

Bills Committee on Building Management (Amendment) Bill 2005

Mechanism for Terminating the Appointment of Managers

PURPOSE

1. At the Bills Committee meeting on 17 May 2005, there was suggestion that the mechanism for terminating the appointment of managers provided under paragraph 7 of Schedule 7 to the Building Management Ordinance (BMO) (Cap.344) should be applicable to all managers. There was also suggestion that the Government should re-consider the proposal to relax the existing requirement for termination of the appointment of managers. This paper sets out the views of the Administration on the above proposals.

BACKGROUND

2. Prior to the adoption of the Lands Department's Guidelines for Deeds of Mutual Covenant (the DMC Guidelines) on 15 October 1987¹, a DMC usually provided for perpetual management of a building by the developer or by a manager associated with the developer.

3. The Building Management (Amendment) Ordinance 1993 thus introduced an enabling provision for the termination of the appointment of the DMC manager by owners' corporation (OC) which should be impliedly incorporated into all DMCs. In accordance with paragraph 7 of Schedule 7 to the BMO, an OC may, by a resolution of owners of not less than 50% of the shares, terminate by notice the manager's appointment without compensation. The Building Management (Amendment) Ordinance 2000 further specified that only the owners of shares who pay (or are liable to pay) the management expenses relating to those shares shall be entitled to vote.

¹ A DMC which was approved in accordance with the DMC Guidelines after 15 October 1987 should normally contain a provision to the effect that the initial period of management by the DMC manager shall not exceed two years.

APPLICATION OF PARAGRAPH 7 OF SCHEDULE 7

4. Schedule 7 to the BMO, which contains mandatory terms which should be impliedly incorporated into all DMCs, was introduced in 1993 to deal with the problems of some old DMCs which were drafted prior to the adoption of the DMC Guidelines. The policy intent of providing a termination mechanism for the appointment of manager under paragraph 7 of Schedule 7 is also targeted at DMC managers.

5. In the case of any subsequent manager appointed by an OC, the relevant management contract normally provides for a specified period of management, and in most cases the termination mechanism for the appointment of the manager. We consider that an OC, being a statutorily-formed body representing the interests of owners, should be free to negotiate the terms and agreement with the manager the OC has chosen without statutory interference.

6. We have, however, encountered problems in the application of paragraph 7 of Schedule 7. While the policy intent is that the termination mechanism should be applicable only to DMC managers, there were cases where the subsequent contract manager refused to leave service even after the specified period in the management contract has expired, claiming that the appointment could only be terminated by a resolution of owners of not less than 50% of the shares, i.e. the mechanism under Schedule 7. There were also cases where the manager refused to leave even though a resolution on termination of his appointment has been passed by the OC, alleging that under subparagraph 7(5)(c) of Schedule 7, not more than one manager's appointment could be terminated within a period of three years. This is unsatisfactory and contradicts the original intent, and has given rise to numerous disputes between OCs and management companies.

7. We therefore propose to specify in the BMO that paragraph 7 of Schedule 7 shall only be used to terminate the appointment of the DMC manager. For any subsequent manager appointed by an OC (including the DMC manager who is re-appointed by the OC), any termination of the manager's appointment should be done in accordance with the terms of the management contract. This also means that the termination mechanism under paragraph 7 of Schedule 7 which applies only to DMC

manager should be exercised once and only once.

8. At the Bills Committee meeting on 17 May 2005, there was suggestion that the mechanism for terminating the appointment of managers provided under paragraph 7 of Schedule 7 should be applicable to all managers, regardless of whether they are DMC managers or contract managers. The reason was that this would create a loophole for the developers to quickly set up an OC or an owners' committee after selling the first unit of a development and request the OC or the owners' committee to immediately sign a contract for a long service period with the manager with which the developer has close relations.

9. We have considered the above suggestion. By virtue of the proposed amendment, the termination mechanism under paragraph 7 of Schedule 7 is that owners of not less than 50% of the shares may terminate the DMC manager's appointment at a general meeting. This is to tackle the problem of many pre-1987 DMCs which did not provide for a termination mechanism at all. However, for most of the management contracts entered into by OCs with a new manager, the contracts usually specify clearly the contract period of the appointment. This means that the contract manager will have to leave service upon expiry of the contract regardless of his performance and has to seek re-appointment from the OCs. In other words, the mechanism for OCs to terminate the appointment of contract manager should be much easier than the one provided for DMC manager under the BMO.

10. If the termination mechanism under paragraph 7 of Schedule 7 is made applicable to contract managers as well, this in effect means that OCs will have no say on the termination mechanism when negotiating the terms and agreements with the contract managers. The BMO will have already provided for such a mechanism and OCs will not be able to set another preferred mechanism, even with the consent of the manager. The present problems arising from paragraph 6 will remain unresolved. The Administration therefore has reservation on the proposal.

11. There were concerns that under the revised BMO, developers will quickly set up an OC or an owners' committee and request the OC or the owners' committee to immediately sign a contract for a long service period with the manager with which the developer has close relations.

The manager will then be able to enjoy a long-service contract without any chance of termination by the OCs as the mechanism under the BMO will not be applicable to such case. We consider that this situation is unlikely to happen. Firstly, the manager who has close relations with the developer will usually be the DMC manager – and in such cases the termination mechanism under paragraph 7 of Schedule 7 will be applicable to him anyway. Secondly, an OC has to convene a general meeting to decide on the appointment of the subsequent manager. We do not believe that owners nowadays will agree to signing an excessively long period of contracts with a new manager without any reference to the performance of the manager. In fact, we understand that most of the contracts with managers are for a term of two years only.

RELAXATION OF THE TERMINATION MECHANISM

12. While paragraph 7 of Schedule 7 has provided a mechanism for the termination of the appointment of the DMC managers, there were concerns at the Bills Committee that it would be practically difficult for an OC to obtain a resolution of the owners of not less than 50% of the relevant shares for the purpose.

13. We have sought the views of the public during the consultation exercise on the proposed amendments to the BMO. While most of the owners, OCs and District Councillors supported to relax the existing termination mechanism for DMC managers, real estate developers, property management companies and associations, some professional organisations and also some OCs strongly opposed the amendments.

14. Those on the supporting side considered that the existing arrangement of having 50% of undivided shares to terminate the appointment of a manager is too stringent and arduous to achieve. An alternative mechanism would allow freedom for owners to choose a manager based on their performance, which would in turn motivate them to do quality work.

15. Strong opposition was received from real estate developers, property managers, some professional organisations and some OCs. Arguments against the relaxation included the possibility of having frequent changes of managers and hence the lack of long-term planning

and foresight in property management. To this camp of respondents (and some of them are OCs), owners might easily vote down the existing manager and this would cause instability and disruption to the normal operation of the building. Unnecessary conflicts among residents and the property manager would arise.

16. The proposal to relax the existing termination mechanism for DMC managers is most controversial. We have considered carefully the divergent views received. We consider that the legislative amendments in 2000 which specified that only owners of shares who pay or are liable to pay management expenses shall be entitled to vote in the resolution of termination of DMC manager has already balanced the interests of the general owners and those of the DMC manager. Since the allocation of undivided shares among owners and the common areas (usually held by the manager) is different amongst buildings, it is difficult to change the existing 50% to another threshold which will suit the circumstances of all buildings. We also note that there are OCs who have successfully terminated the appointment of their managers under the existing mechanism. We therefore consider that the existing mechanism of allowing owners of 50% of the shares to terminate the appointment of the DMC manager should remain.

Home Affairs Department
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