

Part 5: Introduction to Building-related Knowledge, Property Classification and Property Management

Contents

Paragraph		Page
1-6	Forms of Government Leases	96
7	Lot Particulars	96
8-9	Government Lease Conditions	97
10-14	Special Categories	98
15-26	The Town Planning Ordinance	100
27-39	The Buildings Ordinance	102
40-43	Regulation of Existing Buildings	105
44-47	Alterations and Additions	106
48-49	Changes in User	107
50-54	New Sites and Re-developments	108
55-65	Property Management	109
66-73	The Building Management Ordinance	113

FORMS OF GOVERNMENT LEASES

1. For the last few decades it has been common not to issue a paper government lease. Instead, the government lessee, as “owner” of the land, holds the land by way of conditions. There are various types of conditions which initially represent contractual rights and obligations giving the person who will become the “owner” an equitable interest in the land. On observance of those obligations, the contractual right is converted into a legal estate in the land. As the conditions may have provided that a government lease will be issued upon observance of all the positive covenants in the conditions, the observance has the effect of deeming the paper government lease to have been issued. The conditions then, in effect, become the “lease”. Section 14 of the Conveyancing and Property Ordinance makes express provision for this in the case of conditions of sale.
2. The conditions of sale represent the contract entered into by the owner when the land is being sold by the Government by auction or tender. At present, the majority of government land in Hong Kong is sold by auction, and tenders are used only where the development conditions are complex, or in cases of very specialised uses of land, such as petrol filling stations.

The conditions of sale contain the particulars and conditions of sale which include the particulars of the lot being sold, the general and special conditions of sale. In addition, the parties execute a memorandum of agreement. These two documents constitute a complete contract for the sale of land.
3. Conditions of grant are used where land is being granted for a particular purpose; for example, a private treaty grant made to a public utility company, or to a non-profit making organisation, or to an indigenous New Territories villager for the construction of a “small house”.
4. Conditions of exchange are issued where the owner exchanges the land he currently owns for another piece of land.
5. Conditions of regrant are issued where the existing government lease has expired, and the owner receives a new grant. This form of conditions can also be issued when an existing government lease has been lost.
6. Conditions of extension are issued where the Government grants additional land to a landowner, usually a developer.

LOT PARTICULARS

7. A government grant is now usually for a term of 50 years from the date of the document. It also describes the land being granted by reference to:
 - the lot number of the land as registered in the Land Registry;
 - its location;
 - its delineation by reference to a plan;
 - its area in square metres; and
 - the government rent payable on the land, which is usually an annual rent of an amount equal to 3% of the rateable value from time to time of the land.

GOVERNMENT LEASE CONDITIONS

General conditions

8. The usual matters dealt with as general conditions of sale include:
- the conduct of the auction; the highest bidder shall be the purchaser, and that the memorandum of agreement is to be signed immediately;
 - the payment of a deposit on signing the memorandum of agreement, with the balance of the premium payable usually within 28 days;
 - the obligation to pay government rent throughout the term;
 - the setting out of the land by the Director of Lands;
 - the Government's right of re-entry in the event of non-compliance with the general and special conditions. No compensation is payable for any improvements on the land; and
 - the issue of a government lease upon compliance with the general and special conditions.

Special conditions

9. The special conditions usually provide for:
- a building covenant to ensure that the land is developed within a specified period of time. Most building covenants require observance within 48 months, although a longer period may be given for very large developments;
 - permitted "user" of the land which usually corresponds to the land use zoning for the land as shown on the relevant outline zoning plan;
 - development conditions which require the lessee to develop the land in accordance with the Buildings Ordinance and the Town Planning Ordinance (TPO). The conditions also provide for the minimum and maximum gross floor area, maximum site coverage, maximum height, and design and disposition of the building(s);
 - an open space condition which requires the lessee to provide open space on the land for recreational purposes, and to landscape and plant trees;
 - the provision of recreational facilities in the development. The lessee is encouraged to construct recreational facilities. Any building housing these facilities is not counted as part of the site coverage or gross floor area;
 - the preservation of trees and landscaping which prevents the developer interfering with trees except with the consent of the Director of Lands, and requires landscaping and tree planting in un-built areas;
 - a restriction on alienation before compliance with the general and special conditions which prevents the developer selling any unit until all the general and special conditions have been complied with. However, with prior written consent

from the Director of Lands, units may be sold in advance, subject to such conditions as the Director may impose.

When a developer intends to pre-sell uncompleted units in a development, he must apply to the Director of Lands for consent under the Consent Scheme;

- a deed of mutual covenant, complying with the guidelines issued by the Legal Advisory and Conveyancing Office of the Lands Department, must be submitted to the Director of Lands for approval; and
- provision for car parking, and vehicular loading and unloading: this may require a certain number of spaces to be provided.

