

# 立法會

## *Legislative Council*

LC Paper No. CB(2)422/03-04

Ref : CB2/PS/2/00

### **Panel on Home Affairs**

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

#### **Purpose**

This paper summarizes the deliberations of the Subcommittee on review of the Building Management Ordinance (BMO) and the Administration's proposals to amend BMO and other related issues.

#### **Background**

2. The objectives of BMO are to facilitate the incorporation of owners of flats in buildings and to provide for the management of such buildings. After the enactment of the Building Management (Amendment) Ordinance (Ord. No. 69 of 2000) in June 2000, the Administration has established an inter-departmental steering group which is tasked to plan, co-ordinate and monitor actions by the relevant departments for the implementation of the Amendment Ordinance, and to examine scope for further improvement to BMO.

3. At the meeting of the Panel on Home Affairs on 13 March 2001, members agreed to set up a subcommittee to discuss with the Administration about the review of BMO in order to expedite the process.

#### **The Subcommittee**

4. Under the chairmanship of Hon Albert CHAN, the Subcommittee has held 12 meetings to discuss with the Administration about the various inadequacies of the provisions and operation of BMO as well as proposals for improvement. The Subcommittee also met with deputations at one of these meetings. The terms of reference and the membership list of the Subcommittee are in **Appendices I and II** respectively. A list of the organizations and individuals which/who have submitted their views to the Subcommittee is in **Appendix III**.

## **Deliberations of the Subcommittee**

### Scope of review

5. BMO is a piece of complicated legislation which was first written in the early 70s. In view of its old-fashioned style of drafting, Hon Andrew WONG has suggested that the Administration should consider re-writing BMO in modern language. Some other members are concerned that re-writing the Ordinance will be a complicated and time-consuming task. The Administration is of the view that it will be more effective to fine-tune the existing legislation than to re-write the Ordinance. In order not to delay the review process, the Subcommittee has decided to focus its discussions with the Administration on the following issues -

- (a) exemption of the members of a management committee (MC) of an OC from specific legal liabilities;
- (b) percentage of the shares required for the termination of the appointment of the building manager;
- (c) formation and election procedures of an OC;
- (d) voting rights of the shares allocated to the common parts of a building;
- (e) mechanism to amend the terms and conditions of deeds of mutual covenant (DMCs) which are unfair to owners;
- (f) mediation mechanism for resolving building management disputes; and
- (g) formation of OCs by owners of house developments holding divided shares.

### Outcome of deliberations

6. Responding to the views and suggestions of the Subcommittee, the Administration has agreed to put forward various legislative proposals to amend BMO and administrative measures to address the problems identified by members. The Administration has also briefed the Subcommittee on other legislative proposals to amend BMO relating to the powers of an owners' corporation (OC) to borrow money from the Government in compliance with certain statutory notices, orders or other documents and rights of owners to obtain copies of certain building management documents. The Administration issued a consultation paper on the legislative proposals to amend BMO in May 2003. Relevant deliberations of the Subcommittee on the issues which are covered by the consultation paper are summarized from paragraphs 7 to 47 below.

Exemption of members of an MC of an OC from specific legal liabilities

7. Members are of the view that the collective liabilities of an OC should not be transferred to the individual members of an MC. They consider that there should be clear provisions in BMO to exempt the members of an MC from specific legal liabilities. They feel strongly that owners participating in or carrying out the work of an MC in good faith should not be held liable for the collective decisions of the OC.

8. The Administration explains that under the existing BMO, the liability of an OC would not normally be transferred to an individual owner or member of an MC, except in those situations specifically set out in provisions relating to the responsibilities of members of an MC, or under section 17(1) of BMO. The Administration further explains that section 16 of BMO provides that the liabilities of the owners in relation to the common parts of the building shall be enforceable against OCs to the exclusion of the owners. Since section 16 mainly deals with the liabilities relating to the management of the common parts of a building, which is the major function of an OC, the expression “to the exclusion of the owners” already excludes the possibility of a member of an MC being personally sued in respect of any matter relating to the common parts of a building.

9. Members note that the Court of Appeal has already ruled in the case of *葉大永建築師有限公司對金明閣業主立案法團及黃文賢 (CACV 143/99)* that the chairman of an MC personally should not be held responsible for the debts incurred by the OC concerned, and the creditor should pursue the debts with the OC in the first place. Members have pointed out that it is stated in the judgment that if inadequacies are identified in the legislation, the Administration should propose amendments to address the problem. Members have expressed concern that developers and management companies, in cases of disputes with owners, would threaten members of an MC with lawsuits; hence would discourage owners from participating in the work of an OC. They have requested the Administration to address this concern. Hon Albert HO has suggested that BMO should be amended to prevent the transfer of the liabilities of an OC to the individual members of its MC, by making reference to provisions of the Companies Ordinance (Cap. 32) relating to the liabilities of individual directors of a company.

10. The Administration has advised that it does not consider the amendment proposed by Mr HO necessary or appropriate for the following reasons -

- (a) the existing Companies Ordinance does not contain any provisions exempting directors of a company from personal liabilities. On the contrary, section 159 of the Ordinance provides that the liability of directors, may, if so provided by the memorandum of association, be unlimited; and

- (b) as a matter of corporate governance and in order to protect the interest of shareholders, creditors, employees, transaction counter-parties and the investing public as a whole, the Companies Ordinance contains a number of provisions imposing personal liabilities, both civil and criminal, on directors.

