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PANEL ON HOME FFAIRS
Review of the Building Management Ordinance (Cap. 344) –
Further Legislative Proposals and Administrative Measures

Submission

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0. Preamble

The following discourse represent not only my personal perception of the subject matter but also incorporates the views of a quite wide spectrum of people involved. I have kept working closely and exchanging ideas frequently with them as a member of the management committee of incorporated owners including commercial and residential buildings for years. Nevertheless, they are not used to reveal their views openly to the public like the social activist. It is deemed that their voice should be told, heard and taken into consideration in the law reform.

In writing this submission, I have tried all my very best

- to act in good faith without prejudice and intention to infringe the rightful and legal interest of any party concerned;
- to take a fair and balanced view on all issues and people involved;
- to discuss the issue based on reason pursuant to logic and factual evidence;
- to comment on the proposed amendments in the consultation paper from a practical and empirical perspective rather than jurisprudential angle of view as a rational person but layman of law; and
- to support the legal reform intended for the perfection of the legal framework regarding building management.

By and large, we do appreciate and recognize the efforts and reforms that have been made and to be made by the authority in pursuing the perfection of the legal framework for better management of building. Our opposition to some of the proposed changes is indeed consistent to the master theme of the Consultation Paper and the aspirations of the general public.

1. The Background From Our Perspective Of View.

1.1 The Untold Story

We admit that the background as narrated in the paper is absolutely true but it is not the whole story. We all saw the outbreaking of rampant collusive tendering or bid-rigging in recent years and the helplessness of small owners when facing gigantic real estate developers and their agent performing as DMC managers working in collaboration with a number of "friendly" contractors. This in turn gives rise to the populism and the pan-politicalization of the society. As a matter of fact, now we are fighting on three battlefronts against, namely the developer together with DMC manager, unethical contractor and populist.

1.2 3 Battlefronts for Owners

1.2.1 Developer and DMC Manager

About a decade ago, small owners were mainly fighting against gigantic developers who continued to grab the extended benefits from the buildings they developed by running subsidiaries that catering management services to property owners. They charge high manager remuneration(MR), for instance, up to 15% of the total spending. Moreover, on top of the MR, they were allowed to charge administration fee at about 10% of the total amount of all maintenance and repairing projects. In light of the unfair terms and conditions provided in the DMC, small owners were nothing more than cash dispensers of DMC managers. Then we witnessed the lowering of the requirements for the deployment of DMC manager in the BMO and this reform have eased a lot of pressure from small owners on the government. However, as some developers hold a significant or even deterministic percentage of ownership of the building, it is deemed to be impossible for the majority of small owners to terminate the employment of DMC manager. However, the proposed change in the Consultation Paper does not provide any cure to the problem. It can be foreseen that more and more small owners who suffered from the "exploitation" of the DMC manager will thus turn to seek political means instead of legal support to fight for their interest.

1.2.2 Contractors

To be fair, not all contractors are unethical and not all kinds of competition are healthy and beneficial to owners. The services of construction industries including building, amenities installation, maintenance and repairing cannot be evaluated without expertise and user experience for a significant long period of time. We understand that collective pricing was once a common approach to prevent vicious competition which resulted in the adverse phenomenon that the high quality service providers were driven out from the market by the low quality service providers. If the quality or standard of service cannot be well defined and enforced, price competition will only end up with tragedy. We still remember the lift casualties caused by under-quality maintenance. On the other hand, bid-rigging definitely harms the benefits of small owners as the user actually pay unjustified high price for the services procured. The modern building amenities include air-conditioning, fire equipments, water supply, drainage, electricity supply, telecommunication network and gas supply(in Chinese abbrievation , 風，火，水，電，煤), of which each is too complicated for a layman to fully understand how it works, be maintained and repaired. Sometimes we do not even have choices. Take lift and escalator as examples, once a brandname product is chosen, it is almost a lifetime engagement with the supplier. Without an efficient and secured market supply of parts, few third party service providers can compete with the manufacturer. Therefore, some unethical contractors take the advantages of the ignorance or inability of the final users to raise up the contract price and boost up the scale of project, sometimes alleged by small owners that they set the bidding price collusively with the management company. For people who know some more about construction industries, bid-rigging is just one of the many ways to acquire unjustified benefits. For instance, the cost of spalling repair varies tremendously according to the extent of damages. If the management company leaves the damages unattended for enough time, the cost may multiply by many times. Even worse is that the damages to the structure may never be recovered. The proposed amendment in the consultation paper does not directly deal with the problem but tries to motivate more owners to vote directly on choosing the service providers. We do not understand the logic anyway.

