

7 September 2005

URGENT BY HAND & BY EMAIL

Our Ref. SMPC

Ms. Flora Tai
Clerk to Bills Committee
Bills Committee on Building Management (Amendment) Bill 2005
Legislative Council Building
Jackson Road
Central
Hong Kong

Dear Ms. Tai,

Building Management (Amendment) Bill 2005

We refer to the captioned Bill and would like to submit the comments of the Institute's Small and Medium Practitioners Committee and its Building Management Working Group as follows:

1. Clause 14 amending Section 27 – Accounts of corporation

In addition to the proposed changes to the various subsections of Section 27, we would like to recommend the following changes to Section 27 of the Building Management Ordinance (BMO):

- (a) We suggest that the Management Committee should, upon receiving the audited financial statements incorporating the income and expenditure account, the balance sheet and the auditors' report, and the management letter issued by the auditors, if any, distribute the documents to the owners, together with the notice and agenda of the annual general meeting.
- (b) We also suggest that the full disclosure and approval from the OC are required for any management services rendered by the management company, which may involve a third party service provider with possible mark-up charges on expenses or services.
- (c) It has been brought to our attention that some OCs do not keep sufficient transaction records. As this is a requirement under Section 27 of the BMO, we suggest that a penalty clause should be introduced for the failure to comply with this requirement.
- (d) In most cases, the auditor's appointment for the OC is made by owners holding a larger percentage of the total number of shares. We suggest that the appointment should be decided by the OC's Annual General Meeting at the fee to be directed by the Management Committee.

2. Clause 59 amending Section 45 – Jurisdiction of tribunal in relation to building management

We propose that a Tribunal should be established to settle the disputes arising from building management on the grounds as follows:-

- (a) We consider that this proposed Tribunal should protect small property owners from the risk of paying unproportionately high legal costs in the event of losing lawsuits against the OC. As such, owners could pursue their rights effectively.
- (b) We do not consider it appropriate to appoint Hong Kong Mediation Council or the Hong Kong Mediation Centre to render the mediation service and to make dispute settlement as they are not statutory bodies.
- (c) We consider that it would be time-consuming and costly to handle the arbitration of building management disputes by the Lands Tribunal. We suggest that a reference model should be made to the existing mechanism of labour disputes or the Board of Review process set up under the Inland Revenue Ordinance.
- (d) We understand that the Home Affairs Department (“HAD”) had consented to the suggestions made by The Office of the Ombudsman in their Report on “The Direct Investigation into the Role of Home Affairs Department in Facilitating the Formation of Owners’ Corporations” issued in March 2003, such that the HAD would consider a simpler, less formal and costly mechanism for resolving building management disputes. The proposed Tribunal would position appropriately in such perspective.

Furthermore, we suggest the following features of the proposed Tribunal:-

- (a) It should be established within the HAD which is the administrator of BMO.
- (b) The Panel of the Tribunal should consist of a number of Presidents, Deputy Presidents and Members who render voluntary service, and should be appointed by the Chief Executive of HKSAR.
- (c) The President or Deputy President and a certain number of Members will sit on the Board when required.
- (d) A party in dispute may register at the HAD for referral to the Panel.
- (e) The HAD should convene a Tribunal hearing at its premise.
- (f) The HAD may charge a fee to the disputed parties to cover administrative cost.
- (g) The Panel decision should carry certain legal effect.

- (h) Appeal to the Lands Tribunal or High Court should be available but the non-appealing party should not bear any legal costs.

We consider that the proposed Tribunal will give no financial burden on the Government while relieving the grievances of small property owners and improving the effectiveness of settling building management disputes.

3. Deed of Mutual Covenant (“DMC”)

We note that some old DMCs are unfair to the individual owners. These old DMCs are still applying to new properties by developers. We suggest 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 and should have overriding effect.

4. Clause 24 amending the Third Schedule – Meeting and procedure of corporation

- (a) We suggest that the distribution of votes at owners’ meeting should be proportional to the amount of management fee payable.
- (b) We note that only individual owners who attend an owners’ meeting, may accept or solicit proxies. 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. We suggest that the abuse of using proxy should be prevented.
- (c) Some DMCs contain provisions that the first owner and the developer are not required to pay any management fee deposit and other deposits. We suggest that any owners including the first owner and the developer should have an equal obligation to contribute such deposits as well as the subsequent owners.
- (d) Some owners holding a certain percentage of the total number of shares are not required to contribute their share of the management fees under the provisions of some DMCs, for example, car park owners. We suggest that all owners, irrespective of the number of shares they hold, should have an equal obligation to contribute their share of the management fees.
- (e) We refer to paragraph (4) of Schedule 3 and suggest that prior to the proceeding of the general meeting convened by the owners for the purpose of appointing a management committee, an auditor should be present to validate the proxy forms before the proceedings of owners’ meetings with the purpose of avoiding disputes of voting among owners.

5. Procurement of professional indemnity

Arising from the Albert House case, we consider that an additional requirement should be set out to arrange for the procurement of the professional indemnity and fidelity insurance policy on performance failure. This should mitigate the damages to the owners resulted from similar failures of the performance of the property management company in cases such as the illegal building structure or cash embezzlement of the owners' incorporation's funds under the care of the property management company, etc.

6. Licensing of property management company

We suggest that a licensing system for proper regulation of the property management companies should be introduced for the public interest.

7. Schedule 7 – Mandatory terms in Deeds of Mutual Covenant – paragraph 7(1) – Termination of manager's appointment by owners' corporation

We re-affirm that the termination of the appointment of the DMC manager should be conducted by a resolution of owners of not less than 50% of the shares as defined under sub-paragraph 5A of Schedule 7.

If you require any clarifications on our above comments, please do not hesitate to contact the undersigned at 2287 7026 or email schan@hki CPA.org.hk.

Yours sincerely,

Stephen Chan
Executive Director

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c.c. Hon Tam Heung-man