

Bills Committee on Building Management (Amendment) Bill 2005

Borrowing Power of Owners' Corporations

PURPOSE

1. This paper briefs Members about the proposal of empowering owners' corporations (OCs) to borrow from the Government on behalf of the defaulting owners to carry out statutory repair works and seeks Members' views on the way forward.

BACKGROUND

2. During the public consultation on the proposed amendments to the Building Management Ordinance (BMO), there was one proposal to empower OCs to borrow on behalf of those defaulting owners from the Government¹ to carry out statutory works. While the principle of the proposal was generally supported by the public, there were concerns about the potential danger of abuse by OCs. Owners' interests might be at stake if OCs exercise such power in a reckless and unreasonable manner. Many urged the Government to introduce a mechanism with detailed procedures for the OCs' applications and an appeal mechanism for the owners concerned. There were also concerns that the Government might be subject to huge risk of non-repayment from the defaulting owners. These respondents worried that the scheme would turn into a ground for the Government to subsidise certain irresponsible owners by taxpayers' money, which contravenes the principle that "management and maintenance of private buildings is the responsibility of private owners".

3. In addition to the above, the Administration has come across the following difficulties in pursuing the proposal –

- (a) We have doubts on whether the proposal is consistent with the general principle of agency law. Under the proposal, Party A purports to borrow (but without the authority) on behalf of Party B from Party C. There is no principal and agent relationship created between Party A and Party B and the latter might not be bound by the loan agreement.

¹ This in effect means borrowing from the Building Safety Loan Scheme administered by the Buildings Department.

- (b) In order to ensure the best use of public resources, the proposed borrowing power of OCs is restricted to the scope of works demanded by statutory directions, notices or orders. Such restriction, however, would render it economically inefficient for the OCs to tackle the maintenance problems of their buildings as a whole.
- (c) Under the present proposal, the management committee of the OC shall convene a general meeting under paragraph 1(1)(c) of Schedule 3 to the BMO to pass a specified resolution relating to the exercise of the borrowing power. Certain problems arise from here –
- i. The resolution could be passed at a general meeting held for the purpose of endorsing the renovation works and selection of tenders, i.e. before the OC could learn if there is any defaulting owner. In this case, the resolution would only be a very general one, with owners agreeing on broad principles for the OC to take follow-up actions. This might not be in the best interests of owners.
 - ii. If the OC chooses to pass a specific resolution with regard to the borrowing power (i.e. the unit who has refused to pay, the amount of the loan, etc.), they would have to convene a minimum of two owners' meetings in order to proceed with the application. Procedures would get even more cumbersome if maintenance works are to be carried out in stages. OCs would have to go through a series of preparatory works before submitting an application to Government.
 - iii. Validity of the resolutions passed at an owners' meeting might still be subject to challenges as disgruntled owners could always resort to the Lands Tribunal for adjudication.
- (d) In order to provide a channel for the owners concerned to exercise their right of objection, an appeal mechanism has to be built into the borrowing scheme. The Administration's proposal, as set out in this paper, is for them to submit an appeal to the Lands Tribunal within 30 days after being served the notice by the OC. Whilst the Department of Justice has advised that the proposal, coupled with the procedural safeguards, are likely to be able to satisfy the fair balance test and

therefore to be consistent with the property right guarantees under the Basic Law, for some, this could still be seen as a crude violation of human rights, as the owners concerned are forced into court without a choice.

- (e) To secure the repayment of the loan, the OC shall execute and register a charge against the owner' title in the Land Registry in favor of the Government. This is apparently another hurdle for the OC in exercising its borrowing power.
- (f) Under the present scheme of the Building Safety Loan Scheme administered by the Buildings Department, individual borrowers applying for loan at or above \$50,000 are required to provide security under various forms (depending on the loan size) including, as appropriate, the execution of a legal charge registered against the title of the property. Such borrowers who are already on mortgages are required to negotiate with their first lender in removing the "all monies" clause. In so doing, the chances for recovery of its loans would be much higher for the Government. For apparent reasons, it would be impossible for an OC to acquire the necessary details/documentation of the defaulting owner to conform to the current requirements. This would lead to considerable risk to the Government.
- (g) If OCs have the power to borrow on behalf of the owners, some of them might choose not to borrow on their own, but resort to leaving the burden to OCs. This is contrary to our policy intent.

4. Given the above problems, the proposal to empower OCs with borrowing power is excluded from the Building Management (Amendment) Bill 2005.

