

立法會
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seen by the Administration)

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LegCo Panel on Home Affairs

**Subcommittee on review of the
Building Management Ordinance**

**Minutes of meeting
held on Tuesday, 18 December 2001 at 2:30 pm
in Conference Room B of the Legislative Council Building**

Members Present : Hon Albert CHAN Wai-yip (Chairman)
Hon Cyd HO Sau-lan
Hon NG Leung-sing, JP
Hon Andrew WONG Wang-fat, JP
Hon Emily LAU Wai-hing, JP
Hon Andrew CHENG Kar-foo
Hon IP Kwok-him, JP

Member Absent : Hon Albert HO Chun-yan

Public Officers Attending : Mr Francis LO
Principal Assistant Secretary for Home Affairs (5)

Mrs Kenny WONG
Assistant Director of Home Affairs (4)

Miss Stella CHANG
Assistant Secretary for Home Affairs (5)2

Mr MA Kam-ki
Senior Liaison Officer (Building Management)
Home Affairs Department

Clerk in Attendance : Miss Flora TAI
Chief Assistant Secretary (2)2

Staff in Attendance : Mr Stephen LAM
Assistant Legal Adviser 4

Miss Irene MAN
Senior Assistant Secretary (2)9

Action

I. Confirmation of minutes
[LC Paper No. CB(2)698/01-02]

The minutes of the meeting held on 27 November 2001 were confirmed.

II. Proposals to improve the Building Management Ordinance

2. Members noted that the Legislative Council Secretariat had prepared a discussion paper [LC Paper No. CB(2)696/01-02(01)] which summarised the views and various proposals put forward by members and deputations on the seven major issues identified by the Subcommittee for consideration in the review of the Building Management Ordinance (Cap. 344) (BMO) to be conducted by the Administration. Members also noted that the Administration had provided a paper setting out the review framework of BMO to be conducted by the Administration [LC Paper No. CB(2)671/01-02(01)]. Principal Assistant Secretary for Home Affairs (5) (PAS(HA)5) said that the Administration had set out its preliminary positions on the seven major issues to be reviewed in the paper. The Administration would like to gather members' views on the issues before consulting the Department of Justice (D of J), professional bodies and residents' organisations and would come up with its own recommendations.

3. Mr Andrew WONG reiterated his view that the Administration should re-write the Ordinance in the review of BMO. He considered that re-writing BMO in modern language could reduce the conflicts arising from different understandings of the Ordinance which was difficult to read. PAS(HA)5 responded that the

Action

Administration would give priority to the seven major issues as identified by members at the last Subcommittee meeting in conducting the current review. He said that introducing further amendments to the existing legislation would be more cost-effective than re-writing the Ordinance. In this connection, Mr WONG expressed strong dissatisfaction that the Administration had even refused to commit itself to re-writing BMO in the future.

4. The Chairman invited members' views on Mr Andrew WONG's suggestion. Ms Cyd HO said that although she supported that BMO should be written in a user-friendly way, it was not appropriate for the Subcommittee to deal with the issue because the task would be complicated and time-consuming. She understood that D of J was considering re-writing all the existing legislation in modern language and the issue should be dealt with in that context. Ms Emily LAU pointed out that when D of J consulted the Panel on the Administration of Justice and Legal Services on the idea, many Panel members had expressed concern that the original meaning of the legislation might not be retained in the process of re-writing. She was afraid that the Administration would not give the idea a prior consideration. However, Ms LAU was worried that if re-writing BMO was included as one of the issues to be considered in the review, the task might take too long to be completed.

5. The Chairman concluded that members had not indicated support to Mr Andrew WONG's suggestion for fear that re-writing BMO might delay the whole process of the review. He then invited members to discuss the seven major issues.

Formation of owners' corporations (OCs) by owners of house developments holding divided shares

6. Mr Andrew CHENG said that members and the deputations had already expressed various views on the issue and there was a strong request that the scope of BMO should be expanded to cover management of house developments holding divided shares. He requested that the Administration should expedite the progress by consulting D of J on the possible amendments to BMO in order to achieve the intended effect.

