**《2005 年建築物管理(修訂)條例草案》委員會**

**二零零六年一月四日會議上提出的事項**

**委出管理委員會**

在二零零六年一月四日法案委員會的會議上，委員討論了政府就王國興議員的函件(立法會第 CB(2)2617/04-05(06)號文件)作出的回覆(立法會第 CB(2)2617/04-05(01)號文件)，並就委出管理委員會的程序提出了若干問題。本文件載述政府對這些問題的回應。

**條例草案的建議**

2. 《建築物管理條例》(條例)第 3(2)條訂明，在業主會議上可通過下列方式委出管理委員會(管委會)：(a)按照公契規定委出；(b)如無公契，或公契並無委出管委會的規定，由合計擁有份數不少於 30%的業主決議委出。

3. 《2005 年建築物管理(修訂)條例草案》(條例草案)第 4 條修訂條例第 3(2)條，把該條文中所有關於公契的提述刪除。建議的第 3(2)條訂明，業主可在業主會議上決議委出管委會，有關決議必須：(a)由親自投票或委派代表投票的業主以多數票通過；(b)獲總共擁有份數不少於 30%的業主支持。

4. 上述修訂建議旨在達到兩個目的。首先，現行條例第 3(2)條並無明確指出，如另有擁有 30%份數的業主反對動議，有關決議是否仍可獲得通過[1]；為了消除不明確之處，並確保管委會在大多數業主支持下運作，條例草案第 4 條清楚訂明，根據條例第 3(2)條委出管委會的決議，必須在同一會議上獲擁有份數不少於 30%的業主支持，以及由業主以多數票通過。

5. 此外，現行條例第 3 條對公契的提述也有欠明確，沒有訂明在委任管委會時應以公契的條文還是以條例的條文為準，尤其是大部分公契都載有關於委出業主委員會(有時也稱為管理委員會)的條文，而這些業主委員會的職能與根據條例成立的法定管委會相若。這類公契條文有部分與條例訂明的規定並不一致。我們認為這個情況並不理想，因此提出修訂建議作出改善。這是修訂建議要達到的第二個目的，也是本文件的重點。

6. 在*Siu Siu Hing 訴土地註冊處*(HCAL77/2000)(見附件)一案中，法院裁定除非某大廈的公契特別指明該大廈的管理委員會乃根據條例第 3 條委任，否則公契所指的管理委員會並非條例所規定的管理委員會。我們完全同意這個觀點，並希望在條例中申明這一點 — 凡

[1] 有關問題曾在*Kwan & Pun Company Limited v Chan Lai Yee and others* (CACV 234/2002)一案中提及。

根據條例成立的管理委員會，必須由業主按照條例訂明的程序成立，至於其他委員會(例如業主委員會、屋苑委員會，不論公契內的名稱為何)，則必須按照公契訂明的有關程序成立。

7. 條例附表 2 訂明管委會的組成和運作程序。基於上述原因，條例草案第 23 條刪除了附表 2 內所有關於公契的提述，使管委會在組成和運作方面必須依從條例訂明的規定，而非個別公契的規定。為免令人產生疑問，附表 2 第 12 段進一步規定，如附表 2 與公契條款有任何不一致之處，即以前者為準。

**委員關注的問題**

8. 部分公契可能會就業主委員會(或管理委員會、屋苑委員會，不論公契內的名稱為何)的組成作出規定。舉例來說，由若干大廈組成的屋苑，其公契或會規定從每幢大廈選出一定數目的代表；至於綜合用途樓宇，其公契或會就當中的住宅、商業和工業各部分所選出的代表數目比例作出規定。有委員認為，這些都是合理的規定，業主(不論屬於現有法團或即將成立的法團)應可靈活地依從該等公契條款行事。

**政府的意見**

9. 正如我們在上文第 6 段解釋，除非某大廈的公契特別指明該大廈的管委會乃根據條例第 3 條委任，否則公契所指的委員會(不論名稱為何)並非條例所規定的管委會；因此，公契中有關委員會組成(以及其他任何涉及委員會的事項)的條款，只適用於公契指明的委員會，而不是條例所指的管理委員會。因此，業主在根據條例委出管委會時，並不受該等公契條款(不論條款是否合理，以及是否較條例的規定寬鬆或嚴苛)約束。