11. Members also note that the powers and duties conferred or imposed by BMO on an OC shall be exercised and performed by an MC on its behalf. If a judgment is given or an order is made against an OC, legal proceedings against an individual member of an MC may be instituted with leave of the Lands Tribunal. Members have asked whether a person who has been sued solely on the ground that he is a member of an MC could apply to strike out legal proceedings under BMO.

12. The Administration explains that there is already an established case law for a member of an MC to apply to strike out legal proceedings brought against him. If the proceedings are instituted in the Lands Tribunal, the member could apply under rule 11 of the Lands Tribunal Rules (Cap. 17 sub. leg.) to have his name struck out from the proceedings by relying on the authorities of *Millap Ltd. & Others v The Incorporated Owners of Fanling Centre & Others (LDMM 260 & 360 of 1999)* and *葉大永建築師有限公司對金明閣業主立案法團及黃文賢 (CACV 143/99)*. If the proceedings are commenced in the Court of First Instance, the member could apply under Order 18 rule 19 of the Rules of the High Court (Cap. 4 sub. leg.) for an order that those parts of the pleadings relating to him be struck out on the ground that it discloses no reasonable cause of action, or it is otherwise an abuse of the process of the Court. Upon receipt of an application, the Labour Tribunal or the High Court would decide on the basis of its interpretation of the statutory provisions under BMO in due course.

13. The Administration has advised the Subcommittee that incorporation of an express provision in BMO, for the purpose of preventing the transfer of the liabilities of an OC to individual members of the MC of that OC, would have the effect of restricting the circumstances under which a member of an MC could apply for a striking out order, which might otherwise be available under case law.

14. Members have taken the view that such an express provision should be incorporated in BMO on the following considerations -

- (a) members of an MC could apply for a striking out order in courts on the basis of the relevant statutory provisions under BMO, instead of going through the legal proceedings;
- (b) the duration of legal proceedings could be reduced and legal cost would be reduced if an express provision protecting members of an MC from legal liabilities for a collective decision of an OC is provided under BMO; and

- (c) incorporation of an express provisions would facilitate the Lands Tribunal or the High Court to exercise its discretion in striking out the name of a member of an MC from the proceedings.

15. The Administration agrees that an express provision will be added to BMO specifying that members of an MC shall not be held personally liable for any collective decision made by an OC, which is neither ultra vires nor tortuous, solely on the ground that they are members of the MC of that OC.

Percentage of shares required for the termination of the appointment of DMC manager

16. Members note that under paragraph 8(a) of the existing DMC Guidelines, the initial period of management by the first manager should not exceed two years. According to the Administration, the intention of the guidelines is to ensure that there will not be a management vacuum during the initial two years' period when the owners of a new private building have yet to form an OC to manage the building. This will facilitate re-appointment or otherwise of the manager after owners have formed an owners' committee under the DMC or an OC under BMO within the initial two years.

17. Members have expressed concern that in practice, many DMC managers simply carry on providing their services for the buildings concerned after the expiry of the initial period without being subject to any review mechanism.

18. The Administration has informed members that according to its legal advice, in the absence of any specific provision for re-appointment of the same DMC manager in the relevant DMC, the initial DMC manager's appointment could continue after the initial period. However, the appointment can be terminated by a resolution of the owners of not less than 50% of the undivided shares, who pay or who are liable to pay the management expenses relating to those shares.

19. Members are of the view that it would be very difficult for OCs of large developments to obtain the support of owners holding not less than 50% of the undivided shares. Some members have suggested that the appointment of first managers appointed by developers by way of a DMC should end after two years and re-appointment should follow the current requirement for appointing a manager i.e., a simple majority voting at a general meeting attended by not less than 10% of owners. These members have also suggested that termination of the appointment of subsequent managers should follow the same principle, having regard to the specific terms and conditions of the relevant management contract.

20. To address the concern of the Subcommittee, the Administration has proposed to include an alternative mechanism in BMO as follows -

- (a) if a DMC or a management contract provided for a specified initial period of management of a manager, that manager's appointment could only be terminated in accordance with paragraph 7 of the Seventh Schedule to BMO i.e., a resolution of the owners holding not less than 50% of the undivided shares, during this specified period;
- (b) after the initial period of management as specified in a DMC or a management contract, the owners may, at a general meeting convene under paragraph 3(3) of the Third Schedule to BMO by the OC for the purpose decided by a majority of votes, appoint a new manager and terminate the appointment of the existing manager. The appointment of the new manager should take effect on the day immediately after the date of termination of the existing manager's appointment, in order to prevent the incidence of a management vacuum;
- (c) if there is no specified initial period in a DMC or a management contract, the procedure referred to in (b) above shall only apply after the manager's initial two years of management; and
- (d) if no new manager has been appointed following the procedure referred to in (b) above, the existing manager's appointment could only be terminated in accordance with paragraph 7 of the Seventh Schedule to BMO, either within or after the specified initial management period.

The Administration explains that its proposal would provide a feasible mechanism for OCs to terminate the appointment of the first or any subsequent manager and minimize the possibility of a management vacuum in the building.

21. Most members have expressed support for the Administration's proposal. They have also expressed the following views -

- (a) the resolutions for the actual appointment of a new manager and for the termination of the appointment of an existing manager should preferably be passed at the same general meeting;
- (b) references and guidelines for the termination of the appointment of first and subsequent manager should be provided for OCs to follow; and
- (c) the percentage of owners required for implementing the proposed alternative mechanism should be adjusted to 20%, which is in line with the requirement for passing a resolution to dissolve an existing OC at a general meeting.

