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Paper for the House Committee

**Report of the Subcommittee on
Public Health and Municipal Services Ordinance (Public Pleasure Grounds)
(Amendment of Fourth Schedule) (No.2) Order 2012**

Purpose

This paper reports on the deliberations of the Subcommittee on Public Health and Municipal Services Ordinance (Public Pleasure Grounds) (Amendment of Fourth Schedule) (No.2) Order 2012 ("the Subcommittee").

Background

Designation of the West Kowloon Waterfront Promenade ("the Promenade") as a public pleasure ground

2. The Director of Leisure and Cultural Services ("DLCS"), in her capacity as the Authority under the Public Health and Municipal Services Ordinance (Cap. 132) ("PHMSO"), manages the public pleasure grounds listed in the Fourth Schedule to PHMSO. Under section 106 of PHMSO, the Authority may, from time to time, by order set aside places for use as public pleasure grounds, and may by order amend, or add to, or delete from the Fourth Schedule. Public pleasure grounds managed by the Leisure and Cultural Services Department ("LCSD") are regulated by the Pleasure Grounds Regulation (Cap. 132BC) ("PGR") made under PHMSO.

3. According to the Administration, to make good use of the land prior to the implementation of permanent works at the West Kowloon Cultural District ("WKCD"), a temporary promenade, the West Kowloon Waterfront Promenade ("the Promenade") was developed at the site in two phases. The first phase (southern portion) was completed and handed over to LCSD for management and use by the public in September 2005. The second phase (northern portion)

was completed and handed over to LCS D for public use in February 2007. Pursuant to section 106 of PHMSO, LCS D set aside the southern portion of the Promenade as a public pleasure ground in 2005 and included the northern portion into the management boundary of the Promenade in 2007.

4. According to the Legislative Council ("LegCo") Brief¹ issued by LCS D, the Promenade is no longer required to be used as a public pleasure ground and will be handed over to the West Kowloon Cultural District Authority ("WK CDA") for use and management subject to the completion of relevant procedures.

West Kowloon Cultural District Authority

5. WK CDA is established under the West Kowloon Cultural District Authority Ordinance (Cap. 601) ("the WK CDA Ordinance") to develop the land leased to it into an integrated arts and cultural district. Under section 4(1)(c) of the WK CDA Ordinance, WK CDA is responsible, either alone or jointly or by agreement with any other person, for providing (including planning, designing and constructing), operating, managing, maintaining or otherwise dealing with arts and cultural facilities, related facilities or ancillary facilities. Section 4(2) of the WK CDA Ordinance requires WK CDA to perform its functions in ways which aim to achieve a number of objectives, including, amongst others, providing or facilitating the provision of free and accessible open space within the leased area to the general public.

6. Pursuant to section 37(1) of the WK CDA Ordinance, WK CDA is empowered to make bylaws for one or more of the following purposes -

- (a) for the regulation, operation or management of arts and cultural facilities, related facilities or ancillary facilities; and
- (b) for the conduct of all persons within any premises, buildings, structures, facilities or land (including public places) which the Authority holds or manages, whether within or outside the leased area.

Section 37(2)(c) of the WK CDA Ordinance provides that all bylaws made by WK CDA are subject to the approval of the LegCo.

¹ File Ref: L/M (1) in LCS 19/HQ 813/00(18)

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7. The Order is made by DLCS under section 106 of PHMSO. The Order states that the Promenade ceases to be set aside for use as a public pleasure ground, and amends the Fourth Schedule to PHMSO by deleting the reference to the Promenade in that Schedule. The Order was published in the Gazette on 6 July 2012 and came into operation on the same date.

8. To allow sufficient time for the Subcommittee to scrutinize the Order, its scrutiny period has been extended to 7 November 2012 by a resolution of the Council passed on 17 October 2012.

The Subcommittee

9. At the House Committee meeting on 12 October 2012, Members agreed to form a subcommittee to scrutinize the Order. Under the chairmanship of Hon Cyd HO, the Subcommittee has held two meetings with the Administration and WKCDA. The membership list of the Subcommittee is in **Appendix I**.

