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Panel on Home Affairs

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

**Minutes of meeting
held on Friday, 6 February 2004 at 10:45 am
in Conference Room A of the Legislative Council Building**

Members present : Hon Albert CHAN Wai-yip (Chairman)
Hon Albert HO Chun-yan
Hon NG Leung-sing, JP
Hon Andrew WONG Wang-fat, JP
Hon Emily LAU Wai-hing, JP
Hon CHOY So-yuk
Hon Andrew CHENG Kar-foo
Hon Tommy CHEUNG Yu-yan, JP
Hon WONG Sing-chi
Hon IP Kwok-him, JP

Member absent : Hon Cyd HO Sau-lan

Public Officers attending : Mrs Angelina CHEUNG
Assistant Director of Home Affairs

Miss Christine AU
Administrative Officer
Home Affairs Department

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

Clerk in attendance : Mrs Constance LI
Chief Council Secretary (2)5

Staff in attendance : Mr Stephen LAM
Assistant Legal Adviser 4

Mr Stanley MA
Senior Council Secretary (2)6

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I. Meeting with the Administration
[LC Paper No. CB(2)1193/03-04(01)]

Introduction of the "Easy Count" software

At the invitation of the Chairman, Assistant Director of Home Affairs (AD(HA)) conducted a power-point presentation demonstrating the application of the "Easy Count" software which was designed by the Home Affairs Department (HAD) for counting of votes/shares in the election of office holders to the Management Committee (MC) of an owners' corporation (OC) in an owners' meeting. AD(HA) said that the software, together with a set of user guidelines would be made available to the public at HAD's 18 district offices and the four Building Management Resource Centres (BMRCs) starting 1 April 2004. The public would also be welcomed to download the software and user manual for free trial from HAD's building management website: www.buildingmgt.gov.hk. HAD staff would render all possible assistance to owners and MC members in the application of the software.

2. The Chairman remarked that the counting of votes/shares in support of a candidate to the MC was a time-consuming process, especially if there were many candidates competing for each office and a high attendance of owners at the meeting. He suggested that HAD should consider the option of making use of an electronic device which could read owners' choice and make computations digitally. AD(HA) responded that the Administration would continue to refine the software after attaining operational experiences, and explore other alternatives to facilitate the counting of shares in owners' meetings.

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Appointment procedures of an MC

3. At the invitation of the Chairman, AD(HA) briefed members on the Administration's proposed new amendments to the Building Management Ordinance (BMO) on the appointment procedures of an MC as detailed in paragraphs 3 to 14 of the Administration's paper [LC Paper No.CB(2)1193/03-04(01)].

Appointment of MC under BMO

4. Mr IP Kwok-him asked whether the proposed amendment to section 3(2) of BMO, which would specify that an MC formed under BMO might only be appointed by a resolution of owners of not less than 30% of the shares, would have an overriding effect on the Deed of Mutual Covenant (DMC). Mr IP considered that there should be substantive justifications for providing such an overriding effect.

5. AD(HA) responded that the proposed amendment to BMO would not have an overriding effect on similar provisions in the DMC. Following the amendment, all references to DMC in the Second Schedule to the BMO concerning the composition and procedure of an MC would be deleted. She pointed out that according to the records of the Land Registry, only 58 of the 7 000 registered OCs were formed under section 3(2)(a) in accordance with DMC provisions. Most of these DMCs contained provisions for the formation of an owners' committee or residents committee but not an MC as stipulated under the BMO. While the previously formed MCs would remain valid upon enactment of the proposed amendment, HAD would require them to follow BMO requirements on composition and procedures to be set out in the revised Second Schedule at the alternate annual general meeting of the corporation.

6. Miss CHOY So-yuk expressed support for the Administration's proposal. However, she was concerned about the existence of two types of MCs, one formed under the BMO and the other formed under DMC, after the amendment was put into operation. She asked how HAD would assist the existing 58 OCs/MCs formed under DMC to meet the new requirements of the BMO.

7. AD(HA) clarified that most of the existing 58 OCs/MCs formed under DMCs were already following the requirements and procedures of BMO in their composition and operation. However, some of them were inactive and some of them might have incorporated members who were not owners of the building (e.g. spouse or relatives of the owners). HAD would assist these OCs to meet the new requirements after the amendment was put in place.

8. The Chairman said that the Administration should allow sufficient time for the existing 58 OCs, which were formed in accordance with DMC provisions, to prepare for the change to follow the new requirements. He

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suggested that the Administration should also specify a deadline for those inactive OCs to hold a general meeting to establish the new OCs/MCs in accordance with the BMO requirements.

