THE LAW SOCIETY OF HONG KONG 香港律師會

THE LAW SOCIETY'S SUBMISSIONS ON THE BUILDINGS ENERGY EFFICIENCY BILL

The Law Society's Property Committee has reviewed the Buildings Energy Efficiency Bill and supports in principle the idea behind the Bill, i.e. to regulate building energy efficiency with a view to improve local air quality and alleviate the adverse effect of climate change. However, there are concerns and queries on the compliance implications of the new law for conveyancing transactions.

1. The Bill requires the building services installations ("*BSI*") in "prescribed buildings" to comply with specified energy efficiency standards and requirements ("*specified standards*").

Post-Enactment Buildings – Obligations of the Developer

2. The proposed legislation imposes more stringent obligations for post-enactment buildings, i.e. prescribed buildings for which the consent to the commencement of building works for superstructure construction was obtained from the Building Authority *after* the commencement date of the new legislation.

3. For post-enactment buildings, the developers have to ensure the BSI comply with the specified standards and are required under Clauses 8 and 9 of the Bill to submit 2 declarations to the Director of Electrical and Mechanical Services ("the *Director*") and obtain a Certificate of Compliance Registration ("*COCR*") from the latter to confirm compliance.

4. The Director is required under Clause 11 to keep a register of buildings issued with a COCR and make this available for free public inspection at all reasonable times.

5. However, under Clause 10 of the Bill, the Director may refuse to issue a COCR to the developer where:

(i) he has reasonable grounds to believe that the second declaration or any accompanying document is false or misleading in any material particular; or

(ii) he has yet to receive from the developer further information or additional document he has required the developer to produce.

Major Retrofitting Work in all Prescribed Buildings

6. For all prescribed buildings, i.e. pre-enactment or post-enactment buildings alike, Part 3 of the Bill imposes a duty on the "*responsible person*" of a unit or the owner of the common area of a building to obtain a Form of Compliance ("*FOC*") from a registered energy assessor 2 months after "*major retrofitting works*" have been carried out in respect of the BSI. "*Responsible person*" is defined under Clause 2 as, in relation to a building or a unit of a building, "*a person who occupies or is in possession or control of the building or unit (whether under a lease or licence or otherwise).*"

7. A registered energy assessor who issues a FOC is required under Clause18(5) to send a copy of it each to:

(a) the Director; and

(b) the property management company of the building or in its absence, the owner of the building.

However, unlike the COCR, the Director is not required to keep a register of FOC.

Obligations of Owner of a Building

8. The owner of a building has the obligations under Clause 12(2) of the Bill to ensure that:

(a) a COCR is in force at all times in respect of the building [N.B. a COCR will be valid for 10 years – Clause 10(4)];

(b) the central BSI in the building are maintained to a standard not lower than that applied in the first COCR issued in respect of the building; and

(c) if a FOC has been issued, that the central BSI in the building is maintained to a standard not lower than that applied in the latest FOC issued in respect of the installation.

Obligations of the "*responsible person*"

9. The responsible person has the obligation under Clause 12(2) to ensure that:

(a) the BSI serving the unit that are not the central BSI in the building meet, and are maintained to, a standard not lower than that applied in the first COCR issued in respect of the building;

(b) the BSI serving the unit is maintained to a standard not lower than that applied in the latest FOC issued in respect of the installation.

Improvement Notice

10. The proposed legislation imposes criminal penalties for contravention of the various requirements by the developers, owners or responsible persons. Additionally, under Part 5 of the Bill, the Director may issue an improvement notice ("*IN*") to developers, owners and responsible persons to direct the recipient of the notice to remedy the contravention of any requirement under the Bill. Contravention of any direction contained in an IN commits an offence and is liable on conviction to a fine at Level 4 and for any continuing offence, to a daily fine of HK$1,000.

The Law Society's Concerns

11. The Environment Bureau has advised the Law Society that "*The proposed legislation will not contain statutory provisions for the civil consequences of a breach. The remedy that a purchaser or tenant may have against the vendor or landlord will have to be provided for in the sale and purchase agreement of lease an determined under the law of contract.*" However, The Law Society believes the Government should thoroughly consider the policy to adopt and legislate clearly for the incidence of liability although this may be subject to any express contrary intention of the parties in their contract. Otherwise, the new legislation will give rise to more disputes and litigation in property transactions.

12. The Committee also noted the Bureau's suggestions for suitable provisions to be included in the parties' agreement to indicate whether there has been compliance with the Building Energy Codes. Given the aforesaid obligations of the owners and responsible persons, it is important that in the context of property related transactions, mechanism should be put in place to enable the new owners, tenants or licensees ("*the interested parties*") to ascertain whether the law has been properly complied with and the standards under which they are to continually maintain the relevant BSI. In this regard, the interested parties would need to ascertain the existence of a COCR / FOC and whether an IN has been issued and extent of the compliance problem.

