

立法會
Legislative Council

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Legislative Council
Panel on Transport

**Subcommittee on matters relating to the
implementation of railway development projects**

**Minutes of meeting on
Wednesday, 24 July 2002, at 5:00 pm
in the Chamber of the Legislative Council Building**

- Members present** : Hon Miriam LAU Kin-yee, JP (Chairman)
Ir Dr Hon Raymond HO Chung-tai, JP
Hon CHAN Kwok-keung
Hon LAU Kong-wah
Hon Abraham SHEK Lai-him, JP
Hon Tommy CHEUNG Yu-yan, JP
Hon Albert CHAN Wai-yip
Hon LAU Ping-cheung
- Members absent** : Hon LAU Chin-shek, JP
Hon Andrew CHENG Kar-foo
Hon TAM Yiu-chung, GBS, JP
Hon LEUNG Fu-wah, MH, JP
Hon WONG Sing-chi
- Non-Subcommittee Members attending** : Hon Albert HO Chun-yan
Hon Martin LEE Chu-ming, SC, JP
Hon NG Leung-sing, JP
Hon Margaret NG
Hon SIN Chung-kai
Hon Howard YOUNG, JP
Hon Emily LAU Wai-hung, JP

Hon IP Kwok-him, JP
Hon Audrey EU Yuet-mee, SC, JP

Public officers attending : Environment, Transport and Works Bureau

Mr Stephen LAM
Acting Secretary for the Environment, Transport and Works

Mr Paul TANG
Deputy Secretary for the Environment, Transport and Works
(Transport and Works)

Financial Services and the Treasury Bureau

Mr Martin GLASS
Deputy Secretary for Financial Services and the Treasury
(Treasury)

Transport Department

Mr Y M LEE
Chief Engineer/NTW

Highways Department

Mr Matthew HO
Acting Government Engineer/Railway Development

Department of Justice

Mr Benedict LAI
Deputy Law Officer (Civil Law)

Mr M Y CHEUNG
Senior Government Counsel

Clerk in attendance : Mr Andy LAU
Chief Assistant Secretary (1)2

Legal Adviser in attendance : Mr Jimmy MA
Legal Adviser

Staff in attendance : Miss Connie FUNG
Assistant Legal Adviser 3

Ms Alice AU
Senior Assistant Secretary (1)5

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I MTR Penny's Bay Rail Link Project Agreement

- (Ref: TBCR 3/5/511/98 - Legislative Council Brief on the MTR Penny's Bay Rail Link Project Agreement provided by the Administration;
- LC Paper No. CB(1)2279/01-02(01) - Information paper provided by the Administration;
- LC Paper No. CB(1)2297/01-02(01) - Letter dated 13 July 2002 from Legal Adviser to the Administration;
- LC Paper No. CB(1)2297/01-02(02) - Reply dated 15 July 2002 from the Administration;
- LC Paper No. LS133/01-02 - Paper prepared by the Legal Service Division on Proposed Government's agreement to waive claims for dividends for the Mass Transit Railway Penny's Bay Rail Link Project;
- LC Paper No. CB(1)2322/01-02(01) - Information paper provided by the Administration;
- LC Paper No. CB(1)2334/01-02(01) - Supplementary note on "Extract from SC opinion" provided by the Administration;
- LC Paper No. CB(1)2343/01-02(01) - Information paper provided by the Administration; and
- LC Paper No. LS137/01-02 - Paper entitled "Legal Adviser's comments on the Administration's paper considered at the meeting on 22 July 2002" prepared by the Legal Service Division)

The Chairman recapped that at the last meeting on 22 July 2002, two motions were passed by the Subcommittee. The first one called on the Administration not to execute the Project Agreement, pending further deliberation by the Subcommittee on the proposed dividend waiver of \$798 million. The second one called on the MTR Corporation Limited (MTRCL) to provide additional information on the fare level of Penny's Bay Rail Link (PBRL) and the estimated additional revenue induced by PBRL to the rest of the Mass Transit Railway (MTR) network. Subsequently, the Administration had provided an information paper (LC Paper No. CB(1)2343/01-

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02(01)) for members' consideration. As requested by members, Legal Adviser (LA) had also provided written comments on the Administration's paper (LC Paper No. CB(1)2322/01-02(01)) considered at the meeting on 22 July 2002 vide LC Paper No. LS137/01-02.