1.2.3 Political Activists and their Populist Copycats

Since the conflicts as mentioned above remain unresolved, desperate owners turn to political figures

for assistance. We have no intention to negate the function and achievement of political activists in fighting against injustice. Nevertheless, in some of the cases, we witness the wisdom of some old sayings like "Squeaky wheel gets the oil" and "Ignorant is fearless".

The freedom of speech endow us with the right to voice out our grievances. However, whether an outspoken complaints is justified or not is another issue. A complainant may be a whistle blower giving alarming signal to us or a Squeaky wheel intending to get more oil than it deserves. When our society keeps entertaining those noisy minority while penalizing or ignoring those silent working gear, more copycats will try to satisfy their personal desires by doing the same thing. Here are some real life examples:

I. An owner blamed the management company in the meeting for charging "skyhigh" MR and the current MC members were vicious as they allowed them to make such levy. In fact, the MR was about 3% of the total expenditure while the study carried out in 2016 by a political party show that the average MR was 5-7% on average. He was ignorant about the MR, not to mention the "Guideline for DMC" published by the Lands Department which permits a even higher rate of MR.
II. An owner claimed that the minimum wage was not applicable to clerical staff and got confirmation from the liaison officer of HAD. Then her followers were cheered up and jointly demanded for cutting the salary to a level less than the statutory amount. She misinterpreted the words of government official and misled the owners with false information.
III. An owner said that the voting system and the relevant law behind was unjust when his choice was voted down and said that head counting was just. Obviously, he had never thought about the adverse effect of head counting on ordinary owners when a car park owner who hold less than 1 tenth of UDS could have the same right as an ordinary unit owner.
IV. In order to cut the spending, an owner as an MC member repeatedly moved in every meeting for a resolution to stop the repair work of external wall defect that caused waterseepage in the premises of occupant, ignoring the explanation of estate manager and other MC members. In fact, he violated the rules of order and his opinion was dangerous in the light that the defect might cause public nuisance or casualties subject to serious penalty.

It is beyond our imagination if a building or housing estate is managed by laymen of theses kinds. However, the proposed amendments seems to recognize those "squeaky wheels" who are more eager to join the meeting in person and voice out their "outrageous" opinions.

2. Our Opinions on the Proposed Amendment

The Consultation Paper comprise of 9 parts of which part 1 through part VI discuss the amendments to the ordinance per se by section. To make it efficient, we only discuss those we do not accept

2.1 Amendment related to the Procurement and Large Scale Maintenance Project

2.1.1 Our Opinion on the Proposed Amendment

It seems to us that the proposed amendments rely on more extensive participation of owners especially those owners come in person to solve the bid-rigging problem. We do not understand its logic. When all the choices are bad choices, more attendants can do nothing with them. The meeting is just a roll call for owners to give a ritual recognition to something that they do not desire.

The owners situation becomes even worse if the project contain a repair work to be completed before a deadline under a statutory order. Even a majority of owners do not have the legitimate right to vote it down.

According to our practical experience, a lot of large-scale maintenance project are "manipulated" by adding renovation items intended for upgrading or beautifying the current facilities or decorations. When separating those critical repairs like spalling repair for structure on the must-do list from those optional items, most large scale maintenance may be crossed out for their optional nature. Hence, we should rely on reliable and experienced managers or MC members to carefully identify and classify the maintenance and repairing items according to their priorities. Any delay for those high priority work such as spalling and waterseepage does not save money but end up with losing more money. In dealing with professional work, to tell the truth, there is no room for mass opinions. On the contrary, those owners who are laymen will feel that they are forced by the proposed amendment to give their endorsement to the large scale project of which they have no sufficient knowledge to make a sensible choices. Therefore, we do not admit that the proposed change in the quorum and the percentage of personal owners is necessary and relevant.

2.1.2 Our Counter Proposal

Necessities must be separated from luxuries. We need a clearer definition of critical maintenance and repair work. As a matter of fact, all members of building management industry know very well what kind of jobs should be put on the top priority list. Some managers mess up the necessities with luxuries only because the administration fee create a strong incentive for them to initialize a large -scale project. We propose three amendments to the BMO

I. In the light that many of the grievances targeting on bid-rigging relate to DMC managers and their excessive power provided by DMC, adding a **Sunset Clause** for the employment term of DMC manager which automatically turns DMC manager into contract manager after some conditions have been met will solve the problem of this kind.
II. In all cases, all large scale maintenance and repair projects must be itemized and classified into critical works which completion are required by law or statutory order and optional items which may be chosen according to the free will of the majority of owners in the meeting.
III. Moreover, a **cooling-off period**, say 30 or 60 days, is required by BMO for the confirmation of the elected optional project which means that a two round voting is required.

