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中華人民共和國香港特別行政區政府總部衛生福利及食物局
 Health, Welfare and Food Bureau
 Government Secretariat, Government of the Hong Kong Special Administrative Region
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 Our ref.: (35) to HWF CR 1/4051/05
 Your ref.: LS/B/23/04-05

17 May 2005

Assistant Legal Adviser
 (Attn: Mr Stephen Lam)
 Legislative Council Building
 8 Jackson Road, Central
 Hong Kong
 (Fax: 2877 5029)

Dear Mr Lam,

Public Health and Municipal Services (Amendment) Bill 2005

I refer to your letter of 4 May 2005. Our comments on the questions you raised are attached for your perusal please.

Yours sincerely,

(Vincent Liu)

for Secretary for Health, Welfare and Food

Encl.

c.c.

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|------|------------------------|-----------|
| DoJ | (Attn: Mr Alan Chong) | 2869 1302 |
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Public Health and Municipal Services (Amendment) Bill 2005

Clause 2(a)

(a)(i) The term "contractor" is intended to refer to all contractors registered under the Buildings Ordinance (Cap. 123) in respect of a "building site". A contractor responsible for the renovation or maintenance of a building or flat will not be included as the premises concerned are not treated as a building site.

(a)(ii) The term "contractor" is intended to refer to all contractors registered under the Buildings Ordinance (Cap. 123) (which include "registered general building contractor" and "registered specialist contractor") in respect of a "building site".

(a)(iii) The expression "has entered on the site" has the meaning of occupying the site. "Occupy" is defined in the Interpretation and General Clauses Ordinance (Cap. 1).

(b) The Food and Environmental Hygiene Department will consider that potential mosquito breeding grounds will pose a mosquito-related health hazard if they are found within 500 m radius of a dengue fever patient or 2 km radius of a malaria patient or Japanese encephalitis patient (local case only) or in areas where Area Ovitrap Indices are above 40%.

There are a large number of mosquito-borne diseases which constitute a danger to human health and can be fatal, but many of them are of little public health significance to Hong Kong because they rarely appear or have never appeared in Hong Kong. The mosquito-borne diseases of local concern include Malaria, Japanese encephalitis, dengue fever, yellow fever, West Nile disease, etc.

(c) Our experience shows that the owner or occupier is often paying less attention to common parts of a building and hence common parts are likely to have a higher risk of mosquito breeding. In the absence of an owners' corporation, common parts of a building will be under the joint care of all occupiers/owners of the building or body of persons engaged by the occupiers/owners of the building for managing the property

(management body). FEHD has to go through the lengthy process of identifying all the occupiers/owners for the purpose of issuing a notice to each of them, which requires them to carry out anti-mosquito actions. In a scenario where the housing estate is managed by an independent management body, it is presently not possible for FEHD to take enforcement action against the management body, since section 27 of the Ordinance only imposes legal liability upon the occupiers, or in their absence, the owners of the premises concerned. FEHD can only seek the co-operation of the management body to take remedial actions to prevent mosquito breeding. To impose a legal duty upon the management body will make it act responsibly for the good of the owners, occupiers and the public.

Clause 2(b)(i)

(a) It is the policy intent that the Authority may decide on whom a notice is to be served. Where the premises are occupied, holding the occupier responsible is most efficient. Where the premises are unoccupied or the occupier is absent from Hong Kong, the owner should still be taken to have a duty of care over the premises. The Authority should have legal discretion to address various and complicated scenarios while in the meantime expressly making available a defence under the new section 27(2).

(b) The premises concerned will only become a building site after a contractor has been registered in respect of the premises or, where the premises are owned by the Government, a contractor has been appointed in respect of the premises and has entered the same.

Hence, if there is no contractor registered in respect of the premises concerned, the notice will, depending on the circumstances, be served on any one or more of the following persons: the occupier of the premises, the owner of the premises and the person responsible for the management of the premises.

Where the premises are owned by the Government, as the provision does not bind the Government, no notice will be served on the Government. Notice may, however, be served on the occupier of the premises or the

person responsible for the management of the premises provided that the occupier or the person does not occupy or manage the premises in the capacity of a Government official.