Appointment of a vice-chairman

9. Mr IP Kwok-him asked whether the proposed amendment to allow owners to have the discretion to appoint a vice-chairman would have overriding effect over existing owners' committees which had previously appointed a vice-chairman. He was concerned that these committees might decide to cancel the post of vice-chairman after the proposed amendment to the Second Schedule of BMO had come into effect.

10. Mr Andrew CHENG shared the concern expressed by Mr IP Kwok-him. He considered that if the policy intent was to provide for a vice-chairman in an MC, the Administration should spell it out clearly in the proposed amendment so that it could have an overriding effect over DMC provisions. This was to avoid unnecessary disputes between developers of a building who drafted the DMC and the owners of a building.

11. AD(HA) explained that the proposed amendments to BMO were not intended to override the relevant provisions in DMC, but only to provide owners with the discretion to decide whether a vice-chairman was needed. She said that according to the records in the Land Registry, most of the 58 registered OCs, which were formed under section 3(2)(a) in accordance with DMC instead of BMO, contained provisions for the formation of an owners' committee instead of an MC. She said that unless the DMC of a building specifically referred to the appointment of a MC under section 3 of the BMO, the MC referred to in the DMC was not the same one as that provided for in BMO. She explained that substantive justifications would be required for incorporating provisions in BMO which were to have an overriding effect over DMC. She undertook to consult the Department of Justice (D of J) on the matter and revert to the Subcommittee at the next meeting.

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12. Mr Andrew CHENG pointed out that there were existing provisions in BMO which had overriding effect over DMC. Assistant Legal Adviser supplemented that section 34C(2) of BMO had specified that Part VIA should prevail in the event of any inconsistency between its provisions and the terms of a DMC or any other agreement.

13. AD(HA) responded that new DMCs were required to be approved by the Legal Advisory and Convenancing Office (LACO) of the Lands Department. In approving new DMCs, LACO would ensure that the current guidelines for approving DMCs as stipulated in the LACO Circular Memorandum were complied with. LACO would amend and update the guidelines once the proposed amendments were enacted. In fact, paragraph 1(a) of the current

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Guidelines for DMCs had already stipulated that no provision in a DMC shall contravene the provisions of BMO.

Persons presiding at the owners' meeting

14. Mr Andrew CHENG considered that HAD should review the procedures for the issue of certificate of waivers, in order to reduce unnecessary disputes between different groups of owners competing to convene the first meeting for the appointment of an MC. He pointed out that a certificate of waiver issued by HAD would enable a group of owners of not less than 5% of shares to obtain from the Land Registry a free copy of the owners' record of their building. He suggested that HAD should keep the owners' record at its district offices, and provide a copy of such groups of owners on a first-come-first-served basis. He also suggested that the Administration should consider specifying in BMO the criteria adopted in HAD's decision to issue a certificate of waiver.

15. AD(HA) responded that the issuance of certificate of waiver was non-statutory but a means for HAD to facilitate the formation of OCs. HAD had reviewed the procedures involved. If more than one group of owners approached HAD for the formation of an OC, HAD would assist the owners concerned to come together in co-ordinating and convening the first owners' meeting. The arrangements had been effective so far and HAD did not consider that there was a need to provide statutory backing to the mechanism. She said that HAD welcomed any suggestions to improve the existing arrangements.

16. The Chairman pointed out that the law did not require owners to seek HAD's assistance in the formation of OCs and MCs. Owners holding not less than 5% shares could obtain a copy of the owners' record from the Land Registry at a fee, and convene an owners' meeting to form an OC even without HAD's assistance. AD(HA) concurred and reiterated that the provision of a certificate of waiver to owners was one of the support services provided by HAD to facilitate the formation of OCs.

17. The Chairman suggested that HAD should consider requiring owners holding not less than 5% shares to nominate among themselves a representative to co-ordinate the necessary preparation work for the first owners' meeting, before the issuance of the certificate of waiver. The representative as nominated by these owners on a consent form should serve the notice of the first owners' meeting under section 5(1)(b), and he should preside over the meeting for the establishment of an OC and the election of MC members.

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Voting rights of shares

18. The Chairman pointed out that some DMCs might stipulate a disproportionate distribution of undivided shares and management shares between the residential and non-residential portions in a building or development. This had given rise to the problem of disproportionate distribution between voting rights and management liability whereby residential owners had to pay more management expenses but possessed less voting rights, while non-residential owners (invariably the developers) held more voting rights but had less management liability. He said that the Subcommittee had previously suggested that the voting rights of owners for the establishment of an MC should be determined on the basis of management shares instead of the undivided shares. Miss CHOY So-yuk expressed support for the Chairman's view.