13. At present, where a building order has been issued and registered in the case of an unauthorized building structure, it would be the purchaser's commercial decision to consider whether to proceed with the purchase after having considered the extent of non-compliance and his exposure to liability. However, the lack of means for interested parties to ascertain compliance of the new law would render their exposure to liability an unknown factor.

14. Whilst the Director is required under Clause 11 to keep a register of buildings issued with a COCR and make this available for free public inspection at all reasonable times, there is no corresponding duty on the part of the Director with respect to the FOC and IN.

15. For the FOC, Clause 18(5) only requires the registered energy assessor who has issued a FOC to send to each of the following parties a copy of the FOC:
    (a) the Director; and
    (b) the property management company of the building or in its absence, the owner of the building.

16. For the IN, Clause 26(6) of the Bill provides that in the event an IN has been issued to a developer, owner or responsible person ("*the former party*") but there has been a change of ownership or interest in the property so that a person replaces the former party as the developer, owner or responsible person before the expiry of the notice period given in the IN and before the contravention concerned is remedied:
    (a) the former party must, within 7 days after the change, inform the Director of the change; and
    (b) the IN issued to the former party ceases to have effect.

17. Besides the COCR register, it is unclear in what way solicitors acting for the interested parties could ascertain the status of compliance with the law including the following:
    (a) Has the Director refused to issue a COCR to the developer in respect of post-enactment buildings under Clause 10 of the Bill and if so what is the reason for the refusal?
    (b) Has any major retrofitting works been carried out in respect of the building / relevant unit and FOC obtained? If so, where can the interested parties get a copy of the FOC?
    (c) Has an IN been issued in respect of the building / relevant unit and if so,

what are the contents of the IN and where can the interested parties get a copy of the same?

18. It is also unclear what duties or liabilities the subsequent owners will have where the developer has failed to comply with the obligation under Clauses 8 and 9 to submit the 2 requisite declarations in respect of a post-enactment building and no COCR has been issued. As stated in paragraphs 8 and 9 above, the new owners will be under a duty in Clause 12 to ensure that a COCR is in force at all times in respect of the building and that the central BSI is maintained to a standard not lower than that applied in the first COCR. Are they required to or can they submit the declarations required in Clauses 8 and 9 in the place of the developer to obtain a COCR issued? If not, how could they ensure their statutory obligations will be met and not be subject to the issuance of an IN, which could entail the imposition of a daily fine for continuing breach?

19. Likewise, what are the duties and liabilities of the subsequent owners / responsible persons in the event there have been major retrofitting works carried out in the building / relevant unit but no FOC obtained and how could they ensure their statutory obligations will be met? Will they be subject to the issuance of an IN?

20. Where an IN has been issued and there has been a change of ownership / control in the building, it appears Clause 26(6) only seeks to protect the former party by stating in Clause 26(6)(b) that the IN issued to the former party ceased to have effect. Besides the uncertainty as to how the new owner / responsible person can ascertain the existence of an IN, in the case of a lease or licence, there is doubt on whether it is a fair policy for the new law to merely shift the burden of compliance from the existing owner to the lessee or licensee altogether?

21. A further concern on the Bill is that as Land Grants very often require compliance with all laws and regulations from time to time in force in Hong Kong by the Grantee and its successors, non-compliance with the new law would entitle the Government to exercise its right of re-entry under the Land Grant. To avoid causing unnecessary disruption to conveyancing transactions, the Committee submits that the Bill should clarify that non-compliance of the new law will not entitle the Government to exercise its right of re-entry.

22. The Committee noted that the Bill provides for an appeal mechanism under Part 8 for any person who is aggrieved by the decisions of the Director under the legislation to appeal to the Buildings Energy Efficiency Appeal Board. As legal issues will likely be involved, the Committee submits that membership of the Appeal Board should not only comprise representatives from the Engineering sector, but should also include representatives from the legal profession.

23. Lastly, the Committee noted that the definition of "*Major Retrofitting Works*" in Schedule 3 include, inter alia, "*works involving addition or replacement of a BSI specified in a code of practice that covers one or more places with a floor area or total floor area of not less than 500 m^2 under the same series of works within 12 months in a unit or a common area of a prescribed building*". For the sake of clarity, we submit that the legislation should specify the basis on which the "*total floor area of not less than 500m^2*" is to be calculated, e.g. whether on the basis of gross floor area, net floor area, etc.

The Law Society of Hong Kong
Property Committee

27 April 2010