(Post-meeting note: The Chinese versions of LC Paper Nos. LS137/01-02 and CB(1)2343/01-02(01) tabled at the meeting were subsequently issued to members vide LC Paper No. CB(1)2353/01-02.)

Proposed sum of \$798 million funding support

2. The Acting Secretary for the Environment, Transport and Works (SETW(Ag)) apologized to members for the late submission of the Administration's paper. He said that after the last meeting, the Administration had conveyed members' request for additional information to MTRCL. He called on members' understanding that as a publicly-listed company on the Stock Exchange of Hong Kong, MTRCL had a duty to abide by the Stock Exchange Rules and safeguard its commercial and financial information. Nonetheless, MTRCL had provided additional information to the Subcommittee as best as it could. The Corporation's response to questions raised by members was set out in the letter dated 24 July 2002 from the Project Director of the MTRCL to SETW(Ag), which was attached at the Annex to the Administration's paper.

3. SETW(Ag) then briefed members on the salient points of the paper as follows:

- (a) The construction cost of the 3.5-kilometre long PBRL was estimated to be \$2 billion. When compared with the cost of \$18 billion for the 12.5-km long MTR Tseung Kwan O Extension, it could be seen that the cost estimate was within reasonable range.
- (b) The internal rate of return (IRR) of the PBRL Project was 11.25%. It was comparable with the IRRs of other transport infrastructure projects such as toll tunnels. For example, the band of IRRs of Western Harbour Crossing ranged between 15% and 18.5% whilst that for Route 3 ranged between 13.75% and 17.08%.
- (c) The range of one-way fare from Yam O to the Hong Kong Disneyland (HKD) theme park was likely to be between \$5 to \$7.5. The exact fare would be determined by MTRCL before the commissioning of the rail.
- (d) As far as incremental revenue from usage of existing network was concerned, the projected attendance to HKD was around 5.5 million visitors in the opening year and about 30% to 40% of the visitors would be travelling on PBRL. It was anticipated that most people travelling on PBRL would begin their journey outside Lantau Island. They would travel on other MTR lines to reach Yam O and from there to HKD on

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PBRL. The additional fare revenue induced by passengers travelling from other parts of Hong Kong to Yam O had already been taken into account when arriving at the funding gap of \$798 million.

- (e) As emphasized previously, the construction programme of PBRL was very tight. MTRCL had already identified contractors for the Tai Yam Teng Tunnel and Yam O Station contracts which were on a critical path. The award of these two contracts had already been deferred due to the deferral of execution of the Project Agreement. This project involved a total of over ten contracts. Delay of these two contracts would have an adverse impact on all of the remaining contracts. More importantly, as PBRL was an integral part of the overall HKD, there were a lot of interface issues between the PBRL works and the works now being carried out by other government departments for the HKD development. If these MTRCL contracts were delayed, there might be other cost and timing implications.

4. Mr LAU Kong-wah said that the additional information provided by the Administration and MTRCL met the request he made at the last meeting. Citing the growing trend of visitors from the Mainland and the longer passenger trips on PBRL from other parts of Hong Kong to Penny's Bay, he asked whether the projected fare revenue and in turn, the Project's financial viability had been underestimated, resulting in an unnecessarily large funding gap.

5. SETW(Ag) replied that since patronage and revenue of PBRL were commercially sensitive to MTRCL, the Administration was not in a position to divulge more information. However, he assured members that all relevant calculations and assumptions had been carefully verified by the Government's financial advisors and he could confirm that incremental revenue across the whole of the MTR network had been taken into account and credited to the benefit of the extension. Once the Project Agreement was executed, all commercial risks relating to the Project would be borne by the Corporation.

6. Citing recent press reports about the opening of another Disneyland Theme Park in the Mainland possibly in 2006 or 2008, the Chairman asked whether the planning assumptions used by the Administration for the development of HKD would be affected.

