

**立法會**  
**Legislative Council**

LC Paper No. CB(1)1116/03-04  
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by the Administration)

Ref : CB1/PL/HG/1

**Panel on Housing**

**Minutes of meeting**  
**held on Monday, 2 February 2004, at 3:40 pm**  
**in Conference Room A of the Legislative Council Building**

**Members present** : Hon Albert HO Chun-yan (Chairman)  
Hon CHAN Kam-lam, JP (Deputy Chairman)  
Hon LEE Cheuk-yan  
Hon NG Leung-sing, JP  
Hon LEUNG Yiu-chung  
Hon Andrew WONG Wang-fat, JP  
Hon Howard YOUNG, SBS, JP  
Dr Hon YEUNG Sum  
Hon YEUNG Yiu-chung, BBS  
Hon SZETO Wah  
Hon Abraham SHEK Lai-him, JP  
Hon Tommy CHEUNG Yu-yan, JP  
Hon Albert CHAN Wai-yip  
Hon Frederick FUNG Kin-kee  
Hon IP Kwok-him, JP  
Hon LAU Ping-cheung

**Member attending** : Hon Audrey EU Yuet-mee, SC, JP

**Members absent** : Dr Hon David CHU Yu-lin, JP  
Hon Fred LI Wah-ming, JP  
Hon James TO Kun-sun  
Hon CHAN Yuen-han, JP  
Dr Hon LO Wing-lok, JP  
Hon WONG Sing-chi

**Public officers attending : Agenda item IV**

Mr Kenneth MAK, JP  
Deputy Director of Housing (Corporate Services)

Mr Vincent TONG, JP  
Deputy Director of Housing (Business Development)

Mr Anthony WONG  
Assistant Director of Housing (Legal Advice)

**Clerk in attendance :** Miss Odelia LEUNG  
Chief Council Secretary (1)4

**Staff in attendance :** Ms Sarah YUEN  
Senior Council Secretary (1)6

Ms Christina SHIU  
Legislative Assistant

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Action

**I. Confirmation of minutes**

(LC Paper No. CB(1)874/03-04 -- Minutes of meeting on 5 January 2004)

1. The minutes of the meeting held on 5 January 2004 were confirmed.

**II. Information papers issued since last meeting**

2. Members noted the following information papers issued since the last monthly regular meeting of the Panel on 5 January 2004 -

(LC Paper No. CB(1)694/03-04 -- Concern on disposal of surplus Home Ownership Scheme flats raised by Kwun Tong District Council members at the meeting with Legislative Council Members on 25 April 2003

LC Paper No. CB(1)748/03-04 -- Paper on maintenance and replacement of water pipes in public housing estates

LC Paper No. CB(1)867/03-04 -- Concern on the eligibility criteria required of residents of interim housing for public rental housing raised by representatives from Shek Lei (II) Interim Housing Estate at a meeting with Legislative Council Members on 12 January 2004)

**III. Items for discussion at the next meeting**

(LC Paper No. CB(1)872/03-04(01) -- List of outstanding items for discussion

LC Paper No. CB(1)872/03-04(02) -- List of follow-up actions)

3. The next regular meeting was scheduled for Monday, 1 March 2004, at 2:30 pm. Members agreed to discuss the following two items -

- (a) Review of income and asset limits for Waiting List applicants; and
- (b) Implementation of marking scheme for tenancy enforcement in public housing estates.

Clerk

4. Members also agreed to include "disposal of overhung Home Ownership Scheme flats" in the Panel's list of outstanding items for discussion before end of the current term.

