

立法會
Legislative Council

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(These minutes have been seen
by the Administration)

Ref : CB2/SS/5/15

**Subcommittee on Proposed Resolution under Section 37 of
the West Kowloon Cultural District Authority Ordinance (Cap. 601)**

**Minutes of the third meeting
held on Monday, 9 May 2016, at 8:45 am
in Conference Room 2 of the Legislative Council Complex**

Members present : Hon Christopher CHUNG Shu-kun, BBS, MH, JP (Chairman)
Hon Cyd HO Sau-lan, JP
Hon Starry LEE Wai-king, JP
Hon Alan LEONG Kah-kit, SC
Hon Steven HO Chun-yin, BBS
Hon Frankie YICK Chi-ming, JP
Hon WU Chi-wai, MH
Hon YIU Si-wing, BBS
Hon CHAN Chi-chuen
Hon CHAN Yuen-han, SBS, JP
Dr Hon CHIANG Lai-wan, JP
Hon Tony TSE Wai-chuen, BBS
Hon Alvin YEUNG Ngok-kiu

Members absent : Hon Emily LAU Wai-hing, JP
Hon MA Fung-kiwok, SBS, JP
Dr Hon Helena WONG Pik-wan
Dr Hon Elizabeth QUAT, JP

Public Officers attending : Item I

Home Affairs Bureau

Mr Eric CHENG
Principal Assistant Secretary for Home Affairs (West
Kowloon Cultural District)

**Attendance by : Item I
invitation**

West Kowloon Cultural District Authority

Mr Duncan PESCOD, GBS, JP
Chief Executive Officer

Mr Michael RANDALL
General Counsel

Ms Monica CHEUNG
Principal Legal Advisor

Ms Lisa TSANG
Head, Operations Development (Performing Arts)

Ms Fanny CHUN
Senior Manager, Facilities Management

**Clerk in : Ms Alice LEUNG
attendance** Chief Council Secretary (2)6

**Staff in : Ms Vanessa CHENG
attendance** Assistant Legal Adviser 5

Ms Jasmine TAM
Senior Council Secretary (2)8

Miss Meisy KWOK
Legislative Assistant (2)6

Action

I. Meeting with the Administration and the West Kowloon Cultural District Authority

(File Ref: SF(72) to HABCS CR 7/1/99/1/1, LC Paper Nos. CB(3)413/15-16(Appendix 1), LS 37/15-16, CB(2)1066/15-16(01), CB(2)1263/15-16(04)-(05) and CB(2)1426/15-16(01))

The Subcommittee deliberated (index of proceedings at **Annex A**).

2. The Subcommittee received a briefing by the West Kowloon Cultural District Authority ("WKCDA") on its response to the issues raised at the meeting of the Subcommittee held on 18 April 2016 (LC Paper No. CB(2)1426/15-16(01)) ("WKCDA's response").

Action

3. The Subcommittee noted that in the light of members' views and the suggestion made by Mr Alan LEONG at the meeting, WKCDA agreed to amend paragraph (1) of the draft preamble to the proposed West Kowloon Cultural District (Public Open Spaces) Bylaw ("the proposed Bylaw"), which was set out in paragraph 1(a) of WKCDA's response, as follows:

"(1) The vision and mission of the West Kowloon Cultural District Authority for the Public Open Spaces in the West Kowloon Cultural District are formulated in the light of section 4, and in particular section 4(2)(m), of the West Kowloon Cultural District Authority Ordinance (Cap. 601)."

4. The Subcommittee continued clause-by-clause examination of the proposed Bylaw and completed examination of sections 10 to 13.

WKCDA 5. The Subcommittee requested WKCDA to respond in writing to the issues raised by members as set out in **Annex B**.

II. Any other business

Date of next meeting

6. Members noted that the next meeting was scheduled to be held on Tuesday, 17 May 2016, from 4:00 pm to 6:00 pm.

(Post-meeting note: Members were informed vide LC Paper No. CB(2)1461/15-16 on 10 May 2016 that after consultation with the Administration and with the concurrence of the Chairman, the next meeting of the Subcommittee would be held on Tuesday, 17 May 2016, from 3:00 pm to 6:00 pm.)

