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**Report of the Bills Committee on
Buildings Legislation (Amendment) Bill 2011**

Purpose

This paper reports on the deliberations of the Bills Committee on Buildings Legislation (Amendment) Bill 2011.

Background

2. Building safety is a complex and multi-faceted issue. If not addressed properly, the problem will become more serious. Dilapidated concrete spalling, unauthorized or abandoned signboards, windows installed with substandard workmanship or lacking proper maintenance, illegal alterations to internal building structure, etc. are time bombs waiting to strike, and they can lead to injuries and even fatalities. The tragic building collapse incident in Ma Tau Wai in January 2010, which involved unauthorized building works ("UBWs"), claimed a total of four lives and made many homeless. The incident had aroused grave public concern over building safety.

3. The Chief Executive announced in his 2010-2011 Policy Address on 13 October 2010 that the Administration would adopt a new multi-pronged approach to enhance building safety. The approach covered four major areas which were legislation, enforcement, support and assistance to owners, as well as publicity and public education. The Administration introduced the Buildings (Amendment) Bill 2010 ("Amendment Bill") into the Legislative Council ("LegCo") on 3 February 2010 for the implementation of a mandatory building inspection scheme ("MBIS") and a mandatory window inspection scheme ("MWIS"). The Amendment Bill was enacted by LegCo at its meeting of 29 June 2011. The Chief Executive further announced in his 2011-2012 Policy Address on 12 October 2011 that the Administration would introduce amendments to the Buildings Ordinance (Cap. 123) ("BO") and the Buildings

(Amendment) Ordinance 2011 (16 of 2011) ("B(A)O") to further enhance its building safety control regime.

The Bill

4. Introduced into LegCo on 7 December 2011, the Bill seeks to amend BO and B(A)O to bring in the following five new measures to further enhance building safety -

- (a) surcharge on defaulted works;
- (b) penalty against persons who refuse to share cost of works by owners' corporation ("OC") for compliance with statutory orders or notices;
- (c) court warrants to enter individual premises ("warrant proposal");
- (d) signboard control system; and
- (e) registered inspectors to comprehensively report exterior UBWs under MBIS.

The Bills Committee

5. At the House Committee meeting on 9 December 2011, Members formed a Bills Committee to study the Bill in detail. The membership list of the Bills Committee is in **Appendix I**.

6. Under the chairmanship of Hon IP Kwok-him, the Bills Committee has held seven meetings with the Administration. The Bills Committee has also received views from organizations and individuals listed in **Appendix II**.

Deliberations of the Bills Committee

Court warrants for entry into individual premises

7. The Bill proposes to provide for the Building Authority ("BA") to apply to the Magistrates' Court ("Court") for warrants for entry into individual premises for inspection and enforcement. With the enactment of the Bill, the entry or breaking into the premises or upon land by BA in the presence of a police officer is restricted to emergency situations only. If there is no permitted entry, BA will have to apply to the Court for a warrant to enter the premises.

Rationale and need for the warrant proposal

8. Members have pointed out that under the existing section 22(1) of BO, BA may at any time enter and where necessary, in the presence of a police officer, break into any premises or enter upon land. Members have queried the rationale and the need for the warrant proposal.

9. According to the Administration, section 22 of BO currently empowers BA or public officers authorized by BA to enter and where necessary, in the presence of a police officer, break into any premises or enter upon any land to ascertain the premises' safety or their compliance with BO; or to carry out works which BA is authorized to carry out under BO. However, in practice, it is difficult for officers of the Buildings Department ("BD") to exercise this power. The work of BD is often frustrated by uncooperative owners or occupiers who refuse to grant entry to BD's officers, notwithstanding BD's efforts 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 in 2012, as at March 2012, BD faced access problems in about 70% of the cases it had handled. This undermines the effectiveness of the enforcement regime. Being mindful of the owner's private property rights, BD only resorts to its power of forced entry in an extreme case where there is a clear sign of imminent danger or serious environmental and/or health hazard. From 2006 to 2011, BD had only conducted five break-in operations. Operational experience of other departments reveals that with the issue of a warrant from the Court, owners will more readily cooperate and grant entry for inspection and/or carrying out works. The Administration therefore proposes to make provisions for BA to apply to the Court for warrants under BO to facilitate BA's entry into individual premises.

Purposes of entry into premises

10. Members have queried whether, apart from inspection, the purposes of entry into premises by 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 BO, which provides for the carrying out or causing to be carried out any work that BA is authorized to carry out under BO.

11. The Administration has explained that under the Bill, the purposes of entry into premises by BA or an authorized officer under a warrant remain the same as in the existing section 22(1)¹. These four 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 a police officer in case of emergency. The warrant proposal seeks to rationalize the means by which BD gains access to premises for such purposes which are already stipulated in BO. The Administration considers it necessary to empower BD to carry out works when entering premises under a warrant so as to enable BD to carry out defaulted works on behalf of owners. Such power is also 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 BD. When the warrant proposal was first submitted to the Bills Committee on the Buildings (Amendment) Bill 2010 in February 2011, the Administration had explained to that Bills Committee that the purposes of entry into premises by BD under a warrant should cover both inspection and carrying out of works, such as carrying out of defaulted works under MBIS and MWIS.

