Review of the Building Management Ordinance (Cap. 344)

Consultation Paper

Home Affairs Department
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Designed by the Information Services Department
Hong Kong Special Administrative Region Government

Public Consultation on
Review of the Building Management Ordinance

Content

Abbreviations

BAT	Building Affairs Tribunal
BMO	Building Management Ordinance (Cap. 344)
BMPASS	Building Management Professional Advisory Service Scheme
DMC	Deed of Mutual Covenant
HAD	Home Affairs Department
LegCo	Legislative Council
MC	Management Committee
OC	Owners' Corporation
PMC	Property Management Company
Review Committee	Review Committee on the Building Management Ordinance
SHA	Secretary for Home Affairs
SRPA	Sales of First-hand Residential Properties Authority

EXECUTIVE SUMMARY

Ownership of private properties comes with both rights and responsibilities. The Building Management Ordinance (BMO) (Chapter 344) provides a legal framework for owners to organise themselves to discharge their building management responsibilities. To cope with the changing needs and circumstances of building management, the Government has established the Review Committee on the Building Management Ordinance (the Review Committee) to conduct a comprehensive review of the BMO.

2. In the light of the Review Committee's recommendations, the Government would like to consult the public on a number of legislative and administrative proposals which may help address the main concerns raised by the public in recent years, including the disputes arising from large-scale maintenance projects, use of proxies at owners' corporation (OC) meetings, appointment and remuneration of deed of mutual covenant (DMC) managers, etc.

Encouraging Greater Participation by Owners in Implementing Large-scale Maintenance Projects

3. With a growing number of aged buildings in Hong Kong that need to undergo major maintenance or renovation, disputes among owners relating to large-scale maintenance projects have become increasingly common. To ensure that there has been thorough discussion and wide participation by the owners before a decision on large-scale maintenance project is made, consideration may be given to adopting either one of the following two options –

(a) the quorum of the meeting be raised from 10% to, say 20%, of the total number of owners; or

(b) the required percentage of shares of votes for the passage of the resolution be raised from 50% to, say 75%, of the shares of votes at the meeting.

In the event a higher threshold for passing resolution is to be imposed, consideration should be given as to how "large-scale maintenance projects" should be defined in the BMO.

4. As a further step to enhance owners' participation, we propose that the BMO be amended such that the notice of the OC meeting at which voting of resolutions on large-scale maintenance projects will take place should be given to all the owners at least 21 days before holding of the meeting (as opposed to the existing 14 days' notice). The notice of the meeting should also carry a conspicuous "alert" that decision(s) to be taken at the OC meeting may result in contribution of funds exceeding a specified amount by each owner. Furthermore, we suggest stipulating in the BMO additional requirements on the tender process to raise transparency and facilitate owners' monitoring. These may include, for example, displaying a copy of the invitation to tender at a prominent place of the building, allowing inspection of the tender documents by owners, etc.

5. Paragraph 1(2) of Schedule 3 to the BMO provides that the Chairman of the management committee (MC) shall convene a general meeting of the OC at the request of not less than 5% of the owners for the purposes specified by such owners. There are allegations that while aggrieved owners request the MC Chairman to convene a general meeting to revive discussions on a decision to carry out large-scale maintenance project, the MC Chairman deliberately places many unrelated items on the agenda, thus leaving very little time to discuss the requested item or even deferring the item to a future meeting. Another allegation is that the MC Chairman resigns but the MC refuses to fill the vacancy in accordance with the by-election mechanism stipulated in the BMO, thus preventing the convening of an OC meeting.

6. To address the above concerns, we would like to invite public views on the following proposals –

(a) the MC Chairman is required to place the discussion item requested by the owners on a high priority on the agenda; and

(b) when the office of the MC Chairman is vacant, the Vice-chairman should convene the general meeting in place of the Chairman; where no Vice-chairman is elected, the MC should appoint one of its members to convene the general meeting; and where the MC fails to appoint any

member to convene the general meeting, those owners who have requested to convene the general meeting may nominate a representative among themselves to convene the general meeting.

Tightening the Requirements Concerning the Collection and Verification of Proxy Instruments

7. For those owners who are unable to attend OC meetings to cast their votes in person, the BMO allows them to appoint proxy. There are allegations about improper practices adopted by the MC Chairman and the MC Secretary or the convenor of owners' meeting in the collection and verification of proxy instruments, such as refusing to accept valid proxy instruments or ruling proxy instruments invalid without justification. There are also allegations about the use of counterfeit proxy instruments. To address such concerns, we propose a package of measures be adopted to tighten the arrangements. These include –

(a) the MC Secretary/convenor will be required to state clearly in the notice of meeting as to the exact location of the proxy collection boxes and the timing for opening the boxes to inspect and count the proxy;

(b) the proxy boxes should be double-locked and placed in a prominent location of the building. The two keys of each box should be held by the MC Secretary/convenor and a third party respectively. The boxes should be opened by the two key holders in the presence of witnesses;

(c) only the original copy of the proxy instruments should be accepted;

(d) in addition to acknowledging receipt of the proxy instrument by leaving a receipt at the flat of the owner who made the instrument or depositing the receipt in the letter box for that flat, the MC Secretary/convenor should be provided with an additional option of passing the receipts to the owners in person;

(e) the list of flats with proxy instruments lodged should be displayed in a prominent place of the building at least 24 hours before the meeting and until seven days after the meeting; and

(f) the MC Chairman/convenor should mark on each proxy instrument the reasons for invalidation and allow representatives of owners and the appointed third party to inspect invalidated proxy instruments and to appeal against the invalidation with justifications.

Formation of OCs

8. Under section 3(1)(c) of the BMO, owners of not less than 5% of the shares in aggregate may appoint a person amongst themselves to convene an owners' meeting for the purpose of appointing an MC and forming an OC. A resolution to appoint an MC and to form an OC shall be passed by a majority of votes at the meeting, and be supported by the owners of not less than 30% of shares in aggregate.

9. Very often large housing estates where a large number of owners are involved and those estates where the developer holds a large share of ownership have difficulty in gathering sufficient percentage of shares in aggregate to form an OC. Bearing in mind the need to strike a balance between facilitating the formation of an OC on the one hand and ensuring that such decision has the general support of owners on the other, we would like to seek public views on the suggestion of lowering the threshold for OC formation from 30% to 20% of shares in aggregate.

10. The convenor plays an important role in the OC formation process. To ensure the integrity of the convenor, we propose to impose eligibility criteria on the convenor similar to those currently applied to MC members under paragraph 4(1) of Schedule 2 to the BMO.

Appointment and Remuneration of DMC Managers

(I) Termination of the Appointment of DMC Managers

11. Under paragraph 7(1) of Schedule 7 to the BMO, a resolution to terminate the appointment of a DMC manager has to be passed by a majority of votes at a general meeting of the OC and be supported by the owners of not less than 50% of the shares in aggregate. Although there are views that the existing requirements can ensure stability in the management of the building, some owners strongly request that the requirements should be relaxed so that they can terminate the appointment of non-performing DMC managers more flexibly.

12. To address the owners' concern, we would like to seek public views on the following two options –

(a) lowering the threshold for terminating the appointment of DMC managers from 50% to 30% of shares in aggregate; or

(b) limiting the term of appointment of DMC managers to five years with detailed procedures as follows –

(i) during the first to second years of appointment, the DMC manager should assist the owners either to form an OC, or to appoint an owners' committee, or to appoint an owner to sign the contract with the next service provider;

(ii) during the third to fifth years of appointment of the DMC manager, the owners may pass a resolution with 30% of shares in aggregate to appoint a new service provider through open tender; and

(iii) if the owners decide to retain the service of the original manager after the fifth year, they may negotiate new contract terms such as the tenure of appointment, remuneration, etc. and enter into a new contract with the existing manager.

(II) Remuneration of DMC Managers

13. The remuneration of the DMC manager is governed by the DMC Guidelines issued by the Legal Advisory and Conveyancing Office of the Lands Department. Some owners are concerned that the existing mechanism, which links the remuneration rate to the total expenses, induces the DMC managers to spend more so as to increase their remuneration. They also raise concern that there is a lack of transparency in the charges paid to the DMC managers.