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

**Proceedings of third meeting of the
Subcommittee on Proposed Resolution under Section 37 of
the West Kowloon Cultural District Authority Ordinance (Cap. 601)
on Monday, 9 May 2016, at 8:45 am
in Conference Room 2 of the Legislative Council Complex**

Time marker	Speaker(s)	Subject(s)/Discussion	Action Required
000530 - 000724	Chairman	The Chairman's opening remarks	
000725 - 002118	Chairman WKCDA	<p>Briefing by the West Kowloon Cultural District Authority ("WKCDA") on its response to the issues raised at the last meeting of the Subcommittee held on 18 April 2016 (LC Paper No. CB(2)1426/15-16(01)).</p> <p>WKCDA's reply to the questions raised by some members at the last meeting regarding whether spontaneous events and events involving only a small number of participants and not causing nuisance would require WKCDA's written permission before they could take place in the public open spaces ("POS") in the West Kowloon Cultural District ("WKCD").</p>	
002119 - 003015	Chairman WKCDA ALA5 Mr CHAN Chi-chuen Mr Alan LEONG	<p>Referring to paragraph 1 of the draft preamble to the proposed West Kowloon Cultural District (Public Open Spaces) Bylaw ("the proposed Bylaw") as set out in paragraph 1(a) of LC Paper No. CB(2)1426/15-16(01), the Chairman pointed out that section 4(2)(m) of the West Kowloon Cultural District Authority Ordinance (Cap. 601) ("WKCDAO") referred only to WKCDA's objective to provide or facilitate the provision of free and accessible open space within WKCD to the general public. He considered it more appropriate to state in the preamble that the vision and mission for WKCD POS were formulated in the light of the whole section 4(2) of WKCDAO, which set out the various objectives that WKCDA aimed to achieve in performing its functions.</p> <p>The Legal Adviser to the Subcommittee pointed out that apart from section 4(2)(m), other sections such as section 4(2)(d) and (g) of WKCDAO were also relevant to the vision and mission for POS to "inspire, promote and encourage cultural pursuits for all", which was stated in paragraph (3) of the draft preamble to the proposed Bylaw.</p> <p>WKCDA responded that the current drafting of paragraph 1 of the draft preamble to the proposed Bylaw sought to make reference to the relevant section of the principal ordinance (i.e. section 4(2)(m) of WKCDAO) which referred specifically to WKCD POS. In any case, WKCDAO would prevail over the proposed Bylaw and WKCDA was obliged to comply with the provisions within WKCDAO regardless of whether they were referred to in the proposed Bylaw.</p>	

Time marker	Speaker(s)	Subject(s)/Discussion	Action Required
		<p>Mr CHAN Chi-chuen concurred with the Chairman's view that it should be stated in the preamble to the proposed Bylaw that the vision and mission for WKCD POS was formulated in the light of section 4(2) of WKCDAO.</p> <p>In response to Mr Alan LEONG's suggestion, WKCDA agreed to amend paragraph 1 of the draft preamble to the proposed Bylaw as follows:</p> <p>"(1) The vision and mission of the West Kowloon Cultural District Authority for the Public Open Spaces in the West Kowloon Cultural District are formulated in the light of section 4, and in particular section 4(2)(m), of the West Kowloon Cultural District Authority Ordinance (Cap. 601)."</p> <p>Referring to paragraph 1(c) of LC Paper No. CB(2)1426/15-16(01), the Legal Adviser to the Subcommittee pointed out that as WKCDA was prepared to add in a defence of reasonable excuse for only some of the offences under the proposed Bylaw, members might wish to consider the need for providing also such a defence for the other offences when examining the relevant sections of the proposed Bylaw.</p>	<p>WKCDA to follow up</p>
<p><i>Section-by-section examination of the proposed Bylaw</i></p>			
003016 - 003503	Chairman WKCDA	<p>The Subcommittee continued section-by-section examination of the proposed Bylaw (Appendix 1 to LC Paper No. CB(3)413/15-16).</p> <p><u>Part 2 - Boundary, Access, Management and Control</u></p> <p><i>Section 10 on conduct of events</i></p>	
003504 - 004345	Chairman WKCDA Ms Cyd HO ALA5	<p><i>Section 11 on commercial filming, photography and recording</i></p> <p><i>Section 11(1)</i></p> <p>Ms Cyd HO raised the following view and enquiry:</p> <p>(a) in determining whether WKCDA's written permission was required for filming, photography or recording to be carried out in WKCD POS, consideration should be given to whether such acts would occupy such amount of POS as might present other POS users some inconvenience or restrict their free access to the areas concerned, and not whether such acts were carried out for commercial purposes; and</p> <p>(b) whether WKCDA would take enforcement actions against cases in which the filming or photo-taking activities were originally carried out in WKCD POS for non-commercial purposes but the items produced as a result of such activities were subsequently used for commercial purposes.</p>	

