

(Revised)

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Legislative Council

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Paper for House Committee meeting on 22 November 2013

Report of the Subcommittee on Country Parks (Designation) (Consolidation) (Amendment) Order 2013

Purpose

This paper reports on the deliberations of the Subcommittee on Country Parks (Designation) (Consolidation) (Amendment) Order 2013.

Background

Country park enclaves

2. Country park enclaves are sites that are surrounded by or are adjacent to the country parks, but are not part of the country parks. Some of these country park enclaves comprise both private and Government land. Control on developments on private land at the country park enclaves relies on the terms and conditions of the land leases, the Buildings Ordinance (Cap. 123) and, if available, Development Permission Area ("DPA") Plans or Outline Zoning Plans ("OZPs") under the Town Planning Ordinance (Cap. 131) ("TPO"). Developments of New Territories Exempted Houses are subject to the control of the Buildings Ordinance (Application to the New Territories) Ordinance (Cap. 121).

Protection of country park enclaves

3. In June 2010, unauthorized excavation works were detected on both private land and Government land of the country park enclave of Tai Long Sai Wan ("Sai Wan"). This triggered significant public concerns on the protection of country park enclaves in Hong Kong. At that time, there were 77 country park enclaves, of which 23 had already been covered by OZPs under TPO. In the 2010-2011 Policy Address, the Administration undertook

to either include the remaining 54 enclaves into country parks, or determine their proper uses through statutory planning to meet conservation and social development needs.

4. To take forward the policy, the Agriculture, Fisheries and Conservation Department ("AFCD") and the Planning Department ("PlanD") carry out assessments on different enclaves having regard to their situations. Relevant factors such as conservation values, landscape and aesthetic values, geographical locations, existing scales of human settlements and development pressures are taken into consideration. For enclaves which are assessed to be suitable for incorporation into country parks, AFCD will submit the designation proposals to the Country and Marine Parks Board ("CMPB") for consideration and will consult the relevant stakeholders before initiating the relevant statutory process.

5. According to the Legislative Council Brief on the Country Parks (Designation) (Consolidation) (Amendment) Order 2013 ("the LegCo Brief"), in May 2011, a revised set of principles and criteria for designating country parks was unanimously endorsed by CMPB. After an assessment based on the revised principles and criteria, the first batch of three country park enclaves at Sai Wan, Kam Shan and Yuen Tun have been identified for inclusion into the Sai Kung East Country Park ("SKECP"), the Kam Shan Country Park ("KSCP") and the Tai Lam Country Park ("TLCP") respectively. The Director of Agriculture, Fisheries and Conservation, acting as the Country and Marine Parks Authority ("the Authority") under the Country Parks Ordinance (Cap. 208) ("CPO"), invoked the statutory procedures under CPO to incorporate the three enclaves into the country parks concerned. In consultation with CMPB, the Authority prepared draft maps of SKECP, KSCP and TLCP for public inspection for a period of 60 days from 26 October to 24 December 2012. According to the Administration, other procedures for designation of country parks, including hearing of the objections to the draft maps of SKECP and TLCP by CMPB, approval of the draft maps of KSCP, SKECP and TLCP by the Chief Executive ("CE") in Council, and deposit of the approved maps of KSCP, SKECP and TLCP in the Land Registry, have been followed.

The Sai Wan Enclave

6. The country park enclave at Sai Wan ("the Sai Wan Enclave") is situated on the eastern coast of the Sai Kung peninsula. According to the Administration, the site, of an area of 16.55 hectares ("ha"), has a high landscape value which complements the overall naturalness and the landscape beauty of the surrounding SKECP. Sai Wan is also ranked the top

of the Hong Kong Best 10 Scenic Sites in a public campaign organized by the Friends of the Country Parks in 2006. About 24% of the total area of the enclave is private land, comprising agricultural land and scattered village houses, while the remaining 76% is Government land.

