

立法會
Legislative Council

LC Paper No. CB(2)3065/03-04

Ref : CB2/PS/2/00

Panel on Home Affairs

**Final report of the Subcommittee on
review of the Building Management Ordinance (Cap. 344)**

Purpose

This paper reports on the further deliberations of the Subcommittee on review of the Building Management Ordinance (Cap. 344) (BMO) and the Administration's proposals to amend the BMO.

Background

2. At the meeting of the Panel on Home Affairs on 13 March 2001, members agreed to form a subcommittee to discuss with the Administration proposals for improvement to the BMO. After holding 12 meetings with the Administration, the Subcommittee on review of the BMO reported its deliberations to the Panel in November 2003.

3. Following the completion of a public consultation exercise on its proposed amendments to the BMO in July 2003, the Administration briefed the Panel on Home Affairs on the outcome at its meeting on 28 November 2003. The Panel also considered the Report of the Subcommittee (LC Paper No. CB(2)422/03-04) at the same meeting. Since the Administration planned to introduce the proposed amendments into the Legislative Council in the 2004-05 legislative session, members of the Panel agreed that the Subcommittee should continue discussion with the Administration on further improvements to the BMO.

The Subcommittee

4. Under the chairmanship of Hon Albert CHAN, the Subcommittee has held three further meetings with the Administration, bringing the total number of meetings held by the Subcommittee to 15. The updated membership list of the Subcommittee is in **Appendix I**.

Deliberations of the Subcommittee

5. The deliberations of the Subcommittee at its last three meetings with the Administration are summarized in paragraphs 6 to 39 below.

Appointment procedures of a management committee (MC)

Appointment of MC under the BMO

6. Section 3(2) of the BMO provides that an MC may be appointed in accordance with the deed of mutual covenant (DMC) if the deed provides for the appointment of an MC. If there is no DMC, or the deed does not contain such provision, an MC may be formed 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 MC) instead of an MC under the BMO, this has caused confusion to owners as to whether an MC should be appointed in accordance with the DMC or the BMO. What further complicates matters is that DMCs may contain provisions which are significantly different from the BMO provisions regarding the composition and procedures of an MC. In particular, some DMCs may impose more stringent requirements than the BMO in the appointment of the MC.

7. To remove such ambiguity in the legislation, the Administration proposes to amend section 3(2) so that an MC 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 the amendment, all references to the DMC in the Second Schedule to the BMO concerning the composition and procedure of an MC would also be deleted. This means the composition and procedure of an MC formed under section 3 of the BMO should follow the BMO instead of the DMC.

8. The Administration has informed the Subcommittee that according to the records in the Land Registry, only 58 of the 7 000 owners' corporations (OCs) registered were formed under section 3(2)(a) of the BMO in the past, i.e. in accordance with the DMC provisions, rather than the BMO provisions. Following the amendment to delete references to the DMC from section 3(2), the Administration will include a savings provision in the BMO so that those previously formed MCs will remain valid upon the enactment of the proposed amendment.

9. The Administration initially proposed to require these MCs to follow the revised BMO requirements on composition and procedures when the incumbent MC retired at the alternate annual general meeting of the corporation in accordance with paragraph 5(1) of the Second Schedule to the BMO. Some members were concerned that these MCs might not have

sufficient time to prepare for the change and implement it. Having considered members' views, the Administration will allow more time for these MCs by specifying that they will only need to comply with the BMO requirements at the *second* alternate annual meeting of the corporation.

10. Members have asked whether the proposed amendment would have an overriding effect on an MC formed under a DMC. The Administration has explained that the policy intent of the proposed amendment is not to override an MC formed under a DMC but to make it clear that only an MC formed in accordance with the requirements under BMO will be recognised as a legal entity.

11. The Administration has pointed out that it is already stipulated in paragraph 1(a) of the current Guidelines for DMCs that no provision in a DMC shall contravene the provisions of the BMO. The Home Affairs Department (HAD) will maintain close liaison with the Legal Advisory and Conveyancing Office (LACO) of the Lands Department, which is responsible for approving DMCs submitted by developers, to ensure that the Guidelines for DMCs will be updated once the proposed amendments to the BMO are enacted.

Voting rights of undivided shares allocated to the common parts of a building

12. Hon CHOY So-yuk is concerned that the proposed amendment cannot help owners who do not hold sufficient undivided shares to establish an OC because of unfair allocation of shares between developers and owners under some existing DMCs. Moreover, even though an OC has 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.

13. The Administration has explained that the proposed amendment to section 3(2) of the BMO would help owners to establish OCs and MCs in accordance with the BMO requirements instead of the terms of the DMCs which might specify a higher percentage of shares. In response to the concern of the Subcommittee, LACO has 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.

