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Panel on Home Affairs

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

**Minutes of meeting
held on Thursday, 4 March 2004 at 8:30 am
in Conference Room A of the Legislative Council Building**

Members present : Hon Emily LAU Wai-hing, JP (Acting Chairman)
Hon Albert HO Chun-yan
Hon CHOY So-yuk
Hon Andrew CHENG Kar-foo
Hon Tommy CHEUNG Yu-yan, JP
Hon WONG Sing-chi

Members absent : Hon Albert CHAN Wai-yip (Chairman)
Hon Cyd HO Sau-lan
Hon NG Leung-sing, JP
Hon Andrew WONG Wang-fat, JP
Hon IP Kwok-him, JP

Public Officers attending : Mr Isaac CHOW
Deputy Director of Home Affairs

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 : Ms Doris CHAN
Chief Council Secretary (2)2

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)1518/03-04(01) and (02)]

In the absence of the Chairman of the Subcommittee, Ms Emily LAU was elected as the acting Chairman of the Subcommittee.

2. At the invitation of the acting Chairman, Deputy Director of Home Affairs (DD(HA)) briefed members on the latest developments and way forward on the review of the Building Management Ordinance (BMO). DD(HA) said that the Administration had completed a public consultation exercise on the proposed amendments to BMO in July 2003 and briefed the Panel on Home Affairs on the outcome at its meeting on 28 November 2003. Since the Administration planned to introduce the proposed amendments into the Legislative Council in the 2004-05 legislative session, members of the Panel on Home Affairs had agreed that the Subcommittee should continue discussion with the Administration on further improvements to BMO. The Department of Justice (DoJ) had advised that some six months would be needed for the drafting of this amendment bill and drafting would only commence upon finalization of the drafting instructions. As HAD would like to introduce the bill into the Legislative Council in the 2004-05 legislative session, it was hoped that the Subcommittee would conclude its discussion within April/May 2004 so that HAD could prepare and finalize the drafting instructions for DoJ to start the drafting work.

3. Assistant Director of Home Affairs (AD(HA)) briefed members on LC Paper No. CB(2)1518/03-04(01), which set out the Administration's response to members' concerns about the proposed amendments in respect of the appointment procedures of a Management Committee (MC) and proxy raised at

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the last meeting on 6 February 2004. AD(HA) also briefed members on the proposed amendments in respect of setting up of account for OCs as set out in paragraphs 24 to 28 of the Administration's paper for the previous meeting on 6 February 2004 [LC Paper No.CB(2)1193/03-04(01)].

Appointment procedures of an MC

4. Noting that under the proposed amendment to section 3(2) of BMO, an MC could be formed in accordance with the requirements set out in BMO instead of the deed of mutual covenant (DMC) of a building, the acting Chairman asked the Administration to explain the difference between an MC formed under the proposed amendment to the BMO and an MC formed under the DMC. The acting Chairman also asked whether the proposed amendment would have an overriding effect over DMC.

5. AD(HA) explained that under the existing section 3(2) of BMO, an MC should be appointed in accordance with the terms of a DMC which provided for the appointment of an MC. Only if there was no DMC or no such provision in the DMC should the MC be appointed by a resolution of the owners holding not less than 30% of the shares. Since most DMCs contained provisions for the formation of an owners' committee having similar functions as an MC under BMO, this had caused confusion to owners as to whether an MC should be appointed in accordance with DMC or BMO. What further complicated the matter was that DMCs might contain provisions which were different from BMO provisions regarding the composition and procedures of an MC. The proposed amendment aimed to remove the ambiguity in the legislation.

6. AD(HA) further explained that in the case of *Siu Siu Hing vs Land Registry* (HCAL 77/2000), it was held that unless the DMC of a building specifically referred to the appointment of an MC under section 3 of BMO, the MC referred to in the DMC was not the same creature as the one provided for in BMO. In other words, according to court ruling, there were indeed two types of committees; one was the MC formed under BMO and one was any owners' committee (however it was named) provided under DMC. The policy intent of the proposed amendment was not to override an MC formed under a DMC but rather to make it clear that only an MC formed in accordance with the requirements under BMO would be recognised as a legal entity. While the proposal had no overriding effect on DMCs, in order to protect the rights of owners against some "unfair" provisions in existing DMCs which were approved before the nineties, BMO had included some provisions which would need to be impliedly incorporated into all DMCs.

