

Building Management (Amendment) Bill 2005
Response to Hon CHOY So-yuk's Letter of 25 May 2005

Set out below are our response to the Hon CHOY So-yuk's questions in her letter of 25 May 2005 (LC Paper No. CB (2) 1709/04-05) about the Building Management (Amendment) Bill 2005 ("the Bill").

Appointment of Management Committee

Questions 1-3

2. Clause 4 of the Bill proposes to amend section 3(1)(c) of the Building Management Ordinance ("BMO") (Cap.344) by replacing "the owners of not less than 5% of the shares" with "an owner appointed to convene such a meeting by the owners of not less than 5% of the shares in aggregate". Before convening an owners' meeting for the purposes of appointing a management committee and setting up an owners' corporation ("OC"), the owners concerned have to obtain updated records of all owners in the building from the Land Registry in order to issue a notice of meeting and facilitate voting at the owners' meeting.

3. To relieve the financial burden of the meeting convenors (i.e. owners of not less than 5% of the shares who convene an owners' meeting), they could apply to the District Officer of the respective district for an exemption certificate so as to enable them to obtain a set of the owners' records from the Land Registry for free. Information such as the units owned by the owners concerned, name of the owners/companies, number of shares owned, as well as signatures of the owners or company chops, together with a copy of the deed of mutual covenant (DMC), must be provided in the application. The meeting convenors must also undertake in writing to obtain the owners' records from the Land Registry and convene, in the capacity as convenors, an owners' meeting to appoint a management committee within 60 days after the approval of the application and the issue of the exemption certificate by the District Officer. No matter whether an OC is formed, the convenors must return the owners' records to the District Office on expiry of the 60-day period. As the convenors may encounter difficulties in convening an owners' meeting, the District Officer will, on request, consider granting an extension on a case by

case basis.

4. For the effective use of public resources, our practice is to provide the fee-waiver once for each building or estate. The Hong Kong Housing Society has recently introduced the “Building Management Incentive Scheme” where an accountable subsidy up to \$3,000 will be provided to owners of buildings for the formation of OCs on a reimbursable basis. Owners who want to form an OC may apply to the Housing Society for the subsidy.

Question 4

5. In addition to the proposed amendments to section (3)2 of the BMO to clearly stipulate that the resolution on the appointment of a management committee under section 3 must be supported by owners of not less than 30% of the shares, the Bill requires that the resolution must also be passed by a majority of votes of the owners at the same meeting. This in effect means that the resolution on the appointment of a management committee must be supported by not less than 30% of the shares and that there must be a majority of votes of the owners in the same meeting.

Question 5

6. There are provisions about the notice of a meeting convened under sections 3, 3A, 4 or 40C and the voting rights in section 5 of the existing BMO. This means that it is necessary to make reference to the existing section 5 when appointing a management committee under sections 3, 3A, 4 and 40C. We consider that such cross-referencing is inconvenient and confusing to owners. Hence, we have, by virtue of the Bill, included the provisions under the existing section 5 which are related to the procedures of an owners’ meeting convened for the purpose of appointing a management committee (including the provisions for the notice of meeting) into sections 3, 3A, 4 and 40C.

7. The purpose of convening a meeting under sections 3, 3A, 4 or 40C is to appoint a management committee. The existing section 5(4)(b) and the amended sections 3(4)(b), 3A(3B)(b), 4(6)(b) and 40C(5)(b) clearly state that the purpose of the meeting (i.e. the resolution on the appointment of a management committee) must be stated in the notice of meeting. To facilitate the formation of an OC, the Home Affairs Department (HAD) has published a

booklet entitled “How to Form an Owners’ Corporation and Achieve Effective Building Management”, which contains a sample notice of meeting for reference by owners. HAD has also prepared a checklist of procedures of an owners’ meeting for the purpose of forming an OC. These publications have been widely distributed to owners and are available from the District Offices and Building Management Resource Centres. They can also be downloaded from the HAD Homepage on Building Management.

