Review Committee on the Building Management Ordinance

Interim Report

March 2013

Table of Content

		Page
Chapter 1	**Introduction**	3
Chapter 2	**Facilitate Better Understanding of the Requirements of the Building Management Ordinance**	5
Chapter 3	**Possible Improvements to the Building Management Ordinance**	11
Chapter 4	**Issues Requiring Further Consideration of their Legal and Operational Implications**	16
Chapter 5	**Other Issues**	37
Chapter 6	**Way Forward**	53
Annex 1	Membership List and Terms of Reference of the Review Committee	54
Annex 2	Guidelines on "Proxy for the General Meeting of an Owners' Corporation"	56
Annex 3	Guidelines on "To Convene a General Meeting of an Owners' Corporation at the Request of Not Less Than 5% of the Owners"	69
Annex 4	Extract of "Guidelines for Deeds of Mutual Covenant" issued by the Lands Department	78

Abbreviations

BAT	Building Affairs Tribunal
BMO	Building Management Ordinance, Cap. 344
CO	Crimes Ordinance, Cap. 200
DMC	Deeds of Mutual Covenant
HAD	Home Affairs Department
JP	Justice of the Peace
LACO	Legal Advisory and Conveyancing Office
LegCo	Legislative Council
MC	Management Committee
MC Chairman	Chairman of the Management Committee
MC Secretary	Secretary of the Management Committee
MC Treasurer	Treasurer of the Management Committee
OC	Owners' Corporation
PMC	Property Management Company
Review Committee	Review Committee on the Building Management Ordinance
SHA	Secretary for Home Affairs

Chapter 1

Introduction

1.1 The majority of property owners in Hong Kong own flats in multi-storey buildings. It is the responsibility of the owners to manage their properties. Proper building management is conducive to a safe and quality living environment. The Government's policy objective is to encourage owners to organise themselves to effectively manage their properties. The Building Management Ordinance (Cap. 344) (BMO) provides a legal framework to facilitate owners to form owners' corporations (OCs) and to carry out the building management work properly in accordance with the requirements of the legislation.

1.2 The Government has all along been playing the role of a facilitator in encouraging and assisting owners to form OCs in accordance with the BMO, and to provide appropriate support to assist owners in discharging their building management responsibilities. Such assistance and support rendered by the staff of the Home Affairs Department (HAD) include visiting the owners of those buildings which have not yet established their OCs so as to encourage them to set up OCs, attending OC meetings upon invitation and handling enquiries on building management matters. To foster a good building management culture, various initiatives such as the Resident Liaison Ambassador Scheme, the Building Management Professional Advisory Service Scheme and the Panel of Advisors on Building Management Disputes have been implemented by HAD in recent years to provide all-round support to owners and OCs.

1.3 The Government reviews the BMO from time to time. Subsequent to the completion of the last review in 2007, the Building Management (Amendment) Ordinance 2007 was enacted to provide for a number of amendments to the BMO for the purpose of rationalising the appointment procedures of management committees (MC), setting more specific requirements on the use of proxy instruments, as well as setting out the implementation details of the mandatory procurement of insurance for third party, etc.

1.4 In order to keep pace with changing circumstances and to address public concerns, the Review Committee on the Building Management Ordinance (the Review Committee), appointed by the Secretary for Home Affairs (SHA), was established in January 2011 to identify common building management problems, deliberate how they may be resolved or alleviated through amending the BMO, and make recommendations to the Government on how to take forward proposals to enhance the operation of OCs and to protect the interests of individual owners.

1.5 The Review Committee comprises members who are from the relevant professions such as the legal, accounting and engineering fields, and Legislative Council (LegCo) members with rich knowledge in building management. Some experienced MC members have also been invited to attend the meetings of the Review Committee on a need basis in the capacity of co-opted members. The membership list and terms of reference of the Review Committee are at **Annex 1**.

1.6 The Review Committee has examined various common building management problems in its first stage of work with a view to identifying measures to alleviate them. On those issues where disputes arise due to difference in interpretation of the requirements under the BMO by different parties, the Review Committee recommends that more specific guidelines on best practice may be provided to facilitate better understanding of the requirements under the BMO. As regards those issues which are more controversial or involve more complicated legal and property ownership issues, the Review Committee has made its preliminary findings in this Interim Report. The Review Committee will continue with its work in examining the implications of the various proposals before submitting its final recommendations to the Government.

Chapter 2

Facilitate Better Understanding of the Requirements of the Building Management Ordinance

2.1 In the course of daily building management and maintenance, it is inevitable that the owners, the OCs and the property management companies (PMCs) may hold different views on certain matters. Disputes may arise due to different interpretations of the legislative provisions by different parties, or because of insufficient understanding of the requirements of the BMO. Over the years, HAD has published various booklets and pamphlets setting out the requirements of the BMO in a user-friendly manner so as to facilitate compliance with the BMO. These include, for example –

(a) A Guide on Building Management Ordinance (Cap. 344)
(b) An Introduction to Building Management (Amendment) Ordinance 2007
(c) Frequently Asked Questions on Building Management (Amendment) Ordinance 2007
(d) How to Form an Owners' Corporation
(e) Property Owners and Private Building Maintenance
(f) Building Management (Third Party Risks Insurance) Regulation
(g) Home Affairs Department and Management of Private Buildings
(h) Code of Practice on Procurement of Supplies, Goods and Services
(i) Code of Practice on Building Management and Maintenance
(j) Building Management Toolkit
(k) Building Financial Management Toolkit

2.2 The Review Committee notes that the appointment of proxy for an OC's general meeting and the holding of an OC's general meeting at the request of not less than 5% of the owners are two areas where disputes often arise. The Review Committee recommends

promulgation of guidelines targeting at these two controversial areas to enable the stakeholders to have a better understanding of the legislative and procedural requirements, and thus help to avoid disputes.

Guidelines on "Proxy for the General Meeting of an Owners' Corporation"

2.3 According to paragraph 4 of Schedule 3 to the BMO, an owner may cast a vote personally or by proxy at a meeting of the OC. As owners may not always be able to attend OC meetings personally, the proxy arrangement facilitates the operation of the OCs.

2.4 The issue of proxy appointment was reviewed during the amendment exercise to the BMO in 2007. Improvements were then made to the BMO to set out more specifically the requirements for the appointment of proxy. The current statutory requirements are that the proxy instruments shall be in the statutory form set out in the BMO, and the instrument shall be lodged with the secretary of the management committee (MC Secretary) at least 48 hours before the time for the holding of the OC's general meeting. Upon receiving the proxy instrument, the MC Secretary shall acknowledge receipt of the instrument by leaving a receipt at the flat of the owner who made the instrument, or depositing the receipt in the letter box for that flat before the meeting. The MC Secretary shall display information of the owner's flat in a prominent place of the meeting venue before the meeting is held until the conclusion of the meeting.

2.5 The Review Committee notes that notwithstanding the effort of enhancing the proxy arrangement in the last BMO amendment exercise, some consider that the existing proxy arrangement still has room for improvement. For example, some owners are dissatisfied that certain owners or staff of PMCs solicit a large number of proxy instruments before the OC's general meeting and hence can easily predominate in the decision making process. There are also allegations about the use of counterfeit proxy instruments.

2.6 Having reviewed the existing proxy arrangements, and noting that disputes often arise during the processes of collecting and verifying the proxy instruments, the Review Committee recommends that as a short-term measure to address the problem, a dedicated set of user-friendly guidelines should be promulgated to set out the statutory requirements on proxy arrangements under the BMO. The suggested guidelines on "Proxy for the General Meeting of an Owners' Corporation" at **Annex 2** highlight the respective responsibilities of the chairman of the management committee (MC Chairman), the MC Secretary and the owners during the processes of appointing the proxy as well as collecting and verifying the proxy instruments.

2.7 In addition to setting out the statutory requirements, the suggested guidelines at **Annex 2** also provide guidance on the best practice in relation to proxy arrangements with the aim of facilitating compliance with the statutory requirements and reducing the chance of causing disputes among relevant parties. For example, while the BMO requires the MC Secretary to display information of those flats the owners of which have appointed proxy in a prominent place of the meeting venue before the meeting is held until the conclusion of the meeting, the suggested guidelines at **Annex 2** advise MC Secretary to, as a matter of best practice, display an additional copy of such information in a prominent place of the building at least 24 hours before the meeting is held and until seven days after the meeting to facilitate verification by owners.

2.8 The suggested guidelines also remind the MC Chairmen that where there is doubt about the authenticity of the proxy instrument, he should take reasonable steps such as contacting the owner concerned to verify the validity of the proxy instrument.

2.9 The Review Committee is of the view that the above will suffice as a short term measure, but it will continue to explore other possible measures to enhance the proxy arrangements in the next stage of the review. These include –

(a) making it a statutory requirement to accept only the original copy of the proxy instruments signed by the owners;

(b) making it a statutory requirement to display the information of flats with proxy instruments lodged in a prominent place of the building(s), at least 24 hours before the meeting until seven days after the meeting to facilitate verification by owners; and

(c) adding a serial number to each proxy instrument to reduce the risk of having counterfeit proxy instrument.

Guidelines on "To Convene a General Meeting of an Owners' Corporation at the Request of Not Less Than 5% of the Owners"

2.10 In accordance with paragraph 1(2) of Schedule 3 to the BMO, the MC Chairman shall convene a general meeting of the OC at the request of not less than 5% of the owners for the purposes specified by such owners within 14 days of receiving such request, and hold the general meeting within 45 days of receiving such request.

2.11 The Review Committee notes that there have been allegations about the abuse of such right by the owners. For instance, some owners may repeatedly request to convene a general meeting to discuss the same subject over and over again. On the other hand, some complain that the MC Chairman adds a large number of agenda items to make the meeting unreasonably long so that very little time is left to the discussion of those items which the owners really would like to discuss.

2.12 There is suggestion of raising the minimum percentage of owners required to convene a general meeting from 5% to, say 8%, so as to minimize the chance of abuse. However, the proposal may not be able to alleviate the problem because a slight increase in the percentage of owners required in making the request will not have sufficient deterrent effect. On the other hand, raising the percentage of owners required by a large extent would deprive the right of minority owners to request the holding of a general meeting.

2.13 The Review Committee recommends that as a short term measure to address the issue, a dedicated set of user-friendly guidelines should be promulgated to set out the statutory requirements in relation to the holding of OC's general meeting at the request of not less than 5% of owners.

2.14 The suggested guidelines on "To Convene a General Meeting of an Owners' Corporation at the Request of Not Less Than 5% of the Owners" at **Annex 3** seek to –

(a) highlight the respective statutory responsibilities of the MC Chairman, the MC Secretary and the owners.

(b) provide guidance on the best practice with the aim of avoiding disputes in such area. For example,

(i) the MC Chairman is advised to, as a matter of best practice, arrange the discussion items suggested by the owners who request the holding of the meeting as priority items on the agenda.

(ii) those owners who raise the request for the holding of the meeting are advised to appoint a person as their representative or contact point to facilitate communication with the MC Chairman and the MC Secretary on matters relating to the holding of the meeting.

2.15 The Review Committee is of the view that the above will suffice as a short term measure, but it will continue to explore other possible measures to enhance the arrangements in relation to the holding of an OC's general meeting at the request of not less than 5% of owners in its next stage of work. These include –

(a) making it a statutory requirement to require the 5% of owners to appoint a person as their representative or contact point in order to facilitate better communication with the MC Chairman and the MC Secretary on matters relating to the holding of the meeting;

(b) making it a statutory requirement to put the discussion items suggested by the owners who raise the request for the holding of the meeting as priority items on the agenda.

