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29 March 2010

Mr WONG Siu-yee  
 Clerk to Bills Committee  
 Legislative Council Building  
 8 Jackson Road, Central

Dear Mr WONG,

**Buildings (Amendment) Bill 2010**

Thank you for your letter of 26 February 2010. I am pleased to provide below the Administration's response to the issues raised by Hon CHEUNG Hok-ming in his letter of 26 February 2010 (the letter) to the Chairman of the Bills Committee on Buildings (Amendment) Bill 2010 (the Bill).

Clause 4(1) – definition of “contraventions of the provisions of this Ordinance” (paragraph 1 of the letter)

In the definition of “contraventions of the provisions of this Ordinance”, “order” includes orders given by the Building Authority (BA) under sections 19(2), 20(2), 22(3), 23(1), 23(2), 23(3), 24(1), 25(2), 26(1), 26A(1), 26A(3), 27A(1), 27A(2B), 27C(1), 27(4), 28(2)(a), 28(3), 28(5), 29(2)(a), 29A(2), 30(3), 31(2)(a) and 32(2) of the Buildings Ordinance (Cap. 123) (BO). The words “notice served” is added to the definition to cover notices served under the proposed sections 30B(3), (4), (5) and (6) and 30C(3) and (4). All these orders and notices are mandatory in nature and failure to comply with any of them without reasonable excuse is an offence.

Clause 4(5) – definition of “specified document” (paragraph 2 of the letter)

The proposed amendment (as stipulated in the Bill) to the definition of “指明文件” (“specified document”) in the Chinese text of section 2(1) of the BO is to clarify the possible discrepancy between the English text and Chinese text of the definition. With the amendment, the definition will clearly reflect the legislative intent. We do not consider it necessary to further subdivide paragraph (a) of the definition.

Clause 4(6) – definition of “external wall” (paragraph 3 of the letter)

Party walls are usually found in old buildings at the boundary line which separates two buildings. A party wall is an integral element, and it is unlikely that half of the same can be removed with the other half remaining intact. In fact, such removal could be unauthorized building works (UBWs) and a registered inspector appointed to carry out a prescribed inspection in respect of the common parts and external walls of the building is required to identify and report the same to the BA. The Buildings Department (BD) will take necessary actions in accordance with its enforcement policy.

Clause 4(6) – definition of “qualified person” (paragraph 4 of the letter)

With the implementation of the Mandatory Building Inspection Scheme (MBIS) and Mandatory Window Inspection Scheme (MWIS), the BD will launch a comprehensive public education and publicity campaign to enable owners and the general public to gain a better understanding of the key features of the two Schemes, including selection of qualified service providers for the inspection and repair works under the two Schemes. The BD will promulgate a list of qualified personnel, including registered inspectors (RIs), qualified persons (QPs) and registered contractors, through its website. The BD, in collaboration with the Hong Kong Housing Society and Urban Renewal Authority, will also provide owners with advisory services. We will consider the promulgation of user-friendly guidelines to enable building owners to easily identify qualified personnel to carry out inspection and repair works. We do not consider it necessary to further label building professionals and contractors.

Clause 6 – inspectors’ register (paragraphs 5 to 7 of the letter)

Currently under the BO, building works that require the BA’s approval and consent have to be undertaken by APs and RSEs registered under the BO. There are about 1 800 of them at present. To allow more choices for building owners and enhance market competition, the pool of service providers for building inspections will be expanded from APs and RSEs to registered architects (RAs), registered professional engineers (RPEs) and registered professional surveyors (RPSs). They will be registered as RIs under the inspectors’ register. With this expansion, we expect that the number of RIs can reach some 6 500, which should be adequate to meet the market demand upon implementation of the MBIS. The expansion will at the same time promote competition in the industry.

The relevant detailed registration requirements of RIs will be formulated based on the academic training, core training leading to the qualifications and experience of the various professionals concerned. We consider that an RI should be an RA, RPE or RPS registered in the disciplines relevant to building design, construction or maintenance, and should possess experience in the field of building design, construction or maintenance in Hong Kong. The BD is formulating the detailed requirements in consultation with the industry. In line with the existing legal framework for registration of APs and RSEs, such detailed requirements will be prescribed in the regulations made under section 38 of the BO (as to be amended by clause 23 of the Bill).

The BD will promulgate a list of qualified personnel, including RIs, QPs and registered contractors, through its website.

