastic bottles)* …… plastic bottles, but what I find ridiculous is that the waste paper, the plastic bottles, are put in a large black plastic bag, big enough to put me in, before being taken away by trucks.

Today when I was driving to the city from Tung Chung, I saw large black plastic bags on the road side, people still put twigs and leaves cut from plant into these plastic bags. When I was studying in Canada, degradable plastic bags were already in use and large plants trimmed were carried away by trucks for treatment but not for disposal at landfills. In fact, I raised this question to Secretary Edward YAU last year in this Chamber and I told him the places where plastic bags were used. It has been over one year now, but the Government still uses those black plastic bags in public works projects carried out by its contractors. If so, how can the Government promote environmental protection? How can it convince me about landfills? Because of the Government's connivance of these contractors and its administrative blunders, wastes which should not be disposed at landfills are now being disposed there. In fact, the wastes which should be dumped at the landfills are those "dud officials". It is a right move to dump those "dud" Secretaries of Departments and Directors of Bureaux at landfills. They are a waste of tax payers' money. They slow down the progress, which in turn affect the environment. I believe hardly any Members in this Chamber who are familiar with environmental policies and environmental development will oppose changing the mode of waste treatment to incineration because this is the prevailing trend. Yet, before changing from the

mode of landfill disposal to incineration, the Government must properly carry out waste separation. This is an indispensible step.

When we went to Taiwan in the 1990s (I did not remember whether CHEN Shui-bian or MA Ying-jeou was the mayor at that time), waste separation was launched. I then asked myself, "Will this be successful in a place of Chinese people?" In the end, waste separation has been successfully launched in Taipei City of Taiwan. Food waste and dry and wet wastes are separated and the dry wastes are further separated. While they have already succeeded in changing the mode of waste treatment, Hong Kong is still in a state of day-dreaming, lagging far behind Taipei City. This proves that the administrative capacity of the Government is very weak.

As regards the legal issue, many Members have already spoken on it and I will not repeat. As I have said at meetings of the Subcommittee, if the Government has the guts, just do it. However, Members, do not think that the Government does not have the courage because it has a last resort, that is, it can submit a report to the State Council proposing that a request be made to the Standing Committee of the National People's Congress (NPCSC) for an interpretation of the Basic Law. Right? No matter at which court level we have won the case, the "NPCSC interpretation" will become the final judgment. If the Legislative Council does not have the power to repeal this Order made by the Chief Executive, the Government will resort to this final move. Right? Anything can happen, from administrative hegemony to administrative autocracy. With the NPCSC's backing, can the Government not be autocratic? Hence, when Ms Audrey EU spoke just now, I wanted to remind her not to be so assured. Will the Government be fear of losing? No, it will not. An autocratic and overbearing person is not fear of losing. How will a brazen and shameless person be fear of losing? Right? The most important thing to the Government is to control and manipulate everything. LIU Xiaobo has been sentenced to 11 years of imprisonment, should governance of the Communist Party be feared? Hence, I am a little worried. If the Government is autocratic, I cannot rule out the possibility that it will ultimately seek the "NPCSC interpretation" by laying the matter before the court, rendering the Legislative Council …… may even abolish the Legislative Council and dump it at landfills. I have also raised this point in the previous meeting of the Subcommittee.

Last but not least, Deputy President, I wish to raise one more point. Over the years in this Chamber when we have to vote on the relevant legislation or

works projects (including this time), the Government has only lost twice. The first time the Government had lost in the voting even after its active promotion is the project on Route 10. Route 10 is directly linked to Sun Hung Kai Properties Limited. Under the influence of this property developer, a number of pro-government Members voted unanimously against the Government and ultimately rejected the funding application for Route 10. That was very strange. Some district Members, who had been saying that they would fight for the construction of Route 10, voted against its construction in this Chamber. How ridiculous this was. At that time, the pro-democracy camp supported the government proposal to construct Route 10, but the pro-government Members were unanimously against it. That was absolutely ridiculous.

This time I do not know which consortium is working behind the scene. I do not have the information and evidence. Which consortium does the LOHAS Park belong to? The situation this time is unusual. Members from the real estate sector as well as the engineering sector have unanimously supported Miss Tanya CHAN to propose a motion to repeal the Amendment Order and they are against the Government. It is hard for me not to suspect whether there is someone working behind. Despite the fact that the Government has attached great importance to this matter and it has resorted to powerful lobbying and high profile mobilization, and even raised the question of legality as an argument, many pro-government Members are still unanimously against the Government. Are public views and public aspirations powerful enough to do this? By the power of Tseung Kwan O residents alone, can they do this?

Of course, I speak highly of Tseung Kwan O residents, in particular the residents of LOHAS Park, but there may be someone giving a helping hand behind the scene. As a result, I am able to see for the second time since 1991 that a major policy and decision of the Government being vetoed by the Legislative Council. The two times have been put on record and both times are related to the consortium.

DR PRISCILLA LEUNG (in Cantonese): Deputy President, regarding the Tsueng Kwan O landfill, I think the main concerns are related to legal and environmental protection issues. First, I would like to express some of my views on the legal dispute concerned.

Let us look at the opinions of Michael THOMAS, QC, SC, who opines that the Legislative Council is not empowered to repeal subsidiary legislation. I think this clearly reflects the constitutional convention in Hong Kong. Actually, after the Basic Law came into effect on 1 July 1997, changes had taken place. Prior to the reunification, Hong Kong had an unwritten constitutional convention. Hence, Members may notice that his whole discussion evolves around the provisions in subsidiary legislation, and the argument is developed on this point. However, after the Basic Law came into effect on 1 July 1997, I think certain principles have indeed become crystal clear. For instance, it is stipulated in Article 8 of the Basic Law that the laws previously in force in Hong Kong, including the common law, rules of equity, ordinances, subordinate legislation and customary laws, shall be maintained, but if any of that contravene the Basic Law, the Basic Law shall override.

Another provision that touches on the powers and functions of the Legislative Council, which I think is also very simple, is Article 73. It is stated unequivocally in Article 73(1) under the Basic Law that the Legislative Council has the power to enact, amend and repeal laws. Regarding the above two provisions under the Basic Law about the power of the Legislative Council in scrutinizing subsidiary legislation, I personally think that this is not quite controversial. It is clearly a problem about the constitutional framework. How come two members in the legal sector whom I greatly respect have raised two distinctive views? In my opinion, the point mentioned by Ms Cyd HO earlier that the political environment in Hong Kong has changed is only part of the reason; the other part is that the clear provisions under the Basic Law have caused subsequent changes in the constitutional framework. I think this is the first problem.

The second problem is, will the present dispute lead to a constitutional crisis? The answer may be a "yes" or a "no". This is because many Members will vote for the repeal of the Order today, probably more than two thirds of the votes. Regarding the constitutional disputes on such fundamental issues, even if it has to be taken to the court, I think it is no big deal. In other countries, constitutional disputes or problems of great significance may arise, and there is always the first time, but that may not necessarily lead to a constitutional crisis. Hence, personally, I respect that the Government should make its own decision.

Concerning this legal issue, to be honest, you may ask 10 members from the legal sector, they will give you 10 different views, even if they do not

consider the issue from the political perspective, they would also like to know how the problem will eventually be dealt with. So, all of us would like to have a clear definition. However, the Government does not only consider the issue in the legal context, it will have to consider whether it is worthy to waste time on the present dispute over the repeal of the Order after today and the cost to be borne by society. In my view, the Government can examine these concerns in detail on its own accord.

The present dispute has indeed brought to light another problem, that is, the authority between the executive authorities and the legislature. Many people have pointed out that regarding the problem involved, especially in connection with the subsidiary legislation, should the word "shall" necessarily be interpreted as "must". In my view, it is true that in certain circumstances, the Chief Executive has to sign certain motions passed by Members. After the Third Reading by the Legislative Council, the Chief Executive only has limited room to exercise discretion. According to the constitutional convention, he has to sign the legislation before gazettal. But there is still the problem of upper-level laws and lower-level laws. Hence, being the upper-level law, the Basic Law overrides any other laws, and the Legislative Council absolutely has the authority to exercise the powers conferred by the Basic Law to examine and even repeal subsidiary legislation.

Despite that, the present case has brought forward a more fundamental problem, that is, the executive authorities actually needs to have certain discretion. In this connection, as Members of the Legislative Council, we must understand that if the executive authorities lack administrative discretion, the effective implementation of many issues will be made impossible. But in certain circumstance when the power and authority are conferred by subsidiary legislation, the Legislative Council definitely can exercise its power conferred by law to examine the legislation. Will the problem eventually be settled through judicial channels, or will this problem recur in future? I believe the outcome today is not necessarily a conclusion. In view of various considerations, the Government eventually may not initiate a judicial review this time, but the same problem may arise again in future. Hence, according to my study in the law, I think this "first time" pursue is indeed worthwhile.

The second issue is on environmental protection. Since I have only been a Member of the Legislative Council for two years, I earnestly hope that the

Government can provide me with certain information. According to the information provided by green groups in the community, it is said that in the 1990s, the Legislative Council had approved the lease of several hundred hectares of land for use as landfills, and the funding approved at the time almost exceeded $10 billion. I do not know how true such information is. They pointed out that according to the projection in the 1990s, the landfills could be sustained till 2046. But now, the Government needs to borrow 5 ha of land in the country park for landfill purpose. In other words, the several hundred hectares of land approved back then had been used up and the volume of waste produced by us has been tremendous. The several hundred hectares of land was not referring to the country park but the site approved at that time. Dr Raymond HO pointed out earlier that the site concerned was around some 200 ha. Hence, I hope that the Government can give an account of that part of the history for Members' reference.

However, if the 5 ha of land now in question refers only to country park land, or the land which had previously been on loan to the Government, then "it is not difficult for a borrower who returns what he has borrowed to borrow again". However, the issue now in question involves land appropriation, and Members naturally have to think twice. From this perspective, country parks are the assets of the public, and Members must keep a watchful eye.

As for this motion, under normal circumstance, I believe the motion today will be passed, and after that, most of the proposals raised will be on requesting the Government to consider the construction of incinerators. However, in considering the construction of incinerators, I would like to point out that China has signed the Copenhagen Accord and we are obliged to reduce our emission. Regarding the maximum reduction in emission, if the incinerators used in Hong Kong is not advanced, it will indeed increase the pressure on emission.

Hence, if incinerators are eventually built, I think it must adopt the most advanced technology. Some colleagues mentioned earlier that we have conducted some studies in this respect. It is known that incinerators using the most advanced technology can utilize dioxin and part of the heat energy for power generation — it is mentioned earlier that the power generated can be supplied to swimming pools. We notice that there are many incinerators in Japan, which implies that the arrangement is feasible in principle. Hence, I think incineration has become a world trend, but the best technology must be

applied, if not, emission will be increased. For this reason, a pre-condition must be laid down in this aspect.

Moreover, I agree that more effort should be put in upstream work, which means waste separation. In the international community, a lot of businessmen in many countries find that with proper waste separation, refuse is money. Many businesses are actually related to waste treatment and huge profits can be gained.

In relation to waste separation, I think it should start with education. How to start with education? First, ancillary facilities for waste separation should be provided. The Government should put in place some incentive policies. And in respect of transport, storage and the dismantling of refuse and related processes, advanced technology should be applied. Why do I keep emphasizing the use of advanced technology? For high-technology facilities can really solve the present problem of offensive and intolerable smell emitted from waste. Moreover, if we address the problem of waste management from downstream, the capacity of landfills will always be an insurmountable problem.

In addressing the source of waste, I wish to point out that the Government may consider offering tax reduction in the recycling of plastic bottles, or introducing other incentive measures, such as the offering of tokens. I notice that tokens are used as a means in some Western countries. When the public return the tokens, they will enjoy discount on their purchase. This is what I mean that environmental protection should be started with education. It is definitely most desirable to start with the public. If this concept is not instilled in the public, we will experience another failure when landfills are required to be built in every district eventually in future, as mentioned earlier.

I once lived near the seaside and have witnessed the deterioration of the quality of marine water in Hong Kong. Twenty years was a short period of time, but changes are tremendous; the beaches I used to go swimming are no longer suitable for swimming now, and a number of high-rise buildings have been built there. The bad smell gives off by sea water is really disgusting. Today, it is the first time the Legislative Council confronts the Government over this issue. We should handle this issue with equanimity. The most desirable approach to address the issue is to focus on solving the problems of waste and refuse treatment. Let us start from waste reduction at source, from implementing

incentive policies and from applying high-technology. By doing so, I believe the chance of entering into this deadlock again in future will be largely reduced.

Deputy President, I so submit.

MR FRED LI (in Cantonese): Deputy President, I am not the spokesperson of environmental protection, and I am not responsible to scrutiny this piece of legislation. Nonetheless, I live in Tseung Kwan O, so I think I am the most qualified person to speak on this topic. And yet, I do not own any flat in LOHAS Park. Why would I buy a flat on that site knowing the problems there, right? It is nothing but a lie to say that the environment makes people feel relaxed and delightful.

I live in Hang Hau, and one may smell the stench at the property estate Oscar By The Sea near Hang Hau. And yet, Oscar By The Sea is quite a distance from the landfill, so anywhere nearer to the landfill will certainly have stronger smell.

What I want to say, and I hope that the Secretary will be aware of, is the two points which I often mention: First, the Wan Po Road [1] is not environmentally-friendly at all. This is indeed very ironic. When I drive home every day, I will pass through one section of Wan Po Road. I have a number of observations, Secretary. First, you said that actions are now taken, yet actions should be taken long ago. Numerous refuse collection vehicles travel on this road each day, dripping leachate and spattering waste. Sand and silt may also fall from the dump trucks. Actually, I should claim compensation from the Government as the rock debris on Wan Po Road, which I drive through daily, has left paint scratches on my car. I think drivers using this road should know what I am saying.

Besides, what is most annoying, I think I am not the only one to have this feeling, that is, private car drivers hate to have refuse collection vehicles preceding them, because they must turn on the air-conditioners and close all windows. It is impossible to open the windows and turn off the air-conditioner even if you wish to save money. What is more, if you are driving behind a

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[1] "Wan Po" is the transliteration of the Chinese characters "環保", meaning environmentally-friendly.

refuse collection vehicle on a slope heading for the Tseung Kwan O Tunnel, I guess all drivers will try to escape. The reason is very simple as there will be emissions, waste spattering at any time and leachate dripping, and they give off foul smell. How come the refuse collection vehicles of this civilized city are like this? I know many of these vehicles are privately-owned, but not all of them are government-owned with the "AM" prefix.

Do refuse collection vehicles of the Government have no problem at all? No, but they are better than before. They used to be pretty bad, but improvements have been made. Yet, those privately-owned vehicles are still unsatisfactory in terms of repair and maintenance. I have no idea why this is so. Is the Government not aware of this problem? I really do not know if the Secretary is aware of it.

Firstly, the refuse collection vehicles may be a possible cause for the foul smell filling the air around the landfill and the surroundings of Tseung Kwan O. However, the landfill is just one of the sources for the odour, but it is not the only source. The refuse collection vehicles running in the area also cause problems.

Secondly, after dealing with the Secretary for so many years, I get to know some waste recyclers who used to recover wastes near Tseung Kwan O on a very large scale. Wastes from demolished restaurants or office buildings will be separated by these recyclers, who will then keep the usable or salable wastes instead of sending them to the landfill. Only those wastes with no recyclable value will be dumped at the landfill. This practice has supported the livelihood of a large number of workers and the business operation of many companies, it has also extended the lifespan of landfills as many valuable wastes need not be dumped.

However, all waste recyclers have left Tseung Kwan O. Why? They were driven out of the place because of the implementation of another government development project. I had strived to extend their lease time and again, and had succeeded to postpone it for one year. In September this year, however, the last waste recyclers closed down his business, all his employees were dismissed and the trucks were sold. I just called him. First, this employer is still unemployed; second, he used to resell a large amount of wastes every day, and such wastes need not be sent to the landfill. Today, however, I am sorry, everything is directly sent to the landfill.

In that case, is it a bit contradictory for you to say that the lifespan of the landfill has to be extended? You drove the waste recyclers away without making any relocation arrangement, or simply relocated them to the Stonecutter Island or other places, causing difficulties in operation. As regards the Government's provision of land to be tendered by these recyclers, they actually have to submit tenders all over again, because the Government is afraid of being accused of favoritism, and hence it is reluctant to provide any operating concessions. So, the waste recyclers are required to submit tender again to apply to the Lands Department for a short-term lease.

However, as these sites concerned are far away from the Tseung Kwan O Landfill, how can they operate then? While this can euphemistically be described as a relocation arrangement which provides them with a place to operate, it is not practicable at all. What is the point of driving them away? The authorities said that the area would be used for low-density development, I wonder if luxurious flats would be built in future. I have no idea at all. What I am saying is that when someone is being driven away by one department, there is nothing another department can do. The resumption of land has nothing to do with the Lands Department, it is a matter of the Development Bureau. The Bureau expelled those recyclers by terminating their lease for its own development. As a result, this waste recycler who used to the most well established trader and was well motivated for the recycling trade, had to cease operation. He even sold his refuse collection vehicles. Is this very sad, is it a lose-lose situation? A group of workers have lost their jobs, a company had to cease operation, and the waste will be sent to the landfill without sorting. Is that what we want to see? Today, the authorities claim that there is a need for extension, and they have to acquire 5 hectares of land from the country park on the ground that the landfill will soon reach its capacity.

I therefore wish to make a speech here, but I am not going to use up the 15 minutes of speaking time. I want to make an open appeal, the Secretary should liaise with the Development Bureau, they should not simply act in a board-brush manner, and they should not just drive people away and take the land back. And when these people asked for the provision of land, they should not be relocated somewhere arbitrarily. This simply does not work. It will be most efficient and effective to carry out waste sorting near the landfill. This is because the waste should be sorted before the refuse collection vehicles enter the landfill. This arrangement actually serves a gate-keeping purpose. Now, this purpose cannot be served as many waste recyclers have left the trade. Those who remain

are operating on a very small-scale and in a piecemeal manner, their contribution is limited. An enormous amount of wastes, especially industrial and commercial wastes, will now be sent to the landfill directly, which is extremely regrettable and pitiable.

I therefore wish to speak for them and have my words put on record. Is it possible for the authorities to expeditiously identify and provide them with sites near to the landfill so that they can conduct the recycling business, with a view to relieving the burden of the landfill? This is better than eyeing the land of the country park.

I think this approach will win the applause of everyone. On the other hand, it is pretty easy to monitor the vehicles using the Wan Po Road. Once staff is deployed to monitor Wan Po Road, the vehicles which drip leachate or drop refuse on the road will be identified and prosecuted. In my opinion, it is the lack of monitoring of the situation that has made the residents (including me) so sick of the nuisances, and this is why so many of them rose to opposition. I live in Hang Hau and do not smell the stench. Honestly speaking, I am basically immune from the stench. And yet, the nuisances caused by the refuse collection vehicles do exist every day, which is indeed a by-product of the landfill. I just want to say that I am not making sarcastic comments, I just wish to point out that even Tseung Kwan O residents living far away from the landfill have bitter complains to make. I so submit.

MR LEUNG YIU-CHUNG (in Cantonese): Deputy President, I have listened to a radio phone-in programme recently. A member of the public told the host that landfills were certainly unpopular, but if they were not located here, they would be located elsewhere, right? He said that no matter where the landfills located, there would certainly be opposition from local residents who were unhappy. Yet, where else can it be located? Does it mean that local residents should accept rather than object to the extension of the existing landfill?

Recently, there are again reports in the news media that, in view of the future seat of "super Members", people are taking this opportunity to rise to the fore by making a fuss of some common issues, such as the extension of landfill, with the ultimate aim of gaining public attention.

Deputy President, both my living and working places are not near to the landfill. Neither is my constituency. I am a Member of the New Territories West geographical constituency, not New Territories East. Nonetheless, I do wish to express my strong opposition against the Government's latest move. The most important reason is that apart from the foul smell that causes nuisances to local residents, there is also another problem, and that is, what will happen if the proposed extension is endorsed today? Extension is indeed not a permanent solution to the problem as the landfill will reach its capacity one day. Similarly, the wastes that have yet to be dealt with will be disposed of elsewhere, this will likewise cause offensive nuisances to local residents. What to do then? In that case, there will also be local opposition.

Hence, the question is not simply that we oppose the extension because of local opposition, the argument is not that simple; we have to examine how wastes are disposed of by the Government from a long-term perspective, which is of paramount importance. In fact, I can see that over the years, the Government has adopted an attitude of "dealing with the problem only when it arises" in the area of waste treatment. It does not pay heed to people's anxiety and takes actions, and it has not formulated any long-term plan to address the issue.

Insofar as the Tseung Kwan O landfill is concerned, why would I raise such criticism against the Government? In fact, even if the problem of the saturation of landfill sites is not mentioned, the foul smell has actually existed for many years. I have heard Ms Emily LAU saying time and again, "I will have to tell my maid again tonight that the place stinks." Not just Members, many members of the public, residents, friends and colleagues — my colleagues also live there — have complained to me time and again that the smell of the place is really so obnoxious.

And yet, what has the Government done? As we all know, a lot has been done by the Government lately. Let us not talk about the effectiveness of its acts, it has really put in extra efforts these days. The Government is always like this. I am not saying that the authorities act like a person "embracing Buddha's feet at the eleventh hour", this is nonetheless very often the case. Action will be taken only when problems arise, otherwise there will be delays after delays. This is exactly the case of the existing waste disposal problem.

Why does the Government adopt such a dilatory attitude and turns a blind eye to the waste recycling problem? I recall another case which the Secretary

might not be aware of as he had not taken up the post at that time. Before the reunification, I was very concerned about recycling, especially because a recycling plant called the Concordia Paper Company had requested to be granted a piece of land for its operation at that time. Just as Mr Fred LI has said earlier on, this mere request for a piece of land was neglected by the Government, which refused to grant any land. In the end, the Company was forced to close down. The closure had resulted in the unemployment of 5 000 workers, and waste papers were left unattended.

This is precisely the problem encountered by waste recyclers today. Their request for a piece of land in Gin Drinkers Bay was turned down by the authorities, that is, the Marine Department, forcing the recyclers to go on strike. Likewise, the authorities have neglected these problems and failed to attach importance to waste recycling at the policy level. The Government has left the trade to survive on its own, and failed to accord priority to recycling or similar tasks. For instance, we always criticize that the Government, being the major user of paper, fails to accord priority to recycled paper in its procurement. This is the problem.

So, there is a lack of a well-planned and far-sighted policy to tackle these problems. More efforts will be made when opposition from the community is loud enough. Otherwise, less effort will be made. This has all along been the approach of the Government.

Deputy President, I therefore hope to explain the reason for the repeal of the law in today's motion. It aims to remind the Government to attach importance to the formulation of strategies. In fact, it is the longstanding neglect of the Government that has resulted in the outcome of today. I wish to highlight the need to accord importance to waste reduction and recycling, with a view to relieving the waste problem.