Chapter 3

Possible Improvements to the Building Management Ordinance

3.1 One of the major tasks of the Review Committee is to identify building management problems and to deliberate how they may be resolved or alleviated through amending the BMO. Having reviewed the various common building management problems, the Review Committee notes that many of them involve complex legal and operational implications which require in-depth study in its next stage of work before recommendations can be made to the Government (details set out in Chapter 4). Regarding the less complex issues, the Review Committee has preliminarily identified some possible legislative amendments to the BMO for improving the existing arrangements. The ensuing paragraphs set out the deliberation of the Review Committee in this regard.

Declaration of MC Members on their Eligibility

3.2 Under the BMO, the powers and duties of an OC are mainly exercised and performed by its MC. MC members are required to fulfil the eligibility criteria stipulated in the BMO. Under paragraph 4(1) of Schedule 2 to the BMO, a person is not eligible to be appointed as a member of a MC if he –

(a) is an undischarged bankrupt at the time of the appointment, or even though he has obtained a discharge in bankruptcy or entered into a voluntary arrangement within the meaning of the Bankruptcy Ordinance (Cap. 6) with his creditors within the previous five years, he has not paid the creditors in full;

(b) has, within the previous 5 years, been convicted of an offence in Hong Kong or any other place for which he has been sentenced to imprisonment, whether suspended or not, for a term exceeding 3 months without the option of a fine.

3.3 As the MC handles the day-to-day financial and operational business of the OC, it is important to ensure that all the MC members meet the eligibility criteria. Hence, the Building Management (Amendment) Ordinance 2007 introduced a requirement to paragraph 4(3) of Schedule 2 to the BMO that every MC member shall, within 21 days after the appointment, lodge with the MC Secretary a declaration, in such form as the Land Registrar may specify, stating that he does not fall within any of the category of ineligible persons specified in paragraph 4(1) of Schedule 2 to the BMO. Failure to comply with this requirement will lead to cessation of his MC membership. The MC Secretary shall lodge the declaration with the Land Registrar within 28 days after the appointment in the case of appointment of the first MC, and within 28 days after receiving the statement in all other cases.

3.4 To facilitate MC members to make the declaration, we have allowed a solicitor or a Justice of the Peace (JP) to administer the declaration in addition to a Commissioner for Oath. We have also made available a wide range of locations, including the Public Enquiry Service Centres of HAD, the Land Registry offices and the Property Management Advisory Centres of the Hong Kong Housing Society, for MC members to make their declaration.

3.5 However, some MC members still find it inconvenient to go to the designated venues to make the declaration. Others are of the view that as MC members participate in building management work on a voluntary basis, the existing declaration requirement may discourage owners from serving as MC members.

3.6 To address the above concerns, the Review Committee recommends that the following proposed legislative amendments may be considered –

(a) To make a written statement instead of taking an oath

3.7 To obviate the need of taking an oath before a third party like the Commissioner for Oaths, solicitor or JP, the Review

Committee suggests an alternative arrangement of requiring the MC member to make a written statement stating that he does not fall within any of the category of ineligible persons specified in paragraph 4(1) of Schedule 2 to the BMO. Under the proposed requirement, the written statement signed by the MC member shall be in such form as specified by the Land Registrar, and be signed in the presence of a witness, who should also sign on the written statement in order to ensure its authenticity.

3.8 As the proposed written statement is not a statutory declaration falling within the ambit of the Oaths and Declarations Ordinance (Cap. 11), it is not necessary to make the written statement before a Commissioner for Oaths, a JP or a Notary Public, and MC members can make the written statement at any place within or outside Hong Kong. Any person who furnishes any information in the written statement which he knows, or reasonably ought to know, to be false may be held liable for an offence under section 36 of the BMO. Where a change occurs in any matter stated in the statement, the person who made the statement is required to make another written statement stating the particulars of the change.

3.9 The Review Committee further proposes that the submission of the written statements to the relevant parties should basically follow the existing statutory timeframe. The MC member shall lodge the completed statement with the MC Secretary within 21 days after the appointment. The MC Secretary shall cause the statements to be lodged with the Land Registrar within 28 days after the appointment in the case of appointment of the first MC, and within 28 days after receiving the statement in all other cases.

(b) Amendment to section 36 of the BMO

3.10 Currently, under section 36 of the BMO, any person who makes any statement or furnishes any information as required by the BMO which he knows, or reasonably ought to know, to be false shall be guilty of an offence and shall be liable on conviction to a fine at level 3 and to imprisonment for six months. On the other hand, section 36 of the Crimes Ordinance (Cap. 200) (CO) provides that any

person who makes a false statutory declaration shall be liable on conviction to a fine and to imprisonment for two years.

3.11 The Review Committee is of the view that the nature of offence under section 36 of the BMO is similar to that of section 36 of the CO. As such, the Review Committee recommends amending section 36 of the BMO to align its penalty level with that of section 36 of the CO.

Excluding Those Shares with No Voting Right at the Owners' Meeting for the Calculation of the Total Undivided Shares for the Appointment of MC

3.12 In accordance with section 3 of the BMO, owners with not less than 5% of shares may convene an owners' meeting to appoint an MC. A resolution to appoint an MC may be passed by a majority of the votes of the owners and supported by owners of not less than 30% of the shares. The MC so appointed shall apply to the Land Registrar for the registration of the owners as an OC under sections 7 and 8 of the BMO.

3.13 Section 39 of the BMO stipulates that an owner's shares shall be determined –

(a) in the manner provided in an instrument including a deed of mutual covenant (DMC) (if any), which is registered in the Land Registry; or

(b) 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.

3.14 Some DMCs do not have expressed provision on whether the shares of common areas with no voting right at an owners' meeting should be included as part of the total undivided shares when calculating the proportion of shares supporting the resolution to appoint an MC. Neither does the BMO expressly set out whether the

shares of common areas with no voting right at an owners' meeting should be included as part of "the total number of shares into which the building is divided".

3.15 The Review Committee considers it reasonable not to include those shares with no voting right at an owners' meeting as part of the total undivided shares for the purpose of calculating the proportion of owners' shares supporting the resolution to appoint an MC. The Review Committee sees the merit of standardising the arrangement by having an express provision in the BMO to clearly exclude those shares with no voting right at an owners' meeting from the total number of shares into which the building is divided, regardless of whether the calculation of the total number of shares has been specified in the DMC.

Stipulating in the BMO that Owners should be Given the Priority to Take Up the Posts of Secretary and Treasurer of Management Committee

3.16 Unlike other MC members, it is not necessary for the posts of MC Secretary and the treasurer of Management Committee (MC Treasurer) to be taken up by owners according to Schedule 2 to the BMO. These two posts are usually taken up by the staff of the PMCs. There are views that as the MC Secretary and the MC Treasurer are important to the operation of an OC, owners should be accorded priority for the appointment of these posts.

3.17 The Review Committee considers the proposal justifiable and recommends the Government to consider whether it is necessary to explicitly set out in the BMO that owners should be accorded priority in taking up the two posts.

Chapter 4

Issues Requiring Further Consideration of their Legal and Operational Implications

4.1 Some of the building management problems involve complicated financial, legal or ownership implications. Given the complexity and controversy of those issues, the Review Committee has conducted an initial analysis of the issues concerned at its first stage of work, and will proceed to conduct an in-depth study on those issues at its next stage of work before making recommendations to the Government. The initial findings of the Review Committee on the issues falling under this category are set out in the ensuing paragraphs.

Termination of the Appointment of DMC Managers

4.2 According to Schedule 7 to the BMO and section 8(b) of the Guidelines for DMCs issued by the Lands Department, it is necessary to pass a resolution at an owners' meeting with not less than 50% of all undivided shares to terminate the appointment of a DMC manager. The Review Committee notes that some owners express concerns on the difficulties in terminating the appointment of their DMC managers even though they are not satisfied with the performance of their existing DMC managers and wish to select a new service provider. In fact, this is one of the issues which the Administration sought to address in the previous amendment exercises of the BMO. After thorough deliberation in the Bills Committee of LegCo, the BMO has provided for the following mandatory terms in DMCs –

(a) To address the problem of the lack of mechanism to terminate the appointment of DMC managers in some older DMCs, a new provision was added to the BMO stipulating that under the aforementioned circumstances, an OC might terminate by notice the DMC manager's appointment without compensation by a resolution passed by a majority of votes of the owners voting either

personally or by proxy at a general meeting convened, and supported by the owners of not less than 50% of the shares in aggregate.

(b) Only owners of the shares who are required to pay management fees are entitled to vote on the resolution of terminating the appointment of DMC managers.

4.3 However, some owners still find it very difficult to obtain sufficient votes to terminate the appointment of the DMC manager given that the developer may control a large percentage of the shares, and very often the developer also operates the PMC, which is the DMC manager.

4.4 In view of the concerns raised by some of the owners, the Review Committee has reviewed the issue in detail with a view to exploring whether there is room for improvement. The pros and cons of the various options which have been examined by the Review Committee are set out in the ensuing paragraphs –

(a) Lowering the threshold of terminating the appointment of DMC managers from 50% to 30%

4.5 Some owners consider that the "50% threshold" is too stringent and suggest lowering the threshold from 50% to 30%.

4.6 The Review Committee recognises that terminating the appointment of the DMC manager is an important decision to an OC. While lowering the "50% threshold" to 30% will make it easier for owners to obtain the required number of shares to pass the resolution of terminating the appointment of the DMC manager, the implementation of the proposal would have far-reaching implications and may lead to other disputes when different owners have different views on the performance of the DMC manager.

4.7 For instance, while 30% of the owners' shares may vote for the termination of the appointment of the existing DMC manager, another 30% of the owners' shares may prefer the status quo. It is

possible that after the appointment of the DMC manager is terminated by resolution of not less than 30% of the owners' shares, another 30% of the owners' shares may, within a short period of time, pass a new resolution to terminate the appointment of the newly-appointed manager with a view to appointing back the original manager. Consequently, it would lead to instability in the management of the building. The implications to the existing DMCs would also need to be considered because the developer and the existing DMC manager may regard this amendment to the DMC terms to be unilateral and unfair.

4.8 On the other hand, there are views that it would be acceptable to retain the "50% threshold" if amendments are introduced to take away the right of the developers in the voting of the resolution on the termination of the appointment of the DMC manager. However, the Review Committee notes that there would be human rights concern and the proposal would be subject to legal challenge if the right of the developer (who holds shares as other ordinary owners) is deprived without sound justifications.

(b) Introducing a time limit for the appointment of DMC managers and requiring open tender of subsequent property management service providers

4.9 In light of the difficulty to meet the 50% threshold in the termination of the appointment of DMC managers, some suggest adding a new requirement to the DMC Guidelines issued by the Lands Department to the effect that the DMC manager can only serve for a certain number of years, say five years, after the DMC comes into effect. For multi-phase development, it is suggested that the DMC manager can serve for a certain period, say one year, after the issue of the Occupation Permit for the last phase of the development.

4.10 Under the proposal, the DMC manager will be required to, within two years after its appointment, assist the owners to form an OC. Subsequent to its formation, the OC should call for an owners' meeting by the fourth year to decide if they would like to continue to employ the DMC manager. If the voting result is against the

continued employment of the original DMC manager, the OC should commence the tender exercise at the beginning of the fifth year. By the end of the fifth year, the original DMC manager should have transferred the set of required information to the new service provider before stepping down.

4.11 Those who favour this proposal consider that it can help protect the interest of the owners, as it can stop the original DMC manager from serving for an infinite period of time and thus would have incentive to perform better. On the other hand, those who have reservations on the proposal consider that the original DMC manager who is familiar with the building or estate should be more capable than others to provide quality services to the owners. Furthermore, the loyalty of the DMC managers may be impaired in light of the instability created by the limitation on the term of service and thus affecting their quality of services.

