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Panel on Home Affairs

**Updated background brief prepared by the Legislative Council Secretariat
for the meeting on 27 November 2017**

Review of the Building Management Ordinance

Purpose

This paper summarizes previous discussions of the Panel on Home Affairs ("the Panel") on the review of the Building Management Ordinance (Cap. 344) ("BMO").

Background

2. BMO provides a legal framework for owners to form owners' corporations ("OCs") and to manage their buildings properly in accordance with the requirements of the legislation. BMO was last amended in 2007. In order to keep pace with changing circumstances and to address public concerns, the Secretary for Home Affairs appointed the Review Committee on the Building Management Ordinance ("the Review Committee") in January 2011 to conduct a comprehensive review of BMO.

3. In the light of the Review Committee's recommendations, the Administration published in November 2014 the consultation document entitled "Review of the Building Management Ordinance (Cap. 344)" ("Consultation Document") setting out a number of legislative and administrative proposals aiming to address concerns raised by the public in recent years, including the disputes arising from large-scale maintenance projects, use of proxies at OC meetings, as well as appointment and remuneration of deed of mutual covenant ("DMC") managers. The public consultation exercise was conducted between 11 November 2014 and 2 February 2015.

Panel's discussion

4. The Panel discussed the Consultation Document at its meeting on 17 November 2014 and held a special meeting on 24 January 2015 to receive views from deputations. At its meeting on 17 May 2016, the Panel was briefed

by the Administration on the outcome of the public consultation exercise, and the proposed way forward regarding the amendments to BMO. The Panel was subsequently consulted on the Administration's further legislative proposals and administrative measures at the meeting on 27 March 2017, and received public views at the special meeting on 4 May 2017. The major views and concerns of members expressed at these meetings are summarized in the ensuing paragraphs.

Bid-rigging and disputes relating to large-scale maintenance projects

Prevention of bid-rigging

5. Some members considered that the crux of the problem of bid-rigging in building maintenance projects laid in OCs' and owners' lack of expertise in planning building maintenance works, and queried whether the Administration's existing measures could adequately assist owners/OCs in the prevention of bid-rigging. It was suggested that these measures had to be complemented by corresponding amendments to BMO.

6. The Administration advised that it would continue to adopt a multi-pronged approach, including legislation, law enforcement, support and assistance to property owners to prevent bid-rigging. The Administration informed members that the Development Bureau was working closely with the Buildings Department, the Hong Kong Housing Society and the Urban Renewal Authority ("URA") to implement a number of schemes to help owners maintain and repair their buildings. URA would launch the Building Rehabilitation Facilitating Services in May 2016 to enhance technical and professional support for owners, which included providing guidelines and contract samples, arranging professionals to provide independent advice, establishing a tendering platform, etc. to help reduce the risk of bid-rigging. On the law enforcement front, the Hong Kong Police Force and the Independent Commission Against Corruption ("ICAC") would continue with their investigation and enforcement work, as appropriate, to combat illegal activities relating to large-scale maintenance projects.

7. To enhance the transparency of the tender process for large-scale maintenance projects, some members suggested that a "central database" capturing information on market prices for various maintenance items and past performance of consultants/contractors in the market should be established for reference by owners or OCs in planning building maintenance works and assessing the cost of maintenance. The Administration advised that ICAC had commissioned an independent academic institution to analyze the costs of maintenance projects completed under the Operation Building Bright and to explore the feasibility of setting up a renovation cost database for public reference.

Definition of "large-scale maintenance projects"

8. At the Panel meeting on 17 May 2016, some members suggested that the tiered system in respect of the definition of "large-scale maintenance projects" proposed by the Administration should be revised to take into account the fact that many building estates contained as many as 10 000 or more flats. They proposed that the tiered system should be divided into, say, small, medium and large housing estates or "100-1 000 flats", "1 001-5 000 flats", "5 001-10 000 flats" etc., based on which different costs for the definition of "large-scale maintenance projects" should be set. These members also expressed concern about the proposed high threshold of "40% of the annual budget of the OC" for the definition of "large-scale maintenance projects" which would mean that in some cases, only projects that cost over \$100 million could be regarded as a "large-scale maintenance project". There was also a view that a seven-day cooling-off period should be introduced in respect of large-scale maintenance projects to allow time for prudent consideration by owners.