10. 此外，建議修訂的條例附表 2 第 2(1)及第 5(2)段訂明，在業主會議上，業主須藉以多數票通過的決議，從業主當中委任管理委員會委員，以及從管理委員會委員當中委任主席和副主席[2]。現行條例並未訂明管委會的組合。換句話說，只要管委會委員及各個擔任職位者是在業主會議上從業主當中委任的，便已遵行附表 2 第 2(1)及第 5(2)段所載的規定。

11. 因此，當局認為，只要管委會委員的委任是在業主大會上通過的，有關委任即屬有效。業主可按他們同意的方法分配管委會的職位(例如採用公契所訂的分配辦法，但不一定要這樣做)，但各委員最後獲委擔任的職位須在業主會議上獲得通過。

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[2] 附表 2 第 2(1)(c)、第 2(1)(d)、第 5(2)(c)及第 5(2)(d)段也訂明委任管理委員會秘書及司庫的事宜，但擔任這兩個職位的業主無須是管理委員會委員。

**例子：東區一個綜合屋苑**

12. 在法案委員會會議上，有委員提到東區的一個綜合用途屋苑(共有 17 座住宅大廈)。我們且以這個屋苑作為例子，詳細研究有關的公契。現把公契內一些值得留意的條文(全都與根據公契成立的委員會的組織有關)載列如下：

(a) 委員會應由不多於 20 人組成，其中三人為非住宅單位業主所選出的代表，另外 17 人則為每座住宅大廈的業主所選出的代表。

(b) 業主的配偶或業主家中的成年成員，如獲業主以書面形式妥為授權，都可成為委員會委員，但該名配偶或成年家庭成員必須在屋苑內居住。

(c) 委員會的擔任職位者為主席、副主席、秘書，以及由委員會不時選出的其他擔任職位者。

(d) 委員會委員須互選委員會的擔任職位者。

(e) 委員會委員在下列情況下須停任委員：(i)有關的委員辭職並以書面通知委員會；(ii)有關的委員不再符合擔任委員

會委員的資格；(iii)有關的委員被其代表的業主免職；(iv)有關的委員破產、無力償債或被裁定犯有刑事罪行(並非涉及不誠實行為的簡易程序罪行除外)。

13. 這個屋苑的業主在二零零二年根據條例成立法團。在成立法團時，業主在業主會議上以多數票通過採納公契內所訂明的成員組合(見上文第 12(a)段)。我們在此重申，有關的業主並非受公契所載的規定約束，他們是在業主會議上特意決定採納這個成員組合。17 座大廈的業主隨即各自選出他們的代表。須注意的是，任何一座大廈的業主在選舉其代表時，其他大廈的業主並無投票權。該屋苑的業主接着在業主會議上以多數票通過委任所有委員(17 名住戶代表加上 3 名商戶代表)。這最後的步驟(即在業主會議上通過這項決議)十分重要，如此一來，有關的委任便是按條例所載的規定作出。

14. 另有一點值得注意的是，雖然該屋苑的業主特意依從公契中有關成員組合的某些規定行事，但他們也選擇(可能不是特意的，因為他們沒有就這方面通過決議)不依從這方面的其他規定，包括上文第 12(b)段(非業主(例如配偶或成年的家庭成員)可以當委員)、第 12(c)段(沒有設司庫一職)、第 12(d)段(各擔任職位者由委員互選，但無須在業主會議上獲得通過)，以及第 12(e)段(喪失資格的規定有所不同)

所載的規定。由此可見，在委員會的成員組合方面，該屋苑的業主只依從公契所載的部分而非全部規定行事。

15. 在條例修訂後，該屋苑的業主可就管委會的組合繼續採用現行的分配方法，但所有委員的委任須在業主會議上獲得通過。

**委員會審議階段修正案**

16. 為了令條例的有關規定清晰無疑，我們建議修訂條例草案第23(d)(i)條(條例附表2新訂的第2(1)(a)段)和第23(g)(ii)條(條例附表2新訂的第 5(2)(a)段)的英文本，訂明在業主會議上，業主須***from amongst the owners*** *而非“從他們當中”(from amongst themselves)*委出管委會委員。建議如獲委員接納，我們會在委員會審議階段修正案中加入有關的條文。

