

Bills Committee on Buildings Legislation (Amendment) Bill 2011

**Administration's Response to Follow-up Issues
of the Meetings held on 24 April 2012 and 4 May 2012**

This note sets out the Administration's response to the issues to be followed up from the last two meetings of the Bills Committee on 24 April 2012 and 4 May 2012.

Warrant Proposal

2. As we have all along emphasized, the primary purpose of the warrant proposal is to enable the Buildings Department (BD) to respond to complaints and take enforcement actions more efficiently and effectively. It aims to address the current problem faced by the BD that it has practical difficulties in exercising the existing power under section 22 of the Buildings Ordinance (BO) to enter premises and, where necessary, break into such premises in the presence of a police officer for specified purposes given the public's general concern over the disturbance it may cause and the interference with private property rights. The BD will only resort to its power of forced entry in extreme cases where there is a clear sign of imminent danger or serious nuisance. From 2006 to 2011, the BD had only conducted five break-in operations.

3. On the other hand, the work of the BD is often frustrated by uncooperative owners or occupants who refuse to grant entry to BD's staff, notwithstanding the Department's effort in deploying substantial resources in paying visits to the premises on different days and during different times of the day. To illustrate the situation, in the BD's large-scale operation against irregularities of building works associated with sub-divided flats for 2012, as at March 2012, the BD faced access problems in about 70% of the cases it had handled. This clearly undermines the effectiveness of our enforcement regime. Operational experience of other departments reveals that with the issue of a warrant from the Court, owners and occupants will more readily cooperate and grant entry for inspection and/or the carrying out of works. We therefore propose in the Bill that the BD could make application to the Magistrate's Court for warrants under the BO. To address concerns over private property rights, we have built in a number of safeguards in the Bill to clearly define the circumstances under which an application could be made to

the Court for a warrant.

4. Regarding Members' concerns and enquiries on various aspects of the warrant proposal, we set out below our responses.

Purposes of entry into premises

5. At the last meeting on 4 May 2012, some Members asked whether, apart from inspection, the purposes of entry into premises by the Building Authority (BA) or an authorized officer under a warrant issued by the Court should also include the purpose set out in the existing section 22(1)(d) of the BO, which provides for the carrying out or causing to be carried out any work which the BA or the authorized officer is authorized to carry out under the BO. Provisions empowering the BA to carry out works include the existing sections 24, 24A, 24AA, 24B, 26, 26A, 27A, 27B, 27C, 28, 29, 29A and 31, as well as the new sections 30B and 30C relating to the Mandatory Building Inspection Scheme (MBIS) and the Mandatory Window Inspection Scheme (MWIS), all of which invariably involve defaulted works and emergency works.

6. Under the Bill, the purposes of entry into premises by the BA or an authorized officer under a warrant remain the same four purposes in the existing section 22(1)¹. These specified purposes will equally apply to all scenarios of entry, i.e. situations where the entry is permitted by the owner or occupier; where the entry is authorized under a warrant; and where the entry is a forced one in the presence of the Police in case of emergency. As what the warrant proposal under the Bill seeks to do is to rationalize the means by which the BD gains access to premises for such purposes which are already stipulated in the BO, we consider it necessary to empower the BD to carry out works when entering premises under a warrant so as to enable the Department to carry out defaulted works on behalf of owners. Such power is also

¹ The purposes under the existing section 22(1) are –

- (a) to ascertain whether any building, structure, street or natural, formed or man-made land is dangerous or liable to become dangerous;
- (b) to inspect or test any groundwater drainage works, drainage works, drainage system, sewerage works or sewerage system [Note: “sewerage works” and “sewerage system” are proposed items to be added to the existing section 22(1)(b) under Clause 3(2) of the Bill];
- (c) to ascertain whether the provisions of the BO or of any notice order or regulation hereunder are being complied with;
- (d) to carry out or cause to be carried out any work which the BA is authorized to carry out under the BO.

necessary to allow for circumstances where emergency is revealed after BD's entry into the premises under a warrant, hence necessitating the carrying out of urgent works by the BD. In fact, when we first submitted the warrant proposal to the Bills Committee on the Buildings (Amendment) Bill 2010 in February 2011, we also explained to that Bills Committee that the purposes of entry into premises by the BD under a warrant should cover both inspection and carrying out of works, such as the carrying out of defaulted works under the MBIS and the MWIS.

