

For discussion on
6 February 2004

**Legislative Council Panel on Home Affairs
Subcommittee on Review of the
Building Management Ordinance (Cap. 344)**

PURPOSE

1. This paper sets out the Administration's proposals to amend the Building Management Ordinance (BMO) relating to the following areas –
 - (a) appointment procedures of a management committee;
 - (b) appointment of proxy; and
 - (c) setting up of accounts for owners' corporations (OCs).

BACKGROUND

2. At the meeting of the Panel on Home Affairs on 28 November 2003, Members were informed of the results of public consultation on proposed amendments to the BMO conducted from May to July 2003 and that the Administration's intention to introduce an amendment bill into the Legislative Council in the 2004-05 legislative year. The Subcommittee on the Review of BMO under the Panel on Home Affairs subsequently decided to reconvene the Subcommittee to discuss the outstanding issues arising from previous discussions of the Subcommittee and other improvements to the BMO.

PROPOSALS TO AMEND THE BMO

(a) APPOINTMENT PROCEDURES OF A MANAGEMENT COMMITTEE

Appointment of management committee in accordance with BMO

3. Section 3(2) of the BMO provides that a management committee may be appointed in accordance with the deed of mutual covenant (DMC) if the deed provides for the appointment of a management committee, or if there is no DMC, or the deed contains no such provision, by a

resolution of the owners of not less than 30% of the shares. As most DMCs contain provisions for the formation of an owners' committee (having similar functions as the statutory management committee) instead of a management committee, this has caused confusion to owners as to whether a management committee should be appointed in accordance with the DMC or the BMO. What further complicates matters is that DMCs may contain provisions which are different from the BMO provisions regarding the composition and procedures of a management committee.

4. To remove such ambiguity in the legislation, we propose to amend section 3(2) so that a management committee *formed under the BMO* may only be appointed by a resolution of the owners of not less than 30% of the shares, which must also be a majority of votes cast at the same meeting. Following this amendment, all references to the DMC in the Second Schedule to the BMO concerning the composition and procedure of a management committee should also be deleted. This means the composition and procedure of the management committee *formed under section 3 of the BMO* should follow the BMO instead of the DMC¹. The proposal is in line with the main aim of the legislation, which is to facilitate the incorporation of owners, as owners will no longer need to follow the DMC, which may impose more stringent requirements than the BMO in the appointment of the management committee.

5. According to the records in the Land Registry, only 58 of the 7 000 OCs registered were formed under section 3(2)(a) (i.e. in accordance with the DMC provisions, rather than the BMO provisions) in the past. Following the amendment to delete reference to the DMC from section 3(2), we need to include a savings provision in the BMO so that those previously formed management committees will remain valid upon the enactment of the proposed amendment. For these management committees, we will require them to follow the BMO requirements on composition and procedures as set out in the revised Second Schedule when the incumbent management committee retires at the alternate annual general meeting of the corporation in accordance with paragraph 5(1) of the Second Schedule to the BMO.

¹ Reference should still be made to the DMC with respect to the voting rights of shares. Please refer to paragraph 6 of this paper.

Voting rights of shares

6. DMCs which were approved in accordance with the Lands Department's Guidelines for DMCs since 1999 normally contain a provision to the effect that undivided shares allocated to the common areas shall not carry any voting rights or liability to pay fees under the DMC, nor shall such undivided shares be taken into account for the purpose of calculating the quorum of any meeting. Whilst section 5(5)(a) of the BMO provides that each owner shall, save where the DMC otherwise provides, have one vote in respect of each share which he owns, most owners are not aware of such provision in the DMC of their buildings – and this provision in the DMC has significant implications for the calculation of the 30% shares required for the appointment of a management committee. We propose therefore to remind owners in section 3 of the BMO the necessity to make reference to the voting rights of shares which are specified in the DMC.

