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(Attn : Mrs Angelina Cheung, JP  
Assistant Director of Home Affairs)  
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**BY FAX**

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Dear Mrs Cheung,

**Building Management (Amendment) Bill 2005**

We are scrutinising the legal and drafting aspects of the Building Management (Amendment) Bill 2005 (“the Bill”). We should be grateful for your clarification of the following points-

Clause 4

In the Final Report of the Subcommittee on Review of the Building Management Ordinance (Cap. 344) (“the Subcommittee”), members proposed that section 3 of the Building Management Ordinance (Cap. 344) (“the Ordinance”) be amended to include a provision to remind owners of the necessity to make reference to the voting rights of shares which are specified in a deed of mutual covenants (“DMC”). Is that proposal adopted in the Bill?

Clause 4(a)

- (a) Is there any statutory provision resolving the competing claims by more than one group of owners of 5% of the shares appointing a person to convene the meeting?
- (b) There was a view at the Subcommittee that an independent person (instead of the person mentioned in new section 3(1)) should preside at the meeting. Why do you consider that it would be inappropriate to appoint an independent person to preside at the meeting?

Clause 4(b)

- (a) Clause 4(b) amends section 3(2) of the Ordinance. The Explanatory Memorandum to the Bill explains that the proposed amendment is to remove any doubt as to whether a management committee (“MC”) within the meaning of the Ordinance may be appointed in accordance with a DMC.

Supposedly a person referred to under section 3(1)(a), (b) or new section 3(c) of the Ordinance intends to convene a meeting of owners to appoint an MC. At the same time, the DMC provides for the appointment of an MC having similar functions as a statutorily formed MC (therefore an MC within the meaning of the Ordinance). However, the procedures for forming an MC under the DMC are more stringent than those under the Ordinance. The existing manager referred to under section 3(1) may wish to adopt the DMC procedures; while the person referred to under new section 3(1)(c) may wish to adopt the procedures under new section 3(3) to (10). How does new section 3(2) resolve or is there any statutory provision resolving the conflicting claims? Further, if an MC with functions of a statutory MC is appointed either way in compliance with the respective DMC or statutory requirements, how does new section 3(2) (now without reference to provisions in the DMC) help to prevent the legal challenge to the validity of appointment on the ground that the DMC requirements should prevail over the statutory requirements or the vice versa?

- (b) New section 3(2)(a) provides that “...by a resolution passed by a majority of the votes of the owners ...”. Why is it necessary to add the words “a majority of the votes of”? If the words in question are necessary, would you consider the Chinese rendition for the words “以多數票” appropriate to reflect its English meaning in the light of the decision in *The Incorporated Owners of Tsuen Wan Garden v. Prime Light Limited* (CACV 1/2004) which held that the word "majority" in paragraph 3(3) of the Third Schedule to the Ordinance should mean a majority of over 50% (過半數)?
- (c) In comparing with the existing section 3(2)(b), why is it necessary to add “in aggregate” in new section 3(2)(b) after “shares”?

Clause 4(c)

- (a) New section 3(3)(a) and (c) mention the person referred to in section 3(1)(b). Would you consider it appropriate to add the words “(if any)” after subsection (1)(b) in new section 3(3)(a) and (c) respectively because no person may be authorized under section 3(1)(b) or there is no provision to authorize such person in the DMC?

- (b) New section 3(7) provides that the convener shall preside at a meeting of owners for the appointment of a MC. What are the legal powers and liabilities of the convener?

There was a view at the Subcommittee that there should be a separate election for the chairman of the meeting for the appointment of an MC. Of course after the election, the convener may well be elected the chairman of the meeting. Would you explain your reason for putting in the legislation that the convener should preside at the meeting?

- (c) New section 3(10)(b) provides for a 24-hour deadline for lodging the proxy with the convener. It is noted that when the Subcommittee was deliberating the matter, some members were concerned about that a period of 24 hours was not enough to deal with the various issues that might arise and suggested to extend the period to 48 hours. Would you explain the reason for adopting the 24-hour instead of for example, a 48-hour deadline?
- (d) New section 3(10) and Form 1 in new Schedule 1A provide for the requirements of a proxy instrument. Who is to determine the validity of a proxy instrument? It is noted that the Subcommittee had divergent views on this issue.

#### Clause 5(a)

Clause 5(a) amends section 3A(3). In section 3A(3), there is a reference to “majority of votes” (“以多數票”). In the light of the decision in *The Incorporated Owners of Tsuen Wan Garden v. Prime Light Limited* (CACV 1/2004), should “以多數票” be changed to “過半數票”?