7. In reply, SETW(Ag) assured members that the forecast conducted previously for the planning of HKD was still valid today. The Government was confident that the projected attendance of HKD could be achieved, having regard to the fact that other tourist attractions in Hong Kong, say the Ocean Park already attracted over 3 million visitors per year. In addition, there was a growing trend of tourists both from the Mainland and other countries visiting Hong Kong.

8. SETW(Ag) further said that as understood by the Government, The Walt

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Disney Company (WD) had not ruled out any possibility of building another theme park in the Mainland in future. However, as far as the Government knew, no decision or agreement had been made by WD in this regard. When the agreement on the development of HKD was made, WD had undertaken that it would not open another theme park in the Mainland until HKD was up and running successfully. He stressed that the Government and WD were partners in the development of HKD. It was a common aspiration for HKD to achieve target opening and successful operation and hence, bring in economic benefits for the community.

9. Mr Martin LEE was unconvinced by the Administration's reply. He pointed out that WD would still benefit if another Disneyland theme park was constructed in the Mainland. Only Hong Kong would stand to lose because its attendance and hence, revenue would most certainly be reduced in face of such direct competition. Sharing Mr LEE's concern, Ms Emily LAU urged the Administration to take up the matter with WD so that plans for the development of another Disneyland theme park in the Mainland would be delayed.

10. In response, SETW(Ag) said that the development of another Disneyland theme park in the Mainland was WD's commercial decision. Noting members' concern, he said that the Government would work closely with WD to ensure the success of HKD.

Dividend waiver as funding support: Principles

11. Ir Dr Raymond HO did not subscribe to the Administration's view that a dividend waiver was not a cost to the Government but should be treated as retention and enhancement in value of the Government's investment. In his opinion, a dividend waiver would never see a return. If a dividend waiver was indeed an "investment", he questioned about the IRR of such Government investment.

12. The Deputy Secretary for Financial Services and the Treasury (Treasury) (DS/FS&T(T)) reiterated that the effect of a dividend waiver was that part of the dividends declared by the Corporation over a number of years to which the Government had a claim would be waived. MTRCL would apply those profits as financial support for the Project which would bring overall economic benefits to Hong Kong. Moreover, if MTRCL were to undertake the Project without such support, the value of the Corporation would be reduced as its rate of return would be below an acceptable level of 11.25%. By agreeing to the proposed dividend waiver, the Government would ensure that the value of its shares in the Corporation would not be diminished.

13. As regards the IRR of Government investment, DS/FS&T(T) said that the return was about 10% and in excess of 10% respectively before and after MTRCL's privatization. Bearing in mind the large upfront capital expenditure required and the long time period in order to realize a return, the Government would typically use a 40-year period in the financial analysis of such railway projects. As the dividends would only be waived over a relatively short period of time, it should not have a serious

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adverse impact on the overall return of the Government's investment on MTRCL.

14. Mr Tommy CHEUNG considered that the present case should be treated as an isolated case and the Administration should not use this as a precedent to justify any future dividend waiver. As funding support amounting to \$798 million had already been provided by the Administration which guaranteed the project IRR at 11.25%, he asked whether the fare level of PBRL would be reduced accordingly if the capital cost of PBRL fell short of \$2 billion in the end.

15. SETW(Ag) responded that under the draft Project Agreement, the amount of funding support provided by the Government was limited to \$798 million. Once the Project Agreement was executed, all commercial risks relating to the Project would be borne by the Corporation. If the Project achieved a higher IRR, it would enable the Administration to sell its shares at a better price in the end. On the level of PBRL fare, he advised that the exact fare would be determined by the Corporation before the commissioning of the rail having regard to all relevant factors, in particular market competition.