THE FIRE SAFETY (BUILDINGS) ORDINANCE

5. In passing the Fire Safety (Buildings) Ordinance² [FS(B)O] in 2002, the Legislative Council decided that the provisions in the FS(B)O should not come into operation until after the BMO has been amended regarding the borrowing power of OCs. As such, the exclusion of the proposal from the

² The Fire Safety (Buildings) Ordinance 2002 requires OCs and owners to upgrade the fire service installations and equipments and to improve the fire safety construction in their buildings.

BMO Amendment Bill will have implications on the commencement of FS(B)O.

THE PROPOSAL

6. Having considered the above issues, we have worked out, in consultation with bureaux/departments concerned, a proposal about empowerment of OCs to borrow on behalf of the defaulting owners from the Government. Given the complexity of the proposal, we would like to invite Members' views before proceeding to work on any Committee Stage Amendments relating to the borrowing power of OCs.

Scope for the Borrowing Power of OCs

7. A new section will be added to the BMO to empower an OC to borrow money from the Government on behalf of those owners who have failed or refused to pay their share for the purpose of complying with statutory directions, notices or orders relating to the demolition, alteration, repair or improvement works of the building managed by the OC concerned.

8. The power of the OC is limited to borrowing from the Government and any lending institutions authorised by the Government. In borrowing from the Government, the OC, as the borrower of the loan, will be acting as an agent on behalf of those defaulting owners only, instead of all the owners of the building or itself.

Loan Amount for Each Individual Owner

9. The loan to be borrowed by the OC on behalf of each such owner should be the respective share of the cost borne by such owners for the purpose of complying with the statutory works and must be below \$50,000. Furthermore, each loan of \$50,000 should be granted only once to each owner.

10. Under the present mechanism for the Building Safety Loan Scheme administered by the Buildings Department, no security is required for loan which is below \$50,000. As for loan which is at or above \$50,000, applicants are required to provide security under various forms (depending on the loan size) including, as appropriate, the execution of a legal charge registered against the title of his property. If the property concerned is under existing mortgage, the legal charge will have to be a second legal charge which has to satisfy that (a) the "all monies" charge clause in the existing mortgage deed has been/will be removed; and (b) the assessed residual value

of the property at the time of application is adequate to cover the approved loan amount after deducting the outstanding mortgage amount.

11. In the cases of OCs borrowing from the Government on behalf of those owners who have failed or refused to pay their share of costs of works for complying with statutory directions, notices or orders, the Government will surely need security even if the loan is below \$50,000. Regardless of the loan size, the security should be in the form of a legal charge registered against the title of the property of the owner concerned. As for those properties which are subject to existing mortgage, the Financial Services and the Treasury Bureau has agreed that a second legal charge, without any additional condition (with an “all monies” clause in the respective first charge and/or not offering sufficient residual property value in some cases) can be regarded as adequate and accepted as security for such loan. Given that the Government has to accept a lower level of security, the loan for each owner under such circumstances will be capped below \$50,000, no matter the value of the property and no matter the property concerned is under existing mortgage or not. Based on experience, the share of costs of works relating to a building for individual owner should be lower than \$50,000.

Registration of Charges against the Properties of the Owners Concerned

12. To secure the repayment of the loan granted by the Government, the OC shall execute and register a charge on behalf of the owners concerned against the owners’ title in the Land Registry in favor of the Government. The loan would only be released by the Government to the OC upon execution and registration of the charge.

Conditions and Procedures for Exercising the Borrowing Power

13. A new Schedule will be included to set out the conditions and procedures for OCs acting on behalf of the defaulting owners to borrow from the Government, and to execute and register a charge against the defaulting owners’ interest in the property in the Land Registry.

(A) Conditions for exercising the borrowing power

14. There must be a statutory direction, order or notice served on an OC in relation to the common parts of the building. The costs for the statutory works shall be defrayed either by the general fund or contingency fund maintained by the OC under section 20(1) and section 20(2) of the BMO; or the special fund maintained by the manager under paragraph 4 of Schedule 7 to the BMO –

- (a) If the general fund and contingency fund maintained are insufficient to meet such costs, the management committee of the OC shall increase the amount required to be contributed by the owners pursuant to section 21(3). The amount to be contributed by an owner shall be fixed in accordance with sections 22(1) and (2) by the management committee.
- (b) If the special fund is used, the OC shall determine, by a resolution of owners, the amount to be contributed in accordance with paragraph 4(2) of Schedule 7 to the BMO.

(B) Resolution to be passed by the OC

15. If an OC wants to exercise the borrowing power, the management committee shall convene a general meeting of the OC under paragraph 1(1)(c) of Schedule 3 to the BMO to resolve that –

- (a) the OC shall borrow loans from the Government on behalf of those owner(s) for their respective contributions; and
- (b) the OC shall execute and register a charge on behalf of those owner(s) against their interest in the land in the Land Registry in favour of the Government.