7. According to the LegCo Brief, during the period for public inspection of the draft Sai Wan DPA Plan in 2010, a total of 350 representations were received by the Town Planning Board ("TPB"), among which about 300 supported the protection and conservation of the area against incompatible uses and some representations asked for designating the whole Sai Wan Enclave as part of the country park. The Administration consulted CMPB on the proposal to incorporate the Sai Wan Enclave into SKECP in October 2011 and obtained its support in February 2012. During the Administration's engagement exercise with relevant stakeholders on the proposed incorporation of the Sai Wan Enclave into SKECP prior to the initiation of the statutory public inspection and the objection period under CPO, Heung Yee Kuk New Territories ("HYK") raised objection to the proposal as they perceived the proposal as infringing on their traditional and land rights and limiting the development potentials of the localities. The Village Representative of Sai Wan, the Sai Kung Rural Committee, and the Sai Kung District Council ("SKDC") expressed similar concerns. During the 60-day period (26 October to 24 December 2012) of public inspection of the draft maps of SKECP, KSCP and TLCP, SKDC submitted a letter to both CE and the Authority expressing their objection to the incorporation of the enclave into SKECP. During the same period, the Authority received more than 3 200 emails supporting the incorporation, apart from nine objections.

The Kam Shan Enclave and the Yuen Tun Enclave

8. The enclave at Kam Shan ("the Kam Shan Enclave"), located at the upland near the peak of Kam Shan in Sha Tin and mainly covered by dense shrubby woodland, is less than 1 ha in area. Its centre is a piece of paved area which was once erected with telecommunication facilities. The enclave at Yuen Tun ("the Yuen Tun Enclave") is located at the southern part of TLCP. It is about 19 ha in area and is entirely allocated to the Civil Aid Service as an outdoor training ground.

9. According to the Administration, there is no private land in both the Kam Shan Enclave and the Yuen Tun Enclave. With reference to paragraph 16 of the LegCo Brief, the proposal of incorporating the Kam Shan Enclave into the country park is in general supported by the Sha Tin District Council although there was objection from the rural community. The Tsuen Wan District Council supported the incorporation of Yuen Tun Enclave into the

country park in principle, but suggested that local stakeholders be further engaged, on which the Administration would follow up.

The Country Parks (Designation) (Consolidation) (Amendment) Order 2013

10. The Country Parks (Designation) (Consolidation) (Amendment) Order 2013 ("the Amendment Order") is made by CE under section 14 of CPO after consultation with the Executive Council. It amends the Country Parks (Designation) (Consolidation) Order (Cap. 208B) by replacing the references to the original approved maps with those to the new approved maps¹ in respect of the following three country parks --

- (a) KSCP (Plan No. CP/KS1^A approved on 14 June 1977 by the Governor in Council to be replaced by Plan No. CP/KS^B approved on 7 May 2013 by CE in Council);
- (b) SKECP (Plan No. CP/SK(E)^A approved on 17 January 1978 by the Governor in Council to be replaced by Plan No. CP/SK(E)^B approved on 7 May 2013 by CE in Council); and
- (c) TLCP (map CP/TL^E approved on 21 March 1995 by the Governor in Council to be replaced by Plan No. CP/TL^F approved on 7 May 2013 by CE in Council).

The provisions of the Amendment Order are in **Appendix I**. After the amendments, the Kam Shan Enclave, the Sai Wan Enclave and the Yuen Tun Enclave will be incorporated into the boundaries of the above designated country parks. The legal effect is that the control and management of the three country parks as shown in the new approved maps will be vested in the Authority².

11. The Amendment Order was gazetted and tabled in the Legislative Council ("LegCo") on 11 and 16 October 2013 respectively and is to come into operation on 30 December 2013.

¹ The three new approved maps are provided at Annex C to the LegCo Brief.

² According to paragraph 12 of the LegCo Brief, developments of private land that falls within a designated or proposed country park are also subject to the control of the Buildings Ordinance (Cap. 123), and the terms and conditions of the concerned land lease. Developments of New Territories Exempted Houses are subject to the control of the Buildings Ordinance (Application to the New Territories) Ordinance (Cap. 121).

The Subcommittee

12. At the House Committee meeting held on 18 October 2013, members agreed to form a subcommittee to study the Amendment Order. Hon Cyd HO Sau-lan was elected Chairman of the Subcommittee. The membership list of the Subcommittee is in **Appendix II**.

13. To allow time for the Subcommittee to study the Amendment Order, a resolution was passed at the Council meeting of 13 November 2013 to extend the scrutiny period to 4 December 2013. The Subcommittee has held three meetings with the Administration and one meeting to receive views from deputations and members of the public. A list of the organizations/individuals which/who have submitted views to the Subcommittee is in **Appendix III**.