Certainly, landfills, incinerators and other methods of waste disposal would seem necessary and essential at the end of the day, but nowadays we cannot rely on these initiatives alone. I fail to see the implementation of any effective measures by the Government in other respects. For instance, many Members have just raised criticisms like I do. Earlier on, Ms Audrey EU pointed out that the problem of lunch boxes is pretty serious, how many lunch boxes have to be disposed of each day, where they should be dumped and who should be

responsible. Has the Government formulated any policies in this connection? No policies have been formulated, no measures have been implemented, the Government has actually done nothing.

This is the problem. If the Government faces the problems squarely, it should not just talk about landfills today, it should give us a basket of proposals setting out the effective ways of doing this and that.

I did not hear any mention of these problems in the Policy Address delivered earlier on. While environmental problems have been touched on, there is no mentioning of waste recycling and the formulation of long-term policy to deal with the problem. Of course, it will say that the issue is not touched on this time, but was mentioned before, as a paper on the Policy Framework for the Management of Municipal Solid Waste (2005-2014) (Policy Framework) had been issued. However, with regard to the proposals of the Policy Framework, how many have been put forward so far? How much work has been completed and can be presented to us? Will the Government answer these questions? What worries me most is that, as I often give zero mark to my students, I certainly do not wish to do so, but I am afraid this is what is going to happen.

Therefore, I consider that the motion and topic under discussion today has again — I am not making a wake-up call — I do hope that I have the power to wake the Government up so that it would not deal with social problems in such a haphazard manner. We must have some long-term strategies and planning. Even for landfills, it is also important to draw up long-term plans so as to avoid causing nuisances to local residents. Nonetheless, with regard to this matter, we all know that if the Government has listened to public views, it should understand that the odour nuisances have existed for years. However, it still turns a blind eye. What is more, it is adamant that the landfill must be extended. What is the point of this? It seems that it has deliberately positioned itself as the enemy of the people. I have no idea why it is doing so. I really do not know.

I do not want to speak too long, but I just want to remind the Government that it is necessary to formulate long-term strategies to deal with these problems. Just as many Members have said earlier on, wastes can actually be converted into money, which is indeed a kind of social resources, depending on how the Government utilizes them. Waste should not be cast aside unattended. Sometimes, if we accord more importance to them, they are actually more than

wastes and can be used in many ways. I do hope that the Government will learn from its mistakes and reformulate its strategies.

Deputy President, I so submit.

DEPUTY PRESIDENT (in Cantonese): Does any other Member wish to speak?

MR LEUNG KWOK-HUNG (in Cantonese): Deputy President, though this is our first meeting, we are already greatly provoked, am I right? Firstly, the Government went so far as to say that we do not have the power to repeal the Amendment Order. This is very clearly provided in Article 73 of the Basic Law that "The Legislative Council shall enact, amend or repeal laws in accordance with the provisions of this Law and legal procedures." Are we following the legal procedures now? I think so. There is also another provision in the Basic Law concerning the executive authorities. Article 64 states that the Government of the Hong Kong Special Administrative Region must abide by the law and be accountable to the Legislative Council of the Region. You should be accountable to us, buddy, not we should be accountable to you. In order to be accountable to us, you should respect the power vested in us under Article 73. Anyway, you may not understand. WONG Yan-lung is actually fooling you around. He even did not attend this meeting. The issue involves legal matters, and being so highly paid by the Government, he is obliged to provide legal advice to the Government. He has nonetheless abandoned you here in this Chamber. I think he is too inconsiderate.

I have repeated the following stories time and again. Before WONG Yan-lung became the Secretary for Justice, I had only met him once. Once in this Chamber, he invited LEUNG Yiu-chung and I for lunch in Admiralty. I deliberately arrived late as we did not see eye to eye with each other, so I purposely arrived after they had started eating. He asked me what my request was, and I said nothing special. I then said, "I learnt that you were born poor, so first of all, you should safeguard Hong Kong's judicial independence and impartiality; secondly, on that basis, you should help the poor by all means." I left after making these remarks. Of course, I had finished with my tea because I do not want to waste it.

However, it seems that he has never listened to my words. The legal advices that he gave the Government have never complied with these requirements. He also wished to have …… To put it a bit crudely, the so-called "shysters" are people whom I hated most. What I want to say is that while these people have excellent knowledge of law, they make use of it to serve people in power or to serve for their own purpose. Their acts have undoubtedly meet the requirement of "governing according to the law", as advocated by the authorities in the North. The so-called "governing according to the law" is indeed very simple — if the law has been enacted, it should be fully utilized; if distortion is required, do so by all means, and if there are loopholes, exploit them to the fullest. The case is very simple indeed. By taking the lead to seek an interpretation of the law, the SAR Government has destroyed what it should have safeguarded for Hong Kong, right? Today, the same argument is brought up by him. The actual meaning is, before a final judgment is made by the Chief Justice of the Court of Final Appeal, should we have any queries, we may seek an interpretation of the law. You did not have a role to play as you have yet to come into office. However, TUNG Chee-hwa and his team exploited the legal loopholes by seeking an interpretation of the law on their own initiatives. When they were told that this practice was not feasible, they immediately turned to the State Council, and then sought an interpretation by the Standing Committee of the National People's Congress. It is the Government itself which has destroyed the rule of law, so in what position can it talk to us about the rule of law?

They can best be described as inviting humiliation. In fact, this is originally a simple executive decision which is not required to be submitted to the Legislative Council. They have nonetheless insisted to do so, and after submitting to the Council, they warned us, first, we do not have the power to repeal this Amendment Order; second, even if this Amendment Order is repealed, the Government will probably file a lawsuit. Have they not reminded us time and again not to bring political matters to the court? How come they have done exactly the opposite now? Third, they have misunderstood one point — I once had a lawsuit with the President of the Legislative Council, who had ruled against my request. This time, however, the President acceded to Miss Tanya CHAN's request for moving a motion — I do respect Miss Tanya CHAN. Then, what is the point of arguing and what is the basis? The basis which it relies on still prevails. If we put it nicely, it is negotiation. However, if we put it more bluntly, it is "ganging up", hoping that there will not be enough votes if Members from the functional constituencies have stomach-ache or headache, the problem

will then be resolved. Let us wait and see. Seeing you smiling so happily in your seat, has anyone already suffered from stomach-ache or headache, thereby breaking the hearts of Hong Kong people?

Furthermore, I wish to talk about the failures in Chief Executive Donald TSANG's policy administration. He advocated the launching of the Action Blue Sky Campaign, which is nothing but monarchy trickery. He selected certain topics, say Action Blue Sky, and then instructed fellow officials to take actions, with the ultimate aim of seeing the blue sky. Yet, no overall plan was devised to address the environmental protection problem in Hong Kong or to reduce pollution. I am not going to repeat the details as a Member of this Council — a senior colleague — has already lodged an accusation in blood and tears. The reality is that a concept that has been discussed for more than two decades has yet to be implemented. Were you not responsible for green issues at that time, right? This is the big problem. Many people may say that I am blowing my own trumpet. Then who actually is the Chief Executive accountable to? Who is he accountable to? I really do not know. Is it LIAO Hui? LIAO Hui is no long in his original position. He is accountable to WANG Guangya and his superiors. Why would the Chief Executive have a political platform, buddy? Let me tell you, under the present political system, the Chief Executive can act wilfully. He will definitely act wilfully because under our system, first of all, there is no universal suffrage; secondly, the Communist Government is adamant that people with political background should not be allowed to run in the Chief Executive election. I would like to ask a question then. According to the principles of election and universal suffrage, the Chief Executive is not required to be accountable to Hong Kong people as a whole; and as he is neither nominated by nor being a leader of any political parties, he does not need to be held responsible for any parties' political platforms. In that case, to whom should he be accountable? Ms Audrey EU just now said that the Civic Party will do so and so, to which the Civic Party has to be held accountable. Thus, if she has said anything wrong, I would rise up and say, "Sorry, this is not true. Your party's political platform does not say so." How about the Chief Executive, buddy? The Chief Executive only asked us to trust him in the first place, saying "Trust me!" This is precisely the rotten part of the system. Let me quote an example for illustration. The Chief Executive again claimed that he has seen where the problem is. In page 4 of the Policy Address …… Though I have left the Chamber earlier on, I have read his Policy Address. He highlighted the need to solve the housing problem. What is he going to do? While the

supply of public housing is shrinking or fails to catch up with the demand, the construction of Home Ownership Scheme (HOS) flats has yet to be decided. With regard to land supply, the Government has implemented the Application List policy. I consider that this policy has really gone too far. CHAN Hak-kan, you have once been the Chief Executive's …… What was your post title then? You were tasked to serve the Chief Executive. How did the Government invent this Application List system? At that time, the property market was sluggish. Fearing that property developers might join hands to suppress land prices and started hoarding, the Government has introduced the Application List system. While developments in some places are very prosperous recently, the Mainland's Quantitative Easing Monetary Policy also involved thousands of billions of dollars, which has resulted in the influx of capital. And yet, the Government has paid no heed. This is precisely why I staged a protest yesterday. They are now speculating on flour, Secretary Edward YAU, do you know that? You are also a landlord. The speculation on flour would push up the price of freshly baked bread and the stock of flour possessed by them. The Government has nonetheless clung to its own course, leaving them …… What is even worse is that the fair competition law has yet to be enacted. Once enacted, it can be used to combat against them. One of the tactics which they adopt is price manipulation through collusion, but not competition. It may be Corporation A today, then Corporation B or C tomorrow, and Corporation D the day after next, and so on and so forth. This is precisely the approach adopted by the Government in respect of the environmental protection policy under discussion today, am I right? No consideration has been made to the sources of pollution and waste. This is the first blunder, which has contributed to the increasing amount of wastes. Secondly, measures have not been put in place to properly dispose of the wastes. This is the second blunder. Thirdly, it even calls on an extension of the landfill today. This is the fourth blunder. Fifthly, when this Council stops it from doing so, it goes so far as to challenge our President. This is the fifth blunder. Our President is unable to help you even if he wishes to, right? There are five blunders altogether, one being more serious than the other. How can I help you, Secretary Edward YAU? You always ask me, "Mr LEUNG, help me please." I also wish to help you. I have pondered for some time yesterday, and could not sleep. I repeatedly asked myself what could be done to help Secretary Edward YAU. After racking my brain, I hope that I can really help him this time. That is why I have reproached WONG Yan-lung right at the beginning, such that you would not be scolded for too long. This is how I will help you. As he had

begged me time and again, I take an unprecedented move. Why do I have to help him? Because I am not hard-hearted. Secretary Edward YAU, Dr Margaret NG has asked me why I have to help you. I told her, "I am not hard-hearted. As he has begged me for so many times, so I …… any person will do so, right?" Therefore, if Donald TSANG asks me not to scold him so loudly, I will tell him, if you do more good works, I will scold you less.

Now, the problem is the spate of blunders of our Government, which are very serious. How to tackle this problem? I think there must be a solution. Will you adopt the solution, Secretary Edward YAU? Will you back down and discard this proposal at once, and let all Hong Kong people decide what to do? Do you dare to do so? If you do, the League of Social Democrats will immediately respond. We may also let the Civic Party organize a territory-wide consultation on environmental protection. Dr Margaret NG said that she could do that, just go ahead. We would then bring the issue being discussed in the Chamber out for discussion under the blue sky (the blue sky that he wants). Chairman MAO also said, "The people, and the people alone, are the motive force in the making of world history." So, let us create the history of environmental protection for the new Hong Kong today. You may say to me, "Please take pity on me and do not 'dump' me". We would like to help you, but sorry, I cannot, because I want to help Hong Kong people. Here, I wish to warn you, if "Ah TSANG" asks you to back down after listening to my speech, I will not throw anything at him or accuse him tomorrow. I am now giving him an offer: Withdraw this unreasonable Amendment Order at once and create a harmonious condition, or else I will not give him face. I have never seen a government which has made repeated blunders like this, not only one after another, but altogether three, four and five times, and with one blunder more serious than the other.

The last point I wish to make is, many people say that, "'Long Hair', how come you look so obedient without being driven out of the Chamber today?" Let me tell you. I have a reason: I need to repeal an Amendment Order made by our "dud" government, understand? You are the "dud" government, so I have to repeal your Amendment Order. That is why I must stay in the Chamber to cast a vote. If Donald TSANG is so die-hard tomorrow, I will definitely disable him. I will not beat him up, but I will disclose the logical fallacies in his Policy Address. Thank you, Deputy President.

MR CHAN KIN-POR (in Cantonese): Although Hong Kong is an international cosmopolitan city, its way of handling waste is rather backward, lagging far behind Taiwan, Japan, South Korea and Singapore. I believe that to address the problem of municipal waste properly in the long run, it is necessary to start with waste reduction at source, and I must mention the experience of Taiwan.

In July 2000, Taipei introduced the Per Bag Trash Collection Fee Programme and a recovery policy as well as a complete set of complementary policies. Consequently, the amount of waste disposal had dropped 60% within six years. Its effectiveness in waste separation and recovery is even higher than that of the European countries. Actually, any fee collection scheme will arouse big controversy in Hong Kong, but since the Hong Kong people do not want to have the landfills extended, we should seriously consider other feasible alternatives. Moreover, the experience of the plastic bag levy has proved that people can be encouraged to largely reduce the use of plastic bags. Thus Taiwan's approach in waste treatment is worth studying.

As a matter of fact, as early as some 10 years ago, a number of European countries had already started in various aspects to reduce waste at source, such as introducing the producer responsibility scheme, requiring manufacturers to cut down excessive packaging by means of legislation and levies, and encouraging recovery. The result was highly satisfactory.

Moreover, recovery of solid waste is also our priority task. Although Hong Kong has actively commenced the work on recovery of municipal solid waste in recent years, it did not have any plan to implement a comprehensive waste reduction and recovery strategy. A green group has estimated that if Hong Kong can widely pursue refuse separation to sort out useful or recoverable items for reuse, the amount of refuse can actually be substantially reduced by half. I think it is necessary for the Government to raise the people's awareness of refuse separation. Japan has done a very good job in this regard. They have got used to separating the refuse before dumping it. When such a policy was first implemented, the Japanese raise strong opposition, but a few years later, the amount of refuse had drastically reduced by 30% to 40%.

Actually, apart from landfilling, refuse can also be treated by incineration. Japan, Singapore and South Korea have all encountered the problem of municipal waste, and all of them rely heavily on high-technology incineration to deal with refuse. However, they are tidier than Hong Kong and the air there is fresher too.

So the use of high-technology incinerators is probably the most effective way to help us to solve the waste problem. Of course, incinerators will also be rejected by the nearby residents, but we can beautify the incineration facilities. In Japan and many other places, much work has been done and it is difficult for people to tell that the establishment is an incinerator. Besides, high-technology incinerators are far better than landfills. Even if Hong Kong carries out comprehensive waste separation, in the end it may still need to rely on incineration to tackle the problem. The Government should conduct a study on the high-technology incineration methods of various countries, coupled with measures of waste reduction at source, and formulate long-term suitable plans on municipal solid waste for Hong Kong.

In this incident, apart from the need to tackle the odour nuisance and environmental pollution from which the Tseung Kwan O residents have suffered, there is also the opportunity to force the Government to address the problem of solid waste squarely, turn the conflict in society into a driving force for development and formulate a long-term comprehensive policy on reduction of municipal waste.

Although I will support Miss Tanya CHAN's motion today, I do hope that the Government and Members will, with joint efforts, adopt the most effective approach (though members of the public will inevitably be affected), and that the authorities will figure out a solution which will have the least impact on members of the public, to solve the problem of municipal waste.

MR PAUL CHAN (in Cantonese): Deputy President, I speak in support of the motion proposed by Miss Tanya CHAN on behalf of the Subcommittee on the Country Parks (Designation) (Consolidation) (Amendment) Order 2010 (the Subcommittee), which seeks to repeal the Country Parks (Designation) (Consolidation) (Amendment) Order 2010 (Amendment Order). My speech will focus on the policy itself, the Government's amendment on the commencement date of the Amendment Order and the views which I have received. As many Members have already expounded on the issues concerning the legal power for the Legislative Council to endorse the repeal of the Amendment Order and the different views of the Department of Justice on this matter, I will not repeat myself. However, I agree with the President's ruling to allow Miss Tanya CHAN to move a motion in relation to the Amendment Order.

Although I am not a member of the Subcommittee or the Panel on Environmental Affairs, as Deputy Chairman of the Public Accounts Committee (PAC) of the Legislative Council, my first task back then was to consider the Director of Audit's Report No. 51, in which one of the chapters was "Reduction and recovery of municipal solid waste". I thus have some understanding of the topic.

Deputy President, I do not intend to repeat the details of the Director of Audit's Report, but I wish to reiterate some observations made in the PAC report. The PAC report pointed out that although the Government had laid down the target of reducing the quantity of municipal solid waste generated by 1% per annum in the Policy Framework for the Management of Municipal Solid Waste (2005-2014) (Policy Framework), the quantity of municipal solid wasted generated in 2007 actually increased rather than decreased, reflecting that the Environment Bureau had failed to demonstrate its commitment to achieve the target of reducing municipal solid waste. The PAC report also pointed out and criticized that the Environment Bureau had made no further commitment to raise the recovery rate target of such waste.

Despite the fact that the Director of Audit's Report requested the Government to rely less on landfill disposal of municipal solid waste, as a matter of fact, the Government's follow-up actions and its performance were disappointing. As many Members have mentioned just now, in the Government's annual progress report in response to PAC's observations, the Government only indicated that it had laid down the relevant improvement measures, including the identification of two potential sites suitable for developing the first phase of the Integrated Waste Management Facilities (IWMF). The Government thus did not find it necessary to follow up the matter in its annual progress report and would report the progress to the Panel on Environmental Affairs instead.

According to the update which the Government made to the Panel on Environmental Affairs on progress of the key initiatives in the Policy Framework, the Government said (I quote), "…… extending the landfills will not resolve our waste problem. We need to adopt a more sustainable approach to reduce the volume of waste that requires disposal and to conserve our landfill space ……". (End of quote) I wish to ask the Government whether it knows that "extending the landfills will not resolve our waste problem" is a position taken by the

Environment Bureau? If so, why does the Government not expeditiously taking forward the proposal of comprehensively implementing the IWMF and have to insist on proposing the Amendment Order? Perhaps the Secretary can later try to convince me again why the proposal of extending the Tseung Kwan O landfill is currently the only indispensible solution?

Deputy President, I know that the Government has managed to increase the recovery rate of municipal solid waste, but after all, reducing waste generation is the cure to the problem. However, the Government still maintains its waste reduction target at only 1% per annum. Is this target too conservative? Mr CHAN Kin-por mentioned the example of Taiwan just now. If we look at the example of Taiwan, their waste reduction rate has increased from 2.4% to 50% after the implementation of waste reduction measures.

Deputy President, the Secretary has proposed to postpone the commencement date of the Amendment Order for 14 months. Actually, this is the same as setting the commencement date on 1 November because the Government still needs to excise 5 ha of land from the country park for landfill extension. The Government has not duly responded to the aspirations of the Tseung Kwan O residents, nor has it given any convincing explanation to the public. Moreover, the Government has not implemented any improvement measures for the Tseung Kwan O residents until last quarter or so. The Government only responds to residents' aspirations when it has a demand to make. Indeed, everything comes too late.

The Secretary has said in public and at meetings of the Subcommittee that the authorities initiated discussions on the landfill extension as early as 2005. He seemed to imply that Members have failed to voice their opinions sooner. However, as a Secretary who has years of experience in policy execution, he should know that after the Government has proposed a policy, it still needs to map out the execution details. Now that we have the details, it is nothing strange that Members, after reviewing the progress of the entire solid waste treatment plan in various aspects, may find the proposed policy unsatisfactory and refuse to pledge their support. If the Secretary takes Members' silence before the availability of the policy details as their pledge of support, this attitude will hardly be helpful to the policy discussion in future.

Deputy President, apart from considering the details, the Government is also duty-bound to consider the impacts of social changes and the public's view

on the policy. If the Government only knows how to execute the policy rigidly according to procedures and does not try to understand the condition of the people and social changes, it can hardly understand the feelings of the public. Today, caring about our environment has become a global trend. If the Policy Bureau does not keep abreast of the times and change its mindset to formulate appropriate policies according to the prevailing situation, how can the governance be close to the people?

Deputy President, during the discussion of the Amendment Order at the Subcommittee, many people in the accountancy sector who live in Tseung Kwan O have sent emails to or telephoned my office, many Tseung Kwan O residents have also sent emails to my office, they all ask me to vote for the repeal of the Amendment Order. Allow me to cite one of the emails sent from a friend of mine here. He said (I quote), "I am unhappy that the Environment Bureau and the Secretary have turned a deaf ear to the objections of Tseung Kwan O residents. In fact, the Government should implement the so-called odour abatement measures on the landfill way before Members have voiced their objection. As regards the methods of treatment of municipal solid waste proposed and under study by the Government long time ago, the progress is slow. Although the Government has emphasized its co-operation with the Legislative Council, it presented the legal opinion of the Department of Justice at the very last minute in a bid to stopping the Legislative Council". (End of quote) Deputy President, I believe this view from my accounting friend living in Tseung Kwan O represents the feelings of many people. My vote will reflect their views.

Deputy President, I so submit.

DEPUTY PRESIDENT (in Cantonese): Does any other Member wish to speak?

MR PAUL TSE (in Cantonese): Deputy President, I intend to first talk about this incident from two perspectives: firstly on the issue of waste disposal and secondly on the law-related issues. If there is still time, I would also like to talk about other side issues.

Deputy President, I think initially, the main starting point of this incident is to balance the controversies or imbalances arising out of various interests in

society. After all, irrespective of whether it is about columbarium or waste disposal, certain places or people have to accept the reality. Otherwise, where else can these facilities be located? In other words, it is about the saying of "not in my own backyard" that we commonly hear.

Of course, we understand that many local residents have strong views on this matter. At the same time, past records show that from 2007 to 2010, there are some 459, 943, 629 and 610 cases of related complaints received by the Environmental Protection Department (EPD) respectively. This is therefore quite understandable.

Unlike Mr Fred LI, I do not live in the said district. But for quite some time in the past, I had to do some work for the two media companies in the district and I would visit the area frequently. As I would usually drive through that road, I was also aware of the situation. For the purpose of this debate, I drove there again last night specifically to update myself with the latest situation. Of course, my subjective experience may not speak for all because time is at best limited. But for me personally, the problem seems not to be as serious. Of course, for local residents who live in the area and expose to the problem all day, the situation may be different.

Let us look at some objective data. According to the statistics provided by the authorities, a survey conducted 24 hours a day continuously for a period of 14 days in August 2007 found that in 99.8% of the time during the survey hours, no odour could be detected. In the remaining 0.2% of time (that is, about 40 minutes), odour could be detected. This is of course just one set of data. But when we consider today's motion, I am afraid we cannot simply accept or ignore the suggestions of local residents in totality because it is a problem the whole society needs to address.

