

LCQ1: Enforcement of the Building Management Ordinance

Following is a question by the Hon Leung Yiu-chung and a reply by the Secretary for Home Affairs, Mr Tsang Tak-sing, in the Legislative Council today (December 7):

Question:

According to the Direct Investigation Report on "Enforcement of the Building Management Ordinance" published by the Office of the Ombudsman in June 2004 (the Report), the Home Affairs Bureau and the Home Affairs Department (HAD) had failed to enforce the Building Management Ordinance (BMO) since its enactment. The Report pointed out that the Secretary for Home Affairs (SHA) had never instituted prosecution against anyone, never invoked his powers, and never applied to the Lands Tribunal for a court order. The Report also made a total of 11 recommendations to the authorities. In this connection, will the Government inform this Council:

(a) of the number and types of cases recommended by HAD for instituting prosecution for the offences under the provisions of the BMO since June 2004; whether SHA has instituted prosecution against anyone; if so, of the details; if not, the reasons for that;

(b) of the number, types and details of cases of requests for invoking SHA's powers under the provisions of the BMO since June 2004; if the powers have not been invoked, of the reasons for that; and

(c) whether the Government has implemented the recommendations of the Report to enforce the BMO; if it has, of the details; if not, the reasons for that?

Reply:

President,

Private multi-storey buildings are the properties of individual owners. Our policy objective is to encourage owners to organise themselves to effectively manage their properties. The Building Management Ordinance (Cap 344) (BMO) was enacted by the Government and the Legislative Council to provide a legal framework to facilitate owners to form Owners' Corporations (OCs) and to carry out the building

management work properly in accordance with the requirements of the legislation. Each owner is empowered and shall be responsible under the BMO to monitor the work of the OC and its management committee (MC). The BMO also empowers the Authority (i.e. the Secretary for Home Affairs) to exercise certain powers in specified circumstances so as to achieve the policy objectives.

My reply to the three parts of the question is as follows:

(a) & (b) Since June 2004, the Administration has received a total of 25 cases requesting the Authority to invoke his powers or institute prosecution.

Regarding cases of requests for instituting prosecution, three are related to Section 12 of the BMO (i.e. requests to the Land Registrar to maintain register of corporations); six concern Section 27 (i.e. requests to maintain accounts); one is related to Section 32(2) (i.e. giving notice to the Land Registry concerning the appointment or termination of an administrator); and eight are related to Section 36 (i.e. false statements or information).

Among cases of requests for invoking the Authority's powers, one is related to Section 31(1)(d) (i.e. requests to the Authority to apply to the tribunal for appointment of administrator); 11 are related to Section 40A (i.e. wishing the Authority to request the OCs or any person managing the building to provide information, inspect the books or other documents, etc); two cases are related to Section 40B (i.e. requests to SHA to order an appointment of building management agent in a specified period).

Among these 25 cases, seven requested the Authority to both institute prosecution and invoke his powers.

These cases involve the conflicts between owners and OCs, as well as among owners. It is understandable that some owners would request the Government to intervene to redress the scales. From the Administration's point of view, due consideration must be given and sufficient evidence must be presented in exercising the power to intervene the conflicts among owners or even to institute prosecution.

Regarding each of the cases above, staff of the Home Affairs Department (HAD) has conducted in-depth investigation. Upon examining by the seniors and seeking legal advice, a proposal on how the case should be handled would be made to SHA. So far, none of the case reports submitted by HAD has recommended taking legal

action. Having thoroughly weighed all relevant considerations, I have agreed with the each of the proposals and decided not to prosecute or invoke the powers under the BMO. The major reasons include –

First, individual owners made the requests based on their personal perspective of the disputes they involved. We however strived to consider each case in an objective, fair and comprehensive manner, taking into account the actual circumstances. For example, an owner considered that there were problems in the management of his building and requested the Authority to order the MC to appoint a building management agent to manage the building. However, after knowing the actual operation of the building, we confirmed that the daily management of the building was undertaken by the MC and the management company and that the building did not have serious problems. It was therefore inappropriate for the Authority to exercise the power under Section 40B of the BMO.

