

**Legislative Council Panel on Home Affairs
Meeting on 28 November 2003**

**Result on the Consultation on Proposed Amendments to the
Building Management Ordinance (Cap. 344)**

PURPOSE

1. This paper informs Members of the outcome of public consultation on the proposed amendments to the Building Management Ordinance (BMO) (Cap.344) and the way forward.

BACKGROUND

2. Following discussion at the Subcommittee on the Review of BMO under the Legislative Council Panel on Home Affairs, the Home Affairs Department (HAD) issued on 12 May 2003 a consultation paper on the proposed amendments to the BMO (copy at Annex A) to seek the views of the public on the proposals. The aims of the proposals are to assist owners' corporations (OCs) in the performance of duties and exercise of powers, rationalize the procedures for appointing a management committee and its members, and afford better protection for property owners. The consultation ended on 31 July 2003 and we received a plethora of comments from various parties concerned – property owners and occupiers, OCs and other owners' associations, professional organizations and other organisations in the building management industry, District Councillors and Legislative Councillors.

FEEDBACK RECEIVED

3. During the consultation period, we made presentations at all the 18 District Councils and participated in a total of 43 forums, seminars and meetings. A total of 1 240 written submissions have been received. We are encouraged by such an enthusiastic response.

SUMMARY OF COMMENTS

I. TO ASSIST OCS IN THE PERFORMANCE OF DUTIES AND EXERCISE OF POWERS

(A) Personal liabilities of members of a management committee (MC) for the decision of an OC

We proposed to add an express provision in the BMO that MC members of an OC shall not be held personally liable for any collective decision of the OC, which is neither ultra vires nor tortious, simply because they are members of the MC.

4. Comments received from various fronts are generally in support of the proposal, on the understanding that it would help encourage greater participation of owners in the work of OCs. However, the definition of “ultra vires”, “tortious” and “collective decision” are sought for a complete understanding of the amendment proposal.

5. “Ultra vires” means beyond one’s power and MC members will be acting ultra vires if they make a decision which is beyond the provisions in the BMO. “Tortious” means a civil wrong and a common example in the context of building management is libel. There is a great deal of case-law to support the definition of the two terms and we do not think it is appropriate to introduce a specific definition in the BMO. That said, we will work with the Department of Justice (DoJ) on the provision of suitable illustrations in the context of building management in the working guidelines which will be issued for the reference of parties concerned. Regarding the term “collective decision”, we would make clear in the drafting of the bill that it means decisions made either by the whole OC through an owners’ meeting or by the MC.

6. Some professional bodies have expressed concern that a blanket exemption of liabilities would encourage MC members to make unreasonable decisions which may not be in the interest of the majority of owners. This should not be the case under the proposal since MC members would still be liable to collective responsibility, and ultra vires and tortious acts are not covered. The proposed amendment has not given any extra “protection” to MC members but only serves to give them

explicit assurances.

(B) Power of an OC to borrow money from the Government in compliance with statutory notices and orders

We proposed to amend the BMO to specifically empower an OC to borrow from the Government, for the purpose of complying with statutory notices and orders which relate to the common parts of the building an amount equivalent to the costs which should be borne by the owners who fail or refuse to pay. In borrowing from the Government, the OC will be acting as an agent on behalf of those individual owners who fail or refuse to pay, instead of all owners of the buildings. In other words, only those owners who fail or refuse to pay will be liable for the loan from the Government, and the liability for the loan will not be transferred to the OC or to any other owners who have already contributed their shares of the costs.

7. Feedback is largely positive towards this recommendation. Respondents generally considered the proposal conducive to the timely implementation of necessary repairs to buildings.

8. There are however some concerns about the proposal. Some were concerned about the potential danger of abuse by the OCs. Owners' interests might be at stake if OCs exercise such power in a reckless and unreasonable manner. Many urged the Government to introduce a mechanism with detailed procedures for the Administration to vet and process the OCs' applications and an appeal mechanism for the owners concerned. This is to avoid abuse by the OCs and also to safeguard those owners who may have a genuine and valid reason for refusing to pay the OC their share of repair expenses.

9. Some of those who supported the proposal urged the Government to extend the proposal to cover non-statutory works so as to encourage OCs to undertake the necessary repairs and maintenance in a timely manner. Many respondents have also raised concern that merely placing a charging order against the titles of properties belonging to those owners who refused to pay would not be a sufficient deterrent. This is especially the case if there was no intention on the part of the owners to sell the flat.

10. We consider the chance of abuse on the part of OCs would be reduced or avoided under the current proposal which is confined solely to statutory notices and orders. The issue of statutory notices and orders indicates a certain degree of urgency and necessity of such works from the Government's point of view. By restricting the OCs' borrowing power to cases involving statutory orders and notices, we are also able to avoid a great deal of unnecessary disputes among owners. For the same reason, we would not recommend expanding the scope of this proposal to non-statutory orders and notices at this stage.

11. We are now considering the detailed requirements and arrangements under which an OC can exercise the borrowing power in consultation with departments concerned. Our initial thinking is that an owners' meeting should be convened to resolve that the OC should borrow from the Government on behalf of those owners for their respective contributions and the OC has to produce such documentary proof when submitting the application¹. Before a loan is granted to an OC, the designated public officer shall serve a notice on the owner concerned, who may file a claim against the OC with the Lands Tribunal to challenge the debt he owed to the OC. In other words, the owners concerned will be allowed to appeal to the Lands Tribunal and the loan will be withheld pending the court judgment. We will take into account the views received when finalizing the detailed requirements and arrangements.

