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9 June 2005

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Building Management (Amendment) Bill 2005

Thank you for your letter of 1 June 2005.

2. Set out below are our comments on your further questions about the Building Management (Amendment) Bill 2005 (the Bill).

Clause 15

3. Please refer to our paper on “Proposed New Section 29A – Protection of Members of Management Committee” issued to the Bills Committee.

Clause 23

Sub-paragraph (a)

4. Paragraph 12 of Schedule 2 stipulates that in the event of any inconsistency between the Schedule and the terms of a deed of mutual

covenant (DMC) or any other agreement, the Schedule shall prevail. We note your view that this paragraph may not be necessary after the amendments to sections 3, 3A and 4 of and Schedule 2 to the BMO which have the effect that all management committees have to be formed in accordance with the BMO, instead of the DMC.

5. Whilst under our proposed amendments, all management committees will have to be formed in accordance with the BMO, instead of the DMC, we would like to retain this overriding provision both for the reason of avoidance of doubt and also to cater for the situations (although we are not aware of such actual cases so far) where the DMC expressly provides that a management committee appointed under the BMO or an owners' corporation registered under the BMO should follow certain procedures which are different from those set out in Schedules 2 and 3 to the BMO.

6. In addition to paragraph 12 of Schedule 2, paragraph 8 of Schedule 3 contains similar provision. For the same reason above, we also suggest to retain this latter provision.

Sub-paragraph (b)

7. The new sections 3(7), 3A(3E), 4(9) and 40C(8) stipulate that the convenor shall preside at a meeting of owners convened under the respective sections. Paragraph 2 of Schedule 2 provides for the appointment of the chairman, vice-chairman, secretary, treasurer and members of a management committee (after a management committee has been appointed). Whilst there is no express provision stipulating that the convenor shall continue to chair the meeting convened under sections 3, 3A, 4 and 40C after the management committee has been appointed, when reading together the new sections 3(7), 3A(3E), 4(9) and 40C(8) and paragraph 2 of Schedule 2, it is clear that the appointment of members of a management committee is also a matter to be discussed and resolved within the same meeting. As such, the convenor should continue to conduct the proceedings to appoint the members of a management committee under paragraph 2 of Schedule 2.

8. To address your concern, we propose to make a minor amendment to the new paragraph 2(4) of Schedule 2 (in clause 23(d)(ii)) –

- (a) in sub-paragraph (a), by making the new section 3(7) applicable for the purposes of appointing the members of a management

committee at a meeting of owners convened under section 3;

- (b) in sub-paragraph (b), by making the new section 3A(3E) applicable for the purposes of appointing the members of a management committee at a meeting of owners convened under section 3A;
- (c) in sub-paragraph (c), by making the new section 4(9) applicable for the purposes of appointing the members of a management committee at a meeting of owners convened under section 4; and
- (d) in sub-paragraph (d), by making the new section 40C(8) applicable for the purposes of appointing the members of a management committee at a meeting of owners convened under section 40C.

Sub-paragraph (c)

9. Paragraph 5A of Schedule 2 provides for the handing over of books or records of account of the management committee. If the retiring member fails to do so, the new management committee may seek from the court an order to compel the retiring member to deliver the books or records of account within specified time to the specified person or such other relief as appropriate to individual case. You may refer to *碧蘭大樓業主立案法團 訴 司徒勝* (LDBM 199/1999)¹.

Sub-paragraph (d)

10. The new paragraph 10A(2) in Schedule 2 stipulates a new requirement for the secretary of a management committee that he shall, on the payment of a reasonable copying charge, supply copies of the minutes of the management committee meetings to the owner (and other specified person). There is thus no relevant court case. However, if the secretary fails to do so, the owner concerned may seek from the court an order to compel the secretary to deliver the copies of the minutes within specified time to the specified person or such other relief as appropriate to individual case.