8. Under section 8 of the BMO, with effect from the date of issue of the certificate of registration by the Land Registrar, the management committee appointed under sections 3, 3A, 4 or 40C shall be deemed to be the first management committee of the OC. This means that the management committee can only exercise the powers and perform the duties of the OC under the BMO after the issue of the certificate of registration. It follows that all other resolutions on building management should be put forward at meetings of the management committee or OC convened after the certificate of registration has been issued. Please refer to Schedules 2 and 3 to the BMO which set out clearly the meeting procedures of the management committee and OC.

Question 6

9. The existing BMO does not provide for who should be the person to preside over the meeting of owners convened for the appointment of a management committee. We therefore propose in the Bill that a meeting of owners convened under sections 3, 3A, 4 or 40C should be presided over by the convenor.

10. Management of private buildings is squarely the responsibility of the property owners themselves. Other than the person(s) specified in sections 3(1)(a) and (b), we do not think that it is appropriate to allow any persons, other than the owners themselves, to convene an owners’ meeting, the main purpose of which is to appoint a management committee to decide on the management matters of the building.

Question 7

11. The Bill proposes that the quorum at all owners’ meetings convened

for the purpose of appointing a management committee (including a meeting of owners convened under sections 3, 3A, 4 and 40C) should be 10% of the owners. This is to ensure that meetings convened for the purpose of appointing the first management committee are attended and participated by a representative number of owners. Apart from requiring that the appointment of a management committee must be passed by a resolution at an owners' meeting, there is also a quorum requirement which is applicable to the entire process of such meeting. If during the meeting a quorum is not present, the meeting cannot continue.

Question 8

12. We note the view of some Members of the Subcommittee on the Review of the BMO that owners should be given the option to appoint a proxy to attend and vote at the owners' meeting or just to appoint the proxy to attend the meeting only. This was in fact the original proposal of the Administration which was discussed at the Subcommittee meetings on 6 February and 4 March 2004. However, there were also comments at the Subcommittee meetings that allowing the owners such an option would render the proxy instrument a voting paper and would create a lot of extra work for the management committee in counting the votes.

13. Having considered the various views of the Subcommittee, and strongly believing that an owner should carefully consider appointing someone he/she trusts to be his/her proxy, we put forward the present proposal in the Bill, stipulating that an owner may cast a vote personally or by proxy at a meeting convened under sections 3, 3A, 4 or 40C. The instrument appointing a proxy shall be in the form set out in Form 1 in Schedule 1A. Subject to the enactment of the legislative amendment, the Form shall become the specified form of the BMO and could not be amended.

14. As for the example cited by the Hon CHOY So-yuk, if two or more persons are the co-owners of a share and more than one of the co-owners seeks to cast a vote by proxy in respect of the share, only the vote that is cast by the co-owner by proxy whose name, in order of priority, stands highest in relation to that share in the register kept at the Lang Registry shall be treated as valid. For details, please refer to the amended sections 3(9), 3A(3G), 4(11) and 40C(10).

Questions 9-11

15. On the questions about the incorporation of owners of house developments, please refer to LC Paper No CB(2)1709/04-05(01).

16. The case¹ quoted by the Hon CHOY So-yuk is Chun Fai Garden, which consists of 18 lots of land. While each of the 18 lots has its own DMC, the whole development is subject to a Deed of Covenant and Management Agreement, which sets out clearly the procedures and methods of appointing the management committee. If each floor of the three-storey building erected on the lot is owned by an individual owner, they will be the co-owners of the lot and therefore hold the undivided shares of the lot. In the judgment delivered by the High Court, the point at issue is not whether an OC can be formed in the development, but the validity of the OC formed under the more stringent DMC clauses instead of those of the BMO. Having regard to the case, we have amended the requirement for the appointment of management committee and incorporation under section 3 of the BMO.

17. The legislative amendment will have no implication on the legal status of the OC of Chun Fai Garden.

Protection of members of management committee

Question 12

18. As for the definition of the term “good faith”, please refer to the Bills Committee paper submitted to the Legislative Council.

Question 13

19. Under paragraph 1(2) of Schedule 3 to the BMO, the chairman of the management committee shall convene a general meeting of the corporation at the request of not less than 5% of the owners for the purposes specified by such owners within 14 days of receiving such request. The responsibility for convening the above general meeting rests with the chairman, not the management committee. Hence, the chairman may be held personally liable

¹ *Siu Siu Hing v Land Registrar* (HCAL 77/2000).

for refusing to convene a general meeting.

