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LegCo Panel on Home Affairs

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

**Minutes of meeting
held on Tuesday, 14 May 2002 at 10:45 am
in Conference Room B of the Legislative Council Building**

- Members Present** : Hon Albert CHAN Wai-yip (Chairman)
Hon NG Leung-sing, JP
Hon Andrew WONG Wang-fat, JP
Hon Emily LAU Wai-hing, JP
Hon Andrew CHENG Kar-foo
- Members Absent** : Hon Cyd HO Sau-lan
Hon Albert HO Chun-yan
Hon IP Kwok-him, JP
- Public Officers Attending** : Ms Esther LEUNG
Principal Assistant Secretary for Home Affairs (5)
- Mrs Kenny WONG
Assistant Director of Home Affairs (4)
- Ms Angel LI
Acting Assistant Director of Lands
- 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

Mr Stanley MA
Senior Assistant Secretary (2)6

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I. Confirmation of minutes
[LC Paper No. CB(2)1844/01-02]

The minutes of the meeting held on 20 March 2002 were confirmed.

II. Meeting with the Administration

2. Members noted that the Administration had provided background information on the Hong Kong Mediation Council and the Hong Kong Mediation Centre which had indicated interest in providing voluntary mediation service to resolve disputes on building management problems [LC Paper No. CB(2)1840/01-02(01)].

3. Members also noted the further submission from Ms Amy YUNG, a member of the Islands District Council, suggesting that a comprehensive conflict resolution system, instead of a non-statutory mediation mechanism, should be established to resolve building management disputes [LC Paper No. CB(2)1800/01-02(01)].

4. At the Chairman's invitation, Principal Assistant Secretary for Home Affairs (5) (PAS(HA)5) briefed members on the salient points of the Administration's response to the three issues which were raised at the last meeting of the Subcommittee on 26 March 2002 [LC Paper No. CB(2)1839/01-02(01)]. The gist of the ensuing discussion on the Administration's response is summarized below.

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Tenure of service of the initial management company of a new building

5. Members noted that it was the Administration's legal advice that in the absence of any specific provision for re-appointment of the first manager (the initial management company) in the relevant Deeds of Mutual Covenant (DMC), the appointment of the first manager could continue after the initial period of service. However, the appointment could be terminated by an owners' corporation (OC) in accordance with paragraph 7 of the Seventh Schedule to the BMO. Ms Emily LAU asked how an OC could exercise such power. PAS(HA)5 responded that the OC could terminate the appointment of the first manager by a resolution of the owners of not less than 50% of the undivided shares, who paid or who were liable to pay the management expenses relating to those shares.

6. Ms Emily LAU expressed concern that it would be very difficult for the OC to obtain the agreement of owners holding not less than 50% of the undivided shares at an OC meeting. The Chairman echoed her concern, pointing out that it was in practice very difficult to obtain the agreement of owners of not less than 50% of the undivided shares of large developments to endorse a resolution at an OC meeting, although owners could cast their votes by proxies. He cited that in some buildings, even though 70-80% owners had indicated support for terminating the appointment of the first manager in an opinion survey, there were still insufficient owners holding the required 50% of shares attending the general meeting for the purpose. The Chairman therefore suggested that the Administration should consider allowing owners to terminate the first manager's appointment after the expiry of the initial period of management as specified under the relevant DMC by a simply majority of owners voting at an OC meeting convened for that purpose.

7. PAS(HA)5 responded that the effective percentage of shares required for terminating the appointment of a building manager had already been reduced in the last review of BMO in 2000. The Administration had reservations about reducing the percentage of shares required to facilitate termination of the appointment of the first manager since a resolution by the owners of less than 50% of the shares represented a minority view only.

8. The Chairman stressed that the underlying assumption was that the re-appointment or otherwise of the first manager after the initial period of service should be decided by the owners themselves after they had formed an owners' committee under the DMC or an OC under the BMO. He pointed out that owners had no say in the appointment of the first manager of a new building. They should be provided with a simple and practicable mechanism to terminate the appointment of the first manager upon the expiry of the initial period of service. The Chairman asked why the Administration did not consider the option of including a provision similar to paragraph 7 of the Seventh Schedule to the BMO in the DMC Guidelines or in the BMO requiring that re-

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appointment of the first manager should be supported by a majority of owners holding not less than 50% of undivided shares.