**IV. Arbitration between Housing Authority and Zen Pacific relating to Yuen Chau Kok short-piling case**

(LC Paper Nos. CB(1)584/03-04(01)-(06) -- Information about the arbitration between Housing Authority and Zen Pacific relating to Yuen Chau Kok Short-Piling Case)

5. The Chairman drew members' attention to the following papers tabled at the meeting -

- (a) Correspondence between Mr Abraham SHEK Lai-him and the Permanent Secretary for Housing, Planning and Lands (Housing) (PSH) concerning arbitration and the settlement agreement between Housing Authority (HA) and Zen Pacific (Zen) relating to Yuen Chau Kok Short-Piling Case (the Case);
- (b) Paper entitled "Chronology of the Defective Piling Dispute between HA and Zen Pacific" compiled by the Chairman;

- (c) Chinese translation of the letter dated 16 October 2003 from Ms Audrey EU Yuet-mee referring to the Secretary for Housing, Planning and Lands (SHPL) a complaint about the arbitration and the settlement agreement; and
- (d) Chinese translation of the letter dated 18 November 2003 from Ms Audrey EU to SHPL requesting clarification of some points in SHPL's response to her letter dated 16 October 2003.

*(Post-meeting note: The above papers were circulated to members vide LC Paper No. CB(1)932/03-04 on 3 February 2004.)*

- 6. The Chairman briefed members on the paper listed in para 5(b) above.
- 7. Messrs CHAN Kam-lam, NG Leung-sing and Tommy CHEUNG Yu-yan declared interests as members of HA and/or its standing committees. Mr IP Kwok-him declared interests as a member of HA's Building Committee (BC).

The decision to go for arbitration instead of settlement

- 8. Referring to the legal cost of \$38.6 million incurred by HA in the Case, the Deputy Director of Housing (Corporate Services) (DD of H(CS)) clarified that the figure reflected the position as at 28 October 2003. The latest cumulative sum was over \$39 million.
- 9. Noting that Zen had once offered to pay HA \$100 million to settle the Case, Mr LEE Cheuk-yan expressed dissatisfaction that HA had rejected the settlement offer but paid \$39 million legal fees to take the course of arbitration. However, after the arbitration HA resorted to a settlement with Zen but the settlement sum was only \$80 million. Pointing out that the legal cost might be much less if HA had accepted the settlement offer right at the beginning, he requested an estimate on the legal cost had the settlement offer been accepted. He also questioned whether it was justifiable to spend all the time and legal cost to go for arbitration given the stringent financial situation of HA. Mr Howard YOUNG likewise expressed disappointment at how the Case had been handled.
- 10. Explaining the decision to resolve the Case through arbitration and not acceptance of the settlement offers, DD of H(CS) said that in anticipation of the substantial legal cost involved in pursuing litigation or arbitration, HA did consider the settlement offers made by Zen and had indeed made counter-proposals. A settlement agreement could not be reached because firstly, HA found the sum offered by Zen insufficient to compensate for its loss in the Case. Secondly, HA considered it difficult to accept certain conditions attached to the settlement offers. Most important of all, at the time when BC discussed the subject, there was very strong public discontent about sub-standard piling works in public

housing projects. Against this background, BC was keen to make public the whole matter to achieve transparency and decided to go for arbitration instead of a negotiated settlement to establish and demonstrate to the community that liability fell fully and squarely on Zen. BC then was well aware of the consequence that, in taking the course as it did, HA might ultimately recover much less than it would have got had it accepted a settlement, having regard to the probable decrease in net asset value of Zen over time and the legal costs involved. The decision of BC was therefore an informed and conscious one made after thorough discussion, throughout which the establishment of Zen's liability for the short-piling was the over-riding consideration.

11. Mr LEE Cheuk-yan was unconvinced of the above explanations. He considered it contradictory that if the overriding consideration in deciding to pursue arbitration was to establish Zen's liability in the Case, HA should not have accepted a settlement agreement with Zen eventually. To clarify matters, he opined that all relevant minutes of BC meetings should be made open for public inspection. His views were shared by Mr Abraham SHEK.

12. In reply, DD of H(CS) explained that the arbitration award had already demonstrated that the liability for the Case fell fully and squarely on Zen. The arbitrator had determined that there was a series of breaches of contract by Zen, and dismissed its counter-claims against HA in their entirety. HA was awarded \$199 million for its direct costs, full indemnity by Zen for any HA payment to the superstructure contractor, plus interests and legal costs. No award was made for loss of asset value mainly because of HA's decision not to rebuild the two demolished blocks.