Legal basis of dividend waiver

16. At the invitation of the Chairman, LA took members through the paper he prepared for the Subcommittee (LC Paper No. LS137/01-02), which set out his comments on the Administration's paper (LC Paper No. CB(1)2322/01-02(01)) considered at the meeting on 22 July 2002. He highlighted the following points for members' consideration:

- (a) On the interpretation of "claims" under section 38(1)(a) of the Public Finance Ordinance (Cap.2) (PFO), the Legal Service Division had offered its views on the proper interpretation of the term in its paper (LC Paper No. LS133/01-02). Since the issue necessarily involved a degree of subjectivity in the analysis, it would be difficult for LA to advise categorically that the interpretation put by the Administration on the word "claim" would not be able to withstand challenge in law. However, the crux of the matter was not section 38(1)(a) of PFO. Instead, it should be sections 42 and 58 of the Mass Transit Railway Ordinance (Cap. 556) (MTRO) which, when read together, would suggest that all dividends declared by MTRCL should be paid and form part of general revenue.
- (b) The approach which the Administration appeared to have adopted now was to take the line that the power to waive the right of the Financial Secretary Incorporated (FSI) to dividends as shareholder of MTRCL would be exercised by the Financial Secretary (FS) when dividends were being declared by MTRCL. According to the Administration's paper, FS would, by an agreement with MTRCL, bind himself contractually to exercise his power under section 38(1)(a) of PFO "from time to time as

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and when dividends are declared by the Corporation". If that was the case, the Government should be asked to justify the legality of such an agreement.

- (c) As for entering into contract by a public authority, the general principle was that a public authority might not by contract fetter itself so as to disable itself from exercising its discretion as required by law. Its paramount duty was to preserve its own freedom to decide in every case as the public interest required at the time.
- (d) At the last meeting of the Subcommittee, the Administration referred to the House of Lords decision in *Birkdale District Electric Supply Company v Corporation of Southport* [1926] AC 355 as an authority for the principle that an authority vested with statutory powers and duties might enter into an agreement, a commercial agreement in particular, restricting its future exercise of its discretion provided that there was no incompatibility with its statutory powers or duties. Application of that principle turned on the facts of each case and the situation the Subcommittee was interested in was complicated by the fact that the agreement in question was to be entered into between MTRCL and the Government while the discretion was to be exercised by FS.
- (e) Having considered the Administration's views very carefully, LA believed that there were no firm legal grounds for him to advise categorically that the conclusions reached by the Administration would not be able to stand up to challenge in law. However, whether the proposed exercise of power by FS under section 38(1)(a) of PFO to waive the share dividends to be declared by MTRCL was appropriate would be a matter for the Administration to justify to the satisfaction of Members.
- (f) LA expressed the view at the last meeting that the Administration's approach in interpreting section 38(1)(a) of PFO was an example of "pushing the envelope", i.e. stretching statutory interpretation to its very limits. He also suggested that it might be opportune to consider whether the legislative framework provided by PFO for the control and management of public finances of Hong Kong met current needs of Hong Kong.

17. Members thanked LA for his opinion.

18. Miss Margaret NG said that she could not accept the Administration's argument that the word "claims" under section 38(1)(a) of PFO should have such a wide meaning as to cover the right to dividends and that the exercise of FS's discretion in this respect was appropriate under the circumstances. Her views on the proposed dividend waiver were as follows:

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- (a) Notwithstanding LA's view that "it would be difficult for Legal Adviser to advise categorically that the interpretation put by the Administration on the word 'claim' would not be able to withstand challenge in law", she did not agree with the Administration's assertion that such a broad definition should be given to the word "claims" under section 38(1)(a) of PFO because it would seriously undermine the power of the Finance Committee (FC) to scrutinize public expenditure.
- (b) If the courts subsequently held that the dividends declared by the Corporation were not covered by FS's discretion under section 38(1)(a) of PFO, i.e. the power purported to be relied on by the Government was non-existent in the first place, the Government would not be bound by the agreement reached with the Corporation in this respect. Under the circumstances, the Government should be held responsible for the detriments caused to the Corporation.
- (c) As a trustee, FSI would be under a duty to take all reasonable and proper measures to obtain possession of the trust property if it was outstanding. In other words, FSI was obliged to receive the dividends upon declaration by the Corporation and to pay the dividends into general revenue. As such, she considered that the situation where the Government had to "claim" for the dividends would not arise.
- (d) Section 58(1) of the Mass Transit Railway Ordinance (Cap. 556) (MTRO) should not be given a literal interpretation as suggested by the Government. Instead, the provision should be given a purposive and generous interpretation, taking into account the relevant provisions in the Basic Law (BL) governing the respective functions of the legislature and the executive authorities.

