

## Bills Committee on Building Management (Amendment) Bill 2005

### Interpretation of the Term “Majority”

#### PURPOSE

1. This paper sets out the interpretation of the term “majority” used in the Building Management Ordinance (BMO) (Cap.344) and the Administration’s proposal to amend the method of voting for appointment of members to a management committee.

#### BACKGROUND

2. The term “majority” is extensively used in the legislation, including the BMO. Provisions in the BMO where the term “majority” appears are set out in Annex A. The term is not defined in any particular percentage term in the BMO<sup>1</sup>. This might have caused different understanding of the percentage requirements in fulfilling a state of “majority”. The two judgments of *The Incorporated Owners of Tsuen Wan Garden v Prime Light Limited* (LDBM 83-85/2003 and CACV 1/2004) were thus important in providing a definitive interpretation of the term “majority” in its use under the BMO. A brief summary of the Tsuen Wan Garden case is at Annex B.

3. “Majority” is not specifically defined in the BMO. Being a commonly used word, it ordinarily means more than half. According to The New Shorter Oxford English Dictionary, “majority” means “the greater number or part; a number which is more than half the whole number”. According to Black’s Law Dictionary (6th edition), “majority vote” means “*vote by more than half of voters for candidate or other matter on ballot. When there are only two candidates, he who receives the greater number of the votes cast is said to have a majority; when there are more than two competitors for the same office, the person who receives the greatest number of votes has a plurality, but he has not a majority unless he receives a greater number of votes than those cast for all his competitors combined.*”. In the 8th edition of Black’s Law Dictionary, “majority” means “*a number that is more than half of a total;*

<sup>1</sup> Except in section 10(1)(b) of the BMO which provides that a corporation may by a resolution passed by a majority of not less than 75% of the votes of the owners, change the name of the corporation.

*a group of more than 50%.”.*

4. Echoed by the arguments succinctly presented in the two judgments of the Tsuen Wan Garden case, the application of the term “majority” under the BMO is now clearly elucidated. All matters arising at a meeting of an owners’ corporation (OC) would have to be passed by more than 50% of the votes present at the meeting.

## **PROBLEM**

5. Consensus over “majority” is easily achievable when there are only two options available for selection – the one that attains more votes would automatically mean that it acquires more than half of the votes, thus a majority. Problems might arise however, as evidenced in the Tsuen Wan Garden case, when there are more than two alternatives at stake – and this is more often than not in building management matters (e.g. in the selection of tenders, selection of candidates for the different posts in a management committee, etc.).

6. Following the court judgments of the Tsuen Wan Garden case, OCs are concerned about the possible impact on their daily operations. There were proposals for amendments to the BMO to the effect of changing the system to one that allows a winning majority of less than 50%. There were also suggestions to define clearly the term “majority” in the BMO.

## **PROPOSALS**

### ***Amendment of the Chinese Translation***

7. Following the Tsuen Wan Garden case, there are views that the Chinese translation for the term “majority” in the BMO, i.e. 「多數」 is inaccurate. In CACV 1/2004, the Court of Appeal has expressed that “we believe “majority” and 「多數」 should be given their ordinary meanings, namely more than 50%”. The Chinese words 「以多數票」, as ruled by the Lands Tribunal and the Court of Appeal, could not, therefore, be regarded as inaccurate translation for the English word “majority”.

8. That said, having discussed the matter with the Department of Justice, and noting that a number of Ordinances, particularly those

enacted or amended more recently, have used the term 「過半數」 as the Chinese translation of the term “majority” (instead of 「多數」), we propose to amend the Chinese translation of the term “majority” in the BMO to 「過半數」. Subject to Members’ views, we will introduce Committee Stage Amendments as appropriate.

### ***Appointment of Members to a Management Committee***

9. Fundamentally, the operation of OCs is hinged on the concept of “majority rules” and it is only reasonable to require any resolution which is binding on all owners to be approved by at least half of the votes. There may, however, be grave practical difficulties with regard to the appointment of members to a management committee.

