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By Fax (2147 5834)

19 March 2010

Miss Katharine Choi
Principal Assistant Secretary for the Environment (Energy)
Environment Bureau
46/F, Revenue Tower
5 Gloucester Road
Wan Chai
Hong Kong

Dear Miss Choi,

Buildings Energy Efficiency Bill

I am looking at the legal and drafting aspects of the Buildings Energy Efficiency Bill and would be grateful if you let me have your advice on the questions as per attached in bilingual form before 29 March 2010.

Thank you.

Yours sincerely,

Kitty Cheng
Assistant Legal Adviser

Encl

c.c. CCS(1)1

Buildings Energy Efficiency Bill

Clause 2 – Interpretation

Air-conditioning installation

1. Does the definition of "air-conditioning installation" which means fixed equipment, distribution network or control devices that cool down, heat up, humidify, dehumidify, purify *or* distribute air within a building include equipment, network or devices performing more than one of these functions within the building (e.g. air-conditioning installation with both air cooling and heating functions)?

Common area

2. Do car parking spaces or staircases (e.g. inside a duplex unit) which have been specified in an instrument registered in the Lands Registry as being for the exclusive use, occupation or enjoyment of an owner fall within the definition of "common area"?

3. Do "staircases" and "corridors" referred to in paragraph (b) of the definition of "common area" cover "internal corridor" and "internal staircase" referred to in the definition of "unit" (paragraph (a)(ii))?

Composite building

4. "Composite building" means a building that is partly for residential use / industrial use / commercial use and partly for non-residential / non-industrial / non-commercial use (as the case may be). Please explain the intended application of "residential use", "industrial use" and "commercial use".

5. Please also advise whether the interpretation of the terms "commercial building", "industrial building" and "residential building" as provided in clause 2 of the Bill has any bearing on the interpretation of "residential use", "industrial use" and "commercial use" in relation to composite building.

Developer

6. "Developer", in relation to a building, means the owner of the land on which the building is built. The Bill seeks to impose various duties of buildings energy efficiency on developers and to create offences for breach of these duties. Please advise how joint owners of a land, whom are considered "developer", will be treated under the Bill in terms of duties and penalties.

Industrial building

7. "Industrial building" means, amongst other things, a building in which "materials are transformed". Please explain the meaning of "transformed".

Railway station

8. Please explain why a designated rail stop of the North-west railway as defined in the Mass Transit Railway Ordinance (Cap. 556) is excluded from the definition of "railway station".

Clause 6 – Jointly owned etc. building

9. Clause 6 seeks to provide that if a building or common part of a building is jointly owned by 2 or more persons, compliance with a requirement imposed under the Bill by one of the joint owners is regarded as compliance with the requirement by every other joint owner. However, what will be the treatment of the joint owners in terms of criminal liability if a requirement is not complied with?

Clause 7 – Application of Part 2

10. Please explain the meaning of "superstructure construction" and provide examples of other legislation in which the term is used in relation to building works.

Clause 9 – Declaration at occupation approval stage

11. Clause 9(2) requires a registered energy assessor to "personally inspect" the building services installation covered by the certification with regard to a stage two declaration. Personal inspection requirement is also imposed on the registered energy assessor under other clauses, e.g. clauses 13(3) and 18(1)). Please explain why the relevant inspection duty is non-delegable (for example, to other professional

colleagues within the same professional firm) but not so in some other provisions of the Bill.

12. A developer of a building must make and submit a stage two declaration to the Director of Electrical and Mechanical Services ("the Director") within 4 months after the occupational approval is issued. Clause 9(4) provides that the Director may require the developer to furnish any further information that the Director considers reasonably necessary "for the purposes of considering *the making of* the declaration". Under clause 13(4), with respect to an application for renewal of a Certificate of Compliance Registration, the Director may require the owner of the relevant central building services installation to furnish any further information that the Director consider necessary "for the purposes of considering the application".

13. Please explain why different drafting formulae are adopted in the above situations.

14. Is there any time limit for the Director to require the developer to furnish further information about the stage two declaration under clause 9(4)?

