

Consultation Paper on Proposed Amendments to the Building Management Ordinance (Cap. 344)

This paper invites views from members of the public on proposals to amend the Building Management Ordinance (BMO) (Cap. 344)¹.

BACKGROUND

2. It is the Government's objective to facilitate private building owners in the better management and maintenance of their properties. We provide a legal framework through the BMO to facilitate the incorporation of owners of flats in buildings or groups of buildings, and to provide for the management of buildings or groups of buildings and for matter incidental thereto or connected therewith. To better equip the owners to put good building management into practice, we also provide supportive services, offer advice and organize training for the owners of private buildings.

3. In 1970, the Multi-storey Buildings (Owners Incorporation) Ordinance was enacted to provide a legal framework for owners' corporations (OCs) to operate. The Ordinance was extensively amended and renamed as the BMO in May 1993 to keep pace with the ongoing change of the field situation. The BMO which sets out clearly the rights and responsibilities of owners and OCs etc. in legal terms, was further amended in 1998 and 2000 to meet the needs arising from the field developments.

4. For the purposes of enhancing our services and improving the BMO, Home Affairs Department has been collating the views and suggestions from the District Councillors, OCs and other owners' associations, building owners and occupiers, and the professional organizations involved in building management. We have received many constructive views and suggestions through meetings, focus groups, informal discussion and correspondence. Following the enactment of the Building Management (Amendment) Ordinance in August 2000, the Legislative Council also set up, under its Panel on Home Affairs, a Subcommittee on Review of the BMO. The Subcommittee has had 12 meetings since its formation and made various suggestions on how the BMO could be amended.

¹ The full version of the BMO could be viewed at the website of the Bilingual Laws Information System at <http://www.justice.gov.hk/Home.htm>. The BMO booklet is also available for sale at the Government Publication Centre at Lower Block, Ground Floor, Queensway Government Offices, 66 Queensway, Hong Kong.

5. To facilitate better management of private buildings in Hong Kong, the Administration proposes to introduce further amendments to the BMO. Before introduction of the bill into the Legislative Council, we would like to invite comments on the legislative amendment proposals as set out in this consultation document. We also welcome comments and suggestions on whether and how other provisions of the BMO should be amended.

PROPOSALS

6. We have taken account of the views and suggestions received so far in drawing up the following legislative amendment proposals. The proposals set out in the following paragraphs are aimed at facilitating OCs in their performance of duties and exercise of powers, rationalizing the appointment procedures of a management committee and its members, and affording better protection for the interests of building owners.

I. TO FACILITATE OCs IN THEIR PERFORMANCE OF DUTIES AND EXERCISE OF POWERS

(A) Personal liabilities of members of a management committee for the decisions of an OC

7. Under the existing BMO, the liability of an OC should not normally be transferred to an individual member of a management committee, except in the situations specifically set out in those provisions relating to the responsibilities of members of a management committee. There is, however, no clear provision to the above effect in the existing BMO.

8. To address this problem, we propose to add an express provision to the BMO that management committee members of an OC shall not be held personally liable for any collective decision of the OC, which is neither ultra vires nor tortious, solely on the ground that they are members of the management committee.

(B) Power of an OC to borrow money from the Government in compliance with certain statutory notices, orders or other documents

9. Under a number of legislation, the authorities may require owners to undertake works on the common parts of their buildings to ensure public safety. Where the works required are in respect of the common parts of a building and the building is managed by an OC, any statutory notice, order or

other document has to be served on the OC by virtue of section 16 of the BMO.

10. At present, individual private building owners encountering financial difficulties in complying with the above statutory notices, orders or other documents may apply for low interest loans from the Government². OCs, however, are not empowered under section 18 of the existing BMO to borrow money on behalf of all or any of the owners. In the absence of such a power, an OC will not be able to make up the shortfall in the event that some owners fail or refuse to pay their respective shares of the costs of works. In such circumstances, all that an OC can do is to take legal actions against those owners who fail or refuse to pay. This may not be conducive to the timely implementation of the required works.

11. To address this concern, we have been considering to work out an appropriate and fair mechanism to ensure that the works as required upon the common parts of a building under any statutory notice, order or other document will not be unduly delayed by the owners who fail or refuse to pay their shares of the costs involved. We propose to amend the BMO to specifically empower an OC to borrow from the Government, for the purpose of complying with the statutory notices, orders or other documents which relate to the common parts of the building an amount equivalent to the costs which should be borne by the owners who fail or refuse to pay, and to make regulations for setting out the detailed requirements and arrangements. In borrowing from the Government, the OC will be acting as an agent on behalf of those individual owners who fail or refuse to pay, instead of all the owners of the building. In other words, only those owners who fail or refuse to pay will be liable for the loan from the Government, and the liability for the loan will not be transferred to the OC or to any other owners who have already contributed their respective shares of the costs. Upon granting of the loan to the OC, the Government will register charges against the titles of those owners' properties, as a form of security for their respective shares of the loan granted. The charge shall only be released upon the individual owner's repayment of his share of the loan to the Government.

