Bills Committee on Building Management (Amendment) Bill 2005

Various Issues Raised during the Clause by Clause Examination of the Bill

PURPOSE

1. During the clause by clause examination of the Building Management (Amendment) Bill 2005 at the meetings of the Bills Committee[1], Members raised a number of issues on the Bill and the draft Committee Stage Amendments (CSAs). This paper sets out the Administration's response to these various issues.

ADMINISTRATION'S RESPONSE

Delegation by the Authority
Marked-up version – Section 40E; Bill / CSA – Clause 19A

2. At the meeting of the Bills Committee on 5 October 2006, Members raised concern about the proposed deletion of the term "authorized officer" in section 2 and the proposed introduction of the new section 40E in the Building Management Ordinance (BMO). The new section 40E empowers the Authority of the BMO, i.e. the Secretary for Home Affairs, to authorize in writing any public officer to exercise any powers and perform any duties conferred or imposed by the BMO on the Authority. At present, some provisions in the BMO[2] already allow the Authority to authorize a public officer to carry out his work. The new section 40E will empower the Authority to do so for all other provisions[3] as well.

3. We note Members' concern that the proposed scope of authorization under the new section 40E might be too broad. Whilst it is certainly not the Administration's policy intent for the Authority to delegate all his powers and

[1] Meetings of the Bills Committee on 5 October 2006, 17 October 2006, 24 October 2006, 2 November 2006, 7 November 2006, 9 November 2006, 16 November 2006, 21 November 2006 24 November 2006 and 29 November 2006.
[2] Sections 4(1), 15(2), 27(2), 28(1), 28(3), 31(1), 38(4) and 40A(1) of and paragraph 5 of Schedule 5 and paragraph 4 of Schedule 6 to the BMO.
[3] Sections 3A(1), 5(3), 8(1), 20A(2), 34E(4), 34E(6), 34E(8), 40B(1), 40B(3), 40C(1), 42(3) and 44(1) of and paragraph 5 of Schedule 7 to the BMO. (Please note amendments have been proposed to sections 5(3), 20A(2), 40B(3) and paragraph 5 of Schedule 7 in the Bill.)

duties under the BMO to other public officers (especially those relating to mandatory management of a building), the new section 40E does provide for such a delegation power. Having re-considered the matter, we will introduce CSAs to drop this proposal from the Bill. We will retain the definition of and references to "authorized officer" in the BMO, and introduce CSAs to delete Part 4 of the Bill accordingly.

References to majority of votes
Marked-up version – Section 2B; Bill / CSA – Clause 3A

4. We consider that the present drafting of the new section 2B, when read together with the new sections 3(10)(d), 3A(3H)(d), 4(12)(d), 40C(11)(d) of and paragraph 5(2) of Schedule 3 to the BMO (which stipulate that a proxy appointed by an owner to attend and vote on behalf of the owner shall, for the purposes of the meeting, be treated as being the owner present at the meeting), is already clear to show that proxy will be counted in the calculation of votes cast at an owners' meeting. No amendment is therefore necessary for the new section 2B.

Appointment of the convenor under the proposed new section 3(1)(c) of the BMO
Marked-up version – Section 3(1)(c); Bill / CSA – Clause 4(a)

5. The new section 3(1)(c) provides that a meeting of the owners to appoint a management committee may be convened by an owner appointed to convene such a meeting by the owners of not less than 5% of the shares in aggregate.

6. There is no rigid rule to regulate how the decision of appointing a convenor should be made. The owners may do so by holding a meeting amongst themselves or by a letter of authorization signed by the owners. The key is that the convenor must be appointed by all the owners of not less than 5% of the shares in aggregate in order to fulfill the legal requirement under the new section 3(1)(c). In this regard, the Land Registrar will prepare a sample form to facilitate the appointment of convenor by owners.

Publication of the notice of owners' meeting in a newspaper
Marked-up version – Section 3, 3A, 4, 40C; Bill / CSA – Clause 4, 5, 6, 19

7. Having considered Members' views, we decide to do away with the

requirement for the convenor of an owners' meeting to publish in a newspaper the notice of meeting. We will introduce CSAs to amend the new sections 3(6), 3A(3D), 4(8) and 40C(7) of the BMO accordingly.

BMO vs deed of mutual covenant

8. At the meeting of the Bills Committee on 5 October 2006, Members asked whether owners may, in the manner provided for under the deed of mutual covenant (DMC), pass a resolution on matters which are contrary to the decision made by an owners' corporation (OC). At the meeting of the Bills Committee on 24 October 2006, Members further asked whether a resolution passed by an OC under section 14(1) of the BMO with respect to the management of the common parts of the building could have an overriding effect over the provisions in the DMC.

9. DMC is a deed binding on all the owners of a building. Unless the terms of the DMC have been formally amended or varied, and such variations registered in the Land Registry, the original DMC remains the deed binding on all owners. This is consistent with the principle that common law rights cannot be taken away by legislation, except by clear words or by necessary implication[4].

10. Section 16 of the BMO provides that, when the owners have been incorporated under the BMO, the rights, powers and privileges of the owners in relation to the common parts of the building shall be exercised and performed by the corporation to the exclusion of the owners. It is clear from section 16 that the rights, powers and privileges of the owners in relation to the common parts which used to be vested in the owners by virtue of the DMC would belong to the corporation once the corporation is formed and that only the corporation is entitled to exercise those rights, powers and privileges. Owners are no longer entitled to exercise those rights, powers and privileges under the DMC. In the circumstances, a resolution passed by the owners, even if it is passed in the manner provided for in the DMC, relating to the management of the common parts is not valid as there is no longer the rights for the owners to exercise.

11. In this regard, Members may like to note the following judgments

[4] Building Management in Hong Kong by Paul Kent, Malcolm Merry and Megal Walters, LexisNexis Butterworths, pg.290-291.

relating to the rights of an OC. In *Chau Mei Lee Fragrance & The Incorporated Owners of Wing Lee Mansion and Ng Yee Tim (CACV 97/1996)*, it was held that "… it is quite clear from the opening words of the section (section 16) that those rights may only be enforced, so far as common areas are concerned, by the corporation for it is explicitly stated that they should be exercised 'to the exclusion of the owners'". In *See Wah Fan and The Incorporated Owners of Ki Tat Garden (Phase I) (CACV 389/2002)*, it was held that "It is clear from the wording of section 16 that the rights and obligations of the owners in respect of the common parts of a building are to be enforced by and against the corporation to the exclusion of the owners. It is in mandatory terms."

12. As to whether a resolution passed by an OC will have an overriding effect over the provisions in the DMC, the general position is that an OC does not have the power to pass a resolution which contravenes the DMC unless such resolution is passed in accordance with a statutory provision which overrides the inconsistent terms of the DMC.

13. Members may like to note the following judgments. In *Yu Chau Yeung against Incorporated Owners of Yee Hong Building (LDBM 76/1995)*, it was held that "… there is a general principle that every owners incorporated must act according to the law and within its powers granted by law and the governing DMC." In *The Incorporated Owners of Hing Hon Building and Leung Kam Wah (LDBM 145/1999)*, it was held that "Where the DMC has provided for the amount to be contributed by the owners, the DMC must be followed. Where the DMC does not so provide, then the amount to be contributed shall be in accordance with the respective shares of the owners (S.22(2) BMO)". In *東京街恆順大廈業主立案法團訴李子明(CACV 321/2003)*, it was held that 「根據大廈公契 13(j)條或該條例第 14(1)所作的議決，須和公契沒有抵觸，否則議決無效。該條例第 14(1)條只賦予法團一般權力，在法團會議通過有關公用部分的控制、管理、行政事宜或有關該等公用部份的翻新、改善或裝飾的決議。但業主繳款數額的釐定仍需根據該條例第 22 條行事。該條例第 22(1)(a)條明確定明，業主所需繳付的款額，須"由管理委員會按照公契確定"。換而言之，不論是業主大會或法團管理委員會都無權改變公契所列明業主所需繳費的計算方法。… 申請人計算各業主要最終負責的維修及管理費用，必需以上述基礎行事，否則違反了公契及該條例的規定。如申請人沒有根據上述基礎行事，而隨意將各業主攤分維修及管理費的比例分成 104 份或 151 份，申請人的決定並非是按照公契確定，對各業主並沒有約束力，亦屬無效。」

Appointment of proxy
Marked-up version – Section 3(10), Schedule 1A, paragraph 14 of Schedule 8; Bill / CSA – Clause 4(c), 22, 29(j)

14. At the meetings of the Bills Committee on 17 October 2006 and 9 November 2006, Members raised a number of questions relating to appointment of proxy.

15. The new section 3(10)(a)(i)[5] provides that the instrument appointing a proxy shall be signed by the owner. Members asked whether a handicapped person could validly appoint a proxy under this provision. In this regard, section 3 of the Interpretation and General Clauses Ordinance (Cap.1) has already provided that "sign" includes, in the case of a person unable to write, the affixing or making of a seal, mark, thumbprint or chop.

16. The new section 3(10)(a)(ii)[6] provides that if the owner is a body corporate, the instrument appointing a proxy shall, notwithstanding anything to the contrary in its constitution, be sealed or stamped with the seal or stamp of the body corporate and signed by a person authorized by the body corporate in that behalf. Members asked whether the words "notwithstanding anything to the contrary in its constitution" may create confusion to a body corporate owner.