I will first discuss the matter from the two perspectives, that is, the urgency and necessity of the concerned course of action or proposal. In terms of urgency, it seems that as presented by the authorities initially, the proposal is so urgent that it must be implemented. However, my major consideration is that the authorities can then suddenly say that, "No worry, we can wait 14 months." As such, I think the authorities may have slightly over-exaggerated the urgency of the matter when the issue was first considered. There is in fact some flexibility. That is my first point. Second, as presented by the Secretary just now, there

seems to be a decreasing trend in terms of solid waste disposal in Hong Kong. Third, the consideration that sludge treatment facilities (at a construction cost of $5.1 billion) should be commissioned by the end of next year. Fourth, the availability of other means for consideration. If the matter is really so urgent, the Government can very well hasten the pace of studying or implementing other measures. In this respect, I am confident that even though the authorities may suffer setback this time, it can learn from the experience so that other improvement measures can be identified as far as possible and as soon as possible. That is why I am not too worried about this aspect of the matter.

My second point is about necessity. What the bureau is asking now is in fact 5 hectares (ha) of land out of 25 ha. That is the portion required of the country park. Basically, other land requirement is made up by the 15 ha in Area 137 and the 30 ha of piggy-backing over the existing landfill. I have no idea what the latter is because I am not too familiar with environmental affairs. But I think it concerns part of the original landfill which can be used to satisfy most of the 50 ha land requirement for the extension. Therefore, in terms of necessity, there seems to be no real overwhelming need either. On the other hand, I have also made reference to the only precedent in this area, that is, the Court of First Instance's judgment in the judicial review case of LAI Pun-sung against the authorities (HCAL83/2009). In this case, I am afraid that as the subject matter or point of contention chosen by the applicant was relatively narrow, it had just slightly touched on the question of whether the authorities have any power to turn part of the country park land into landfill under the Country Parks Ordinance. As his question was so narrow, the Judge of the Court of First Instance simply ruled that the authorities had this power. That is it. But, incidentally, the Judge said that if the matter were to be taken to court, the question to ask should be whether the course of action was really necessary? Was there a genuine need to turn country park land into landfill? As this point was not made at that time, nothing was mentioned by the court. But I think it can serve as our reference in respect of the necessity of the matter.

Deputy President, another point which I would like to address is the legal issues involved. Firstly, I have to point out that this resolution is based on a motion passed by the Subcommittee unanimously, which I am inclined to have a relatively high regard. Of course, the Council has the right not to accept the Subcommittee's motion. However, in the absence of an exceptionally good reason, the spirit of mutual co-operation and respect within the Legislative

Council should be upheld so that due regard would be given to this motion. On the other hand, the authorities have to convince us with good reasons why we should override this motion. In this respect, what are the views we receive from the Government?

I must stress again that I share the view of many Honourable colleagues that the Government's act of proposing this motion of amendment seems, simply put, not quite in line with the spirit of co-operation. In fact, the Government has only put forward these views in the fashion of so-called "imperial swords" after the Subcommittee passed the relevant motion on 4 October, seemingly hoping to influence our decision. I have great reservation about such action. While the Government may have obtained the legal opinion of Mr Michael THOMAS, Q.C., some time ago (I still have no idea when it happened), why has it stated such views only until that time? Another point which I have great reservation about is that only a summary of the legal opinion was provided by the Government upon pressure. But everyone in the legal profession knows that a summary has to be read with great caution because an understanding of the opinion itself would very much depend on the advice sought and the arguments used. The opinion itself could never be fully understood by simply referring to a summary. In this regard, I would rather the authorities provide nothing at all. In fact, this is a course favoured by the Government. When asked to provide its legal opinions, the Government would always decline by claiming privilege and stating that the interests of the person is involved. But in this case, the Government has only provided us with part of the legal opinion hoping that the disclosure of a summary would be convincing enough. I cannot quite agree with the Government trying to "lose-hit, win-take" or take all the advantages.

More importantly, there is a saying — I have no idea whether it originates from the Queen's Counsel concerned or relevant government official preparing the summary — which I have strong views. What is that about really? Let me quote from paragraph 9 of the summary (serialized as CB(1)2988/09-10(01)), or due to time constraint, I will just paraphrase instead of reading out the exact wording. The meaning is more or less like: As the relevant legislation was passed by some Honourable colleagues of this Council or their predecessors, any complaint we have now is much ado about nothing and it comes too late. That is what has been said in paragraph 9.

I think this attitude and approach well demonstrate the arrogance of the writer. Moreover, he might not have considered the great difference between

the Legislative Council of today and that in 1976. I have also looked up the situation then. As Ms Cyd HO has already read out the relevant remarks just now, I will waste no time to repeat. After the legislation was enacted, the then Governor made the following remarks on 10 October 1979 when, just like today, he was delivering a policy address at the opening of a legislative session. He claimed that exceptional progress had been made as the Authority had completed 18 months ahead of schedule its designation programme of country parks which covered almost 40% of Hong Kong's total area. He claimed that the relevant approach was highly efficient. All these suggested that efficiency was a major objective of legislative work at that time and no consideration whatsoever had been given as to whether the negative vetting procedure would create any adverse impacts. And of course, these adverse impacts have not surfaced for many years until today.

Interestingly, I would like to mention in passing and with no particular reason that one of the Members of the Legislative Council being accused of possibly passing legislation hurriedly or even haphazardly or negligently was Lady Lydia DUNN. She might have to explain to Mr Michael THOMAS, Q.C., who had prepared this advice, why legislation was passed hurriedly at that time. They might have to sort this out themselves. Nonetheless, all these are small talk. But most importantly, the relevant legislation has clearly provided for the preservation or development of country parks. In this regard, I agree with the President's view that unless it has been clearly stated in the legislation that we cannot give any views after the Chief Executive has decided on certain procedures, there is no reason to say that we have no power to scrutinize the same in the absence of such clear limiting provisions. This might well be the strongest reason I am more inclined to accept or support this motion. I think it might also make those colleagues who are originally not very concerned about this matter feel righteous and stand united against the wrong. This is a very important power and it must not be taken away easily.

Regarding the view that this matter might result in a court battle or a constitutional crisis, some Honourable colleagues echoed this view, but I have reservation. I think the authorities should only take the matter to court as a final resort in the absence of other better options. The main reason is that while I am not worried about our view being invalid or having insufficient grounds, the court's decision (regardless of how it goes) will only deal with the mechanism as applicable to the Country Parks Ordinance, rather than the issue of legality of the

negative vetting mechanism as a whole. If the judgment is at best factual and limited to the interpretation of a particular statutory provision, it will not help in terms of the distribution of powers between the legislature and the executive authorities.

Instead, I think there is a better option to deal with the matter. While there is no such mechanism in Hong Kong, a Joint Committee on Statutory Instruments is formed under the British Parliament to review periodically whether any statutory instruments subject to negative vetting has contravened its legislative intent or affected the distribution of powers. As no such committee has been set up in Hong Kong for the time being, is it now the right time for us to consider establishing a mechanism to deal with these matters so that they will not have to be considered by different persons on each and every occasion. I am afraid the present approach is not very efficient.

As time is limited, I am afraid I cannot go into other issues. But all in all, I hope we can reflect on the whole incident and the authorities will be more determined in addressing the problem of waste disposal expeditiously. Also, we can take this case as a good example to illustrate again the point that, contrary to what some colleagues have claimed, Members of the Legislative Council returned by functional constituencies (FC) are not necessarily enemies of the people. The fact is when it involves issues considered reasonable and worth supporting by society, as in the present case, FC Members will give their support. I hope we will remember that FC Members are no different from others in their support for these issues as well as their concern for the public interests involved. Moreover, it is not about any threat or seeking an interpretation of the Basic Law. The seeking of an interpretation of the Basic Law is not intended for such purpose. I think Members with some *(The buzzer sounded)* …… general knowledge will understand.

DEPUTY PRESIDENT (in Cantonese): Your speaking time is up. Does any Member wish to speak?

MR PAUL TSE (in Cantonese): Thank you, Deputy President.

MR WONG YUK-MAN (in Cantonese): Uphold the dignity of the legislature and oppose the executive hegemony. Deputy President, the discussion of today's motion to repeal the Country Parks (Designation) (Consolidation) (Amendment) Order 2010 (the Amendment Order) involves four issues, including the dignity of this Council and the limitation of our legislative powers; the policy on solid waste disposal; the siting of landfills; and the Government's response after the motion to repeal the Order is passed by the Legislative Council. These four issues must be clearly dealt with one by one.

The first issue is about the dignity of this Council and the limitation of our legislative powers. According to the Department of Justice, the Legislative Council does not have the power to repeal the Amendment Order and certain legal arguments have been proposed. On the other hand, Counsel to the Legislature and most Members hold different views and they put forward the constitutional viewpoint that the Basic Law has vested the Legislative Council with the power to scrutinize or even repeal this Order.

I hold that in responding to the present legal dispute, one must clearly recognize that under the Basic Law, the Legislative Council shall have legislative power, and the major principle of checks and balances between the executive authorities and the legislature has also been stipulated. It is clearly stated in Article 66 of the Basic Law that the Legislative Council is the legislature of the Hong Kong Special Administrative Region. Under Article 73 of the Basic Law, the powers and functions of the Legislative Council include "to enact, amend or repeal laws in accordance with …… legal procedures". Apparently, legislative power belongs solely to the Legislative Council. Under the system of separation of powers in Hong Kong, even though the system is still not perfect, the executive authorities must be accountable to the legislature. This is a common understanding. When interpreting the Country Parks Ordinance and the Interpretation and General Clauses Ordinance, the Government has disregarded the constitutional role of the Legislative Council and the major principles of checks and balances and separation of powers. This is putting the cart before the horse.

The Country Parks Ordinance was enacted in 1976. The then Legislative Council, which only functioned as an advisory body to the colonial government, had neither an independent constitutional status nor any role to play under the Ordinance. On 1 July 1997, the Basic Law came into force and the legislature of the Hong Kong Special Administrative Region was established. The

legislature shall be constituted by election and the executive authorities shall be accountable to the legislature. The legislature is vested by the constitution with legislative power to scrutinize legislation and it also has the power to monitor the executive authorities through checks and balances. When interpreting the Country Parks Ordinance, the Government has obviously not adapted to the reality that the regime has changed.

Insofar as the interpretation of the Interpretation and General Clauses Ordinance (IGCO) (Cap. 1) is concerned, I concur with the legal opinion provided by Senior Counsel Mr Philip DYKES to the Legislative Council, which said that "[the Legislative Council] 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". Mr DYKES went on to say that, "[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 [the Legislative Council]." To put it simply, the Legislative Council has the constitutional responsibility of scrutinizing subsidiary legislation and hence, the relevant laws should be construed from the perspective of safeguarding the power of the Legislative Council. The constitutional power of the Legislative Council to scrutinize, amend or repeal laws and subsidiary legislation should not be taken away.

The fact that Tanya CHAN, Chairman of the Subcommittee, has proposed a motion to repeal the Amendment Order and that Jasper TSANG, President of the Legislative Council, has approved the moving and discussion of the said motion at this meeting of the Legislative Council indicate their undertaking of the duties expected of them, that is, to uphold the dignity and status of the Council. This will of course gain public approval in society. The Legislative Council, in discharging its constitutional powers and monitoring role, will vote on the motion, this act must be respected by the executive authorities.

The second issue is about the policy on solid waste disposal. Due to time constraint, I have written an article so that the Secretary may make reference to it. I have cited the examples of Taiwan, Japan and the European Union for his reference. Anyway, he should already know about these things. He just has not and cannot do anything.

As the landfill in Tseung Kwan O will be full by 2013, the proposed extension, even if successful, can only last for six years, buddy. The landfills in Tuen Mun and Ta Kwu Ling will also approach their capacity one after another in the next 10 years. What we need most today is not the provision of more landfills or incinerators; instead, we need a solid waste disposal policy which is sustainable and environmentally-friendly.

The third issue is about the siting of landfills. Actually, the Government should bear the greatest responsibility for the landfill problem. The Government must bear the greatest responsibility for the obnoxious stench in the district and the roaring complaints from the residents. The Government is always shedding its responsibility to the locals or disregarding the interests of the majority in order to protect the interests of the minority. I am telling you this: All of you "wimps" should be fired if the interests of the majority are to be protected. But can all of you be fired? No, there is no way to fire all of you. Then what can be done? We must, of course, make noise. What do you mean by "the interests of the minority cannot override the interests of the majority"? Who has set this standard? For me, firing all of you "wimps" is in line with the interests of the majority. But of course no one will go along with me.

The truth is that the Government does not have a long-term policy. Sometimes, I want to be less critical of Edward YAU. After all, he became a Bureau Secretary just in his forties and his career is like a ride on the helicopter. However, people whose career is a ride on the helicopter will invariably meet with ill fate. He should know better if he has studied history. Both WANG Hungwen and YAO Wenyuan met with ill fate. It is really experience that counts. Now that he is occupying this high position, he must keep these words in mind, that is, "stay cautious and apprehensive". Also, here is my advice to him, he should act as if he is on the brink of a deep gulf and as if he is treading on thin ice. He should be more humble, right? He flops time and time again. For example, the compact fluorescent lamp incident is already a case in point, and now, another incident emerges. Even the pro-establishment camp does not support him, so he should back off and stop holding on. Maybe with only a year or so left in his last term of office, Donald TSANG has lost interest and let Edward YAU make the policy. Trouble then arises, buddy. Being the most modest among the three of us, LEUNG Kwok-hung said, WONG Yan-lung should be admonished more and Edward YAU less. I think the young can afford to make mistakes, provided that they can learn from their mistakes and

change their stubborn ways. That is the most important thing, buddy. We have certain expectation for some officials. We really do.

Now it seems that the motion to repeal the Order will be passed, I will spend more time on the fourth issue. After the passage of the motion, what does he intend to do? Do tell me. The SAR Government led by Donald TSANG has faltered again, how would they respond? Hence, I come to the fourth issue which is the Government's response after the motion to repeal the Order is passed by the Legislative Council. If everything goes well, the motion will be passed today. If the Government still stands firm, claiming that the Legislative Council has no power to repeal the Amendment Order, and tries to challenge the authority of the Legislative Council again through judicial means, it is digging its own grave. Instead, the Government should introduce legislative amendment. Well, what is it for? That is to establish the absolute power of the Legislative Council to amend and repeal subsidiary legislation so as to avoid the recurrence of this so-called *impasse* between the executive authorities and the legislature.

Here, I would like to request the Government to provide a paper listing out other legislation (apart from the Country Parks Ordinance) that might create similar dispute. This, of course, does not fall within his purview, and he has to make enquiry with the Chief Executive and the Chief Secretary for Administration. In other words, if these potential questions of controversy can be raised as early as possible, it might help to avoid incidents similar to the present case that further undermine the prestige and credibility, or if there is any left at all, of the Government's governance. This is really for his own good.

At present, the question that the Government should respond to is not whether the executive authorities can apply for judicial review against the motion passed by the Legislative Council, but whether the Government should apply for judicial review. This is a political question and political questions have to be resolved through politics. Political questions cannot be resolved by law, buddy. The question about LIU Xiaobo is a political one. The Communist Party has resolved it by law and LIU was put behind bars. Likewise, legal questions can also be resolved through politics. Hence, an autocratic government tends to solve legal question by politics and solve political problems by law. If the Government intends to apply for judicial review out of spite for its defeat today, it will be seeking to resolve a political question by law. This is but a perverse act no different from what is practised by some autocratic governments.

There is no democracy in Hong Kong. The implementation of universal suffrage has been postponed time and again. Moreover, as there are political parties which had betrayed trust and justice by turning towards the communist regime and selling out the interests of Hong Kong people, constitutional development in Hong Kong had to be stalled for 10 long years. Both the executive authorities and the legislature are not democratic and it is blatant to everyone. Since the reunification, the judiciary has been undermined again and again so much so that it has become a machinery for suppressing the underprivileged and the dissidents. The precedent case of the Citizens' Radio has said it all. The so-called separation of powers in Hong Kong is but deceitful talk. Separation of powers is phoney and executive hegemony is real.

If the Government really intends to apply for judicial review, its objective is nothing but stripping the Legislative Council of what remains of its legislative power so that the Government can do whatever it wants.

As Mr Ronny TONG (who is a Senior Counsel himself) has pointed out clearly, the Government should not take the matter to court even if the motion to repeal the Amendment Order was passed by the Legislative Council because the decision of the Legislative Council was not under the jurisdiction of the court. It would have difficulty in law if this political question was to be adjudicated by the court. Even if the court ruled in favour of the Government, it would only create an impression in society that the Government had acted without reason and regard for the Legislative Council's constitutional power of providing checks and balances against the executive authorities. So please think about this carefully.

Although this Council is undemocratic and manipulated by functional constituencies, it is likely that the motion would be passed with an overwhelming majority. It shows that the repeal of the Amendment Order is in line with public aspiration. And of course it has something to do with the forthcoming elections. Nothing done by the Government right now is acceptable, for example, its proposal to bid for the right to host the Asian Games. Buddy, elections will be held next year and the year after. There will be elections for the Legislative Council, the District Councils, the Election Committee and the Chief Executive. Within the next two years, more than 90 elections will be held and those political groups, political parties …… Please do not kid around with me. Elections must come first and hence, the Government will have no support in this matter. No explanation is needed, it is just a matter of timing. Hence, there is an

overwhelming support for the motion to repeal the Amendment Order in this Chamber today because first and foremost, it is in line with public aspiration — or in other words, the Government has acted against public aspiration — and secondly, elections are to be held. Therefore, if reckless action is taken against public opinion to apply for judicial review to abolish the power of the Legislative Council, I think there will be some serious consequences which the Government cannot afford.

I do not want to give a lecture here. The theories and practice of the separation of powers are all in the books. You will have a very clear understanding if you do some reading and look at the actual political situation now.

Article 64 of the Basic Law stipulates that, "[T]he Government of the Hong Kong Special Administrative Region must abide by the law and be accountable to the Legislative Council of the Region: it shall implement laws passed by the Council and already in force; it shall present regular policy addresses to the Council; it shall answer questions raised by members of the Council; and it shall obtain approval from the Council for taxation and public expenditure." The executive authorities are accountable to the legislature which shall be constituted by election. All these are written into this mini-constitution which regulates the acts of the Government. Can the Government ignore it? Today, the Amendment Order is repealed and it will be quite a scene if the Government wants to overturn our decision afterwards. That is why my warning is, do not make any reckless move. Let me tell you, you can really lose your job.

The Government has said that livelihood issues should not be politicized, yet it is now trying to challenge the constitutional power of the Legislative Council under the pretext of the landfill issue. Is that not politicizing the issue? This is all plain and clear. Why saying something like "do not politicize livelihood issues"? All those in this Chamber are talking about politics; if we do not talk about politics, why do we become Members?

Although I have prepared a speaking note, I cannot help but make impromptu remarks here and there. I am quite fed up. Why is the Government so dumb? It is really quite unthinkable. These officials are so presentable in appearance and have all received high education. Some have even worked as Administrative Officers for several decades. How come they are so muddled

time and time again? It is really quite unthinkable. Are they under some sort of evil spell? It is even more so with the Secretary. The compact fluorescent lamp incident in the past was bad enough. Now he screwed up again. Does he not worry that things will turn from bad to worse? I am really surprised because it defies all common sense. I cannot figure out why, does he really has some problems. I really don't understand. I am completely lost. Why does it happen time and time again? Buddy, can you at least do something right for a change? He is still maintaining his stance and holding on. But what good can it bring? Everyone is against him now including Members of DAB who are in this Chamber. Therefore, I hope the Secretary …… This is a very good lesson. Honestly, if he continues with his stubborn ways by maintaining a stance that goes against the trend and acting as a reactionary, I can do nothing to help.

A good friend of mine recently said to me, "Yuk-man, you should not call those people pro-establishment." I then asked him what should they be called? He said they should be called the reactionaries. Why should they be called the pro-establishment reactionaries? Because on a recent visit in Europe, Premier WEN Jiabao made this remark about his devotion for promoting political reform, he said, "I will not fall in spite of the strong wind and harsh rain, and I will not yield until the last day of my life". The promotion of political reform must continue in spite of strong wind and harsh rain until the very last day. This is the trend of history. People like the Secretary who acts against the trend are reactionary, understand? Therefore, these people are the pro-establishment reactionaries.

With these remarks, Deputy President, I support the motion proposed by Miss Tanya CHAN to repeal the Amendment Order. Thank you.

DEPUTY PRESIDENT (in Cantonese): Does any other Member wish to speak?

(No Member indicated a wish to speak)

SECRETARY FOR THE ENVIRONMENT (in Cantonese): Deputy President, I would like to thank Members for speaking on the motion. In the speeches given by Members earlier, apart from the part related to legal aspect, many points are focused on my policy area, and certain fundamental figures or information on

policies implemented in the past have been mentioned. Will Honourable Members allow me to take this opportunity to spend some time to explain the case to the public. Every year, we will give an account to the Legislative Council on the policy agenda on waste treatment and waste management, which usually takes place around March or April. I recalled, and if my memory has not failed me, that at least two to three motion debates had been held on waste treatment in the past three years. Regarding the content of the speech presented by Members earlier, which include figures and policies, there may be some discrepancies between the figures currently in the hands of Members and those mentioned in the motion debates in the past. In discussing this issue, though it is centered on the extension of the landfill in Tseung Kwan O, the question relating to the overall planning of Hong Kong is expressed unequivocally in Members' speeches. We must clarify a number of figures. First, whether the overall figure on waste produced in Hong Kong is increasing or decreasing. Second, whether the amount of waste disposed of at landfills is increasing or decreasing. These figures can serve as an indicator and have a bearing on the work we have undertaken together and the policies formulated.

(THE PRESIDENT resumed the Chair)

The total amount of waste produced in Hong Kong in the past 10 years, from 2000 to 2009, was on the rise, which was broadly in line with figures quoted by Members. Certainly, the rise in this figure should mainly be attributed to the increase in population, economic activities and the number of visitors, leading to an increase in the amount of waste disposed of per person. However, when we talk about waste treatment in a city, the most important figure is the amount of waste eventually disposed of at landfills after recovery. Today, we also have to address this problem. Members may look back on the situation in the past 10 years, the amount of waste to be disposed of at landfills has remained stable, from 3.42 million tonnes 10 years ago to 3.27 million tonnes in 2009, which was a slight decrease. The decrease should be attributed to the positive development in waste recovery in the past 10 years, and in the past five years in particular. By 2009, nearly half of the waste can be recycled.

