

立法會
Legislative Council

LC Paper No. CB(2)1844/01-02
(These minutes have been seen
by the Administration)

Ref : CB2/PS/2/00

LegCo Panel on Home Affairs

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

**Minutes of meeting
held on Wednesday, 20 March 2002 at 10:45 am
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 IP Kwok-him, JP
- Members Absent** : Hon Albert HO Chun-yan
Hon Andrew CHENG Kar-foo
- Public Officers Attending** : Ms Esther LEUNG
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 Lolita SHEK
Senior Assistant Secretary (2)7

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I. Confirmation of minutes
[LC Paper No. CB(2)1371/01-02]

The minutes of the meeting held on 22 January 2002 were confirmed.

II. Meeting with the Administration
[LC Paper No. CB(2)1368/01-02(01)]

2. Members noted the Administration's response to some of the issues raised at the last meeting of the Subcommittee on 22 January 2002 in the information paper.

Formation of owners' corporation (OCs) by owners of house developments consisting of independent houses built on individual land lots

3. Mr IP Kwok-him noted the legal advice obtained by the Home Affairs Bureau (HAB) that the ownership structure and the nature of the title of flats in multi-storey buildings and independent houses built on individual land lots were different and that mere replacement of the concept of undivided shares with that of shares based on areas of land or number of houses owned was not sufficient to make the Building Management Ordinance (BMO) applicable to house developments. He asked whether the Administration had intended to draw up a new piece of legislation to enable owners of house developments to form OCs and, if so, the time schedule for this legislation.

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4. The Principal Assistant Secretary for Home Affairs (5) (PAS(HA)5) responded that the Administration had no objection in principle to amending BMO to enable owners of house development to form OCs. However, based on the legal advice sought, it appeared that detailed and substantial revisions to and adaptation of the provisions in BMO were necessary in order to make BMO applicable to the management of house developments. On the other hand, as the nature of property title of individual houses and flats in multi-storey buildings were fundamentally different and these two different types of properties had different management concerns and requirements, a new piece of legislation might be needed for the purpose. Since consultation with the concerned parties had to be conducted and a lot of technical issues had to be resolved, PAS(HA)5 estimated that approximately six months would be required for drawing up the legislative proposals.

5. Mr IP Kwok-him said that he personally preferred to have a separate piece of legislation for owners of house developments to form OCs. He urged the Administration to speed up the process. Mr Andrew WONG held a different view, saying that drafting a new piece of legislation would be a time consuming and difficult task with all the complicated issues to be addressed to. He considered that the review of BMO should take priority over the proposed new legislation and the Administration should concentrate its efforts on tidying up the provisions of BMO first.

6. The Chairman did not agree with Mr WONG and pointed out that the Subcommittee had agreed that equal importance should be attached to providing a legal framework to enable owners of house developments to form OCs. He remained of the view that the primary concern was to enable owners, whether of flats in multi-storey buildings or of independent houses, to manage their properties through the formation of OCs. Since this coincided with the objective of BMO, the latter should be expanded to accommodate house developments and a new piece of legislation was therefore not necessarily required. He noted that some newly developed estates with house-type developments had been allowed to form OCs. He requested the Administration to make reference to these cases and explore how BMO could be amended to cover the characteristics of house developments so that their owners could enjoy the right to form OCs to collectively manage their properties. He suggested that in these cases, an owner's undivided shares might be determined in proportion to the size of a land lot or the areas of the structures built on a land lot. The Administration undertook to explore with the Department of Justice on the best possible alternative to serve this purpose and revert to the Subcommittee in six months' time.

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Liabilities of individual members of a Management Committee (MC) of an OC

7. Mr Andrew WONG asked the Administration to clarify whether individual members of a MC could enjoy a status similar to that of directors of a limited company. PAS(HA)5 clarified that according to legal advice, their status was similar in that the liabilities of an OC could not be transferred to individual members of MC under the existing BMO, except in those situations specifically spelt out in the provisions of BMO relating to the responsibilities of members of a MC, or under section 17(1)(b) of BMO. She further pointed out that unlike BMO, the existing Companies Ordinance contained a number of provisions that imposed personal liabilities, both civil and criminal, on directors.