12. We are aware of the limitation of a charging order but must emphasise that the Government will not hesitate to apply to the court for cost recovery from those who fail to pay within the specified period of time. The Government will, at the same time, review the cost-recovery methods with a view to establishing a fair and cost-effective system.

¹ It refers to the application for the Building Safety Loan Scheme.

(C) Termination of appointment of the manager specified in the Deed of Mutual Covenant (DMC) by an OC

We proposed to specify in the BMO that paragraph 7(1) of the Seventh Schedule shall only be used to terminate appointment of the DMC manager. We also proposed to remove the provision in the Seventh Schedule that not more than one manager's appointment can be terminated within any three consecutive years.

We further proposed to have an alternative mechanism for OCs to terminate appointment of the DMC manager – If a DMC provides for a specified period of management of the DMC manager, the manager's appointment can only be terminated in accordance with paragraph 7(1) of the Seventh Schedule within the specified period. After the specified period of management provided in a DMC, the owners may at a general meeting resolve by a majority of the votes to appoint a new manager and to terminate appointment of the DMC manager, provided that a quorum of 20% of owners has been met at the meeting. Appointment of the new manager shall take effect on the day immediately after the date of termination of the DMC manager's appointment. If no new manager has been appointed, the DMC manager's appointment can only be terminated in accordance with paragraph 7(1) of the Seventh Schedule. However, if there is no specified period provided in a DMC, the procedure proposed above shall only apply after the manager's initial two years of management.

13. This is one of the most controversial proposals in the consultation exercise. While most of the owners, OCs and District Councillors and certain professional organisations strongly support the amendments, real estate developers, property management companies and associations and some professional organisations are strongly opposed to the amendments.

14. Those on the supporting side believe that the amendments could bring more flexibility into the appointment and termination of managers. The existing arrangement of having 50% of undivided shares to terminate the appointment of a manager is regarded to be too stringent and arduous to achieve. An alternative mechanism would allow freedom for owners to choose a manager based on their performance, which would in turn motivate them to do quality work. They perceived the new mechanism

fair and reasonable in a free market and considered competition would be the best way to guarantee quality.

15. Some supporting respondents have, however, expressed concern that it might be practically difficult for a new manager to be hired before the termination of the existing one. Although this could be solved through contractual specifications, we agree that in view of the practical difficulties, such a requirement should not be stipulated. We believe that owners would make the best arrangements possible to avoid a management vacuum and there is little need to mandate the immediate availability of a new manager in the legislation.

16. Strong opposition was received from real estate developers and property managers. Property managers, especially those who were employed as DMC managers, were most opposed to the proposal. They generally considered the new requirement introduced in the 2000 BMO amendment exercise that only owners of shares who pay or are liable to pay management expenses shall be entitled to vote in the resolution of termination of DMC manager has already balanced the interests of the general owners and those of the DMC manager. Property management companies which have been looking for new business in the market are not as against the proposal as their counterparts who were being employed as DMC managers.

17. Arguments against the proposal included the possibility of having too frequent changes of managers and hence the lack of long-term planning and foresight in property management. To this camp of respondents, the quorum requirement of 20% of owners could be easily attainable with the use of proxies. Moreover, owners might easily vote down the existing manager and this would cause instability and disruption to the normal operation of the building. Unnecessary conflicts among residents and the property manager would arise.

18. Property developers also expressed difficulties in managing multi-phased housing developments, which have become very common in recent years, if they are not guaranteed a sufficiently long term of management. Two years as allowed under the existing DMC Guidelines issued by the Lands Department would not be sufficient for all the phases to be developed (which mostly take five years or more) and any newly-

appointed manager which is not affiliated to the developer would face tremendous difficulties providing a proper management service. The termination of the DMC manager before the completion of all phases may also affect the sales of the subsequent phases.

19. The aim of our proposal has all along been the introduction of flexibility into the mechanism for appointing managers, believing that developers, managers and owners are all geared towards the provision of good management services and ultimately a desirable living environment. We should not presume that they would allow reckless alteration of managers simply because the mechanism has been made easier.

20. We also do not consider that a resolution passed by a majority of shares of votes within a 20% quorum is merely representing a minority view. The majority rules still apply under the proposal. The 20% quorum requirement is merely the minimum requirement for an owners' meeting to be valid. The resolution to terminate the DMC manager will still need to be passed by a majority of shares at the meeting.

21. That said, we agree that the proposal to change the threshold of terminating the appointment of the DMC manager from 50% to a simple majority present at an owners' meeting will mean a drastic change to the existing mechanism. Moreover, since the allocation of undivided shares is different amongst buildings (especially for buildings which were built prior to the adoption of the Lands Department's DMC Guidelines in 1987), it is difficult to set a specific threshold which will suit the circumstances of all buildings.

22. Having considered the views received, we will continue to specify in the BMO that paragraph 7(1) of the Seventh Schedule shall only be used to terminate appointment of the DMC manager. We will also go ahead with the proposal to remove the provision in the Seventh Schedule that not more than one manager's appointment can be terminated within any three consecutive years. However, in consultation with all stakeholders, we will re-consider the proposal to relax the existing requirements for termination of the DMC manager.

II. TO RATIONALIZE THE APPOINTMENT PROCEDURES OF A MANAGEMENT COMMITTEE AND ITS MEMBERS

(D) Appointment of a management committee

We proposed to amend the BMO such that an MC may be appointed by a resolution of the owners of not less than 30% of the shares, and the resolution must also be passed by a majority of the votes of the owners voting either personally or by proxy at the same meeting.

