

立法會
Legislative Council

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by the Administration)

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Legislative Council
Panel on Planning, Lands and Works

Minutes of special meeting
held on Friday, 8 March 2002 at 8:30 am
in the Chamber of the Legislative Council Building

Members present : Dr Hon TANG Siu-tong, JP (Chairman)
Hon LAU Ping-cheung (Deputy Chairman)
Ir Dr Hon Raymond HO Chung-tai, JP
Hon James TO Kun-sun
Hon WONG Yung-kan
Hon TAM Yiu-chung, GBS, JP
Hon Abraham SHEK Lai-him, JP
Hon Albert CHAN Wai-yip
Hon WONG Sing-chi
Hon IP Kwok-him, JP

Members attending : Hon Emily LAU Wai-hing, JP
Hon Audrey EU Yuet-mee, SC,JP

Members absent : Hon LAU Wong-fat, GBS, JP
Hon Timothy FOK Tsun-ting, SBS, JP

Public officers attending : Mr H I KWONG
Principal Assistant Secretary
Works Bureau

Mr Peter H H WONG
Senior Assistant Solicitor General
Department of Justice

Mr H C WONG
Assistant Director
Highways Department

Mr H H LIU
Chief Highway Engineer
Highways Department

Mr Y M CHAN
Chief Engineer
Transport Department

Attendance by invitation : The Hong Kong Construction Association

Mr Patrick CHAN
Secretary General

Mr David WESTWOOD
Member

Pacific Century CyberWorks Limited

Mr TANG Shiu-wah
General Manager, Outside Plant Services

Mr CHEUNG Kwok-chi
Assistant General Manager, Outside Plant Services

CLP Power Hong Kong Limited

Mr Paul POON
Chief Engineer, Asset Management

Ms Catherine YEUNG
Legal Manager

Miss Daisy CHAN
Public Affairs Manager (PSBG)

Hutchison Global Crossing Limited

Mr K T WONG
Engineering Director

Mr Y C TANG
General Manager Infrastructure

Mr K K TSANG
Implementation Manager

Hong Kong General Building Contractors Association

Mr CHAN Cheung
President

Mr CHOW Yan-wei
Vice-president

The Hong Kong and China Gas Co. Limited

Mr Simon S H NGO
Network Manager

Mr K W LEE
Network Project Manager

New World Telephone Limited

Mr Kevin KWAN
Assistant General Manager

Mr Tony WONG
Legal Counsel

Hong Kong Cable Television Limited

Mr Allen LAW
General Manager, OSP Engineering and Construction

Ms S K CHAN
Senior External Affairs Manager

Hong Kong Tramways Limited

Mr Quinn LAW
Director

Mr Steven CHAN
Engineering Manager

Yuen Long District Council

Mr LEUNG Fuk-yuen
Chairman, Town Planning and Development Committee

Central and Western District Council

Mr CHAN Chit-kwai
Central and Western District Councillor

Clerk in attendance : Miss Salumi CHAN
Chief Assistant Secretary (1)5

Staff in attendance : Mrs Queenie YU
Senior Assistant Secretary (1)6

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- I. Proposed charging and penalty system for road opening works**
(LC Paper No. CB(1)1201/01-02(01) — “List of information to be provided by the Administration after the special meeting on 20 February 2002” prepared by the Legislative Council Secretariat
- LC Paper No. CB(1)1201/01-02(02) — Paper provided by the Administration for the special meeting on 8 March 2002
- LC Paper No. CB(1)1061/01-02(01) — Paper provided by the Administration for the special meeting on 20 February 2002

- LC Paper No. CB(1)1090/01-02(01) — “List of queries and concerns raised at the special meeting on 15 January 2002” prepared by the Legislative Council Secretariat
- LC Paper No. CB(1)755/01-02(05) — Paper provided by the Administration for the special meeting on 15 January 2002
- LC Paper No. CB(1)509/01-02(02) — Paper provided by the Administration for the special meeting on 12 December 2001
- LC Paper No. CB(1)509/01-02(03) — Background brief prepared by the LegCo Secretariat
- LC Paper No. CB(1)369/01-02 — Information provided by the Clerk to the Public Accounts Committee)

The Chairman welcomed representatives of the Administration, utility companies, construction industry and District Councils (DCs) to the special meeting.