Grounds for application for warrant

12. Concern has been raised that the warrant proposal may expand the existing power of BA to enter premises and about the grounds on which BA could apply to the Court for a warrant for entering private premises. Some members have suggested that such grounds should be confined strictly to circumstances related to building safety. Some members also consider the coverage of the two grounds in the proposed section 22(1B)(a)(i) and (ii) too wide. The proposed section 22(1B)(a)(i) provides that a magistrate may issue a warrant authorizing BA or any authorized officer to enter and, if necessary, break into the premises, for specified purposes if the magistrate is satisfied 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 BO, whereas proposed section 22(1B)(a)(ii) provides that the use of the premises or land has contravened any provision of BO. Members are particularly concerned that even some minor works in contravention of BO may trigger the application for a warrant to enter the interior of premises, thus infringing the private property

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 items proposed to be added to the existing section 22(1)(b) under clause 3(2) of the Bill);
- (c) to ascertain whether the provisions of 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 BA is authorized to carry out under BO.

rights of individual owners.

13. According to the Administration, the primary purpose of the warrant proposal is to enable BD to respond to complaints and take enforcement actions against building-related problems more efficiently and effectively to preserve the integrity of the building control regime. The proposal aims to address the current problem faced by BD that it has practical difficulties in exercising the existing power under section 22 of BO to enter individual 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. At present, 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, thus undermining the effectiveness of the enforcement regime.

14. The Administration has emphasized that the warrant proposal is not an expansion of the existing power of BA. Apart from introducing the requirement for application to the Court for the warrant whereby the Court would act as a gatekeeper for ascertaining whether the relevant statutory requirements have been complied with, the Administration has also specified more clearly in the Bill the grounds on which a warrant could be granted. Under the existing section 22, BA could exercise its power to enter or break into the premises to, *inter alia*, ascertain whether the provisions of BO or any notice order or regulation hereunder are being complied with. Under the Bill, an application for a warrant for entry into premises could only be made when there are grounds for reasonable suspicion of such circumstances as stipulated in the proposed section 22(1B)(a)² of BO, and that is also subject to other requirements being met at the same time. The "reasonable suspicion" requirement is imposed on other grounds which a warrant could be applied. This has considerably raised the threshold of entry under non-emergency situations. BA will have to satisfy the Court that it has grounds for reasonable suspicion having regard to the circumstances of the case.

² Under the proposed section 22(1B), a magistrate may issue a warrant authorizing BA or an authorized officer to enter and, if necessary, break into any premises or enter upon any land for any of the purposes mentioned in subsection (1) if the magistrate is satisfied by information on oath that -

- (a) there are reasonable grounds for suspecting that -
 - (i) building works have been or are being carried out to the premises or land in contravention of any provision of BO;
 - (ii) the use of the premises or land has contravened any provision of BO;
 - (iii) the premises have been, or the land has been, rendered dangerous, or the premises are, or the land is, liable to become dangerous;
 - (iv) the drains or sewers of the premises or land are in a defective or insanitary condition; or
 - (v) a notice or order served under BO has not been complied with.

15. Regarding the suggestion of some members that the grounds for application for warrants should be confined strictly to circumstances relating to building safety, the Administration has explained that signs of hazards may not always be apparent from the outside of the premises during the inspection carried out by BD. In many circumstances, it is necessary for BD's officers to enter premises for ascertaining whether there are UBWs which have been carried out in contravention of BO compromising building standards or even creating public safety hazards which could not be verified by external inspections only. Such circumstances include alteration of internal structure or drainage system, change in use of premises, blockage of means of escape, etc. While such contraventions may not pose immediate safety concern, the entry into premises for a thorough inspection may still be essential in some cases for ascertaining the contraventions before BA could consider taking follow-up enforcement actions to rectify the contraventions. 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 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 relating to building safety only, BD could not apply for a 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 inadvertently promote contraventions of these kinds as owners or occupiers would acknowledge the fact that BD would not be able to take enforcement action due to a lack of means to gain entry into the premises even with reasonable suspicion of the contraventions.

16. The Administration has also pointed out that under the revised enforcement policy against UBWs which has come into operation since April 2011, the coverage of actionable UBWs has been extended to include UBWs on rooftops and podiums as well as in yards and lanes of buildings, irrespective of their risk to public safety or whether they are newly constructed. In this connection, to confine the ground on which BD could apply for a warrant to circumstances related to imminent building safety only would inadvertently affect the power of BD to enforce BO.

