

立法會
Legislative Council

LC Paper No. CB(4)1487/14-15
(These minutes have been seen
by the Administration)

Ref: CB4/BC/2/14

Bills Committee on Peak Tramway (Amendment) Bill 2015

**Minutes of the third meeting held on
Monday, 29 June 2015, at 8:45 am
in Conference Room 3 of the Legislative Council Complex**

Members present : Hon Jeffrey LAM Kin-fung, GBS, JP (Chairman)
Hon CHAN Kam-lam, SBS, JP
Hon WONG Kwok-hing, BBS, MH
Hon Paul TSE Wai-chun, JP
Hon Frankie YICK Chi-ming
Hon YIU Si-wing
Hon CHAN Han-pan, JP
Dr Hon Kenneth CHAN Ka-lok
Hon Christopher CHEUNG Wah-fung, SBS, JP
Hon SIN Chung-kai, SBS, JP
Hon Tony TSE Wai-chuen, BBS

Members absent : Hon Cyd HO Sau-lan, JP
Hon KWOK Wai-keung

Public Officers attending : Agenda item I

Mr Andy CHAN, JP
Deputy Secretary for Transport and Housing
(Transport) 2

Miss Carrie CHANG
Principal Assistant Secretary for Transport and
Housing (Transport) 1

Mr Gilbert MO
Deputy Law Draftsman (Bilingual Drafting and
Administration)
Department of Justice

Mr Llewellyn MUI
Senior Assistant Solicitor General
Department of Justice

Ms Daphne SIU
Assistant Law Officer (Civil) (Advisory) (Acting)
Department of Justice

Ms Doris CHOW
Assistant Director (Regional 1)
Lands Department

Ms Phyllis MCKENNA
Assistant Director/Legal/Hong Kong and Tsuen Wan
(Legal Advisory and Conveyancing Office)
Lands Department

**Attendance
by invitation**

: Civic Party

Miss Tanya CHAN
Vice-Chairman

Liberal Party(District Councillor, Central and Western
(The Peak))

Mr Joseph CHAN

Peak Tramways Company Limited

Mr Martyn SAWYER
Group Director of Properties of Hongkong and
Shanghai Hotels

Ms May TSANG
General Manager

Clerk in attendance : Ms Debbie YAU
Chief Council Secretary (4)5

Staff in attendance : Miss Evelyn LEE
Assistant Legal Adviser 10

Ms Katrina WU
Senior Council Secretary (4)5

Ms Zoe TONG
Legislative Assistant (4)5

Action

I. Meeting with deputations and the Administration

(LC Paper No. CB(4)1208/14-15(01) -- List of follow-up actions arising from the discussion at the meeting on 2 June 2015

LC Paper No. CB(4)1208/14-15(02) -- Administration's response to issues raised at the meeting on 2 June 2015)

Clause-by-clause examination of the Bill

(LC Paper No. CB(3)625/14-15 -- The Bill

LC Paper No. CB(4)1006/14-15(01) -- Marked-up copy of the Bill prepared by the Legislative Service Division (Restricted to members only))

Discussion

The Bills Committee deliberated (Index of proceedings attached at **Annex**).

Follow-up actions to be taken by the Administration

2. The Administration was requested to consider/provide the following information –

- (a) regarding implementing the proposed mandatory lease arrangement under the exit mechanism by non-legislative means to bind the new operator, consideration should be given to stipulating the

Action

requirement in the operating right for the new operator to rent the "essential premises" at market rent which should be subject to the same dispute resolution mechanism set out in the Bill;

- (b) on mandatory lease of essential premises under proposed section 11B, the provisions should be set out in such a way for the market to come into play before the mechanism was triggered under the order to be made by the Chief Executive ("CE") in Council, with details on the circumstances pertaining to the application of proposed section 11B(1);
- (c) the relevant arrangements in case the peak tramway service needed to be suspended for a certain period of time for redevelopment/upgrading purpose;
- (d) in respect of an application for operating right for peak tramway service under proposed section 2C, whether provision(s) should be added to stipulate the period of time within which the Administration should submit recommendation to CE in Council in relation to granting the operating right or otherwise, and notifying the applicant about the outcome to give business certainty; and
- (e) considering the following textual amendments:
 - (i) adding "service" after "maintain the tramway" in proposed section 8A(a) and (c); and
 - (ii) highlighting the element of "safety" in proposed section 8E(1)(b)(ii) when CE in Council terminated the operating right granted to the company.

