# 2007年建築物管理(修訂)條例

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對於香港物業管理業界而言，《建築物管理條例》毫無疑問是我們在日常工作中其中一份極為重要的法律文件。該條例由一九九三年五月正式生效實施以來，經歷過不少挑戰。期間政府有見業主與業主之間及業主與管理公司之間仍然經常發生不少矛盾及條例中仍有不少需厘清之法律問題，已數次通過修訂該條例，藉以進一步完善有關法律條文及更乎合業主、居民及物業管理業界的需要和期望。

最近期的一次修訂始於二零零一年三月一次立法會民政事務委員會會議上，委員會同意成立一個小組委員會與政府磋商改善《建築物管理條例》的建議；該小組委員會選出陳偉業議員為主席。經過十二次會議及二零零三年七月的公眾諮詢活動後，署方於同年十一月向民政事務委員會匯報了有關討論及諮詢情況。由於政府預計於二零零四/零五年之立法年度向立法會提交有關之修訂條例草案，民政事務委員會同意小組委員會繼續其工作；得悉往後小組委員會於二零零四年再開了三次會議跟進討論有關事宜。

政府於二零零五年向立法會提交了《2005年建築物管理(修訂)條例草案》，並由涂謹申議員出任法案委員會主席。條例草案在二零零五年四月在立法會首次二讀，其後經過接近兩年的審議，法案委員會一共舉行了五十一次會議，就條例草案的條文和大廈管理的各個範疇，作出詳細和深入的討論，共提出了許多不同的意見，務求條例草案得以更為清晰，及便利業主履行他們管理自己擁有的物業之責任。期間政府亦諮詢了多個不同的專業團體包括英國特許房屋經理學會亞太分會，本會亦於二零零五年十二月提交了我們對修訂條例草案的專業意見。條例草案的審議經歷了兩年多的時間，反映了草案的複雜性及爭議性。最後，《2005年建築物管理(修訂)條例草案》於二零零七年四月二十五日在立法會會議上恢復二讀辯論及三讀通過正式成為《2007年建築物管理(修訂)條例》(“《修訂條例》”)。而該條例亦已於本年六月十五日刊憲及於八月一日正式生效實施。

鑑於《修訂條例》所涉及之範圍較大及很大程度上影響同業之日常運作，香港房地產專業服務聯盟(“聯盟”)率先於本年六月二十六日及二十七日連續兩天舉行有關《2007年建築物管理(修訂)條例》專題講座。聯盟很榮幸邀請到當時任職民政事務總署助理署長張馮泳萍太平紳士為主講嘉賓，為業界同行為數共五百多人就《修訂條例》詳細解釋有關內容及解答與會者提問。聯盟代表包括英國特許房屋經理學會亞太分會(本會)主席周超雄先生、香港房屋經理學會會長黃繼生先生、香港地產行政學會會長何照基先生及香港物業管理公司協會副會長陳有燦先生出席是次專題講座及致送紀念品予馮署長以作答謝。再者，本會及香港房屋經理學會為加深業界在《修訂條例》正式實施前從法律角度講解一些重點外，更希望進一步了解《修訂條例》所帶來的一些操作上的轉變，兩會於七月十一日邀請到李郭羅律師行郭冠英律師為主講嘉賓，為兩會約四百四十位會員就《2007年建築物管理(修訂)條例》之影響作專題演講。兩會代表包括本會周超雄主席及香港房屋經理學會黃繼生會長均出席是次演講及致送紀念品予郭律師。

《修訂條例》的主要目的為協助法團執行職務和行使權力；保障業主的權益；及使委出管理委員會和委任委員的程序更為合理。而《修訂條例》的主要內容涵蓋在成立業主立案法團時怎樣委出管理委員會及委員、有關管理委員會委員的事宜、法團業主大會、委任代表及其指定文書、法團及經理人在採購安排上的要求、法團展示法律程序的資料、法團及經理人的財務安排、經理人被終止委任及離任時的交接安排、經理人須諮詢法

團有關業主之間的通訊渠道等等。業主及業界如對《修訂條例》的內容有任何疑問可按民政事務總署剛出版的各種刊物作參考；其中包括《修訂條例》簡介及常見問題；《建築物管理條例》指南；怎樣成立業主立案法團；廉潔有效財務管理指南；供應品、貨品及服務採購工作守則及大廈管理及維修工作守則。因此，本人在此不再贅述當中詳細內容。