17. Different Articles of Association may contain different provisions governing the requirement of appointment of a proxy. Hence, by adding the words "notwithstanding anything to the contrary in its constitution" in the new section 3(10)(a)(ii), we could standardize the requirements in appointing a proxy for an owners' meeting convened under the BMO. The BMO is, however, silent on the procedure for the body corporate to authorize a signatory. Hence, the body corporate is still required to follow its own procedure under the Articles of Association in doing so.

18. Having regard to Members' comments on the drafting of the new section 3(10)(2)(ii), we will introduce CSAs to amend it to read as "if the owner is a body corporate, shall, notwithstanding anything to the contrary in its constitution, be *impressed with the seal or chop* of the body corporate and

[5] Related provisions are sections 3A(3H)(a)(i), 4(12)(a)(i), 40C(11)(a)(i) and paragraph 4(2)(a) of Schedule 3.
[6] Related provisions are sections 3A(3H)(a)(ii), 4(12)(a)(ii), 40C(11)(a)(ii) and paragraph 4(2)(b) of Schedule 3.

signed by a person authorized by the body corporate in that behalf".

19. The new section 3(10)(e)(iii) requires, where a proxy form is lodged with the convenor, the convenor to display information of the owner's address in a prominent place in the place of the meeting. The information to be displayed should be "the owner's flat". We will introduce CSAs to amend the new sections 3(10)(e)(iii), 3A(3H)(e)(iii), 4(12)(e)(iii) and 40C(11)(e)(iii) and the new paragraph 4(5)(a)(ii) of Schedule 3 accordingly.

20. The new section 3(10)(e)(ii)[7] stipulates that the convenor of the owners' meeting shall determine the validity of the proxy instrument in accordance with section 3(10)(c). Section 3(10)(c) provides that the instrument appointing a proxy is valid only if it is made and lodged in accordance with section 3(10)(a) and (b). These two provisions stipulate that the instrument shall be in the form set out in the BMO, signed by the owner/sealed or stamped by the body corporate and signed by an authorized person of the body corporate, and lodged within the statutory timeframe of 48 hours before the meeting. Members were concerned about the liability of the convenor in checking these proxy instruments and whether a protection clause could be included in the BMO.

21. If the convenor has no reason to believe that the proxy instrument is not in order (e.g. no enquiries received on its validity, no suspicious element on the proxy instrument, etc), or has no reason to suspect that there is a motive for forgery, then it is acceptable for him, as a reasonable man, to consider that the proxy instrument is valid.

22. The suggestion to include a protection clause (similar to section 29A) for the convenor in checking the proxy instrument raises both human rights and Basic Law concerns. The effect of the proposal is that there will be a procedural bar on an individual's right to institute legal proceedings before a court in civil matters and a restriction on the court's jurisdictions and powers. If the proposal is adopted, it will mean that an aggrieved party under the BMO will not be able to obtain any relief against the convenor in respect of the act or default of the convenor of the owners' meeting. As the act concerned is related to a statutory duty imposed on the convenor, neither could the aggrieved party obtain any relief from the OC. That will leave the aggrieved party with no access to the court to have his claim determined.

[7] Related provisions are sections 3A(3H)(e)(ii), 4(12)(e)(ii), 40C(11)(e)(ii) and paragraph 4(5)(b) of Schedule 3.

23. On the statutory proxy form in Schedule 1A, having regard to Members' views, we will amend it as follows –

(a) to specify the space where the owner's and the proxy's name should be filled in respectively;
(b) to delete the space for the name of the building in the text of the proxy form in Form 1 as this is already shown in the heading of the form; and
(c) to specify that the space for signature should be signed by the owner.

24. We take Members' views that detailed administrative guidelines and instructions should be issued, following passage of the Bill, to OCs and property owners on how to follow the new requirements on appointment of proxy, including but not limited to, how to verify the proxy instruments, how to treat the invalid proxies (e.g. more than one proxy instrument received from one owner), the standard format for the posting of proxy information and other good practices relating to the appointment of proxy.

25. As a related matter, Members discussed amendments to Schedule 8 to the BMO at the Bills Committee meeting on 24 November 2006. According to section 34F of the BMO, provisions in Schedule 8 shall, to the extent that they are consistent with the DMC, be impliedly incorporated into all DMCs. We take Members' view that requiring owners' committees to adopt the statutory proxy format under the new Schedule 1A to the BMO may facilitate the operation of owners' committees. We will introduce CSAs to amend Schedule 8 accordingly. However, we have reservation on extending all the new requirements for OCs on appointment of proxy to owners' committees. The new requirements on appointment of proxy, e.g. issuance of receipts to every owner who have appointed a proxy, posting of the relevant information at the venue of meeting, keeping of the proxy instruments, etc., if extended to an owners' committee, would place a lot of responsibilities onto the convenor of an owners' meeting. Although some owners' committees, especially those for large estates, are supported by property managers, some are not. This will put a lot of burden onto the members of the owners' committee, which is an advisory body and not a legal entity. Furthermore, the composition of an owners' committee is governed by the DMC of the building – there is not necessarily a secretary post. We will need to put further thoughts on how owners' committees should be subject to the various requirements which are

designed for OCs. We will look into this matter further from the practical point of view after the requirements have been imposed on OCs.

Avoidance of formation of more than one OC
Marked-up version – Section 8(1A); Bill / CSA – Clause 9A

26. The new section 8(1A) of the BMO stipulates that the Land Registrar shall not issue a certificate of registration to more than one corporation for a building in respect of which a DMC is in force. At the meeting of the Bills Committee on 24 October 2006, Members asked about the legal basis for this new section. A paper explaining the matter is at Annex A.

Change of name by a corporation
Marked-up version – Section 10(1); Bill / CSA – Clause 44

27. Section 10(1)(b) of the BMO provides that a corporation may, by a resolution passed by a majority of not less than 75% of the votes of the owners, change the name of the corporation. Having regard to Members' comments on the drafting of this section, we will delete the words "a majority of" from the provision as 75% of the votes has already guaranteed a majority of the votes.

Register of corporations maintained by the Land Registrar
Marked-up version – Section 12(2); Bill / CSA – Clause 10

28. Section 12(2)(d) provides that the Land Registrar shall enter into the register of corporations the name and address of the chairman, vice-chairman (if any), secretary and treasurer of the management committee. We accept Members' suggestion to extend the scope of reporting to all members of the management committee.

Chinese translation of "with necessary modifications"
Marked-up version – Section 14(4); Bill / CSA – Clause 10A

29. Section 14(4) of the BMO provides that paragraph 6 of Schedule 2 to the BMO shall, with necessary modifications, apply for the purposes of section 14(2) in the appointment of members to the management committee. We consider the Chinese translation of "with necessary modifications" should remain as 「經必要的變通後」as this is along the lines of other Ordinances.

Allowance for members of management committee

Marked-up version – Section 18(2)(aa); Bill / CSA – Clause 11(a)

30. The revised section 18(2)(aa) provides that, subject to a resolution passed at a general meeting of the owners and the cap specified in Schedule 4 to the BMO, all members of the management committee may be given an allowance. We accept Members' suggestion that only the chairman, vice-chairman (if any), secretary and treasurer (who have more statutory duties under the BMO) should be eligible for the allowance. Corresponding amendment will be made to the heading of Schedule 4 to the BMO. Members may like to note that following the amendment, even the secretary and treasurer who are not members of the management committee may be eligible for the allowance.

31. At the Bills Committee meeting on 21 November 2006, Members asked whether the allowance for members of management committee is taxable. Section 8(1)(a) of the Inland Revenue Ordinance (Cap.112) provides that salaries tax shall be charged for each year of assessment on every person in respect of his income arising in or derived from Hong Kong from any office or employment of profit. Recipients of allowance paid under section 18(2)(aa) of the BMO are subject to salaries tax. Section 12(1)(a) of Cap.112 further provides that, in ascertaining the net assessable income of a person for any year of assessment, there shall be deducted from the assessable income of that person all outgoings and expenses, other than expenses of a domestic or private nature and capital expenditure, wholly, exclusively and necessarily incurred in the production of the assessable income. The Inland Revenue Department will consider the post and job nature of the taxpayer and other related factors of each particular case to determine whether the outgoings and expenses are deductible or not.

Procurement of supplies, goods and services by OCs
Marked-up version – Section 20A; Bill / CSA – Clause 13

32. At the meeting of the Bills Committee on 2 November 2006, Members raised a number of questions relating to the requirements for OCs in the procurement of supplies, goods and services.

33. The new section 20A(2A) provides that an OC may decide not to procure any supplies, goods or services by invitation to tender if these supplies, goods or services are for the time being supplied to the corporation by a supplier and the corporation decides by a resolution of the owners passed at a

general meeting that the supplies, goods and services shall be procured from the same supplier. We note Members' different views on the issue. We consider that this provision should be retained so as to allow flexibility for the OC to decide at a general meeting of owners what is best for the majority of the owners. We also accept Members' view that the general meeting of owners should, in addition to deciding whether tendering should be conducted/waived, decide the terms and conditions of the new procurement contract. We will introduce CSAs to this effect.

