THE LAW SOCIETY OF HONG KONG 香港律師會

Review of the Building Management Ordinance (Cap. 344)

Submission

Introduction

1. The Law Society of Hong Kong noted and has reviewed the Administration's Paper on its further legislative proposals to update the Building Management Ordinance (Cap. 344) ("BMO") and the related administrative measures under LC Paper No. CB(2) 1038/16-17(03).

2. This submission is made in response to an invitation from the Legislative Council Panel on Home Affairs for views on "Review of the Building Management Ordinance (Cap.344)".

Comments

3. We had in 2015 produced a very detailed written submission on the Administration's then legislative and administrative proposals on the BMO.

4. With disappointment we note that, despite our submission dated 2 February 2015, some of the issues we have commented upon have not been taken on board for consideration by the Administration. We shall draw the Administration's attention to those latest legislative proposals which in our view should merit a serious and thorough consideration.

5. We invite the Panel's attention again to our submission made in 2015, a copy of which is at Annex I.

Quorum of Meeting

6. We refer to the proposal to raise the quorum of the meeting of the owner's corporation ("OC") for the passage of resolutions on "large-scale maintenance projects" from 10% to 20% of the owners. We reiterate that that is neither practical nor in the interests of the owners.

7. The further proposal to stipulate that at least 10% of the owners have to attend personally at an OC meeting to decide on "large-scale maintenance projects" is, in our view, undesirable.

8. The Administration is invited to take note of the following:

   (i) For those owners who are non-local and who reside overseas, it is unlikely that they would attend the OC meeting. The population of these overseas owners seems to be on the increase;

   (ii) Many owners already themselves make up their mind and choose not to attend the OC meeting. Raising the threshold of the quorum of the OC meeting will not help boost the attendance rate;

   (iii) There are logistics difficulties in arranging meetings with an increase in the quorum. One of the practical difficulties is the availability of a suitably large venue for the OC meeting. For a housing estate which has over 1,000 units (and that is not uncommon), the required quorum under the proposal is 200 owners. It is not easy to find a venue to accommodate meeting of this size. Our members have already heard of an OC meeting being held at the car park area. That is inappropriate. Further, if the meeting venue is not convenient to the owners, there is little incentive for the owners to attend the OC meeting.

   (iv) Additionally, under the proposal, the OC has to ensure at least 10% of the owners have to attend the OC meeting in person. This presents an extra hurdle. We surmise that there is an extremely high likelihood of adjournment of an OC meeting due to insufficient quorum of personal attendance.

   (v) Inevitably, due to lack of quorum, the OC meeting(s) would have to be adjourned. If the building is having a maintenance project, an adjournment of OC meeting(s) naturally would cause delays in carrying out the necessary maintenance works. The adverse consequences can be huge and irremediable. One can imagine, by way of illustration, a delay in carrying out slope maintenance. Such can endanger lives and pose criminal and civil liabilities on all the owners.

9. The wishful thinking of the Administration which underlines the proposal to have increased quorum for OC meeting is to avoid bid-rigging. However, the Administration fails to supply us with the requisite reasoning as to how an increase in the threshold in quorum of OC meeting can achieve the objective of rooting out bid-rigging.

10. We urge the Administration to re-consider this proposal.

Definition of "Large-Scale Maintenance Projects"

11. We do not agree to the latest proposal to link the definition of "large-scale maintenance projects" with the average *audited annual expenditure* of the OC for the past three years immediately before the maintenance proposal. It is incorrect to use the "average audited annual expenditure" as the benchmark.

12. For one thing, if the financial year of the accounts has not concluded, it is not possible to have an audit on the accounts.

13. We maintain our view as set out in our submission in 2015 that we do not support any increase of the existing threshold (quorum/resolution) for passing of resolution relating to large-scale maintenance projects. However, should the Administration insist on a definition, it should only include maintenance project the costs of which will not be less than 3 times of the **current annual budget** of the entire development.

Procurement of Other Supplies, Goods and Services

14. Following our comments in paragraphs 11 and 13 above, it is in our view not necessary to amend the benchmark as specified in section 20A and paragraph 5 of Schedule 7 of the BMO. A benchmark based on the audited annual expenditure of the current year would be impossible for the annual expenditure of the current year would not be known yet let alone having been audited. If the intended benchmark is the latest audited annual expenditure available, the benchmark is undesirable for the expenditure of the current year may be very different from the amount used as the benchmark, depending on whether any major works have been or will be carried out.