**徵詢意見**

17. 請委員就上述建議提出意見。

***民政事務總署***
***二零零六年一月***

Annex

HCAL77/2000

**IN THE HIGH COURT OF THE**
**HONG KONG SPECIAL ADMINISTRATIVE REGION**
**COURT OF FIRST INSTANCE**
CONSTITUTIONAL AND ADMINISTRATIVE LAW LIST
NO. 77 OF 2000

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BETWEEN

SIU SIU HING trading as CHUNG SHING MANAGEMENT COMPANY — Applicant

and

THE LAND REGISTRAR — Respondent

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Before : Hon Cheung J in Court
Dates of Hearing : 2 and 3 January 2001
Date of Judgment : 31 January 2001

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J U D G M E N T

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*The application*

This is an application for judicial review of the decision of the Land Registrar. The decision was given on 18 November 1999 when the Land Registrar issued a Certificate of Registration under section 8(1) of the Building Management Ordinance, Cap.344 ("the Ordinance"), under which the owners of Chun Fai Garden ("the Garden"), 132 Muk Kiu Tau Tsuen, Yuen Long, New Territories, Hong Kong were registered as a corporation.

The Incorporated Owners of the Garden had intervened in this application by filing evidence. Although counsel on their behalf was present at the hearing, he had, however, not made any submission on their case.

*The Garden*

The Garden consisted of 18 lots of land. 18 detached buildings are built on this 18 lots of land. Each building consists of three separate flats. Of the 18 buildings, two have not been issued with the Certificate of Compliance at the time when the proceeding was instituted. Of the 18 lots of land, each is subdivided into three equal and undivided parts or shares and held by the owner of the ground floor, first floor and the second floor of the building erected thereon respectively. The result of this is that the individual owners of the flats in the Garden do not have an undivided part or share in all the land in the Garden. What they have instead is an undivided part in the respective lots of land on which the buildings are constructed.

*The events*

On 24 February 1999, there was a meeting of the flat owners of the Garden which formed the first management committee under the Deed of Covenant and Management Agreement dated 2 August 1996 of the Garden ("the DMC"). On 25 June 1999, there was a further meeting of the flat owners of the Garden pursuant to section 3 of the Ordinance. At this meeting, a resolution was passed by the flat owners for the appointment of a management committee ("the Management Committee"). The Management Committee subsequently made an application to the Land Registrar for a Certificate of Registration of the Incorporated Owners of the Garden under section 7 of the Ordinance. On 18 November 1999, the Certificate of Registration was issued.

*The applicant*

The applicant was appointed to manage the Garden under the DMC. The appointment was for an initial period of two years, and thereafter for a further period of three years. The owners of the Garden had issued notice of termination of the applicant's appointment as the manager of the Garden. Three notices had been given. The first was dated 23 July 1999, terminating her appointment on 22 October 1999. The second was dated 22 November 1999, terminating her appointment on 31 November 1999 and the third was dated 23 December 1999, terminating her appointment on 22 March 2000. The last notice was issued by the Incorporated Owners of the Garden. There are disputes between the applicant and the Incorporated Owners arising out of the management of the Garden. Proceedings had been instituted by them in the Lands Tribunal.

*The basis of challenge*

The first ground of challenge to the decision of the Land Registrar is that under the Ordinance, the provisions for incorporation only applies to a building or buildings where the owners have an undivided share in the land on which there is a building or buildings. As the Garden does not have a common piece of land on which the owners have an undivided share, the owners are therefore not entitled to become incorporated.

*The Ordinance*

Under the Ordinance, the first step leading to the incorporation is by the appointment of a management committee under section 3. After this management committee has been appointed, it is required to apply to the Land Registrar for the registration of the owners as a corporation under section 7. Under section 8, if the Land Registrar is satisfied that the statutory requirements had been complied with, then he shall issue a Certificate of Registration. With effect from the date of the issue of the Certificate of Registration, the owners shall be a body corporate with perpetual succession.