SPECIAL CATEGORIES

Letters A and B

10. To implement the Government's policy of urban development in the New Territories, many lots of land in the New Town Development Areas of the New Territories were resumed from villagers in the 1960s and 1970s. The Government would offer the landowner either:

- a cash payment for the land resumed; or
- a promise by the Government to provide building land elsewhere in an urban development area in the New Territories at some unspecified time in the future. If the landowner chose this option of a land exchange entitlement, it was effected by way of a Letter B. The purpose of the land exchange entitlement system was to facilitate the speedy resumption of land by avoiding protracted litigation about the amount of compensation payable to the landowners.

The scheme also provided for a Letter A which was issued for voluntary surrender of land by a landowner prior to the issue of a resumption order.

11. The practice of issuing these letters ceased in 1983. In 1996 the New Territories Land Exchange Entitlements (Redemption) Ordinance was enacted to entitle the landowner to a money payment, at a statutory rate, rather than a right to land.

The New Territories "Small House" Policy

12. In 1972 the Government introduced the "small house" policy which provided for a grant of land with special features. The main features of the policy are:

- every indigenous villager who is a male of 18 years of age, who can trace his descent through the male line from a 1898 resident of a recognised village is entitled to apply to the District Lands Officer for a grant of land at a nominal premium:
 - as a private treaty grant;
 - which contains certain restrictions on alienation;
- the owner can construct a "small house" on a suitable site within his own village for his habitation which is usually required to be completed within 36 months of the grant;

- if a villager owns agricultural land, he may apply to the District Lands Officer for a Building Licence to build a “small house” on his agricultural land; and
- the house cannot exceed three storeys or 8.23 metres (27ft.) in height with a maximum roofed-over area of 65.03 square metres (700 sq. ft.). The house is usually exempt from certain provisions of the Buildings Ordinance when a certificate of exemption (CE) is issued by the District Lands Officer.

13. There are special provisions relevant to the sale and purchase of a New Territories small house, including:

- the land grant for a small house usually contains restrictions on the disposal of the land even after the development has been completed;
- the owner may have to pay an additional premium for the removal of the restrictions;
- practitioners should refer to the land grant to see if these restrictions are still applicable, or whether they have been removed/tolerated by the District Lands Officer by the issue of:
 - a modification letter;
 - a consent letter;
 - a waiver;
 - a letter of toleration; or
 - a letter of no objection, etc.;
- all these letters should be registered in the Land Registry as they represent part of the title deeds to the land;
- even though compliance with the Buildings Ordinance may not be required, practitioners should be aware that:
 - CEs under the Buildings Ordinance (Application to the New Territories) Ordinance in respect of the building, site formation and drainage works must have been issued to show that non-compliance is permitted;
 - in some cases, on completion of construction a certificate of compliance (CC) with the conditions of the lease, the land grant or Building Licence, will be issued by the District Lands Office. No CC will be issued if the building is on land held under a Block Lease or is a re-development of a previous building;
 - both the CE and CC should be registered in the Land Registry.

14. Another special feature of New Territories property is that some land is held by t’so (祖) or t’ong (堂). This form of land holding is described as “Chinese customary trust”. The members of the t’so or t’ong are the male members of a clan. The land is held by a manager on behalf of all members. The New Territories Ordinance requires that the manager must be registered as manager, and that any disposition of the land requires the consent of the District Officer on behalf of the Secretary for Home Affairs. Practitioners should ask the vendor to produce such letter of consent and ensure that, if it was issued subject to a time limit, that it is still valid, before advising a purchaser to enter into a transaction involving the property.

THE TOWN PLANNING ORDINANCE

Introduction

15. The principal legislation governing town planning in Hong Kong is the Town Planning Ordinance (TPO) which is designed to “promote the health, safety, convenience and general welfare of the community, by making provision for the systematic preparation and approval of plans for the lay-out of areas of Hong Kong, as well as for the types of building suitable for erection therein and for the preparation and approval of plans for areas within which permission is required for development”: see the Long Title to the TPO.
16. Section 3 of the TPO establishes the Town Planning Board (“the TP Board”), which is charged with the systematic preparation of draft plans for the lay-out and draft development permission area plans of such areas in Hong Kong as the Chief Executive may direct. In practice, the draft plans are drawn up by the Planning Department and approved by the TP Board.

