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(Urgent by Fax)

19 April 2001

Ms Anita Ho
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Legal Service Division
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8 Jackson Road
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Dear Ms Ho

Fire Safety (Buildings) Bill

Thank you for your letter of 8 March. We have consulted the Department of Justice on your points raised. Our clarifications are set out in the Annex attached.

I hope you will find our response useful. Should you require further information, please feel free to contact us.

Yours sincerely,

(David Wong)
for Secretary for Security

Annex

Clause 3- definition of "domestic purposes" (住用用途)

The term "domestic"(住用) is adopted in the Fire Safety (Commercial Premises) Ordinance (Cap 502), while the term "domestic purposes "(住用用途) is adopted in the Buildings Ordinance (Cap 123). We consider that the current drafting is in order.

Clause 5 – Owner or occupier may be directed to comply with fire safety measures

Although “科技” is equally acceptable, we consider that "技術和工藝" is a more appropriate Chinese version of the term "technology".

Clause 7 – District Court may make orders prohibiting occupation of a building or part of a building

Article 22 of the Hong Kong Bill of Right Ordinance (Cap 383) ('BOR') mirrors Article 26 of the International Covenant on Civil and Political Rights ('ICCPR') and guarantees the right to equality before and equal protection of the law. Article 22 BOR provides that – 'All persons are equal before the law and are entitled without any discrimination to the equal protection of the law'. In this respect, it is provided that the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on grounds including property, birth or other status. Article 22 BOR therefore proscribes differential treatment based on, inter alia, the different status of the persons concerned unless the differential treatment is based on reasonable and objective criteria.

The policy intention of a prohibition order provision is to prevent occupation of premises which might present substantial fire risks and hence to protect public safety. If the prohibition order provision were to apply to non-domestic parts of composite buildings only, but not domestic parts of composite buildings nor pure domestic buildings, the statutory protection will only be offered to certain owners/occupiers of certain buildings but not others.

Arguments in favour of the exclusion of the application of the prohibition order provision from domestic parts of composite buildings and domestic buildings include the prevention of undue impact on the livelihood of those occupying those premises as well as a relatively lower fire risk involved. However, for the following reasons, these arguments do not constitute sufficient justification for the differential treatment.

Under clause 7(6)(e) of the Bill, the District Court will only exercise its discretion to make a prohibition order if it is satisfied that there could be substantial fire risks if the relevant building or part of a building is occupied. If due to a failure to comply with fire safety directions or fire safety compliance orders regarding a composite buildings, and as a result, the Court is satisfied that there could be substantial fire risks if the premises were continued to be occupied, we cannot see any reasonable and objective justification to support a provision which authorises the Court to issue a prohibition order in respect of the non-domestic part only of a building, while it is unable to do the same with the domestic part of the same building.

The differential treatment may also indirectly provide a disincentive to compliance with the fire safety directions or compliance orders by owners and occupiers of premises in domestic parts of composite buildings or domestic buildings. This may endanger life and property of occupants within the entire composite or domestic building.

Article 22 of BOR is to ensure equal protection of the law. The safety of the owners/occupiers of all parts of a composite building and domestic building should be protected by the law. In the absence of reasonable and objective justification, the differential treatment is inconsistent with Article 22 of BOR. Given that the purpose of the Bill is to provide better protection from the risk of fire for occupants and users of, and visitors to, composite buildings and domestic buildings (see clause 2 of the Bill), the differential treatment appears to run counter to the purpose of the Bill.

Although the proviso to section 128(1) of the Public Health and Municipal Services Ordinance (Cap 132) provides that a prohibition order made pursuant to that section shall not apply to premises or vessel used for the purpose of human habitation, each case has to be considered on its own merits. What may be sufficient to constitute justification in one case may not be sufficient to constitute justification in another case.

The court's power to issue prohibition orders is consistent with the provision of the Basic Law in relation to protection of residents' homes and other premises, Article 29. Under Clause 5(2) of the Bill, a separate fire safety direction will be served on each owner in respect of the part he exclusively occupies or on each co-owner in respect of the part he does not exclusively occupy (i.e. the common areas). For example, in respect of the fire safety measures required to be implemented inside a private unit (e.g. sprinklers inside a non-domestic unit), the owner of that unit will receive a fire safety direction. In respect of the fire safety measures required to be implemented within the common areas (e.g. the protection of staircases), each of the co-owners will receive a separate fire safety direction. It is possible for the court to issue a prohibition order in respect of a certain part of a building only (e.g. in respect of a non-domestic unit without sprinkler installation). It is also possible for the court to issue prohibition orders in respect of the whole building if circumstances so warrant. There would be no arbitrary interference of a residents' home/premises in violation of Article 29 of the Basic Law. The provision is clear such that the power will only be exercised in circumstances where the issue of a prohibition order is rational and proportionate to protect a legitimate purpose, viz. public safety.

The issue of prohibition orders is also consistent with Articles 6 and 105 of the Basic Law in relation to protection of property rights, in that it is in accordance with law, accessible, sufficiently certain and not arbitrary, and justified subject to the “fair balance” test established in human rights jurisprudence. We are satisfied that, in devising the scheme as contained in the Bill, we have struck a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual’s fundamental rights. The means employed are proportional to the aim sought to be realised, as reflected in -

- cl. 2 - the purpose of the Bill is for public interest i.e. to provide better protection from the risk of fire;
- cl.5(8) - failure to comply with fire safety direction is subject to a “reasonable excuse” defence;
- cl.7(6) - the imposition of prohibition orders must be reasonable, necessary and in case of substantial fire risk;

- cl. 13 - the relevant order is issued by the court, with right given to the affected to apply for revocation; and
- cl. 14 - the enforcement officer shall cause to be registered against the land register a revocation of the relevant prohibition order or a certificate of compliance.

In general, temporary dispossession is not regarded as deprivation. In view that the prohibition order is revocable and that financial assistance would be made available to owners affected by the Bill under a revised loan scheme (see para.17 of the LegCo Brief), it is unlikely that the prohibition order would amount to deprivation of property and result in payment of compensation under Article 105 of the Basic Law.

Finally, in exercising its power to grant the Order under clause 7(6), the court is bound to take into account the property rights of the owners. In this connection, the proportionality requirement has already been adequately addressed in clause 7(6)(d), under which the court is required to be satisfied that it is reasonable and necessary in the circumstances to make the order.

In line with Government policy on the removal of unauthorised building works, occupants rendered homeless by Government's statutory actions will be offered alternative housing accommodation by the Housing Department.

Clause 8 – Effect of prohibition order

Clause 8(1)(a)(iii)

This provision is identical to s.8A(1)(a)(iii) of the Fire Safety (Commercial Premises) Ordinance (Cap 502). It provides an avenue for the enforcement authority, under certain circumstance, to immediately revoke or cancel the permission granted under subparagraph (ii). These circumstances may include the existence of undue or substantial fire risk, unreasonable delay in implementing measures necessary for the discharge or revocation of the prohibition order, misuses of the permission, etc. As a matter of good practice, the enforcement authority would cancel the permission in writing and give reasons.

Clause 8(3)

There is no difference in meaning between the two versions.

Clause 14 – Registration of notice of fire safety compliance order, etc. in the Land Registry

The registration of a fire safety compliance order or a prohibition order against the land register is meant to provide an added incentive for owners to comply with the requirement under the Bill. There are no such statutory provisions in the Fire Safety (Commercial Premises) Ordinance. At present we are satisfied with the progress of implementation of the Fire Safety (Commercial Premises) Ordinance and do not consider it necessary to add a similar incentive in that Ordinance.