

I. Appointment of MC for the Incorporation of Owners

Q1 :

How can owners appoint a convenor under section 3(1)(c) of the BMO?

A :

There is no rigid rule to regulate how the decision of appointing a convenor should be made under section 3(1)(c) of the BMO. The owners may do so by holding a meeting amongst themselves or by a letter of authorization signed by the owners. The key is that the convenor must be appointed by all the owners of not less than 5% of the shares in aggregate in order to fulfill the legal requirement under section 3(1)(c).

Section 3(1)(c)

Owners may obtain a sample form from District Offices or Land Registry Offices to facilitate the appointment of convenor. They may also download the sample form from the following websites –

www.landreg.gov.hk

www.buildingmgt.gov.hk

Q2 :

Who should act as the convenor of a meeting of owners if the owner appointed under section 3(1)(c) as the convenor is a body corporate?

A :

If the owner concerned is a body corporate, the body corporate may appoint a director or other officer of that body or some other individual to act as its representative. This representative could then act as the convenor of the meeting of owners.

Section 3(1)(c)

The same applies when the meeting of owners is convened in accordance with section 3(1)(a) of the BMO, i.e. by the person managing the building in accordance with the DMC, who is in most cases a body corporate.

Q3 :

Can the owners of not less than 5% of the shares in aggregate appoint more than one owner to be the convenor of the meeting of owners referred to under section 3(1)(c) of the BMO?

A :

No. The owners should only appoint one owner to be the convenor of the meeting of owners.

Section 3(1)(c)

Q4 :

Can a non-owner (e.g. staff of the property management company, a district personality, a legal professional etc.) convene the meeting of owners under section 3?

A :

According to section 3(1) of the BMO, only three types of persons may convene a meeting of owners to appoint an MC. They are –

Section 3(1)

- (a) any person managing the building in accordance with the DMC;
- (b) any other person authorized to convene such a meeting by the DMC; or
- (c) one owner appointed to convene such a meeting by the owners of not less than 5% of the shares in aggregate.

If a non-owner falls within the description of (a) or (b) above (e.g. the DMC manager), then he may convene the meeting of owners. Otherwise, a non-owner cannot convene such meeting under section 3 of the BMO.

Q5 :

Under the new requirements, how can the owners appoint an MC under section 3 of the BMO? What if the DMC has different requirements?

A :

Section 3(2) of the BMO provides that owners may appoint an MC by –

Section 3(2)

- (a) passing a resolution by a majority of votes of the owners voting either personally or by proxy; **and**
- (b) such resolution is supported by the owners of not less than 30% of the shares in aggregate.

The above-stipulated requirements in the BMO should be followed in the appointment of an MC regardless of the requirements in the DMC of the building. Only the MC which is appointed in accordance with the BMO requirements is recognized under the BMO and could be registered with the Land Registry. Any committee (howsoever its name) appointed in accordance with the requirements in the DMC could not be registered with the Land Registry and does not possess the rights and duties of the MC referred to in the BMO.

Court case: *Siu Siu Hing trading as Chung Shing Management Company v. The Land Registrar* [HCAL 77/2000]

Q6 :

If there is no need to follow the DMC requirements in the appointment of an MC, is there no need to refer to the DMC at all?

A :

DMC is a very important document in the management of building. An owner's share in a building shall generally be determined in the manner provided in a DMC. In other words, all issues relating to common ownership of land point to the DMC of the building. When owners decide to incorporate and appoint an MC, they must refer to the DMC to ascertain their respective shares and voting rights at the meeting of owners.

Sections 3(9)(a), 3A(3G)(a), 4(11)(a) and 39 and para 3(5)(a) of Sch. 3

Even after an OC has been formed, it does not have the power to pass a resolution that contravenes the DMC unless such resolution is passed in accordance with a statutory provision which overrides the inconsistent terms of the DMC.

Q7 :

What is the DMC of a building? Where could owners obtain a copy of the DMC?

A :

According to section 2 of the BMO, DMC means a document which –
(a) defines the rights, interests and obligations of owners among themselves; **and**
(b) is registered in the Land Registry.

Section 2

Generally speaking, DMC is a private contractual agreement among all the co-owners, the manager, and also the developer of a building. It sets out the respective rights and obligations of the parties concerned, for example the owners' right to exclusive use and possession of particular units in a building, obligations relating to the repair and maintenance of common parts etc. A DMC is usually executed by the purchaser of the first unit sold by the developer, but the provisions in a DMC are binding on all subsequent owners.

Owners may obtain a copy of the DMC at any Land Registry Search Offices or through the online services of the Land Registry (www.iris.gov.hk).

Q8 :

What is meant by “supported by the owners of not less than 30% of the shares in aggregate” in section 3(2)(b) of the BMO?

A :

It means that in passing a resolution concerning the appointment of an MC for the incorporation of owners, owners holding not less than 30% of the shares in aggregate vote in favour of appointing the MC.

