Bills Committee on Building Management (Amendment) Bill 2005

Matters Arising from Meeting on 15 December 2005

1. At the meeting of the Bills Committee on 15 December 2005, during discussion of the proposal to form a committee (not owners' corporation (OC)) in house developments like Hong Lok Yuen[1], Members raised some legal questions regarding the definition of "building" under the Building Management Ordinance (BMO). Below are the responses of the Administration.

Definition of "Building"

2. Prior to 1993, OCs were formed under the Multi-Storey Buildings (Owners Incorporation) Ordinance (MSBO). According to section 2 of the then MSBO, a "building" was defined to mean –

(a) any building which consists of two or more levels, including basements; and

(b) the land upon which such a building is erected and any land in common ownership with such land.

Based on this definition, a building with two blocks which are not in common ownership could not incorporate to form one OC even though owners of the two blocks share common facilities and that the two blocks are physically linked to each other.

3. The MSBO was significantly revamped and renamed as BMO in 1993. The definition of a "building" was amended to mean –

(a) any building which contains any number of flats comprising 2 or more levels, including basements or underground parking areas;

(b) the land upon which such a building is erected; and

(c) any other land (if any) which –

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[1] LC Paper No. CB(2)657/05-06(01) – *Proposed Formation of a Committee (Not Owners' Corporation) for Owners of House Developments*

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

(ii) in relation to the appointment of an MC under Part II or any application in respect thereof, is owned or held by any person for the common use, enjoyment and benefit (whether exclusively or otherwise) of the owners and occupiers of the flats in that building.

The amended definition of a "building" (in particular the new paragraph (c)(ii)), subject to the provisions of the deed of mutual covenant (DMC) concerned, makes it possible for a building with two blocks to form one OC, provided that there is land in each of these blocks which is held for the common use, enjoyment and benefits of owners of the adjacent block. The amendment was related only to the appointment of a management committee and did not meddle with the ownership of the common areas of a building.

4. Members asked whether the "common parts" of Hong Lok Yuen, which are retained by the developer but are for the common use, enjoyment and benefit of owners, fall under the definition of "building" of the BMO which was amended in 1993. As advised by the Department of Justice, most of the owners of Hong Lok Yuen do not fall under the definition of "owner" under the BMO – i.e. 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[2]. Since most of the owners in Hong Lok Yuen are not "owner of an undivided share", "building" as defined under the BMO does not cover buildings in Hong Lok Yuen or other similar house developments to which no undivided shares are allotted.

Proposal to Takeover the Common Parts through Legislative Means

5. Members asked whether statutory provisions could be introduced to empower the OC of house developments (if formed) to takeover the so-called "common parts" from the developer. This was on the ground that the Administration had previously introduced legislative measures to interfere with the rights of minority owners such as the mechanism for termination of appointment of the manager specified under the DMC by a

[2] "Owner" also means a registered mortgagee in possession of such share.

resolution of 50% of the shares of the owners (paragraph 7(1) of Schedule 7). The Administration was requested to explain the difference in nature between the two and the legal consequences the Government would bear if owners of house developments were allowed to incorporate under the BMO and have rights to manage and maintain the so-called "common parts" which are privately owned.

6. As advised by the Department of Justice, taking over from the developer of the so-called "common parts" is an interference with property rights of the developer. This is different from paragraph 7(1) of Schedule 7 to the BMO which concerns mere variation of the mechanism of terminating the appointment of the DMC manager. Whilst some old DMCs may not provide for a termination mechanism, it does not necessarily mean that the DMC manager's right to manage is "indefinite". Under common law, failure of a contractual party to perform its contractual duties may in certain circumstances entitle the other party to treat the contract as discharged[3]. The proposal to take over from the developer the so-called "common parts" cannot be justified unless it is accompanied by proper compensation to the developer, whose property rights are taken away.

