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Paper for the House Committee meeting on 28 March 2008

**Report of the Subcommittee on Antiquities and Monuments
(Withdrawal of Declaration of Proposed Monument)
(No. 128 Pok Fu Lam Road) Notice**

Purpose

This paper reports on the deliberations of the Subcommittee on Antiquities and Monuments (Withdrawal of Declaration of Proposed Monument) (No. 128 Pok Fu Lam Road) Notice.

**The Antiquities and Monuments (Declaration of Proposed Monument)
(No. 128 Pok Fu Lam Road) Notice**

2. On 20 April 2007, the Secretary for Home Affairs, in his capacity as the Authority (the Authority) under the Antiquities and Monuments Ordinance (the Ordinance) (Cap. 53), made the Antiquities and Monuments (Declaration of Proposed Monument) (No. 128 Pok Fu Lam Road) Notice (the Declaration Notice) under section 2A(1) of the Ordinance. The Declaration Notice declared the buildings and the adjoining land situated within Rural Building Lot No. 324, at No. 128 Pok Fu Lam Road, together with all the structures erected on such land (collectively referred to as "the Building" hereunder) as a proposed monument for a period of 12 months from 20 April 2007, unless withdrawn earlier by the Authority.

3. Constructed in around 1931, the Building is a private residence of European-style known as "Jessville", named after Jessie TAM, the wife of William Ngar Tse Thomas TAM, more popularly known as Thomas TAM. Thomas TAM was a barrister and appointed as a Magistrate in 1947. The Building is of Italian Renaissance architectural style with Art Deco variations, with a gross floor area of about 1 340 m².

4. On 14 September 2004, the owner of the Building submitted to the Buildings Department an application for approval of plans for its demolition, but no redevelopment plan was revealed at that time. Under the Buildings Ordinance (Cap. 123), the Building Authority (BA) may not refuse to give approval to a demolition plan on heritage preservation grounds unless the building concerned is a declared monument or a proposed monument. As such, the BA approved the demolition plans on 12 November 2004.

5. In view of the imminent threat of demolition, the Authority proposed to declare the Building as a proposed monument under section 2A of the Ordinance and consulted the Antiquities Advisory Board (AAB) on 3 November 2004. The AAB supported the proposed declaration. Subsequently, the owner suspended the demolition plans and had not made any application to the BA to commence the demolition works. As such, the intended action to declare the Building as a proposed monument had since then been held in abeyance until 2006.

6. On 10 November 2006, the owner resumed the pre-demolition procedures and applied to the BA for approval of amendments to the approved demolition plans. The BA gave approval on 7 December 2006. On 29 March 2007, the owner's Authorized Person filed an application to the BA for consent to commence the demolition works. The statutory deadline for the BA to reply to the Authorized Person was 25 April 2007. Under the circumstances and having assessed the heritage value of the Building on the basis of the available information possessed by the Antiquities and Monuments Office (AMO) at that time, the Authority decided to exercise his authority under section 2A of the Ordinance to make the Declaration Notice in order to protect it from the immediate threat of demolition and to allow the Authority time to consider in a comprehensive manner whether the Building is of such historical significance that should be declared as a monument.

Antiquities and Monuments (Withdrawal of Declaration of Proposed Monument) (No. 128 Pok Fu Lam Road) Notice

7. Pursuant to the reorganization of Government bureaux on 1 July 2007, the policy responsibility for heritage conservation has been transferred from the Home Affairs Bureau to the Development Bureau. On 1 February 2008, the Secretary for Development, in her capacity as the Authority under the Ordinance, made the Antiquities and Monuments (Withdrawal of Declaration of Proposed Monument) (No. 128 Pok Fu Lam Road) Notice (the Withdrawal Notice) to withdraw the Declaration Notice after consultation with and obtaining the unanimous support of AAB not to declare the Building as a monument and to withdraw the Declaration Notice. The Withdrawal Notice has taken effect on the date of its publication in the Gazette (i.e. 1 February 2008).

8. After withdrawal of the declaration, the Building is not subject to statutory protection under the Ordinance. AAB has accorded the Building a Grade III status under its administrative grading system. Grade III buildings are buildings of some merit but are not yet qualified for consideration as monuments. It is up to the owner of the Building to consider whether the Building could be preserved.