Grounds for application of warrant

7. At the last meeting on 4 May 2012, some Members expressed concerns about the grounds on which the BD could apply to the Court for a warrant to enter private premises. Specifically, some Members considered that the coverage of two of the proposed grounds in the new section 22(1B)(a)(i) and (ii) might be too wide. The grounds in the new section 22(1B)(a)(i) and (ii) respectively provide that there are reasonable grounds for suspecting that “building works have been or are being carried out to the premises or land in contravention of any provision of this Ordinance”; and that “the use of the premises or land has contravened any provision of this Ordinance”. Members may wish to note that the expressions “contravention of any provision of this Ordinance” in the new section 22(1B)(a)(i) and “contravene any provision of this Ordinance” in the new section 22(1B)(a)(ii) should be construed according to the definition of “contraventions of the provisions of this Ordinance” in the existing section 2(1) of the BO², which includes -

- (a) “failure to comply with any order given, notice served or any condition imposed by the BA under this [the Buildings] Ordinance”;
- (b) “in the case of building works (other than minor works commenced under the simplified requirements), material divergence or deviation from any plan approved by the BA under this [the Buildings] Ordinance”;

² The defined term “contraventions of the provisions of this Ordinance” in section 2(1) appears in the BO in its varied forms such as “contravention of any of the provisions of this Ordinance” and “contravene the provisions of this Ordinance”. By virtue of section 5 of the Interpretation and General Clauses Ordinance (Cap. 1), which provides that “[w]here any word or expression is defined in any Ordinance, such definition shall extend to the grammatical variations and cognate expressions of such word or expression”, these varied forms, including the new forms in the proposed section 22(1B)(a)(i) and (ii), should be construed according to the definition in section 2(1).

- (c) “in the case of minor works commenced under the simplified requirements, material divergence or deviation from any plan required to be submitted to the BA under the simplified requirements”; and
- (d) “in the case of minor works commenced under the simplified requirements, failure to submit to the BA any certificate required to be submitted under the simplified requirements”.

8. In other words, where the BD raises grounds of reasonable suspicion of the circumstances under the new section 22(1B)(a)(i) and/or (ii) in support of an application for warrant, the magistrate must take into account the definition of “contraventions of the provisions of this Ordinance” in section 2(1) before deciding whether a warrant should be granted.

9. We note the comments of some Members that the grounds for application for warrant should be confined strictly to circumstances related to building safety. In our previous response to the Bills Committee (Paper no. CB(2)/1033/11-12/(01)), we have explained in detail why it is inappropriate to confine such grounds strictly to building safety-related situations. In gist, signs of hazards or safety risks are not always apparent from the outside of the premises during the enforcement action carried out by the BD. Under these circumstances, it is impossible for the BD staff to establish at the time of application for warrant the safety problems of the suspected contravention in question without first having an inspection inside the premises.

10. In addition, the warrant proposal should be able to cater for cases not leading to building safety problems but nonetheless involving contraventions of the prescribed standards under the BO, with the objective of upholding the law and preserving the integrity of the building control regime. Should the grounds for making application for warrants be confined to circumstances related to building safety only, BD could not apply for warrant in some cases, such as unauthorized structures that are structurally sound, even if there is grave public concern. This may create enforcement loopholes, or even inadvertently promote contraventions of these kinds as owners/occupiers would acknowledge the fact that the BD would not be able to take enforcement action due to lack of means to gain entry into the premises even with reasonable suspicions of the contraventions.