10. When an owners’ meeting resolves to appoint a management committee under paragraph 2 of Schedule 2 or re-appoint another management committee when the previous one retires under paragraph 5 of Schedule 2, the owners’ meeting will usually decide first on the number of members of the management committee and then invite nominations from owners. In some cases, especially for those larger estates with the assistance of a property management company, nominations could be made before the owners’ meeting is held. Except for those old tenement buildings, the number of members of the management committee is usually some 11 – 16 members. Assuming there is the exact number of nominees to fit the number of members of the management committee, there will still be the need to vote such number of times in order that all the nominees are appointed to the management committee by a majority of the votes at the meeting. The problem will be even worse if the number of nominees exceeds the number of members of the management committee – meaning that there will be the need for many rounds of voting in order to determine who could receive the majority of votes from the meeting and get appointed.

11. While the usual reference to “majority” infers a winning majority of more than 50%, we have found some exceptions in the Hong Kong Laws – in particular those legislation which are election-related. Section 51 of the Legislative Council Ordinance (Cap.542) provides for a winning majority of less than 50% (referred to as “first past the post” voting system). Similar provisions appear in section 41 of the District Councils Ordinance (Cap.547), section 29 of the Schedule to the Chief

Executive Election Ordinance (Cap. 569) and section 31 of the Village Representative Election Ordinance (Cap.576). In these Ordinances, where the legislative intent is that the winning majority at a poll could be less than 50%, special emphasis was expressly made in the provision.

12. Given the practical problem of appointment to management committees under a “majority” voting system, we propose that the “first past the post” voting system should be adopted in the appointment of members of management committee in the BMO – in other words, those who receive the highest number of votes will be appointed as members of the management committee and there is no need to obtain a 50% majority support. Subject to Members’ views, we will introduce Committee Stage Amendments as appropriate.

### *Procurement by OCs and Managers*

13. Another building management matter which commonly involves two or more alternatives for owners to choose is related to the procurement of goods, supplies or services. As in the Tsuen Wan Garden case, the OC is asked to select a contractor from a list of tenders to carry out the renovation project of the building.

14. We have considered whether the “first past the post” voting system, as explained above, should be provided for in the selection of tenders. However, we think that this is not absolutely necessary. The reasons are as follows –

- (a) The operation of OCs is hinged on the concept of “majority rules”. Unless there are grave difficulties, it is only reasonable to require any resolution which is binding on all owners to be approved by at least half of the votes.
- (b) The above concept is especially important for controversial building management matters – procurement being one of those top on the list. Experience shows that it is not uncommon for owners to request a second owners’ meeting to re-discuss the tenders received and do a fresh voting. Requiring a 50% majority vote to support the selected tender will help to avoid such dispute.

- (c) Selection of tenders is usually related to the carrying out of renovation/repair works in the common parts of a building. Such works involve huge amount of money and owners may be required to pay some tens of thousands for the works. It is in the interests of the owners if a majority vote is required to support the selected tender.
- (d) Unlike in the situation of appointment of members to management committee (where the size ranges from 11 – 16), the number of tenders received by an OC is usually around five. We appreciate that there is administrative work for the OC in order to obtain a majority support for the selected tender yet the difficulties envisaged are not insurmountable
- (e) Administratively, in order to comply with the BMO, OCs might have to conduct a second round of voting on some occasions. OCs may consider adopting the method of elimination or short-listing to come up with the ultimate choice that fulfils the “majority” requirement. Some options could be eliminated after the first round of voting, leaving the two which gained the greatest support for a second round of voting.
- (f) Another plausible solution is by way of confirmation. A second round of voting could be carried out to confirm (i.e. to either accept or reject) the option which has attained the highest number of votes in the first round. The confirmation is a binary decision, meaning that a more-than-50% resolution could be achieved.

15. We therefore consider that the “majority rules” principle should be retained in the selection of tenders by an OC.

## **VIEWS SOUGHT**

16. Members are invited to give their views on the above proposals.

**Provisions in the BMO with the Term “Majority”**

Section 3A(3)

“(3) Subject to subsection (5), the meeting of owners convened under this section may, by a resolution passed by a *majority* of the votes of the owners voting either personally or by proxy, appoint a management committee.”.

Section 4(4)

“(4) The meeting of owners convened under this section may, by a resolution passed by a *majority* of the votes of the owners voting either personally or by proxy, appoint a management committee.”.

Section 10(1)

“(1) At a general meeting of a corporation convened and conducted in accordance with the Third Schedule for the purpose, the corporation may-

- (a) in the case of a direction by the Land Registrar under subsection (2), by a resolution passed by a *majority*; or
- (b) in any other case, by a resolution passed by a *majority* of not less than 75%,

of the votes of the owners, change the name of the corporation.”.