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		<p>The Chairman's enquiry about whether wedding photography by amateur photographers would be allowed in WKCD POS without WKCDA's prior written permission. His view that photo-taking activities by amateur photographers should be encouraged in POS.</p> <p>WKCDA responded that:</p> <p>(a) casual photography by visitors to WKCD POS would not be subject to control under the proposed Bylaw although such acts might cause some minor inconvenience to other POS users. WKCDA was mainly concerned about the conduct of commercial or professional filming, photography and recording in POS, which usually involved major set-ups such as lighting systems, sound equipment, and wardrobe and make-up facilities. In WKCDA's view, it was more appropriate to set a higher benchmark by requiring only filming, photography and recording for commercial purposes to obtain WKCDA's prior written permission; and</p> <p>(b) while there was no restriction on photo-taking activities in POS by individuals or amateur groups for weddings, professional wedding photographers seeking to use POS for photo shoots frequently would be required to register with and obtain a permit from WKCDA in advance.</p> <p><i>Section 11(2)</i></p> <p>In reply to the Legal Adviser to the Subcommittee, WKCDA advised that it did not see the need to insert a defence of reasonable excuse in section 11(2) as it could be clearly distinguished whether or not a filming or photo-taking activity in WKCD POS was for commercial purposes and WKCDA did not contemplate any reasonable excuse which could justify a departure from the requirement for persons seeking to carry out commercial filming, photography and recording in POS to obtain prior written permission from WKCDA.</p>	
004346 - 011251	Chairman WKCDA ALA5 Mr Alan LEONG Mr Alvin YEUNG	<p><u>Part 3 – Conduct of Public</u></p> <p><i>Section 12 on compliance with notices and directions</i></p> <p><i>Section 12(3)</i></p> <p>The Legal Adviser to the Subcommittee enquired whether WKCDA would consider including a defence of reasonable excuse in section 12(3), which provided that a person who did not comply with any written notice issued and displayed in WKCD POS by WKCDA or follow the direction given by an authorized person of WKCDA for the purposes of ensuring public safety or order committed an offence and was liable on conviction to a fine.</p>	

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		<p>WKCD A responded that as public safety and order were paramount, if there was sufficient evidence that the provisions relating to public safety and order under the proposed Bylaw had been breached, WKCD A did not consider it appropriate to require its authorized persons to consider whether there was any reasonable excuse for such breach before taking enforcement action. Given that a written notice was issued and displayed for a purpose, WKCD A considered it sufficient that POS users be required to comply with such notice.</p> <p>In reply to Mr Alan LEONG's enquiry on how a person who had committed an offence under the proposed Bylaw would be held liable to a fine, WKCD A advised that there was no "fixed penalty" arrangement under the proposed Bylaw and prosecutions would be brought against alleged offenders if considered appropriate. In considering whether or not to bring a prosecution, WKCD A would take into account, amongst other matters, whether it would be in the public interest to do so. Where there was a reasonable excuse such that the public interest would not be served by prosecuting an alleged offender, WKCD A would not institute prosecution. Additionally, as the court had the discretion to decide whether an alleged offender had a reasonable excuse taking into account, amongst other matters, the evidence produced by WKCD A and by the alleged offender, WKCD A did not consider it necessary to insert a defence of reasonable excuse in section 12(3).</p> <p>In response to Mr Alan LEONG, the Legal Adviser to the Subcommittee advised that while WKCD A had proposed to provide a defence of reasonable excuse for some of the offences under the proposed Bylaw, such defence was not provided for the offence under section 12(3). It followed that contravention of section 12(2) might constitute an offence under section 12(3) even if a reasonable excuse could be provided for such contravention. Pointing out that a defence of reasonable excuse for similar offences was provided in the Kai Tak Cruise Terminal Bill, the Legal Adviser to the Subcommittee considered that the inclusion of a defence of reasonable excuse in section 12(3) of the proposed Bylaw would afford better protection to users of WKCD POS.</p> <p>Mr Alan LEONG said that even if a defence of reasonable excuse was not expressly provided for the offence under section 12(3), it was his understanding that such offence would not be construed as a strict liability offence and the prosecution would still have to prove mens rea (i.e. criminal intent) in relation to the offence to the court. Furthermore, the court would have the discretion to decide whether or not there was a reasonable excuse for the offence.</p>	

