Buildings Energy Efficiency Bill

Letter from Assistant Legal Adviser dated 19 March 2010 - The Administration's response to issues relating from clauses 17 onwards

Clause 17 – Duty to obtain Form of Compliance for major retrofitting works

Question:
25. Clause 17(3) provides that major retrofitting works are regarded as completed when "the works have been carried out and the installation is ready to be used for its principal function as designed". Please explain (and illustrate with examples if possible) the meaning of "its principal function as designed".

Answer:

- Each type of the installations would have their own principal functions as designed. For example, the principal function of a lighting installation would be to provide general illumination to a building; whereas the principal function of an air-conditioning installation would be to cool down, heat up, humidify, dehumidify, purify or distribute air within the building, depending on the design of the installation. The adoption of the triggering point i.e. when the installation is ready to be used for its principal function as designed, is to minimize any ambiguity in the definition of the completion of major retrofitting works, and to prevent undue delay in this connection.

Question:
26. Please consider review the Chinese text of clause 17(1) that "就*服務*某建築物的任何單位或公用地方" as it does not seem to give an apt translation of the English text "major retrofitting works… *that serves* any unit or common area of building…" in the particular context.

Answer:

- The Department of Justice is of the view that the wording in clause 17(1) reflects our policy intent and the meaning presented in both the Chinese and English texts is consistent. Precedents for using "服務" in the same context can be found in Taiwan. Hence, no amendments are considered necessary.

Question:

27. Please also review the word "即" in the Chinese text of clause 17(4), which denotes "immediately" and may not be consistent with the English text. You may refer to clause 9(5), a similar provision for extension of time, the Chinese text of which does not contain the word "即".

Answer:

- The Department of Justice advises that the word "即" in the Chinese text of clause 17(4) is a function word that caters for the flow of the sentence (as in the case of "即屬犯罪") and does not carry the meaning of "immediately". The Department of Justice is of the view that the meaning presented in both the Chinese and English texts is consistent and in accordance with the rule of grammar for both languages. Hence, no amendments are considered necessary.

Clause 25 – Exemption from energy audit requirement

Question:

28. Is there time limitation for applying for exemption from energy audit requirement?

Answer:

- As the complexity and nature of each application varies, we do not consider it appropriate to set a time limit for applying for exemption from energy audit requirement.

Clause 29 – Powers of authorized officers

Question:

29. Are the powers of entry and inspection exercised by the authorized officers under clause 29(1) subject to any time prescription?

Answer:

- Clause 29(1) of the Bill does not set out the time prescription in exercising the powers of authorized officers.

Question:

30. What is meaning of "residential unit" in clause 29(1)(a)?

Answer:

- "Residential unit" means a unit in a prescribed building which is for residential use. The expression "unit" is defined in clause 2.

Question:

31. Who will be the "any assistant" taken by the authorized officer in the exercise of the authorized officer's powers under clause 29(2)?

Answer:

- The assistants to be taken by authorized officers in exercising the powers under clause 29(2) may include their subordinates, technicians consultants and contractors etc..

Question:

32. Clause 29(4) provides that a person who knowingly or recklessly provides any false or misleading information commits an offence and is liable on conviction to a fine at level 6 ($100,000) and to imprisonment for 6 months. Clause 49(1) provides for a similar offence and penalty for a person who knowingly or recklessly provides any false or misleading information to procure the registration of any person as a registered energy assessor. However, under clause 49(2) a registered energy assessor who knowingly or recklessly issue any Form of Compliance or Energy Audit Form or make any certification that is *false or misleading in any material particular* commits an offence with same level of penalty.

33. Please explain whether or not clauses 29(4) and 49(1), as compared with clause 49(2), imposes a less stringent requirement on the prosecution, and if so, the reason for the different treatment for these provisions.