11. Under the new section 22(1B)(a)(v), reasonable suspicions of non-compliance of a notice or order served under the BO constitutes a ground for application for warrants. As requested by Members, we attach at Annex A a list of all the notices and orders that the BA may serve under the existing provisions of the BO. The new section 22(1B)(a)(v) requires that the notice or order has to be “served under the BO”. The methods of service of any notice, order or certificate required to be served under the Ordinance is prescribed under Section 35 of the BO³. The list of such notices and orders is confined by the relevant provisions of the BO and cannot be extended administratively.

The requirement for a visit on at least 2 different days

12. Under the Bill, we propose that a magistrate may issue a warrant if the entry into the premises by the BA or an authorized officer was refused or could not be gained despite a visit made to the premises on at least 2 different days, subject to other requirements being met at the same time. At the meeting on 24 April 2012, some Members considered that the requirement for a visit on 2 different days may not be sufficient. Some Members also asked the Administration to consider whether a minimum interval between the two mandatory visits should be specified in the new section 22.

13. Generally, initial inspections in response to complaints or large-scale operations are carried out by BD’s outsourced consultants. Contact slips will be left at the premises if access is not available. According to the standard provisions of the consultancy agreements, BD’s consultants are required to make at least 3 attempts on different days and during different times of the day to gain access for inspection. If the attempts are unsuccessful, the case will be reported to BD officers for follow-up.

14. Under the proposed section 22(1B)(b)(ii), the BA or an authorized officer is required to make a visit to the premises on at least 2 different days.

³ Under section 35(1) of the BO, any notice, order or certificate required to be served under the Ordinance may be served by serving a copy – (a) personally; or (b) by registered post addressed to the last known place of business or residence of the person to be served; or (c) by leaving the same with an adult occupier of the premises or land to which the notice or order relates or by posting the same upon a conspicuous part of such premises or land: Provided that in addition to or in substitution for any such method of service the publication in the Gazette of any such notice or order together with the available particulars of the person to whom it is addressed shall be deemed to be good service.

According to the BD's current practice, the two visits will be made during 2 different times of the day. A flowchart showing the BD's proposed operation procedures is at **Annex B** for reference. In other words, in practice, there will be at least a total of 5 visits by staff of the BD and its consultants before any application for a warrant is to be made to the Court. Such multiple visits will give ample chances to the owner or occupier to respond to BD's requests for entry. We also do not recommend specifying in the law a minimum interval between the two visits by BD officers to allow flexibility to handle cases requiring prompt follow-up actions, such as cases involving serious contraventions and those of great public concern.

15. We appreciate the suggestion of some Members that the BD should ensure proper supervision of its outsourced consultants to prevent them from conducting more visits than necessary in an attempt to earn more fees, thereby causing unnecessary nuisance to owners or occupiers. In practice, there is no incentive for an outsourced consultant to conduct excessive visits to any premises as the fees to a consultant under the BD's consultancy agreement are not dependant on the number of site inspections to particular premises. After a successful attempt of inspection or three abortive visits, the case will be referred back to BD officers for follow-up.

Making contact with the owner or occupier before and after the application for warrant

16. The new section 22(1B)(c) requires that Notice of Intention (NOI) has to be served to the owner or occupier of the premises before the BD could make an application to the Court. As requested by Members, a draft NOI is attached at **Annex C** for reference. The contact means of the BD's subject officer will be set out in the NOI to facilitate the owner or occupier in making enquiries on the request for entry and the intended application for a warrant, including when the BD intends to apply for a warrant. As regards Members' suggestion that the owners or occupier should be informed of the date when BD would enter the premises after the issue of warrant, it should be noted that upon the issue of a warrant by the Court, as shown in the proposed operation procedures at **Annex B**, the BD will attempt to contact the owner or occupier concerned through available means to inform him of the issue of the warrant and to arrange for entry into the premises. The above operation procedures will be clearly set out in BD's internal staff manual.