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		<p>The Legal Adviser to the Subcommittee pointed out that the common law defence of honest and reasonable, albeit mistaken, belief might be available even if the offence was a strict liability offence. Depending on the facts and circumstances of the case, such common law defence might not be resorted to by the defendant in every case.</p> <p>The Chairman said that although the court had the discretion to decide whether there was a reasonable excuse for an offence under the proposed Bylaw, he was concerned that the lack of a reasonable excuse defence in section 12(3) might cause nuisance to suspected offenders or offenders as they might not be given the opportunity to state their defence before the matter was brought to court and therefore might be left with no choice but to deal with the legal proceedings.</p> <p>WKCD A responded that it would listen to the explanation given by an alleged offender, collect evidence relating to the offence and seek legal advice before taking a decision on whether prosecution should be instituted against the alleged offender. As a general rule, WKCD A would negotiate and discuss with the alleged offender and would consider taking prosecution action only when all attempts to negotiate failed. Where prosecution was to be proceeded with, WKCD A would have to present to the court the evidence it had collected in respect of the offence and it was for the court to decide whether or not there was a reasonable excuse for the offence after hearing from both WKCD A and the alleged offender.</p> <p>Mr Alvin YEUNG considered it more appropriate to provide a defence of reasonable excuse for all offences under the proposed Bylaw as it would enable the general public to have a better understanding of their right to defend and minimize the disputes that might arise from the enforcement of the relevant requirements of the proposed Bylaw.</p> <p>In response to Mr Alvin YEUNG's enquiries, WKCD A advised that it was empowered under the proposed Bylaw to issue summons to alleged offenders. Prosecution against the alleged offenders, if considered appropriate, would either be brought by WKCD A or, in cases of more serious offences, by the Police. WKCD A would brief out the prosecution cases to private law firms or barristers and cover the relevant costs, while the Department of Justice would deal with those cases brought by the Police.</p> <p>Mr Alvin YEUNG opined that as considerable costs would be involved if WKCD A were to engage private law firms or barristers to carry out the prosecution work, it might not be in the public interest to prosecute the alleged offenders having regard to the consideration</p>	

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		<p>that the offences under the proposed Bylaw were of a relatively minor nature.</p> <p>WKCDA advised that it had been managing the Nursery Park since July 2015 and had not prosecuted any alleged offender so far. It would endeavour to seek the cooperation of alleged offenders through communication and discussion and prosecution action would only be taken as a last resort. As such, WKCDA expected that prosecutions would be very infrequent.</p>	
011252 - 014324	<p>Chairman WKCDA Mr CHAN Chi-chuen Mr Alvin YEUNG Mr Alan LEONG Ms Cyd HO</p>	<p><i>Section 13 on public conduct</i></p> <p><i>Section 13(1)(g)</i></p> <p>Mr Alvin YEUNG's enquiry about whether WKCDA's authorized persons would consider whether a complaint of nuisance or annoyance lodged by a POS user was reasonable before taking action to request the party under complaint to desist from such conduct.</p> <p>WKCDA's advice that its authorized persons were trained to de-escalate conflicts through communication and discussion and to facilitate the parties concerned to work out a compromise solution. WKCDA had been adopting such an approach in managing the activities in the Nursery Park and had no difficulty obtaining the cooperation of the Park users so far.</p> <p><i>Section 13(1)(k)</i></p> <p>Mr CHAN Chi-chuen sought clarification on whether the flying of remotely controlled flying drones or model aircraft from WKCD POS or through the airspace above POS would require permission under section 13(1)(k). He further enquired whether there was any restriction on the altitude of the operation of such flying devices in POS, and whether the use of camera drones in POS would also be subject to regulation under the proposed Bylaw.</p> <p>Referring to section 11(1) of the proposed Bylaw, Mr Alvin Yeung sought clarification on whether the use of camera drones for commercial filming or photography would be permitted in WKCD POS.</p> <p>WKCDA advised that as WKCD was located within five kilometers of the helicopter landing pad on the top of the Macau Ferry Terminal, the launching of any kind of remotely controlled flying drones or model aircraft from WKCD POS was subject to the prevailing civil aviation requirements and the permission of the Civil Aviation Department ("CAD"). Furthermore, the flying of model aircraft from the coastal areas of Victoria Harbour was prohibited under the relevant civil aviation guidelines issued by CAD.</p>	