4.12 The Review Committee also notes that there would be practical difficulties associated with the implementation of the proposal under certain circumstances and hence further consideration is required. For example, as the formation of OC is always not an easy task, if the original DMC manager fails to assist the owners in forming an OC within the stipulated timeframe or the owners themselves simply have no intention to form an OC, the absence of an OC would render it difficult to identify a legal entity with recognised legal status to sign the contract with the new manager on behalf of the owners. Another problem is that it would lead to a "management vacuum" if, after the owners decide to terminate the appointment of the original DMC manager by the end of the fifth year, they could not find a suitable replacement upon the completion of the tender exercise.

(c) Counting the shares of the owners of the residential part and that of the commercial part separately when voting on the resolution on the termination of DMC manager

4.13 In composite developments consisting of residential units and commercial facilities such as shops, car parks, etc., the owners of the residential part may hold different views on the performance of the

DMC manager from that of the owners of the commercial part. Some consider that a possible approach to improve the existing termination mechanism is to count the shares of the owners of the residential part separately from that of the commercial part when voting on the resolution on the termination of the DMC manager.

4.14 The Review Committee notes that in considering the aforementioned proposal, the following issues are relevant –

(a) If the proposal is to be implemented, the shares of the residential part and that of the commercial part must be properly differentiated with clear definitions of the relevant terms. Otherwise, it would easily lead to disputes.

(b) Even if the shares of the residential part and the commercial part are properly defined, various issues will still need to be sorted out before the new arrangement can be rolled out. For instance, if only the shares of the residential part are included while excluding the shares of the commercial part in the voting process, owners of the commercial part would most probably react strongly as they consider that their rights have been infringed. On the other hand, if both the shares of the residential part and the commercial part are included but each part is required to meet the 50% threshold for the termination of appointment of DMC managers, owners may still face difficulty in meeting the new "double" threshold as under the existing requirement.

(c) Normally, there is one DMC manager for each DMC. If the owners' shares of the residential part have passed a majority resolution to terminate the appointment of a DMC manager but owners of the commercial part remain silent or pass a contrary resolution, it is doubtful whether the residential part could unilaterally terminate the appointment of the DMC manager and engage another service provider.

4.15 The Review Committee will further consider the legal and operational implications of the above proposals before making recommendations on the way forward.

Remuneration of DMC Managers

4.16 There are suggestions that the basis for setting the remuneration level of DMC managers as specified in the DMC Guidelines issued by the Lands Department should be reviewed. At present, according to the DMC Guidelines, the remuneration of the DMC manager is capped below a certain percentage of the total expenses, costs and charges necessarily and reasonably incurred in the management of the development. For residential developments, the maximum percentage is set according to the total number of residential units and parking spaces in the development: 20% for developments with not more than 20 residential units and parking spaces, 15% for developments with 21 to 100 residential units and parking spaces, and 10% for developments with 101 or more residential units and parking spaces (the relevant extract of the DMC Guidelines is at **Annex 4**).

4.17 Some owners suggest that the remuneration level of DMC managers should not be calculated on the basis of the percentage of the total expenses, costs and charges incurred in the management of the development, as it induces the DMC managers to spend more so as to increase their remuneration. Some suggest that the remuneration should be capped at a fixed price. The Review Committee envisages that any review of the mechanism for determining the remuneration level of DMC managers would be a large scale exercise, as substantial research on the existing market situation is required. If a new mechanism is to be introduced and amendments are to be made to the DMC Guidelines by the Lands Department, there is also a need to consider how the remuneration of the DMC managers appointed under the existing DMCs should be handled.

4.18 Other owners are of the view that if they can indeed exercise their right in terminating the appointment of the DMC

managers, and there is more transparency on the charges of the PMCs, it will be more desirable to leave it to market forces to find the equilibrium price. The Government should not artificially set a standard fee which has to catch up with changing circumstances even with regular and frequent fee revisions.

4.19 As the Review Committee will study in detail the mechanism for termination of the appointment of DMC managers at its next stage of work, and the Government's proposed regulatory regime of the property management industry will help enhance the transparency of the operation of the PMCs, the Review Committee will take these factors into consideration with a view to making a recommendation on the proposed way forward regarding the remuneration of the DMC managers at its next stage of work.

Mandatory Building Management

4.20 The BMO empowers the Government to mandate owners to appoint building management agents or to appoint administrators under the following specified circumstances so as to ensure proper building maintenance –

(a) On the appointment of building management agent, under section 40B of the BMO, SHA may order the MC of an OC to appoint a building management agent for the purposes of managing the building, where it appears to him that no person is managing the building, the MC has failed substantially to perform the duties of the OC under section 18 of the BMO and, by reason of such circumstances, that there is a danger or risk of danger to the occupiers or owners of the building.

(b) If the building concerned does not have an OC, or where it appears to SHA that a MC of the building concerned has not been or is not likely to be appointed, no person is managing that building and SHA is satisfied that by reason of such circumstances there is a danger or risk of danger to the occupiers or owners of the building, SHA

may apply, under section 40C of the BMO, to the Lands Tribunal for an order that a meeting of the owners be convened to –

(i) consider and, if thought fit, to pass a resolution to appoint a MC, or;

(ii) where such resolution is not passed, to consider and, if thought fit, to pass a resolution to appoint a building management agent. According to section 40C(3A), the convenor may appoint a building management agent directly if no MC or building management agent is appointed at the meeting of the owners.

4.21 The Review Committee notes the following practical concerns with regard to the application of sections 40B and 40C of the BMO –

(a) where a MC, having taken proper procedures in procuring the requisite services, still fails to find any suitable building management agent who is interested in providing such services, it is doubtful if SHA may take action under section 40B;

(b) where a MC, having appointed a building management agent, but does not approve the agent's proposal for building maintenance works for good reasons, it is arguable that SHA's order under section 40B has been complied with and hence there is no legal action that SHA may take;

(c) similar problems may arise in the context of section 40C;

(d) designating one of the owners under section 40C to be a "convenor" would be controversial and the law provides no guidance or criteria on how this "convenor" should be selected from among the owners;

(e) whether a MC has failed "substantially" to perform its duties is a matter of judgment and that a MC may have acted in good faith and exercised due diligence in performing its duties but still fails substantially to perform such duties;

(f) it is difficult for SHA to determine whether a building is in danger or poses a risk of danger without some readily measurable quantitative indicators. The Review Committee would need to consider the matter further; and

(g) any order made by SHA to an inactive or defunct MC is legally questionable.

4.22 On the appointment of administrator, Part V of the BMO provides a mechanism for the dissolution of an existing MC and appointment of an administrator by the owners at a meeting of the OC under section 30 or by the Lands Tribunal upon application made to it by, amongst others, an owner or SHA under section 31. Section 31 provides, inter alia, that the Lands Tribunal may, upon application made by SHA, dissolve the existing MC and appoint an administrator, or remove and replace an administrator. These provisions have the following problems –

(a) This mechanism is even more draconian than the one under sections 40B and 40C because it involves the dissolution of an existing MC duly elected by the owners of the building concerned.

(b) Even though section 31(2) provides that the Lands Tribunal may direct to appoint an administrator on such terms and conditions including the remuneration and expenses of the administrator and that the expenses incurred shall be deemed to be part of the expenses of management of the building, the building owners concerned may refuse to pay for the administrator's expense or contribute to the cost of repair works.

(c) If the Government, which has no legal obligation to pay for such expenses, starts to bear the expenses on behalf of the owners, hoping to recover them from the owners later, it might in effect take on the recurrent management costs of that building for an indefinite period of time, if no new MC is appointed.

4.23 The power to order mandatory appointment of building management agent and administrator must be exercised prudently with sound justifications. Otherwise, it would be regarded as an unreasonable intrusion of the Government into the management of private properties.

4.24 To address the concerns regarding the application of sections 40B, 40C and Part V of the BMO, the Review Committee has preliminarily identified the following possible measures –

(a) Specifying the conditions constituting to a danger or a risk of danger to occupiers or owners of a building in the BMO to facilitate the implementation of sections 40B and 40C. For example, a building may be considered "in danger or posing a risk of danger to the occupiers or owners" if it has received a certain number of orders issued by the relevant Government departments, or that it has received a certain number of a particular type of warning;

(b) Making it an offence if an owner, without reasonable excuse, refuses to pay the relevant share of cost of carrying out the order issued by SHA and the Lands Tribunal; and

(c) Imposing a surcharge on default actions ordered by SHA or the Lands Tribunal.

The Review Committee will examine in detail the feasibility and implications of the above measures in its next stage of work before

making its recommendation.

Winding-up of OCs Due to Re-grant of Land Lease by the Government

4.25 The winding-up of Pokfulam Gardens' OC as a result of the re-grant of land lease by the Government has aroused concerns on how similar cases should be handled in future. Pokfulam Gardens is a private residential development in the Southern District. Upon expiry of the Government land lease in June 2006, the Government combined the two lots concerned and renamed the Inland Lot number. According to the new DMC of Pokfulam Gardens, the owners were required to form a new OC.

4.26 Having sought legal advice, the owners decided to wind up the original OC in accordance with section 33 of the BMO and form a new OC under the new DMC. At the time of winding-up, the original OC had a substantial amount of tangible assets. The owners found it difficult to divide the assets proportionally among the owners of undivided shares and hence applied to the High Court for an order to transfer the assets of the original OC to the new OC direct. In January 2011, the Court ordered the transfer and stressed that a lesson should be learned regarding the dealing of assets in similar situations.

4.27 The Pokfulam Gardens case is the first of its kind in which the change of land lease upon lease expiry affects the operation of an incumbent OC. While no lease on which the lot is held in multiple-ownership will expire from 2013 to 2016 according to the Lands Department, the Review Committee considers it worthwhile to explore whether there is any room for improvement to the existing mechanism so as to facilitate smooth transition under similar circumstances in future. The Review Committee has preliminarily identified the following options –

Option (1): Allowing the original OC to continue to operate under the new DMC, with a view to saving time and effort in forming a new OC, winding up the original OC and transferring the assets of the original OC to the new OC

4.28 The feasibility of this option is doubtful. Arguably, when a Government lease expires, no person has any interest in the land, except the Government. All the rights and interests of the existing owners in the land will lapse. Those who support such an interpretation consider that as the legal basis of an OC is ownership in land, the original OC ceases to exist upon the expiry of a Government lease. The original OC was formed to only serve the old Government lease and the old DMC.

Option (2): Allowing the original OC to dissolve without winding-up and allowing the direct transfer of assets from the original OC to the new OC, if it is necessary to form a new OC under the new DMC

4.29 Some suggest that the BMO should be amended to the effect that the original OC is not required to wind up until a new OC has already been established under the new DMC, if its defunct is solely caused by the re-grant of Government lease. Under the proposed mechanism, once a new OC is formed under the new DMC, the original OC will inform the Land Registry in writing (or in certain prescribed format) with supporting documents that it would be deregistered, without going through the winding-up process. It could then transfer the funds from the old bank account to that of the new OC. However, the legal feasibility of this proposal will need to be further explored.

4.30 On the operational side, there should be a mechanism in place for the owners to reach a consensus on the deregistration of the original OC and the settling of the outstanding liabilities, if any. The original OC may be required to appoint a certified public accountant to handle the assets and transfer any surplus fund directly to the new OC. Compared with the winding-up mechanism under the existing legal regime, the proposed new mechanism may be more vulnerable to

disputes and challenges.

Option (3): Allowing the assets of the original OC to be directly transferred to the new OC, if it is necessary to form a new OC under the new DMC and wind up the original OC

4.31 After considering Options (1) and (2), if it is found necessary to form a new OC under the new DMC and wind up the original OC, the possibility of directly transferring the assets of the original OC to the new OC to avoid the trouble of dividing the assets of the old OC among the owners during the winding-up process should be explored. In the Pokfulam Gardens case, the High Court ordered that the surplus fund of the original OC be transferred directly to the new OC. The Court also stressed that a lesson should be learned regarding the dealing of surplus assets in similar situations.