Formation and election procedures of an OC

*Views and suggestions of members*

22. Members consider that the arrangements and procedures for formation of an OC and appointment of an MC and its members should be thoroughly reviewed. They have pointed out that the existing procedures for convening and conducting the first and subsequent owners' meetings and meetings of an MC, nominating and electing members of an MC and their re-appointment, voting at owners' meetings by proxies, etc, are unclear. Members have put forward the following suggestions to improve the relevant arrangements and procedures -

- (a) procedures for the election of an MC, such as the power of the chairman and deadline for nominations, issuance of agenda and calculation of quorum as well as the change-over of MCs, should be made more user-friendly and clearly specified;
- (b) the forms used for the election of an MC such as the proxy form and ballot paper should be prescribed in BMO;
- (c) conduct of a poll for appointment of members of an MC should be allowed after the passage of a resolution to form an OC at the first owners' meeting;
- (d) the election procedures should be standardized so that the chairman, secretary and treasurer of MCs would be elected before other members;
- (e) the secretary and/or treasurer of an MC could be employed from outside;
- (f) the procedures for the re-election of an MC should be included in a new schedule;
- (g) the polling time for an MC should be shortened and the procedure for the appointment of proxy should be simplified;
- (h) there should be some flexibility in setting the deadline for nominations;
- (i) there should be a provision in BMO to enable owners to observe meetings of an MC; and
- (j) staff of the Home Affairs Department (HAD) should be present at the election of an MC, and to provide advice on election procedures, if necessary.

*Appointment of an MC of an OC*

23. According to section 3(2) of BMO, an MC may be appointed at a duly convened meeting of the owners in accordance with the DMC, or if there is no DMC or the DMC contains no provision for the appointment of an MC, by a resolution of the owners of not less than 30% of the shares. A deputation has suggested that section 3(2)(b) of BMO should be amended to clearly specify that if there is no DMC, or the DMC contains no provision for the appointment of an MC, an MC should be appointed by a resolution of a simple majority of the owners of less than 30% of the shares, in order to remove any ambiguities of the provision.

24. Hon Albert HO considers that the proposed amendment is not necessary because no resolution will be passed if owners of only 30% of the shares support the motion while owners of another 35% of the shares against the motion. The Administration agrees with Mr HO's observation. However, the Administration has indicated that it would consider improving the clarity of the provision.

25. The Administration has also proposed to amend paragraph 2(1) of the Second Schedule to the effect that members and holders of office of an MC shall be appointed by a resolution passed by a majority of the votes of the owners voting either personally or by proxy at an owners' meeting.

26. Members and the Administration are in general of the same view that as long as the appointment of an MC per se has been supported by a resolution of the owners holding not less than 30% of the shares at an owners' meeting convened in accordance with section 3(2) of BMO, it is not necessary to adopt the same threshold for the purpose of appointing individual members and holders of office of the MC at the same meeting. While most members consider that the quorum requirement for the appointment of an MC and that for the appointment of its members at the first owners' meeting should be specified in the schedule, Hon Andrew WONG opines that it should be specified in the principal Ordinance.

27. In response to members' suggestions, the Administration proposes to specify in paragraph 2(1) of the Second Schedule that members and holders of office of the MC shall be appointed by a resolution passed by a majority of the votes of the owners at the same owners' meeting with a quorum of 10%. The Administration has pointed out that its proposal is in line with the quorum requirement for a normal general meeting of an OC under paragraph 5(1)(b) of the Third Schedule.

28. Members have expressed support for the Administration's proposal to adopt the quorum requirement of 10% of owners which is not too difficult to be met. However, for the sake of consistency, they have suggested that a quorum of 10% of owners should be required of all owners' meetings including an owners' meeting convened for the purpose of appointing an MC. Members



consider that such requirement, while ensuring greater participation of owners in the affairs of OC, would not create additional difficulties for the conduct of OC meetings.

29. Hon Albert HO and Hon Andrew WONG consider that the offices of the secretary and treasurer should preferably be held by owners. Mr WONG has suggested that an owner should be allowed to take up the offices of both the secretary and treasurer at the same time to facilitate operation of OCs and MCs in small buildings. Hon Albert CHAN and Hon IP Kwok-him, however, are of the view that flexibility should be given for MCs to appoint outsiders to perform the functions of the secretary and treasurer. They have expressed concern that as the secretary and treasurer have to perform their statutory obligations and financial functions stipulated in BMO, opportunities for abuses of power may arise if a person holds two offices of an MC at the same time.

*Change-over of MCs*

30. Members have expressed support for the Administration's proposal to specify that MC members should hold office until a new MC was appointed and assume office at the next annual general meeting of the OC. They have suggested that if the position of an MC Chairman is left vacant, BMO should provide for a mechanism for the OC to convene an owners' meeting for the appointment of another MC without the need to apply for a court order. They have also suggested that BMO should specify a period for an appointed MC to take over the office and transfer of any books or records of account, papers, documents and other records in respect of the control, management and administration of the building between the existing and the succeeding MC members.

31. The Administration has agreed to consider members' views when drafting the procedural requirements regarding an owners' meeting held for the purpose of appointing the first or subsequent management committees, and deciding other issues.

*Meeting procedures of an owners' meeting convened for the purpose of appointing an MC*

32. The Administration has originally proposed to add a schedule to the BMO setting out a series of procedural requirements regarding an owners' meeting held for the purpose of appointing the first or subsequent MCs. Specifically, the proposed requirements aim to supplement the existing Third Schedule to BMO by including the following elements -

- (a) the powers and responsibilities of the convenor of an owners' meeting held for the purpose of appointing the first MC;

- (b) the nomination procedures for members and holders of office of an MC;
- (c) certain standing proceedings of an owners' meeting;
- (d) scope of expenses for an owners' meeting under section 3, 3A or 4; and
- (e) the sequence between retirement and appointment of members of an MC.