34. The new section 20A(6)(b) provides that a procurement contract may be avoided by an OC if it does not comply with the statutory procurement requirements. The new section 20A(7) provides that the court may make such orders and give such directions in respect of the rights and obligations of the contractual parties. To clarify the relation between the two subsections, we will introduce CSAs such that a resolution made under section 20A(6)(b) should be subject to any order of the court made under section 20A(7).

35. We also accept Members' suggestion that the court should take into account whether the supplier has benefited from the contract in making an order under section 20A(7). We will introduce CSAs to this effect.

36. In the Brief for Legislative Council on the Bill issued to Members in April 2005, we proposed that the procurement requirements shall take effect 12 months after commencement of the Bill so as to allow sufficient time for the OCs and building managers to acquaint themselves with the new provisions. We have re-considered the matter. We are of the view that the owners and building managers are already well aware of the new requirements during the consultation period and the amendments will in fact bring about improvements to the existing mechanism which are welcome by the public. The provisions should therefore come into effect as soon as possible (i.e. on the same day as other provisions) for the benefit of the owners. In any case, we have planned to publish in the Gazette the commencement of all the provisions of the Amendment Ordinance (except those related to the third party risks insurance for OCs) around three months following the passage of the Bill. This should allow sufficient time for the public to understand the new provisions.

Posting of information about legal proceedings
Marked-up version – Section 26A; Bill / CSA – Clause 13A

37. We note Members' differing views, as raised in the Bills Committee

meeting on 7 November 2006, on whether legal proceedings brought in the Small Claims Tribunal should be excluded from the new section 26A – i.e. whether a management committee needs to notify the owners of such legal proceedings by posting a notice in a prominent place in the building. We are of the view that all legal proceedings, with no exception, should be brought to the owners' notice.

38. We have passed to Members a copy of the judgment *Yeung Chung Lau and Incorporated Owners of Century Industrial Centre and Ors* (DCCJ 381/2006). It was held in that case that a resolution passed by an owners' meeting to financially support the chairman of the management committee in a lawsuit against her was invalid because it was neither related to nor connected with "the operation, servicing, maintenance, repairing, rebuilding, insurance or management of the building" (provision in the DMC) or "the control, management and administration of the common parts or the renovation, improvement or decoration of those parts" (provision in section 14(1) of the BMO). As we have mentioned at the Bills Committee meeting on 7 November 2006, the defendant of the case, i.e. the OC of the building has submitted an appeal. The High Court has granted leave to the appeal as the issue was clearly an arguable point of law.

39. Members asked whether the new section 26A covers the situation where an OC becomes a third party to an action. Under Order 16 of The Rules of the High Court (Cap.4 sub. leg. A), a defendant in an action may claim against a person not already a party to the action any contribution or indemnity by issuing a third party notice to that person. If an OC is served with such a third party notice, it will become a party to the action and will have the same rights in respect of its defence against any claim made against it in the notice as if it had been sued by the defendant. The requirement to notify owners will, therefore, apply in these circumstances as well.

Protection of members of management committee
Marked-up version – Section 29A; Bill / CSA – Clause 15

40. The protection for members of management committee under the new section 29A covers only acts done on behalf of the OC in the exercise of the powers conferred or performance of the duties imposed by the BMO. Section 29 of the BMO stipulates that the powers and duties conferred or imposed by the BMO on a corporation shall be exercised and performed on behalf of the corporation by the management committee. It is clear, when the two sections

are read together, that an individual member of a management committee is not liable for an act done by the management committee provided that the management committee is performing a function in accordance with a provision in the BMO.

41. We have passed to Members a copy of the judgment *宜高物業管理有限公司對新蒲崗大廈業主立案法團* (DCCJ 14835/2000). Details were set out in the Bills Committee paper issued to Members in October 2005 (LC Paper No. CB(2)222/05-06(01)) which was deliberated at the Bills Committee meeting on 26 January 2006. It was held in that case that –

> "The Second and the Third Schedules to the Building Management Ordinance, when read together, expressly provide that the powers and duties of the chairman of an incorporated owners are the convening and chairing of meetings, exercising a casting vote when necessary and signing minutes of meetings. In other words, the powers and duties of the chairman of an incorporated owners are limited to matters concerning meetings.
>
> When all the above provisions are read together, I believe the highest authority of decision-making of an incorporated owners is vested in the general meeting of the owners, and next in the management committee. Individuals including the chairman of an incorporated owners do not have any authority to make decisions. Section 29 of the Building Management Ordinance provides that the powers and duties of an incorporated owners 'shall be' exercised and performed on behalf of the incorporated owners by the management committee. The meaning could not be clearer. It means that an incorporated owners is under collective leadership, and the chairman is merely the chairman of meetings and not the leader or chief executive of a corporation."

<u>Procurement of third party risks insurance by OCs</u>
<u>*Marked-up version – Section 28, 41(ca); Bill / CSA – Clause 33, 20*</u>

42. At the Bills Committee meeting on 7 November 2006, Members asked why the word "occupiers" has to be deleted from section 28(1) of the BMO (as

amended by the Building Management (Amendment) Ordinance 2000), meaning that an OC will not be required to procure third party risks insurance on behalf of the occupiers. In order for a risk to be insurable, there must be an "insurable interest" in the thing or person being insured. Generally, this means that the policyholder must have a particular relationship with the subject matter of the insurance. "Occupier" is defined under section 2 of the BMO as a tenant, sub-tenant or other person in lawful occupation of a flat, but does not include an owner of that flat. The responsibility to properly manage and maintain the common parts of a building rests with the owners, and not the occupiers. Hence, the BMO should only require an OC (which represents all owners of a building) to procure third party risks insurance for common parts of the building. In fact, an OC formed under the BMO could only represent all owners, and could not represent the interests of the occupiers who reside or stay in the building.

43. Members further asked whether an occupier may be held liable for the death or injury of a third party that occurs in a building. That is possible. In fact, not only an occupier but an individual owner (as opposed to the OC/all owners) could be held liable as well. Anyone who suffers loss and damage caused by an accident that occurs in a building may claim compensation for property damage, bodily injury or death. This is a question of civil liability to be determined by the court taking into account various factors, including but not limited to whether the common parts of a building or a unit of which an owner has exclusive possession is involved, whether the accident is caused by an individual owner, an OC or a contractor, whether the person claiming compensation has contributed to the accident, and any other factors which the court considers relevant. If it is held by the court that the OC should be responsible for the accident, then the OC will have to pay the damages determined by the court and the third party risks insurance procured by the OC will be called upon to settle the claim. If, however, the court decides that the individual owner and/or the individual occupier is responsible for the accident, then they should be responsible for payment of the damages determined by the court. It would be unfair and inappropriate for the OC to pick up the claim for this individual owner and/or individual occupier. In this regard, Members may like to note the judgment in *Wong Sau Kam and Yeung Kong, the administrators of the estate of Yeung Ki Yee, deceased and Shum Yuk Fong and others* (HCPI 798/1998), *Wong Lai Kai and The Incorporated Owners of Lok Fu Building, Yuen Long* (CACV 189/1999 and CACV 195/1999), *Chan Yan Nam and Hui Ka Ming trading as Kar Lee Engineerng and others* (HCPI 1169/2000 and CACV 342/2002), *Leung Tsang Hung and Lee Wai Yu, the*

administrators of the estate of Liu Ngan Fong Sukey, deceased and The Incorporated Owners of Kwok Wing House (HCPI 595/2002 and CACV 195/2004). Individual owner and individual occupier may decide to procure their own third party risks insurance. According to a survey conducted by the Consumer Council[8] on home insurance, insurance policies that cover occupiers are available in the market.

44. Members enquired about the need for section 28(3) of the BMO which provides that a corporation may insure and keep insured with an insurance company the common parts of the building and the property of the corporation to the reinstatement value thereof against fire and other risks. Section 28(3) was actually copied from section 18(2)(d), which will be repealed on the commencement of the provisions regarding insurance in the Building Management (Amendment) Ordinance 2000. There is also a similar provision in the Guidelines for DMC issued by Lands Department. We prefer to retain section 28(3) to empower an OC to procure insurance on fire and other risks for the protection of owners' interests. We will, however, introduce CSAs to amend section 28(6A) of the BMO so that the requirement to give notice to the Land Registrar applies only to third party risks insurance policy procured by the OC under section 28(1) of the BMO but not the insurance on fire and other risks under section 28(3). Corresponding amendment will be made to the new section 12(2)(da).

45. We have reviewed the wordings of sub-sections (1), (1A) and (3) of section 28 again. As mentioned above, we have deleted "occupiers" from sub-sections (1) and (3) in the Bill. As an OC represents all owners and the liabilities of owners in relation to common parts are enforceable against the OC to the exclusion of the owners (section 16 of the BMO), we only need to say simply that the OC shall procure the insurance policy (instead of having the OC to procure the insurance policy on behalf of the OC and the owners). For the same reason, it seems unnecessary to retain section 28(1A) which provides that an OC shall enter into a policy of insurance as agent for the owners of a building. We will introduce CSAs to delete section sub-section (1A) and amend sub-sections (1) and (3) accordingly. We will also make corresponding amendment to section 41(ca) of the BMO, which is the empowering provision for the making of regulations by the Chief Executive in Council.