然而，《修訂條例》內有幾點是值得與業界分享和討論。在是次《建築物管理條例》的修訂中，政府其中的一個方向乃盡量遵從如大廈公契並未訂明有關規定時，則按照條例的條文行事這個原則辦理。例如有關委出管理委員會、以處理成立業主立案法團的問題。根據現有的《建築物管理條例》第3條，業主會議可按照大廈公契的規定，委出管理委員會及成立業主立案法團。惟現行的條文，可能會令人產生混淆，不知道應該根據大廈公契，還是《建築物管理條例》，成立業主立案法團。因此，《修訂條例》中清楚訂明，要委出《建築物管理條例》所規定的管理委員會，業主必須遵照條例訂明的程序行事，而並非按照大廈公契辦理。而在委出管理委員會後，業主便須在業主會議上委任管理委員會委員。有鑒於荃灣花園業主立案法團(二零零五年三月)一案及考慮到管理委員會的委員數目眾多時，如果每位委員的委任，均要取得過半數的決議支持，在實際情況下會有很大的困難。因此，在《修訂條例》中政府參考《立法會條例》和《區議會條例》中的投票方法，讓法團在委任管理委員會委員時，採取“得票最多者當選”的投票制，而非“過半數票”投票制的原則。惟業界必須注意，除在委任管理委員會委員的決議外，其他任何法團業主大會的決議，仍然以“過半數票”投票制為準。此外，《修訂條例》第2B條更清楚訂明，為免生疑問，在斷定其決議是否在根據本條例召開的會議上獲業主或管理委員會委員以過半數通過時，無須理會(i)沒有出席會議的業主或委員(視屬何情況而定)；(ii)出席會議但沒有投票的業主或委員(視屬何情況而定)；(iii)空白或無效的票；及(iv)棄權票。

是次《修訂條例》較為特別的內容為有關委託書的事宜。在新的第1A附表中引入表格一及二，後者乃供成立了法團之後的業主大會使用；並且委任代表文書上不可加入任何投票指示。《修訂條例》訂明送交委託書的時限，即召開業主大會時，必須將以法定格式的委任代表文書至少48小時前遞交管理委員會秘書，而主席是沒有權力縮短上述48小時的時限。秘書亦必須在收到委託書後發出認收回條，以及在會議地點顯眼處張貼委任代表的單位資料。務使委任代表的機制，更為公開、透明、減少業主之間的爭議。由於《修訂條例》生效不足一個月，相信不少業界朋友在管理一些仍然未有法團或只有業主委員會的物業時，或有不少疑問如該等物業召開業主大會時是否必須嚴格遵從《修訂條例》以上的新要求，特別是影響委託書的措施。期望政府有關方面及法律界朋友可加以澄清。

法團及經理人在採購方面，《修訂條例》亦引入正式法律規定。如法團及經理人要作出價值超過或可能超過$200,000或款額超過物業年度預算的20%的採購時，便必須以招標承投的方式進行；而在後者的情況下更須在業主大會上通過決議是否接納有關的採購建議。法團可以引用由業主大會通過的決議，廢止不符合條例規定的採購合約；而如果有任何人士在不符合條例規定的情況下，訂立採購合約，便有可能須就合約所引致的申索，負上個人的法律責任。《修訂條例》進一步規定，當法團根據條例需要聘請會計師審計財務報表，管理委員會便必須把經審計的財務報表，連同會計師報告提交法團省覽。在不少於5%的業主要求下，管理委員會須准許該等業主或該等業主委任的任何人士在合理時間查閱由管理委員會備存的帳簿、帳項記錄及其他財務記錄內所指向的任何單據、發票、憑單、收據或其他文件，藉此提高法團在財務安排方面的透明度。

過去業主在召開業主大會及管理委員會會議的安排上往往與管理委員會有不同的理解及期望，產生不少爭拗。《修訂條例》第二附表第8(1)(b)段訂明管理委員會秘書在收到兩位管理委員會委員要求後，必須在14天內召開，並在收到該要求後21天內舉行管理委員會會議。此外，第三附表第1(2)段訂明管理委員會主席在收到不少於5%人數的業主要求下，須在收到要求的14天內就業主指明的事宜召開法團的業主大會，該大會亦必須在收到要求後45天內舉行。至於在填補管理委員會的空缺安排上，《修訂條例》亦清楚訂明法團可在業主大會上通過決議，委任一名業主填補該空缺，任期直至下一次管理委員會須卸任的業主周年大會為止。如沒有召開業主大會去填補空缺的話，管理委員會則可委任一名業主填補該空缺，惟其任期只至下一次法團業