(Post-meeting note: The Administration's written response was issued to members vide LC Paper No. CB(4)1288/14-15(02) issued on 14 and 15 July 2015 respectively.)

II. Any other business

3. Members noted that the next meeting of the Bills Committee would be held on 16 July 2015 to meet with the Administration.

4. There being no other business, the meeting ended at 12:28 pm.

**Proceedings of the third meeting of
the Bills Committee on Peak Tramway (Amendment) Bill 2015
on Monday, 29 June 2015, at 8:45 am
in Conference Room 3 of the Legislative Council Complex**

Time marker	Speaker	Subject(s)	Action required
Agenda item I –Meeting with the Administration and the deputations			
000156 – 000410	Chairman	Welcoming remarks	
000411 – 000920	Civic Party	Presentation of views [LC Paper No. CB(4)1272/14-15(01)]	
000921 – 001222	Liberal Party ("LP")	<p>LP supported granting operating right to the Peak Tramways Company, Limited ("PTC") to enable its long-term investment to upgrade its facilities for carrying 60% more passengers. It considered that the current long queues for peak tramway had caused visitors to use other transportation means to reach the peak, leading to traffic congestion in the peak area.</p> <p>LP expressed concern on the need to preserve the natural environment of the peak area and no plants should be removed or damaged during PTC's upgrading work. It disagreed with the proposed mandatory lease arrangement ("MLA") under the Bill as it might not be able to protect the right of private property owner.</p>	
001223 – 001710	PTC	Presentation of views [LC Paper No. CB(4)1208/14-15(03)]	
001711 – 002512	Chairman Administration	<p>In response to deputations' views and concerns, the Administration advised that –</p> <p>(a) the "premium" as stipulated in section 2A(1) of the Peak Tramway Ordinance (Cap. 265) ("PTO") was the amount payable by the peak tramway operator to the Government for the government land on which the tram track and the four intermediate stations were located for the operating right for 1984-2003. In the past, when the Chief Executive ("CE") in Council granted the operating right to the operator in reliance on section 2A, payment of premium was a key term on which the operating right was granted. The level of premium was assessed based on the business performance of the operator. The amount would be reported in the Legislative Council ("LegCo") brief and published in the gazette upon the granting of the operating right. The Administration was now</p>	

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		<p>reviewing whether the previous practice of charging premium, i.e. by a lump-sum payment upfront, should continue;</p> <p>(b) according to proposed section 2C(2)(a), if the period for which the operating right was granted to an operator was longer than three years, an application by the operator for the grant of the operating right for a further period might only be made before the last three years of the current period. This would help ensure that the Administration would have sufficient time to arrange open tender when necessary;</p> <p>(c) as set out in proposed section 2B(3) of the Bill, in deciding whether or not to grant an operating right, CE in Council must take into account all relevant matters. If necessary, the Administration would require the applicant to provide supplementary information for the consideration of CE in Council;</p> <p>(d) the bureaux/departments concerned would carefully examine PTC's upgrading plan, including the environmental impacts (if any) of the proposed improvement measures; and</p> <p>(e) the proposed MLA was devised to minimize the risk of disruption of peak tramway service by enabling the new operator to have the right to use the land, structure or building essential to peak tramway operation ("essential premises") in case there was a change of operator. Acquisition of the essential premises was not necessary to achieve the same purpose. PTC had expressed objection to any compulsory acquisition of its essential premises under the exit arrangement. Rather, it considered the MLA an acceptable arrangement. Indeed, the proposed MLA did not constitute a deprivation of property as the land owner still retained ownership of the property, and that the owner still had the right to sell the "essential premises" or receive rent at market value under the MLA. Putting the MLA in the law was the best way to protect the interests of future peak tramway operators and the land owner.</p>	
002513 – 003127	Chairman Mr WONG Kwok-hing Administration	As the operating right could be granted for up to 10 years and be further extended for another 10 years at most, Mr WONG suggested the Administration to conduct an interim review during the 20-year period.	