46. We note Members' concern on the new section 41(ca)(xi) which

[8] Choice Magazine No.345 (July 2005)

provides that the Chief Executive in Council may make regulations for the effecting of policies of insurance in respect of third party risks and against fire and other risks by corporations with insurance companies and the conditions and requirements which are to apply in respect of those policies, including the avoidance of arrangements, agreements or understandings, or parts thereof, made or reached after 31 March 2005 as to the liability of corporations, or owners of buildings, towards third parties. The proposal is aimed to protect the rights of third parties. Without the stipulated date of 31 March 2005, this section will only apply to arrangements, agreements or understandings made after the commencement of the Regulation. This may defeat our purpose if an OC tries to avoid its liability by making such an arrangement, agreement or understanding before commencement of the legislation. That said, we note Members' concern on the retrospective implication of the provision. We will therefore introduce CSAs to delete the stipulated date in the provision, meaning that the Building Management (Third Party Risks Insurance) Regulation may only take effect on or after the day on which it is published in the Gazette.

47. As a related matter, when Members discussed LC Paper No. CB(2)446/06-07(01)[9] at the Bills Committee meeting on 7 December 2006, Members requested the Administration to consider extending the mandatory requirement of procurement of third party risks insurance to the building manager. Whilst we appreciate the good intent of the proposal, we have reservation to extend this statutory requirement to building managers at this stage. The reasons are as follows: –

(a) The duties of managers are stipulated in Schedule 7 to the BMO (which are mainly related to financial arrangements and obligations after termination). According to section 34E of the BMO, provisions in Schedule 7 shall be impliedly incorporated into every DMC. In other words, a new provision in Schedule 7 to mandate building managers to procure insurance will only create a contractual term between owners/OC and managers. It does not impose a statutory duty on building managers.

(b) Under section 28(2), non-compliance with the statutory requirement to procure insurance by an OC is an offence. We could not impose any

[9] *"Supplementary Consolidated Response – The Administration's response to Members' Suggestions/Views on the Draft Building Management (Third Party Risks Insurance) Regulation"*

criminal liability in the provisions in Schedule 7, which are only contractual terms.

(c) Members suggested that we could still include a provision in Schedule 7 to the BMO to require building managers to procure insurance in the manner required under the Building Management (Third Party Risks Insurance) Regulation ("Regulation"). There are grave difficulties in this suggestion –

i. The current draft of the Regulation, which is subsidiary legislation of the BMO, is applicable to OCs only. Under the BMO, OCs are required to procure third party risks insurance – the OC is the assured and the contract is made between the assured and the insurer. If we were to require managers to procure insurance, we will have to introduce substantial amendments to the BMO to clarify that the manager is to procure insurance on behalf of the owners and that the owners (not the manager) are the assured.

ii. Apart from imposing obligations on OCs, the draft Regulation will also provide for other matters. If an insurance company introduces restrictions in an insurance policy by reference to matters like the condition or maintenance of the building, and use of the building, etc, such restrictions will be ineffective – subject to certain requirements such as exercise of reasonable diligence in managing the building and keeping the building in good condition. Furthermore, if a third party has obtained a judgment against an OC, an insurance company is required to pay to the third party any sum payable under the judgment up to the policy amount. In the event of a winding-up order being made against an OC, the third party's right against the insurer under the Third Parties (Rights Against Insurers) Ordinance (Cap.273) will not affect such right to have a judgment to be paid by the insurer. In this connection, we could not, through introducing provisions in Schedule 7 (which are DMC terms only), provide for these matters.

These matters are, however, the very key elements in the Regulation for protection of owners' interests.

iii. In particular, the draft Regulation will provide that if an OC enters into an agreement with a third party purporting to negative or restrict its liability to the third party, any such agreement will be ineffective. If we apply this requirement to a building manager by adding corresponding provisions in Schedule 7, it would only become a DMC term as between owners and manager. Such provisions would not be incorporated into an agreement made between the manager and a third party.

iv. It follows that only a few provisions in the draft Regulation could be made applicable to managers by way of DMC provisions. These include the minimum coverage of the insurance policy and that the manager should be required to post out the relevant information for owners' information. This is far from comprehensive.

v. Another concern is that a building manager is only an agent of OC/owners. No matter how beneficial it may appear to the owners for the manager to procure insurance for them, they could still give different instructions to the manager on the matter. If the manager does not procure insurance on the instruction of the owners (say for the reason that there is insufficient funds) – the manager has only breached a DMC term and it is unlikely that the owners will take action against the manager in such circumstances. The crux of the matter is that the law does not impose on unincorporated owners a statutory duty to procure third party risks insurance. The proposal to impose the requirement on managers instead through DMC terms will not achieve the purpose.

48. Given its complexity, we propose to look into the matter after the making of the Building Management (Third Party Risks Insurance) Regulation. As explained at the Bills Committee meeting on 7 December 2006, section 42

of the BMO stipulates that the Chief Executive in Council may, by order published in the Gazette, amend Schedule 7 to the BMO. Hence, if we in due course could find a way to solve the above problems and introduce the requirements of procurement of insurance on building managers under Schedule 7, this could be done through a relatively quicker legislative amendment exercise.

List of building management agents under section 40B

49. Section 40B(1) of the BMO provides that, under certain circumstances, the Authority may order the management committee of a building to appoint a building management agent for the purposes of managing that building. Section 40B(3) provides that the Authority shall, from time to time publish in the Gazette, a list of persons engaged in the business of the management of the buildings. Members would like to know the criteria for inclusion in the list.

50. Following the passage of the Building Management (Amendment) Ordinance 2000, the Administration had drawn up, based on the Housing Department's Approved List of Property Management Agents for public housing estates, a set of criteria for the list of building management agents under section 40B. This was reported to the then Bills Committee on the Building Management (Amendment) Bill 2000. These criteria are set out as follows –

(a) it has been incorporated under the Companies Ordinance (Cap.32) or incorporated by any other Ordinance of the HKSAR;

(b) it currently managing a portfolio of 500 residential/commercial units or more in the HKSAR. The number of commercial units will be calculated based on a notional size of 50m^2 gross floor area per unit;

(c) it has a minimum of three years' experience in property management in the HKSAR and has at least one full-time member or employee at directorate or senior managerial level, who is a practicing member of the Hong Kong Institute of Housing or Hong Kong Institute of Surveyors with not less than three years' post-qualification experience in property management; and

(d) it has a sound financial background.

There are, at present, 67 property management companies on the published list.

51. We are reviewing this list in the context of the consultancy study on licensing of property management companies.

Composition and procedure of management committee (Schedule 2)

52. Members discussed the amendments to Schedule 2 at the meetings on 9 November 2006,16 November 2006 and 21 November 2006.

Size of a management committee
Marked-up version – Paragraph 1, 2 of Sch. 2; Bill / CSA – Clause 23(c), 23(d)

53. We accept Members' views on the drafting of paragraph 1 of Schedule 2 regarding the statutory minimum size of management committee. We will introduce CSAs to modify the drafting of the provision. On this matter, we have passed to Members a copy of the judgment in *The Incorporated Owners of Blocks F1 to F7 of Pearl Island Holiday Flat 對 Wong Chun Yee and others* (CACV 1911/2001). Details were set out in the Bills Committee paper issued to Members in February 2006 (LC Paper No. CB(2)1182/05-06(01)) which was deliberated at the Bills Committee meeting on 27 April 2006. It was held in that case that the reduction of the size of a management committee (as vacancies may arise due to the resignation of members or other reasons) to below the statutory minimum alone would not render the management committee invalid. If this happens, the management committee could fill the vacancies in accordance with paragraph 6 of Schedule 2. We will introduce CSAs to expressly stipulate this interpretation by the court in paragraph 6 of Schedule 2 to the BMO relating to the filling of vacancies of a management committee (the effect is that paragraph 6 of Schedule 2 will still be applicable notwithstanding that the requirement under paragraph 1 of Schedule 2 is not met).

54. As a related matter, we accept Members' view that it is clearer to stipulate in paragraph 2 of Schedule 2 that before putting to vote the appointment of members to the management committee, the owners' meeting should first pass a resolution on the size of the management committee by majority votes of owners. This is in fact the practice for most management committees and such a resolution has also been included in our sample agenda

form issued to the public. Members then asked whether a simple resolution of "appointment of management committee" in the agenda will be acceptable. As we have provided a sample agenda form setting out all the resolutions required to the public, almost all owners will use this form. That said, in the case where only a simple resolution of "appointment of management committee" is stated in the agenda, it would still be regarded as valid as the resolutions to appoint members of management committee, etc. are ancillary to it. In this regard, Members may like to note the judgment in *Kwan & Pun Company Limited and Chan Lai Yee and others* (CACV 234/2002) in which it was held that –

> "In respect of the first issue, I have no hesitation at all to find that no separate resolution is required for the appointment of the management committee. Counsel informed the Court that the agenda of the meeting consisted of only one item, namely, the appointment of the management committee. The resolutions passed for the appointment of the members and office bearers of the management committee could only indicate that the owners at the meeting were doing precisely what the agenda set out to do, namely the appointment of the management committee. As a matter of fact, even before the list of nine names were put forward, it was explained to the owners that the purpose of the meeting was to appoint the management committee.
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> ***
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> I agree that this appeal should be allowed. In relation to the first point raised on appeal that there was no separate, specific resolution for the appointment of a management committee (even though the meeting was asked to vote on the appointment of members for a management committee), on the facts of the present case, that is a mere exercise in semantics. It is significant that the only item on the agenda here was the appointment of a management committee. There was no separate item for the appointment of members for the committee. There was no evidence that anyone at the meeting had moved any additional resolution beyond the single item on the agenda.
>
> Although the judge accepted the evidence of Mr Liu that he thought there would be a separate, specific resolution for the

appointment of a management committee, the question must be whether Mr Liu's belief was reasonable. In my judgment, such a belief, however genuinely held, was not reasonable. Quite apart from the fact that there was only one item on the agenda, what was the point of voting for members of a body if that body may or may not even come into existence, no resolution having been passed for it? The judge did not suggest that there was any satisfactory evidence from Mr Liu to substantiate the reasonableness of his belief that there would be a separate, specific resolution for the appointment of a management committee coming after the vote for appointing members to it."

