

**President's ruling on Committee stage amendments to
the Buildings (Amendment) Bill 2010
proposed by Hon KAM Nai-wai**

Hon KAM Nai-wai has given notice to move Committee stage amendments (“CSAs”) to the Buildings (Amendment) Bill 2010 (“the Bill”), if the motion for the Second Reading of the Bill is agreed to at the meeting of the Legislative Council (“LegCo”) of 29 June 2011. Before considering the admissibility of the CSAs under the Rules of Procedure, I invited the Administration to comment on the CSAs and Mr KAM to respond to the Administration’s comments.

Relevant rule of the Rules of Procedure

2. In commenting on Mr KAM’s CSAs, the Administration submits that they are in breach of Rule 57(6) of the Rules of Procedure, which provides that an amendment, the object or effect of which may, in the opinion of the President, be to dispose of or charge any part of the revenue or other public moneys of Hong Kong shall be proposed only by the Chief Executive; or a designated public officer; or a Member, if the Chief Executive consents in writing to the proposal.

Object of the Bill

3. According to the LegCo Brief on the Bill, the introduction of the Bill is for the implementation of a mandatory building inspection scheme (“MBIS”) and a mandatory window inspection scheme (“MWIS”). As set out in the Explanatory Memorandum of the Bill, the object of the Bill is to amend the Buildings Ordinance (“BO”) (Cap. 123) and its subsidiary legislation to –

- (a) provide for matters relating to the regular inspections of buildings and the windows in buildings, and the associated repairs, to prevent the buildings and windows from becoming

unsafe;

- (b) provide for matters relating to the appointment, control and duties of persons who are to deal with those inspections and repairs;
- (c) introduce two categories of persons, that is, registered inspectors (“RIs”) and qualified persons (“QPs”), who are to deal with those inspections and repairs;
- (d) repeal certain existing provisions in BO that provide the decision of the Court of First Instance on appeal is final; and
- (e) make some related, consequential and other minor amendments.

Hon KAM Nai-wai’s CSAs

4. Mr KAM’s CSAs seek to –

- (a) amend clause 19 of the Bill (to add subsection (2A) to the proposed section 30D) to require RIs to comply with the “practice note for registered inspectors regarding the prescribed inspection or supervision of the prescribed repair relating to the best practices on tendering procedures for engagement of registered inspectors and registered contractors”;
- (b) amend clause 19 of the Bill (to add subsection (1B) to the proposed section 30E) to require QPs to comply with the “practice note for qualified persons regarding the prescribed inspection, prescribed repair or supervision of the prescribed repair relating to the best practices on tendering procedures for engagement of qualified persons and registered contractors”; and

- (c) amend clause 27(8) of the Bill (to add subsection (2ADA) to the proposed section 40(2AD)) to provide that non-compliance with the practice note by RIs and QPs is an offence punishable by a fine.

The Administration's comments

5. The Administration submits that statutory planning, design and construction standards and requirements for buildings as well as the penalties for violation are stipulated in BO and its regulations, and that to guide the persons involved to meet these statutory standards and requirements and to advise them on the prevailing best practices, the Buildings Department (“BD”) issues practice notes, codes of practice and guidelines from time to time. The Administration points out that these documents are administrative in nature and are for reference by professionals as well as members of the general public. It is not the objective to make it a requirement that they must be adopted, and non-compliance with the best practices set out in these documents does not and should not constitute violation of BO.

6. The Administration also points out that the practice note referred to in Mr KAM’s CSAs is entitled “Best Practices on Tendering Procedures for Engagement of Registered Inspectors/Qualified Persons and Registered Contractors under the Mandatory Building Inspection Scheme (MBIS) and the Mandatory Window Inspection Scheme (MWIS)”, which makes reference to the guidelines on building maintenance works published jointly by the Hong Kong Housing Society (“HKHS”) and the Urban Renewal Authority (“URA”)¹. The practice note advises RIs and QPs to adopt the best practices on tendering procedures as stipulated in HKHS/URA’s guidelines, and highlights the relevant parts of HKHS/URA’s guidelines.