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		<p>The Administration explained that if the operator failed to maintain the operation of the peak tramway in a safe manner or did not comply with the term(s) on which the operating right was granted, the Administration could require it to take remedial actions, failing which CE in Council could terminate its operating right. In reply to Mr WONG, the Administration undertook to report to LegCo the performance of peak tramway service at an appropriate juncture, such as before the grant or extension of an operating right.</p>	
003128 – 003642	Chairman Mr Frankie YICK Administration	<p>Mr YICK disagreed with the Administration's view as set out in paragraph 2 of its paper (LC Paper No. CB(4)1208/14-15(02)) that the proposed MLA complied with the requirement under Article 105 of the Basic Law ("BL105") concerning the protection of private property which, in his opinion, should be effected in such a way that no one including the Government could impose any requirement further to the land grant on the private property concerned. Nevertheless, he agreed with Mr Paul TSE's prior suggestion of implementing the proposed MLA through surrendering the existing land grant and making a re-grant for the plots of land concerned and in the operating right, rather than in the Bill.</p> <p>The Administration advised that even if the proposed MLA could be implemented through a modified land lease and the terms of the operating right in theory, it could not achieve the exact same effect as putting MLA in the law. This was because lease provisions did not have any binding effect on non-contracting parties (the new operator would not be a party to the land lease) and certain arrangements (such as the empowerment of the Lands Tribunal to handle disputes over the terms of the mandatory lease) could only be effected through legislative means. Further, it would be necessary for the Government and land owner to negotiate with the new operator on various issues, including the payment of open market rent for the essential premises, every time when the exit mechanism was triggered. This would not be conducive to maintaining the long-term stability of peak tramway service, and would defeat the very purpose of putting in place an exit mechanism.</p> <p>Mr YICK disagreed with the Administration.</p>	The Administration to follow up as per paragraph 3(a) of the minutes.
003643 – 004230	Chairman Mr YIU Si-wing Administration	In reply to Mr YIU, the Administration advised that the lessee under MLA would be designated and the period of the lease determined by CE in Council.	

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		<p>The provisions as now drafted did not preclude the operating right to be granted to an entity affiliated with the Government if no suitable party could be identified from the market. Indeed, there were provisions empowering the Government to take possession of the properties of an individual or a legal person for a specified period of time under specified circumstances in the Public Bus Services Ordinance (Cap. 230), Ferry Services Ordinance (Cap. 104) and Mass Transit Railway Ordinance (Cap. 556) ("the three ordinances"). During the period of possession-taking, the Administration could find a new operator through tender.</p>	
004231 – 005327	Chairman Mr Tony TSE Administration	<p>Mr TSE expressed objection to the proposed MLA as it was unjust to the property owner. He elaborated that the property owner had no choice but to lease the land and premises to the new operator selected by the Government, and allow the tenancy to continue even if the new operator did not comply with certain lease terms. He suggested allowing PTC to sell the property and premises concerned in case it was unwilling to lease them to a designated party.</p> <p>The Administration reiterated the disadvantages of compulsory sale of essential premises. PTC accepted the proposed MLA but was unwilling to sell the essential premises.</p>	
005328 – 010021	Chairman PTC Administration	<p>In response to the enquiry of the Chairman, PTC advised that it considered the current MLA proposal the best option to ensure the continued operation of peak tramway.</p> <p>In response to the Chairman's concern, the Administration advised that the dispute resolution mechanism over the terms was part of the proposed MLA. It assured members that the proposed MLA under the Bill could solve the problem of a lack of exit mechanism associated with peak tramway operation. The proposed MLA would and could only apply to peak tramway operation. Any future legislative proposal incorporating the idea of MLA would be subject to LegCo's scrutiny and passage.</p>	
010022 – 010835	Chairman Dr Kenneth CHAN Civic Party	<p>Noting that the Bill proposed MLA while repealing existing section 11 of PTO on purchase by Government of tramway after the Administration had discussed and agreed with PTC, Dr CHAN expressed concern that the practice of obtaining agreement with the existing operator and then amending the relevant legislation would become a precedent of practice in future.</p>	