33. According to the Administration's proposal, certain forms such as those for proxy, notice of meetings and nomination which are frequently used in owners' meetings and standing order for meeting procedures would also be prescribed under the relevant sections of BMO.

34. Members note that according to the meeting procedures for owners' meetings proposed by the Administration, the convenor of a meeting of owners under section 3(1)(a), 3(1)(b), 3A or 4 of BMO, or an owner nominated by the convenors of a meeting of owners under section 3(1)(c), cannot allow nomination at the meeting if there are sufficient nominations for the purpose of forming an MC in accordance with paragraph 1(a) of the Second Schedule. The convenor of that meeting may also declare cancellation of the meeting if -

- (a) the MC has not been appointed within two hours after the time scheduled for commencement of the meeting;
- (b) the order of the meeting cannot be maintained; or
- (c) the meeting cannot be continued due to inclement weather.

35. Members have expressed concern that in practice nominations for MC membership are very often made at the first meeting, and the proposed restriction might create conflicts among owners. They are of the view that flexibility should be provided for accepting nominations at the meeting. Members have suggested that acceptance of nominations at the meeting could be allowed by way of an appropriate mechanism, such as passing a resolution for such purpose by a majority of owners at the meeting.

36. Members also consider that the effects of the cancellation of a meeting on resolutions passed or decisions made at that meeting should be carefully examined. They have suggested that the Administration should provide clear guidelines on cancellation or adjournment of a meeting for owners to follow. Members have further pointed out that the counting of votes of owners holding different types of shares for formation of an OC and the appointment of an MC in a large development could take more than two hours to complete.

37. Members have further expressed concern about the impartiality of the convenor in presiding the first owners' meeting, particularly when the meeting is convened by owners in possession of 5% of shares and the convenor himself is also a candidate for an office of an MC. They have suggested that BMO should provide for the owners who convene the first meeting to agree among themselves on a convenor, or alternatively for the owners attending the first meeting to pass a resolution to appoint a person to preside over the meeting. They have also suggested the Administration to consider specifying a requirement for electing a chairman to preside over the meeting and the election should first be presided by the convenor of the meeting. The Administration has undertaken to examine the feasibility of members' suggestions.

38. Hon Andrew WONG is of the view that nomination of candidates for members of an MC should be passed by owners at the first owners' meeting and the election of members of the MC should be carried out at another owners' meeting convened for such purpose. He has suggested that as an alternative, a resolution can be passed to adjourn the first owners' meeting after the appointment of an MC and the nomination of candidates for individual members, and resume the meeting at another time to carry out the polling exercise. Mr WONG points out that such practices can enhance fair competition among owners for membership of an MC. Most other Subcommittee members, however, have expressed reservations about conducting a poll for appointing individual members of an MC separately. They consider that the arrangement as suggested by Mr WONG would not only prolong the process but also create additional work for participating convenor and owners.

39. Responding to members' concerns and suggestions, the Administration agrees to set out the meeting procedures for owners' meetings including the effects of cancellation or adjournment of an OC meeting on resolutions passed or decisions made at the same meeting in the form of standing orders or a code of practice, instead of a schedule to the Ordinance.

#### Procedural requirements regarding procurement of supplies, goods and services

40. Members are of the view that the requirements and procedures in respect of certain financial and statutory functions of an OC such as the invitation and selection of tenders should be specified in BMO. Some members have suggested that as some of the maintenance contracts granted by an OC involve a huge sum of money, a system of declaration of interest for members of the MC should be included in the amendments to be proposed to BMO. In response, the Administration has undertaken a review of the procedural requirements regarding procurement of supplies, goods and services.

41. Section 20A(2) of the BMO stipulates that -

“Any supplies, goods or services the value of which exceeds or is likely to exceed-

- (a) the sum of \$100,000 or such other sum in substitution therefor as the Authority (Secretary for Home Affairs) may specify by notice in the Gazette; or
- (b) a sum which is equivalent to 20% of the annual budget of the corporation or such other percentage in substitution therefor as may be approved by the corporation by a resolution passed at a general meeting, whichever is the lesser, shall be procured by invitation to tender.”

The Administration has proposed after the review to amend the Code of Practice on procurement of supplies, goods and services issued by the Secretary for Home Affairs (SHA) under section 44(1) of BMO to make it clear that such a requirement is mandatory. The Administration has also proposed the following amendments to section 20A of BMO -

- (a) to lower the minimum percentage of an OC’s annual budget for the purpose of tendering in section 20A(2)(b) from the existing 20% to 10%;
- (b) to include a requirement that any tender of a value exceeding a sum which is equivalent to 10% of the annual budget of the corporation shall be submitted to the corporation, and any such tender shall be accepted or rejected by a resolution passed at a general meeting of the corporation (the existing paragraph 8 of the Code of Practice should be deleted as a result); and
- (c) to insert a punitive clause to the effect that in the event of a contravention of the above requirements, every member of an MC shall be guilty of an offence and shall be liable on conviction to a fine at level 5 i.e., \$50,000, unless he proves that the offence was committed without his consent or connivance and that he exercised all such due diligence to prevent the commission of the offence as he ought to have exercised in the circumstances.