Deliberations of the Subcommittee

Pending judicial review proceedings

14. The Subcommittee notes that on 15 October 2013, the LegCo Secretariat received a letter from a solicitors' firm stating that judicial review ("JR") proceedings had been initiated against the decision of CE in Council approving the draft new map of SKECP (Plan No. CP/SK(E)^B). On 1 November 2013, the Chairman received a letter from HYK requesting the Subcommittee to defer discussion on the part of the Amendment Order relating to SKECP pending the court decision on the JR case.

15. The Subcommittee has invited the legal adviser to the Subcommittee ("the Legal Adviser") to brief members on the possible implications of the JR case on the work of the Subcommittee. The Legal Adviser advises that the Amendment Order is a piece of subsidiary legislation made and published under the Interpretation and General Clauses Ordinance (Cap. 1). Section 34(2) of Cap. 1 gives LegCo the power to amend any subsidiary legislation. Article 73(1) of the Basic Law provides that LegCo has the power and function "to enact, amend or repeal laws" in accordance with the provisions of the Basic Law and legal procedures. The Subcommittee is formed by the House Committee of LegCo to scrutinize the Amendment Order as part of the legislative process. The scrutiny should have no conflict with the pending court proceedings. The Legal Adviser further advises that pursuant to Rule 41(2) of the Rules of Procedure of LegCo, during the scrutiny of the Amendment Order, reference shall not be made to a case pending in a court of law in such a way as, in the opinion of the Chairman, might prejudice that

case. However, there is not much information about the JR proceedings available to the Subcommittee at this stage.

Legislative Council's power to amend or repeal the Amendment Order

16. The Subcommittee has also examined whether LegCo has the power to amend or repeal the Amendment Order. The Legal Adviser has referred the Subcommittee to a similar order made by CE under section 14 of CPO. The Legal Adviser points out that the Country Parks (Designation) (Consolidation) (Amendment) Order 2010 ("the Amendment Order 2010") amended the Country Parks (Designation) (Consolidation) Order (Cap. 208B) by replacing the original approved map in respect of the Clear Water Bay Country Park ("CWBCP") with a new approved map with the effect of carving out space in CWBCP for landfill purpose. A subcommittee was formed to study the Amendment Order 2010. During the course of study, the issue as to whether LegCo had the power to repeal an order made under section 14 of CPO was considered. Hon Tanya CHAN, chairman of the subcommittee, proposed on behalf of the subcommittee to repeal the Amendment Order 2010.

17. The Administration was of the view that LegCo did not have the power to repeal the Amendment Order 2010. Its view was 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." The Administration argued that since the provision is cast in mandatory terms, CE is bound to make the Amendment Order 2010. In its view, 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 2010, LegCo equally has no such power.

18. The subcommittee on the Amendment Order 2010 did not subscribe to the Administration's view. It took note of the view of its legal adviser that the new map for CWBCP, i.e. 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 2010 sought to replace the original approved map in respect of CWBCP with the new approved map. If the Amendment Order 2010 was repealed before the commencement date, the original approved map remained effective.

19. The amendment proposed by Hon Tanya CHAN on behalf of the subcommittee to repeal the Amendment Order 2010 was ruled by the President to be in order and passed by LegCo at its meeting of 13 October 2010. A summary of the legal issues raised during the scrutiny of the Amendment Order 2010 is in **Appendix IV**.

20. The Subcommittee notes that the Administration maintains the view that LegCo has no power to repeal the Amendment Order as to do so would be inconsistent with CE's power to make the Amendment Order under section 14 of CPO. The Legal Adviser however advises that the opinion given to the subcommittee on the Amendment Order 2010 is still valid, i.e. LegCo has the power to repeal an order made under section 14 of CPO.

The proposal to incorporate the Sai Wan Enclave to the Sai Kung East Country Park

21. Whilst the Subcommittee is in support of the inclusion of the Kam Shan Enclave and the Yuen Tun Enclave, both being Government land, into country parks, there are divergent views over the Administration's proposal to incorporate the Sai Wan Enclave, where there are private agricultural land and village houses, into SKECP. The Subcommittee notes that the Administration would either include a country park enclave into a country park, or determine its uses through statutory planning. It has examined in detail the circumstances leading to the present proposal, assessed the impact of the proposal on indigenous villagers' rights and discussed the compensation to landowners after Sai Wan is incorporated into SKECP. The Subcommittee has also cast doubts on the Authority's ability in enhancing the protection or management of the enclaves after their incorporation into country parks.