19. Given the serious doubts about the legality of the Administration's proposed course of action, Miss NG considered that the prudent approach was to submit a funding proposal to FC for approval. She also asked whether the discretion under section 38(1)(a) of PFO would be exercised by FS or the Secretary for Financial Services and the Treasury.

20. In response, SETW(Ag) stressed that the Government had all along acted prudently in this matter. As stated in previous meetings, the dividend waiver option was entirely lawful. Views from the Department of Justice (D of J) and an outside Senior Counsel (SC) had also confirmed that the Government was entitled to rely on section 38(1)(a) of PFO to implement its proposal to waive its claim to dividends to be declared in future by MTRCL. He further explained that the authority to exercise such discretion would be decided on a case-by-case basis. Given the importance of the matter, the discretionary power under section 38(1)(a) of PFO would be exercised by FS in the present case.

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21. In reply to Miss Margaret NG, LA said that the issues he raised in paragraph 10 of his paper about the Legislative Council (LegCo) applying to the courts for a judicial declaration on the legality of the proposed funding arrangements were technical in nature. The focus was whether LegCo had the capacity to make such an application in court. The legal issues involved were very complex and there was no binding judicial authority which was directly on point.

22. On the legal basis of the proposed dividend waiver, Mr Martin LEE criticized the opinion put forward by the Government and the outside SC as "blowing hot and cold", i.e. putting a very narrow meaning in relation to a word in one provision and putting a very broad meaning to another word in another provision, in order to arrive at the conclusion they wanted. Rebutting the Administration's interpretation of the word "claims", Mr LEE said that as a matter of common sense, there had to be a default on the part of the other party to pay and then a demand before a claim could possibly arise. However, in the present case, there was no suggestion at all that MTRCL would not pay any dividends or would not declare dividends to all shareholders. If there was a declaration of dividends, MTRCL would pay the dividends to the Government. There was no question of a demand or "claim".

23. Mr LEE further stated that even if the word "claims" did include the right to a dividend as suggested by the Administration, the proposed waiver by FS of his right to the dividends would in practice have a ridiculous effect as MTRCL would be declaring dividends to all shareholders except the Government. It would make nonsense of this provision. This meaning was far too wide and no courts would give such a meaning to it. On the meaning of the expression "monies received" in section 58(1) of MTRO, he said that in order to justify its argument that the dividends declared by MTRCL did not form part of the general revenue, the Administration had tried to put a very narrow meaning to the expression, i.e. only monies physically received would be included. However, such a narrow interpretation was clearly against the requirement laid down by BL for the executive authorities to be accountable to the legislature.

24. Mr LEE concluded that if the courts were to look at the general scheme of arrangements having regard to all the various provisions, no reasonable court would give such a ridiculously wide meaning and then a ridiculously narrow meaning to the relevant words used in PFO and MTRO so as to come to a conclusion that the Government could bypass FC.

25. On behalf of LegCo Members of the Democratic Party, Mr Albert HO stated objection to the proposed waiver dividend. In view of the hefty sum of public monies involved, he considered it regretful that the Administration should seek to justify its actions by playing on words in the law. Concurring with Mr Martin LEE's views, he said that as the Government's proposal actually involved the waiver of its right to dividends declared by MTRCL, such a waiver should be effected through an assignment of the Government's entitlement in this respect. Moreover, he was not convinced that the Administration's proposal which amounted to a subsidy to a private

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company was reasonable and in line with public interest. Mr HO was also worried that once a bad precedent was set in the present case, there would be far-reaching consequences in the management of public finance in Hong Kong. If FS could continue to rely on section 38(1)(a) of PFO to waive any claims by or on behalf of the Government, the Government would be free to waive other sums of monies due to the Government, for example premium for land grant.

