政府總部民政事務局的信頭
Letterhead of GOVERNMENT SECRETARIAT HOME AFFAIRS BUREAU

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來函檔號 YOUR REF. :
電話號碼 TEL.NO. : 2835 1168
圖文傳真 FAXLINE : 2591 6002

27 May 2000

The Hon. Albert Ho
Room 909, Tak Shing House
20 Des Voeux Road Central
Hong Kong

Dear

Building Management (Amendment) Bill 2000
Committee Stage Amendments

At our breakfast meeting last Saturday, I promised to put in writing our views on the proposed Committee Stage Amendments (CSAs) you intend to move to the Building Management (Amendment) Bill 2000.

As you will recall, the Administration has responded to your proposed CSAs vide Papers CB(2)1258/99-00(01), CB(2)1489/99-00(01), CB(2)1570/99-00(02), CB(2)1740/99-00(01) and CB(2)1868/99-00(01) presented to the Bills Committee earlier. Paper CB(2)1740/99-00(01), in particular, responded directly to the earlier versions of CSAs proposed by you and the Hon. Cheng Kai-nam. As you will notice, some of these CSAs have already been incorporated into the latest draft CSAs presented by the Administration to the Bills Committee. These include (a) lowering the percentage share threshold for appointing management committees in existing buildings (to 30%, 20% and 10% as the case may be); (b) stipulating that the shares allocated to common areas that are not liable to pay fees do not carry voting rights in a resolution to consider the termination of the building

manager's appointment; (c) enabling all co-owners of flats to be able to appoint proxies; and (d) elaborating on the enumeration of percentage of owners.

Having carefully examined your CSAs and consulted the departments concerned, I regret to inform that the Administration is unable to take them on board on both principle and practical grounds. Some of the proposed amendments will create serious and fundamental implications for the Building Management Ordinance (BMO). The rationale behind our consideration is set out below.

Extending the operation of the BMO to estate developments without an allocation of undivided shares

The Administration is of the view that management of house-type developments without an allocation of undivided shares falls outside the ambit of the BMO. The legislative intent of the Ordinance, as reflected in its former title namely the Multi-Storey Buildings (Owners Incorporation) Ordinance, is to ensure good management of multi-storey buildings where there are designated common areas with undivided shares. We are concerned that artificial insertion of provisions into the BMO to deal with developments without an allocation of undivided shares will not resolve the difficulties encountered by owners in such developments and may create other problems.

Aside from the basic issue of whether the BMO is the right vehicle to achieve the desired purpose, we foresee great difficulties in implementing the proposed CSA. First, it is doubtful whether the principle of "one house/unit, one vote" is fair and equitable from the point of view of all owners particularly those who own a large house/unit in the development. Secondly, it is not clear whether owners of non-residential buildings in an estate development (e.g. commercial complex, schools, churches, sewage treatment plants) will have any voting rights and, if so, how the voting rights should be determined or apportioned (e.g. in the case of different owners of shops in a commercial complex). Thirdly, small estates with individual houses such as those in Shouson Hill and the Peak may also be caught by the proposed CSA. For developments where the total number of houses is less than 10, applying the BMO in particular new section 3(3) could lead to absurdities (e.g. when one or less than one owner could form the quorum to convene a meeting and form an OC).

We have so far come across very few cases where management of house-type developments has encountered problems. The Fairview Park case is probably rather unique. In that case, public facilities such as roads and recreation areas in Fairview Park are not designated common areas. According to the deed of mutual covenant (DMC), they belong to the developer and an easement has been granted to the owners/occupants of individual houses to use and enjoy the facilities. There is therefore no or little "common areas" for the owners' corporation (OC) to manage even if one can be formed. Also, the land lease imposes on the original grantee (the developer) of the Fairview Park a personal obligation to ensure that the development is properly managed; and for this purpose, a bank bond of $5M has been paid by the grantee as a guarantee to manage the estate properly. It seems that the impact of the proposed CSA on this obligation has not been thoroughly studied. In brief, we believe a tailor-made solution, as opposed to an across-the-board legislative provision, should be devised for the Fairview Park case.

