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CODES AND REGULATIONS OF MALAYSIA – RECENT CHANGES TO IMPROVE THE BUILDING APPROVAL AND ISSUANCE OF CERTIFICATE OF FITNESS FOR BUILDINGS

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In Malaysia, the building industry is probably one of the most regulated industries. There are many acts, laws and regulation controlling the delivery process with the intention of protecting the quality of the built environment, safety and health of the public.

The overly regulated building approval and issuance of Certificate of Fitness for Occupation (CFO) with many bureaucratic red tapes have caused unnecessary delay. There are many complaints received from the public, professional bodies and the developers as the delay adds unnecessary cost to the development. Many attempts have been made over the last ten to fifteen years to improve the delivery process but no bold step was made to make a significant change despite lobbying from the professionals and investors. The government began to realize recently that this lengthy process has rendered Malaysia uncompetitive and this has deterred many foreign investments into the country.

In May 2003, the government has made the announcement on the Economic Stimulus Package with the intention of stimulating economic growth of the country. Under 'Measure 70c', the processing and approvals for Building Plans and the Certificate of Fitness for Occupation (CFO) will be expedited through the following measures:-

- a) Establishing a two-tier 'One-Stop Center' at the Local authority and at the State Government level to coordinate the building plans approval and CFO issuance;
- b) Local Authorities will comply with existing Guidelines on approving Building Plans within 12 weeks and issuing CFOs within 4 weeks;
- c) The no of technical departments involved in certifying CFOs will be reduced from 7 to 2, namely Sewerage Services Department, Fire Services and Rescue Department (for buildings with active fire fighting system). The consultants are responsible in ensuring the electricity and water supplies are ready for connection;

- d) Exempting CFO requirement for several categories of buildings to promote self-regulation through appropriate certification by relevant professional bodies;
- e) Giving priority to applications for Building plans and CFOs for the manufacturing sector and related services.
- f) Local Authorities and technical departments involved will approve CFOs without the requirement for developers or applicants to settle all payments; and
- g) Disseminating information on Building Plans and CFOs through guidebooks and the electronic media

The OSC has been implemented for close to a year and the feedback has not been positive. Although the concept is workable, many of the local authorities have not implemented the OSC in its true spirit and many red tapes were introduced administratively.

Our Prime Minister made a call on the 26th June 2004 for the replacement of the issuance of the Certificate of Fitness of Occupation (CFO) by the local authorities with the certification by the professionals for all Buildings with the intention of minimizing delay in the process of issuance of CFO.

In response to the call by the PM, both the Ministry of Works (MOW) and Ministry of Housing and Local Government (MOHLG) initiated meetings and discussions with the industry players to seek their respective feedback and to prepare proposals for this to be implemented.

Most of the industry players support the call for de-regulation and for the professionals namely the Architects and Engineers to take on the role and responsibility of self-certification. However, the house buyers and consumers groups have reservations on the proposal as they feel that there is a conflict of interest and could be subjected to abuse.

The Ministry of Housing and Local government (MOHLG) organized a working visit to Australia covering three main cities, namely Sydney (NSW), Canberra (ACT) and Brisbane (Queensland) to study the Australian's system and experience on the self-certification.

The delegation was headed by the Minister, Dato' Seri Ong Ka Ting. Other delegates include the Director General, Department of Local Government, Deputy Secretary General of MOHLG, Mayor from Shah Alam City Council, Special Officer to the Minister and representatives from private organization including Malaysian Institute of Architects (PAM), Real Estate and Housing Developer Association (REDHA) and Association of Consulting Engineer of Malaysia (ACEM)

The delivery process in Australia is very different from Malaysia. The role of the Architect is restricted in Australia, as the profession is not protected under the law although the name 'Architect' is protected. Within Australia itself, the delivery process from planning approval to issuance of certificate of fitness varies slightly from state to state and named differently. Out of the three cities visited, the following are some of the observations:-

