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22 June 2015

Ms Debbie Yau
Legislative Council Complex
1 Legislative Council Road
Central, Hong Kong

Dear Ms Yau,

Peak Tramway (Amendment) Bill 2015

At the meeting of the Bills Committee on the Peak Tramway (Amendment) Bill 2015 (“the Bill”) on 2 June 2015, some Members and the Assistant Legal Advisor requested the Government to provide further information on the Public Bus Services Ordinance (Cap. 230), Ferry Services Ordinance (Cap. 104) and Mass Transit Railway Ordinance (Cap. 556) mentioned in paragraph 19 of the Government’s written reply of 29 May 2015 (CB(4)1069/14-15(02)) (“Written Reply”). They would like to know the similarities and differences between the arrangements under these three ordinances and those under the Bill. Further, there were enquiries on the following issues:

- (i) whether the mandatory lease arrangement under the Bill, instead of being implemented through legislative means, could draw on the model of a Deed of Mutual Covenant (“DMC”) where the rights and responsibilities of the tenants of a building are bound by the DMC;
- (ii) the exit arrangement when the franchise of the China Motor Bus Company Limited expired and no new franchise was granted to it in 1998; and

- (iii) whether the formulation “the Chief Executive in Council must take into account all relevant matters, including—” in the proposed section 2B(3) of the Bill could be revised to make it more clear that the matters that the Chief Executive in Council must take into account were not limited to those five as set out under that section.

This letter responds to the above concerns and enquiries.

(a) Implementing the mandatory lease arrangement by the DMC model

2. We explained to Members in the Written Reply and at the Bills Committee’s meeting on 2 June 2015 that implementing the mandatory lease arrangement through land lease modification could not achieve the same effect as having the arrangement implemented through legislative amendments. In gist, the objective for introducing an exit mechanism is to ensure the long-term stability of peak tramway service, i.e. there will not be service disruption in case the operating right has to change hands. The key is to ensure that the right of possession and use of the land, structures and buildings essential to peak tramway operation can be smoothly and properly transferred to the new operator. This has to be done through the mandatory lease arrangement. The mandatory lease arrangement must comply with the Basic Law (“BL”) requirement concerning protection of private property. To be able to do so, we must ensure that the asset holder can receive rent at market value when leasing out the “essential premises”. Once the mandatory lease arrangement becomes a legal provision upon the passage of the Bill, the requirements proposed under the arrangement (including the payment of market rent by the lessee (i.e. the new operator) for compliance with the requirement concerning the protection of private property under Article 105 of BL) would become legally binding on all lessees in future. Implementing the same mandatory lease arrangement by way of land lease modification can, however, not achieve the same binding effect for the following reasons:

- (a) the land leases for the terminus sites are contracts between the Government and the holder of the terminus sites. As with all contracts, lease provisions generally cannot have any binding effect on non-contracting parties. In other words, even if the site holder agrees to modify the land leases of the two terminus sites, we cannot include provisions in the land leases to stipulate the rights and obligations of the lessee under the mandatory lease arrangement, such that such provisions will be legally binding on the new operator. The outcome would be that the most critical requirement – that the lessee under the mandatory lease arrangement must pay market rent – cannot be effected;

- (b) even if the provisions on the mechanism to resolve disputes over the terms under the mandatory lease as stipulated in the proposed section 11D are incorporated into the land leases of the terminus sites, such provisions can only bind the site holder. Since the lessee under the mandatory lease arrangement is not a contracting party to the land lease, he/she will not be bound by the lease provisions. As a result, the dispute resolution mechanism, originally intended to be binding on both parties, would become ineffectual. The exit mechanism would consequentially not work; and
- (c) the empowerment of the Lands Tribunal to handle disputes under the mandatory lease arrangement can only be effected through legislative means.

3. Some Members raised at the meeting on 2 June 2015 the possibility of making reference to the DMC approach and implementing the mandatory lease arrangement through land lease (contractual), instead of legislative, amendments. We have carefully considered this suggestion and come to the view that that this alternative is infeasible. As far as the DMC is concerned, all co-owners are bound to observe the land-related covenants in the DMC by virtue of section 41 of the Conveyancing and Property Ordinance (Cap. 219). Nevertheless, the tenants of the co-owners are only bound to comply with the restrictive covenants, but not the positive covenants. For instance, the property manager may take action against a tenant directly if the latter is in breach of the DMC provision that prohibits pet-keeping (which is regarded as a restrictive covenant). Yet, if a tenant is in breach of a positive covenant, such as arrears of management fees, the property manager can only take action against the co-owner. This is because the tenant is not a contracting party to the DMC. While the co-owner may recover the arrears from the tenant in accordance with the terms of their tenancy agreement, the property manager (or other co-owners) does not have the right to do so. Again, this is because the tenant is not a contracting party to the DMC. Even if the site holder agrees to modify the land leases to include a provision requiring the lessee under the mandatory lease arrangement to pay rent at market value, such a provision will have no binding effect on the new operator who is not a contracting party to the land lease.