Voting rights of undivided shares allocated to the common parts

The proposal will have wider implications than the CSA proposed by Government which applies to resolutions to terminate the appointment of building managers only. Our legal advice is that differential treatment of property rights may constitute discrimination and is liable to challenge under Articles 6 and 105 of the Basic Law on protection of property rights. A case may be made if discrimination is based on objective and reasonable justifications and if there is reasonable proportionality between the means employed and the aim sought to be realized. In this regard, legal advice confirms that the CSA proposed by the Government would meet the above test. Furthermore, as the proposal lacks specificity and would apply retrospectively to all DMCs, it raises concerns as to whether property rights enjoyed by owners of shares of common areas will be affected. Whether or not the proposal could satisfy the Basic Law tests depends on whether and, if so, to what extent the overall economic value of such shares will be deprived by the proposal and the justification for doing so. The above are complicated but important issues that warrant more careful consideration and wider consultation.

Amendment of DMCs

We have grave reservations about the proposal to include in the BMO provisions for variation/amendment of DMCs. We consider that the proposal falls

outside the ambit of the Bill and the Ordinance and hence should be disallowed. Indeed, the proposal will have serious implications for the rights and obligations of parties to the DMCs (i.e. all owners, the manager and the developer) since property rights, which are guaranteed under Articles 6 and 105 of the Basic Law, may be adversely affected by a decision taken by a relatively limited number of owners. The Administration therefore has fundamental difficulties with members pursuing such a proposal particularly since it has not been subject to any public consultation.

Apart from objection on grounds of principles, the mechanism for introducing amendments to the DMC will need to be very carefully thought out to minimize implementation difficulties. Some of the immediate and practical questions that come to mind include: what criteria should be adopted by the Authority and the Lands Tribunal in deciding whether an amendment to DMC is "just and fair in all circumstances"? Who should be consulted in the public inquiry conducted by the Authority? Will the provision give rise to uncertainties over the rights and obligations of the parties to the DMC and hence affect the disposal of individual owner's shares in the market (which is protected by section 43 of BMO)? Can variation be made to those DMC terms which serve to give effect to the lease conditions and which cannot be varied without the consent of the Director of Lands? Have the implications of the proposal on the Conveyancing and Property Ordinance, particularly section 41, been assessed? We believe that more careful thought should be given to these questions and that the public should be more widely consulted on the proposal before legislative amendments are made to the BMO or indeed any other Ordinances.

Composition of management committees

Your proposal to amend the Second Schedule will require holders of office of a management committee to retire at the same time as the members of the management committee. We remain of the view that the owners should retain the discretion to decide by resolution whether the office holders (including the secretary and treasurer) should retire together with the members of the management committee.

Termination of manager's appointment

The Administration has included in its latest draft CSAs a proposal to revise the threshold for a decision to terminate the building manager's appointment

to not less than 50% of the shares *that are eligible to vote*. Our latest proposal represents a further improvement to the current requirement and aims to strike a balance between the need to expedite the procedure for terminating the manager's appointment where necessary and the need to avoid undue disruption to building management services. We are concerned that the proposal to further reduce the requirement from 50% to 30% of shares may result in undue disruption to such services. On balance, we consider that there is no need to introduce the proposed change at this stage.

The Administration would very much like to see the passage of the Bill within this legislative session. I hope you can give serious consideration to our above comments and consider the possibility of withdrawing the CSAs. I am happy to discuss with you further at your convenience.

Please do not hesitate to contact me or Mr. Edward Chu at 28351485 if you have any queries.

Yours sincerely,

(Mrs. Betty Fung)
for Secretary for Home Affairs

c.c. Ms. Flora Tai, Clerk to Bills Committee
Mr. Stephen Lam, Assistant Legal Advisor