The Subcommittee

9. The House Committee agreed at its meeting on 15 February 2008 to form a subcommittee to study the Withdrawal Notice. Hon Audrey EU Yuet-mee was elected Chairman of the Subcommittee. The membership list of the Subcommittee is in **Appendix I**. The Subcommittee held two meetings with the Administration, and received the views of three organizations and one individual, a list of which is in **Appendix II**.

Deliberations of the Subcommittee

10. Members are well aware that the purpose of setting up the Subcommittee is to study matters relating to the Withdrawal Notice. Although policy matters concerning heritage preservation have been raised by the deputations in the course of deliberations, members have considered these policy matters only in the context of the Withdrawal Notice. Based on this principle, members have discussed the following issues -

- (a) assessment of the heritage value of the Building;
- (b) authority for making the assessment;
- (c) availability of options to preserve the Building; and
- (d) legal effect of amendments, if any, to the Withdrawal Notice.

11. The deliberations of the Subcommittee on the above issues are set out below.

Assessment of the heritage value of the Building

12. Members note with grave concern the significantly different conclusions reached on the historical and architectural value of the Building at the time of declaring the Building as a proposed monument and of withdrawal of the declaration. When the Authority intended to declare the Building as a proposed monument in April 2007, it was stated in the relevant Legislative Council (LegCo) Brief that Thomas TAM, the owner of the Building, was "a

representative figure of the Chinese elite class in Hong Kong in the mid-20th century. His influence as a social leader was rooted in different spectra of the community...."¹ However, 10 months after when the Authority decided that the Building should not be declared as a monument and the Declaration Notice should be withdrawn, the influence of Thomas TAM was described as short-lived in the relevant LegCo Brief. He was said to be socially less active and influential given his short period of public service, and his contribution to and prominence in the society were regarded as not so significant to have left him in the memory of the people of Hong Kong.²

13. Members consider that such inconsistency also applies to the architectural value of the Building. At the time of declaring the Building as a proposed monument, the Building was described as "*an epitome of the Classical Revival residence of Italian Renaissance style with interesting Art Deco variations. It is elaborate and distinct in design, decoration and craftsmanship.*" At the time of withdrawing the declaration, the assessment then became: "*the dome and the pavilion are of ordinary workmanship and their architectural merits are not high. The interior décor, which has been revealed to the AMO for the first time, is not of extraordinary style.*"³ Members have sought explanations for such great variations on the assessment of the historical and architectural value of the Building in 10 months' time.

14. It is the AMO's view after its comprehensive assessment of the Building in 2008 that while the Building possesses some heritage value, it is not up to the required high threshold that justifies its declaration as a monument. According to the Administration, AMO's assessment of the heritage value of the Building in aspects, such as its authenticity, rarity and integrity has not been changed in its initial and subsequent comprehensive assessments. As to the other aspects, before the declaration of the Building as a proposed monument, AMO had not been able to gain access to the Building nor establish a direct dialogue with its owner. AMO's initial assessment of the architectural value of the Building was based on its external appearance as viewed from a distance, and of its general heritage value based on the information available to AMO at that time. After securing the consent of the owner following the declaration of the Building as a proposed monument, AMO had gained access to the Building in late 2007 to carry out on-site inspections. With the new information gathered, AMO re-assessed the architectural merit of the Building and prepared a report containing its comprehensive assessment of the heritage value of the Building for the Authority's consideration. In assessing the historical value of the Building, AMO had considered the historical facts of Thomas TAM as contained in the LegCo Brief issued in 2007 (2007 LegCo Brief) and had made comparison

¹ LegCo Brief entitled "Preservation of the Building at 128 Pok Fu Lam Road" issued by the Home Affairs Bureau in April 2007 [File Ref: HAB/CS/CR 4/1/83]

