

Bills Committee on Building Management (Amendment) Bill 2005

Matters Arising from Meeting on 12 July 2005 Appointment of Proxy

At the meeting of the Bills Committee on 12 July 2005, Members raised a number of questions about the appointment of proxy 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)¹. Below are the responses of the Administration to these questions.

Adjournment of Owners' Meeting

2. In accordance with law books, an adjournment of a meeting, if bona fide, is only a continuation of the meeting and the notice that was given for the first meeting holds good for and includes all the other meetings following upon it. If however, the meeting is adjourned without a date for the adjourned meeting having been fixed, a fresh notice must be given². If a quorum is not present³ or when there is a failure to muster a quorum⁴, the chairman may adjourn the meeting to another date⁵. Proxies deposited prior to the original meeting may be used at the adjournment, for in the absence of any provision to the contrary, an adjourned meeting is a continuation of the original meeting⁶.

3. According to a recent judgment of the Lands Tribunal⁷, the right to adjourn an owners' 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 owners agree to the adjournment. But if nobody objects at the meeting, it could be taken that the meeting agrees to the adjournment.

¹ Further to LC Paper No. CB(2)1709/04-05, the Hon Choy So-yuk has raised further questions in LC Paper No. CB(2)2017/04-05(03). The Administration's response is set out in LC Paper No. CB(2)2192/04-05(02).

² Please refer to paragraphs 5-15 and 6-16 of "Shackleton on The Law and Practice of Meetings", Sweet and Maxwell, 9th edition.

³ Please refer to paragraph 6-16 of "Shackleton on The Law and Practice of Meetings", Sweet and Maxwell, 9th edition.

⁴ Please refer to page 68 of "Meetings in Hong Kong – Their Law and Practice", Longman, 5th edition.

⁵ The UK Court of Appeal held in *Byng v London Life Association and another* [1989] 1 All ER 560, C.A. that in any circumstances where there is a meeting at which the view of the majority cannot be validly ascertained, the chairman has a residual common law power to adjourn so as to give all persons entitled a reasonable opportunity of voting and speaking at the meeting.

⁶ Please refer to paragraph 14-24 of "Shackleton on The Law and Practice of Meetings" 9th edition.

⁷ 余劍英對張文東、張壯貝、李卓玲、南盛閣業主立案法團 (LDBM 338/2004).

4. It is also useful to make reference to Table A in the First Schedule to the Companies Ordinance (Cap.32). Regulation 56 of Table A provides that if within half an hour from the time appointed for the meeting a quorum is not present, the meeting, if convened upon the requisition of members, shall be dissolved; in any other case it shall stand adjourned to the same day in the next week, at the same time and place or to such other day and at such other time and place as the directors may determine, and if at the adjourned meeting a quorum is not present within half an hour from the time appointed for the meeting, the members present shall be a quorum.

5. That said, in actual practice, no matter it is a meeting of owners convened for the purpose of appointment of a management committee (i.e. before the owners have been incorporated) or a general meeting of owners convened after the owners have been incorporated, the District Office staff attending the meeting will normally recommend to the convenor/chairman and the owners to arrange afresh another owners' meeting in order to avoid any legal dispute in future. This is especially the case when there is insufficient quorum at the owners' meeting as the remaining handful of owners may not be able to pass on the message about the details of the adjourned meeting to other absentee owners. This means that a fresh notice for the re-convened meeting will have to be issued to owners in accordance with section 5 (for meetings convened for the purpose of appointment of a management committee) of or Schedule 3 (for OC meetings) to the Building Management Ordinance (BMO).

6. Paragraph 2 of Schedule 2 to the BMO provides for the appointment of the chairman, vice-chairman, secretary, treasurer and members of a management committee (after the resolution to appoint a management committee has been passed). The amended paragraph 2 stipulates that at a meeting of owners convened under sections 3, 3A, 4 or 40C, after a management committee is appointed, the owners shall by a resolution passed by a majority of the votes of the owners appoint the various members of the management committee. The above provision clearly indicates that the appointment of members of a management committee is a matter to be discussed and resolved at the same meeting when the management committee is first appointed.

7. If an owners' meeting convened under sections 3, 3A, 4 or 40C resolves only to appoint a management committee and for whatever reasons (e.g. insufficient time, insufficient quorum, etc), could not resolve

to appoint the members, while it is arguable that the chairman and/or the meeting may have a common law power to adjourn the meeting under certain circumstances, as explained in paragraph 5 above, the District Office staff attending the owners' meeting will normally recommend to the convenor and the owners to arrange afresh another owners' meeting in order to avoid any legal dispute about the legality of the resolutions passed.