One of the observations pointed out by a number of Members earlier is correct. They notice that the 49% recovery rate achieved by Hong Kong is

comparable to that of places we usually draw a comparison with, namely Singapore and Taipei, the recovery rate of which stands at 44% and 43% respectively. But as many Members have pointed out, apart from waste recovery, Hong Kong relies solely on landfills in waste management, whereas in many of our neighbouring regions, such as Japan, incineration facilities are used to process a very large proportion, or more than 60%, of their waste. This is also the case in Singapore. I believe these two sets of figures clearly indicate a reality or a problem that we have to face today. At present, even with the concerted effort of all residents, we can achieve a recovery rate of 49%, that is, almost half of the total amount of waste. Assuming that we can do better and achieve a higher recovery rate of 60%, ranking the top few in the world, we still need to treat 7 000 tonnes to 9 000 tonnes of refuse every day. The sole reliance on landfills cannot solve the problem, however landfills have remained the primary option for waste treatment as at today. Hence, I share the views of Members that we can no longer rely on this option alone in waste treatment.

I believe with the discussion today, all of us will fully agree with this point. Referring to the several figures mentioned earlier, if we have to treat 9 000 tonnes of waste daily at present, even if we can do a better job in waste recovery and achieve an additional recovery rate of 10% in the next 10 years, how should the remaining 7 000 tonnes of waste be treated? In the past, as in the 2005 Policy Framework or the report we made to Members — as some Members mentioned earlier — we have planned the construction of an integrated waste treatment facility with a daily treatment capacity of about 3 000 tonnes. In handling the 7 000 to 9 000 tonnes of remaining waste, we need at least two large-scale facilities with a treatment capacity of 3 000 tonnes. As for the remaining waste, a small amount may still have to be disposed of at landfills. Certainly, the quality of waste to be disposed of at landfills by then will be different with the present case. As Members mentioned earlier, at present, a lot of waste now disposed of at landfills is domestic waste, which gives off a bad smell. Waste treated by incineration will turn to ash amounting to 10% of the original waste, and the environmental nuisance caused by such ash will be smaller than the present one. However, the figure illustrates that unless we can construct at least one modernized incineration facility within a short time, we have to resort to landfills as a major option for waste treatment. This is the reason we cannot state determinedly when landfills can be capped. But if we continue to work on the various measures proposed in the 2005 Policy Framework which Members frequently quoted, 10 years later, when the modernized incineration facilities

have been established or expanded, there will be a chance that the problem of waste disposal can be significantly alleviated. At the same time, as mentioned earlier, the quality of waste disposed of at landfills by then will be better than the waste disposed of today.

Among the issues discussed today, the most imminent one is naturally the situation of local residents. Many Members said that the Government only seemed to work on the issue in the past few weeks. With regard to this remark, I have to ensure that justice is done to my colleagues, residents and the District Councils (DC) concerned. Apart from the work I mentioned earlier, we have recently worked on the improvement work outside the landfill, as mentioned in my letter to the Subcommittee on 4 October. Actually, in the past two to three years, extra effort had been put in this landfill in comparison with the other two landfills. These measures include the provision of cover for unused area and area that have just reached full capacity in the landfill, reduction of the area of the tipping face, use of additional mobile facilities for covering waste deposited, addition of ore to materials used for covering waste deposited, and collection of methane at the landfill. We are now discussing with the Towngas on the waste-to-energy method that can be adopted to make use of the methane.

In short, in the past few years, more than $40 million had been invested on these additional measures in the landfill, and all efforts are made specifically for the Tseung Kwan O landfill. But surely, the problems outside the landfill, which many Members have mentioned based on their personal experience, should also be addressed. These include the cleaning and management of other refuse collection vehicles and roads at the entry and exit area of the landfill other than within the landfill area. Recently, we have made extra effort in these aspects in response to the requests of residents. President, I can assure Honourable Members that we will keep on with the work so as to alleviate the impact on residents of the district on the one hand, and win the continual support of the public for various green policies implemented by the Government on the other.

The sludge treatment plant I mentioned earlier rightly illustrates that the establishment of other modernized facilities, if possible, will not only benefit Hong Kong on the whole, but also the districts where landfills are located. Members have also mentioned the controversy aroused last year. Actually, when the sludge treatment plant project at Tsang Tsui, Tuen Mun was discussed by the Public Works Subcommittee and later by the Finance Committee, the

process was not all that smooth, with a lot of heated discussions. Eventually, we obtained the support of the Legislative Council, and we can see the result today. In the next two weeks, I will brief the Tuen Mun District Council (DC) of the specific design feature added after the $5.1 billion project is put up for tender. And upon consulting the DC, we have adopted the theme on water consumption which the DC considered acceptable. We will inform the DC concerned about the design of the treatment plant and the facilities inside the plant. Some Members mentioned their observation that in some overseas countries, these noxious facilities, noxious in the psychological sense, can indeed bring ancillary benefits to the district. The sludge treatment plant in Tuen Mun is one of such examples. Not only is the external design of the plant pleasant, the facilities inside, including some heated pools, open space, beautiful fountains, some leisure space, an education centre and a café, may also benefit the community. These facilities can be provided because Members have approved the funding for the project, so that we can include these facilities in the design, to be provided to the community in future. The most important point is that 2 000 tonnes of sludge can be treated daily at the sludge treatment plant, which will reduce almost all the sludge now being disposed of at landfills, including the Tseung Kwan O landfill — sludge is a major source of the bad smell.

Hence, in this connection, we will not stop our work in Tseung Kwan O because of the voting result of today's motion, nor will we do so when we submit the funding application again in future. I believe we will continue to work on this. Like what we have done in the past two to three years, we will, in collaboration with the DC concerned and staff of the District Office, continue to discuss with residents in the district — which may include members from various political parties and groupings, to find out the additional measures required. It is hoped that after this process, the proposal will eventually be accepted by members in the district. We also hope that the so-called Nimby (Not-in-my-back-yard) fatalism, which is a concern of some Hong Kong people and has been mentioned by certain Members, can be changed. Whenever environmental measures or facilities are proposed, do members of the public naturally consider that opposition must be staged? In the next few years, we will no longer remain at the stage of drawing up proposals, as some Members said, we have to move on to executing and implementing the proposals. It is time to carry out and approve the projects.

Members have mentioned the strategy of adopting a multi-pronged approach, which is completely in line with the position always held by the

Environment Bureau. I totally agree with this. The sludge treatment plant mentioned earlier is a successful example. We must work on the issue at district level and at the legislature with the investment of government resources.

Similar cases will come one after another in the next few months. We will not just leave it as Members said. For instance, by the end of this year, we will submit funding application to the Legislative Council for the construction of a food waste treatment centre at Siu Ho Wan. We have mentioned this proposal to Members in the past. We will apply for funding by the end of this year. I believe this case will be relatively simple and straightforward, for there is no residents living in the surrounding area for the time being, and in terms of technology, the centre is not a noxious facility, apart from the psychological aspect.

By the end of this year or early next year, the report on the Environmental Impact Assessment (EIA) for siting will be completed, for the cycle for conducting an EIA will need at least one year. As Members mentioned earlier, we have eventually identified two locations for the building of a waste treatment centre, one in Shek Kwu Chau and the other one in Tuen Mun. Obviously, as discussed by Members and according to the figures I listed earlier, this centre must be built and should be built as soon as possible. Of the two sites identified, one may involve a small area of reclamation, as for the other, strong opposition from the district was raised in the past. Yesterday, certain Members had spoken through the media that if similar problems were brought up in Tseung Kwan O district, they would have to withstand additional pressure. Actually, we rely on the concerted effort of Members in taking forward the project in question.

Earlier on, Members also mentioned the issue of waste charges. If my memory has not failed me, Members have in general mentioned this point earlier. According to the information today, a survey conducted by a green group indicates that 26 out of the 59 Members of the Legislative Council support imposing waste charges. Surely, I also heard that some Members express reservation about the relevant arrangement, they worry that charges are levied in order to deter people from producing waste.

However, the purpose of this policy is to employ economic means to return the eco-responsibility to polluters. In fact, the world is heading towards this direction. Hence, I hope that when Members give their views or even criticize

this policy of the Government today, they will leave room for the Government to put forth those policies, and I earnestly hope that Members will do so. I hope we will be allowed to put forth the relevant polices and be given the room to consider the overall interests of Hong Kong.

I think Members have made clear their requests on the Government. Regarding the several points mentioned earlier, particularly on the provision of certain modernized facilities or implementation of some controversial policies, Members have requested expeditious actions from the Government, and we have heard such views. Members also consider that the authorities should take this opportunity to put forth the relevant policies earlier for discussion. We will follow up the issue.

Some Members also mentioned earlier that this might be a good opportunity to arouse discussion in society and allow the public to focus on the issue. The authorities may even take this opportunity to launch public education and promotion. I completely agree with this point.

Actually, today, a lot of efforts have been put in this type of work in schools. In the Policy Address today, Members may see that following the $1 billion earmarked for the relevant fund in 2008, the Chief Executive will allot another $500 million this year for the fund. This is exactly because the function of the fund has been brought into full play in the past few years in launching public education and introducing applied environmental technology. At least $700 million of the $1 billion fund have been set aside for these tasks.

Some Members mentioned the provision of "Green Lunch" at school. Perhaps Members have not noticed that in the past few years, which is just a short period, we have been encouraging schools to adopt self-portioning arrangement for lunch to reduce food waste. The authorities have invested more than $150 million in this respect.

Certainly, if members of the public do not know or understand a lot of the work of the Government, the Government is the first to shoulder this responsibility. However, since Members share this concern with us, we hope Members will join hands with us in conveying the correct message to the public.

Members have also asked what lesson we can learn from the present incident. Regarding Members' criticisms targeting at me or my work, I will

think about them carefully. Apart from these, on a number of points concerning the overall strategy, I think I agree with the direction put forth by Members. First, I think we are now trying to change the existing single-pronged approach adopted in Hong Kong on waste treatment, which relies solely on landfills. The Government has pointed out long time ago that this approach should not be adopted. Today, I think Members also agree with this point.

Second, we have to consider the issue comprehensively. Today is the appropriate time to start working and implementing plans rather than bringing forth new direction. Perhaps I can take this opportunity to inform Members that in the coming month, I may invite Members from various political parties and groupings to come together to have in-depth discussions on the issue of waste treatment on the whole. On the one hand, I may have certain information to present to Members, as some Members may consider the information contained in our annual report insufficient. I may ask Members to focus on certain issues. For instance, on the approval of the integrated waste treatment facility, what major difficulties Members think we will encounter, and whether we will face certain unforeseeable difficulties. Take the imposition of levy on municipal solid waste as an example. In 2006, we tried to introduce such a levy, but we had a lot of worries about its implementation. So when we bring up the issue again, what position will Members take? Hence, please allow the Environment Bureau to take the lead in this aspect of work.

I hope the discussion today will not only provide an opportunity for Members to assess to our work, but will also enable all of us to move forward on this issue of common concern.

President, I so submit.

PRESIDENT (in Cantonese): I now call upon Miss Tanya CHAN to reply.

MISS TANYA CHAN (in Cantonese): President, this is the first time that I acted as Chairman of a subcommittee since I was elected a Member of the Legislative Council and I have made some slips in the process. Now that we are almost at the final moment, I would like to share these slips with Honourable colleagues later on.

The first meeting in the new Session is really an opportune time for Secretaries of Bureaux and Honourable colleagues to warm up. We have had in-depth discussions in our debate today about long-term development and the problems faced by residents in Tseung Kwan O, and I believe we have had a chance for introspection.

Mr Ronny TONG has just brought into this Chamber the signatures of around 4 000 residents who opposed the Tseung Kwan O landfill extension. I believe that Honourable colleagues have similarly received a number of emails about the landfill incident these few days. These residents have set out their views and personal experiences in many emails of thousands of words. However, many Honourable colleagues may not have taken a look at the plan of the extension in question. I have a copy of the plan of the Tseung Kwan O landfill extension, and Honourable colleagues can see clearly from the plan how this extension will intrude into the country park.

As I mentioned when I spoke a while ago, regarding the issue relating to another 15 ha of land, apart from the Finance Committee of the Legislative Council, the Government has to pass another barrier, that is, the Town Planning Board (TPB). Actually, I suspect that the Government has started ahead of the scheduled time to take that step forward. In late April, the Rural and New Town Planning Committee under the TPB started holding discussions on items including the proposed amendment to the Tseung Kwan O Outline Zoning Plan, comprising amendment items A1 and A2. Items A1 and A2 are about 20 ha of land within the extension area. A two-month consultation exercise has been launched in May and some opposing views have been collected, and the TPB is now handling the opposing veiws concerned. Of course, people who have submitted opposing views would have a chance to make representations to TPB officers and the TPB is going to make the final decision. Nevertheless, complaints have been handled since July and all complaints will be handled within nine months. As we have already noticed, even if this Order is repealed today, we still have to consider if the TPB has played a good role in gatekeeping.

Nonetheless, there is something paradoxical in terms of planning, and I will describe it as "the book of three lives". As we all know, the Outline Zoning Plan contains some areas of land for different purposes, and the uses of these areas of land are sub-divided into Column 1 and Column 2. Under Column 1, the "uses which are always permitted" for which the TPB's permission needs not be sought,

while Column 2 uses are other uses for which the TPB must take such steps as conducting consultations. It is set out in Column 1 of the Outline Zoning Plan that 5 ha of land of the country park and 15 ha of land within the extension area in Area 137 have been designated for special "uses which are always permitted". First of all, it is a country park — there is no problem as it has already been used for such a purpose — but a very interesting point is that the landfill and the country park are under the same column. It is really intriguing that the area can be used as a landfill and also a country park. Can the site be returned to its original state of a country park after it has been used for landfill purpose? I believe Honourable colleagues also understand that, by nature, this would be impossible. If the site is to be used as an open space or a barbecue spot, we still understand that there could be a possibility.

Although the Government has stated in the section on planning intention that this is just a long-term objective, I would describe this as "the book of three lives". For example, A is a human being in this life, he may become a celestial being in the next life and he may become a pet in the life after next. However, long-term projections may actually be meaningless to the public. The authorities concerned even fail to specify a closure date; will it be meaningful to discuss things in the next life? I understand the importance of long-term planning but I think it is better to have adequate discussions on each and every plan because this can well indicate the sincerity of the authorities concerned.

Next, I hope that we will discuss about taking stopgap measures or effecting a permanent cure. Mr Fred LI used the word "by-product" when he spoke just now — he was referring to the by-product from the landfill. The first by-product is odour. As many Honourable colleagues have mentioned, even though only one refuse collection vehicle has passed by, the odour lasts for a long time. Recently, I "enjoyed" the odour around six times each morning when I was helping out in the election campaign of a party member, Paul ZIMMERMAN. Refuse collection vehicles pass through the area day after day, and the odour really last for a long time and it is quite strong on days with poorer air quality.

As far as country parks are concerned, we have once again asked the Secretary to set out in a table the areas of land within country parks that have been borrowed for landfill purpose, and the areas of land that have or have not been returned. I have learnt a few expressions today, and the first one is "people

who return what they have borrowed are upper-class people" — from Mr IP Wai-ming; and "it is not difficult for a borrower who returns what he has borrowed to borrow again" — from Dr Priscilla LEUNG. Yet, I am most afraid that the Government will not return what it has borrowed and it is going to borrow from us again, which is not at all desirable. Hence, I hope that the Government would present in a table form the relevant information.

As regards effecting a permanent cure, the Government has just discussed in great length about drawing up an outline plan for solid waste management. Actually, I believe the Government has a timetable and a roadmap in its mind; and it may be better …… I suggest that the Government should have discussions with Members from various parties and groupings, as well as independent Members, and I hope that a timetable and a roadmap would then be re-submitted. In that case, the public, political parties, independent Members and District Council members can move together towards the target. I would like to see the Government share with all of us its long-term outline plan within this year.

The Policy Address delivered today has also touched upon promoting exchanges with Taiwan in the cultural and economic aspects. I hope that the Government would have intense communication with Taiwan in respect of environmental protection measures, which will promote mutual understanding between us and other Asian cities. What makes Taiwan a good example for reference? It is because we are all Chinese people with similar habits. Therefore, it will be of high reference value if we can share and make reference to the experience of another party.

Furthermore, I think it is very important to close down the landfill in a well-planned manner, and this can also demonstrate the Government's confidence in its policy. If the Government has the confidence to do this job well, I believe the closure of the landfill can be expected soon. I earnestly hope that landfills near to the residential area will be closed first. In that case, I hope that the Tseung Kwan O landfill should be accorded priority, because it is the grave concern of many residents, and the Tseung Kwan O community has now been better developed in aspects such as the transport network, community facilities, and so on. In the long run, I believe that it is not quite desirable to have a landfill in the area, so I hope that the Government would practically consider the matter and propose a closure date as soon as possible.

Furthermore, many measures are mentioned just now, such as those on food waste, these measures are well-intended and are actually long awaited. As I have just said, we would like to have a timetable and a roadmap on these measures. There are, however, some longer-term problems. The Government has frequently brought up the issue of energy-from-waste. The Secretary has just mentioned the discussions with the gas company and I also understand that this is within the Government's area of work. In foreign countries, the incinerators in some places are used for energy or power generation, yet in Hong Kong, there are no other participants in the power generation sector. Can any incineration facilities with power generation capability be set up, so that residents in the vicinity can enjoy the power generated, thereby relieving their burden of the monthly electricity bill? I believe the residents can more directly enjoy the power generated. Thus, I hope that the Secretary would take this into account because his area of work also includes energy issues.

Also, a Member has just talked about construction waste. Actually, many infrastructure projects will be implemented in Hong Kong in the next few years. Furthermore, as the property market is really prosperous, I believe many buildings will be demolished for redevelopment or many fitting-out works will be carried out. All these will produce a lot of construction waste. What can we do now? We have just talked about land-filling. There are two ways of transporting the construction waste to landfills, one is by sea, the other is by land. Nevertheless, both ways are unsatisfactory because the so-called barging points are actually very hard to locate, and we can only find suitable sites for use as barging points through the co-operation of many departments. Barging points also increase traffic flow and bring about the situations mentioned above. In other words, sand and stones may spatter when trucks are bumping along the road, which may cause traffic accidents. Hence, transportation either by land or by sea is unsatisfactory, and I know that there is a demand on the Mainland for a large quantity of quality sand, stones, rocks, and mud excavated in Hong Kong, which may be used for construction purposes. If we transport these quality materials to the Mainland, we will no longer have such materials and we also have to pay Mainland people for taking these quality materials with high potentials for recycling. I think that is a waste. It may be necessary to discuss with the Civil Engineering and Development Department on how these resources can be fully utilized so that they will not be turned into waste.

Lastly, as the Secretary has just mentioned, the Environment and Conservation Fund is mentioned in the Policy Address. In my opinion, in

respect of the long-term development of the environmental industry, that is, one of the six industries mentioned last year …… But, I personally think that the six industries are all related to land; in other words, there are six property industries. At all events, as a Member has just said, we should rely on the discussions between the Secretary and Secretary Mrs Carrie LAM as far as land is concerned. However, the fund should be used to finance more studies with a view to sustaining the development of our environmental industry.

Just now, the Secretary has also talked about a very important aspect of work, that is, the work on education. Taking the Announcement of Public Interest (API) on television as an example, I earnestly hope that the Government will not only publicize the constitutional reform, it is meaningless to draw an analogy between the issue and dancing. Regarding the API of the Environment Bureau, as far as we remember, some good-looking men and ladies in T-shirts call upon people to save water and electricity. I wonder if the authorities concerned can present the message in a more concrete way, rather than in such a abstract way, for example, one API specifically for one item of work. The overall publicity effort should certainly make people feel relaxed and delightful, but at a certain juncture, the message may have to be explicitly expressed, so that it can be easily understood and absorbed. I earnestly hope that the authorities concerned would give clear messages while not affecting creativity. Under these two premises, a series of new APIs may be produced, and schools, the public and even Members should help in the publicity efforts. Last but not least, a Member mentioned that the officers concerned may be removed from post. In my view …… it is also stated in the Policy Address that the political appointment system should be reviewed. We are not sure if the Government would consider making arrangements such as a revolving door. I hope that this door is not especially designed for the Secretary. To be frank, I think the Secretary has shown tolerance when he makes his concluding speech. Perhaps I should not say so, but at least he is willing to accept the reality as it is, and he has expressed the desire to continue the discussion with Members. On this occasion, I think the Secretary has expressed highly positive views and today's discussion can have a very positive function. As regards the continuous development of solid waste management in Hong Kong in the long run, I think it is worthy to have the discussion today.

At this most critical final moment, I have to express my sincere thanks to the Secretariat and the Legal Service Division because the current discussions

involve a lot of unexpected development, making it necessary for many staff members to work overtime and work till late at night, they even have to work during weekends. Therefore, I am very grateful to many staff members for being so helpful and accommodating, and for their patience and the large amount of time they have spent. I would also like to thank the staff members of my office to work as paparazzi, they remind Members who leave the Chamber not to forget to come back to vote. Nonetheless, I think we should view the present discussion from a positive perspective, I hope that the Government would submit a new roadmap and a new timetable as quickly as possible so that Members and the public can continue to move forward in the right direction. Thank you, President.

PRESIDENT (in Cantonese): I now put the question to you and that is: That the motion moved by Miss Tanya CHAN be passed. Will those in favour please raise their hands?

(Members raised their hands)

PRESIDENT (in Cantonese): Those against please raise their hands.

(Members raised their hands)

Miss Tanya CHAN rose to claim a division.

PRESIDENT (in Cantonese): Miss Tanya CHAN has claimed a division. The division bell will ring for three minutes.

PRESIDENT (in Cantonese): Will Members please proceed to vote.

PRESIDENT (in Cantonese): Will Members please check their votes. If there are no queries, voting shall now stop and the result will be displayed.

Functional Constituencies:

Dr Raymond HO, Dr David LI, Dr Margaret NG, Mr CHEUNG Man-kwong, Mrs Sophie LEUNG, Dr Philip WONG, Mr WONG Yung-kan, Ms Miriam LAU, Mr Abraham SHEK, Ms LI Fung-ying, Mr Tommy CHEUNG, Mr Vincent FANG, Dr Joseph LEE, Mr Jeffrey LAM, Mr Andrew LEUNG, Mr WONG Ting-kwong, Prof Patrick LAU, Dr LAM Tai-fai, Mr Paul CHAN, Mr CHAN Kin-por, Dr LEUNG Ka-lau, Mr CHEUNG Kwok-che, Mr IP Wai-ming, Mr IP Kwok-him, Dr PAN Pey-chyou, Mr Paul TSE and Dr Samson TAM voted for the motion.

Mr LAU Wong-fat voted against the motion.

Mr CHIM Pui-chung abstained.