Appointment of vice-chairman

7. Following the amendment to delete all references to the DMC in the Second Schedule to the BMO concerning the composition and procedure of a management committee, the restriction on appointment of a vice-chairman to the management committee under the existing BMO will be lifted. Paragraph 2(c) of the Second Schedule at present provides that a vice-chairman could be appointed if that office (howsoever named) is specified in the DMC. This provision has prohibited those buildings whose DMC has not specified the vice-chairman post from appointing such a post. It is also confusing if the OC has to refer to the DMC on the appointment of the vice-chairman if the MC itself is appointed under the BMO.

8. We are of the view that the composition of the MC should be set out in the legislation governing the OC, i.e. the BMO, and that owners should be given the discretion to decide whether a vice-chairman is needed in the MC for the management of the building. We will introduce amendments to the Second Schedule to this effect.

Appointment of secretary and treasurer

9. Paragraph 2(1) of the Second Schedule requires the appointment of a secretary and a treasurer of the MC. The person appointed may be, but need not be, one of the persons appointed as a member of the MC. If the two posts are held by members of the MC, they will be required to retire with the MC under paragraph 5(1) of the same Schedule at the second annual general meeting of the OC. Such a requirement, however, does not apply to those secretaries and treasurers who are not persons appointed as members of the MC.

10. To rationalize the arrangement, we propose to specify in the Second Schedule that the secretary and treasurer, who are not persons appointed as members of the MC, will not become members of the MC by virtue of their appointment and all secretaries and treasurers, no matter they are members of the MC or not, should retire together with other members of the MC under paragraph 5(1) of the Second Schedule at the second and alternate annual general meeting of the OC.

Person presiding at the owners' meeting

11. We further propose to specify in the BMO that for owners' meetings convened under section 3(1)(c), i.e. by the owners of not less than 5% of the shares, the owners should nominate among themselves a person to preside over the meeting. This person should also be the one to serve the notice of meeting under section 5(1)(b). This will avoid the situation of having a group of owners (5% could mean tens or hundreds of owners in the case of large estates) to be the person presiding over the meeting.

Quorum requirement for owners' meetings

12. There is at present no quorum requirement for owners' meetings convened with a view to appointing a management committee under sections 3, 3A and 4. To ensure that all owners' meetings convened for the purpose of appointing the first management committee are attended and participated by a representative number of owners, we propose to impose a quorum requirement of 10% of owners for all these meetings.

Holders of office of a management committee

13. Section 18(2)(aa) of the BMO provides that an OC may, in its discretion, pay the chairman, vice-chairman, secretary, treasurer and other holders of office of the management committee appointed in accordance with the Second Schedule such allowances as may be approved by the OC by resolution passed at a general meeting, in accordance with, but not exceeding, the maximum allowances specified in the Fourth Schedule. Paragraph 2(1) of the Second Schedule to the BMO provides that the owners may appoint (in addition to the holders of the offices of the chairman, vice-chairman, secretary and treasurer) one or more members of the management committee to hold such other offices as may be specified in the DMC and which the owners determine to be necessary in respect of the control, management and administration of the building.

14. The problem with the above provisions is on the definition of holders of office. The allowances for office holders of a management committee is an incentive and a form of recognition for their voluntary work in the management of their building. It is however arguable whether posts other than the chairman, vice-chairman, secretary and treasurer should be regarded as the holders of the offices who will be eligible for allowances. This has sometimes caused disputes among owners. We therefore propose to do away with the term “holders of office” in the BMO (including section 18 of, and the Second and Fourth Schedule to the BMO). Following this amendment, all members of the management committee would be eligible for allowances. Such payment is not mandatory and is left to the discretion of the OC. We consider the Fourth Schedule (which sets out the maximum allowances) and section 18(2)(aa) that provides the payment has to be approved at an owners’ meeting, have already served to prevent any malpractices that may arise.

(b) APPOINTMENT OF PROXY

Guidelines for appointment of proxy

15. Paragraph 4 of the Third Schedule provides that at a meeting of the corporation, the votes of owners may be given either personally or by proxy. To facilitate the appointment of proxy by owners, we have

drafted, in consultation with the Department of Justice, a set of guidelines for reference by the OCs and owners. The guidelines are a matter of good practice and are not legally binding. The draft guidelines are at the Annex for Members' reference and comments.