主大會為止。根據未經修訂的條例，業主可以按照大廈公契的規定委任管理委員會；而《修訂條例》就這些按照大廈公契委任的管理委員會提供了四年的過渡期，即由二零零七年八月一日起至二零一一年七月三十一日止。在過渡期內，這些管理委員會可繼續按照未經修訂的條例第二附表行事。但是，如在過渡期內，法團在業主大會上通過決議，決定遵照經修訂的第二附表行事或過渡期屆滿者，管理委員會便須按照《修訂條例》第二附表行事。

最後值得一提的是法團投購第三者風險保險的安排。查實，政府在制定《2000年建築物管理(修訂)條例》時，已增訂了一項條文規定所有法團均須與保險公司訂立第三者風險保單。為了實施這項新規定，政府在二零零五年把《2005年建築物管理(修訂)條例草案》提交立法會時，也一併提交了《建築物管理(第三者風險保險)規例》(“規例”)的草擬本，詳細列出強制法團投購第三者風險保險的規定。行政會議已於二零零七年六月二十六日訂立有關規例，並於七月六日在憲報刊登及於七月十一日在立法會通過。因此，《2000年建築物管理(修訂)條例》第十二段將於二零零九年一月一日正式實施；所有法團必須於規例生效日期後投購大廈公用部份及第三者傷亡的責任保險，保額以每宗計不少於港幣一千萬元，惟受保範圍無須涵蓋建築物內的僭建物，違規者最高可被罰款港幣五萬元。

總的而言，是次《2007年建築物管理(修訂)條例》的實施，應可就業界在過去多年運作時所遇到的挑戰及條例的灰色地帶，提供了清晰的方向，以及進一步完善了《建築物管理條例》不足之處。相信民政事務總署會繼續就該修訂條例作出宣傳推廣，望能令廣大市民業主認識《修訂條例》的內容及影響。在此，本人亦期望業界朋友盡快了解及深入認識《修訂條例》對我們日常管理工作的影響，以及提出業界在新的修訂條例影響中大家的回饋意見供有關方面考慮，好使在現行的法律框架下，業主的權益得到更大保障，業界亦能夠在一個公平及清晰的營商環境下運作。

# Brief comments on salient points in BMO Amendments

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**Most of the provisions in The Building Management (Amendment) Ordinance have come into operation on 1 August 2007. The amendments introduced will greatly affect the management of buildings and estates as well as the operations of the Management Committee(MC) of Owners Corporations(OC). The following are some brief comments on the more relevant amendments in the hope that they will enable Members to better cope with the changes involved.**

## 1. Appointment of members to the Management Committee (MC)

At a meeting of owners convened for the appointment of a MC if the number of candidates for the MC does not exceed the resolved number there is no need to carry out any voting procedure and all the candidates shall be deemed to be appointed as members of the MC including the Chairman, the Vice Chairman, the Secretary and the Treasurer.

However if the number of candidates is more than the resolved number then voting and counting of votes have to be carried out according to the "first past the post" voting system. Names of candidates should be listed according to the number of votes held. The topmost candidates holding the greatest number of votes should be appointed as the members of new MC.

Therefore, each candidate need not obtain more than half of the number of votes of those present at the meeting to be elected and there is no need to adopt the knock-out voting procedure until each candidate manages to obtain more than 50% of the votes of those present at the meeting.

Should there be more than one candidate for the post of Chairman, Vice Chairman, Secretary or Treasurer the "first past the post" voting system is also applicable to their appointment.

If two candidates should have an equal number of votes the person who presides over the meeting shall determine the result by drawing lots.

## 2. Filling vacancies of MC

Should a vacancy occur in the MC the OC can at a general meeting of owners appoint an owner to fill the vacancy until election of the MC at the next AGM. If no general meeting of owners is convened the MC can appoint any owner to fill the vacancy but the appointment can only last till the next general meeting of owners (not necessarily an AGM).

The same procedure is to be adopted should a vacancy arise for Chairman, Vice Chairman, Secretary or Treasurer.

Therefore the term of office for any person filling a vacancy occurring in the MC will depend on whether the appointment is made at a general meeting of owners or at a MC meeting.

## 3. Protection for MC members

Individual members of a MC shall not be held personally liable when he is acting in good faith or in a reasonable manner in carrying out any act on behalf of the OC in the exercise or purported exercise of the powers conferred by the BMO on the OC or in the performance or purported performance of the duties imposed by the BMO on the OC.

Therefore members of the MC are protected from being personally liable for their acts so long as they act in good faith and in a reasonable manner taking into consideration all factors involved (including the advice of professionals) and at the same time they are dutiful in the performance of the duties imposed by the BMO on the OC and does not exceed the powers conferred on it by the BMO.

## 4. Number of MC members, their allowance and required Statutory Declarations

First of all the number of members in a MC should be resolved at a general meeting of owners.