Deliberations of the Subcommittee

Reasons for ceasing to set aside the Promenade as a public pleasure ground

10. Noting that the Promenade is no longer subject to any statutory regulation upon the gazettal of the Order on 6 July 2012 and is currently managed by WKCDA with a set of temporary house rules with no legal basis, members are concerned that WKCDA has yet to formulate a set of bylaws concerning the use of the Promenade in accordance with section 37(1) of the WKCDA Ordinance and whether the house rules prepared by WKCDA are more relaxed than the relevant provisions of PGR. Members have therefore enquired about the reasons for the Administration to cease to set aside the Promenade specified in Schedule 1 of the Order for use as a public pleasure ground and to hand over the Promenade to WKCDA for use and management.

11. The Administration's explanation is that the statutory planning process of WKCD has reached an advanced stage. Upon completion of the statutory planning process, construction works will commence as early as possible for completion of the facilities in phases starting from 2014-2015. The first phase of the future park, which will include the current site of the Promenade, is planned to be opened for public enjoyment within 2014. The period before

commencement of active construction of permanent development provides an opportunity for WKCDA to utilize the WKCD site to bring people to WKCD and to bring arts to the public. The Joint Subcommittee to Monitor the Implementation of the West Kowloon Cultural District Project formed under the Fourth LegCo has been briefed on the temporary uses of the WKCD site. WKCDA has applied to Lands Department ("LandsD") for short term tenancies ("STTs") covering various parts of the WKCD site for advance works and temporary events. On 3 January 2012, WKCDA entered into a STT with LandsD in respect of the headland area of the WKCD site.

12. According to the Administration, WKCDA has been drawing up programme proposals and working with collaborators and event organizers to animate the STT site. Some of the planned large-scale public events require the temporary occupation of the Promenade. To allow for better preparations for the advance works and large-scale events and to ensure the coordinated management of the Promenade and the adjoining land, WKCDA applied for an extension of the STT boundary to cover the Promenade and some adjoining land in March 2012. It was necessary for DLCS to exercise her power under PHMSO to cease to set aside the Promenade for use as a public pleasure ground in view of the proposed change of use.

13. The Administration and WKCDA have provided to the Subcommittee a map showing the boundary of the Promenade in the current WKCD site and a layout plan indicating the location of the Promenade and the distribution of other facilities to be built in WKCD². Members note that the total STT area under WKCDA's use and management comprises about 206 000 square metres, of which about 34 000 square metres is occupied by the Promenade.

14. Upon members' enquiries, the Administration has advised that, owing to the preparatory work for the Hong Kong Wine & Dine Festival 2012 on site, the Promenade was delivered to WKCDA on 3 October 2012 for its control and management.

Management of the Promenade after the gazettal of the Order

15. Members have enquired about which party was responsible for managing the Promenade during the period between 6 July 2012 when the Order came into operation and 3 October 2012 when WKCDA took over the management of the Promenade. Members are concerned whether the Promenade, under the management of WKCDA, is subject to any statutory regulation.

² Annex 2 to LC Paper No. CB(2)106/12-13(01).

16. According to the Administration, although the Promenade ceased to be subject to the regulation of PGR upon the gazettal of the Order on 6 July 2012, the Promenade was still under the general management of LCSD (in its capacity as land allocatee of the Promenade) before it was handed over to WKCDA for use and management on 3 October 2012. Taking into account that WKCDA will soon proceed with the future park design and the park design will have an impact on the rules for managing the future park in the long run, WKCDA plans to draw up these bylaws from a more holistic perspective during the park design process. As an interim arrangement, the Promenade will be managed through a set of temporary and administrative house rules, which are executed and enforced by WKCDA in its capacity as the lessee under the STT concerned.

17. Hon James TO has expressed grave concern about the situation that the Promenade is no longer subject to any statutory regulation and it is currently managed by WKCDA with a set of temporary house rules without any legal basis. He is of the view that the Administration and WKCDA should have had anticipated the need for WKCDA to use the Promenade for the staging of public events and early planning should have been made for WKCDA to formulate a set of bylaws concerning the use of the Promenade in accordance with section 37(1) of the WKCDA Ordinance before taking over the Promenade from LCSD, such that the use of the Promenade would continue to be subject to statutory regulation after it was handed over to WKCDA. In this connection, he has sought clarifications as to whether WKCDA has the statutory authority to make bylaws for the management of STT sites.

18. The legal adviser to the Subcommittee has advised that by virtue of section 37(1) of the WKCDA Ordinance, WKCDA is empowered to make bylaws for the regulation, operation or management of arts and cultural facilities, related facilities or ancillary activities; and for the conduct of all persons within any premises, buildings, structures, facilities or land which WKCDA holds or manages, whether within or outside the leased area.