Clause 2(c)

(a) The premises concerned will only become a building site after a contractor has been registered in respect of the premises or, where the premises are owned by the Government, a contractor has been appointed in respect of the premises and has entered the same.

Hence, if there is no contractor registered in respect of the premises concerned, the notice will, depending on the circumstances, be served on any one or more of the following persons: the occupier of the premises, the owner of the premises and the person responsible for the management of the premises.

Where the premises are owned by the Government, as the provision does not bind the Government, no notice will be served on the Government. Notice may, however, be served on the occupier of the premises or the person responsible for the management of the premises provided that the occupier or the person does not occupy or manage the premises in the capacity of a Government official.

(b)(i) The scope of the reference to "any article capable of causing accumulation of water which allows the breeding of mosquitoes" is not wider in meaning than that of the expression "any accumulation of water ... likely to contain larvae or pupae of mosquitoes" in the existing section 27(1) of Cap. 132. Instead, those references relate to different scenarios.

The former one concerns the case where there is such article which may cause mosquito breeding problem if allowed to exist. No accumulation of water is in existence for the time being. The relevant provision is intended to deal with places where there are articles capable of causing accumulation of water, such as the piling of tyres, so that preventive measure can be swiftly taken.

The latter one, however, concerns the case where there is, or is likely to be, an accumulation of water which contains larvae or pupae of mosquitoes.

(b)(ii) As stated above, the above reference is not wider in meaning.

(c) Section 126 of Cap. 132 will be applicable if the Authority is to exercise the powers through entry.

Clause 2(d)

(a) Such defence should not be available in a case where an offence is committed when required steps are not taken. It should only apply in relation to a state of affairs which may exist despite all reasonable steps taken by a person. In the circumstances, the defence afforded by the new section 27(2A) of Cap. 132 is only necessary for the case where a person is charged under the amended section 27(2)(a) of Cap. 132 in relation to a requirement referred to in section 27(1)(a). A person who has taken all reasonable steps for the purpose of removing the accumulation of water from a piece of open land may still fail to remove the accumulation of water owing to continuous heavy rainfall.

(b)(i) Section 126 of Cap. 132 will be applicable if the Authority is to exercise the powers through entry.

(b)(ii) By reference to the provision of the existing section 27(1) of Cap. 132, it is appropriate to add to the new section 27(2B)(a) of Cap. 132 the following new sub-paragraph:

"take such other action as he considers necessary to prevent the existence of larvae or pupae of mosquitoes upon the premises."

The Administration will move CSAs in respect of the above sub-paragraph and the related amendment in due course.

(c) Section 126 of Cap. 132 will be applicable if the Authority is to exercise the powers through entry.

Clause 2(e)

(a) Section 27(3) is a strict liability offence, subject to the common law defence of honest but erroneous belief that the Ordinance has been complied with.

(b)(i) The premises concerned will only become a building site after a contractor has been registered in respect of the premises or, where the premises are owned by the Government, a contractor has been appointed in respect of the premises and has entered the same.

Hence, if there is no contractor registered in respect of the premises concerned, the premises are not a building site and the new section 27(3) shall apply. The person whose act, default or sufferance the existence of larvae or pupae on the premises is attributable to shall be guilty of an offence.

Where the premises are owned by the Government, the person whose act, default or sufferance the existence of larvae or pupae on the premises is attributable to may be guilty of an offence provided that the person is not acting in the capacity of a Government official.

It should be pointed out here that even if section 27(3A) is applicable to a building site, this does not exonerate the person whose act, default or sufferance the existence of larvae or pupae on the premises is attributable to.

(b)(ii) Section 27(3A) is a strict liability offence, subject to the common law defence of honest but erroneous belief that the Ordinance has been complied with.

(b)(iii) The term "the appointed contractor" is defined for the purposes of section 27 of Cap. 132 and is referred to in the definition of "the person responsible for the premises" so far as "building site" is concerned. The term is hence only relevant where the premises concerned consist of a "building site". For the purposes of section 27, the "site" referred to in the definition of "the appointed contractor" shall mean the "building site".