16. The above resolution could be passed at a general meeting held for the purpose of endorsing the statutorily required works and selection of tenders, i.e. when the OC has not yet confirmed whether there is the need to exercise the borrowing power, or after the OC has confirmed that some owners have refused or failed to pay their share of costs and has decided to exercise the borrowing power under the BMO. We propose to leave this to the OC to decide.

17. The resolution to be passed by the OC shall be as follows –

“The Incorporated Owners of _____ (name of building) _____ resolved that in exercise of its powers under section [the new section] of the Building Management Ordinance, it will borrow loans from the Government on behalf of those owners who have failed or refused to contribute their share of cost of works in compliance with the statutory direction/order/notice _____ (No.) _____ issued by _____ (Government department) _____ on _____ (date) _____. The Incorporated Owners of

(name of building) also resolved that in exercise of its powers under section [the new section] of the Building Management Ordinance, it will execute and register a charge against the interests in the properties of the owners' concerned in the Land Registry in favour of the Government.”

(C) Serving of notice to owners concerned

18. Before a loan is granted to an OC for and on behalf of an owner, the OC shall be required to serve a notice on each of the owner concerned. The followings shall be specified in the notice –

- (a) a resolution required under the BMO has been passed in a general meeting of the OC to empower the OC to apply for a loan from the Government on his behalf and to execute and register a charge against his property as security for the loan;
- (b) the amount of the proposed loan is the share of cost to be contributed by the owner for the statutory works which is fixed in accordance with the deed of mutual covenant and/or section 22 of the BMO, whichever is appropriate and must be below \$50,000;
- (c) if he wishes to object to the application of the loan, he must file his objection against the OC with the Lands Tribunal with stated grounds within 30 days from the date of the notice;
- (d) he has to send a copy of his claim filed with the Lands Tribunal to the OC by registered post within seven days from the date of filing; and
- (e) if he withdraws the claim against the OC, he shall send a copy of the notice of withdrawal filed with the Lands Tribunal to the OC.

19. If the OC does not receive a copy of the objection from the owner within the prescribed timeframe, or if the OC has received a copy of the notice of withdrawal from the owner, it can then proceed to apply for a loan from the Government.

(D) Appeal by owners concerned

20. If an appeal against the determination of the respective share of cost of works to be contributed is filed within the prescribed period of time, the OC will have to withhold the application for the loan pending the Lands Tribunal's judgment. If the Lands Tribunal rules in favour of the OC and

upholds the debt, the OC shall then serve another notice on the owner. The following details shall be specified in the notice:

- (a) if he wishes to further object to the application of the loan, he must file an appeal with the Court of First Instance within 14 days from the date of the judgment;
- (b) he shall send a copy of his appeal filed with the Court of First Instance to the OC by registered post within seven days from the date of filing; and
- (c) if he withdraws the appeal, he shall produce to the OC a copy of the notice of withdrawal filed with the Court of First Instance.

21. If the OC does not receive a copy of the appeal from the owner within the prescribed timeframe, or if the OC has received a copy of the notice of withdrawal from the owner, it can then proceed to apply for a loan from the Government.

(E) Statutory declaration by the OC

22. In submitting an application for a loan from the Government, the management committee shall be required to fill in an application form required and specified by the responsible public officer. The management committee shall also make a statutory declaration to pronounce that –

- (a) a general meeting of the OC complying with the provisions of the BMO had been convened;
- (b) the prescribed resolution has been passed at the general meeting of the OC in (a) above;
- (c) a notice required under the BMO has been served on the owners concerned;
- (d) the specified timeframe has passed after serving the notice in (c) above; and
- (e) no objection has been received from the owners concerned *or* a copy of the claim filed with the court has been received from the owners concerned but the claim had subsequently been withdrawn; *or* the Lands Tribunal/the Court of First Instance has ruled in favour of the OC, whichever is applicable.

CONCERNS

23. The procedures set out in the paper, including the appeal mechanism, are aimed at striking a fair balance between efficient building management and maintenance and the interests of individual owners. When the Legislative Council passed the FSBO in 2002, the concern was on how the Government could help OCs in carrying out the statutory works where some owners have refused to pay their share. Given the need to avoid abuse by OCs and to safeguard the interests of individual owners, the proposal above will likely be of assistance to OCs only in situation where the owners are missing – because they will not appeal. For those owners who deliberately refuse to pay (whether their reasons are valid or not), the appeal mechanism will enable them to delay the whole process for a very long period of time.

WAY FORWARD

24. Members' views are invited on whether the above proposal is acceptable. Subject to Members' views, we will introduce Committee Stage Amendments as appropriate.

Home Affairs Department
February 2006