"First past the post" voting system
Marked-up version – Paragraph 2, 5, 6 of Sch. 2; Bill / CSA – Clause 23(d), 23(g), 23(gb)

55. We note Members' suggestion that the "first past the post" voting system should be applicable to the resolution on the size of the management committee so as to facilitate the procedures at the owners' meeting. We, however, consider that it would not be unduly difficult or impractical for the majority vote system to be used here and prefer to stick to it. We will review the situation after the Bill has been passed and the "first past the post" voting system implemented in the context of appointment of management committee members.

56. As explained at the meeting on 9 November 2006, we will amend paragraphs 2, 5 and 6 of Schedule 2 to clarify that all appointments to the management committee should be made by the "first past the post" system (and not the majority vote system).

57. Paragraph 2(1A)(b)(ii)[10] of Schedule 2 provides that if the most successful candidates have an equal number of votes, the person who presides at the meeting shall determine the result by drawing lots, and the candidate on whom the lot falls is to be appointed. Members were concerned that it would not be fair for the presiding person to draw the lots if he is also one of the candidates. Section 3(7)[11] of the BMO stipulates that the convenor shall preside at a meeting of owners convened under section 3, meaning that the

[10] Related provisions are paragraphs 2(2A)(b)(ii), 5(2A)(b)(ii), 5(2C)(b)(ii), 6(7)(b)(ii) and 6(8)(b)(ii) of Schedule 2.
[11] Related provisions are sections 3A(3E), 4(9) and 40C(8) of and paragraph 3(1) of Schedule 3 to the BMO.

convenor will be the one to draw the lots. There is no provision to allow delegation of such power to another person. Whilst it is possible that the convenor may himself run for a post in the management committee, we do not consider the simple fact that he is also the one to draw lots will give rise to a conflict of interest. The act of drawing lots does not involve the exercise of discretion. It is the way in which a draw is conducted that matters if collusion is to be avoided. Results of a draw, if properly conducted, depends purely on luck.

Terms of a management committee
Marked-up version – Paragraph 3 of Sch. 2

58. Paragraph 3 of Schedule 2 to the BMO provides that the members of the management committee appointed under paragraph 2(1)(a) shall hold office until the members of a new management committee are appointed under paragraph 5(2)(a) of Schedule 2. Members considered that the BMO should be amended so that all management committees should convene an annual general meeting to conduct the appointment exercise on a timely manner, failing which the management committee should become invalid.

59. Whilst we appreciate Members' concern, we have strong reservation against this proposal. If a management committee will automatically dissolve or cease to have the power to represent the OC, or that members of a management committee are compelled to retire before new members of an incoming management committee are appointed to take their place, the building would lapse into a state of "anarchy". There will be no way for the owners to reverse the situation and validate the management committee again. There would be no one or nobody to exercise the powers and perform the duties as set out in section 18 of the BMO on behalf of the OC under section 29 in various aspects of management of the building – such as collecting monthly management fees, contracting with or instructing any contractors or workers to carry out the necessary repair and maintenance works to the common parts, renewing the maintenance contracts for lifts and escalators, renewing the insurance contracts, renewing the contracts with the property management agent and related personnel, etc. The owners will have to seek an order from the court for appointment of an administrator under section 31 of the BMO.

60. Furthermore, if an express provision to such effect is included in the BMO, the management vacuum of a building will happen not only when a management committee delays in the convening of the general meeting. In some cases, the general meeting of owners is unable to successfully appoint a new management committee to replace the new one (e.g. lack of

quorum for a meeting, nobody willing to take up the posts in the new management committee, etc). This may have nothing to do with the fault of the incumbent management committee. On the other hand, if a management committee which is due to retire deliberately delays the procedure for voting for a new management committee, the owners have certain remedies under the BMO to deal with the situation. Members may like to refer to the judgments in *The Incorporated Owners of Maple Mansion 訴Ho Yiu Keung and Regent Talent Industrial Limited* (LDBM 98/2000), *The Incorporated Owners of Finance Building and Bright Hill Management Consultants Company Limited* (CACV 386/2000) and *Leung Ho Sing and others and Shum Yiu Tung and others* (CACV 108/2006) which share the same view.

61. The proposal has very serious and wide implication on the operation of management committees and the public will likely have diverse views on the matter. As it has not been included in any public consultation we have conducted, we do not agree to incorporate this proposal into the Bill at this very late stage of the amendment exercise.

Self-declaration requirement of management committee members
Marked-up version – Paragraph 4 of Sch. 2; Bill / CSA – Clause 23(f)

62. The new section 7(3)(e) of the BMO provides that each member of the management committee has to submit a declaration that he is eligible for appointment under paragraph 4(1) of Schedule 2 to the BMO. Land Registrar is now working on the statutory self-declaration form for members of management committee. Under the new paragraph 4(3) of Schedule 2, every member of the management committee shall, within 14 days after the appointment, lodge with the secretary of the management committee the declaration. Members were concerned that there may not be sufficient time for the member to fill in the declaration form.

63. Having considered Members' views, we will introduce CSAs to allow at most 21 days for an individual member of the management committee to submit the declaration form to the secretary under paragraph 4(3) of Schedule 2. As section 7(1) of the BMO requires a management committee to apply to the Land Registrar for the registration of the OC within 28 days of the appointment, that means the secretary will be given, in the most extreme situation where all members submit the declaration on the 21st day, seven days to make the application to the Land Registrar. For subsequent appointments to the management committee and where the member's situation has changed which necessitates the submission of a new

declaration form, the 21-day requirement will still apply. The secretary in such cases will be given a longer time (28 days from the date of his receipt of the forms) to lodge the declaration forms with the Land Registrar. We will introduce CSAs to amend paragraphs 4(4) and 4(5) of Schedule 2 to such effect.

64. The new paragraph 4(3A) of Schedule 2 stipulates that a member of the management committee who fails to comply with paragraph 4(3) shall cease to be such member. We confirm that the wording in the new paragraph 4(3A) is clear to show that the cessation of membership is permanent and irreversible. If the person wants to be appointed as a member of the management committee again, he will have to get a fresh appointment in accordance with the requirements in Schedule 2 to the BMO. The same wording is used in paragraph 4(2) of Schedule 2 to the BMO.

Filling of vacancies in management committee
Marked-up version – Paragraph 6, 6A of Sch. 2; Bill / CSA – Clause 23(gb), 23(gc)

65. As explained in LC Paper No. CB(2)1182/05-06(01) *Quorum of a Management Committee and Other Related Matters* which was deliberated at the Bills Committee meeting on 27 April 2006, under the existing BMO, the filling of vacancies for the chairman/vice-chairman post could be filled by a management committee meeting or a general meeting of the corporation but the filling of vacancies for other offices (members) could only be made by the management committee – not even a general meeting of the corporation could pass such a resolution. We have not proposed any changes to the existing mechanism to fill the vacancies for the chairman/vice-chairman post. We have only proposed that the vacancies for the other offices could also be filled by the general meeting of the corporation.

66. Members were concerned that it was unclear under the amended paragraph 6(1) of Schedule 2 to the BMO whether a management committee or a corporation should have the overriding power in filling the vacancies in a management committee. As explained above, owners may choose to adopt either mechanism to fill the vacancies in the management committee. The mechanism has worked well for the chairman/vice-chairman post so far. If the management committee chooses to fill the vacancies without convening a general meeting of the corporation, the appointment will be of temporary nature only – it is more like an acting appointment to ensure the smooth operation of the OC.

67. To further reinforce this concept of temporary arrangement, we will introduce CSAs to amend the new paragraphs 6(3)(b), 6(4)(b) and 6(5)(b) of Schedule 2 to stipulate clearly that the appointment should last till the next general meeting of the corporation only. This means that once a general meeting of owners is convened (whether it is an annual general meeting under paragraph 1(1)(b) of Schedule 3 or an extraordinary general meeting under paragraph 1(1)(c) and (2) of Schedule 3, which could be convened anytime before the annual general meeting), the appointment of the chairman and members made under these paragraphs will cease immediately. According to our experience, vacancy in a management committee will normally arise a few months after the appointment is made. This means that the terms of appointment for the temporary chairman/member will be for a few months at most even if owners decide to wait till the next annual general meeting.