9. At the Panel meeting on 27 March 2017, members noted that the Administration proposed to refine the tiered system by introducing a three-tier system, and to link the definition of "large-scale maintenance projects" with the average audited annual expenditure of OC for the past three years immediately before the maintenance proposal.¹ However, some members considered the proposed threshold for "Tier 1" (i.e. where the building contained more than 500 flats) too low, which would mean that some buildings classified as "Tier 1" with high annual expenditure would need to convene OC meetings very frequently to discuss "large-scale maintenance projects". Besides, some members expressed concerns that for "Tier 3" (i.e. where buildings contained not more than 100 flats), the proposed threshold was too high. There was also a view that as most of the buildings with less than 50 flats did not hire PMCs, there would be practical difficulties for their OCs to comply with the proposed requirement that the financial statements of OCs be audited.

10. The Administration advised that the three-tier system was proposed taking into consideration buildings/housing estates of various scales. Besides, as the annual budgets of OCs was only an estimate, there were risks that it might be artificially inflated to allow for a higher contract ceiling to circumvent the definition of large-scale maintenance projects. To prevent attempts to circumvent the definition of large-scale maintenance projects, the Administration proposed to link the definition of large-scale maintenance projects with the average audited annual expenditure of OC for the past three

¹ For details of the further proposed tiered system in respect of the definition of "large-scale maintenance projects", please refer to paragraph 11 of the Administration's paper (LC Paper No. CB(2)1038/16-17(03)).

years immediately before the maintenance proposal was put to OC for discussion. Nevertheless, the Administration was willing to consider the views of members and relevant stakeholders.

Quorum of general meeting for passage of resolutions on large-scale maintenance projects

11. The Administration proposed raising the quorum of the general meeting for passing resolutions on large-scale maintenance projects from 10% to 20% of the owners to encourage owners' participation in making such important decisions. At the Panel meeting on 27 March 2017, members noted that the Administration further proposed that at least 10% of the owners had to attend the OC meeting in person to decide on large-scale maintenance projects. Some members expressed concern that it was difficult to meet this requirement given the high threshold, and there would also be practical difficulties in arranging venues to accommodate the attendance of a large number of owners particularly for large housing estates. Some members suggested that the Administration might consider introducing a tiered system in respect of the quorum requirement which should be set based on the number of flats.

12. The Administration explained that the additional proposal that at least 10% of the owners had to attend the meeting in person aimed to address concerns about the appointment of a large number of proxies and the potential manipulation of proxies in connection with large-scale maintenance projects. Besides, as the current quorum requirement under BMO was also 10% of the owners, there was a need to cater for such turnout in planning for an OC meeting. The Administration advised that following the existing practice in venue arrangements, the common areas in housing estates, community halls and school halls could be used for holding OC meetings.

Enforcement and criminal sanctions

13. Some members considered that the mere provision of mediation and advisory services under various schemes launched by HAD could hardly address the issue of bid-rigging and the problems faced by property owners in the event that management committees ("MCs") of OCs failed to perform the duties under BMO or their members acted with wilful negligence/made unreasonable decisions, thus causing losses to individual owners. In these members' view, criminal sanctions should be provided in BMO to deter people, including MC members, from breaching the requirements of BMO. Some other members, however, considered that adding more criminal sanctions to BMO might deter people from serving as MC members.

14. The Administration advised that BMO sought to provide a legal

framework for owners to organize themselves to discharge their building management responsibilities. For example, there were penalty provisions in BMO with respect to OCs' non-compliance with the registration requirements, their furnishing of false information and failure to maintain proper records of account and procure third party risks insurance for the common parts of the building. Law enforcement agencies would investigate into any suspected unlawful activities in the course of building management and maintenance works in accordance with the law. The Competition Commission might also launch investigations into anti-competitive conducts such as bid-rigging pursuant to the Competition Ordinance (Cap. 619), and apply to the Competition Tribunal for imposing penalties.

