

EXECUTIVE SUMMARY

Direct Investigation Enforcement against Unauthorised Building Works in New Territories Exempted Houses

Ambit of Investigation

This direct investigation serves to examine:

- (a) the effectiveness of the current enforcement regime in stopping the proliferation of unauthorised building works (“UBW”)¹ in New Territories Exempted Houses² (“NTEHs”); and
- (b) any necessary improvement to the enforcement regime.

Statutory Powers of Departments Concerned

2. Both the Buildings Department (“BD”) and the Lands Department (“Lands D”) may take enforcement action against UBW in NTEHs.

3. BD may issue a statutory order under section 24 of the Buildings Ordinance, Cap. 123, (“BO”), requiring the property owner to remove any illegal or dangerous structure within a specified period, failing which the UBW may be demolished by BD at the owner’s expense. Non-compliance with a removal order is an offence under section 40(1)(B) of the BO, with the offender liable to imprisonment and fines.

4. Lands D may take lease enforcement action against UBW if they constitute a contravention of the lease conditions. As land administrator, Lands D

¹ *Unauthorised building works are building works that have not been approved by the Buildings Department or the Lands Department.*

² *New Territories Exempted Houses are houses built on land granted under the New Territories Small House Policy to male indigenous villagers, or houses built outside the scope of the New Territories Small House Policy by indigenous or non-indigenous villagers, in accordance with the specifications of an New Territories Exempted House.*

has the powers to demolish UBW under sections 12 and 13 of the Lands (Miscellaneous Provisions) Ordinance, Cap. 28 and to re-enter the land and cancel the lease under section 4 of the Government Rights (Re-entry and Vesting Remedies) Ordinance, Cap. 126.

Enforcement Policy

5. In 2001, a Working Group comprising the then Planning, Environment and Lands Bureau (“PELB”), BD, Lands D and Planning Department (“Plan D”) decided to adopt a strategy of prioritisation of enforcement actions, in respect of all buildings in Hong Kong, by prescribing that BD should take priority action against, *inter alia*, “new” UBW, i.e. UBW completed within 12 months, and UBW constituting obvious or imminent danger to life or property.

6. In 2002, the Working Group revised the policy such that for NTEHs, BD will take enforcement action only against UBW in progress (“WIP”) and UBW constituting obvious or imminent danger. Unlike other buildings, no enforcement action is to be taken by BD against “new” UBW in NTEHs. Lands D will accord high priority of lease enforcement action only to cases of blatant breach, such as erection of an over-sized NTEH.

7. In 2006, the Development Bureau (“DevB”) (the successor of PELB), BD, Lands D and Plan D decided that an item of unauthorised building works-in-progress should not be considered WIP if it is “practically completed”, i.e. if the construction of the concrete framework of the structure or the cover of the stairhood of the building has been completed. The WIP status of a structure is determined upon the site situation reported at the date of first detection.

8. Pursuant to this definition, UBW under construction in NTEHs with their main structures already completed will not be classified as WIP and will not be subject to immediate enforcement action by BD. We dub the above “the WIP Policy”.

Work Practices

Detection and Referral

9. BD will consider the need for taking action upon receipt of a complaint on WIP. For referrals from Lands D, the related land information (e.g. land status plans, lot particulars, ownership records) and photographs showing the site and its surrounding area are accompanied as far as possible.

Site Inspection and Report

10. BD will arrange for one of its consultants to conduct a site inspection within 48 hours of receipt of the complaint. The consultant will submit an inspection report to BD afterwards for consideration as to whether and what enforcement action should be taken.

Removal Order

11. If BD confirms the case to be WIP, it will issue a “cease work advisory letter” and a removal order to the lot owner concerned demanding him to cease work and remove the UBW respectively. If the owner does not remove the UBW, BD will consider prosecution.

12. A removal order requires the owner to remove the UBW within a specific period of time, which varies from 30 days to a few months. BD will arrange inspection to check compliance. Extension may be allowed.

Lease Enforcement Action

13. Lands D usually accords low priority to dealing with UBW in NTEHs. Upon receipt of a complaint on UBW, Lands D will inspect the premises to ascertain if a breach of the lease conditions is involved. If so, Lands D will issue a warning letter requiring the breach to be purged within a specified period. If the breach persists, Lands D may take further lease enforcement action, including registering the warning letter in the Land Registry against the title of the property.

Overall Monitoring

14. According to Lands D, as at February 2004, there were around 13,000 UBW in NTEHs which constituted contravention of the lease conditions. A visual survey conducted by Lands D in 2004/05 confirmed that the problem of UBW in NTEHs was serious. However, since then, neither Lands D nor BD has conducted any further survey or study to size up the problem.