19. AD(HA) noted the Chairman's suggestion. She said that some developers had adopted different formulae in allocating undivided shares and management shares in a building, i.e. while undivided shares were calculated on a "value" basis, the management shares were calculated on a gross floor area basis. In response to the Subcommittee's concern raised in the previous meetings, LACO had already amended the guidelines for approving DMCs to ensure that gross floor area should be used in both the allocation of undivided shares and management shares in a building.

Holders of office of an MC

20. Miss CHOY So-yuk pointed out that there had been many disputes over fund management and appointment of MC office holders between MCs and owners. She considered that the Administration should review the rules and procedures on appointment of MC office holders to improve the situation.

Appointment of proxy

21. At the invitation of the Chairman, AD(HA) briefed members on the proposed amendments in respect of appointment of proxy by owner who was a body corporate, the time limit for lodging of the proxy instrument, the standard format of the proxy instrument, and the person to decide the validity of proxy instrument as detailed in paragraphs 15 to 23 of the Administration's paper.

Time limit for lodging of the proxy instrument

22. The Chairman, Miss CHOY So-yuk and Mr WONG Sing-chi expressed support for setting a deadline in BMO for submission of proxy 24 hours before the holding of the meeting concerned. They said that sometimes the proxy forms were distributed to owners at the very last minute and delivered to the MC only at the meeting. They considered that the provision of a 24-hour

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duration would allow sufficient time for the MC or the person presiding at the meeting to verify the authenticity of the proxies received.

23. AD(HA) said that the proposed amendment was aimed to plug the loopholes in the application of the proxy instrument, and to educate owners that appointing a proxy to attend and vote on their behalf at an owners' meeting was an important matter. It was an offence under the Crimes Ordinance for a person to falsify a proxy instrument, or make any statement or furnish any information in the proxy instrument which he knew, or reasonably ought to know, to be false. The Administration would launch publicity programmes to promote public awareness on the application of proxy instruments and the serious consequence of falsifying a proxy instrument.

24. Mr WONG Sing-chi suggested that to avoid unnecessary disputes, HAD should consider using guidelines to set out the procedures for the distribution and submission of proxy instruments, such as the time and place for return of proxy forms, for OCs and owners to follow. He also suggested that HAD should work out procedures to prevent selective distribution of proxy forms to owners by MCs.

25. AD(HA) responded that to facilitate the appointment of proxy by owners, HAD had drafted, in consultation with the D of J, a set of guidelines for reference by OCs and owners. The guidelines were annexed to LC Paper No. CB(2) 1193/03-04(01). She said that the guidelines were meant to provide guidance on good practice and were not legally binding.

26. The Chairman said that the procedures on distribution and submission of proxy forms should be made legally binding on the operation of OCs and MCs. He pointed out that the guidelines now drafted would not be accepted by the court in future dispute cases.

Standard format of the proxy instrument

27. Mr Andrew CHENG suggested that BMO should incorporate the standard formats of proxy instruments for different types of OC meetings for OCs and owners to follow. He considered that the OCs or owners should not be given the flexibility to make amendment to the standard formats to avoid unnecessary disputes at such meetings.

28. The Chairman expressed support for incorporating in the BMO the standard formats of proxy instruments for OCs/MCs to follow. However, he was concerned about possible manipulation by MCs in the distribution of proxy forms. He said that some OCs had made their own rules and proxy forms for owners, while some other MC members might collaborate with building managers to manipulate the distribution of proxy forms in order to pass a resolution at an OC meeting. He held a strong view that BMO should specify

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that OCs and MCs must follow the correct procedures for distribution of the specified proxy forms to owners.

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29. AD(HA) advised that the Administration had proposed to include a subparagraph under paragraph 4 of the Third Schedule to provide a sample form of the proxy instrument for OCs and owners to follow. Unless the owner had otherwise instructed, the proxy would be allowed to vote as he/she considered fit at the meeting. AD(HA) agreed to consider the views of the Chairman and Mr Andrew CHENG, and consult D of J as appropriate.

Person to decide the validity of proxy instrument

30. Members in general expressed reservations about empowering the MC chairman alone to determine the validity of questionable proxy instruments. Mr Andrew CHENG, Miss CHOY So-yuk and Ms Emily LAU considered it more appropriate for an MC to make the decision collectively. Miss CHOY So-yuk pointed out that there were cases where the MC chairmen were found to have abused their power, in order to delay or prevent the holding of an owners' meeting.

