Buildings Energy Efficiency Bill

The Administration's response to Action Items at the Bills Committee meeting on 15 June 2010

Revision of the penalties at clauses 18(6) and 22(9)

Clause 18(5) requires that a Registered Energy Assessor ("REA") who issues a Form of Compliance ("FOC") must send a copy of it to the Director of Electrical and Mechanical Services ("DEMS"). Under clause 18(6), a REA who fails to comply with clause 18(5) is liable on conviction to a fine at level 3 (i.e. $10,000). Similarly, clause 22(5) of the Bill requires an REA who carries out an energy audit to send a copy of the Energy Audit Form and the energy audit report on the audit to DEMS. An REA who contravenes clause 22(5) is liable on conviction to a fine at level 3, as stipulated under clause 22(9).

2. As explained at the Bills Committee meeting on 15 June 2010, the Administration considers the level of penalty under clauses 18(6) and 22(9) reasonable, and is proportionate with the severity of the offences (i.e. failure to submit copies of relevant documents to DEMS). We do not consider that an REA, albeit being a professional, should be imposed a higher standard with regard to sending copies of relevant documents to DEMS and hence should attract a higher penalty than the proposed level in case of non-compliance. Owners and responsible persons of prescribed buildings are required to comply with the Bill to ensure that the relevant building services installations adhere to the specified standards and requirements. Non-compliance in this regard is of a different nature from REA's failure to submit a copy of document to DEMS (penalty for the former is a fine at Level 5 (i.e. $50,000)) and hence the penalties for these different offences should be considered individually.

Revision of clause 29 in particular on the need for warrant to enter any part of a prescribed building that is not a residential unit

3. Having regard to the comments of the Bills Committee at its meeting of 15 June 2010, the Administration has reviewed clause 29. As explained in LC Paper No. CB(1) 2245/09-10(02), different powers have been provided for public officers under different legislation to meet specific requirements. For the purpose of the Bill, the Administration considers that the power for authorized officers under clause 29 is appropriate and essential for the implementation of the Ordinance, when

enacted. As such, we consider it impractical to introduce a warrant system under the Bill and set a reasonable threshold for the grant of a warrant by Magistrates. To apply for a warrant to enter any part of a prescribed building that is not a residential unit, it should be reasonably expected that DEMS should have reasonable suspicion that some relevant building services installations do not comply with the legislation. However, the whole purpose for an authorized officer to enter a prescribed building to inspect and examine any building services installations is to ascertain whether the legislation has been or is being complied with. It would be very difficult to gather evidence of non-compliance with the relevant provisions by making observation outside the premises or making simple enquiries. In reality, it is very difficult, if not totally impossible, for DEMS to prove the reasonableness of his suspicion of non-compliance before an authorized officer ever enters a building and inspects the relevant building services installations. On the contrary, if the "reasonable suspicion" element is not required for the issuance of a warrant, or the threshold for its issuance is set too low (e.g. the authorized officer reasonably suspects that there exists a building services installation), then virtually each and every inspection requires backup of a warrant. This is undesirable and would cause undue burden on the Administration as well as the Judiciary.

4. As explained in the earlier paper (LC Paper No. CB(1) 2245/09-10(02)), clause 29 only empowers authorized officers to enter a non-residential unit for the purpose of ascertaining whether the Ordinance has been or is being complied with. Also, a person would only contravene clause 29 if he fails to comply with the requirements or obstructs any authorized officer or his assistant to exercise the power without reasonable excuse. Whether a person has reasonable excuse depends on the facts of individual cases and would be determined by the Court. To further ensure reasonableness in exercising this power, the Administration proposes to amend clause 29 so that authorized officers would only enter any part of a prescribed building that is not a residential unit during reasonable hours. This is in line with section 31(1) of the Genetically Modified Organisms (Control of Release) Ordinance (Cap. 607) and section 7(3) of the Product Eco-responsibility Ordinance (Cap. 603).

5. We also propose to introduce a "notice system" modeling on the Electricity Ordinance (Cap. 406). Section 49(1) of Cap. 406 reads "*The Director may at a reasonable time enter premises to inspect an electrical installation but an owner of an electrical installation is not obliged to allow the Director to inspect his installation unless the Director has given*

him at least 2 weeks notification of the proposed time of the inspection and includes in the notice the reason for the inspection." For the Bill, we propose to amend clause 29 so that an authorized officer should be given entry into the premises after a two-week notice. Under this proposed approach, a person will only be liable for obstructing an authorized officer in exercising the power under the Bill, if that person refuses the officer's entry after receiving the two-week notice.

Inclusion in the Bill provisions for cancellation of registration of REAs

6. As explained at the Bills Committee meeting on 15 June 2010, clause 42 of the Bill empowers the Secretary for the Environment ("SEN") to make regulations providing for the registration and regulation of, and disciplinary matters in respect of, REAs. This includes the cancellation of registration of REAs. Clause 31 of the Bill stipulates that DEMS must keep a Register of REAs and make available the Register for inspection by members of the public, with a view to ascertaining whether any person is a REA. Under clause 31(4), DEMS must update the Register at any intervals. Hence, those REAs who are cancelled with the registration would be removed from the Register. The Administration considers that details regarding cancellation of the registration of REAs should be dealt with when the Legislative Council considers the relevant regulation, as part and parcel of a whole package of registration matters.