7. Mr Andrew CHENG said that he supported the policy that the proposed amendment was not to override an MC formed under a DMC. He, however, expressed concern about the impact of the proposed amendment on other

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provisions of the BMO, particularly those which had an overriding effect on relevant DMC provisions.

8. AD(HA) responded that the overriding provisions in Part VIA of and Schedule 7 to the BMO were aimed to protect the interest of owners from “unfair” DMC provisions by setting out the basic requirements for the operation of the property management companies in a limited and focused context. AD(HA) pointed out that HAD would maintain close liaison with the Legal Advisory and Conveyancing Office (LACO) of the Lands Department, which was the office responsible for approving DMCs submitted by developers, to ensure that the current Guidelines for DMCs would be updated once the proposed amendments to the BMO were enacted. AD(HA) added that paragraph 1(a) of the current Guidelines for DMCs had already stipulated that no provision in a DMC shall contravene the provisions of BMO.

9. Assistant Legal Adviser 4 advised that section 34(C) of BMO stipulated that the provisions in Part VIA shall prevail in case of any inconsistency between Part VIA and the terms of a DMC or any other agreement. He agreed that the overriding effect was given in a limited context and the policy intent was to protect the fundamental interests of owners which might otherwise be jeopardised by the “unfair” provisions in some DMCs.

10. Mr Andrew CHENG remarked that since the policy intent of the proposed amendment was not to override the relevant provisions in existing DMCs, the Administration should assist existing OCs formed under DMC to follow BMO requirements on composition and procedure as set out in the revised Second Schedule when the incumbent MC retired at the alternate annual general meeting of the corporation.

11. Miss CHOY So-yuk expressed support for amending section 3(2) of BMO to the effect that owners only needed to follow the requirements and procedures under BMO in the formation of an OC. She, however, pointed out that the proposed amendment could not help owners who did not hold sufficient undivided shares to establish an OC because of “unfair” allocation of shares between developers and owners under some existing DMCs. Even though an OC had been established, a developer holding a majority of shares by virtue of the common parts of a building could still dictate the decisions of the MC on building management matters. Miss CHOY asked whether the proposed amendments would improve the situation.

12. AD(HA) responded that the proposed amendment to section 3(2) of BMO would help owners to establish OCs and MCs in accordance with BMO requirements, i.e., by a resolution of the owners of not less than 30% of the shares, instead of the terms of DMCs which might specify a higher % of shares. AD(HA) explained that “unfair” allocation of undivided shares and management shares was formerly a result of the adoption of different bases, i.e.

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undivided shares on a “value” basis and management shares on a gross floor area basis. In response to the concern of the Subcommittee, LACO had amended the Guidelines for DMCs to the effect that both the undivided shares and management shares of a building should be allocated on the basis of gross floor area. This would prevent “unfair” allocation of shares in new DMCs submitted to LACO for approval.

13. Miss CHOY So-yuk asked whether further amendments could be made to BMO so that OCs and MCs established under existing DMCs which specified an “unfair” allocation of undivided shares between the developer and the owners could operate on the basis of the management shares which should be allocated in accordance with the current Guidelines for DMCs.

14. AD(HA) explained that private property rights and obligations as specified in existing DMCs should be respected and protected. She pointed out that the provisions and fundamental concepts in BMO were construed specifically to cater for the management of flats in multi-storey buildings under the common ownership of undivided shares in land. To override the right of any persons holding the undivided shares as specified in a DMC to vote in the management of a building by legislation was a very complicated issue that might provoke serious legal consequences.

15. AD(HA) pointed out that for DMCs approved before the introduction of the Guidelines for DMCs by LACO in 1987, the undivided shares allocated to the common parts of a building were often assigned to the developer or building manager in the form of a trustee. In theory, a building manager holding these undivided shares could vote on behalf of the owners at OC meetings after consulting the owners. However, it was in practice difficult for owners holding these undivided shares to reach consensus on a resolution to be passed at an OC meeting. For this reason, most developers and building managers would not vote, by virtue of the shares of the common parts of a building, at OC meetings.

16. The acting Chairman asked about the validity of the vote cast by a developer or a building manager by virtue of the undivided shares allocated to the common parts of a building. AD(HA) replied that the vote of a developer or a building manager cast on the basis of such shares without prior consultation with the owners was liable to legal proceedings in case of disputes between the owners and the developer or the building manager over the decision of the vote. ALA4 advised that a trustee should obtain the prior consent of the owners before he cast such a vote on a resolution at an OC meeting. The acting Chairman remarked that HAD should prepare appropriate guidelines for the developers and building managers to consult the owners before they cast their votes at OC meetings on the basis of such shares.