In addition whether stipulated in the DMC or not the meeting of owners can appoint one of the MC members as a Vice Chairman.

Only the MC Chairman, Vice Chairman, Secretary or Treasurer is permitted to receive an allowance. Whether stipulated in the DMC or not no other member within the MC will be permitted to receive any allowance.

At the same time, there is a new requirement for members of the MC to, within 21 days of their appointment, lodge with the MC Secretary a statutory declaration in a specified form (LR169) stating that he is not:

(a) an undischarged bankrupt or within the previous 5 years, had either obtained a discharge in bankruptcy or entered into a voluntary arrangement within the meaning of the Bankruptcy Ordinance; or

(b) has, within the previous 5 years, been convicted of an offence in Hong Kong or any other place for which he has been sentenced to imprisonment whether suspended or not, for a term exceeding 3 months without the option of a fine.

The Secretary of the MC should lodge the declaration forms received with the Land Registrar within 28 days of the receipt of such forms (except for the appointment of the first MC). If a change occurs in any matter stated in the declaration form, then the person who made the declaration shall, within 21 days after the change occurs, lodge with the Secretary of the MC another declaration stating the particulars of the change. The Secretary of the MC shall then lodge the Declaration of Change of Particulars Form with the Land Registrar within 28 days of the receipt of the Form. Should the change of particulars relate to the Secretary he should within 28 days after the change, lodge the Declaration of Change of Particulars Form with the Land Registrar.

## 5. References to the Majority of Votes

For the avoidance of doubt in determining whether a resolution is passed by a majority of votes at a meeting convened under the BMO the following shall be disregarded:

- Owners or members, as the case may be, who are not present at the meeting
- Owners or members, as the case may be, who are presenting at the meeting but do not vote
- Blank or invalid votes
- Abstentions

In other words, when counting votes, only valid votes in the ballot box need be taken into account. The management shares of all invalid votes, abstentions and those who are present at the meeting but do not vote need not be taken into account.

## 6. Appointment of Proxies

A proxy appointed by an owner to attend and vote on his behalf at a meeting of the owners or at a meeting of the corporation should be in the prescribed Form 1 or Form 2 set out in Schedule 1A of the BMO. Form 2 is for use at a meeting of the owners after the formation of the Owners' Corporation. There should be no instructions on how to vote in the proxies.

The instrument of proxy shall be lodged with the MC Secretary at least 48 hours before the time for the holding of the meeting so as to provide sufficient time for the MC Secretary to complete the necessary procedures which he has to make (the Chairman has no right to shorten the said period of 48 hours):

(a) the Secretary should issue a receipt to all the owners who have lodged the instruments of proxy to acknowledge receipt of the instrument before the time for the holding of the meeting and leave it at the flat of the owner or deposit it in the letter box for that flat.

(b) prepare a list setting out the information of all the flats with instruments of proxy lodged and display it in a prominent place at the place of the meeting before the time for the holding of the meeting and keep it displayed till the conclusion of the meeting. (Note: Do not display the name or other personal particulars of the owner in order to avoid breach of privacy); and

(c) MC Chairman or person to preside over the meeting to determine the validity of the instruments of proxy received by ensuring the following:

(i) the instrument is in the form set out in Form 2 in Schedule 1A

(ii) it is signed by the owner (if the owner is a body corporate, signed by a person authorized by the body corporate and impressed with the chop or seal of the body corporate); and

(iii) the instrument is lodged with the convenor at least 48 hours before the time for the holding of the meeting.

## 7. Procurement of supplies, goods and services

All procurement for supplies, goods and services, if exceeding or likely to exceed $200,000 (existing legislation is $100,000) shall be procured by invitation to tender. If it does not exceed this amount invitation to tender can be waived (but have to ensure that it does not exceed 20% of the annual budget of the OC. Otherwise, invitation to tender is still required and whether it is to be accepted or not shall be decided by a resolution passed by a majority of votes at a general meeting of the OC.)

If the procurement exceeds 20% of the annual budget of the OC invitation to tender is required and acceptance of any tender should be by a resolution of a majority of votes at a meeting of the OC. This means that all valid tenders received should be put up to the general meeting of the corporation to decide which should be accepted. If tenders received are too many a short listing exercise according the guidelines set out in the Code of Practice (effective 1st August 2007) can be carried out. In other words invitation to tender and a resolution to be passed by a majority of votes at a general meeting of the corporation is required.