23. This proposal is mainly a procedural matter. The existing provision in the BMO has given rise to two problems. First, as the threshold of appointing an MC was reduced from 50% to 30% in 2000, it would be possible for other owners with 30% or more shares to vote against the appointment of an MC at the same owners' meeting. Second, the present composition of section 3 of the BMO has posed the question whether an absolute majority of 30% is needed. To remove such confusion and to ensure the elected MC will operate with the support of the majority of owners, we would make it clear that the resolution under section 3 of the BMO must be passed by a majority of votes of not less than 30%. The proposal received general support.

24. In relation to this amendment, we have received comments that section 3 of the BMO as it now stands has caused confusion to owners as to whether an MC should be appointed in accordance with the DMC or the BMO.

25. Having considered the comments received and the problems we have encountered with the application of this section of the BMO in the past, we propose to further amend section 3(2) such that a management committee *under this section of the BMO* could only be appointed by a resolution of the owners of not less than 30% of the shares, which must also be a majority of votes cast at the same meeting. Following this amendment, we propose that all references to the DMC in the Second Schedule to the BMO concerning the composition and procedure of a management committee should also be deleted. This means the composition and procedure of the management committee *formed under section 3 of the BMO* should follow the BMO instead of the DMC. The rationale for the proposal is that –

- (a) In the case of Siu Siu Hing v Land Registry (HCAL 77/2000), it was held that unless the DMC of a building specifically referred to the appointment of an MC under section 3 of the BMO, the MC referred to in the DMC was not the same creature as the one provided for in the BMO. We fully subscribe to this view and our proposal is to make this crystal clear in the BMO – for an MC to be formed under the BMO, the owners have to follow the procedures set out in the law; for other committees (say, owners’ committee, estate committee, howsoever named in the DMC), they have to follow the procedures set out in the DMC. And only the former one, i.e. the MC formed under the BMO, could be registered as MC of an OC.
- (b) The DMC provisions for different buildings vary to a great extent. Section 8 of the BMO provides that the Land Registry shall, if satisfied that the provisions of section 3 (and other specified sections) have been complied with, issue a certificate of registration to the OC. The Land Registry has all along been adopting the view that if the committee (however named) referred to in the DMC can manage the building and give directions to the manager, it will be treated as a management committee under the BMO. This is a very subjective assessment and has caused some uncertainty about the interpretation of the DMC. The proposed amendment will help to resolve this problem.
- (c) There is also the question of whether the composition and procedure of an MC formed under section 3(2)(a) of the BMO should follow that of the DMC provisions or the Second Schedule to the BMO. In some cases, the two (i.e. the DMC and BMO provisions) may contradict each other. What further complicates the matter is that paragraph 12 of the Second Schedule provides that in the event of any inconsistency between this Schedule and the DMC, the former should prevail. The proposed amendment will help to remove this ambiguity in the legislation.

26. We have also received enquiries about who should be the person to preside over the meeting convened for the appointment of a management committee. Having considered the practical situation, we propose to specify that for meetings convened under section 3(1)(c), i.e.

by the owners of not less than 5% of the shares, the owners should nominate among themselves a person to preside over the meeting. This person should also be the one to serve the notice of meeting under section 5(1)(b). This will avoid the situation of having a group of owners (5% could mean tens or hundreds of owners in the cases of large estates) to be the person presiding over the meeting.

(E) Appointment of members and holders of office of the first management committee

We proposed to specify in the Second Schedule that members and holders of office of the MC shall be appointed by a resolution passed by a majority of the votes of the owners voting either personally or by proxy at the same owners' meeting at which the first MC has been successfully appointed, provided that there is a quorum of 10% of owners at that meeting.

27. This is a simple amendment that enjoys extensive support among the respondents. The 10% quorum requirement is in line with that for a general meeting of an OC under paragraph 5(1)(b) of the Third Schedule.

28. Having considered the practical implications, we also propose to refine the original proposal as follows –

(a) For an owners' meeting convened with a view to appointing an MC for the formation of an OC under sections 3, 3A and 4, the quorum of 10% of owners should apply from the start of the meeting.

(b) Once a resolution has been passed on the appointment of an MC under sections 3, 3A and 4, the appointment of the members and office bearers of the MC shall be appointed by a resolution passed by a simple majority of shares. The 10% quorum requirement remains.

29. The proposed refinement would ensure that all owners' meetings convened with a view to appointing the first MC and appointment of office holders would be attended and participated by a representative number of owners. We consider the requirement equally important no matter the MC is appointed by 30% of shares under section 3 of the BMO,

or appointed at an owners' meeting which is convened on the order of SHA as the Authority under section 3A or of the Lands Tribunal under section 4 of the BMO.

30. In relation to this amendment, some respondents have expressed concern over the restriction on appointment of a vice-chairman to the MC under the existing BMO. Paragraph 2(c) of the Second Schedule provides that a vice-chairman could be appointed if that office (howsoever named) is specified in the DMC. This provision has prohibited those buildings whose DMC has not specified the vice-chairman post from appointing such a post. It is also confusing if the OC has to refer to the DMC on such appointment matter if the MC itself is appointed under the BMO. We are of the view that the composition of the MC should be set out in the legislation governing the OC, i.e. the BMO, and that owners should be given the discretion to decide whether a vice-chairman is needed in the MC for the management of the building. We will introduce amendments to the Second Schedule to this effect.

(F) Appointment of members and holders of office of any subsequent management committee

We proposed to amend the Second Schedule by stating that the corporation shall, by a resolution passed by owners at an annual general meeting of the corporation at which the MC retires, appoint a new MC, a chairman, a vice-chairman (if necessary), a secretary (if vacant), a treasurer (if vacant) and other holders of office.