Geographical Constituencies:

Mr Albert HO, Mr LEE Cheuk-yan, Mr Fred LI, Mr James TO, Mr CHAN Kam-lam, Mr LEUNG Yiu-chung, Ms Emily LAU, Mr Andrew CHENG, Mr TAM Yiu-chung, Mr Frederick FUNG, Ms Audrey EU, Mr WONG Kwok-hing, Mr LEE Wing-tat, Mr CHEUNG Hok-ming, Mr Ronny TONG, Mr KAM Nai-wai, Ms Cyd HO, Ms Starry LEE, Mr CHAN Hak-kan, Dr Priscilla LEUNG, Mr WONG Sing-chi, Mr WONG Kwok-kin, Mrs Regina IP, Mr Alan LEONG, Mr LEUNG Kwok-hung, Miss Tanya CHAN, Mr Albert CHAN and Mr WONG Yuk-man voted for the motion.

Mr LAU Kong-wah voted against the motion.

THE PRESIDENT, Mr Jasper TSANG, did not cast any vote.

THE PRESIDENT announced that among the Members returned by functional constituencies, 29 were present, 27 were in favour of the motion, one against it

and one abstained; while among the Members returned by geographical constituencies through direct elections, 30 were present, 28 were in favour of the motion and one against it. Since the question was agreed by a majority of each of the two groups of Members present, he therefore declared that the motion was passed.

(Some Members were speaking loudly in the Chamber)

PRESIDENT (in Cantonese): Members will please note that the meeting is still in progress.

PRESIDENT (in Cantonese): As Miss Tanya CHAN's motion has been passed, the Secretary for the Environment may not move his motion.

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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 208[1]) 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.

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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,

(Henry Tang)
Chief Secretary for Administration

中華人民共和國香港特別行政區
Hong Kong Special Administrative Region of the People's Republic of China

立法會主席
PRESIDENT OF THE LEGISLATIVE COUNCIL
曾鈺成 GBS, 太平紳士 Jasper Tsang Yok Sing GBS, JP

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LC Paper No. CB(2) 789/10-11(01)

11 January 2011

The Hon Henry Tang Ying Yen, GBM, GBS, JP
Chief Secretary for Administration
12/F, West Wing
Central Government Offices
Lower Albert Road
Central
Hong Kong

Dear Chief Secretary,

Country Parks (Designation)
(Consolidation)(Amendment) Order 2010 ("the Order")

I refer to your letter dated 4 January 2011 which I have passed to the House Committee in connection with its consideration to appoint a subcommittee to study matters relating to the power of the Legislative Council to amend subsidiary legislation.

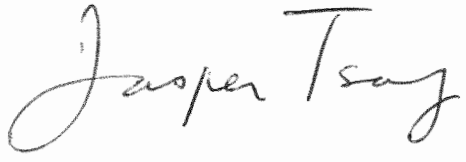
At the House Committee meeting held on 7 January 2011, Members considered it necessary that I should write to you and convey their grave concern over the manner in which the Administration questioned the legality of the resolution of this Council which repealed the Order.

I wish to stress that when I ruled on 11 October 2010 that the Honourable Tanya CHAN's proposed resolution to repeal the Order ("the Resolution") was in order under the Rules of Procedure of the Legislative Council, I had given very careful consideration to all the viewpoints placed before me, including those from the Administration. The Resolution was passed by the Council at its meeting on 13 October 2010 in accordance with the Rules of Procedure and the powers given under section 34(2) of the

Interpretation and General Clauses Ordinance (Cap. 1). It was then published in the Gazette on 15 October 2010 as Legal Notice No. 135 of 2010 pursuant to section 34(5) of Cap. 1. The Resolution has the full force of law.

I understand that the House Committee is taking proactive steps to study the concerns expressed over the interpretation of the various statutory formulations which define LegCo's power to amend subsidiary legislation. I am certain, with the support of the Administration, we should be able to come up with useful suggestions to remove any current doubts that may exist and, for the benefits of law drafters and law makers, to achieve a common understanding on the proper formulations to be adopted in future.

Yours sincerely,



(Jasper Tsang Yok Sing)
President

FORMULATIONS OF EMPOWERING PROVISIONS

PART I Common formulations for subsidiary legislation subject to section 34 of Cap. 1

Item	Formulation (with examples of variations)	Examples of relevant provisions	Examples of L.N.
1.	**"may by notice…"**		
	(a) "… in the Gazette, amend"	s. 31(2) of the Employees Retraining Ordinance (Cap. 423)	75, 76 & 99 of 2010
	(b) "… in the Gazette specify"	s. 2(2A) of the Trade Descriptions Ordinance (Cap. 362)	115 & 116 of 2010
	(c) " …in the Gazette declare"	s. 2A of the Antiquities and Monuments Ordinance (Cap. 53)	59 of 2007 & 21 of 2008
	(d) " … published in the Gazette amend"	s. 15 of the Prevention and Control of Disease Ordinance (Cap. 599)	117 of 2010
	(e) " … published in the Gazette, designate"	s. 3(1AB) of the Smoking (Public Health) Ordinance (Cap. 371)	100 of 2010
	(f) " … published in the Gazette, determine"	s. 12(1)(ea) of the Dutiable Commodities Regulations (Cap. 109A)	35 of 2010
2.	**"may by order…"**		
	(a) " … amend, or add to or delete from"	s. 106(6) of the Public Health and Municipal Services Ordinance (Cap. 132)	40 of 2010
	(b) " … , declare"	s. 36(2) of the Rating Ordinance (Cap. 116)	19 of 2010
	(c) " … designate"	s. 32I(1) of the Telecommunications Ordinance (Cap. 106)	62 & 63 of 2010
	(d) " … direct"	s. 3(1) of the Fugitive Offenders Ordinance (Cap. 503) ***[s. 3(3) : LegCo only has power to repeal]***	43 of 2010
	(e) " … exclude"	s. 3(1) of the Clubs (Safety of Premises) Ordinance (Cap. 376)	130 of 2010

Item	Formulation (with examples of variations)	Examples of relevant provisions	Examples of L.N.
	"may by order…"		
	(f) " … provide for"	s. 35(1) of the Immigration Ordinance (Cap. 115)	14 & 15 of 2010
	(g) " … replace…or amend"	s. 6B(1) of the Import and Export Ordinance (Cap. 60) ***[s. 6B(3) : LegCo only has power to repeal]***	45 of 2010
	(h) " … specify"	s. 2(2)(b) of the Trade Descriptions Ordinance (Cap. 362)	112, 113 & 114 of 2010
	(i) " … set aside"	s. 106(1) of the Public Health and Municipal Services Ordinance (Cap. 132)	39 of 2010
	(j) " … in the Gazette, direct"	s. 11(1) of the Census and Statistics Ordinance (Cap. 316)	7 of 2010
	(k) " … published in the Gazette amend "	s. 50(2) of the Dangerous Drugs Ordinance (Cap. 134)	64 of 2010
	(l) " … published in the Gazette, declare"	s. 3(1) of the Port Control (Cargo Working Areas) Ordinance (Cap. 81)	98 of 2010
	(m) " … published in the Gazette, designate"	s. 105K(1) of the Public Health and Municipal Services Ordinance (Cap. 132)	22, 42 & 86 of 2010
	(n) " … published in the Gazette exclude"	s. 11(1) of the Electronic Transactions Ordinance (Cap. 553)	54 of 2010
	(o) " … published in the Gazette provide for"	s. 4 of the Prisons Ordinance (Cap. 234)	13 & 38 of 2010
3.	**"may by regulation…"**		
	(a) " … prescribe or provide for"	s. 6(1) of the Dutiable Commodities Ordinance (Cap. 109)	21 of 2010
	(b) " … provide for"	s. 33(1) of the Waste Disposal Ordinance (Cap. 354)	83 & 84 of 2010

Item	Formulation (with examples of variations)	Examples of relevant provisions	Examples of L.N.
4.	**"may make…"**		
	(a) " … by-laws"	s. 8(1) of the Professional Accountants Ordinance (Cap. 50)	44 of 2010
	(b) " … regulations"	s. 37(1) of the Waterworks Ordinance (Cap. 102)	129 of 2010
	(c) " … rules"	s. 51(1) of the Deposit Protection Scheme Ordinance (Cap. 581)	131 of 2010

PART II Formulations for subsidiary legislation which is expressed to be not subject to section 34 of Cap. 1

Item	Formulation	Relevant provision	Examples of L.N.
1.	**"may by notice** published in the Gazette amend…"	s.16(2) of Tung Chung Cable Car Ordinance (Cap. 577)	-
2.	**"shall by notice…"**[1]		
	(a) "……. published in the Gazette amend"	s.52(1) of Western Harbour Crossing Ordinance (Cap. 436)	107 of 2010
	(b) "…….published in the Gazette amend"	s.45(1) of Tai Lam Tunnel and Yuen Long Approach Road Ordinance (Cap. 474)	109 of 2010
	(c) "……. published in the Gazette, announce"	s.21(1) of Carriage By Air Ordinance (Cap. 500)	251 of 2009
3.	**"may by order…"**		
	(a) "…….amend"	s.35(2) of Volunteer And Naval Volunteer Pensions Ordinance (Cap. 202)	106 of 2010
	(b) "…….revoke"	section 27(1) of Tung Chung Cable Car Ordinance (Cap. 577)	-

[1] Please also refer to paragraph 2.30.

Item	Formulation	Relevant provision	Examples of L.N.
4.	**"may make rules"**	s. 51 of Professional Accountants Ordinance (Cap. 50)	-
5.	**"shall make regulations…"**	s. 3 of United Nations Sanctions Ordinance (Cap. 537)	111 of 2010
6.	**"may by bylaw…."**	s.13 of Hong Kong Academy of Medicine Ordinance (Cap. 419)	-

President's Ruling on the
Proposed resolutions under section 34(2)
Of the Interpretation and General Clauses Ordinance (Cap 1)
To amend the Public Revenue Protection (Revenue) Order 1999

On 30 March 1999, the Chief Executive in Council made the Public Revenue Protection (Revenue) Order 1999 under section 2 of the Public Revenue Protection Ordinance (Cap 120). The Order was gazetted the same day and laid on the table of the Legislative Council on 31 March 1999. Set out in the Schedule to the Order was a bill to amend certain ordinances to give effect to the revenue proposals in the Budget for the 1999-2000 financial year. The Order came into operation on 1 April 1999.

2. Section 2 of the Public Revenue Protection Ordinance provides that –

" If the Governor approves of the introduction into the Legislative Council of a bill or resolution whereby, if such bill or resolution were to become law –

(a) any duty, tax, fee, rate or other item of revenue would be imposed, removed or altered; or

(b) any allowance in respect of a duty, tax, fee, rate or other item of revenue would be granted, altered, or removed; or

(c) any administrative or general provision in relation to a duty, tax, fee, rate or other item of revenue would be enacted, altered, or removed

the Governor may make an order giving full force and effect of law to all the provisions of the bill or resolution so long as such order remains in force." (The term "the Governor" is contrued as meaning "the Chief Executive".)

3. The Order is a temporary measure. Under section 5 (2) of the Ordinance, it will expire and cease to be in force upon the –

(a) notification in the Gazette of the rejection by the Legislative Council of the bill in respect of which the order was made;

(b) notification in the Gazette of the withdrawal of the bill or order; the Bill, with or without modification, becoming law in the

ordinary manner; or

(c) the expiration of 4 months from the day on which the order came into force,

whichever event first happens.

4. An order made under section 2 of the Public Revenue Protection Ordinance is subsidiary legislation which is subject to the provisions of section 34 of the Interpretation and General Clauses Ordinance (Cap 1).

5. Later, on 21 April 1999, the same bill set out in the Order, entitled Revenue Bill 1999, was introduced intact into the Legislative Council. It is now being studied by a Bills Committee of the Council.

Hon Albert HO's proposed resolutions

6. Hon Albert HO Chun-yan has given notice of his intention to move four proposed resolutions which seek to amend, by way of repeal, certain provisions in the bill scheduled to the Order.

7. Mr HO's first proposed resolution seeks to repeal those clauses of the bill scheduled to the Order which relate to the Betting Duty Ordinance. The intention of these clauses is to increase the duty on exotic bets with effect from 1 September 1999.

8. The second proposed resolution seeks to repeal those clauses of the same bill which relate to the Fixed Penalty (Traffic Contraventions) Ordinance and the Fixed Penalty (Criminal Proceedings) Ordinance. The intention of these clauses is to increase the fixed penalties provided in the Ordinances with effect from 1 August 1999.

9. The third proposed resolution seeks to repeal those clauses of the same bill which relate to the Cross-Harbour Tunnel. The intention of these provisions is to increase the tolls for the use of the Cross-Harbour Tunnel with effect from 1 September 1999.

10. The fourth proposed resolution seeks to repeal clause 43 of the same bill relating to the Road Traffic (Parking) Regulations. The clause increases the fees for the use of metered parking spaces with effect from 1 April 1999.

The Administration's grounds of objection

11. The Secretary for the Treasury has put forward three grounds of objection: that the resolutions have a charging effect within the meaning of Rule 31 of the Council's Rules of Procedure; that the resolutions anticipate Revenue Bill 1999 which is now being studied by the Council and will be fully debated in Council in due course; and that the Legislative Council does not have the power to amend the Order in the manner sought by Mr HO's proposed resolutions.

12. Because the question of whether the Legislative Council has the power to amend the Order in the manner proposed by Mr HO is of primary importance, I have directed my main attention to the consideration of this aspect. I have considered Mr HO's response to the Administration's arguments, as well as the views of Counsel to the Legislature which lend support to the Administration's claim in regard to the Council's power to amend the Order.

Views of Counsel to the Legislature

13. Counsel to the Legislature has advised that under section 34 (2) of Cap 1, the Legislative Council may amend an item of subsidiary legislation (the Order in this case) "in any manner whatsoever consistent with the power to make such subsidiary legislation". In 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 Public Revenue Protection Ordinance. Under section 2 of the Ordinance, if the Chief Executive has approved of the introduction into the Legislative Council of a bill which would provide the legal basis for achieving any of the revenue measures provided in section 2(a) to (c) of the Ordinance, he will have a discretion to decide whether to make an order to give "full force and effect of law to all the provisions of the bill". In other words, if the Chief Executive decides to make an order, he will have no choice but to include in the order all the provisions of the bill. Since the Legislative Council's power to amend the order has to be consistent with the power of the Chief Executive to make the order, its power is limited to either

to make or not to make the order in its entirety. Practically speaking, the Legislative Council, in exercising its power under section 34(2) of Cap 1, does not have the power to amend individual provisions in the order.

Hon Albert HO's response to the Administration's objection

14. Mr HO argues that the proper reading of section 2 of the Public Revenue Protection Ordinance is that it grants the Chief Executive the discretionary power to put into effect all the revenue-related provisions in a bill; it does not require that all such provisions be put into effect, but merely gives the Chief Executive this power over all of the bill's revenue provisions. The Legislative Council has the power to amend the individual provisions in the Order, and section 6 of the Ordinance clearly envisages that the order of the Chief Executive is reversible by the Legislative Council. Section 6 provides that "So much of any duty, tax, fee, rate or other item of revenue as may have been paid under any order made under this Ordinance in excess of the respective duty, tax, fee, rate or other item of revenue payable immediately after expiration of the order shall be repaid to the person who paid the same."

Discussion

15. The purpose of the Public Revenue Protection Ordinance is to protect the Government from loss of revenue during the period when long-term proposals for increases in duty, tax, fees, rates and other items of revenue are being considered by the Council. It is clear that any order made under the Ordinance should be intended to be a provisional and temporary measure (lasting for a maximum period of four months only) for preventing the avoidance of payment. An order made under the Public Revenue Protection Ordinance should be distinguished from bills and resolutions which seek to bring in long-term revenue proposals for the Council's consideration. I realize that there have been discussions between the Administration and Members about the merits of including in the present Order, by way of an unprecedented omnibus bill in its Schedule, provisions that relate to tax concessions, fines, and some revenue proposals that will not take effect until after the expiry of the Order. Some Members doubt whether the Public Revenue Protection Ordinance is being used for its true purpose of protecting Government's revenue. I note that the Administration is reported as having conceded to the House Committee's Subcommittee which studied the Order that the existing wording of section 2 is too rigid and leaves no room for flexibility, and the Administration intends to amend the section in the future to the effect that an order need not include all the provisions in a revenue bill.

16. However, these discussions and development do not detract from the legal position of section 2 of the Ordinance, which is that the Chief Executive is empowered to make an order to give "full force and effect of law to all the provisions in the bill" the introduction of which he has approved of. Because the Chief Executive, unlike in previous years, has approved of the introduction of only one omnibus bill containing the revenue proposals, he is obliged under section 2 to include in the Order all the provisions of the bill. To be consistent with the power of the Chief Executive to make the Order, the Legislative Council's power to amend the Order under section 34(2) of Cap 1 is therefore limited to repealing the Order where it considers appropriate.

Ruling

17. Having considered the arguments put forth by the Secretary for the Treasury and Mr HO, and taking into account the views of Counsel to the Legislature, I rule that Mr HO may not move the proposed resolutions as they fall outside the power of the Legislative Council to amend the Order under section 34(2) of Cap 1.

18. As I have ruled that the Council has no power to amend the Order in the manner proposed by Mr HO, I do not feel that any useful purpose would be served by my consideration of the Administration's two other grounds of objections in this context. These issues should be considered when the need arises.

(Mrs Rita FAN)
President
Legislative Council

3 May 1999

President's ruling
on proposed resolutions to amend the Employees Retraining Ordinance (Amendment of Schedule 3) (No. 2) Notice 2008 proposed by Hon Mrs Regina IP LAU Suk-yee and Hon LEE Wing-tat

Hon Mrs Regina IP and Hon LEE Wing-tat have given notice to move proposed resolutions to amend the Employees Retraining Ordinance (Amendment of Schedule 3) (No. 2) Notice 2008 ("No. 2 Notice") at the meeting of the Legislative Council of 10 December 2008. In considering the admissibility of these proposed resolutions for consideration by the Council, I have invited the Administration to comment on the proposed resolutions and the Members concerned to respond to the Administration's comments. The Administration's comments and the Members' responses are summarized in the **Appendix**.

2. In the two submissions of the Administration, I notice that the Administration has addressed at some length the "lawfulness" of the Members' proposed resolutions. I wish to reiterate that the President determines the admissibility of the proposed resolutions in accordance with the Rules of Procedure of the Legislative Council ("RoP") only. My rulings are procedural in nature. Legal or constitutional issues would be considered when they form an integral part of the procedural question under my consideration. I shall take into account all relevant considerations and the purpose of the relevant rules when forming my opinion.

3. In the course of my consideration, I have made reference to the advice of Counsel to the Legislature in respect of the Council's power to amend subsidiary legislation, his analysis of the meaning of "public moneys" in the context of RoP 31(1), and also to past cases in the Council where references were made to principles of ultra vires and charging effect.

Employees Retraining Ordinance (Amendment of Schedule 3) (No. 2) Notice 2008

4. The Employees Retraining Ordinance (Cap. 423) ("ERO") establishes a body corporate, known as the Employees Retraining Board ("the Board"), to administer the Employees Retraining Fund ("the Fund") for providing training and retraining for local workers.

5. Under section 14 of ERO, a levy, known as the Employees Retraining Levy ("the levy"), shall be payable by each employer who employs imported employees under a labour importation scheme in respect of each imported employee to be employed by him under a contract of employment and granted a visa. The amount of levy payable is the sum specified in Schedule 3 of ERO multiplied by the number of months specified in the contract of

employment. Section 31(1) provides that the Chief Executive in Council ("CE-in-Council") may, by notice in the Gazette, amend Schedule 3.

6. On 1 August 2008, the Employees Retraining Ordinance (Amendment of Schedule 3) Notice 2008 ("Amendment Notice") was gazetted to reduce the sum of $400 specified in Schedule 3 to $0 for two years with effect from that date. The Amendment Notice was tabled in Council on 8 October 2008.

7. On 11 November 2008, the No. 2 Notice was gazetted to repeal the Amendment Notice and extend the reduction of the sum to $0 for five years, and revert the sum to $400 as from 1 August 2013. The No. 2 Notice was tabled in Council on 12 November 2008.

Hon Mrs Regina IP's proposed resolution

The proposed resolution

8. Mrs IP's proposed resolution seeks to amend the No. 2 Notice to the effect that the levy in respect of each imported employee to be employed under the "Scheme for Importation of Foreign Domestic Helpers ("FDHs")" approved by CE-in-Council on 25 February 2003 shall remain at $0 from 1 August 2013 onwards, whereas the sum for each imported employee to be employed under any other labour importation scheme shall revert to $400.

Ultra vires issues

9. The Administration refers to section 34(2) of the Interpretation and General Clauses Ordinance (Cap. 1) and submits that Mrs IP's proposed amendment is not "consistent with" the power to make the No. 2 Notice, and hence is ultra vires section 31(1) of ERO. The argument put forward by the Administration is that in making the No. 2 Notice, CE-in-Council merely sought to provide temporary relief. As Mrs IP's proposed resolution seeks to dispense altogether with the need to impose a levy on the employers of FDHs for an indefinite period, contrary to ERO itself, the proposed amendment exceeds the power that CE-in-Council was exercising in making the No. 2 Notice. The Administration also argues that there is nothing in ERO indicating that differential levies may be set.

10. Mrs IP does not agree to the Administration's views. Mrs IP submits that if CE-in-Council may suspend the levy of $400 for a fixed period of time, CE-in-Council must also have the power to extend the suspension period until further notice. Mrs IP also submits that there is no prohibition against CE-in-Council to apply different rates of levy.

11. Counsel advises me that there is no expressed or implied restriction on the length of period during which a certain specified amount of levy, including

the amount of "$0", should apply to amendments made to Schedule 3 to ERO under section 31(1) thereof. Such length of period is essentially a question of policy. Counsel's view is that the proposed amendment is within the power of CE-in-Council to make, and it does not fall foul of the requirement that the amendment proposed to be made pursuant to section 34(2) of Cap. 1 has to be made in a manner consistent with the power to make the No. 2 Notice under section 31(1) of ERO.

12. As regards differential rates of levy, Counsel points out that section 7(2) of Cap. 1 provides to the effect that words and expressions in the singular include the plural and vice versa. Section 2(1) of the same provides that save where the contrary intention appears, section 7(2) applies to ERO. The references to "the amount of levy" and "the sum specified in Schedule 3" in section 14(2) of ERO, couched in the singular, can be easily explained by the fact that the reference they relate to is "in respect of each imported employee". To construe that wording as disallowing differential levies may well be too restrictive because different labour importation schemes may be approved which may need differential levies to cater for their individual circumstances. In Counsel's view, no contrary intention appears against construing the relevant provisions as allowing differential sums of levies to be specified.

13. Having considered the relevant sections of Cap. 1 and ERO and the views of the Administration, Mrs IP and Counsel, I am of the opinion that no provision is found in ERO which restricts the power of CE-in-Council in amending Schedule 3 in such a way that it has to be for a definite period. It is entirely a question of public policy to be reflected in Schedule 3. ERO does not impose any restriction regarding the duration that a specified amount of levy should apply and so the proposed amendment is not inconsistent with the ERO and thereby with section 34(2) of Cap. 1.