42. Members have expressed support for the Administration’s proposals to improve the procedural requirements regarding procurement of supplies, goods and services. They have pointed out that it is not uncommon that some OCs do not prepare their annual budgets. Hence, it is more appropriate to refer to 10% of the annual expenditure instead of annual budget of an OC in the proposed amendments. They have suggested that it should be specified very clearly in the amendments to be proposed whether the annual budget or expenditure of an OC would be used as the basis of calculation as there might be a difference in the resulting amounts. Members consider that contracts on renewal should only be required to be approved by the OC without the need to

invite tenders. They have stressed that management companies should be required to comply with the above requirement in order to prevent possible abuse of management funds.

43. Members have expressed reservations about the punitive clause proposed by the Administration. They consider that the punitive clause is too harsh, and might discourage owners from participating in the work of an MC. Members have pointed out that although a member of an MC would not be guilty of the offence if he could prove that the offence is committed without his consent or connivance and that he has exercised all such due diligence to prevent the commission of the offence as he ought to have exercised in the circumstances, the defence provision might not be adequate.

44. A majority of members have suggested that while a punitive clause is necessary to ensure compliance with procedural requirements regarding procurement of goods and services, the wording of the punitive clause should be revised so that only those members of an MC who have been involved in the award of the contracts concerned should bear the criminal liability for contravening the procedural requirements, and the onus of proof should lie on the prosecution instead of members of an MC.

45. Hon Andrew CHENG holds a different view. He has pointed out that civil proceedings to resolve disputes over abuse of management funds are preferable to criminalization of contravention of the procurement procedures as such punitive clause would discourage owners from participating in the work of an MC.

#### The Building Safety Loan Scheme

46. The Subcommittee notes that the Administration has proposed to amend BMO to specifically empower an OC to borrow from the Building Safety Loan Scheme, for the purpose of complying with statutory fire safety or building safety improvement directions or statutory orders an amount equivalent to the costs which should be borne by the missing owners and/or owners who refuse to pay their share of the improvement costs as determined by a resolution which is binding on all building owners. Members note that the Panel on Home Affairs was briefed on the proposals at its meeting on 12 April 2002. The Subcommittee raises no objection to the proposal.

#### Rights of owners to obtain copies of certain building management documents

47. The Administration proposes to specify in BMO that MC should, on payment of a reasonable copying charge, supply any owner with a copy of the minutes of an MC's meeting and those of an OC's general meeting. Members have expressed support for the Administration's proposal. Hon Albert CHAN has suggested that the provision should cover other building management documents and that the charge should be specified in BMO so as to prevent MCs from over-charging owners in order to deter them from obtaining the

documents.

A summary of members views on the legislative proposals to amend BMO

48. A summary of members' views on the legislative proposals to amend BMO covered in the consultation paper is prepared in **Appendix IV** for members' easy reference.

Other issues not covered in the consultation paper

49. The Subcommittee has held discussions with the Administration on other issues which are not covered in the consultation paper issued by the Administration in May 2003. Relevant deliberations of the Subcommittee on these issues are summarized in paragraphs 50 to 78 below.

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

50. Members are of the view that it is unfair for owners of the common parts of a building, mostly the developers, to possess voting rights but the shares allocated to these common parts do not carry any liability to pay management fees. They are concerned that in some developments, a majority of shares is allocated to the common parts of the development which enables the developer to play a decisive role in the formation of an OC and day-to-day building management matters.

51. Some members have suggested that the Administration should consider further limiting the rights of owners of shares who are not liable to pay management fees to the extent that they cannot vote at an owners' meeting or will not be counted for the purpose of forming a quorum for the formation of OCs. Some members have also suggested that as an alternative to facilitate formation of OCs, the Administration should consider empowering SHA to exercise discretion on the number of undivided shares required in special circumstances.

52. The Administration is of the view that since private property rights and obligations are involved, a cautious, narrow and focused approach should be adopted for limiting the voting rights of owners holding undivided shares which are not liable to pay management fees. A blanket limitation of rights would be inappropriate.

53. The Administration further informs the Subcommittee that according to the current DMC Guidelines which were last revised in June 1999, owners of common areas are not entitled to any voting rights. For DMCs approved before June 1999, the management company is required to hold the shares allocated to the common parts of a building for the owners in the form of a trustee. However, holders of the undivided shares of the common parts of some old building might have voting rights by virtue of the provisions in relevant DMCs.

54. Members have requested that the Administration should explore ways to address the problems found in the DMCs approved before the 90s.

*Mechanism to amend terms and conditions of DMCs which are unfair to owners*

55. Members have expressed concern about cases of “unfair” allocation of undivided shares and management shares between the owners of residential portions and owners of non-residential (or commercial) portions in a building. They have pointed out that while voting rights in some private developments are determined on the basis of undivided shares, the management expenses are calculated on the basis of management shares. This inevitably gives rise to the problem of disproportionate distribution between voting rights and management liability. Residential owners who shoulder more management expenses possess less voting rights, while non-residential owners (invariably the developers) hold more voting rights but shoulder less liability to pay management expenses. Some members have suggested that the Administration might need to consider capping the discrepancy between the allocation of undivided shares and the management shares.

56. The Administration explains that “unfair” allocation of undivided shares and management shares stems mainly from the adoption of different bases for allocating undivided shares and management shares in the same building, i.e. undivided shares on a “value” basis and management shares on a gross floor area basis. It follows that those premises with a higher value have been allocated more undivided shares, while those premises with a larger size have been allocated more management shares. Since the market value of non-residential or commercial premises tends to be higher than the residential units, owners of non-residential units (usually developers) could hold more undivided shares which carry voting rights but less management shares, hence paying less management expenses. On the other hand, owners of the residential portions could, by virtue of the larger floor area and lower market value of their premises, hold smaller undivided shares (hence less voting rights) but greater management shares (hence paying higher management expenses).