#### Clause 5(c)

- (a) New section 3A(3A) mentions the person referred to in section 3(1)(b). Would you consider it appropriate to add the words “(if any)” after subsection (1)(b) because no person may be authorized under section 3(1)(b) or there is no provision to authorize such person in the DMC?
- (b) New section 3A(3E) provides that the convener shall preside at a meeting of owners for the appointment of a MC. What are the incidental legal powers and liabilities of the convener?

There was a view at the Subcommittee that there should be a separate election for the chairman of the meeting for the appointment of an MC. Of course after the election, the convener may well be elected the chairman of the meeting. Would you explain your reason for putting in the legislation that the convener should preside at the meeting?

- (c) New section 3A(3H)(b) provides for a 24-hour deadline for lodging the proxy with the convener. It is noted that when the Subcommittee was deliberating the matter, some members were concerned about that a period of 24 hours was not enough to deal with the various issues that might arise and suggested to extend the period to 48 hours. Would you explain the reason for adopting the 24-hour instead of for example, a 48-hour deadline?
- (d) New section 3A(3H) and Form 1 in new Schedule 1A provide for the requirements of a proxy instrument. Who is to determine the validity of a proxy instrument? It is noted that the Subcommittee had divergent views on this issue.

#### Clause 6(a)

Clause 6(a) amends section 4(4). In section 4(4), there is a reference to “majority of votes” (“以多數票”). In the light of the decision in *The incorporated Owners of Tsuen Wan Garden v. Prime Light Limited (CACV 1/2004)*, should “以多數票” be changed to “過半數票”?

#### Clause 6(b)

- (a) New section 4(5) mentions the person referred to in section 3(1)(b). Would you consider it appropriate to add the words “(if any)” after subsection (1)(b) because no person may be authorized under section 3(1)(b) or there is no provision to authorize such person in the DMC?
- (b) New section 4(9) provides that the convener shall preside at a meeting of owners for the appointment of a MC. What are the incidental legal powers and liabilities of the convener?

There was a view at the Subcommittee that there should be a separate election for the chairman of the meeting for the appointment of an MC. Of course after the election, the convener may well be elected the chairman of the meeting. Would you explain your reason for putting in the legislation that the convener should preside at the meeting?

- (c) New section 4(12)(b) provides for a 24-hour deadline for lodging the proxy with the convener. It is noted that when the Subcommittee was deliberating the matter, some members were concerned about that a period of 24 hours was not enough to deal with the various issues that might arise and suggested to extend the period to 48 hours. Would you explain the reason for adopting the 24-hour instead of for example, a 48-hour deadline?

- (d) New section 4(12) and Form 1 in new Schedule 1A provide for the requirements of a proxy instrument. Who is to determine the validity of a proxy instrument? It is noted that the Subcommittee had divergent views on this issue.

Clause 9(c)

If the person submits a declaration containing false information under new section 7(3)(e), is the person liable to an offence under section 36 of the Ordinance?

Clause 11(a)(i)

Why is it appropriate to delete the reference to “subject to subsection (3)”? It appears that the payment of allowance is subject to the condition in subsection (3).

Clause 15

It adds a new section 29A about protection of members of management committee.

- (a) Would you give examples to illustrate the operation of new section 29A(1)(a) and (b)?
- (b) Would you give examples as to an MC member being not protected under new section 29A from incurring personal liability in performing his duty as an MC member?

Clause 18

According to the Explanatory Memorandum to the Bill, section 40B(3) is amended to clarify who is eligible to be appointed as a building management agent. Would you explain the ambiguity in the existing section 40B(3) that needs to be clarified?

Clause 19(a)

In new section 40C(3), there is a reference to “majority of the votes” (“以多數票”). In light of the reason given above, would it be appropriate to amend it to “過半數票”?

Clause 19(c)

In new section 40C(4), there is a reference to section 3(1)(a), i.e. any person managing the building in accordance with the DMC. However, section

40C(1)(b) provides for one of the criteria for the appointment of MC or building management agent under the section is that no person is, for the time being, managing that building. Therefore, is the reference to section 3(1)(a) superfluous?