Alternative measures to protect a country park enclave

22. The Subcommittee has examined whether there are other alternatives to protect a country park enclave. Some members, including Ir Dr LO Wai-kwok and Hon Christopher CHUNG Shu-kun, hold the view that uses of land in a country park enclave can be controlled by covering it with a statutory town plan, i.e. a DPA Plan and subsequently an OZP, which would clearly demarcate different zones for agricultural use, conservation, green belt, Village Type Development, etc. The Subcommittee notes that some country park enclaves such as Hoi Ha, Pak Lap and So Lo Pun, which are of high ecological value or sparsely populated, are covered by draft OZPs. It has queried why the Administration had adopted different ways to control the uses of land in country park enclaves (i.e. covering an enclave with a

statutory town plan or incorporating it to a country park), whether consistent standards are applied in the assessment, and whether the adoption of different measures for different enclaves is fair to the affected villagers .

23. The Administration has explained that in determining whether to include an enclave into a country park or to apply statutory planning, it will consider relevant factors such as conservation values, landscape and aesthetic values, geographical locations, existing scale of human settlement and development pressures. For the case of the Sai Wan Enclave, it has a high landscape and aesthetic value, including a natural and unpolluted beach, well-established woodland, two natural streams flowing with nice mangroves established at the lower stream courses, which is an integral part of the overall naturalness and the landscape of the surrounding SKECP. Considering also its high recreation potential, the enclave meets the criteria for incorporation into a country park.

24. The Administration has advised that, if the Sai Wan Enclave is incorporated into SKECP, the Authority would improve the management of the area, allocate resources for habitat and amenities improvement, and thereby increase its aesthetic value. Under CPO, the Authority would manage the area as part of SKECP and improve the supporting facilities therein, and seek to enhance the environment in collaboration with local villagers.

25. As for the statutory town plans prepared under TPO, the Administration has stressed that although such plans would set out the land use framework and make provision for planning enforcement, PlanD or TPB would not allocate resources for habitat/amenity improvement. Regular management of sites like patrol and refuse collection would also fall outside their ambit. As there are sound justifications that the Sai Wan Enclave is suitable for inclusion into SKECP and it can be effectively protected under CPO, in the Administration's view, there is therefore no justification for preparing an OZP for Sai Wan. Moreover, the option of applying statutory planning to the Sai Wan Enclave is not supported by some stakeholders, such as green groups and hikers.

26. On the preparation of draft OZPs for Hoi Ha, the Administration has explained that it has taken into consideration the scale of existing human settlements and status of land in the area. Compared with Hoi Ha, the Sai Wan Enclave has a greater need for AFCD's active management to conserve its landscape and aesthetic value.

27. Some members have reservation on applying statutory planning on country park enclaves. The Chairman is concerned that the possible sale of "small house rights" (i.e. agreements between indigenous villagers and developers in respect of transferring the rights to build New Territories Exempted Houses ("small houses") during the applications of small houses, commonly referred to as "*tao ding*") would enable large-scale residential developments to take place in an area zoned for "Village Type Development" in an enclave and then possibly obstruct public access to the adjacent country park. Dr Kenneth CHAN Ka-lok considers that, compared with the inclusion of an enclave into a country park, statutory land use planning is inadequate for improving the environment and the facilities therein.

Impact on indigenous villagers' rights

28. The Subcommittee notes the strong objection of HYK, SKDC, Sai Kung Rural Committee, Sai Kung North Rural Committee, Shap Pat Heung Rural Committee and indigenous villagers of Sai Wan to the incorporation of the Sai Wan Enclave to SKECP on the ground that the incorporation would infringe on villagers' traditional and land rights as well as limiting the development potentials of the localities. Members consider that any legislative measures to include private land into country parks should not encroach on the right to private property. In this regard, the Subcommittee has examined whether the inclusion of the private land in the Sai Wan Enclave would lead to changes in land ownership and restrictions on land development.

Development of New Territories Exempted Houses on private land within a country park

29. The Administration has advised that incorporating private land into a country park is by no means depriving anyone of the ownership of the private land or reverting the land back to the Government. In general, development of small houses on private land must comply with the small house policy and the requirements of relevant land lease conditions, as well as the relevant ordinances, such as the Buildings Ordinance (Application to the New Territories) Ordinance (Cap. 121), and other requirements stipulated by the Government. If the application is not in contravention to the relevant legislations and is not objected by relevant departments (including AFCD), the relevant District Lands Office ("DLO") may approve such application with conditions. Should the proposed development involves private land within a country park, it must comply with CPO. In considering any application for use within a country park, DLO will consult the Authority (i.e. Director of Agriculture, Fisheries and Conservation) before making a decision to approve or not approve it.