Observations

15. Our investigation, including study of cases, has revealed that despite the Administration's commitment to enhance enforcement against UBW in NTEHs, there remain obvious deficiencies in the current enforcement system.

Questionable Efficiency and Effectiveness

16. Statistics on the enforcement actions taken by BD and Lands D between 2007 and 2010 have raised doubts on the efficiency and effectiveness of the system:

- (a) of the 2,400 WIP cases received by BD, 1,492 (62%) were not subject to enforcement action. Of those 1,492 cases, 931 (62%) were due to "WIP practically completed" or "no works under construction" – to some extent, a reflection of BD's restrictive enforcement criteria and action threshold.
- (b) Only 755 (31%) of the 2,400 cases received by BD were confirmed to be WIP cases and, therefore, subject to enforcement action. Despite BD's issuance of removal orders in 721 of those cases, as at 25 February 2011, only 285 cases (40%) have been resolved; the UBW in the remaining 436 cases (60%) have not been removed.
- (c) Of the 129 removal orders issued in as early as 2007, 57 (44%) have remained outstanding as at 25 February 2011. The corresponding figures for 2008, 2009 and 2010 are equally unimpressive.

- (d) Only 118 (5%) of the 2,161 cases handled by Lands D have yielded positive result (UBW purged). Of the rest, warning letters have been issued and registered in the Land Registry in 1,147 cases (53%). Action remain outstanding for 888 cases (41%). No re-entry of land or cancellation of lease has been invoked.

17. The slow rate of enforcement of removal orders by BD and the mere registration of warning letters in the Land Registry by Lands D is highly unsatisfactory, especially in the light of the increase in the number of complaints against UBW in NTEHs (49% increase from 2007 to 2010).

Narrow Opportunity for Enforcement

18. The current enforcement regime for UBW in NTEHs gives priority of enforcement only to (a) WIP and (b) UBW constituting obvious or imminent danger to life or property. UBW, which are not under construction or dangerous, are not actionable under the regime.

19. Structures that are simple and fast to build could easily escape enforcement. If an inspection of WIP is not made during the brief spell of construction, no enforcement action will be taken against them. If the owner refuses the authorities entry for inspection and collection of evidence during the construction period, he stands a high chance of having no enforcement action taken against his UBW thereafter.

Defying Common Sense and Logic

20. In many of the cases studied, the circumstantial evidence for substantiating the WIP status of UBW, such as the presence of building materials or workmen or the self-admission to WIP status by the owner, were available to BD. Yet, BD did not classify them as WIP on the grounds that the main structures of the UBW had been completed. BD's decisions, though technically defensible by reference to the definition of WIP, clearly defy common sense and logic and are certainly not in line with the Administration's commitment to curb the proliferation of UBW in NTEHs.

Inequity between NTEHs and Other Buildings

21. For buildings other than NTEHs, BD gives high priority of enforcement to tackling “new” UBW. The present restrictive WIP Policy for UBW in NTEHs is, therefore, inconsistent with the general approach. It unnecessarily imposes an obstacle in enforcement action against “new” UBW in NTEHs, causes inequity between NTEHs and other buildings, and gives a signal that owners of NTEHs are privileged.

Inconsistent Application of Action Criteria

22. As indicated by the cases studied, the definition of WIP is capable of being interpreted loosely and differently by BD and Lands D staff. Lands D may refer cases of WIP with circumstantial evidence and photographs to BD in the belief that they are actionable, only to be told that the works have been “practically completed”. In some cases, Lands D may not agree with BD’s judgment. At times, the rationale behind BD’s own decision in different cases cannot be reconciled.

23. Such inconsistencies result in a waste of time and efforts in referrals and abortive visits, as well as unfairness in enforcement action.

Delay

24. We notice that delays in action have been caused by the spending of excessive time on ascertaining the status of WIP or simply tardiness on the part of the departments.

25. Under Lands D’s operational guidelines, in referring a suspected WIP case to BD, staff are required to provide land information and circumstantial evidence, such as photographs, so as to avoid abortive visits by BD. However, since time is of the essence in stopping WIP cases, we consider that Lands D staff should promptly refer cases of suspected WIP to BD. Circumstantial evidence not readily available could be collected and provided later.

Lack of Recourse against Owners’ Stalling Tactics

26. Some owners of UBW adopt stalling tactics by refusing BD or Lands D entry for inspection or arguing at length about the completion date of the UBW to

prove that the UBW should not be subject to immediate enforcement action.

