

Bills Committee on Building Management (Amendment) Bill 2005

Matters Arising from Meeting on 23 June 2005

At the meeting of the Bills Committee on 23 June 2005, Members raised a number of questions during the discussion of LC Paper No. CB(2) 1885/04-05(03), which was submitted by the Administration in response to Hon CHOY So-yuk's paper LC Paper No. CB(2) 1709/04-05(04). Below are the responses of the Administration to these questions.

Avoidance of Formation of More than One Owners' Corporation in a Building

2. Members were generally concerned on whether there are sufficient provisions under the BMO to avoid the formation of more than one owners' corporation (OC) in a building.

3. Section 7 of the BMO provides that a duly appointed management committee shall within 28 days of such appointment apply to the Land Registrar for the registration of the owners as a corporation under the BMO. Section 8 further provides that the Land Registrar shall, if satisfied that the legal requirements have been complied with, issue a certificate of registration. With effect from the date of issue of the certificate of registration, the owners for the time being shall be a body corporate with perpetual succession and the management committee appointed shall be deemed to be the first management committee of the OC. Section 16 provides that when the owners of a building have been incorporated, the rights, powers, privileges and duties of the owners in relation to the common parts of the building shall be exercised and performed by the corporation to the exclusion of the owners. Reading these provisions together, it is clear that only one OC can be formed in a building.

4. Administratively, the Land Registrar will issue only one certificate of registration to one building under section 8 of the BMO. The Land Registry has an effective mechanism in preventing the registration of more than one OC in a building. The Registry has a control register for receipt of applications for registration as OC. In processing the applications, the Land Registrar will verify the name and address of the building against the control register to ensure that only one OC is registered. Each application will be considered on its own merit.

5. It must also be stressed that the term “building”¹ in the BMO does not refer only to the building structure itself but also the land upon which the building structure is erected. Furthermore, the building (together with the land) has to be in common ownership or held for the common enjoyment of owners and occupiers. The basis of common ownership (or common enjoyment) among owners is set out in the deed of mutual covenant (DMC) of the building. It is thus more accurate to say that only one OC could be formed for one DMC.

6. Some Members asked if the Government could introduce measures at the stage when different groups of owners (of not less than 5% of the shares) are preparing for the owners’ meeting under section 3 of the BMO. This is not viable. Section 3 of the BMO provides that the owners of not less than 5% of the shares, amongst others, may convene a meeting of owners to appoint a management committee. Whilst this is, under most circumstances, the first step for OC formation, it is not guaranteed that the first group of owners with 5% shares could meet the requirement under the existing/amended section 3(2)(b), i.e. the resolution to appoint a management committee is supported by the owners of not less than 30% of the shares in aggregate. As such, we could not specify, whether through statutory or administrative measures, that only the first group of owners with 5% shares, no matter they are the first group to convene an owners’ meeting under section 3, or that they are the first group to apply to the District Office for a certificate of waiver for the land search fees, could be allowed to register with the Land Registrar.

Waiver of Land Search Fees for Convenors

7. That brings us to the Home Affairs Department’s (HAD) scheme in subsidising owners who are interested in forming OCs for the land search fees at the Land Registry. Some Members were concerned about how HAD could ensure that (1) owners who have enjoyed the free land search service will return the land search records to HAD; (2) the owners will not use the records for commercial purpose; and (3) the land search

¹ According to section 2 of the BMO, “building” means –

- (a) any building which contains any number of flats comprising 2 or more levels, including basements or underground parking areas;
- (b) any land upon which that building is erected; and
- (c) any other land (if any) which –
 - (i) is in common ownership with that building or land; or
 - (ii) in relation to the appointment of a management committee under Part II or any application in respect thereof, is owned or held by any person for the common use, enjoyment and benefit (whether exclusively or otherwise) of the owners and occupiers of the flats in that building.

records are up-to-date.

