

18 February 2002

The Secretary
LegCo Panel on Home Affairs
Subcommittee on Review of
The Building Management Ordinance
Legislative Council Secretariat
Legislative Building
8 Jackson Road, Central
Hong Kong

Dear Sir/Madam

I have been following the work of the Subcommittee with great interest, concern and hope. I request the Subcommittee to consider my following submissions:

1. **Unfair Deed of Mutual Covenant (DMC)**

In the Foreword in the Booklet on Building Management produced by the Home Affairs Department it is stated that one of the purposes of the amendments to the Multi-storey Building (Owners Incorporation) Ordinance (Cap.344) was "**to rectify unfair provisions in the Deed of Mutual Covenant (DMC)**". In the current review the Administration cannot turn away from this policy. **I therefore suggest that Part VI A should be amended to the effect:**

- (a) **that the Revised Guidelines for Deeds of Mutual Covenant (LACO Circular Memo No. 41 of 29.6.99) should apply to all DMCs irrespective of the dates of the DMC.** This need is obvious as most old DMCs are grossly unfair to the individual owners. Take Discovery Bay for example: the City Owners Committee (COC) formed under the DMC has no power at all over the Discovery Bay Services Management Ltd. (DBSML) which is a subsidiary company of the developer and is not legally responsible to the owners or the COC for its actions. Section VII para. 9 of the DMC stipulates that all resolutions passed at a meeting of the COC are binding on the owners but **not** on the Manager (i.e. DBSML).

This grossly unfair DMC still applies to new properties which the developer puts on the market today and in future despite the fact that these new properties are constructed under the new master development plan approved by the Administration as late as 2000;

- (b) that the distribution of votes at owners meeting should be proportional to the amount of management fee payable.**

2. Enforcement of the Building Management Ordinance

For the BMO to be of practical use to those it intends to protect -- the small owners from the powerful developers -- there should be provisions for a conflict resolution system which is simple, quick and inexpensive. I suggest it should be modelled on the machinery for settlement of labour disputes, namely:

- (a) The Home Affairs Department should provide the following services:
 - (i) advisory
 - (ii) conciliation
 - (iii) mediation or arbitration

- (b) If the above services fail to resolve a dispute and litigation is necessary, then it should be quick, simple and inexpensive (similar to the Labour Tribunal Ordinance). If the Lands Tribunal must be used then there must be a limit in cost, including that claimed by the winning party in the litigation, when the case is referred to it by the Home Affairs Department. This arrangement would prevent abuse of the low cost system.

Under the provisions of the current law an owner who wants to enforce his/her rights under the BMO (e.g. Part VI A) will have to go the Lands Tribunal which was originally established to deal with more complicated and technical matters than building management. In my experience I was not able even to see certain accounting documents which the DBSML was unwilling to show. I have not tried to enforce my right at the Lands Tribunal because it can be very time-consuming and expensive for me as an individual owner who wants to protect the interests of all owners concerned. I can go bankrupt in a lawsuit with DBSML which has all the management funds at its disposal and the powerful developer behind it. **Knowing this weakness in the law management can ignore the law altogether.**

3. Preventing abuse of using proxy

I suggest that there should be a provision in the BMO to the effect that only individual owner who intend to attend an owners meeting may accept or solicit

proxies. An owner who solicits a proxy should explain the purpose to the other owner and ask him to complete all relevant items in the proxy form.

It is not uncommon that estate managers use the proxy system to collect votes for those candidates of their choice or to vote in their favour. This is in fact a common practice in Discovery Bay. The DBSML will send out staff to ask owners to sign the blank proxy forms and then give the proxies to the candidates or owners of their choice, who will get elected or vote in their favour.

I would be pleased to explain my suggestions in person.

I await your reply.

Yours faithfully

Amy Yung
Islands District Council Member

29 April, 2002

(Revised on 9 May 2002)

The Secretary
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The Buildings Management Ordinance
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Dear Sir/Madam

I note that the Administration is considering the “establishment of a non-statutory mediation mechanism to resolve building management disputes” as revealed in the last meeting of the Panel on 20 March, 2002. This is a far cry from my suggestion for a comprehensive conflict resolution system which should be simple, quick and inexpensive. (See Para 2 of my letter of 18 February 2002 to you.)

2. I don't think the Administration's piecemeal-proposed solution is going to work at all. The Hong Kong Mediation Council defines “mediation” as a voluntary, non-binding private dispute resolution process in which a neutral person helps the parties to reach a negotiated settlement. I cannot see how a non-statutory mediation mechanism as envisaged by the Administration is going to work given the special characteristics of building management disputes which mainly involve the enforcement of the small owners' statutory rights in building management. Managers of large estates such as Discovery Bay is so powerful and can ignore any demand of right by an individual owner, knowing that he/she would not have the resources to go the Lands Tribunal to enforce his/her rights under the BMO. There is no incentive at all for these managers to go to mediation. In my view, mediation of a voluntary nature is only attractive and useful to disputing parties who are more or less equal in strength and would have to pay a higher price if they choose litigation instead.