4.32 One suggestion worth exploring is that the original OC should be required to hold an owners' meeting before the expiry of the Government lease to entrust the fund to the manager by a resolution passed at the meeting. Provisions may be added to the BMO or the DMC to make it a mandatory requirement in case of the re-grant of Government lease. Apart from examining the legal feasibility of this proposal, various operational implications would also need to be considered. For example, an OC may fail to convene such owners' meeting or pass such resolution because of disputes or other reasons.

4.33 Given the complexity of the legal and operational issues involved, the Review Committee will further examine the feasibility of the various options at its next stage of work.

Dissolution of Defunct MCs and Removal of Records from the Land Registry

4.34 At present, the proper conclusion of the operation of an OC with the removal of its records from the Land Registry can only be done through the winding-up of the OC. In some cases where all MC members of an OC have resigned without any successor (e.g. for demolished buildings or buildings under active acquisition for redevelopment), the record of the OC, including the names of all MC members, is still kept in the Land Registry and cannot be properly removed.

4.35 To address the issue of obsolete records of defunct OCs still being kept in the Land Registry, the Review Committee recommends that the names of the OCs of the demolished buildings should be removed from the records of the Land Registry, modeling on the deregistration arrangement of solvent private companies under the Companies Ordinance (Cap. 32)[1].

4.36 The Review Committee considers that if an OC of a demolished building does not file any information to the Land Registry, say from the date of demolition for a period of three years and does not respond to the Land Registry's letters, the Land Registry may strike the OC off the register and the OC will be dissolved.

4.37 As for those buildings under active acquisition, the Review Committee considers that further deliberation is necessary as those buildings may still have a small number of residents. Allowing the deregistration of such OCs may disseminate a wrong message that the Government encourages OCs of such buildings to discontinue their functions or to give up the management of the buildings. The Review Committee will further examine the legal and operational implications of the proposal of allowing the OCs of those buildings under active acquisition to apply for deregistration under the following

[1] At present, the Companies Registry may strike the name of a company off the register should the Companies Registry have reasonable cause to believe that the company is not carrying on business or in operation (e.g. no filing or update of information from the company or no response to the Companies Registry's letters).

circumstances –

(a) a resolution has been passed at an owners' meeting or all MC members agree to the deregistration; and

(b) when the acquiring party files an application to the Court for compulsory sale under the Land (Compulsory Sale for Redevelopment) Ordinance (Cap. 545) and the OC has no outstanding liabilities.

Incorporation of Owners of House Developments

4.38 The Review Committee notes that some owners of house developments would like to form OCs to better manage their properties. However, there is legal difficulty in the incorporation of owners of house developments under the BMO because the ownership structure and nature of house developments do not fall within the ambit of the BMO.

4.39 The aim of the BMO is to facilitate the management of multi-storey buildings by providing a mechanism for owners, who own undivided shares, to form an OC. This is reflected in the definition of the term of "owner" in section 2 of the BMO that "a person who for the time being appears from the records of the Land Registry to be the owner of an undivided share in land on which there is a building". Owners of house developments usually are not allocated any undivided shares. In other words, owners of house developments are sole owners of the respective subsections but not co-owners of the whole development, and hence do not fall within the definition of "owner" in the BMO.

4.40 Given that the provisions and fundamental concepts in the BMO were construed specifically to cater for the management of multi-storey buildings, it is doubtful whether amendments to the BMO can address the problem. In addition, there are two fundamental problems arising from the ownership structure of house developments. Firstly, while 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 private properties of the developers. It follows that even if owners of individual houses in house developments incorporated themselves into an OC, the OC would not be able to carry out a fundamental duty of an OC which is to manage and maintain the common parts (within the meaning of the BMO) as it might amount to interference of property rights of the developers.

4.41 Secondly, given that the size of the subsections (or houses) of house developments often varies to a great extent and a house development might contain individual houses and multi-storey buildings, unless it is provided for in the DMC, it would be extremely difficult for owners to agree among themselves on a basis for determination of their shares.

4.42 In view of the above, it might not be feasible for owners of house developments to form an OC under the BMO. Some consider that a way out would be to set up a mechanism, by introducing provisions under the BMO or under a new piece of legislation, to enable owners of house developments to form committees so that they can have a greater say in the management of the common parts and facilities of the house developments. However, it should be noted that the setting up of such kind of committees of the owners may not enable the owners concerned to have any management control of the common parts and facilities of the house developments. If the Government tried to confer powers on such committees by introducing legislative amendments, this might amount to infringement of private property right.

4.43 The Review Committee considers that 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 PMCs. Many owners of house developments have already formed non-statutory organisations like owners' committees for the better management of their properties. Besides, the Government is now working on the proposed licensing regime of the property management industry which aims to ensure the service quality of PMCs and property management personnel. As the

incorporation of owners of house developments involves complicated legal issues, the Review Committee will further study the issue at its next stage of work.

Matters relating to DMCs

4.44 A DMC is a deed and a private contract signed among 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. The 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, 1999, 2006 and 2011. In approving DMCs, LACO will ensure that the current Guidelines for DMCs are complied with.

4.45 Sub-DMCs are most common in phased developments. In most cases, the principal DMC covers matters which are applicable to the entire development and the first phase of the development. The sub-DMCs cover matters which are applicable to the subsequent phases. Paragraph 29 of the Guidelines for DMCs issued by LACO provides that the developer may reserve rights to execute sub-DMCs in respect of separate towers, phases, etc. All sub-DMCs (as well as the principal DMC) require the approval of the Director of Lands but where the Director is satisfied, upon submission of the draft sub-DMC to the Director, that the sub-DMC relates only to the internal sub-division of an existing unit and by the sub-DMC there will be no alteration to common parts or liability for management or other charges under the principal DMC, the Director may, in his absolute discretion, waive the requirement of approval of the sub-DMC.

4.46 Some owners raise the following concerns regarding the applicability and the terms of DMCs –

One building with multiple OCs

4.47 Buildings which are covered by more than one DMC are mostly built prior to the introduction of the DMC clause in 1985 requiring Government's approval of the relevant DMCs. Each of these buildings usually consists of blocks which are erected on different sections of a lot or different lots. In some cases, there are common areas or facilities such as roof, corridor or staircase which are used by the owners of two or more blocks of a building. Practical difficulties will arise if two blocks in the same building come under two DMCs which contain provisions inconsistent with each other. The sharing of responsibility (such as the cost of repair, management fees, etc.) among the owners of the different blocks is often a subject of dispute. Since an OC is formed on the basis of each DMC, these buildings would have more than one OC and therefore the MC Chairmen have expressed difficulties in their management.

Multiple buildings with one OC

4.48 "Multiple buildings with one OC" is another common phenomenon particularly for buildings with shared common facilities such as car parks and clubhouses. There are various problems associated with such buildings. For example, owners of certain buildings may not be willing to pay the maintenance fees for the works of another building under the same OC. Another problem is that some owners of the residential part may find it unfair that they need to pay for the maintenance of the commercial part.

Unfair terms in DMCs

4.49 Some owners are concerned that the old DMCs contain unfair terms, for example, unfair allocation of management shares and undivided shares between owners and developers, where the developers may have a large number of undivided shares but only need to pay a small amount of management expenses.

Applicability of the BMO to sub-DMCs

4.50 According to section 34E of the BMO, the provisions in Schedule 7 to the BMO[2] are mandatory to every DMC. In addition, according to section 34F, the provisions in Schedule 8[3] which are consistent with the DMC shall be impliedly incorporated into every DMC, regardless of the date it was made. Some suggest that Schedules 7 and 8 to the BMO should also apply to sub-DMCs.

4.51 In the light of the above, there have been suggestions that the Government should introduce provisions in the BMO to solve the problems of old DMCs and sub-DMCs and that a mechanism should be allowed for owners to amend the DMCs and sub-DMCs, in particular those provisions which are unfair and unreasonable to owners. Some suggest introducing a mechanism under which applications can be made to the court to amend provisions of a DMC (or sub-DMC) if not less than 80% or 90% of the owners concerned agree to the amendment. There is also a suggestion of introducing the concept of "user-pays" principle to the BMO to resolve the problem of unfair allocation of management shares and undivided shares.

4.52 In examining the feasibility of the aforementioned proposals, the Review Committee considers that the following considerations are relevant –

(a) DMC is a private deed among the developer, the manager and the owners of the building. As in the case of any other private contracts, no party to a DMC shall unilaterally modify any provisions of the DMC without the consent of all other parties. This is a contractual principle. It may not be appropriate for the Government,

---

[2] Schedule 7 to the BMO provides for the requirements relating to keeping of accounts, resignation of manager, termination of manager's appointment by OC, obligations after manager's appointment ends and communication among owners, etc.

[3] Schedule 8 to the BMO provides for the requirements relating to meetings of OCs and meetings of owners.

which 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 only 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.

(b) In fact, with the consent of all owners, several DMCs could be rewritten and combined into one DMC. However, the practical difficulty is that there would be significant impact on property rights. Ensuring proper protection to those owners who are affected by or who oppose such changes is important.

(c) Alternatively, the Government may encourage respective OCs to appoint representative(s) to form a joint management committee to solve the problem of "one building with multiple OCs".

(d) Some consider that the Government should not arbitrarily set a percentage of majority, say 70% or 80%, as a threshold. Moreover, no matter how large the percentage, there might remain a minority who objects to the amendments proposed to be made to their DMC. Consideration should also be given to whether such an approach would be in breach of the spirit of private contracts.

(e) For multiple buildings with one OC, it may not be realistic or in line with the present modes of building management to stipulate that an OC can only manage one building, or to allow the commercial and residential parts to form their respective OCs.

(f) The re-distribution of undivided or management shares will likely benefit one group of owners at the expense of

another group. This can be regarded as having an impact on the property rights of owners, which might provoke strong objections on the ground of property rights protection under Articles 6 and 105 of the Basic Law.

4.53 The Review Committee will further study the issues concerned at its next stage of work with a view of making recommendations to the Government on the proposed way forward.

Other Technical Amendments

4.54 The Review Committee will also consider whether some of the existing definitions in the BMO need to be reviewed at its next stage of work. For example, although the term "common parts" is already defined in Schedule 1 to the BMO, sometimes there are disputes over whether certain parts (e.g. air-conditioner hood) fall within the definition of "common parts". In reviewing the definition, the Review Committee understands that any proposed amendment to the existing definition must be considered carefully as it may have read-across implications to the existing DMCs and the management of the buildings.

Chapter 5

Other Issues

5.1 Apart from the issues discussed in Chapters 2 to 4, the Review Committee has studied a number of other building management issues and considered various options with a view to examining whether the existing arrangements can be further improved. The deliberations of the Review Committee on these issues are set out in the ensuing paragraphs.

Quorum of OC's Meeting

5.2 Paragraph 5(1) of Schedule 3 to the BMO stipulates, amongst others, that the quorum of an OC's meeting shall be 10% of the owners (except in the case of an OC's meeting at which a resolution for the dissolution of the MC is proposed, the quorum shall be 20% of the owners). The purpose of setting the quorum at 10% of the owners seeks to strike a balance between facilitating the holding of an OC's meeting and ensuring that the resolutions at an OC's meeting can only be passed with a reasonable level of support from the owners.

5.3 The actual number of owners required to meet the quorum for each building or housing estate varies depending on the scale of the building or housing estate. For those large estates with several hundreds of units, it is often not easy to find a mutually convenient time and a suitable venue for holding the OC's meeting in view of the large number of owners involved. Conversely, in respect of single tenement buildings, the minimum number of owners that are required to attend the OC's meeting is much smaller, and hence the decisions made at the OC's meeting may be dominated by a small number of owners.