8. Taking into account the above factors (paragraphs 5 – 7), we consider that as there is a common law power for the adjournment of meetings, this should be applicable to owners' meetings convened under the BMO as well. However, in order to ensure that owners are aware of the details of any adjourned meetings, we propose to make specific provisions in the BMO to the effect that all adjourned meetings should comply with the requirements set out in Schedule 3 to the BMO. In particular, the requirement of issuance of notice at least 14 days before the meeting should also apply to all adjourned meetings. Furthermore, we propose to amend Form 1 and Form 2 of Schedule 1A in the Bill to the effect that the original proxy instruments cannot be used at adjourned meetings. Subject to Members' views, we will introduce Committee Stage Amendments as appropriate.

Format of the Proxy Instrument

9. There is no common law right to vote by proxy, and such power must be conferred by statute (in our case the BMO) or by the regulations of the body concerned⁸.

10. We are aware that Members have diverse views on the format of the proxy instrument to be stipulated in the BMO. There are two issues at stake: (a) flexibility for owners to indicate their voting instructions to the proxy on the proxy instrument; and (b) flexibility for owners to alter the statutorily-stipulated format. As explained at the Bills Committee meetings, the Administration has no strong views on any format from both the legal and policy point of view. Annex A compares the various options for Members' consideration.

11. The format of proxy instrument stipulated in the proposed Schedule 1A of the Bill is modeled after the Companies Ordinance⁹. A copy of the relevant provisions in the Companies Ordinance is at

⁸ Please refer to paragraph 14-15 of "Shackleton on The Law and Practice of Meetings" 9th edition.

⁹ Paragraphs 72 and 73 of Table A of Schedule 1 of Companies Ordinance (Cap.32).

Annex B.

12. Some Members suggested that the following elements should be required for a proxy to be valid –

- the first four digits of the Hong Kong Identity Card number of the owner;
- the contact telephone number of the owner;
- the time of signing the proxy instrument; and
- the name and signature of a witness.

We are now seeking the views of the Office of the Privacy Commissioner for Personal Data. Our preliminary views are set out below.

13. *The Code of Practice on the Identity Card Number and Other Personal Identifiers* issued by the Privacy Commissioner for Personal Data provides that before a data user seeks to collect from an individual his Identity Card number, the data user should consider whether there may be any less privacy-intrusive alternatives to the collection of such number, and should wherever practicable give the individual the option to choose any such alternative in lieu of providing his Identity Card number. It is for consideration whether the first four digits of the Identity Card number (instead of the full number) may be regarded as a “less privacy-intrusive alternative”. Nonetheless, even though this may not constitute violation of the Data Protection Principles under the Personal Data (Privacy) Ordinance (Cap.486), if such information is to be used for verification purpose, the OC must possess the full Identity Card number of the owner concerned. There may also be complication if the owner concerned does not possess an Identity Card.

14. The same concern about personal data privacy applies to the contact telephone number of the owner. Whilst requesting the telephone number alone may not necessarily constitute violation of the Data Protection Principles, when such information is put together with other personal data of the same person (like the name and address of the owner), the concern may become valid.

15. We consider that it is legally feasible to mandate the owners to include the time (in addition to the date) of signing the proxy instrument. The Data Protection Principles under the Personal Data (Privacy) Ordinance provides that personal data shall not be collected unless the collection is necessary for or directly related to that purpose and the data are adequate but not excessive in relation to that purpose. Hence,

Members may wish to consider if they want to pursue such a proposal as including additional mandatory element(s) in the proxy instrument will not only complicate the instrument itself but also has adverse implication on the willingness of owners to appoint proxy to attend owners' meetings. For the same reason above, Members may wish to consider if the requirement for a witness should be made mandatory in the proxy instrument.

Cross-Checking of Proxy Voting

16. To facilitate the appointment of proxy by owners, we have published in June 2004, in consultation with the Department of Justice, a set of guidelines for reference by the OC and owners. The guidelines are a matter of good practice and are not legally binding.

