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20 June 2005

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Bills Committee on
Building Management (Amendment) Bill 2005
Legislative Council Building
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Bills Committee on Building Management (Amendment) Bill 2005

Matters Arising from Meeting on 2 June 2005

At the meeting of the Bills Committee on 2 June 2005, Members raised a number of questions during discussion of the papers submitted by the Administration. Below are the responses of the Administration to these questions.

Formation of Owners' Corporations (OCs) in House Developments
[LC Paper No. CB(2)1709/04-05(01)]

Small House Developments and Village-Type Developments

2. Members asked why some small house developments or village-type house developments could incorporate under the BMO while others could not. In Chun Fai Garden, Yuen Long, which is a classic

case on the incorporation of owners, there are 18 lots of land with 18 detached buildings (consisting of three separate flats) on each of the lot. Each of the 18 lots is subdivided into three equal and undivided shares and held by the owner of the ground floor, first floor and the second floor of the building. The result is that the individual owners of the flats in the Garden do have an undivided part in the respective lots of land on which the buildings were constructed. Furthermore, while each of the 18 lots has their own Deed of Mutual Covenant (DMC), the whole development is subject to a Deed of Covenant and Management Agreement which sets out clearly the voting rights and other powers conferred to owners. Most important of all, the latter deed states that the share of owner is by reference to the share of the owners in proportion to the number of flats owned by them in the property (i.e. the 54 flats in the 18 houses) – thus making the owners qualified under the BMO. In *Siu Hing v Land Registrar* (HCAL 77/2000), the learned judge stated that –

“In my view, the definition of “owner” in section 2 (of the BMO) does not mean that a management committee cannot be appointed for a residential development such as the (Chun Fai) 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 (of the BMO) which prevents the owners of a development with multiple land holdings from agreeing to form a management committee.

..... in my view, the extended meaning of the word “building” (in section 2 of the BMO) clearly covers situations such as the present one in which all the other owners in the (Chun Fai) Garden would qualify as the owners of any one building. Because for the purpose of the appointment of a management committee, each lot of the (Chun Fai) 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 (Chun Fai) Garden.”

Fontana Gardens

3. Another case, Fontana Gardens in Wan Chai, was raised during discussion at the Bills Committee meeting. Fontana Gardens is a residential estate with seven residential blocks and a three-storey carpark

building. The estate is governed by five different 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. Unlike Chun Fai Garden, there is neither a master DMC nor a Deed of Covenant and Management Agreement which sets out the share of owners.

4. Owners of Fontana Gardens have not sought assistance from our Wan Chai District Office on building management matters, including the formation of OC. 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 BMO. Following the 1993 BMO 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 (i.e. before the judgment on Chun Fai Garden was delivered). Following the Chun Fai Garden case 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.

5. Buildings which are covered by more than one DMC were mostly built prior to the introduction of the Lands Department’s Guidelines for DMCs in 1987 when Government’s approval of the relevant DMCs was not required in the land lease. These buildings are with more than one block which are erected on different sections of a lot or different lots. In some cases (as in Fontana Gardens), there is land in each of these blocks which is held for the common use of owners of the adjacent block. If the two blocks are covered under two DMCs which contain provisions inconsistent with each other, practical difficulties could arise if one OC is to be formed and performs its building management duties under different DMCs. The absence of a proper basis for calculation of the owners’ undivided shares in the building presents an insurmountable obstacle to the formation of an OC. A proper counting of quorum or valid votes in an owners’ meeting becomes impracticable. The sharing of responsibility (like the cost of repairs, management fees, etc.) among the owners of the different blocks could be a major subject for dispute.

6. In any case, 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.

Discovery Bay

7. Members also asked about the situation in Discovery Bay, Islands District. A master DMC governing the whole Discovery Bay was executed in 1980 and a manager was appointed under the master DMC to manage the whole development. Since then, 12 villages have been developed by stages in the past 25 years and the 13th is on the pipeline. Each of the villages is governed by a separate sub-DMC (which is subject to the master DMC). According to the master DMC, the developer holds more than 70% of the undivided shares of the development, mainly in the form of the common areas, such as the reservoir, the pier, access roads and other common facilities. In other words, without the support of the developer, it would be extremely difficult for the individual owners to incorporate themselves and form an OC under the BMO.

8. The difficulties for OC formation in Discovery Bay is not related to the problems of divided shares, as in some of the house developments.

Suggestion of Co-ownership of Common Facilities Deemed to be Possession of Undivided Shares

9. Members noted at the Bills Committee on 2 June 2005 that in many house developments, the owners only own a subsection of the lot (in the form of divided shares) – and that the ownership of the common area is retained by the developer and the owners were given easements, rights and privileges in the use of the common facilities subject to certain covenants such as the sharing of management expenses. Members then suggested that in the cases where these owners share the ownership of a common facility, e.g. the club house, the owners could be deemed as possessing undivided shares for the whole lot and the BMO would therefore be applicable to them for incorporation.