^{2&3} LegCo Brief entitled "Withdrawal of the Declaration of the Building at 128 Pok Fu Lam Road as a Proposed Monument" issued by the Development Bureau in February 2008 [File Ref: DEVB/CS/CR 4/1/83]

with other historical former residential buildings such as the University Hall and Morrison Building that had been declared as monuments. Although the Administration did not consider it necessary, as a matter of presentation, to refer to the historical facts about Thomas TAM again in the LegCo Brief issued in 2008 (2008 LegCo Brief), AMO had taken into account such historical facts in analysing Mr TAM's historical influence in the Hong Kong society. The 2008 LegCo Brief did not deny the historical facts about Mr TAM as shown in the 2007 LegCo Brief. It reflected the views of AMO after detailed analysis of the facts, amongst others, that Mr TAM's historical influence to the Hong Kong society was rather short-lived and that the Building did not possess strong association with any significant historical events in the history of Hong Kong. As regards the architectural value of the Building, the 2008 LegCo Brief contained the AMO's views on its re-assessment of the architectural value of the Building based on all information available (including that obtained from on-site inspections). As to the social value of the Building, AMO had, for the purpose of the comprehensive assessment, compared the heritage value of the Building with that of other historic buildings, and such information was included in the 2008 LegCo Brief. AMO has emphasised that there is no contradiction between the assessment in 2007 and the comprehensive assessment in 2008, and there is no question that the comprehensive assessment reflects accurately and truly its views on the heritage value of the Building.

Authority for making the assessment

15. Members are concerned that different from the case of King Yin Lei in which an independent expert had been appointed to assess its heritage value, the assessment of the heritage value of the Building was conducted by AMO. The deputations and individual who have presented views to the Subcommittee have expressed a similar concern. They have doubt on the independence and impartiality of AMO in conducting the assessment. In their view, considerations other than the heritage value of the Building may have been factored in the assessment process. One of the extraneous factors is the development value of the Building, and the Administration has an apparent interest in deciding whether the Building should be declared as a monument. The deputations have pointed out that if the Building is not declared as a monument, the owner of the Building may redevelop it, and the land premium payable to the Administration for lease modification could be substantial. AMO, being an executive arm of the Authority, cannot be perceived to be independent and impartial in assessing the heritage value of the Building. Hence, the deputations consider it important to seek independent professional advice by appointing an outside expert to carry out the assessment task.

16. The Administration has highlighted the professionalism, impartiality and objectivity of AMO in carrying out its functions relating to the research, identification, examination and preservation of historical buildings and archaeological sites in Hong Kong. According to the Administration, AMO may carry out the assessment by in-house experts and/or engage outside experts

to perform the task, depending on the merits and complexity of each case. The Administration considers that the staff of AMO have sufficient professional knowledge and expertise in assessing the historical and architectural significance of the Building. It is therefore not necessary to commission any independent expert to undertake the task. For the case of King Yin Lei, the outside expert was appointed to assess the damages done and the feasibility of restoration. The heritage assessment on King Yin Lei was carried out by AMO. The Administration has also dispelled any concern about the independence and impartiality of AMO staff in undertaking their duties. The Administration has pointed out that generation of land premium through lease modification for the redevelopment of the site of the Building had not been an objective or consideration of the Administration. AAB has accorded the Building a Grade III status, and the owner may consider whether the Building will be preserved. The owner may put forward redevelopment proposals through lease modification to achieve construction of new buildings and the preservation of the Building itself. Any proposal for redevelopment of the Building which requires planning approval of the Town Planning Board (TPB) will be considered by TPB independently. Moreover, application for lease modifications by the owner of the Building (including the payment of full market value land premium, if applicable) will be considered by the Lands Department in accordance with the established procedures.

17. The Administration has stressed that the declaration of a building as a proposed monument is not necessarily followed by its declaration as a monument. The purpose of declaring the Building as a proposed monument is to give it temporary statutory protection from immediate threat of demolition and to allow time for the Authority to consider in a comprehensive manner whether it should be declared as a monument. In deciding whether the Building should be declared as a monument, the Authority had taken into account the comprehensive assessment made by AMO (who had compared the heritage value of the Building with that of other historic buildings of similar use that had been declared as monuments) and the view of AAB. Twelve members of AAB had visited the Building on 16 November 2007. A paper containing detailed assessment of the heritage value of the Building was issued to AAB members before their meeting on 25 January 2008. After discussions, AAB members unanimously supported the Authority's intention not to declare the Building as a monument and to withdraw the Declaration Notice to remove the restrictions on the Building and the uncertainty caused to the owner.