(You may wish to note that under section 45(1) of the Genetically Modified Organisms (Control of Release) Ordinance (Ord. No.7 of 2010), the same level of penalty is imposed on a person who furnishes any information for certain purposes of that Ordinance that he knows or believes to be misleading *in a material particular*.)**

Answer:

- The prosecution requirement in clauses 29(4) and 49(1) is different from that in clause 49(2) which denotes the differences in the nature and context of the offence provisions. Clause 49(2) provides for the offence relating to registered energy assessors on the issue of Form of Compliance (FOC) and Energy Audit Form, of which the required information and document will be clearly set out in the relevant forms to be issued under clause 46 of the Bill. The specification of "*in any material particular*" would prevent any errors or omissions in the FOC and Energy Audit Form that are minor or clerical in nature from becoming an offence. The Department of Justice advises that the drafting formula is not suitable for the general offences in clauses 29(4)

and 49(1), as those clauses cover a wide range of information and document. The burden to prove whether a piece of information is a material particular will reduce the deterrent effect of those provisions.

Clause 32 – Appeal to appeal board

Question:

34. Clause 32(2) provides that an appeal against a decision or direction does not suspend the decision or direction unless the Director decides otherwise. Is there a time frame within which the Director should decide whether or not to suspend the decision or direction pending an appeal?

Answer:

- Clause 32(2) already provides that an appeal against a decision or direction does not suspend the decision or direction unless the Director decides otherwise. The Director will only suspend a decision or direction pending an appeal when it is well justified. As the complexity and nature of each case varies, we do not consider it appropriate to set a time limit for the Director to suspend a decision or direction. The proposed arrangement is also found in other existing laws of Hong Kong, such as section 33 of the Energy Efficiency (Labelling of Products) Ordinance (Cap. 598); section 52 of the Construction Workers Registration Ordinance (Cap. 583); and section 13 of the Consumer Goods Safety Ordinance (Cap.456).

Clause 37 – Hearing of appeal

Question:

35. Under clause 37(3), an appeal board may engage any barrister or solicitor to attend a hearing of the board to advise on any matter relating to the appeal. In the context of professional duty, who is the client(s) of the barrister or solicitor "engaged" by the appeal board? Does the solicitor or barrister owe any professional duty to advise the appellant or the Director on matters relating to the appeal?

Answer:

- The client of the barrister or solicitor engaged by the appeal board would be the appeal board formed under clause 35 of the Bill. Since clause 37(2) provides that an appellant and the Director may be represented by a barrister or solicitor, the appellant and the Director could separately engage a barrister or solicitor accordingly. The barrister or solicitor engaged by the appeal board does not owe any professional duty to advise the appellant or the Director on matters

relating to the appeal.

Question:
36. Clause 37(7) provides that no person to whom a direction is given to attend before the board and give evidence "is bound to incriminate" himself. Can that person refuse to give evidence which "tend to incriminate" himself?

Answer:

- Yes. That person may refuse to give evidence which "tend to incriminate" himself.

Question:
37. Furthermore, if that person is not a party to the appeal, does the law of self-incrimination apply?

Answer:

- The Department of Justice advises that the law of self-incrimination also applies to a person who is not a party to the appeal.

Clause 39 – Determination of appeal

Question:
38. Clause 39(2) provides that an appeal board may make any order with regard to the payment of (a) costs of the appeal proceedings; *or* (b) costs of the Director or any other person in the proceedings. Are sub-clauses (a) and (b) to be read disjunctively?

Answer:

- It is our policy intention that the appeal board may make one or more than one of the following orders that it thinks fit with regard to the payment of –
  (a) costs of the appeal proceedings;
  (b) costs of the Director or any other person in the proceedings.

Clause 40 – Code of Practice

Question:
39. Are there any consultation requirements (whether legal or administrative) to be fulfilled before the Director issues or approves any code of practice?

Answer:

- The Electrical and Mechanical Services Department (EMSD) has been gauging views on the code of practice through its Technical Task Force. The Technical Task Force comprises representatives from professional bodies and trade associations in relation to the design, installation, operation or maintenance of building services installations. Though the Bill does not provide for a legal consultation requirement on the issue or approval of code of practice, EMSD will continue to consult the Technical Task Force in future on the review of the code of practice to reflect the latest technological development and trade practices.

Clause 47 – Issue of notice, etc

Question:

40. Clause 47(1) provides for the issue and submission of notice or document required under the Bill. Does the "company" under clause 47(1)(c) refer only to companies registered under the Companies Ordinance (Cap. 32)? What is the "body corporate other than a company" under clause 47(1)(d)?