Section 3 of the Ordinance provides that :

"(1) A meeting of the owners to appoint a management committee may be convened by—

(*a*) any person managing the building in accordance with the deed of mutual covenant (if any); or

(*b*) any other person authorized to convene such a meeting by the deed of mutual covenant (if any); or

(*c*) the owners of not less than 5% of the shares.

(2) At a meeting convened under subsection (1) a management committee may be appointed—

(*a*) in accordance with the deed of mutual covenant, if the deed provides for the appointment of a management committee; or

(*b*) if there is no deed of mutual covenant, or the deed contains no provision for the appointment of a management committee, by a resolution of the owners of not less than 50% of the shares."

Under section 2, an owner means, among other things, a person who for the time being appears from the records at the Land Registry to be the owner of an undivided share in land on which there is a building.

*The statutory intent*

Mr Kwok, counsel for the applicant referred to *Merrilong Dyeing Works Limited v. Chiu Shu Choi* [1984] HKC 535, in which the Court of Appeal dealt with the system of land holdings in Hong Kong in the context of a multi-storey building. The court held that when an owner is said to have ownership of one particular floor, all that it means is that he has an equal undivided part or share in the land and in the building as a whole.

While this is indeed the system of land holding in a multi-storey building in Hong Kong, the issue that has to be focused in this case is whether the Ordinance would only allow incorporation where there is a single tenancy in common. The preamble of the Ordinance states that the Ordinance is "to facilitate the incorporation of owners of flats in buildings or groups of buildings, to provide for the management or buildings or groups of buildings and for matters incidental thereto or connected therewith". The reference to "groups of buildings" was introduced in 1993 when the Ordinance was amended. Prior to that, the preamble merely mentioned about incorporation of owners of flats in multi-storey buildings. Clearly, the intention of the legislation is to ensure that incorporation of owners can be formed so as to provide better management for the buildings. In my view, this being the stated purpose of the Ordinance, in order for the applicant's argument to succeed, there must be clear and unambiguous provisions in the Ordinance itself that the owners of the Garden are unable to be incorporated. The Ordinance contains no provision which restricts incorporation to buildings built under a single piece of land or where there is only a single tenancy in common.

*The absurd result*

In my view, the definition of "owner" in section 2 does not mean that a management committee cannot be appointed for a residential development such as the Garden in which there is no single tenancy in common. All that section 2 does is to provide the qualification for being an owner. In other words, he must have an undivided share in land. However, there is nothing in section 3 which prevents the owners of a

development with multiple land holdings from agreeing to form a management committee. In fact, the reverse situation would create absurd results. Take the Garden as an example. There are 18 different lots of land, if the applicant's suggestion is correct, then it would mean that each building would have its own management committee and incorporated owners without a single management committee or incorporated owners managing the whole of the Garden. This is undesirable and cannot be the intention of the legislation. The absurdity is not merely in the number of management committees or incorporated owners but in substance, because without a single management committee or incorporated owners, matters relating to the Garden as a whole cannot be properly dealt by a single body. For this reason alone, one has to find against the applicant.

*Who can convene the meeting?*

Under section 3(1), three categories of person can convene the meeting :

(a) The person managing the building in accordance with the deed of mutual covenant.

(b) The person authorized to convene such a meeting by the deed of mutual covenant.

(c) The owners of not less than 5% of the shares.

The first two categories of person who can convene a section 3 meeting do not need to be owners.

*Share of owners*

Where the owners convene the meeting, they need to hold not less than 5% of the shares. "Share" is defined in section 2 as meaning the share of an owner in a building determined in accordance with section 39. Section 39 provides for the determination of an owner's share either in the manner provided in the deed of mutual covenant or, if there is no such deed or the deed does not contain any 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.