26. In response, SETW(Ag) reiterated that the PBRL Project was an essential element of the associated infrastructure in support of the HKD development. It was also well received by the general public. On the other hand, as MTRCL was a commercially-run corporation, a reasonable rate of return should be attainable by the Corporation. The Government, being the majority shareholder of the Corporation, supported the PBRL, which was also in line with public interest.

27. SETW(Ag) also emphasized that the scope of legal opinion provided by the Government and the outside SC was limited to the draft Project Agreement for PBRL. The relevant provisions were section 38 of PFO and section 58 of MTRO. It was not intended to cover other situations such as the waiver of land premium. In this connection, he assured members that due care would be taken in any exercise of FS's discretion under section 38(1)(a) of PFO. FS would only exercise such power in important matters as required by public interest, having satisfied himself that the decision was legally in order and made on reasonable grounds. If any further exercise of such discretion was required, arrangements would be made to brief LegCo as far as practicable.

28. The Deputy Law Officer (Civil Law) (DLO(CL)) maintained that the interpretation of "claims" was not too wide. Under the law, there was nothing to prevent FS from indicating, in any agreement to be reached with the Corporation, that he would exercise his discretion under section 38(1)(a) of PFO at the relevant time, provided such agreement was in no way inconsistent with his duties and functions as FS and such exercise of the power was in the public interest.

29. Mr Albert HO was unconvinced by the Administration's reply. Highlighting the importance of maintaining the checks and balances between LegCo and the Government, he considered that the question of whether FS was exercising his discretion on reasonable grounds and in line with public interest in the present case should be a matter for FC to decide.

30. Ms Emily LAU also did not agree that the proposed dividend waiver was in line with public interest because the Government was essentially foregoing the return due from its investment on the Corporation and the monies were used to subsidize a project which did not yield an economic return. In addition, all these decisions were made by the Government alone without any scrutiny by FC. Under the circumstances, she was utterly not convinced that public interest had been adequately safeguarded. She was worried that this case would become a precedent for the Government to effect further waiver bypassing the scrutiny of FC.

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31. In response, SETW(Ag) reiterated that the Government would consider each request for funding support on its own merits. In this case, PBRL was essential to the opening of HKD as it would provide a principal gateway to the theme park, conveniently linked to other parts of the territory. As estimated, the net economic benefit of HKD to the whole economy was around \$148 billion. In the past, the Government had always supported the implementation of various projects, say by granting property development rights or equity injection. But as explained previously, these options were considered neither feasible nor practicable for the PBRL Project. Hence, the Administration's conclusion was that the best option was to allow MTRCL to reinvest that part of its profits which would otherwise come to the Government in the new project in order to achieve the desired overall return.

32. DLO(CL) said that apart from maintaining the checks and balances between the Government and LegCo, the statutory framework provided by PFO for the control and management of the public finances of Hong Kong was also intended to facilitate the delegation of financial authorities in view of the increasing complexity and pace of Government business.

33. Responding to members' concern about further exercise of FS's discretion under section 38(1)(a) of PFO, SETW(Ag) said that the Government would make a decision based on the facts of individual cases. DLO(CL) added that in line with the principles of administrative law, any exercise of a discretionary power should be reasonable and in line with its legislative intents.

34. In reply to Ms Emily LAU, LA said that in law, a public body endowed with a statutory discretion might legitimately adopt general rules or principles of policy to guide itself as to the manner of exercising its own discretion in individual cases, provided that certain criteria were satisfied. The courts would look at whether such rules or principles were legally relevant to the exercise of the powers of the public body, consistent with the purpose of the enabling legislation and not arbitrary, capricious or unjust and would decide the issue based on the facts of individual cases. However, because of the requirement of reasonableness, the courts would sometimes take into account previous decisions in similar cases.

35. Miss Margaret NG however pointed out that the question of concern here was not about the present case becoming a precedent because the fundamental issues about the statutory interpretation of the relevant provisions and hence, the legal basis of the proposed dividend waiver were still undetermined. If the proposed arrangements were legally not in order, the question of this case becoming a precedent would simply not arise. She was strongly of the view that there was no way she could accept the proposed dividend waiver because it would mean accepting the Administration's claim that approval from FC for such dividend waiver was not required.