57. In response to the Subcommittee’s concern, the Administration has decided to amend the DMC Guidelines to require both the undivided shares and management shares in a building to be allocated on the basis of gross floor area rather than market value on the basis of the following considerations -

- (a) the market values of different premises or different types of premises may change over time. Undivided shares allocated on the “current value” basis therefore cannot reflect the actual value of the premises or the actual relative values between different premises at different times. On the other hand, undivided shares allocated on the gross floor area basis reflect the constant relative sizes between different premises;

- (b) it is equitable that those owners who use more common areas and facilities should be allocated more management shares and hence pay more management expenses. Those paying more should also have a greater say in management. However, in the absence of a practicable basis to assess the frequency of use, gross floor area should be the most objective criterion for the allocation of management shares; and
- (c) if both the undivided shares and management shares are to be allocated on the basis of gross floor area, they would be in proportion. It would no longer be necessary to cap the ratio between undivided and management shares.

58. The Subcommittee welcomes the Administration's amendments to the DMC guidelines.

59. Members have also expressed concern that some provisions in DMCs are advantageous to developers at the expense of owners. Members are of the view that Government has the obligation to ensure justice and fair provisions in DMCs. Members have suggested that the Legal Advisory and Conveyancing Office (LACO) should set clear criteria and guidelines for approving DMCs, and the Administration should ensure by way of legislation that DMCs would not contain provisions which are unfair to owners.

60. The Administration explains that a DMC which stipulates the property rights and obligations of the parties concerned is a private contract executed between the developer and owners. A DMC is expressly defined in section 2 of BMO to mean a document which defines the rights, interests and obligations of owners among themselves. The Administration stresses that it is not a party to the contract and is therefore not in a position to meddle with its terms and conditions, especially those which affect the property and monetary rights and obligations of the parties concerned.

61. Members have considered the following possible proposals to address the problems of provisions in DMCs which are unfair to owners -

- (a) setting up a mechanism for amending the provisions of a DMC by a resolution of an OC and with the approval of SHA or the Court;
- (b) amending BMO to the effect that a DMC might be amended by a resolution of owners of not less than 75% of the shares at an OC meeting; and
- (c) adding overriding provisions to BMO in order to protect the interest of owners against provisions in a DMC which are unfair to them.



62. As regards the proposal in paragraph 61(a) above, the Administration has pointed out that it would be inappropriate for SHA, as an administrator, to play a role in the mechanism and it would be difficult for him to make a fair judgment. It is also doubtful whether the Court would have the expertise to make such a judgment.

63. As regards the proposal in paragraph 61(b) above, the Administration has also pointed out that if the percentage of shares required for amending a DMC is set at a very high level, it would be difficult to meet such requirement. However, the wish of the majority owners might not be represented if a lower level is set and the mechanism might subject to abuse easily.

64. The Administration has further pointed out that as legislative amendments to BMO have been used to override certain provisions of DMCs, any proposal should be considered along the line of adding overriding provisions to BMO.

65. The Administration, however, stresses that legislative measure to amend and obliterate provisions in DMCs which would affect property and monetary rights and obligations of private parties is a very complicate and contentious subject. The Administration would have to carefully examine the policy, legal and technical issues and implications involved in such amendments and thoroughly consult the parties concerned before reaching a conclusion on the issue.

66. Hon Andrew CHENG does not agree with the Administration. He considers that BMO should be amended to the effect that a DMC could be amended by a resolution of about 60 to 70% of owners. To protect the interests of the minority, if the interests of the minority of owners are affected by the proposed amendment to the DMC, a mechanism should be provided to allow them to file their objection to SHA or the Court on the condition that the number of these owners reaches a certain percentage.

67. Some other members including Hon Andrew WONG and Hon Albert CHAN have expressed reservations about Hon Andrew CHENG's suggestion. They are concerned that the mechanism of amending the DMC by a resolution of an OC might affect the interest of the minority. These members have pointed out that even the Court could hardly determine whether a certain amendment is fair or not unless specific standards or criteria are stipulated in the legislation. They stress that it is of utmost importance to ensure that interests of the minorities should not be sacrificed in any proposal to set up a mechanism to amend DMC.

68. Members in general are of the view that as the grievances of most owners about provisions in DMCs mainly focus on the distribution of shares which is unfair to owners and the proportion of management fees payable by developers, the DMC Guidelines as revised in respect of the voting rights of the

owners of common areas and the allocation of shares on the basis of gross floor area (paragraph 57 above refers) should be able to address the grievances. They agree that in the light of the divergent views expressed, the Subcommittee should not pursue the issue in the current review exercise.

*Mediation mechanism to resolve building management disputes*

69. Members are of the view that the Administration should render more support and assistance to OCs and MCs in building management, in particular settlement of disputes among owners and between owners and developers arising from building management matters. Some members have suggested that the Administration should consider establishing a mediation mechanism modelled on the operation of the Labour Tribunal or Small Claims Tribunal to resolve building management disputes.

70. The Administration has explained that where disputes arise among owners or between owners and OCs, staff of HAD and its District Offices, would assist in liaison and providing advice. Owners and OCs may also resolve disputes through the Lands Tribunal which has jurisdiction to hear and determine cases in relation to building management under BMO since 1993. The Lands Tribunal already provides a quicker and cheaper way to for owners and parties concerned to resolve disputes, instead of resorting to the Court of First Instance.

71. The Administration has also informed the Subcommittee that the Administration is considering the feasibility of establishing a non-statutory mediation mechanism through making arrangements for mediation bodies to provide voluntary services at the Building Management Resource Centres (BMRCs) under HAD. The objective is to provide a quicker and cheaper way to resolve building management disputes, thereby reducing the number of cases referred to the Lands Tribunal.

