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By Fax (2899 2916)

25 February 2010

Mr. Harry LIN
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Development Bureau
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Dear Mr. LIN,

Buildings (Amendment) Bill 2010

I am scrutinizing the legal and drafting aspects of the above Bill and would like to seek clarification on the following points -

Clause 4(1)

The expression "contraventions of the provisions of this Ordinance" as defined in section 2(1) of the Buildings Ordinance (Cap. 123) (BO) does not seem to appear anywhere in the provisions of BO. If so, please advise on the need for the definition as drafted and the proposed amendments.

Clause 4(6)

The expression "prescribed repair" as proposed to be defined means "a repair or testing of a building as prescribed in the regulations". Please advise on the reason for including "testing" for the purpose of the definition but not for the definition of "prescribed inspection". Further, please clarify whether "testing" in the proposed definition would involve construction works in any or all cases. Similarly, please set out the rationale for allowing only the registered general building contractors and registered minor works contractors amongst the qualified persons (the proposed section 30E(5)) to carry out the prescribed repair if it relates to testing only.

Clauses 6(2), 6(9) and 8

The proposed section 3(3B) of BO refers to the "inspectors' register". Similarly, "Registered Inspectors' Disciplinary Board Panel" is mentioned in the proposed section 3(5FA) and the proposed amended section 5A. Sections 3(1), (3), (3A), (5F) and 5A of BO contain similar expressions. Unlike similar names in other legislation such as "Adopted Children Register" in the Adoption Ordinance (Cap. 290), "Children Register", "Donors Register" and "Patients Register" in Human Reproductive Technology (Licensing) Regulation (Cap. 561 sub. leg. A) and "Solicitors Disciplinary Tribunal Panel" in Legal Practitioners Ordinance (Cap. 159), each of them contains an apostrophe to denote the possessive case. Please clarify the difference in drafting.

Clauses 10(16), 11(1), 13(6) and 14(1)

The above clauses amend sections 7(4)(a)¹, 9A(1)², 13(7)³ and 13A(1)⁴ of BO respectively to include the time within which appeals may be made. It is expressly provided that the appeal under these sections is subject to any rules of court made under the High Court Ordinance (Cap. 4). However, the time limit specified for appeal in the sections mentioned above is different from that in Order 55 rule 4(2)⁵ of the Rules of the High Court (Cap. 4 sub. leg. A) (RHC). Please clarify the policy intention or the effect of the different formulation.

As regards the actual amendments under the Bill, the proposed amended sections 7(4)(a) and 13(7) of BO specify "within 28 days of the order of the disciplinary board" as the time limit for appeal. There is no requirement under sections 7 and 13 of BO that the person subject to disciplinary proceedings be notified of the order of the disciplinary board except the publication of the findings and order

¹ The proposed amended section 7(4)(a) of BO provides that "any authorized person, registered structural engineer, registered geotechnical engineer or registered inspector aggrieved by any order made in respect of him under this section may appeal to a judge of the Court of First Instance within 28 days of the order of the disciplinary board and...".

² The proposed amended section 9A(1) provides that "a person who is aggrieved by a decision of a Registration Committee under this Part may appeal to a judge of the Court of First Instance within 28 days of the notification of the decision of the Registration Committee by the Building Authority to the person."

³ The proposed amended section 13(7) provides that "a registered general building contractor, registered specialist contractor, director, officer or other person aggrieved by an order made in respect of him under this section may appeal to a judge of the Court of First Instance within 28 days of the order of the disciplinary board."

⁴ The proposed amended section 13A(1) provides that "an applicant for registration, renewal of registration or restoration of his name to a register who is dissatisfied with a decision of the Building Authority may appeal to a judge of the Court of First Instance within 28 days of the notification of the decision of the Building Authority by the Building Authority to the applicant."

⁵ Order 55 rule 4(2) of RHC provides that the notice of motion "must be served, and the appeal entered, within 28 days after the date of the judgment, order, determination or other decision against which the appeal is brought". In the case of an appeal against an order, determination, award or other decision of a tribunal, government department or other person, Order 55 rule 4(4) of RHC provides that "the period specified in paragraph (2) shall be calculated from the date on which notice of the decision was given to the appellant by the person who made the decision or by a person authorized in that behalf to do so."

of the disciplinary board in the Gazette under sections 7(2A) and 13(4A). Please clarify whether the proposed time limit for appeal refers to the date of the order of the disciplinary board or the date of gazettal of such order. If it refers to the former, please advise on the rationale for the proposed time limit for appeal before the order of the disciplinary board is brought to the notice of the person subject to disciplinary proceedings.

The proposed amended sections 9A(1) and 13A(1) of BO specify "within 28 days of the notification of the decision of the [Registration Committee/Building Authority] by the Building Authority to the [person/applicant]" as the time limit for appeal. There is no requirement under sections 9A and 13A of BO that the person against whom the decision is made be notified of the relevant decision nor that such decision be published in the Gazette. Please clarify how the proposed time limit for appeal is to be calculated.

Clause 19

The proposed sections 30B(11) and 30C(9) specify the persons who are liable for the cost of the inspection and repair works that the Building Authority has carried out or has caused to be carried out (together with a surcharge of 20% on the cost that the Building Authority may impose) in two different circumstances, namely before and after the registration by memorial in the Land Registry of a notice requiring a prescribed inspection and, if necessary, prescribed repair. Before registration of the notice, only the person being served with the notice is liable, and after registration, the owner of the relevant part of the building as at the date of completion of the inspection or repair works (as the case may be) is liable. Hence, the Building Authority's choice of whether to register a memorial with the Land Register will determine the person liable for the cost and surcharge, in particular if there is a change of ownership after a notice is served but before its registration. Please provide information on how such a choice will be made.

Section 33 of BO also provides for recovery of costs by the Building Authority. Please elaborate on how this section will be applied in the light of section 30B(11) and 30C(9).

Clause 23(3)

The proposed section 38(1)(kg)(i) empowers the Secretary for Development to make regulation to provide for the scope, standard and requirements of a prescribed inspection or prescribed repair in respect of a building whilst paragraph (ii) sets out the same regulation making power but in respect of a window in a building. It appears that "in respect of a building" in paragraph (i) refers to all parts of the building including windows. Please clarify and consider whether it is necessary to specify paragraph (ii).

I shall be grateful if you could let me have your response in both Chinese and English to the above points at your earliest convenience, preferably on or before 12 March 2010 to enable members of the Bills Committee to consider the matter before its second meeting which is to be held on 20 March 2010.

Yours sincerely,

(Winnie LO)
Assistant Legal Adviser

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