9. PAS(HA)5 responded that the Administration had considered the option, but considered that if the re-appointment of the first manager was to be subject to a resolution of the owners of not less than 50% of the shares, it would be more difficult to renew the appointment than to terminate it, because in reality owners who were dissatisfied with the performance of the management company would be more willing to attend an OC meeting to cast their votes than otherwise. She pointed out that a management vacuum could arise if there were insufficient owners to pass a resolution for the re-appointment of the initial management company. On balance, the Administration proposed to maintain the present arrangement, i.e. to let the first manager's appointment continue after the initial period of two years until it was terminated.

10. The Chairman and Ms Emily LAU considered that the Administration appeared to have given priority consideration to facilitating re-appointment of the first manager, by assuming that it was more difficult to renew the first manager's appointment than to terminate it. They considered that the difficulty to obtain support from owners holding a majority of undivided shares applied in both situations. They were of the view that the threshold for terminating the appointment of a manager should not apply in respect of the re-appointment of the first manager.

11. The Chairman asked whether the Administration had compiled statistics on the percentage of shares held by owners in attendance at each OC meeting. Senior Liaison Officer (Building Management) of the Home Affairs Department (SLO(BM)) responded that he did not have relevant available information. Responding to the Chairman's request for an estimated figure based on past experience, SLO(BM) said that there were practical difficulties for OC meetings of large developments to have an attendance of owners of more than 50% of undivided shares. However, depending on the efforts of the Management Committee (MC) members concerned, OC meetings of small and medium buildings might well be attended by owners holding a majority of undivided shares. PAS(HA)5 supplemented that owners could cast their votes by way of proxies at OC meetings.

12. Mr NG Leung-sing said that the Administration should thoroughly examine whether the existing percentage of shares required for the termination of the appointment of the first manager had struck an appropriate balance between the interest of owners and the first manager. He agreed that an attendance by owners holding not less than 50% of undivided shares at OC meetings was certainly not easy to achieve, and in most situations the requirement was met by voting in the form of proxies. Mr NG pointed out that one of the shortcomings of lowering the percentage of undivided shares required for terminating the appointment of a manager was that the MC might dominate the decision. On the other hand, a serving building manager would be

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re-appointed if he could win the support of a few MC members. Mr NG agreed that in reality it was more likely for dissatisfied owner to attend an OC meeting to express their views. Mr NG considered it difficult at this stage to conclude whether the 50% threshold should be lowered to facilitate owners to manage their building. He suggested that the Administration should further explore the actual problems in building management in order to assess more accurately the merits and demerits of lowering the threshold. Mr NG stressed that it was most important that the BMO should be amended to strike an appropriate balance between the interest of the owners and the building managers.

13. Mr NG Leung-sing further said that being a member of the Housing Authority (HA), he had the opportunities to participate in the management of public housing estates. He said that HA operated an Estate Management Advisory Scheme (EMAC) to ensure effective and efficient estate management. Under the scheme, the appointment, re-appointment and termination of service of building managers of public housing estates were carried out without disputes between owners/tenants and management companies. He then described the operation of EMAC in relation to the decision-making process of HA to appoint, re-appoint or terminate the service of a building manager in public estates. He pointed out that termination of a manager's appointment before the expiry of relevant contract was rare and in case re-appointment of the first manager was not recommended, the subsequent transfer of the building management responsibilities from the outgoing manager to the incoming manager had been smoothly carried out.

14. Mr Andrew CHENG said that requiring the support of owners holding a certain proportion of undivided shares for re-appointment of the first manager would have positive impact on fostering of proper values and concepts among owners that they had a say in building management. He pointed out that if re-appointment required a resolution of owners with a specified percentage of shares at a general meeting, the first manager would proactively approach owners for support of his re-appointment. Mr CHENG considered it not difficult for a first manager to encourage sufficient owners to cast votes in person or by way of proxies in support of his re-appointment. He added that the requirement would promote owners' participation in the management of their building, and would contribute to enhance a wider participation of the community in building management in the long run.

15. PAS(HA)5 responded that termination of a manager's appointment was an important building management decision which should be made jointly by owners who might vote either personally or by proxy at a general meeting convened for that purpose. She reiterated that the Administration was only concerned that requiring support from a majority of owners for re-appointment of the first manager might result in a management vacuum if there were insufficient owners to pass a relevant resolution at a general meeting. In this connection, she sought members' view on the appropriate percentage of undivided shares for re-appointment of the first manager.