19. Some members share Hon James TO's concern, pointing out that the Order may create a "legal vacuum" in respect of the management of the Promenade, which is open to members of the public for use.

Justifications for WKCDA to assume the management of the Promenade

20. Members have questioned the arrangement for WKCDA to introduce a set of temporary house rules with no legal basis to manage the Promenade. Noting that WKCDA is empowered to make bylaws concerning the use of the Promenade in accordance with section 37(1) of the WKCDA Ordinance,

members have queried why WKCDA is not able to make the relevant bylaws before taking over the Promenade from LCSD.

21. The Administration and WKCDA have explained that to meet the tight construction programme, WKCDA plans to commence advance works such as site investigation at different parts of the site, including the area occupied by the Promenade, from early 2013, to be followed by construction of permanent facilities in phases. To ensure public safety, during site investigation and advanced works, parts of the Promenade will have to be closed to the public from early 2013, and the majority of the Promenade will be closed to the public from approximately the third quarter of 2013 to enable works to progress on the park. In order not to delay the construction works and given the short time span before the closure of the Promenade for advance works, it is considered more practical for WKCDA to manage the whole STT site including the Promenade by a set of temporary and administrative house rules. In fact, WKCDA can exercise all its rights as the lessee under the STT to manage the STT site. In addition, the STT site is subject to other statutory regulations such as noise control and illegal hawking.

22. Hon WU Chi-wai considers that the Administration could have adopted the mode of management of Nan Lian Garden, a designated public pleasure ground governed by PGR. While DLCS is the authority of the overall management of Nan Lian Garden under PGR, the Chi Lin Nunnery is entrusted to manage and maintain the Garden. The Administration has explained that given the nature and functions of WKCDA, especially that WKCDA is an independent statutory body, the same mode of management could not apply.

23. Hon Cyd HO has pointed out that as there are comments that the provisions in PGR are outdated and not conducive to freedom of expression, WKCDA should adopt a lax approach in managing WKCD. Pursuant to members' request, the Administration has provided a set of the house rules prepared by WKCDA to the Subcommittee and a comparison table³ explaining the differences between the house rules adopted by WKCDA for managing the Promenade and the relevant provisions of PGR.

24. WKCDA has stressed that the house rules, which are drafted on the basis of the legal framework of PGR, have been modified and relaxed with a view to providing a more welcoming environment for the public. Noting members' concern that the house rules prepared by WKCDA for managing the Promenade is not subject to scrutiny and approval by LegCo, WKCDA has undertaken to consult the Panel on Home Affairs or relevant subcommittee of

³ Annex 4 to LC Paper No. CB(2)106/12-13(01).

LegCo before making any amendments to the house rules. Taking into consideration the target commissioning date of the first phase of the future park in late 2014, WKCDA will prepare the relevant bylaws in accordance with section 37(1) of the WKCDA Ordinance in 2013 to cater for the opening of the future park. The Administration and WKCDA have undertaken to consult the Panel on Home Affairs or relevant subcommittee of LegCo before the legislative process of the bylaws is initiated.

25. Members note that to ensure effective management of the STT site and enforcement of the house rules on a daily basis, WKCDA has engaged a professional facilities management company which has been providing security services to LCSD and has good knowledge of the facilities and operation of the Promenade. The manpower that WKCDA has put in place for security, cleaning and landscape services is on par with that of LCSD, with additional on-site full-time management officers for daily operations and overseeing major public events. With regard to the major events to be patronized by large crowds, WKCDA and event organizers are required under the terms and conditions of the STT and license agreements respectively to comply with all of the STT terms and conditions and relevant Government regulations for organizing such programmes. The Administration has stressed that similar regulatory frameworks and modes of operation apply regardless of whether the Promenade is under the control of WKCDA or whether it is a public pleasure ground under the management and control of LCSD.

Whether a repeal of the Order is required

26. Hon James TO has expressed a strong view that the Administration should not hastily gazette the Order to the effect that the Promenade ceased to be set aside as a public pleasure ground before WKCDA has made its set of bylaws governing the venue under section 37(1) of the WKCDA Ordinance. He has once suggested that the Subcommittee should consider repealing the Order.

27. Members note that WKCDA has planned a number of major public events in WKCD during the period from November 2012 to June 2013, a copy of which is in **Appendix II**. They have enquired whether and what will be the impact on these events if the Order is repealed and the Promenade is managed by LCSD under PGR.