1. The submission of building plans can be by any person in all the three states. In NSW, Architect's involvement is only mandatory for multi units' development.
2. The whole of Australia adopts Building Code of Australia (similar to Malaysia's Uniform Building By-Law) with some modification from state to state to cater for local requirements
3. The applicant has an option of getting the building plan certified/approved by a Private Certifier (PC) or by the City Council. The applicant also has an option to appoint the PC or the City Council to certify that the building is fit for occupation. All the states and territories in Australia have introduced private certification for both the building approval and certification for completion/occupation except West Australia.
4. The move towards private certification is to create competitiveness between private sector and City Council with the intention of reducing the entire building approval/certification process. However, in Canberra, the introduction of private certification is due to political agenda.
5. The appointment of the PC can be by the owner or the Builder (contractor). In ACT and NSW, the City Council is amending the law not to allow the Builder to appoint the PC. In Queensland, it is also of the opinion that owner should be involved in the certification process although the Builder is still allowed to appoint the PC directly.
6. The Occupation Certificate (NSW), Certificate of Classification (Queensland), Occupation Permit (Victoria) and Certificate of Occupation (ACT) are different from the Certificate of Fitness in Malaysia. As long as the safety aspects is in place and fully operational (including fire safety) and the building is substantially completed, the certificate can be issued even when some of the works such as finishes, painting, fittings etc are not completed. The role of PC is only to certify compliance of building codes and safety aspects and they are not responsible in ensuring quality. Quality issues are the responsibility of the Builder. In Queensland, planning issues relating to amenities and landscape etc are not considered by PC in the certification.

7. There is no limit as to the number of projects that the PC can undertake
8. In both ACT and Queensland, for any building construction to proceed on a piece of land, the land title must be issued. The land title will only be issued when the main infrastructure serving that land is in place.
9. The Builders including the tradesmen (electrician, plumber etc) are strictly regulated and are held liable and responsible for their works under various Acts (ie. Construction Occupation Licensing Act 2004 for ACT) and regulated by government agency (ie. Building Services Authority (State Government) under Queensland, Building Commission under Victoria). Only licensed Builder is allowed to build. Demerit system is implemented to monitor the performance of the Builder and their license can be taken away for repeated or serious offences. The Builders are also required to take up insurances (ie Statutory Home Owner's Warranty Insurance for residential homes and multi-units occupancies in ACT)
10. The PCs are usually Building Surveyors registered with the Institute of Building Surveyor. Other professionals including planners, Engineers, Health and Building surveyor etc can also be PC. According to RAIA, Architects are also allowed to be an PC but most of them have chosen not to be involved.
11. The certification system in Queensland is similar to those adopted in Victoria. The PC is involved from design to certification of building plan, inspections during construction right up to issuance of certificate for classification (similar to occupation permit). However, in NSW, the role of design and certification are kept separate. In Queensland, the City Council feels that the PC should be the same person who is involved in the entire process so that he is familiar with the requirement and there is no conflict.
12. The Principal PC may not have the expertise covering all aspects of the building and the Principal PC will have to rely on other PCs or professionals to certify compliance for the respective areas before he certifies completion.
13. In NSW, the government is introducing an Independent Statutory Authority called Building Professional Board (government agency) that will come into effect in Jan 2005 to accredit, audit and regulate the PC due to problems encountered with PCs. In Queensland, Building Services Authority (BSA) regulates PC. Penalty involves fine and deregistration. There is no jail term. . BSA will also carry out audit randomly. The focuses of auditing are on administrative matters (documents) and technical issues for post construction and construction stages.