2.2 Amendment to the Proxy Instruments

2.2.1 Lack of Operability and Logical Sense in Dealing with Bid-rigging

We believe that the proposed amendments to the proxy instrument is intended for curbing the suspected false proxies alleged by those owners who lose in the voting. Logically, in response to the allegation, we should develop some kinds of validation method to ensure that all proxies are true original documents as far as possible. Yet, once again, we do not understand the logical relation between the deterrence of false proxies and the new provisions including percentage limit of 1. proxy holding for one representative, 2. the failing of proxies in excess over the limit and 3. the voting intention in the proxy. If there is really bid-rigging activities by means of false proxies, all these deterrent measures can be easily disarmed by employing additional labours to hold all the necessary proxies in the meeting. However, for those faithful owners, the new mechanism can do

nothing but add complexity and workload to the working staff. In the absence of effective validation means, the proposed criminal charge of pretext in BMO is just a hollow threat. It is also a redundant provision with respect to the prevailing law.

Proxy is commonly used in commercial environment and its legitimacy is widely recognized in various jurisdictions. It should be noted that those people choosing to authorize representatives to act for themselves must have their own reason. Failing the proxy in excess over the limit is equivalent to the deprivation of their legitimate right to vote without attending the meeting. It will give rise to numerous disputes or lawsuits and is considered to be inconsistent with the provision of other ordinances.

It should be noted that all voting systems are unable to please all voters. Voting result must disappoint the losers by default. For some people, it seems that they never understand or accept a voting system under which they are the losers. The real problem to be dealt with is the bid-rigging but not the disappointment of losers in the voting. Once the problem is solved and all the owners are provided with good choices, they will feel happier than facing a number of bad choices.

2.2.2 Our Opinions on the Use of Proxy Instruments

If validation of the proxy is considered to be critical, additional marking like IO seal, serial number or third party certification should be employed. With all these measures, the law enforcement department will be easier and more confident in the determination of false proxy and in turn forming an effective deterrence to the potential offender.

2.3 Criminal Sanctions

2.3.1 Our Opinions on the New Penalty Provisions

Except a small number of ill-minded persons, those who volunteer to participate in the building management as MC members should have no intention to commit criminal offence. Nevertheless, it is quite easy for them to be alleged by owners who are harsh and mean when they perform their duties. In statistics, 5% is almost the lowest end of significance that is qualified to be taken into consideration. In the worst case, a building may divided into 20 minus rivalry groups at maximum based on this setting. Especially in some building or housing estate where there are a large number of small owners, it is too easy to motivate 5% of fanatic owners to act collectively against some members of the current MC or the MC as a whole. Let alone effective and efficient management, the stability of MC is undermined. The enthusiasm if owners to take part in the building management will be overshadowed by the threat of prosecution which can be triggered by the allegation of 5% owners and the burden of proving innocence is put on the prosecuted. The principle of the new provision indeed violates the spirit of our legal system. It is too easy to be abused by ill-minded people for achieving malicious purpose.

The proposal also reflects that the role of MC members as surveillance body are confused with the paid services provider. The liability of non-performance or the fault of estate managers and his staff is shifted to their surveillant according to the new provision. We do not understand its rationale.

2.3.2 Our Counter Proposal

In our opinions, in the practical environment, the non-performance of MC pursuant to BMO such as S26(i) and S27(3) as stipulated in the consultation paper is very often not the fault of MC member. Sometimes, it is not even the fault of the manager and his staff but the consequence of a lot of

factors out of their control. Again, the proposed provision equips the authority with a handy prosecution power without the need for collecting sufficient evidence but put the burden of proof to the prosecuted who are responsible for the surveillance only. In other words, the defender must seek and present evidence to prove his innocence in the court. However, the court is not the right place to perform the investigation.

Frankly speaking, in many cases, the above mentioned problem is found when there is a handover between management company or sessions of MC. The current management company or the current MC does not commit any mistake in reality. To be fair, the prosecution must be supported by investigation to ensure that the ultimate offender is penalized.

2.4 Regulation of Managers and Contractors

We are disappointed by the consultation paper because it does not mention any provision for the regulation of management company and contractors. They are the core of the problem and also the key parties of the solution to the problem. We do believe that those ethical professionals working in these industries welcome the regulation so that their competition will be more healthy. A comprehensive licensing and ranking system are viable methods to regulate all these service providers so that we do not have to pay too much effort in information searching and validation.

3. Conclusion

We can be quite sure that majority view cannot replace professional knowledge or guarantee righteous decision in handling problems involving scientific knowledge like maintenance and repairing. When there is conflict, both the community education and government intervention are needed. A good legal framework must incorporated the public view and professional knowledge in the provision and reconcile their conflict in a just and tactful way so that it can work properly in the practical environment. For layman of law like us, clarity, simplicity and operability are the indispensable qualities of good law. We hope that the amendments will equip us with a better BMO for the management of building in the future.

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