Clause 10 – Certificate of Compliance Registration

15. If the Director refuses to issue a Certificate of Compliance Registration to a developer, he must issue a notice of refusal as soon as reasonably practicable (clause 10(3)). On the other hand, is there a time requirement for the Director to issue of a Certificate of Compliance Registration?

Clause 11 – Register of buildings issued with Certificate of Compliance Registration

Clause 31 – Register of registered energy assessors

16. Under clause 11(3), the Director must make a register of building issued with a Certificate of Compliance Registration available for members of the public to inspect free of charge at all reasonable times. What will be the means for making the register available to the public?

17. Please also advise on the similar provision for register of registered energy assessors under clause 31.

Clause 12 – Duties of owners and responsible persons of building with Certificate of Compliance Registration

18. Clause 12(2) requires that the owner of a building must ensure that the central building services installations in the building are maintained to "a standard not lower than" that applied in the first Certificate of Compliance Registration issued in respect of the building. The Certificate of Compliance Registration is issued on submission of a stage two declaration. The stage two declaration declares that all building services installations provided by the developer have been designed, installed and completed in the accordance with the specified standards and requirements (clause 9) as set out in a code of practice (clause 2 interpretation).

19. It seems that whether the owner of a building complies with clause 12(2) largely depends on the interpretation of the standards as set out in the relevant code of practice. In the *Code of Practice for Energy Efficiency of Electrical Installations 2007*, for example -

"Requirements for efficient utilisation of power

5.1 Lamps and Luminaries

All lamps and luminaries forming part of an electrical installation in a building should *preferably* comply with the latest edition of Code of Practice for Energy Efficiency of Lighting Installations.

5.5 Power Factor Improvement

... The correction device should be installed at the source motor control centre or distribution board just upstream of the circuit in question... .

5.6 Other Good Practice

5.6.1 Office consumers *should be encouraged* to select and purchase office machinery/equipment ... complete with 'power management' or 'energy saving feature' which...".

20. The standards contained in the provisions of the above Code of Practice do not seem to be absolute or numerical standards. Please explain what would be expected with respect to the requirement of "maintained to a standard not lower than" in clause 12(2).

21. Please also explain the above in the light of the similar requirement under clauses 12(3)), 13(2)(c) and 18(2).

Clause 13 – Renewal of Certificate of Compliance Registration

22. Who may apply for a renewal of Certificate of Compliance Registration under clause 13?

23. Whilst the renewed certificate is effective from the date of expiry if the application is made during the preceding 12 months, is there a time frame for such application?

Clause 15 – Exemption from specific standards and requirements

24. Is there a time frame or time limitation for applying for exemption of building services installation?

Clause 17 – Duty to obtain Form of Compliance for major retrofitting works

25. Clause 17(3) provides that major retrofitting works are regarded as completed when "the works have been carried out and the installation is ready to be used for its principal function as designed". Please explain (and illustrate with examples if possible) the meaning of "its principal function as designed".

26. Please consider review the Chinese text of clause 17(1) that "就服務某建築物的任何單位或公用地方" as it does not seem to give an apt translation of the English text "major retrofitting works... *that serves* any unit or common area of building..." in the particular context.

27. Please also review the word "即" in the Chinese text of clause 17(4), which denotes "immediately" and may not be consistent with the English text. You may refer to clause 9(5), a similar provision for extension of time, the Chinese text of which does not contain the word "即".

Clause 25 – Exemption from energy audit requirement

28. Is there time limitation for applying for exemption from energy audit requirement?

Clause 29 – Powers of authorized officers

29. Are the powers of entry and inspection exercised by the authorized officers under clause 29(1) subject to any time prescription?

30. What is meaning of "residential unit" in clause 29(1)(a)?

31. Who will be the "any assistant" taken by the authorized officer in the exercise of the authorized officer's powers under clause 29(2)?