17. Regarding some members' concern about the wide coverage of the proposed section 22(1B)(a)(i) and (ii), the Administration has explained that the expressions "contravention of any provision of this Ordinance" in the proposed section 22(1B)(a)(i) and "contravene any provision of this Ordinance" in the proposed 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 BO³. It includes -

³ The term "contraventions of the provisions of this Ordinance" defined in section 2(1) appears in BO in its varied forms such as "contravention of any of the provisions of this Ordinance" and "contravene the

- (a) failure to comply with any order given, notice served or any condition imposed by BA under BO;
- (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 BA under BO;
- (c) in the case of minor works commenced under the simplified requirements, material divergence or deviation from any plan required to be submitted to BA under the simplified requirements; and
- (d) in the case of minor works commenced under the simplified requirements, failure to submit to BA any certificate required to be submitted under the simplified requirements.

In other words, where BD raises grounds of reasonable suspicion of the circumstances under the proposed 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.

18. While members are in support of the principles of the warrant proposal, some members remain concerned about the proposed section 22(1B)(a)(i) and (ii). They have suggested that the threshold for these two grounds be raised to having reasonable suspicion of serious contravention of BO.

19. The Administration has stressed that the warrant proposal seeks to strike a balance between the need to preserve the integrity of the building control regime and protection of private property rights. Nevertheless, having regard to members' concern about the wide coverage of the proposed section 22(1B)(a)(i) and (ii), the Administration will introduce Committee Stage amendments ("CSAs") to revise the proposed provisions as follows -

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).

- "(1B) A magistrate may issue a warrant authorizing the Building Authority or an authorized officer to enter and, if necessary, break into any premises or enter upon any land for any of the purposes mentioned in subsection (1) if the magistrate is satisfied by information on oath that -
- (a) there are reasonable grounds for suspecting -
 - (i) with respect to building works that have been or are being carried out to the premises or land -
 - (A) that they are in contravention of section 14(1);
 - (B) that there is a material divergence or deviation from any plan approved by the Building Authority under this Ordinance or required to be submitted to the Building Authority under the simplified requirements; or
 - (C) that they are not in compliance with the standard of structural stability, public health or fire safety established by regulations;
 - (ii) that the use of the premises has been changed in contravention of section 25(1) or (2);"

20. According to the Administration, under the proposed CSAs, section 22 (1B)(a)(i)(A) will cater for the situation where no plans have been submitted in respect of works requiring prior approval of plan and consent to commencement of works from BA under section 14(1) of BO; and section 22(1B)(a)(i)(B) will cater for building works that require approval and consent and the works have material divergence or deviation from the plan approved; and minor works that require submission of plans (i.e. classes I and II) and the works have material divergence or deviation from the plan submitted. Section 22(1B)(a)(i)(C) mainly seeks to cater for exempted works (where no plans are required to be submitted) and minor works commenced under the simplified requirements. In relation to minor works, although plans are required to be submitted for classes I and II minor works items, the plans are not required to be approved by BD and henceforth it is the responsibility of the prescribed building professionals and the prescribed registered contractor to ensure that the minor works meet the prevailing building standards as prescribed by the various regulations under BO. Even if the minor works are carried out in strict accordance with the plan submitted to BA, BD will still need to carry out audit check to ensure compliance with BO. In view of some members' concern that the grounds for applying for warrants in relation to minor works items should be confined as far as possible, the Administration has narrowed the scope for BD to apply for warrant to cases where there is reasonable suspicion that the works, including both minor works and exempted works, are not in compliance with the standard of structural stability, public health or fire safety established by regulations. In the

Administration's view, they are the essential standards that BD would need to enforce regardless of the nature and complexity of the works.

21. Some members, including Hon Audrey EU, Prof Hon Patrick LAU and Hon Cyd HO, have queried the need for the new proposed section 22(1B)(a)(i)(A) referred to in paragraph 19 above, given the wide scope of section 14(1) of BO. They have pointed out that under section 14(1), no person shall commence or carry out any building works without having first obtained the BA's approval of plans submitted in accordance with the regulations, and the BA's consent for the commencement of the building works shown in the approved plan. There are many situations falling within section 14(1) and any contravention of section 14(1) will be subject to a warrant for entry into the premises. Hon Audrey EU has proposed a progressive approach under which the proposed provisions in section 22(1B)(a)(i)(B) and (C) referred to in paragraph 19 above be implemented first, and the proposed section 22(1B)(a)(i)(A) could be deferred for consideration at a later stage.

22. The Administration maintains its views that the new proposed section 22(1B)(a)(i)(A) is necessary to avoid having a loophole in enforcement. In the absence of the proposed provision, BD will not be able to apply for warrant to enter premises to inspect unauthorized structure or building works where there is no approved plan, for example, unauthorized building or building works carried out without having obtained prior approval of plans and consent to commencement of works from BA under section 14(1) of BO and without apparent safety implications on private land. The Administration has stressed that under section 41(3) of BO, common household building works in existing buildings not involving the structure of the buildings are regarded as exempted building works and would therefore fall outside the scope of the proposed section 22(1B)(a)(i)(A).

23. Notwithstanding the Administration's explanations, some members remains having grave reservations about the new proposed section 22(1B)(a)(i)(A). In the light of members' concern, the Administration has reconsidered the issue and agreed to delete the proposed section 22(1B)(a)(i)(A) from its CSAs.