Answer:

- The "company" under clause 47(1)(c) refers to companies registered under the Companies Ordinance (Cap. 32). "Body corporate other than a company" under clause 47(1)(d) includes other forms of corporation such as statutory corporations.

Question:

41. Please explain how to determine who is "a person apparently concerned in the management of" the body/partnership (clause 47(1)(d) and (e)).

Answer:

- The policy intent to serve a notice to a person apparently concerned in the management of a body corporate or partnership is to ensure that the notice would be brought to the attention of the management of the body corporate or partnership in a timely manner. In determining whether a person is concerned in the management of a body corporate or partnership, one may need to consider the facts of each particular case such as the position and duty of that person in the body corporate or partnership.

- Such provision is also found in other existing laws of Hong Kong, such as section 47 of the Energy Efficiency (Labelling of Products)

Ordinance (Cap. 598); section 30 of the Bunker Oil Pollution (Liability and Compensation) Ordinance (Cap. 605); and section 44 of Hazardous Chemicals Control Ordinance (Cap. 595).

Clause 50 – Defence of due diligence

Question:

42. Under clause 50, if a defence of due diligence involves an allegation that the offence was due to the act or default of another person or reliance on information given by another person, the defendant is not, without the leave of the court, entitled to rely on the defence unless he has issued a notice in accordance with the procedure set out in this clause at least 7 working days before the hearing.

43. What is the reason for the above special procedure in this type of court proceedings? Is same type of procedure in relation to criminal proceedings provided in other ordinances?

Answer:

- The proposed arrangement is to allow the person whom the defendant has made an allegation against would have sufficient time to prepare for a possible defence. Such arrangement is also found in other existing laws of Hong Kong, such as section 46 of the Energy Efficiency (Labelling of Products) Ordinance (Cap. 598); section 56B of the Electricity Ordinance (Cap. 406); and section 24 of the Consumer Goods Safety Ordinance (Cap.456).

Schedule 1

Question:

44. What is meaning of "occupied predominantly" in paragraphs 7, 8, 9, 10 and 11?

Answer:

- "Occupied predominantly" in paragraphs 7, 8, 9, 10 and 11 means the predominant usage of those occupiers in the relevant categories of buildings under Schedule 1.

Question:

45. Is there any difference between the word "predominantly" and words such as "principally" and "primarily" used in other legislation in relation to occupation or use of premises?

Answer:

- According to Concise Oxford Dictionary (10th Ed., Revised) –
  - "predominantly" means "present as the strongest or main element";
  - "principally" means "for the most part, chiefly";
  - "primarily" means "for the most part, chiefly".

- The meanings of the three expressions are similar. In the light of views expressed by the Bills Committee on 26 April 2010, we will consider replacing "predominantly" by "principally" in the English version.

Question:

46. What is the meaning of "community building" in paragraph 8?

Answer:

- "Community building" means a building that is used for the provision of community services. Paragraph 8 also lists out examples of "community building" that are commonly found in Hong Kong to provide easy reference.

Question:

47. Please also review the Chinese text of paragraphs 8 and 9 ("主要作社區/市政*用途*而佔用的建築物"). It seems to refer to the "use of the building", which may be inconsistent with the English text ("[b]uilding that is occupied predominantly as community building / municipal services building…"). You may also wish to review bilingual texts of paragraphs 10 and 11.

Answer:

- The Department of Justice is of the view that the meaning presented in both the Chinese and English texts is consistent and in accordance with the rule of grammar for both languages. Hence, no amendments are considered necessary.

Schedule 3

Question:

48. What is the legal effect of the "Notes" which appears below paragraph 2?

Answer:

- The "Notes" in Schedule 3 have the same legal effect as other

substantive provisions in the Bill. The purpose of the "Notes" is to provide explanations to paragraphs 1 and 2 in Schedule 3.

Question:

49. Is the reference "carpark" in paragraph (1) of the Notes same as "car parks" in the definition of "common area" in clause 2?

Answer:

- The meaning of "carpark" in paragraph (1) of the Note is the same as "car parks" in the definition of "common area". For consistency, we plan to move amendment to replace "carpark" by "car park" in paragraph (1) of the Note.