4. Moreover, for a tenancy agreement to take effect, the prerequisite is that the tenant must have already agreed to its terms and conditions. If the DMC model were to be applied to the mandatory lease arrangement of the peak tramway, the asset holder would have to negotiate with the new operator

the inclusion of the requirement to pay market rent for the “essential premises” every time when the operating right changes hand. Also, the lease arrangement can only be reached upon mutual agreement. Given that the new operator is not a contracting party to the land lease, the Government cannot take action against him/her in reliance on the land lease if he/she does not agree to pay market rent. This means that the exit mechanism, if triggered when the operating right changes hands, may fail if the new operator does not accept such a requirement. 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. Therefore, the DMC model cannot apply to the mandatory lease arrangement for the peak tramway.

5. In fact, there are certain powers that cannot be conferred by way of contracts and must be conferred by law (such as empowering the Lands Tribunal to handle disputes under the lease arrangement as stipulated in the proposed section 11D). The rights of asset holders and future lessees of the “essential premises” under the mandatory lease arrangement can be protected only if the mandatory lease arrangement (particularly the arrangement to resolve disputes over the rental amount and other lease terms as provided for under the proposed section 11D) is effected through legislative amendments. This is also the most effective way to ensure that all relevant parties (including the Peak Tramways Company Limited, parties interested in operating the peak tramway service, and general public) can clearly understand their rights and responsibilities, both at present and in future.

(b) Exit arrangement of the China Motor Bus Company Limited (“CMB”)

6. When the franchise of CMB expired and no new franchise was granted to it in 1998, CMB and the new operator (i.e. New World First Bus Services Limited (“NWFB”)) reached an agreement on their own accord regarding the assets essential to the operation of franchised bus service. These assets included the Chai Wan Road depot. It was owned by CMB and was leased to NWFB for three years. There was thus no need for the Government to invoke the power as conferred by the Public Bus Services Ordinance to take possession of private property in the transfer of the franchise for the CMB network.

(c) Section 2B(3)

7. As a common practice of law drafting, legal provisions should be concise and easy to understand. According to the general principles of legal interpretation, the provision, when clear and unambiguous, should be interpreted by its literal meaning. The proposed section 2B(3) under the Bill,

which says “the Chief Executive in Council must take into account all relevant matters, including—”¹, has clearly indicated that the Chief Executive in Council has to consider “all relevant matters”. As such, these matters are clearly not confined to the five matters listed in that section. There is thus no need to further amend the provision.

(d) Further information on the examples of existing legislation relating to the mandatory lease arrangement

8. As stated in paragraph 19 of the Written Reply, provisions empowering the Government to take possession of the properties of an individual or a legal person within a specified period of time under specified circumstances can be found in Part IV of the Public Bus Services Ordinance, Part V of the Ferry Services Ordinance and Part IV of the Mass Transit Railway Ordinance. The relevant provisions are extracted at **Annex 1**. As mentioned at the Bills Committee’s meeting on 2 June 2015, these examples shared a common feature of having provisions which allowed taking possession of private properties, including land and buildings, under different circumstances. This illustrates that the idea of mandatory lease arrangement as proposed under the Bill is not unprecedented.

9. The Written Reply points out that there are differences between the mandatory lease arrangement under the Bill and the examples of the arrangements quoted in paragraph 8 above. There are also differences among the quoted examples themselves. At the Bills Committee’s meeting on 2 June 2015, we further explained that the key difference was in the duration of the arrangements where private properties were taken possession of among the examples. Also, some arrangements are for emergencies, whilst others for revocation of franchises or franchises having expired without renewal. There is so far no need to exercise the above statutory powers to take possession of private properties. The types and nature of properties to which such powers apply are summarised in **Annex 2**.