31. This proposal received general support during the consultation.

32. We also propose to refine the provisions regarding the appointment of the secretary and the treasurer of the MC. Paragraph 2(1) of the Second Schedule requires the appointment of a secretary and a treasurer of the MC. The person appointed may be, but need not be, one of the persons appointed as a member of the MC. If the two posts are held by members of the MC, they will be required to retire with the MC under paragraph 5(1) of the same Schedule at the second annual general meeting of the OC. Such a requirement, however, does not apply to those secretaries and treasurers who are not persons appointed as members of the MC. There have been cases where these secretaries and

treasurers refused to retire from their posts upon the appointment of a new MC.

33. We therefore propose to specify in the Second Schedule that the secretary and treasurer, who are not persons appointed as members of the MC, will not become members of the MC by their appointment as two post-holders and all secretaries and treasurers, no matter they are members of the MC or not, should retire together with other members of the MC. There is no justification for giving them preferential treatment.

III. TO AFFORD BETTER PROTECTION FOR THE INTERESTS OF PROPERTY OWNERS

(G) Procurement of supplies, goods and services by an OC

We proposed to-

- (i) delete paragraph 1 from the Code of Practice on procurement of supplies, goods and services so that any such procurement with a value exceeding the prescribed threshold has to be done through tendering in accordance with section 20(A)2 of the BMO;*
- (ii) lower the minimum percentage of an OC's annual budget for the purpose of tendering from the existing 20% to 10% while retaining the specified sum of \$100,000 or such other sum in substitution therefore as the Authority may specify by notice in the Gazette;*
- (iii) include a requirement that any tender of a value exceeding a sum which is equivalent to 10% of the annual budget of an OC shall be accepted or rejected by a resolution passed at a general meeting of the OC; and*
- (iv) insert a punitive clause that any member of an MC who contravenes the requirements shall be guilty of an offence and shall be liable on conviction to a maximum fine of \$50,000 (i.e. level 5 under the Criminal Procedure Ordinance (Cap. 221)), unless he proves that the offence was committed without his consent or connivance and that he exercised all such due diligence to prevent the commission of the offence as he ought to have exercised in the circumstances.*

34. This is another area which has attracted heated debates. Many

of the respondents supported strengthening of the requirements for procurement in the BMO but there were arguments for and against the proposed threshold. Some regarded 10% of the annual budget to be too huge a sum (10% could mean millions for the large estates) while others, mostly office-holders of MC and the property managers, regarded it too minimal to require tendering and endorsement at owners' meetings. The latter foresaw that tenders and owners' meeting would be a commonplace and a significant amount of resources and manpower would have to be devoted to the arrangements and proceedings required under the proposal. On the other hand, 10% of the annual budget may only mean at most thousands of dollars for single-block tenement buildings. This calls into question the necessity of tendering and having owners' meetings under such circumstances. There is also a suggestion for a tiered system to cater for buildings of different sizes.

35. Taken all the views into consideration, we have refined the proposal as follows:

- (a) Any procurement of supplies, goods and services which exceeds the sum of \$200,000 (*\$100,000 in the original proposal*) or a sum which is equivalent to 20% (*10% in the original proposal*) of the annual budget of the corporation (or such other sum or percentage in substitution which may be specified in the Gazette), whichever is the lesser, shall be done by invitation to tender.
- (b) Any procurement of supplies, goods and services which exceeds the sum of 20% (*10% in the original proposal*) of the annual budget of an OC (or such other percentage in substitution which may be specified in the Gazette) shall be accepted or rejected by a resolution passed at a general meeting of the OC.

36. We believe that the revised proposals are closer to reality and have managed to strike a balance between the protection of owners' rights and the operation of OCs. The threshold for tendering is set at 20% of the annual budget or \$200,000, whichever is the lesser. For the large estates with a huge annual budget, it will mean tendering is required whenever the procurement is at or above \$200,000. We consider this is a reasonable amount. Moreover, we have not specified that all tenders have to be open tender and tendering itself should not be viewed as

arduous or unachievable. After all, greater transparency of MCs' decisions would be beneficial to all the parties concerned. As for endorsement at owners' meetings, we have adjusted the threshold to 20% of the annual budget which will apply to all buildings. We consider the owners will have the right to vote on the procurement since 20% will already mean some 2½ months' share of management fees² on the part of individual owners. Any expenditure exceeding this amount merits the approval of the owners and an objective selection procedure.

37. We have considered the option of having a tiered structure for the procurement requirement. However, the number of units in buildings of Hong Kong varies greatly (from some 10 units to thousands of units) and it is basically impractical to have a demarcation that will satisfy everyone. To make a tiered system work, a number of tiers would be required to cater for the many different types of buildings. This would bring obvious inconvenience in implementation and render the mechanism unworkable and ineffective. In fact, it is another form of tiered structure by applying a threshold based on the percentage of annual budget and doing away with a fixed amount. We consider the revised proposal will be able to cater for the needs of buildings of different sizes.

38. In the process of deliberations, some respondents worried that putting the tender requirements into the BMO would reduce flexibility and create hindrances for the work of the OC, especially in times of emergency. For urgent repair work such as sudden leakage or blockage of sewage pipes, it would be extremely difficult to follow the requirement of tendering and endorsement at owners' meetings (which requires the issuance of notice 14 days in advance of the meeting).

39. Having considered such practical difficulties, we will work with DoJ during the drafting of the amendment bill to allow OCs to formulate a list of urgent matters which do not need to go through the process of tendering and owners' meetings. It is vital, however, for the list to be pre-approved by owners at a general meeting. Any procurement which is not within the pre-approved list should follow the proposed tendering procedure and going through the owners' meeting.