8. Noting that the Administration had quoted two recent court cases in the information paper to illustrate that there were adequate provisions in the existing BMO to prevent the transfer of liabilities of an OC to individual members of a MC, Mr IP Kwok-him sought clarification whether, according to legal advice, the existing BMO had provided members of a MC with adequate protection to prevent them from being held personally liable for the action taken in the name of an OC.

9. PAS(HA)5 clarified that according to sections 16, 17 and 29 of BMO, the liability of an OC should not normally be transferred to an individual owner or members of MC. This had been reinforced by the judgments on the two cases quoted in the information paper in which leave applications were filed by development companies or building contractors against both the OC and members of MC on certain building management issues under BMO. It was therefore not necessary to amend BMO for the sake of making clear this legislative intent. As regards the suggestion from some Subcommittee members that there should be clear provisions in BMO to exempt owners and members of MCs from certain civil liabilities, such as liabilities for libel, arising from the performance of OC duties, PAS(HA)5 said that the Administration considered it not appropriate to give a blanket exemption from legal liabilities to individual MC members under BMO since it was outside the purview of BMO and the owners should not be exempted from their personal responsibilities and liabilities under a libel action by the mere fact that they were members of a MC.

10. Assistant Legal Adviser 4 drew members' attention to section 17 of BMO under which execution to enforce any judgment against a corporation could be issued against any owner with the leave of the Lands Tribunal. As he had pointed out at the Subcommittee meeting on 18 December 2001, 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 such circumstances in BMO. He suggested HAB to provide for members' reference information on the court cases against individual members of MC. PAS(HA)5

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Adm said that she did not recall any such cases but would check against the records and provide the information to members after the meeting. She remarked that it might not be possible to specify exhaustively all the circumstances under which the Lands Tribunal would grant such leave under section 17.

11. Referring to the mediation mechanism proposed in paragraph 12 of the information paper, Mr NG Leung-sing suggested that the mediation bodies might be granted statutory powers in resolving building management disputes. Their ruling could then decide whether the MC members should be held personally responsible for their action in a particular case before legal proceedings were instituted against them. This would help reduce the number of cases brought to court. PAS(HA)5 advised that the Administration was considering establishing a non-statutory mediation mechanism in which mediation bodies would provide voluntary services at the Building Management Resource Centres under the Home Affairs Department (HAD) to resolve building management disputes. The mediation bodies would not possess the statutory powers required to perform the function suggested by Mr NG.

12. The Chairman remained of the view that clear provisions should be made in BMO to exempt certain liabilities of individual MC members when they exercised and performed the powers and duties of the OC in good faith. He quoted as an example the case of Beverly Garden which was mentioned by Mr Andrew CHENG at the Subcommittee meeting on 18 December 2001 to illustrate that under the existing BMO, MC members could not apply to strike out legal action and be spared the ordeal and pressure of facing legal action. He quoted another case in which a MC member who had remained silent throughout a MC meeting was also sued together with all other MC members because of a decision made at that meeting. The Chairman expressed concern that similar cases would likely to happen in future with the increase in the number of building maintenance contracts granted by OCs which might involved a huge sum of money. He reiterated that the Subcommittee had not advocated for providing a blanket exemption from legal liabilities for MC members but considered that they should be granted an exemption when they performed duties and exercised power of the OC in good faith on its behalf.

13. Ms Cyd HO, Ms Emily LAU and Mr IP Kwok-him supported the view of the Chairman. Ms Cyd HO suggested the Administration to make reference to the Human Organ Transplant (Amendment) Bill in which a new provision had been made to protect individual members of the Human Organ Transplant Board from any civil liability or claim when they acted in good faith under the Ordinance. Ms HO urged the Administration to provide similar protection to MC members who volunteered their service for OCs. Ms Emily LAU and Mr IP Kwok-him added that most of the owners were laymen with no legal background and little

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knowledge of BMO. The Administration should provide more positive and effective assistance to them. A provision in BMO to exempt them from legal liability as proposed by the Chairman would certainly help encourage them to participate in the work of OCs. The Chairman pointed out that MC members should not be personally held responsible for executing a resolution of the OC even if the resolution was subsequently found to be void on procedural grounds such as an absence of a quorum in the OC meeting concerned.