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16. The Chairman pointed out that unlike termination of appointment, the percentage of undivided shares required for re-appointment of the first manager at an OC meeting should not necessarily followed the 50% majority rule. He considered that if the first manager was appointed by the developer for a two-year period as specified in a DMC, the appointment should end after two years. From this perspective, re-appointment should follow the current requirement for appointing a manger by an OC. In other words, a simple majority voting at a general meeting attended by not less than 10% of owners should suffice for re-appointment purpose. In case a change of manager was required, there could be a three-month transitional period for appointing a succeeding manager and arranging the transfer of building management responsibilities between the outgoing and the succeeding managers. He suggested that the Administration could propose necessary amendments to BMO to avoid a management vacuum under such situation.

17. The Chairman further said that the establishment of a mechanism for re-appointment of the first manager who was appointed by the developer by way of a DMC was essential for protection of owners' interest. He pointed out that the first manager appointed by the developer was normally given a management fee amounting to 10% of the total operating expenses of the OC. In contrast, the management fee received by mangers of public estates who were appointed by a tendering exercise was only in the range of 2-3%. Furthermore, first managers appointed by developers would mostly operate in the interest of the developers, particularly those in large developments containing residential and non-residential portions. He cited a number of possible malpractices in building management which were detrimental to the interests of the owners.

18. In light of the Chairman's concerns, Ms Emily LAU considered that BMO should incorporate provisions to regulate developers in appointing its associate or affiliated companies to be the first manager of large developments. Mr NG Leung-sing said that developers should be allowed to conduct legitimate business if the appointment was made in an appropriate manner and there were adequate monitoring guidelines.

19. In view of members' strong views and concerns, PAS(HA)5 said that the Administration would explore the feasibility of providing for a mechanism in the BMO for the re-appointment of the first manager of a new building or development. She undertook to revert to the Subcommittee on the subject as soon as practicable.

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Allocation of undivided shares and management shares between owners

20. Members noted that in the light of the Subcommittee's concern about cases of "unfair" allocation of undivided shares and management shares between the owners of residential portions and owners of non-residential (or

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commercial) portions in a building, the Administration would propose to amend the DMC Guidelines to require both the undivided shares and management shares in a building to be allocated on the basis of gross floor area rather than market value. Members welcomed the Administration's proposal.

Personal liabilities of members of management committees

21. Assistant Legal Adviser 4 (ALA4) said that the Administration had proposed two options for the consideration of the Subcommittee in respect of personal liabilities of members of MCs. The first option was to specify in the BMO that individual members of a MC shall not be held personally liable for collective decisions made by an OC under the BMO which were neither ultra vires nor tortious solely on the ground that they were members of the MC, except situations covered in specific provisions of the BMO relating to individual members' responsibilities, such as sections 11(3), 12(4), 27(3), 40(A)(2) and 40(B)(2). The option would allow members of MCs to apply for a striking out order in the courts on the basis of the relevant statutory provisions under BMO. However, such provisions in the BMO could have the effect of restricting the circumstances under which a MC member could apply for a striking out order, which might otherwise be available under case law decided before the enactment of the new provision. In that case, the court would not have the discretion to apply the case law in considering an application for a striking out order. The other option was to retain the established "case law" basis on which the courts should consider various factors developed through the evolving case law. ALA4 advised that the Subcommittee should consider both options from the policy perspective.

22. Members in general were of the view that there should be express provisions in the BMO to provide the basis for applying for a striking out order in the courts. Mr Andrew CHENG and Ms Emily LAU pointed out that owners participating in or carrying out the work of a MC in good faith should not be held liable for the collective decisions of the OC solely on the ground that they were members of the MC.

23. Mr NG Leung-sing said that the Administration should aim to ensure that the statutory provisions to absolve MC members from civil and criminal liabilities would not result in unfettered rights with no corresponding legal consequences. PAS(HA)5 responded that the MC member should apply under Rule 11 of the Lands Tribunal Rules or under Order 18 Rule 19 of the Rules of the High Court to have his name struck out from the proceedings involved. The Labour Tribunal or the High Court would decide on the basis of its interpretation of the statutory provisions under the BMO in due course.