18. Some representatives of the deputations have queried the independence of AAB in its discharge of duties as its members are appointed by the Chief Executive. Prof Hon Patrick LAU, a member of AAB, informed members that AAB had discussed in-depth the heritage value of the Building, and the architectural value of the Building was the most important consideration in assessing whether it should be declared as a monument. In his view, AAB members had discharged their duties properly.

19. Notwithstanding the explanations provided by the Administration, Hon Alan LEONG maintains the view that in the absence of a heritage conservation policy and of an independent party to assess the heritage value of the Building, his concern about the use of an administrative means to achieve a political end cannot be allayed. In his view, as the Administration has held several rounds of discussions with the owner concerning possible options for preservation of the Building and the owner has indicated wish to consider preserving the Building in the redevelopment scheme, the possibility of the Authority making an expedient decision not to declare the Building as a monument under the circumstances cannot be ruled out.

20. The Administration has pointed out that the comprehensive heritage assessment was conducted by AMO in a professional and independent manner, and the decision to withdraw the Declaration Notice was a result of a proper and professional process. Since the announcement of the Government's new heritage conservation policy in October 2007, the Government has accepted in principle the need for appropriate economic incentives to facilitate preservation of privately-owned historic buildings. However, the implementation of incentives is complicated as it straddles a number of different areas including planning, lands and building control. Also, each case has its own uniqueness. It is against this background that the Administration is discussing with the owner of the Building on possible economic incentives. The Administration has reported to LegCo that it is making a start by adopting a case-by-case approach, and that the Building is one of such cases. The Administration has stressed that these discussions are held independently of and have no connection whatsoever with the comprehensive heritage assessment conducted by AMO.

Availability of options to preserve the Building

21. Members note that the owner of the Building has filed a rezoning application with four redevelopment options to TPB, and has indicated preference for an option to preserve the Building and construct three buildings within the boundaries of the existing lot which does not involve any land exchange. The rezoning application is originally scheduled to be considered by the Metro Planning Committee of TPB on 28 March 2008. However, the owner has subsequently lodged a request to TPB for deferral of TPB's consideration of the application until after the middle of May. The request will be considered by TPB on 28 March 2008. Should the rezoning application be approved by TPB, an amendment to the relevant Outline Zoning Plan will be made and the new zoning can include a provision to guard against demolition of the Building through the planning permission system. If the lease modification for the proposed redevelopment scheme is subsequently approved by the Lands Department, and given the owner's preference to preserve the Building, the preservation of the Building could be reflected in the conditions of the lease modification.

22. Members have examined the availability of other options to preserve the Building, other than by redeveloping it with restrictions or conditions. Members note that AAB has accorded the Building a Grade III status under its grading system. Grade III buildings are buildings of some merit but are not yet qualified for consideration as possible monuments. The Subcommittee has discussed whether the grading of the Building can be reviewed. Members note that the grading is only an administrative measure, and does not confer any statutory protection. There is no provision in any statute on the review of such a grading. Even if the Building is accorded a Grade I status, which means buildings of outstanding merit for which every effort should be made to preserve if possible, the Administration cannot stop the owner from demolishing it except by declaring it as a monument or a proposed monument.

23. In the view of the Legal Adviser to the Subcommittee, the Authority can only practically declare the Building within private land to be a proposed monument once in the circumstances of the case. According to the Administration, there appears no specific provisions in the Ordinance prohibiting the Authority from declaring a building twice as a proposed monument should she consider necessary and justifiable in all circumstances of the case. However, as the Authority has comprehensively considered the heritage value of the Building only recently and has withdrawn the Declaration Notice, there will unlikely be justifiable grounds to declare the Building as a proposed monument again.

24. Members note that another possible option to preserve the Building is by applying for judicial review on the withdrawal of the declaration of the Building as a proposed monument. However, members consider this not an appropriate action for LegCo to take.