14. In view of the above concerns, we would like to invite public views on the following proposals –

(a) reducing the ceiling on the remuneration rate of DMC manager by a specified percentage each year, as the service and overhead costs incurred by the DMC manager may decrease with the accumulation of experience in serving the development;

(b) setting lower ceilings on the remuneration rates of DMC managers for large scale developments as the manager should be able to achieve economies of scale. For example, developments with over 300, 500, 700 and 1000 (and so on) residential units and parking spaces will be subject to different ceilings;

(c) excluding a specified list of expenditure items which do not involve any value-added services by the DMC manager (e.g. electricity charges, water bills, etc.) from the formula for calculating the remuneration of the DMC manager; and

(d) for certain expenditure items incurred by the headquarters or parent company of the DMC manager (e.g. services provided by the DMC manager's accountants who serve more than one developments), the DMC manager should provide the owners with a detailed breakdown on how the service fee of the headquarters/parent company is apportioned among the developments they serve.

As the above proposals may have great impact on the level of remuneration of DMC managers, consideration should be given to whether the proposed arrangements, if implemented, should be

applicable to new and existing developments or to new developments only.

15. We understand that many of the proposals put forward in this consultation paper have significant implications on the management of private properties, its owners and the relevant industries. Members of the public, in particular property owners, are encouraged to offer comments and suggestions on the above and other issues during the public consultation period.

Chapter 1

Introduction

(I) Background

1.1 Ownership of private properties comes with both rights and responsibilities. The concerted efforts and earnest co-operation of owners are of paramount importance in the management of properties, especially multi-storey buildings where the management of common parts and facilities such as external walls, staircases, roofs and lifts is involved. The prerequisite to effective building management is that all owners are aware that it is in their own interests to participate actively in building management.

1.2 Formation of OCs is one of the tools for effective building management. Owners may also opt to form other types of owners' organisations including owners' committees, mutual aid committees or other residents' associations, having regard to their own preferences and the actual circumstances of the buildings.

1.3 The BMO provides a legal framework for owners to organise themselves to discharge their building management responsibilities. The BMO empowers owners to form OCs which in turn carry out its duties through the MC appointed by owners. As circumstances vary among buildings, owners will need an appropriate degree of autonomy in deciding the detailed procedures for the operation of their OCs. Hence, the BMO is crafted with the aim of striking a balance between the provision of an effective legal framework for the orderly operation of OCs and the need to avoid undue interference with owners' autonomy in managing their private properties. To cope with the changing needs and circumstances of building management, the Government has reviewed and revised the BMO from time to time, and published a series of building management guidelines to assist owners to implement the BMO provisions.

1.4 The work of an OC is carried out mainly through the MC appointed by owners. The BMO seeks to provide effective monitoring of the work of the OC through the following–

(a) **Monitoring by Owners:** The BMO clearly stipulates the rights of owners in the participation of the affairs of OC. For instance, the owners of not less than 5% of the shares in aggregate may request to convene a meeting of the owners; an owner may attend a meeting of the owners to vote in person or by proxy, etc.

(b) **Rulings of the Lands Tribunal:** According to section 45 of the BMO, the Lands Tribunal has the jurisdiction to hear and determine any proceedings specified in Schedule 10 to the BMO, which include interpretation and enforcement of the provisions of the BMO or the DMC, powers and duties of the OC, etc.

(II) Role of the Home Affairs Department

1.5 The Home Affairs Department (HAD) plays the role of a facilitator in assisting owners to carry out their building management responsibilities. We provide support to owners and OCs through various means, such as attending OC meetings upon invitation, answering enquiries of owners on building management, etc. HAD also organises various training programmes on building management such as seminars, workshops, talks, etc. to enhance the knowledge and capability of owners in building management. In the past five years, on average around 100 building management training programmes, with a total of about 4 000 participants, have been held each year.

1.6 In addition, HAD has introduced a number of new measures in recent years to provide targeted assistance to owners, including –

(a) Measures Targeting "Three-nil" Buildings[1]

(i) ***Building Management Professional Advisory Service Scheme (BMPASS)***: HAD has engaged professional property management companies to provide the target "three-nil" buildings with one-stop and customised professional advice and support, including conducting management audits for the fire services, electrical and other public facilities of the buildings; assisting the owners in forming OCs or reactivating defunct OCs, and supporting the operation of the OCs; assisting the OCs in applying for various subsidy or loan schemes; as well as assisting the OCs in taking forward maintenance works.

(ii) ***Resident Liaison Ambassador Scheme***: HAD has recruited owners and tenants who live in buildings aged 30 years or above and without any form of management as Resident Liaison Ambassadors to discuss and handle daily building management matters, and assist them in forming OCs.

(b) Enhancing Owners' Capability to Manage Their Buildings

(iii) ***"AP Easy" Building Maintenance Advisory Service Scheme***: members of three professional institutes, namely the Hong Kong Institute of Surveyors, the Hong Kong Institution of Engineers and the Hong Kong Institute of Architects, have formed expert teams to render on a voluntary basis professional advice and support to the OCs in need and to assist them in commissioning consultants by tender for taking forward maintenance works.

(iv) ***LEAD Programme***: tertiary institutions are engaged to provide structured training for MC members to enhance

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1 "Three nil" buildings refer to those buildings that are without OCs, residents' organisations or property management companies (PMCs).

their professional knowledge in building management. Graduates have also formed the BM Link[2]. Apart from regular meetings for strengthening ties, they also actively promote quality building management in the community through outreach activities.

(c) Other Assistance

(v) ***Panel of Advisors on Building Management Disputes***: professionals with rich experience and knowledge in building management are engaged to analyse cases and render impartial professional advice to OCs and owners in dispute.

(vi) ***Community Care Fund - Subsidy for Owners' Corporations of Old Buildings***: a maximum subsidy of $20,000 is provided to eligible OCs of old buildings for paying the expenses of registration and filing with the Land Registry, third party risks insurance for the common parts, inspection of fire services and electrical equipment and clearance of fire escapes.

(III) Review of the Building Management Ordinance

1.7 The BMO was last amended in 2007. In 2011, the Government started another round of review of the BMO and established the Review Committee. The Review Committee comprises members from the relevant professional fields such as legal, accounting, engineering and property management sectors, as well as Legislative Council (LegCo) Members with rich knowledge in building management. The Review Committee published its interim report in March 2013 (http://www.buildingmgt.gov.hk/pdf/bmo_review_interim_report_eng_final.pdf).

[2] BM Link is a platform established by the HAD in June 2012 for graduates of the LEAD Programme. Through experience sharing and regular outreaching programmes by the BM Link members as "community mentors", it aims to promote mutual help and foster a building care culture in the community.

1.8 The Review Committee has completed the review and put forward a series of recommendations with a view to improving the legal and administrative framework for building management. It has also deliberated on a number of issues on which views from the public and relevant stakeholders would be welcomed. In the light of the Review Committee's recommendations, the Government would like to consult the public on a number of legislative and administrative proposals which may help address the main concerns raised by the public in recent years, including the disputes arising from large-scale maintenance projects, use of proxies at OC meetings, appointment and remuneration of DMC managers, etc. As many of the proposals put forward in this consultation paper have implications on the management of private properties, its owners and the relevant industries, members of the public, in particular property owners, are encouraged to offer comments and suggestions on the above and other issues during the public consultation period.

Chapter 2

Operation of Management Committees and Owners' Corporations

2.1 An OC is an independent body corporate set up under the BMO. It may exercise and perform the rights, powers, privileges and duties of the owners with respect to the control, management, administration, renovation and improvement of the common parts of the building. There have been concerns and complaints in recent years regarding the way the OCs operate when carrying out large-scale maintenance projects for the buildings.

(I) Bid-rigging and Disputes Relating to Large-scale Maintenance Projects

2.2 With a growing number of aged buildings in Hong Kong that need to undergo major maintenance or renovation, disputes among owners relating to large-scale maintenance projects have become increasingly common. There have been allegations that bid-rigging activities are involved in the tendering of these projects. While the law enforcement agencies such as the Police and the Independent Commission Against Corruption have adopted a multi-pronged approach to prevent unlawful activities in the course of building maintenance works, there have been calls for tightening the requirements relating to the passage of resolutions on large-scale maintenance projects at OC meetings and ensuring that the decision to proceed with such projects are made after thorough discussion and active participation by a majority of the owners. The ensuing paragraphs outline possible amendments to the BMO that may help address the problem.