14. All PCs must undertake Professional Indemnity Insurance. However, it was recognized that this has failed resulting from the collapse of the insurance system. The insurance scheme has also encouraged more claims to be filed. It is believed that NSW has become the 2nd most litigious state after California.
15. Victoria has introduced private certification since more than 10 years ago but NSW and Queensland introduced private certification only in 1998. The feedback has not been positive in NSW whereas Queensland is of the opinion that this is workable. Most of the Principle PC is Building Surveyors who left the City Councils as being a private PC is more rewarding financially. This has caused some problems within the City Council for losing their personnel to the private sector and they are unable to fulfill their duty. In NSW, more and more PCs are returning to the City Council, as the certification process and the penalty are getting too onerous. The PCs find that it is getting to be more difficult to certify due to literal interpretation of the requirement and the individual risk is getting too high. The insurance coverage is often inadequate. Certification by City Council carries less risk as the City Council can take a more sensible stand in certification and City Council can fix the problem if Council makes mistake. City Council is also making it difficult for the PC to access to information due to competition.
16. ACT is of the opinion that self-regulation and self-certification does not work in most instances. The insurance is becoming a big issue. In Queensland, Building Service Authority (BSA) insured every building up to 4 stories up to AS 200,000-00

Based on the above findings, it is of the opinion that the certification by a private certifier in Australia may not be a suitable system to be adopted for Malaysia and may create more problems as the context of practice between Malaysia and Australia varies greatly. In Australia, the Builders and Tradesmen are regulated but the professionals are not so regulated whereas in Malaysia, the professionals are all regulated under the respective Boards established under the Act of Parliament but the contractors are not regulated. Under the Malaysian context and the regulatory framework, if the authority to issue CFO is to be transferred away from the local authorities, the most suitable party to resume that responsibility should be the original submitting person (Architect and Engineer) as they are already held fully responsible and liable for the building under the current system when CFO is issued by the local authority.

During and after the working trip to Australia, many meetings and discussions were also conducted among PAM, ACEM, REDHA and MOHLG to explore the following options of certification including their implications:-

Model 1 -Certification of CFO By Independent Certifier (Non Architects and Engineers)

- Availability and qualification of such person. Currently, there is no such group of people who are qualified enough to undertake the role of certification. This group of people must be well verse with the technical aspects and all the building regulations and by-laws.
- A new Act and law have to be put in place to regulate the conduct of such group of people assuming that this group of person is available.
- What will be the responsibility and liability of the independent certifier against those of the submitting persons? In Australia (Queensland), the Independent Certifier is required to be involved from design, building plan approval, site inspection and final certification of CFO and he is held responsible for the safety of the building and compliance to the building codes in all aspects. In Malaysia, introducing Independent Certification by persons other than the submitting persons for CFO will create a lot of conflict throughout the entire process and it will be difficult to draw the line of responsibility and liability.
- Additional cost will be incurred for having to pay extra to engage such person to carry out the work and to bear the responsibility. All these additional cost will be passed on to the consumers with no apparent added value.
- As the certifier is paid directly by the client, there is still this perceived conflict of interest.
- This person has to be involved in the project from the beginning to the end (ie design through to construction and completion) before he is able to certify properly. In Australia, the Independent Certifier is becoming more and more like a postman by collecting all the certification from all the certifiers and professionals before he certifies.

- In Australia, most of the independent certifiers are Building Surveyors who left the local councils when independent certification (both building approval and CFO) was first introduced. This has created a serious drain of resources from the local councils. In Malaysia, the local authorities are already facing problems in getting adequate qualified personnel to carry out their basic duty. The qualification of the personnel from the local authority in Malaysia cannot equate to those in Australia.
- The introduction of independent certifier will require a major change in the delivery system, acts, regulations and by-laws.