15. At the Panel meeting on 27 March 2017, members noted that the Administration proposed to extend the criminal liability (currently applicable to MC members) to DMC Manager/PMC in case of failure to produce annual audited accounts or audited accounts as required by contract. Any contravention would be an offence and the party concerned would be liable on conviction to a fine at level five. Furthermore, the Administration proposed to impose a criminal liability on DMC Manager/PMC/MC Members for non-compliance with the requirements for proper safekeeping and circulation of minutes of MC/OC meetings as well as safekeeping of tender documents. Any contravention would be an offence and the party concerned would be liable on conviction to a fine at level two. There was a view that these provisions were rather narrow in scope and the penalty level too lenient to achieve adequate deterrent effect. However, some members considered that as owners served as MC members on a voluntary basis, adding too many criminal sanctions in BMO might discourage owners from serving on MC.

16. Some members suggested that the Administration should consider setting up a Building Affairs Tribunal to hear relevant cases so as to avoid incurring large amount of litigation costs to owners. They also considered that the Liaison Officers ("LOs") lacked the authority and power to resolve disputes relating to building management and maintenance. While expressing support for strengthening the manpower of LOs, members suggested that enhanced training should be provided to LOs so that they would provide better support in handling building management disputes.

17. The Administration advised that HAD had been encouraging the parties in dispute to resolve their conflicts through mediation and other dispute resolution arrangements. In addition, training would be provided for LOs to facilitate their effective implementation of building management work. Furthermore, to facilitate the resolution of some building management disputes, the Administration proposed in March 2017 to launch the Building Management Dispute Resolution Service as a pilot scheme for two years. The service, to be

chaired by a retired Judge, would assume a "quasi-adjudication" function in offering neutral, authoritative, written pre-litigation advice to case applicant(s).

Formation and operation of Owners Committees

18. Some members considered that OC formation should not be a mandatory requirement, given the difference in the number of property units involved in different buildings/estates and the varied needs of property owners.

19. The Administration advised that formation of OCs was one of the tools for effective building management. Owners might also opt to form other types of owners' organizations including owners' committees, mutual aid committees or other residents' associations, having regard to their specific needs and preferences and the actual circumstances of the buildings. In response to members' concerns about the difficulties in the formation of OCs for "three-nil" buildings, the Administration advised that through engaging property management companies to provide assistance to these buildings, HAD had succeeded in assisting some 400 in forming OCs amongst some 2 000 "three-nil" buildings in Hong Kong. Besides, HAD had recruited more than 2 000 owners/residents of "three-nil" buildings to serve as Resident Liaison Ambassadors for promoting better management of their buildings. They would assist the Government in contacting residents with a view to forming OCs in the long run.

20. In response to members' enquiries on the operation of OCs, the Administration advised that owners could apply to the Lands Tribunal in the event that the MC Chairman did not convene a general meeting upon the request of not less than 5% of owners. However, some members suggested that it should be HAD rather than the Lands Tribunal to take up the responsibility of convening and chairing the general meeting under such circumstances. Some members also suggested that the Administration should take measures to resolve the situation that the operation of OC came to a standstill due to disputes between the old and the new OCs during their handover. They considered that the Government should have the power to require convening a general meeting of OC in this situation.

21. Regarding the proposal that the Authority should be empowered to, at the request of not less than 5% of the owners, dissolve the non-performing MC, there was a view that for such an important decision, the required percentage should be raised to 10% of the owners.

Collection and verification of proxy instruments

22. Noting the Administration's proposed amendments to BMO to stipulate that the proxy instrument should be lodged with the MC Secretary at least 72 hours

before the meeting,² some members suggested that this new measure should be complemented with the introduction of sanctions in order to ensure compliance. With regard to the proposed requirement that the list of flats with proxy instruments lodged should be displayed in a prominent place of the building at least 24 hours before the OC meeting and until seven days after the meeting, some members considered that to facilitate verification, the 24 hour-requirement should be further extended.