¹ The document was jointly published based on the experience gained by HKHS and URA in implementing Operation Building Bright, which is a one-off scheme introduced by the Administration at the time of the 2008 financial tsunami to increase job opportunities particularly in the construction sector and to provide financial assistance to help building owners repair their buildings.

7. The Administration argues that if Mr KAM's CSAs are passed, it will become a statutory requirement for RIs and QPs to follow the practice note in question and BD's statutory duty will be expanded to cover this new area of work. The Administration submits that BD does not have a staff establishment with the required expertise to take up this new area of work which involves building management, ethical and private contractual matters. For BD to take up this new area of work, BD will have to establish a special team with appropriate expertise and training to monitor compliance with the practice note by RIs and QPs.

8. The Administration further argues that this new area of work will be resource-intensive in that to check compliance with the practice note by RIs and QPs, the special team will have to examine the tender documents and declarations submitted by RIs, QPs or registered contractors and ascertain whether the practice note is complied with. If anomalies are discovered, follow-up actions including further investigations, gathering of evidence and disciplinary/prosecution proceedings may have to be carried out. The Administration submits that the involvement of building professionals in tendering is not a straightforward issue as the final decision in adopting what form of tendering rests with the owners' corporations or building owners concerned, and in many cases, the RIs and QPs may also have reasonable excuse in not strictly following the practice note. BD would therefore have to collect evidence and hear the explanations they have to advance.

9. The Administration estimates that six professional officers (\$3,300,300 recurrent expenditure a year)² are required to check tender documents and to take any necessary follow-up action for cases with irregularities, one professional officer (\$550,050 recurrent expenditure a year) is required to follow up the necessary disciplinary/prosecution

² The Administration assumes that there will be a total of about 12 000 tenders per year, and that BD will audit check only about 30% of these tenders, the number of cases that have to be scrutinized would be about 3 600 per year. The manpower is calculated based on the total net working hour per year of 1 697 hours. Assuming that it takes on average three hours for a professional officer to check one set of tender document and to take any necessary follow-up action for cases with irregularities, each year one officer can check about 566 tenders. BD would therefore need to have six professional officers to handle the new area of work. The total of 12 000 tenders is calculated by the Administration on the basis that the number of MBIS/MWIS notices to be issued will involve around 200 000 households each year and the number of inspection or repair tenders is roughly estimated to be around 12 000 each year.

proceedings for cases of non-compliance with the practice note, and three Assistant Clerical Officers (\$571,500 recurrent expenditure a year) to handle the administrative procedures and filing of the cases. According to the Administration, a very rough estimated recurrent expenditure is \$4,421,850 a year. The Administration therefore considers that Mr KAM's CSAs have charging effect under Rule 57(6) of the Rules of Procedure.

Hon KAM Nai-wai's response to the Administration's comments

10. Mr KAM does not agree that his CSAs have charging effect. He submits that the practice note for RIs and QPs is issued by BD and hence BD has the responsibility to carry out monitoring work to ensure compliance which includes conducting random checks, handling complaints, carrying out investigations and conducting disciplinary or prosecution proceedings if necessary.

11. Mr KAM points out that according to the Administration³, in formulating practice notes, BD will consult the industry concerned through the established channels, and BD will issue the practice notes after incorporation of the industry's views. For instance, the practice note referred to in his CSAs is formulated by making reference to the guidelines on building maintenance works of HKHS/URA. BD, therefore, should have the professional knowledge about compliance with the requirements and tendering procedures set out in the practice note.

12. Mr KAM also points out that in seeking funding support for the re-organization of BD, the Administration earlier informed Members⁴ that to ensure the effective and smooth implementation of MBIS, adequate directorate support would be required to steer and manage MBIS, and upon

³ Paper on Subsidiary Legislation and Practice Notes (CB(1)1983/09-10(02) issued in May 2011) provided by the Administration to the Bills Committee on the Bill.