² One month's management fee will mean around 8.33% (1/12) of the annual management expenses.

40. Many of the comments received were strongly against the insertion of the punitive clause. It was argued that the introduction of such a clause would discourage owners from participating in the voluntary work of OCs and serve no healthy purpose. On balance, we propose to do away with such a clause in the amendment bill and allow non-compliance to be dealt with through civil means.

(H) Individual owners' rights to obtain copies of certain building management documents from an OC

We proposed to provide for the owners' rights to obtain copies of minutes of meetings of both the OCs and MCs upon payment of reasonable copying charges as the MC concerned may determine.

41. The principle of this amendment was supported by an absolute majority of the respondents. The only concern was the definition of a "reasonable" copying charge. Many comments believed that the term "reasonable" is subject to interpretation and may cause disputes between owners and the OCs.

42. The term "reasonable copying charge" is used in existing provisions regarding copies of annual budget, income and expenditure account and balance sheet in paragraph 4 of the Fifth Schedule and paragraph 3 of the Sixth Schedule. The term is also commonly used in other legislation. We do not consider it appropriate for the Government to stipulate the level of copying charges in the legislation.

43. In relation, given that owners will be given the express rights to obtain copies of minutes of meetings of both the OCs and MCs, we will require the MC to keep such records for a period of not less than six years. This is in line with the requirement for the keeping of bills, invoices, vouchers, receipts and other documents as set out in paragraph 1 of the Sixth Schedule.

44. In addition, we propose to expand the scope of the amendment to cover the auditor's report of the OC. Section 27 of the BMO provides that the income and expenditure account and balance sheet of the OC³

³ The auditing by accountant requirement does not apply to OCs of buildings which contain not more than 50 flats.

shall be audited by an accountant. According to paragraph 3 of the Sixth Schedule, an OC ought to supply copies of its income and expenditure account and balance sheet to the owners upon request and payment of a reasonable copying charge. We propose to amend this provision to cover the auditors' report as well because it is the document which will provide a true and fair view of the financial transactions of the OC and the financial position of the corporation.

IV. OTHER PROPOSALS NOT CONTAINED IN THE CONSULTATION PAPER

(I) Appointment of proxy

45. We have received a number of comments on the appointment of proxy at owners' meetings. Some suggested that a standard proxy form and more detailed requirements for the appointment of proxy should be specified in a Schedule to the BMO. There were also suggestions that the number of proxy held by one person should be restricted or that the proxy system should be cancelled.

46. Paragraph 4 of the Third Schedule provides that at a meeting of the corporation, the votes of owners may be given either personally or by proxy. The reason for allowing owners to appoint a proxy at an owners' meeting is to enable those owners who may not be able to attend the meeting in person to cast their votes. We are aware that there are many disputes over the validity of the proxy at owners' meetings. However, this does not mean that the proxy system should be abolished. Neither do we consider that it is appropriate to restrict the number of proxy held by one person as this will in turn mean restricting the freedom of the owners to choose any person to be their proxy. On the contrary, we consider that owners should be informed and reminded of the importance and implication of appointing a proxy and that the owners and proxies should be aware that falsifying a proxy form is a criminal offence. As to the provision of a set of detailed requirements and arrangements for the appointment of proxy, we are drafting in consultation with DoJ a set of guidelines for reference by the OCs and owners.

47. Section 4(2) of the Third Schedule provides that the instrument appointing a proxy shall be in writing signed by the owner, or if the owner is a body corporate, under the seal of that body. Confusion has

arisen over the meaning of the “seal” of a body corporate. Without a specific definition in the BMO, a “seal” should be construed to mean the common seal⁴, normally applied by companies. For proxies used at owners’ meetings, OCs normally do not require the owner who is a body corporate to use the common seal. A rubber stamp with the authorized signature of the company should suffice. Such practice may however cause disputes in some cases. In accordance with a number of court judgments on proxy⁵, the purpose of using any common seal is to serve as an evidence of authenticity. If a rubber stamp together with an authorized signature of the body corporate on the proxy form could serve the purpose well, there is no reason for not clarifying so in the legislation. We therefore propose to amend the requirement of having a common seal to a rubber stamp of a body corporate together with an authorized signature. The aim of this proposal is not to tighten or relax the present requirement governing proxy but to clarify the present requirement for easier compliance.

48. Paragraph 4(3) of the Third Schedule provides that the appointment of a proxy shall have no effect unless the instrument appointing the proxy is lodged with the secretary of the management committee not less than 24 hours before the time for the holding of the meeting at which the proxy proposes to vote, *or within such lesser time as the chairman shall allow*. Section 5 of the BMO has similar provisions for the appointment of proxy at owners’ meetings convened for the appointment of a management committee⁶. These provisions have allowed, in the case of a general meeting, the chairman, and in the case of a meeting convened for the appointment of a management committee, the person presiding at the meeting, the discretion to decide whether the late proxy should be accepted. This has caused many disputes among owners at owners’ meetings. Such practice has also hindered the management committee from checking and verifying the

⁴ A company’s common seal is an important and valuable instrument and is used to execute certain important documents (e.g. execution of deed under the Conveyancing and Property Ordinance).

⁵ U Wai Investment Co Ltd (LDBM 80/1997) and Triumphal Fountain Ltd (LDBM 309/2001).

