

For discussion on
8 April 2005

Legislative Council Panel on Home Affairs

Formation of Owners' Corporations in Buildings with More than one Deed of Mutual Covenant

Purpose

This paper sets out the problems of formation of owners' corporation (OC) in buildings with more than one deed of mutual covenant (DMC).

Formation of OCs

2. The aim of the Building Management Ordinance (BMO) (Cap.344) is to facilitate the management of multi-storey buildings by providing a mechanism for the incorporation of owners who own undivided shares. An OC is most commonly formed under section 3(2)(b) of the BMO which provides that a management committee (MC) could be appointed by a resolution of the owners of not less than 30% of the shares.

3. Apart from referring to the provisions of the BMO, owners of a building also have to make reference to the relevant provisions in the DMC of their building if they want to incorporate themselves. A DMC is a deed and a private contract signed between the developer, the manager and the first purchaser of a unit in the building. It sets out the rights and responsibilities of the various parties to the deed. Matters in the DMC that are of relevance to the formation of OCs are set out below.

(a) *Number of Shares Held by Each Owner and the Voting Right of such Shares*

4. Section 5(5) of the BMO stipulates that each owner shall, save where the DMC otherwise provides, have one vote in respect of each share which he owns. Section 39 of the BMO provides that an owner's

share shall be determined in the manner provided in an instrument including a DMC (if any) which is registered in the Land Registry; or if there is no such instrument or the instrument contains no such provision, then in the proportion which his undivided share in the building bears to the total number of shares into which the building is divided.

(b) Convenor of owners' meeting for the purpose of appointing an MC

5. Section 3(1)(a) and (b) of the BMO provides that a meeting of the owners may be convened by any person managing the building in accordance with the DMC (if any); or any other person authorised to convene such a meeting by the DMC (if any).

(c) Procedures for the Appointment of an MC

6. Section 3(2)(a) provides that an MC may be appointed in accordance with the DMC, if the DMC provides for the appointment of an MC.

(d) Composition of an MC

7. Paragraph 1 of Schedule 2 to the BMO sets out the number of persons which is to constitute the MC if there is no DMC or the DMC does not specify the number of persons of the MC. Paragraph 2(1)(c) and paragraph 5(2)(ba) of Schedule 2 to the BMO provides that a vice-chairman could be appointed only if that office is specified in the DMC.

(e) Common Parts of a Building

8. Section 2 of the BMO provides that “common parts” means the whole of a building, except such parts as have been specified or designated in an instrument registered in the Land Registry as being for the exclusive use, occupation or enjoyment of an owner; and unless so specified or designated, those parts specified in Schedule 1 to the BMO.

9. The above shows the significance of the provisions in a DMC in the management of buildings and the incorporation of owners.

Guidelines for DMC

10. Government has introduced a DMC clause in all non-industrial land grants since 1985. The Legal Advisory and Conveyancing Office (LACO) of the Lands Department is the approving authority of DMCs submitted by developers if the land grant contains a DMC clause. LACO issued Guidelines for DMCs and revised Guidelines for DMCs in 1987 and 1999 respectively. In approving DMCs, LACO will ensure that the current Guidelines for DMCs are complied with.

Buildings with more than one DMC

11. Buildings which are covered by more than one DMC are mostly built prior to the introduction of the DMC clause and thus Government's approval of the relevant DMCs were not required. These buildings are with more than one block which are erected on different sections of a lot or different lots. In some cases, there is land in each of these blocks which is held for the common use of owners of the adjacent block.

12. Based on information collected by the District Offices, we are aware of 130 buildings which are covered by more than one DMC and have formed two or more OCs. The majority of them are located in Sham Shui Po, Wan Chai, Eastern, Yau Tsim Mong and Kowloon City.

Amendments to the BMO in 1993

13. Prior to 1993, OCs were formed under the Multi-Storey Buildings (Owners Incorporation) Ordinance (MSBO). According to section 2 of the then MSBO, a "building" was defined to mean –

(a) any building which consists of two or more levels, including basements; and

(b) the land upon which such a building is erected and any land in

common ownership with such land.

Based on this definition, a building with two blocks with common parts which are not in common ownership could not incorporate to form one OC even though the common parts are for the common use and enjoyment of owners and that the two blocks are physically linked to each other.

14. The MSBO was significantly revamped and renamed as BMO in 1993. The definition of a “building” was amended to mean –

(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 an MC 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.

The amended definition of a “building”, subject to the provisions of the DMC concerned, makes it possible for a building with two blocks to form one OC, provided that there is land in each of these blocks which is held for the common use, enjoyment and benefits of owners of the adjacent block.

Registration of OCs

15. We learn from the Land Registry that when an application for OC formation is received, it will first examine whether the statutory requirements of section 3 of BMO have been fulfilled. When there is a common area shared or enjoyed by the owners of two or more blocks of a

building and each block is covered under different DMCs, the Land Registry will consider the application for registration of OCs on a case-by-case basis. Factors like whether the DMCs of the different blocks of the building contain more or less identical provisions; whether the method of division of owners' undivided shares are more or less the same and compatible among the different blocks; and whether there was an unanimous resolution passed by all owners on the formation of one single OC are relevant.

16. In most cases, if the two blocks come under two DMCs which contain provisions inconsistent with each other, practical difficulties could arise if one OC is to be formed and performs its building management duties under different DMCs. The absence of a proper basis for calculation of the owners' undivided shares in the building presents an insurmountable obstacle to the formation of an OC. A proper counting of quorum or valid votes in an owners' meeting becomes impracticable. The sharing of responsibility (such as the cost of repairs, management fees, etc.) among the owners of the different blocks could be a major subject for dispute.

Mandatory Provisions in the BMO

17. We have received comments that Government should introduce provisions in the BMO to solve the problems of these old DMCs and that a mechanism should be allowed for owners to amend the DMCs. As explained above, DMC is a private deed between the developer, the manager and the owners of the building. It is not appropriate for the Government, who is not a party to the deed, to attempt to override provisions set out in the DMC which are regarded as outdated or inconvenient by one party. Moreover, DMC sets out the rights and obligations of all owners of a building. It is questionable whether it is appropriate for the Government to introduce changes through statutory means in circumstances where the rights and duties of different parties may be affected.

18. That said, the Administration is aware of the need to introduce some mandatory terms to facilitate building management and has therefore introduced certain sections in the BMO, notably Part VIA and

Schedule 7, which shall be impliedly incorporated in all DMCs. These provisions are very restricted and concern mainly the rights of owners to establish an OC and the duties of the building manager.

Good Building Management

19. There are at present some 40 000 private multi-storey buildings in Hong Kong, of which some 14 500 have formed an OC. No doubt the Government's policy intention is to encourage and assist property owners in the formation of OCs for the management of private buildings. However, incorporation of owners is only one of the many tools to achieve effective building management. The key has always been active participation of owners and close liaison with the property management company. In fact, for various reasons, owners of some 17 000 buildings have chosen to form a non-statutory organisation like an owners' committee and/or engage a property manager instead.

20. For buildings which are covered by more than one DMC, we understand that some of them which have formed more than one OC have formed a joint committee/working group to facilitate management of the buildings. For the others, they could either form a non-statutory committee like Mutual Aid Committee or owners' committee or engage a property manager to assist in the management of the building. We should never undermine the benefits that could be brought about by these owners' or residents' associations. Basically, the owners and occupiers of the flats in the building can still enjoy a pleasant living environment as long as there are frank and uninhibited channels of communication among owners, between owners and the management company, together with the necessary assistance and support provided by the Government departments concerned.