5.4 The Review Committee has examined the feasibility of the following proposals for enhancing the existing arrangements –

(a) Introduction of a tiered quorum system

5.5 Under a tiered quorum system, a lower quorum requirement will be imposed on estates or buildings with a large number of units, while a higher quorum requirement will apply to single tenement buildings. The table below illustrates an example of a tiered quorum system –

Number of Units	**Quorum Requirement**
1 to 50 units	15% of owners
51 to 100 units	10% of owners
101 units or more	5% of owners

5.6 The Review Committee is concerned that a tiered quorum system may unnecessarily complicate the existing arrangements and cause confusion to the owners. Furthermore, raising the quorum requirement of single tenement buildings will pose a bigger hurdle to owners who are willing to participate in the management of their buildings voluntarily as they will have to work harder to solicit enough support from other owners to attend the meeting. On the other hand, lowering the quorum requirement of large housing estates will heighten the risk of the decisions made at an OC's meeting being dominated by a small number of owners. Recognising the importance of having a system which is fair and easy to administer, the Review Committee recommends that the existing fixed quorum requirement be maintained.

(b) For large-scale maintenance project –

- ***(i) raise the quorum requirement for resolutions; and/or***
- ***(ii) require such resolutions to be passed by a higher percentage of votes or a certain percentage of undivided shares***

5.7 In view of the significant financial implications of large scale maintenance projects, it is important to ensure that such projects are properly discussed and endorsed by the majority of owners at OC's meetings. There are views that the quorum requirement should be raised, say from 10% to 20% of the owners, when voting of a

resolution on large-scale maintenance project takes place at an OC's meeting. Another proposal is that the passage of resolutions relating to large-scale maintenance projects should require a three-quarters majority (i.e. 75%) instead of a simple majority (i.e. 50%).

5.8 The Review Committee is concerned that raising the quorum requirement or changing the "simple majority" requirement for voting of resolutions relating to large-scale maintenance project may render most maintenance projects "non-startable", which will in turn lower the quality of a building. Furthermore, if different quorum or resolution requirements are imposed on different types of resolutions, it will complicate the transaction of business at the OC's meetings. In particular, it will be extremely difficult for the MC to ensure the quorum is met throughout the meeting if a series of resolutions are to be passed at the OC's meeting and the quorum requirement is different for each agenda item. The Review Committee therefore recommends that the present arrangement be maintained given its simplicity and clarity.

The Establishment of an Alternative Dispute Resolution Mechanism

5.9 In the course of daily building management and maintenance, disagreements often arise among owners or between owners and OCs. The disputes are far-ranging from daily operational matters like collection of management fees to matters of principle like interpretation of the DMC or the BMO.

5.10 Currently, the parties in dispute can settle their cases in the Small Claims Tribunal, the Lands Tribunal, the District Court or the Court of First Instance of the High Court as appropriate. However, there are views that settling disputes through the existing mechanism is unsatisfactory as it involves high legal costs and lengthy litigation processes. Thus, some have suggested that a tribunal not involving legal representation like the Small Claims Tribunal and dedicated to handling building management matters should be established with a view to resolving the disputes in a more efficient and less costly manner.

5.11 The then Housing, Planning and Lands Bureau and the Development Bureau conducted a thorough examination of the feasibility of establishing a Building Affairs Tribunal (BAT) during 2005 to 2007 when the public consultation exercise on mandatory building inspection was carried out. They concluded in their consultation report that as the issues involved were complicated, they would continue to study the feasibility of such a tribunal.

5.12 The Review Committee has thoroughly considered the proposal from the angle of building management. It has taken into account the views received from stakeholders and has consulted the Judiciary Administrator in the process. The Review Committee has the following comments on the proposal –

(a) Establishing the proposed BAT within the judicial system

5.13 Those who advocate the setting up of a BAT within the judicial system suggest that the operation of the proposed BAT should be similar to that of the Small Claims Tribunal where no legal representation is allowed during the proceedings so that the processing time and litigation costs can be minimised.

5.14 The Review Committee has reservation over the proposal in view of the following considerations –

(i) The proposal to disallow legal representation in the proposed BAT could be seen to have the effect of taking away the civil right of the parties to have their cases argued by lawyers. The Judiciary considers that unless there are full justifications, this would likely call into question possible constitutional and human right implications. Moreover, this must be considered in the context that building management disputes could and do from time to time involve difficult questions of law regarding the interpretation and application of the BMO and the relevant DMC.

(ii) To ensure fairness, the BAT must give parties a proper opportunity to present their evidence and cases. As such, the processing time by the proposed BAT may not be shorter than the existing arrangements in the Lands Tribunal.

(iii) As pointed out by the Judiciary, the Lands Tribunal is already a specialized court that specifically deals with building management and other land-related matters, while at the same time, the Small Claims Tribunal also provides a simple, inexpensive and informal procedure to deal with claims within the prescribed limit of $50,000 (which does not exclude claims that may be related to building management disputes).

(iv) The Judiciary is of the view that to establish a BAT as another court within the existing court system would unnecessarily complicate the structure of the relevant courts and tribunals. The existing courts and tribunals, including the Small Claims Tribunal, the Lands Tribunal, the District Court and the Court of First Instance of the High Court, have been effective in dealing with building management disputes. Creating a new BAT may risk duplicating their roles and duties.

(v) To facilitate the more efficient, expeditious and fair disposal of building management cases, the Lands Tribunal has adopted a new standard practice with effect from 1 July 2009 to take proactive case management so as to streamline the processing of building management cases. According to the Judiciary Administrator, the average waiting time for building management cases currently handled by the Lands Tribunal is not more than 35 days. The Judiciary will monitor the situation closely and consider as appropriate areas where procedures could be streamlined or simplified.

(b) Establishment of a BAT outside the judicial system

5.15 Another option which has been examined by the Review Committee is to establish the BAT outside the judicial system with a mode of operation similar to that of the Minor Employment Claims Adjudication Board under the Labour Department. The Minor Employment Claims Adjudication Board deals with claims arising from disputes of statutory or contractual right of employment, involving not more than ten claimants and not exceeding $8,000 per claimant. Hearing of minor employment claims is conducted in public and no legal representation is allowed. The adjudicator is a senior labour officer.

5.16 The Review Committee considers that it may not be appropriate to extend the mode of operation of the Minor Employment Claims Adjudication Board to the BAT due to the following reasons –

(i) Compared with employment disputes, building management cases are often more complex as they involve complicated ownership issues in addition to financial disputes. Thus, it will be very difficult to identify simple cases to be resolved by the proposed BAT. Even cases involving only a small amount of money can be complicated in nature if ownership of common parts is involved, and may have read-across implication to future cases.

(ii) It may be inappropriate to limit the right of appeal as it may have constitutional implications. Persons who are not satisfied with the adjudication result may still appeal to the higher courts, and this will defeat the purpose of shortening the processing time of the case.

(iii) Separately, the Review Committee notes that the Government has been promoting the use of mediation for resolving disputes, which provides an alternative mechanism for settling building management disputes in a more efficient and less costly manner.

(iv) To facilitate the parties in seeking mediation on building management cases, a Building Management Mediation Co-ordinator's Office has been set up in the Lands Tribunal since January 2008. After holding information sessions on mediation, the Mediation Co-ordinator will conduct a pre-mediation consultation with the parties and give the information on mediation service available for the parties to consider and apply for such service. The aim is to help the litigants seek mediation to resolve their disputes in a more cost-effective, timely and satisfactory manner.

5.17 On the whole, the Review Committee considers that establishing a dedicated BAT to resolve building management disputes may not be able to bring about the benefits that some intend to achieve. The most effective way to address the problem of building management disputes is to tackle the problem at its root.

5.18 In this connection, HAD has been implementing various measures to strengthen the owners' and OCs' ability in building management with a view to minimising disputes among relevant parties. For instance, the Panel of Advisors on Building Management Disputes has been set up to provide authoritative and impartial professional advice for owners on complicated building management cases and disputes. Panel members are experienced professionals in building management affairs, including lawyers, accountants, surveyors, etc. All participating owners found the advice of the Panel very useful, and very often they adopted the advice of the Panel without having to resort to the Lands Tribunal.

Recovery of Management and Maintenance Fees

5.19 Some OCs encounter difficulty in recovering the management and maintenance fees from owners. They consider that the existing mechanism, such as registering a charge against such interest in the Land Registry or putting up the case to the Small Claims Tribunal, can only effectively deal with those owners who are

co-operative. For those owners who are not co-operative, registering a charge may not have deterrent effect if such owners do not intend to sell their flats. Putting the case to the Small Claims Tribunal is time-consuming. In this connection, there are suggestions to put in place a mechanism to enable easier recovery of the management and maintenance fees. The Review Committee has considered the following proposals –

(a) Disallow defaulting owners to attend or vote at any OC's meetings

5.20 Some suggest that if an owner wishes to have a say in the running of the building, he should pay his share. If an owner fails to pay his share, his views should be ignored and his vote should be disregarded. Therefore, there is a suggestion that non-paying owners should be prohibited from voting at any OC's meeting.

5.21 The Review Committee notes that there are cases where the owners concerned do not pay the fees with valid reasons (e.g. the budget has not been properly prepared, the management fees are not calculated in accordance with the DMC, etc.). These concerns should best be addressed through discussion at the OC's meetings. It will be unfair to these owners if they cannot attend or vote at the meetings. On the other hand, for those owners that do not care about the management of the building, taking away their voting rights at the OC's meetings may not be an effective deterrent. Furthermore, the proposal to disallow defaulting owners from attending or voting at the OCs' meetings may raise the issue of property right protection under Articles 6 and 105 of the Basic Law.

(b) Forbid the defaulting owners to use the services of the housing estates

5.22 In order to recover management and maintenance fees from owners, some suggest creating some kind of "trouble" to the owners concerned. For example, some suggest that defaulting owners should not be allowed to enter the building or use the lift.

5.23 Paragraph 28(a) of the DMC Guidelines stipulates that there must be no provision in the DMC for preventing access to the unit by reason of the owner of that unit failing to pay any fees or to comply with any other provisions under the DMC. Hence, such suggestion may contravene the DMC Guidelines.

(c) Bankruptcy petition

5.24 Some owners do not care about their properties being registered a charge in the Land Registry as they do not intend to sell their flats. However, quite a large number of owners, particularly those who have the ability to pay but refuse to pay, do not wish to go bankrupt as their bank accounts and assets will all be frozen when a petition is filed. Hence, some consider that making it explicit in the BMO that the OCs should file a bankruptcy petition with the court against any owner who owes the management and/or maintenance fees for a certain period of time can have deterrent effect.

5.25 Given that an OC can always file a bankruptcy petition with the court against an individual under the current arrangement, the Review Committee is of the view that it is not necessary to introduce a special clause in the BMO on such issues.

5.26 The Review Committee considers that there are already provisions in the BMO and the DMC Guidelines[4] to facilitate the collection of payments. There are many precedent cases of OCs using these channels to deal with defaulting owners successfully. The Review Committee is of the view that the status quo should be maintained.

Allowances to MC Members

5.27 At present, according to section 18(2)(aa) of the BMO, an OC may at its discretion pay the Chairman, the Vice-chairman, the Secretary and the Treasurer an allowance as approved by passing a resolution at a general meeting of the OC. The maximum amount shall not exceed the amount specified in Schedule 4 to the BMO. Some suggest giving all MC members the allowances, or setting a ceiling on the total amount of allowances and allowing owners to

---

[4] Section 22 of the BMO provides that the amount to be contributed by an owner towards the amount determined under section 21 shall be payable at such times and in such manner as the MC may determine. Section 22(3) clearly stipulates that the amount payable by an owner under section 22 shall be a debt due from him to the OC at the time when it is payable.

Under section 19, if a DMC provides that if an owner fails to pay any sum which is payable under the DMC, a person may sell that owner's interest in the land or register a charge against such interest in the Land Registry, then the OC may, to the exclusion of such person, exercise such power of sale or register such charge in the same manner and subject to the same conditions as it were the person referred to in the DMC.