Clause 19(d)

- (a) In new section 40C(10)(a), why is the reference to “unless the deed of mutual covenant (if any) otherwise provides” omitted (c.f. new section 3(9)(a), 3A(3G)(a) and 4(11)(a))?
- (b) In new section 40C(10)(c) and (d), there are references to “in the case of co-owners”. However, in identical circumstance, in new sections 3(9)(c), 3A(3G)(c) and 4(11)(c), and sections 3(9)(d), 3A(3G)(d) and 4(11)(d), there are references to “where 2 or more persons are the co-owners of a share”. Would you explain the use of different drafting style in identical circumstance?
- (c) According to the Explanatory Memorandum to the Bill, new section 40C(9), (10) and (11) are modelled, among other things, on section 5A. In such case, why is section 5A(a) not adopted?

Clause 20(b)

Why is the date “31 March 2005” chosen?

Clause 22

Contrary to the view of the Subcommittee that an option should be given to an owner to elect to give a proxy to another person to attend and vote at the meeting or only to attend the meeting, there is no such option in either of the prescribed proxy instrument. Would you explain?

Clause 23(c)

The Explanatory Memorandum to the Bill says that clause 23(c) replaces the original paragraph 1(a), (b) and (c) of the Schedule with the new paragraph 1(a) to remove any doubt as to whether an MC within the meaning of the Ordinance may be appointed in accordance with a DMC.

- (a) What is the doubt arising from the original provisions?
- (b) Upon enactment of the legislative amendment, does it mean that an MC not within the meaning of the Ordinance may be appointed in accordance with a DMC which specifies the number of persons constituting the MC greater or smaller than the minimum number of persons specified in new paragraph 1(a) in respect of the same number

of flats referred to in new paragraph 1(a)?

- (c) Upon enactment of the legislative amendment, is there any mechanism to resolve competing claims for appointment of an MC under the DMC and under the Ordinance? For example, there are 70% of the shares wishing to appoint an MC under the DMC; while there are 30% of the shares wishing to appoint an MC under section 3 of the Ordinance.
- (d) What will be the legal position if the size of membership fall below the requirement set out in new paragraph 1(a)(i), (ii) or (iii) after the formation of an MC?

Clause 23(d)(i)

- (a) New paragraph 2(1)(c) and (d) allow the appointment of a person who is not an owner to be either the secretary or treasurer. However, there was a view at the Subcommittee that the office of secretary or treasurer should preferably be held by an owner. Would you explain the reason for allowing a non-owner to be the secretary or treasurer?
- (b) There are references to “majority of the votes” (“以多數票”) in new paragraph 2(1). In light of the reason given above, would it be appropriate to amend them to “過半數票”?
- (c) In light of the proposed repeal of paragraph 2(1), what will be the requirement of appointment of MC members, chairman, secretary, treasurer, etc. in the case of a meeting convened other than under section 3 the Ordinance, for example under the DMC?
- (d) What is the nomination procedure for an MC member and other office bearers?
- (e) Under the existing paragraph 2(1), the owners may appoint MC members to hold offices (as specified in the DMC) in addition to the holders of offices referred to in sub-subparagraphs (b), (c), (d) and (e). Upon repeal of paragraph 2(1), does it mean that the owners are not allowed to appoint MC members to hold offices (even though they are specified in the DMC) on an MC within the meaning of the Ordinance in addition to those referred to in new paragraph 2(1)(a)-(d)?

Clause 23(f)(i)

In new paragraph 4(1)(b), does the conviction apply to conviction outside Hong Kong?

Clause 23(f)(iii)

- (a) If the person submits a declaration containing false information under new paragraph 4(3), (4) or (6), is the person liable to an offence under section 36 of the Ordinance?
- (b) If the person fails to submit a declaration or delays in submitting a declaration under new paragraph 4(3), (4), (5) or (6), is there any statutory sanction against him?

Clause 23(g)(i)

Upon the retirement of the incumbent MC members, should there be a provision requiring the outgoing MC to hand over the books and records within a specified period to the incoming MC?

Clause 23(g)(ii)

Under the existing paragraph 5(1), the corporation may appoint MC members to hold offices (as specified in the DMC) in addition to the holders of offices referred to in sub-subparagraphs (b), (ba), (c) and (d). Upon repeal of paragraph 5(1), does it mean that the corporation is not allowed to appoint MC members to hold offices (even though they are specified in the DMC) on an MC within the meaning of the Ordinance in addition to those referred to in new paragraph 5(1)(a)-(c)?

Clause 23(i)

Is there any legal sanction against the secretary who does not comply with a legitimate request under new paragraph 10A(2)?

