

## **Executive Summary**

### **Direct Investigation into Lands Department's Enforcement against a Village House with Irregularities**

#### **Background**

This Office received earlier a complaint in which the complainant alleged that the owner of a piece of agricultural land in the New Territories ("the Agricultural Land") had enclosed the adjoining Government land ("the Government Land"), blocking neighbouring villagers' access. Our inquiry revealed that the case involved irregularities that had persisted for more than 20 years:

- (1) breach of the conditions of the Short Term Waiver ("Waiver") granted to New Territories Exempted Houses ("NTEHs");
- (2) erection of unauthorised structures on private agricultural land; and
- (3) illegal occupation of Government land.

2. In this light, The Ombudsman initiated an in-depth investigation against the **Lands Department** ("Lands D") to probe into the underlying causes of its delay in taking enforcement actions against the irregularities.

#### **Relevant Legislation and Enforcement Policy**

3. By virtue of the Buildings Ordinance (Application to the New Territories) Ordinance, Lands D is empowered to issue a Waiver to an NTEH, which normally carries restrictive conditions on the height, area and use of the NTEH. Any breach of those conditions may lead to cancellation of the Waiver. An NTEH having had its Waiver cancelled by Lands D would be regarded as being in breach of the land lease conditions ("lease conditions") and subject to Lands D's lease enforcement actions in accordance with established procedures.

4. Erecting unauthorised structures on private agricultural land also constitutes a breach of the lease conditions. Lands D may take lease enforcement actions against the land owner, including: (1) issue warning letter demanding the owner to rectify the irregularity by a specified date; and (2) registration of the warning letter at the Land Registry if the irregularity persists.

5. In the past, lease enforcement actions usually would not go beyond registration of warning letter. Since April 2014, Lands D has implemented a new policy such that with regard to unauthorised structures on agricultural land that have already been

constructed and remain unpurged despite registration of warning letter, Lands D will proceed to re-enter the agricultural land pursuant to section 7 of the Government Rights (Re-entry and Vesting Remedies) Ordinance (“the Re-entry Provision”).

6. Where illegal occupation of Government land is found, Lands D is empowered to post a notice under section 6 of the Land (Miscellaneous Provisions) Ordinance (“the Occupation of Government Land Provision”) demanding the occupier to cease occupation of the land by a specified date. If the notice is not complied with, Lands D may take possession of the property or structure(s) on the land and institute prosecution against the occupier. Lands D may also remove the structure(s) and recover the costs incurred from the convicted occupier.

7. Since February 2015, “the Occupation of Government Land Provision” has imposed heavier penalty on the occupier. Among other things, the maximum fine has been drastically raised from \$10,000 to \$500,000 for first-time conviction; and to \$1 million for each subsequent conviction.

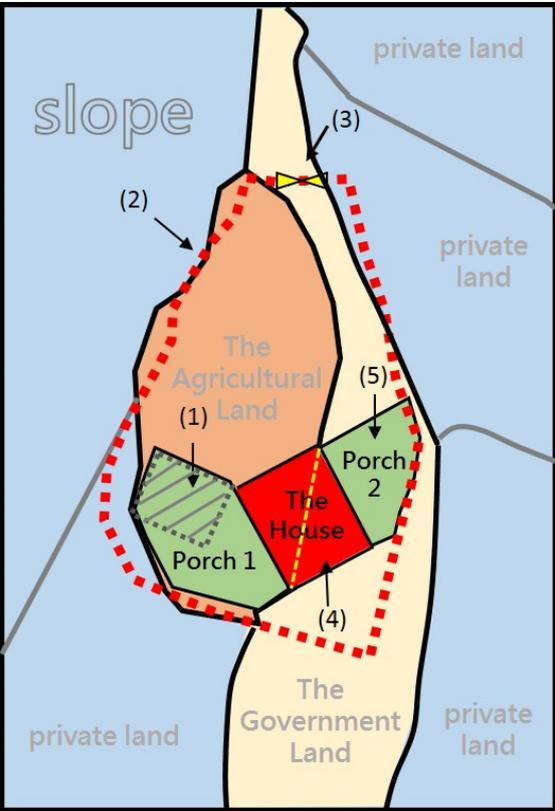
**Our Findings**

*Details of the Case*

8. The case which is the subject of this investigation could be traced back to **1994** when the local District Lands Office (“DLO”) of Lands D issued a Waiver to the then owner (“Owner A”) of the Agricultural Land, granting him approval to construct an NTEH (“the House”), which was subsequently completed in **1995**. The House, however, breached a number of conditions of the Waiver, as set out below:

|     | <b>Conditions of the Waiver</b>   | <b>What Actually Happened</b>   |
|-----|---|---|
| (1) | The NTEH should not exceed 5.18 metres in height.   | The House exceeded 5.18 metres in height.   |
| (2) | The NTEH should not have any additional structures.   | The House had additional structures, namely, a balcony, a canopy and a stairhood.           |
| (3) | The NTEH should be built within the perimeter of the Agricultural Land.                                 | The House straddled the Agricultural Land and the Government Land.                          |
| (4) | The NTEH should only be used for self-residence of Owner A and should not be transferred or leased out. | Upon completion of the House, Owner A sold the Agricultural Land (together with the House). |

9. Between 1999 and 2003, the subsequent owner of the Agricultural Land (“Owner B”) carried out a number of unauthorised extension works, as listed in items (1) to (5) below:



- (1) Constructed Porch 1
- (2) Constructed enclosing walls
- (3) Erected a steel gate
- (4) Constructed a roofed structure on the rooftop of the House
- (5) Constructed Porch 2

|  |   |
|--|---|
|  | Steel gate  |
|  | Enclosing walls   |
|  | Demarcation line between the Agricultural Land and the Government Land  |
|  | The area initially covered by Porch 1 (which was then extended about 2.5 times in 2015 to cover the whole green area) |

***Lands D’s Follow-up Actions and Response***

10. The case was followed up first by **DLO** and then the **New Territories Action Team** (“the Action Team”). The whole process can be divided into four phases. Actions in Phases I and II were taken by DLO, and those in Phases III and IV by the Action Team.

| <b>DLO</b>                                 |   |
|--|---|
| <b>Phase I (October 1995 - March 2004)</b> |   |
| 1995                                       | Discovered irregularities in respect of the House for the first time, wrote to Owner A demanding rectification.   |
| 1996                                       | Wrote to Owner A again demanding rectification of the irregularities.   |
| 1996 - 2003                                | Conducted nine inspections, during which DLO found in 1999 that Owner A had already sold the Agricultural Land, and discovered in 2002 that part of the House was on the Government Land. |

|   |   |
|---|---|
| 2004  | Cancelled the Waiver.   |
| <b>Phase II (April 2004 - September 2007)</b> |   |
| 2004 - 2007                                   | After two inspections (in 2004 and 2005), referred the case to the Action Team (in 2007). |

11. Lands D gave the following explanation for DLO’s slow progress in handling the case:

- (1) **Phase I:** In accordance with the then prevailing guidelines of Lands D, breach of conditions of a Waiver was not accorded “high priority”, so DLO just handled such cases one by one.
- (2) **Phase II:** Under Lands D’s guidelines, a case of an NTEH having had its Waiver cancelled by the Department is of “medium priority”. DLO had to handle such cases one by one. Lands D’s guidelines set no timeframes for handling cases of high, medium or low priorities.

12. The Action Team took over the case in 2007. It has since taken the following actions:

|  |  |
|--|--|
| <b>Action Team</b>   |  |
| <b>Phase III (October 2007 - February 2014)</b>  |  |
| 2007 - 2014  | Took no action.  |
| <b>Phase IV (March 2014 - July 2017)</b>   |  |
| <div style="display: flex; align-items: center;"> <div style="width: 15px; height: 10px; background-color: yellow; border: 1px solid black; margin-right: 5px;"></div> Enforcement actions taken regarding the Agricultural Land         </div> <div style="display: flex; align-items: center;"> <div style="width: 15px; height: 10px; background-color: lightblue; border: 1px solid black; margin-right: 5px;"></div> Enforcement actions taken regarding the Government Land         </div> |  |
| 2014   | Commenced enforcement actions.   |
| 2015   | Issued a warning letter/posted a notice on three occasions (in July, August and November), requiring the then owner (“Owner C”) to rectify the unauthorised structures on the Agricultural Land by a specified date. |
|  | Posted a notice (in July), requiring Owner C to cease occupation of the Government Land by a specified date.   |
| 2016   | Registered a warning letter in respect of the Agricultural Land (in January).  |
|  | Posted a notice again (in February), requiring Owner C to cease occupation of the Government Land, and later started the prosecution procedures (in April). Though convicted (in July),                              |

|      |  |
|------|--|
|      | Owner C continued to occupy the Government Land. The Action Team then posted another notice and issued a letter (in October and November), requiring Owner C to cease occupation of the Government Land by a specified date. |
| 2017 | Instituted another prosecution against Owner C, who was subsequently convicted (in June). Owner C indicated that demolition of the unauthorised structures on the Government Land was in progress.                           |
|      | Issued a fourth warning letter (in July), requiring Owner C to rectify the unauthorised structures by a specified date or else the Agricultural Land would be re-entered.  |