Example (1). The annual budget of the estate is $5,000,000 and cost for the works is estimated to be $1,000,000, then invitation to tender and a resolution of the majority of votes at a general meeting of the corporation is required

Example (2). The annual budget of the estate is $800,000 and estimated cost of works is $180,000 (i.e. exceeding 20% of the annual budget of the estate) then even though the cost does not exceed $200,000 but invitation to tender and a resolution of the majority of votes at a general meeting of the corporation is still required.

Still, there are exceptions:(i)if the procurement for supplies, goods or services are of the same type as the supplies, goods or services that is provided by the supplier for the time being and (ii)the relevant supplier is providing supplies goods or services to the OC for the time being (e.g. the incumbent management company, cleaning contractor, lift maintenance contractor) and (iii)a resolution of the owners has been passed at a general meeting that the relevant supplies, goods or services shall be procured from that supplier on such terms and conditions as specified in the resolution instead of by invitation to tender, then even though the value exceeds $200,000 or 20% of the annual budget of the OC, tendering can be waived.

OCs and all managers have to comply with the above statutory requirements.

## 8. Consequences of non-compliance with statutory requirements on procurement

Non-compliance with statutory requirements does not affect the validity of the contract unless (i) the contract has been voided by a court order (ii) the corporation resolves at a general meeting to void the contract due to non-compliance.

In addition any person who enters into a contract for the procurement of any supplies, goods or services otherwise than in compliance with the statutory requirements may be personally liable for any claims arising from the contract.

Therefore, for avoidance of claims, damage or loss, all managers and MCs should ensure that statutory compliances are met.

## 9. Display of information about legal proceedings

If the OC is party to any legal proceedings, irrespective of whether the proceedings are made by the corporation or against the corporation, the OC should notify the owners by:

(a) (If the proceedings are against the corporation) displaying a notice containing the particulars of the proceedings in a prominent place in the building within 7 days of receiving any court documents commencing the proceedings and causing the notice to remain so displayed for at least 7 consecutive days:

(b) (If the proceedings are made by the corporation) displaying a notice containing the particulars of the proceedings in a prominent place in the building within 7 days of issuing any court documents commencing the proceedings, and causing the notice to remain so displayed for at least 7 consecutive days.

## 10. Inspection of the books of account

The MC should at the request of not less than 5% of owners, allow such owners or such persons appointed by the owners, at reasonable hours to inspect the books or records of account, bills, invoices, vouchers, receipts and other documents referred to in the books or records of account kept by the MC.



Therefore, the MC has to have a prior understanding with the management company on arrangements for requests from 5% of the owners to inspect such records and should make prior arrangements for their storage.

Besides managers should

(a) permit any owner, at a reasonable hour, to inspect the Income and Expenditure Account (I & E) and the Balance Sheet, ad the account and auditor's report on the I & E and Balance Sheet and

(b) after receiving payment of reasonable copying charges, to provide owners with copies of the I & E and Balance Sheet or copies of the accountant or auditor's report on the I & E and the Balance Sheet.

## 11. Opening of accounts by manager

If there is an OC, the manager should open one or more segregated interest bearing accounts, each of which should be designated as a trust account or client account, for holding money received by him from or on behalf of the OC in respect of the management of the building. At the same time, the manager should display a document showing evidence of the above bank accounts opened and maintained by him in a prominent place in the building. For any money collected by the manager from or on behalf of the OC as a special fund the same practice should apply.

## 12. Termination of manager's appointment

A corporation may, at a general meeting of the corporation convened for the purpose, terminate by notice the DMC Manager's appointment without compensation by a resolution:

(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 50% of the shares in aggregate.

For termination of a non-DMC Managers' appointment (for example: a manager appointed by contract) where the employment contract contains no provision for the termination of the manager's appointment the above mechanism should also apply.

## 13. Obligations of manager after appointment ends

If the manager's appointment ends for any reason, he shall as soon as practicable after his appointment ends (in any event within 14 days of the date his appointment ends) deliver any movable property in respect of the management of the building that is in his possession and that belongs to the OC (if any) or owners to the MC (if any) or the manager appointed in his place. Take note that only movable property is referred to in the above. Delivery of other documents such as I & E and Balance Sheet remain unchanged at within 2 months of the date his appointment ends.

## 14. Meetings of MC

The MC secretary should at least 7 days before the date of the meeting in a prominent place in the building for at least 7 days. At the same time certified minutes of the MC meeting should be displayed in a prominent place in the building within 28 days from the date of the MC meeting for 7 consecutive days.

Any owner may, in writing, request the OC to supply him with copies of the certified minutes. The MC shall supply such persons with the concerned copies upon payment of a reasonable copying charge.