14. As regards differential rates, the Administration's submission fails to persuade me that there can only be one rate for the levy under ERO. I am therefore of the opinion that Mrs IP's proposed amendment to provide a separate rate in respect of the employees under the FDH scheme is not out of order.

<u>Charging effect issue</u>

15. The Administration is of the view that Mrs IP's proposed amendment has charging effect and hence is caught by RoP 31(1), which says:

> "A motion or an amendment, the object or effect of which may, in the opinion of the President or Chairman, be to dispose of or charge any part of the revenue or other public moneys of Hong Kong shall be proposed only by –

(a) the Chief Executive; or

(b) a designated public officer; or

(c) a Member, if the Chief Executive consents in writing to the proposal."

16. The Administration submits that the assets of the Fund plainly fall within the broad definition of "revenue or other public moneys". Whether sourced from employers by way of the levy or by subvention out of general revenue, the assets of the Fund can only be regarded as public and not private moneys. The Administration considers that the proposed amendment is an infringement which "fails to respect the Executive's financial initiatives", and "interferes with CE's constitutional responsibility to ensure that the Fund is at all time adequate to ensure that the Board can fulfil its statutory responsibilities". The Administration also submits that under section 27(2) of ERO, if and when the Fund's assets are no longer required, the assets may be transferred to general revenue.

17. The Administration further submits that the object or effect of the proposed amendment is to dispose of (i.e. to get rid of) the levy in relation to FDHs as from 1 August 2013. It would thereafter inexorably reduce the income of the Fund, and therefore the assets of the Fund.

18. The Administration has referred to my predecessor's ruling in 1998 in relation to the Pneumoconiosis Compensation Fund[1] and has made the comment that the President took far too narrow a view of the meaning of "revenue or public moneys". The Administration also argues that while the Government had not given any funding support to the Pneumoconiosis Compensation Fund in the past other than the initial loan facility in 1980 which had already been repaid in full in 1983, a zero levy post-2013 in relation to FDHs would necessitate reinstatement of government subventions to the Employees Retraining Fund if the purposes of ERO are thereafter to be fulfilled.

19. Mrs IP submits that judging from how the Fund is established, vested, maintained, used and operated under ERO, the Fund is independent of the Government and does not fall within the definition of "public moneys". Mrs IP also points out that the Administration's submission does not provide an accurate description as to what amounts to "public moneys".

20. Counsel advises that the Board, as a body corporate, has a distinct legal personality of its own. It is empowered to perform the Board's functions and exercise its powers on its own, subject to section 27 of ERO, which

[1] Ruling on Hon LEE Cheuk-yan's amendment to the Administration's resolution under the Pneumoconiosis (Compensation) Ordinance (Cap. 360) dated 20 July 1998

provides that CE may give to the Board such directions as he thinks fit in relation to the performance of its functions or the exercise of its powers and the Board shall comply with such directions. Nevertheless, where this happens, it is still the Board, and the Board alone, which performs its functions or exercises its powers. In this regard, section 2 of Schedule 1 to ERO specifically provides that the Board "shall not be regarded as a servant or agent of the Government or as enjoying any status, immunity or privilege of the Government".

21. Counsel points out that the definitions of “public moneys” in the Public Finance Ordinance (Cap. 2) and the Audit Ordinance (Cap. 122) are the only statutory definitions of the expression. These definitions not only appear in the two main ordinances dealing with public finance, but they also carry the same narrow meaning. As advised by Counsel, in today's public finance system of Hong Kong, funds that fall within the meaning of "public moneys" include, for example, the Capital Works Reserve Fund, Capital Investment Fund, and trading funds of various government departments. Regarding section 27(2) of ERO, Counsel points out that similar mechanisms are found in other ordinances, for example section 23C of the Probate and Administration Ordinance (Cap. 10), to deal with non-public moneys which are being held by a public authority.

22. In the light of Counsel's advice in paragraph 21 above, I share Counsel's view that there is a strong argument that the Employees Retraining Fund does not fall within the meaning of "other public moneys" in RoP 31(1). Counsel further advises that ERO does not place any statutory obligation on the Government to inject funds into the Fund on any account.

23. I note from the previous rulings of my predecessor the following principles which have been established in relation to the application of RoP 31(1):

(a) any consequence on a statutory fund, not being the revenue or other public moneys of Hong Kong, incidental or direct, would not have any charging effect within the meaning of RoP 31(1); and

(b) unless there is a relevant obligation under which the Government is bound by law, any effect that an amendment will have on government revenue will not constitute charging effect.

24. There is nothing in the Administration's submission to persuade me that the above principles should not apply in the present case. None of the points raised by the Administration could, on its own or taken together, establish to my satisfaction that the Employees Retraining Fund is within the meaning of "public moneys" of RoP 31(1). I have no alternative but to form

the opinion that the Fund is not a part of public moneys and so Mrs IP's proposed resolution does not have charging effect under RoP 31(1).

Hon LEE Wing-tat's proposed resolution

The proposed resolution

25. Mr LEE's proposed resolution seeks to provide for the reversion of the amount of the levy to $400 to come into operation on a date to be appointed by the Secretary for Labour Welfare (SLW) subject to the approval of the Council.

26. The Administration has made a submission to object to Mr LEE's proposed amendment on grounds of ultra vires and charging effect, which I shall address later. Mr LEE's proposed amendment has also raised a drafting issue, which has called for a study of its compliance with section 28(4) of Cap. 1. In the course of my consideration, I have been assisted by Counsel to the Legislature on whether the drafting of the proposed amendment is in order. Under RoP 30(3)(c), I am under the obligation to direct the notice of a motion to be returned to the Member who signed it, if it is in my opinion out of order.

Ultra vires issues

27. Mr LEE's proposed amendment is to repeal section 1(1) of the No. 2 Notice, and substitute it with the following:

> "(1) Section 2 shall come into operation on a date to be appointed by the Secretary for Labour and Welfare subject to the approval of the Legislative Council.".

Section 2 reverts the amount of levy from $0 to $400. Section 1(1) is to enable section 2 to come into operation on 1 August 2013, with the effect that the $0 levy will be in force for five years from 1 August 2008.

28. Mr LEE's proposed amendment comprises three operative parts:

(a) that section 2 shall come into operation on a date to be appointed;

(b) that the date shall be appointed by SLW; and

(c) that the commencement of section 2 shall be subject to the approval of the Council.

29. Counsel advises me that Mr LEE's proposed amendment contains no requirement that the appointment be "by notice", which is always present in commencement clauses providing for the commencement date to be appointed. According to Counsel, the statutory provision that governs the commencement

of subsidiary legislation is section 28(3) and (4) of Cap. 1. The relevant provision for the present purpose is subsection (4), which provides:

> "A person who makes subsidiary legislation may provide for the subsidiary legislation to commence on a day to be fixed by notice to be given by him or by some other person designated in the subsidiary legislation.".

The effect of subsection (4) is to empower the maker of the subsidiary legislation to defer the fixing of a commencement date to another date to be appointed by notice, and the notice may be given by himself or by another person. Where this power to defer the fixing of a commencement date is exercised, it is clear that the power has to be exercised as provided, that is, by notice.

30. I have looked closely at the relevant provision in the context of section 28 of Cap. 1 and noted how the requirement of "notice" relates to the definition of subsidiary legislation. I agree with Counsel that the requirement to make the appointment of the commencement date "by notice" is essential to the valid exercise of the power to make such an appointment. Hence, it follows that Mr LEE's proposed resolution is ultra vires the said subsection (4) as the governing provision.

31. The Administration's objection to Mr LEE's proposed amendment is also on ultra vires ground but on a basis different from that referred to in the foregoing paragraphs. The Administration's submission refers to the third part of Mr LEE's proposed amendment, i.e. the commencement of the reversion of the amount of levy to $400 shall be subject to the approval of the Council. The Administration points out that a notice made under section 31(1) of ERO including the commencement provision as set out in section 1 of the No. 2 Notice is a form of subsidiary legislation which is subject to the requirement of section 34 of Cap. 1 that it be tabled in Council, i.e. the negative vetting procedure[2]. Mr LEE's proposed amendment has the effect of making the commencement subject to section 35 of Cap. 1, i.e. the positive vetting procedure[3]. While section 31(1) of ERO is not subject to section 35 of Cap. 1, the proposed imposition or importation of such a requirement would have the effect of applying the requirement of section 35 of Cap. 1 to the making of subsidiary legislation under section 31(1) of ERO. The Administration

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[2] Under the negative vetting procedure provided in section 34 of Cap. 1, all subsidiary legislation is to be tabled at the next Council meeting after the publication in the Gazette of the subsidiary legislation. The Council may amend an item of subsidiary legislation by a resolution passed at a Council meeting held not later than 28 days after the meeting at which it was tabled. The Council may also extend the scrutiny period by 21 days, or to the Council meeting immediately following the 21 days, if there is no Council meeting on the 21st day.

[3] Under the positive vetting procedure provided in section 35 of Cap. 1, where any ordinance provides that an item of subsidiary legislation is to be subject to the Council's approval, the item must be submitted to the Council for approval.

considers that it is beyond the scope of powers under section 31(1) to make such an amendment, which may only be achieved by way of an amendment ordinance.

32. In Mr LEE's submission, he argues that there is nothing in section 35 or other parts of Cap. 1 that requires that amendments to a provision to the effect that it be submitted for the approval of the Council could only be made when the provision itself is subject to the requirement of section 35 of Cap. 1. Mr LEE also points out that there is no previous ruling that such an amendment is "beyond the scope of power".

33. I accept the Administration's submission that the imposition of requirements of section 35 of Cap. 1 to the making of the subsidiary legislation, i.e. a commencement notice, under section 31(1) of ERO is beyond the powers given to CE-in-Council by the same section. Accordingly, I rule Mr LEE's proposed amendment out of order.

Charging effect issue

34. As I have already formed the opinion that Mr LEE's proposed amendment is ultra vires, I shall not deal with the issue of whether it has charging effect under RoP 31(1).

My ruling

35. I rule that:

(a) Hon Mrs Regina IP may move her proposed resolution to the No. 2 Notice at the Council meeting of 10 December 2008; and

(b) Mr LEE Wing-tat's proposed resolution is out of order and its notice be returned to him under RoP 30(3)(c).

(Jasper TSANG Yok-sing)
President
Legislative Council

8 December 2008

Appendix

Employees Retraining Ordinance (Amendment of Schedule 3) (No. 2) Notice 2008

**Summary of Members' proposed resolutions,
the Administration's comments and the Members' responses**

Proposed resolutions	Administration's comments	Members' responses
(a) Hon Mrs Regina IP LAU Suk-yee		
The proposed resolution seeks to amend the No. 2 Notice to the effect that the levy in respect of each imported employee to be employed under the "Scheme for Importation of FDHs" approved by CE-in-Council on 25 February 2003 shall remain at $0 from 1 August 2013 onwards, whereas the sum for each imported employee to be employed under any other labour importation scheme shall revert to $400.	<u>Ultra vires and section 34(2) of Cap. 1</u> The proposed resolution to specify the amount of levy imposed in relation to FDHs to be $0 and the amount of levy imposed in relation to other imported workers to be $400 is objectionable because it is ultra vires section 31(1) of ERO, and hence is not "consistent with" the power to make the No. 2 Notice and goes beyond the power conferred by section 34(2) of Cap. 1 in the following way. First, the proposed resolution exceeds the power that CE-in-Council was exercising in making subsidiary legislation by the No. 2 Notice. CE merely sought to give temporary relief to employers of imported workers including FDHs for a limited time, that being justified by the current balance of the Fund. The proposed resolution goes far further. It would seek to dispense altogether with the need to impose a levy on employers of FDHs for an indefinite period, contrary to ERO itself. Second, ERO establishes a framework under which CE-in-Council may approve a labour importation scheme which requires employers of workers covered by that scheme	<u>Ultra vires</u> Looking at ERO as a whole, one will note that under section 14(3) of ERO, CE-in-Council may approve a labour importation scheme under the terms of which a levy shall be payable. In addition, under section 31(1), CE-in-Council has been given a general power to amend Schedule 3, i.e. the Schedule containing the amount of the levy. It is reasonable to argue that there is no prohibition against CE-in-Council to apply different rates of levy to different types of labour importation scheme. Further, one must put the proposed resolution in the context of ERO. The provisions imposing the levy are set out in ERO. The effect of the proposed resolution is not to amend those provisions. The main difference between Administration's proposal and the proposed resolution is that the Administration proposes to suspend the imposition of the levy for a fixed period of time whereas the proposed resolution suspends the imposition until

Proposed resolutions	Administration's comments	Members' responses
	to apply to the Director of Immigration for permission to engage workers from abroad and, having obtained that permission, to pay a levy in respect of any such worker. The amount of the levy is specified in Schedule 3 to ERO. There is nothing in ERO indicating that differential levies may be set. Section 14(2) of ERO refers to the "sum specified in Schedule 3" and section 31(1) of ERO only empowers CE-in-Council to amend Schedule 3, i.e. "the amount of levy specified for the purposes of section 14(2)". It does not empower CE-in-Council to specify different sums in relation to different classes of imported employees or in respect of different schemes approved under section 14(3). An amendment Ordinance would be required for this purpose.	further notice. The power of CE-in-Council to impose the levy under ERO is not affected by the proposed resolution. If CE-in-Council may suspend the levy for a fixed period of time, CE-in-Council must also have power to extend the suspension period until further notice. As the power of CE-in-Council to impose the levy under ERO is not prejudiced by the proposed resolution, the proposed resolution will not infringe the purported "Executive's financial initiative". In any event, CE-in-Council has no role in the use of the Fund and thus "Executive's financial initiative" is irrelevant in this context.
	<u>Charging effect under RoP 31(1)</u> The proposed resolution has charging effect and hence is caught by RoP 31(1). It may not be proposed without the written consent of CE. The assets of the Fund plainly fall within the broad description of "revenue or other public moneys". The Fund is currently vested in the Board which in turn is accountable to LegCo (section 13 of ERO). The Fund itself is partly sourced from moneys provided by Government (a total of $4 billion since the establishment of the Board in 1992 including some $400 million paid annually between 2001-2002 and 2007-2008) (section 6(3)(e) of ERO). The Fund includes the levy collected by a public	<u>Charging effect</u> It appears that the Administration is not disputing that the levy or the Fund is not part of the revenue. The main issue is whether the proposed resolution will dispose of or charge any part of other public moneys of Hong Kong. The Fund was established by section 6 of ERO and is vested in the Board. Under section 8, the Board is required to maintain the Fund with a bank and pay all moneys comprising the Fund into the Account. Payments from the Fund is governed by section 7 of ERO. The operation of the Fund is based on ERO and is independent from the Government. Apparently, the Fund does not fall within the definition of "public moneys" in Cap. 2.

Proposed resolutions	Administration's comments	Members' responses
	officer (the Director of Immigration) and remitted to the Fund (sections 14(1), 15(1) and 16 of ERO). The Fund is subject to examination by the Director of Audit (section 12 of ERO). If and when the Fund's assets are no longer required, the assets may be transferred to general revenue (section 27(2) of ERO). We have examined the definitions in Cap. 2 (dealing primarily with the process of LegCo's approval of Government expenditure and the responsibility of controlling officers) and those in Cap. 122 (which covers the work of the Director of Audit). Those definitions, applicable in the context of those particular statutory provisions, do not purport to be of general application, still less to govern the meaning of RoP 31(1). There is no good reason for treating the Fund and its assets as beyond the wide meaning of the words "revenue or other public moneys". Put simply, the Board is there to carry out a facet of public policy. The Fund is there to facilitate that public purpose. Whether sourced from employers by way of the statutory levy, or by subvention out of general revenue, the assets of the Fund can only be regarded as public (not private) moneys, albeit presently vested in the Board for statutory purposes. It is surely for that reason that ERO contains the provisions of sections 12, 13, 14(1), 15, 16 and 27(2). The purpose of RoP 31(1) is to reflect the long-established parliamentary principle of respecting the Executive's financial initiative.	Although the Administration submits that the definition of "public moneys" in Cap. 2 and Cap. 122 confines to their specific context, and that the assets of the Fund can only be regarded as public (not private) because of the public nature of the Fund, the Administration's submissions do not provide an accurate description as to what amounts to "public moneys". Further, the Administration's understanding appears to be far too wide and may lead to absurdity if the Administration's interpretation is adopted.

Proposed resolutions	Administration's comments	Members' responses
	The proposed resolution removes or extends the all-important temporal element in relation to FDHs. It turns what would have been short-term relief for employers of FDHs during the period of surplus into permanent or long-term relief. It would override the decision of CE-in-Council that there were special reasons to justify reducing the statutory levy to zero for five years only, and would perpetuate or extend relief from the statutory levy in relation to FDHs. This is exactly the kind of infringement that fails to respect the Executive's financial initiative. It interferes with CE's constitutional responsibility to ensure the Fund is at all time adequate to ensure the Board can fulfil its statutory responsibilities. The "object or effect" of the proposed resolution is equally plain. The proposed resolution would deprive the Fund after 1 August 2013 of an important source of its income as enacted by section 14 of ERO. That section, read with the No. 2 Notice, presently provides for a levy payable by employers of FDHs and to be received by the Fund at the monthly rate of $400 from 1 August 2013. The object or effect of the proposed resolution is to "dispose of" (i.e. get rid of) that levy in relation to FDHs as from 1 August 2013. It would thereafter inexorably reduce the income of the Fund, and therefore the assets of the Fund. The proposed resolution's object or at least its effect may be to charge the revenue in the future in the all too likely event that it becomes necessary for unforeseen subventions to top up the Fund to make good the loss of the revenue stream from the levy.	

Proposed resolutions	Administration's comments	Members' responses
	Previous rulings In the 1998 ruling in relation to the Pneumoconiosis Compensation Fund, the President took far too narrow a view of the meaning of "revenue or other public moneys" in RoP 31(1). It is clearly a broader term than "revenue of Government". Furthermore, to refer to a "statutory fund" as *sui generis* cannot be justified if it can be seen that the assets in the fund are to be treated as part of "public moneys", although set aside for specific public purposes (here to provide training in vocational skills to meet changing employment market conditions). As ERO contemplates (section 6(3)(e)) and as history has shown in recent years, the Government would be bound to make up any deficit in the Fund available to implement this important element of its employment and training policies caused by loss of income from the levy. Although there is currently a substantial surplus that has built up in the Fund, it is all too likely (and Members have shown their anxiety on this account) that a zero levy post-2013 in relation to FDHs would necessitate reinstatement of government subventions to the Fund from general revenue if the purposes of ERO are thereafter to be fulfilled. The President ought properly to take account of this consideration in forming his opinion of the object and effect of the proposed resolution. Public moneys will not only be disposed of (by loss of the income from the levy), but the general revenue will be charged to make good that loss. In addition, the subject matter of the 1998 ruling is, we submit, anyhow distinguishable in the following way. The	Previous rulings In the ruling of the President dated 20 July 1998 in relation to an amendment to be moved by Hon LEE Cheuk-yan to amend Cap. 360, the President ruled that, in paragraph 10, "[r]ule 31 of the Rules of Procedure refers to revenue or other public moneys of Hong Kong. Since the Pneumoconiosis Compensation Fund is a statutory fund and not the revenue of the Government, any consequence on the Fund, incidental or direct…, would not have any charging effect on general revenue.". The set up and composition of the Pneumoconiosis Compensation Fund is similar to the Fund. Therefore, applying the ruling of the President in 1998, amending the levy should carry no charging effect. It should be pointed out that the Government are under no obligation to finance the Pneumoconiosis Compensation Fund and the Fund under the ordinances of which the two funds were established. Despite the Administration submits that the Government would be bound to make up any deficit in the Fund caused by loss of income from the levy, the Administration is under no duty to finance the Fund and thus it is not in law "bound" to make up any deficit.

Proposed resolutions	Administration's comments	Members' responses
	object or effect of the proposed resolution contemplated to the No. 2 Notice would reduce the income to and therefore the assets of the Fund. That is why it would "dispose of public moneys". On the other hand, it would not affect how the Fund might be disbursed by the Board. The 1998 amendment was different for it affected out-goings from the statutory fund by raising compensation levels (the imaginary equivalent here might be a proposal to raise training allowances payable by the Board). Nor was any Government revenue paid into the Pneumoconiosis Compensation Fund. The Government had not given any funding support to the Pneumoconiosis Compensation Fund in the past other than the initial loan facility in 1980 which had already been repaid in full in 1983. The 2001 ruling on the Public Revenue Protection (Revenue) Order confirms that it is common ground that an amendment under section 34 of Cap. 1 falls within the constraints of RoP 31. It also confirms that RoP 31(1) applies to "revenue which may be collected under statutory authority" (which we would suggest is exactly the case here). It is otherwise distinguishable. It was concerned with an order that was the sole source of authority for raising temporary revenue. In the present case, the levy sourcing the Fund is already the subject of an enacted Ordinance (section 14 of ERO) and is collected under statutory authority. The No. 2 Notice is only concerned with fixing its rate over the next five years.	

