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19 December 2024

Ms Emily MOK
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1 Legislative Council Road
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Dear Ms MOK,

Public Health and Municipal Services (Amendment) Bill 2024

I refer to your letter dated 12 December 2024 in relation to the captioned, please find our response to your requests for clarification at Annex. Thank you.

Yours sincerely,

(Miss Sibyl WONG)
for Secretary for Environment and Ecology

c.c.
Clerk to the Bills Committee
Department of Justice (Attn: Miss Vonda LAM)
Food and Environmental Hygiene Department (Attn: Mr Benny YIP)

Annex

Dealing with verminous premises (clause 5)

1. The Bill proposes adding new sections 47(1A) and (1B) to the Public Health and Municipal Services Ordinance (Cap. 132) to empower the Director of the Food and Environmental Hygiene (DFEH) to issue vermin notice requiring a person responsible for the management of a building, i.e. owners' corporations (OCs) or if there is none, the manager of the building, to cleanse and remove vermin from the common parts of buildings. This is to ensure more effective and timely follow-up on vermin infestation in common parts of building. When serving a vermin notice to manager of the building, the Authority would specify in the notice requiring the manager to inform the owners/occupiers about the receipt and requirement of the notice.

In regard to recovery of expenses, considering managers of building such as property management companies are typically engaged by the OCs/owners as "agents" to provide property management services to the buildings, it is considered more appropriate that expenses be recovered from the OCs and if there is none, all owners. This is reflected in the existing section 47(2) and the new section 47(2A) of the Bill. Also, the Authority's power to serve vermin notice on persons responsible for the management of a building under the new section 47(1A) is in addition to the existing powers of serving notice on the owners or occupiers of a premises under section 47(1). The serving of notice to the OCs or manager of the building would not impede the serving of notice on owners or occupiers, as and when deemed appropriate.

Separately, in the scenario which the Authority forthwith take reasonable steps as may be required to destroy or remove vermin from any premises pursuant to section 47(4), the Authority may recover the expenses incurred from the person in charge of the premises, i.e. the OCs or if there is none, the owner of the premises under section 47(6). We are of the view the existing and proposed provisions have already provided for scenarios of recovering expenses from the owner(s) of the premises expressly.

2(a). Under section 126(1) of Cap 132, authorised public officers have a right to enter any premises within the specified time period with prior notice to the occupier, or any workplace or premises for business purposes during which work or business is carried on, for carrying out any tests authorized under Cap. 132. FEHD will give prior notice pursuant to section 126(1), separate provision is not considered required.

2(b). The new section 47(4A) sets out that if it appears to the Authority that any premises or vessel are or is infested with vermin, equipment may be placed for conducting tests or assessing vermin proliferation. The conduct of test is in view of possible vermin infestation at any premises or vessel. We consider that the purpose of such test is clear, there is no need to add that the test is "for the purpose of vermin control".

2(c). As stipulated in the new section 47(6), the expenses that may be recovered will be those incurred on exercising the power under section 47(4) which is about forthwith taking reasonable steps to destroy or remove vermin. It is not intended to and does not cover the new section 47(4A) about placing equipment for testing or assessing vermin. The purpose of such test/assessment includes assessing the scale of the infestation and ascertaining whether the actions taken by the person concerned has effectively destroyed or removed vermin infested at the premises or vessel.

<u>Unlawful shopfront extensions (clause 6)</u>

3(a). The FEHD has been tackling shopfront extension (SFE) situations for "obstruction of public places" under the Summary Offences Ordinance (Cap. 228). Nonetheless, the department has to rely on the Hong Kong Police Force's power under Cap. 228 to require shop operators to remove obstructing articles. The Bill recommends introducing a new SFE provision in Cap. 132 to allow FEHD to handle SFE independently, including requiring shops to remove obstructing articles, or allowing the department to remove obstructing articles when no owners have come forward, as well as stipulating the mechanism for disposing of removed articles. The amendments aim to enhance enforcement efficiency and provide similar powers as that under Cap. 228; which will follow the current

enforcement standards for SFE under Cap. 228 and interpretation of whether the offence is one of strict liability.

3(b). It is ultimately for the defendant to decide whether to raise this issue before the court depending on the facts and circumstances of his case, upon which the court will apply the principles of *Kulemesin v HKSAR* (2013) 16 HKCFAR 195 and related cases with due regard to any fundamental rights which may be engaged.

3(c). Not applicable in view of the reply to 3(b) above.

4(a). Under the new section 86G(4), the cost of removal, seizure or detention of an article in relation to the SFE offence may be recovered from "an owner of the article" or "any other person concerned in the business". Separately, under the new section 86H(2), if a person made a claim in respect of the seized article and the Authority is satisfied that such claimant was "entitled to the possession of an article at the time of the seizure", the Authority will, on the claimant's payment of the cost that can be recovered under section 86G(4) (if any), return the article to the claimant. Hence, the person "entitled to the possession of an article at the time of the seizure" should cover "an owner of the article" or "any other person concerned in the business".