## 15. Convening a meeting of the OC at the request of not less than 5% of the owners

At the request of not less than 5% of the owners, the Chairman of the MC should, within 14 days of receiving the request, convene a general meeting of the OC, for the purposes specified by the owners and hold the general meeting within 45 days of receiving such request. The MC Secretary shall at least 14 days before the date of the general meeting of the OC, give notice of the meeting to each owner and the tenant's representative (if any) and display the notice of meeting in a prominent place in the building.

This amendment has rectified the existing legislative loophole where no period has been specified for the convening of a general meeting of the OC.

Again, any owner may, in writing, request the OC to supply him with a copy of the certified meeting minutes. The MC Secretary shall supply such persons with the concerned copy upon payment of a reasonable copying charge.

## 16. The Code of Practice has also come into effect on 1 August 2007.


# 關於物權法的學習貫徹及對物業管理發展有關問題的思考

中國物業管理協會會長
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## 第一部份　關於物權法的學習與貫徹

今年三月，第十屆全國人民代表大會第五次會議高票通過了《中華人民共和國物權法》（以下簡稱《物權法》）。

物權法的內容非常豐富，很多問題還有待深入學習以及在貫徹中加深理解。下面，我談一下自己初步學習的體會，僅供大家參考。

**一．認真學習，全面了解和掌握物權法涉及物業管理活動的主要內容**

作為廣大業主管理自身主要財產（不動產）法律的制定，物權法對保護業主權益、規範業主行為的影響將是積極而深遠的。同時，《物權法》中“業主的建築物區分所有權”和“相鄰關係”兩章的內容直接涉及物業管理，從法律的角度為物業管理定紛止爭、正本清源，對物業管理更好地行使經營管理以及為業主提供服務都提供了重要的法律依據。因此，對《物權法》的深入貫徹，是關係到物業管理進一步走向法制化路程的一件大事，值得全行業高度關注。

1. 物權法回答的三個問題。全國人大常委會法制工作委員會副主任王勝明在新聞發布會上說：物權法回答了三個問題。第一，“物”是誰的？第二，權利人對物享有什麼權利？負有什麼義務？第三，怎樣保護物權？侵害物權的人要承擔甚麼樣的法律責任？
2. 物權法涉及物業管理的主要內容。物權法關於“業主的建築物區分所有權”一章逐條都有很強的針對性。首先弄清楚什麼叫建築物區分所有權？第七十條規定：“業主對建築物內的住宅、經營性用房等專有部份享有所有權，對專有部份以外的共有部份享有共有和共同管理的權利。”從這一表述看，從法理上說是建築物區分所有權的三元論，即建築物區分所有權由三部份的權利構成：對專有部份的所有權、共有部份的共有權和共同管理權；第七十一條規定了業主行使所有權的內容及方式“業主對其建築物專有部份享有佔有、使用、收益和處分的權利。業主行使權利不得危及建築物的安全，不得損害其他業主的合法權益。”第七十二條規定了業主對專有部份的權利與義務，並明確“業主不得以放棄權利為由不履行義務”，例如不得以不使用電梯為由，不交納電梯維修費用。在集中供暖的情況下，不得以冬季不在此住宅居住為由，不交納暖氣費用等；第七十三條明確了建築區劃內的道路、綠地、物業服務用房及其它公共場所、設施的歸屬：“建築區劃內的道路，屬於業主共有，但屬於城鎮公共道路的除外。建築區劃內的綠地，屬於業主共有，但屬於城鎮公共綠地或者明示屬於個人的除外。建築區劃內的其他公共場所、公用設施和物業服務用房，屬於業主共有”。全國人大法工委民法室編著的“物權法精解”（以下簡稱全國人大法工委“精解”）寫到：“需要指出的是，本條說的綠地、道路歸業主所有，不是說綠地、道路的土地所有權歸業主所有，而是說綠地、道路作為土地上的附着物歸業主所有”；第七十四條特別就車位、車庫的歸屬作出規定。“建築區劃內，規劃用於停放汽車的車位、車庫應當首先滿足業主的需要。建築區劃內，規劃用於停放汽車的車位、車庫的歸屬，由當事人通過出售、附贈或者出租等方式約定。佔用業主共有的道路或者其他場地用於停放汽車的車位，屬於業主共有”。針對關於車庫、車位