68. The above amendment also addresses another concern of Members. If after the management committee has filled the vacancies, the management committee (for whatever reasons, e.g. at the request of owners, or on its own initiative) convenes a general meeting of the owners to fill the vacancies, then the appointment of these "temporary" chairman and members will cease automatically. There will not be the question of a management committee having two chairmen (who are appointed under different mechanisms).

69. If the management committee chooses to fill the vacancy at a management committee meeting, the owners will be informed through the minutes of meeting that will be posted out within 28 days of the date of the meeting under paragraph 10(4B) of Schedule 2. .

70. The new paragraph 6A of Schedule 2 introduces a new mechanism whereby the remaining member(s) of a management committee (even though the quorum could not be reached) could still convene a general meeting of owners for the sole purpose of filling the vacancies. We do not consider it practical to set a time limit for the remaining member(s) of the management committee to take action in this regard. In any case, owners who are dissatisfied with the efficiency of the remaining member(s) in convening this special meeting of owners can always make an application to the Lands Tribunal under section 31 of the BMO for the appointment of an administrator. The remaining members of the management committee who want to avoid the cumbersome court procedures will certainly adopt this new mechanism in a timely manner.

Agenda of the management committee
Marked-up version – Paragraph 8 of Sch. 2; Bill / CSA – Clause 23(h)

71. On the setting of agenda, according to "Shackleton on The Law and Practice of Meetings"[12], the responsibility for determining the contents of the agenda will rest with the governing committee of the body sponsoring the meeting, or its chairman. The secretary frequently acts on his own initiative in preparing the agenda, with such consultation as is necessary to ensure that no item of business has been overlooked. If there is a dispute as to whether an item should be included in the agenda or not, the secretary should err on the side of the inclusion, leaving the matter for the ultimate decision of the meeting itself. In order to preserve impartiality, the secretary should, at the request of a member, include any matter which can be regarded as the proper business of the meeting. In the context of building management, the agenda for the management committee meeting should be determined by the chairman/vice-chairman, in consultation with members of the management committee (if it is convened in accordance with paragraph 8(1)(a) of Schedule 2) or the secretary and the two members who request the meeting (if it is convened in accordance with paragraph 8(1)(b) of Schedule 2). We will set these out in the detailed guidelines to be issued after the passage of the Bill.

72. We will introduce CSAs to amend paragraph 8(2A) and (3) of Schedule 2 to ensure that the notice of management committee meeting has to be issued to all members of management committee, as well as the secretary and treasurer who are not management committee members.

73. As a related matter, Members suggested at the meeting on 21 September 2006, when discussing LC Paper No.CB(2)3038/05-06(01) *Supplementary Consolidated Response – The Administration's response to Members' Suggestions/Views*, that management committees should be required to inform owners of the agenda of management committee meetings. Under the existing BMO, there is no absolute need for a management committee to include all resolutions to be passed in the agenda. This is to allow more flexibility for the operation of management committees in dealing with urgent building management matters. Moreover, paragraph 7 of Schedule 2 requires a management committee to meet at least once in every period of three months and paragraph 8(3) further provides that, if a management committee resolves that it shall meet at specified intervals and the resolution specifies the place, dates or days and

[12] Paragraph 5-16 of "Shackleton on The Law and Practice of Meetings", Sweet and Maxwell, 9th edition.

times of such meetings, the secretary shall give a copy of such resolution to each member of the management committee and then the requirement on service of notice will be waived. Owners would be aware of the discussions and resolutions passed by a management committee through the minutes of meeting that need to be posted out within 28 days of the meeting. We have also included a new paragraph 10A in Schedule 2 to the BMO to allow owners to obtain copies of any minutes of the management committee meetings after paying reasonable copying charge.

Meetings and procedure of corporation
Marked-up version – Paragraph 1 of Sch. 3; Bill / CSA – Clause 24(ba)

74. Members discussed the amendments to Schedule 3 at the Bills Committee meeting on 21 November 2006.

75. We note the majority views of Members raised at the meeting that the chairman of the management committee should be required to hold the extraordinary general meeting requested by 5% owners under paragraph 1(2) of Schedule 3 to the BMO within 30 days after the receipt of the request. Whilst we share Members' view that the 30-day deadline is easy to remember by the general public, this may pose some practical difficulties for the chairman of the management committee. The current requirement is for the chairman to convene the meeting (i.e. issue the notice of meeting) within 14 days after the receipt of the request. Even if the chairman issues the notice earlier than the stipulated deadline, because of the requirement under paragraph 2 of Schedule 3 to the BMO about notice of meeting, he will be left with only a few available dates for the actual holding of the owners' meeting. If it has been the practice of a particular building to have the owners' meetings held during weekends, the options will even be more limited for the chairman of the management committee. We will therefore extend the time limit by half a month from Members' proposal of 30 days to 45 days. This is generally in line with the corresponding requirements under the Companies Ordinance (Cap.32) (49 days) and the Land Titles (Strata) Act of Singapore (six weeks).

76. The amended paragraph 1(2) of Schedule 3 provides that the chairman of the management committee shall convene a general meeting of the corporation at the request of not less than 5% of the owners for the purposes specified by such owners within 14 days of receiving such request, and hold the general meeting within 35 days (to be amended to 45 days) of receiving such request. The amended paragraph 8(1)(b) of Schedule 2 to the BMO provides that a meeting of a management committee shall be convened by the secretary, at the request of any two members thereof,

within 14 days of receiving such request, and held within 21 days of receiving such request. Members suggested that there might be no need to specify the date for convening of the meeting if the date for holding of the meeting has already been provided for.

77. We note Members' views. We, however, prefer to keep the two dates in the provision, i.e. the date for convening of the meeting and the date for holding of the meeting. The court has already held clearly in the judgment of *顏偉國 訴 何蘭及嘉都大廈業主立案法團* (LDBM 173/2000) that the term "convene" does not mean formally holding the meeting, and it only means issuance of the notice of meeting. To avoid further dispute over this very important provision regarding minority owners' right, we prefer to stipulate clearly the date for convening of the meeting (i.e. issue of notice) and the date for actual holding of the meeting.

78. As explained at the meeting on 21 November 2006, we will delete paragraph 9 of Schedule 3 on the counting of the percentage of owners as the requirements have already been set out in section 5B of and Schedule 11 to the BMO.

79. As a related matter, Members asked at the meeting on 21 September 2006, when discussing LC Paper No.CB(2)3038/05-06(01) *Supplementary Consolidated Response – The Administration's response to Members' Suggestions/Views*, whether video-recording or audio-recording of the proceedings of a meeting amounted to collection of personal data under the Personal Data (Privacy) Ordinance (PDPO). The images and voice of any person collected in any video or audio tapes or device which constitute pictorial or vocal representation of information about a person are personal data. Views of identified attendees recorded in any minutes of meeting are also personal data. It is within the contemplation of any attendees attending an owners' meeting that they would be identified and any views expressed by them in the meeting would be recorded in writing, they would have given the required consent by attending the meeting and expressing their views in the meeting. In other words, by attending an owners' meeting and publicly saying something, the owners should have already given the implied consent that their views could be recorded. Unless it is within the contemplation of every attendees that the meeting would be video/audio-recorded (e.g. it has been a practice for a long time), we consider that the attendees of the owners' meeting should be informed of the recording and the purpose of the recording in accordance with the Data Protection Principles under the PDPO. Whether a meeting should be video/audio-recorded is a question that could be decided by resolution.

Mandatory terms in DMCs: requirement for managers
Marked-up version – Section 34J, paragraph 8, 9 of Sch. 7; Bill / CSA – Clause 17, 28(h), 28(i)

80. Members discussed amendments to Schedule 7 to the BMO at the Bills Committee meetings on 21 November 2006 and 24 November 2006.

81. Paragraph 7 of Schedule 7 provides for a termination mechanism for the manager. We will correspondingly introduce CSAs to delete clause 17(b) of the Bill to retain the wordings in the existing section 34J(4)(b) of the BMO, viz. "the termination of a manager's appointment in accordance with Schedule 7", as the mechanism is applicable to both DMC managers and contract managers (contract of which does not contain a termination clause).

82. Paragraph 8 of Schedule 7 to the BMO provides for the handing over from the outgoing manager to the owners' committee or the new manager. Having considered Members' views, we will introduce CSAs to amend paragraph 8(2)(b) to ensure that only those books or records of account, papers, documents and other records which have to be used for the purpose of preparing the financial statements as required under paragraph 8(2)(a) of Schedule 7 could be delivered to the new manager or the owners' committee within two months of the termination or expiry of the contract of the old manager. Other properties or records have to be delivered as soon as practicable but no later than 14 days under paragraph 8(1) of Schedule 8.

83. The new paragraph 9 of Schedule 7 requires the manager to consult the OC or the owners' committee on the channels of communication among owners on any business relating to the management of the building. We note Members' view that letting the owners' committee make the decision may not necessarily be in the best interests of all the owners. Having considered Members' views, we will amend this paragraph so that the manager shall consult the corporation at a general meeting of the owners on the channels of communication to be adopted. It was suggested at the meeting that the manager shall allow all channels of communication unless any channel is prohibited specifically by a resolution passed at a general meeting of owners. We have reservation on this proposal as this will undermine the manager's right and duty to properly manage the common parts of the building.