3. For mediation to work at all in the context of building management disputes, particularly in cases involving the BMO, it must have the following features which would induce the parties in dispute to use it:

- a. It must be established within the Home Affairs Department (HAD) who is the administrator of the BMO.
- b. Either part in dispute should be able to register its case with the HAD to start the process.
- c. If one party refuses to attend mediation or when mediation fails to settle a dispute the HAD may refer the case to the Lands Tribunal. When a case is so referred there should be special arrangements so that lawyers are **not** allowed to represent the parties involved and cost should be minimal.

4. The Lands Tribunal in its present form is not suitable for such cases because of the high legal cost involved which a small owner cannot afford.

5. The BMO, with all its good intention to protect small owners, is not effective without a simple, cheap and quick system to enable the small owners to enforce their rights. The Government has the responsibility to make it effective otherwise it is just paying lip service.

6. I request this paper be presented to the Panel for consideration at its next meeting on 14 May, 2002.

I would be pleased to explain my suggestions in person.

Thank you for your attention.

Yours sincerely

Amy Yung
Islands District Council Member
10 June 2003

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By Hand and by email
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Dear Sirs

Re: Consultation Paper on Proposed Amendments to the Building Management Ordinance (Cap.344)

I am very surprised that the Consultation Paper does not include a very important item which was discussed in considerable detail at the LegCo on 20 March 2002. It is about the introduction of a simple, quick and inexpensive mechanism for the settlement of disputes arising from the BMO. Without such a mechanism, the BMO, with all its good intention to protect small property owners, is ineffective and virtually unenforceable. This is so because the small owners have not the necessary means, i.e. money, time and knowledge, to challenge the powerful estate managers or property developers at the Lands Tribunal. The risk of having to pay legal costs in the event of losing a case is so intimidating that no individual owner or owners' representative would dare to bring them to the Lands Tribunal in order to enforce his/her rights under the BMO.

HAD's response so far is to try out if the Hong Kong Mediation Council and the Hong Kong Mediation Centre can meet the required need. It has referred 10 cases of building management disputes to these two bodies for mediation to see if they are a suitable mechanism for the purpose. So far the results have been very disappointing and have proved that they are not suitable bodies for this particular purpose. HAD should have known that is not going to work as the two bodies are voluntary organizations and they have no power or influence whatsoever to cause the parties in dispute to use their mediation service nor can they cause any settlement to be respected by the parties.

The Office of the Ombudsman in its report of 27 March 2003 on the Direct Investigation into the Role of Home Affairs Department in Facilitating the Formation of Owners' Corporations states:

“Mediation performed by HAD is informal and cannot proceed without the consent of the disputing parties. On the other hand, arbitration of building management disputes by the Lands Tribunal is time-consuming and costly. A variety of mechanism exists for the settlement of labour disputes and employment claims in a quicker, simpler and less expensive manner than the Lands Tribunal. HAD should take reference from these for settling building management disputes.”

The report asks HAD **“ to consider the scope for simpler, less formal and less costly mechanism for resolving building management disputes”**

HAD has accepted the Ombudsman’s report.

Since HAD has accepted that its existing voluntary mediation service is not suitable for settling such disputes how can it even think that the Hong Kong Mediation Council and the Hong Kong Mediation Centre may be suitable? HAD should not waste more time on the trial scheme which should not have been carried in the first instance.

There is an urgent need to introduce a simpler, less formal and less costly mechanism for resolving building management disputes. This is in line with the Ombudsman’s view. I strongly recommend that the BMO should be amended to establish a Mediation Board which can take as model the Board of Review under the Inland Revenue Ordinance (Cap 112). Briefly, it can include the following essential elements:

1. The Chief Executive appoints a Panel consisting of a number of Presidents, Deputy Presidents and Members.
2. A President or Deputy President and a small number of Members will sit as the Board when required. They are rendering social service and are normally unpaid.
3. A party in dispute may apply to HAD for referral to the Board.
4. HAD should convene a Board hearing which can take place on HAD premise, such as a conference room.
5. .HAD may charge a fee to cover administration cost.
6. The Board’s decision or award should carry certain legal effect.
7. Appeal to the Lands Tribunal should be available but the non-appealing party should not bear any legal costs.

This mechanism will not put any financial burden on Government. On the other hand it will remove the long standing grievances of small property owners and improve the effectiveness of the BMO and HAD's administrative policy on building management. Government therefore should have no reason to reject such a proposal.

As suggested by the Ombudsman, HAD should take reference from the mechanism for settling labour disputes. In this respect I suggest that HAD should refer to the operation of the Labour Tribunal and the provision for conciliation in the Labour Relations Ordinance. These would be useful references for the formation of the proposed Mediation Board.

I am ready to discuss with you in detail anything about this proposal.