30. According to the Administration, upon designation of the enclaves as country park areas, if the Authority is of the opinion that any use or proposed use of, or any new development on, any leased land within the sites would "substantially reduce the enjoyment and amenities of the country park as such", under section 16 of the CPO, the Authority may request the appropriate Land Authority to exercise the powers conferred by CPO, whom may then, by notice in writing, require the occupier to discontinue or modify a use within a designated period, or to prohibit the occupier from proceeding with the proposed use, or within a designated period, require the occupier to modify the proposed use. In considering whether a proposed development would substantially reduce the enjoyment and amenities of the country park concerned, the Authority will take into account all relevant factors including land status, location, nature conservation, landscape and visual impacts, and country park users or facilities points of views. In the Administration's view, these assessment criteria are not dissimilar to those used in assessing small house applications outside country parks. To enhance the transparency of the consideration of the Authority on assessing such applications, the Authority has prepared and published on AFCD's website a "Note on the Use or Development of Land within a Country Park Enclave after Inclusion into a Country Park"³ to better illustrate the focus of concern.

31. The Administration has advised that there are already about 460 ha of private land in the existing country parks. Since the designation of country parks in accordance with the provisions of CPO, two applications for erecting small houses in private land within country parks have been received and they have been approved by the Authority. In respect of the Sai Wan Enclave, as most of the private lands there are Old Schedule agricultural lots or Old Schedule building lots, no matter whether the lands are included or not to a country park, development permitted under the terms of the lease concerned is limited. Without prejudice to the Authority's consideration of the facts of each individual case, in general the Authority is of view that small houses are compatible with country parks. The boundary of the village environs of Sai Wan Village remains unchanged after the Sai Wan Enclave is incorporated into SKECP.

Inclusion of private land into country park areas

32. Dr Hon LAU Wong-fat and some deputations from rural committees have pointed out that in the 1970s, when the then Hong Kong Government started to designate country parks, to avoid interfering with village life and to respect private property ownership, it had pledged that private land would not

³ The Note is appended at Annex B of LC Paper No. CB(1)216/13-14(35).

be included into country parks and the country park boundary would be kept at a certain distance away from private land. As such, the Administration's current proposal to incorporate Sai Wan Village into SKECP is a breach of its pledges and confiscation of private property.

33. The Administration has responded that, owing to the quickened pace of urbanization, some country park enclaves are facing increasing development pressure. Developments in these enclaves, however, may not be compatible with the natural environment of the country parks, or may degrade the integrity and the aesthetic and landscape quality of the country parks as a whole. After the occurrence of unauthorized excavation works on both private land and Government land in the Sai Wan Enclave in 2010, there has been public expectation on the Administration to better protect the country park enclaves and safeguard them against any development that would undermine public enjoyment of the natural environment. The Administration further advises that in May 2011, CMPB endorsed the revised principles and criteria for designation of new country parks or extending country parks. Under the revised principles and criteria, the mere existence of private land will not be taken as a determining factor for exclusion from the boundary of a country park. If the use of private land is compatible with the country park setting, it may be incorporated into the country park. Consultation with HYK about the proposed measures for better protecting country park enclaves was conducted on 21 June 2011.

34. Regarding the proposed incorporation of the Sai Wan Enclave into SKECP, the Administration has advised that it commenced consultations with relevant stakeholders a year before invoking the statutory procedures under CPO. The Authority and the Environmental Protection Department ("EPD") consulted the Sai Wan Village Representative, Sai Kung Rural Committee and SKDC in 2011 and 2012. In March 2012, SKDC set up a Task Force on Planning Issues related to Tai Long Sai Wan ("the Task Force") to follow up discussions with the Administration. Before the gazettal, the Authority, EPD and other Government departments had attended three meetings of the Task Force to address villagers' concerns about the incorporation of the Sai Wan Enclave into SKECP. The Chairperson and two members of CMPB also attended a meeting to exchange views with the Task Force on the subject.