(a) Quorum and Percentage of Votes for Large-scale Maintenance Projects

2.3 Section 20A(2) of the BMO requires that any supplies, goods or services the value of which exceeds or is likely to exceed the sum of $200,000 or a sum which is equivalent to 20% of the annual

budget of the OC, whichever is lesser, shall be procured by tenders. For the latter category of procurement (i.e. of an amount exceeding 20% of the annual budget of the OC), the decision on whether a tender is accepted or not require the passage of a resolution of the owners passed at a general meeting of the OC.

2.4 Paragraph 5(1) of Schedule 3 to BMO stipulates, amongst others, that the quorum of an OC meeting shall be 10% of the owners. Paragraph 3(3) of Schedule 3 to the BMO provides that all matters considered at OC meetings shall be decided by a majority of the votes of the owners voting either personally or by proxy.

2.5 To ensure that there has been thorough discussion and wide participation by the owners before a decision on large-scale maintenance project is made, it has been suggested that the threshold for passing the resolution for such projects should be raised, e.g., by raising the quorum of the OC meeting at which the voting of the resolution takes place, and/or the percentage of shares of votes required for the passage of the resolution.

2.6 In considering these proposals, the Review Committee is mindful that raising the quorum may complicate and obstruct the transaction of business at an OC meeting since different resolutions would be discussed at an OC meeting and a fresh count of the quorum for each resolution would be required.

2.7 In working out the threshold, we should be mindful that it should not create unreasonable hurdles for OCs to conduct procurements of normal services (e.g. cleansing, security) for their buildings, especially for single tenement buildings which generally have a tight budget. It is certainly not our objective to impose unnecessarily stringent controls on such procurements. The threshold also should not be set at too high a level as to frustrate essential building maintenance projects. Otherwise, it will adversely affect the quality of the building or may even pose danger to the residents of the building and the general public due to a lack of proper maintenance. On the other hand, there should be safeguards against the artificial splitting of procurements into smaller contracts with the

sole purpose of bypassing the definition of "large-scale maintenance projects".

2.8 Since many buildings in Hong Kong are in need of repairs, we consider that if the threshold for passing the resolution for large-scale maintenance projects is to be raised, either of the following two options may be considered but they should not be implemented at the same time –

(i) the **quorum** of the meeting be raised from 10% to, say 20%, of the total number of owners; or

(ii) the required **percentage of shares of votes** for the passage of the resolution be raised from 50% to, say 75%, of the shares of votes at the meeting.

2.9 Both options seek to raise the threshold for passing a resolution at an OC meeting on large-scale maintenance projects with a view to encouraging owners' participation in making such important decisions. This can help ensure that the decision will not be made solely on the views of a small group of owners. With greater participation of owners in the voting process, it will minimise the chances of having to reopen the discussion after the voting on the resolution has taken place and the ensuing disputes.

2.10 In the event a higher threshold for passing resolution is to be imposed, consideration should be given as to how "large-scale maintenance projects" should be defined in the BMO. Due to the varying number of household units in a development, the different sizes of the common parts and the complexity of the maintenance works involved, it may not be practical or realistic to set one single monetary value for "large-scale maintenance projects" that would apply to all types of buildings and projects. It may also be impractical to define "large-scale maintenance projects" in terms of the types of maintenance works to be carried out. Possible options that may be considered include setting the threshold as a percentage (or percentages) of the total annual budget of the OC, or the amount the owner(s) of each flat will have to contribute to the project.

However, there would still be practical constraints in setting a threshold that can apply to all types of buildings or to owners of all sizes of flats. On the other hand, adopting a tiered system may create other complications. Consideration may also have to be given to how essential maintenance projects, such as those that are required to be carried out in accordance with government orders, should be handled. Since each of the options has its merits and limitations, we welcome members of the public to come forth with suggestions.

(b) Enhancing Transparency of Tender Process

2.11 There were concerns about the way some OCs conducted the tender process that are not fully transparent to the individual owners. To enhance the transparency of the tender process for large scale maintenance projects and to facilitate owners' monitoring of the process, the following legislative amendments are proposed –

(i) to allow more time for the MC and owners who want to know more about particulars of the projects to prepare for the meeting, the BMO should be amended such that the **notice** of OC meeting at which voting of resolutions on large-scale maintenance projects will take place should be given to all owners <u>at least 21 days</u> before holding of the meeting (as opposed to the existing 14 days' notice). The notice of the meeting should also carry a conspicuous "alert" that decision(s) to be taken at the OC meeting may result in the contribution of funds exceeding a specified amount by each owner; and

(ii) to stipulate in the BMO additional requirements on the **tender process**, e.g. to display a copy of the invitation to tender at a prominent place of the building, to allow inspection of the tender documents by owners, etc. Some of the requirements are modelled on the existing requirements in the Code of Practice on Procurement of Supplies, Goods and Services. The objective is to raise the transparency of the process and facilitate owners to monitor the process.

(c) Format of Ballot Paper

2.12 According to paragraph 4(1) of Schedule 3 to the BMO, an owner may cast a vote personally or by proxy at a meeting of the OC. There are suggestions that, similar to the format for proxy instruments stipulated in Schedule 1A to the BMO, the format of ballot papers used in the voting of resolutions should also be specified in the BMO.

2.13 We have to be mindful of the following in considering the above proposal –

(i) there may be practical problems in specifying the format of the ballot paper in the legislation. For instance, if owners are required to vote on a number of resolutions at an OC meeting, the wording of the subsequent resolutions may hinge on the voting result of the previous resolutions; and

(ii) the various measures proposed in paragraphs 2.8, 2.10 and 2.11 above, if adopted, should be able to prevent malpractice in the voting process to a large extent.

2.14 Instead of prescribing the format of ballot papers, consideration may be given to providing more detailed guidelines on the voting process, for example, introducing measures to ensure that each owner/proxy is given one ballot paper only and that the ballot boxes are locked properly.

(II) Convening a General Meeting of an OC at the Request of Owners

2.15 Paragraph 1(2) of Schedule 3 to the BMO provides that the MC Chairman shall convene a general meeting of the OC 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 45 days of receiving such request. We propose that consideration should be given to implementing the

following improvement measures through legislative means –

(a) Putting the Discussion Items Suggested by the Owners who Raised the Request for the Holding of the OC General Meeting as Priority Items on the Agenda

2.16 There are allegations that while aggrieved owners request the MC Chairman to convene a general meeting to revive discussions on a decision to carry out large-scale maintenance project, the MC Chairman deliberately places many unrelated items on the agenda, thus leaving very little time to discuss the requested item or even deferring the item to a future meeting. In view of the above concerns, consideration can be given to amending the BMO such that the MC Chairman is required to place the discussion item requested by the owners on a high priority on the agenda.

(b) Mechanism to Convene OC General Meeting when the Office of the MC Chairman is Vacant

2.17 Another allegation is that the MC Chairman resigns but the MC refuses to fill the vacancy in accordance with the by-election mechanism stipulated in paragraph 6(4) of Schedule 2 to the BMO, thus preventing the convening of an OC meeting under paragraph 1(2) of Schedule 3 to the BMO. The former provides for the following two ways to fill the vacancy of the office of the MC Chairman –

(i) the OC may, by a resolution passed at a general meeting of the OC, appoint a person, from amongst the MC members, to fill the vacancy till the next annual general meeting of the OC at which the MC members retire under paragraph 5(1) of the BMO; or

(ii) if no general meeting of the OC has been convened or no appointment is made to fill the vacancy at a general meeting, the MC members may appoint a person, from amongst themselves, to fill the vacancy till the next general meeting of the OC.