Land use zoning

17. Under the TPO, the TP Board prepares and publishes two types of statutory plans, namely outline zoning plans (OZPs) and development permission area (DPA) plans.
18. OZPs are prepared in draft form under the TPO. They make provision for:
 - streets, railways and other main communications;
 - zones or districts set apart for use for residential, commercial, industrial or other specified uses;
 - reserves for government, institution or community purposes;
 - parks, recreation grounds and similar open spaces;
 - zones or districts set apart for undetermined uses;
 - comprehensive development areas;
 - country parks, coastal protection areas, sites of special scientific interest, green belts or other specified uses that promote conservation or protection of the environment;
 - zones or districts set apart for use for village type development, agriculture or other specified rural uses; and
 - zones or districts set apart for use for open storage.
19. Once a draft OZP has been approved by the Chief Executive in Council, it becomes an “approved plan”. The OZPs deal with areas zoned for uses such as residential, commercial, industrial, open space, government, institution or community, green belt, conservation development areas, village-type development, open storage or other specified uses.
20. DPA plans are prepared mainly for areas not previously covered by OZPs, usually non-urban areas. The proposed land use information shown on a DPA plan is generally not as

detailed as that shown on an OZP. A DPA plan will only be effective for three years from the date of publication and will be replaced by an OZP within that time.

21. TPO provisions for the implementation and enforcement of the statutory plans include:

- Section 13: the approved plans are to be used by public officers and bodies as standards for guidance in the exercise of their powers;
- Section 4: the TP Board may recommend to the Chief Executive in Council the resumption of any land that interferes with the lay-out of an area shown on a draft or approved plan;
- Section 21: a development which is undertaken or continued in breach of the ordinance constitutes an “unauthorised development”, and the Planning Authority can take action for enforcement and prosecution. However, Section 21 excludes “existing use” developments, or one permitted by the plan, or for which planning permission has been obtained under Section 16;
- the conditions in the government lease which invariably require the lessee to develop land in accordance with the TPO; and
- the provisions of the Buildings Ordinance which restricts the commencement of building work until approval of the building plans has been received from the Building Authority (BA). Approval may be refused if the building works would contravene any approved or draft plan prepared, or a master layout plan approved for a comprehensive development area, under the TPO.

Planning permission

22. Both the OZP and the DPA plan have a set of notes setting out:

- the uses which are always permitted (Column 1 uses) in a particular zone; and
- other uses which require permission from the TP Board (Column 2 uses).

For example, in an area zoned for residential use, “flat” and “house” would be uses always permitted (under Column 1), but “bank” or “office” or “retail shop” may appear under Column 2 as uses that may be permitted with or without conditions on application to the Board.

There may also be additional restrictions on uses or developments under the “Remarks” column in the notes for that land use zone.

23. An application for “planning permission” under Section 16 of the TPO is necessary for a proposed Column 2 use or development, or if required in the Remarks section of the notes.

The application should be made to the TP Board. A number of guidelines have been issued by the TP Board and they are available from the TP Board’s website.

24. In assessing an application for planning permission, the foremost consideration of the TP Board should be the OZP or the DPA plan because the TP Board may only grant planning permission within the terms of the relevant plan. The TP Board should also take into account all other material considerations, such as planning policies laid down in the explanatory statement annexed to a draft or approved plan, and guidance notes and other

statements issued by the TP Board.

Another material consideration is whether a proposed development would be beneficial to the community. For example, the TP Board may favourably consider an application for an office building in an industrial zone where early development in that zone needs renovation so that the building would bring significant improvement to the general amenities and environment of the area.

25. The TP Board must consider the application within two months of its submission. Approval of the application may be subject to whatever conditions the TP Board thinks fit.
26. An applicant aggrieved by a decision of the TP Board may apply for a review by the TP Board. If still aggrieved on review he may appeal to the Town Planning Appeal Board.

THE BUILDINGS ORDINANCE

27. The principal legislation governing control of buildings in Hong Kong is the Buildings Ordinance and its subsidiary legislation. The administration of the Buildings Ordinance is vested in the Buildings Department which is headed by the Director of Buildings, who is referred to as the Building Authority (BA).

Definitions

28. Some of the more important definitions in the Buildings Ordinance are as follows:
 - an “authorised person” means a person whose name is on the authorised persons’ register kept under Section 3(1):
 - (a) as an architect;
 - (b) as an engineer; or
 - (c) as a surveyor;
 - “building” includes the whole, or any part, of any domestic or public building or building which is constructed or adapted for use for public entertainment, arch, bridge, cavern adapted or constructed to be used for the storage of petroleum products, chimney, cook-house, cowshed, dock, factory, garage, hangar, hoarding, latrine, matshed, office, oil storage installation, out-house, pier, shelter, shop, stable, stairs, wall, warehouse, wharf, workshop or tower, sea-wall, breakwater, jetty, mole, quay, cavern or any underground space adapted or constructed for occupation or use for any purpose including its associated access tunnels and access shafts, pylon or other similar structure supporting an aerial ropeway and such other structures as the BA may by notice in the Gazette declare to be a building;
 - “building works” includes any kind of building construction, site formation works, ground investigation in specified areas, foundation works, repairs, demolition, alteration, addition and every kind of building operation, and includes drainage works;
 - “composite building” means a building that is partly domestic and partly non-domestic;
 - “domestic building” means a building constructed or intended to be used for habitation;