Meaning of "emergency situations"

24. The Bills Committee has sought information on the circumstances that will be considered as emergency situations. According to the Administration, the concept of emergency is well understood within the building industry. Similar reference is found in section 19 of BO which provides that in case of emergency, building works or street works may commence without obtaining BA's prior consent. In general, cases of emergency are circumstances where imminent

danger or serious environmental nuisance is envisaged. These may include outbreak of fire in a building after which BD's officers need to enter premises to assess the overall structural condition of the building; dilapidation of projections/windows of premises involving loose eaves/air-conditioner supporting frames, dislodged window frames, defective concrete or external rendering, etc. with danger of falling from height; and defective or choked drainage causing serious environmental nuisance. Inspection by BD is generally carried out by professional grade officers or senior ranking technical grade officers who are competent to assess whether a case is an emergency situation warranting immediate follow-up action.

Meaning of "authorized officer"

25. Under the proposed section 22(1B) of BO, a magistrate may issue a warrant authorizing BA or an authorized officer to enter and, if necessary, break into any premises or enter upon any land for specified purposes. The Bills Committee has sought clarification on the meaning of "authorized officer".

26. The Administration has explained that under the proposed section 22(4) of BO, "authorized officer" means a public officer authorized in writing by BA for any of such specified purposes. 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 currently 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 BD. Consultants and contractors engaged by BD are not authorized officers for the purpose of entry into premises under BO.

27. At the Bills Committee's request, the Administration has agreed to state in its speech during the resumption of the Second Reading debate on the Bill the grades and ranks of BD officers who will be authorized by BA to enter premises under a warrant.

Requirement for visit on at least two different days

28. Under the Bill, the Administration proposes that a magistrate may issue a warrant if the entry into the premises by BA or an authorized officer was refused or could not be gained despite a visit made to the premises on at least two different days, subject to other requirements being met at the same time. Members consider that the requirement for a visit on two different days may not be sufficient, and have suggested that a minimum interval between the two

mandatory visits should be specified in the Bill.

29. The Administration has responded that 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 three 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. Under the proposed section 22(1B)(b)(ii), BA or an authorized officer is required to make a visit to the premises on at least two different days. According to the BD's current practice, the two visits will be made during two different times of the day. In other words, there will be at least a total of five visits by staff of 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. The Administration does not agree to specify in the Bill a minimum interval between the two visits by BD officers in order to allow flexibility to handle cases requiring prompt follow-up actions, such as cases involving serious contraventions and those of grave public concern.

30. Members are of the view that 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. According to the Administration, 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 dependent on the number of site inspections to particular premises. After successful attempt of inspection or three abortive visits, the case will be referred to BD officers for follow-up.

31. At the request of members, the Administration has agreed to state its views on the issue of visit on two different days in its speech during the resumption of the Second Reading on the Bill.

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

32. The proposed section 22(1B)(c) of BO requires that notice of the intention to apply for a warrant for entry into premises has to be served on the owner or occupier of the premises before BD could make an application to the Court. The Bills Committee has sought information on how the owner or occupier will be contacted. Some members have suggested that the owner or occupier should be informed of the date when BD would enter the premises after the issue of a warrant.

33. The Administration has advised members that the contact means of the BD's subject officer will be set out in the notice of intention to facilitate the owner or occupier in making enquiries on the request for entry and the intended application for a warrant, including when BD intends to apply for a warrant. Upon the issue of a warrant by the Court, 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.

Right of an owner or occupier to respond to application for warrant

34. The Bills Committee has sought information on whether an owner or occupier of a premises has the right to respond to BA's application to the Court for a warrant to enter the premises, and the procedures for the aggrieved owner or occupier to follow up.

35. According to the Administration, in general, applications for court warrants are ex parte. A magistrate may, in the absence of the owner or occupier concerned, issue a warrant authorizing BA's entry into the premises for specified purposes. Nevertheless, under the Bill, notice of intention to apply for a warrant has to be served on the owner or occupier before BA may make an application to the Court. After such notice has been served, the magistrate may, upon application, allow an affected owner or occupier to make representations at the hearing when the magistrate determines the application for a warrant.

Content of court warrant

36. Regarding the content of a warrant issued by a magistrate, the Bills Committee notes that the proposed section 22(1C) requires a warrant to 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 by reason of entry by BD

37. The Bills Committee has queried whether and, if so, how an owner or occupier of a premises may seek compensation for loss or damage by reason of the entry into the premises by BA or an authorized officer under a warrant.

38. According to the Administration, under the proposed section 22(1F), on leaving any unoccupied premises or land, 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. In general, the objective test of "good faith" is required to be satisfied.

Expiry date of warrant

39. Under the proposed section 22(1G) of BO, a warrant issued under section 22(1B) continues in force until the purpose for which entry is necessary has been fulfilled. Some members have asked the Administration to consider whether a warrant issued under the provision should expire after a specified period of time.

40. The Administration has explained that the specified purposes of entry into premises by 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 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 BD to estimate at the time of applying for the warrant the required number of entries or the duration of the warrant, the Administration considers it appropriate to provide that a warrant continues in force until the purpose for which entry is necessary has been fulfilled.