14. The Administration has pointed out that for DMCs approved before the introduction of the Guidelines for DMCs 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. Although in theory, a building manager holding these undivided shares could vote on behalf of the owners, it is 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.

15. As a trustee should obtain the prior consent of the owners before he casts a vote on a resolution at an OC meeting, the Subcommittee suggests that HAD should prepare appropriate guidelines for the developers and building managers to consult the owners before they cast their votes on the basis of such shares at OC meetings.

Appointment of vice-chairman

16. The Administration has pointed out that following the amendment to delete all references to the DMC in the Second Schedule to the BMO concerning the composition and procedure of an MC, the restriction on appointment of a vice-chairman to the MC 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 is specified in the DMC. This provision has prohibited those buildings the DMC of which has not specified the vice-chairman post from appointing such a post. The Administration will introduce amendments to the Second Schedule to set out the composition of the MC and to give owners the discretion to decide whether a vice-chairman is needed in the management of the building.

Appointment of secretary and treasurer

17. Paragraph 2(1) of the Second Schedule requires the appointment of a secretary and a treasurer of the MC. The person appointed may 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 an arrangement, however, does not apply to those secretaries and treasurers who are not persons appointed as members of the MC.

18. To rationalise the arrangement, the Administration proposes to specify in the Second Schedule that the secretary and the treasurer, who are not persons appointed as members of the MC, will not become members of the MC by virtue of their appointment. All secretaries and treasurers, no matter whether they are members of the MC, 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.

Persons presiding at the owners' meeting

19. The Administration has proposed 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 amongst 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).

20. Hon Albert HO has pointed out that the proposed arrangement may give rise to the problem of having more than one such group of owners. Mr HO suggests that the Administration should instead consider appointing a person who should obtain support from owners of not less than 5% of the shares. The Chairman has expressed support for Mr HO's suggestion.

Quorum requirement for owners' meetings

21. There is at present no quorum requirement for owners' meetings convened with a view to appointing an MC under sections 3, 3A and 4. To ensure that all owners' meetings convened for the purpose of appointing the first MC are attended and participated by a representative number of owners, the Administration proposes to impose a quorum requirement of 10% of owners for all these meeting. Members support the proposal.

Eligibility of members of MC for allowances

22. Section 18(2)(aa) of the BMO provides that an OC may, at its discretion, pay the chairman, vice-chairman, secretary, treasurer and other holders of office of the MC such allowances as may be approved by the OC by resolution passed at a general meeting. To avoid disputes regarding the definition of "holders of office", the Administration proposes to remove such a term from section 18 and the Second and Fourth Schedules to the BMO. Following this amendment, all members of the MC would be eligible for allowances. Such payment is not mandatory and is left to the discretion of the OC. Members agree with the Administration's view that the Fourth Schedule, which sets out the maximum allowances, and section 18(2)(aa), which provides that the payment has to be approved at an OC meeting, have already served to prevent any malpractice that may arise.

Appointment of proxy

Standard format of the proxy instrument

23. Paragraph 4(2) of the Third Schedule to the BMO specifies 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. There is no other legal requirement for the proxy instrument. The Administration has since August 2002 provided a sample form of proxy instrument in the HAD's booklet on formation of an OC for reference by owners. Members share the view that the format of the proxy instrument should be stipulated in the law.

24. The Administration initially proposed to include a subparagraph under paragraph 4 of the Third Schedule to the BMO to provide a sample format of a proxy instrument for OCs and owners to follow. The same format of proxy instrument should be adopted for meetings convened for the purpose of appointment of an MC. Unless the owner has otherwise instructed, the proxy would be allowed to vote as he/she considers fit at the meeting.

25. Some members have suggested that the BMO should incorporate the standard formats of proxy instrument for different types of OC meetings for OCs and owners to follow. These members share the view that OCs or owners should not be given the flexibility to make amendments to the standard formats to avoid unnecessary disputes. The Chairman holds a strong view that the BMO should also specify that OCs and MCs must follow the correct procedures for distribution of the specified proxy forms to owners.

26. After considering members' views, the Administration has proposed two standard formats of proxy instrument for attendance of the proxy with or without the right to vote on resolutions to be considered at the OC meeting concerned. Some members have pointed out that owners might not be aware that there are separate forms for the authorization of a proxy to attend an OC meeting with or without the right to vote on resolutions. These members consider that a single standard format of proxy instrument providing the owners with two options regarding the right to vote on resolutions at an OC meeting would be easier for owners to follow. The Administration has agreed to consider the suggestion and work with the Department of Justice on the standard format during the drafting of the amendment bill.