72. Members have expressed no objection to conducting a pilot scheme to assess the feasibility of establishing a non-statutory mediation mechanism for provision of free mediation services to owners in resolving building management disputes. They, however, consider that it may not be realistic to expect continuous provision of free mediation services by a few voluntary organizations in the long run. Members have also pointed out that instead of relying on the mediation mechanism, the staff members at BMRCs should play a key role in offering advice to OC and MC members for resolving minor disputes on building management. The provision of free mediation service should follow when these minor disputes could not be resolved.

73. The Administration has informed the Subcommittee that the Administration would assess the quality and effectiveness of such mediation service after completion of the pilot scheme.

*Formation of OCs by owners of house developments holding divided shares*

74. Members consider that management of house-type properties such as Discovery Bay in Lantau Island, Fairview Park in Yuen Long and Hong Lok Yuen in Tai Po should fall within the ambit of BMO. They are of the view that the Administration should ensure that all property owners, including owners of individual units in a house development, enjoy the right to form OCs so that owners can collectively manage their properties in accordance with the legislation and in their best interest.

75. Members note that section 39(a) of BMO provides that an owner's share of a development can be determined in the manner provided in an instrument such as a DMC which is registered in the Land Registry. Hon Albert HO has informed the Subcommittee that small houses built on different land lots have been allowed to form an OC under an instrument recognized by LACO. He has suggested that LACO should ensure that DMCs of new developments must stipulate the number of undivided shares allocated to each flat or house and common parts of a building or development. Hon Martin LEE, a non-Subcommittee member, has suggested that the definition of "building" under section 2 of BMO should be amended to include not only flats with undivided shares in multi-storey buildings, but also houses built on lots of lands with divided shares.

76. The Administration has informed the Subcommittee that it has no objection in principle to owners of house developments forming OCs if such developments contain areas and/or facilities for the common use of owners. However, according to the preliminary legal advice obtained from the Department of Justice, the ownership structure and the nature of the title of flats in multi-storey buildings and independent houses built on individual land lots are quite different. The Administration considers that to provide an alternative way to determine shares on the basis of area of land or number of houses owned by a mere amendment to the provision relating to determination of owner's shares i.e., section 39 of BMO, would not be sufficient to make BMO applicable to house developments.

77. The Administration further advises that since most of the provisions and fundamental concepts in BMO are construed specifically to cater for the management of flats in multi-storey buildings, it appears difficult to apply them to house developments which have an entirely different nature of title and ownership from flats and which do not have common ownership of undivided shares in land. The Administration considers that detailed and substantial revisions to the provisions of BMO, or a separate piece of legislation, would be required in order to provide a proper legal framework to enable owners of house developments to manage their building through the formation of OCs.

78. At the request of the Subcommittee, the Administration has undertaken to explore with the Department of Justice on how best to provide a legal framework to enable owners of house developments to form OC for the

management of their properties. In order not to delay the review process, members agree that the issue be dealt with in a separate exercise.

**Advice sought**

79. Members are invited to note the deliberations of the Subcommittee.

Council Business Division 2  
Legislative Council Secretariat  
27 November 2003

**Panel on Home Affairs**

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

**Terms of Reference**

To discuss with the Administration review of the Building Management Ordinance.

**Panel on Home Affairs**

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

**Membership list**

<b>Chairman</b>	Hon Albert CHAN Wai-yip
<b>Members</b>	Hon Cyd HO Sau-lan Hon Albert HO Chun-yan Hon NG Leung-sing, JP (since 21.10.2001) Hon Andrew WONG Wang-fat, JP Hon Emily LAU Wai-hing, JP (since 21.10.2001) Hon CHOY So-yuk (up to 20.10.2001) Hon Andrew CHENG Kar-foo Hon Tommy CHEUNG Yu-yan, JP (since 19.10.2003) Hon WONG Sing-chi (since 20.10.2002) Hon IP Kwok-him, JP  (Total : 10 Members)
<b>Clerk</b>	Miss Flora TAI Yin-ping
<b>Legal Adviser</b>	Mr Stephen LAM Ping-man
<b>Date</b>	19 October 2003

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

**List of organizations and individuals who have made submissions  
to the Subcommittee**

Organizations

1. Association for Owners' Building Management Right
2. Chartered Institute of Housing Hong Kong Branch
- \* 3. Democratic Party
4. Fairview Park Property Management Ltd
5. Hong Kong Association of Property Management Companies
6. Hong Kong Institute of Real Estate Administration
7. Hong Lok Yuen Property Management Co Ltd
8. Joint Conference of Members of Incorporated Owners and Mutual Aid Committees of Buildings in Wanchai
9. Kai Shing Management Services Limited
- \* 10. Public Housing Hotline
11. The Hong Kong Association of Incorporated Owners Committees
12. The Hong Kong Institute of Housing
- \* 13. The Incorporated Owners of Jubilee Garden (Shatin)
14. The Incorporated Owners of Rhine Garden
15. The Incorporated Owners of Tai On Building, Shau Kei Wan
16. The Incorporated Owners of Tuen Mun Tai Hing Gardens Phase II
- \* 17. The Real Estate Developers Association of Hong Kong

Individuals

18. Mr Raymond CHAN Wing-wai
- \* 19. Mr Thomas CHAN
- \* 20. Mr LAI Kin-on
- \* 21. Mr Y F LIU
- \* 22. Mr K L WAN
- \* 23. Ms Amy YUNG, member of Islands District Council