36. Mr Albert CHAN remarked that the proposed dividend waiver was in contravention of PFO, MTRO and BL. In view of members' concerns about related

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issues including the interpretation of relevant provisions and the consideration of public interest, he considered that FS, as the authority vested with the discretionary power under section 38(1)(a) of PFO, should have the responsibility to account for his decision to members. As the Administration was so certain about the justifications for the proposed dividend waiver, it should have the confidence to submit a funding proposal to FC for approval.

37. In response, SETW(Ag) stressed that the Government must act in accordance with the Basic Law and the laws of Hong Kong. In the present case, all the legal issues arising out of the proposed dividend waiver had been carefully considered by the Administration including D of J. The conclusion was that there was sound legal basis for the proposed waiver and that the proposed waiver was entirely lawful. The draft Project Agreement including the proposed dividend waiver had been approved by the Executive Council. Reiterating that the development of HKD was in the overall interest of the community, SETW(Ag) said that the Government was committed to the scheduled operation of PBRL to tie in with HKD's opening.

38. Ms Audrey EU reiterated that she was utterly not convinced by the legal basis put forward by the Administration for the proposed dividend waiver, nor did she think that the Government was acting in accordance with law if FC's scrutiny was bypassed. As the issue involved the constitutional relationship between the legislature and the executive authorities, Members should duly safeguard the powers of LegCo provided in Articles 64 and 73 of BL in respect of the monitoring of public expenditure by insisting that a proper funding proposal be submitted to FC for approval.

Urgency of the Project

39. Mr Albert CHAN remarked that the Administration should not use urgency of the Project as an excuse to push the matter through. Given the decision to grant the development right for PBRL to MTRCL was made back in 1999, he criticized the Administration for not taking early actions in respect of the draft Project Agreement. As the HKD project had been planned for years, there was no reason for the Administration to put up a case for members' consideration at the last minute, not to mention the fact that the legality of the proposed act had yet to be established. Given that the proposal would involve public monies, LegCo had a duty to scrutinize the proposed expenditure in detail.

40. In response, SETW(Ag) said that since the decision to develop HKD was made, the Administration had been planning for the provision of associated supporting infrastructure including the implementation of PBRL. The Deputy Secretary for the Environment, Transport and Works (Transport and Works) supplemented that the railway scheme of PBRL was authorized by the Executive Council on 16 January 2001. Since then, the Administration had entered into detailed discussions with MTRCL in respect of the draft Project Agreement, including the financing arrangements for bridging the funding gap identified in connection with the Project. Once a decision was made by the Executive Council, the Administration had immediately made

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arrangements to brief members about the matter.

41. Ir Dr Raymond HO enquired about the validity period of the tenders identified for the tunnel and Yam O Station contracts. Acting Government Engineer/Railway Development replied that the validity period for the tunnelling works had expired while that for the Yam O Station was due to expire in August 2002. The Corporation was now negotiating with the relevant contractors to ensure that such delays would not have any adverse impact on the scheduled operating date of PBRL at 1 July 2005.

42. In this respect, Ir Dr HO said that a short period of deferral in the signing of contracts would normally be acceptable for the tenderers.

Motions

43. As the LegCo Member returned from the Real Estate and Construction Functional Constituency, Mr Abraham SHEK expressed support for the construction of PBRL to serve HKD. While emphasizing the importance of LegCo's power in monitoring public expenditure, he said that it was the Government's prerogative to present financial proposals to FC. Notwithstanding his reservations about the justifications presented by the Administration for the proposed dividend waiver, Mr SHEK considered that the early construction of the Project was in line with public interest as it could create much needed employment opportunities in Hong Kong. In this connection, he proposed the following motion urging the Administration to speed up the delivery of PBRL and provide regular progress report to the Subcommittee. The Subcommittee however had reservation about the Government's proposed dividend waiver for financing the railway project. The wording of the motion was as follows:

"本小組委員會支持盡快興建竹篙灣鐵路線，但對於政府以豁免收取地鐵股息作為財務支持有所保留，並促請政府繼續向本小組委員會匯報工程進度。"

44. Members agreed to proceed with the motion.

45. Mr Albert CHAN considered that the Project should not be given the go-ahead without first establishing the legality of the proposed dividend waiver. Hence, he did not support Mr Abraham SHEK's motion. Mr CHAN proposed another motion urging the Administration not to execute the Project Agreement for PBRL, pending further deliberation by FC on the Government's proposal to waive its claim for \$798 million worth of dividends that it could otherwise expect to receive as a shareholder from MTRCL from time to time during the next few years. The wording of the motion was as follows:

"政府在立法會財務委員會沒有機會討論竹篙灣支線所引起 7.98 億元股息寬免的問題前，不應與地鐵有限公司簽署

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有關協議。"

46. Members agreed to proceed with the motion.

47. Mr Howard YOUNG expressed support for the timely provision of PBRL to serve HKD. In view of the imminent competition from another Disneyland theme park in the Mainland, it was all the more important to ensure that HKD would be up and running successfully as soon as practicable. As long as the present case would not become a precedent, he considered that the legal issues and concerns raised by members could be dealt with in another forum in due course.

48. In this connection, the Chairman recapped that at the last meeting, concerns had been raised by members about the scope and extent of FS's powers in relation to the management of dividends and other forms of income generated from Government's investment in public and private companies, and whether proper mechanisms were in place to ensure that the exercise of such powers was properly accounted for by the executive authorities to LegCo. Members agreed that the policy issues involved should be further discussed by the Financial Affairs Panel (FA Panel). Members noted that the matter had been included in the FA Panel's list of outstanding items for discussion.

49. Miss Margaret NG remarked that the legality of the Administration's proposal could only be established by FC's approval. If Members accepted other course of action, they would be abandoning one of their most important duties as LegCo Members.

50. Ms Audrey EU expressed support for Mr Albert CHAN's motion. She remarked that if Members went along with the Administration's explanation, they were effectively giving away one of the most important functions of LegCo.

51. Mr LAU Ping-cheung however considered that Members should be free to express their own views and they should not be criticized for doing so. He pointed out that in the past, funding support provided by the Government for the development of railway projects in the form of a grant of property development rights was likewise not subject to scrutiny by FC.

52. Ir Dr Raymond HO said that while he had clearly expressed his dissatisfaction about the Administration's way of handling the proposed dividend waiver, he too was concerned about the timely completion of the PBRL Project which was planned against a tight schedule. Any further delay might have a great adverse impact on the construction of the railway as well as its safe operation in future. Out of these considerations for public interest, he would reluctantly give his support for Mr Abraham SHEK's motion.

53. Highlighting the importance of PBRL as a key transport infrastructure serving HKD's development, Mr LAU Kong-wah stated support for the timely completion of

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the Project. As such, he would support Mr Abraham SHEK's motion and oppose to Albert CHAN's motion. As the matter essentially involved subjective analysis, he considered that the legal basis of the proposed dividend waiver might have to be decided by the courts. It was not a decision for the Subcommittee to take.

54. On the advice of LA, the Chairman decided that as the two motions were inconsistent, Mr Albert CHAN's motion which was proposed after Mr Abraham SHEK's motion would not be voted on if Mr SHEK's motion was carried.

55. Members voted on the motion proposed by Mr Abraham SHEK. The motion was passed by the Subcommittee.

56. The Chairman invited the Administration to take note of the motion passed by the Subcommittee. In view of members' general support for the HKD's development, she called on the Administration to ensure the timely completion of PBRL to tie in with the scheduled opening of HKD. In addition, the Administration should also address members' concerns about the exercise of FS's discretion under section 38(1)(a) of PFO in the context of FA Panel's discussion. In response, SETW(Ag) undertook to relay members' views to FS and other colleagues in the Government for consideration.

II Any other business

57. There being no other business, the meeting ended at 7:30 pm.

Council Business Division 1
Legislative Council Secretariat
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