應該屬於全體業主的意見，全國人大法工委“精解”指出：屬於業主共有的財產，應當是那些不可分割、不宜也不可能歸任何業主專有的財產，如電梯等公用設施、綠地等公用場所，而車庫、車位的歸屬，是由當事人通過出售、附贈或出租等方式約定歸業主專有或者專用的。對於認為“開發商把車庫、車位建造費用攤入了成本，因此應該歸全體業主”的說法，人大法工委認為：這和商品房銷售價格沒有必然聯繫，而且也很難証明車庫和車位的價值是否包括在建築成本之中；第七十五條規定了業主對建築物進行管理的組織機構“可以設立業主大會，選舉業主委員會”，並指出“地方人民政府有關部門應當對設立業主大會和選舉業主委員會給予指導和協助”；第七十六條規定了業主共同決定的事項內容及決定方式和投票權數，鑒於物業面積數很容易形成在前期階段開發商的絕對優勢，所以就產生了人數的規定，出發點是要維護小業主的利益；第七十七條對改變住宅用途作出了規定；第七十八條規定了業主大會決定的效力；第七十九條設立了維修資金制度；第八十條規定了建築物共有部份費用的分攤與收益分配；第八十一條規定了業主管理建築物的方式“業主可以自行管理建築物及其附屬設施，也可以委托物業服務企業或者其他管理人管理。對建設單位聘請的物業服務企業或者其他管理人，業主有權依法更換。第八十二條規定了業主與物業管理企業的關係“物業服務企業或者其他管理人根據業主的委托管理建築區劃內的建築物及其附屬設施，並接受業主的監督”。第八十三條規定了業主、業主大會、業主委員會的相應權利義務。表述為“業主應當遵守法律、法規以及管理規約。業主大會和業主委員會，對任意棄置垃圾、排放污染物或者噪音、違反規定飼養動物、違章搭建、侵佔通道、拒付物業費等損害他人合法權益的行為，有權依照法律、法規以及管理規約，要求行為人停止侵害、消除危險、排除妨害、賠償損失。業主對侵害自己合法權益的行為，可以依法向人民法院提起訴訟”。全國人大法工委“精解”指出：這一規定表明對建築區劃內侵害他人合法權益的處置辦法有三：一是，業主大會、業主委員會依照法律、法規以及管理規約，要求行為人停止侵害、消除危險、排除妨害、賠償損失；二是，受到侵害的業主個人依據民事訴訟法等法律的規定，向人民法院提起訴訟；三是，共同受到侵害的業主，推選代表人，依據民事訴訟法等法律的規定，向人民法院提起訴訟。

3. 物權法對《物業管理條例》的突破。一是對共有部份和共有設施設備的歸屬作了明晰；第二是規定了住宅改變用途的法定條件；第三對業主義務作了強化（第七十二條規定：業主對建築物專有部份以外的共有部份，享有權利，承擔義務；不得以放棄權利不履行義務）；第四，規定了物業管理費的分攤規則（第八十條規定“建築物及其附屬設施的費用分攤、收益分配等事項，有約定的，按照約定；沒有約定或者約定不明確的，按照業主專有部份佔建築物總面積的比例確定”）；第五對多種管理建築物的模式作了明確；第六對業主自我管理機制作了規範。

第六章的每條都有很深的法律內涵，與物業管理直接相關，全行業要通過深入學習，全面了解和準確掌握物權法涉及物業管理活動的主要內容，充分運用法律手段提高物業管理和服務的水平，增強解決矛盾和糾紛的能力，促進物業管理的和諧發展。

**二・深入研究、把握物權法對物業管理活動的主要影響**

1. 促進物業管理的法制化進程。物權法從民事基本法律的層面，將物業管理活動相關的基本概念以法律形式予以確認。物權法的有關內容與《物業管理條例》的基本原則、指導思想相一致，它不僅繼承、豐富了條例的內容，而且將條例確立的業主大會、業主公約、專項維修資金等基本制度由行政法規上升為法律，提高了上述制度的適用範圍與效力等級。因此，物權法的頒布與實施將更好地促進條例的貫徹與執行，使物業管理活動更加有法可依，使業主和物業管理企業的合法權益得到更好的維護。
2. 促進物業管理的加快發展。當前的物業管理企業已經進入理性承接項目的階段，對於產權不

清、存在隱患的項目，特別是對一些產權關係複雜，矛盾糾紛不斷的老舊住宅區等項目一般不予介入或者逐步退出。可見，不動產各項權利的不明晰以及鄰里糾紛處理的煩雜已經制約了物業管理的進一步發展。物權法明確了物的歸屬和相鄰關係應當遵循的準則，有利於物業管理企業減少經營風險、降低交易成本、穩定預期收益，從而增加生產性投資，提高物業管理服務的供給數量和品質。