- “non-domestic building” means a building that is not a domestic building;
- “owner” includes any person holding premises direct from the Government whether under lease, licence or otherwise, any mortgagee in possession and any person receiving the rent of any premises, solely or with another, on his own behalf or that of any person, or who would receive the same if such premises were let to a tenant, and where such owner as above defined cannot be found or ascertained or is absent from Hong Kong or is under disability, the agent of such owner;
- “registered general building contractor” means a person whose name is for the time being on the register of general building contractors maintained under Section 8A;
- “registered specialist contractor” means a person whose name is for the time being on the register of specialist contractors maintained under Section 8A;
- “registered structural engineer” means a person whose name is for the time being on the structural engineers’ register kept under Section 3(3); and
- “registered geotechnical engineer” means a person whose name is for the time being on the geotechnical engineers’ register kept under Section 3(3A).

The parties and their duties

29. Under the Buildings Ordinance, any person who intends to carry out building works must appoint:
- an authorised person as the co-ordinator of such building works or street works; and
 - a registered structural engineer, where structural aspects are involved, and if so required under the Buildings Ordinance; and
 - a registered geotechnical engineer where geotechnical elements are involved, and if so required under the Buildings Ordinance; and
 - a registered contractor to carry out the building works. The contractor may be a general contractor (for non-specialised works) or a specialist contractor (for specialised works).
30. The statutory duties of an authorised person, a registered structural engineer, and a registered geotechnical engineer are:
- to supervise the carrying out of the building works in accordance with the supervision plan (a plan drawn up by an authorised person for safety management of building works);
 - to notify the BA of any contravention of the rules and regulations made under the Buildings Ordinance (“the Regulations”), and
 - to comply generally with the Buildings Ordinance.
31. The statutory duties of a “registered contractor” are:

- to provide continuous supervision of the carrying out of the works in accordance with the supervision plan;
 - to notify the BA of any contravention of the Regulations; and
 - to comply generally with the Buildings Ordinance.
32. The authorised person, the registered structural engineer, the registered geotechnical engineer, and the registered contractor together supervise the carrying out of building works and ensure all building works comply with the Buildings Ordinance and its subsidiary legislation.

Building standards and safety

33. The objectives of the Buildings Ordinance are to provide for the planning, design and construction of buildings, and to make provision for rendering dangerous buildings and land safe.

Approval of building plans

34. Section 14 prohibits the commencement of any building works without first having obtained from the BA:
- approval of any documents, including building plans submitted in accordance with the Regulations; and
 - consent for the commencement of such building works.
35. Under Section 16, the BA may refuse to give approval for any building plans on certain specified grounds such as:
- the plans are not as prescribed by Regulations;
 - the plans are not endorsed with or accompanied by a certificate from the Director of Fire Services in regard to fire service installations and equipment;
 - the carrying out of the building works would contravene the provisions of the Buildings Ordinance or of any other enactment, or would contravene any approved or draft plan prepared under the TPO;
 -
 - the building works are within a comprehensive development area of an approved or draft plan, and would contravene a master lay-out plan approved by the TP Board;
 - the carrying out of the building works would result in a building differing in height, design, type or intended use from buildings in the immediate neighbourhood or previously existing on the same site;
 - the building works consist of the construction of any means of access to a street and the place or manner in which such means of access opens on the street is dangerous or likely to be dangerous or prejudicial to the safety or convenience of traffic using the street; and
 - it appears to the BA that the demolition of a building that is required to be demolished before the building works can be carried out will cause, or is likely to cause, the collapse of any adjoining building.

36. After receiving the building plans drawn up by an authorised person, the Buildings Department refers them to relevant government departments for comment.

Before approval of the plans, the Buildings Department considers the views and requirements of departments such as the Civil Engineering Department, the Drainage Services Department, the Environmental Protection Department, the Fire Services Department, the Highways Department, the Lands Department, the Transport Department and the Water Supplies Department.

Consent for commencement of building works

37. After the issue of approval for the plans, consent must then be obtained from the BA under Section 14 for the actual commencement of building works. Consent is required to ensure that:

- the plans as approved are complied with;
- any new regulations which have come into effect after approval of the plans will be complied with and the plans will be amended accordingly before commencement; and
- all plans and documents required under the Regulations are submitted and the approval conditions are complied with.