Rank of “authorized officer”

17. We propose in the Bill that a magistrate may issue a warrant authorizing the BA or an authorized officer to enter premises for specified purposes. Under the new section 22(4), “authorized officer” means a public officer authorized in writing by the BA for any of such specified purposes. In relation to Members’ question raised at the last meeting about the rank of “authorized officer”, we have explained in our previous response to the Bills Committee (Paper No. CB(2)/1251/11-12(01)) that in practice, “authorized officers” are BD officers who are professional grade officers of building surveyor or structural engineer ranks and above; and technical grade officers of survey officer (building) or technical officer (structural) ranks and above, building safety officer rank, building safety assistant rank and building surveying graduate rank. These officers are also now involved in different types of enforcement action including those that require entry into private premises. These ranks of officers will be set out in the internal staff manual of the BD. In the light of Members’ suggestion, we agree to state the grades and ranks of BD officers who will be authorized by the BA to enter premises under a warrant in the speech to resume second reading debate of the Bill.

Content of the warrant

18. As regards Members’ enquiries on the content of a warrant issued by a magistrate, it should be noted that the new section 22(1C) requires that a warrant specify the premises or land to be entered; the purposes of the entry; the name and capacity of the person authorized to enter the premises or land; and the date of the issue of the warrant.

Compensation for loss or damage suffered by owner or occupier by reason of entry by the BD

19. At the last meeting on 4 May 2012, some Member raised an enquiry on where an owner or occupier suffers loss or damage by reason of the entry into the premises by the BA or an authorized officer under a warrant, whether and, if so, how the owner or occupier may seek compensation. We propose under the new section 22(1F) that on leaving any unoccupied premises or land, the BA or an authorized officer must leave the premises or land as effectually

secured against trespassers as the premises or land was found at the time of entry. If an owner or occupier suffers loss or damage due to the negligence of the public officer, he may bring a civil action in negligence against the public officer. Whether the public officer could invoke the provision in section 37(2)⁴ as a defence to the negligence action will depend on the facts and circumstances of the individual case. Generally speaking, the objective test of “good faith” is required to be satisfied.

Expiry date of warrant

20. Under the proposed section 22(1G), a warrant issued under subsection 22(1B) continues in force until the purpose for which entry is necessary has been fulfilled. At the meeting on 24 April 2012, some Members asked whether a warrant issued under the new section should be made to expire after a specific period of time. As explained in paragraph 6 above, the specified purposes of entry into premises by the BA or an authorized officer are set out in the existing section 22(1). The purpose of the entry, the extent of inspection and the amount of work required to be carried out by the BD will vary from case to case. While in some cases the purpose of the entry can be fulfilled swiftly upon the first inspection, in other cases, follow-up inspections and/or the carrying out of works may be necessary subsequent to the first inspection. As it is not possible for the BD to estimate at the time of applying for the warrant the required number of entries or the duration of the warrant, we consider it appropriate to provide that a warrant continues in force until the purpose for which entry is necessary has been fulfilled.

Surcharge on defaulted works

21. Under the Bill, we propose that a surcharge of not exceeding 20% of the cost incurred by the BD be imposed on an owner in default of any BD’s statutory orders or notices. The BA will have a discretionary power to determine the amount of surcharge, which is capped at 20%, having regard to the circumstances of each case. The principles to be adopted in determining the amount of surcharge have been set out in our last response to the Bills

⁴ Section 37(2) of the BO provides that no matter or thing done by the BA or by any public officer acting under his direction shall if it were done bona fide for the purpose of executing the Ordinance subject him or such public officer personally to any action, liability, claim or demand whatsoever. The objective test of “good faith” is required to be satisfied.

Committee (paper no. CB(2)/1802/11-12(01)). We propose, inter alia, that in respect of owners who have proved that genuine practical difficulties were encountered in complying with an order or notice due to old age, infirmity, disability, mental illness, tenant's refusal to grant access, obstruction of access to common parts of a building by uncooperative persons, and unsuccessful attempt in organising the required works in the common parts of a building, etc., a surcharge of 10% be imposed on the cost of the required works.