17. Members may wish to note in particular the following guidelines which are drawn up with a view to facilitating the cross-checking of proxy voting in an owners' meeting –

- As a matter of good practice, the secretary of an OC may consider to acknowledge receipt of all valid proxy instruments submitted by depositing a receipt slip (preferably with an authorized signature of the OC and/or the seal of the OC) in the letter box of the owner.
- After verifying the proxy instruments, the secretary of the OC may consider posting the information in respect of those flats where a proxy has been appointed in a prominent place of the venue of the owners' meeting for inspection.
- The OC may consider including the information in respect of those flats in the building where a proxy has been appointed in the minutes of meeting for owners' information. This should be displayed in a prominent place of the building within 28 days of the owners' meeting in accordance with paragraph 6 of Schedule 3 to the BMO.
- The secretary may disclose the proxy instruments to other owners for inspection upon their request provided that the owners/proxies concerned have been explicitly informed of this arrangement and consent obtained before they complete the forms through the statement of purpose attached to the proxy instruments.

18. Members are invited to consider whether any of the above good practices regarding appointment of proxy should be turned mandatory in the law.

Power to Determine the Validity of a Proxy Instrument

19. The existing BMO is silent on who should have the power to determine the validity of a proxy instrument. In the absence of such an express provision, reference should be made to paragraph 3(3) of Schedule 3 which provides that all matters arising at a meeting of the corporation at which a quorum is present shall be decided by a majority of votes of the owners. Paragraph 7 of Schedule 3 further provides that the procedure at a general meeting shall be as is determined by the corporation. However, it will be cumbersome, if not unrealistic, to require the owners' meeting to decide the validity of each questionable proxy instrument. As such, we consider there is a need to stipulate in the BMO which person(s) has/have the power to determine the validity of the questionable proxy instruments lodged with the secretary.

20. The above issue has been discussed at the meetings of the Subcommittee on Review of the BMO on 6 February 2004¹⁰ and 4 March 2004¹¹. Having considered Members' views at the Subcommittee meetings and the Bills Committee meetings, we propose for Members' consideration that the chairman of the management committee should be given the power to determine the validity of the questionable proxy instruments. In the case of meetings convened for the purpose of appointing a management committee, the person presiding at the meeting should be given such powers. Subject to Members' views, we will introduce Committee Stage Amendments as appropriate.

21. There may be concern over the abuse of power by the chairman, especially when one of the resolutions to be passed at the owners' meeting is to dissolve the management committee or to terminate the appointment of the chairman. However, we consider that the chairman of the management committee, as the ex officio chairman of the meetings of the OC, is the most appropriate person to do so. Moreover, we have proposed to stipulate in the BMO the format of the proxy instrument. The chairman of the management committee, in determining whether the questionable proxy instruments are valid, should take into account the

¹⁰ LC Paper No. CB(2)1193/03-04(01)

¹¹ LC Paper No. CB(2)1518/03-04(01)

provisions in the BMO, which will, following the amendments, provide clearer and more definitive instructions on what should be regarded as a valid proxy instrument.

22. There was a suggestion at the Bills Committee that if an OC wishes to appoint a professional to assist in verifying the proxy instruments received, the Administration should liaise with the chairman of the professional body concerned to seek his assistance in providing such a referral. Information about law firms and their areas of practice is available at the Building Management Resource Centres. OCs/owners who wish to appoint a professional who specialises in building management cases may seek assistance/advice from our Building Management Resource Centres.

23. We do not consider it appropriate for District Office staff attending meetings of the OC to determine the validity of proxy instruments received by an OC. An OC registered under the BMO has the power and responsibility to manage and maintain the building in accordance with the DMC and the BMO. It is not appropriate to pass the responsibility of management of private properties to the Government.

24. Members also asked about the situation when two or more proxy instruments signed by the same owner were lodged and which one should be valid. Under such circumstances, the proxy who was last appointed by the owner should be valid. However, where the convenor of the owners' meeting/chairman of the meeting could not ascertain whom of the proxies was last appointed, neither proxies will be regarded as valid.

Police's Action in Dealing with Complaints Against False Proxy Instruments

25. Based on information collected from the 18 District Offices, we note that since January 2000, there have been some 110 owners' meetings which required Police's assistance in maintaining the order. Of these meetings, 13 were related to disputes about proxy instruments. According to our frontline staff, when called upon, Police officers would generally advise the disputing parties to seek agreement on the way forward. In some cases, the Police officers would recommend the disputing parties to bring the proxy instruments in question to the nearby Police station for further investigation.

26. As advised by the Police, in circumstance where it is believed that an offence has been committed, there is established procedure that a report should be made direct to the Duty Officer of the Division concerned for further investigation.