Compensation issues

35. Members including Hon CHAN Hak-kan, Hon WU Chi-wai and Hon CHAN Han-pan have enquired about the compensation mechanism for any loss, damage or cost suffered by the concerned landowner over the

incorporation of his/her land into a country park. They consider that if landowners are compensated in a fair manner, they might be more willing to support the Administration's efforts in controlling incompatible developments in country parks. Hon WU Chi-wai has suggested that the Administration should consider making reference to the mechanism under the Land Resumption Ordinance to compensate those landowners whose land is incorporated to a country park for their loss of possible opportunities for land development. Hon CHAN Hak-kan has pointed out that there are precedent cases of the Administration offering land exchange for a site with conservation value and that CE has proposed that a charity fund could be set up to provide compensation to landowners for their financial loss due to the implementation of Government initiatives on conservation.

36. In response to members' suggestions, the Administration has advised that land resumption for nature conservation purposes will have significant resource implications having regard to the huge areas of land involved. The issue of relative priority in competition for scarce public resources and the adverse implications over private property rights are important principles that have to be carefully deliberated. At this stage, the Administration considers that land resumption for conservation purposes is not the appropriate option.

37. The Administration has further advised that under CPO, there are provisions for land occupiers to seek compensation for prohibition of a proposed land use. As mentioned above, upon designation of an enclave as a country park area, if the Authority is of the opinion that any use or proposed use of, or any new development on, any leased land within the site would "substantially reduce the enjoyment and amenities of the country park as such", under section 16 of CPO, he may request the appropriate Land Authority to exercise the powers conferred by CPO, whom may then require the occupier to discontinue or modify a use, prohibit the occupier from proceeding with the proposed use, or modify the proposed use. If such use is permitted by any lease under which the land is held, any aggrieved occupiers could object, appeal or seek compensation according to the procedures prescribed in CPO⁴. Members note that save in the circumstances described above, no compensation shall be paid to the owner of, or to any person interested in, any land because it is situated within or is affected by a country park.

38. The Subcommittee has examined whether the Administration could provide some form of incentives to owners of private land in country parks or their enclaves in exchange for management rights over their land or their

⁴ Details about the procedures are given at Annex C to LC Paper No. CB(1)216/13-14(35).

cooperation in enhancing conservation of the sites concerned, for instance, by helping them develop green tourism, or obtaining licences for operating small businesses such as shops, restaurants and home-stay lodging services in their village.

39. The Administration has advised that, in respect of financial support for engaging villagers in conservation of land, the Management Agreement ("MA") Scheme under the New Nature Conservation Policy has been extended in 2011 to cover private land in country park enclaves as well as private land within country parks. Under the MA Scheme, funding support will be granted to enable competent non-profit making organizations to enter into management agreements with landowners to organize conservation activities which are compatible with the land uses and country park objectives within private land in country parks or their enclaves. A conservation project funded by the MA Scheme is being carried out in Long Valley. The Administration has undertaken to assist interested villagers in applying for funds under the MA Scheme for conservation activities and obtaining the necessary licences for operating small business within country parks.

Management of the land in a country park enclave after it is incorporated to a country park

40. According to the Administration, once the enclaves are included to their respective country parks under CPO, the Authority will take active management of the areas. Incompatible land developments and activities within the country park areas are unlikely to be approved. The conservation and management of the enclaves will be enhanced to ensure the integrity and landscape value of the sites and the adjacent country parks. For the visitors, country park facilities will be provided and signage/notice boards will be installed to promote outdoor safety. Publicity and education programmes will be implemented to encourage the appreciation of the nature and to remind visitors not to spoil the natural environment. The visitors will also bring business opportunities to local villagers.

41. The Subcommittee has examined whether the inclusion of an enclave into a country park would bring improvements to the living environment of the local villagers in terms of infrastructure facilities and environmental hygiene, and whether the Authority has the ability and resources to do so.

42. The Administration has advised that the Authority would manage the area as part of SKECP and improve the supporting facilities therein. The Authority will arrange vegetation management and refuse collection.

Besides, AFCD has dedicated law enforcement staff, i.e. the Park Rangers, to carry out regular patrol and surveillance in country parks who would take action under the Country Parks and Special Areas Regulations (Cap. 208A) against irregularities or breaches as and when necessary. If necessary, the Authority will assist in improving village roads to facilitate villagers' access or use of village vehicles. The Authority will provide technical support if villagers wish to resume farming on leased agricultural land.