Proposed resolutions	Administration's comments	Members' responses
(b) Hon LEE Wing-tat		
The proposed resolution seeks to provide for the reversion of the amount of levy to $400 to come into operation on a date to be appointed by SLW subject to the approval of the Council.	<u>Ultra vires and section 34(2) of Cap. 1</u> The proposed resolution to provide that section 2 of the No. 2 Notice shall come into operation on a date to be appointed by SLW subject to the approval of LegCo is ultra vires section 31(1) of ERO, and hence is not "consistent with" the power to make the No. 2 Notice and goes beyond the power conferred by section 34(2) of Cap. 1. A notice made under section 31(1) of ERO including the commencement provision as set out in section 1(1) of the No. 2 Notice is a form of subsidiary legislation which is subject to the requirement of section 34 of Cap. 1 that it be laid on the table of LegCo. It is under section 34 of Cap. 1 that LegCo is empowered to amend the subsidiary legislation in a manner consistent with the power to make it. Separately, section 35 of Cap. 1 provides that where any Ordinance provides that subsidiary legislation shall be subject to the approval of LegCo or contains words to like effect, the subsidiary legislation shall be submitted for the approval of LegCo by a resolution. There are no such words under section 31(1) of ERO (or any other provision of that Ordinance) to indicate that the making of subsidiary legislation under section 31(1) of ERO is subject to the requirements of section 35 of Cap. 1. The proposed imposition or importation of such a requirement by amending the No. 2 Notice would have the effect of applying the requirements of section 35 of Cap. 1 to the making of subsidiary legislation under section 31(1) of ERO. It is	<u>Ultra vires and section 34(2) of Cap. 1</u> The Administration's submission does no more than stating the undisputed facts that: (a) a notice made under section 31(1) of ERO is a form of subsidiary legislation which is subject to the requirement of section 34 of Cap. 1 that it be laid on the table of LegCo; and (b) it is under section 34 of Cap. 1 that LegCo is empowered to amend the subsidiary legislation in a manner consistent with the power to make it. It is difficult to base on (a) and (b) above to conclude that my proposed resolution is ultra vires section 31(1) of ERO and hence is "not consistent with" the power to make the No. 2 Notice and goes beyond the power conferred by section 34(2) of Cap. 1. The Administration submits that section 35 of Cap. 1 provides that where any Ordinance provides that subsidiary legislation shall be subject to the approval of LegCo or contains words to like effect, the subsidiary legislation shall be submitted for the approval of LegCo by a resolution. The Administration is of the view that there are no such words under section 31(1) of ERO to indicate that the making of the subsidiary legislation under section 31(1) of ERO is subject to the requirements of section 35 of Cap. 1, and that the making of my

Proposed resolutions	Administration's comments	Members' responses
	beyond the scope of powers under section 31(1) of ERO to make such an amendment, which may only be achieved by way of an amendment Ordinance.	proposed amendment would be "beyond the scope of powers" under section 31(1) of ERO. I disagree with the Administration's view. First, the Administration has failed to show that there are specific provisions under section 35 or in other parts of Cap. 1 stipulating that subsidiary legislation "without words indicating that the making of which is subject to the requirements of section 35 of Cap. 1" is not subject to amendment to the effect that it be submitted for the approval of the LegCo or other authority. There is also no previous ruling that an amendment made to subsidiary legislation with an effect that it be submitted for the approval of the LegCo is "beyond the scope of power". Section 28(4) of Cap. 1 provides that a person who makes subsidiary legislation may provide for the subsidiary legislation to commence on a day to be fixed by notice to be given by him or by some other person designated in the subsidiary legislation. My proposed resolution has been submitted legitimately under section 28(4) of Cap. 1 and there is no question of "ultra vires" or beyond any scope of power under section 34(2) or section 35 of Cap. 1.
	<u>Charging effect under RoP 31(1)</u> The proposed resolution has charging effect and hence is caught by RoP 31(1). It may not be proposed without the written consent of CE.	<u>Charging effect under RoP 31(1)</u> I disagree with the Administration's view that my proposed amendment to section 1(1) of the No. 2 Notice to provide that section 2 therein shall come into operation on a date to be appointed by SLW

Proposed resolutions	Administration's comments	Members' responses
	The assets of the Fund plainly fall within the broad description of "revenue or other public moneys". The Fund is currently vested in the Board which in turn is accountable to LegCo (section 13 of ERO). The Fund itself is partly sourced from moneys provided by Government (a total of $4 billion since the establishment of the Board in 1992 including some $400 million paid annually between 2001-2002 and 2007-2008) (section 6(3)(e) of ERO). The Fund includes the levy collected by a public officer (the Director of Immigration) and remitted to the Fund (sections 14(1), 15(1) and 16 of ERO). The Fund is subject to examination by the Director of Audit (section 12 of ERO). If and when the Fund's assets are no longer required, the assets may be transferred to general revenue (section 27(2) of ERO). We have examined the definitions in Cap. 2 (dealing primarily with the process of LegCo's approval of Government expenditure and the responsibility of controlling officers) and those in Cap. 122 (which covers the work of the Director of Audit). Those definitions, applicable in the context of those particular statutory provisions, do not purport to be of general application, still less to govern the meaning of RoP 31(1). There is no good reason for treating the Fund and its assets as beyond the wide meaning of the words "revenue or other public moneys". Put simply, the Board is there to carry out a facet of public policy. The Fund is there to facilitate that public purpose. Whether sourced from employers by way	subject to the approval of LegCo has charging effect under RoP 31(1). In a previous ruling by the President in 1998 on whether there is charging effect in Hon LEE Cheuk-yan's amendment to the Administration's resolution under Cap. 360, the President held that Mr LEE's amendment does not have any charging effect under RoP 31(1), since there is no statutory mechanism in the Ordinance to peg the level of levy to the amounts of compensation. Therefore, the Administration is not bound by law to make up any deficit in the Pneumoconiosis Compensation Fund. Mr LEE's amendment does not have the legislative effect of increasing Government's expenditure on the Pneumoconiosis Ex-Gratia Scheme. In the same ruling, the President expressly manifested that the Pneumoconiosis Compensation Fund is a statutory fund and not the revenue of the Government, and that "any consequence on the Fund, incidental or direct…would not have any charging effect on general revenue." In the case at hand, the Fund is a statutory fund established under the ERO, which is of the same nature as the Pneumoconiosis Compensation Fund established under Cap. 360. It is clearly established in the 1998 ruling that such statutory fund is not the revenue of the Government, and any consequence on the Fund, incidental or direct, would not have any charging effect on general revenue under RoP 31(1).

Proposed resolutions	Administration's comments	Members' responses
	of the statutory levy, or by subvention out of general revenue, the assets of the Fund can only be regarded as public (not private) moneys, albeit presently vested in the Board for statutory purposes. It is surely for that reason that ERO contains the provisions of sections 12, 13, 14(1), 15, 16 and 27(2). The purpose of RoP 31(1) is to reflect the long-established parliamentary principle of respecting the Executive's financial initiative. The proposed resolution removes or extends the all-important temporal element. It turns what would have been short-term relief during the period of surplus into relief for an uncertain period. It would override the decision of the CE-in-Council that there were special reasons to justify reducing the statutory levy to zero for five years only, and remove the certainty of the suspension period of the levy leaving that period in limbo. It would further interrupt the flow of a prescribed amount of revenue from the established source. Under the proposed resolution, the reinstatement of the levy would become highly uncertain and the Fund would be deprived of an important source of its income as enacted by section 14 of ERO until a date appointed by SLW is approved by LegCo. The original section 1(1) of the No. 2 Notice, read with section 14 of ERO, provides for the reinstatement of the levy payable by employers of imported workers including FDHs to the monthly rate of $400 with effect from 1 August 2013, ensuring that the Fund has a steady and sufficient source of income in the long run. The	The decision on whether my proposed resolution has charging effect under RoP 31(1) is legal in nature. The only points that should be taken into consideration must be points of law. In this context, it is unreasonable to consider whether there is good reason for treating the Fund and its assets as beyond the meaning of the words "revenue or other public moneys", as suggested by the Administration. Based on the 1998 ruling, I am of the view that my proposed resolution is not a subject caught under RoP 31(1), and therefore there is not legitimate reason for it to be put to CE for his consent. Even if my proposed resolution is a subject caught under RoP 31(1), it would not lead to any charging effect. In the 1998 ruling, the President held that "Although it is the policy of the Government to bring the level of compensation under the Pneumoconiosis Ex-Gratia Scheme in line with that under the Ordinance, it is not bound by law to do so", and hence the amendment does not have the legislative effect of increasing Government's expenditure. Similarly, it follows that my proposed resolution does not lead to a legislative effect of binding the Government to "top up the Fund to make good the loss of the revenue stream" even if the levy remains at zero over an uncertain period. Whether the Administration will make up any deficit in the Fund remains a policy decision by the Administration, rather than a result of my proposed resolution. I urge the President to follow this *ratio decidendi* in

Proposed resolutions	Administration's comments	Members' responses
	object or effect of the proposed resolution is to "dispose of" (i.e. get rid of) that levy until a date appointed by SLW is approved by LegCo by resolution. The uncertainty involved would interrupt the flow of the income of the Fund, and therefore the assets of the Fund. The proposed resolution's object or at least its effect may be to charge the revenue in the future in the all too likely event that it becomes necessary for unforeseen subventions to top up the Fund to make good the loss of the revenue stream when the levy remains at zero over an uncertain period.	the 1998 ruling and ignore any points other than points of law.
	<u>Previous rulings</u> In the 1998 ruling in relation to the Pneumoconiosis Compensation Fund, the President took far too narrow a view of the meaning of "revenue or other public moneys" in RoP 31(1). It is clearly a broader term than "revenue of Government". Furthermore, to refer to a "statutory fund" as *sui generis* cannot be justified if it can be seen that the assets in the fund are to be treated as part of "public moneys", although set aside for specific public purposes (here to provide training in vocational skills to meet changing employment market conditions). As ERO contemplates (section 6(3)(e)) and as history has shown in recent years, the Government would be bound to make up any deficit in the Fund available to implement this important element of its employment and training policies caused by loss of income from the levy. Although there is currently a substantial surplus that has built up in the Fund, it is all too likely (and Members have shown their anxiety on	

Proposed resolutions	Administration's comments	Members' responses
	this account) that a zero levy for an uncertain period would necessitate reinstatement of government subventions to the Fund from general revenue if the purposes of ERO are thereafter to be fulfilled. The President ought properly to take account of this consideration in forming his opinion of the object and effect of the proposed resolution. Public moneys will not only be disposed of (by loss of the income from the levy), but the general revenue will be charged to make good that loss. In addition, the subject matter of the 1998 ruling is, we submit, anyhow distinguishable in the following way. The object or effect of the proposed resolution contemplated to the No. 2 Notice would reduce the income to and therefore the assets of the Fund. That is why it would "dispose of public moneys". On the other hand, it would not affect how the Fund might be disbursed by the Board. The 1998 amendment was different for it affected out-goings from the statutory fund by raising compensation levels (the imaginary equivalent here might be a proposal to raise training allowances payable by the Board). Nor was any Government revenue paid into the Pneumoconiosis Compensation Fund. The Government had not given any funding support to the Pneumoconiosis Compensation Fund in the past other than the initial loan facility in 1980 which had already been repaid in full in 1983. The 2001 ruling on the Public Revenue Protection (Revenue) Order confirms that it is common ground that an amendment under section 34 of Cap. 1 falls within the constraints of RoP 31. It also confirms that RoP 31(1) applies to "revenue which may be collected under statutory authority" (which we	

Proposed resolutions	Administration's comments	Members' responses
	would suggest is exactly the case here). It is otherwise distinguishable. It was concerned with an order that was the sole source of authority for raising temporary revenue. In the present case, the levy sourcing the Fund is already the subject of an enacted Ordinance (section 14 of ERO) and is collected under statutory authority. The No. 2 Notice is only concerned with fixing its rate over the next five years.	

Abbreviations

Board	Employees Retraining Board
Cap. 1	Interpretation and General Clauses Ordinance
Cap. 2	Public Finance Ordinance
Cap. 122	Audit Ordinance
Cap. 360	Pneumoconiosis (Compensation) Ordinance
ERO	Employees Retraining Ordinance
CE	Chief Executive
FDHs	Foreign Domestic Helpers
Fund	Employees Retraining Fund
LegCo	Legislative Council
Levy	Employees Retraining Levy
No. 2 Notice	Employees Retraining Ordinance (Amendment of Schedule 3) (No. 2) Notice 2008
SLW	Secretary for Labour and Welfare
RoP	Rules of Procedure of the Legislative Council

President's ruling on proposed resolutions to amend the Land (Compulsory Sale for Redevelopment) (Specification of Lower Percentage) Notice proposed by Hon James TO, Hon Albert HO, Hon LEE Wing-tat and Hon Audrey EU

Hon James TO, Hon Albert HO, Hon LEE Wing-tat and Hon Audrey EU have given notice to move proposed resolutions to amend the Land (Compulsory Sale for Redevelopment) (Specification of Lower Percentage) Notice ("the Notice") at the meeting of the Legislative Council ("LegCo") of 17 March 2010. In considering whether the proposed resolutions are in order under the Rules of Procedure ("RoP"), I have invited the Administration to comment on them and the Members concerned to respond to the Administration's comments. The Administration's comments and the Members' responses are summarized in the **Appendix**. I have also sought the advice of Counsel to the Legislature.

Land (Compulsory Sale for Redevelopment) (Specification of Lower Percentage) Notice

2. Under the Land (Compulsory Sale for Redevelopment) Ordinance (Cap. 545) ("the Ordinance"), the person or persons who owns or own, otherwise than as a mortgagee, not less than 90% of the undivided shares in a lot may make an application to the Lands Tribunal for an order for the sale of all the undivided shares in the lot for the purposes of redevelopment of the lot (section 3(1) of the Ordinance). The Lands Tribunal shall not make an order for sale unless the Tribunal is satisfied that the redevelopment of the lot is justified due to the age or state of repair of the existing development on the lot and the majority owner has taken reasonable steps to acquire all the undivided shares in the lot (section 4(2) of the Ordinance).

3. The Ordinance also provides that the Chief Executive ("CE") in Council may, by notice in the Gazette, specify a lower compulsory sale threshold of no less than 80% in respect of a lot belonging to a class of lot specified in the notice (section 3(5) and (6) of the Ordinance).

4. The Notice was gazetted on 22 January 2010 to specify a lower application threshold of 80% for the following three classes of lot:

(a) a lot with units each of which accounts for more than 10% of the undivided shares in the lot;

(b) a lot with all buildings aged 50 years or above; and

(c) a lot with all industrial buildings aged 30 years or above not located within an industrial zone.

5. For the purposes of paragraph 4(a) above, if a unit in a building is sub-divided into two or more units and the sub-division does not involve any alteration to the size of any common area of the building; or any change in a person's liability in relation to the common areas and facilities of the building, those units are regarded as one single unit.

6. The Notice was tabled in LegCo on 27 January 2010 and will come into operation on 1 April 2010.

Proposed resolutions of Hon James TO, Hon Albert HO and Hon LEE Wing-tat

7. The proposed resolutions of Hon James TO, Hon Albert HO and Hon LEE Wing-tat seek to amend section 4(1)(a) and (b) of the Notice. Counsel has advised that in relation to the proposed amendments to section 4(1)(a), all the three Members seek to retain the original section 4(1)(a) as section 4(1)(a)(i) and introduce additional provisions to describe the class of lot in respect of which the lowered threshold of 80% would apply. While the Administration has indicated that it does not see any of the proposed resolutions will have charging effect under Rule 31(1) of RoP[1], it has raised other issues against the admissibility of the proposed resolutions.

Hon James TO's proposed resolutions

Paragraph a(iii) of the first proposed resolution as set out in the Appendix

8. The Administration argues that section 3(5) of the Ordinance requires classes of lot to be specified in the Notice. The description in paragraph a(iii) of the proposed resolution, i.e. "where the majority owner owns not less than 80% of the market value of all the properties in the lot according to the valuation report prepared in accordance with Paragraph 1 of Schedule 1 to the Ordinance" does not relate to an attribute or a particular nature of a class of lot or the buildings on it. It is only a description of the value of the property owned by the majority owner. Hence, this paragraph of the proposed resolution does not fit in with section 3(5) and may be considered as ultra-vires.

9. The second proposed resolution of Mr TO as well as the two proposed resolutions of Hon Albert HO and the four proposed resolutions of Hon LEE Wing-tat also contain a provision identical to paragraph a(iii) of Mr TO's first proposed resolution. The Administration's submissions in respect of such provisions are the same as those as set out in paragraph 8 above.

[1] Rule 31(1) of RoP provides that a motion or amendment, the object or effect of which may, in the opinion of the President or Chairman, be to dispose of or charge any part of the revenue or other public moneys of Hong Kong shall be proposed only by CE; or a designated public officer; or a Member, if CE consents in writing to the proposal.

Paragraph a(ii) of the second proposed resolution as set out in the Appendix

10. Regarding paragraph a(ii) of the proposed resolution which reads: "specified by the Secretary for Development for redevelopment on the ground of public safety if no order in writing issued by the Building Authority under section 26 or 26A of the Buildings Ordinance (Cap. 123) has been registered in the Land Registry", the Administration submits that section 3(5) of the Ordinance empowers CE in Council to specify a lower application percentage in respect of a lot belonging to a specified class of lot. If the Secretary for Development ("SDEV") were to make the above specification, this may amount to unlawful delegation of the power of CE in Council under section 3(5).

11. The third proposed resolution of Hon LEE Wing-tat also contains a provision identical to paragraph a(ii) of Mr TO's second proposed resolution. The Administration's submission in respect of such provision is the same as what is set out in paragraph 10 above.

Hon Albert HO's proposed resolutions

Paragraph a(ii) of the first proposed resolution as set out in the Appendix

12. Referring to paragraph a(ii) of the proposed resolution which states: "where the [Lands] Tribunal is satisfied that redevelopment of the lot is justified due to the state of repair of each of the existing buildings erected on the lot", the Administration similarly argues that section 3(5) of the Ordinance empowers CE in Council to specify a lower application percentage in respect of a lot belonging to a specified class of lot. If the Lands Tribunal were to make the specification, this may amount to unlawful delegation of the power of CE in Council under section 3(5).

13. The second proposed resolution of Hon LEE Wing-tat also contains a provision identical to paragraph a(ii) of Mr HO's first proposed resolution. The Administration's submission in respect of such provision is the same as what is set out in paragraph 12 above.

Paragraph a(ii) of the second proposed resolution as set out in the Appendix

14. As regards paragraph a(ii) of the proposed resolution which provides: "where the [Lands] Tribunal is satisfied that the redevelopment of the lot is justified due to the interests of public safety", the Administration again argues that if the Lands Tribunal were to make the specification, this may amount to unlawful delegation of the power of CE in Council under section 3(5) of the Ordinance.

15. The fourth proposed resolution of Hon LEE Wing-tat also contains a provision identical to paragraph a(ii) of Mr HO's second proposed resolution. The Administration's submission in respect of that provision is the same as what is set out in paragraph 14 above.

Hon LEE Wing-tat's proposed resolutions

Paragraph a(iv) of the first, second, third and fourth proposed resolutions as set out in the Appendix

16. Paragraph a(iv) of each of the four resolutions proposed by Hon LEE Wing-tat is identical. The provision stipulates: "where the majority owner of the lot certifies in writing that mediation between the majority owner and minority owner has been conducted before the relevant date". The Administration similarly submits that the description does not relate to an attribute or a particular nature of a class of lot or the buildings on it. It is only a description of certain action of the property owners involved. Hence, this paragraph of the proposed resolution does not fit in with section 3(5) of the Ordinance and may be considered as ultra-vires.

Responses of three Members to the Administration's comments

17. The three Members do not agree to the Administration's comments. They point out that "class of lot" is neither defined in the Ordinance nor in any other Ordinance. The definition of "class of lot" can be construed according to its literal and common meaning. According to the Compact Oxford English Dictionary, "class" can be construed as "set or category of things having a common characteristic and differentiated from others by kind or quality." Hence, lots possessing a common attribute based on objective and external facts can be regarded as within one and the same class.

18. The Members also argue that under the Ordinance, that common attribute has to be related to or used in describing lots. Referring to the three classes of lot specified by the Government in the Notice, one of them is a lot with all buildings on it aged 50 years or above. As 50 years is the age of the buildings on the lot, so the building age of 50 years can be regarded as an attribute related to the lot. Similarly, 80% of the market value of the properties to be acquired by the majority owner is a common attribute capable of being confirmed, recognized or identified with objective facts. Lots with this attribute can also be regarded as a class of lot.

19. The Members also consider that similarly, lots for which there are written proof or other objective facts proving that mediation has been conducted between the majority owner and minority owner can be said to possess a common attribute. Therefore, such lots may also be regarded as a class of lot.

20. Further, the Members argue that the proposed resolutions only seek to request CE in Council to devise an objective mechanism for screening classes of lot based on objective facts, and SDEV or the Lands Tribunal is only responsible for its implementation. This does not constitute unlawful delegation of power.

Hon Audrey EU's proposed resolution

21. Hon Audrey EU's proposed resolution seeks to repeal section 4(1)(b) of the Notice and substitute it by -

"(b) a lot -

(i) designated by the Secretary for Development for priority redevelopment for reason of public interest, with each of the buildings erected on the lot issued with an occupation permit at least 50 years before the relevant date; and

(ii) where mediation between the majority owner and minority owner has been conducted, including the obtaining of the undivided shares of the minority owner in the lot at the relevant date by the majority owner by offering the same number of undivided shares from the lot after its redevelopment;"

22. The Administration has not raised objection to the proposed resolution on the ground of charging effect under Rule 31(1) of RoP. The Administration again submits that if SDEV were to make the specification as described in paragraph b(i), this may amount to unlawful delegation of the power of CE in Council under section 3(5) of the Ordinance. As regards paragraph b(ii) above, the Administration argues that the description therein is only that of a certain action of the property owners involved. Hence, this paragraph of the proposed resolution does not fit in with section 3(5) and may be considered as ultra-vires.

23. Hon Audrey EU does not agree to the Administration's comments. She submits that her proposal in paragraph b(i) neither affects the power of CE in Council nor amounts to an unlawful delegation of power. It only seeks to add a condition based on objective facts in order to comply with the object of the law. As regards the proposed condition in paragraph b(ii), Ms EU argues that whether mediation between the majority owner and minority owner has been conducted is based on objective facts. The proposed condition is related to the property right of a lot, hence it does not exceed the scope of the Notice.

Ultra-vires issues

24. Counsel advises me that under section 3(5) of the Ordinance, the power of CE in Council is to specify a lower percentage in respect of a lot belonging to a class of lot. Therefore, in determining whether the additional provisions proposed by the Members are in order, it is necessary to consider whether the additional provisions may be properly regarded as specifying a "class of lot". Counsel points out that the Administration's objections to a number of proposed amendments are based on its assertion that they "do not relate to an attribute or a particular nature of a class of lot or the buildings on it" and hence do not "fit in with section 3(5) and may be considered as ultra-vires". However, the Administration has not set out the legal basis for such an assertion.

25. Counsel also points out that "class of lot" is not defined in the Ordinance, and there is no other statutory provision employing the same expression which could be used as a reference. The expression should therefore be given its ordinary and natural meaning. In Black's Law Dictionary, "class", as a noun, is defined as "a group of people, things, qualities, or activities that have common characteristics or attributes". There is no requirement as to what these characteristics or attributes have to be. Counsel considers that for lots to constitute a class, it would suffice if they have in common certain characteristics or attributes which relate to each of these lots. It follows that when making a specification of the class of lot under section 3(5) of the Ordinance, it should suffice if the class of lot is reasonably identifiable by a general or collective formula used in the descriptions as set out in the specification made by CE in Council.

26. The other objection that the Administration has raised is that the provision under which SDEV's having specified a lot for redevelopment on the ground of public safety if no order in writing issued by the Building Authority under section 26 or 26A of the Buildings Ordinance (Cap. 123) has been registered in the Land Registry may amount to unlawful delegation of the power of CE in Council under section 3(5) of the Ordinance. The Administration has offered no legal basis for reaching the conclusion that it may be unlawful delegation of power. In Counsel's view, since the power in question is to specify a percentage lower than 90% in respect of a lot belonging to a class of lot specified in the notice, including the reference to a decision to be made by SDEV on the redevelopment of the lot as one of the characteristics that the lot should have does not impinge upon the principle against sub-delegation of the power vested on CE in Council under section 3(5) of the Ordinance.