⁶ The appointment of proxy in owners’ meetings convened under sections 3, 3A, 4 or 40C shall have no effect unless the instrument appointing the proxy is lodged with the person or one of the persons, as the case may be, who convened the meeting **not less than 24 hours** before the time for the holding of the meeting at which the proxy proposes to vote, or within such lesser time as the person presiding at the meeting shall allow.

proxy forms received if they were submitted at the last minute at the owners' meeting. To allow the management committee sufficient time to check the proxy forms and to verify the accuracy with both the owners concerned and the proxy in case of doubt, we propose to set the deadline in the BMO for submission of proxy at 24 hours before the holding of the meeting. In other words, neither the person presiding at the meeting nor the chairman of the owners' meeting will have the authority to accept the proxy after the 24-hour limit.

(J) “Unfair” Provisions in DMCs

49. We have received comments that the Government should introduce provisions in the BMO to override all “unfair” provisions in DMCs and that a mechanism should be allowed for owners to amend the DMCs.

50. DMC is a deed and a private contract signed between the developer, the manager and the first purchaser of the building. It is not appropriate for the Government, who is not a party to the deed, to attempt to override all provisions set out in the DMC which are regarded as “unfair” by one party. Moreover, DMC sets out the rights and obligations of all owners of a building. It is questionable whether a simple majority view reflected by owners' present at an owners' meeting would suffice and be appropriate in circumstances where the rights and duties of different parties may be affected. That said, the Administration is aware of the need to introduce some mandatory terms to facilitate building management and has therefore introduced certain sections in the BMO, notably Part VIA and the Seventh Schedule, which shall be impliedly incorporated in all DMCs. These provisions concern mainly the rights of owners to establish an OC and the duties of the building manager.

LEGISLATIVE TIMETABLE

51. We will include the above proposals in a composite amendment bill which we plan to introduce into the Legislative Council in the 2004-05 legislative session.

Home Affairs Department
November 2003

**Consultation Paper on
Proposed Amendments to the
Building Management Ordinance (Cap. 344)**

This paper invites views from members of the public on proposals to amend the Building Management Ordinance (BMO) (Cap. 344)¹.

BACKGROUND

2. It is the Government's objective to facilitate private building owners in the better management and maintenance of their properties. We provide a legal framework through the BMO to facilitate the incorporation of owners of flats in buildings or groups of buildings, and to provide for the management of buildings or groups of buildings and for matter incidental thereto or connected therewith. To better equip the owners to put good building management into practice, we also provide supportive services, offer advice and organize training for the owners of private buildings.

3. In 1970, the Multi-storey Buildings (Owners Incorporation) Ordinance was enacted to provide a legal framework for owners' corporations (OCs) to operate. The Ordinance was extensively amended and renamed as the BMO in May 1993 to keep pace with the ongoing change of the field situation. The BMO which sets out clearly the rights and responsibilities of owners and OCs etc. in legal terms, was further amended in 1998 and 2000 to meet the needs arising from the field developments.

4. For the purposes of enhancing our services and improving the BMO, Home Affairs Department has been collating the views and suggestions from the District Councillors, OCs and other owners' associations, building owners and occupiers, and the professional organizations involved in building management. We have received many constructive views and suggestions through meetings, focus groups, informal discussion and correspondence. Following the enactment of the Building Management (Amendment) Ordinance in August 2000, the Legislative Council also set up, under its Panel on Home Affairs, a Subcommittee on Review of the BMO. The Subcommittee has had 12 meetings since its formation and made various suggestions on how the BMO could be amended.

¹ The full version of the BMO could be viewed at the website of the Bilingual Laws Information System at <http://www.justice.gov.hk/Home.htm>. The BMO booklet is also available for sale at the Government Publication Centre at Lower Block, Ground Floor, Queensway Government Offices, 66 Queensway, Hong Kong.

5. To facilitate better management of private buildings in Hong Kong, the Administration proposes to introduce further amendments to the BMO. Before introduction of the bill into the Legislative Council, we would like to invite comments on the legislative amendment proposals as set out in this consultation document. We also welcome comments and suggestions on whether and how other provisions of the BMO should be amended.

PROPOSALS

6. We have taken account of the views and suggestions received so far in drawing up the following legislative amendment proposals. The proposals set out in the following paragraphs are aimed at facilitating OCs in their performance of duties and exercise of powers, rationalizing the appointment procedures of a management committee and its members, and affording better protection for the interests of building owners.

I. TO FACILITATE OCS IN THEIR PERFORMANCE OF DUTIES AND EXERCISE OF POWERS

(A) Personal liabilities of members of a management committee for the decisions of an OC

7. Under the existing BMO, the liability of an OC should not normally be transferred to an individual member of a management committee, except in the situations specifically set out in those provisions relating to the responsibilities of members of a management committee. There is, however, no clear provision to the above effect in the existing BMO.

8. To address this problem, we propose to add an express provision to the BMO that management committee members of an OC shall not be held personally liable for any collective decision of the OC, which is neither ultra vires nor tortious, solely on the ground that they are members of the management committee.

(B) Power of an OC to borrow money from the Government in compliance with certain statutory notices, orders or other documents

9. Under a number of legislation, the authorities may require owners to undertake works on the common parts of their buildings to ensure public safety. Where the works required are in respect of the common parts of a building and the building is managed by an OC, any statutory notice, order or other document has to be served on the OC by virtue of section 16 of the

BMO.

10. At present, individual private building owners encountering financial difficulties in complying with the above statutory notices, orders or other documents may apply for low interest loans from the Government². OCs, however, are not empowered under section 18 of the existing BMO to borrow money on behalf of all or any of the owners. In the absence of such a power, an OC will not be able to make up the shortfall in the event that some owners fail or refuse to pay their respective shares of the costs of works. In such circumstances, all that an OC can do is to take legal actions against those owners who fail or refuse to pay. This may not be conducive to the timely implementation of the required works.

