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Dear

Public Health and Municipal Services (Amendment) Bill 2008

We have further questions on the new section 78H and would be grateful for your clarification.

Under the new section 78H(1), a person bound by a section 78B order may apply for an amount of compensation, which is subject to certain limits (as revised by a proposal in the Administration's paper vide LC Paper No. CB(2)466/08-09(01)), if –

(a) an appeal has been made and the Municipal Services Appeals Board (MSAB) has varied or set aside the order; and

(b) the person proves that-

(i) the Authority, i.e. the Director of Food and Environmental Hygiene did not have reasonable grounds to make the order at the time of making the order; and

(ii) the person has suffered loss as a result of the order, etc.

Is it the policy intent that the statutory scheme will deprive the person bound by a section 78B order of his ordinary rights of action generally or only as regards matters within the scope of the provision?

For instance, a person bound by a section 78B order has made an appeal against the order to the MSAB. The MSAB is established under the Municipal Services Appeals Board Ordinance (Cap. 220) which does not prescribe the grounds on which the MSAB could vary or set aside an appeal. Presumably, in this scenario, the MSAB sets aside a section 78B order on a ground other than the unreasonableness of the Authority's decision to make the order. The MSAB may find that there was bad faith on the part of the Authority when making the order. There exists an independent tort of misfeasance by a public officer in the exercise of his power. The person bound by a section 78B order is highly improbably, in light of the MSAB's finding, to prove under the new section 78H(1)(b)(i) that the Authority did not have reasonable grounds to make the order. The question here is, by introducing a statutory scheme of compensation under the new section 78H, whether it is the policy intent that the person bound by a section 78B order could or could not bring another proceedings against the Authority for misfeasance by a public officer. If the answer is that the person bound by a section 78B order could not take proceedings against the Authority for breach of common law duties, the scope of the new section 78H(1)(b)(i) may not be wide enough to achieve the policy intent. Because the provision only covers the ground of unreasonableness of the Authority's decision. There may be possibilities, (unless you are for sure that once a decision of the Authority is reasonable, there will not be possibility for him to be in breach of any common law duties) that a decision of the Authority may be reasonable but is still subject to challenge on grounds for breach of common law duties. If the answer is that the person bound by a section 78B order could bring proceedings against the Authority for breach of common law duties, you may confirm whether it is the policy intent that in such circumstance the person may get compensation, among other things, better than that under the revised compensation scheme.

Yours sincerely,

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