15. Instead, we invite the Administration to revisit paragraphs 10.2 and 10.3 of our submission in 2015 regarding the suggested amendments to section 20A(2B) of the BMO.

Automatic termination of DMC Managers

16. The termination of the appointment of DMC managers is subject to the provisions of the Government Lease(s). We have reservation on the proposed introduction of an additional requirement that the term of appointment of DMC managers would be automatically terminated five years after formation of OC.

Remuneration of DMC Managers

17. We note the retention of the earlier proposal that for certain expenditure items incurred by the headquarters of the DMC managers (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 amongst the developments they serve. We consider this proposal to be unrealistic and problematic and will result in unnecessary disputes. Please see paragraph 8.4 of our submission in 2015.

18. The DMC managers simply do not have authority to provide information of a development to owners of other developments.

19. We also reiterate our views relating to the proposal of reducing the ceiling rate by a specific percentage each year and lowering ceiling rate for large estates as set out in paragraphs 8.2 and 8.3 of our submission in 2015.

The Law Society of Hong Kong
2 May 2017

THE LAW SOCIETY OF HONG KONG 香港律師會

Consultation Paper on Review of the Building Management Ordinance (Cap.344)

The Law Society's Submissions

This submission is made in response to the Consultation Paper on Review of the Building Management Ordinance (Cap.344) ("**BMO**") issued in November 2014 ("**Consultation Paper**").

It is the policy of the Administration to encourage active participation of owners and residents in building management, enhance the quality of building management and provide a sustainable living environment.

The Law Society welcomes the Administration's recommendation to review the BMO which leads to the publication of the Consultation Paper with legislative and administrative proposals.

A number of proposals in the Consultation Paper do address certain existing problems in the BMO and enhance the building management, but some proposals are neither practical nor consistent with the Administration's policy as aforesaid. Our comments and observations on the proposals are set out hereinbelow.

CHAPTER 2: OPERATION OF MANAGEMENT COMMITTEE & OWNERS' CORPORATION

1. Bid-rigging and Disputes in Large Scale Maintenance Projects

1.1 In view of allegations about bid-rigging activities in the tender process for large scale maintenance projects, there are a number of proposals[1] to address this issue by introducing the following measures:

(a) notice of meeting includes an alert as to money contribution;
(b) a longer notice period;
(c) a copy of the invitation to tender be displayed in a prominent place of the building;
(d) allowing inspection of the tender documents; and

[1] Paragraphs 2.11 – 2.14 of the Consultation Paper

(e) more detailed guidelines on voting process.

These new measures would improve the transparency of the tender process and ensure owners having access to information and adequate time to consider the issues before any owners' meeting and we welcome these proposals.

1.2 In addition to the above measures, it is also proposed to increase the threshold for a quorum/resolution to 20% or 75% respectively[2]. However, increase of the threshold as aforesaid appears to have no relevance to the avoidance of bid-rigging.

Bid-rigging is already made an offence under the First Conduct Rule in the new Competition Ordinance Cap.619 and sanctioned by criminal liability. The objective of BMO is to provide a legal framework for owners to organize themselves to manage their buildings, so it is not necessary to address the issue of bid-rigging under the BMO.

Imposition of such a high threshold is neither practical nor in the interest of the owners. In reality, it will be very difficult (if not impossible) to achieve the proposed threshold of 20% (quorum) or 75% (resolution), bearing in mind it is not uncommon for large estates to have over 1000 units. If the proposed requirements on notices and tender process are to be enhanced as aforesaid, there is no justification for imposing a high threshold of 75%. The existing requirement of a simple majority for passing resolutions is fair and reasonable and should be retained.

For small estates in which a full or a near full quorum can be obtained, it is unreasonable to require a 75% of the shares to pass a resolution when a 50% proportion should be the correct percentage.

With such a high threshold as proposed, it will inevitably result in difficulties and delay in passing resolution for carrying out maintenance work which in turn will adversely affect the safety and hygiene standard of the building, and with the growing number of aged buildings in Hong Kong, the situation will become acute. This is clearly inconsistent with the Administration's policy of enhancing building management and maintaining a sustainable living environment.