2.18 When the office of the MC Chairman becomes vacant, we encourage the OC to fill the vacancy according to the mechanism stipulated in paragraph 6(4) of Schedule 2 as soon as possible for the normal operation of the OC. However, there are allegations that the MC Chairman resigns but the MC refuses to fill the vacancy in accordance with the by-election mechanism in paragraph 6(4) of Schedule 2 to the BMO, thus hindering the convening of an OC meeting under paragraph 1(2) of Schedule 3 to the BMO. To address the above concern, we propose to amend paragraph 1(2) of Schedule 3 to the BMO such that when the office of the MC Chairman is vacant, the Vice-chairman should convene the general meeting in place of the Chairman; where no Vice-chairman is elected, the MC should appoint one of its members to convene the general meeting; and where the MC fails to appoint any member to convene the general meeting, those owners who have requested to convene the general meeting may nominate a representative among themselves to convene the general meeting.

2.19 We further propose that, as an administrative measure, those owners who raise the request for the holding of the OC general meeting should be advised to appoint a representative to facilitate communication with the MC on matters relating to the holding of the meeting.

(III) Counterfeit Proxy Instruments and Improper Practices

2.20 For those owners who are unable to attend OC meetings to cast their votes in person, the BMO allows them to appoint proxy. Since the function of the OC is mainly executed through the MC, the MC Chairman and the MC Secretary play an important role in the collection and verification of proxy instruments. For those meetings contemplating the formation of an OC, the convenor of the owners' meeting for the appointment of an MC is responsible for the collection and verification of proxy instruments.

2.21 There are complaints and allegations about improper practices adopted by the MC Chairman, the MC Secretary or the convenor of owners' meeting in the collection and verification of

proxy instruments, such as refusing to accept valid proxy instruments or ruling proxy instruments invalid unjustifiably. There are also allegations about the use of counterfeit proxy instruments. To address such concerns, we propose to adopt a package of legislative and administrative measures to tighten the proxy arrangements.

<u>Proposed Legislative Measures</u>

(a) Displaying the List of Flats with Proxy Instruments Lodged 24 Hours Before the Meeting

(b) Announcing the Number of Proxy Instruments Received after the Close of Lodging Time

2.22 Paragraph 4(5)(a)(ii) of Schedule 3 to BMO provides that where an instrument appointing a proxy is lodged with the MC Secretary, the MC Secretary shall display information of the owner's flat in a prominent place in the place of the meeting before the time for the holding of the meeting, and cause the information so displayed until the conclusion of the meeting. Sections 3(10)(e)(iii), 3A(3H)(e)(iii) and 4(12)(e)(iii) of the BMO provide for the same requirement for the convenor.

2.23 Some owners raise concern that those owners who decide not to attend the meeting but appoint proxy instead will unlikely go to the meeting place to inspect the list of flats with proxy appointed. In order to facilitate relevant owners to check the information, we propose to amend the BMO such 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 meeting and until seven days after the meeting.

2.24 In addition to the above proposed measure, consideration may be given to requiring the MC Secretary/convenor to declare the number of proxy instruments received as soon as practicable after close of the lodging time, and cause a notice of the result of counting to be posted at a prominent place in the building. This measure can help to ensure that no proxy instruments will be accepted after the close of the lodging time.

(c) Lodging of Proxy Instruments

2.25 The existing BMO is silent on whether proxy instruments can be submitted via fax or electronic means. As it is very difficult for the MC Chairman/convenor to verify the authenticity of proxy instruments submitted via fax or electronic means and to minimise counterfeit proxy instruments, we propose to make it clear in the BMO that only the original copy of the proxy forms will be accepted. Although some owners who live overseas may find it inconvenient as they will have to submit the proxy instrument by mail instead of by fax or electronic means, the proposed requirement will be an effective measure to minimise counterfeit proxy instruments.

(d) Acknowledging Receipt of Proxy Instruments

2.26 Paragraph 4(5)(a)(i) of Schedule 3 to the BMO provides that where an instrument appointing a proxy is lodged with the MC Secretary, he shall acknowledge receipt of the proxy instrument by leaving a receipt at the flat of the owner who made the instrument, or depositing the receipt in the letter box for that flat, before the time for the holding of the meeting. Sections 3(10)(e)(i), 3A(3H)(e)(i) and 4(12)(e)(i) of BMO provide for the same requirement for the convenor.

2.27 As there are often disputes between owners and the MC Secretary/convenor as to whether a receipt has actually been issued, we propose that the BMO be amended to provide the MC Secretary/convenor with an additional option of passing the receipts to the owners in person.

(e) Collecting Proxy Instruments from Owners

2.28 Paragraph 4(3) of Schedule 3 to the BMO provides that the proxy instrument shall be lodged with the MC Secretary at least 48 hours before the meeting. Sections 3(10)(b), 3A(3H)(b) and 4(12)(b) of the BMO provide for the same requirement for lodging the proxy instrument with the convenor. In practice, many owners lodge the proxy instruments with the management office instead of submitting

them to the MC Secretary/convenor direct and they have sought clarification as to whether this complied with the statutory requirement. To address the uncertainty and to avoid disputes, we propose that the BMO be amended to require the MC Secretary/convenor to state clearly in the notice of meeting as to the exact location of the proxy collection boxes, as well as the timing for opening the boxes to inspect and count the proxy.

(f) Other Proposed Improvement Measures

2.29 The following proposed measures to improve the existing procedures in the collection and verification of proxy instrument may also be considered –

(i) the date of the OC meeting should be printed on each proxy form to help ensure that the owner, when signing on the proxy instrument, clearly knows at which meeting the appointed proxy will exercise the voting right on his behalf, thus preventing abuse of the proxy arrangement;

(ii) the proxy collection boxes should be double-locked and placed in a prominent location of the building. The two keys should be held by the MC Secretary/convenor and a third party (e.g. a mediator, an auditor or a lawyer) respectively. The boxes should be opened by the two key holders in the presence of witnesses. Detailed guidelines will be promulgated on how the third party responsible for holding the key of the proxy collection box should be selected and appointed; and

(iii) the MC Chairman/convenor or, if he is absent, the person who presides at the meeting to mark on each proxy instrument the reasons for invalidation and to allow representatives of the owners and the appointed third party to inspect invalidated proxy instruments and appeal against the invalidation with justifications.

Proposed Administrative Measures

2.30 In addition to the proposed legislative amendments above, the following administrative measures can be implemented to enhance the existing proxy arrangements –

(i) to provide additional guidelines on the format of the notice showing the information of flats with proxy instruments lodged (e.g. the font size of the words) and the additional means of dissemination (e.g. posting onto the website of the OC to facilitate checking by the owners);

(ii) to encourage owners who do not intend to appoint proxy to register with the MC Secretary/convenor, who shall cause the register to be available for public inspection;

(iii) to encourage owners to set out their contact details (e.g. telephone number, e-mail address, etc.) on the proxy instruments so as to facilitate the MC Chairman/convenor to check with the owners concerned when the validity of the proxy instrument is in doubt;

(iv) to encourage owners to use the proxy instrument issued by the OC with a unique serial number printed on it to facilitate checking by the MC;

(v) to encourage owners to appoint a third party to monitor the collection and verification of proxy instruments for the voting on important items. The third party so appointed should be required to declare his interest; and

(vi) the proxy instruments received before close of the lodging time should be kept in a safe place designated by the MC.

(IV) The Issue of Cheques by the MC on Behalf of the OC

2.31 Some owners suggest that tighter control should be introduced on the issue of cheques by the MC on behalf of the OC. "A Guide on Clean and Effective Financial Management" issued by HAD provides guidelines on the proper practice in the issue of cheques by the MC on behalf of OC. For example, as a matter of best practice, cheques should be signed by at least two signatories authorised by the MC; cashing of personal cheques through OC's bank account should be strictly prohibited; signing of blank cheques should not be allowed. To address the owners' concern, we propose that consideration may be given to incorporating the requirements into the existing guidelines issued under the BMO.

(V) Appointment of MC Secretary and MC Treasurer

2.32 According to paragraph 2(1)(c)(ii) and (iii) of Schedule 2 to the BMO, it is not necessary for the posts of MC Secretary and MC Treasurer to be taken up by owners. These two posts are usually taken up by the staff of the PMCs. There are views that owners should be accorded priority for the appointment of these posts. We propose to consider stipulating in the BMO that owners should be given the priority to take up the posts of MC Secretary and MC Treasurer.