11. To address this concern, we have been considering to work out an appropriate and fair mechanism to ensure that the works as required upon the common parts of a building under any statutory notice, order or other document will not be unduly delayed by the owners who fail or refuse to pay their shares of the costs involved. We propose to amend the BMO to specifically empower an OC to borrow from the Government, for the purpose of complying with the statutory notices, orders or other documents which relate to the common parts of the building an amount equivalent to the costs which should be borne by the owners who fail or refuse to pay, and to make regulations for setting out the detailed requirements and arrangements. In borrowing from the Government, the OC will be acting as an agent on behalf of those individual owners who fail or refuse to pay, instead of all the owners of the building. In other words, only those owners who fail or refuse to pay will be liable for the loan from the Government, and the liability for the loan will not be transferred to the OC or to any other owners who have already contributed their respective shares of the costs. Upon granting of the loan to the OC, the Government will register charges against the titles of those owners' properties, as a form of security for their respective shares of the loan granted. The charge shall only be released upon the individual owner's repayment of his share of the loan to the Government.

(C) Termination of appointment of the DMC manager by an OC

12. Prior to the adoption of the Lands Department's Guidelines for Deeds of Mutual Covenant (DMCs) on 15 October 1987, a DMC usually provided for perpetual management of a building by the developer or by a manager associated with the developer. Paragraph 7(1) of the Seventh

² The Building Safety Loan Scheme administered by the Buildings Department.

Schedule to the BMO³ was therefore introduced for the purpose of enabling an OC to terminate appointment of **the DMC manager**.

13. Though DMCs approved in accordance with the DMC Guidelines on or after 15 October 1987 should normally contain a provision to the effect that the initial period of management by the manager shall not exceed two years, it appears that the manager's appointment may continue after the initial period of two years (or any period specified in the DMC) until the appointment has been terminated by the OC in accordance with paragraph 7(1) of the Seventh Schedule. There are also concerns that it would be practically difficult for an OC to obtain a resolution of the owners of not less than 50% of the shares for the purpose.

14. We propose to specify in the BMO that paragraph 7(1) of the Seventh Schedule shall only be used to terminate appointment of the DMC manager. For any subsequent manager appointed by an OC, the relevant management contract normally provides for a specified period of management, and the manager's appointment should be terminated in accordance with the provisions of the management contract. We also propose to remove the provision in the Seventh Schedule that not more than one manager's appointment can be terminated within any three consecutive years.

15. We further propose to provide an alternative mechanism in the BMO whereby an OC can terminate appointment of **the DMC manager**. The proposed mechanism, in addition to the existing one under the BMO, is set out as follows :

- a) If a DMC provides for a specified period of management of the DMC manager, that manager's appointment can only be terminated in accordance with paragraph 7(1) of the Seventh Schedule **within** the specified period.
- b) **After** the specified period of management provided in a DMC, the owners may at a general meeting⁴ resolve by a majority of the votes to appoint a new manager **and** to terminate appointment of the DMC manager, provided that a quorum of 20% of owners has been met at the meeting. Appointment of the new manager shall take effect on the day immediately after the date of termination of the DMC manager's appointment. If no new manager has been appointed, the DMC

³ Paragraph 7(1) of the Seventh Schedule provides that at a general meeting convened for the purpose a corporation may, by a resolution of the owners of not less than 50% of the shares, terminate by notice the manager's appointment without compensation.

⁴ A general meeting convened by an OC under paragraph 1(1) of the Third Schedule to the BMO.

manager's appointment can only be terminated in accordance with paragraph 7(1) of the Seventh Schedule.

- c) If there is no specified period provided in a DMC, the procedure at (b) above shall only apply **after** the manager's initial two years of management.

16. The proposed mechanism seeks to enable an OC to terminate appointment of the DMC manager upon a resolution passed by a majority of the votes of the owners present (or by proxy) at a general meeting (i.e. without the need to comply with the requirement of 50% shares), provided that a quorum of 20% of owners has been met at that meeting, and a new manager has been effectively appointed (supported by a valid resolution of owners) upon termination of the DMC manager's appointment. This will enable an OC to terminate appointment of the DMC manager under less stringent conditions, without compromising the need to minimize the possibility of a management vacuum in a building.

II. TO RATIONALIZE THE APPOINTMENT PROCEDURES OF A MANAGEMENT COMMITTEE AND ITS MEMBERS

(D) Appointment of a management committee

17. According to section 3(2) of the BMO, a management committee may be appointed at a duly convened meeting of the owners in accordance with the DMC; or if there is no DMC or the DMC contains no provision for the appointment of a management committee, by a resolution of the owners of not less than 30% of the shares.

18. We propose to amend the BMO such that a management committee may be appointed by a resolution of the owners of not less than 30% of the shares, and the resolution must also be passed by a majority of the votes of the owners voting either personally or by proxy at the same meeting. This will avoid the situation of two separate management committees being appointed by different groups of owners (each with not less than 30% of the shares).

(E) Appointment of members and holders of office of the first management committee

19. According to paragraph 2(1) of the Second Schedule to the BMO, the owners shall, at a meeting convened under sections 3, 3A, 4 or 40C appoint the members of the management committee, and appoint a chairman,

a vice-chairman (if necessary), a secretary, a treasurer, and may at such meeting appoint other holders of the office as may be specified in the DMC and which the owners determine to be necessary in respect of the control, management and administration of the building.