27. The same objection of unlawful delegation of power is also raised by the Administration in respect of the provision that for a lot to come within the class of lot as specified in the Notice, the Lands Tribunal has to be satisfied that the redevelopment of the lot is justified due to the interests of public safety or state of repair. For the same reason as set out above, Counsel is of the view that the Administration has not provided sufficient basis to support their objection.

My opinion

28. As the President, I have to rule whether the proposed resolutions are in order under RoP and the issue before me is whether the amendments proposed by the Members are consistent with the power of CE in Council to make the Notice[2]. I have carefully considered the arguments put forward by the Administration and the four Members as well as the advice of Counsel to the Legislature. I have also studied in detail the provisions made in the Notice and other relevant information.

29. The Administration has put forward two main arguments to object to the proposed resolutions of the four Members. The first argument is that section 3(5) of the Ordinance requires classes of lot to be specified in the Notice. Any proposal which does not relate to an attribute or a particular nature of a class of lot or the buildings on it does not fit in with section 3(5) and may be considered as ultra-vires. The Administration therefore considers the following proposed provisions to be ultra-vires:

(a) "where the majority owner owns not less than 80% of the market value of all the properties in the lot according to the valuation report prepared in accordance with Paragraph 1 of Schedule 1 to the Ordinance", i.e. paragraph a(iii) of the first and second proposed resolutions of Hon James TO as well as paragraph a(iii) of each of the two proposed resolutions of Hon Albert HO and paragraph a(iii) of the four proposed resolutions of Hon LEE Wing-tat;

(b) "where the majority owner of the lot certifies in writing that mediation between the majority owner and minority owner has been conducted before the relevant date", i.e. paragraph a(iv) of each of the four proposed resolutions of Hon LEE Wing-tat; and

[2] Section 34(2) of the Interpretation and General Clauses Ordinance (Cap. 1) provides that "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".

(c) "where mediation between the majority owner and minority owner has been conducted, including the obtaining of the undivided shares of the minority owner in the lot at the relevant date by the majority owner by offering the same number of undivided shares from the lot after its redevelopment", i.e. paragraph b(ii) of the proposed resolution of Hon Audrey EU.

30. I note that "class of lot" is not defined in the Ordinance or in any other Ordinance. I found the formulation used in section 4(2)(b)(ii) of the Notice helpful for ascertaining the meaning of that expression. Section 4(2)(b)(ii) reads: "any change in a person's liability in relation to the common areas and facilities of the building under the common law or any enactment". That sub-paragraph, together with section 4(2)(a) and (b)(i), is added to prevent abuse by owners who choose to sub-divide existing units internally to undermine the proposed relaxation of the compulsory sale threshold to 80%[3]. My view is that the description in section 4(2)(b)(ii) constitutes a condition which is in nature similar to the provisions proposed by the Members. I am not persuaded by the Administration's assertion that the proposed provisions listed in paragraph 29 above do not relate to an attribute or a particular nature of a class of lot. I am of the opinion that the amendments proposed by the Members are consistent with the power of CE in Council under section 3(5) of the Ordinance to make the Notice.

31. The second argument submitted by the Administration is that as section 3(5) of the Ordinance empowers CE in Council to specify a lower application percentage in respect of a lot belonging to a specified class of lot, the following proposals made by the four Members of either SDEV making a specification or designation for priority redevelopment and the Lands Tribunal being satisfied that a lot is justified for redevelopment may amount to unlawful delegation of the power of CE in Council under section 3(5) of the Ordinance:

(a) "specified by the Secretary for Development for redevelopment on the ground of public safety if no order in writing issued by the Building Authority under section 26 or 26A of the Buildings Ordinance (Cap. 123) has been registered in the Land Registry", i.e. paragraph a(ii) of Hon James TO's second proposed resolution and that of Hon LEE Wing-tat's third proposed resolution;

(b) "where the [Lands] Tribunal is satisfied that redevelopment of the lot is justified due to the state of repair of each of the existing buildings erected on the lot", i.e. paragraph a(ii) of the first proposed resolution of Hon Albert HO and that of the

[3] Paragraph 13 of the LegCo Brief on the Notice.

second proposed resolution of Hon LEE Wing-tat;

(c) "where the [Lands] Tribunal is satisfied that the redevelopment of the lot is justified due to the interest of public safety", i.e. paragraph a(ii) of the second proposed resolution of Hon Albert HO and that of the fourth proposed resolution of Hon LEE Wing-tat; and

(d) "designated by the Secretary for Development for priority redevelopment for reason of public interest, with each of the buildings erected on the lot issued with an occupation permit at least 50 years before the relevant date", i.e. paragraph b(i) of Hon Audrey EU's proposed resolution.

32. It is clear to me that the above proposals relate to characteristics of a lot for it to belong to the class of lot as specified, i.e. SDEV's specification or designation for redevelopment and the Lands Tribunal being satisfied that a lot is justified for redevelopment. These are facts to be ascertained before the Lands Tribunal is to consider an application for an order for sale under section 4 of the Ordinance. There is nothing in the Administration's submissions which explains how these provisions would amount to unlawful delegation of the power of CE in Council under section 3(5) of the Ordinance.

Ruling

33. I rule that the proposed resolutions of Hon James TO, Hon Albert HO, Hon LEE Wing-tat and Hon Audrey EU, as set out in the **Appendix**, are in order under RoP.

(Jasper TSANG Yok-sing)
President
Legislative Council

16 March 2010

Land (Compulsory Sale for Redevelopment) (Specification of Lower Percentage) Notice

**Summary of Members' proposed resolutions,
the Administration's comments and Members' responses**

Proposed resolutions	**Administration's comments**	**Members' responses**
(a) Hon James TO		
<u>First proposed resolution</u> To repeal section 4(1)(a) and (b) and substitute with – "(a) a lot - (i) with each of the units on the lot representing more than 10% of all the undivided shares in the lot; (ii) with each of the buildings erected on the lot – (A) issued with an occupation permit at least 50 years before the relevant date; and (B) against which an order in writing issued by the Building Authority under section 26 or 26A of the Buildings Ordinance (Cap.123) is registered in the Land Registry at the relevant date; and (iii) where the majority owner owns not less than 80% of the market	1. Section 3(5) of the Ordinance requires classes of lot to be specified in the Notice. The description in a(iii) does not relate to an attribute or a particular nature of a class of lot or the buildings on it. It is only a description of the value of the property owned by the majority owner. Hence, this part of the proposed resolution does not fit in with section 3(5) and may be considered as ultra-vires according to legal advice.	Section 3(5) empowers CE in Council to specify that the majority owner of certain classes of lot may apply for compulsory sale of the lot with a lower ownership percentage. "Class of lot" is neither defined in the Ordinance nor in any other Ordinance. Therefore, the definition of "class of lot" can be construed according to its literal and common meaning. According to the Compact Oxford English Dictionary, "class" can be construed as "set or category of things having a common characteristic and differentiated from others by kind or quality." Hence, lots possessing a common attribute based on objective and external facts can be regarded as within one and the same class. Moreover, under the Ordinance, that common attribute has to be related to or used in describing lots. Referring to the three classes of lot specified by the Government in the Notice, one of them is a lot with all buildings on it aged 50 or above. As 50 years is the age of the buildings on the lot, so the building age of 50 years can be regarded

Proposed resolutions	Administration's comments	Members' responses
value of all the properties in the lot according to the valuation report prepared in accordance with Part 1 of Schedule 1 to the Ordinance; (b) a lot which satisfies the requirements specified in subsection (1)(a)(ii) and (iii) are applicable;". <u>Second proposed resolution</u> To repeal section 4(1)(a) and (b) and substitute with – "(a) a lot - (i) with each of the units on the lot representing more than 10% of all the undivided shares in the lot; (ii) specified by the Secretary for Development for redevelopment on the ground of public safety if no order in writing issued by the Building Authority under section 26 or 26A of the Buildings Ordinance (Cap.123) has been registered in the Land Registry; and (iii) where the majority owner owns not less than 80% of the market value of all the	2. The Administration's observations in respect of paragraph a(iii) are the same as those set out in paragraph 1 above. 3. Section 3(5) of the Ordinance requires classes of lot to be specified in the Notice. The description in paragraph a(iii) does not relate to an attribute or a particular nature of a class of lot or the buildings on it. It is only a description of the value of the property owned by the majority owner. Hence, this part of the proposed resolution does not fit in with section 3(5) and may be considered as ultra-vires according to legal advice. 4. Further, section 3(5) empowers CE in Council to specify a lower application percentage in respect of a lot belonging to a specified class of lot; if SDEV were to make the specification as described in paragraph a(ii), this may amount to unlawful delegation of the power of CE in Council under section 3(5) of the Ordinance according to legal advice.	as an attribute related to the lot. Similarly, since 80% of the market value stated in the valuation report on a relevant date is used to describe the value of the properties possessed by the owners on the lot, this can also be regarded as an attribute related to the lot. In the same way as the building age of 50 years, 80% of the market value of the properties to be acquired by the majority owner is a common attribute capable of being confirmed and recognized or identified with objective facts. Lots with this attribute can also be regarded as a class of lot. Similarly, lots for which there are written proof or other objective facts proving that mediation has been conducted between the majority owner and minority owner can be said to possess a common attribute. Therefore, such lots may also be regarded as a class of lot. Section 3(5) empowers CE in Council to specify that the majority owner of certain classes of lot can apply for compulsory sale of the lot with a lower ownership percentage, thus the provisions in the resolutions have not comprehensively, unconditionally and fully delegated the power of CE in Council to another person to make a decision. Therefore, comprehensive delegation of power is not involved in the resolutions. The proposed resolutions only seek to request CE in Council to devise an objective

Proposed resolutions	Administration's comments	Members' responses
properties in the lot according to the valuation report prepared in accordance with Part 1 of Schedule 1 to the Ordinance; (b) a lot - (i) which satisfies the requirements specified in subsection (1)(a)(ii) and (iii); and (ii) with each of the buildings erected on the lot issued with an occupation permit at least 50 years before the relevant date;".	5. The Administration's observations on paragraphs a(ii) and a(iii) are the same as those set out in paragraphs 3 and 4 above.	mechanism for screening classes of lot based on objective facts, and SDEV or the Lands Tribunal is only responsible for its implementation. This does not constitute unlawful delegation of power.
(b) Hon Albert HO		
<u>First proposed resolution</u> To repeal section 4(1)(a) and (b) and substitute with – "(a) a lot - (i) with each of the units on the lot representing more than 10% of all the undivided shares in the lot; (ii) where the Tribunal is satisfied that redevelopment of the lot is justified due to the state of repair of each of the existing buildings erected on the lot;	6. Section 3(5) of the Ordinance requires classes of lot to be specified in the Notice. The description in paragraph a(iii) does not relate to an attribute or a particular nature of a class of lot or the buildings on it. It is only a description of the value of the property owned by the majority owner. Hence, this part of the proposed resolution does not fit in with section 3(5) and may be considered as ultra-vires according to legal advice. 7. Further, section 3(5) empowers CE in	Same as the above.

Proposed resolutions	Administration's comments	Members' responses
and (iii) where the majority owner owns not less than 80% of the market value of all the properties in the lot according to the valuation report prepared in accordance with Part 1 of Schedule 1 to the Ordinance; (b) a lot- (i) which satisfies the requirements specified in subsection (1)(a)(ii) and (iii); and (ii) with each of the buildings erected on the lot issued with an occupation permit at least 50 years before the relevant date;". <u>Second proposed resolution</u> To repeal section 4(1)(a) and (b) and substitute with – "(a) a lot - (i) with each of the units on the lot representing more than 10% of all the undivided shares in the lot; (ii) where the Tribunal is satisfied that the redevelopment of the lot is justified due to the	Council to specify a lower application percentage in respect of a lot belonging to a specified class of lot; if the Lands Tribunal were to make the specification as described in paragraph a(ii), this may amount to unlawful delegation of the power of CE in Council under section 3(5) of the Ordinance according to legal advice. 8. The Administration's observations on paragraphs a(ii) and a(iii) are the same as those set out in paragraphs 6 and 7 above. 9. Section 3(5) of the Ordinance requires classes of lot to be specified in the Notice. The description in paragraph a(iii) does not relate to an attribute or a particular nature of a class of lot or the buildings on it. It is only a description of the value of the property owned by the majority owner. Hence, this part of the proposed resolution does not fit in with section 3(5) and may be considered as ultra-vires according to legal advice.	

Proposed resolutions	Administration's comments	Members' responses
interests of public safety; and (iii) where the majority owner owns not less than 80% of the market value of all the properties in the lot according to the valuation report prepared in accordance with Part 1 of Schedule 1 to the Ordinance; (b) a lot - (i) which satisfies the requirements specified in subsection (1)(a)(ii) and (iii); and (ii) with each of the buildings erected on the lot issued with an occupation permit at least 50 years before the relevant date;".	10. Further, section 3(5) empowers CE in Council to specify a lower application percentage in respect of a lot belonging to a specified class of lot; if the Lands Tribunal were to make the specification as described in paragraph a(ii), this may amount to unlawful delegation of the power of CE in Council under section 3(5) of the Ordinance according to legal advice. 11. The Administration's observations on paragraphs a(ii) and a(iii) are the same as those set out in paragraphs 9 and 10 above.	
(c) Hon LEE Wing-tat		
<u>First proposed resolution</u> To repeal section 4(1)(a) and (b) and substitute with – "(a) a lot - (i) with each of the units on the lot representing more than 10% of all the undivided shares in the lot; (ii) with each of the buildings	12. Section 3(5) of the Ordinance requires classes of lot to be specified in the Notice. The description in paragraph a(iii) does not relate to an attribute or a particular nature of a class of lot or the buildings on it. It is only a description of the value of the property owned by the majority owner. Hence, this part of the proposed resolution does not fit in with section 3(5) and may be	Same as the above.

Proposed resolutions	Administration's comments	Members' responses
erected on the lot – (A) issued with an occupation permit at least 50 years before the relevant date; and (B) against which an order in writing issued by the Building Authority under section 26 or 26A of the Buildings Ordinance (Cap.123) is registered in the Land Registry at the relevant date; (iii) where the majority owner owns not less than 80% of the market value of all the properties in the lot according to the valuation report prepared in accordance with Part 1 of Schedule 1 to the Ordinance; and (iv) where the majority owner of the lot certifies in writing that mediation between the majority owner and minority owner has been conducted before the relevant date; (b) a lot which satisfies the requirements specified in subsection (1)(a)(ii), (iii) and (iv) are applicable;".	considered as ultra-vires according to legal advice. For a similar reason, the description in paragraph a(iv) does not relate to an attribute or a particular nature of a class of lot or the buildings on it. It is only a description of certain action of the property owners involved. Hence, this part of the proposed resolution does not fit in with section 3(5) and may be considered as ultra-vires according to legal advice. 13. The Administration's observations in respect of paragraphs a(iii) and a(iv) are the same as those set out in paragraph 12 above.	

Proposed resolutions	Administration's comments	Members' responses
<u>Second proposed resolution</u> To repeal section 4(1)(a) and (b) and substitute with – "(a) a lot - (i) with each of the units on the lot representing more than 10% of all the undivided shares in the lot; (ii) where the Tribunal is satisfied that redevelopment of the lot is justified due to the state of repair of each of the existing buildings erected on the lot; (iii) where the majority owner owns not less than 80% of the market value of all the properties in the lot according to the valuation report prepared in accordance with Part 1 of Schedule 1 to the Ordinance; and (iv) where the majority owner of the lot certifies in writing that mediation between the majority owner and minority owner has been conducted before the relevant date; (b) a lot - (i) which satisfies the	14. Section 3(5) of the Ordinance requires classes of lot to be specified in the Notice. The description in paragraph a(iii) does not relate to an attribute or a particular nature of a class of lot or the buildings on it. It is only a description of the value of the property owned by the majority owner. Hence, this part of the proposed resolution does not fit in with section 3(5) and may be considered as ultra-vires according to legal advice. For a similar reason, the description in paragraph a(iv) does not relate to an attribute or a particular nature of a class of lot or the buildings on it. It is only a description of certain action of the property owners involved. Hence, this part of the proposed resolution does not fit in with section 3(5) and may be considered as ultra-vires according to our legal advice. 15. Further, section 3(5) empowers CE in Council to specify a lower application percentage in respect of a lot belonging to a specified class of lot: if the Lands Tribunal were to make a specification as described in paragraph a(ii), this may amount to unlawful delegation of the power of CE in Council under section 3(5) of the Ordinance according to legal advice. 16. The Administration's observations on paragraphs a(ii), a(iii) and a(iv) are the same	

Proposed resolutions	Administration's comments	Members' responses
requirements specified in subsection (1)(a)(ii), (iii) and (iv); (ii) with each of the buildings erected on the lot issued with an occupation permit at least 50 years before the relevant date;". <u>Third proposed resolution</u> To repeal section 4(1)(a) and (b) and substitute with – "(a) a lot - (i) with each of the units on the lot representing more than 10% of all the undivided shares in the lots; (ii) specified by the Secretary for Development for redevelopment on the ground of public safety if no order in writing issued by the Building Authority under section 26 or 26A of the Buildings Ordinance (Cap. 123) has been registered in the Land Registry; (iii) where the majority owner owns not less than 80% of the market value of all the properties in the lot according to the valuation report	as those set out in paragraphs 14 and 15 above. 17. Section 3(5) of the Ordinance requires classes of lot to be specified in the Notice. The description in paragraph a(iii) does not relate to an attribute or a particular nature of a class of lot or the buildings on it. It is only a description of the value of the property owned by the majority owner. Hence, this part of the proposed resolution does not fit in with section 3(5) and may be considered as ultra-vires according to legal advice. For a similar reason, the description in paragraph a(iv) does not relate to an attribute or a particular nature of a class of lot or the buildings on it. It is only a description of certain action of the property owners involved. Hence, this part of the proposed resolution does not fit in with section 3(5) and may be considered as ultra-vires according to legal advice. 18. Further, section 3(5) empowers CE in Council to specify a lower application percentage in respect of a lot belonging to a	

Proposed resolutions	Administration's comments	Members' responses
prepared in accordance with Part 1 of Schedule 1 to the Ordinance; and (iv) where the majority owner of the lot certifies in writing that mediation between the majority owner and minority owner has been conducted before the relevant date; (b) a lot - (i) which satisfies the requirements specified in subsection (1)(a)(ii), (iii) and (iv); and (ii) with each of the buildings erected on the lot issued with an occupation permit at least 50 years before the relevant date;". <u>Fourth proposed resolution</u> To repeal section 4(1)(a) and (b) and substitute with – "(a) a lot - (i) with each of the units on the lot representing more than 10% of all the undivided shares in the lot; (ii) where the Tribunal is satisfied that the redevelopment of the lot is justified due to the	specified class of lot; if SDEV were to make a specification as described in paragraph a(ii), this may amount to unlawful delegation of the power of CE in Council under section 3(5) of the Ordinance according to legal advice. 19. The Administration's observations on paragraphs a(ii), a(iii) and a(iv) are the same as those set out in paragraphs 17 and 18 above. 20. Section 3(5) of the Ordinance requires classes of lot to be specified in the Notice. The description in paragraph a(iii) does not relate to an attribute or a particular nature of a class of lot or the buildings on it. It is only a description of the value of the property owned by the majority owner. Hence, this part of the proposed resolution does not fit in with section 3(5) and may be considered as ultra-vires according to legal advice. For a similar reason, the	

Proposed resolutions	Administration's comments	Members' responses
interests of public safety; (iii) where the majority owner owns not less than 80% of the market value of all the properties in the lot according to the valuation report prepared in accordance with Part 1 of Schedule 1 to the Ordinance; and (iv) where the majority owner of the lot certifies in writing that mediation between the majority owner and minority owner has been conducted before the relevant date; (b) a lot - (i) which satisfies the requirements specified in subsection (1)(a)(ii), (iii) and (iv); and (ii) with each of the buildings erected on the lot issued with an occupation permit at least 50 years before the relevant date;".	description in paragraph a(iv) does not relate to an attribute or a particular nature of a class of lot or the buildings on it. It is only a description of certain action of the property owners involved. Hence, this part of the proposed resolution does not fit in with section 3(5) and may be considered as ultra-vires according to legal advice. 21. Further, section 3(5) empowers CE in Council to specify a lower application percentage in respect of a lot belonging to a specified class of lot; if the Lands Tribunal were to make a specification as described in paragraph a(ii), this may amount to unlawful delegation of the power of CE in Council under section 3(5) of the Ordinance according to legal advice. 22. The Administration's observations on paragraphs a(ii), a(iii) and a(iv) are the same as those set out in paragraphs 20 and 21 above.	
(d) Hon Audrey EU		
To repeal section 4(1)(b) and substitute with –	23. Section 3(5) empowers CE in Council to specify a lower application percentage in respect of a lot belonging to a specified class	Paragraph b(i) is proposed and based on two principles: public interest and priority redevelopment of the lot. Since the number

Proposed resolutions	Administration's comments	Members' responses
"(b) a lot - (i) designated by the Secretary for Development for priority redevelopment for reason of public interest, with each of the buildings erected on the lot issued with an occupation permit at least 50 years before the relevant date; and (ii) where mediation between the majority owner and minority owner has been conducted, including the obtaining of the undivided shares of the minority owner in the lot at the relevant date by the majority owner by offering the same number of undivided shares from the lot after its redevelopment;".	of lot. If SDEV were to make the specification as described in paragraph b(i), this may amount to unlawful delegation of the power of CE in Council under section 3(5) of the Ordinance according to legal advice. 24. Section 3(5) of the Ordinance requires classes of lot to be specified in the Notice. The description in paragraph b(ii) does not relate to an attribute or a particular nature of a class of lot or the buildings on it. It is only a description of certain action of the property owners involved. Hence, this part of the proposed resolution does not fit in with section 3(5) and may be considered as ultra-vires according to legal advice.	of buildings aged 50 or above will increase each year, the developer will inevitably consider the lots which can generate more profits instead of those with priority for redevelopment. The provision proposed in the amendment, concerning a lot designated by SDEV "for priority redevelopment for reason of public interest, with each of the buildings erected on the lot issued with an occupation permit at least 50 years before the relevant date", has neither affected the power of CE in Council under section 3(5) of the Ordinance, nor amounted to an unlawful delegation of power. It only seeks to add a condition based on objective facts in order to comply with the object of the law. Paragraph b(ii) seeks to add a condition for the lowering of the application threshold for compulsory sale auctions. Whether mediation between the majority owner and minority owner has been conducted is based on objective facts, which is also related to the property right of a lot. Hence, it does not exceed the scope of the Notice.

Abbreviations

CE in Council	Chief Executive in Council
SDEV	Secretary for Development
the Notice	Land (Compulsory Sale for Redevelopment) (Specification of Lower Percentage) Notice
the Ordinance	Land (Compulsory Sale for Redevelopment) Ordinance (Cap. 545)