Resolution to be proposed by the Subcommittee

43. At the Subcommittee meeting held on 6 November 2013, Dr Hon LAU Wong-fat proposed a motion requesting that section 3(2) of the Amendment Order (the replacement of the original map of SKECP by the new approved map) be repealed. The motion was put to vote. Seven members, including Dr Hon LAU Wong-fat, Hon CHAN Hak-kan, Hon James TIEN Pei-chun, Hon CHAN Han-pan, Dr Hon Elizabeth QUAT, Ir Dr Hon LO Wai-kiwok and Hon Christopher CHUNG Shu-kun, supported the motion. Four members, including Hon Albert CHAN Wai-yip, Hon WU Chi-wai, Hon CHAN Chi-chuen and Dr Hon Kenneth CHAN Ka-lok objected to the motion. Whilst the Chairman did not exercise her original vote, the Subcommittee noted that the Chairman was not in support of the motion.

44. The Subcommittee considered at its meeting on 12 November 2013 the wording of the resolution to repeal section 3(2) of the Amendment Order proposed by Dr Hon LAU Wong-fat. As the Chairman is not in favour of the resolution proposed by Dr Hon LAU Wong-fat, the Subcommittee agreed that Dr Hon LAU Wong-fat should move the resolution on behalf of the Subcommittee. The wording of the resolution is in **Appendix V**.

Advice sought

45. Members are invited to note the deliberations of the Subcommittee.

L.N. 152 of 2013

Country Parks (Designation) (Consolidation) (Amendment) Order 2013

(Made by the Chief Executive under section 14 of the Country Parks Ordinance (Cap. 208) after consultation with the Executive Council)

1. Commencement

This Order comes into operation on 30 December 2013.

2. Country Parks (Designation) (Consolidation) Order amended

The Country Parks (Designation) (Consolidation) Order (Cap. 208 sub. leg. B) is amended as set out in section 3.

3. Schedule amended

(1) The Schedule, item 2—

Repeal

"Plan No. CP/KS1^A approved on 14 June 1977 by the Governor in Council"

Substitute

"Plan No. CP/KS^B approved on 7 May 2013 by the Chief Executive in Council".

(2) The Schedule, item 6—

Repeal

"Plan No. CP/SK(E)^A approved on 17 January 1978 by the Governor in Council"

Substitute

"Plan No. CP/SK(E)^B approved on 7 May 2013 by the Chief Executive in Council".

(3) The Schedule, item 12—

Repeal

"map CP/TL^E approved on 21 March 1995 by the Governor in Council"

Substitute

"Plan No. CP/TL^F approved on 7 May 2013 by the Chief Executive in Council".

C. Y. LEUNG
Chief Executive

2 July 2013

Explanatory Note

This Order amends the Country Parks (Designation) (Consolidation) Order (Cap. 208 sub. leg. B) to replace the original approved maps in respect of Kam Shan Country Park, Sai Kung East Country Park and Tai Lam Country Park with new approved maps. After the amendments, the country park enclaves of Kam Shan, Tai Long Sai Wan and Yuen Tun will be incorporated into the boundaries of the above designated country parks.

**Subcommittee on Country Parks (Designation)
(Consolidation) (Amendment) Order 2013**

Membership list

Chairman Hon Cyd HO Sau-lan

Members Dr Hon LAU Wong-fat, GBM, GBS, JP
Hon CHAN Hak-kan, JP
Hon Albert CHAN Wai-yip
Hon James TIEN Pei-chun, GBS, JP
Hon WU Chi-wai, MH
Hon CHAN Chi-chuen
Hon CHAN Han-pan
Dr Hon Kenneth CHAN Ka-lok
Dr Hon Elizabeth QUAT, JP
Ir Dr Hon LO Wai-kiwok, BBS, MH, JP
Hon Christopher CHUNG Shu-kun, BBS, MH, JP

(Total : 12 members)

Clerk Ms Sharon CHUNG

Legal Adviser Mr Stephen LAM

**Subcommittee on Country Parks (Designation)
(Consolidation) (Amendment) Order 2013**

**List of organizations/individuals which/who have
provided views to the Subcommittee**

Deputations

1. Ark Eden
2. Association for Geoconservation, Hong Kong
3. Civic Party
4. The Conservancy Association
5. Designing Hong Kong Limited
6. Friends of Hoi Ha
7. Friends of the Earth (HK)
8. Friends of Sai Kung
9. Greeners Action
10. Green Power
11. Green Sense
12. Heung Yee Kuk New Territories
13. The Hong Kong Bird Watching Society
14. Hong Kong Hiking Association, China
15. Hong Kong Outdoors
16. Kadoorie Farm & Botanic Garden Corporation
17. Sai Kung District Council
18. Sai Kung North Rural Committee
19. Sai Kung Rural Committee
20. Shap Pat Heung Rural Committee
21. World Wide Fund - Hong Kong
22. Land Justice League