2. The Chairman advised that the purpose of the special meeting was to follow up the discussion at the previous two special meetings on 15 January and 20 February 2002 on the proposed charging and penalty (C&P) system for road excavation works. He drew Members' attention to the list of concerns raised at the last special meeting on 20 February 2002 set out in LC Paper No. CB(1)1201/01-02(01).

Briefing by the Administration

3. At the invitation of the Chairman, the Principal Assistant Secretary of Works Bureau (PAS/WB) briefed Members on the paper provided by the Administration (LC Paper No. CB(1)1201/01-02(02)) in response to the issues raised by Members and deputations at the last special meeting.

Presentation of views by deputations

Yuen Long District Council
(LC Paper No. CB(1)1090/01-02(03))

4. Mr LEUNG Fuk-yuen, Chairman of Town Planning and Development Committee, Yuen Long DC presented the following views -

- (a) Delays in road excavation works had caused serious disturbance to the community.

- (b) Road works should be conducted at night as far as practicable to reduce the disturbance caused to the community.
- (c) The Administration should step up regulatory control and enhance efficiency of road excavation works in the interest of the community.

Central and Western District Council
(LC Paper No. CB(1)1090/01-02(04))

5. Mr CHAN Chit-kwai, member of Central and Western DC presented the following views -

- (a) Despite the grievances expressed by the public about the economic loss and traffic problems caused by road excavation works and delay in such works, the problems remained unresolved for many years.
- (b) The proposed legislative amendments should aim at resolving the long-standing problems related to road excavation works, e.g. work sites being left unattended after roads had been dug up, repetition of road excavation works at the same location within a short period of time, and the completion dates for road excavation works shown on display notice boards at work sites were subject to frequent amendments.
- (c) The processing and monitoring of Excavation Permits (EPs) should not be contracted out.

New World Telephone Limited
(LC Paper No. CB(1)786/01-02(01))

6. Mr Tony WONG, Legal Counsel of New World Telephone Limited reiterated the concern of New World Telephone Limited that the proposed fees and charges were unreasonably high. A survey on the cost for processing EPs based on pricing of the private sector should be used as the benchmark for determining the proposed fees and charges.

The Hong Kong Construction Association
(LC Paper Nos. CB(1)755/01-02(04) and CB(1)819/01-02(02))

7. Mr Patrick CHAN, Secretary General of the Hong Kong Construction Association (HKCA) requested the Administration to elaborate on the types of appeals to be handled under the appeal mechanism mentioned in the paper provided by the Administration.

Brief response by the Administration

8. Responding to the deputations' views, PAS/WB advised that to reduce unnecessary delay in road excavation works, the Administration would encourage detailed site investigation work to ascertain the underground conditions before the works commenced. The proposed C&P system would serve as a deterrent against any unnecessary delay. On the proposed fees and charges, the Administration considered it reasonable to adopt the “user-pays principle” to recover the full administrative costs incurred by Government departments in processing and monitoring EPs. A statutory review mechanism would be introduced to handle reviews on the duration of EP periods and waiver of economic charges.

Discussion with the Administration and deputations

Proposed fees and charges

9. Responding to Mr Abraham SHEK Lai-him, PAS/WB advised that the proposed charging scheme was in line with the existing practice where all Government fees and charges were calculated on the basis of the administrative costs involved in accordance with the “user-pays principle”, and that the staff cost involved would be adjusted following civil service pay adjustment in accordance with the pay trend in the private sector. As it was not uncommon for various levels of staff to be involved in processing each application for licences/permits, Mr Abraham SHEK was concerned that the staff cost involved would be substantial. He urged the Administration to ensure that the proposed fees and charges were set at reasonable levels.