22. At the meeting on 24 April 2012, some Members suggested that the scope of persons who would be entitled for the exemption of the proposed surcharge on defaulted works should be expanded. While the proposed reduction of surcharge from 20% to 10% for cases involving genuine practical difficulties on the part of the owners is a balanced decision taking into account the need to maintain an incentive for owners to carry out the required works themselves vis-à-vis the genuine difficulties experienced by some owners in arranging for the works, we take note of Members' view that cases where old or infirm owners have genuine practical difficulties in arranging for the necessary works themselves warrant special consideration. In the light of Members' concern, we agree to completely waive the surcharge for owners who are old, infirm or with disability or mental illness and also have genuine practical difficulties. As regards other persons who have genuine practical difficulties due to tenant's refusal to grant access, obstruction of access to common parts of a building by uncooperative persons, and unsuccessful attempt in organizing the required works in the common parts of a building, etc., a surcharge of 10% on the cost of the required works would be imposed.

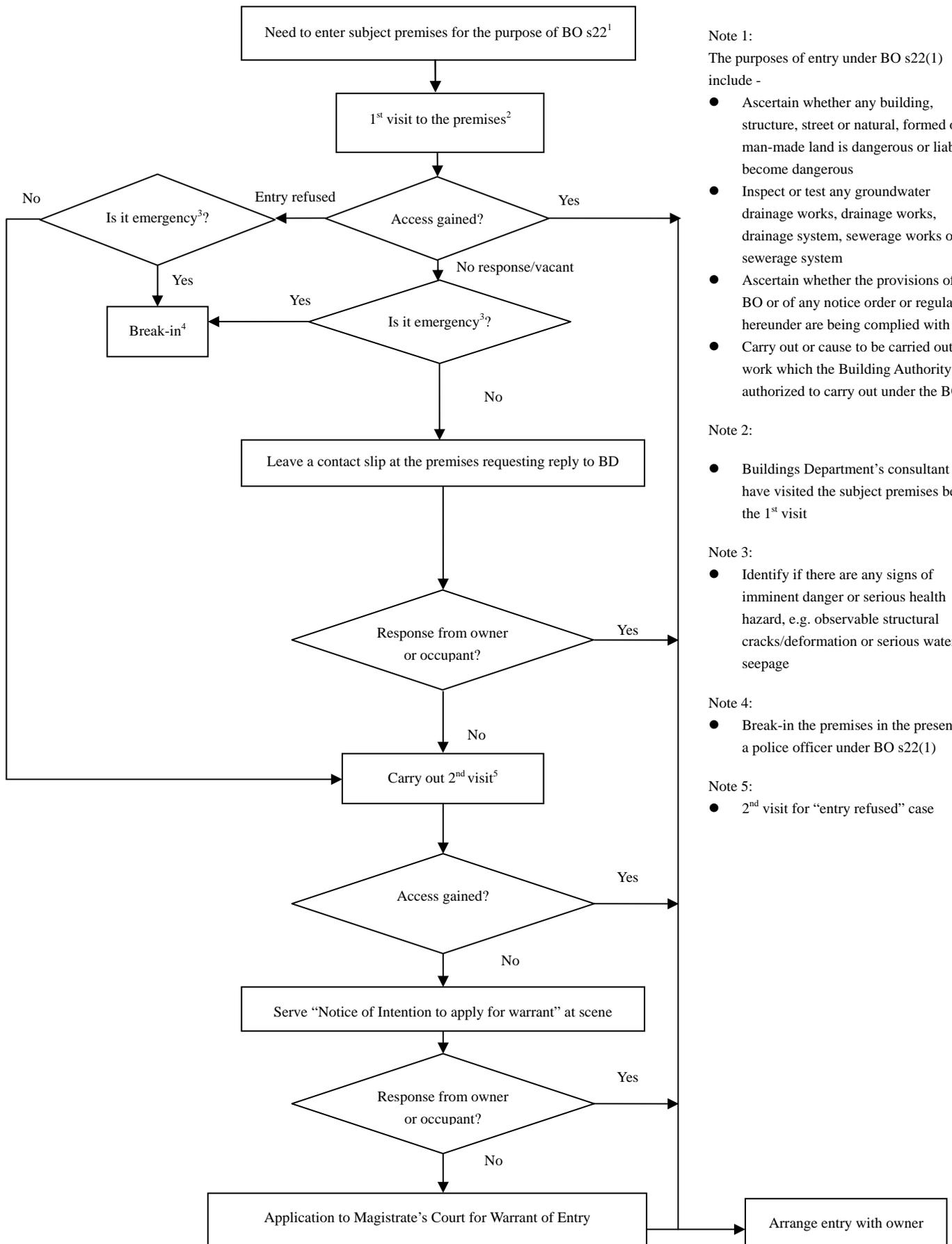
Development Bureau
Buildings Department
May 2012