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		<p>Discussion on the proposed MLA and its advantages.</p> <p>The Administration further explained that prior to the passage of the Peak Tramway (Amendment) Bill 1985, PTO had provided an exit arrangement and conferred to the then Governor in Council the right to mandatorily buy back the undertaking of the peak tramway within six months after the expiration of 28 years from the time when PTC was empowered to construct the tramway, and within six months after the expiration of every subsequent period of seven years. Yet, PTO no longer featured any provision on exit arrangement after passage of the Peak Tramway (Amendment) Bill 1985. With the proposed sections 8A to 8E (which empowered the Government to take action when there was any default) and sections 11A to 11D (on the mandatory lease of essential premises and sale of essential equipment when exit had to be triggered), the existing section 11 (which only catered for only two very specific scenarios concerning the operator becoming insolvent and service suspension) would no longer be required and hence was proposed to be repealed.</p>	
010836 – 011320	Chairman Mr WONG Kwok-hing PTC	<p>In response to Mr WONG's enquiry, PTC advised that the company had renovated all the intermediate stations with new weather protection facilities. If PTC would be granted a 10-year operating right commencing in January 2016, it would submit and, subject to approval as well as the grant of the second 10-year operating right, implement a comprehensive upgrading plan for the peak tramway, with a view to improving the queuing situations by (i) increasing the current carrying capacity from 120 to 200 passengers with longer tramcars, and (ii) relocating the Garden Road terminus uphill to house the whole queuing area in an air-conditioned environment. PTC stressed that the upgrading plan was a significant investment to the company, and was expected to be completed in four to five years' time.</p> <p>The Chairman added that the paths and railings along the intermediate stations of the peak tramway should also be well-maintained by PTC.</p>	
011321 – 011515	Chairman Mr Frankie YICK Administration	<p>Noting the Administration's advice that if the proposed MLA was implemented by incorporating the requirements in the operating right, the Administration and land owner would need to negotiate with the new operator every time when there was a change of operator, Mr YICK opined that it was an ordinary</p>	

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		procedure and it would be necessary for the Administration to negotiate the terms with the new operator. He agreed with Mr Paul TSE's suggestion on implementing MLA through land lease modification although it might involve compensating the incumbent operator.	
011516 – 011900	Chairman Mr Paul TSE PTC	In reply to Mr TSE's enquiries, PTC advised that it might need to spend considerable amount of time, in terms of years, to discuss with the Administration in order to reach a mutually acceptable solution on the conditions on implementing MLA through land lease modification. Moreover, such conditions, like the payment of market rent for essential premises, could not bind the new operator who was not a party to the land lease. PTC considered that land lease modification was not a practical option due to the significant time delay.	
Break & Meeting with the Administration			
013023 – 014459	Chairman Administration	The Administration briefed members on its response to issues raised at the meeting on 2 June 2015 (LC Paper No. CB(4)1208/14-15(02)). Discussion on the proposed MLA under the exit mechanism in the Bill.	
014500 – 014841	Chairman Mr YIU Si-wing Administration	Regarding MLA under the proposed section 11B, Mr YIU considered that the provisions should be set out in such a way for the market force to first come into play (i.e. the existing land owner should be given a chance to negotiate on the lease arrangements with the operator identified by CE in Council before the mechanism was triggered under the order to be made by CE in Council). The Administration agreed to consider the matter. <i>(Post-meeting note: The Administration proposed that a provision should be added to sections 11B and 11C under the Bill to stipulate that CE in Council must not make an order to trigger a mandatory lease or sale unless it considered that peak tramway service would likely be disrupted if no such order was made.)</i>	The Administration to follow up as per paragraph 3(b) of the minutes.
014842 – 015706	Chairman Mr Frankie YICK Administration	In response to Mr YICK's concern, the Administration advised that PTC and the Administration might need a long time to reach consensus on land lease modification. Yet, the current operating right would expire on 31 December 2015. There was also uncertainty under a land lease approach as to whether the new operator would be willing to pay market rent to the land owner in renting the essential premises. Meanwhile, the proposed	

