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Legislative Council

LC Paper No. LS64/14-15

**Paper for the House Committee Meeting
on 8 May 2015**

**Legal Service Division Report on
Peak Tramway (Amendment) Bill 2015**

I. SUMMARY

- 1. The Bill**

The Bill proposes to amend the Peak Tramway Ordinance (Cap. 265) to provide for the grant and termination of the operating right of the Peak Tramway authorized by Cap. 265 after 31 December 2015 and to regulate the operation of the Peak Tramway. The Bill also seeks to transfer certain powers or duties which are vested in the Secretary for Transport and Housing under Cap. 265 to the Secretary for Commerce and Economic Development and to make consequential or related amendments.
- 2. Consultation with LegCo Panel**

As advised by the Clerk to Panel on Economic Development, the Panel was consulted on the legislative proposal concerning the long-term arrangements of the peak tramway operation at its meeting on 23 March 2015. Members supported the Administration to table the legislative amendments at the Council but expressed certain concerns, including the conformity of the proposed exit mechanism with the Basic Law.
- 3. Conclusion**

In light of the concerns raised by Members at the meeting on 23 March 2015, Members may wish to form a Bills Committee to study the Bill in detail. The Administration has been requested to clarify certain legal aspects of the Bill. The Legal Service Division will continue with the scrutiny of the Bill.

II. REPORT

The date of First Reading of the Bill is 6 May 2015. Members may refer to the LegCo Brief (File Ref.: THB(T)CR 2/5591/75) issued by the Transport and Housing Bureau dated 22 April 2015 for further details.

Object of the Bill

2. The Bill proposes to amend the Peak Tramway Ordinance (Cap. 265) to provide for the grant and termination of the operating right of the peak tramway authorized by Cap. 265 (Peak Tramway) after 31 December 2015 and to regulate the operation of the Peak Tramway. The Bill also seeks to transfer certain powers or duties which are vested in the Secretary for Transport and Housing (STH) under Cap. 265 to the Secretary for Commerce and Economic Development (SCED) and to make consequential or related amendments.

Background

3. Section 2A(1) of Cap. 265 grants the right to run and operate the Peak Tramway to the Peak Tramways Company Limited (PTC) upon specified conditions for a period of 10 years commencing on 1 January 1984. Section 2A(2) provides that Secretary for Transport shall, upon specified conditions, grant to PTC the right referred to in section 2A(1) for a further period of 10 years commencing immediately after the expiration of the first such period. It was the understanding of the Government and PTC that sections 2A(5) and 2A(6) of Cap. 265 provided the necessary basis for the continued operation of the Peak Tramway beyond 2013, subject to the application by PTC, payment of a premium by PTC and approval by the Chief Executive (CE) in Council. However, it had come to the Government's attention that sections 2A(5) and 2A(6) were one-off provisions and would not allow further extensions of the operating right beyond 2013. Accordingly, the Peak Tramway (Amendment) Ordinance 2013 was enacted to add sections 2A(7) and 2A(8) to Cap. 265 to grant the operating right of the Peak Tramway to PTC for two years¹ (i.e. from 1 January 2014 to 31 December 2015). Meanwhile, the Administration would study and decide upon certain long-term arrangements for the operating right of the Peak Tramway during the two year period.

¹ Members may refer to paragraph 6(b) of the LegCo Brief (File Ref: THB (T) L 2/5/7) issued by the Transport and Housing Bureau dated 11 September 2013.

Key provisions of the Bill

Granting and termination of the Peak Tramway operating right

4. The Bill seeks to empower CE in Council to grant the operating right of the Peak Tramway commencing on or after 1 January 2016 to any applicant (that is a body corporate²) for such right after taking into account all the relevant matters. Such matters³ include whether the applicant will be able to maintain the Peak Tramway as an important tourism and recreational facility, the applicant's financial capability and its relevant experience and performance in operating the Peak Tramway or any similar facility. The operating right may be granted to a body corporate for a period not exceeding 10 years, subject to the terms agreed between the Government and the body corporate. Further, the operating right may be extended for not more than 10 years by the CE in Council if certain conditions are satisfied.

5. The Bill also seeks to provide for the termination of the operating right of the Peak Tramway. Under the Bill, CE in Council is empowered to terminate the said right before its expiry on the ground that the operator of the Peak Tramway is in default⁴. In case of such default or the operating right is to expire or is to be terminated under Cap. 265 and the right is not to be granted for a further period to the operator⁵, CE in Council may, under an "exit mechanism"⁶ proposed by the Bill, order the owner of any land, structure or building which is essential to the operation of the Peak Tramway to lease the said properties to a party designated by the CE in Council⁷. Further, under the said mechanism, CE in Council may order the owner of any equipment which is essential to the operation of the Peak Tramway to sell the equipment to a party designated by the CE in Council⁸.