The issue of an occupation permit

38. Pursuant to Section 21 of the Buildings Ordinance, a new building may not be occupied by more than two caretakers until an occupation permit or a temporary occupation permit has been issued by the BA. The BA may refuse to issue the permit, for example, where building works have been carried out in contravention of the provisions of the Buildings Ordinance.
39. The control the BA has over building means that it is able to set building standards and safety requirements, and to enforce planning control and development control of all new buildings in Hong Kong which are subject to the provisions of the Buildings Ordinance.

REGULATION OF EXISTING BUILDINGS

40. For most property owners, the gross floor area, the saleable area, and permitted user represent essential information about their properties.

Gross floor area

41. Under the Building (Planning) Regulations (“the Planning Regulations”), the gross floor area (GFA) of a building means the area contained within the external walls of the building measured at each floor level (including any floor below the level of the ground), together with the area of each balcony in the building. In determining the GFA, the following floor space is disregarded, namely that:
- used solely for parking or loading or unloading of motor vehicles;
 - used solely for refuse storage chambers;
 - used solely for access facilities for telecommunications and broadcasting services;

- occupied solely by machinery or equipment for any lift, air-conditioning or heating system or any similar service.

Saleable area

42. Since the GFA includes the area of the common parts and facilities of a building, it cannot accurately identify the floor area of a unit. The floor area is better ascertained from the definition of “saleable area” set out in the sale and purchase agreement of uncompleted units used under the Consent Scheme and the Non-consent Scheme. Under such definition, the saleable area of a unit includes the following:

- the floor area of the unit measured from the exterior of the enclosing walls. Where such enclosing walls separate two adjoining units, the measurement shall be taken from the middle of those walls;
- the floor area of any balconies and verandahs;
- in relation to any cockloft, its floor area measured from the interior of the enclosing walls;
- the area of any bay windows;
- in relation to any car park space, its area measured from the interior of its demarcating lines or walls;
- the area of any yard, terrace, garden, flat roof or roof, which shall be measured from the interior of their boundary lines; and
- the floor area of any utility platform.

Under such definition, the common parts outside the enclosing walls are expressly excluded from the floor area of a unit.

Occupation permit

43. An occupation permit shows the date of completion of a building, and also specifies the permitted user of units in the building. The Property Information Online service of the Rating and Valuation Department gives information about the age, floor area, and permitted occupation of more than one million domestic properties: see the Rating and Valuation Department website (<http://www.rvd.gov.hk>).

If this information is not available from that website, a copy of a registered occupation permit can be obtained from the Land Registry, or from the Buildings Department. The procedure for obtaining a copy of the occupation permit from the Buildings Department requires an application to be made in a prescribed form, and the requested material will be available the following day.

ALTERATIONS AND ADDITIONS

44. The definition of “building works” in the Buildings Ordinance includes alterations and additions. Any person intending to carry out building works to alter or add to the existing building must appoint an authorised person, and if necessary a registered structural

engineer, to prepare and submit plans for the approval of the BA. The approved building works must be carried out by a registered contractor.

45. Common examples of building works include:

- combining two or more independent units into one larger unit;
- subdividing one unit into two or more smaller independent units;
- constructing a cockloft within a unit; and
- constructing roofed-over structures on the flat roof of a unit or on the main roof of a building.

All these building works must comply with the requirements of the Buildings Ordinance unless they are exempted works. Section 41(3) of the Buildings Ordinance provides that building works:

- which are not drainage works, ground investigation in specified areas or site formation works; and
- which do not involve the structure of any building,

may be carried out in any building without application to or approval from the BA.

46. Unless the alterations or additions are exempted, compliance with the Buildings Ordinance is necessary, otherwise they will be “unauthorised or illegal structures”. The BA may issue a notice or order under Section 24C, or a “building order” or “statutory order” under Section 24, on the breach or non-compliance of the relevant provisions. The notice or order will constitute an incumbrance on the property.

47. This notice or order will be registered in the Land Registry. A letter of compliance will be issued and registered in the Land Registry when the owner of the land has complied with the notice or order.

CHANGES IN USER

48. An owner who wishes to materially alter the user of a property must give one month’s notice in the specified form to the BA under Section 25(1) of the Buildings Ordinance. For example, he might wish to change the user from “domestic purposes” to “office purposes”. If the BA decides the change is not suitable by reason of the nature of its construction in relation to its present or intended use, an order in writing is to be served on the owner or occupier under Section 25(2). That order may:

- prohibit such intended use; or
- require the owner or occupier to discontinue such present use of the building within one month from the service of the order.

49. The title of the applicant may be rendered defeasible by reason of a material change in user of the premises. A defeasible title is one that is forfeitable and subject to re-entry by the Government.

In *World Investment Ltd v Young King Asia Ltd* [1996] 4 HKC 238. the owner used the premises as a shop in breach of the authorised user of a garage. This breach constituted

an incumbrance on title, giving rise to the Government's right to re-enter.