Clause 8(3) – Registered Inspectors’ Disciplinary Board Panel (paragraph 8 of the letter)

Clause 8(3) of the Bill was drafted based on section 5A(2) of the BO. According to this clause, the Registered Inspectors’ Disciplinary Board Panel (the Panel) consists of not less than one RI each from the lists of architects, engineers and surveyors, to ensure that the Panel will consist of members from all of the three professions. In practice, 15 RIs will be appointed to the Panel as far as possible, with five RIs each from the lists of architects, engineers and

surveyors. There will be a balanced participation among architects, engineers and surveyors in a disciplinary board to conduct a hearing of disciplinary proceedings against an RI as, according to the proposed section 5(2AA), such disciplinary board should comprise at least one member of the Panel each from the three professions.

Clause 10 – disciplinary proceedings for AP, RSE, registered geotechnical engineer or RI (paragraphs 9 to 11 of the letter)

According to the proposed sections 7(1)(bc) to (be) and 7(1A)(k) and (l), the BA may bring to the notice of a disciplinary board that an AP, RSE or RI has failed to discharge the duties or abide by the requirements imposed on an RI or QP under the BO and such failure may render the person unfit for certifying any prescribed inspection or certifying or supervising any prescribed repair; make further certification of any prescribed inspection or certification or supervision of any prescribed repair by that person prejudicial to the due administration of the BO; or render the person deserving of suspension from certifying any prescribed inspection or certifying or supervising any prescribed repair. When considering whether to so bring to the notice of a disciplinary board, the BA will consider whether the AP, RSE or RI is unsuitable for undertaking a prescribed inspection or prescribed repair, taking into account all relevant considerations, including the extent and seriousness of the consequences of the aforementioned failure, whether the failure is committed deliberately, etc.

According to section 7(2) of the BO as to be amended by clause 10 of the Bill, the disciplinary board may, after due inquiry order that, inter alia, the name of a person be removed from the inspectors' register or the person be prohibited from certifying any prescribed inspection or certifying or supervising any prescribed repair in respect of a window in a building, either permanently or for any period that the disciplinary board thinks fit. The BD will promulgate a list of qualified personnel, including RIs, QPs and registered contractors, through its website. The person so removed or prohibited by a disciplinary board will no longer appear in the list. The order of the disciplinary board will also be published in the Gazette. Owners may check with the BD if a person possesses a valid registration. After all, any person who carries out building works without appropriate qualification (including those who are permanently or temporarily prohibited from carrying out such works) commits an offence. The

BD will check the documents submitted by professionals and contractors to ensure that their registrations are valid.

Clause 13 – disciplinary proceedings for contractors (paragraph 12 of the letter)

The BD will promulgate a list of qualified personnel, including RIs, QPs and registered contractors, through its website. Same as the arrangement for APs, RSEs and RIs explained in the paragraph above, a contractor the name of whom is removed from the relevant register or who is prohibited from certifying any prescribed inspection or certifying or supervising any prescribed repair in respect of a window in a building in accordance with a order made by a disciplinary board will no longer appear in the list. The order of the disciplinary board will also be published in the Gazette.

Clauses 13(6) and 14(1) – appeal against disciplinary order or BA’s decision (paragraphs 13 and 14 of the letter)

As explained in our separate reply to the Assistant Legal Advisor, section 13(4A) of the BO provides that where the disciplinary board makes an order under section 13(4), it shall order that its findings and order be published in the Gazette, which constitutes public notice of the order on the date of publication. In practice, the person will be made aware of the order made by the disciplinary board at the hearing of the disciplinary proceedings conducted by the disciplinary board, and will also be subsequently notified of the order of and reasons considered by the disciplinary board in writing. It is the Administration’s intention to follow the existing practice that the person may appeal against the order within 28 days from the date of service of the notice of the order in writing.

Sections 3(16) and 8E of the BO provides that the BA is required to give reasons in writing for a decision not to include, retain or restore a person’s name in a register at the time of giving notice of the refusal. It is the Administration’s intention that the person may appeal against the decision under section 9A(1) of the BO within 28 days from the date of the service of the notice of the BA’s decision.

We notice that the relevant time limit for lodging an appeal has already been specified in Order 55 rule 4 of the Rules of High Court (Cap. 4 sub. leg. A) (RHC) and, for the avoidance of doubt, would delete clauses 13(6) and 14(1) of the Bill.