7. As a related matter, we note from the land grant of Hong Lok Yuen that the lease conditions have expressly imposed on the developer an obligation to ensure that the "common parts" are properly managed and the developer has to provide a bank bond as security for the due performance of such obligations. Similar requirement appears in the land grant for Fairview Park, another house development in the territory. Section 34H(1) of the BMO stipulates that where a person who owns any part of a building, that person shall maintain that part in good repair and condition. It would be unfair to the developer if he is obligated to ensure proper management of the "common parts" but on the other hand, deprived of the right to manage and maintain these parts.

Views of the Hong Lok Yuen Property Management Company Ltd

8. We have written to the Hong Lok Yuen Property Management Company Ltd to enquire about the ownership structure of Hong Lok Yuen and also to seek its views. We were given the confirmation that the "common parts" of Hong Lok Yuen are retained by the developer. As to the proposal of setting up an owners' committee and how such committee

[3] Chitty on Contract, Vol.1 28th ed., para.25-051.

should be formed, the Hong Lok Yuen Property Management Company Ltd considered that the question should be left to the owners to decide.

Fontana Gardens

9. In LC Paper No. CB(2)2017/04-05(02) – *Matters Arising from Meeting on 2 June 2005*, we set out the ownership structure of Fontana Gardens in Wan Chai District. To recap, Fontana Gardens is a residential estate with seven residential blocks and a three-storey carpark building. Owners of Fontana Gardens were incorporated in 1995[4]. The issues relating to the incorporation of Fontana Gardens lie with the existence of more than one DMC and not the lack of undivided shares. Following the Chun Fai Garden case[5] which gave a more definitive ruling on the appointment of management committee under the BMO, buildings covered by more than one DMC are unlikely to be able to incorporate. Members would however like to know whether there were "common parts" between the residential blocks in Fontana Garden.

10. The whole lot of Fontana Gardens was carved out into six sections (Section A to Section E and RP[6]). Section A to Section E (seven residential blocks) are governed by five separate DMCs. By such DMCs, shares were allocated to units in the building on the individual section only – meaning that an owner of shares in the building on a particular section does not have interest in the buildings on the other sections. The RP section of Fontana Gardens (a three-storey carpark building) is not covered by any DMC and does not have any allocation of undivided shares. There is neither a master DMC nor a Deed of Covenant and Management Agreement which sets out the share of all owners. In all of the five DMCs, there is a standard provision about the rights of use of the RP section by owners of the five sections. According to land search, the RP section was first retained by the developer and subsequently assigned to the owners' corporation of Fontana Gardens at a consideration of $1 in October 2000.

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[4] According to the Land Registry, owners have applied to the Land Registry for formation of an OC way back in 1988. The application was rejected because it fell outside of the scope of the term "building" in the then MSBO. Following the 1993 legislative amendment exercise, the Land Registry had taken a more liberal approach towards the interpretation of the extended definition of the term "building" in section 2 of the BMO. As such, the application for incorporation of Fontana Gardens was accepted by the Land Registry in 1995.

[5] *Siu Siu Hing v Land Registrar* (HCAL 77/2000).

[6] Retained Portion.

Way Forward

11. Given that the so-called "common parts" of Hong Lok Yuen are private properties retained by the developer, we do not see merits for owners of Hong Lok Yuen, and in fact other house developments with similar ownership structure, to incorporate under the BMO. We therefore appeal for Members' re-consideration of LC Paper No. CB(2)657/05-06(01) – *Proposed Formation of a Committee (Not Owners' Corporation) for Owners of House Developments* which sets out some fundamental issues relating to Members' earlier proposal of setting up of a mechanism to enable owners of house developments to form a committee (but not an owners' corporation).

12. Subject to Members' views, we will continue to work on the proposal in consultation with the departments concerned. Consultation with the owners of house developments, the real estate and property management industries and the professional bodies will need to be conducted. Given the complexity of the proposal and also the need for extensive consultation, we do not propose to incorporate the amendments into the Building Management (Amendment) Bill 2005.

Views Sought

13. Members' views are invited on the above.

Home Affairs Department
May 2006