Section 3(2)

Q9 :

At a meeting of owners convened under section 3 of the BMO, whether the resolution to appoint an MC will be regarded as passed if 30% of the shares of owners support it but owners of a higher percentage of shares (e.g. 35% of the shares of owners) vote against it in the meeting?

A :

Section 3(2) of the BMO stipulates that at a meeting of owners convened under section 3, the owners may appoint an MC by a resolution –

Section 3(2)

- (a) passed by a majority of the votes of the owners voting either personally or by proxy; **and**
- (b) supported by the owners of not less than 30% of the shares in aggregate.

This means that the resolution to appoint an MC must be passed by a majority of the votes of the owners. If owners with a higher percentage of shares (e.g. 35% of the shares of owners) vote against the resolution, then such resolution will not be regarded as passed even if it is supported by owners of 30% of the shares.

Q10 :

Our estate has three blocks. All three blocks are covered by one single DMC and each of the blocks has its own sub-DMC. Could we form three OCs so that the present mode of separate management could be maintained?

A :

Section 8(1A) of the BMO stipulates that the Land Registrar shall not issue a certificate of registration to more than one corporation for a building in respect of which a DMC is in force. If an estate is covered by one single DMC, no matter how many blocks it has, only one OC could be formed.

Section 8(1A)

In fact, the basis of common ownership among owners of a building (i.e. shares of each owner) is set out in the DMC of the building. Owners under one DMC could only form themselves into one OC to manage the building of which they have common ownership.

Q11 :

Our estate has three blocks, each of which is covered by a separate DMC. There is no master DMC which governs the whole estate. Could we form one OC to facilitate management?

A :

The owners in this case could not incorporate as one single OC. It will not be possible for them to calculate their respective shares under the different DMCs. Owners covered by the same DMC could decide to incorporate and three OCs could be formed for this estate.

Court case: 萬高大廈B座業主立案法團 訴 鄒永平及另一人 [LDBM 306/2005]

Q12 :

Some single-block old tenement buildings are covered by more than one DMC. Should these buildings form one OC or not?

A :

The owners in this case could not incorporate as one single OC. A DMC sets out the rights and obligations of the owners concerned, such as the shares owned by respective owners. Different DMCs may have different basis for calculation of the undivided shares in respect of the units in the building. The absence of a proper basis for calculation of the owners' undivided shares in the building presents an insurmountable obstacle to the formation and subsequent operation of the OC. Problems like whether the owners covered by one DMC should share the burden of the liabilities of the owners covered by another DMC, the sharing of management expenses among the owners covered by the two DMCs, etc may arise.

Q13 :

Sections 3, 3A and 4 of the BMO provide for different methods to appoint an MC. When could sections 3A and 4 be invoked?

A :

We encourage owners to follow section 3 of the BMO first. If, however, owners consider there may be genuine difficulties in obtaining the support of 30% of the shares of the owners at a meeting of owners as required under section 3, they may resort to invoke sections 3A and 4 of the BMO.

Application to the Secretary for Home Affairs under section 3A will be considered on a case by case basis. A previous attempt under section 3 to appoint an MC is not a pre-condition for application under section 3A or section 4.

Sections 3, 3A and 4



Q14 :

For a meeting of owners to appoint the first MC, what shall be the resolutions listed on the notice of meeting?

A :

Please refer to the booklet on *“How to form an Owners’ Corporation”* published by the Home Affairs Department which is available at all District Offices and at the following website – www.buildingmgt.gov.hk. The resolutions should be –

Sections 3(4),
3A(3B) and 4(6)

- (1) to resolve on the formation of OC and the appointment of an MC;
- (2) to resolve on the number of members of the MC;
- (3) to resolve on the appointment of members of the MC;
- (4) to resolve on the establishment of the office of vice-chairman of the MC;
- (5) to resolve on the appointment of a chairman of the MC;
- (6) to resolve on the appointment of a vice-chairman of the MC (subject to the passage of a resolution on the establishment of the office);
- (7) to resolve on the appointment of a secretary of the MC;
- (8) to resolve on the appointment of a treasurer of the MC;
- (9) to resolve on the registered address of the OC;
- (10) any other business.

Q15 :

Can matters other than the incorporation of owners, such as maintenance works or termination of manager be discussed at a meeting of owners to appoint the first MC?

A :

A meeting of owners convened for the purpose of appointing the first MC should resolve only on matters relating to the appointment of an MC and the incorporation of owners. The owners have not yet incorporated at this meeting and it is not appropriate for them to pass any resolutions relating to the management of the building at this meeting. The resolutions so passed are likely to be regarded as invalid.

Sections 3(4),
3A(3B) and 4(6)

Q16 :

What is the effective date of the formation of an OC? Is it the date of the meeting of owners convened under section 3, 3A, 4 or 40C or the date of issue of the certificate of registration by the Land Registry?

A :

The effective date of the formation of an OC should be the date of issue of the certificate of registration by the Land Registry. Section 13 of the BMO provides that a certificate of registration issued by the Land Registrar in respect of a corporation shall be conclusive evidence that such corporation is incorporated under the BMO.