Appointment of proxy by owner who is a body corporate

16. Section 4(2) of the Third Schedule provides that the instrument appointing a proxy shall be in writing signed by the owner, or if the owner is a body corporate, under the seal of that body. Confusion has arisen over the meaning of the "seal" of a body corporate. Without a specific definition in the BMO, a "seal" should be construed to mean the common seal², normally applied by companies. For proxies used at owners' meetings, OCs normally do not require the owner who is a body corporate to use the common seal. A rubber stamp with the authorized signature of the company should suffice. Such practice may however cause disputes in some cases. In accordance with a number of court judgments on proxy³, the purpose of using any common seal is to serve as an evidence of authenticity. If a rubber stamp together with an authorized signature of the body corporate on the proxy form could serve the purpose well, there is no reason for not clarifying so in the legislation. We therefore propose to amend the requirement of having a common seal to a rubber stamp of a body corporate together with an authorized signature. The aim of this proposal is to clarify the statutory requirement for appointment of proxy for easier compliance.

Time limit for lodging of the proxy instrument

17. Paragraph 4(3) of the Third Schedule provides that the appointment of a proxy shall have no effect unless the instrument appointing the proxy is lodged with the secretary of the management committee not less than 24 hours before the time for the holding of the meeting at which the proxy proposes to vote, ***or within such lesser time as the chairman shall allow.*** Section 5 of the BMO has similar provisions for the appointment of proxy at owners' meetings convened

² A company's common seal is an important and valuable instrument and is used to execute certain important documents (e.g. execution of deed under the Conveyancing and Property Ordinance).

³ U Wai Investment Co Ltd (LDBM 80/1997) and Triumphal Fountain Ltd (LDBM 309/2001).

for the appointment of a management committee⁴. These provisions have allowed, in the case of a general meeting, the chairman, and in the case of a meeting convened for the appointment of a management committee, the person presiding at the meeting, the discretion to decide whether the late proxy should be accepted. This has caused many disputes among owners at owners' meetings. Such practice has also hindered the management committee or the person presiding at the meeting from checking and verifying the proxy forms received if they were submitted at the last minute at the owners' meeting. To allow the management committee or the person presiding at the meeting sufficient time to check the proxy forms and to verify accuracy with both the owners concerned and the proxy in case of doubt, we propose to set the deadline in the BMO for submission of proxy at 24 hours before the holding of the meeting. In other words, neither the person presiding at the meeting nor the chairman of the owners' meeting will have the authority to accept the proxy after the 24-hour limit.

Standard format of the proxy instrument

18. Other than the requirement as set out in paragraph 4(2) of the Third Schedule to the BMO, i.e. the instrument appointing a proxy shall be in writing signed by the owner, or if the owner is a body corporate, under the seal of that body, there is no other legal requirement for the proxy instrument. While this may offer more flexibility for OCs and owners, the lack of clear instructions in the BMO has caused confusion and sometimes disputes among owners. We have since August 2002 provided a sample form of proxy instrument in HAD's booklet "How to Form an Owners' Corporation and Achieve Effective Building Management" for reference by owners. There is a general view that the format of the proxy instrument, or at least the basic elements for a valid proxy instrument, should be stipulated in the law.

19. We propose therefore to include a subparagraph under paragraph 4 of the Third Schedule to the BMO along the following lines –

⁴ The appointment of proxy in owners' meetings convened under sections 3, 3A, 4 or 40C shall have no effect unless the instrument appointing the proxy is lodged with the person or one of the persons, as the case may be, who convened the meeting **not less than 24 hours** before the time for the holding of the meeting at which the proxy proposes to vote, or within such lesser time as the person presiding at the meeting shall allow.