27. We find that such stalling tactics are fuelled by the lack of decisive action on the part of the Administration. Pending the strengthening of their power of entry, DevB should review the departments' action criteria for referring cases of WIP and initiating enforcement action. DevB should also explore alternative methods of collecting evidence such as resorting to technological devices or soliciting the assistance of complainants or nearby residents.

Improper Keeping of File Records

28. The inspection reports prepared by BD's consultants provide first-hand information about UBW in NTEHs. However, as our study of the cases reveals, BD may deviate from the assessments and recommendations of its consultants, without providing the reasons or justifications for its deviation in the case files or to the consultants. This does not help to ensure that BD's decisions are well-grounded and consistent, nor does this facilitate the consultants' understanding of BD's thinking and requirements.

Lack of Monitoring

29. We are disappointed that DevB and the departments do not systematically collect and monitor statistics on UBW in NTEHs. We consider that in the absence of such statistical data, it is difficult, if not impossible to assess accurately the effectiveness of the enforcement regime for UBW in NTEHs.

Feasibility of Expanding the Coverage of Enforcement

30. DevB and BD have expressed difficulties in expanding the scope of enforcement action to cover "new" UBW in NTEHs:

- (a) Unlike other buildings covered by the BO, NTEHs do not have detailed building plans or subsequent building plans for alteration and addition works. This makes it difficult to ascertain the "unauthorised" status of structure.

- (b) There is often an absence of evidence to prove that the UBW were “new”, i.e. newly completed within the past 12 months.
- (c) Expansion of the coverage of enforcement action may not be cost-effective. Public expectation has to be carefully balanced and managed.

31. Our response is as follows:

- (a) The difficulties in proving the “unauthorised” status of UBW in NTEHs do not apply to every case. For typical NTEHs³, the dimensions are clearly specified and BD can readily recognise whether the NTEH carries UBW. For non-typical NTEHs⁴, the absence of detailed building plans may pose difficulties for BD in determining the “unauthorised” status of a structure. If that is indeed the case, BD may eventually have to drop the charge against the owner. However, that is an operational problem which may arise in WIP, as well as in “new” UBW cases. We see no grounds why this problem should be taken as a reason not to expand the scope of enforcement action to cover “new” UBW in NTEHs.
- (b) DevB and BD have set too high a standard of proof for themselves for establishing the “new” status of UBW. Before issuing a removal order, BD should, of course, exercise due diligence to ascertain the “new” status of the UBW. This may be done, for example, by questioning the owner and his neighbours and examining the structure concerned. After issuing the order, the onus is on the owner to adduce sufficient evidence to prove that the UBW is not “new” and,

³ *The specifications on the dimensions of an NTEH are stipulated under the Buildings Ordinance (Application to the New Territories) Ordinance, Cap. 121.*

⁴ *NTEHs built before 1 January 1961 were not subject to the control of the BO at the time of their construction and, therefore, the specifications on the dimensions of NTEHs later imposed under Buildings Ordinance (Application to the New Territories) Ordinance.*

therefore, should not be subject to immediate enforcement action by BD under the Department's prioritisation policy. That should not be too much of a burden on the owner.

- (c) We are not asking BD to do the impossible. We are merely suggesting that it should not make it a policy or a norm not to take enforcement action against "new" UBW in NTEHs. The Department should deal with such cases in line with its policy for all other buildings. The public at large would welcome consistent and non-discriminatory handling of UBW cases and appreciate the practical difficulties involved.

Conclusion and Recommendations

32. Government has sworn its determination to tackle UBW on a sweeping scale, but UBW in NTEHs are exempted under the WIP Policy without sound justifications being proffered. Numerous cases of "new" UBW in NTEHs have, as a result, escaped enforcement action and the situation will persist unless positive changes are made.

33. In this light, The Ombudsman recommends that:

- (a) the Administration scrap the WIP Policy altogether to bring effective enforcement action against UBW in NTEHs in a manner that is fair and consistent compared to that against other buildings;
- (b) BD and Lands D align the departments' understanding and practices and set up a database of cases on which enforcement action has or has not been taken;
- (c) BD and Lands D streamline the departments' procedures for more efficient operation;

- (d) BD and Lands D explore alternative methods of collecting evidence such as resorting to technological devices or soliciting the assistance of complainants or nearby residents;
- (e) BD record its decisions on UBW cases and the rationale behind them and make them known to its consultants; and
- (f) DevB, in association with BD and Lands D, expeditiously size up the problem of UBW in NTEHs, with a view to objectively assessing the effectiveness of its enforcement regime.

Office of The Ombudsman
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