3. 促進物業管理矛盾糾紛的防範化解。開發建設售賣遺留問題、業主相鄰關係處理不當等一直是引發物業管理矛盾糾紛的痼疾所在，物權法為其有效解決提供了法律途徑。物權法關於專有部份所有權、共有部份共有權以及共同管理權利的規定，為物業管理活動中的各方主體的權利、義務和責任界定奠定了法律基礎；建築區劃內的道路、綠地、車位、車庫及其他公共場所和設施的產權明晰，從根本上減少了業主、開發企業、物業管理企業之間因產權不清等造成的矛盾糾紛；不動產相鄰權利人相鄰關係的規定，有助於避免業主之間的矛盾糾紛轉嫁於物業管理。
4. 促進業主自我管理、自我約束機制的形成。物權法設立了業主大會和業主委員會制度、明確了業主大會或者業主委員會的決定對業主的約束作用、規定了業主應當遵守建築物及其附屬設施的管理規約，尤其是《物權法》第八十三條明確了要求損害他人合法權益的行為的人停止侵害、消除危險、排除妨害、賠償損失的實施主體是業主大會和業委會，從而為拒付物業管理費、侵佔共有部份等損害他人合法權益的行為提供了業主內部自我管理與約束機制，強化了業主在物業管理活動中的責任與義務，有利於維護業主的共同利益。物業管理企業要認清形勢，真誠地依靠業委會做好有關工作。另一方面，在增大業委會責任的同時，我們要特別注意加強基層政府對業委會運作的指導和監督。
5. 促進物業管理服務質量的提高。物權法關於“業主可以自行管理建築物及其附屬設施、也可以委托物業管理企業或者其他管理人管理”的規定，是法律維護市場經濟秩序、權衡各方利益關係作出的選擇。從狹隘的角度看，選聘物業管理企業實施管理只是業主管理自身物業的方式之一，會給物業管理帶來一定的壓力；另外一方面，我們應該看到，經過二十多年的發展，從有效改善業主的生活和工作環境質量來看，社會化、專業化、市場化的物業管理應當是多產權物業管理的主要選擇，物業管理已經深入人心，允許業主自管並不會降低物業管理市場的潛在需求。我們相信有實力的物業管理企業會變壓力為動力，以精心管理、優質服務、誠信經營贏得廣大業主的信賴。對此，全國人大法工委“精解”中有一段話：隨着經濟的發展、科技的進步，建築領域不斷出現新技術、新產品，建築物及其附屬設施的科技含量越來越高，管理的難度加大，還是選擇專業化、市場化、社會化的物業管理公司對建築物及其附屬設施進行管理為好。

此外，隨着物業管理師職業准入制度的實施，以及相關專業的市場化逐步完善與成熟，會產生業主聘請一個註冊物業管理師作為大管家來實施統攬管理，而清潔、綠化等單項業務則聘請專業公司運作的模式。還可以直接從社會上請專業公司配合業主自行管理等（單棟樓宇的管理可以試行）。這兩種模式的出現對我國物業管理形式多元化的形成，促進優勝劣汰，讓業主權益得到更大的保障都會有積極作用。但在短期內不太可能成為業態的主流，前一種模式單個管理人的抗風險能力是軟肋，而後一種模式則存在專業知識缺乏和監管機制先天不足等弊病。

此外，第八十一條第二款規定：“對建設單位聘請的物業服務機構或者其他管理人，業主有權依法更換”，這對物業管理服務質量的提高、服務態度的端正將起到進一步的促進作用。

6. 促進物業管理服務職能定位與責任邊界的明晰。《物業管理條例》明確：本條例所稱物業管理，是指業主通過選聘物業管理企業，由業主和物業管理企業按照物業服務合同約定，對房屋及配套的設施設備和相關場地進行維修、養護、管理，維護相關區域內的環境衛生和秩序的活動。其對物業管理定位是清晰的。

但是，近些年，物業管理承擔了很多自身不該承擔和無力承擔的工作和責任，引發了很多難以解決的糾紛。這次物權法就業主對“建築物內的住宅、經營性用房等專有部位享有所有權，對專有部分以外的共有部份享有共有和共同管理權”以及對業主大會和業委會對侵害他人合法權益行為管理權和責任的界定，應該引起我們行業對自身職能定位與責任邊界作認真的再思考。我們的企業就是一個按照合同提供服務的服務型企業，不能包攬一切、包打天下。把該做和能做的事情簽訂在合同上，並用內部制度保証其切實執行好，很多不該做和做不了的事情，不要都攬在自己身上。只有這樣，才能正本清源，幹好自己的事情，改變目前行業代人受過的被動局面。

本文為謝家瑾女士於深圳市物業管理行業<物權法>與物業管理專題報告會講話的節錄，獲謝家瑾女士授權轉載，本刊特此致謝。