Appointment of proxy by owner who is a body corporate

27. For easier compliance of the statutory requirement for appointment of proxy in section 4(2) of the Third Schedule, the Administration proposes to amend the requirement of having a common seal to a rubber stamp of a body corporate together with an authorized signature. Members have no objection to the proposal.

Time limit for lodging of the proxy instrument

28. 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 MC not less than 24 hours before the time for the holding of the meeting at which the proxy proposes to vote, or with such lesser time as the chairman shall allow. Section 5 of the BMO has similar provisions for the appointment of the proxy at owners' meetings convened for the appointment of an MC. To allow the MC 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, the Administration

proposes to set the deadline in the BMO for submission of proxy at 24 hours before the holding of the meeting.

29. Some members are of the view that 24 hours is not enough to deal with the various issues that may arise and suggest to extend the period to 48 hours. Members all share the view that a list of owners who have appointed proxies should be published for owners' information before the meeting. The list should be displayed at a prominent place of the building before the meeting and also at the entrance to the meeting venue. The Administration has agreed to consider the above suggestions.

Person to decide the validity of proxy instrument

30. At present there is no express provision in the BMO as to whether the chairman or the secretary or any other post holder of the MC has the power to determine whether certain proxy instruments are valid or not. The Administration initially proposed that the chairman of the MC should be given the power to determine the validity of the questionable proxy instruments.

31. Members have expressed serious reservation about the proposal. Some are worried that there could be abuse of power by the chairman, especially when one of the resolutions to be passed at the owners' meeting is to dissolve the MC or to terminate the appointment of the chairman. Some members are of the view that the MC as a whole should be given the power. Some members suggest that an independent third party should be tasked with this job.

32. Having considered members' views, the Administration now proposes to empower the MC to determine the validity of questionable proxy instruments. The Administration has pointed out that being the legal representative of all owners in a building with its members duly elected at an owners' meeting, the MC is best placed to perform the task. Members, however, remain to have reservation on the revised proposal. The Administration has agreed to re-consider the amendment.

Setting up of account for OCs

33. 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. Members have urged the Administration to strengthen its regulatory control of such companies.

34. The Administration has pointed out that 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. To offer better protection for the owners, the Administration proposes to strengthen the requirements for property management companies under paragraphs 3 and 4 of

the Seventh Schedule. Subject to formal consultation with the property management industry, the Administration 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. 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 bank account is in effect.

35. 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 the period and shall display a copy of it in a prominent place in the building. In order to give a full picture of the financial position of the entity, the Administration proposes to include in the said paragraph 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.

36. Members support the Administration's proposals in paragraphs 34 and 35 above. As the requirements for property management companies on financial management will be tightened, the Administration has asked members to consider whether a corresponding penalty provision should be included in the BMO.

37. Different views have been expressed by members regarding the penalty provision. Hon Tommy CHEUNG has pointed out that the Liberal Party considers it inappropriate to criminalize the offence arising from non-compliance with the new requirements. Mr CHEUNG considers that a financial penalty for non-compliance would be more appropriate. Hon CHOY So-yuk supports the imposition of an imprisonment penalty as it would have a deterrent effect. Referring to the relevant provisions under the Insurance Companies Ordinance (Cap. 41) and the Securities and Futures Ordinance (Cap. 571), Hon Andrew CHENG considers that the Administration should carefully examine whether a penalty provision should be included in the BMO. Mr CHENG has also suggested that the Administration should explore the adoption of a licensing system for registration of qualified building managers in the long term.

Procurement of supplies, goods and services by tendering

38. Having taken into account the views expressed during the public consultation, the Administration has revised its original proposals as follows -

- (a) any procurement of supplies, goods and services which exceeds the sum of \$200,000 (*\$100,000 in the original proposal*) or a sum

which is equivalent to 20% (*10% in the original proposal*) of the annual budget of the corporation (or such other sum or percentage in substitution which may be specified in the Gazette), whichever is the lesser, shall be done by invitation to tender.

- (b) any procurement of supplies, goods and services which exceeds the sum of 20% (*10% in the original proposal*) of the annual budget of an OC (or such other percentage in substitution which may be specified in the Gazette) shall be accepted or rejected by a resolution passed a general meeting of the OC.

39. Hon Albert HO has asked whether the proposed amendment bill would provide flexibility for OCs to arrange urgent repairs and maintenance work or appoint a solicitor in times of emergency, without the need to go through the tendering process and obtain the endorsement of OC at an OC meeting. Having considered the practical difficulties, the Administration will work with the Department of Justice during the drafting of the amendment bill to allow OCs to formulate a list of urgent matters which do not need to go through the process of tendering and owners' meetings. The list should be approved by owners at a general meeting. Any procurement which is not within the pre-approved list should follow the proposed tendering procedure and go through the owners' meeting.