10. It should be noted that, irrespective of whether a precedent exists or whether such a precedent is similar to the proposed mandatory lease

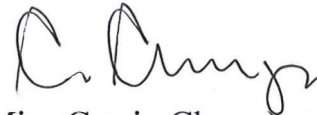
¹ Section 2B(3) of the Bill reads:

“In deciding whether or not to grant the operating right to a body corporate under subsection (1), the Chief Executive in Council must take into account all relevant matters, including—

- (a) the terms proposed by the body corporate;
- (b) any representation made by the body corporate;
- (c) whether the body corporate will be able to maintain the tramway as an important tourism and recreational facility;
- (d) the financial capability of the body corporate; and
- (e) any relevant experience and performance of the body corporate in operating the tramway or any similar facility.”

arrangement under the Bill, the proposed mandatory lease arrangement under the Bill is compliant with the BL on the grounds set out in our reply of 7 May 2015 (CB(4)1006/14-15(03)) and the Written Reply. Given the uniqueness of the peak tramway operation (see paragraphs 5-6 of the Written Reply), existing practices in other areas do not necessarily have reference value insofar as the long-term arrangements for the peak tramway are concerned. The transfer of “essential premises” of the peak tramway has to be handled in a practical and practicable manner, and the mandatory lease arrangement as proposed under the Bill is exactly how the matter can be dealt with properly.

Yours sincerely,



(Miss Carrie Chang)

for Secretary for Transport and Housing

c.c. Department of Justice
(Attn: Mr Gilbert Mo, Ms Daphne Siu and Mr Llewellyn Mui)

Lands Department
(Attn: Ms Doris Chow)

Hon Jeffrey Lam Kin-fung, Chairman of the Bills Committee

Legislations with provisions similar to the mandatory lease arrangement under the Peak Tramway (Amendment) Bill 2015

Public Bus Services Ordinance (Cap. 230)

Section 23(2) of the Public Bus Services Ordinance stipulates that “*where under subsection (1) a franchise is suspended altogether or in respect of any specified route, the Government may by written notice served on the company and published in the Gazette require the company to deliver to the Government possession of the following property until the Chief Executive in Council declares that the emergency no longer exists: (a) any premises provided and maintained in accordance with section 19; (b) any property (other than premises mentioned in paragraph (a)) used or kept by the company for the purposes of or in connection with its franchise, and may at the time of or as soon as practicable after service of the notice take possession of such property.*” In addition, section 25 also stipulates that where the franchise of a bus company has been revoked or a franchise period has expired, the bus company has to deliver any of the above properties, as specified by the Government, to the Government for temporary possession. The above provisions empower the Government to take possession of properties (including the premises concerned) of a franchised bus company within a specified duration under specified circumstances. These provisions also clearly require the Government to pay compensation to the person having the right to possession over the properties during the period of possession. If the properties concerned are motor vehicles, land or buildings on land, the compensation shall be an amount equal to open market rental (sections 23(4) to (6)).

Ferry Services Ordinance (Cap. 104)

2. Under section 26(1) of the Ferry Services Ordinance, where a franchise for ferry service is revoked, the Government may take possession of any property used or kept by the franchisee for the purposes of or in connection with the operation of any ferry service. Subsection (2) provides that “*any property of which possession is taken under subsection (1) may be retained by the Government for such initial period, not exceeding 2 years, as the Chief Executive in Council may direct and such period may be extended by resolution of the Legislative Council for further successive periods not exceeding 6*

months each.” Subsection (4) stipulates that “*where possession is taken under subsection (1) of any property, the owner shall be entitled to compensation for the use or loss of or damage to such property.*” Under section 27, if the Government and the owner are unable to agree on the amount of compensation, either party may refer the matter to arbitration according to the Arbitration Ordinance (Cap. 609).

Mass Transit Railway Ordinance (Cap. 556)

3. Section 19(1) of the Mass Transit Railway Ordinance provides that where the franchise for railway service is revoked or has expired and has not been extended, the Government, its nominee or a third party designated by the Government may take possession of any property which, at the time of such revocation or expiry, is property used or kept by the MTR Corporation Limited for the purposes of or in connection with the franchise. Subsection (2) stipulates that property taken possession of under subsection (1) may be retained for an initial period not exceeding 2 years (as may be determined by the Chief Executive in Council), and for such further successive periods not exceeding 6 months each (as may be determined by the Chief Executive in Council). Section 20(1) provides that the Government is liable to pay compensation for the use of, loss of or damage to any property taken possession of under section 19.

Examples of the types and nature of properties

- For franchised buses, a franchised bus company is in possession of several sites used for depots and purposes relating to franchised bus service. The depots are built by the franchised bus companies.
- In respect of the current ferry services operated by way of a franchise, the piers and the sites on which the piers are located are all owned by the Government.
- As for MTR, the MTR Corporation Limited is in possession of various sites for its depots and other facilities for the purposes of railway operation (including stations and tracks). The facilities and buildings used for railway operation are built by the railway operators.