(VI) Transfer of Documents or Records from the Old MC to the New MC

2.33 Paragraph 5A of Schedule 2 to the BMO provides, amongst others, that an MC member who steps down from office shall, within 14 days of his ceasing to be a member or of his retirement, as the case may be, hand over to the MC Secretary or, if the office of the MC Secretary is vacant, the MC Chairman, any books or records of account, papers, documents and other records in respect of the control, management and administration of the building together with any movable property belonging to the OC that are under his control or in his custody or possession.

2.34 There had been a case where the incumbent MC could not obtain the financial documents from the retired MC and lodged a lawsuit against the retired MC. The retired MC claimed that the financial documents had already been handed over to the PMC. The Court ruled that the case could not be substantiated unless the incumbent MC could prove that the retired MC was still keeping the documents.

2.35 To ensure proper handover of records between the old MC and the new MC, we propose to consider that as a best practice and an administrative measure, the old MC should be advised to pass the documents direct to the new MC and ask the recipient(s) to sign an acknowledgement of receipt. Where a duplicate copy of the documents has been kept by the old MC, it should inform the new MC of the type of such documents and where duplicate copy has been placed.

Chapter 3

Formation of Owners' Corporations

3.1 Notwithstanding the lowering of the percentage of shares required for the formation of OCs in 2000, large housing estates with a large number of owners as well as those estates where the developer holds a large share of ownership still encounter difficulties in gathering sufficient percentage of shares in aggregate to form an OC.

(I) Percentage of Shares in Aggregate Required for the Formation of OCs

3.2 Under section 3(1)(c) of the BMO, owners of not less than 5% of the shares in aggregate may appoint a person amongst themselves to convene an owners' meeting for the purpose of appointing an MC and forming an OC. A resolution to appoint an MC and to form an OC shall be passed by a majority of votes at the meeting, and be supported by the owners of not less than 30% of shares in aggregate. Alternatively, under section 3A of the BMO, owners of not less than 20% of the shares in aggregate may apply to the Secretary for Home Affairs (SHA) for an order to convene an owners' meeting for the purpose of appointing an MC and forming an OC. However, the order shall be of no effect if a notice of objection from the owners of not less than 20% of the shares in aggregate is given to the SHA. Another mechanism of forming an OC is provided for under section 4 of the BMO whereby owners of not less than 10% of the shares in aggregate may make an application to the Lands Tribunal for an order to convene an owners' meeting.

3.3 Bearing in mind the need to strike a balance between facilitating the formation of an OC on the one hand and ensuring that such decision has the general support of owners on the other, we would like to seek public views on the following proposals –

(a) whether the threshold for OC formation under section 3 of the BMO should be lowered from 30% to 20% of shares in aggregate; and

(b) whether the thresholds under sections 3A and 4 of the BMO should be lowered correspondingly (say to 10% and 5% respectively), or whether there is a need to retain sections 3A and 4 of the BMO after the threshold stipulated in section 3 of the BMO has been lowered to 20%.

3.4 In taking forward the above proposals, we have to be mindful that forming an OC is an important decision as it involves the long term commitment of owners. Lowering the percentage of shares in aggregate required may increase the risk of operational difficulty of the OC if the decision to form an OC has not been supported by a vast majority of the owners.

(II) Determination of Owner's Shares

3.5 Section 39 of the BMO provides that an owner's shares 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.

3.6 Some DMCs do not have express provisions on whether the shares of common areas with no voting right at an owners' meeting should be included as part of the shares in aggregate when calculating the proportion of shares supporting the resolution on the appointment of an MC and the formation of an OC. It is logical that those shares with no voting right should not be included as part of the shares for the purpose of the said calculations. We propose amending the BMO to provide for the exclusion explicitly.

3.7 There is also suggestion that the counting of shares for the formation of OCs can make reference to that for the termination of appointment of DMC manager, whereby only the shares of owners who pay or who are liable to pay management fees relating to those shares shall be entitled to vote. However, it should be noted that owners who are not liable to pay management fees may still have the right to vote at an owners' meeting under their respective DMCs. Therefore, it may not be entirely logical to exclude all of them from the counting of shares for the formation of OCs.

(III) Eligibility of the Convenor

3.8 The convenor plays an important role in the OC formation process and must act impartially in the process of collecting and verifying proxy instruments. To ensure the integrity of the convenor, we propose to amend the BMO to impose the following eligibility criteria on the convenor, which are the same as those currently applied to MC members under paragraph 4(1) of Schedule 2 to the BMO –

(a) the convenor is <u>not</u> an undischarged bankrupt at the time of the appointment or has <u>not</u>, within the previous 5 years, either obtained a discharge in bankruptcy or entered into a voluntary arrangement within the meaning of the Bankruptcy Ordinance (Cap. 6) with his creditors, in either case without paying the creditors in full;

(b) the convenor has <u>not</u>, within the previous 5 years, been convicted of an offence in Hong Kong or any other place for which he has been sentenced to imprisonment, whether suspended or not, for a term exceeding 3 months without the option of a fine.

Chapter 4

Appointment and Remuneration of Deed of Mutual Covenant Managers

4.1 A DMC is a private contract signed among the developer, the manager and the first purchaser of a unit in the building. It sets out the rights and responsibilities of the various parties to the deed. A DMC manager, which is usually a PMC, is the manager specified in the DMC for managing the building. This chapter sets out proposals on issues relating to the termination of appointment of DMC managers and the mechanism for determining the remuneration of DMC managers.

(I) Termination of the Appointment of DMC Managers

4.2 Some owners have raised concerns that they find it very difficult to invoke the mechanism stipulated in the BMO for the termination of a DMC manager even though his performance is unsatisfactory, especially when the developer holds a large percentage of shares and the DMC manager is a subsidiary company of the developer.

4.3 Under paragraph 7(1) of Schedule 7 to the BMO, at a general meeting convened for the purpose, an OC may, by a resolution passed by a majority of the votes of the owners voting either personally or by proxy and supported by the owners of not less than 50% of the shares in aggregate, terminate by notice the DMC manager's appointment without compensation. While the existing requirements would ensure stability in the management of the building, some owners have put in a strong request for relaxation so that they could terminate the appointment of non-performing DMC managers more flexibly.

4.4 In view of the above concerns and to improve the existing arrangements, we propose to put forward the following options for public consultation –

(a) lowering the threshold for terminating the appointment of DMC manager from 50% to 30% of shares in aggregate; or

(b) limiting the term of appointment of DMC managers to five years –

- during the first to second years of appointment, the DMC manager should assist the owners either to form an OC, or to appoint an owners' committee, or to appoint an owner to sign the contract with the next service provider;

- during the third to fifth years of the appointment of the DMC manager, the owners may pass a resolution with 30% of shares in aggregate to appoint a new service provider through open tender; and

- if the owners decide not to appoint a new service provider after the fifth year, they may negotiate new contract terms (such as the tenure of appointment, the remuneration, etc.) and enter into a new contract with the existing manager.

4.5 Given that the proposal will affect not only the interest of the existing DMC managers but also individual owners, consideration should also be given to whether the new arrangements, if implemented, should be applicable to new and existing developments or to new developments only.

(II) Remuneration of DMC Managers

4.6 DMCs are required to be approved by the Director of Lands under the land grant and the remuneration of the DMC manager is governed by the DMC Guidelines issued by the Legal Advisory and Conveyancing Office of the Lands Department. According to Guideline 19 of the DMC Guidelines, the remuneration of the DMC manager is capped below a certain percentage of the total expenses, costs and charges necessarily and reasonably incurred in the management of the development. For residential developments, the existing guidelines are as follows –

Number of Residential Units and Parking Spaces in the Building	**Ceiling on Remuneration Rate**
Not more than 20	20%
21 to 100	15%
101 or more	10%

For composite developments comprising both residential and non-residential units, the above will apply as if each non-residential unit is a residential unit.

4.7 Some owners are of the view that the existing mechanism induces the DMC managers to spend more so as to increase their remuneration. They also raise concern that there is a lack of transparency in the charges paid to the DMC managers.