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		<p>Mr Alvin YEUNG suggested that as the proposed Chinese rendition of "powered flying drones" (i.e. "電動飛行靶機") might not be easily comprehensible to the general public, WKCD should consider providing examples of such flying devices in the notice(s) to be issued and displayed in WKCD POS.</p> <p><i>Section 13(2)</i></p> <p>Mr Alan LEONG requested WKCD to explain why it had proposed to provide a defence of reasonable/lawful excuse for only some of the offences but not all offences punishable with a fine under the proposed Bylaw. Mr LEONG was concerned that the adoption of such a differential approach might have the effect of usurping the functions of the court in deciding whether there could be or could not be any reasonable/lawful excuse for individual offences set out in the proposed Bylaw. He suggested that WKCD should either do away with the reasonable/lawful excuse defence for the offences set out in the relevant sections of the proposed Bylaw, or provide such a defence for all offences under the proposed Bylaw.</p> <p>WKCD explained that it had initially stated in its reply dated 11 April 2016 to the letters from the Legal Adviser to the Subcommittee (LC Paper No. CB(2)1263/1455-16(05)) that WKCD considered it not necessary to provide a defence of reasonable excuse for the offences punishable with a fine under the proposed Bylaw for the reasons set out in its reply. WKCD also pointed out in its reply that in circumstances where there might be lawful excuses for contravention of the provisions of the proposed Bylaw, express provisions had been made in relevant section of the proposed Bylaw (e.g. section 16(1)) to provide for a defence of lawful excuse. Having considered some members' view that a defence of reasonable excuse should be provided for the offences under the proposed Bylaw, WKCD was currently prepared to provide such a defence for those offences for which, in WKCD's view, there could be reasonable excuses. Nevertheless, WKCD considered it more preferable not to provide a defence of reasonable excuse for the offences under the proposed Bylaw.</p> <p>The Chairman considered it necessary to provide a defence of reasonable excuse for all offences under the proposed Bylaw in order to ensure that WKCD's authorized persons would take account of the defence, if any, of the offenders in enforcing the Bylaw. He stressed that the provision of a reasonable excuse defence in all relevant sections of the proposed Bylaw would enhance the protection for members of the public who might inadvertently contravene the relevant requirements under the Bylaw.</p>	

Time marker	Speaker(s)	Subject(s)/Discussion	Action Required
		<p>Ms Cyd HO sought the advice of the Legal Adviser to the Subcommittee on the difference in the meaning between the term "lawful excuse", which was referred to in section 16(3), and the term "reasonable excuse", which WKCDA was prepared to insert in some other sections of the proposed Bylaw.</p> <p>The Legal Adviser to the Subcommittee advised that the term "reasonable excuse" carried a broader meaning than "lawful excuse", as the latter was connected to a legal authorization.</p> <p>In response to Mr Cyd HO, WKCDA advised that it did not consider it appropriate to insert a defence of lawful or reasonable excuse in section 13(2).</p> <p>WKCDA was requested to consider and respond to the views and concerns expressed by members in respect of the provision or otherwise of a defence of reasonable excuse for the offences under the proposed Bylaw.</p>	<p>WKCDA (Annex B to the minutes)</p>
014325 - 014541	Chairman WKCDA	<p><u>Part 4 – Protection of Public Open Spaces and Environment</u></p> <p><i>Section 14 on prohibited acts</i></p>	
014542 - 014618	Chairman	Date of next meeting	

**Subcommittee on Proposed Resolution under Section 37 of
the West Kowloon Cultural District Authority Ordinance (Cap. 601)**

**List of follow-up actions required of
the West Kowloon Cultural District Authority ("WKCD")
arising from the discussion at the meeting on 9 May 2016**

The Subcommittee noted from paragraph 1(c) of WKCD's response to the issues raised at the meeting on 18 April 2016 (LC Paper No. CB(2)1426/15-16(01)) that subject to members' views, WKCD was prepared to insert a defence of reasonable excuse for the offences set out in sections 7(2), 8(4), 9(9), 10(9), 17(4), 22(2), 23(3) and 23(6) of the proposed West Kowloon Cultural District (Public Open Spaces) Bylaw ("the proposed Bylaw") through adding in the wording "without reasonable excuse" as appropriate in the relevant sections. The Subcommittee also noted that a defence of lawful excuse was provided for the offence set out in section 16(5) of the proposed Bylaw.

WKCD was requested to explain the logic behind its proposal to provide a defence of reasonable/lawful excuse for only some of the offences but not all offences punishable with a fine under the proposed Bylaw, and respond to Mr Alan LEONG's concern that the adoption of such a differential approach might have the effect of usurping the functions of the court in deciding whether there could be or could be no reasonable/lawful excuse for individual offences set out in the proposed Bylaw. WKCD was also requested to consider and respond to Mr Alan LEONG's suggestion that WKCD should either do away with all reasonable/lawful excuse defence for the offences set out in the relevant sections of the proposed Bylaw, or provide such a defence for all offences under the proposed Bylaw which, in some members' view, would afford better protection to users of the public open spaces in the West Kowloon Cultural District.

Council Business Division 2
Legislative Council Secretariat
17 June 2016