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20 July 2010

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The Law Society of Hong Kong
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By Fax (2845 0387) and By Mail

Dear Ms Chu,

Buildings Energy Efficiency Bill

Thank you for your letter of 9 July 2010, enclosing further views of the Law Society of Hong Kong ("Law Society") on the Buildings Energy Efficiency Bill ("the Bill"). We would like to provide our comments in the ensuing paragraphs.

Civil consequences of non-compliance of the Bill

2. The Administration maintained the view that it is not a common practice to put civil consequence in legislation. The Bill only mandates the compliance with codes of practice promulgated by the Electrical and Mechanical Services Department concerning the energy efficiency of certain types of buildings services installations. For existing legislation, e.g. the Building Ordinance (Cap. 123) which governs, among other things, the safety of buildings (which is a more serious matter than energy efficiency), the civil consequences of breaches among private parties are

also not provided for by means of legislation.

3. The Administration is now devising a detailed publicity plan. We will employ a wide range of publicity measures to enhance public awareness on requirements under the Buildings Energy Efficiency Ordinance, when enacted. It is always the liberty of interested parties of real estate transactions to determine whatever additional conditions to be included in the agreements.

Records of Certificates of Compliance ("COCR"), Forms of Compliance ("FOC") and Improvement Notices ("IN") and duties and responsibilities of a subsequent owner and responsible person

4. Issues regarding the records of COCR, FOC, IN and the duties and responsibilities of subsequent owners and responsible persons have already been thoroughly discussed at the Legislative Council Bills Committee.

5. The Bills Committee recommended and the Administration agreed to include a daily fine of $10,000 at clauses 8 and 9 of the Bill, so that a developer failing to make declarations under the two provisions will be liable to a heavier penalty. As explained in our earlier response, it is the responsibility of a developer to make declarations under clauses 8 and 9 of the Bill. A subsequent developer who has purchased the whole development project has duty to ensure compliance of clauses 8 and 9 if his predecessor fails to do so. In case the developer fails to obtain a COCR, we do not propose to shift the burden to building owners as it should be the developers' legal responsibility to do so. Hence, with the endorsement of the Bills Committee, the Administration is prepared to amend clause 12 of the Bill to make it clear that only the owners of a building issued with a COCR have a duty to ensure that a COCR is in force at all times.

6. That said, the Administration envisages that it would be very unlikely that a developer would fail to make declarations under clauses 8 and 9, as the cost of compliance is low as compared to the overall construction cost of a building, and the enhanced penalty level (with daily fine as suggested by the Bills Committee) should provide a strong deterrent effect. It would also be the potential buyers' interests to ascertain whether a COCR has been issued for a building before they acquire the building or any units of the building.

FOC and IN

7. Clause 19 of the Bill has already provided a means for owner or responsible person to apply to the Director of Electrical and Mechanical Services ("DEMS") for a duplicate of the FOC. A potential buyer should always ascertain with the existing owner whether a FOC has been issued and whether it is complied with. Failure of the existing owner or responsible person to disclose shall be dealt with among the parties in accordance with the law of contract where appropriate.

8. As explained earlier at our response to Law Society's submission, clause 26(6) of the Bill provides that if an IN is issued to a developer, owner or responsible person ("the former party") by DEMS but before the period specified in the IN expires and before any contravention of the concerned is remedied, another person replaces the former party as the developer, owner or responsible person, then the former party must inform DEMS within seven days after the change and the IN issued to the former party ceases to have effect. The former party commits an offence if he fails to notify DEMS, without reasonable excuse, of the change.

9. In any case, according to clause 26(6)(b), an IN issued to a former party will not apply on a subsequent owner or responsible person, as the latter may replace the installation concerned when they move in. We do not agree with the Law Society's submission that *"For IN, the responsibility to comply can be shifted onto the purchaser while the vendor will be gone."* and *"clause 26(6) of the Bill serves to protect the vendor and facilitates the issuance of a new IN on the purchaser only"*. We consider that clause 26(6)(b) essentially protects the interests of subsequent owners or responsible persons.

10. The Administration has advised the Bills Committee that for those responsible persons who intend to use the existing building services installations in that unit which have been left by their predecessors, they must ensure that such installations meet the requirement in clause 12(3). In doing so, it is advisable for the responsible person to seek advice from a registered energy assessor to ensure compliance. DEMS will keep a register of registered energy assessors and such information would be available in the website of EMSD. As mentioned at paragraph 3 above, the Government will strengthen public education on the new requirements after the enactment of the Ordinance.

Liabilities under the Bill

11. Regarding the owners' liabilities under the Bill, it should be noted that clause 50 of the Bill provides for the defence of due diligence. It is a statutory defence for a person who is able to show that he has taken all reasonable steps and exercised all due diligence to avoid committing an offence under the Bill . Hence, before an interested party enters into any transaction, he should make every endeavour to seek all relevant information and clarification from existing developer, owner or responsible person where appropriate. On the other hand, in order to ascertain whether a particular building services installation meets the required standard at COCR or FOC (if issued), the interested party should seek professional advice from a registered energy assessor.

Issues regarding Land Grant

12. As the Administration indicated to the Law Society at our meeting in January 2010 and at our response to Law Society's submission, if a land grant contains terms requiring the grantee to comply with all laws and regulations from time to time in force in Hong Kong, and that the breach of a term of the land grant would entitle the Government to exercise the right of re-entry, then non-compliance with the Bill would entitle the Government to re-enter the land as a matter of its contractual right. It is common for a land grant to contain such caveat. We could not see any case to depart from such practice for the captioned Bill. It is indeed always the grantee's duty to ensure compliance with all laws and regulations from time to time in force in Hong Kong.

13. The right of entry is only one of the various actions the Government may take under a land grant. In any event, where a memorial of re-entry has been registered in the Land Registry, the former owner of the land may consider petitioning the Chief Executive and / or applying to the Court of First Instance for relief against the re-entry under section 8 of the Government Rights (Re-entry and Vesting Remedies) Ordinance (Cap. 126).

Yours sincerely,

(Miss Katharine Choi)
for Secretary for the Environment

c.c.
Bills Committee on the Buildings Energy Efficiency Bill
(Attn: Miss Becky Yu)