An instrument appointing a proxy shall be in the following form or a form as near thereto as circumstances admit :

“Incorporated Owners of _____
I/We, _____, of _____ (address of the flat)
being a member/members of the above-named Incorporated
Owners, hereby appoint _____
, or failing him, _____,
as my/our proxy to attend and vote for me/us on my/our behalf at
the [annual or extraordinary, as the case may be] general meeting
of the Incorporated Owners, to be held on _____, and at
any adjournment thereof.

Signed this day of _____.

Unless otherwise instructed, the proxy may vote as he thinks fit.

The same format of proxy instrument should be adopted for meetings convened for the purpose of appointment of a management committee. Section 5(5)(b) of the BMO will be amended accordingly to this effect.

20. The above amendment is in line with the provision in the Companies Ordinance⁵ which also provides for the appointment of proxy by shareholders for voting at company meetings. Unless the owner has indicated his/her view to vote in favour of or against the resolution, the proxy should be allowed to vote as he/she thinks fit. We consider that the proposed amendment will provide OCs and owners with a standard format of the proxy instrument for easy reference.

Person to decide the validity of proxy instrument

21. Another common dispute over the appointment of proxy is who has the power to determine the validity of questionable proxy instruments. While paragraph 4(3) of Third Schedule to the BMO requires that the instrument appointing a proxy should be lodged with the secretary of the management committee within a certain time limit and that the chairman of the management committee has the power to relax this time limit, it is

⁵ Paragraphs 72 and 73 of Table A of Schedule 1 to Cap.32, Companies Ordinance

not clear whether the chairman or the secretary or any other post holder of the management committee has the power to determine whether certain questionable proxy instruments are valid or not.

22. In the absence of such an express provision, reference should be made to paragraph 3(3) of the Third Schedule which provides that all matters arising at a meeting of the corporation at which a quorum is present shall be decided by a majority of votes of the owners. Paragraph 7 of the Third Schedule further provides that the procedure at a general meeting shall be as is determined by the corporation. However, it will be cumbersome, if not unrealistic, to require the owners' meeting to decide the validity of each questionable proxy instrument. As such, we consider there is a strong need to stipulate in the BMO which person(s) has/have the power to determine the validity of the questionable proxy instruments lodged with the secretary.

23. We are of the view that the chairman of the management committee should be given the power to determine the validity of the questionable proxy instruments. In the case of meetings convened for the purpose of appointing a management committee, the person presiding at the meeting should be given such powers. There may be concern over the abuse of power by the chairman, especially when one of the resolutions to be passed at the owners' meeting is to dissolve the management committee or to terminate the appointment of the chairman. However, we consider that the chairman of the management committee, as head of the OC and the ex-officio chairman of the owners' meeting, is the most appropriate person to do so. Moreover, we have proposed to stipulate in the BMO the format of the proxy instrument. The chairman of the management committee, in determining whether the questionable proxy instruments are valid, should take into account the provisions in the BMO, which will, following the amendments, provide clearer and more definitive instructions on what should be regarded as a valid proxy instrument.

(c) SETTING UP OF ACCOUNT FOR OCS

24. The sudden closure of a property management company in August 2003 has caused concern among OCs and owners about the management of funds by property management companies. There are

existing provisions in the BMO which aim to protect the interests of owners and guard against the misuse of the owners' money. The Seventh Schedule to the BMO, which are mandatory terms impliedly incorporated into all deeds of mutual covenant, provides that the management company shall maintain an interest-bearing account and shall use that account exclusively in respect of the management of the building. All money received by the management company shall be deposited into that account without delay. At earlier times, we have written to all OCs, owners' associations, residents' associations and property management companies to remind them of their responsibilities and rights provided under the BMO.

25. Section 20 of the BMO provides that an OC shall maintain an interest-bearing account and shall use that account exclusively in respect of the management of the building. The best practice in the interest of owners is of course for the OC to require the owners to deposit the management fee into the account of the OC (instead of the property management company's account) and for the OC to reimburse on a regular, say, monthly basis to the property management companies. This will avoid the property management companies from accumulating and holding a huge sum of management fees on behalf of the owners. This however may not be an efficient way for the OC, who has delegated to the property management company the authority to manage the building on its behalf. In fact, many property owners are asked to deposit the management fees into the account of the manager direct.