23. Some members expressed support for the proposed arrangement that the maximum number of proxy instruments a person could hold should not exceed 5% of the owners.³ It was suggested that a random checking mechanism should be put in place to ensure compliance, and that the name of the person holding 5% of proxy instrument should be disclosed to enhance transparency. Concern was also raised as to how to ensure that the holder of the proxy really voted in accordance with the owner's voting instruction in the proxy instrument, and whether the Administration would prohibit improper practices such as involvement of monetary interests in soliciting proxy instruments from owners. There was a suggestion that the Administration should designate its staff to collect and verify proxy instruments for the OC meetings concerned at the request of not less than 5% of the owners.

24. The Administration advised that under section 36 of BMO, furnishing false information under BMO was criminally liable. To make any manipulation of proxy instruments more difficult, the Administration had further proposed a set of new requirements⁴ which sought to enhance the transparency of the use of proxy instruments, facilitate owners to verify proxy instruments, and facilitate investigation into and prosecution against the use of

² Please see Annex 4 ("Proposed Amendments to Proxy Arrangements") to LC Paper No. CB(2)1502/15-16(03).

³ Please see Annex 4 ("Proposed Amendments to Proxy Arrangements") to LC Paper No. CB(2)1502/15-16(03).

⁴ To make any manipulation of proxies more difficult, the Administration further proposed to implement the following requirements:

- (i) owners may include their voting instructions in the proxy instruments;
- (ii) the proxy instrument should be countersigned by the proxy, so that the proxy would know the percentage of owners appointing him and such percentage should not exceed 5% of the owners;
- (iii) holders of the proxies should make a declaration that the proxies they hold are honestly procured from the respective owners concerned and are true and accurate representation of the said owners' voting instruction;
- (iv) MC Secretary should disclose the name of any person holding proxies of 5% of the owners (and any person, whether attending in person or appointing proxy, holding 5% or more of the aggregate shares) on a list to be displayed pursuant to paragraph 4(5)(a)(ii) of Schedule 3 to BMO; and
- (v) OC should keep the record of the proxies and the declaration in item (iii) above for at least three years.

fabricated proxy instruments. In addition, the Administration would consider providing a template proxy form which would include three parts as follows: (i) the personal particulars and other details of the owners and the proxy holders; (ii) owners' voting instruction; and (iii) the signature/declaration by the owners and proxy holders. After verification, part (ii) of the proxy form could be torn out for the purpose of voting. The Administration considered that the proposals would further enhance the protection of owners. The Administration explained that as building management was the responsibility of private owners, it was inappropriate for the Administration to intervene too much.

Matters relating to deeds of mutual covenant

25. Concern was raised about the difficulties encountered by owners in forming OCs and owners' committees due to unfair terms and conditions in some old DMCs drawn up by property developers. An example of such problem was the unfair allocation of undivided shares and management shares between owners and developers, where the developers might have a large number of undivided shares but only needed to pay a small amount of management expenses. The Administration was urged to consider introducing the concept of "user-pays" principle to BMO by imposing a mandatory requirement on separation of accounts and budgets for the residential and commercial parts in composite developments. Some other members also suggested that the Administration should consider providing standard provisions of DMC for estate developers to follow.

26. According to the Administration, there might be practical difficulties to have separate accounts and budgets for residential and commercial parts of composite developments under certain circumstances, as in the cases where restaurants and shops were located on the first few floors while residential units were located on the upper floors sharing common facilities such as water tanks, sewers and drains. Owners should have the joint responsibility for managing and maintaining these common and inseparable facilities. DMCs had to be approved by LandsD and drawn up in line with the "Guidelines for Deeds of Mutual Covenant" which regulated the remit of developers, owners and managers. With regard to the suggestion of standardizing the DMC provisions, the Administration would refer members' concern to LandsD for its consideration. It was also pointed out that DMC was a private deed among the parties who entered into it and no party to a DMC should unilaterally modify any provisions in DMC without the consent of all other parties.

Termination of DMC managers

27. Members expressed grave concern about the difficulties encountered by owners in terminating the appointment of DMC managers. Some members expressed support for lowering the threshold for terminating the appointment of

DMC managers from 50% to 30% of shares in aggregate, as well as limiting the term of appointment of DMC managers to five years. However, concern was raised that lowering the threshold for terminating the appointment of DMC managers to 30% of shares in aggregate might result in a paradox that the decision of appointing the DMC manager previously supported by owners of not less than 50% of the shares in aggregate was overruled by a resolution with 30% of shares in aggregate.

