Buildings Energy Efficiency Bill

The Administration's response to the submissions from The Law Society of Hong Kong dated 27 April 2010

Introduction

The Law Society of Hong Kong ("the Law Society") wrote to the Bills Committee on Buildings Energy Efficiency Bill ("the Bill") on 27 April 2010. This paper sets out the Administration's response to the Law Society's submissions.

Civil consequences of non-compliance of the Bill

2. The Law Society submitted that 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 the contract. The Law Society was concerned that the Buildings Energy Efficiency Ordinance ("the Ordinance"), when enacted, would give rise to more disputes and litigation in property transactions.

3. The Bill has a separate penalty system for non-compliance and we consider it more appropriate to handle civil claims under the existing law of contract. It is indeed not a common practice to put civil consequence in legislation. Hence, the Bill does not contain statutory provisions for the civil consequences of a breach, and 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 or lease and determined under the law of contract.

Records of Certificates of Compliance Registration ("COCRs"), Forms of Compliance ("FOCs") and Improvement Notices ("INs") and duties and responsibilities of a subsequent owner and responsible person

4. The Law Society considered it unclear for solicitors acting for interested parties to ascertain the status of compliance of the Ordinance, and enquired about the duties and responsibilities of a subsequent owner and responsible person of a building.

COCRs

5. For post-enactment buildings, a developer is required under clauses 8 and 9 of the Bill to make declarations that all building services installations provided by the developer are designed, installed and completed in accordance with the specified standards and requirements. The Director of Electrical and Mechanical Services ("DEMS") must issue a COCR to the developer if he has duly fulfilled the requirements under clauses 8 and 9, otherwise DEMS may refuse to issue the COCR under clause 10 of the Bill. Under clause 11 of the Bill, DEMS must keep a register of buildings issued with a COCR.

6. Clause 11(3) of the Bill specifies that DEMS must make the register of buildings issued with a COCR available for public inspection. The register will be uploaded to the webpage of the Electrical and Mechanical Services Department ("EMSD") for public inspection. A copy of the register will also be available at the head office of EMSD. An interested party or his legal representative may look up the register and ascertain if a particular building has been issued with COCR.

7. It should be noted that it is the responsibility of a developer to make declaration under clauses 8 and 9 of the Bill. A subsequent developer who has purchased the whole development project has duty to ensure compliance of clauses 8 and 9 if his predecessor fails to do so. In case the developer fails to obtain a COCR, we do not propose to shift the burden to building owners as it should be the developers' legal responsibility to do so. Such incident should be very rare as the cost of compliance should be low as compared to the overall construction cost of a building, and the enhanced penalty level (with daily fine as suggested by the Bills Committee) should provide a strong deterrent effect. That said, it is advisable that interested parties should ascertain whether a COCR has been issued for a building before they acquire the building or any units of the building.

FOCs

8. Under clauses 17(1) and 17(2), if major retrofitting works have been carried out in respect of any central building services installations or building services installations that serve any unit or common area of a building, their owner or responsible person shall obtain a FOC within two months after the completion of the works. Under clauses 18(4) and 18(5), if a registered energy assessor is satisfied that the relevant installation complies with the specified standards and requirements after

inspection, he must issue a FOC and send a copy of it to DEMS and the property management company (or the owner if there is no property management company) of the building concerned. Under clauses 19(1) and 19(2), the owner or responsible person may apply to DEMS for a duplicate of the FOC issued in respect of the unit concerned or common area of the building concerned.

9. Hence, prior to acquisition of property, an interested party or his legal representative should request the existing owner or responsible person to produce a copy of the applicable FOC issued. We do not consider it advisable to keep a register of FOC since –

(a) the applicability of an FOC may change over time. For installations which have subsequently been replaced, the FOC concerning its installation issued years ago will no longer be applicable. We consider that the latest owner / responsible person would be in the best position to identify which FOC is still applicable;

(b) there may be concerns on the confidentiality of relevant information. As such, we have proposed in clause 19 that only owner or responsible person could apply to DEMS for a duplicate of the FOC.

<u>INs</u>

10. Clause 26(6) of the Bill provides that if an IN is issued to a developer, owner or responsible person ("the former party") by DEMS but before the period specified in the IN expires and before any contravention of the concerned is remedied, another person replaces the former party as the developer, owner or responsible person, then the former party must inform DEMS within seven days after the change and the IN issued to the former party ceases to have effect. The former party commits an offence if he fails to notify DEMS, without reasonable excuse, of the change.

11. Hence, any interested party or his legal representative should always enquire the existing owner or responsible person about whether he has been issued with an IN, should the interested party consider entering into any transaction. Yet in any case, according to clause 26(6)(b) an IN issued to a former party will not apply on a subsequent owner or responsible person, as they may replace the installation concerned when they move in.

12. We have already alerted the Law Society that suitable provisions might be required in the sale and purchase agreement or lease to indicate whether the building services installations provided in the buildings/premises are in compliance with the specified standards and requirements, and the maintenance responsibility of the concerned building services installations to ensure continued compliance. Should the subsequent owner or responsible person intend to use an existing installation on which an IN has been issued, the relevant installation should be upgraded or replaced to meet the specified standards and requirements. As mentioned in paragraph 3 above, the Bill does not contain statutory provisions for the civil consequences of a breach and 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 or lease and determined under the law of contract. For better publicity and to keep legal practitioners updated with the changes, we look forward to the Law Society's support and assistance in disseminating the information to its members for future conveyancing practices.