10. First of all, we are not aware of any actual cases for such hypothetical situation. Indeed, in house developments where the lot is divided into subsections and assigned to individual owners in subsections (through divided shares), the owners have only purchased the subsection and not the common parts/facilities. Co-ownership of the common parts/facilities is unlikely. Secondly, even if there is co-ownership of the common facilities in the house development, there must be a deed or any instrument registered with the Land Registry that shows the shares of owners in these common facilities. Without such a deed or legal

instrument, it would be impossible to determine the basis for proportioning the shares among the owners. Thirdly, assuming the presence of such a deed or legal instrument, then the co-ownership lies with the common facilities only. It begs two questions: (1) whether the common facilities alone could be regarded as “building” under the BMO; and (2) whether any corporation formed in such circumstances is applicable to the common facilities only (if not, that leads to a more complicated question of how to apply or relate fairly the undivided shares under the co-ownership in respect of the common facilities to the separate ownership, as opposed to co-ownership, of individual house owners in their subsections).

Other House Developments

11. Members also requested information on cases of house developments which had intended to incorporate but could not do so due to the requirement of determining owners’ shares on the basis of undivided shares. Based on information collected from the 18 District Offices, there are some tens of small house developments or village-type house developments, mostly located in Yuen Long, Sai Kung and Tai Po that the individual houses stand on subsections. There are also a handful of house developments in the Southern District (mostly high-end residential developments). Many of these house developments have either engaged a building manager or formed an owners’/residents’ association. Our District Offices are not aware of any significant problems in building management and maintenance in these developments. If owners of these developments want to incorporate under the BMO, some of them may be able to do so if their case is similar to the Chun Fai Garden case above, i.e. there is a separate deed stating clearly the undivided shares of owners. As for the others, the obstacles for OC formation may not necessarily be related to the share issue. As far as we know, for some of these developments, while the owners have been allocated with undivided shares, part of the lot remains undeveloped/unsold and is not/has not yet been allocated with any share at all. In the other cases, the whole lot may be covered by different DMCs, causing it difficult to determine the share of responsibility of owners covered by the different DMCs. This is especially the case for small house developments and village-type house developments in the New Territories where the land lease does not contain a DMC clause – as such, Lands Department’s approval for the relevant DMC is not required.

12. In addition to Hong Lok Yuen of Tai Po which the Bills Committee has deliberated at the meeting on 2 June 2005, we are aware

of two small house developments in Yuen Long owners of which are keen to incorporate. The two developments consist of 21 units and 45 units respectively. For the former, the owners are not in good terms with the management company. For the latter, a Mutual Aid Committee has been formed. We understand that the owners are in the process of seeking legal advice on the provisions of their DMCs. As for Fairview Park in Yuen Long, an owners' committee has been formed in 2001 and it has been working closely with the building manager in the management and maintenance of the estate.

Empowerment of the Authority of the BMO

13. At the Bills Committee meeting on 2 June 2005, there was the suggestion that the Authority of the BMO, i.e. the Secretary for Home Affairs, should be empowered to apply to the court for an order for formation of OCs in house developments. Section 3 of the existing BMO provides that the Authority may, upon application by owners of not less than 20% of the shares, order that a meeting of owners be convened to appoint a management committee. Section 4 of the BMO further provides that the Lands Tribunal may, upon application by owners of not less than 10% of shares or by the Authority, order that a meeting of owners be convened to appoint a management committee. There is, therefore already such a mechanism in place. Some owners of Hong Lok Yuen (claiming that they have the support of 25% of the shares of owners¹) did make a submission to the Authority in mid-2003 to request the Authority to make an application under section 4 of the BMO to the Lands Tribunal for an order that a meeting of owners be convened. Having sought legal advice, the Administration is not able to process the application as the so-called "shares" are not undivided shares under the BMO.

Way Forward

14. The Administration notes the Bills Committee's views on the incorporation of owners in house developments. We will commence study on the legislative proposals on the matter but this should be done after the Bills Committee's scrutiny of the proposal to amend the provisions regarding appointment of management committee under the BMO (not after completion of the scrutiny of the whole Bill). This is of utmost importance to any legislative proposal regarding incorporation of

¹ The method adopted by the Hong Lok Yuen owners is that one "share" is assigned to every dollar of management fees paid by each owner.

owners of house developments. Moreover, as explained above, the problems for house developments (including small house developments and village-type house developments) are not confined to shares only. Some of these developments, while the owners have been allocated with undivided shares, part of the lot, for unknown reasons, is not allocated with any share at all. In the other cases, the whole lot may be covered by different DMCs. The problems are further complicated by the fact that the DMC of these developments does not require prior approval by the Lands Department. As such, simply drawing up a piece of legislation to allow incorporation of owners who own divided shares definitely could not help owners of these developments.