Individuals

23. Mr Ruy Octavio BARRETTO
24. Ms Carmen CHAN Ka-mun
25. Ms Priscilla CHAU
26. Bernie CHIK
27. Ms Catherine CHENG
28. Chung Fai Wu
29. Mr Paul CROW
30. Mr Arnold FAN
31. Mr LAI Kwan
32. Mr Thomas LAI
33. Mr LAI Yan
34. Jo LAU
35. Mr Ken LEUNG
36. Ms Venus LEUNG
37. Mr LI Ka-leung, Sai Kung District Council member
38. Mr Joseph MO Ka-hung
39. Mr Roger NISSIM
40. Mr K S TAM
41. Mr TSANG Yuk-on, Sha Tau Kok Mui Tsz Lam Village
Representative
42. Ms TSE Sau-man
43. C K WONG
44. Mr Jeffrey WONG
45. Mr Johnny WONG
46. WONG Yu-ki
47. Mr YAU Yuk-lun, Sai Kung District Council member

48. Ms Jane YEUNG
49. Mr Kong YEUNG
50. A member of the public (Jacky)
51. A member of the public (Lily abc)
52. A member of the public (Sandy)
53. A member of the public (So)
54. A member of the public (婉彤 Yuki)
55. A member of the public (陳先生)
56. A member of the public (周禮賢)
57. A member of the public (葉子林)

A summary of the legal issues raised during the scrutiny of the Country Parks (Designation)(Consolidation)(Amendment) Order 2010⁵

On 25 May 2010, the Executive Council advised and the Chief Executive ("CE") ordered that the Country Parks (Designation) (Consolidation) (Amendment) Order 2010 ("Amendment Order") should be made under section 14 of the Country Parks Ordinance (Cap. 208) ("CPO"). The Amendment Order sought 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.

2. The Amendment Order was gazetted on 4 June 2010 and tabled in the Legislative Council ("LegCo") on 9 June 2010. At the House Committee meeting on 11 June 2010, Members formed 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") 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 ("SKDC") objected to the proposed extension of the SENT Landfill. At the meeting on 29 July 2010, the Subcommittee requested the Administration to draw up concrete odour abatement measures with implementation timetable in order to secure the support of SKDC and local residents. Otherwise, the Subcommittee might consider repealing the Amendment Order. The Subcommittee passed a motion on 27 September 2010 requesting CE to repeal the Amendment Order.

⁵ Source: Appendix I to the Report of the Subcommittee to Study Issues relating to the Power of the Legislative Council to Amend Subsidiary Legislation (Appendix I to LC Paper No. CB(2)975/11-12)

3. In its response to the enquiry of the Chairman of the Country Parks Subcommittee on the legal consequence of the repeal of the Amendment Order, 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.

4. 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.

5. At its meeting on 4 October 2010, the Country Parks Subcommittee resolved 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. At the meeting on 6 October 2010, the Administration informed the Subcommittee that LegCo did not have the power to repeal 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."

6. 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.

7. In the view of the Legal Adviser 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.

8. 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.

9. 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 motion to repeal the Amendment Order. The House Committee 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 Country Parks 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 Country Parks Subcommittee, had given notice to move a motion 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

10. 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.

11. 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.

12. 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.

13. 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

14. 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 Resolution was published in the Gazette on 15 October 2010 as Legal Notice No. 135 pursuant to section 34(5) of Cap. 1.

Further developments

15. On 4 January 2011, the Chief Secretary for Administration ("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.

16. 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.

Interpretation and General Clauses Ordinance

Resolution

(Under section 34(2) of the Interpretation and
General Clauses Ordinance (Cap. 1))

Country Parks (Designation) (Consolidation) (Amendment) Order 2013

Resolved that the Country Parks (Designation) (Consolidation) (Amendment) Order 2013, published in the Gazette as Legal Notice No. 152 of 2013 and laid on the table of the Legislative Council on 16 October 2013, be amended as set out in the Schedule.

Schedule

**Amendment to Country Parks (Designation) (Consolidation)
(Amendment) Order 2013**

1. Section 3 amended (Schedule amended)

Section 3—

Repeal subsection (2).