Clause 23(j)

As opposed to the original provision, does it mean that the amended paragraph 11(1) does not have overriding effect on a contrary provision in a DMC?

Clause 24(c)(i)

- (a) It repeals paragraph 1(1) which provides for the period within which an annual general meeting is to be convened. New paragraph 1(1) does not make similar provision. In light of the amendment, what would be the period within which an annual general meeting is to be convened?
- (b) Would it be lawful for the notice to specify that if the meeting could not be finished at a certain time, then it would be adjourned to a specified date to continue with the discussion about the outstanding business?

Clause 24(d)(iii)

There is a reference to “majority of the votes” (“以多數票”) in the amended paragraph 3(3). In light of the reason given above, would it be appropriate to amend them to “過半數票”?

Clause 24(e)(ii)

There was a view at the Subcommittee that the deadline should be 48 hours instead of 24 hours. Would you justify your choice of 24-hour deadline?

Clause 24(f)

Would there be any penalty if the secretary fails to comply with new paragraph 6A, for example he fails to deliver a copy of the certified minutes upon payment being made?

Clause 27(c)

Would there be any penalty if the treasurer fails to comply with amended paragraph 3(a), for example he fails to deliver a copy of the financial statements or accountant’s report upon payment being made?

Clause 28(c) and (d)

Is there any penalty for a manager who fails to keep segregated trust/client account under amended paragraph 3 or 4 of Schedule 7?

Clause 28(g)(vi)

- (a) In the Final Report of the Subcommittee, members proposed that the provision on not more than one manager can be terminated within any three consecutive years is to be removed. Is that proposal adopted in the Bill?
- (b) After the termination of the DMC manager’s appointment in accordance with the new procedures, in order to save time, would it be desirable to allow the owners to appoint another manager at the same meeting?
- (c) In sub-subclause (vi), why is it necessary to repeal paragraph 7(5) of Schedule 7?

Clause 29(c)

Why is the 7-day notice period different from the 14-day notice period of an OC’s meeting under new paragraph 1(1) of Schedule 3?

Clause 29(j)(ii)

There was a view at the Subcommittee that the deadline should be 48 hours instead of 24 hours. Would you justify your choice of 24-hour deadline?

Clause 33(e)

The reference of “the treasurer” in the Ordinance should be “The treasurer”.

Clause 36(3)

Upon expiry of the grace period:-

- (a) What will the management committee be supposed to do if it was formed under the existing paragraph 1(b) of the Second Schedule to the Ordinance?
- (b) What will be the legal position, if the management committee, formed under existing paragraph 1(b) of the Second Schedule to the Ordinance, refuses to do another thing to comply with the requirement of the new paragraph 1(a)?

Clauses 39(d)(i) and (ii), 40(a)(i), 52(c)(iii), 64(c)(i) and (ii), 65, and 68(a)(i) and (b)(i)

Why is it necessary to add “in aggregate”?

Clause 69(a) and (c)

- (a) Clause 69(a) repeals section 114 of Schedule 3 to the Land Titles Ordinance (26 of 2004). On the face of it, the repeal is consequential upon the repeal of section 5 of the Ordinance. However, the wording of repealed section 5(5)(c)(iii) appears in new sections 3(9)(d), 3A(3G)(d) and 4(11)(d) (in particular the reference to the register kept at the Land Registry). Would it be appropriate to amend section 114 of Schedule 3 to the Land Titles Ordinance to reflect the expression of “register kept under the Land Registration Ordinance (Cap. 128) or the Title Register kept under the Land Titles Ordinance (26 of 2004), as the case may be,” in the appropriate new provisions?
- (b) Clause 69(c) repeals section 119 of Schedule 3 to the Land Titles Ordinance (26 of 2004). On the face of it, the repeal is consequential upon the repeal of paragraph 13 of the Eighth Schedule to the Ordinance. However, the wording of repealed paragraph 13(c)(iii) appears in new paragraph 13(ca) (in particular the reference to the register kept at the

Land Registry). Would it be appropriate to amend section 119 of Schedule 3 to the Land Titles Ordinance to reflect the expression of “register kept under the Land Registration Ordinance (Cap. 128) or the Title Register kept under the Land Titles Ordinance (26 of 2004), as the case may be,” in new paragraph 13(ca)?

We should be grateful for your earliest reply in both languages.

Yours sincerely,

(Stephen Lam)  
Assistant Legal Adviser

c.c. LA