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		<p>MLA could solve the problem of a lack of exit mechanism associated with peak tramway operation. In any event, the proposed MLA would not prevent the land owner to sell its essential premises to the new operator, if the former so wished.</p> <p>Mr YICK considered that the Administration might grant another interim operating right to PTC for two years to buy time for both parties to consider the suggestion of implementing the proposed MLA through surrender and re-grant of land lease.</p>	
015707 – 022937	<p>Chairman Assistant legal Adviser ("ALA") Administration Mr SIN Chung-kai</p>	<p>Discussion on –</p> <p>(a) precedent of court ruling vis-à-vis law-making. The Administration advised that the ruling of a court case would become case law and might serve as a precedent for future cases handled by the lower court(s). Yet, each and every legislative proposal would be subject to LegCo's scrutiny on a case-by-case basis before it was passed and became law. Hence there was no "precedent" as such in the context of law-making;</p> <p>(b) protection of private property right in accordance with law as required under BL105. Regarding the "proportionality test" outlined in footnote 2 of the Administration's paper (LC Paper No. CB(4)1069/14-15(03)), the case on <i>Hysan Development CO. Ltd. & Ors v Town Planning Board</i>, CACV 232 & 233 of 2012, according to the Administration's response at a previous meeting of the Bills Committee, a party of the case had sought to lodge an appeal to the Court of Final Appeal. ALA further expressed that the proposed MLA might have certain impacts on the property right of PTC.</p> <p>The Administration advised that BL105 sought to protect the rights of an owner to use and dispose of his/her property while restrictions imposed by the Government on such shall be made "in accordance with law";</p> <p>(c) the need to reflect the policy intent in the Bill that the power under the proposed section 11B should not be exercised by CE in Council through an order unless it considered that peak tramway service would likely be disrupted if no such order was made;</p>	<p>The Administration to follow up as per paragraph 3(b) of the minutes.</p>

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		<p>(d) negotiation with PTC on the operating right and upgrading plan of the peak tramway which would commence once the Bill was passed; and</p> <p>(e) sections 9, 10 and 11 of PTO which were obsolete and would be repealed.</p>	
022938 – 023633	Chairman Mr Frankie YICK Administration	Discussion on the relevant arrangements in case the peak tramway service needed to be suspended for a certain period of time for redevelopment/upgrading purpose.	The Administration to follow up as per paragraph 3(c) of the minutes.
023634 – 024629	Chairman Mr Paul TSE Administration	<p>Discussion on -</p> <p>(a) implications of setting a precedent in the context of law-making; and</p> <p>(b) implementing the proposed MLA by the "Deed of Mutual Covenant approach" or under the terms of the operating right.</p> <p>Mr TSE indicated reservations on the view of the Administration, and still considered it more desirable to implement the proposed MLA through land lease modification.</p>	
024630 – 024801	Chairman Mr Frankie YICK	Mr YICK reiterated that the proposed MLA could be implemented by non-legislative means, including modifying the relevant land lease and/or stipulating the requirements as part of the terms of the operating right granted to the new operator. He also disagreed that the MLA proposed in the Bill conformed with BL105 as PTC's property right was not unaffected.	
024802 – 025408	Chairman Mr YIU Si-wing Administration Mr Paul TSE	<p>On the account that the operation of peak tramway involved public interest, its service should be improved in a timely manner, and that the existing operating right would expire at the end of 2015, Mr YIU considered that granting the operating right to PTC should not be deferred.</p> <p>The Administration advised that implementing the proposed MLA by way of land lease modification could not achieve the same binding effect as legislative amendments. Mr TSE cautioned that the proposed MLA would become a precedent once the Bill was passed.</p>	