20. There is a precedent judgment² at the Lands Tribunal holding that it is the responsibility of the chairman to convene a general meeting within 14 days of receiving a request. He cannot pass the responsibility to the management committee. Even if the management committee has made a decision not to convene a general meeting, this does not necessarily mean that the chairman has to follow such a decision. It is also held that the responsibility for convening the meeting rests personally with the chairman. The chairman (not the management committee) should be the one to make the decision and be held personally liable for it.

DMC Managers

Question 14

21. Clause 16 of the Bill defines the meaning of the term “DMC manager”, which “in relation to a building, means the person who is specified in the deed of mutual covenant to manage the building”. This is to differentiate the “DMC manager” (公契經理人) appointed under the DMC from the “manager” (經理人) subsequently appointed by the OC.

22. When the appointment of a DMC manager of a housing estate is terminated under the DMC, the manager subsequently appointed by the OC (including the one previously appointed under the DMC and re-appointed by the OC) will be appointed under a management contract. Any termination of the subsequent manager’s appointment should be done in accordance with management contract.

Composition of Management Committee, Corporation Meetings and the Procedure

Question 15

23. The new paragraph 10(A)2 of Schedule 2, new paragraph 6A(2) of Schedule 3, amended paragraph 3 of Schedule 6, and amended paragraphs 1(7) and 2(5) of Schedule 7 do not provide for any statutory sanction. In the

² 胡桂容及另一人訴黃漢明(LDBM 323/2002).

absence of sanction provisions, the affected party may seek redress from the court, which is in line with the provisions in paragraph 4 of Schedule 5 and paragraph 3 of Schedule 6 under the existing BMO. The proposed amendments will not affect the existing effect of paragraph 4 of Schedule 5, paragraph 3 of Schedule 6, paragraph 1(7) of Schedule 7 and paragraph 2(5) of Schedule 7.

Questions 16-17

24. Please refer to our response to Question 13.

25. Under paragraph 1(2) of Schedule 3, the chairman of the management committee shall convene a general meeting of the corporation at the request of not less than 5% of the owners for the purposes specified by such owners within 14 days of receiving such request. Paragraph 2(1) also provides that notice of a meeting convened under paragraph 1 shall be served by the secretary of the management committee upon each owner and upon the tenants' representative (if any) at least 14 days before the date of the meeting. The Lands Tribunal has held that the term "convene" does not mean formally holding the meeting³ and that the convening of a meeting within 14 days only means the issuance of the notice of meeting, but not holding the meeting within the specified 14-day period.

Annual Budget and Accounts

Question 19

26. Please refer to our response to Question 15.

Mandatory Terms in Deeds of Mutual Covenant

Question 20

27. Please refer to our response to Question 15.

³ 顏偉國訴何蘭及嘉都大廈業主立案法團(LDBM 173/2000).

Question 21

28. Schedule 7 to the BMO currently stipulates that the manager shall maintain an interest-bearing account and shall use that account exclusively in respect of the management of the building.

29. To offer better protection for the owners, we need to strengthen the requirements for the manager to open an account for the OC. This is to ensure that the management fees received by the manager on behalf of the OC are kept separate from his own monies and deposited into a segregated account and that the manager will not merge the management fees of different buildings into one single account. We propose in the Bill that the manager shall open one or more segregated interest-bearing trust/client accounts, with the OC as the client, for holding money received by him in respect of the management of the building. The interest-bearing accounts referred to in the BMO generally means the savings accounts. In fact, the expression “interest-bearing accounts” is extensively used in a number of other legislation⁴ in Hong Kong. The reference to “interest-bearing accounts” in those legislations also means the savings accounts.

The Person Presiding Over An Owners’ Meeting

Question 22

30. The provisions in Schedule 8 to the BMO apply to an owners’ meeting. According to section 34F of the BMO, the provisions in Schedule 8 shall, to the extent that they are consistent with the DMC, be incorporated into the DMC concerned.