1.3 Also, it is difficult and impracticable to draw a line between what is "*large scale*" and "*non-large scale*". Hence, whenever there is maintenance project, there will be disputes as to whether it is a large scale project or not and whether the higher or lower threshold (quorum/resolution) shall apply. It inevitably complicates the process and delays the passing of the resolution. However, should the Administration insist on a definition, for the sake of

[2] Paragraph 2.3 to 2.9 of the Consultation Paper

certainty and avoiding disputes, "*Large Scale Maintenance Project*" should only include maintenance project the cost of which will be not less than 3 times of the total annual budget of the entire development.

1.4 In view of the aforesaid, we do not support any increase of the existing threshold (quorum/resolution) for passing of resolution relating to large scale maintenance project.

2. Mechanism to Convene General Meeting and Priority of Agenda Items

We note the owners' concerns[3] about certain abuses such as deliberate delay in convening a general meeting and placement of unrelated items in the agenda as mentioned in the Consultation Paper. We welcome such proposals therein which we believe would address the alleged abuses.

3. Counterfeit Proxy Instruments and Improper Practices

A number of proposals, both legislative and administrative, are also introduced to address the risk of forged proxy instruments and avoid disputes over proxy forms[4]. These proposals are welcomed, although we consider that the risk of fraud is low as the relevant owner can discover such fraud easily.

4. Others

There are also a number of other proposals regarding the operation of a management committee and owners' corporation as follows[5]:

(a) Issue of cheques by two authorized signatories;
(b) Appointment of secretary/treasurer with priority given to owners; and
(c) Receipts for transfer of documents between old and new management committee.

We in principle welcome these proposals.

CHAPTER 3: FORMATION OF OWNERS CORPORATIONS ("OC")

5. Percentage of Shares for Forming OC

5.1 In view of allegations about difficulties encountered by owners in gathering sufficient percentage of shares in aggregate to form an OC, it is proposed in the Consultation Paper that the threshold for the required resolution under

[3] Paragraphs 2.16 & 2.17 of the Consultation Paper
[4] Paragraphs 2.20 to 2.30 of the Consultation Paper
[5] Paragraphs 2.31 – 2.35 of the Consultation Paper

sections 3(1) (c), 3A and 4 of the BMO should be lowered to 20%, 10% and 5% respectively.[6]

5.2 Whilst we understand the rationale behind lowering the threshold for passing of a resolution to form an OC under sections 3(1)(c) is to make it easier for the owners to form an OC, the proposed relaxation appears not to be necessary as other provisions in the BMO (i.e. sections 3A and 4) already provide an alternative mechanism with a lower threshold.

5.3 As pointed out in paragraph 3.4 of the Consultation Paper, an OC involves long term commitment of the owners. Hence, an OC is an entity of co-operative nature and its operation depends on mutual trust among the owners. Any OC to be formed under the proposed lower threshold (i.e. minority support of only 20%) apparently lacks the general support/trust of the majority owners. Such OC would face challenges, difficulties and/or non-co-operative action from the owners resulting in frequent disputes/litigation which hinder the OC from operating properly, efficiently and smoothly.

5.4 To ensure that an OC be formed with reasonably sufficient support from the owners, the existing threshold under sections 3(1)(c), 3A and 4 of the BMO should be retained.

6. Others

It is also proposed[7] that the BMO should be amended to:

(i) clarify that the shares of common areas with no voting right should not be treated as part of the shares in aggregate when calculating the proportion of shares supporting the resolution for appointment of a management committee/OC; and

(ii) impose eligibility criteria on the convenor.

These proposals no doubt would help to clarify the position and ensure the integrity of a convenor and we welcome these proposals.

CHAPTER 4: APPOINTMENT AND REMUNERATION OF DEED OF MUTUAL COVENANT MANAGERS ("DMC MANAGER")

7. Termination of DMC Manager

7.1 As there are concerns from some owners about the difficulties to invoke the current mechanism under the BMO to terminate the appointment of a non-performing DMC Manager, it is therefore proposed to relax the resolution for such termination by reducing the threshold from 50% to 30% of the

[6] Paragraphs 3.2 & 3.3 of the Consultation Paper

[7] Paragraphs 3.5 – 3.8 of the Consultation Paper

shares in aggregate[8] or limiting the term of appointment of DMC managers to five years

7.2 The proposal is problematic in principle. If this lower threshold is implemented, it means a minority of 30% who want to terminate the appointment of the DMC Manager can override a majority of 70% who wish to retain the DMC Manager.

7.3 Management of an estate involves long term commitment. A lower threshold for termination could result in easy and frequent change of managers and this will not only affect the stability of the estate's management, but also prompt the manager to avoid implementation of any long term/innovative plan even if it will benefit the owners. This contradicts the Administration's policy to enhance and maintain a high standard of building management.