Inclusion in clause 34(1) a member from the legal profession in the appeal board panel

7. As explained at the Bills Committee meeting on 15 June 2010, both an appellant and DEMS may be represented by a barrister or solicitor at a hearing of the Appeal Board. The Appeal Board may also engage any barrister or solicitor to advise the board on any matter relating to the appeal. The Administration considers it not necessary to specifically appoint legal professionals to the Appeal Board Panel under clause 34 of the Bill. Under clause 39(4) of the Bill, an Appeal Board must issue to the appellant and DEMS a notice of its determination and the reasons for it. We consider it not necessary for the determination and the reasons to be drafted by a legal professional. This is consistent with the arrangements for some other Appeal Boards under existing legislation, e.g. the Gas Safety Ordinance (Cap. 51) and the Energy Efficiency (Labelling of Products) Ordinance (Cap. 598).

Inclusion in the speech to be delivered by the Secretary for the Environment at the resumption of Second Reading debate on the Bill that any member of the appeal board panel will not be reappointed after serving six years

8. In making appointments to advisory and statutory bodies ("ASBs"), the Government aims to secure the services of the most suitable persons to meet the requirements of the board or committee concerned. In making appointments, the Government will consider a host of factors including a candidate's ability, expertise, experience, integrity and commitment to public service, the functions and nature of the board or committee concerned, and so on. For statutory bodies, the appointing authorities will also consider the relevant statutory requirements.

9. In considering the above factors, the appointing authorities aim to achieve the objective that the composition of ASBs could broadly reflect the interests and views of the community, and that the principle of appointment by merit can be upheld. When appointing members to the Appeal Board Panel under clause 34, the Administration will observe the "Six-year Rule" and "Six-board Rule" (6-6 Rules) as far as practicable. As requested by the Bills Committee on 15 June 2010, we will consider stating in SEN's speech at the resumption of Second Reading Debate that the 6-6 Rules would be observed as far as possible regarding appointments to the Appeal Board Panel.

Revision of the composition and proceedings of appeal board under clause 36

10. Having regard to the comments of the Bills Committee at its meeting of 15 June 2010, the Administration has reviewed the composition and proceedings of an Appeal Board under clauses 35 and 36. If a member of an Appeal Board, during the course of an appeal, resigns or has his membership terminated, the Administration would appoint a new member from the Appeal Board Panel to replace the original member. The appeal being heard shall continue, unless out of the five members of the Appeal Board, more than two have resigned or have their membership terminated. The Administration would propose Committee Stage Amendments ("CSAs") to state this out under clause 35. Besides, the Administration intends to lower the quorum for an Appeal Board meeting from four members to three members under clause 36 to allow greater flexibility for the conduct of an appeal hearing.

Flowchart with the logistics of appeals under the Bill and setting a time table for hearing of appeals

11. Clause 33(4) stipulates that on receipt of a notice of appeal, DEMS must deliver it to SEN as soon as reasonably practicable. Clause 35(1) stipulates that within 21 days after receiving a notice of appeal, SEN must appoint an Appeal Board by drawing members from the Appeal Board Panel formed under clause 34. Given the circumstances of each case vary from one to another, the Administration considers it impractical to specify in the Bill a time frame for the hearing of appeals. That said, to facilitate formation of an Appeal Board, the Administration proposes to increase the maximum number of Appeal Board Panel members to be appointed by amending clause 34(1) such that each professional stream as stated in respective paragraphs may return up to 10 members, instead of five.

12. As regards the logistics of appeals, a flowchart is at **Annex**.

Requirement on the Director to inform an appellant the documents which the Director will rely on and any witness that the Director intends to call at the hearing of an appeal

13. Clause 33(3) specifies that a notice of appeal must be made in a specified form, to be accompanied by a copy of any document the appellant intends to rely on and contains the particulars of any witness that the appellant intends to call at the hearing. To discourage unreasonable requests of appeals, the Administration considers the requirements under clause 33(3) reasonable. The Administration considers it not necessary for DEMS to inform the appellant the same. This is also in line with the arrangement under existing law, e.g. section 34 of the Energy Efficiency (Labelling of Products) Ordinance (Cap. 598).

Amendments to clauses 37(3) and 37(7)

14. The Administration considers that clause 37(3) is clear that any barrister or solicitor engaged by an appeal board is to advise the board on any matter relating to an appeal. An appellant or DEMS may separately be represented by a barrister or solicitor. That said, having regard to the comments of the Bills Committee at its meeting of 15 June 2010, the Administration is prepared to amend clause 37(3) to state that the barrister or solicitor engaged by an Appeal Board is only required to give

advice to the Appeal Board. Regarding clause 37(7), the Administration agrees to replace “bound to incriminate” by “tend to incriminate”.

Draft Committee Stage Amendments

15. A revised draft CSAs will be submitted to the Bills Committee in due course.

Environment Bureau
Electrical and Mechanical Services Department
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Annex

Logistics of Appeals