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9 July 2010

Miss Katharine Choi,
Office of the Secretary for the Environment,
Environment Bureau,
Government Secretariat,
46/F., Revenue Tower,
5 Gloucester Road,
Wan Chai, Hong Kong.

Dear Miss Choi,

Building Energy Efficiency Bill

Thank you for your letter dated 26 May 2010 enclosing the Administration's response to submissions made by our Property Committee on the above Bill. The Committee has reviewed the Administration's response and would like to make further submissions as follows:

Civil Consequences of non-compliance of the Bill

It may be easy for the Administration to say that "*it is indeed not the common practice to put civil consequence in legislation*" and that the parties should deal with this under the law of contract. The Administration should reach out to see how real estate transactions are done in reality. Once the preliminary agreements are signed, it will be difficult for solicitors to put in additional terms and conditions in a formal sale and purchase agreement for the protection of their clients unless with the other party's consensus. It is doubtful whether estate agents will remind purchasers and tenants to make provision for the civil consequences of a breach under the new legislation in the preliminary agreements, in any event, they have no obligations to do so. The Administration's view is only wishful thinking. This can be a trap for the unwary purchasers and tenants, and will increase the potential for claims and disputes in property transactions.

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Records of Certificates of Compliance ("*COCR*"), Forms of Compliance ("*FOC*") and Improvement Notices ("*IN*") and duties and responsibilities of a subsequent owner and responsible person

COCR

The Administration advised that the responsibility to obtain a COCR primarily rest with the developer. If the Administration is determined to improve the energy efficiency of buildings, the most effective measure is to make the COCR a pre-requisite for sale. Compared to the lucrative profits in real estate projects, a mere fine of $1 million on the developer has no deterrent effect.

In the event that an individual unit of a building without COCR has been sold to a purchaser, he may not be in a position to comply at all, since it may involve common parts or even units belonging to other owners, or even worse, the job can only be done during construction of the building.

It should also be noted that the owner of a building has the obligation under Clause 12(2) of the Bill to ensure that the central building services installation in the building are maintained to a standard not lower than that applied in the first COCR issued in respect of the building. How can an owner comply with his obligation under Clause 12(2) if the developer has failed to obtain a COCR in the first place?

Moreover, as COCR will only be valid for 10 years and have to be renewed from time to time, the question is again whether it will be difficult for the individual owners to comply when ownership of the building is in the hands of hundreds of owners.

FOC and IN

The Society raised concern on the lack of corresponding registers for the FOC and IN as the one that is proposed to be set up for COCR. The Administration is asking purchasers to rely on the full and frank disclosure of the vendor. However, what if the vendor fails to disclose?

For FOC, the purchaser will not be in a position to know whether an FOC has been issued but when he becomes the owner, he will have the responsibility to maintain the installations to a standard not lower than that applied in the FOC , i.e. he will be taking on hidden responsibilities.

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On the grounds furnished by the Administration for not keeping a register of FOC, the Committee has the following comments:

(a) *FOC may change over time* – if a register is available, it can always be updated. In fact, knowledge of a previous FOC may alert the purchaser to seek professional help to check if the installations have been maintained to the required standard.

(b) *Concerns on the confidentiality of the relevant information* – the Committee wonders what confidential information will be included in the FOC which is issued by a registered energy assessor, bearing in mind that names, addresses and even ID card numbers of owners of properties are now being placed on the public registers maintained by the Administration.

The Committee believes that it is indeed a matter of public interest for the COCR, FOC and IN to be made available in the form of a public register for the public information.

For IN, the responsibility to comply can be shifted onto the purchaser while the vendor will be gone. Clause 26(6) of the Bill serves to protect the vendor and facilitates the issuance of a new IN on the purchaser only.

Again it is impracticable to expect that lawyers will be able to make provisions in the agreements for sale and purchase to cater for civil consequences given that their hands are always tied by preliminary agreements signed between the parties without seeking prior legal advice.

Perhaps the public should be told that this legislation will impose extra burden on every purchaser to use all due diligence to seek relevant information on the COCR, FOC and IN from the vendor, and to seek professional assistance from a registered energy assessor when he wants to purchase a property.

Issues regarding Land Grant

The Committee understood the remedies available to the owners should the Government take re-entry action but the concern is more on that given the standard provision in the Government Grant entitling the Government to exercise the right of re-entry in the event of non-compliance of any law, unless the new legislation should expressly clarify that non-compliance of the new legislation will not trigger the Government's right of re-entry under the Government Grant, it will have such effect thus giving rise to title problems and posing difficulties for conveyancing transactions.

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The Administration must have its own policy as to under what circumstances it will or will not exercise its right of enforcement under a Government Grant. With the introduction of more and more legislation imposing obligations on owners of properties, a blanket reservation of the Administration's right of enforcement by re-entry action will only cast more doubts on the title of properties and hinders property transactions. Openness and transparency in the Administration's policy are essential for the sustainable development of Hong Kong.

In the joint meeting with the Administration on discussion of the Bill in January this year, the Committee queried why compliance of the new law should not be made a pre-condition for sale. Representatives from the Environment Bureau indicated that as the issuance of an Occupation Permit was usually tied up with building safety issues but the new legislation would only concern "*relatively minor obligations*", they have come to the conclusion not to link the new law with the issuance of the Occupation Permit. If the new law only imposes "*minor obligations*" on the public as alleged, the Government should really not tie its re-entry right with non-compliance of the new requirements.

We understand that the Bills Committee is nearing completion of its deliberation process on the Bill but submit that the above are important issues to be discussed and resolved before formal passage of the Bill into legislation by our Legislative Council.

Yours sincerely,

Christine W. S. Chu
Assistant Director of Practitioners Affairs

c.c. Hon Audrey Eu, Chairman of the Bills Committee

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