24. Ms Emily LAU asked whether the legal proceedings against a MC member would end with the issue of a striking out order. The Chairman pointed out that the management companies or the developer who initiated the legal proceedings might lodge an appeal against the decision of the Lands

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Tribunal or the High Court to strike out the name of a MC member from the proceedings. Ms LAU remarked that in such circumstances, the legislative protection given to MC members was still limited. ALA4 advised that Rule 11 of the Lands Tribunal Rules empowered the Lands Tribunal to have discretion to strike out the name of a MC member from the proceedings, without the need of that MC member to lodge an application. By virtue of Order 18 Rule 19 of the Rules of the High Court, the High Court also had the discretion to do so. Mr Andrew CHENG said that it was very likely that the cost of subsequent legal proceedings would be reduced if express provisions protecting MC members from legal liabilities for an OC's collective decisions were provided under the BMO. These express provisions would also facilitate the Lands Tribunal or the High Court to exercise its discretion in striking out the name of a MC member from the proceedings.

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

25. At the Chairman's invitation, Assistant Director of Home Affairs (4) (AD(HA)4) briefed members on the Administration's progress in liaison with the Hong Kong Mediation Centre and the Hong Kong Mediation Council for the provision of voluntary mediation services at Building Management Resource Centres (BMRCs) of the Home Affairs Department. She highlighted that the Administration was discussing with both organisations on the details of the arrangement with emphasis on three areas of concerns, namely, the number of qualified mediators, the qualification of mediators and whether mediation was an effective means to resolve building management disputes. The Administration intended to invite the two organisations to handle two selected cases of building management disputes each on a pilot basis. The Administration would evaluate the results of their mediation service and decide the way forward.

Adm 26. Mr Ng Leung-sing and Ms Emily LAU expressed support for the conduct of a pilot scheme to assess the quality and effectiveness of the mediation service provided by the two organisations at BMRCs. They requested the Administration to report the progress to the Subcommittee in due course. Since a mediator might spend some 10 to 20 hours to handle a complicated case of building management dispute, Ms LAU suggested that the Administration should make it clear to the two organisations on the terms and arrangements for continuous provision of free mediation service at BMRCs. Adm Mr NG expressed a similar concern. He requested the Administration to provide further information on the quality and quantity of the free mediation service.

27. AD(HA)4 responded that the Administration had expressly advised the two organisations that they were expected to provide free mediation service to OC or MC members at BMRCs in respect of building management disputes,

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similar to the voluntary services provided by other professional bodies at BMRCs.

28. Referring to the further submission of Miss Amy YUNG, a member of the Islands District Council, Ms Emily LAU enquired about the effectiveness of a mediation mechanism if the advantaged management company, as a party to the dispute, refused to mediate. AD(HA)4 responded that an equal strength between the management company and the owners might not have a major bearing on the success of the mediation mechanism. AD(HA)4 cited the experience of the Labour Tribunal in tackling disputes between employers and employees to illustrate that equal strength between the negotiation parties was not a prerequisite for successful mediation.

29. Mr Andrew CHENG said that it might not be realistic to expect continuous provision of free mediation services for building management disputes by a few voluntary organisations in the long run. He considered that to promote owners' participation in building management, the Administration should play an active role and provide the necessary supporting services to MCs and OCs for settlement of any disputes between owners and developers or management companies. PAS(HA)5 responded that the role of the Administration in settling building management dispute was a major issue which should be dealt with separately in the long run. At this stage, the Administration considered it worthwhile to try the voluntary mediation services for settling building management disputes first.

30. The Chairman considered that the staff members at BMRCs should play a key role in offering advice to OC and MC members for resolving minor disputes on building management. The provision of free mediation service should follow when these minor disputes could not be resolved. In this connection, the Chairman suggested that the Administration should monitor and evaluate the results of free mediation services as well as the range of supporting services provided at BMRCs for long-term planning purpose.

Way forward

31. Responding to Ms Emily LAU, PAS(HA)5 advised that the Administration was working on the necessary amendments to the BMO in response to the Subcommittee's views and suggestions. She said that the Administration could provide the Subcommittee with relevant preliminary legislative proposals, including the amendments to be proposed for improving the procedures for formation of OCs, in July 2002.

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III. Date of next meeting

32. Members agreed to hold the next meeting at 10:45 am on 8 July 2002.

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IV. Any other business

33. There being no other business, the meeting ended at 12:25 pm.

Council Business Division 2
Legislative Council Secretariat
4 July 2002