⁴ Paper on Re-organization of Buildings Department for Implementation of Package of Measures to Enhance Building Safety (CB(1)2087/10-11(01) issued in May 2011) provided by the Administration to Subcommittee on Building Safety and Related Issues of the Panel on Development.

the re-organization of BD, a new dedicated Mandatory Building Inspection Division headed by a directorate officer and underpinned by two new MBIS Sections would be established to handle the implementation of MBIS. The Administration also informed Members that BD would adopt a “building co-ordinator” approach whereby a single section would be designated to handle all general building safety problems for the same building. The approach aimed to improve efficiency in the day-to-day operation of BD as well as to provide greater convenience to building owners. Mr KAM believes that under this new approach, BD should have made provision for the necessary resources for implementing and supervising MBIS and MWIS, including monitoring compliance with the law, subsidiary legislation and practice note, etc.; otherwise it would not be able to effectively supervise the implementation and day-to-day operation of the two schemes.

13. Mr KAM submits that according to the Administration⁵, RIs and QPs will face disciplinary actions if any deviation from or non-compliance with the practice note results in negligence or improper professional conduct. Mr KAM argues that his CSAs will not create new and additional work for BD because regardless of whether the practice note is advisory or mandatory in nature, BD already has the responsibility to conduct investigation into non-compliance cases and carry out disciplinary proceedings if necessary.

My opinion

14. A clear principle has been established in past rulings that a CSA will have charging effect within the meaning of Rule 57(6) of the Rules of Procedure only if it imposes a new and distinct function on the Administration, i.e. a statutory function which is not provided in the existing law, and the President is satisfied that the performance of the new and distinct function will require the spending of an amount of public money that is not nominal or negligible.

⁵ Letter dated 28 February 2011 (CB(1)1451/10-11(01)) from the Secretary for Development to the Bills Committee on the Bill.

15. Mr KAM's CSAs seek to make it mandatory for RIs and QPs to comply with the practice note referred to in his CSAs and create an offence of non-compliance with the practice note punishable by a fine. Counsel to the Legislature advises me that the CSAs do not impose a duty on the Administration to issue a practice note relating to a specific subject nor do the CSAs impose a duty on the Administration to monitor compliance with a practice note by RIs and QPs. Counsel also points out that under BO, there is already a disciplinary mechanism for, inter alia, QPs, and the Bill has already created a power for the existing disciplinary board to conduct a hearing of disciplinary proceedings against RIs.

16. It is clear to me that Mr KAM's CSAs do not have the effect of creating a new statutory duty on BD to monitor compliance with the practice note by RIs and QPs nor do they have the effect of creating any new and distinct function in respect of disciplinary proceedings to be taken against defaulting RIs and QPs. I am therefore not convinced that Mr KAM's CSAs have charging effect within the meaning of Rule 57(6) of the Rules of Procedure.

17. As regards resources for following up prosecution proceedings, I note a former ruling in 1996⁶ which referred to the practice in the United Kingdom House of Commons that where sufficient statutory authority exists, the costs for the administration of justice is not a charge and does not require authorization⁷. I think the same principle may be applied in the present case. Although Mr KAM's CSAs may result in prosecution being required to be undertaken against defaulting RIs and QPs, the Government as a whole already has statutory authority to incur expenditure for the administration of justice.

⁶ The ruling was on the Equal Opportunities (Family Responsibility, Sexuality and Age) Bill proposed by a Member. The former President ruled that although the Bill, which sought to render unlawful three areas of discrimination and to make provisions for enforcing the legal rights in those areas, would have the effect of widening the jurisdiction of the District Court, and consequently, of increasing the costs of the administration of justice, he was persuaded by the United Kingdom House of Commons principle that where sufficient authority exists, such expenditure is not a charge and does not require authorization. Under the Standing Orders of the former LegCo, a bill, the object or effect of which might, in the opinion of the President, be to dispose of or charge any part of the revenue or other public moneys of Hong Kong could be proposed only by a Member expressly authorized or permitted by the Governor to make such a proposal.

⁷ Boulton, *Erskine May Parliamentary Practice*, Twenty-first Edition, at 717 or McKay, *Erskine May Parliamentary Practice*, Twenty-third Edition, at 888.

My ruling

18. I rule that all the CSAs proposed by Hon KAM Nai-wai are admissible under the Rules of Procedure.



(Jasper TSANG Yok-sing)
President
Legislative Council

27 June 2011