It can be seen that under section 3(c), there is no reference to undivided shares under the DMC. Each of the owner in the Garden has one undivided share in the land upon which the building is built. However, in matters such as management expenses, voting rights, the percentage required to exercise the power of appointment of a management committee under the DMC and other powers conferred to owners in the meetings of the owners, their share is by reference to the share of the owners in proportion to the number of flats owned by them in the property. In other words, each flat owner will have one out of 48 or 54 shares in the Garden (depending on whether the two other buildings in the Garden which has not been issued with the Certificate of Compliance are counted or not). Thus in section 7, payment of common expenses shall be borne and paid by the owners in proportion to the number of flats owned by them in the property. "Property" is defined as the 18 houses in the Garden. Under Clause 12.7, each flat owner shall be entitled to one vote in respect of each flat owned by him. Under Clause 12.11.4, a resolution in writing, signed by the owners who in the aggregate own not less than 95% of the total number of flats shall be as valid and effectual as it had been passed at a duly convened meeting of the owners. Under Clause 8.4, the first committee shall be appointed by an instrument of appointment signed by owners who own in the aggregate not less than 75% of the flats. Under Clause 10.1.2, the manager may continue for another three years after the first two years of appointment unless a notice of objection is signed by owners who own in the aggregate not less than 75% of the flats. Under Clause 12.2, meetings may be convened by the manager or the management committee of not less than 25% of the flat owners. Under Clause 12.4, the quorum in meetings are determined by the percentage of flat owners.

In the present case, the meeting was in fact convened by owners of not less than 5% of the total number of flats in the Garden. Given what I had said on the legislative intent, the owners were clearly able to convene and hold the meeting in which the Management Committee was appointed.

*The building*

As we had seen earlier, an owner means the owner of an undivided share in land on which there is a building. It is significant that the meaning of building in the Ordinance has an extended meaning. Under section 2, it means :

(a) any building which consists a number of flats comprising two or more storeys;

(b) any land upon which that building is erected; and

**(c) any other land which**

(i) is in common ownership with that building or land; or

**(ii) in relation to the appointment of a management committee or any application in respect thereof, is owned or held by any person for the common use, enjoyment and benefit of the owners and occupiers of the flats in that building.**

The extended meaning of "building" in (c)(ii) is particularly significant because it is specifically applicable to the appointment of a management committee. This is again one of the amendments introduced in 1993. Although for technical reasons one cannot simply substitute the words in (c)(ii) with the word "building" under the definition of an owner, in my view, the extended meaning of the word "building" clearly covers situations such as the present one in which all the other owners in the Garden would qualify as the owners of any one building. Because for the purpose of the appointment of a management committee, each lot in the Garden would have included the other land owned or held by any person for the common use of the owners and occupiers of the flats in that building. Hence the owners who can appoint the Management Committee are the owners of the 18 lots of land in the Garden.

In *Grace International Ltd v. Incorporated Owners of Fontana Gardens & Ors* [1996] 4 HKC 635 at 643, Le Pichon J (as she then was) agreed with the submission of counsel that the absence of common ownership and the existence of different DMCs appeared to be insurmountable obstacles for incorporation under the Ordinance. The learned judge, however, did not actually rule affirmatively on this issue. Hence her observation on the obstacles would not assist the applicant in this case.

*The required majority*

At a section 3 meeting, a management committee may be appointed either in accordance with the deed of mutual covenant if the

deed provides for the appointment of a management committee or if there is no deed of mutual covenant, or the deed contains no provision for the appointment of a management committee, by a resolution of the owners of not less than 50% of the shares. The percentage has since been lowered to 30% by Ordinance No.69 of 2000.

Under section 5(5)(a) of the Ordinance, at a meeting convened under section 3, each owner shall, save where the deed of mutual covenant otherwise provides, have one vote in respect of each share which he owns. The DMC of the Garden provides for one vote for each flat and that governs the voting at the section 3 meeting. In the present case, it is not disputed that owners of not less than 50% of the shares had voted in favour for the appointment of the Management Committee.

The applicant, however, argued that the required number of shares is 75% as required by the DMC and hence the Management Committee had not been properly appointed in this case. Clause 8.1 of the DMC provides that there shall be a management committee of the property. Clause 8.4 provides that the first committee shall be appointed by **an instrument of appointment signed by owners who own in the aggregate not less than 75% of the flats**. In my view, Clause 8.4 of the DMC does not fit into section 3(2) because the section requires the appointment of a management committee at a meeting, whereas Clause 8.4 provides for the appointment of the committee by an instrument of appointment signed by the owners.