Clause 19 (proposed section 30A) – application (paragraph 15 of the letter)

It is proposed that the MBIS and MWIS will not cover domestic buildings not exceeding three storeys in height. However, non-domestic buildings such as commercial and industrial buildings, though not exceeding three storeys in height, will be included in the two Schemes. Whether a building is included in or excluded from the two Schemes will be determined according to the authorised height and use of the building. The BA will make reference to the occupation permit of a building and other evidence available to the BA (including documents submitted to or issued by the BA under the BO and information kept by other government departments) in making the determination.

Where a domestic building (with its authorised construction) does not exceed three storeys in height, even if any unauthorised building works (UBWs) make the building exceed three storeys in height, the building will not be covered by the two Schemes. The BA will take necessary actions against such UBWs in accordance with its enforcement policy.

Where part of a building not exceeding three storeys in height is domestic while part of it is non-domestic (i.e. a composite building), the entire building will be included in the two Schemes. Unauthorised change in use of a building does not affect the application of the two Schemes. The BA will take necessary actions against unauthorised material change in use in accordance with its enforcement policy.

Clause 19 (proposed sections 30B(1) and (2)) – age of building (paragraph 16 of the letter)

According to the proposed section 30B(2), the age of a building is to be determined by the BA in accordance with the date the occupation permit in respect of the building was issued, or if no occupation permit had been issued

the evidence available to the BA. In the latter case, the BA will make reference to relevant information available to the BA, for example, documents submitted to or issued by the BA under the BO, permit to occupy a new building issued by the relevant District Officer, the Land Registry's record, pre-war building data kept by the BD, records of aerial photos and any other evidence kept by other government departments.

Clause 19 – inspection of roof (paragraph 17 of the letter)

The MBIS is proposed to cover the common parts, external walls and projections of buildings. The scope of the Scheme is formulated based on safety assessment that the aforementioned components of a building pose a higher risk to public safety as they directly face the pedestrians or are areas frequented by building users. Roofs which are not common parts of buildings will not be covered by the Scheme, and will be dealt with by the BD in accordance with the existing provisions of the BO.

Clause 19 – service of notices (paragraphs 18 and 22 of the letter)

It is an established principle that building owners have the responsibility to coordinate and finance the building works of their own properties. Therefore a notice served under the proposed section 30B(3), (4), (5) or (6) or 30C(3) or (4), as for other orders under the BO, will be served on the concerned owner. Where a notice served under the proposed section 30B(3), (4), (5) or (6) or 30C(3) or (4) is not complied with (for example, the owner cannot be found), the BA may, based on public safety consideration, carry out or cause to be carried out the inspection or repair works required by the notice and subsequently recover the cost and surcharge from the concerned owner.

Clause 19 (proposed section 30B(6)) – control of signboards (paragraphs 19 and 20 of the letter)

Signboards are buildings works within the building control system under the BO and, under the current BO, must be erected after obtaining prior approval and consent from the BA. In future, they can be erected in accordance with the simplified requirements under the minor works control system (to be implemented within 2010). There is no retrospective approval mechanism in

the BO and signboards erected not in accordance with the above requirements are UBWs.

Notices under the proposed section 30B(6) will only be served requiring prescribed inspection and prescribed repair of authorised signboards. Where a notice served is not complied with, the BA may, based on public safety consideration, carry out or cause to be carried out the inspection or repair works required by the notice and subsequently recover the cost and surcharge from the concerned owners. The BA may also take necessary actions under section 105 of the Public Health and Municipal Services Ordinance (Cap. 132) in accordance with its enforcement policy against abandoned signboards.

Similar to the treatment of UBWs, notices will not be served under the proposed section 30B(6) against unauthorised signboards. Under the proposed section 30D(5)(b), an RI appointed to carry out a prescribed inspection in respect of the common parts and external walls of a building is required to identify UBWs, including unauthorised signboards, in the common parts and the external walls of the building, assess the safety conditions of these UBWs, and report to the BA the same in the inspection reports. For emergency situations, the RI is required to report immediately to the BA. Upon receipt of report of unauthorised signboards, the BA will take necessary actions in accordance with its enforcement policy against UBWs and abandoned signboards.

Clause 19 – standard of prescribed inspection and prescribed repair (paragraphs 21 and 23 of the letter)

The standard and requirements of the MBIS and MWIS will be provided for in the BO to be amended and regulations to be made under section 38 of the BO (as to be amended by the Bill). For the detailed technical standards and requirements, following the BD's established practice, the Department will issue practice notes and codes of practice to the industry. With the implementation of the two Schemes, the BD will launch a comprehensive public education and publicity campaign to enable owners and the general public to gain a better understanding of the key features of the two Schemes, including the required standards of the two Schemes. The BD will also endeavour to ensure that service providers understand the statutory requirements.