7.4 The existing requirement of a simple majority is fair and reasonable representing the view of the majority and should be retained for all developments.

8. Remuneration of DMC Manager

8.1 The Consultation Paper also includes a number of proposed changes[9] to the existing mechanism for calculation of the remuneration of the DMC Manager as follows:-

(a) reduction of the ceiling rate by a specified percentage each year;
(b) lower ceiling rate for large estates; and
(c) exclusion from the formula of certain expenditure items which do not include value added services.

8.2 The proposed reduction in the current ceiling rate or setting lower ceiling rates for large estates in respect of the remuneration of the DMC Manager appears to lack justification:-

(a) The theory of lower remuneration for manager with more experience is incorrect in principle. It is not reasonable for more experienced managers to be paid less.
(b) It is based on an incorrect assumption that building management only involves work of a routine nature. It will also discourage the manager to improve the quality of the management and meet new challenges with planning.
(c) For large estates, they involve complicated ownership and composition which require high professional management skills, knowledge and standard.

[8] Paragraphs 4.2 – 4.5 of the Consultation Paper
[9] Paragraphs 4.6 – 4.9 of the Consultation Paper

(d) As to aged buildings, it in fact takes more time and professional work and skill to manage.

(e) New laws and rules regarding building management to be introduced by the Administration from time to time will increase the workload of managers. The most recent example is The Property Management Services Bill which introduces, inter alia, a bundle of compliance obligations (e.g. preparation and provision of books and records) on property managers. The said Bill is still under deliberation in the Bills Committee and may be passed within the current legislative session.

8.3 The current formula for calculating the manager's remuneration is a reasonable one with certainty. One must look at the formula as a whole. In view of the existence of a ceiling rate which serves as an overall reasonable cap on the manager's remuneration, exclusion of specific expenditure item from the formula appears to be not necessary.

8.4 While it is reasonable to require a manager to show how the service fee of headquarter is apportioned among various developments, the term "*detailed breakdown*" adopted in the Consultation Paper is vague, problematic and will result in unnecessary disputes as different persons could have different interpretation or standard on the word "*detailed*". It should be replaced by "*reasonable apportionment*".

CHAPTER 5: OTHER ISSUES FOR CONSIDERATION

9. Chapter 5 of the Consultation Paper contains various observations and proposals on miscellaneous matters such as allocation of undivided/management shares, separate budgets for residential/non-residential units, Sub-DMC, Multiple OCs, management of house developments, expansion of the definition of common areas, power of intervention by the Administration, unlimited liability of OC, establishment of a new Tribunal, the role of mediation in building management and criminal sanctions[10].

In principle, we agree to the observations and proposals in the Consultation Paper in respect of the aforesaid miscellaneous matters.

OTHER SUGGESTIONS/COMMENTS

10.1 We note the Administration's invitation on page 52 of the Consultation Paper for any suggestion/comment on any other provisions in the BMO.

[10] Paragraphs 5.1 – 5.37 of the Consultation Paper

10.2 S.20A (2B) of the BMO

(a) S.20A(2B) requires that any supplies, goods and services the value of which exceeds HK$200,000.00 or 20% of the annual budget whichever is the lower shall be procured by invitation to tender, and whether a tender submitted for this purpose is accepted or not shall be decided by a resolution of the owners.

(b) However, this requirement appears to be impracticable to a new estate as it takes months for a new owner to decorate his/her flat before actual moving in and it is usually difficult to secure a sufficient quorum for passing the required resolution, although it requires various services like security and cleaning in order to manage the new estate.

(c) In order to avoid breaching the said S.20A (2B), short term service contract (say, less than one year) has to be awarded. But the value of a short term contract is relatively higher when compared with a long term contract (say, a contract of two years). This will also result in frequent change of service providers and affect the stability of estate management.

10.3 The Administration is invited to consider reviewing and amending S.20A (2B) of the BMO so as to create an appropriate exemption for new estates in its first year of management to procure contracts for supplies, goods or services by invitation to tender in lieu of the owners' resolution.

Last but not least, the Consultation Paper only touches on limited topics in the BMO and should only be regarded as a first step to reform the BMO. Subject to consultation with the public, a comprehensive review of all aspects in the BMO should continue in order to enhance the quality of building management and provide a sustainable living environment.

The Law Society of Hong Kong
2 February 2015