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17. Miss CHOY So-yuk cited examples to illustrate some particular problems in the management of existing old buildings where there were no OCs or the majority of shares were held by the developer or the building manager. DD(HA) replied that HAD's district offices would provide assistance to owners of individual buildings who had come across such problems.

Appointment of proxy

Standard format of the proxy instrument

18. Mr Andrew CHENG expressed support for providing standard format of the proxy instrument for OCs and owners to follow on a mandatory basis. He asked which part of the BMO would incorporate the standard formats.

19. AD(HA) responded that having considered members' views at the meeting on 6 February 2004, the Administration had proposed two standard formats of proxy instrument, as shown in paragraphs 8 - 9 of the Administration's paper, for attendance of the proxy with or without the right to vote on resolution(s) to be considered at the OC meeting concerned. DD(HA) supplemented that the standard format of the proxy instrument would be incorporated in Schedule 2 to the BMO.

20. Miss CHOY So-yuk pointed out that owners might not be aware that there were separate forms for the authorization of a proxy to attend an OC meeting with or without the right to vote on the resolutions. She suggested that the Administration should consider providing the two options in one standard format on which owners were required to sign to certify whether the proxy was authorized to vote at the OC meeting.

21. The acting Chairman expressed a similar concern and said that a single standard format of proxy instrument providing the owners with the choice to delegate a proxy to attend an OC meeting with or without the right to vote on the resolutions of the meeting would be easier for owners to follow. AD(HA) agreed to consider the suggestion and work with DoJ during the drafting of the amendment bill.

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Persons to decide the validity of proxy instrument

22. Mr Andrew CHENG expressed support for empowering MCs to determine the validity of proxy instruments. He considered that although MCs should be the best party to do the job, there would be disputes between owners at the implementation stage. He asked the Administration to provide information on the statutory procedures which would be incorporated in the Second Schedule to the BMO to facilitate smooth implementation of the proposed amendment in due course.

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23. AD(HA) responded that the Administration would propose amendment to empower MCs to determine the validity of questionable proxy instruments. To execute the power, the MCs should convene a meeting to go over the questionable proxy forms and follow the statutory procedures as set out in the revised Second Schedule to the BMO. To assist MCs in determining the validity of proxy instruments, the Administration would provide standard formats in BMO and a set of guidelines on the appointment of proxy for MC members to follow. HAD would collaborate with DoJ on the drafting of the necessary requirements and procedures which would be set out in the revised Second Schedule for MCs to follow.

24. Miss CHOY So-yuk considered that the proposed amendment should specify the procedures and timing for the conduct of the MC meeting to decide the validity of proxy instruments in detail.

25. AD(HA) responded that the proposed amendment would remove the existing provision which empowered the MC chairman or the presiding person at the first OC meeting to accept late submission of proxy, i.e., all proxies should be lodged with the secretary of the MC not less than 24 hours before the time for the holding of the meeting at which the proxy proposed to vote. She pointed out that there should be no problem in arranging an MC meeting before the conduct of an OC meeting as the periods of notice required for OC and MC meetings were at least 14 and seven days respectively.

26. Miss CHOY So-yuk said that an MC would not be able to check the authenticity of the proxy instruments if the MC secretary refused to produce the owners' record to MC. She considered that a simple and efficient mechanism should be set up to facilitate the verification of the authenticity of proxy instruments on the part of the MC. Miss CHOY added that most owners would prefer not to report minor disputes on building management matters to the Police for assistance.

27. AD(HA) pointed out that the performance of a secretary of an MC was subject to statutory requirements under BMO. Owners who were not satisfied with the performance of an MC secretary could convene an OC meeting to pass a resolution to terminate the appointment of the MC secretary who refused to produce the owners' record without valid reasons.

Setting up of accounts for OCs

28. Mr Tommy CHEUNG expressed support for the proposal to require building managers to establish and maintain one or more segregated accounts for money received in respect of the management of the building with the OC as the client, and prepare a balance sheet in accordance with the schedule under BMO for the preparation of a summary of income and expenditure. He, however, said that the Liberal Party considered it inappropriate to criminalize

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the offence arising from non-compliance with the new requirements. He considered that a financial penalty for non-compliance would be more appropriate.

