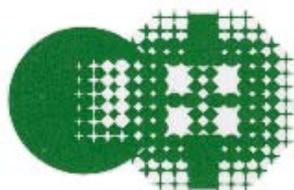


DIRECT INVESTIGATION REPORT

**ALLOCATION AND MONITORING
OF GOVERNMENT LAND**

September 2010



**Office of The Ombudsman
Hong Kong**

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EXECUTIVE SUMMARY

Direct Investigation on Allocation and Monitoring of Government Land

Background and Ambit

In the course of investigating a complaint in 2008, this Office noted an apparent lack of monitoring by the Administration over the use of a piece of Government land (“the Site”) by a sports association (“the Association”). After a preliminary inquiry, The Ombudsman declared in June 2009 a direct investigation to examine:

- (a) the award of the use of the Site to the Association; and
- (b) the monitoring of the use of the Site by the Education Bureau (“EDB”) and the Lands Department (“Lands D”).

2. The Education Department (“ED”) and the New Territories Administration (“NTA”) were the forerunners of EDB and Lands D respectively insofar as this case is concerned.

Facts of Case

3. Our investigation has revealed the following:

- (a) The Association was formed in the 1960s under the Societies Ordinance.
- (b) In 1974, the Director of Education (“D of E”) was appointed to the Executive Committee of the Association.
- (c) On 19 August 1974, D of E wrote to the District Officer concerned of NTA stating that “ED would like to obtain a lot of land ... for the purpose of establishing an outdoor education centre for schools primarily”.
- (d) On 23 December 1974, the Secretary for the New Territories replied to D of E that “allocation of the site shown coloured pink on the attached plan (i.e. the Site) ... is now made subject to the enclosed Engineering Conditions (for Government Projects)”. The Association was named under the caption of the Engineering Conditions.
- (e) In 1974 and 1978, the Association obtained two grants of \$500,000 and \$110,000 respectively from the then Governor’s Special Fund for the construction of an activity centre and an extension to the centre on the Site.

- (f) In October 1976, D of E applied to the Deputy Financial Secretary (“DFS”) for a subvention of \$25,000 per annum to the Association for maintenance and operation of the centre. DFS rejected the application on the ground that the activities were not subvention-worthy.
- (g) In December 1976, D of E sought DFS’ approval to pay rent to the Association at \$1,500 per month for using part of the Association’s accommodation on the Site. The fact that D of E himself was the allocatee of the Site was not mentioned in his application.
- (h) In February 1977, D of E’s application was approved. Thereafter, the rent was adjusted from time to time according to the advice of the Ratings and Valuation Department. However, no written lease agreement between ED/EDB and the Association was made. The lease was terminated in 2004 when EDB ceased to use the Site. The total rental paid over the years amounted to \$1.8 million.
- (i) In 1992, D of E was appointed ex-officio member of the Executive Committee of the Association.
- (j) During 2000 to 2006, the number of participants in the Association’s activities per year was as follows:

Year	Number of Participants
2000	175
2001	215
2002	175
2003	280
2004	204
2005	128
2006	120

- (k) In 2007, with the Association ceasing its activities, the number of participants dropped to zero.
- (l) In February 2007, the Police temporarily removed the Association from the list of societies.
- (m) In October 2007, the Association resumed its activities.
- (n) In 2008, the Association was incorporated as a limited company.
- (o) Between 2006 and 2008, EDB and Lands D had a dispute over which department should be responsible for taking action on the under-utilised Site. EDB argued that as Lands D was the sole competent authority to decide whether the Site should continue to be used by the Association, it should contact the Association direct to get

back the Site.

Our Observations

Shirking of Responsibility

4. EDB argued that “the District Office (of NTA) and the Association were well aware of the fact that the Site was actually allocated to (the Association) using the technical means of Government Land Allocation (“GLA”) ... to effect an administrative convenience”. In support of this argument, EDB referred to the caption of the Engineering Conditions (**para. 3(d)**) and the direct contacts between the Association and the District Office on matters pertaining to the use of the Site.

5. Lands D retorted that under Government’s land policy, allocation of Government land to Government departments is by GLA, and that to non-government organisations by Short Term Tenancy or Private Treaty Grant. For unallocated Government land, Lands D is responsible for its administration. For Government land allocated by GLA, the allocatee Government department will take over the role of Lands D in managing the Government land. In the case under consideration, the Site was allocated not to the Association, but to ED.

6. Having examined the submissions by EDB and Lands D, we find EDB’s argument unconvincing. ED’s request to NTA for land and NTA’s allocation of the Site to ED in 1974 were stated in unequivocal language and documented on file (**paras. 3(c) and (d)**). The allocation conformed with the prevailing land policy (**para. 5**). The caption of the Engineering Conditions (**para. 3(d)**) and the direct contacts between NTA and the Association are no evidence that the Site was allocated by NTA to the Association direct. We, therefore, find ED, and now EDB, to be the allocatee of the Site.