Follow-up on building safety-related complaints

41. The Bills Committee has sought information on BD's procedures for following up building safety-related complaints. Members consider that BD's investigation into the complaints should avoid creating unnecessary nuisance to property owners or occupiers. Some members oppose the application by BD for a warrant to enter the premises based on an anonymous complaint without substantiated evidence obtained during the inspection from the exterior. In their view, the privacy of the property owners and occupiers should be respected.

42. According to the Administration, as a general practice, upon receipt of a report or complaint about suspected UBWs or building safety problem, BD staff will consider the information provided by the informant or complainant, seek clarification from the informant or complainant as necessary, carry out a desk-top

⁴ Section 37(2) of BO provides that no matter or thing done by 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.

investigation with reference to file records kept by BD and decide whether a site inspection is necessary. BD receives a large number of complaints or reports on UBWs and other building safety-related matters each year. In 2011, BD received about 53 000 such complaints or reports. It is impossible for BD to carry out inspection for all the complaints or reports. In general, BD will not conduct site inspections for non-specific or block reports covering numerous buildings without specific details. BD has also issued an office manual to illustrate some criteria that may be useful to its staff in making a decision as to whether an inspection should be conducted. Such screening criteria include the substance of the complaint or report; assessment of relevant records kept by BD; knowledge of staff of the building or area; and obvious "non-actionable" items under the enforcement policy (i.e. complaints or reports concerning UBWs that are clearly "non-actionable" under the prevailing enforcement policy of BD and have no safety concern will usually not warrant a site inspection).

43. The Administration has advised the Bills Committee that a recommendation made by the case officer for not conducting a site inspection in response to a complaint or report will need to be endorsed by a senior professional officer of BD. Reports constituting a challenge against or a request for re-consideration of an earlier decision by a senior professional officer will have to be endorsed by a directorate officer of BD. In cases where inspection is confirmed to be required, depending on the subject matter of the report, inspection from the exterior and common parts of the building concerned will usually serve the purpose of the investigation in most cases and no attempt will be made to enter the private premises.

44. The Administration has further informed members that in cases where entry to the interior of private premises is necessary, such as the investigation of UBWs associated with sub-division of flats, internal UBWs that may affect third parties, or unauthorized change in use, BD staff will endeavour to seek the cooperation of the unit owner, occupier or the building management office for access. If no one answers the door, BD staff will leave a contact slip at the concerned premises requesting the owner or occupier to contact BD for making arrangement for access. Efforts will also be made to arrange inspection on different dates and during different times of the day to suit the owner or occupier as far as possible. BD may also issue letters to the owner seeking his cooperation to grant access. Should the situation warrant invocation of the power under the existing section 22 of BO to break into the premises or application to the Court for a warrant as proposed, the endorsement by a directorate officer of BD will be required.

45. The Administration has stressed that it attaches importance to private property rights and the need to minimize nuisance to property owners or occupiers. No inspection will be carried out on cases that are considered

unfounded and not worthy of investigation to minimize the disturbance that may be caused to the owners or occupiers concerned.

Surcharge on defaulted works

46. The Bill proposes to empower BA to impose a surcharge of not exceeding 20% on the cost incurred by BA to be recovered from an owner who has failed to comply with statutory orders or notices issued under BO. The Bills Committee notes some deputations' concern that in case of buildings without OCs, the carrying out of works may be frustrated by some uncooperative owners who refuse to comply with BD's orders or notices. In the view of these deputations, the surcharge on defaulted works should be imposed only on those uncooperative owners but not those who are willing to carry out works in compliance with BD's orders or notices.

47. According to the Administration, the legislative intent of the imposition of a surcharge on defaulted works is not a penalty on the uncooperative owners but aims to encourage owners to undertake the works themselves in a timely manner instead of relying on BD to carry out the works for them. Penalty on the uncooperative owners may be imposed by the Court upon their conviction of the relevant offences. In causing the necessary works to be carried out in default of the owners, apart from the cost of works themselves and the associated supervision charge, BD has to make effort in the arrangement for the defaulted works including the tendering for outsourced consultants and contractors as well as the management thereof. The cost incurred in such arrangement may have to be covered by the surcharge. Nevertheless, under the present proposal, BD will have a discretionary power to determine the amount of surcharge which is capped at 20% of the total cost having regard to the circumstances of each case. Individual owners who have proven practical difficulties in arranging the required works may submit their justifications to BD, which will consider the amount of surcharge to be imposed on a case-by-case basis.

48. Members have sought information on how the discretion to determine the amount of surcharge on defaulted works will be exercised. According to the Administration, the discretion will be made by directorate officers in BD under the delegated authority of BA. In imposing the surcharge, BD will adopt the following principles, which will be laid down in BD's internal office manuals -

- (a) for the carrying out of emergency works where no order or notice under BO has been issued, no surcharge would be imposed;
- (b) in the case of default of a statutory order or notice, BD would engage the service of an outsourced consultant and/or the government contractor to carry out the required works. If the owner chooses to

make arrangement for the works before the commencement of the required works by BD and eventually the owner has complied with the order or notice, no surcharge would be imposed;

- (c) owners who have proved that genuine practical difficulties were encountered in complying with the order or notice due to old age, infirmity, mental illness, 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; and
- (d) for all other cases, a surcharge of 20% would be imposed.