Mr Kwok argued that the meeting can be adjourned for the instrument in writing to be signed. In my view, this is not what section 3(2)(b) intended. It clearly envisages the requirement of voting instead of what is contained in Clause 8.4. In my view, the situation is governed by section 3(2)(b). The appointment is to be made by the resolution of the owners of not less than 50% of the shares. The required votes had been fulfilled.

*Nature of the committee*

There is another reason why Clause 8.4 is not applicable because the committee appointed under the DMC is quite different from the management committee under the Ordinance. This can be seen from Clause 19 of the DMC which provides that if an Owners' Corporation of the Garden shall be formed under the Ordinance, "the Committee of the Owners' Corporation shall take the place of the Owners as the Committee

under this deed". This clearly envisages two kinds of bodies. Further, "management committee" is defined in section 2 of the Ordinance as a management committee appointed under section 3. Hence, unless the DMC specifically refers to the appointment of a management committee under section 3 of the Ordinance, the management committee referred to in the DMC is not the same creature as the one provided for in the Ordinance. As such Clause 8.4 is not relevant.

Mr Mok, counsel for the Land Registrar, had also referred to other arguments showing the difference between the management committee under the DMC and the statutory management committee. For example, a duty is imposed upon the statutory management committee to register the owners as a corporation. There is no similar requirement imposed on the management committee in the DMC. In view of what I had said, it is not necessary for me to deal with these other arguments.

*Failure to consider objections raised by the applicant*

The applicant further argued that the Registrar had failed to consider the objections raised by the applicant that there had been no or no sufficient verification of identity of those voting at the meeting who appointed the management committee.

*The inquiry by the Land Registrar*

After the meeting of 5 June 1999, the Management Committee on 12 July 1999 applied to the Land Registrar for the registration of the owners of the Garden as a corporation. The documents lodged for the application included the resolution for the appointment of the Management Committee and the affirmation of the secretary of the Management Committee, in which he stated that the provisions of sections 3 and 5 of the Ordinance had been complied with.

On 14 August 1999, the applicant's solicitors wrote to the Land Registrar stating that at the meeting no step was taken by any party to verify the identity of the voters at the meeting. Further, some of the owners who might have signed did not physically attend the meeting. The letter asked the Land Registrar to withhold the registration process pending the clarification of the controversy.

Upon receiving this letter, the Land Registrar enquired with the chairman of the Management Committee and also with the District

Office who had a representative present at the meeting. The response of the District Office was that there was no complaint or objection raised during the meeting. The lawyer for the chairman replied stating that there was no legal requirement for any formal verification of the identity of the voters. There was also no evidence indicating there was any doubt on the identity of the voters at the meeting. Furthermore, as the Garden is a small community consisting of 48 flats and the owners were well acquainted with each other, it was unnecessary to verify the identify of the owners. No complaints had been received from any of the owners for any procedural irregularity of the meeting.

The Land Registrar on 1 November 1999 responded to the applicant's complaint by referring them to these two letters. On 10 November 1999, the applicant's solicitors wrote again stating that the applicant "did query on lack of step/procedure taken on the verification of the identity of the voter at the meeting". The letter further referred to two lists of attendance of owners on the meetings of 24 February 1999 and 25 June 1999 respectively. The letters stated that "doubts arises as to the identity of the owners".

On 12 November 1999, the Land Registrar informed the applicant's solicitors that "It is not the stance of the Land Registrar nor his duty to attend and witness the owners' meeting, thereby assuring the regularity of all procedures. The District Officer (Yuen Long) and the convenors should be in a better position to take care of such matters." The Land Registrar further stated that since all papers in this case appeared to be in order, he shall have the application approved in the usual manner pursuant to section 8 of the Ordinance.

*Further complaints*

At the hearing, Mr Kwok further argued that the provisions of section 5 of the Ordinance had not been complied with. Specifically, section 5(2) deals with the mode of service of the notice of the meeting, it is submitted that there is no evidence showing that this provision had been observed. Section 5(4) requires the notice to specify the resolution which is to be proposed and in particular, the resolution for the appointment of a management committee. It is submitted that the notice merely set out the agenda which stated that :

(1) to form an incorporation of owners and appoint a management committee for the incorporated owners of the Garden; and

(2) to elect a chairman, secretary and other members of the management committee.