7. As the allocatee of the Site, EDB should have readily accepted responsibility for the Site, when approached by Lands D in 2006. However, EDB had acted otherwise (**paras. 3(o) and 4**). Its response fell short of the standard required of an accountable Government department.

8. If “the technical means of GLA” had, as alleged, been used “to effect an administrative convenience” for awarding the Site to the Association (**para. 4**), that would have been an abuse of GLA and a serious act of maladministration.

Lack of Monitoring

9. EDB claimed to have “supervised” the Association, for the sake of promoting school sports activities, by collecting from it yearly figures of activities for conducting curriculum review and responding to enquiries relating to student learning in physical education, and advising it to stop its activities upon learning that it had been temporarily removed from the list of societies (**para. 3(l)**). After the Association’s resumption of activities (**para. 3(m)**), EDB sought agreement for its officers to visit the Association twice a year, and for the Association to provide EDB with yearly figures of activities, notes of annual general meetings, and notices of change of office-bearers.

10. We consider that EDB, as the allocatee of the Site and ex-officio member of the Executive Committee of the Association (**paras. 3(d) and (i)**), should have done more than just collecting statistics and paying infrequent visits under the notion of promoting school sports activities. If EDB had exercised due care and diligence, it would have noticed that the Site was

seriously under-utilised (**paras. 3(j) and (k)**) and taken early and appropriate remedial action, for example, discontinuing the use of the Site by the Association and returning it to Lands D. At the very least, it should have worked out proper arrangements with the Association for monitoring and appraisal to ensure that the Bureau's policy support to the Association continued to be justified.

11. It was reasonable of Lands D to expect EDB, the allocatee of the Site, to account for its use. When Lands D questioned the usage of the Site, it checked that with EDB and considered the need for reallocating the Site to other users. Lands D has thus duly discharged its duty.

Payment of Rent

12. We find it absurd that ED had to pay rent to the Association for using part of the Site, of which the Department itself was the allocatee. We are also baffled by the lack of a written agreement between ED/EDB and the Association for leasing the premises (**para. 3(h)**).

Recommendations

13. The Ombudsman recommends that:

- (a) **EDB** keep a close watch over the use of the Site by the Association to ensure that the agreed aims and objectives are achieved;
- (b) **EDB** make proper arrangements (including setting of standards) for monitoring and appraising the activities of the Association;
- (c) **EDB** discontinue the use of the Site by the Association in case of under-utilisation or abuse, and return it to Lands D; and
- (d) **Lands D**, in consultation with all bureaux/departments, examine whether any similar cases exist and rectify any anomalies as soon as possible.

Office of The Ombudsman
September 2010

1

INTRODUCTION

BACKGROUND

1.1 In the course of investigating a complaint in 2008, this Office noted an apparent lack of monitoring by the Administration over the use of a piece of Government land (“the Site”), which measures about 1,200 square metres, by a sports association (“the Association”).

1.2 The Association was formed in the 1960s under the Societies Ordinance. Since 1974, the Association has been occupying the Site, which was allocated by the New Territories Administration (“NTA”) to the Education Department (“ED”). ED and NTA were the forerunners of the current Education Bureau (“EDB”) and Lands Department (“Lands D”) respectively insofar as this case is concerned.

1.3 With Government funds, the Association built on the Site an activity centre and later an extension to the centre. The centre was opened by the Governor in April 1976.

1.4 The number of participants in the Association’s activities ranged from 175 to 280 per year during 2000 to 2004. In the three years from 2005 to 2007, the number of participants dropped to 128, 20 and 0 respectively.

1.5 In February 2007, the Police temporarily removed the Association from the list of societies, believing that it had ceased to exist.

1.6 In October 2007, the Association resumed its activities. In December 2008, the Association was incorporated as a limited company under the Companies Ordinance.

PURPOSE AND AMBIT

1.7 The Ombudsman’s concern over this case stemmed not only from the low usage rate of the Site (**para. 1.4**), but also from the apparent shirking of responsibility by the Administration over the use of the Site by the Association.

1.8 After a preliminary inquiry, The Ombudsman declared on 23 June 2009 a direct investigation to examine:

- (a) the award of the use of the Site to the Association; and
- (b) the monitoring of the use of the Site by EDB and Lands D.

METHODOLOGY

1.9 We have sought and studied information from EDB and Lands D. We have had a meeting with officers of EDB and Lands D to discuss the case. We have also obtained information from the Home Affairs Bureau (“HAB”) on details of Government funding to the Association (**para. 2.6**), as well as information from the Government Property Agency (“GPA”) on details of payment of rent to the Association (**para. 2.7**).