7. PAS(HA)5 said that the Administration in principle had no objection to owners of house developments forming OCs if such developments contained areas and/or facilities for the common use and enjoyment of owners. The Administration had considered preliminarily three possible options that an owner's undivided shares might be determined -

- (a) in proportion to the total number of houses owned by the owner, that was, one share for one house; or

Action

- (b) in proportion to the size of a land lot, for example, one share for one square metre of land; or
- (c) in proportion to the areas of the structures built on a land lot.

As each option had its own merits and problems, the Administration intended to conduct detailed discussions with the parties concerned to ascertain how the scope of BMO could be expanded to accommodate house developments, in particular, whether OCs for house developments could be formed on the basis of areas of land or properties owned by individual owners.

8. Ms Cyd HO said that the Administration should consider the issue of the maintenance liability of common areas if an OC was formed for the management of village houses in the New Territories. For instance, the owners of a village house were normally responsible for maintaining the slope behind the house; the maintenance liability for the slope which now became a common area might rest with OC instead of individual owners after the formation of OC. The Chairman remarked that when members discussed formation of OC by owners holding divided shares, the focus was on house developments. He asked the Administration to clarify whether it would consider formation of OC by owners of village houses in the review.

9. PAS(HA)5 said that when the Administration considered the formation of OCs by owners of house developments holding divided shares, it maintained the principle that these developments must contain areas and/or facilities for the common use and enjoyment of owners because it was consistent with the spirit of BMO to facilitate the formation of OC for the management of buildings or groups of buildings. Village houses which did not share any common areas or facilities were not consistent with that principle. However, PAS(HA)5 referred to the example given by Ms Cyd HO and said that the owners of that village house could consider forming an OC among themselves and the maintenance liability of the slope could then rest with the OC so formed. He stressed that whether owners of village houses could form OC under BMO would depend on the nature of the development and the contents of their deeds of mutual covenant (DMCs), if any.

10. Mr Andrew CHENG pointed out that the seven-phase development of Kong Fu Garden in Tai Po had over a hundred of village houses and the owners of these village houses had the common use of roads, carparks and recreational space in the development. He asked whether developments of this kind could form OCs under BMO.

Action

11. Senior Liaison Officer (Building Management) of Home Affairs Department (SLO(BM)) responded that village houses might involve different land grants. For example, some approvals were granted for the built-up area but others were granted for a land lot on which buildings were constructed. The feasibility to form OCs would depend on individual circumstances. PAS(HA)5 supplemented that conceptually speaking, formation of OCs in Kong Fu Garden could be considered. It would depend on how many common areas or facilities were being shared by the village houses and the conditions of the land deeds as well.

12. Mr Andrew CHENG said that given the complexity of the issue and the variety of development natures, various options should be provided for in BMO for the formation of OCs by owners of house developments of various kinds. Mr CHENG requested that the Administration should ask D of J to advise on the feasibility of incorporating all the three options as proposed in paragraph 7 into the legislation so that owners might choose the most appropriate option for the formation of OCs to suit their own circumstances. He also requested that D of J should advise on whether incorporation of relevant provisions into BMO would be consistent with the Ordinance. The Chairman added that D of J should also advise on which option was most compatible with the spirit and principles of BMO. At Mr CHENG's suggestion, the Chairman requested the Administration to liaise with D of J for a written advice to address members' questions. Mr CHENG further suggested that representatives from D of J should be invited to future meeting if necessary.

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Specific exemption of members of a management committee (MC) of an OC from legal liabilities

13. The Chairman expressed concern that the chairman of the MC of an OC (the Chairman of the MC) who signed a works contract with a contractor on behalf of the OC could be held personally liable, even after the work had been approved by a resolution at an OC meeting. Mr Andrew CHENG shared the Chairman's concern. They suggested that an OC should be allowed to operate as a corporate body so that members of a MC enjoyed the status similar to that of directors of a limited company. Mr CHENG added that even if an OC was given the status of a corporate body, it would still be held responsible on a collective basis for any legal consequences arising from its action. The Administration therefore should not worry that any exemption of legal liabilities might result in unfettered rights with no corresponding legal consequences.