10. Mr CHAN Cheung, President of Hong Kong General Building Contractors Association (HKGBCA) considered the proposed additional daily charge for traffic delay caused to Strategic Roads at \$18, 000 unacceptable. PAS/WB and the Chief Engineer of Transport Department explained that from each category of roads (i.e. Strategic Roads, Sensitive Roads and Remaining Roads), the Transport Department selected representative road sections and junctions to conduct a computer study to assess the delay to motorists caused by road excavation works. By comparing the total travel time experienced by all vehicles through the road section for the scenarios with and without the excavation works, a delay value was derived. The delay was converted to an economic loss in dollars per day by application of a “value of time” factor used in the Comprehensive Transport Study. The Chairman suggested the Administration to discuss further with the industry to address their concern.

Better planning of road excavation works

11. Mr Patrick CHAN, Secretary General of HKCA considered that it should be set out clearly in the legislation the party responsible for carrying out the site investigation works to ascertain the underground conditions before road excavation

works commenced. PAS/WB replied that it was the responsibility of road works promoters and their contractors to carry out the site investigation works.

Criminal liability

12. Responding to Mr Albert CHAN Wai-yip's enquiry, the Senior Assistant Solicitor General of the Department of Justice (SASG/DJ) clarified that the reporting mechanism referred to in paragraph 6 of the paper provided by the Administration was proposed for Government departments only. He advised that from the legal policy angle, the Administration had serious reservation about the idea of imposing criminal liability on the Government or Government departments. In the Administration's recent review of leading decisions in other common law jurisdictions (Australia, Canada and New Zealand) on the issue, it was revealed that the courts had, in general, expressed reservation over the idea of imposing criminal liability on the Government or Government departments. The courts would be very reluctant to hold that a particular piece of legislation imposed such criminal liability in the absence of clear and unequivocal words to that effect. Reference had been made by the Administration to the following three cases:

- (a) Cain v. Doyle (1946), High Court of Australia;
- (b) Canadian Broadcasting Corporation v. Attorney General for Ontario (1959), Supreme Court of Canada; and
- (c) Southland Acclimatisation Society v. Anderson (1978), Supreme Court of New Zealand.

13. On the Australian case mentioned in paragraph 12(a) above, SASG/DJ advised that the Chief Justice in charge of the case considered it not possible to impose any criminal liability on the Government. The remaining four judges however considered it possible to do so, if there were clear and unequivocal words to that effect. The final decision of the court was that the relevant legislation did not impose criminal liability on the Government.

14. On the Canadian case mentioned in paragraph 12(b) above, SASG/DJ advised that four of the seven judges considered it possible to impose criminal liability on the Government, if there were clear and unequivocal words to that effect. The final decision of the court was that the relevant legislation did not impose criminal liability on the Government.

15. On the New Zealand case mentioned in paragraph 12(c) above, SASG/DJ advised that the court held the view that although the relevant legislation was binding on the Government, it did not impose criminal liability on the Government.

16. Regarding the position in Hong Kong, SASG/DJ advised that a reporting mechanism had been introduced since the 1980s and 1990s. Under the reporting mechanism, contravention of the relevant legislation by Government officials would be reported to a senior official who was required to enquire into the circumstances of the case. If the enquiry showed that a contravention was continuing or likely to recur, the senior official must exercise his statutory function to ensure that the best practicable steps were taken to terminate the contravention or avoid the recurrence. The reporting mechanism was adopted in some existing ordinances, such as the Environmental Impact Assessment Ordinance (Cap. 499) under which the Director of Environmental Protection would report any contravention of the Ordinance by Government officials to the Chief Secretary for Administration. Officials who had committed misconduct would be subject to disciplinary action.

17. Mr Albert CHAN considered that the three cases cited by SASG/DJ illustrated two points. First, there were divided views among judges in common law jurisdictions on whether it was possible to impose criminal liability on the Government. Second, some judges considered it possible to do so, if there were clear and unequivocal words to that effect. This pointed out the need to set out clearly in the legislation that criminal liability would be imposed on all road works promoters, including the Government. While the proposal of imposing criminal liability on Government departments might be further discussed, it should be put beyond doubt that criminal liability would be imposed on individual officers who had breached the EP conditions. In this connection, Mr CHAN cited the example that if a Government driver committed an offence of dangerous driving, it was the driver, not the department he worked for, that would be prosecuted. On the same basis, individual officers who had breached the EP conditions should also be prosecuted.