Legal effect of amendments to the Withdrawal Notice

25. Members have queried the need for the Withdrawal Notice taking immediate effect upon its publication in the Gazette. The Administration has explained that as such cases are rare, it had in this particular case looked into relevant aspects in order to sort out the best way forward before issuing the Withdrawal Notice. The Administration had considered the effect of the proposed monument declaration on the owner. The Administration considered that, once the Authority had made the decisions not to declare the Building as a monument and to withdraw the Declaration Notice, the Withdrawal Notice should be issued and should take effect as soon as possible. If the proposed monument declaration were not withdrawn with immediate effect, the owner would continue to be subject to the restrictions under section 6 of the Ordinance and it would be unfair to the owner. Any delay in effecting the withdrawal of the Declaration Notice after the Authority had made a decision to do so would cause uncertainty and thus hardship to the owner. Apart from the above, the

Administration had also taken into account the consideration that when the Authority declared the Building as a proposed monument in April 2007, the Declaration Notice took immediate effect. Hence, the same arrangement should be made for the Withdrawal Notice. That approach would liberate the owner of the Building from various restrictions under the Declaration Notice immediately. The Administration has stressed that the issue of the Withdrawal Notice is legally proper and is reasonable and fair in all respects. Even without the Withdrawal Notice, the Declaration Notice will expire after 19 April 2008 in any event.

26. As the Administration does not consider there to be justifiable grounds to declare the Building as a proposed monument again, the Subcommittee has examined the legal effect of repealing the Withdrawal Notice. Although the Withdrawal Notice is subject to the negative vetting procedure of LegCo under section 34 of the Interpretation and General Clauses Ordinance (Cap. 1), the Withdrawal Notice has taken effect on the day of its publication in the Gazette on 1 February 2008, i.e. the Declaration Notice has been withdrawn with effect from that day. Section 23(a) of Cap. 1 provides that where an ordinance repeals in whole or in part any other ordinance, the repeal shall not revive anything not in force or existing at the time at which the repeal takes effect. Both a resolution passed by LegCo and the Withdrawal Notice fall within the definition of "ordinance" under section 3 of Cap. 1. Therefore, should a resolution be passed by LegCo to repeal the Withdrawal Notice, such repeal will not revive the Declaration Notice which is no longer in force or does not exist when the resolution takes effect.

27. Nevertheless, the Subcommittee considers it appropriate and necessary to repeal the Withdrawal Notice to reflect members' dissatisfaction with the way in which the Administration has handled matters relating to the declaration and withdrawal of the declaration of the Building as a proposed monument. Members stress that the Administration should provide sufficient time for LegCo to complete the due process in making any legislative proposal. An item of subsidiary legislation subject to the negative vetting procedure of LegCo should not take effect until after the expiry of the scrutiny period, unless absolutely necessary.

28. Prof Patrick LAU has indicated that he objects to the proposal to repeal the Withdrawal Notice.

Policy issues to be followed up

29. In the context of examining the Withdrawal Notice, members and the deputations have raised the following views concerning heritage conservation:

- (a) the transparency and independence of the mechanism for assessing the heritage value of buildings and sites should be enhanced;

- (b) the criteria for assessing the heritage value of buildings and sites should be updated in line with the international trend;
 - (c) town planning should play an increasingly important role in heritage conservation;
 - (d) AAB should be reorganized as an independent statutory body to take over the functions of AMO; and
 - (e) the Ordinance should be revamped to strengthen the heritage conservation work.
30. The Subcommittee agrees that the above views should be referred to the Panel on Home Affairs for consideration and follow up.

Recommendation

31. The Subcommittee agrees that a motion be moved by its Chairman to repeal the Withdrawal Notice at the Council meeting on 9 April 2008.

Advice sought

32. Members are requested to note the deliberations of the Subcommittee.

Council Business Division 2
Legislative Council Secretariat
27 March 2008

**Subcommittee on Antiquities and Monuments
(Withdrawal of Declaration of Proposed Monument)
(No. 128 Pok Fu Lam Road) Notice**

Membership list

Chairman	Hon Audrey EU Yuet-mee, SC, JP
Members	Hon CHOY So-yuk, JP Hon Abraham SHEK Lai-him, SBS, JP Hon LEE Wing-tat Hon Alan LEONG Kah-kit, SC Prof Hon Patrick LAU Sau-shing, SBS, JP
	(Total : 6 Members)
Clerk	Miss Odelia LEUNG
Legal Adviser	Mr Timothy TSO

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**List of organizations and individual
which/who have given views to the Subcommittee**

1. Heritage Watch
2. Civic Party
3. The Hong Kong Institute of Architects
4. Mr William Meacham

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