4.8 In view of the above concerns, we would like to invite public views on the following options –

(a) for residential developments and composite developments comprising both residential and non-residential units, to reduce the ceiling on the remuneration rate of DMC manager by a specified percentage each year, as the service and overhead costs incurred by the DMC manager may decrease with the accumulation of experience in serving the development. An illustrative example is set out in the table below –

A building with more than 100 residential units <u>and</u> parking spaces	
Year of Appointment	**Possible Ceiling on Remuneration Rate**
1st year	10%
2nd year	9.5%
3rd year	9%
4th year	8.5%
5th year and thereafter	8%

(b) setting lower ceilings on the remuneration rates of DMC managers for large-scale developments as the manager should be able to achieve economies of scale. For example, developments with over 300, 500, 700 and 1 000 (and so on) residential units and parking spaces will be subject to different ceilings below 10%;

(c) excluding a specified list of expenditure items which do not involve any value-added services by the DMC manager (e.g. electricity charges, water bills, etc.) from the formula for calculating the remuneration of the DMC manager. Only those items which genuinely involve management supervision (e.g. payments for garbage disposal, security services, etc.) should be counted as the "total expenses, costs and charges necessarily and reasonably incurred in the management of the development";

(d) for certain kinds of expenditure incurred by the headquarters or parent company of the DMC manager (e.g. services provided by the DMC manager's accountants who serve more than one developments), the DMC manager should provide the owners with a detailed breakdown on how the service fee of the headquarters/parent company is apportioned among the developments they serve.

4.9 As the above proposals may have great impact on the level of remuneration of DMC managers, consideration should also be given to whether the new arrangements, if implemented, should be applicable to new and existing developments or to new developments only.

Chapter 5

Other Issues for Consideration

(I) Matters related to the DMC

5.1 A DMC is a deed and a private contract signed among the developer, the manager and the first purchaser of a unit in the building. It sets out the rights and responsibilities of various parties.

(a) Allocation of Undivided and Management Shares

5.2 Under Guideline 6 of the DMC Guidelines, the allocation of undivided shares and management shares to a unit is basically calculated by reference to the gross floor area of the unit in proportion to the gross floor area of the development. Guideline 22(a) of the existing DMC Guidelines sets out the principle regarding an owners' contribution towards the total expenses, costs and charges necessarily and reasonably incurred in the management of the development. The contribution is calculated according to the number of undivided or management shares allocated to each unit.

5.3 Some owners raise concern that some old DMCs (which did not require the approval of the Director of Lands) contain terms which are unfair to the minority owners. An example of such problem is the unfair allocation of undivided shares and management shares between owners and developers, where the developers may have a large number of undivided shares but only need to pay a small amount of management expenses.

5.4 While we are of the view that the existing arrangement of allocating undivided shares and management shares with reference to the gross floor area of a unit in proportion to the gross floor area of the development is reasonable, there are suggestions that the terms of the old DMCs (which did not require the approval of the Director of Lands) should be amended to rationalise the allocation of undivided shares and management shares. However, it is important to note that

any amendments to the DMC, a contractual agreement, may benefit one group of owners and inevitably affect the rights of another group of owners. Hence, unless the consent of all owners is obtained, any unilateral attempt to amend the terms of the DMC may lead to even more disputes.

(b) Separating the Accounts and Budgets of the Residential Part and the Commercial Part of a Composite Development

5.5 Guideline 24 of the existing DMC Guidelines provides that separate accounts and budgets for each part of a composite development must be kept, and that the owners are liable to contribute to the management and maintenance costs of their respective parts only. Guideline 15 allows the manager to appoint sub-managers to carry out various aspects of the management works or management works of certain areas of the development.

5.6 Building management disputes often arise in the cases of older composite developments where their DMCs do not provide for separating the accounts and budgets of the residential parts and commercial parts. Some suggest that separate accounts and budgets of the residential and commercial parts should become mandatory for all composite developments including the old ones.

5.7 However, there may be practical difficulties in implementing the suggestion under certain circumstances. For instance, it is not uncommon that the first few floors of a building are restaurants or shops with the residential units located on the upper floors. In such cases, the commercial part and the residential part share common and inseparable facilities such as water tanks, sewers and drains. Owners should have joint responsibility to manage and maintain the common parts.

(c) Applicability of the BMO to Sub-DMCs

5.8 Sub-DMCs are most common in phased developments. In most cases, the principal DMC covers matters which are applicable to the entire development and the first phase of the development.

The sub-DMCs cover matters which are applicable to the subsequent phases. Paragraph 29 of the Guidelines for DMCs provides that the developer may reserve rights to execute sub-DMCs in respect of separate towers, phases, etc.

5.9 Schedules 7 and 8 to the BMO are only applicable to DMCs but not sub-DMCs. There are suggestions that the two schedules should also apply to sub-DMCs to better protect the interest of owners.

5.10 Schedule 7 to the BMO is mainly related to the requirement that the manager should follow in relation to the financial management of the building, and the arrangements concerning the termination of the manager's appointment. The terms in Schedule 8 to the BMO relate to the procedures to be followed in respect of meetings of the owners' committee and of the owners. The provisions in Schedule 7 to the BMO are mandatory to every DMC, while the provisions in Schedule 8 which are consistent with the DMC shall be impliedly incorporated in every DMC.

5.11 A sub-DMC merely regulates a certain part of a building. That certain part of a building represents only a discrete area of a "building" defined in section 2 of the BMO. Accordingly, the so-called "common parts" under a sub-DMC do not carry the same meaning as the term "common parts" defined in section 2 of the BMO. If the definitions of "building" and "common parts" in the BMO are to be amended to cater for the applicability of the BMO to the sub-DMCs, substantial amendments to other parts of the BMO will be required and will have significant implications to the original intent of the BMO. There are practical difficulties in applying Schedules 7 and 8 to the BMO to sub-DMCs.

(II) One Building with Multiple OCs and Multiple Buildings with One OC

5.12 Under the BMO, an OC is formed on the basis of each DMC. For "one building with multiple OCs", these buildings usually consist of blocks which are erected on different sections of a

lot or different lots, and each section or each lot has its own DMC. Since an OC is formed on the basis of each DMC, buildings may form multiple OCs if they are covered by more than one DMC.

5.13 In some cases, there are common areas or facilities such as roof, corridor or staircase which are used by the owners of two or more blocks of a building. Practical difficulties will arise if two DMCs of the same building contain provisions which are inconsistent with each other, for example, provisions regarding the sharing of repair cost, management fees, etc. The OCs concerned are encouraged to form a joint management committee to reach consensus on the sharing of responsibility over the management of commonly used areas.

5.14 For "multiple buildings with one OC", the common problem is that owners of certain buildings may not be willing to pay the maintenance fees for the works of another building under the same OC. However, it may not be realistic or in line with the present mode of building management to stipulate that each OC can only manage one building.

5.15 To alleviate the problems associated with "one building with multiple OCs" and "multiple buildings with one OC", HAD will continue with its efforts in providing assistance to the owners in fulfilling their building management responsibility, e.g. the BMPASS, the Panel of Advisors on Building management Disputes and the "AP Easy" Building Maintenance Advisory Service Scheme.

(III) Management of House Development

5.16 Some owners of house developments would like to form OCs modelling on the mechanism for the formation of OC of multi-storey buildings under the BMO.

5.17 The original purpose of the BMO is to facilitate the management of multi-storey buildings by providing a mechanism for owners, who own undivided shares, to form OCs. This is reflected in the definition of the term "owner" in section 2 of the BMO that "a

person who for the time being appears from the records of the Land Registry to be the owner of an undivided share in land on which there is a building".

5.18 The difficulty for incorporation of owners of house developments under the BMO stems from the fact that the DMCs of house developments usually do not allocate any undivided shares to the owners. In other words, owners of house developments are sole owners of their respective subsections but not co-owners of the whole development, and hence do not fall within the definition of "owner" in the BMO. Even if the BMO is to be amended to provide for incorporation of owners of house developments, the power and function of the OC of house developments will not be the same as those of multi-storey buildings in view of the fact that the individual owners are not co-owners of the development but owners of their respective house only.