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14. PAS(HA)5 responded that the Administration recognised the need to provide support to members of OCs and MCs and had all along been offering assistance to them readily. She explained that while the Administration considered it inappropriate to give a blanket exemption to individual MC members, it would consider including an express provision to make it clear that individual MC members would not be held personally liable for the collective decision of an OC purely on the ground that they were acting as the agent of OC, exercising and performing the powers and duties of the latter. PAS(HA)5 undertook to seek legal advice on members' suggestions to include a provision in BMO to this effect and to specify the circumstances under which the Lands Tribunal would grant leave for a judgment to be enforced against individual owner under section 17 of BMO. She said that the Administration would also make reference to the proposed protection in the Human Organ Transplant (Amendment) Bill.

15. Mr Andrew WONG cautioned that such an exemption from legal liabilities should only be granted under very clear, specific and narrow circumstances in order to prevent possible abuse. He considered that a balance should be struck so that the extent of exemption would be restricted to prevent possible abuse while the owners could still be protected from legal liabilities and hence encouraged to participate in the work of OC. Mr NG Leung-sing shared the views of Mr WONG. Ms Emily LAU suggested that reference might also be made to the exemption from legal liabilities granted to civil servants. PAS(HA)5 assured members that the Administration would try to strike a balance in drafting the related amendments to prevent any possible abuse.

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16. The Chairman suggested HAD to refer cases and issues of concern in this respect to HAB for reference so that the Bureau could identify the problems and address them by introducing amendments to BMO. The Chairman added that with the large sum involved in some of the maintenance contracts granted by OCs, a system of declaration of interest for MC members was necessary and should be included in the amendments to be proposed to BMO. His view was supported by Ms Emily LAU.

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Procedures for formation of OCs

17. In response to the question from the Chairman, PAS(HA)5 informed members that the appropriate procedures for formation of OCs would be included in a new schedule to be added to BMO. The Administration was also considering to prescribe certain forms of notice and proxy forms used for formation of an OC in BMO by way of legislative amendments. These were intended to reduce the number of building management disputes arising from the interpretation of procedural requirements under BMO.

18. The Chairman opined that HAD should be able to identify problems and issues of concern from the cases they encountered on the procedures for formation and election of OCs and MCs which should be addressed in the new schedule or amendments to BMO. To minimise disputes, he requested the Administration to lay down clearly in BMO the proper procedures for the election of MCs, such as the power of the chairman and deadline for nominations, as well as the change over of MCs. The forms used for the election of MCs such as proxy form and ballot paper should also be prescribed in BMO.

19. Sharing similar views, Mr Andrew WONG echoed that to facilitate the formation of MCs, the Administration should spell out clearly in the new schedule that OCs could decide the composition of MCs and that the secretary and/or treasurer of MCs could be employed from outside. The Administration should also consider standardising the election procedures so that the chairman, secretary and treasurer of MCs would be elected before other members. The procedures for the re-election of MCs should also be included in the new schedule.

20. Ms Emily LAU requested the Administration to revise the election procedures for MCs so that they would be more user-friendly to owners to encourage their participation. She suggested that the polling time should be shortened and the procedure for the appointment of proxy simplified. To provide more assistance to owners, staff of HAD should be present at the election and legal advice should be available readily to owners. Ms LAU drew members' attention to a referral from Duty Roster Members regarding a complaint from some of the owners in King Lam Estate about the election of the MC in their estate [LC Paper No. CB(2)1402/01-02]. She requested the Administration to review the election procedures for MCs in the light of the concerns raised in this case. She pointed out that confusion and complaints similar to those in the case of King Lam Estate would arise if nominations could still be accepted shortly before election and there was not sufficient time to print out the name of the candidates on the ballot paper. Mr IP Kwok-him cautioned that very often, the election of MC was not able to attract enough nominations and flexibility would therefore be required for setting the deadline for nominations.