49. Members have expressed concern that those owners who are old, infirm or with mental illness may have genuine practical difficulties in arranging for the necessary works themselves. Members also consider it unfair to impose a surcharge on an owner whose tenant refuses to grant entry. They have suggested that the exemption of the proposed surcharge on defaulted works should be expanded to cover these categories of owners. While the proposed reduction of surcharge from 20% to 10% for cases involving genuine practical difficulties on the part of the owners to carry out the required works themselves 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, in the light of members' concern, the Administration has agreed to completely waive the surcharge for owners who are old, infirm or with disability or mental illness and also have genuine practical difficulties. At the Bills Committee's request, the Administration will affirm this undertaking in its speech during the resumption of the Second Reading debate on the Bill. As regards owners 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., the Administration maintains that a surcharge of 10% on the cost of the required works would be imposed.

50. Some depositions are concerned that certain owners may not be able to comply with BD's orders to carry out the works because of financial difficulties, and suggest that a surcharge should not be imposed in such cases. The Administration has stressed that in exercising the discretion in determining the amount of surcharge, BD would take into account genuine financial difficulties of the owners. Nevertheless, in assessing the financial conditions of the owners concerned, BD will also take into account the fact that there are at present various schemes offering financial assistance to owners for carrying out building

maintenance and repair works required by BD's statutory orders, including the Building Safety Loan Scheme, the Building Maintenance Grant Scheme for Elderly Owners and the Integrated Building Maintenance Assistance Scheme.

Signboard control system

51. The Bills Committee notes the Administration's proposal to introduce a statutory control system for signboards. Under section 39C of BO, demolition orders or notices will not be made to certain unauthorized building or building works prescribed in the Building (Minor Works) Regulation (Cap. 123 sub. leg. N) ("Regulation") if they are completed or carried out before 31 December 2010 and the requirements in section 39C(2), (3) and (4)⁵ have been complied with. The Bill extends the application of section 39C to further types of unauthorized building or building works to be prescribed in the Regulation, and provide for a periodic compliance with the above-mentioned requirements for certain prescribed building or building works.

52. According to the Administration, the proposed system would allow the continued use of certain existing unauthorized signboards (e.g. those that are within stipulated dimensional requirements, or not blocking operation of emergency vehicles) after safety checks by registered building professionals or registered contractors. The safety checking has to be conducted once every five years. Unauthorized signboards not joining the scheme will be subject to BD's enforcement action. Details of the signboard control system will be set out in subsidiary legislation in due course.

53. The Bills Committee is concerned that the enabling provision in the proposed section 39C(1A) as presently drafted is so wide that it is not restricted to the control of signboards. Members consider that the enabling provision should be narrowed to cover signboards only to avoid possible disputes that the validation scheme could also apply to other items. Should the need arise in the future, legislative amendments to BO could be introduced to extend the provision to cover other building features under statutory control.

54. The Administration has explained that while unauthorized signboard is the first upcoming item that it intends to include in the validation scheme (i.e.

⁵ Section 39C(2) provides that "[a]n authorized person, a registered structural engineer, a registered general building contractor, a registered specialist contractor or a registered minor works contractor as required by the regulations is to be appointed to inspect the prescribed building or building works.". Section 39C(3) provides that "[t]he person appointed under subsection (2) is to submit or deliver to the Building Authority or other persons prescribed plans, certificates, notices and other documents as required by the regulations.". Section 39C(4) provides that "[w]here the person appointed under subsection (2) considers that for the safety of the prescribed building or building works, it is necessary to carry out minor works to alter, rectify or reinforce the prescribed building or building works, such works are to be carried out by a prescribed registered contractor under the simplified requirements.".

signboard control system), it is necessary to cater for possible extension of the validation scheme to items other than signboards in future. BD is considering including a number of green and minor amenity features in the validation scheme in the near future. The validation scheme is in fact part of the Minor Works Control System, and any addition to or changes of minor work items under the System can be effected by amendments to the relevant subsidiary legislation, i.e. the Regulation, through negative vetting. Therefore, the proposed amendment to section 39C seeks to rationalize the arrangement by prescribing the building or building works under the validation scheme in the Regulation.

55. Nevertheless, having further considered members' views, the Administration has agreed to add a schedule to BO by way of a CSA to prescribe the list of items that is subject to the validation scheme, so that expansion of the list would have to go through a positive vetting procedure, while the details of the items are to be prescribed in the Regulation. In this way, the list of items would have to be subject to LegCo's approval before it can take effect. Subject to the passage of the Bill, the Administration will make an amendment regulation in due course to prescribe in the Regulation the technical details of unauthorized signboards that could fall within the signboard control system.