28. The Administration and WKCDA have advised that the licensed areas and structures of the Hong Kong Wine & Dine Festival 2012 to be held from 1 to 4 November 2012 and Clockenflap Music & Arts Festival to be held from 1 to 2 December 2012 will straddle both the Promenade and the earlier STT

area secured by WKCD in January 2012. It would be undesirable for the organizers and participants of these large scale events to be subjected to two different sets of regulations and user requirements (e.g. insurance and fee charges) adopted by WKCD and LCSD. Given the lead time required for proper event planning, contract negotiation, publicity and preparations on site, WKCD has to take over the Promenade in good time to ensure the smooth operation of the events.

29. Hon Alan LEONG has sought clarifications from the legal adviser to the Subcommittee on whether the Order will remain in force until and unless the Order is repealed by a resolution passed at a Council meeting held on or before the expiry date of the scrutiny period of the Order (i.e. 7 November 2012). Members have also enquired whether the Order, if so repealed, will have any effect on the contractual agreements entered into on or after 6 July 2012 (i.e. the date on which the Order came into operation) between WKCD and the event organizers in respect of the use of the Promenade.

30. Members note the advice given by the legal adviser to the Subcommittee that pursuant to section 34(2) of the Interpretation and General Clauses Ordinance (Cap. 1), where subsidiary legislation has been laid on the table of LegCo, LegCo may, by resolution passed at a LegCo sitting held not later than 28 days after the sitting at which it was so laid, provide that such subsidiary legislation shall be amended in any manner whatsoever consistent with the power to make such subsidiary legislation, and if any resolution is so passed the subsidiary legislation shall, without prejudice to anything done thereunder, be deemed to be amended as from the date of publication in the Gazette of such resolution. Therefore, the contracts signed between WKCD and the event organizers during the period when the Order is in force shall remain valid and binding.

31. The Administration and WKCD have advised that, given the imminent need to commence advance works in the Promenade area, it would be necessary to re-trigger the process to remove the Promenade from the Fourth Schedule to PHMSO very soon if it were restored as a public pleasure ground. Members note that the Administration and WKCD have undertaken to prepare the relevant bylaws in accordance with section 37(1) of the WKCD Ordinance and consult the Panel on Home Affairs or relevant subcommittee of LegCo before WKCD makes any changes to its temporary house rules for the Promenade.

32. Having considered the explanations and the undertakings made by the Administration and WKCD, members have agreed that the Subcommittee will not propose any amendment to the Order. However, members are very

dissatisfied at the Administration's way of taking forward the handing over of the management of the Promenade to WKCDA. They consider that the Administration has failed to give due regard to the work of LegCo in scrutinizing legislation. The Administration should have consulted relevant committee of LegCo before gazettal of the Order. Members have impressed upon the Administration and WKCDA that LegCo has all along attached great importance to the development of WKCD and they should handle matters relating to the WKCD project with sensitivity and care for the due process of LegCo in scrutiny of legislative proposals.

Advice sought

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

Council Business Division 2
Legislative Council Secretariat
31 October 2012

Appendix I

Subcommittee on Public Health and Municipal Services Ordinance (Public Pleasure Grounds) (Amendment of Fourth Schedule)(No.2) Order 2012

Membership List

Chairman Hon Cyd HO Sau-lan

Members Hon James TO Kun-sun

Hon Alan LEONG Kah-kit, SC

Hon WU Chi-wai, MH

Hon SIN Chung-kai, SBS, JP

Hon Christopher CHUNG Shu-kun, BBS, MH, JP

(Total : 6 Members)

Clerk Ms Alice LEUNG

Legal adviser Miss Winnie LO

Date 24 October 2012

Appendix II

Major public events planned to be held in the West Kowloon Cultural District

| Date | Programme | Organiser |
|--------------------------|-------------------------------------|--|
| * 1 – 4 November 2012 | Hong Kong Wine & Dine Festival 2012 | External party |
| 24 November 2012 | Renaissance 2012 | External party |
| * 1 – 2 December 2012 | Clockenflap Music & Arts Festival | External party |
| * 15 – 16 December 2012 | Freespace Fest | West Kowloon Cultural District Authority |
| * 23 March – 2 June 2013 | Mobile M+: INFLATION! | West Kowloon Cultural District Authority |

* Events involving the use of the Promenade

Source : LC Paper No. CB(2)106/12-13(01)