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21. On the operation of MCs, both Mr Andrew WONG and Ms Emily LAU requested that a provision should be made in BMO to enable owners to observe MC meetings. The Chairman added that the confusion caused by the adjournment and resumption of OC and MC meetings should also be dealt with in BMO and standard format for meeting documents such as notice of meetings should also be provided in the new schedule. PAS(HA)5 said that the Administration recognised the need to set out clear and user-friendly procedures for the formation of OCs and MCs and would further consult the Subcommittee on the draft revised procedures. She added that the Administration would try to address the problems identified in the referral in the draft revised procedures.

Establishment of a non-statutory mediation mechanism to resolve building management disputes

22. In response to the questions from Mr Andrew WONG, Mr NG Leung-sing and the Chairman, PAS(HA)5 clarified that the mediation mechanism under planning was designed to help resolve building management disputes arising from the interpretation of BMO among the parties concerned, including owners, OCs and management companies.

23. Mr NG Leung-sing remarked that in order to resolve disputes successfully, mediators should be independent professionals who were able to win the respect and trust from the parties involved in the disputes. He requested the Administration to provide additional information on the mediation bodies that would provide services under the mediation mechanism so as to assure members that suitable and qualified mediators would be provided for the parties in need. Sharing a similar concern, Mr Andrew WONG sought clarification on the qualification required of a mediator.

24. The Assistant Director of Home Affairs (4) (AD of HA (4)) informed members that the Administration had liaised with two mediation bodies, the Hong Kong Mediation Centre and Hong Kong Mediation Council, for the provision of voluntary mediation services. The mediators in these two organisations were mostly professionals such as lawyers, surveyors and engineers who had undergone training on mediation. The two organisations would provide mediators of different background and experience according to the nature of the disputes involved. Since the present practice of mediation bodies did not require accreditation from a mediator, anyone who possessed expertise in a particular field and had received training in mediation could become a mediator. In spite of this, one of the organisations did require accreditation from their mediators. Since they were not specialised in building management disputes, two organisations were considering offering special training and guidelines to their mediators in this

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respect. AD of HA (4) assured members that once a detailed proposal was received from the two organisations, the Administration would forward it to the Subcommittee for reference. The Chairman requested HAD to provide more information on the two mediation organisations to members after meeting.

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25. Ms Emily LAU said that she supported the establishment of the mediation mechanism but shared the concern of Mr NG Leung-sing about the status of the mediation mechanism and the qualification of the mediators. In response to Ms LAU's enquiry, AD of HA (4) clarified that like the seven other organisations providing voluntary services at the Building Management Resources Centres (BMRC) under HAD at present, the two mediation organisations would provide completely free services to the owners. According to the estimates of the mediation organisations, fifteen to sixteen hours of mediation work would be required for a complicated case. AD of HA (4) undertook to provide more details on the operation of the mediation mechanism to the Subcommittee when the joint proposal from the two organisations was received.

Adm

26. Expressing similar concern about the waiting and processing time of the cases, Mr NG Leung-sing warned that the mediation mechanism might attract an enormous number of cases a year hence thorough planning would be required for meeting the heavy demand for mediation services and handling the heavy caseload efficiently. He suggested that the parties concerned should be allowed to seek assistance from one of the two organisations only. With the consent of the parties concerned, their negotiation meetings should be opened and the case details released to the public.

27. To ensure the effectiveness and quality of mediation services, the Chairman suggested that the Administration should consider the following in planning for the mediation mechanism:

- (a) BMRC should also assign their own mediators directly to resolve building management disputes;
- (b) special arrangements had to be made to deal with urgent cases;
- (c) Legal liabilities would be involved in the mediation process as the information used might constitute a prejudice against one of the parties in future legal proceedings;
- (d) A mediator should formulate his opinion after having heard the submissions from both parties in a dispute and such opinion should be made available to the public for reference in order to facilitate mediation of similar disputes in future.

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III. Date of next meeting

28. In response to members' enquiry, PAS(HA)5 said that the Administration should be able to revert to the Subcommittee in two months' time (except on the proposal to enable owners of house developments to form OCs). Members agreed to hold the next meeting on Tuesday, 14 May 2002 at 10:45 am to discuss the Administration's response on the outstanding issues.

IV. Any other business

29. There being no other business, the meeting ended at 12:40 p.m.

Council Business Division 2
Legislative Council Secretariat
10 May 2002