26. To offer better protection for the owners, we propose to strengthen the requirements for property management companies under paragraphs 3 and 4 of the Seventh Schedule. Management fees deposited by owners with the manager, less the remuneration of the manager as stipulated in the DMC or the management contract, are the owners' money and not the manager's money. Subject to formal consultation with the property management industry, we will stipulate in the law that the manager shall 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, each of which shall be designated as a trust account or client account. As the OC will be the client, the above requirement will not be applicable to buildings without an OC. On opening such bank account(s), the manager is required to display a

copy of the document showing evidence of such segregated account(s) in a prominent place in the building and so display the document as long as the account with the bank is in effect. The proposal will ensure that the manager will keep the management fees received for an OC in a bank account separate from his own monies. It will also ensure that the manager will not merge the management fees received from different buildings into one single bank account.

27. As the requirements for property management companies on financial management are tightened, it is for consideration whether a corresponding penalty provision should be included in the BMO. We have researched into the provisions in other legislation with similar requirements. Under the Securities and Futures Ordinance (Cap.571), a licensed corporation which without a reasonable excuse contravenes the requirement that client money should be paid into segregated accounts commits an offence and is liable to a specified penalty not exceeding (a) on conviction on indictment a fine of \$200,000 and a term of imprisonment of two years; and (b) on summary conviction a fine at level 6 (i.e. \$50,001-\$100,000) and a term of imprisonment of six months. Under the Insurance Companies Ordinance (Cap.41), an authorized insurance broker who fails to keep client monies in separate accounts commits an offence and is liable (a) on conviction upon indictment to a fine of \$1,000,000 and to imprisonment for five years; and (b) on summary conviction to a fine of \$100,000 and to imprisonment for six months. While the Estate Agents Practice (General Duties and Hong Kong Residential Properties) (Cap.511C) also requires that a licensed estate agent shall deposit all moneys received or held for or on account of a client in a trust account, there is no penalty clause associated with this legal requirement. Members may consider whether a corresponding punitive clause should be inserted under paragraphs 3 and 4 of the Seventh Schedule to the BMO for managers.

28. Paragraph 2(2) of the Seventh Schedule to the BMO provides that the manager shall, within one month after each consecutive period of three months, prepare a summary of income and expenditure in respect of that period and shall display a copy of it in a prominent place in the building. The balance sheet is required to be prepared at the end of the year in accordance with paragraph 2(3) of the same Schedule. Under the accounting principles, the summary of income and expenditure has to

be read together with the balance sheet in order to give a full picture of the financial position of the entity. We propose therefore to include in paragraph 2(2) of the Seventh Schedule that the manager shall also prepare a balance sheet as at the end of the period in addition to the summary of income and expenditure.

Views Sought

29. Members are invited to comment on the above proposals.

(Draft)
Guidelines for
Appointment of Proxy for Owners' Meetings

Provisions in the Building Management Ordinance (Cap.344)

1. Paragraph 4 of the Third Schedule to the Building Management Ordinance (BMO) provides that at a meeting of the corporation, the votes of owners may be given either personally or by proxy. The instrument appointing a proxy shall be in writing signed by the owner, or if the owner is a body corporate, under the seal of that body. The appointment of a proxy shall have no effect unless the instrument appointing the proxy is lodged with the secretary of the management committee not less than 24 hours before the time for the holding of the meeting at which the proxy proposes to vote, or within such lesser time as the chairman shall allow.
2. Paragraph 5(2) of the Third Schedule to the BMO provides that a proxy appointed in accordance with paragraph 4 to give the vote of an owner at a meeting of the corporation shall, for the purposes of establishing a quorum, be treated as being an owner present at that meeting.
3. Paragraph 3(5)(a) of the Third Schedule to the BMO provides that at any meeting of the corporation, each owner shall, subject to the provision of any instrument registered in the Land Registry and subject to Paragraph 3(6) of the same Schedule, have one vote in respect of each share which he owns. Paragraph 3(5)(b) of the Third Schedule provides that if any share is jointly owned by two or more persons the vote in respect of that share may be cast (i) by a proxy jointly appointed by the co-owners; or (ii) by one co-owner appointed by the others; or (iii) if no appointment has been made under (i) or (ii), then either personally or by proxy by one of the co-owners; and, in the case of any meeting where more than one co-owner seeks to cast a vote in respect of the share, only the vote that is cast, in person or by proxy, by the co-owner whose name, in

