

Summary of Investigation Report

Complaint against Three Government Departments for Failing to Curb the Unauthorised Activities of a Hawker Stall

Background

Since July 2009, the complainant had repeatedly complained to the Food and Environmental Hygiene Department (“FEHD”), the Lands Department (“Lands D”) and the Buildings Department (“BD”) about the unauthorised extension of business area by a FEHD-licensed hawker stall (“Stall A”) which stood against the external wall of a building. The unauthorised extension comprised the illegal construction of another stall (“Stall B”) next to Stall A, encroaching on the pavement.

2. Stall B consisted of the following unauthorised building works (“UBW”):

- a concrete platform that occupied part of the pavement;
- a display rack affixed to the external wall of the building;
- a canopy as well as an overhanging structure projecting from the external wall of the building, similar to the roller shutter hoods of street-level shops.

3. FEHD considered that as Stall B was operating within some structure, it did not constitute unlicensed hawking “on the street”. Accordingly, FEHD only focused on whether there was street obstruction caused by goods placed in front of Stall A. The Department disregarded the illegal hawking activity at Stall B.

4. Lands D had posted a notice under the Land (Miscellaneous Provisions) Ordinance (“LMPO”) on the platform of Stall B and ordered its owner to cease occupation of Government land before a specified date. Subsequently, the stall operator removed a portion of the platform. As the remaining part of the platform could not be removed without affecting the other UBW items, Lands D decided to wait until BD took enforcement actions against such items under the Buildings Ordinance (“BO”).

5. BD’s subsequent inspections revealed that the operator of Stall B had replaced the overhanging structure with a new one, while the other UBW items remained.

Details of Complaint

6. In July 2011, the complainant complained to this Office that FEHD, Lands D and BD had failed to rectify the situation. In fact, Stall B had even widened its range of merchandise. The complainant alleged that:

- (1) **FEHD** had failed to eradicate the unauthorised extension of business area by Stall A; and
- (2) **Lands D** and **BD** had failed to reach an agreement on whether the UBW items could be removed separately and had shirked their own responsibilities, thus allowing the problem to persist.

Our Findings

Response from FEHD

7. Upon our further queries, FEHD sought legal advice from the Department of Justice (“DoJ”) again and eventually revised its stance and practice as follows:

FEHD not only could take enforcement action against Stall A for causing obstruction by placing goods in front of the stall, but also treat Stall B as engaging in unlicensed hawking on the street and institute prosecution if there is sufficient evidence.

Response from Lands D

8. Lands D reiterated that while under LMPO, it can deal with unauthorised platforms that occupy Government land, the UBW items projecting from the external wall of a building, such as overhanging structures and canopies should be handled by BD under BO. That was the usual division of work between the two departments when coping with similar problems.

9. Furthermore, all the UBW items of Stall B were inter-connected structurally. According to the advice of Lands D’s demolition contractor, for the sake of safety, the UBW items should be removed sequentially from top to bottom. Since the overhanging structure was quite bulky, it might collapse if the display rack below was removed first. Hence, Lands D could only remove the platform and the display rack in tandem with BD’s action on the other UBW items, i.e. the overhanging structure and canopy.

Response from BD

10. BD indicated that unleased land (i.e. Government land) and streets belonging to Government are exempt from the provisions of BO. The overhanging structure in this case fell outside the purview of BO for the following reasons:

- (1) Although the overhanging structure was affixed to the external wall of the building, it belonged to the operator of Stall B, not the owners of the building.
- (2) The overhanging structure and the other parts of Stall B formed an integral structure that was solely used by the stall operator.
- (3) Stall B was entirely on Government land.

11. Under BO, a removal order for UBW items issued by BD “shall be served on the owner of the land or premises on which the building has been erected”. Since Stall B was located on Government land, BD would have to serve such removal order on Government, which is, nevertheless, not feasible.

12. In short, BD considered itself not having the power to take enforcement action.

Our Comments

Allegation (1)

13. FEHD had all along ignored the illegal hawking activity at Stall B and refused to take enforcement action. Its arguments showed a total disregard of the plain fact that illegal hawking on the pavement had been going on at Stall B.

14. DoJ’s latest advice demonstrated that FEHD’s arguments for not taking enforcement action had no grounds.

15. In light of the above, The Ombudsman considered **allegation (1)** against FEHD **substantiated**.

Allegation (2)

16. According to BD’s analysis, all the UBW items of Stall B could together be regarded as one large object occupying Government land. We considered that Lands D could have invoked LMPO to take enforcement action and remove all the UBW items all by itself.

17. Nevertheless, it is also true that UBW items projecting from the external wall of a building fall within BD's jurisdiction under BO. Hence, BD could well have followed the usual division of work between it and Lands D (paragraph 8 above) in handling the case of Stall B. In this event, BD had unnecessarily curtailed its own enforcement powers. In fact, BD could have served a removal order on the owners of the external wall of the building. Any dispute between those owners and the stall operator should be resolved between themselves.

18. Evidently, both BD and Lands D had powers to deal with the UBW items in this case. Even though they might have doubts or concerns, the two departments should have addressed the problems jointly in a proactive manner at the outset, rather than shifting the responsibility to each other.

19. The Ombudsman, therefore, considered **allegation (2)** against both Lands D and BD **substantiated**.

Final Remarks

20. The unauthorised activities in this case were serious and blatant. The illegal extension was of the resemblance and scale of a shop, with fixed bulky UBW items such as a concrete platform, display rack and roller shutter. And yet all the three departments, with their compartmental mentality, had attempted to evade their responsibilities with such excuses as Government policy, limitation of powers and technical difficulties, thereby allowing the situation to worsen. Their performance was disappointing.

Recommendations

21. The Ombudsman urged:

- (1) FEHD to take prompt and stringent enforcement action against the unlicensed hawking; and
- (2) BD and/or Lands D to clear all the UBW items in the most efficient way as soon as possible.

22. If BD and Lands D still had divergent views, they should resolve their differences by consulting the Development Bureau together with DoJ immediately.

Latest Developments

23. FEHD has recently instituted prosecution against the stall operator for illegal hawking. Lands D has also agreed to assume the responsibility of taking

enforcement action against all the UBW items. It has issued a notice ordering the stall operator to demolish all the UBW items before a specified date.

Office of The Ombudsman
May 2012