20. We propose to specify in the Second Schedule that members and holders of office of the management committee shall be appointed by a resolution passed by a majority of the votes of the owners voting either personally or by proxy at the same owners' meeting at which the first management committee has been successfully appointed, provided that there is a quorum of 10% of owners at that meeting.

(F) Appointment of members and holders of office of any subsequent management committee

21. According to paragraph 5(1) of the Second Schedule to the BMO, at the second annual general meeting (AGM) of an OC and thereafter at every alternate AGM, all members of the management committee other than the tenants' representative shall retire from office. Paragraph 5(2) of the Second Schedule provides that at an AGM at which the management committee retires, the OC shall appoint a new management committee, a chairman, a vice-chairman (if necessary), a secretary (if vacant) and a treasurer (if vacant), and may at such AGM appoint other holders of office. While paragraph 2(1) of the Second Schedule states that the **owners** shall appoint members of the **first** management committee, members of any **subsequent** management committee shall be appointed by the **corporation** pursuant to paragraph 5(2).

22. We propose to amend the Second Schedule by stating that the corporation shall, by a resolution passed by owners at an AGM of the corporation at which the management committee retires, appoint a new management committee, a chairman, a vice-chairman (if necessary), a secretary (if vacant), a treasurer (if vacant) and other holders of office. This amendment will have the effect that members and holders of office of any subsequent management committee can only be appointed by **a resolution of the owners passed at an AGM.**

III. TO AFFORD BETTER PROTECTION FOR THE INTERESTS OF BUILDING OWNERS

(G) Procurement of supplies, goods and services by an OC

23. Section 20A(2) of the BMO stipulates that:

Any supplies, goods or services the value of which exceeds or is likely to exceed-

- (a) the sum of \$100,000 or such other sum in substitution therefor as the Authority (Secretary for Home Affairs) may specify by notice in the Gazette; or
- (b) a sum which is equivalent to 20% of the annual budget of the corporation or such other percentage in substitution therefor as may be approved by the corporation by a resolution passed at a general meeting,

whichever is the lesser, shall be procured by invitation to tender.

24. The same provision is also set out in paragraph 1 of the Code of Practice on procurement of supplies, goods and services issued by the Authority under section 44(1) of the BMO. According to section 44(2), a failure on the part of any person to observe any Code of Practice shall not by itself render that person liable to criminal proceedings of any kind but any such failure may, in any proceedings whether civil or criminal, be relied upon as tending to establish or to negate any liability which is in question in those proceedings.

25. We have taken the opportunity to review the tender procurement provisions under section 20A. Specifically, we propose:

- a) To delete paragraph 1 from the said Code of Practice, so that any procurement of supplies, goods or services with a value exceeding the prescribed threshold has to be done through tendering in accordance with section 20A(2) of the BMO;
- b) To lower the minimum percentage of an OC's annual budget for the purpose of tendering from the existing 20% to 10%, (while retaining the specified sum of \$100,000 or such other sum in substitution therefor as the Authority may specify by notice in the Gazette);
- c) To include a requirement that any tender of a value exceeding a sum which is equivalent to 10% of the annual budget of an OC shall be accepted or rejected by a resolution passed at a general meeting of the OC; and
- d) To insert a punitive clause that any member of a management committee who contravenes the requirements shall be guilty of an offence and shall

be liable on conviction to a maximum fine of \$50,000 (i.e. level 5 under the Criminal Procedure Ordinance (Cap. 221)), unless he proves that the offence was committed without his consent or connivance and that he exercised all such due diligence to prevent the commission of the offence as he ought to have exercised in the circumstances.

(H) Individual owners' rights to obtain copies of certain building management documents from an OC

26. According to paragraph 10(4B) of the Second Schedule and paragraph 6(3) of the Third Schedule to the BMO, the minutes of a management committee's meeting and those of an OC's meetings shall, within 28 days of the respective dates of the meetings, be displayed by the secretary in a prominent place in the building. However, there is no provision in the BMO which gives owners the rights to request copies of such documents.

27. We propose to provide for the owners' rights to obtain copies of minutes of meetings of both OCs and management committees upon payment of reasonable copying charges as the management committee concerned may determine.

SUMMARY OF PROPOSALS

28. Having regard to the views we have received, we would like to put forward the legislative amendment proposals to amend the BMO as follows –

- a) to make clear that management committee members of an OC shall not be held personally liable for any collective decision of the OC solely on the ground that they are members of the management committee;
- b) to enable an OC to borrow money from the Government for the purpose of complying with certain statutory notices, orders and other documents;
- c) to rationalize the requirements regarding termination of appointment of managers by an OC;
- d) to clarify the requirements of a resolution to appoint the first management committee;
- e) to rationalize the appointment procedure of members and holders of office of the first management committee;

- f) to clarify the appointment procedure of members and holders of office of any subsequent management committee;
- g) to improve the requirements regarding procurement of supplies, goods and services by an OC; and
- h) to provide for the owners' rights to obtain copies of the minutes of meetings of a management committee and those of an OC.

CONSULTATION

29. Members of the public are invited to give their comments on the above legislative amendment proposals and any other provisions on the BMO. Comments can be sent in writing to Home Affairs Department **on or before 31 July 2003** –

Address: Home Affairs Department (Division IV)
21/F China Overseas Building
139 Hennessy Road
Wan Chai
Hong Kong

Facsimile No.: 2147 0984

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

Website: www.buildingmgt.gov.hk

30. Home Affairs Department reserves the right to publish all views and comments. If you do not wish your name to be disclosed, please state so when making your submission.

Home Affairs Department
May 2003