13. Mr Abraham SHEK opined that by making the settlement offers, Zen had in effect admitted liability. HA should therefore negotiate the settlement offers with Zen instead of pursuing arbitration to establish Zen's liability. In reply, DD of H(CS) reported that Zen had never admitted liability throughout the negotiation process from 2000 to 2002. Had Zen admitted liability, HA would not have gone for arbitration. As to whether HA had ever asked Zen to admit its fault, the Assistant Director of Housing (Legal Advice) (AD of H(LA)) confirmed that the settlement offers were made by Zen on the basis of without admission of liability.

14. In response to members' comment that the settlement sum of \$80 million was too small viewed against HA's loss and the legal cost incurred, DD of H(CS) pointed out that the settlement agreement was made in the best interest of HA and the public in the circumstances. He provided the following details -

- (a) Zen had indicated its intention to appeal against the arbitrator's award if HA was not willing to accept a settlement of the award. This would entail additional legal costs on both sides;

- (b) As assessed by a professional accounting firm commissioned by HA in September 2003, the settlement sum already exceeded the net asset value of Zen at that time. Moreover, if Zen was liquidated, HA was unlikely to recover any money because HA was an unsecured creditor; and
- (c) HA secured a guarantee from Zen's parent company that Zen would pay \$80 million to HA in accordance with the settlement agreement.

Appointment of HA members in professional capacity

15. Mr LEE Cheuk-yan expressed concern about conflict of interests in the appointment of Messrs. Simmons & Simmons (S&S), in which Mr Philip NUNN, a member and later Chairman of BC, was senior partner, as HA's solicitors for the arbitration. He opined that Mr NUNN might be better informed of the Case than other bidders and hence stood a better chance in securing the relevant service contract. In particular, he was concerned about whether Mr NUNN had played any role in BC's decision to go for litigation and then arbitration instead of a negotiated settlement.

*Selection process*

16. In response, DD of H(CS) clarified that BC members were not involved in the selection of the legal adviser for the Case. The criteria for selection were the firms' and their nominated solicitors' experience in handling construction dispute cases and the fees charged. No regard was given to familiarity with the cases concerned. In fact, the relevant tendering exercise was conducted to appoint solicitor firms to advise on seven defective piling projects including the Case. HA compiled a list of ten legal firms which constituted Hong Kong's major construction dispute practice. However, only eight of them were invited to submit proposals because the other two were known to be representing the contractors concerned. Only six firms submitted proposals because two were also representing the contractors. As the seven projects were grouped into four service contracts, four firms were eventually selected from the six. S&S, being third in overall score, was one of the four firms and was assigned to deal with the Case.

17. Mr LEE Cheuk-yan said that notwithstanding the conduct of a tendering exercise, it remained unanswered why S&S was assigned to deal with the Case. He queried whether the solicitors' fees involved, at \$20.8 million, was the highest among the seven cases which required legal advice. In reply, DD of H(CS) explained that the firm which was first in overall score was assigned to deal with three projects undertaken by the same contractor; the firm second in overall score two projects; and the firms ranked third and fourth in overall score one project each. The assessment at that time was that HA had a strong case to win in all seven projects. At the end HA could not obtain compensation in some cases because the contractors concerned went into liquidation. All seven cases involved substantial

claims and the Case did not involve the largest amount. It was purely a coincidence that S&S was assigned to deal with the Case.

*Conflict of interests*

18. Mr Abraham SHEK pointed out that being a BC member entrusted with the management of HA affairs, Mr NUNN owed HA a fiduciary obligation to discharge his duties properly and should avoid putting himself in a position where his duties and interests were in conflict. As a BC member, Mr NUNN had a duty to protect the interests of HA. Being a senior partner of S&S, he also had a material interest in securing the appointment of S&S as HA's solicitors for the Case. As such, his appointment as the legal adviser for HA in the Case was inappropriate. To substantiate his view, Mr SHEK quoted Rules 7.01 and 7.01(6) of The Law Society of Hong Kong's Professional Guide. Rule 7.01 provided that "a solicitor must not act where his own interests conflict or are likely to conflict with the interests of a client or potential client". Under Rule 7.01(6), "a solicitor who is a director or shareholder of a company for which he also acts must consider whether he is in a position of conflict when he is asked to advise the company upon steps it has taken or should take. It may be necessary for the solicitor to resign from the board or for another solicitor to advise the company in that particular matter". In Mr SHEK's view, it was apparent from the above rules that HA should not have assigned the Case to S&S. Dr YEUNG Sum also considered that there was apparent conflict of interests in the appointment of S&S and expressed regret over the arrangement. He found it surprising that Mr NUNN himself as an experienced solicitor, the senior officers of HA and the many professionals sitting on BC had not perceived the problems with the appointment.