28. At the Panel meeting on 17 May 2016, the Administration advised that in order to strike a proper balance between ensuring stability in building management and provision of services and allowing owners to terminate the appointment of non-performing DMC managers when needed, it was proposed to maintain the existing threshold for terminating the appointment of DMC managers. The Administration also proposed an additional arrangement that the term of appointment of DMC managers would be automatically terminated five years after the formation of OC, and by then the OC might enter into a new contract and negotiate new contract terms (such as the tenure of appointment, remuneration, etc.) with the existing DMC manager or engage a new manager/service provider through open tender.

29. Some members, however, considered that the threshold should be lowered to 30% of shares of owners, as they noted that section 3 of BMO only required a resolution of owners of not less than 30% of the shares for the formation of OC. In response to members' enquiry as to whether the shares of common areas would be counted when calculating the threshold of "50% of the owners" in the context of termination of appointment of DMC managers, the Administration advised that it was already stipulated in DMCs of some new buildings that only owners of shares who were liable to pay management fees would be entitled to vote in the resolution on the appointment of MC and the formation of OC.

30. Regarding the proposed arrangement that the term of appointment of DMC managers would be automatically terminated five years after the formation of OC, concern was raised that, for those buildings which were unable to form OC, the appointment of the DMC managers might continue indefinitely.

Legislative timetable

31. At the meeting on 27 March 2017, the Administration advised the Panel that it would consult the Department of Justice on the legal aspects for implementation of the proposals. The Administration would prepare the draft amendment bill to be introduced into the Legislative Council and consult the relevant stakeholders. The Administration further advised that given the time

required to amend BMO, the Administration planned to include those proposals, which were not in conflict with BMO, in the Code of Practice ("CoP")⁵ as best practices, so as to address public concerns on the arrangements for procurement and proxy instruments by OCs as soon as practicable. The Administration would encourage OCs to adopt those proposals as far as practicable.

Latest developments

32. A Member's motion on "Combating bid-rigging to defend the rights and interests of property owners" was passed at the Council meeting of 7 June 2017, and the progress report provided by the Administration was issued to Members vide LC Paper No. CB(3)870/16-17 on 10 October 2017.

33. The Administration will consult the Panel on the enhanced proposals on legislative amendments of BMO and administrative support measures at the next meeting on 27 November 2017.

Relevant papers

34. A list of relevant papers on the Legislative Council website is in the **Appendix**.

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⁵ Pursuant to section 44 of BMO, the Authority may issue CoP to give guidance and direction as to the standards and practices of management, among others, to be observed and followed by an OC. While a failure to observe any CoP per se is not liable to criminal proceedings, any such failure may, in any proceedings whether civil or criminal including proceedings for an offence under BMO, be relied upon as tending to establish or to negative any liability which is in question in those proceedings.

**Relevant papers on
Review of the Building Management Ordinance**

Committee	Date of meeting	Paper
Panel on Home Affairs ("HA Panel")	28.5.2013 (Item V)	Agenda Minutes Administration's follow-up paper on the specific provisions of the Building Management Ordinance (Cap. 344) which prevail over the terms of deeds of mutual covenant in the event of inconsistency between the two (LC Paper No. CB(2)1459/12-13(01))
	17.11.2014 (Item IV)	Agenda Minutes
	24.1.2015 (Item I)	Agenda Minutes
Legislative Council	10.6.2015	Motion on "Stepping up regulation on the repair and maintenance works of private buildings" Progress report on the motion
	2.12.2015	Motion on "Combating acts of bid-rigging in repair works of private residential buildings" Progress report on the motion
HA Panel	17.5.2016 (Item III)	Agenda Minutes
	27.3.2017 (Item IV)	Agenda Minutes

Legislative Council	7.6.2017	Motion on "Combating bid-rigging to defend the rights and interests of property owners" Progress report on the motion
HA Panel	4.5.2017 (Item I)	Agenda

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