NEW SITES AND RE-DEVELOPMENTS

Development potential

50. The Buildings Ordinance and subsidiary legislation contain provisions relating to site classification, permitted site coverage and plot ratio of buildings which give the BA control over population density. These provisions in turn affect the development potential of land.

Classification of sites

51. The Planning Regulations provide for three kinds of sites:

- a "class A" site, that is, not a class B or class C site, that abuts one street of not less than 4.5m width, or more than one such street;
- a "class B" site means a corner site that abuts two streets neither of which is less than 4.5m wide; and
- a "class C" site means a corner site that abuts three streets none of which is less than 4.5m wide.

The class of a site is relevant to the permitted site coverage and plot ratio of a building.

Site coverage

52. Site coverage means the area of the site that is covered by buildings. For example, if a building on a site measures 60 metres by 100 metres, the covered area of the site is 6,000 square meters. If the area of the site is 10,000 sq metres, then the site coverage is 60%.

Plot ratio

53. Plot ratio is the ratio of the total GFA of the building to the area of the site. Thus if a building has 20 storeys each having a GFA of 6,000 sq metres, the GFA of the building is 120,000 sq metres. If the site area is 10,000 sq metres, then the plot ratio is 12.

The First Schedule of the Planning Regulations sets out a table of permitted site coverage and plot ratios, including:

- non-domestic buildings have a greater permitted site coverage and plot ratio than domestic buildings;
- class C sites have a greater permitted site coverage and plot ratio than class B or class A sites, and class A sites have the lowest site coverage and plot ratio;
- (up to 61m) the higher the building is, the smaller the permitted site coverage but the greater the plot ratio.

Additional Planning Regulations

54. Other significant provisions in the Planning Regulations include:

- the height of a storey: a room, used for an office or for habitation, must be of a height of not less than 2.5m from floor to ceiling;

- open space: every domestic building must have an open space at the rear, or partly at the rear and partly at the side, of an area as prescribed in the Planning Regulations;
- a service lane: every domestic building must have a service lane at the rear or side of such building; and
- lighting and ventilation: every storey of every building whether used for the purpose of an office or for habitation shall be provided with effectual means of lighting and ventilation. Every room whether used for habitation or for the purpose of an office or as a kitchen shall be provided with natural lighting and ventilation in accordance with the Planning Regulations.

PROPERTY MANAGEMENT

Introduction

55. The objectives of building management are to provide and maintain a pleasant and comfortable living environment for the owners and occupiers of a building, and to properly maintain the common parts and facilities of the building. Good building management will bring about cleanliness, safety, security and harmony to a building, and improve the quality of living for the owners and occupiers. It will also enhance the value of properties.
56. Authority to manage a building comes from the building's deed of mutual covenant. The deed of mutual covenant sets out the rights and obligations of the owners in regard to the common parts and facilities of the building, and is a document binding on the owners and their successors in title. By the Building Management Ordinance, certain terms are made mandatory for all deeds of mutual covenant.

The deed of mutual covenant

57. A deed of mutual covenant (DMC) is a contract in the form of a deed entered into by the developer of the building, the manager appointed by the developer, and the first person to purchase a unit in the building.
58. A DMC specifies one or more equal undivided shares in the land that an owner would have in relation to his unit, as a tenant in common with all other co-owners of the land. Each owner has the exclusive use and possession of his unit, but shares the use of the common parts with all co-owners.
59. Once a DMC is registered in the Land Registry, it is binding on all owners and their successors in title, even though the latter are not parties to it. The units of the building are sold subject to and with the benefit of the provisions of the DMC. Section 41 of the Conveyancing and Property Ordinance enables covenants in a registered DMC to pass automatically to successors in title.
60. A DMC contains detailed provisions for the management of the building and maintenance of the common parts, and sets out the powers and duties of the manager.

Usual provisions in a DMC

61. A typical DMC usually has the following provisions:
- The allocation of undivided shares to the various parts and units of the

development as set out in a schedule.