19. Addressing the above concerns, DD of H(CS) clarified that Mr NUNN was a BC member, instead of BC chairman, when S&S was appointed solicitors for the Case. He only became BC Chairman afterwards. Stressing that S&S's appointment did not constitute conflict of interests, he and AD of H(LA) made the following points -

- (a) Every time before attending BC meetings to discuss matters related to the Case, Mr NUNN declared his interests, and attended the BC meetings concerned in his capacity as HA's legal adviser for the Case. BC members were hence fully aware that when Mr NUNN spoke on the subject, he was acting in his capacity as HA's legal adviser and not as a HA member and therefore did not participate in the decision-making process. In fact, papers and correspondence relating to the allegations about conflict of interest had been copied to BC members, and they had confirmed that their decisions in relation to the Case had not been affected in any way by Mr NUNN as a HA member;
- (b) On the point that Mr NUNN and his firm might have direct conflict of interests when advising HA whether to carry on or to settle litigation,

such potential conflict of interests existed for any legal firm advising its client in a similar situation. Whether Mr NUNN was a HA member or not was not really relevant. In fact, Mr NUNN had advised BC that the likely outcome would be that although HA would be awarded a substantial sum in arbitration, it might be an empty judgement in view of Zen's asset position. Such advice had been clearly recorded in the relevant minutes of meetings; and

- (c) As to whether Mr NUNN was a fiduciary to HA and hence there was conflict of interests arising from the appointment of S&S, it should be noted that to constitute conflict of interests, Mr NUNN had to be involved in two conflicting roles. However, in all discussions relating to the Case after the appointment, Mr NUNN only acted in the capacity as HA's legal adviser. HA's Standing Orders (SOs) also did not restrict HA from employing its members in a professional capacity as long as the member(s) concerned would not participate in the case(s) concerned as HA member(s).

20. Commenting on para 19(b) above, Mr Abraham SHEK maintained that Mr NUNN could have influenced HA into carrying on legal proceedings against Zen before S&S's appointment. Mr Andrew WONG Wang-fat echoed his views. He opined that S&S should have refrained from bidding for the relevant service contract and requested sight of the relevant minutes of BC meetings. In response, DD of H(CS) said that S&S had been appointed before BC decided to take legal proceedings against Zen. He reiterated that HA's SOs did not restrict HA from employing its members in a professional capacity. This was because such restrictions would adversely affect HA's ability to appoint people with relevant professional expertise to serve on HA's committees to support the work of these committees. He also emphasized that Mr NUNN had complied with all the relevant SOs and his appointment was in no way a unique arrangement in HA. There were some precedent cases.

21. Mr Albert CHAN Wai-yip opined that through appointing professionals to various statutory bodies, Government was trying to give advantages to professionals in return for their political support. In his view, the Case had set a very bad example of preferential treatment. To address public concern about conflict of interests in cases like the one under discussion, members of statutory bodies should resign before taking up any service contract with the bodies they were sitting on.

22. The Chairman considered that HA members should not take up jobs in relation to the HA committees on which they were sitting. In response to Dr YEUNG Sum's call to review the relevant arrangements to avoid recurrence of such appointment, DD of H(CS) stressed that the relevant tendering process was fair and open. Nevertheless, he admitted that there might be public perception of conflict of interests of Mr NUNN in the Case. HA would review the existing SOs

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governing employment of its members in a professional capacity. At the Chairman's request, he agreed to report the outcome of the review to the Panel in due course.

**V. Any other business**

23. There being no other business, the meeting ended at 4:45 pm.

Council Business Division 1  
Legislative Council Secretariat  
27 February 2004