15. At the meeting of the Panel on Home Affairs on 8 April 2005, Members discussed the problems of buildings with more than one DMC and urged the Administration to consider solutions – one of which is to provide a mechanism for amendments to the DMC. We are of the view that these problems are all inter-related. We assure Members that we will study the problems in consultation with the Department of Justice, Lands Department and the Land Registry and report to the Panel as soon as possible.

Allocation of Manpower Resources for Building Management Duties in Districts

[LC Paper No. CB(2)/709/04-05(02)]

16. Each of the 18 districts has its own District Building Management Liaison Team (DBMLT) which is responsible for the front-line work relating to building management. When DBMLTs were first formed in phases in early 2000, the 18 districts were divided into four categories. While District Offices were allocated with additional resources for the formation of the DBMLTs, the respective District Officers were responsible for deployment of staff in accordance with the district needs.

17. Since resources are finite and additional resources may not be made available in view of fiscal constraints, we decided in 2003 to re-allocate the staffing resources more equitably. The re-allocation arrangement took place in April 2003, with flexibility allowed for the District Officers having regard to their respective human resource management plans and operational exigencies. We have taken into account the number of private buildings, number of OCs, population residing in the private buildings, existence of a Building Management Co-ordination Committee, number of Mutual Aid Committees and the

number of private buildings aged 30 or above in the 18 districts in the resource re-allocation exercise in April 2003.

18. To enable the District Officers to have flexibility in the deployment of manpower resources to meet different district needs and fluctuating demands in the different service areas, they are allowed to deploy their building management staff to take up other duties (and vice versa). We consider that flexibility in organisation structure and staff deployment should be allowed so that the District officers could better respond to the district needs. Some District Officers, having regard to factors like geographical coverage of the district, number of old buildings or buildings which require more attention, number of OCs and the characteristics of the local community, considered that it is more appropriate to have geographical teams rather than dedicated teams to provide services on building management. These District Officers considered that it is more effective from the operational point of view for the geographical team, who has been working closely with the sub-district and has developed a good relationship with the locals, to deal also with building management matters within the sub-district. This explains why the staffing resources in the DBMLT of some districts may seem to be low but that does not necessarily mean that the manpower resources devoted to building management in these districts is reduced.

19. In addition to Liaison Officer, Community Organisers are employed by District Offices to carry out various duties, including that related to building management matters. The table in Annex A shows the engagement of Community Organisers (in terms of man-hours) in carrying out building management-related duties in the 18 District Offices.

20. On receipt of an invitation to attend an owners' meeting, the subject Liaison Officer will discuss with the chairman or secretary of the management committee to ascertain whether there are potentially controversial items on the meeting agenda. Priority will be given to owners' meetings with a view to forming an OC because of the technicalities involved – for these meetings, Liaison Officers, in some cases with the assistance of a Community Organiser, will attend. Where the building concerned is a large development involving hundreds/thousands of owners attending the meeting, the subject Liaison Officer will also attend the meeting. Only when the owners' meeting is expected to be straight-forward and when the subject Liaison Officer is not available will he assign a Community Organiser to attend the meeting on his own. In these cases, the Community Organiser concerned will be

fully briefed beforehand about the background of the building concerned, the agenda items of the meeting and the Government policies. The subject Liaison Officer will also be available by phone in case the Community Organiser needs to seek advice on some unforeseen matters at the meeting.

21. As Community Organisers play a role in our building management work, we have the duty to ensure they are adequately trained and thus competent to perform their role. We have prepared training courses covering basic knowledge in the formation of OCs, building management and maintenance and BMO for these Community Organisers. Written instructions and reference materials, like court judgments and procedural guidelines, are given to the Community Organisers from time to time. A comprehensive kit is produced for all Community Organisers who are involved in building management work. The District Officers also provide on-the-job training, briefing and points to note to cater for the characteristics of individual districts.

Complaint Cases Relating to Building Management Handled by the
Complaints Division of the Legislative Council Secretariat
[LC Paper No. CB(2)1726/04-05(01)]

22. The complaint cases handled by the Complaints Division of the Legislative Council Secretariat could be generally categorized as follows –

- (a) Appointment of proxy by owners
- (b) Procedures for owners' meeting in the appointment of a management committee
- (c) Procurement by OCs
- (d) Financial arrangements of OCs
- (e) Matters relating to property management companies
- (f) Owners' rights to obtain copies of documents of the OCs
- (g) Unfair distribution of undivided and management shares among owners, developers and managers
- (h) Role of Liaison Officers at owners' meeting
- (i) Alternative dispute resolution mechanism for building management disputes

23. Some of the above complaints could be resolved by amendments to the BMO while some of the complaints could be resolved by non-legislative means. For items (a) to (f) above, we have proposed legislative amendments in the Bill to address these problems. For item

(g), the Lands Department has amended the Guidelines for DMCs to the effect that both undivided shares and management shares should be allocated on the same basis, i.e. the basis of gross floor area. Please refer to LC Paper No. CB(2)1839/01-02(01) submitted to the Subcommittee on Review of the BMO. For item (h), we are aware that there is a general misunderstanding on the role of Liaison Officers. We have in March 2003 published a pamphlet to set out clearly the role of Home Affairs Department in private building management and the role played by Liaison Officers at owners' meeting. For item (i), please refer to our paper on "Alternative Dispute Resolution for Building Management Disputes" which has been submitted to the Bills Committee.