² The term "body corporate" is defined in the Bill to mean a body corporate within the meaning of "company" in section 2(1) of the Companies Ordinance (Cap.622). Members may refer to the proposed section 2B(7) in the Bill.

³ See the proposed section 2B(3) of the Bill.

⁴ In gist, such default includes the failure to operate and maintain the Peak Tramway in a safe manner, the failure to comply with any term on which the operating right is granted, a petition is presented for the winding up of the operator under the Companies (Winding Up and Miscellaneous Provisions) Ordinance (Cap. 32) or the operator is insolvent or has passed a resolution for voluntary winding-up under section 228(2) of Cap. 32 (see the proposed section 8A of the Bill).

⁵ See the proposed section 11A of the Bill.

⁶ In gist, the mechanism consists of the provisions which are proposed under clause 15 of the Bill.

⁷ See the proposed section 11B of the Bill.

⁸ See the proposed section 11C of the Bill.

Transfer of powers or duties

6. The Bill proposes to transfer certain powers or duties which are vested in STH under Cap. 265 to SCED⁹. According to the Administration, the transfer is made in light of the fact that the Peak Tramway has become a tourism and recreational facility and, as such, the Administration considers that it is appropriate for the Commerce and Economic Development Bureau to be the policy bureau overseeing the facility. Further, the Bill proposes to confer certain powers on SCED in relation to a default of an operator of the Peak Tramway.

Other related or consequential amendments

7. In addition, the Bill seeks to make certain related or consequential amendments. Such amendments include changing the definition of the term "company" in Cap. 265 from "the Peak Tramways Company Limited" to "the body corporate to which the operating right is granted under Cap. 265" and adding Cap. 265 to the Schedule to the Lands Tribunal Ordinance (Cap. 17) so that the Lands Tribunal may determine any matter under Cap. 265 which is within the ambit of the Tribunal's jurisdiction that is conferred by Cap. 17.

Commencement

8. If the Bill is passed, except for clauses 5, 12(4) and 13¹⁰ of the Bill (which will come into operation on 1 January 2016), the Bill will come into operation on the day on which it is published as the Peak Tramway (Amendment) Ordinance 2015 in the Gazette.

Consultation with LegCo Panel

9. According to paragraph 19 of the LegCo Brief, on 23 March 2015, the Administration consulted the Panel on Economic Development, joined by members of the Panel on Transport, on the legislative proposal and the plan to negotiate with PTC with a view to grant to PTC the 10-year operating right of the Peak Tramway which will commence in January 2016. The Panel was supportive of the proposal and the plan and raised certain queries, including

⁹ See clauses 8 to 12, 16 to 21 and 24 of the Bill.

¹⁰ Clause 5 proposes to repeal section 2A of Cap. 265, which concerns the granting of the operating right to run the Peak Tramway to PTC. Clause 12(4) concerns the arrangements if the company which is granted the operating right of the Peak Tramway is in default under any condition which is provided in the proposed section 8A.

details of the exit arrangement which is proposed by the Bill. The Administration assured Members at the meeting that the exit mechanism is consistent with Articles 6 and 105 of the Basic Law.

10. Further, as advised by the Clerk to Panel on Economic Development, the Administration briefed the Panel on the legislative proposal concerning the long-term arrangements of the peak tramway operation at its meeting on 23 March 2015.

11. Considering that the proposed exit mechanism (in particular the mandatory lease/sale arrangements) might be subject to judicial review and legal challenges, some members expressed concerns on whether it was in conformity with Article 105 of the Basic Law. As advised by the Administration, the Department of Justice had studied the provisions relating to the proposed mandatory lease/sale arrangements under the exit mechanism and confirmed that they were in compliance with the Basic Law.

12. Members also expressed concerns on the queuing and waiting arrangement at the termini of the peak tramway, the regulation of peak tramway fares and the payment of premium by the future operator. In response, the Administration advised that PTC had already implemented measures to improve the queuing and waiting arrangements. As regards the said fares, the Administration considered it more appropriate for market forces to decide their levels. The Administration also advised that it was reviewing the practice of charging premium in one go and would appoint a financial consultant to advise the best way to charge the premium in the future.

Conclusion

13. In light of the concerns raised by Members at the meeting on 23 March 2015, Members may wish to form a Bills Committee to study the Bill in detail. The Administration has been requested to clarify certain legal aspects of the Bill. The Legal Service Division will continue with the scrutiny of the Bill.

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