5.19 The Review Committee considers that the incorporation of owners is only one of the many tools to achieve effective building management, and recommends HAD to continue to provide advice and assistance to owners of house developments who wish to form other types of owners' organisations such as owners' committees or mutual aid committees. Nonetheless, the Review Committee considers it important for the potential purchasers of house developments to be aware of the constraints against forming OCs in such developments. It therefore recommends that developers should state clearly in the sales brochures that no OC can be formed for such developments. We have referred the Review Committee's recommendation to the Sales of First-hand Residential Properties Authority (SRPA) for consideration. The SRPA will take that suggestion into account in the review of the Residential Properties (First-hand Sales) Ordinance (Chapter 621) when the next opportunity arises.

(IV) Definition of "Common Parts"

5.20 There are sometimes disputes over the management of certain parts of a building which are not clear as to whether they fall

within the scope of "common parts" as defined in Schedule 1 to the BMO.

5.21 Taking into account operational experience and court judgments of building management cases, the Review Committee has identified the following proposed amendments to the definition of "common parts" in paragraphs 1, 3, 6 of Schedule 1 to the BMO –

(a) **Paragraph 1** – to add that air-conditioner hoods, air-conditioner rack, window fins, canopy, flower rack and shading panel originally constructed and attached to external walls to the list. To specify that "load bearing walls, foundations, columns, beams and other structural supports" would be those structural elements contributing to the overall stability of the whole building.

(b) **Paragraph 3** – to stipulate that the "roofs" would include the waterproof finishing to the roofs.

(c) **Paragraph 6** – to add "air-conditioner drainage pipes" and "rain water pipes" to the list.

(V) Mandatory Building Management (Sections 40B and 40C of the BMO)

5.22 The Government is empowered under the BMO to mandate owners to appoint building management agents or administrators to manage their buildings under specified circumstances. Section 40B of the BMO is applicable to buildings with MC appointed, stipulates that SHA may order an MC to appoint a building management agent to manage the building, where it appears to him that (a) no person is managing the building, (b) the MC has failed substantially to perform the duties under section 18 of the BMO, and by reason of circumstances in (a) and (b), there is a danger or risk of danger to the occupiers or owners of the building.

5.23 For buildings which have not yet formed any OC, section 40C of the BMO provides that SHA may apply to the Lands

Tribunal for an order that a meeting of the owners be convened to consider to pass a resolution to appoint an MC or, where such resolution is not passed, to consider to pass a resolution to appoint a building management agent, where it appears to him that (a) an MC has not been or is not likely to be appointed, (b) no person is managing that building, and SHA is satisfied that by reason of circumstances in (a) and (b), there is a danger or risk of danger to the occupiers or owners of the building.

5.24 The position of the Government is that it should not invoke the power under sections 40B and 40C of the BMO to intervene in the management of private buildings unless such intervention is fully justified. The Review Committee notes that although so far no cases have warranted the invocation of power under sections 40B and 40C, repealing the two provisions will not be in line with public expectation. As an improvement measure, the Review Committee recommends HAD to stipulate in its internal guidelines the relevant criteria and considerations which HAD staff should take into account in deciding whether to recommend SHA to invoke the power, e.g. HAD should consult relevant departments for professional advice in assessing whether a building is "in danger or posing a risk of danger to occupiers or owners".

(VI) Liability of OCs

5.25 According to section 34 of the BMO, in winding up an OC, the owners shall be liable, both jointly and severally, to contribute to the assets of the OC to an amount sufficient to discharge its debts and liabilities according to their respective shares. In other words, the liability of an OC is unlimited. Some owners are concerned about the unlimited liability of OCs and hence are reluctant to form OCs.

5.26 Third party liability is unlimited under common law for the protection of third parties. Whether an OC has been formed or not, the owners have the legal responsibility to take care of the common parts of the building which they jointly own. It is practically impossible to limit the liability of OCs.

5.27 We note that the major concern on limiting OC's liability is related to compensation to third parties in case of accidents. In this connection, the mandatory requirement for OCs to procure third party risks insurance effectively protected owners of buildings with OCs. However, there is no such mandatory requirement for owners of "three-nil" buildings and such owners remained unprotected. We propose to arrange more publicity to encourage owners of "three-nil" buildings to procure third party risk insurance.

(VII) Building Affairs Tribunal

5.28 There are views that the existing avenues for settling building management, including the Small Claims Tribunal, the Lands Tribunal, the District Court or the Court of First Instance of the High Court, are unsatisfactory as all entail high legal costs and lengthy litigation processes. Some people suggest that a Building Affairs Tribunal (BAT) dedicated to handling building management matters where legal representation is not allowed should be established with a view to resolving the disputes in quicker and cheaper manner.

5.29 The Review Committee has considered two options of pursuing the proposal but expresses reservations on both of them –

(a) Establishing the BAT within the Judicial System

5.30 It may complicate the structure of the existing court system. Furthermore, to ensure fairness, the proposed BAT must give parties adequate opportunities to present their evidence and cases. As such, the processing time by the proposed BAT may not be shorter than the existing arrangements in the Lands Tribunal.

(b) Establishing the BAT outside the Judicial System

5.31 Building management cases often involve complicated legal and ownership issues. Even cases involving only a small amount of money would be complicated if ownership of common parts is involved, the handling of which may have read-across implications for other cases. Thus, it will be very difficult to identify

simple cases to be resolved by the BAT.

5.32 We consider that establishing a dedicated BAT to resolve building management disputes may not be effective in solving the problems identified above and that its benefits may have been over-stated. We will continue to rely on the existing mechanisms, including the Small Claims Tribunal, the Lands Tribunal, the District Court and the Court of First Instance of the High Court, to settle building management disputes while enhancing our efforts to promote the use of administrative arrangements to resolve disputes as much as possible.

(VIII) Mediation

5.33 HAD encourages the parties in dispute to resolve their conflicts through enhanced communication and alternative dispute resolution arrangements, especially mediation. To assist the parties in dispute to start constructive dialogue, HAD set up in 2011 a dedicated Panel of Advisors on Building Management Disputes, comprising solicitors, accountants, surveyors, architects, building management professionals, etc., to render impartial and professional advice to the parties concerned on the issues in dispute. If both parties agree, HAD may also refer them to free voluntary mediation services provided by professional mediation bodies.

5.34 The Judiciary established the Building Management Mediation Coordinator's Office in the Lands Tribunal in 2008 to promote the use of mediation in building management cases. The dedicated office provides information and enquiry services for parties who are willing to seek mediation before or after they commence their proceedings in the Lands Tribunal. It maintains a list of accredited mediators outside the Judiciary who are available to mediate disputes.

5.35 HAD will continue to promote the use of mediation to resolve building management disputes.

(IX) Criminal Sanctions

5.36 There is a suggestion that more criminal sanctions should be added to the BMO to deter people, including MC members, from breaching the requirements of the BMO.

5.37 Under the existing BMO, the Lands Tribunal has the jurisdiction to hear and determine any proceedings relating to the interpretation and enforcement of the provisions of the BMO and the DMC, powers and duties of the OC, etc. As owners serve as MC members on a voluntary basis, many of them consider that it would be unfair to subject them to criminal liability. We will continue to encourage owners to participate in the management of their buildings and assist them to fulfil their building management responsibilities through various kinds of support services.

Chapter 6

Views Sought

6.1 We would like to enlist your views on how the various provisions of the BMO can be further improved. While we are open to how the subject matters raised in this consultation document should be addressed, views are invited specifically on the following proposals –

(I) Bid-rigging and Disputes relating to Large-scale Maintenance Projects

To ensure that the OC meeting at which voting of resolutions on large-scale maintenance projects will take place will be attended by a significant proportion of owners, the following legislative proposals may be considered –

Quorum and Percentage of Votes

- the quorum of the meeting be raised from 10% to, say 20%, of the total number of owners; or
- the required percentage of shares of votes for the passage of the resolution be raised from 50% to, say 75%, of the shares of votes at the meeting.

Definition of "Large-Scale Maintenance Projects"

- to consider how "large-scale maintenance projects" should be defined for the purpose of BMO. Options include: projects exceeding a certain percentage (or percentages) of the total annual budget of the OC, or set the threshold as the amount the owner(s) of each flat will have to contribute to the project.

Notice of Meeting

- should be given to each owner at least 21 days before the holding of the meeting.
- should carry a conspicuous "alert" that any decision(s) to be taken at the OC meeting may result in the contribution of

funds exceeding a certain specified amount by each owner.