Appointment of Proxy

24. The original proposal of the Administration regarding inclusion of a standard format of proxy instrument in the BMO, which was discussed at the meetings of the Subcommittee on the Review of the BMO on 6 February and 4 March 2004 [LC Paper No CB(2) 1193/03-04(01) and LC Paper No CB(2)1518/03-04(01)], actually allowed owners an option to elect to give a proxy to another person to attend and vote at the owners' meeting or only to attend the meeting. The suggestion was therefore viable from the drafting point of view.

25. Members may like to note that the proposal of providing a standard format of the proxy instrument in the BMO is drawn up with reference to the Companies Ordinance (Cap.32). There is however more flexibility given to shareholders in the appointment of proxy. Section 114C(6) of Cap.32 provides that any proxy form issued to a member of the company for appointing a proxy to attend and vote at a meeting of the company shall be such as to enable the member, according to his intention, to instruct the proxy to vote in favour of or against each resolution. Paragraphs 72 and 73 of Table A of Schedule 1 of Cap.32 sets out respectively the proxy instrument which allows or disallows the member an opportunity of voting for or against a resolution. Moreover, any form that is "as near thereto as circumstances admit" will be acceptable.

26. However, there were comments at meetings of the Subcommittee on Review of the BMO that allowing owners such an option at owners' meetings would render the proxy instrument a voting paper and would create a lot of extra work for the management committee in counting the votes. This is especially the case when the owners' meeting agreed to amend a resolution in the agenda, which is allowed by paragraph 3(8) of

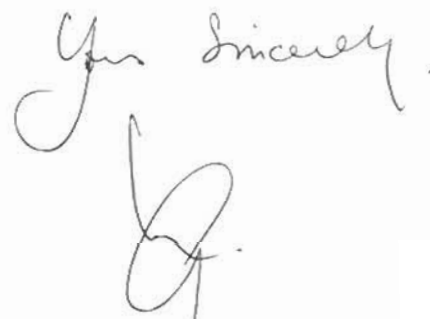
Schedule 3 to the BMO. We have since August 2002 provided a sample form of proxy instrument for reference by owners. If we allow too much flexibility for owners in a statutorily stipulated format, then it begs the question on whether a sample form of proxy instrument provided to owners for reference (i.e. a non-statutory form) could serve the same purpose. Having considered the various views of the Subcommittee, and believing that an owner should carefully consider appointing someone he trusts to be his proxy, we put forward the present proposal in the Bill (new Schedule 1A).

27. Under the present proposal in the Bill, even an authorization letter issued by a legal practitioner appointed by an owner would not be acceptable other than the standard proxy format provided in the law.

28. That said, we are open to the format of the proxy instrument and welcome views from Members of the Bills Committee.

Meetings to Meet with Deputations

29. Please note that we have, through the 18 District Offices, informed the Area Committees of the invitations from the Bills Committee for written submissions and oral representations.

A handwritten signature in cursive script, appearing to read 'Yours Sincerely', followed by a large, stylized initial or signature mark.

(Mrs Angelina Cheung)
for Director of Home Affairs

Man-hours of Community Organizers Undertaking Building Management Duties in Districts for the Financial Year 2004 - 2005

十八區內負責大廈管理事宜的社區幹事於二零零四年至二零零五年財政年度的工作時數

	C&W 中西區	E 東區	KC 九龍城	KT 觀塘	SSP 深水埗	S 南區	WC 灣仔	WTS 黃大仙	YTM 油尖旺
Number of Man-hours of Community Organizers Undertaking Building Management Duties 負責大廈管理事宜的社區幹事的工作時數	22 399	16 847	6 497	4 677	8 278	1 977	22 069	3 000	28 766

	Is 離島	K&T 葵青	N 北區	SK 西貢	ST 沙田	TP 大埔	TW 荃灣	TM 屯門	YL 元朗	Total 總計
Number of Man-hours of Community Organizers Undertaking Building Management Duties (con't) 負責大廈管理事宜的社區幹事的工作時數 (續)	6 300	3 194	7 807	3 175	7 627	9 505	8 956	9 100	10 709	180 883