Section 23(1) provides that if any amount payable by an owner under section 22 who is not occupying a flat remains unpaid for a period of one month after it has become due to the OC, the OC may by notice in writing addressed to the occupier of the flat demand such amount from the occupier, who shall thereupon be liable to pay the same to the OC. Section 24 provides that Part III of the Landlord and Tenant (Consolidation) Ordinance (Cap 7) shall apply to an amount payable by the owner under section 22 or 23 as if the amount were rent payable to the OC as landlord of the owner's flat.

Section 25 further provides that if an owner fails to pay any amount payable under section 22 within one month of it becoming due and a registered mortgagee of the flat in respect of which the owner is in default has paid such amount on the owners' behalf, such payment shall be recoverable by the registered mortgagee from the owner as if the amount of such payment formed part of the principal sum due under the registered mortgage of the flats.

An OC may file a claim to the Small Claims Tribunal or District Court for an order demanding payment of outstanding management and/or maintenance fees from defaulting owners.

decide on the number of MC members eligible for allowances. This recognises the contribution of MC members and provides more flexibility to the OCs.

5.28 Since the number of units and the number of MC members vary among different types of buildings or housing estates, it is difficult to set a universal ceiling on the total amount of allowances applicable to all buildings. On the other hand, allowing owners to decide on the number of MC members eligible for allowances would lead to disputes among owners as some may argue whether a particular MC member should be eligible for allowances.

5.29 The Review Committee notes that in the previous amendment exercise of the BMO, the initial proposal of the Administration was to make each MC member be eligible for allowances. However, during the deliberation of the proposal at the Bills Committee, some members expressed concerns that allowing all MC members to be eligible for allowances could incur a very large sum of expenses and might be subject to abuse.

5.30 The Review Committee considers that the proposal may be subject to abuse and may lead to disputes among owners, such as determining the eligibility of individual MC member for allowances. The Review Committee recommends that the status quo be maintained.

Appointment of MCs

5.31 There are suggestions that more restriction should be placed on the appointment of MC members under the BMO. Such proposals include stipulating in the BMO that the number of MC members shall not exceed 11 if the building contains more than 200 flats[5], limiting the term of office of each MC member (say not more than five years or two consecutive terms), setting a limit on the number of re-elected members (say only two-thirds of MC members could be re-elected), requiring MC members to declare their interests

[5] The existing requirement under the BMO is that for buildings having more than 100 flats, the number of MC members should not be less than nine.

by lodging the information with the Land Registry, etc.

5.32 The Review Committee considers that the present arrangement of MC appointment strikes a balance between placing appropriate restriction on the appointment of MC members and allowing more flexibility to the owners. Given that MC members only serve on a pro-bono basis, the proposals above would render it very difficult to obtain sufficient number of owners willing to serve as MC members, which is contrary to the policy objective of the Government to encourage owners to form OCs to enable effective building management.

Control over the Financial Matters of OCs and PMCs

5.33 There are views that the existing control on the financial matters of OCs and PMCs should be enhanced. For instance, there are views that a statutory timeframe should be imposed on the OC in supplying its financial records to the owners under Schedule 6 to the BMO, more stringent requirement should be imposed on the opening of bank account by an OC, etc.

5.34 The Review Committee is of the view that these proposals would create unnecessary restriction to the daily operation of the OCs and may discourage owners from participating in the management of their buildings. Moreover, the Government is formulating a regime to regulate the property management industry, which should be able to address the concerns of the owners regarding proper financial management of buildings.

Liability of OCs

5.35 According to section 34 of the BMO, in the winding up of an OC under section 33, the owners shall be liable, both jointly and severally, to contribute, to the assets of the OC to an amount sufficient to discharge its debts and liabilities according to their respective shares. Some owners are concerned about the unlimited liability of the OCs and hence are reluctant to form OCs. Some propose that the liability of OCs should be limited in the same way as limited

companies such that the liability of individual owners is limited to the fees they have paid to the OC or the amount they need to contribute to the annual budget of the OC.

5.36 Having reviewed the issue, the Review Committee has the following findings:

(a) Third party liability is unlimited under common law for the protection of third parties. Thus, each case has to be considered on its own merits and the damages or compensation adjudged by the court differs from one case to another. In the case of the fatal accident at Albert House, Aberdeen in 1994, the solvent parties (one of which is the OC) have to bear the compensation left unpaid by the insolvent parties. This was a decision of the court having regard to certain common law principles. The dispute in question relates to distribution and settlement of civil liabilities, rather than a matter related to the application of the BMO.

(b) When one becomes an owner of a building (i.e. possession of an undivided share of the building), one actually has the exclusive right to use his unit and also co-owns the common parts with other owners of the building. Whether an OC has been formed or not, owners have the legal responsibility to take care of the common parts of the building which they jointly own with other owners.

(c) The BMO only seeks to create a persisting entity (i.e. the OC) capable of representing all the owners at any moment for any of the given purposes in the BMO. Against such legislative background, the co-owners are thus required under section 34 of the BMO to contribute jointly and severally according to their respective shares to the assets of the OC to an amount sufficient to discharge its debts and liabilities upon the winding up of the OC.

(d) If an OC will only have limited liability for the management of the building which is co-owned, the OC does not bear a representative identity for the co-owners of the land and building because under common law, the liability of co-owners of land to third party is not limited unless there is express agreement to the contrary.

(e) If an OC shall have limited liability, this may produce unfavourable consequences to the management of the multi-storey building. In case of limited companies, lenders may charge higher interest rates on loans or may require personal guarantee from the directors or shareholders of the company. Alternatively, they may improve their priority of claims by taking real security against the company's assets. Potential creditors of an OC, like service providers or goods suppliers may take similar measures as those lenders of limited companies. This may cause adverse effects to the management of the multi-storey building.

Allowing Owners to Set Out their Voting Instruction on the Proxy Instruments

5.37 There are views that an owner should be allowed to indicate his voting instruction on the proxy instrument so as to ensure that the proxy votes according to the owner's choice. The Review Committee has reservation over the proposal due to the following reasons –

(a) The proxy appointed by the owner should have considered various views at the owners' meeting before making the voting decision. The purpose of convening the meeting will be defeated if voting instruction is given before the meeting.

(b) The statutory format of the proxy instrument as specified in the BMO is simple and easy to administer. Any proposal which has the effect of allowing an owner extra discretion in altering the format of the proxy instrument may give rise to more disputes over the validity of the proxy instrument.

(c) In the case of an owners' meeting where the voting of more than one resolution takes place, the wording of the second and other subsequent resolutions may hinge on the voting result of the first resolution. It is doubtful whether a proxy instrument with pre-determined voting instruction remains valid under such circumstances.

Communication among Owners

5.38 Some owners deposit leaflets or letters on building management matters into the letter boxes of other owners. The Bills Committee on Building Management (Amendment) Bill 2005 had thoroughly discussed whether there should be an explicit provision in the BMO to the effect that no provision in a DMC or other agreement shall operate to prevent owners of any building from communicating with each other through the depositing of materials into the letter boxes of owners on any business relating to the management of a building. The proposal was not pursued due to the following reasons –

(a) The content of the leaflets or letters distributed by the owners may not be solely related to building management matters. Misrepresented information or personal attacks may be included in the leaflets or letters. Hence, some sort of screening or approval mechanism would be required if the proposal is to be taken forward. As the leaflets or letters are often related to disputes among the owners, the MC and the managers, it seems that it would not be appropriate for any particular party to be vested with the power to screen or approve the leaflets or letters for distribution.

(b) Owners are in the best position to determine how their buildings should be managed. Hence, it is most appropriate to leave it to the owners to decide the mode of communication among themselves having regard to the specific circumstances of individual buildings.

5.39 After thorough discussion, the Building Management (Amendment) Ordinance 2007 added the following new provision to paragraph 9 of Schedule 7 to the BMO to facilitate communication among owners –

> "The manager shall consult (either generally or in any particular case) the corporation at a general meeting of the corporation and adopt the approach decided by the corporation on the channels of communication among owners on any business related to the management of the building."

5.40 The Review Committee considers that the added provision can address the concerns of owners in a pragmatic way and do not recommend any further amendment.

Chapter 6

Way Forward

6.1 Building management affects the interests of various stakeholders, from individual small property owners and tenants to large property developers. Any proposed amendments to the existing arrangements may arouse much controversy. For those building management issues which are controversial involving complicated legal and ownership issues, thorough analysis of the implications of the various options identified in this Interim Report by the Review Committee will be required. The Review Committee will duly take into account the views of different stakeholders before finalising its recommendations at its next stage of work in 2013.

Annex 1

Review Committee on the Building Management Ordinance

Terms of Reference and Membership List

Terms of Reference

1. To identify building management problems and deliberate how they may be resolved or alleviated through amending the Building Management Ordinance;
2. To tap the views of the community on building management issues through co-opted members and, if necessary, focus group meetings with other stakeholders; and
3. To make recommendations to the Government on how to take forward proposals to enhance the operation of Owners' Corporations and to protect the interests of individual owners.

Members

Chairman
Mr CHUNG Pui-lam, GBS, JP

Core Members
Hon TO Kun-sun, James
Hon LEE Wai-king, Starry, JP
Mr FONG Chun-kwong, Edwin
Mr KONG Tze-wing, James, MH, JP
Dr LAU Chi-wang, James, BBS, JP
Mr LAU Kam Sing, Dickie
Mr YUEN Ching Bor, Stephen, MH

Co-opted Members
Mr CHEUNG Ching-yeung, Teddy
Ms CHIU Kin-san
Mr FAN Ying-ming
Ms LAM Wai-lung
Mr LAU Chi-wan

Mr LAU Ming-sum, Julius
Ms LEE Ming-ho, Verna
Mr LEE Sau-shing
Mr LEUNG Fuk-pui
Mr LEUNG Hing-choi, Raymond
Prof LEUNG Yee-tak, Andrew
Mr LI Wai-chun
Mr MAN Chi-wah, MH
Mr YIM Kin-ping, JP

Annex 2

Proxy for the General Meeting of an Owners' Corporation

Guidelines

Key:

✓ ***Statutory requirements***
👍 ***Good practice recommended***

Disclaimer

This set of Guidelines is intended for general reference only. Users of the Guidelines are advised to seek independent legal advice and assistance from lawyers should there be doubts on the application of the Building Management Ordinance (Cap. 344) in individual circumstances. The Government shall not be responsible for any errors in, omissions from or misstatements or misrepresentations concerning (whether expressed or implied) any part of the Guidelines and shall not be held liable or accept any liability, obligation and responsibility whatsoever (including, without limitation, consequential loss or damage) arising from or in respect of any use, inability to use or misuse or reliance on the Guidelines.

The Government reserves the right to revise, omit, suspend or edit the Guidelines at any time in its absolute discretion without giving any reason or prior notice.

Introduction

The Building Management Ordinance (Cap. 344) ("BMO") provides the legal framework for the formation of Owners' Corporation ("Corporation") to facilitate effective management of buildings. Owners of flats in building or groups of buildings ("owners") are encouraged to actively participate in the management of their buildings, including attending the meetings of the Corporation in person.

It is understandable that at times an owner may not be able to attend the meetings of the Corporation in person. To cater for such situation, the BMO provides that an owner may appoint a proxy to attend and vote at the meeting of the Corporation on his behalf.

The proxy should be appointed with extreme care because –

- a proxy appointed by an owner to attend and vote on behalf of the owner at a meeting shall, for the purposes of the meeting, be treated as being the owner present at the meeting.
- voting at the meeting is a crucial step in the decision making process for the management of the building. Major building management matters with significant financial implication requiring contribution of the owners (e.g. maintenance and renovation works on the common parts) are usually resolved through voting at the meeting of the Corporation.