13. Lands D gave the following explanation for the Action Team’s slow progress in taking enforcement actions:

- (1) **Phase III:** When the Action Team was set up, it adopted a strategy of “straightforward cases first, thorny cases last” (i.e. to handle simple cases first) and “last-in-first-out” (i.e. to handle the most recent cases first) for outstanding cases that did not pose a threat to public safety or require urgent action. Since the House did not pose any threat to public safety or require urgent action, and the problem was “difficult” and long standing, the case was accorded almost the lowest priority.
- (2) **Phase IV:** As the House straddled the Agricultural Land and Government Land, demolition of the structures on the two pieces of land had to be carried out concurrently. The Action Team had already registered a warning letter in respect of **the Agricultural Land** for the irregularities concerned. If Owner C failed to comply with the fourth warning letter, the Action Team would then re-enter the Agricultural Land in accordance with “the Re-entry Provision”. As regards the irregularities on **the Government Land**, the Action Team intended to repeat prosecutions against Owner C, hoping that the heavier fines thus imposed could compel that offender to demolish the unauthorised structures.

## **Our Comments**

### ***Laxity and Delay in Cancelling the Waiver***

14. When **DLO** conducted its first inspection of the House in 1995, it failed to notice that a significant part of the House had encroached on the Government Land and that Owner A had already sold the Agricultural Land. That inspection was far from thorough. Besides, DLO had taken more than eight years in Phase I before deciding to cancel the Waiver, and the nine inspections conducted were totally ineffective. DLO

simply turned a blind eye to the continual unauthorised extension of the House, and such toleration of the irregularities resulted in a waste of manpower, resources and time.

### ***Inappropriate Strategy for Prioritising Cases and Delay in Tackling Problem***

15. For many years, Lands D had not reviewed **the Action Team**'s strategy of "straightforward cases first, thorny cases last" and "last-in-first-out". As a result, a number of serious and complicated cases (including this case) had remained outstanding for years. This case had been put aside for more than six years in Phase III, and there was serious delay. The saving grace is that the Action Team has recently remedied the situation by revising its strategy to give priority to long standing cases.

### ***Indecisiveness in Enforcement Actions***

16. **The Action Team** initiated enforcement actions against the House in Phase IV. Nevertheless, during the subsequent three years, it had failed to demolish, or compel Owner C to demolish, the unauthorised structures on the Agricultural Land and the Government Land. This shows the indecisiveness of the Action Team in taking enforcement actions. Moreover, the Action Team had also failed to handle the case in accordance with Lands D's new policy. Though a registration of warning letter had already been executed, the irregularities on the Agricultural Land persisted, and yet the Action Team did not proceed to activate the procedures to re-enter the Agricultural Land. Besides, we do not consider it cost-effective for the Action Team to repeatedly prosecute Owner C without exercising its statutory power under "the Occupation of Government Land Provision" to demolish the unauthorised structures on the Government Land. In fact, had the Action Team invoked "the Re-entry Provision" and "the Occupation of Government Land Provision" to respectively re-enter the Agricultural Land and take possession of the Government Land, it would have been able to demolish the structures that straddled the two pieces of land at the same time.

### ***"Order of Priority" to account for "Inaction"***

17. In defending the failure of DLO and the Action Team to take concrete enforcement actions against the irregularities of the House, **Lands D** gave such reasons as "not accorded high priority", "accorded only medium priority", "posing no hazard" or "not urgent". We find those reasons hardly acceptable. Worse still, Lands D had for years turned a blind eye to the fact that enclosure of the Government Land adjoining the House had been hindering villagers' access. Lands D has never set a timeframe for enforcement actions, and that is tantamount to connivance at persistent offence.

## **Recommendations**

18. In the light of the above, The Ombudsman urges Lands D:
- (1) to set a target completion date for processing each case for enforcement staff to follow (staff can review progress against the prescribed timeframe and, where necessary, make minor adjustments according to the actual situation); and
  - (2) to step up its enforcement efforts in this case; in case the irregularities persist, to demolish the unauthorised structures and re-enter the land, so as to eradicate the problem once and for all.

**Office of The Ombudsman  
September 2017**