31. Paragraph 8(b) of Schedule 8 stipulates that a meeting of owners may be convened by the owners of not less than 5% of the shares. Paragraph 12 provides that a meeting of the owners shall be presided over by the chairman of the owners' committee or, in his absence, by an owner appointed by the owners as chairman for that meeting. In fact, paragraphs 1(2) and 3 of

⁴ Section 24E of Drug Trafficking (Recovery of Proceeds) Ordinance (Cap 405), Section 2 of Minor Employment Claims Adjudication Board (Suitors’ Funds) Rules (Cap 453C), Section 3 of Labour Tribunal (Suitors' Funds) Rules (Cap 25D), Schedule 2 of Mutual Legal Assistance in Criminal Matters Ordinance (Cap 525) and Schedule 3 of Drug Trafficking (Recovery of Proceeds) (Designated Countries and Territories) Order (Cap 405A).

Schedule 3 contain similar provisions with regard to meetings of the OC. This in effect means that the chairman of an owners' committee (in respect of an owners' meeting) or the chairman of a management committee (in respect of a meeting of the OC) shall convene a meeting of owners at the request of not less than 5% of the owners for the purposes specified by such owners. Hence, even if the matters to be discussed and resolved at an owners' meeting convened at the request of not less than 5% of the owners may not be in the "interests" of the owners' committee, the chairman has to convene a meeting under the BMO at their request. As all matters arising at a meeting at which a quorum is present shall be decided by votes of the owners, we do not think that it is appropriate to allow any person, other than the chairman, to preside over an owners' meeting. Besides, management of private buildings is squarely the responsibility of the property owners themselves. It is incumbent on the chairman of an owners' committee to preside over an owners' meeting.

Abusing the Majority Voting System

Question 23

32. Under paragraph 3(3) of Schedule 3 to the existing BMO, all matters arising at a meeting of the corporation shall be decided by a majority of votes of the owners. Paragraph 10(2) of Schedule 2 provides that matters to be done by the management committee may be decided by a resolution passed by a majority of the votes of its members.

33. It would be ideal to have the owners' consensus on every issue relating to building management, but this seems highly unlikely. The BMO seeks to overcome this difficulty through a majority voting system so as to ensure the effective operation of OCs. As for the concern on the passing of "unreasonable resolutions" by OCs and the suggestion of introducing guiding principles on "reasonable resolutions" in the Bill, we find it difficult to provide a clear definition of the term "unreasonable" and disputes over its interpretation might have to be settled in court. It seems likely that this will give rise to even more disputes and will in turn impede the effective operation of OCs.

Amending the Deeds of Mutual Covenant

Question 24

34. The DMC is a deed and a private contract between the developer, the manager and the first purchaser of the building. It is not appropriate for the Government, who is not a party to the deed, to attempt to override those provisions set out in the DMC which are regarded as “unfair” by one party. Moreover, DMC sets out the rights and obligations of all owners of a building. It is questionable whether the view of a group of owners (or even the majority view of owners) would suffice and be appropriate in circumstances where the rights and duties of different parties may be affected.

35. That said, the Administration is aware of the need to introduce some mandatory terms to facilitate building management and has therefore introduced certain sections in the BMO, notably Part VIA and Schedule 7, which shall be impliedly incorporated in all DMCs. These provisions concern mainly the rights of owners to establish an OC and the duties of the building manager.

Registration of Managers

Question 25

36. There are divided views among the public on whether a regulatory scheme for property management companies should be introduced. Those in favour of a statutory regulatory scheme opine that this will help improve the performance of property management companies, whereas those against the proposal are concerned about the adverse effects on small and medium property management companies. They are also worried that owners of old private tenement buildings, who are generally less better-off, may not be able to afford to employ a property management company to carry out building management and maintenance works.

37. The aim of regulating property management companies is to protect the interests of owners. In fact, the existing BMO (Part VIA and Schedule 7) has already laid down provisions to protect the pecuniary interests of owners and prevent their money from being misused. To offer better protection for the owners, we have proposed to include a provision in the Bill to tighten the requirement for property management companies to establish and maintain accounts for OCs.

38. The Administration has an open mind on the matter. We hope that the property owners, OCs, the property management industry, relevant professional bodies and the public at large will have more discussion on the subject and put forward their views to us.

Home Affairs Department
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