order of priority, stands highest in relation to that share in the register shall be treated as valid.

4. Paragraph 3(3) of the Third Schedule to the BMO provides that all matters arising at a meeting of the corporation at which a quorum is present shall be decided by a majority of votes of the owners.
5. It is the responsibility of owners to understand the above provisions and the importance and implication of appointing a proxy to attend and vote on their behalf at an owners' meeting.

Format of Proxy Instruments

6. An owners' corporation (OC) is encouraged to enhance the transparency of the procedures in handling proxy instruments. An OC may set its own rules and requirements at the owners' meeting in respect of the proxy instruments. These rules and requirements should be subject, but not limited to, the provisions of the Deeds of Mutual Covenant of the building and the BMO.
7. If the Management Committee of the OC considers that a specified format of the proxy instrument should be adopted for the owner's meeting, it is strongly recommended to consult the owners at an owners' meeting on the matter. The format should preferably be endorsed by a majority of votes at the owners' meeting. A sample instrument is available in the booklet "How to Form an Owner's Corporation and Achieve Effective Building Management".
8. The secretary of the Management Committee could specify in the proxy instrument when (as provided in the BMO) and where the proxy instrument should be lodged.
9. A clear statement of purpose may be attached to each proxy instrument issued specifying the purpose for which the information are to be used and the rights of an individual owner/proxy to request access to and request the correction of the data to the proxy form. Both the owner and the proxy should be reminded to peruse the statement of purpose before completing the proxy form. A sample statement is available in the booklet "How to Form an Owner's

Corporation and Achieve Effective Building Management”.

10. There is no statutory requirement for owners to provide the HKID Card number in the proxy instrument.
11. Owners should be aware that they may be liable under the Crimes Ordinance (Cap.200) if he falsifies a proxy instrument and makes any statement or furnishes any information in the proxy instrument which he knows, or reasonably ought to know, to be false in a material particular.

Suggested Rules and Requirements for Handling Proxy Instruments

12. As a matter of good practice, the secretary of an OC may consider to acknowledge receipt of all valid proxy instruments submitted by depositing a receipt slip (preferably with an authorized signature of the OC and/or the seal of the OC) in the letter box of the owner.
13. After verifying the proxy instruments, the secretary of the OC may consider posting the information in respect of those flats where a proxy has been appointed in a prominent place of the venue of the owners’ meeting for inspection.
14. The OC may consider including the information in respect of those flats in the building where a proxy has been appointed in the minutes of meeting for owners’ information. This should be displayed in a prominent place of the building within 28 days of the owners’ meeting in accordance with paragraph 6 of the Third Schedule of the BMO.
15. The secretary may disclose the proxy instruments to other owners for inspection upon their request provided that the owners/proxies concerned have been explicitly informed of this arrangement and consent obtained before they complete the forms through the statement of purpose attached to the proxy instruments.

Disclaimer

16. The guidelines are provided by Home Affairs Department as a

general reference only. The guidelines are a matter of good practice and are not statutorily-based. Users of the guidelines must not treat them as exhaustive and are strongly advised to seek independent legal advice on the BMO and the Deed of Mutual Covenant and/or management agreement of the relevant building or estate in respect of any query on their appointment of a proxy. The Home Affairs Department does not guarantee the accuracy and suitability of the guidelines in any particular case. The Home Affairs Department disclaims all liabilities to any person arising from or as a consequence of the use of or reliance on the guidelines.

Home Affairs Department
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