In view of the significance of appointment of a proxy, it is important for the Chairman of the management committee ("MC"), the Secretary of the MC ("the Secretary") and the owners to adopt a proper practice in making and handling the proxy instruments.

1) For the Chairman of the MC

Paragraph 4(5)(b) of Schedule 3 to the BMO provides that the Chairman of the MC (" the Chairman") or, if he is absent, the person who presides at the meeting, shall determine the validity of the proxy instrument in accordance with paragraph 4(4) of Schedule 3 to the BMO. Therefore, the Chairman plays a vital role in determining the validity of a proxy instrument.

Determination of the Validity of a Proxy Instrument

- ✓ In determining the validity of a proxy instrument, the Chairman shall ensure that the proxy instrument is in the form set out in Form 2 in Schedule 1A to the BMO.

Para. 4(4) of Schedule 3 to the BMO

- If the instrument appointing a proxy is in the form set out in Schedule 1A to the BMO, the Chairman should not reject the proxy instrument for the sole reason that it is not the printed proxy form provided by the Corporation.
- The mere act of providing additional information such as Hong Kong Identity Card number or time of signing the proxy will not render the proxy instrument invalid.

✓ The Chairman is required to check whether the proxy instrument has been signed by an owner; or if the owner is a body corporate, whether it has been impressed with the seal or chop of the body corporate and signed by a person authorized by the body corporate in that behalf.

✓ Only those proxy instruments which are lodged within the specified statutory time limit, i.e. at least 48 hours before the time for the holding of the meeting should be considered valid.

☝ In the normal event that there are two proxy instruments with different dates for the purpose of a particular meeting of the Corporation, the proxy instrument with the most recent date would supersede the proxy instrument with an earlier date. If in doubt, the Chairman should contact the owner(s) concerned to clarify which proxy instrument is intended to be used by the owner(s). If no date is marked on the proxy instruments or both proxy instruments are marked with the same date but appointment of different proxies, the Chairman should clarify with the owner(s) concerned. Both proxy instruments should be considered as invalid if their validity cannot be ascertained after the Chairman has taken some reasonable steps to ascertain the validity of the proxy instruments.

☝ The Chairman is advised to handle the proxy instruments in a fair and transparent manner and in accordance with the provisions under the BMO.

- If the Chairman has determined that certain proxy instruments are invalid before the meeting, he may contact the owner(s) concerned to explain the invalidity of the proxy instrument to them so that the owner(s) concerned may consider whether a fresh proxy instrument should be made or to attend the meeting in person instead. According to Paragraph 4(3) of Schedule 3 to the BMO, the instrument appointing a proxy shall be lodged with the Secretary at least 48 hours before the time for the holding of the meeting.

2) For the Secretary of the MC

The instrument appointing a proxy shall be lodged with the Secretary hence the Secretary is responsible for collecting the proxy instruments for the meeting of the Corporation. If the office of the Secretary is vacant, the Corporation or the MC may, in accordance with paragraph 6(5)(a) or (b) of Schedule 2 to the BMO, appoint a person to fill the vacancy until the next annual general meeting of the Corporation or the next general meeting of the Corporation. The appointed person shall then carry out the statutory duties of the Secretary set out in the BMO.

The Secretary is advised to pay attention to the following before, during and after the general meeting of the Corporation regarding the handling of proxy instruments –

The Statutory Format of an Instrument Appointing a Proxy

- ✓ The instrument appointing a proxy should be in the statutory form set out in Form 2 in Schedule 1A to the BMO (which can be downloaded from Home Affairs Department's website on Building Management (www.buildingmgt.gov.hk)).

Para. 4(2) of Schedule 3 to the BMO

The Secretary is advised to –

- attach to the proxy instrument a statement of purposes in respect of the collection of personal data of owners.

- attach to the proxy instrument explanatory notes to remind owners the importance of their voting right.

- attach a blank proxy instrument to the notice of meeting or make it available at the management office.

- distribute the proxy instrument with the name of the proxy left blank for completion by the owner(s).

Collection of the Proxy Instruments

- ✓ The instrument appointing a proxy shall be lodged with the Secretary at least 48 hours before the time for the holding of the meeting. Proxy instruments which are not lodged in accordance with paragraph 4(3) of Schedule 3 to the BMO would not be accepted.

Para. 4(3) of Schedule 3 to the BMO

- Owners should be informed of the specified statutory time within which the proxy instruments should be lodged with the Secretary. The method and location for lodging the proxy instruments should also be relayed to all owners and it should be convenient to all owners.

- If the property management company or the management office assists the Secretary in collecting the proxy instruments, the Secretary should give clear instructions to the property management company or the management office on the submission deadline and the collection method.

- The Secretary is advised to remind the owners to lodge with him or her the original proxy instrument signed by the owner(s) concerned.

- The proxy instruments lodged with the Secretary should be put in a locked box for deposit and custody (e.g. the box should be double-locked, if necessary, with the keys to be separately held by two persons to enhance checks and balances).

Actions after Receipt of Proxy Instruments

The Secretary shall –

Para. 4(5)(a)(i) of Schedule 3 to the BMO

- ✓ acknowledge receipt of all proxy instruments received by leaving a receipt at the flat of the owner who made the proxy instrument, or depositing the receipt in the letter box for that flat, before the time for the holding of the meeting.

Para. 4(5)(a)(ii) of Schedule 3 to the BMO

- ✓ display information of the owner's flat to which a proxy has been appointed in a prominent place in the place of the meeting before the time for the holding of the meeting, and cause the information to remain so displayed until the conclusion of the meeting.

The Secretary is advised to –

- 👍 assist the Chairman to contact the owners concerned for verification of the validity of the proxy instruments as soon as practicable, in any event no later than the time of the holding of the meeting, if there is any query or uncertainty arising from the proxy instruments.

- 👍 display the information of those flats with proxy instruments lodged in a prominent place of the building(s), in addition to the place where the meeting holds, at least 24 hours before the meeting until seven days after the meeting to facilitate verification by owners.

- 👍 put a mark on the information against the flat of the owner concerned whose proxy instrument is considered invalid by the Chairman.

- 👍 send the acknowledgement receipt of the proxy instrument to the correspondence address provided by the owner if the owner concerned does not reside at the building.

- 👍 remind the owners to check the displayed information with a view to finding out if there is any unauthorized appointment of

proxy.

- confirm the undivided shares under each of the validated proxy instrument for the purpose of vote counting unless the deed of mutual covenant specifies other mechanism for determining the owners' shares.

Actions after the Conclusion of the Meeting

- ✓ All the instruments for the appointment of proxies that have been lodged with the Secretary shall be kept by the MC for a period of at least 12 months after the conclusion of the meeting.

Para. 4(6) of Schedule 3 to the BMO

- It is advisable to keep the information showing the owner's flats with proxy instruments lodged for at least 12 months and make the information available for inspection by the owners of the building upon request during such period.

3) For Owners

Format for the Instrument Appointing a Proxy

- ✓ When filling out a proxy instrument, the owners should ensure that the proxy instrument shall be in the form set out in Form 2 in Schedule 1A to the BMO. The form can be downloaded from Home Affairs Department's website on Building Management (www.buildingmgt.gov.hk).
    - Authorization documents prepared by a lawyer (e.g. instruments creating power of attorney) are not valid instruments for appointing a proxy under the BMO

Para. 4(2) of Schedule 3 to the BMO

- ✓ Owners should fill in all the required information, particularly the name of the proxy and alternate proxy in the proxy instruments when appointing proxy.

- It is not absolutely necessary to use the printed proxy form provided by the Corporation. The instrument for appointing a proxy is considered acceptable as long as it is in accordance with

the statutory format in Form 2 in Schedule 1A to the BMO.

- It is not necessary for the signature of the owner on the proxy instrument being identical to the signature as appeared on the deed of assignment, but it is desirable that they are.

Persons to be Appointed as Proxy

The purpose of appointing a proxy is to facilitate the voting at the meeting of the Corporation where the owners are not able to attend the meeting in person. The instrument only provides that a proxy is appointed by an owner to attend and vote on behalf of the owner. The proxy can vote according to his own wish. No voting instruction is to be provided on the proxy instrument. The Corporation, the MC, the manager under the deed of mutual covenant or the property management company is not in a position to enforce or check any voting instruction given by the owners as the proxies have the final voting decision.

- An owner should appoint someone, aged 18 or above, whom he trusts to be his proxy and can vote on his behalf.

- An owner is advised not to pass a signed proxy instrument to anyone without filling in the name of the proxy in the proxy instrument.

- In the event that an owner receives a proxy instrument with a printed name of the proxy on it but the owner prefers to appoint another person to be his proxy, he can cross out the printed name on the proxy instrument and put down the name of his own proxy, with his signature beside the amendment. The Chairman should not reject these proxy instruments for the sole reason that the owner has crossed out the printed name on the proxy instruments if the owner has put down the name of his own proxy and signed on the proxy instrument.

Co-owners

- ✓ Co-owners of a share in the property may jointly appoint a proxy, appoint a person amongst themselves as the proxy or either one of them personally may appoint a proxy.

- ✓ If more than one of the co-owners of a share seek to cast a vote in respect of the share, only the vote that is cast by the proxy appointed by the co-owner whose name, in order of priority, stands highest in relation to that share in the register kept at the Land Registry shall be treated as valid.

Para. 3(5)(b) & (c) of Schedule 3 to the BMO

Body Corporate as Owners

- ✓ The proxy instrument should be impressed with the seal or chop of the body corporate and signed by a person authorized by the body corporate in that behalf.

- 👍 The body corporate shall follow its constitution in authorizing a person to sign on the proxy instrument.

- 👍 The body corporate shall comply with the requirements in the BMO in appointing a proxy.

Para. 4(2)(b) of Schedule 3 to the BMO

Lodging the Proxy Instruments

- ✓ Owners should lodge the proxy instruments with the Secretary at least 48 hours before the time for the holding of the meeting.

- 👍 Owners are advised to personally lodge the duly completed proxy instruments with the Secretary direct or deposit them in the ways as instructed by the Secretary and avoid giving the proxy instruments to a third party.

- 👍 Owners are advised to check whether they have received the acknowledgment receipt of the proxy instrument before the time for the holding of the meeting to ensure that the Secretary has received the proxy instruments.

Para 4(3) of Schedule 3 to the BMO

- If in doubt, the owners should check with the Secretary on the handling of the proxy instrument.

- In the event that the Chairman verifies with the owner on the validity of the proxy instrument, the owner is advised to cooperate with the Chairman as far as practicable so as to ensure the proxy has been properly appointed.

- It is advisable for the owner to make a copy of his or her signed proxy instrument before lodging it with the Secretary.

Appendix

Relevant Provisions in the Building Management Ordinance (Cap. 344)

Schedule 1A: FORMS

FORM 2

INSTRUMENT OF PROXY FOR MEETINGS OF CORPORATION

The Incorporated Owners of .....
(description of building)

I/We, ... (name(s) of owner(s)), being the owner(s) of .... (unit and address of building), hereby appoint ..... (name of proxy) *[or failing him ..... (name of alternative proxy)], as my/our proxy to attend and vote on my/our behalf at the [*general meeting/annual general meeting] of The Incorporated Owners of ..... (description of building), to be held on the ..... day of ..... *[and at any adjournment thereof].

Dated this day of .

(Signature of owner(s))

* Delete where inapplicable.

Schedule 3: MEETINGS AND PROCEDURE OF CORPORATION

Paragraph 3

(5) (b) Where 2 or more persons are the co-owners of a share, the vote in respect of the share may be cast—

(i) by a proxy jointly appointed by the co-owners;

(ii) by a person appointed by the co-owners from amongst themselves; or

(iii) if no appointment is made under sub-sub-subparagraph (i) or (ii), either by one of the co-owners personally or by a proxy appointed by one of the co-owners.