14. PAS(HA)5 said that pursuant to BMO, an OC was a corporate body which had some similarities to a company. In normal circumstances, the collective legal liability of an OC should not and could not be transferred to individual members

Action

of the MC. As such, the chairman of the MC should not be held personally liable for the action taken by an OC so long as he followed the proper procedures. He reiterated that a cautious, narrow and focused approach must be adopted in considering any exemption of members of an MC from legal liabilities.

15. The Chairman stressed that members had no intention to propose any exemption of MC members from criminal liabilities. The Chairman pointed out that there were situations where a notice had been issued in the name of an OC only and yet all individual members of the MC were being sued for the action. Facing threat of legal action, owners would be discouraged from participation in the work of OCs. The Chairman considered that if there were clear provisions in the legislation to exempt certain liabilities of individual members of a MC when they exercised and performed the powers and duties on behalf of the OC, these MC members could immediately apply to strike out the legal action and would save a lot of unnecessary legal cost. He added that developers might make use of the loophole in the legislation to discourage owners from participation in the work of an OC and the problem would very likely arise when there were conflicts between an OC and the building manager appointed by the developer.

16. Mr Andrew CHENG referred to the recent case of Beverly Garden where all members of the MC were sued for defamation by the former building manager when the OC issued a notice announcing the termination of the appointment of that building manager. However, these MC members were unable to apply to strike out the legal action because it was not clear in the legislation that they should not be held liable in this respect.

17. In response to the Chairman's enquiry about the legal liabilities of MC members under BMO, Assistant Legal Adviser 4 (ALA4) advised that according to section 16 of the Ordinance, the rights, powers, privileges and duties of owners in relation to the common parts of the building should be exercised and performed by an OC when the OC was formed. Under section 17, execution to enforce any judgment against a corporation could be issued against any owner only with the leave of the Lands Tribunal. ALA4 referred to the judgment delivered by the Court of Appeal on 25 November 1999 [subsequently issued vide LC Paper No. CB(2)746/01-02(01)] and explained the circumstances under which the Lands Tribunal might grant such leave. He drew members' attention that the Court of Appeal had ruled that the chairman of the MC should not be held responsible for the debts incurred by the OC concerned; and the creditor should pursue the debts with OC in the first place. The Court had also suggested certain circumstances and conditions under which the creditor might consider enforcing the judgment against individual members of a MC instead of the OC.

Action

18. The Chairman said that the Court had stated in the last paragraph of the judgment that the Administration should provide positive and effective assistance to owners if it wished to encourage them to participate in the work of an OC. If inadequacies were identified in the legislation, the Administration should propose amendments to address the problem. The Chairman therefore requested the Administration to take note of the judgment and to plug the loophole in the legislation accordingly.

19. PAS(HA)5 said that the explanation given by ALA4 in relation to sections 16 and 17 of BMO reflected that the Ordinance had already specified the circumstances under which the OC or members of a MC should be held liable. If members considered that there were grey areas in the legislation, the Administration would welcome any concrete suggestions.

20. ALA4 pointed out that although section 17 had specified that a judgment could only be enforced against individual owners with the leave of the Lands Tribunal, the circumstances under which the Lands Tribunal would grant such leave were not specified in the legislation. The Subcommittee might consider the need to specify the circumstances in the legislation.

21. Mr Andrew CHENG suggested that the Administration should relay members' views and ALA4's interpretation to D of J for consideration and seek advice from D of J regarding how the management companies concerned could take individual members of a MC to court instead of the OC itself. He considered that the advice of D of J would be useful for members to consider whether there was any loophole in BMO. Mr IP Kwok-him expressed support for Mr Andrew CHENG's suggestion. He stressed that it was important to uphold the principle of justice by preventing developers from threatening individual owners with unreasonable legal action. The Chairman suggested that the Administration should also consult D of J on the differences in legal liabilities between members of a MC under BMO and those of directors under the Company Law. He requested the Administration to liaise with D of J for a written response.

