CB(2)2144/99-00(01)

政府總部民政事務局的信頭
Letterhead of GOVERNMENT SECRETARIAT HOME AFFAIRS BUREAU

本局檔號 OUR REF. : S/F(3) in HAB/CR/8/10/12 Pt. 10
來函檔號 YOUR REF. :
電話號碼 TEL.NO. : 2835 1168
圖文傳真 FAXLINE : 2591 6002

25 May 2000

The Hon. Cheng Kai-nam
Room 523B, West Wing
Central Government Offices
Hong Kong

Dear

Building Management (Amendment) Bill 2000
Committee stage amendments

The Legal Adviser to the Bills Committee on the Building Management (Amendment) Bill 2000 has sought the Administration's comments on the legal and drafting aspects of your proposed Committee Stage Amendments (CSAs) to the Bill.

As you will recall, the Administration has responded to most of your proposed CSAs vide Papers CB(2)1258/99-00(01), CB(2)1489/99-00(01), CB(2)1570/99-00(02) and CB(2)1740/99-00(01) presented to the Bills Committee earlier. The last paper, in particular, attempted to address directly the points raised by you and the Hon Albert Ho. As you will notice, some of these CSAs have been incorporated into the latest draft CSAs presented by the Administration to the Bills Committee. These include (a) lowering the percentage share threshold for appointing management committees in existing buildings (to 30%, 20% and 10% as

the case may be); and (b) stipulating that the shares allocated to common areas do not carry voting rights in a resolution to consider the termination of the building manager's appointment.

Having studied the latest draft of your proposed CSAs carefully, I regret to inform that the Administration is unable to take them on board on both principle and practical grounds. Some of the proposed amendments will have serious and fundamental implications for the Building Management Ordinance (BMO). The rationale behind our consideration is set out below.

Mandatory establishment of a contingency fund

Under the existing law, Owners' Corporations (OCs) are required to set up ***a general fund*** to pay for the various expenses arising from, among other things, the obligations stipulated in the BMO, the deed of mutual covenant (DMC) and maintenance/repairs works. The ambit of such a fund should be able to meet the basic and general needs of the OC. On the other hand, the primary purpose of setting up a contingency fund is to make provisions for "unexpected and urgent" expenditure that may be incurred by an OC in exceptional circumstances. In deciding whether to set up an additional fund, an OC will have consider, among others, the need for such a fund and the financial situation of the owners. To make the establishment and maintenance of a contingency fund a mandatory requirement may impose an additional financial and administrative burden on the OCs, especially those with a small number of owners. Indeed, the OCs can always set aside within the general fund an amount to cater for emergency situations. It is therefore the Administration's view that we should leave to the OCs to decide whether or not a contingency fund needs to be set up.

Amendment of DMCs

We have grave reservations about the proposal to provide for amendment of the DMCs in the BMO particularly with less than unanimous consent. The proposal will have serious implications for the rights and obligations of parties to the DMCs (i.e. all owners, the manager and the developer) since property rights, which are guaranteed under Basic Law (BL) Articles 6 and 105, may be adversely affected by a decision taken by a relatively limited number of owners. The Administration therefore has fundamental difficulties with members

pursuing such a proposal particularly since it has not been subject to any public consultation. We are also of the view that the proposed amendment falls outside the ambit of the Bill and hence should be disallowed.

Apart from objection on grounds of principles, the mechanism for introducing amendments to the DMC will need to be very carefully thought out to minimize implementation difficulties. Some of the immediate and practical questions that come to mind include: under what circumstances will the Lands Tribunal reject or modify the amendments made to the DMCs? What is the justification for setting the percentage thresholds of the proposed Sections 34M(5) and (8) at 5% and 75% respectively? Why only a "Corporation" (as opposed to owners without an OC) has the right to vary the DMCs by resolution? Is there any redress for an owner (or a group of owners) who is not party to the decision to amend the DMC but come to know about it after 28 days of the adoption of the resolution (e.g. due to his absence from Hong Kong)? Is the Lands Tribunal's decision final? If not, will the proposed mechanism result in an endless loop of litigation? We believe that more careful thoughts should be given to these questions and that the public should be more widely consulted on the proposal before a legislative amendment is made.

Quorum of meeting

The proposal to include an absolute number (as opposed to percentage) of owners as an alternative criterion for forming the quorum may create absurdities for the large developments. Under the proposal, the percentage of owners required to form a quorum in, say a large estate with 4,000 owners, will be reduced from 10% to 2.5% (and from 20% to 5% in case of dissolution of management committee). The proposal may thus create a situation whereby a matter of importance to all owners are decided by a very small percentage of owners. The Administration is of the view that the current requirements of 10% and 20% of owners caters well for the need to facilitate the formation of quorum and to ensure the credibility of the decisions taken by the OCs.

In this connection, we note that your other proposal is to increase the quorum requirement for a meeting to consider the termination of the building manager's appointment from 10% to 20% of owners. We would be grateful to know the rationale behind the proposal.

Enumeration of number of owners

We believe your proposal to set out more clearly the enumeration of owners has already been catered for by the Administration's proposed CSAs (the new section 5B and the Eleventh Schedule). We consider it not necessary to repeat the CSAs in the Third Schedule.

Termination of manager's appointment

As mentioned in paragraph 2 above, the Administration has included in its latest CSAs a proposal to revise the threshold for a decision to terminate the building manager's appointment to not less than 50% of the shares *that are eligible to vote*. Our latest proposal represents a further improvement to the current requirement and aims to strike a balance between the need to expedite the procedure for terminating the manager's appointment where necessary and the need to avoid undue disruption to building management. Your proposal to change the basis of decision-making to resolution by a majority of votes of the owners present at the meeting however runs the risk of reducing the decision-making threshold to a very low percentage. As the current arrangements have not encountered major problems since its implementation in 1993, we consider that there is no need to introduce a drastic change at this stage.

The Administration would very much like to see the passage of the Bill within this legislative session. I hope you can give serious consideration to our above comments and consider the possibility of withdrawing the CSAs. I am happy to discuss with your further at your convenience.

Please do not hesitate to contact me or Mr Edward Chu at 2835 1485 if you wish to discuss further.

Yours sincerely,

(Mrs. Betty Fung)
for Secretary for Home Affairs

c.c. Ms. Flora Tai, Clerk to Bills Committee

Mr. Stephen Lam, Assistant Legal Advisor