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13 July 2015

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

Dear Ms YAU,

**Peak Tramway (Amendment) Bill 2015**

Thank you for your letter dated 30 June 2015. At the meeting of the Bills Committee on 29 June 2015, Members enquired about the following issues -

- (a) whether the mandatory lease arrangement under the Peak Tramway (Amendment) Bill 2015 (“the Bill”) can be implemented through land lease and the terms of the operating right, rather than through legislative means;
- (b) whether it is possible to specify in the proposed section 11B of the Bill that the lessor and lessee may first negotiate on their own accord the lease arrangements for the “essential premises”, and that the Chief Executive (“CE”) in Council will not exercise its power to issue an order for mandatory lease until and unless the lessor and lessee fail to reach an agreement;
- (c) whether the requirement that the operator should maintain peak tramway service will hinder possible future redevelopment of the Peak terminus and/or Garden Road terminus site(s);
- (d) whether it can be stipulated in the Bill that, upon receipt of an application from the incumbent operator for an extension of its operating right, CE in Council must make a decision in respect of

the application within a reasonable period of time, so that the incumbent operator or any new operator interested in bidding for the operating right can make preparation accordingly; and

- (e) whether some wording of the proposed sections 8A(a), 8A(c) and 8E(1)(b)(ii) of the Bill can be amended to enhance clarity.

This letter responds to these enquiries.

*(a) Implementing the mandatory lease arrangement by a contractual approach*

2. During the discussion on the mandatory lease arrangement at the Bills Committee's meetings, we noted that Members –

- (a) concurred that there was a need to put in place an exit mechanism which must comprise an arrangement that could enable proper transfer of private property. This is to ensure that the operating right of the peak tramway can change hands when necessary and that the associated arrangements (including the arrangement to enable the new operator to obtain the right to use the “essential premises” for peak tramway operation) would be implemented effectively to avoid service disruption. Members noted that the proposed mandatory lease arrangement for the “essential premises” under the Bill could give such an effect; and
- (b) noted that the proposal to implement the mandatory lease arrangement through legislative means as set out in the Bill was in compliance with the requirement concerning the protection of private property right under Article 105 of the Basic Law (“BL”).

3. We explained to Members in our two written replies of 29 May 2015 and 22 June 2015 (namely LC Paper No. CB(4)1069/14-15(03) and LC Paper No. CB(4)1208/14-15(02)) and at the Bills Committee's meetings held on 2 June and 29 June 2015 that implementing the mandatory lease arrangement through land lease modification and other contractual means could not achieve the same effect as having the arrangement implemented through legislative amendments. Our objective for introducing an exit mechanism is to ensure the long-term stability of peak tramway service and that there will not be service disruption even if 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 a mandatory lease arrangement. Meanwhile, the mandatory lease arrangement must comply with the BL requirement concerning the protection of private property. To achieve this, we must ensure that the asset holder will be paid market rent whenever he/she leases out the “essential premises”. Putting the requirement to pay market rent in place through legislative means can legally bind all future lessees under the mandatory lease arrangement. This will be critical to the effective operation of the exit mechanism.

4. There are views that implementing the mandatory lease arrangement by way of land lease modification can achieve the same binding effect. The Government does not agree. As we have repeatedly pointed out, implementing the mandatory lease arrangement by way of land lease modification cannot have the same effect as that of legislative amendments for the following reasons –

- (a) even if the Government and the Peak Tramways Company Limited (“PTC”) could reach an agreement on how the terms under the land lease should be modified, we cannot be certain if the terms under the land lease as modified can also bind PTC’s successor in land title. This is a complex legal issue. There is so far no case law under the common law that provides a clear answer to this question<sup>1</sup>; and
- (b) as with all contracts, a land lease cannot bind non-contracting parties. In other words, even if the site holder agrees to modify the land leases of the two terminus sites, the land leases cannot have any binding effect on the lessee under the mandatory lease arrangement (i.e. the new operator). There are views that the Government may, through our negotiation with the new operator, incorporate mandatory requirements which bind the new operator as part of the terms of the operating right. This, however, would mean that we have to negotiate with each new operator on the lease arrangements of the “essential premises” every time when the operating right changes hand. As the outcome of each negotiation cannot be predicted, such uncertainty may render the exit

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<sup>1</sup> According to Sir Nicholas Browne –Wilkinson VC in *Kumar v Dunning* [1989] 1 QB 193 quoting Romer LJ in *Grant v Edmundson* [1931] 1 Ch. 1,28 “ In connection with the subject of covenants running with land it is impossible to reason by analogy. The established rules concerning it are purely arbitrary, and the distinctions, for the most part, quite illogical.”

arrangement ineffectual. This would not be conducive to maintaining the continuity of peak tramway service and is therefore undesirable.