- Until he sells the other units, the developer has an exclusive right to use and enjoy the whole of the development, except the unit assigned to the first purchaser and the common areas.
- The first purchaser has the exclusive right to use and enjoy the unit assigned to him by the developer.
- There are detailed provisions on the appointment of the manager to manage the development, the termination of his appointment, his remuneration, the preparation of an annual budget, the establishment of a building fund, the payment of management or other fees, the establishment of management accounts and preparation of income and expenditure accounts and balance sheets.
- The manager is given wide powers of management which may include the power:
 - to demand and collect all amounts payable by owners under the DMC;
 - to effect necessary insurance;
 - to arrange for refuse collection and disposal;
 - to keep in good order and repair the lighting of the common areas;
 - to repair and maintain the structure and external walls and common areas of the development;
 - to keep the sewers and drains and watercourses and pipes of the common areas free and clear from obstructions;
 - to paint, white-wash, tile or otherwise treat as appropriate the exterior of the development;
 - to regulate the use of any common facilities;
 - to make suitable arrangements for the supply of fresh and flushing water and gas and electricity and other utilities to the development;
 - to provide watchmen and caretakers, a closed circuit TV system, and other security measures;
 - to maintain and operate TV and satellite dishes;
 - to remove any structure or installation in the development that is illegal or unauthorised and which contravenes the DMC;
 - to seek legal advice and instruct solicitors for legal matters;
 - to have the authority to act for and represent all the owners in all matters touching or concerning the management of the development or the common areas;
 - to enter into contracts and to engage professional advisors and workmen;
 - to enforce the obligations of all owners and occupiers to maintain their units in a proper and satisfactory manner;
 - to convene meetings of owners as may be necessary; and
 - to do all other things as are reasonably incidental to the management of the development.
- The manager must call a meeting of the owners within nine months from the date of the DMC to establish a committee of owners, or a management committee for the purpose of forming an Owners' Corporation (OC) under the Building Management Ordinance.
- There are also elaborate provisions on procedures and other matters for meetings of owners.

- There would also be provisions on meetings of owners and resolutions and other matters in the event of the development being so damaged by fire, typhoon, earthquake, subsidence or other causes as to be unfit for use or habitation.

Terms implied under the Building Management Ordinance

62. Many DMCs contain terms which are favourable to the developers and managers (many of which are subsidiary companies of the developers) rather than to the owners. Therefore the Building Management Ordinance provides that certain provisions are to be incorporated into all DMCs to ensure fairness between the parties, and to provide for effective management of the buildings. Under Sections 34E and 34F of the Building Management Ordinance:
- the provisions in the Seventh Schedule are implied into every DMC and they prevail over any other provision in the DMC that is inconsistent with them; and
 - the provisions in the Eighth Schedule are implied into all DMCs but only so far as they are consistent with the terms of the DMC.
63. The provisions in the Seventh Schedule of the Building Management Ordinance are therefore mandatory provisions, and they relate to the following matters:
- determination of the total amount of management expenses;
 - keeping of accounts;
 - manager's obligation to maintain a bank account;
 - establishment of a special fund;
 - contracts the manager can enter into;
 - resignation of manager, by giving three months' notice;
 - termination of manager's appointment by the OC; and
 - on termination of the manager's appointment, presentation of accounts and delivery of books of accounts to the owners' committee.

Property management

64. In performing its duties and exercising its powers in the management of a building, the management committee of an OC must observe Codes of Practice, issued from time to time by the Secretary for Home Affairs under Section 44 (1) of the Building Management Ordinance. Two Codes have been issued, namely:
- the Management Code of Practice on Building Management and Maintenance ("the Management Code"); and
 - the Management Code of Practice on Procurement of Supplies, Goods and Services ("the Supplies Code").
65. The more important terms of the Management Code include:

- Management of common parts
The Management Code provides that all common parts must be maintained in a state of good and serviceable repair, and in clean condition, and as provided for in the DMC.
- Environmental hygiene
Refuse and garbage must be collected on a daily basis, and transported to a refuse collection point. All staircases and corridors and lift lobbies, etc. must be cleansed at least once a week. Any water seepage or pipe leakage in the common parts should be rectified as soon as possible, at least within three working days.
- Security
Any provision of security and guarding services including the employment of security personnel must comply with the Security and Guarding Services Ordinance and the Watchman Ordinance.
- Insurance
Owners must take out insurance for staff, as required by the Employees' Compensation Ordinance. Owners may insure and keep insured the building or any part thereof to the reinstatement value against fire and other risk. An OC must effect third party liability insurance in respect of the building and common areas under its management.
- Accounts
Proper books and records of account and other financial records, including an income and expenditure account and balance sheet, must be properly prepared by the management committee of the OC in accordance with the Sixth and Seventh Schedules to the Building Management Ordinance.
- Procurement of supplies, goods and services
The procurement of all supplies, goods and services must comply with the Supplies Code which requires a tender for any supplies, goods or services the value of which exceeds or is likely to exceed \$100,000, or the sum which is equivalent to 20% of the annual budget of the OC, whichever is the lesser.
- Water supply
Water pumps, tanks and associated pipeworks must be maintained in good and serviceable repair and condition. Water tanks must be cleansed at least once every six months.
- Fire safety
The requirements of the Management Code on this relate to:
 - means of escape to be free from obstruction;
 - gates/doors at building entrance and/or rooftop to be readily opened from within the premises without the use of a key;
 - metal gates or roller shutters not to be installed across means of escape;
 - smoke lobby doors to be in good working condition and properly closed at all times;
 - emergency vehicular access to be free from obstruction;
 - fire service installations or equipment provided in buildings not to be removed or obstructed;
 - fire shutters and dampers to be maintained in good working order;

- fire service installations or equipment provided in buildings to be maintained in efficient working order at all times; and
 - fire service installations or equipment to be inspected by a registered fire service installation contractor at least once every 12 months.
- *Building safety*
If there is cracking, spalling, bulging or deformation of structural elements, or exposing of reinforcement bars, the OC must appoint an authorised person and/or registered structural engineer to check the condition and, if necessary, to submit remedial proposals to the BA for consideration.