(C) Termination of appointment of the DMC manager by an OC

12. Prior to the adoption of the Lands Department's Guidelines for Deeds of Mutual Covenant (DMCs) on 15 October 1987, a DMC usually provided for perpetual management of a building by the developer or by a manager associated with the developer. Paragraph 7(1) of the Seventh

² The Building Safety Loan Scheme administered by the Buildings Department.

Schedule to the BMO³ was therefore introduced for the purpose of enabling an OC to terminate appointment of **the DMC manager**.

13. Though DMCs approved in accordance with the DMC Guidelines on or after 15 October 1987 should normally contain a provision to the effect that the initial period of management by the manager shall not exceed two years, it appears that the manager's appointment may continue after the initial period of two years (or any period specified in the DMC) until the appointment has been terminated by the OC in accordance with paragraph 7(1) of the Seventh Schedule. There are also concerns that it would be practically difficult for an OC to obtain a resolution of the owners of not less than 50% of the shares for the purpose.

14. We propose to specify in the BMO that paragraph 7(1) of the Seventh Schedule shall only be used to terminate appointment of the DMC manager. For any subsequent manager appointed by an OC, the relevant management contract normally provides for a specified period of management, and the manager's appointment should be terminated in accordance with the provisions of the management contract. We also propose to remove the provision in the Seventh Schedule that not more than one manager's appointment can be terminated within any three consecutive years.

15. We further propose to provide an alternative mechanism in the BMO whereby an OC can terminate appointment of **the DMC manager**. The proposed mechanism, in addition to the existing one under the BMO, is set out as follows :

- a) If a DMC provides for a specified period of management of the DMC manager, that manager's appointment can only be terminated in accordance with paragraph 7(1) of the Seventh Schedule **within** the specified period.
- b) **After** the specified period of management provided in a DMC, the owners may at a general meeting⁴ resolve by a majority of the votes to appoint a new manager **and** to terminate appointment of the DMC manager, provided that a quorum of 20% of owners has been met at the meeting. Appointment of the new manager shall take effect on the day immediately after the date of termination of the DMC manager's

³ Paragraph 7(1) of the Seventh Schedule provides that at a general meeting convened for the purpose a corporation may, by a resolution of the owners of not less than 50% of the shares, terminate by notice the manager's appointment without compensation.

⁴ A general meeting convened by an OC under paragraph 1(1) of the Third Schedule to the BMO.

appointment. If no new manager has been appointed, the DMC manager's appointment can only be terminated in accordance with paragraph 7(1) of the Seventh Schedule.

- c) If there is no specified period provided in a DMC, the procedure at (b) above shall only apply **after** the manager's initial two years of management.

16. The proposed mechanism seeks to enable an OC to terminate appointment of the DMC manager upon a resolution passed by a majority of the votes of the owners present (or by proxy) at a general meeting (i.e. without the need to comply with the requirement of 50% shares), provided that a quorum of 20% of owners has been met at that meeting, and a new manager has been effectively appointed (supported by a valid resolution of owners) upon termination of the DMC manager's appointment. This will enable an OC to terminate appointment of the DMC manager under less stringent conditions, without compromising the need to minimize the possibility of a management vacuum in a building.

II. TO RATIONALIZE THE APPOINTMENT PROCEDURES OF A MANAGEMENT COMMITTEE AND ITS MEMBERS

(D) Appointment of a management committee

17. According to section 3(2) of the BMO, a management committee may be appointed at a duly convened meeting of the owners in accordance with the DMC; or if there is no DMC or the DMC contains no provision for the appointment of a management committee, by a resolution of the owners of not less than 30% of the shares.

18. We propose to amend the BMO such that a management committee may be appointed by a resolution of the owners of not less than 30% of the shares, and the resolution must also be passed by a majority of the votes of the owners voting either personally or by proxy at the same meeting. This will avoid the situation of two separate management committees being appointed by different groups of owners (each with not less than 30% of the shares).

(E) Appointment of members and holders of office of the first management committee

19. According to paragraph 2(1) of the Second Schedule to the BMO,

the owners shall, at a meeting convened under sections 3, 3A, 4 or 40C appoint the members of the management committee, and appoint a chairman, a vice-chairman (if necessary), a secretary, a treasurer, and may at such meeting appoint other holders of the office as may be specified in the DMC and which the owners determine to be necessary in respect of the control, management and administration of the building.

20. We propose to specify in the Second Schedule that members and holders of office of the management committee shall be appointed by a resolution passed by a majority of the votes of the owners voting either personally or by proxy at the same owners' meeting at which the first management committee has been successfully appointed, provided that there is a quorum of 10% of owners at that meeting.