32. Clause 29(4) provides that a person who knowingly or recklessly provides any false or misleading information commits an offence and is liable on conviction to a fine at level 6 (\$100,000) and to imprisonment for 6 months. Clause 49(1) provides for a similar offence and penalty for a person who knowingly or recklessly provides any false or misleading information to procure the registration of any person as a registered energy assessor. However, under clause 49(2) a registered energy assessor who knowingly or recklessly issue any Form of Compliance or Energy Audit Form or make any certification that is *false or misleading in any material particular* commits an offence with same level of penalty.

33. Please explain whether or not clauses 29(4) and 49(1), as compared with clause 49(2), imposes a less stringent requirement on the prosecution, and if so, the reason for the different treatment for these provisions.

(**You may wish to note that under section 45(1) of the Genetically Modified Organisms (Control of Release) Ordinance (Ord. No.7 of 2010), the same level of penalty is imposed on a person who furnishes any information for certain purposes of that Ordinance that he knows or believes to be misleading *in a material particular*.)

Clause 32 – Appeal to appeal board

34. Clause 32(2) provides that an appeal against a decision or direction does not suspend the decision or direction unless the Director decides otherwise. Is there a time frame within which the Director should decide whether or not to suspend the decision or direction pending an appeal?

Clause 37 – Hearing of appeal

35. Under clause 37(3), an appeal board may engage any barrister or solicitor to attend a hearing of the board to advise on any matter relating to the appeal. In the context of professional duty, who is the client(s) of the barrister or solicitor "engaged" by the appeal board? Does the solicitor or barrister owe any professional duty to advise the appellant or the Director on matters relating to the appeal?

36. Clause 37(7) provides that no person to whom a direction is given to attend before the board and give evidence "is bound to incriminate" himself. Can that person refuse to give evidence which "tend to incriminate" himself?

37. Furthermore, if that person is not a party to the appeal, does the law of self-incrimination apply?

Clause 39 – Determination of appeal

38. Clause 39(2) provides that an appeal board may make any order with regard to the payment of (a) costs of the appeal proceedings; *or* (b) costs of the Director or any other person in the proceedings. Are sub-clauses (a) and (b) to be read disjunctively?

Clause 40 – Code of Practice

39. Are there any consultation requirements (whether legal or administrative) to be fulfilled before the Director issues or approves any code of practice?

Clause 47 – Issue of notice, etc

40. Clause 47(1) provides for the issue and submission of notice or document required under the Bill. Does the "company" under clause 47(1)(c) refer only to companies registered under the Companies Ordinance (Cap. 32)? What is the "body corporate other than a company" under clause 47(1)(d)?

41. Please explain how to determine who is "a person apparently concerned in the management of" the body/partnership (clause 47(1)(d) and (e)).

Clause 50 – Defence of due diligence

42. Under clause 50, if a defence of due diligence involves an allegation that the offence was due to the act or default of another person or reliance on information given by another person, the defendant is not, without the leave of the court, entitled to rely on the defence unless he has issued a notice in accordance with the procedure set out in this clause at least 7 working days before the hearing.

43. What is the reason for the above special procedure in this type of court proceedings? Is same type of procedure in relation to criminal proceedings provided in other ordinances?

Schedule 1

44. What is meaning of "occupied predominantly" in paragraphs 7, 8, 9, 10 and 11?

45. Is there any difference between the word "predominantly" and words such as "principally" and "primarily" used in other legislation in relation to occupation or use of premises?

46. What is the meaning of "community building" in paragraph 8?

47. Please also review the Chinese text of paragraphs 8 and 9 ("主要作社區/市政用途而佔用的建築物"). It seems to refer to the "use of the building", which may be inconsistent with the English text ("[b]uilding that is occupied predominantly as community building / municipal services building..."). You may also wish to review bilingual texts of paragraphs 10 and 11.

Schedule 3

48. What is the legal effect of the "Notes" which appears below paragraph 2?

49. Is the reference "carpark" in paragraph (1) of the Notes same as "car parks" in the definition of "common area" in clause 2?