18. In response, SASG/DJ pointed out that while there were divided views among the judges involved in the three cases mentioned in paragraph 12 above, the majority of them had expressed reservation over the idea of imposing criminal liability on the Government or Government departments. He further pointed out that such an approach would raise complex questions of procedure and efficacy, e.g. the question of whether a Government department had legal personality. As regards individual officers, they were subject to criminal sanction in cases of dangerous driving, murder, corruption, etc. However, the general approach was to resort to the reporting mechanism mentioned in paragraph 16 above and other effective means, including the accountability to the Legislative Council (LegCo) and the monitoring of alleged maladministration by the Ombudsman, to ensure Government's compliance with the statutory requirements.

19. Ms Audrey EU Yuet-mee considered that whether an individual who had committed an offence should be subject to criminal sanction should depend on the nature and seriousness of the offence, but not on whether he was a Government employee. Government departments or employees should not be above the law. The complex questions of procedure and efficacy referred to by the Administration could

be addressed by proper drafting of the relevant legislation. Ms EU further pointed out that the reporting mechanism applicable to Government departments was only a monitoring system, not a penalty system.

20. SASG/DJ assured members that there was no question of Government departments or employees being above the law. Under the current proposal, Government departments would be issued EPs and charged for fees in the same way as other private sector road works promoters. The only difference lied in the enforcement arrangements. In fact, the issue involved both legal and policy aspects. On the legal side, reference should be made to relevant court cases in other common law jurisdictions on the proposed idea of imposing criminal liability on the Government. On the policy side, the reporting mechanism provided under the EIA Ordinance (Cap. 499) had proved to be an effective measure in monitoring the performance of Government departments. To adopt the same approach for the C&P system would be in line with the usual practice under the Hong Kong legal system.

21. Ms Audrey EU considered the effectiveness of the reporting mechanism provided under the EIA Ordinance not relevant to the present case. It was of paramount importance to ensure that a fair legal system was maintained. She considered it essential for the Administration to clarify the circumstances under which criminal liability would be imposed on permittees of EPs before assessing whether it was justified to exempt the Government from the criminal sanction.

22. SASG/DJ reiterated that it was not a usual practice to impose criminal liability on the Government or Government departments. Given that the Government as a whole, rather than an individual officer, was to be held accountable for any policy decisions, it would be a subject for discussion as to whether it was appropriate to impose criminal liability on an individual officer.

23. Mr Albert CHAN considered that Government officials and private sector employees who had breached the EP conditions should be subject to the same type of sanction. Government officials would be above the law if criminal liability would not be imposed on them, but only on road works promoters in the private sector. He urged the Administration to review the proposed arrangements to ensure equal treatment of all road works promoters, irrespective of whether they came from the Government or the private sector.

24. PAS/WB pointed out that it was unlikely that Government departments or officials would, in the process of discharging their duties, contravene the relevant legislative provisions or breach the EP conditions, as there was no commercial incentive for them to do so. Mr Allen LAW, General Manager of OSP Engineering and Construction of Hong Kong Cable Television Limited (HK Cable TV) however pointed out that private enterprises had the commercial incentive to complete road excavation works as early as practicable.

25. Mr Patrick CHAN, Secretary General of HKCA considered it essential for the Administration to set out clearly the circumstances under which criminal liability would be imposed. In his view, criminal liability should only be imposed for conducting road excavation works without an EP, but not for breach of EP conditions. He pointed out that there had been occasions in which contractors had breached EP conditions for reasons beyond their control. It was unfair to impose criminal sanction on them in such circumstances. Mr CHAN also stressed that Government officials and private sector employees should be subject to the same type of sanction.

26. Mr Abraham SHEK and Ir Dr Raymond HO Chung-tai shared HKCA's view that criminal liability should only be imposed for conducting road excavation works without an EP. Cases in which the life and property of the public had been endangered by road excavation works should be dealt with under the relevant ordinances. Mr Allen LAW, General Manager of OSP Engineering and Construction of Hong Kong Cable TV and Mr CHAN Chit-kwai, member of C&WDC held the same view. Mr K K TSANG, Implementation Manager of Hutchison Global Crossing Limited pointed out that criminal sanction would discourage investment by utility undertakers and aggravate the unemployment situation.