8. First of all, HAD will require owners applying for the waiver to sign an undertaking. By signing the undertaking, the owners concerned undertake to convene, in the capacity of the convenor(s), an owners' meeting to appoint a management committee within 60 days after the approval of the application and the issue of the waiver certificate. No matter whether an OC is formed, the owners undertake to return the land search records on expiry of the 60-day period (subject to extension to be granted by the District Officer). The owners also undertake that the land search records obtained from HAD will not be used for any purpose other than the OC formation. The undertaking stipulates clearly that the land search records belong to the Government. A set of the application form and undertaking is at the Annex.

9. The undertaking is legally binding on the owners. If they fail to comply with the terms of the undertaking, the Government may take civil action against them.

10. HAD is unable to guarantee that the land search records provided are up-to-date. Firstly, according to the Land Registration Ordinance (Cap.128), an instrument needs only be registered with the Land Registry within one month of its execution. Secondly, the convenor will need to obtain the land search records from the Land Registry at least 14 days before the owners' meeting to facilitate the issuance of notice to owners. Thirdly, for subsequent groups of owners who would like to convene an owners' meeting after the first group has failed, the land search records obtained at an earlier date may not be able to reflect any change of ownership which may occur after the issuance of the records by the Land Registry. This was clearly explained to the owners concerned.

11. The Administration is aware of such shortcomings. However, since this involves the use of public funds, we are unable to provide any group of owners with 5% shares indicating an interest to convene an owners' meeting with such a free service. HAD's practice is to provide the fee-waiver once for any one building only. Land search records are public records that could be obtained at a fee of \$15 per unit at the Land Registry. Owners who want to form an OC could always apply for land search records from the Land Registry. In addition to the one-off free service provided by HAD, the Hong Kong Housing Society has recently introduced a scheme to subsidise owners in forming OCs. We hope this scheme will, to a certain extent, assist owners in obtaining updated land

search records from the Land Registry.

Body Corporate to Act as Convenor

12. A Member asked who should act as the convenor of an owners' meeting for the purpose of appointing a management committee if the owner concerned is a body corporate. There are a number of provisions in the BMO which touch on the owner being a body corporate. Paragraph 11(1) of Schedule 2 provides that where an owner, being a body corporate, is appointed as a member of a management committee, that body corporate may (notwithstanding any provision in a DMC to the contrary²), appoint a director or other officer of that body or some other individual to act as its representative as if the authorised representative were a member of the management committee in his own right. The amended paragraph 4(2) of Schedule 3 to the BMO provides that if the owner is a body corporate, the instrument appointing a proxy shall (notwithstanding anything to the contrary in its constitution), be sealed or stamped with the seal or stamp of the body corporate and signed by a person authorised by the body corporate in that behalf.

13. If the owner concerned is a body corporate, the body corporate may appoint a director or other officer of that body or some other individual to act as its representative. This representative could then act as the convenor of the owner's meeting. The same applies when the owners' meeting is convened in accordance with section 3(1)(a) of the BMO, i.e. by the person³ managing the building in accordance with the DMC, who is in most cases a corporation. This practice has been adopted in many owners' meetings and so far, we have not encountered any problem in this regard.

Owners' Right to Incorporation

14. Some Members asked if there are provisions in the BMO protecting owners' right to incorporate and their right to appoint a new management committee.

15. Firstly, section 34J(1) of the BMO provides that no provision in a

² The wordings "Notwithstanding any provision in a deed of mutual covenant to the contrary" in paragraph 11(1) of Schedule 2 to the BMO are deleted in the Bill as they are redundant.

³ According to section 3 of the Interpretation and General Clauses Ordinance (Cap.1), "person" includes any public body and any body of persons, corporate or unincorporate, and this definition shall apply notwithstanding that the word "person" occurs in a provision creating or relating to an offence or for the recovery of any fine or compensation.

DMC or other agreement shall operate to prevent the owners of any building from being registered as a corporation under the BMO and any such provision shall be void and of no effect.