56. Some deputations consider the period of five years for safety checking under the proposed signboard control system too long. The Administration has responded that the proposed interval of five years aims to strike a balance between the need to tackle the building safety problem arising from the existing unauthorized signboards and to avoid bringing undue inconvenience to business operators. In between the five-year interval, the signboard owner should be responsible for proper maintenance of the signboard. Where an existing signboard is rendered dangerous because of a change in circumstances or lack of proper maintenance, BD may take prompt enforcement action under section 105(1) of the Public Health and Municipal Services Ordinance (Cap. 132) to require the signboard owner to remove it or do any such work to render it safe for protecting public safety. Under MBIS, the inspection cycle of a building, including the common parts, external walls, projections as well as signboards, is 10 years. The requirement of safety checking on unauthorized signboards every five years under the signboard control system is considered reasonable.

57. Regarding members' concern about the removal of abandoned signboards, the Administration has advised the Bills Committee that BD is empowered under the Public Health and Municipal Services Ordinance to remove abandoned signboards of which the owners cannot be identified. In addition to taking enforcement actions upon receipt of complaints or reports, BD will conduct large-scale operations, with the cooperation of the relevant District Councils if necessary, to remove abandoned or dangerous signboards. Between 2002 and 2011, BD has removed about 24 000 abandoned or dangerous signboards.

Penalty for refusing to share cost of works by owners' corporations

58. The Bills Committee notes that under B(A)O, it is an offence if a person, without reasonable excuse, refuses to pay the relevant share of the inspection and repair costs for the common parts of the building for works being undertaken by OC in compliance with an MBIS or MWIS notice issued by BA. The Administration proposes to extend this offence to all works required by statutory orders or notices in respect of the common parts of the building that are required to be carried out by OCs in compliance with an order or a notice under BO. Offenders are liable on conviction to a fine at level 4 (currently at the maximum of \$25,000). Members are concerned about the consequences for an owner who fails to pay the fine, and have enquired whether such outstanding fine could be registered as an encumbrance against his property title at the Land Registry.

59. According to the Administration, as the offence in question is summary in nature, section 51 of the Magistrates Ordinance (Cap. 227) is relevant for the follow-up action in case of any default in the payment of fine. If a convicted offender fails to pay the fine, the magistrate could issue a warrant of distress for the purpose of levying the fine. However, whenever it appears to the magistrate that the issue of the warrant would be ruinous to the defendant and his family, or whenever it appears to the magistrate, by the confession of the defendant or otherwise, that he has no goods or chattels whereon to levy the distress, or whenever in the opinion of the magistrate it is inexpedient to issue such warrant, it shall be lawful for the magistrate in every such case, instead of issuing the warrant of distress, to commit the defendant to prison. The maximum period of imprisonment for a fine not exceeding \$25,000 is three months.

60. The Administration has further advised members that there is no provision in BO or the existing criminal sanction provisions that provides for the registration of the defaulted fine as an encumbrance against the title of the offender's property. In addition, according to section 2 of the Land Registration Ordinance (Cap. 128) ("LRO"), only instruments affecting land can be registered. Under section 2(1) of LRO, the types of interests registrable are deeds, conveyances, and other instruments in writing, and all judgments, by which any parcels of ground, tenements, or premises in Hong Kong may be affected. According to section 2(2) of LRO, "judgments" include judgments and orders of the Court of First Instance, the District Court and the Lands Tribunal. The payment of fine which a person is liable to pay on conviction is a personal obligation on the part of the offender. Accordingly, the failure to pay the fine on the part of the offender is not an instrument affecting land that is capable of being registered under LRO.

Registered inspectors to comprehensively report exterior unauthorized building works

61. Under B(A)O, a registered inspector appointed to carry out a prescribed inspection must notify BA of any building works in the common parts or the external walls of the building, identified during the course of inspection under MBIS, that have been or are being carried out in contravention of any provision of BO. To dovetail with the revised enforcement policy against UBWs effective since 1 April 2011, the Administration proposes to extend the scope of identification of UBWs to cover those on the exterior of the building, including roof, podium, yard or slope adjoining the building, and street on which the building fronts or abuts. Members have sought clarification on the duty of registered inspectors in relation to the scope of identification of UBWs under MBIS.

62. According to the Administration, registered inspectors are only required to report the UBWs identified during the course of prescribed inspection and the coverage of such inspection does not include the interior of any private premises. As such, the registered inspectors are not expected to enter individual owner's premises for inspection of UBWs. More detailed guidelines and requirements will be set out in the Code of Practice for MBIS and MWIS a draft of which has been published.

63. The Bills Committee notes the suggestion from some deputations that the qualification requirements for registered inspectors should be adjusted to include Clerks of Works and Inspectorate and other building practitioners who have received relevant training. According to the Administration, under BO, major building works that require BA's approval and consent have to be undertaken by authorized persons and registered structural engineers. To allow more choices for building owners and enhance market competition, the pool of service providers for building inspections under MBIS has been expanded from authorized persons and registered structural engineers to registered architects, registered professional engineers of the relevant disciplines and registered professional surveyors of the relevant division. Such qualification and experience requirements have been worked out in consultation with the professional institutes and the Building Subcommittee of the Land and Development Advisory Committee.