Model 2 - Certification of CFO by Independent Certifier (By Architects and Engineers Who Are Not the Submitting Person)

- For every project, 2 sets of consultants will have to be engaged, one set as the designer, and the other set as the independent certifier. This will add to the cost of the project, which has very little added value.
- The independence of such independent certifier is also questioned as the client also pays him. There is still this perceived conflict of interest.
- Currently, there are fewer than 2000 Professional Architects in Malaysia. There will not be sufficient architects and engineers who are prepared to take up the role of Independent Certifier especially if he has to bear part or all the responsibility and liability.
- The same problem in model 1 applies, as it will be difficult to define the responsibility and liability between the independent certifier and submitting person.
- This will create a lot of conflicts and problems between the submitting persons and the Independent Certifier for the entire process with regard of who has the final authority in all issues (from design to site matters).

Model 3 : Certification of CFO by Submitting Persons

- Currently, the submitting persons are already held fully liable and responsible under Uniform Building By-Law (UBBL) for the entire project regardless of the fact that the CFO is issued by the local authorities. The issuance of CFO by the local authorities is only an administrative process, which does not add guarantee and safety to the buildings. Local authorities do not carry any liability when something goes wrong with the building. Switching the role of certification from local authority to the submitting person is only a switch of administrative role.
- The self-certification by Professional Architect is already practiced and allowed under the UBBL for individually owned bungalows. Many meetings had also been held with MOHLG to extend this self-certification to industrial buildings with the ultimate intention to cover all the buildings eventually. The call by Prime Minister only hastens the process of self-certification for all projects by the submitting person base on established framework.
- The current OSC which has been introduced under 'Measure 70C' of the stimulus package is already a move towards self-certification. Under OSC, clearances are only required from Sewerage Services Department, Fire Services and Rescue Department (for building involves active fire fighting system) and internal departments of local authorities. Other infrastructure works such as roads and drainage, utilities etc are self-certified by the respective professional. Self-certification of CFO by submitting person is only a slight extension of the current role of the submitting person.
- Currently, for housing projects, the Professional Architects are already been entrusted with the responsibility and liability of certifying various stages of works under the Housing Development Act and Regulations (The sales and purchase agreement). This self certification of CFO does not compromise the position of the house purchasers as 92 ½% of the purchase price would have been released by the house buyers to the developer upon handing over of vacant possession. The houses are handed over as long as the local authority accepts application of CFO regardless whether the CFO is issued. With the introduction of self certification, the house purchaser will benefit as certification by Architect for handing over of vacant possession by the developer can now be tied to the issuance of CFO by the Architect and it eliminates the problem of house purchasers having to take over the houses but cannot move in until the CFO is issued by the local authority.

- There is no additional cost involved for the submitting persons to undertake the role of certification of CFO.
- There will be minimum changes required in the Acts and regulations, as there is already an existing provision in UBBL for self-certification by Architects.
- Architects and Engineers are very well regulated in Malaysia and the disciplinary framework is already in place. The Boards are given the power to reprimand, suspend and deregister members. It is a matter of increasing the penalty for offenders to ensure that the penalty is severe enough to deter wrongful certification. The process can be easily reviewed and improved to strengthen its efficiency.
- A lot of complaints received from the house purchasers relate to workmanship. Issuance of CFO by the local authority does not address the problems. The most effective way of improving workmanship is to hold the contractor accountable and responsible for the works executed by them. In Australia, the Builder is a licensed individual who is regulated by law and statutory body and is held fully liable for the quality of construction. The role of the Certifier is only strictly on safety aspects relating to compliance of codes and regulations and he is not responsible for the quality of the building. CIDB has to seriously regulate the performance of the contractor and make them accountable like all the other parties in the whole delivery chain.

After all the studies, the MOHLG has in principle agreed to adopt self-certification of CFO by the original submitting professionals, namely Architects and Engineers. Cabinet paper has been prepared and will be tabled for adoption by the Parliament in the very near future.

The working committee also prepares the necessary framework, working paper and the flow chart for building approval and certification. Opportunity is also taken to streamline and improve the entire approval and certification process. The preliminary flow chart, which has been developed, is as per appendix A.

The building industry players and the professional institution in Malaysia hope that the proposal for self-certification system will be implemented and we believe that this will improve the overall delivery system.