31. AD(HA) responded that HAD had considered empowering MC to determine the validity of questionable proxy instruments, and would re-consider the option in the light of members' views. She said that at present there was no express provision in BMO specifying the power to decide the validity of proxy instrument, and it was most important to empower certain person/body to do so. She pointed out that paragraph 3(3) of the Third Schedule had already provided that all matters arising at a meeting of the corporation at which a quorum was present shall be decided by a majority of votes of the owners. In other words, owners could collectively decide the validity of questionable proxy instrument by a majority of votes at an owners' meeting, but this would be impractical.

32. Ms Emily LAU and Mr WONG Sing-chi expressed concern if the counting of shares and verification of proxies could be conducted in a fair and open manner at owners' meetings. Mr WONG pointed out that there were many disputes between MC and owners on the validity of proxies. He suggested that HAD or independent persons such as lawyers should be invited to supervise the verification of proxies at owners' meetings.

33. AD(HA) responded that in practice, it would be very difficult to implement a requirement for HAD staff or independent professionals to attend each owners' meeting to determine the validity of the proxies. It was also not appropriate for staff of HAD to interfere with private property management matters, or to give professional or legal advice to resolve disputes at owners' meetings.

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34. AD(HA) advised that in addition to the provision of free professional advice at BMRCs, HAD had recently operated an outreaching service to assist owners in the establishment of an OC and other building management matters that may arise at owners' meetings. She added that while it might be useful for the owners and the MC to obtain an independent opinion, the owners themselves had the legal right to make decisions on matters concerning their own building.

35. Mr Andrew CHENG shared the view that it would not be practical to require HAD or independent persons to verify proxies at each OC meeting, as these involved management matters of a private building. He considered that MC was the appropriate body to determine the validity of questionable proxy instrument. If the MC was not acting properly, the owners could dissolve the MC.

36. The Chairman pointed out that there would be circumstances where owners did not trust the decision of an MC on the validity of questionable proxies. In some cases, the MCs concerned had prevented owners to have access to the proxy instrument or refused owners' request to check the validity. He considered that information on the proxy instruments received by an MC should be made available to owners of the building before the owners' meeting was held. He also suggested that a mechanism be put in place to enable owners holding a certain percentage of shares to apply to HAD for checking the validity of proxy instruments. Mr WONG Sing-chi expressed a similar concern and suggested that the procedures for the collection of proxies should be set out in the guidelines or in the BMO.

37. AD(HA) responded that OCs were encouraged to enhance the transparency of their procedures in handling proxy instruments. She said that the secretary of an MC could play a role in ensuring the validity of proxies and enhancing the transparency in handling proxy instruments as follows –

- (a) specifying in the proxy instrument when and where the proxy instrument should be lodged;
- (b) depositing a receipt slip in the letter box of the owner in acknowledgement of the receipt of a valid proxy instrument;
- (c) posting in a prominent place of the building information on those flats where a proxy had been appointed; and
- (d) attaching a list to the minutes of the meeting to show the flats where a proxy had been appointed.

38. Miss CHOY So-yuk pointed out that owners might oppose the disclosure of their proxy instrument to other owners. AD(HA) responded that

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the consent of the owners/proxies concerned could be obtained by requiring them to give express permission for the disclosure in the proxy instrument or in an appendix to the proxy form.

Consultation

39. Ms Emily LAU expressed concern about the acceptability of the proposed amendments to owners, property managers and developers. She asked whether the Administration had consulted them on the proposed amendments about the appointment of a MC, proxy and the setting up of accounts for OCs.

40. AD(HA) responded that HAD had consulted the 18 District Offices and the OCs, and they generally accepted the proposed amendments in the appointment of proxy. However, the setting up of accounts for OCs would need further consultation. She explained that those amendments on the appointment of MCs and proxy were proposed as a result of an extensive consultation conducted from May to July in 2003 and the actual experience gained from implementing relevant requirements under the BMO.

41. As regards the proposal on setting up of accounts for OCs, AD(HA) said that it was made after the sudden closure of a property management company in August 2003, as this had given rise to concerns over the management of funds by property managers. The Administration had conducted informal consultation with the trade and there were no dissenting views on the proposal. The Administration would refine the proposals in the light of members' views and suggestions, and would further consult the trade, OCs and owners' associations before drafting the proposed amendments.

IV. Any other business

42. The Chairman requested the Secretariat to prepare a summary of the proposals of the Subcommittee regarding amendments to the BMO to facilitate the Subcommittee's discussion at the next meeting.

[Post-meeting note : The summary was issued to members vide LC Paper No. CB(2)1572/03-04 on 3 March 2004.]

43. There being no other business, the meeting ended at 12:55 pm.

Council Business Division 2
Legislative Council Secretariat
28 April 2004