64. In setting the qualification requirements of registered inspectors, the Administration has taken into consideration that registered inspectors have to provide comprehensive professional services to owners in respect of building maintenance and repair, and they have to be personally held responsible for the inspection and supervision of repair. The duties of registered inspectors include carrying out the prescribed inspection personally, ascertaining the safety of

various items including building structures, fire safety provisions, projections and signboards etc., making appropriate proposal for repair to render the building safe, and reporting UBWs in the common parts and external walls as well as the exterior of the building as currently proposed. During the course of inspection, registered inspectors have to make accurate professional judgement in ascertaining the type, scope and degree of defects and assessing their causes, preparing repair proposals and supervising the repair. Accordingly, registered inspectors should possess adequate professional knowledge and experience in building design, construction, repair and maintenance and be fully acquainted with BO. Considering the statutory duties of registered inspectors and public expectation on their service standard, the Administration considers it necessary to require registered inspectors to be building professionals who are recognized by their respective professional registration boards to be professionally competent. Such requirements have also been laid down in B(A)O and the relevant subsidiary legislation.

Resources for enforcement

65. The Bills Committee notes the view of some deputations that the Administration should increase the resources for BD on the enforcement front. According to the Administration, BD has been provided with additional resources for creating a total of 236 civil service posts in BD to implement a series of measures to enhance building safety in the past two years. Since 2011-2012, BD has initiated three new types of large-scale operations as follows -

- (a) comprehensive clearance of UBWs on rooftops and podiums, as well as in yards and lanes of target buildings;
- (b) inspection of target dilapidated buildings with issue of statutory orders as appropriate to require investigation and/or repair works; and
- (c) inspection of target buildings for rectification of irregularities of building works associated with sub-divided flats.

For the large-scale operations referred in (a) and (b) above, the number of target buildings per year is 500. As for the large-scale operations on sub-divided flats, with additional manpower resources, BD will increase the number of target buildings to be inspected under this operation from 150 to 200 per annum starting from April 2012. Sub-divided flats in industrial buildings will also be included under this operation starting from 2012. The Administration will continue to monitor the manpower situation of BD and seek the necessary resources for the implementation of enforcement initiatives in accordance with the established procedures.

Commencement date

66. Under clause 1 of the Bill, amendments to B(A)O come into operation on the gazettal of the Bill, if enacted, and amendments to BO commence operation on a day to be appointed by the Secretary for Development by notice published in the Gazette. The Administration has proposed to introduce CSAs to the effect that all provisions in the Bill come into operation upon gazettal except for those provisions relating to the signboard control system, given that the details of unauthorized signboard under the control system would be prescribed in the Regulation.

Committee Stage amendments

67. Apart from the CSAs referred to in the above paragraphs, the Administration will move consequential or technical amendments to the Bill.

Consultation with the House Committee

68. The Bills Committee consulted the House Committee on 1 June 2012 and obtained its support for the Second Reading debate on the Bill to be resumed at the Council meeting of 13 June 2012.

Council Business Division 2
Legislative Council Secretariat
5 June 2012

Bills Committee on Buildings Legislation (Amendment) Bill 2011

Membership list

Chairman Hon IP Kwok-him, GBS, JP

Members Ir Dr Hon Raymond HO Chung-tai, SBS, S.B.St.J., JP
Hon James TO Kun-sun
Hon Mrs Sophie LEUNG LAU Yau-fun, GBS, JP
Hon Miriam LAU Kin-yee, GBS, JP
Hon Abraham SHEK Lai-him, SBS, JP
Hon Audrey EU Yuet-mee, SC, JP
Hon LEE Wing-tat
Hon CHEUNG Hok-ming, GBS, JP
Prof Hon Patrick LAU Sau-shing, SBS, JP
Hon Cyd HO Sau-lan
Hon Starry LEE Wai-king, JP
Hon Tanya CHAN

(Total : 13 Members)

Clerk Mrs Sharon TONG

Legal Adviser Miss Winnie LO

Bills Committee on Buildings Legislation (Amendment) Bill 2011

A. Organizations and individuals which/who have made oral representation to the Bills Committee

1. Hong Kong General Building Contractors Association Ltd.
2. Hong Kong Institute of Real Estate Administrators
3. The Hong Kong Institute of Surveyors
4. Yat Tung Community Network Association
5. The Hong Kong Association of Property Management Companies
6. The Institute of Clerks of Works & Construction Inspectorate (Hong Kong)
7. Ms TONG Po-chun, Shatin District Council Member
8. Dr LAU Chee-shing, Tai Po District Council Member

B. Organizations and individuals which/who have provided written submissions only

1. The Real Estate Developers Association of Hong Kong
2. The Chartered Institute of Building (Hong Kong)
3. The Hong Kong Institute of Architects
4. Mr YEUNG Wai-sing, Eastern District Council Member
5. Ms Christine FONG Kwok-shan, Sai Kung District Council Member