1.10 As the outcome of our investigation might affect the Association’s future use of the Site, we wrote to the Association in June 2009, suggesting a meeting to enable us to learn more about the Association and its activities. In August 2009, the Association sent us copies of its documents, including Memorandum and Articles, chairman’s reports and plans of activities. In September 2009, we wrote to seek further information from the Association on its occupation of the Site and its relationship with EDB, but to no avail.

INVESTIGATION REPORT

1.11 On 22 March 2010, we forwarded a Draft Investigation Report (“DIR”) to the Secretary for Education and the Director of Lands for comments. Having duly considered and incorporated their views, we revised the DIR for their final comments. We issued this Final Report on 7 September 2010.

2

HISTORY

ALLOCATION OF SITE

2.1 On 19 August 1974, the Director of Education (“D of E”) wrote to the District Officer concerned of NTA for allocation of the Site. In the memo, D of E stated “**The Education Department** (emphasis added) would like to obtain a lot of land ... for the purpose of establishing an outdoor education centre for schools primarily”.

2.2 In response, the Secretary for the New Territories replied to D of E on 23 December 1974 that “Allocation of the site shown coloured pink on the attached plan (i.e. the Site) ... is now made subject to the enclosed Engineering Conditions (for Government Projects)”. The Association was named under the caption of the Engineering Conditions.

ED’S INVOLVEMENT IN THE ASSOCIATION

2.3 The Constitution of the Association of 1974 stipulated that “The Affairs of the Association shall be conducted by an Executive Committee consisting of ... D of E or his nominated representative...”.

2.4 That section was amended in 1992 to read “The Executive Committee shall be composed of ... an ex-officio member, D of E or his nominated representative”.

2.5 Upon enactment of the Association's Memorandum and Articles in 2008, the Secretary for Education or his nominated representative ceased to be a member of the Association's Executive Committee.

GOVERNMENT FUNDING

2.6 Records from EDB and Lands D show that there were two grants from the then Governor's Special Fund to the Association for the construction of, and acquiring sports equipment for, an activity centre and an extension to the activity centre on the Site. The first grant of \$500,000, approved by the Secretary for Home Affairs, was awarded to the Association via ED in August 1974. The second grant of \$110,000, approved by the Governor on the recommendation of the Council for Recreation and Sport, was made to the Association via NTA in July 1978.

PAYMENT OF RENT

2.7 According to GPA's records:

- (a) From April 1976, ED had occupied more than one half of the building on the Site and had exclusive access to that area where ED sports equipment was stored. At that time, ED did not pay the Association for the use of the Site.
- (b) In October 1976, D of E applied to the Deputy Financial Secretary ("DFS") for a subvention of \$25,000 per annum to the Association for maintenance and operation of the centre.
- (c) DFS rejected the application on the ground that the activities were not subvention-worthy. However, DFS advised D of E to consider paying rent to the Association as ED was occupying part of the Association's accommodation on the Site.
- (d) D of E then consulted the Rating and Valuation Department ("RVD"), which replied that the rental value of the space occupied by ED was \$1,500 per month.

- (e) In December 1976, D of E sought DFS' approval to pay rent to the Association at \$1,500 per month. The fact that ED was the official allocatee of the Site was not mentioned in his application.
- (f) In February 1977, the Secretary for Civil Service was directed to inform D of E that there was no objection to the payment of the proposed rent.
- (g) Thereafter, the rent was adjusted from time to time according to the valuation of RVD.
- (h) GPA took over the case from RVD in April 1990.
- (i) GPA terminated the lease in 2004 on EDB's advice that it had ceased to use the Site. The rent paid before termination was \$10,000 per month.
- (j) The total sum of rental payments to the Association from 1977 to 2004 was \$1,808,000.
- (k) There was no written lease agreement between ED/EDB and the Association.

3

“THE 2006 – 2008 WAR OF WORDS”

3.1 The following written exchange between EDB and Lands D took place between 2006 and 2008:

- (a) On 25 August 2006, having received a request from another organisation to use the Site, Lands D enquired whether EDB would return the Site for reallocation to other users.
- (b) On 18 January 2007, EDB replied in the affirmative provided that there was no objection from the Association.
- (c) On 13 December 2007, however, EDB informed Lands D that the Association would resume activities and the Bureau supported the continued use of the Site by the Association.
- (d) On 7 March 2008, in response to Lands D’s request for the return of the Site, EDB stated that it would not dictate the decision to take back the Site as the Association owned the buildings on the Site (**para. 2.6**). EDB would consult the Association.

