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14 October 2005

By post & fax
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Mrs Pandora Chan
Legislative Council Secretariat
Complaints Division
Legislative Council Building
8 Jackson Road
Central, Hong Kong

Dear Mrs Chan,

Incorporation of Owners of Hong Lok Yuen

Thank you for your letter of 20 July 2005. The Administration's response to the proposal by Hon Ronny Tong on the Incorporation of Owners of House Developments is attached for your information, please.

Should you have any enquiry, please contact the undersigned at 2123 8395.

Yours sincerely,

(Miss Daisy C Y Lo)
for Director of Home Affairs

Enclosure

C.C.

Clerk to Bills Committee on Building Management (Amendment) Bill 2005 (Attn: Ms Flora Tai)

The Administration's Response to the Proposal by Hon Ronny Tong on the Incorporation of Owners of House Developments

Purpose

1. Following his meeting with some owners of Hong Lok Yuen to discuss the incorporation of owners of the estate, the Hon Ronny Tong submitted to the Legislative Council on 11 July 2005 proposed legislative amendments to provide for the incorporation of owners of house developments under the Building Management Ordinance (BMO). This paper sets out the Administration's views on the proposal.

Alternative Basis for Undivided Shares

2. As explained in LC Paper No. CB(2)1709/04-05(01), the legal difficulty for the incorporation of owners in house developments under the BMO stems from the fact that the deed of mutual covenant (DMC) of house developments usually does not allocate any undivided share to the owners, which is a crucial element for incorporation under the BMO. Hon Tong has tried to overcome this difficulty by providing an alternative basis, other than undivided share, for the incorporation of owners. We concur that this is the right direction to go.

"Common Parts" of House Developments

3. Following preliminary discussion at the Bills Committee, we have conducted further research into the ownership structure of house developments. We note in most of the DMCs of house developments, the common parts are not owned by the owners, or any owners, of the individual subsections (or houses). In other words, whilst the common parts of a multi-storey building are usually co-owned by the owners of the flats of the building, the so-called "common parts" of house developments remain to be private properties of the developer. Owners of individual subsections (or houses) in house developments are usually granted express easements in the DMC for the use of such common parts of the developments. It follows that even if owners of individual houses in house developments incorporate themselves into an OC, the OC will not be able to carry out a fundamental duty of an OC under section

18(1)(a) of the BMO, which is to maintain the common parts (within the meaning of BMO) and the property of the corporation in a state of good and serviceable repair and clean condition. Neither will the incorporation in such circumstances enable the OC to have the right to manage and maintain these “common parts” – as this may amount to interference of property rights. In fact, since these “common parts” are actually private properties retained by the developer, any attempt to exercise rights over these “common parts” might arguably amount to interference of the developer’s property rights.

4. The above is exactly the case in Hong Lok Yuen. The roads, clubhouse, sewage treatment plant and other retained parts, etc. of the estate are owned by the developer. According to the Master Layout Plan obtained from the Land Registry, the whole lot of Hong Lok Yuen has a total of 51 097 hectares, of which 38 472 hectares are housing areas. A rough calculation shows that some 25% of the whole lot are owned by the developer and used, under the DMC, by the owners of individual houses and also owners of a number of multi-storey blocks¹ in Hong Lok Yuen.

5. The BMO is aimed at providing a legal framework for the incorporation of owners so as to better facilitate the management and maintenance of the common parts of a building, which is jointly owned by the co-owners. Given that the so-called “common parts” of Hong Lok Yuen are private properties retained by the developer, we do not see merits for owners of Hong Lok Yuen, and in fact other house developments with similar ownership structure, to incorporate under the BMO.

Comments on Hon Tong’s Proposals

6. Aside from the fundamental difficulties about the ownership of “common parts” in house developments, the Administration has the following comments on Hon Tong’s proposal –

(a) Hon Tong proposed that in the case of an estate consisting of lots² on which there are built houses, if there is no DMC or the DMC contains

¹ See paragraph 6(d) of this paper.

² In the case of Hong Lok Yuen, the term “subsection” is used – majority of the owners own a subsection together with the buildings thereon.

no provision for the determination of an owner's share, the owner's share shall be determined in the proportion either –

- i. his lot bears to the total number of lots comprised in the estate;
or
- ii. the total area of his lot to the total area of the estate

as all the owners of the estate may by a simple majority determine.

The above proposal gives two options for the owners of house developments to choose on which their share should be based. The choice is to be determined by “simple majority”. If owners were to determine such a key issue by simple majority (presumed to mean by headcount of owners), then it begs the question on why the same mechanism, i.e. simple majority by headcount, should not be applied in determining individual owners' share.

- (b) In the case of Hong Lok Yuen, the size of the subsections (or houses) varies to a great extent. Based on the Master Layout Plan obtained from the Land Registry, there are at least six types of houses (detached units, semi-detached units, one-unit garden houses, two-unit garden houses, three-unit garden houses, four-unit garden houses, etc). Based on information obtained from real estate agents, the size of the houses (or units) ranges from 879 to 3 500 square feet. Unless provided for in its DMC, it would be extremely difficult for owners to agree among themselves a basis (whether it is based on the number of subsections they own, the size of their subsections, or headcount, etc) for determination of their shares.
- (c) It seems that the proposed formula in (a) above has taken account only of the lots (or subsections or houses) owned by individual owners. We are not sure how the above formula could be used for determining the shares to be allocated to the common parts (whether they are retained by the developer or not).
- (d) In the case of Hong Lok Yuen, in addition to houses, there are also multi-storey blocks. Of the 12 sections of the development, two of them (totaling ten subsections) contain such multi-storey developments (all of them are four-storey buildings). The ten

subsections are governed by their respective sub-DMCs. According to the sub-DMCs, the joint owners of these subsections (there should be 62 such co-owners) are allocated with undivided shares – like ordinary multi-storey buildings. The sub-DMCs state that owners of these subsections are subject to the Master DMC under which Hong Lok Yuen is managed as a single development. In the circumstances, it is for consideration how the undivided shares of these multi-storey blocks (totaling 62 co-owners) could be matched with the shares of the owners of the individual subsections (or houses) (totaling 1 128 houses) to be determined in accordance with Hon Tong's proposal.

Winding Up of an OC

7. Section 34 of the BMO provides that on the winding up of an OC, the owners shall be jointly and severally liable to contribute, according to their respective shares, to an amount that is sufficient to discharge the debts and liabilities of an OC. For owners of undivided shares in a multi-storey building, they in any case are co-owners of the land on which the building is erected. This is however not the case for owners of house developments who own individual lots/subsections/divided shares. An owner of an individual subsection (or house) of Hong Lok Yuen or any other similar house development, who does not own the land/development jointly with other owners, should consider whether he is prepared [and whether all the other owners of the individual subsections (or houses) in the development are prepared] to be bound by this provision.

Advice Sought

8. Members' views are invited on the above paper.

Home Affairs Department
October 2005