THE BUILDING MANAGEMENT ORDINANCE (BMO)

66. The BMO was formerly called the Multi-storey Buildings (Owners Incorporation) Ordinance. Its objectives are to facilitate the incorporation of owners of flats in buildings, and to provide for the management of buildings.

Incorporation of owners

67. The first step leading to the incorporation of owners is the appointment of a management committee. Under the BMO, a meeting of the owners to appoint a management committee may be convened in any of the following manner:
- owners of not less than 5% of the shares in a building can convene a meeting of owners;
 - owners of not less than 20% of the shares in a building may apply to the Secretary for Home Affairs for an order to convene a meeting of owners;
 - owners of not less than 10% of the shares in a building may apply to the Lands Tribunal for an order to convene a meeting of owners;
 - any person managing the building in accordance with the DMC can convene a meeting of owners; or
 - any other person so authorised by the DMC can convene a meeting of owners.
68. At the meeting, the owners will appoint a management committee and elect its members, namely a chairman, a vice-chairman (if the DMC provides for this post), a secretary and a treasurer. The management committee must, within 28 days of its appointment, apply to the Land Registrar for registration of the Owners Incorporation (OI). On the issue of a certificate of registration by the Land Registrar, the owners become a body corporate. The terms of the Companies Ordinance do not apply to the OI. However, Part X will apply on the winding-up of the OI.

Where there is no management committee, and no one managing a building so that there is a danger or risk of danger to the occupiers or owners of the building, the Lands Tribunal may order that a meeting of owners be convened by such owner as the Tribunal may direct to form an OC and appoint a building management agent.

Duties and powers of the OC

69. The issue of a certificate of registration causes the owners, for the time being, to become a body corporate with separate legal entity and perpetual succession, being capable of

suing and being sued, and doing other acts and things as a body corporate may lawfully do.

70. Upon incorporation, an OC will have certain mandatory duties and powers, which are set out in Section 18 of the BMO. Section 18(1) provides that an OC must:
- maintain the common parts, and the property of the corporation in a state of good and serviceable repair and clean condition;
 - carry out such work as may be ordered or required in respect of the common parts by any public officer or public body in exercise of the powers conferred by any ordinance; and
 - do all things reasonably necessary for the enforcement of the obligations contained in the DMC (if any) for the control, management and administration of the building.
71. Section 18(2) gives an OC extensive powers including:
- to engage and remunerate staff and other professionals;
 - to effect insurance policies;
 - to deal with matters relating to the common parts; and
 - to act on behalf of the owners in respect of any other matter in which the owners have a common interest.
72. On incorporation, Section 16 of the BMO requires the powers and duties of the owners in relation to the common parts to be exercised and performed by the OC “to the exclusion of the owners”. Similarly, the liabilities of the owners in relation to the common parts are enforceable against the OC only, “to the exclusion of the owners”. This means that any proceedings in respect of the common parts can no longer be taken by an owner.

Liability of owners

73. Section 17 provides that a judgment against an OC may be executed against any property of the OC, or with the permission of the Lands Tribunal against any owner. The “owner” is a person recorded in the Land Registry as the owner of an undivided share of the land. Thus a purchaser who buys a unit, where there is a judgment against the OC, may be subject to execution of the judgement against him.

In *Chi Kit Co Ltd and Loong Hock Ltd v Lucky Health International Enterprise Ltd* [2000] 3 HKC 143, completion of the sale and purchase agreement was due to take place on 20 November 1997. In October 1997, the purchaser discovered that a personal injury action had been commenced against the incorporated owners of the building in respect of injuries sustained by a workman. The vendors had not disclosed the action to the purchaser. On 30 October 1997, judgment was given against the incorporated owners for \$25.7m together with interest and costs. It was held that the judgment could have been executed against the OI or against an individual owner, pursuant to Section 17. Accordingly, the purchaser would have been bound to contribute to the amount of the judgment executed against the OI, or even to pay the whole amount if Section 17 was relied upon to vest all liability in the vendor. This represented a defect in title because of the magnitude of the liability, and because it was an event not ordinarily expected by a purchaser. The purchaser was able to rescind the contract.