Enumeration of Owners
Marked-up version – Schedule 11; Bill / CSA – Clause 32

84. Members discussed amendments to Schedule 11 to the BMO at the Bills Committee meeting on 24 November 2006. We note Members' view on the drafting of Schedule 11. We remain of the view that the enumeration of owners should be included in the Schedule and there is no need to move them to the main legislation. We will liaise with the Land Registrar and prepare guidelines to facilitate the counting of owners during an owners' meeting.

Transitional Provisions
Bill / CSA – Clause 36

85. Members discussed Part 5 of the Bill (clauses 35 and 36) at the Bills Committee meeting on 29 November 2006. Clause 36 of the Bill provides that management committees that were previously formed in accordance with the DMC (instead of the BMO) may still follow the pre-amended Schedule 2 to the BMO regarding the composition and procedure of a management committee for a maximum period of four years. Members asked about the consequence if a management committee does not take any action to comply with the amended Schedule 2 requirements after the deadline.

86. Based on records we obtained from the Land Registry, some 60 OCs were formed in accordance with the provisions in their respective DMCs. We will contact these OCs to encourage and assist them in complying with the new requirements. With the improved provisions in Schedule 2 (e.g. size of a management committee, the "first past the post" voting system", the mechanism to fill vacancies, etc), we see no difficulties in convincing owners to pass a resolution to follow the requirements under the amended Schedule 2.

87. Schedule 2 sets out the composition and procedure of a management committee. If a management committee does not take any action to comply with the amended Schedule 2 requirements after the deadline, the validity of the management committee, including the validity of the appointment of certain members of the management committee, may be called into question. The situation is the same for existing management committees which do not comply with the requirements under the existing Schedule 2 (e.g. appointment procedure, quorum of a management committee, issue of notice of meeting, etc) or new management committees which do not comply with the requirements under the new Schedule 2. Under these situations, aggrieved owners may seek a ruling from the court on whether the non-compliance may cause the whole management committee or just the appointment of a certain member to become invalid.

The court will take into account all the circumstances of the case in making the decision. The court's decision may have implication on the decisions made by the management committee.

88. We accept Members' suggestion that an OC may decide, at any general meeting of owners (instead of just the annual general meeting), that they would follow the requirements under the amended Schedule 2. We will amend clause 36(3)(a) accordingly.

COMMITTEE STAGE AMENDMENTS

89. The revised CSAs have been issued under LC Paper No. CB(2)638 /06-07(02). The mark-up version to show the revisions to the earlier version of the CSAs[13] has also been issued under LC Paper No. CB(2)638/06-07(03).

ENFORCEMENT OF THE BMO

90. As a related matter, Members have requested a paper on the enforcement of the various provisions in the BMO. The paper is at Annex B.

ADVICE SOUGHT

91. Members' views are invited on the above.

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[13] LC Paper CB(2)3140/05-06(02)

Bills Committee on Building Management (Amendment) Bill 2005

Proposed Section 8(1A)

At the meeting of the Bills Committee on 24 October 2006, Members asked about the legal basis for the proposed new section 8(1A) which stipulates that the Land Registrar shall not issue a certificate of registration to more than one corporation for a building in respect of which a deed of mutual covenant (DMC) is in force and whether it overrides the existing section 8(1). Below is the response of the Administration to the question.

2. The aims of the Building Management Ordinance (BMO) (Cap.344) are to facilitate the incorporation of owners of flats in buildings or groups of buildings, to provide for the management of buildings or groups of buildings and for matters incidental thereto or connected therewith.

3. "Building" is defined under section 2 of the BMO as –

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

(b) any land upon which that building is erected; and

(c) any other land (if any) which –

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

(ii) in relation to the appointment of a management committee 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.

4. The term "building" in the BMO, therefore, does not refer only to the building structure itself but also the land upon which the building structure is erected. Furthermore, the land has to be in common ownership with the building or held for the common use, enjoyment and benefit of owners and occupiers. The basis of common ownership (or common use, enjoyment and benefit) among owners is set out in the DMC of the building. Owners under one DMC could therefore only

form themselves into one owners' corporation (OC) to manage the "building" of which they have common ownership.

5. Section 8(1) of the BMO provides that the Land Registrar shall, if satisfied that the provisions of section 3, 3A, 4 or 40C[1] and section 7(2) and (3)[2] have been complied with, issue a certificate of registration in such form as may be specified by the Authority from time to time. Take section 3 as an example: section 3(2)(b) of the BMO stipulates that, if there is no DMC or the DMC contains no provision for the appointment of a management committee, owners of not less than 30% of the shares may by a resolution appoint a management committee.

6. "Owner" is defined under section 2 of the BMO as 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; and a registered mortgagee in possession of such share. "Share" means the share of an owner in a building determined in accordance with section 39. According to section 39 of the BMO, an owner's share shall generally be determined in the manner provided in a DMC[3]. In other words, all issues relating to common ownership of land all point to the DMC of the building. Whilst the existing section 8(1) alone may imply that the Land Registrar has to issue a certificate of registration as long as section 3, 3A, 4 or 40C have been complied with and there could be more than one applications which fulfilled the legal requirements, when all the provisions are read together, it is clear that only one OC could be formed for one building in respect of which a DMC is in force. Based on the definitions of "building", "owner" and "share" as explained above, it is impossible for owners of one building which is covered by one DMC to incorporate as more than one OC. Neither is it possible for owners of more than one building which are covered by separate DMCs to incorporate as one OC as they will not be able to calculate their respective shares under the different DMCs.

7. During previous discussion at the Bills Committee, Members were concerned on whether there are sufficient provisions under the BMO to avoid the formation of more than one OC in a building. We

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[1] Section 3, 3A, 4 and 40C of the BMO set out the procedures of the meetings of owners convened for the purpose of appointing a management committee.

[2] Section 7(2) and (3) of the BMO sets out the application procedures for registration as an OC with the Land Registry.

[3] Section 39 stipulates that an owner's share shall be determined in the manner provided in an instrument including a DMC (if any) which is registered in the Land Registry; or if there is no such instrument, or the instrument contains no such provision, then in the proportion which his undivided share in the building bears to the total number of shares into which the building is divided.

have explained the above provisions and advised that the Land Registrar will issue only one certificate of registration to one building in respect of which a DMC is in force under section 8 of the BMO. Some Members however considered that an express provision should be included to clarify the matter.

8. Having considered Members' views, we propose to introduce a Committee Stage Amendment to add a new section 8(1A) to the BMO to the effect that the Land Registrar shall not issue a certificate of registration to more than one corporation for a building in respect of which a DMC is in force. This is not a new policy proposal but only an express provision to elucidate the existing principle of the BMO.

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Bills Committee on Building Management (Amendment) Bill 2005

Enforcement of the the Building Management Ordinance

1. This paper explains the enforcement of the various provisions in the Building Management Ordinance (BMO) (Cap.344).

Objectives of the Ordinance

2. Management of private properties is squarely the responsibilities of the owners themselves. The BMO was enacted to provide a legal framework to facilitate the incorporation of owners so that they could better manage their buildings in the capacity of a legal entity. The general operational procedures of an owners' corporation (OC) and its management committee are stipulated in the law to ensure uniformity and protection of owners' interests.

Provisions with Penalty Clause

3. There are not many penalty provisions in the BMO. For the nine existing provisions which come with a penalty provision, four of them are related to OCs' non-compliance with the registration requirements. The others are related to the failure of an OC in maintaining proper books or records of account, improper use of "Incorporated Owners", making of false statement and furnishing of false information, and failure to comply with the order of the Authority of the BMO[1]. In addition, the new section 28(2) of the BMO (which is yet to commence) introduced by the Building Management (Amendment) Ordinance 2000 stipulates that it is a criminal offence if an OC does not comply with the requirement to procure third party risks insurance for the common parts of the building. Details of these statutory provisions are set out in Attachment A.

4. The public generally considers that prosecution against OCs, members of management committee or property owners by the Government for not properly managing their buildings in accordance with the BMO would discourage owners from participating in the voluntary work of OCs. This could be seen clearly from the strong public objection on the Government's earlier proposal to introduce further

[1] Secretary for Home Affairs is the Authority of the BMO.

penalty provision in the BMO regarding procurement by OCs, as well as the strong support we receive for the introduction of a protection provision in the BMO for members of management committee so that they will not be personally liable for any collective decision of the OCs.

5. The Government has all along adopted a positive approach in dealing with suspected non-compliance with the BMO requirements. When our frontline staff of the District Offices get to know of a suspected breach of the BMO, they would draw the attention of the management committee of the OC concerned to the legal requirements of the BMO. In most cases, the alleged contravention of provisions in the BMO are due to disputes among members of the management committee and property owners and/or a lack of understanding of the BMO provisions. Most of these cases could be resolved through liaison and informal mediation. After all, the Government's ultimate goal is not to penalize any particular party, but to ensure the best protection of owners' interests and the presence of a harmonious living environment.

6. It must, however, be stressed that where the suspected breach is associated with possible corruption or crime, we will refer the case to the authorities concerned immediately.

7. If, after investigation by our District Offices, there seems to be a suspected breach of the BMO requirements, we will seek the advice of the Department of Justice on whether prosecution is merited for the case.