27. PAS/WB pointed out that under the existing provisions in the Land (Miscellaneous Provisions) Ordinance (Cap. 28), a person made or maintained any excavation in unleased land without an EP or not in accordance with an EP should be guilty of an offence and be liable on conviction to a fine of \$5,000 and to imprisonment for six months. The Administration's current proposal was to increase the fine from \$5,000 to \$50,000 to reflect inflation over the past 30 years. PAS/WB also clarified that for breach of EP conditions due to technical and administrative reasons, only fines would be considered. Cases in which the life and property of the public had been endangered by road excavation works would be subject to criminal sanction.

Appeal mechanism

28. Mr Albert CHAN called for a fair and open appeal mechanism. Referring to paragraph 10 of the paper provided by the Administration, PAS/WB pointed out that if an applicant for EP or waiver of economic charge was not satisfied with the result of the assessment made by the Chief Highway Engineer, he might seek a final review by the Director of Highways (the Director). The Director would be assisted by a review panel, which would include at least one independent member from outside the Highways Department (HyD). The purpose of including an independent member in the review panel was to ensure that the mechanism was fair and open. As regards membership of the review panel, the Administration welcomed suggestions and would decide on the membership at a later stage.

29. Mr LAU Ping-cheung pointed out that while HyD would be the authority for processing and monitoring EPs, it would also be a permittee and the authority for

handling appeals. He was concerned that there would be a role conflict among the various roles of HyD. Mr Abraham SHEK also considered it inappropriate for HyD to handle appeals. PAS/WB said that the work of HyD was open to public scrutiny. He also pointed out that under the proposed appeal mechanism, for cases on the waiver of economic charge, if the applicant was not satisfied with the decision of the Director, he might go to the Administrative Appeals Board.

One-stop-shop mechanism

30. Mr Abraham SHEK and Ir Dr Raymond HO supported the industry's request for a one-stop-shop mechanism to process EP applications. PAS/WB advised that a one-stop-shop mechanism might not be necessary after improvement measures had been put in place to streamline the EP application procedures and to avoid imposing conflicting requirements on an applicant by various relevant government departments. HyD would nevertheless assist in resolving any disputes. Mr SHEK, Ir Dr HO, Mr Albert CHAN and Ms Emily LAU Wai-hing considered a one-stop-shop mechanism essential for improving the prevailing arrangements for road excavation works. They requested the Administration to reconsider the issue.

31. Mr David WESTWOOD, member of HKCA enquired whether the prevailing monitoring mechanism of road excavation works by a site liaison group (SLG) comprising representatives of relevant Government departments, DCs and parties concerned would remain unchanged. The Assistant Director of Highways Department (AD/HyD) advised that the SLG would continue to coordinate road excavation works. HyD, in deciding the EP period, would take into account the recommendation of the SLG.

Way forward

32. After deliberations, the Chairman summarized the following areas of concern expressed by Members and the deputations -

- (a) whether the proposed fees and charges were too high, in particular, the proposed additional daily charge of \$18,000 for traffic delay caused to a Strategic Road;
- (b) whether criminal sanction was appropriate for breach of EP conditions and the differential treatment for non-compliant Government departments/officials;
- (c) whether a one-stop-shop mechanism for processing EP applications could be established;
- (d) whether there was a role conflict of HyD; and

- (e) whether a fair and open appeal mechanism could be put in place to handle appeals from road works promoters.

33. Responding to Ms Emily LAU, PAS/WB advised that the Administration planned to introduce the relevant bill into LegCo on 24 April 2002. Mr TAM Yiu-chung and Mr Abraham SHEK considered that as some of the major issues were still unresolved, the Administration should further discuss the issues with the Panel and the parties concerned before presenting the relevant bill to LegCo. However, Mr Albert CHAN considered that the issues could be discussed by the relevant bills committee. He was in support of the early presentation of the bill.

II. Any other business

- 34. There being no other business, the meeting ended at 10:30 am.

Legislative Council Secretariat

17 October 2002