Second, in a considerable number of cases, the OCs did not deliberately contravene the BMO. In the course of investigating owners' complaints, HAD would actively advise the OCs to strictly abide by the requirements of the BMO. Under most circumstances, the OCs would make rectification upon HAD's advice. Sometimes, dissatisfaction among owners arose because the OCs lacked understanding about the BMO or were affected by other factors. For instance, an owner lodged a complaint against the OC for not retaining an accountant to audit the financial statements under Section 27 and requested the Authority to institute prosecution against the MC members. Upon investigation, we learned that the OC did not deliberately refuse to engage an accountant for auditing. The fact was that there were multiple switches of property management companies for the building within the past few years and that the property management companies had failed to maintain the accounts and relevant records properly. As a result, the then MC was unable to prepare the financial statements or to engage an accountant for auditing within the designated time frame. Notwithstanding its failure to fulfill its obligation under the BMO, upon the admonition of the District Office (DO), the OC promptly convened a general meeting of the OC to inform owners of the actual situation and its plan for remedial actions, so that the owners could deliberate and pass a resolution on the matter. In light of the case, we did not consider prosecution necessary.

Third, there are prerequisites and limits on the powers vested in the Authority under the BMO. The applicability of the powers is not the same as what some owners may envisage. For instance, an owner said that there was financial problem of a

building and requested the Authority to invoke Section 40A of the BMO to inspect the financial statements of the OC. However, such power should be exercised to forestall situations posing safety risks and safeguard the interest of owners when the prerequisite of identification of major building management problems is met. There is a threshold in exercising the power in view of the legal advice. Having further understanding the situation, we confirmed that there was no circumstance warranting the invocation of the powers for the building. Another example is that an owner requested to invoke Section 40A to inspect an instrument for the appointment of a proxy to determine its validity. However, the BMO expressly provides that only the MC chairman or the person presiding at the meeting has the power to make these decisions. Even if SHA inspects the relevant proxy instruments, he does not have the authority to determine the validity. Any owner who disagrees with the decision of the MC chairman may apply to the Lands Tribunal for adjudication under Section 45 and Schedule 10 of the BMO.

The powers vested in the Authority under the BMO should be exercised for the benefits of the people. Our policy objective is to encourage owners to form OCs to work together for building management, so as to foster a harmonious living environment and ensure that the owners' interest are best protected, instead of deepening the conflicts in the neighbourhood. Hence, we have endeavoured to resolve the disputes through communication and admonition. Nevertheless, if an OC deliberately violates the law and does not take DO's advice, which affects owners' legal rights, we will be determined to take enforcement actions.

(c) Regarding the recommendations made in the Ombudsman's Report in 2004, particularly those relating to enforcement actions, the Home Affairs Bureau and HAD have formulated implementation measures.

HAD has formulated and issued detailed internal guidelines to clearly set out the procedures for HAD staff when handling requests to the Authority to institute prosecutions and invoke powers, which include acknowledgement of receipt of a request within a designated time frame; collection of case information; maintaining close communication with the parties concerned and submission of a detailed report to the HAD, etc. In line with the recommendations of the Report, all cases will be submitted to the SHA for consideration

The internal guidelines also set out the factors in considering whether prosecutions should be instituted and powers be invoked by the Authority, such as the nature of the

incident, whether the violation is deliberately caused by the OC and whether it has caused any damages to other owners, etc. The guidelines also list out powers which can be invoked by the Authority under the relevant provisions of the BMO and the role of the Department of Justice in providing legal advice.

In addition, to further enhance the understanding of the owners and OCs of the BMO, we have put together a guide on the BMO to provide an outline of the major provisions of the BMO in simple language. We have also compiled publications and pamphlets, such as Frequently Asked Questions on the BMO; How to Form an OC; Code of Practice on Procurement of Supplies, Goods & Services and Code of Practice on Building Management & Maintenance; Property Owners and Private Building Maintenance; Building Management (Third Party Risks Insurance) Regulations for owners' and OCs' ease of reference.

HAD also advises owners on the procedures for the formation of an OC; assists in convening general meetings and provides subsidies for searches; attends OC meetings to advise owners on the operation of an OC; handles enquiries of and complaints about building management, so as to assist in resolving disputes among owners, OCs and management companies; organises education and publicity activities (including training courses, workshops and seminars) to promote effective building management.

In the meantime, we have established the Review Committee on the Building Management Ordinance which is currently studying common problems in respect of building management, including those relating to Sections 40A and 40B of the BMO. It will examine whether these problems should be resolved through amending the BMO. The Committee will make recommendations to the Government to enhance the operation of OCs and to safeguard the interests of individual owners. It is expected that the Committee will submit an interim report to the Administration by the first half of next year.

Thank you President.

Ends/Wednesday, December 7, 2011

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