Section 5(5) states that the vote may either be cast personally or by proxy, appointed in accordance with paragraph 4(2) of the Third Schedule of the Ordinance. This paragraph provides that "the instrument appointing a proxy shall be in writing signed by the owner, or if the owner is a body corporate, under the seal of that body". It is submitted that the proxy is defective.

The failure to observe the provisions of section 5 had not been drawn to the attention of the Land Registrar before. It was only raised for the first time at the hearing. Mr Kwok's submission was considered on *de bene esse* basis. Mr Mok objected to the raising of these matters at this late stage.

*Overview*

In considering the submissions on procedural impropriety, it is necessary to take an overview of the matter. The applicant is not an owner of the Garden. After the meeting in June 1999, no owners had complained of any procedural irregularity of the meeting in which the Management Committee was formed. It was obviously the desire of the owners to form themselves into an owner's corporation. Under the DMC, the owners had expressly agreed that they are to be incorporated into an owner's corporation under the Ordinance. It is submitted that the applicant had a financial interest in this case because she was appointed to be the manager of the Garden and her status to challenge the decision arises because the owner's corporation had terminated her appointment. In my view, if the applicant was really concerned about whether the incorporated owners was properly formed or not, she could well have commenced proceedings after the meeting of 22 June 1999 to challenge the validity of the meeting. This she had not done. In my view, the Land Registrar had clearly considered the objections raised by the applicant's lawyer and made enquiries before deciding to approve the application for incorporation. There is no procedural impropriety.

In *Computer Land Ltd v. Registrar of Companies & Anor* [1986] HKC 49, Rhind J in considering the role of the Registrar of Companies held that it would not be reasonable to expect the Registrar to follow a procedure akin to a judge conducting a trial. As he had no

power of receiving evidence on oath or resolving conflicts in the evidence of competing parties, it is inconceivable that he is expected to do more than take note of the observations that an interested party choose to make to him.

In my view, this observation applies equally to the role of the Land Registrar in the present case. Furthermore, a judicial review is not concerned with the merits of the decision. Unless the Registrar has been specifically drawn to the complaints under section 5, otherwise, I fail to see how it can be said that he had failed to properly take such objections into account when granting the application. Under section 8 of the Ordinance, the Land Registrar, if satisfied that the provisions of section 3 had been complied with, shall then issue the Certificate of Registration. There is clearly evidence that the section 3 requirement had been complied with and it is clear that the Ordinance does not require the Land Registrar to consider the procedural matters relating to the notice and voting at meetings under section 5.

Furthermore, this is clearly a case where section 13 of the Ordinance comes into play. This section provides that the Certificate of Registration shall be conclusive evidence that such corporation is incorporated under this Ordinance. In *R. v. Registrar of Companies, Ex parte Central Bank of India* [1986] 2 WLR 177 at 192 to 193, Lawton LJ adopted the submission of counsel that the conclusive evidence clause excluded the admission of evidence but not the jurisdiction of the court to grant judicial review. In my view, this clause specifically excludes evidence relating to any alleged procedural irregularity of the meeting.

Mr Mok further referred to *Incorporated Owners of Million Fortune Industrial Centre v. Jikan Development Limited*, CACV 122 of 2000, the Court of Appeal had to construe section 6 and the Second Schedule of the Ordinance. Rogers JA stated that Clause 10 of the Second Schedule imposed mandatory requirements to ensure that the owners are kept informed of the transactions of the management committee, however, the failure by the chairman of the management committee to comply with this provision does not render the resolutions which had been passed invalid or unprovable, but it does open up parties perhaps to the sanction of applications for their removal and, perhaps, for the appointment of an administrator. In view of my decision, it is not necessary for me to consider whether the same approach should be adopted to a suggestion there had been breach of the provisions of section 5.

*Conclusion*

Accordingly, the application for judicial review is dismissed with costs *nisi* to the Land Registrar.

(P. Cheung)
Judge of the Court of First Instance,
High Court

Mr Tim Kwok, instructed by Messrs Quan & Co., for the Applicant

Mr Y.C. Mok, instructed by Department of Justice, for the Respondent

Mr Sammy Ho, instructed by Messrs Ivan Tang & Co.,
for the Incorporated Owners of Chun Fai Garden, as Observer