Upon completion of the prescribed inspection and prescribed repair required by a notice served under the proposed section 30B(3), (4), (5) or (6) or 30C(3) or (4), the RI or QP appointed for the prescribed inspection and prescribed repair is required to submit relevant documents to the BD. The BD will conduct desktop and random check of the documents. In line with the BD's current practice, if the BD considers that the notice has not been fully complied with, the BD will contact the person on whom the notice is served to explain the statutory requirements and provide necessary advice and guidance to assist the person in compliance with the notice.

We anticipate that only when the concerned owners are unwilling or unable to comply with a notice served under the proposed section 30B(3), (4), (5) or (6) or 30C(3) or (4) will the BA consider, based on public safety consideration, carrying out or causing to be carried out the inspection or repair works required by the notice and subsequently recover the cost and surcharge from the concerned owners.

Clause 19 (proposed section 30D(3)(a)) – exemption of RI from personal inspection (paragraph 24 of the letter)

Generally, an RI must carry out a prescribed inspection personally. Nevertheless, we recognise that in some occasions an RI may not be able to carry out a prescribed inspection personally, and exemption will be prescribed in the regulations to cater for such occasions. For example, where a detailed investigation into certain inspection items is necessary to ascertain the extent or cause of a defect, an RI may not possess the relevant specialised qualifications and experience and hence will be allowed to engage a specialist to carry out such detailed investigation.

Clause 19 (proposed sections 30D(5) and (6)) – duty of RI to report any case of emergency (paragraph 25 of the letter)

The concept of case of emergency is well understood within the industry. Similar reference is found in section 19 of the BO which provides that in case of emergency, building works or street works may be commenced without obtaining the BA's prior consent. In general, a case of emergency refers to a situation which constitutes obvious or imminent danger to life or property,

including irregularities in structural integrity and safety.

Clause 19 (proposed section 30D(7)) – RI not to act as contractors (paragraph 26 of the letter)

For the proposed section 30D(7), our intention is that the RI appointed to carry out a prescribed inspection or supervise a prescribed repair must not be the authorised signatory or the person who acts on behalf of the registered contractors appointed to carry out the prescribed repair.

Clause 19 (proposed section 30E(3)) – personal inspection by QP who is not natural person (paragraph 27 of the letter)

The proposed section 30E(3) provides that if a QP is not a natural person, a representative of the QP as prescribed in the regulations must carry out the prescribed inspection personally. The prescription of representatives of QPs for the purposes of this proposed section will be provided for in a regulation to be made under section 38 of the BO as to be amended by clause 23(3) of the Bill.

Clause 21(2) (proposed section 35(2)) – certificate of service (paragraph 28 of the letter)

The proposed section 35(2) provides that “[a] *certificate* purporting to be signed by a person who *states* in that certificate that the person has effected service under section 35(1) is evidence of the facts stated in the certificate relating to that service.” Section 36 of the Crimes Ordinance (Cap. 200) provides (among others) that “[a]ny person who knowingly and wilfully makes (otherwise than on oath) a *statement* false in a material particular, such statement being made ... (b) in ... *certificate* ... which he is authorized or required to make, attest or verify ... shall be guilty of an offence ...” Therefore, if a person knowingly and wilfully makes a false statement in the certificate referred to in the proposed section 35(2), the person commits an offence under section 36 of the Crimes Ordinance.

Clause 25(4) – obstruction of OC (paragraph 29 of the letter)

Under section 40(4B) of the BO, any person who without reasonable excuse contravenes section 39B(1) of the BO is guilty of an offence. By amending section 39B(1) of the BO (by clause 25(4) of the Bill), it will be an offence if any person who has been notified by an OC of a building that a notice has been served on the OC under the proposed section 30B(3), (5) or (6) or 30C(3) in relation to any common parts of the building refuses to contribute to the cost of the inspection or repair works that is required for the purpose of complying with the notice.

Sharing of the cost of the inspection and repair works in respect of the common parts of a building is a private contractual matter among the owners of the building under the deed of mutual covenant. The owners/OC may take appropriate actions against an owner who fails to pay his share of the cost payable under the deed of mutual covenant.

A handwritten signature in black ink, appearing to read 'Harry Lin', positioned above a horizontal line.

(Harry LIN)

for Secretary for Development

c.c. DD/BD  
LD/DoJ  
SGC/CD/DoJ