(c) Where 2 or more persons are the co-owners of a share and more than one of the co-owners seeks to cast a vote in respect of the share, only the vote that is cast, whether personally or by proxy, by the co-owner whose name, in order of priority, stands highest in relation to that share in the register kept at the Land Registry shall be treated as valid.

Paragraph 4

(1) At a meeting of the corporation, an owner may cast a vote personally or by proxy.

(2) The instrument appointing a proxy shall be in the form set out in Form 2 in Schedule 1A, and –

(a) shall be signed by the owner; or

(b) if the owner is a body corporate, shall, notwithstanding anything to the contrary in its constitution, be impressed

with the seal or chop of the body corporate and signed by a person authorized by the body corporate in that behalf.

(3) The instrument appointing a proxy shall be lodged with the secretary of the management committee at least 48 hours before the time for the holding of the meeting.

(4) The instrument appointing a proxy is valid only if it is made and lodged in accordance with subparagraphs (2) and (3).

(5) Where an instrument appointing a proxy is lodged with the secretary of the management committee –

(a) the secretary shall –

(i) acknowledge receipt of the instrument by leaving a receipt at the flat of the owner who made the instrument, or depositing the receipt in the letter box for that flat, before the time for the holding of the meeting; and

(ii) display information of the owner's flat in a prominent place in the place of the meeting before the time for the holding of the meeting, and cause the information to remain so displayed until the conclusion of the meeting; and

(b) the chairman of the management committee or, if he is absent, the person who presides at the meeting, shall determine the validity of the instrument in accordance with subparagraph (4).

(6) The management committee shall keep all the instruments for the appointment of proxies that have been lodged with the secretary of the management committee for a period of at least 12 months after the conclusion of the meeting.

Annex 3

To Convene a General Meeting of an Owners' Corporation at the Request of Not Less Than 5% of the Owners

Guidelines

Key:

✓ ***Statutory requirements***

👍 ***Good practice recommended***

Disclaimer

This set of Guidelines is intended for general reference only. Users of the Guidelines are advised to seek independent legal advice and assistance from lawyers should there be doubts on the application of the Building Management Ordinance (Cap. 344) in individual circumstances. The Government shall not be responsible for any errors in, omissions from or misstatements or misrepresentations concerning (whether expressed or implied) any part of the Guidelines and shall not be held liable or accept any liability, obligation and responsibility whatsoever (including, without limitation, consequential loss or damage) arising from or in respect of any use, inability to use or misuse or reliance on the Guidelines.

The Government reserves the right to revise, omit, suspend or edit the Guidelines at any time in its absolute discretion without giving any reason or prior notice.

Introduction

A general meeting of an owners' corporation ("Corporation") is usually held for the purposes of –

(a) informing owners of the updated situation of the Corporation;
(b) exchanging views with owners on building management issues;
(c) passing any resolution with respect to the control, management and administration of the common parts of the building, as well as renovation, improvement or decoration of the common parts.

Apart from the annual general meetings, the Management Committee ("MC") may convene a general meeting of the Corporation at any time for such purposes as the MC thinks fit.

In addition, paragraph 1(2) of Schedule 3 to the Building Management Ordinance (Cap. 344) ("BMO") provides that the Chairman of the MC ("the Chairman") shall convene a general meeting of the Corporation at the request of not less than 5% of the owners of the building for the purposes specified by such owners within 14 days of receiving such request, and hold the general meeting within 45 days of receiving such request.

1) For the Chairman of the MC

According to paragraph 1(2) of Schedule 3 to the BMO, the Chairman (not the MC or the Secretary of the MC ("the Secretary")) is legally obliged to convene a general meeting at the request of not less than 5% of the owners for the purposes specified by such owners.

Upon Receiving the Request for Meeting from the Owners

✓ The Chairman shall convene a general meeting of the Corporation for the purposes specified by such owners within 14 days of receiving such request and hold the general meeting within 45 days of receiving such request.

Para. 1(2) of Schedule 3 to the BMO

<u>Computation of the "14 days" and the "45 days"</u>

- The duration of "14 days" refers to 14 calendar days, and is to be counted from the date immediately following the date of receiving the request for meeting from the owners.

- The same principle applies in counting the "45 days" duration.

👍 The Chairman cannot refuse to convene the general meeting on the ground that the requested items of discussion have been discussed in previous meetings of the Corporation. If a

requested item has been repeatedly discussed at previous meetings of the Corporation but the owners still request to convene a general meeting to discuss such item, the Chairman is advised to liaise with the owners with a view to working out suitable measures to resolve the issue.

- The Chairman is advised to verify whether the request for meeting is made by not less than 5% of the owners.

- In order to facilitate better coordination and communication within the MC, the Chairman should inform other MC Members as soon as practicable upon receipt of the request for meeting.

- It is desirable to arrange the requested items raised by the owners who made the request for meeting as priority items when setting the agenda of the general meeting, and the Chairman may seek clarifications with the owners concerned on their requests where necessary.

Presiding at the General Meeting

The Chairman is advised to –

- conduct the general meeting in an orderly manner.

- explain clearly to the owners the background and facts of the issues to be discussed.

- allow owners to have equal opportunity to speak at the general meeting.

- encourage owners to express their views so as to ensure that the requested items are thoroughly discussed before voting.

2) For the Secretary of the MC

Before the General Meeting

After the Chairman has decided to convene the general meeting upon the owners' request, the Secretary is legally obliged to take the following actions –

- ✓ The Secretary shall, at least 14 days before the date of the general meeting, give notice of the general meeting to each owner and the tenants' representative (if any), and display the notice of general meeting in a prominent place in the building.

Para. 2 of Schedule 3 to the BMO

- ✓ The notice of the general meeting may be delivered personally to the owner or tenant's representative (if any) or sent by post or left at the flat of the owner or tenant's representative (if any) or deposited in the letter box for that flat.

- ✓ The notice of the general meeting shall specify the date, time and place of the general meeting, and the resolutions (if any) that are to be proposed at the general meeting or other matters that are to be discussed at the general meeting.

During the General Meeting

The Secretary is advised to –

- 👍 ensure the quorum of the meeting is met before the commencement of the general meeting.

- 👍 keep track of the number of owners coming in or leaving the general meeting venue to ensure that the quorum requirement is met before putting up a resolution for voting.

- 👍 advise the Chairman to adjourn the general meeting if the quorum is not met.

After the General Meeting

The Secretary is required to –

- ✓ keep minutes of the proceedings at every general meeting of the Corporation.

  Para. 6(1) of Schedule 3 to the BMO

- ✓ make sure that the minutes* of the general meeting are certified by the person presiding over the general meeting as containing a true record of the proceedings of the general meeting to which they relate.

- ✓ display the certified minutes of the general meeting in a prominent place in the building within 28 days of the date of the general meeting to which the minutes relate, and cause the certified minutes to remain so displayed for at least 7 consecutive days.

  Para. 6 and 6A of Schedule 3 to the BMO

- ✓ supply copies of certified minutes of the general meeting to owners, registered mortgagees, tenants' representatives and any other person duly authorized in writing by the owner or registered mortgagee upon their request and upon payment of a reasonable copying charge. The copying charge shall be determined by the MC.

* The certified minutes of the general meeting shall be kept by the MC for such period, being not less than 6 years, as the Corporation may determine.

3) For Owners

Owners are advised to make proper use of their right to request the convening of the general meeting of the Corporation, as the holding of each meeting involves significant preparatory work and resources. It would not be conducive to effective building management if such right is abused. In particular, they should note that –

- ✓ The request for convening a general meeting of the Corporation should be made to the Chairman, instead of the MC or the Secretary.

  Para. 1(2) of Schedule 3 to the BMO

- In making the request for convening a general meeting, the owners concerned are advised to provide a list clearly setting out the names of the owners who made such request, the flats they reside in and their signatures. The co-owners of a flat with multiple ownership will be counted as one owner. All co-owners are advised to sign on the list.

- The owners submitting the request should check that the minimum requirement of "5% of the owners" is met before making the request to the Chairman.

- The owners concerned are advised to appoint a person as their representative/contact point in order to facilitate better communication with the Chairman.

Relevant Provisions in the Building Management Ordinance (Cap. 344)

Schedule 3: MEETINGS AND PROCEDURE OF CORPORATION

Paragraph 1

(2) The chairman of the management committee shall convene a general meeting of the corporation at the request of not less than 5% of the owners for the purposes specified by such owners within 14 days of receiving such request, and hold the general meeting within 45 days of receiving such request.

Paragraph 2

(1) The secretary of the management committee shall, at least 14 days before the date of the meeting of the corporation, give notice of the meeting to each owner and the tenants' representative (if any).

(1AA) The notice of meeting shall specify –

(a) the date, time and place of the meeting; and

(b) the resolutions (if any) that are to be proposed at the meeting or other matters that are to be discussed at the meeting.

(1A) The notice of meeting may be given –

(a) by delivering it personally to the owner or tenants' representative (if any); or

(b) by sending it by post to the owner or tenants' representative (if any) at his last known address; or

(c) by leaving it at the flat of the owner or tenants' representative (if any) or depositing it in the letter box for that flat.

(2) The secretary shall also, at least 14 days before the date of the meeting of the corporation, display the notice of meeting in a prominent place in the building.

Paragraph 5

(1) The quorum at a meeting of the corporation shall be –

(a) 20% of the owners, in the case of a meeting at which a resolution for the dissolution of the management committee under section 30 is proposed; or

(b) 10% of the owners in any other case.

Paragraph 6

(1) The secretary of the management committee shall keep minutes of the proceedings at every general meeting of the corporation.

(2) The minutes referred to in subparagraph (1) shall be certified by the person presiding over the meeting as containing a true record of the proceedings of the general meeting to which they relate.

(3) The secretary shall display the minutes certified in accordance with subparagraph (2) in a prominent place in the building within 28 days of the date of the general meeting to which the minutes relate, and cause the minutes to remain so displayed for at least 7 consecutive days.

Paragraph 6A

(1) The minutes certified in accordance with paragraph 6(2) shall be kept by the management committee for such period, being not less than 6 years, as the corporation may determine.

(2) If the tenants' representative, an owner, a registered mortgagee or any person duly authorized in writing in that behalf by an owner or registered mortgagee requests in writing the corporation to supply him with copies of any minutes certified in accordance with paragraph 6(2), the secretary shall, on the payment of such reasonable copying charge as the management committee may determine, supply such copies to that person.

Annex 4

Extract of the Guidelines for Deeds of Mutual Covenants issued by the Lands Department

19. (a)(i) For residential developments, the manager's remuneration must not exceed a percentage of the total expenses, costs and charges necessarily and reasonably incurred in the management of the development. The percentage must be based on the total number of residential units and parking spaces in the development and must not exceed the following:

20 residential units and parking spaces or below	20%
21 to 100 residential units and parking spaces	15%
101 residential units and parking spaces or above	10%

(ii) For non-residential developments, the manager's remuneration must not exceed 15% of the total expenses, costs and charges necessarily and reasonably incurred in the management of the development.

(iii) For composite developments comprising both residential and non-residential units, sub-paragraph (a)(i) above will apply as if each non-residential unit is a residential

(b) No variation of the percentages in sub-paragraph (a) above may be made except with approval by a resolution of owners at an owners' meeting convened under the DMC.

(c) For the purpose of calculating the manager's remuneration, the total expenses, costs and charges necessarily and reasonably incurred in the management of the development or any portion of it must exclude (i) the manager's remuneration itself and (ii) any capital expenditure or expenditure drawn out of the Special Fund provided that by a resolution of owners at an owners' meeting convened under the DMC, any capital expenditure or expenditure drawn out of the Special Fund may be included for calculating the manager's remuneration at the rate applicable under sub-paragraph (a) or (b) above or at any lower rate as considered appropriate by the owners.