Section 34D(2)

“(2) In this Part and the Seventh Schedule, a reference to a resolution of the owners' committee is a reference to a resolution passed by a *majority* of the votes of the members of the owners' committee present at a meeting convened and conducted in accordance with the deed of mutual covenant.”.

### Section 34D(3)

“(3) In this Part, a reference to a resolution of the owners is –

- (a) if there is a corporation, a reference to a resolution passed at a general meeting of the corporation convened and conducted in accordance with the Third Schedule; or
- (b) if there is no corporation, a reference to a resolution passed by a **majority** of the votes of the owners voting either personally or by proxy at a general meeting convened and conducted in accordance with the deed of mutual covenant.”.

### Section 40C(3)

“(3) Notwithstanding anything to the contrary in the deed of mutual covenant, if any, the appointment of –

- (a) a management committee under subsection (2)(a) shall be deemed to be effected if at the meeting of owners convened under that subsection a resolution in favour of that appointment is passed by a **majority** vote of the owners voting either personally or by proxy at a meeting with a quorum of not less than 10% of the owners; and for the purposes of that meeting, any proxy appointed by an owner for the purposes of voting on that resolution shall be treated as being an owner present at the meeting for the purposes of establishing that quorum-;
- (b) a building management agent under subsection (2)(b) shall be deemed to be effected if -
  - (i) a resolution in favour of that appointment is passed at a meeting of the owners in the manner described in paragraph (a); or
  - (ii) where a resolution of the description mentioned in subparagraph (i) is not passed, by appointment, directly, by the owner named in the order made under subsection (1).”.

Schedule 2, paragraph 10(2)

“(2) All acts, matters or things authorized or required to be done by the management committee may be decided by a resolution passed by a *majority* of the votes of members of the management committee present at a meeting of the management committee.”.

Schedule 3, paragraph 3(3)

“(3) Subject to section 10(1), 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.”.

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## **Summary Report on the Tsuen Wan Garden Case**

The owners' corporation of Tsuen Wan Garden (TWOC) was incorporated on 26 October 1995.

2. At the owners' meeting on 9 September 2002, the management committee of TWOC reported that in response to a statutory order issued by the Buildings Department, it had already gone through tendering procedures and would report the results to owners in due course.

3. On 25 November 2002, TWOC convened another owners' meeting to decide how the repair and improvement works should be carried out. Three renovation plans were put to vote and the owners were given the option of choosing one of those plans. The total number of shares present in person or by proxy was 1 024 while 998 shares cast their votes: 253 for Plan 1; 307 for Plan 2; and 438 shares for Plan 3. The management committee declared that Plan 3 was selected. The meeting also resolved on which contractor should be appointed and the arrangement of cost contribution among owners.

4. In mid-2003, TWOC claimed against one of the owners, the Prime Light Limited (PLL), in the Lands Tribunal for contribution for costs of repair and improvement works of the building (LDBM 83-85/2003). After the hearing held in October 2003, the judge dismissed TWOC's claim. The judge referred to paragraph 3(3) of Schedule 3 to the Building Management Ordinance (BMO), which provides that "..... all matters arising at a meeting ..... shall be decided by a majority of votes of the owners", and considered that "the ultimate question is whether those voting for Plan 3 outnumbered those who were against it". As only 438 shares supported Plan 3, the resolution to adopt Plan 3 was not passed by the majority and was not within the meaning of BMO.

5. TWOC appealed against the Lands Tribunal's decision in the Court of Appeal (CACV 1/2004).

6. The Court of Appeal dismissed the appeal of TWOC and upheld the original decision of the Lands Tribunal in March 2005.

7. The Court of Appeal considered that the term “majority” and the Chinese text “多數” should be given their ordinary meanings, namely more than 50%. The owners or the corporation can, if desired, determine any matter by a “2-way vote” and they can arrive at a “2-way vote” by progressive elimination, short-listing etc. These are procedure matters and can be determined in accordance with paragraph 7 of the Third Schedule or by the owners at meetings. Hence, if Plan 3 had received more than half of the votes, the Court of Appeal believed the decision would have complied with paragraph 3(3) of the Third Schedule of the Building Management Ordinance, although the members were asked to choose one amongst three options.

8. The Court of Appeal concluded that the decision of TWOC to accept the 438 votes (being less than 50% of the total votes), as the majority of votes, was inconsistent with the BMO. The resolution to adopt Plan 3 was therefore invalid.

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