Clause 24

Sub-paragraph (a)

¹ In *碧蘭大樓業主立案法團 訴 司徒勝* (LDBM 199/1999), the newly appointed management committee applied to the court for an order for the former chairman of the management committee to hand over the documents. The order was not granted because the court considered that the applicant is not a validly appointed management committee.

11. While the chairman of a meeting has a common law power to adjourn the meeting, a recent court case² ruled that the right to adjourn the meeting rests with the meeting, and not the chairman alone. If there is the need, the meeting has to vote to decide whether the majority of the owners agree to the adjournment. But if nobody objects at the meeting, it could be taken that the meeting agrees to the adjournment.

12. You asked whether it would be lawful for the notice of meeting to specify that if the meeting could not be finished at a certain time, then it would be adjourned to a specific date to continue with the discussion about the outstanding business. First of all, we are not aware of any such actual cases in the past (except where the notice of meetings specifies the arrangement for inclement weather). Secondly, while we do not consider inclusion of such a note in the notice of meeting will render the notice unlawful, we do not think this note has any legal effect. As explained above, the right to adjourn the meeting rests with the meeting. The note could, at most, serve as an advance notice to owners that there might be the possibility of adjournment of the meeting. Thirdly, we have proposed to include a new Schedule 1A to set out the standard format for the proxy instrument. You may like to note that the format also provides for the possibility of an adjournment of the meeting.

Sub-paragraph (b)

13. The new paragraph 6A(2) in Schedule 3 stipulates a new requirement for the secretary of a management committee that he shall, on the payment of a reasonable copying charge, supply copies of the minutes of the owners' meetings to the owner (and other specified person). There is thus no relevant court case. However, if the secretary fails to do so, the owner concerned may seek from the court an order to compel the secretary to deliver the copies of the minutes within specified time to the specified person or such other relief as appropriate to individual case.

Clause 27

14. Paragraph 3 in Schedule 6 stipulates that the treasurer of a management committee that he shall, on the payment of a reasonable copying charge, supply copies of the financial statements of the corporation to the owner (and other specified person). If the treasurer

² 余劍英對張文東、張壯員、李卓玲、南盛閣業主立案法團 (LDBM 338/2004)

fails to do so, the owner concerned may seek from the court an order to compel the treasurer to deliver the copies of the financial statements within specified time to the specified person or such other relief as appropriate to individual case.

15. You may refer to 張宗明 訴 李俊德、寶怡花園業主立案法團、啓勝管理服務有限公司 (LDBM 351/1998)³, 大廈發展有限公司對 和域臺業主立案法團 (LDBM 76/1999)⁴ and 黎明光 訴 林兆年 (LDBM 297/2000)⁵.

Clause 28

16. The amended paragraphs 3 and 4 in Schedule 7 stipulate a new requirement for the manager to open and maintain a trust or client account. There is thus no relevant court case. However, if the manager fails to do so, the owner concerned may seek from the court an order to compel the manager to comply with the legal requirement or such other relief as appropriate to individual case. The owner concerned may also seek damages against the manager for loss suffered as a result of the manager's failure to comply with the requirement.

17. If you have further questions on the above, please feel free to contact me on 2123 8391.

[signed]

(Mrs. Angelina Cheung)
for Director of Home Affairs

³ In 張宗明 訴 李俊德、寶怡花園業主立案法團、啓勝管理服務有限公司 (LDBM 351/1998), an owner applied to the court to request the respondents to, among others, supply copies of the budgets. The court ruled that the respondents should provide such copies of documents under their custody to the applicant upon payment.

⁴ In 大廈發展有限公司對 和域臺業主立案法團 (LDBM 76/1999), an owner applied to the court to request copies of the budget and audited accounts of the OC for the past six years. The court ruled that the OC did not possess all the documents requested and the OC had already supplied the information as far as it could.

⁵ In 黎明光 訴 林兆年 (LDBM 297/2000), an owner applied to the court to request the chairman of the management committee to provide copies of the income and expenditure accounts. The court ruled that the requests under paragraph 3 of Schedule 6 should be made in writing.