Hon Wong Kwok-hing's Suggestions Relating to Proxy

27. The Administration's response to the questions raised by Hon WONG Kwok-hing in his letter of 22 July 2005 will be issued to the Bills Committee separately (LC Paper No. CB(2)2617/04-05(01)).

Home Affairs Department
September 2005

Format of the Proxy Instrument

This paper discusses two issues: (I) whether owners should be able to indicate their instructions to the proxy on the proxy instrument; and (II) whether owners should be able to alter the format of the proxy instrument stipulated in the law.

I. Flexibility for Owners to Indicate their Instructions

2. Set out below are the arguments on the two options.

Format that disallows owners to give instructions to the proxy (Option A)

3. Arguments for Option A are –

- (a) Easy to follow by both the owners and the owners' corporation (OC).
- (b) The proxy will be counted for the purpose of the quorum and also be allowed to vote as he thinks fit.
- (c) Administratively easy for the OC in counting the number of owners and votes. Allowing owners to give voting instructions would render the proxy instrument a voting paper and would create a lot of extra administrative work for the OC in counting the votes.
- (d) Seem to be a fairer arrangement as allowing owners to give voting instructions before the owners' meeting might, to a certain extent, affect the voting results at the owners' meeting.
- (e) Able to accommodate the situation where the owners' meeting agrees to amend a proposed resolution on the agenda, which is permissible under paragraph 3(8) of Schedule 3 to the BMO. If a resolution is amended at the owners' meeting, the proxy instruments on which the voting instructions were indicated might immediately become invalid.
- (f) It is the responsibility of an owner to carefully consider appointing someone he trusts to be his proxy.

- (g) If an owner appoints someone he trusts to be his proxy, he can give written/verbal instructions on his voting intentions even if he is not able to indicate such instructions on the proxy instrument.
- (h) It is not necessary for all BMO provisions to be along the line of the Companies Ordinance (Cap.32)¹. In fact, it is the policy view that provisions governing the operation of OCs should be simple and easy to follow by ordinary property owners.
- (i) This option is generally preferred during public consultation.

Format that allows owners to give instructions to the proxy (Option B)

4. There are three further sub-options which include allowing owners to (i) indicate that the proxy should be counted as quorum only and could not vote, (ii) indicate that the proxy should be counted as quorum and could vote as the proxy thinks fit, and (iii) give voting instructions on the various resolutions on the agenda.

5. Arguments for Option B are –

- (a) The right to vote, including the right to indicate to his proxy how he wants to vote, should not be taken away from the owner.
- (b) This is in line with the flexibility provided to shareholders in company meetings under the Companies Ordinance¹.

II. Flexibility for Owners to Alter the Statutory Format of the Proxy Instrument

6. Set out below are the arguments on the two options.

Owners Only Allowed to Use the Statutory Format (Option A)

7. Arguments for Option A are –

- (a) Simple to follow by both the owners and the OC.

¹ Section 114C(6) of the Companies Ordinance (Cap.32) provides that any proxy form issued to a member of the company for appointing a proxy to attend and vote at a meeting of the company shall be such as to enable the member, according to his intention, to instruct the proxy to vote in favour of or against each resolution. Paragraphs 72 and 73 of Table A of Schedule 1 of Cap.32 sets out respectively the proxy instrument which allows or disallows the member an opportunity of voting for or against a resolution.

- (b) Avoid disputes over the validity of the proxy instrument – as any instrument that follows the statutory requirements should be accepted.
- (c) The crucial elements of a valid proxy instrument are already included in the statutory format.
- (d) If we allow flexibility for owners in a statutory format, then it begs the question on whether a sample form of proxy instrument provided to owners for reference (i.e. a non-statutory form) could serve the same purpose.

Owners Allowed to Alter the Statutory Format (Option B)

- 8. Arguments for Option B are –
 - (a) This is in line with the flexibility provided to shareholders in company meetings under the Companies Ordinance².
 - (b) This option enables the OC to accept authorization letters issued by a legal practitioner (power of attorney).
- 9. Members are invited to give their views on the above.

² Paragraphs 72 and 73 of Table A of Schedule 1 to the Companies Ordinance set out respectively the proxy instrument which allows or disallows the member an opportunity of voting for or against a resolution. Any form that is “as near thereto as circumstances admit” will be acceptable.

or extraordinary, as the case may be] general meeting of the company, to be held on the day of 19 , and at any adjournment thereof.

Signed this day of 19 .

This form is to be used *in favour of/against the resolution.

Unless otherwise instructed, the proxy will vote as he thinks fit.

*Strike out whichever is not desired.".