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22. Ms Cyd HO said that she considered that the Home Affairs Department (HAD) should provide more support for owners in the work of OCs. Since the Independent Commission Against Corruption had issued guidelines to members of the MC after the formation of an OC, such as the procedures for tender arrangements, HAD should also give legal support to MC members for the sake of protecting their interest in the course of participating in the work of an OC. Ms HO then asked about the number of court cases involving individual members of a MC being sued for reasons relating to the work of an OC. SLO(BM) said that HAD did not have comprehensive information for HAD only collected information of known cases from court papers available in the court library.

Action

23. Mr Andrew CHENG expressed dissatisfaction with the Administration's reply. He said that HAD should keep itself informed of relevant information and provide more support to members of MCs. He added that liaison officers of HAD very often had even refused to be the witnesses at owners' meetings for the formation of OCs or for the termination of the appointment of the building manager.

Adm 24. The Chairman requested the Administration to provide the number and information on the court cases where individual MC members were being sued by developers, management companies or contractors because of the work of the OC.

Voting rights of the shares allocated to the common parts of a building

25. The Chairman said that it was not fair for owners of the common parts of a building, mostly the developer, to possess voting rights but the shares allocated to these common parts did not carry any liability to pay management fees. He pointed out that a large majority of shares was always allocated to the common parts of a building which enabled the developer to use its voting rights to hinder the formation of an OC for the protection of its own interest.

26. In response, PAS(HA)5 said that owners of shares who were not liable to pay management fees were not entitled to vote in determining whether a manager's appointment should be terminated since paragraph 7 of the Seventh Schedule to BMO had been amended in 2000. The Administration was of the view that a cautious, narrow and focused approach should be adopted in considering any further limitation of their rights. He added that the requirement under section 3 of BMO was reasonable as owners of not less than 30% of undivided shares could resolve to form an OC.

27. Mr IP Kwok-him said that he agreed that private property rights and obligations should be respected. However, it was not unfair to further limit the rights of the owners of the shares for the sake of facilitating the formation of OCs if these shares were allocated to the common parts of a building and carried no liability to pay management fees.

28. The Chairman asked whether the Administration would consider further limiting the rights of owners of shares who were not liable to pay management fees to the extent that they could not vote at an owners' meeting or would not be counted for the purpose of forming a quorum for the formation of OCs. PAS(HA)5 responded that owners who were liable to pay management fees should have the right to terminate the appointment of a building manager for they

Action

shouldered the related expenses. However, the Administration had reservations about restricting the voting rights of owners of shares in forming OCs because whether they were required to pay management fees or not as stipulated in DMCs should not affect the exercise of their property rights.

29. Mr IP Kwok-him said that he did not agree with the Administration's view. He pointed out that both the termination of the appointment of a building manager and the formation of an OC were intended to achieve good management of the building. Any restriction on the voting rights of owners of shares who were not required to pay management fees in respect of formation of OCs would not affect the other decision-making powers of these owners at an owners' meeting.

30. The Chairman said that owners of some housing estates suffered from very unreasonable ratio of undivided shares and management shares. For example, owners of a building might have enough management shares to terminate the appointment of the building manager but did not have enough shares to form an OC because the developer which held a large number of undivided shares objected to the formation. In the case of Discovery Park, almost 50% of the undivided shares but only 33% of the management shares were allocated to the commercial units.

31. Mr IP Kwok-him said that Chi Fu Fa Yuen was another example to illustrate the distribution of shares which was unfair to owners and had hindered the formation of OC. He explained that the developer possessed the bump rooms, garbage rooms, rooftop playground and swimming pool etc but was not required to pay any management fees. As the developer which owned the majority of the undivided shares did not support the formation of OC (50% of total shares were required to form an OC at that time), owners were unable to form OC. Mr IP considered that there was a need to amend the legislation to address the problem.