Duties and responsibilities of a new owner and responsible person

13. According to clause 10(1) of the Bill, DEMS must issue a COCR to the developer in respect of the building if the developer has submitted a stage two declaration under clause 9(2)(a) of the Bill that **all** building services installations provided by the developer in the building at or before the time when the declaration is made have been designed, installed and completed in accordance with the specified standards and requirements. Hence, for building services installations which are provided by the developer for individual units, they should also have been certified compliance with the standard and requirement of the Bill.

14. For any unit in a post-enactment building, its responsible person (which may include owner) will have to comply with clause 12(3), which specifies that the responsible person must ensure that –

(a) the building services installations serving the unit that are not the central building services installations 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; and

(b) if an FOC has been issued in respect of any building services installation serving the unit, the installation is maintained to a standard not lower than that applied in the latest FOC issued in respect of the installation.

15. In other words, the responsible person need not ascertain whether a particular building services installation serving his or her unit is covered under the first COCR. He or she is only required to maintain **all** building services installations serving the unit to a certain standard by complying with clause 12(3), and he or she may refer to the register on buildings with COCR kept under clause 11, on the standard (i.e. version of the code of practice) to which he or she should adhere to. It should also be noted that renewal of a COCR under clause 13 of the Bill only concerns central building services installations covered by the COCR, but not those building services installations serving individual units.

16. For those responsible persons who intend to use the existing building services installations in that unit which have been left by their predecessors, they must ensure that such installations meet the requirement in clause 12(3). In doing so, it is advisable for the responsible person to seek advice from a registered energy assessor to ensure compliance. DEMS will keep a register of registered energy assessors and such information would be available in the website of EMSD. The Government will also strengthen public education on the new requirements after the enactment of the Ordinance.

17. If non-compliance is identified, the new owner or responsible person might be issued with an IN and the relevant installations should be upgraded or replaced to meet the specified standards and requirements.

Defence

18. Notwithstanding the above, it should be noted that clause 50 of the Bill provides for the defence of due diligence. It is a statutory defence for a person who is able to show that he has taken all reasonable steps and exercised all due diligence to avoid committing the offence. Hence, before an interested party enters into any transaction, he should make every endeavour to seek all relevant information and clarification from existing developer, owner or responsible person. On the other hand, in order to ascertain whether a particular building services installation meets the required standard at COCR or FOC (if issued), the interested party should seek professional advice from a registered energy assessor.

Not registering a notice against the property

19. The Law Society also raised that for the case of a building order

which has been issued against an unauthorized building structure, the order will be registered in the Land Registry. We consider that situations under the Buildings Ordinance that would register an order issued by the Government against a property are usually those concerning safety. The Bill relates to energy efficiency and is of different nature. Hence, we do not propose to introduce similar registration system for FOCs or INs issued under the Ordinance.

Issue regarding Land Grant

20. The Law Society submitted that the Bill should express that non-compliance with the Ordinance will not entitle the Government to exercise its right of re-entry under land grants.

21. While it would be unlikely that a future land grant contains a condition specifically requiring the grantee to comply with the Ordinance, it should be noted that if a land grant contains terms requiring the grantee to comply with all laws and regulations from time to time in force in Hong Kong, and that the breach of a term of the land grant would entitle the Government to exercise the right of re-entry, then non-compliance with the Bill would entitle the Government to re-enter the land as a matter of its contractual right. It is always the grantee's duty to ensure compliance with all laws and regulations from time to time in force in Hong Kong.

22. However, where a memorial of re-entry has been registered in the Land Registry, the former owner may consider petitioning the Chief Executive and / or applying to the Court of First Instance for relief against the re-entry under section 8 of the Government Rights (Re-entry and Vesting Remedies) Ordinance (Cap. 126).

Membership of Appeal Board

23. The Law Society submitted that Buildings Energy Efficiency Appeal Boards ("Appeal Boards") formed under the Bill should comprise representatives from the legal profession as legal issues would likely be involved in the appeals.

24. Clause 34 provides for the appointment of members of a Buildings Energy Efficiency Appeal Board Panel ("Appeal Board Panel"). Clause 35 provides for the setting up of Appeal Boards by drawing members from the Appeal Board Panel. Under clause 37(3) of the Bill, an Appeal Board may engage any barrister or solicitor to advise on any

matter relating to the appeal. On the other hand, at any proceedings before an appeal board, both the appellant and DEMS may be represented by a barrister or solicitor under clause 37(2). Hence, we consider it not necessary to appoint legal professionals in the Appeal Board Panel or the Appeal Boards.

Reference of "floor area" regarding "major retrofitting works"

25. Schedule 3 to the Bill defines "major retrofitting works". Among other things, works involving a building services installation specified in a code of practice covering certain place(s) of a prescribed building with a floor area or total floor area of not less than 500 m^2 is classified as "major retrofitting works". The Law Society submitted that the Bill should specify how floor area is calculated.

26. Similar to the treatment of other technical details relating to the implementation of the Bill, we intend to set out the specific calculation methodology in respect of floor area in the code of practice to be issued or approved under clause 40 of the Bill. We have consulted the relevant industry and understand that it is familiar with such calculation method. We will provide clear definition in the code of practice and prepare guidelines to illustrate the measurement of floor area with diagrams and examples.

Environment Bureau
Electrical and Mechanical Services Department
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