29. Miss CHOY So-yuk expressed support for the proposed amendments and considered that the imposition of an imprisonment penalty could create a deterrent effect. Miss CHOY suggested that the Administration should allow a transitional period for building managers to comply with the new requirements.

30. Miss CHOY So-yuk asked how the interests of owners, in the absence of an OC, could be protected in case a building manager did not produce the financial statements in accordance with the requirements under BMO. She also asked whether building managers were authorized to collect fees from owners whose flats were under renovation, repair or maintenance work.

31. AD(HA) responded that there were existing provisions in BMO which aimed to protect the interests of owners and guard against the misuses of the owners' money, regardless of whether an OC had been established or not. For instance, the Seventh Schedule to BMO, which set out the mandatory terms in all DMCs, provided that the building manager should maintain an interest-bearing account and shall use that account exclusively in respect of the management of the building. In any circumstances, owners could terminate the appointment of a building manager who failed to produce the required financial statements in accordance with the requirement of BMO.

32. AD(HA) further said that most DMCs would incorporate provisions which allowed the building managers to collect fees from owners or persons using the facilities or parts of the building for various purposes. The Administration did not consider it necessary to specify in the law on collection of fees by building managers on building management matters. AD(HA) added that owners could express their objection by proposing a resolution to remove the power of a building manager to collect certain types of fees for consideration at an OC meeting.

33. Miss CHOY So-yuk agreed that a building manager should be allowed to collect fees from owners for pre-determined building management matters, but pointed out that the law should aim at improving the transparency of building management work. Miss CHOY suggested that BMO should require building managers to maintain detailed records of the fees collected, in particular those who were not subject to the supervision of an MC.

34. Mr Andrew CHENG considered that the Administration should explore the feasibility of setting up a mechanism, such as the adoption of a licence system for registration of qualified building managers, to monitor the operation of the building management companies and their service quality in the long term. Referring to paragraph 27 of the Administration's paper, Mr CHENG

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pointed out that while a licensed corporation under the Securities and Futures Ordinance and an authorized insurance broker under the Insurance Companies Ordinance would commit an offence for non-compliance with the provisions for handling clients' monies, a licensed estate agent would not be penalised for similar non-compliance. Mr CHENG considered that the Administration should carefully examine whether a penalty provision should be included in BMO for non-compliance with the proposed amendment.

Procurement of supplies, goods and services by tendering

35. Mr Tommy CHEUNG enquired about the revised threshold for invitation of tenders in the procurement of supplies, goods and services by an OC. He pointed out that given the amount of resources and manpower required, many building managers considered the current threshold of \$100,000 too low to require tendering and endorsement at owners' meetings.

36. DD(HA) responded that the Administration originally proposed to lower the percentage of an OC's annual budget from the existing 20% to 10% while retaining the threshold of \$100,000 for the purpose of tendering as the minimum requirements for procurement of supplies, goods and services by an OC under BMO. Having considered the opposing views in the public consultation exercise, the Administration had refined the proposal to require that any procurement in excess of a sum of \$200,000 or 20% of the annual budget of the OC should be conducted by invitation to tender. DD(HA) added that HAD had presented the revised proposal to the Panel on Home Affairs at its meeting on 28 November 2004 and members had not raised any objection to the proposal.

37. Mr Albert HO asked whether the proposed amendment bill would provide flexibility for OCs to arrange urgent repair and maintenance work or appoint a solicitor in times of emergency, i.e., without the need to go through the tendering process and obtain the endorsement of OC at an OC meeting.

38. DD(HA) responded that arising from the findings of the consultation exercise in 2003, the Administration would work with DoJ during the drafting of the amendment bill to allow OCs to formulate a list of urgent matters which needed not go through the process of tendering and owners' meetings. The list should be pre-approved by owners at a general meeting of OC.

39. Miss CHOY So-yuk suggested that the Administration should specify the procedures for invitation of tenders and endorsement at owners' meetings when the value of the tender exceeded a pre-determined threshold. Miss CHOY cited an example to illustrate that owners should be given sufficient time to deliberate on a tender proposal on repair or maintenance work which would incur an expense exceeding a pre-determined amount such as \$5 million. AD(HA) replied that the Administration would review the procedures for

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tendering in the procurement of services by OCs under the current review exercise.

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40. In concluding the discussion, the acting Chairman requested the Administration to prepare a written response to members' views and concerns to facilitate discussion at the next meeting.

II. Any other business

41. There being no other business, the meeting ended at 10:30 am.

Council Business Division 2
Legislative Council Secretariat
28 April 2004