32. Ms Emily LAU said that it was clear from the cases quoted by members that owners of many housing estates were unable to form OCs because they did not possess sufficient number of undivided shares. She sought clarification whether it was the Administration's policy to facilitate the formation of OCs; and if yes, whether the Administration would take appropriate measures to implement that policy. PAS(HA)5 said that it was the Administration's considered principle that private property rights should be respected and any consideration of restricting these rights should follow a cautious, narrow and focused approach. He said that members' suggestion of restricting the rights of owners of shares who were not liable to pay management fees in respect of the formation of OCs might be consistent with that principle. The Administration would consider members' suggestions and consult the relevant professional bodies.

Action

33. The Chairman suggested that the Administration should consider empowering the Secretary for Home Affairs under BMO to allow formation of OCs by a resolution of the owners of certain percentage of the management shares instead of undivided shares under special circumstances.

34. Mr Andrew WONG said that he considered that owners of shares who were not liable to pay management fees should not have any voting rights. He was of the view that the issue should be considered in a wider context. Mr WONG pointed out that undivided shares should not be allocated to some common parts of a building such as bump rooms because the maintenance expense for these facilities were actually shouldered by owners by way of paying management fees.

35. Mr Andrew WONG further said that there were many unfair provisions in DMCs. For example, the developer of a building usually held a large number of undivided shares by way of possessing the rooftop or external walls. However, the DMC had specified that the owners of these shares were not required to pay management fees. Thus, he had suggested at previous meetings that provisions should be added to BMO to override the unfair provisions in DMCs. Mr WONG suggested that the Administration should make an analysis of all DMCs to identify unfair provisions. The Chairman added that the Administration should address the unfair situation that some DMCs required owners of flats of different sizes to pay the same amount of management fees. PAS(HA)5 said that approval of DMCs fell within the jurisdiction of the Director of Lands. He suggested that members could consider inviting representatives of the Lands Departments to the next meeting for the discussion of "unfair" provisions in DMCs.

Formation and election procedures of an OC

36. Mr Andrew WONG considered that the present procedures for the appointment of a MC were confusing. He suggested that relevant procedures for the formation of an OC and the appointment of a MC should be stipulated separately and clearly in BMO. For example, a longer voting period should be allowed for owners to vote for the formation of an OC and the election procedures for the chairman and members of a MC could commence immediately when the resolution to form the OC was passed.

37. PAS(HA)5 said that the Administration would be pleased to listen to views on the formation and election procedures of an OC. At present, an owners' meeting would be convened to appoint members of a MC and owners would then elect members of the MC for the various positions such as chairman, secretary and treasurer. Some had suggested that owners should directly elect the chairman, secretary and treasurer at the owners' meeting. He would welcome members' concrete suggestions in this respect.

Action

38. The Chairman said that he was concerned that many owners of old buildings were not familiarised with the procedures to conduct a meeting of an OC. He suggested that the Administration should consider specifying the procedures to conduct the meeting, such as the issuance of agenda, the appointment of proxies and the calculation of quorum in different circumstances etc, by way of adding a schedule to BMO. PAS(HA)5 said that the Administration would consider adding a schedule to BMO setting out the appropriate procedures for the formation of OCs and incorporating the relevant forms into the schedules of BMO if appropriate.

39. Members agreed to continue the discussion of the issue at the next meeting.

III. Date of next meeting

40. Members agreed to hold the next meeting on Tuesday, 15 January 2002 at 2:30 p.m. to continue discussion with the Administration on the major issues identified. Members further agreed that representatives of the Lands Department should be invited to the next meeting. The Chairman requested the Admin

(*Post-meeting note* : The next meeting has been re-scheduled for Tuesday, 22 January 2002 at 2:30pm.)

IV. Any other business

41. There being no other business, the meeting ended at 4:20 pm.

Council Business Division 2
Legislative Council Secretariat
18 January 2002