Summary of proposals on amendments to the BMO

- 40. A summary of proposals is in **Appendix II** for members' easy reference.

Advice sought

- 41. Members are invited to note the deliberations of the Subcommittee.

Council Business Division 2
Legislative Council Secretariat
12 July 2004

Panel on Home Affairs

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

Membership list

Chairman	Hon Albert CHAN Wai-yip
Members	Hon Cyd HO Sau-lan Hon Albert HO Chun-yan Hon NG Leung-sing, SBS, 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, GBS, JP (Total : 10 Members)
Clerk	Ms Doris CHAN
Legal Adviser	Mr Stephen LAM Ping-man
Date	2 July 2004

LegCo Panel on Home Affairs

Subcommittee on review of the Building Management Ordinance

**Summary of proposals on amendments to
the Building Management Ordinance**

Personal liabilities of members of a management committee (MC) for the decisions of an owners' corporation (OC)	
1.	To add an express provision to the effect that MC members of an OC would not be held personally liable for any collective decision of the OC, which is neither ultra vires nor tortious, solely on the ground that they are members of the MC.
Termination of appointment of the deeds of mutual covenant (DMC) manager by an OC	
2.	To specify in the BMO that paragraph 7(1) of the Seventh Schedule shall only be used to terminate the DMC manager's appointment and to remove the provision that not more than one manager can be terminated within any three consecutive years.
Appointment of the first management committee and its members and holders of office	
3.	To specify that the first MC may be appointed by a resolution of the owners of not less than 30% of the shares, and the resolution must also be passed by a majority of the votes of the owners voting either personally or by proxy at the same owners' meeting.
4.	To specify that members and holders of office of the first MC have to be appointed by a resolution passed by a majority of the votes of the owners voting either personally or by proxy at the same owners' meeting at which the first MC has been successfully appointed, provided that there is a quorum of 10% of owners at that meeting.

Appointment of members and holders of office of any subsequent management committee	
5.	To specify that an OC shall, by a resolution passed by owners at an annual general meeting of the OC at which the existing MC retires, appoint a new MC, its members and holders of office.
Appointment procedures of a management committee	
6.	To amend section 3(2) (deleting reference to DMCs) so that an MC 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.
7.	To include a provision in section 3 of the BMO to remind owners of the necessity to make reference to the voting rights of shares which are specified in the DMC.
8.	To specify in the BMO that for owners' meetings convened under section 3(1)c (by owners of not less than 5% of the shares), the owners should nominate among themselves a person to preside over the meeting.
9.	To amend the Second Schedule to delete references to DMC and to provide owners with the discretion to decide whether a vice-chairman is needed in the MC for the management of the building.
10.	To specify in the Second Schedule that all secretaries and treasurers, no matter whether 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.
11.	To impose a quorum requirement of 10% of owners for owners' meetings convened with a view to appointing an MC.
12.	To remove the term "holders of office" in the BMO (including section 18, the Second and the Fourth Schedules).
Procurement of supplies, goods and services by an OC	
13.	To delete the provisions on tendering requirement from the Code of Practice on procurement of supplies, goods and services issued by the Secretary for Home Affairs, so that any procurement with a value exceeding the prescribed threshold has to be done through tendering in accordance with the BMO.

14.	To specify the threshold for procurements of supplies, goods and services which shall be done by invitation to tender or approved by way of a resolution passed at a general meeting of the OC.
Power of an OC to borrow money from the government in compliance with certain statutory notices, orders or other documents	
15.	To empower an OC to borrow from the Government, on behalf of those individual owners who fail or refuse to pay, for the purpose of complying with statutory notices, orders or other documents which relate to the common parts of a building.
Individual owners' rights to obtain copies of certain building management documents from an OC	
16.	To provide for the owners' rights to obtain copies of minutes of meetings of both OCs and MCs upon payment of reasonable copying charges.
Appointment of proxy	
17.	To amend the requirement of having a common seal to a rubber stamp of a body corporate together with an authorized signature.
18.	To set the deadline in the BMO for submission of proxy at 24 hours before the holding of the meeting.
19.	To include a subparagraph under paragraph 4 of the Third Schedule to the BMO requiring that an instrument appointing a proxy shall follow the sample specimen provided.
20.	To stipulate in the BMO that MC is empowered to determine the validity of questionable proxy instrument lodged with the secretary.
Setting up of account for OCs	
21.	To strengthen the requirements for property management companies under paragraphs 3 and 4 of the Seventh Schedule by specifying 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 OCs as the client, each of which shall be designated as a trust account or client account, and consider whether a corresponding punitive clause should be imposed for non-compliance; and

22.	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.
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Council Business Division 2
Legislative Council Secretariat
12 July 2004