8. According to *The Statement of Prosecution Policy and Practice* published by the Department of Justice, a prosecutor must consider two issues in deciding whether to prosecute. First, is the evidence sufficient to justify the institution or continuation of proceedings? Second, if it is, does the public interest require a prosecution to be pursued? In considering the public interest criteria, regard should be given to the availability or efficacy of any alternatives to prosecution. The availability of a civil remedy, amongst other, is one of the factors that will be taken into account. In fact, civil proceedings, especially in building management cases, may offer a more appropriate method of settling the dispute. In short, all cases would be assessed with due consideration by the Department of Justice before prosecution is instituted.

General Enforcement of the BMO

9. For the other provisions in the BMO which do not include a

penalty, there are a number of ways to ensure compliance. As explained above, most of the disputes and complaints over non-compliance with the BMO stem from misunderstanding of the requirements in the law. Following enactment of the Amendment Bill, most of the existing ambiguities in the BMO will be clarified. Disputes over the interpretation of the legal provisions will certainly decrease.

10. Management of building is, afterall, the responsibilities of the owners themselves – any dispute among the owners should best be resolved through owners' meetings. Paragraph 1(2) of Schedule 3 to the BMO provides that 5% of the owners may request the chairman of the management committee to convene a general meeting of the corporation to discuss issues of their concern.

11. At the meeting of the Bills Committee on 6 April 2006, Members agreed to amend paragraph 1(2) of Schedule 3 to the BMO so that the chairman shall hold the owners' meeting within a specified number of days of receipt of the request from owners. This is certainly a huge improvement to the existing provision as chairmen of management committees will then have a clear timeframe by which the owner's meeting must be held.

12. If the chairman still refuses to comply with the legal requirement to hold an owners' meeting, he may suffer a vote of no confidence by his fellow management members at a management committee which would make his position untenable. He may also be removed from office by a resolution of the corporation at a general meeting of the corporation.

13. Section 45 of and Schedule 10 to the BMO has empowered any owner to take his case to the Lands Tribunal for an adjudication and to seek civil remedy. There are precedent cases[2] where the chairmen of management committees were ordered by the court to convene an owners' meeting to discuss matters of owners' concerns. The chairmen concerned, in some cases, were ordered to pay the legal costs of the applicants. The breach of such an order of the court could amount to contempt of court, punishment for which could ultimately result in imprisonment.

Civil Penalties

[2] *胡桂容及廖廣海 訴 黃漢明* (LDBM 323/2002), *Fung Yuet Hing and The Incorporated Owners of Hing Wong Mansion, Lee Leng Kong and Wong Sik Cham* (LDBM 367/2004).

14. Members have raised the idea of introducing civil penalties in the BMO. This is a relatively new idea in the statute law of Hong Kong. Based on research, we found out that civil penalty is a term used to describe a situation whereby a state seeks monetary relief against an individual as restitution for wrongdoing by the individual. Civil penalty is primarily sought in order to compensate the state for harm done to it, rather than to punish for the wrongful conduct. We understand that in the exercise to rewrite the Companies Ordinance (Cap.32), the issue of whether civil penalties should be included will be studied. As the concept of civil penalty is foreign to us and the exact meaning of civil penalty is unclear, we would like to avoid that grey area and hence we do not propose to consider this idea in the context of the BMO in the current legislative exercise.

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Attachment A

Building Management Ordinance (BMO) (Cap. 344)
Provisions with Penalty Clause

Section	Section Title	Related Provisions
10	Change of Name	(2) If at any time a corporation is registered by a name which, in the opinion of the Land Registrar, is so similar to the name by which another corporation is registered as to be likely to mislead, the Land Registrar may direct that the first mentioned corporation shall change its name within a period of six weeks from the date of the direction or such longer period as the Land Registrar may allow. (3) A corporation which makes default in complying with a direction under subsection (2) shall be guilty of an offence and shall be liable on conviction to a fine of $50 for each day during which the default continues.
11	Display of copy certificate of registration, etc.	(3) In the event of a contravention of this section, every member of the management committee shall be guilty of an offence and shall be liable on conviction to a fine of $50 unless he proves that the offence was committed without his consent or connivance and that he exercised all such due diligence to prevent the commission of the offence as he ought to have exercised having regard to the nature of his functions in that capacity and to all the circumstances.
12	Land Registrar to maintain register of corporations	(3) The secretary of the management committee shall, within 28 days of the date of any change in the particulars registered under subsection (2), other than the particulars referred to in paragraph (e) or (f) of that subsection, give notice thereof to the Land Registrar in such form as the Land Registrar may specify. (4) In the event of a contravention of subsection (3), the secretary of the management committee shall be guilty of an offence and shall be liable on conviction to a fine of $100 for each day during which the contravention continues.

Section	Section Title	Related Provisions
27	Accounts of corporation	(1) Subject to subsection (3), a management committee shall maintain proper books or records of account and other financial records and shall prepare, not later than 15 months after the date of the registration of the corporation and thereafter every 12 months, an income and expenditure account and a balance sheet which shall both be signed by the chairman and the secretary or the treasurer of the management committee and laid before the corporation at the annual general meeting of the corporation convened in accordance with paragraph 1(1) of the Third Schedule. (3) In the event of a contravention of subsection (1), every member of the management committee shall be guilty of an offence and shall be liable on conviction to a fine at level 5 unless he proves – (a) that the offence was committed without his consent or connivance; and (b) that he exercised all such due diligence to prevent the commission of the offence as he ought to have exercised in the circumstances.
32	Powers and duties of an administrator	(2) An administrator shall, within 7 days of the date of his appointment or the determination of his appointment, give notice thereof to the Land Registrar in such form as the Land Registrar may specify. (3) Any person who contravenes subsection (2) shall be guilty of an offence and shall be liable on conviction to a fine of $100 for each day during which the contravention continues.
35	Penalty for improper use of “Incorporated Owners”	Any person who, not being a corporation incorporated under this Ordinance, uses a name or title containing the words "Incorporated Owners" or "Owners' Corporation" or the Chinese characters therefor, or other words or Chinese characters implying that such person is a corporation incorporated under this Ordinance, shall be guilty of an offence and shall be liable on conviction to a fine at level 3.

Section	Section Title	Related Provisions
36	False statement or information	Any person who – (a) in any form required by this Ordinance, or in any notice or document given, issued or made for the purposes of this Ordinance, makes any statement or furnishes any information; or (b) furnishes any information required to be furnished under this Ordinance, which he knows, or reasonably ought to know, to be false in a material particular, shall be guilty of an offence and shall be liable on conviction to a fine at level 3 and to imprisonment for 6 months.
40A	Powers of Authority or authorized officer	(1) The Authority or an authorized officer may, for the purpose of ascertaining the manner in which a building is being controlled, managed or administered- (a) enter and inspect any common parts of a building; (b) attend any general meeting of a corporation; (c) require a corporation or any person managing the building to furnish him with such information in the possession of the corporation or that person, as the case may be, as the Authority of authorized officer may specify in relation to the control, management and administration of the building; (d) inspect the books or records of account and other records maintained under section 27(1) including any accounts relating to any fund established and maintained under section 20; and (e) inspect any other documents or records kept by a corporation in relation to any of its functions, duties or powers. (2) Any person who obstructs, or fails to comply with a reasonable requirement of, the Authority or an authorized officer acting under subsection (1) commits an offence and is liable to a fine at level 4.

Section	Section Title	Related Provisions
40B	Appointment of building management agent by order of Authority	(1) Where it appears to the Authority in the case of any building having a management committee that – (a) no person is, for the time being, managing that building; (b) the management committee has, in any material particular, failed substantially to perform the duties of a corporation under section 18 including without limitation, the duty of a corporation under subsection (2A) of that section to have regard to and be guided by Codes of Practice; and (c) by reason of the circumstances mentioned in paragraphs (a) and (b), there is a danger or risk of danger to the occupiers or owners of the building, the Authority may order that, within such reasonable period as shall be specified in the order, the management committee must appoint a building management agent for the purposes of managing that building. (2) Where a management committee without reasonable excuse fails to comply with an order made under subsection (1), every member of the management committee shall be guilty of an offence and shall be liable on conviction to a fine at level 5 and in the case of a continuing offence, to a further daily fine of $1,000 for each day during which the offence continues, unless he proves- (a) that the offence was committed without his consent or connivance; and (b) that he exercised all such due diligence to prevent the commission of the offence as he ought to have exercised in the circumstances.

Section	Section Title	Related Provisions
28*	Obligations regarding insurance	(1) A corporation shall, on behalf of the corporation and the occupiers and owners of a building, procure and keep in force in relation to the building and all parts thereof including the common parts and the property of the corporation, such policy of insurance with an insurance company in respect of third party risks as complies with any requirement prescribed for the purposes of this section. (2) In the event of a contravention of subsection (1), every member of the management committee shall be guilty of an offence and shall be liable on conviction to a fine at level 5 unless he proves – (a) that the offence was committed without his consent or connivance; and (b) that he exercised all such due diligence to prevent the commission of the offence as he ought to have exercised in the circumstances.

* The new section 28 was introduced by the Building Management (Amendment) Ordinance 2000, but has not yet come into operation.