5. In addition, the land leases of the terminus sites are contracts between the Government and the holder of the sites. The mandatory lease arrangement to be implemented by way of land lease modification is only possible upon agreement of both contracting parties. At the meeting of the Bills Committee on 29 June 2015, the incumbent site holder (i.e. PTC) indicated that it did not find implementing the mandatory lease arrangement by way of land lease modification useful, the reason being that land lease modification would touch on rather complex matters and that it would not be possible for PTC and the Government to reach an agreement on how the terms should be modified within a short period of time. PTC expected that the discussion would take at least several years (when PTC's priority was mainly to apply for an operating right after the passage of the Bill and thereafter to implement its upgrading plan to increase the capacity of the tramcars as well as to improve queuing arrangements). We note that land lease modification may involve complex and sensitive matters such as the land use requirement and payment of premium.

6. In view of the analysis in paragraphs 3 - 5 above, the proposed mandatory lease arrangement under the Bill is the most practical and practicable option. The Government will not consider replacing it by a contractual approach.

*(b) whether it is possible to specify in the Bill that the lessor and lessee may first negotiate on their own accord the lease arrangements for the "essential premises"*

7. As we have repeatedly explained at the meetings of the Bills Committee, the Government's intention is that CE in Council will exercise its power under section 11B of the Bill to order mandatory lease only if it is necessary to do so (such as when the lessor and lessee cannot agree on the lease arrangements of the "essential premises" on their own accord). The Government therefore has no objection to adding a provision in the Bill to expressly state the above policy intention as suggested by some Members. We propose a new provision be added to sections 11B and 11C under the Bill to stipulate that CE in Council must not make the order unless it considers that peak tramway service will likely be disrupted if no such order is made (see

item (iii) in **Annex** for the proposed wording).

- (c) *whether the requirement that the operator should maintain peak tramway service will hinder future redevelopment of the Peak terminus and/or Garden Road terminus site(s)*

8. Under the terms of the land leases of the two terminus sites, the site holder may apply for redevelopment of both sites. Any development must as a matter of course comply with the terms of the land leases (including the land use requirement) and the relevant statutory requirements. The Garden Road terminus site and the Peak terminus site were last redeveloped in the 1980s and 1990s respectively. At those times, peak tramway service was still able to be operated in accordance with the statutory requirements and the terms of the operating right. The Bill has not proposed any changes in this aspect. The operation of the peak tramway will not affect redevelopment of the sites.

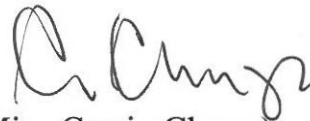
- (d) *whether it can be stipulated in the Bill that, upon receipt of an application from the incumbent operator for an extension of its operating right, CE in Council must make a decision in respect of the application within a reasonable period of time*

9. Section 70 of the Interpretation and General Clauses Ordinance (Cap. 1) provides that “*Where no time is prescribed or allowed within which any thing shall be done, such thing shall be done without unreasonable delay, and as often as due occasion arises.*” As such, CE in Council must handle matters in a reasonable manner and shall not cause unreasonable delay in the process. An important objective of this legislative amendment exercise is to ensure the continuity of peak tramway service. The Government will act accordingly to meet this objective when granting new operating rights in future and will not cause unreasonable delay. This notwithstanding and taking into account Members’ concern, the Government proposes adding a provision to specify that CE in Council has the duty to make a decision without unreasonable delay (see item (i) in the **Annex** for the exact wording proposed).

- (e) *whether some wording of the proposed sections 8A(a), 8A(c) and 8E(1)(b)(ii) in the Bill can be amended to enhance clarity*

10. The Government has no objection to Members' proposal in respect of section 8A(a) (see item (ii) in the Annex for the proposed wording). Separately, for the peak tramway to be "an important tourism and recreational facility" (see sections 8A(c) and 8E(1)(b)(ii)), it must as a matter of course be safe first: safety is a basic requirement rather than a service performance. There is thus no need to add the word "safe" in these sections (and change the relevant formulation to read "a safe and important tourism and recreational facility"). Otherwise, it may give rise to a misunderstanding that the safety of the peak tramway is called into question.

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-fun, Chairman of the Bills Committee

**Proposed amendments to the Peak Tramway (Amendment) Bill 2015**  
**(13 July 2015)**

Preliminary draft subject to further amendments

(i) Clause 6, proposed section 2C

Add–

“(3) The Chief Executive in Council must process an application for the operating right without unreasonable delay.”.

(ii) Clause 13, proposed section 8A(a), Chinese text

Replace “維持” with “維修保養”.

(iii) Clause 15, proposed sections 11B and 11C

Add after subsection (1)–

“(1A) The power under subsection (1) must not be exercised unless the Chief Executive in Council is satisfied that if the power is not exercised, there is a substantial risk that the operation of the tramway will be disrupted.”