Time marker	Speaker	Subject(s)	Action required
Clause-by-clause examination of the Bill			
025409 – 030542	Chairman Administration Mr SIN Chung-kai	<p><u>Clause 6 – Sections 2B and 2C added</u></p> <p>In respect of an application for the operating right for peak tramway service under proposed section 2C, Mr SIN asked whether provision(s) should be added to stipulate the period of time within which the Administration should submit its recommendation to CE in Council in relation to granting the operating right or otherwise, and notifying the applicant about the outcome to give business certainty.</p> <p>The Administration agreed to consider the suggestion.</p> <p><i>(Post-meeting note: The Administration proposed adding a provision to specify that CE in Council had to determine an application for the operating right without unreasonable delay.)</i></p>	The Administration to follow up as per paragraph 3(d) of the minutes.
030543 – 031459	Chairman Dr Kenneth CHAN Administration	Discussion on the implementation of the upgrading plan stipulated in proposed section 2B(5) and (6). The Administration undertook to consult Members on the upgrading plan before giving approval, as part of the consultation for the grant of a further operating right as and when the operator applied for it.	
031500 – 031640	Chairman Mr YIU Si-wing Administration Mr Frankie YICK	Mr YIU, Mr YICK and the Chairman agreed with Mr SIN that there should be provision(s) stipulating the period of time within which the Administration should submit the recommendation to CE in Council in relation to granting the operating right or otherwise, and notifying the applicant about the outcome to give business certainty.	
031641 – 031947	Chairman Administration	<p><u>Clause 7 to Clause 12</u></p> <p>Members raised no query on the above clauses.</p>	
031948 – 032039	Mr Frankie YICK Administration	<p><u>Clause 13 – Sections 8A to 8E added</u></p> <p>Mr YICK suggested adding "service" after "maintain the tramway" in proposed section 8A(a) and (c).</p> <p><i>(Post-meeting note: The Administration proposed to revise in the Chinese text of the proposed section 8A(a), by deleting "維持" and substituting "維修保養".)</i></p>	The Administration to follow up as per paragraph 3(e)(i) of the minutes.
032040 – 033412	Chairman Administration ALA Mr YIU Si-wing	<p><u>Clause 13 – Sections 8A to 8E added</u></p> <p>ALA referred to the proposed section 8E(3) and expressed that, according to the section, CE in</p>	The Administration to follow up as per paragraph

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		<p>Council must consider all relevant matters before exercising the power under the proposed section 8E(1)(b). In light of the aforesaid, ALA requested the Administration to clarify the relevant matters that CE in Council would take into account in the said circumstances.</p> <p>The Administration advised that when the company was in default under proposed section 8A(a) to (c), the Administration needed to look into the situation, including the extent of the default, and consider the company's representation before taking actions in accordance with proposed sections 8B, 8C and 8E. Meanwhile, whether there was a default which fell under proposed section 8A(d) was a matter of fact. The proposed section 8E would thus automatically be triggered.</p> <p>Mr YIU suggested highlighting the element of "safety" in proposed section 8E(1)(b)(ii) when CE in Council terminated the operating right granted to the company.</p> <p><i>(Post-meeting note: The Administration advised that safety was a basic requirement rather than a service performance, thus there was no need to add the word "safe" in the proposed section 8E(1)(b)(ii).)</i></p>	3(e)(ii) of the minutes.
033413 – 034300	Chairman Administration	<p><u>Clause 14 to Clause 27</u></p> <p>Members raised no query on the above clauses.</p>	
Agenda item II – Any other business			
034301 – 034402	Chairman	Date of next meeting	