Section 13

Even if a meeting of owners is convened under section 3, 3A, 4 or 40C, there is a possibility that the application for the incorporation of owners may be rejected by the Land Registrar (maybe due to incorrect procedures). Thus, the date of the meeting of owners could not be deemed as the effective date of the formation of an OC.

Q17 :

Sections 3, 3A and 4 of the BMO only set out the requirement for the appointment of an MC. How about the procedures for the appointment of members of the MC?

A :

The procedures for the appointment of members of the MC are set out in Schedule 2 to the BMO.

Sch. 2

Q18 :

How to count the 14 days in fulfilling the requirement on giving notice of meeting to the owners? Are public holidays or weekends included in counting the 14 days?

A :

A notice of meeting shall be given at least 14 days before the date of the meeting of owners. In other words, in counting the 14 days, the date of giving the notice is included whereas the date of the meeting is not considered as one of the 14 days. Public holidays or weekends are included in counting the 14 days.

Sections 3(3),
3A(3A), 4(5) and
40C(4)

To illustrate, let's assume that the meeting of owners is held on 15 September. In this case, a notice given on 1 September shall be sufficient and valid, regardless of whether there are any public holidays in between 1 and 15 September.

Despite the above, it is always advisable to allow a few more days in giving the notice of meeting so as to avoid unnecessary disputes.

Court case: The Incorporated Owners of Pearl Island Garden v. Hui Chan Soon Hoy and another [CACV 26/2004]

Q19 :

How shall the notice of meeting be given to owners?

A :

The notice of meeting shall be given by the convenor to each owner through any one of the following three methods –

- (a) by delivering it personally to the owner;
- (b) by sending it by post to the owner at his last known address; or
- (c) by leaving it at the owners' flat or depositing it in the letter box for that flat.

Sections 3(5),
3A(3C), 4(7) and
40C(6)

Q20 :

If the notice of meeting is sent to the owners by post, does the convenor have to confirm that the owners have received the notice? If one of the owners claim that he does not receive the notice of meeting, will this affect the validity of the resolutions passed?

A :

The notice shall be deemed to be effected by properly addressing, pre-paying the postage thereon and dispatching it by post to the last known address of the person to be given the notice. Unless the contrary is proved, such notice shall be deemed to have been effected at the time at which the notice would be delivered in the ordinary course of post.

Section 37

According to section 37 of the BMO, a resolution passed at any meeting convened under the BMO shall not be invalid by reason only of the omission to give notice of the meeting to any person entitled to such notice.

Court cases: 德昌大廈業主立案法團 (炮台街) 訴 唐偉德及另一人 [LDBM 104/1999]; 胡德仁 訴 香港房屋協會 [LDBM 299/1999]; *The Incorporated Owners of Winner Building v. Wai Mau Sze and others* [HCA 20180/1998 & 7564/1999]

Q21 :

How about the display of notice in a prominent place in the building? Should it be displayed 14 days before the meeting as well?

A :

Besides giving the notice of meeting to owners, the convenor shall also display the notice in a prominent place in the building at least 14 days before the date of the meeting of owners convened under section 3, 3A, 4 or 40C of the BMO.

Sections 3(6),
3A(3D), 4(8) and
40C(7)

Q22 :

Is there the need to publish the notice of meeting in a newspaper?

A :

There is no longer the need to publish the notice of meeting in a newspaper.

Q23 :

Who shall preside at a meeting of owners for the appointment of an MC?

A :

The convenor shall preside at a meeting of owners convened under section 3, 3A, 4 or 40C of the BMO.

Sections 3(7),
3A(3E), 4(9) and
40C(8)

Q24 :

If the convenor is not available at a meeting of owners for the appointment of an MC, can the owners present at the meeting appoint another person to preside at the meeting?

A :

No. BMO provides that the convenor shall preside at a meeting of owners convened under section 3, 3A, 4 or 40C. There is no provision in the BMO that provides for the delegation of such statutory duty of the convenor to another person.

Sections 3(7),
3A(3E), 4(9) and
40C(8)

Q25 :

What should be the quorum at a meeting of owners convened under section 3, 3A, 4 or 40C of the BMO? Should the quorum be counted in terms of shares or number of owners?

A :

The quorum should be 10% of the owners. It should be counted in terms of the number of owners, without regard to the shares owned by the owners. For example, if there are 100 owners in a building, the quorum of the meeting should be 10 owners.

Sections 3(8),
3A(3F), 4(10), 5B
and 40C(9) and
Sch. 11

Q26 :

There is already an owners' committee formed under the DMC in our building. What will happen after an MC has been appointed and an OC formed?

A :

Section 34K of the BMO stipulates that where an MC in respect of a building has been appointed, the members of the MC for the time being shall be deemed, for the purposes of the DMC in respect of that building, to be the owners' committee. In other words, the MC, once appointed, will replace the owners' committee.

Section 34K