(F) Appointment of members and holders of office of any subsequent management committee

21. According to paragraph 5(1) of the Second Schedule to the BMO, at the second annual general meeting (AGM) of an OC and thereafter at every alternate AGM, all members of the management committee other than the tenants' representative shall retire from office. Paragraph 5(2) of the Second Schedule provides that at an AGM at which the management committee retires, the OC shall appoint a new management committee, a chairman, a vice-chairman (if necessary), a secretary (if vacant) and a treasurer (if vacant), and may at such AGM appoint other holders of office. While paragraph 2(1) of the Second Schedule states that the **owners** shall appoint members of the **first** management committee, members of any **subsequent** management committee shall be appointed by the **corporation** pursuant to paragraph 5(2).

22. We propose to amend the Second Schedule by stating that the corporation shall, by a resolution passed by owners at an AGM of the corporation at which the management committee retires, appoint a new management committee, a chairman, a vice-chairman (if necessary), a secretary (if vacant), a treasurer (if vacant) and other holders of office. This amendment will have the effect that members and holders of office of any subsequent management committee can only be appointed by **a resolution of the owners passed at an AGM.**

III. TO AFFORD BETTER PROTECTION FOR THE INTERESTS OF BUILDING OWNERS

(G) Procurement of supplies, goods and services by an OC

23. Section 20A(2) of the BMO stipulates that:

Any supplies, goods or services the value of which exceeds or is likely to exceed-

- (a) the sum of \$100,000 or such other sum in substitution therefor as the Authority (Secretary for Home Affairs) may specify by notice in the Gazette; or
- (b) a sum which is equivalent to 20% of the annual budget of the corporation or such other percentage in substitution therefor as may be approved by the corporation by a resolution passed at a general meeting,

whichever is the lesser, shall be procured by invitation to tender.

24. The same provision is also set out in paragraph 1 of the Code of Practice on procurement of supplies, goods and services issued by the Authority under section 44(1) of the BMO. According to section 44(2), a failure on the part of any person to observe any Code of Practice shall not by itself render that person liable to criminal proceedings of any kind but any such failure may, in any proceedings whether civil or criminal, be relied upon as tending to establish or to negate any liability which is in question in those proceedings.

25. We have taken the opportunity to review the tender procurement provisions under section 20A. Specifically, we propose:

- a) To delete paragraph 1 from the said Code of Practice, so that any procurement of supplies, goods or services with a value exceeding the prescribed threshold has to be done through tendering in accordance with section 20A(2) of the BMO;
- b) To lower the minimum percentage of an OC's annual budget for the purpose of tendering from the existing 20% to 10%, (while retaining the specified sum of \$100,000 or such other sum in substitution therefor as the Authority may specify by notice in the Gazette);
- c) To include a requirement that any tender of a value exceeding a sum which is equivalent to 10% of the annual budget of an OC shall be accepted or rejected by a resolution passed at a general meeting of the

OC; and

- d) To insert a punitive clause that any member of a management committee who contravenes the requirements shall be guilty of an offence and shall be liable on conviction to a maximum fine of \$50,000 (i.e. level 5 under the Criminal Procedure Ordinance (Cap. 221)), unless he proves that the offence was committed without his consent or connivance and that he exercised all such due diligence to prevent the commission of the offence as he ought to have exercised in the circumstances.

(H) Individual owners' rights to obtain copies of certain building management documents from an OC

26. According to paragraph 10(4B) of the Second Schedule and paragraph 6(3) of the Third Schedule to the BMO, the minutes of a management committee's meeting and those of an OC's meetings shall, within 28 days of the respective dates of the meetings, be displayed by the secretary in a prominent place in the building. However, there is no provision in the BMO which gives owners the rights to request copies of such documents.

27. We propose to provide for the owners' rights to obtain copies of minutes of meetings of both OCs and management committees upon payment of reasonable copying charges as the management committee concerned may determine.

SUMMARY OF PROPOSALS

28. Having regard to the views we have received, we would like to put forward the legislative amendment proposals to amend the BMO as follows –

- a) to make clear that management committee members of an OC shall not be held personally liable for any collective decision of the OC solely on the ground that they are members of the management committee;
- b) to enable an OC to borrow money from the Government for the purpose of complying with certain statutory notices, orders and other documents;
- c) to rationalize the requirements regarding termination of appointment of managers by an OC;
- d) to clarify the requirements of a resolution to appoint the first management

committee;

- e) to rationalize the appointment procedure of members and holders of office of the first management committee;
- f) to clarify the appointment procedure of members and holders of office of any subsequent management committee;
- g) to improve the requirements regarding procurement of supplies, goods and services by an OC; and
- h) to provide for the owners' rights to obtain copies of the minutes of meetings of a management committee and those of an OC.

CONSULTATION

29. Members of the public are invited to give their comments on the above legislative amendment proposals and any other provisions on the BMO. Comments can be sent in writing to Home Affairs Department **on or before 31 July 2003** –

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30. Home Affairs Department reserves the right to publish all views and comments. If you do not wish your name to be disclosed, please state so when making your submission.

Home Affairs Department
May 2003