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18 April 2008

Clerk to Bills Committee
(Attn : Ms. YUE Tin-po)
Legislative Council Building
8 Jackson Road
Central
Hong Kong

Dear Ms. Yue,

Buildings (Amendment) Bill 2007
Response to Bills Committee's Request at Meeting on 7 April 2008

At the Bills Committee meeting of the Buildings (Amendment) Bill 2007 ("the Bill") held on 7 April 2008, the Administration was requested to provide further information on:

- (a) possible ways in respect of the legal framework and procedural arrangements to spell out clearly the legislative intent and help identify the legal responsibilities of various parties that might be involved in the carrying out of minor works under various possible scenarios;
- (b) scenarios under which a building owner would discharge his duties stipulated in new sections 4A and 9AA for the appointment of qualified persons to commence or carry out minor works and hence would not be deemed as knowingly contravening the BO, by making reference to similar provisions found in other legislation and case law; and
- (c) response to members' view that the Administration should delete the proposed term of imprisonment imposed on the person for whom minor works were to be carried out, in particular building

owners, for non-compliance of the proposed minor works control system under Class III taking into account the nature and gravity of the offence.

Our response is at ensuing paragraphs.

Legal responsibilities of the person for whom minor works are to be carried out

As explained in our letter dated 3 April 2008 (LC Paper No. CB(1)1179/07-08(01)), if a person intends to carry out minor works under the simplified requirements, he should appoint qualified persons including registered professionals (authorized person (and registered structural engineer and/or registered geotechnical engineer as appropriate)) and registered contractors as stipulated in the proposed sections 4A and 9AA of the BO. Normally the owner or tenant of the premises, where minor works are to be carried out, would appoint the qualified persons direct. There are however situations whereby the owner or tenant has to entrust the minor works to an agent. For example, where repair works to the common parts of a building having 1 000 co-owners without an Owners' Corporation are to be carried out, it would not be possible for each and everyone co-owner to appoint the qualified persons direct, but instead the management company would be entrusted to deal with the implementation of the repair works on behalf of the co-owners. Under the circumstances the management company, being the agent, has the responsibility to ensure qualified persons are appointed to carry out the repair works. It is therefore our intention that there should be no restriction on the identity or capacity of "the person for whom minor works are to be carried out". He may be the owner or tenant of the subject land or premises, or the agent of an owner or a tenant. The name and details of "the person for whom minor works are to be carried out" will be recorded in the specified forms submitted to the BA confirming such appointment and commencement/completion of the minor works. In case where the person is an agent, he will have a role under the BO if he directly employs the registered professionals/contractors and his name is recorded in the specified form as the one for whom minor works are to be carried out. The proposed provisions in the Bill adequately stipulate the aforementioned intention and arrangements.

Any person who knowingly contravenes the proposed section 4A or 9AA of the BO shall be guilty of an offence in accordance with the proposed section 40(1AB) of the Ordinance. If an agent is engaged and he directly employs the registered professionals/contractors and his name is contained in the specified form as "the person for whom minor works are to be carried out",

he shall be liable for the offence under the proposed section 40(1AB), if he knowingly contravenes the proposed sections 4A or 9AA of the BO. The current drafting of the proposed sections 4A, 9AA and 40(1AB) is adequate to manifest our policy intention.

Scenarios of building owners discharging duties under new sections 4A and 9AA

Concerning Members' enquiries about how a building owner could discharge his duties stipulated in new sections 4A and 9AA for the appointment of qualified persons to commence or carry out minor works and hence would not be deemed as knowingly contravening the BO, our response is set out in ensuing paragraphs.

To prove that "a person for whom minor works are carried out" has knowingly contravened section 40(1AB), the Prosecution has to ascertain the state of mind of that person at the material time. In general, when dealing with prosecution cases for offence provisions with the "knowledge requirement", the Prosecution must prove a case beyond reasonable doubt. To prosecute against an offence under the proposed section 40(1AB), the Prosecution needs to prove beyond reasonable doubt that the person has the "knowledge" that the contractor is not qualified at the time that the appointment is made. The burden of proof is on the Prosecution and not on the defendant. In other words, the defendant does not need to prove anything to the court that at the time when the appointment was made he did not have knowledge that the contractor was unqualified, nor to disprove that he had such knowledge. The Prosecution, on the other hand, needs to prove everything.

How to establish that the person has the necessary "knowledge" at the material time is a matter of fact. The Prosecution will have to prove that the person does the acts concerned "knowingly". This can be proved by direct evidence, say, admission under caution from such persons that they knew that the contractor was not qualified but they went on to engage the service. This can also be proved by circumstantial evidence, for instance, the conversation between the person and the contractor. The person's explanation will also be taken into account by the Prosecution in determining whether he possessed the knowledge of the qualification of the contractor.

The objective of the minor works control system is to introduce a set of simplified statutory requirements and procedures to facilitate members of the public to carry out minor works in a lawful and efficient manner. In the carrying out of minor works, an owner will be subject to an offence under the

proposed section 40(1AB) only if he has the "knowledge" that the contractor is not qualified but still appoints such contractor to carry out minor works for him. In our public education and publicity campaign, we will remind building owners to follow the proper statutory simplified procedures in conducting minor works. We will also provide advisory services to answer public enquiries to facilitate their beneficial use of the new system.

The proposed term of imprisonment imposed on the person for whom minor works are to be carried out

We have reviewed the relevant provisions and agreed to delete the term of imprisonment under the proposed section 40(1AB) imposed on "the person for whom minor works are to be carried out".

Yours sincerely,



(Jerry Cheung)
for Secretary for Development

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