Annex A

List of orders and notices that the Building Authority may serve under the existing provisions of the Buildings Ordinance (BO)

Section	Nature of the order or notice
19	Cease works order for urgent works
20	Order to impose conditions on resumed works
23	Cease works order for building works or street works
24	Removal order for unauthorized building works
24A	Order to cease or remedy dangerous works
24AA	Order for demolition, removal, or alteration of minor works commenced under simplified requirements
24B	Order for priority demolition
24C	Notice for demolition or alteration of building works
25	Prohibition or discontinuance order for change in use of buildings
26	Repair order for dangerous buildings
26A	Investigation and repair order for defective buildings
27	Closure order
27A	Repair order for dangerous hillsides
27B	Order for cessation of abstraction of groundwater from wells
27C	Investigation and repair order for water pipes, drains or sewers laid in slope
28	Repair order for drainage works
28A	Order for groundwater drainage works in scheduled area
29	Repair order for private streets and access roads
29A	Repair order for emergency vehicular access
30	Order to impose conditions when giving consent for formation of openings to or from Streets
30B	Notice for prescribed inspection and prescribed repair for Buildings (not commenced yet)
30C	Notice for prescribed inspection and prescribed repair for windows (not commenced yet)
31	Order for removal or alteration of projections on and over streets
32	Order for naming of streets and numbering of buildings

Flowchart for the proposed warrant in section 22 of the Buildings Ordinance (BO)



Note 1:
The purposes of entry under BO s22(1) include -

- Ascertain whether any building, structure, street or natural, formed or man-made land is dangerous or liable to become dangerous
- Inspect or test any groundwater drainage works, drainage works, drainage system, sewerage works or sewerage system
- Ascertain whether the provisions of the BO or of any notice order or regulation hereunder are being complied with
- Carry out or cause to be carried out any work which the Building Authority is authorized to carry out under the BO

Note 2:
● Buildings Department's consultant may have visited the subject premises before the 1st visit

Note 3:
● Identify if there are any signs of imminent danger or serious health hazard, e.g. observable structural cracks/deformation or serious water seepage

Note 4:
● Break-in the premises in the presence of a police officer under BO s22(1)

Note 5:
● 2nd visit for "entry refused" case

NOTICE OF INTENTION TO APPLY FOR WARRANT OF ENTRY

_____ (Date) _____

To the Owner/Occupier of _____ (address of premises) _____

Dear Sir/Madam,

We have notified you on _____ in writing (copy attached) of the intended visit of the officer(s) of the Buildings Department/*and the government's appointed Consultant to your premises for the purpose of the performance of the function under section 22(1) of the Buildings Ordinance (Cap. 123). However, the officer(s) of the Buildings Department/*and the government's appointed Consultant have so far not been able to enter your premises due to _____ (give reason) _____.

We will apply to the Court under Section 22(1B) of the said Ordinance for a warrant to effect entry into your premises.

For enquiry, including the date of application for the warrant from the Court, please contact *Mr/Ms _____, of the Buildings Department at telephone _____ during office hours.

Yours faithfully,

()
for Director of Buildings

* delete as appropriate