Tender Process

- to stipulate in the BMO additional requirements on the tender process, e.g. displaying a copy of the invitation to tender at a prominent place of the building, allowing inspection of the tender documents by owners, etc.

(II) Convening of an OC General Meeting at the Request of Owners

To ensure that OC meetings can be convened expeditiously, the BMO can be amended to –

- require the MC Chairman to place the discussion item requested by the owners on a high priority on the agenda; and
- when the office of the MC Chairman is vacant, the Vice-chairman should convene the general meeting in place of the Chairman; where no Vice-chairman is elected, the MC should appoint one of its members to convene the general meeting; and where the MC fails to appoint any member to convene the general meeting, those owners who have requested to convene the general meeting may nominate a representative among themselves to convene the general meeting.

(III) Counterfeit Proxy Instruments and Improper Practices

To minimise improper or abusive use of proxies at OC meetings, the following legislative and administrative proposals can be considered –

(a) Collection of Proxy Instruments

- to require the MC Secretary/convenor to state clearly in the notice of meeting as to the exact location of the proxy collection boxes and the timing for opening the boxes to inspect and count the proxy.
- the proxy collection boxes should be double-locked and

placed in a prominent location of the building.

- the two keys of each box should be held by the MC Secretary /convenor and a third party (e.g., a mediator, an auditor or a lawyer) respectively.
- the boxes should be opened by the key holders in the presence of witnesses.
- only the original copy of the proxy forms will be accepted.
- the date of the OC meeting should be printed on each proxy form.
- to provide the MC Secretary/convenor with an additional means of acknowledging receipt of the proxy instrument by passing the receipts to the owners in person.

(b) Verification of Proxy Instruments

- the list of flats with proxy instruments lodged should be displayed in a prominent place of the building at least 24 hours before the meeting and until seven days after the meeting.
- the MC Chairman/convenor should mark on each proxy instrument the reasons for invalidating it and to allow representatives of owners and the appointed third party to inspect invalidated proxy instruments and appeal against the invalidation with justifications.

(c) Administrative Measures

Owners and OCs may be encouraged to adopt the following administrative measures with regard to the use, collection, and verification of proxies –

- to appoint a third party, for example, a mediator, to monitor the collection and verification of proxy instruments especially during the process leading to the appointment of an MC and the formation of an OC.
- to comply with additional guidelines to be promulgated by HAD on the format of the notice showing the information of flats with proxy instruments lodged (for example, the font

size of the words) and the additional means of dissemination (for example, posting onto the website of the OC to facilitate checking by the owners).

- owners who do not intend to appoint a proxy to register such intention with the MC Secretary/convenor, who shall cause the register to be available for public inspection.
- owners to set out their contact details (for example, telephone number, e-mail address, etc.) on the proxy instruments so as to facilitate the MC Chairman/convenor to check with the owner concerned when the validity of the proxy instrument is in doubt.
- owners to use the proxy instrument issued by the OC with a unique serial number printed on it to facilitate checking by the MC.

(IV) Formation of OCs

The following measures seek to protect the rights of owners in forming OCs by lowering the threshold and tightening up the eligibility of convenors –

(a) Percentage of Shares in Aggregate Required for the Formation of OCs and Determination of Owner's Shares

- whether the threshold for OC formation under section 3 of the BMO should be lowered from 30% to 20% of shares in aggregate.
- whether the thresholds under sections 3A and 4 of the BMO should be lowered correspondingly (say to 10% and 5% respectively), or whether there is a need to retain sections 3A and 4 of the BMO after the threshold stipulated in section 3 of the BMO has been lowered to 20%.
- to introduce a technical amendment to make it clear that shares with no voting right will not be counted as part of the total shares when calculating the proportion of shares supporting the formation of an OC out of the total number of shares in aggregate.

(b) Eligibility of the Convenor

- to impose the following eligibility criteria on the convenor which are the same as those currently applied to MC members –
  - is not an undischarged bankrupt at the time of the appointment or has not, within the previous 5 years, either obtained a discharge in bankruptcy or entered into a voluntary arrangement within the meaning of the Bankruptcy Ordinance (Cap. 6) with his or her creditors, in either case without paying the creditors in full;
  - has not, within the previous 5 years, been convicted of an offence in Hong Kong or any other place for which he or she has been sentenced to imprisonment, whether suspended or not, for a term exceeding 3 months without the option of a fine.

(V) Termination of the Appointment of DMC Managers

The following measures will lower the threshold for terminating the appointment of the DMC managers by owners –

- to lower the threshold for terminating the appointment of DMC managers from 50% to 30% of shares in aggregate.
- to limit the term of appointment of DMC managers to five years –
  - during the first to second years of appointment, the DMC manager should assist the owners either to form an OC, or to appoint an owners' committee, or to appoint an owner to sign the contract with the next service provider;
  - during the third to fifth years of the appointment of the DMC manager, the owners may pass a resolution with 30% of shares in aggregate to appoint a new service provider through open tender; and
  - if the owners decide not to appoint a new service provider after the fifth year, they may negotiate new contract terms (such as the tenure of appointment, the

remuneration, etc.) and enter into a new contract with the existing manager.

- whether the new arrangements, if implemented, should be applicable to new and existing developments or to new developments only.

(VI) Remuneration of DMC Managers

The following shows the possible ways to reduce the remuneration rate of DMC managers of large scale developments and to improve the transparency of calculating remuneration –

- to reduce the ceiling on the remuneration rate of DMC manager by a specified percentage (e.g. 0.5%) each year. An illustrative example is as below –

A building with more than 100 residential units and parking spaces	
Year of Appointment	**Possible Ceiling on Remuneration Rate**
1st year	10%
2nd year	9.5%
3rd year	9%
4th year	8.5%
5th year and thereafter	8%

- to exclude a specified list of expenditure items which do not involve any value-added services by the DMC manager (e.g. electricity charges, water bills, etc.) from the formula for calculating the remuneration of the DMC manager.
- for certain expenditure items incurred by the headquarters of the DMC manager (e.g. services provided by the DMC manager's accountants who serve more than one developments), the DMC manager should provide the owners with detailed breakdown on how the service fee of the headquarters is apportioned among the developments they serve.
- to increase the number of tiers of ceiling on the DMC

manager's remuneration and set lower ceilings for large scale developments with, e.g. above 300, 500, 700 and 1 000 (and so on) residential units and parking spaces.

- whether the new arrangements, if implemented, should be applicable to new and existing developments or to new developments only.

6.2 Members of the public are invited to give their comments on the issues and proposals set out in the consultation document, as well as other suggestions on whether and how other provisions of the BMO could be enhanced. Comments can be sent in writing to HAD on or before 2 February 2015 –

Address: Division V
Home Affairs Department
31/F Southorn Centre
130 Hennessy Road
Wan Chai, Hong Kong

Fax number: 2575 1009

E-mail Address: bm_consultation@had.gov.hk

Website: www.buildingmgt.gov.hk

6.3 It is voluntary for any member of the public to supply his / her personal data upon providing views on this consultation document. Any personal data provided with a submission will only be used for the purpose of this consultation exercise.

6.4 The submissions and personal data collected may be transferred to other Government bureaux and departments or agencies for purpose(s) directly related to this consultation exercise. The parties receiving the data are bound by such purposes in their subsequent use of such information.

6.5 The names and views of individuals and organisations which put forth submissions in response to this consultation document (senders) may be published, in whole or in part, for public viewing after conclusion of the public consultation exercise. The Government may use, adopt or develop any views put forward without seeking permission or providing acknowledgement of the party making the view. The Government may, either in discussion with others or in any subsequent report, whether privately or publicly, attribute comments submitted in response to the consultation document. If you do wish to remain anonymous and / or keep your views submitted in relation to all or part of a submission confidential, it is necessary for you to state so when making your submission.

6.6 Any sender providing personal data to this Department in the submission will have right of access to or correction of personal data contained in the submission. Any requests for data access or correction of personal data should be made in writing to –

Senior Administrative Officer (5)
Home Affairs Department
31/F Southorn Centre
130 Hennessy Road
Wan Chai, Hong Kong
(Fax number: 2575 1009)
(Email address: bm_consultation@had.gov.hk)

Home Affairs Department
November 2014