The meaning of "an owner of the article" and "a person entitled to the possession of the article at the time of the seizure" are straightforward, while "any other person who is concerned in the business" is defined in section 86E(3), thus we consider that provision of further definition is not necessary.

4(b)(i). At the time of the claim under the new section 86H(2), costs may already have been recovered under the proposed new section 86G(4). In this scenario, a reference to "any cost recovered under section 86G(4)" is suitable. However, on review, the scenario where the costs, albeit recoverable, have not yet been actually recovered cannot be ruled out. We propose to introduce a Committee Stage Amendment to the proposed new section 86H(2)(b) to refer to in that section any costs recoverable or recovered (whichever is applicable) under section 86G(4) so as to better cater for different circumstances.

4(b)(ii). In cases where the assessed value of the article is lower than the cost recovered under section 86G(4), the difference will be reflected in

the removal cost. Specifically, the claimant will only need to pay the difference between the actual removal cost and value of the article. Therefore, it is not necessary to include such provision in the proposed new section 86H(2)(b).

4(b)(iii). Similar to assessing the value of commodities seized for the existing hawker offence, the Authority will assess the value of the article based on various factors, including its condition and the market value of similar articles in the market.

4(c). It is the intention that a claimant's right to request for return of seized article or seek compensation is independent of whether such claimant is convicted of the shopfront extension offence. In addition to section 86H(2) providing a mechanism for handling claims, section 86H(5) also provides for a mechanism of handling scenarios where a claim is refused or there is dispute on the amount of compensation.

<u>Power to remove display equipment used for displaying bills and posters (clause 7)</u>

5. Under the proposed new section 104C(4), the Authority's power exercisable under section 104C(1) includes the power to remove the display equipment for the bills and posters. Section 104C(1) empowers the Authority to recover the cost of removal from the person displaying the bill or poster. Thus, it is considered that the cost of removal to be recovered by the Authority covers the cost of removing the display equipment and there is no need for separate express provision on this part. It may also be noted that in actual practice, for cases which display equipment is concerned, the bills or posters are usually attached on the display equipment.

6. We consider that persons who have self-admitted under caution to displaying or affixing the bills or posters, or beneficiary or owners of such bills, posters or display equipment are entitled to making claim. Unless the seized articles have to be kept as court evidence, they will be returned to the claimant. We consider it not necessary to provide for a mechanism in the Bill.

Offence of failing to allow entry (clause 10)

7(a). The source of nuisance must first be ascertained in order to handle nuisance. To ensure that inspection of suspected causes can be conducted promptly without unreasonable delay, the Bill recommends making it an offence for failing to comply with "Notice of Intended Entry" without reasonable excuse. It is intended that the provision of reasonable excuse for failing to allow entry (such as travelling abroad etc.) would be a statutory defence to be established by the relevant owner or occupier of the premises. The defendant would only bear an evidential burden of proof to show sufficient evidence to raise an issue that the person had a reasonable excuse, while the prosecution would retain the burden of proving the absence of a reasonable excuse beyond reasonable doubt.

7(b). It is ultimately for the defendant to decide whether to raise this issue before the court depending on the facts and circumstances of his case, upon which the court will apply the principles of *Kulemesin v HKSAR* (2013) 16 HKCFAR 195 and related cases with due regard to any fundamental rights which may be engaged.

7(c). Not applicable in view of reply to 7(b) above.

Clarification on using "cost" or "expense"

8(a)& 8(b). The reference to "expenses" in the proposed new section 47(6) etc. and the reference to "cost" in the proposed new section 86G(4) etc. are both references to money incurred. The two words both convey the meaning effectively. The two references appear in various parts of Cap. 132. The approach in recovering "cost" and "expense" follows the existing section 130 in the same manner.

The use of "expenses" in the new section 47(6) is necessary to achieve internal consistency with the existing section 47. For the new section 86G(4), as section 86G itself is a new provision, there is no similar need to achieve internal consistency with an existing provision. We are of the view that the use of "cost" in section 86G and the use of "expenses" in section 47 both convey the policy intent accurately.

Prosecution for the new offences

9. Noting that for offences with DFEH being the authority are generally included in the Sixth Schedule, we propose to introduce Committee Stage Amendments to add to the said Schedule that prosecutions for an offence under the proposed new sections 86F and 126A may be brought in the name of DFEH to enhance consistency.

Drafting issues

10. Under the current drafting practice as detailed in paragraph 10.4.21 of Drafting Legislation in Hong Kong – A Guide to Styles and Practices, if there is a clear and concise way of expressing a concept in English, foreign words should not be used. "Bona fide" are Latin words, but not English ones. According to the Concise Oxford English Dictionary, the term means "with good faith", so the English expression is used in the proposed new section 86G(3) to comply with the current drafting practice.

In relation to the existing section 22(5), as the relevant subsection is not amended by this Bill and the Bill is not a rewrite exercise, the original wording in that subsection has not been changed.