16. According to the current Guidelines for DMC issued by the Lands Department (Guideline No.13), house rules may be made by the building manager with the approval of the owners' committee or the OC, if formed. Such house rules must not be inconsistent with the DMC of the building. The manager of a building has a general duty under the DMC to manage the building and this includes, amongst others, the avoidance of nuisance caused to the owners/residents of the building. We are aware that some property management companies have made house rules which are related to publicity activities conducted by owners (e.g. distribution of leaflets and household visits) on the ground that some owners/residents may consider such activities a nuisance. We consider that whether such publicity activities are to be regarded as "nuisance" should best be decided by the owners themselves. It is, therefore, in the best interests of owners to form an owners' committee or an OC as soon as possible so that they could pass resolutions regarding the house rules in accordance with the majority wish of the owners. According to the current Guidelines for DMC (Guideline No.10), the manager of the building shall call the first meeting of owners as soon as possible, but, in any event, not later than nine months after the date of the DMC, which meeting shall appoint a chairman and committee of owners or shall appoint a management committee for the purpose of forming an OC under the BMO.

17. Once an OC has been formed, if the owners are dissatisfied with the incumbent management committee, they could request the chairman to convene a general meeting of the corporation under paragraph 1(2) of Schedule 3 to the BMO. The owners may resolve to appoint an administrator and dissolve the management committee at the owners' meeting. If the above does not work, the owners may also, in accordance with section 31 of the BMO, make an application to the Lands Tribunal to dissolve the management committee and appoint an administrator for the building.

Adjournment of Owners' Meeting

18. For matters relating to the adjournment of owners' meeting, please refer to paragraphs 2 to 8 of the Administration's paper on "Matters Arising from Meeting on 12 July 2005 – Appointment of Proxy" [LC Paper No. CB(2)2617/04-05(03)] which has been issued separately

to the Bills Committee.

Table on Major Amendments to the BMO

19. A table setting out the major proposed amendments to the BMO has been issued separately to the Bills Committee [LC Paper No. CB(2)2192/04-05(03)].

Home Affairs Department
September 2005

Annex

To: The Government of Hong Kong Special Administrative Region
(via _____ District Office)

Application for Exemption from the Charge for Owners' Records

*I/We confirm that *I am/we are the owner(s) of not less than 5% of the shares in _____ (name of the building). *I/We would like to form an owners' corporation (OC) under section 3 of the Building Management Ordinance (Cap. 344). *I/We undertake to act as the convenor(s) of an OC formation meeting to appoint a management committee. Details of the building are as follows:

Name of the building : (in English) _____
(in Chinese) _____
Address of the building : (in English) _____
(in Chinese) _____

To facilitate the formation of OC, *I/we need to obtain the records of all owners in the building from the Land Registry and hereby apply for an exemption certificate in respect of the charge for the said records. If the application is approved, please give the certificate to the person named below, whose personal particulars are as follows:

Name : (in English) _____
(in Chinese) _____
Contact Tel. No. : _____

* Please delete as appropriate

Date: / /

* Please delete as appropriate

** If applicable

(Note: Please attach additional sheets if necessary)

Date: / /

Statement of Purposes in Respect of Collection of Information

Purpose of Collection

1. The personal data you provide by means of this form will be used for the purpose of forming an owners' corporation under section 3 of the Building Management Ordinance (Cap. 344).

Classes of Transferees

2. The personal data provided in this form may be disclosed to other Government bureaux, departments, and other relevant persons and bodies for the purposes mentioned in paragraph 1 above.

Access to Personal Data

3. You have the rights of access to and correction of your personal data as provided for in sections 18 and 22 and Principle 5 in Schedule 1 of the Personal Data (Privacy) Ordinance. The right of access includes the right to obtain a copy of your personal data provided in this form.

Enquiries

4. Enquiries concerning the personal data collected by means of this form, including requests for access to and correction of data, should be directed to respective District Offices.