\* Written submission only

**A summary of members' views on the Administration's proposals  
to amend the Building Management Ordinance (BMO)**

**I. Personal liabilities of members of a management committee (MC) for the decisions of an owners' corporation (OC)**

- (a) To add an express provision so that management committee 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 management committee

Members consider that an express provision should be incorporated in BMO for the purpose of preventing the transfer of the liabilities of an OC to individual members of the MC of that OC because -

- (a) members of an MC can apply for a striking out order in courts on the basis of the relevant statutory provisions under BMO, instead of going through the legal proceedings;
- (b) the cost of legal proceedings can be reduced if an express provision protecting members of an MC from legal liabilities for a collective decision of an OC is provided under BMO; and
- (c) incorporation of an express provisions would facilitate the Lands Tribunal or the High Court to exercise its discretion in striking out the name of a member of an MC from the proceedings.

**II. Termination of appointment of the deeds of mutual covenant (DMC) manager by an OC**

- (b) To specify in 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

- Members have expressed concern that many DMC managers simply carry on providing their services for the buildings concerned after the expiry of the initial period of management stipulated in the DMC without being subject to any review mechanism of their performance.
- Members have raised no objection to the proposal.



- (c) To provide an alternative mechanism whereby an OC can terminate appointment of the DMC manager upon a resolution passed by a majority of the votes of the owners present (or by proxy) at a general meeting, provided that a quorum of 20% of owners has been met at that meeting and a new manager has been effectively appointed upon termination of the DMC manager's appointment

Members have expressed support for the Administration's proposal to provide for a more effective alternative mechanism for an OC to terminate appointment of the DMC manager. They have also expressed the following views -

- (a) the resolutions for the actual appointment of a new manager and for the termination of the appointment of an existing manager should preferably be passed at the same general meeting;
- (b) references and guidelines for the termination of the first and subsequent manager should be provided for OCs to follow; and
- (c) the percentage of owners required for implementing the proposed alternative mechanism should be adjusted to 20%, in line with the requirement for passing a resolution to dissolve an existing OC at a general meeting.

### **III. Appointment of a management committee (MC)**

- (d) To specify that the first management committee 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

A deputation presenting views to the Subcommittee has suggested that section 3(2)(b) of BMO should be amended to the effect that if there is no DMC, or DMC contains no provision for the appointment of an MC, an MC may be appointed by a resolution of a simple majority of the owners of less than 30% of the shares, in order to remove any ambiguities of the provision. Hon Albert HO considers that the proposed amendment is not necessary because no resolution will be passed if owners of only 30% of the shares support the motion while owners of another 35% of the shares against the motion.

**IV. Appointment of members and holders of office of the first management committee**

- (e) To specify that members and holders of office of the management committee 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 management committee has been successfully appointed, provided that there is a quorum of 10% of owners at that meeting

Members have expressed support for the Administration's proposal to adopt the quorum requirement of 10% of owners for the appointment of individual members of an MC because it will ensure greater participation of owners in the affairs of OC and will not create additional difficulties for the conduct of OC meetings. However, Hon Andrew WONG is of the view that it should be specified in the principal Ordinance instead of in a schedule.

**V. Appointment of members and holders of office of any subsequent management committee**

- (f) To specify that an OC shall, by a resolution passed by owners at an annual general meeting of the OC at which the existing management committee retires, appoint a new management committee, its members and holders of office

Members have expressed support for the Administration's proposal to specify that MC members should hold office until a new MC is appointed and assume office at the next annual general meeting of the DC.

**VI. Procurement of supplies, goods and services by an OC**

- (g) 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

Members have expressed support for the Administration's proposals to improve the procedural requirements regarding procurement of supplies, goods and services. Members, however, consider that contracts on renewal should only be required to be approved by the OC without the need to invite tenders.

- (h) To lower the minimum percentage of an OC's annual budget for the purpose of tendering from the existing 20% to 10%, and to include a requirement that any tender of a value exceeding a sum equivalent to 10% of the annual budget of an OC has to be accepted or rejected by a resolution passed at a general meeting of an OC

Members have pointed out that it is not uncommon that some OCs do not prepare their annual budgets. Hence, it is more appropriate to refer to 10% of the annual expenditure instead of annual budget of an OC in the proposed amendments.

- (i) To add a punitive clause for non-compliance with the above requirements

Members have expressed reservations about the proposed punitive clause. A majority of members have suggested that while a punitive clause is necessary to ensure compliance with procedural requirements regarding procurement of goods and services, the wording of the punitive clause should be revised so that only those members of an MC who have been involved in the award of the contracts concerned should bear the criminal liability for contravening the procedural requirements, and the onus of proof should lie on the prosecution instead of members of an MC. Hon Andrew CHENG, however, holds a different view. He has pointed out that civil proceedings to resolve disputes over abuse of management funds are preferable to criminalization of contravention of the procurement procedures as such punitive clause would discourage owners from participating in the work of an MC.

**VII. Power of an OC to borrow money from the government in compliance with certain statutory notices, orders or other documents**

- (j) 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

Members have no objection to the proposal.

**VIII. Individual owners' rights to obtain copies of certain building management documents from an OC**

- (k) To provide for the owners' rights to obtain copies of minutes of meetings of both OCs and management committees upon payment of reasonable copying charges

Members have expressed support for the Administration's proposal. Hon Albert CHAN has suggested that the provision should cover other building management documents and that the charge should be specified in BMO so as to prevent MCs from over-charging owners in order to deter them from obtaining the documents.

Council Business Division 2  
Legislative Council Secretariat  
27 November 2003