- (e) On 26 March 2008, in response to Lands D's further request, EDB claimed that the Bureau was not in a position to judge whose demand to use the Site should prevail. EDB deferred to Lands D to decide which non-governmental organisation ("NGO") should use the land.
- (f) On 25 April 2008, Lands D requested EDB to confirm its continued policy support for the Association, pointing out that the Site had been allocated to ED in 1974 in accordance with the then prevailing policy.
- (g) On 14 May 2008, EDB responded that it deferred to Lands D to decide which NGO should have higher priority to use the Site. To tackle the problem, EDB suggested that Lands D contact the Association direct for information and convene a meeting with the Association and other relevant parties, with EDB present to offer comments where necessary.
- (h) On 4 June 2008, Lands D raised objection to EDB's suggested approach, given that the Site had been allocated to ED to meet its policy objectives and EDB had decided that the Association fulfilled the Bureau's purpose.
- (i) On 13 June 2008, EDB reiterated that it did not suggest or take any stance as to whether the Site should continue to be used by the Association, or be reallocated to other NGOs, as Lands D was the sole competent authority to decide on the matter.

3.2 The dispute between EDB and Lands D continued.

4

COMMENTS FROM EDB AND LANDS D

EDB'S COMMENTS

4.1 EDB does not dispute the records of allocation of the Site (**paras. 2.1 – 2.2**) and the Government land allocation policy (**para. 4.7**).

4.2 However, in April 2009, the Bureau contended that “the District Office (of NTA) and the Association were well aware of the fact that the Site was actually allocated to (the Association) using the technical means of Government Land Allocation”. EDB supported its claim with the following:

- (a) The caption of the Engineering Conditions (**para. 2.2**) shows the use of the Site by the Association.
- (b) The Association was directly involved in discussion with the District Office on the selection of the Site.
- (c) In a speech made in 1976, the Association thanked the District Office for its help in securing the Site.
- (d) The District Office and the Association had direct contact to settle matters pertaining to the use of the Site. The Association wrote directly to Lands D in 1983 for additional land. EDB suspected that Lands D had approved the Association's application.

- (e) It is normal practice for ED and EDB to give comments to other Government departments on matters relating to the Association. For example, in 1993, ED wrote to the then Recreation and Culture Branch to support the Association's application for funds to renovate its activity centre.

4.3 In the same reply, EDB further argued that “the so-called ‘allocation’ to the then ED was merely a measure to effect an administrative convenience”. As “EDB is actually playing the role of an advisor or the recommending office ... it would be more appropriate to take EDB's efforts to help liaise with the Association as goodwill action, rather than to assume that EDB has the authority to take back the Site”.

4.4 In July 2009, EDB claimed that for the sake of promoting school sports activities, it had been “supervising” the Association as follows:

- (a) Before 2006, EDB collected from the Association yearly figures of activities for conducting curriculum review and responding to enquiries relating to student learning in physical education.
- (b) Upon learning that the Association had been temporarily removed from the list of societies (**para. 1.5**), EDB advised the Association to stop its activities until after the issue of its status was resolved and proper insurance coverage secured for its activities.
- (c) After the Association decided to resume its activities (**para. 1.6**), EDB sought agreement for its officers to visit the Association twice a year, and for the Association to provide EDB with yearly figures of activities, notes of annual general meetings and notices of change of office-bearers.

4.5 EDB further explained that the Principal Inspector (Physical Education) of ED and his staff had often been invited by national sports associations and school sports associations to be their vice-presidents, advisors or committee members. For building rapport, showing goodwill and enhancing collaboration for win-win outcomes, ED had accepted some of the invitations. EDB considered those appointments to be honorary only. In this particular case, ED representative attended

meetings only when invited to offer advice and comments.

4.6 EDB reiterated that it would be more effective and appropriate for Lands D to contact the Association to get the Site back, since the Site was actually allocated to the Association (**para. 4.2**), the District Office of NTA had had direct dealings with the Association (**para. 4.2(d)**), EDB had been liaising with the Association out of goodwill only (**para. 4.3**), and EDB did not in fact have the authority to take the Site back from the Association (**para. 4.3**).

LANDS D'S COMMENTS

4.7 According to Lands D, allocation of Government land to Government departments is by Government Land Allocation ("GLA"), and that to NGOs by Short Term Tenancy or Private Treaty Grant. For unallocated Government land, Lands D is responsible for its administration. For Government land allocated by GLA, the allocatee Government department will take over the role of Lands D in managing the land.

4.8 Lands D considers EDB's assertion that "the Site was actually allocated to the Association using the technical means of GLA" (**para. 4.2**) not supported by factual evidence and not in line with Government policy (**para. 4.7**). There has never been any land application from, or land lease to, the Association. ED's request for land and the allocation of the Site to ED in 1974 (**paras. 2.1 – 2.2**) are properly documented on file.

4.9 Lands D states that its predecessor might have made direct replies to or contact with the Association (**para. 4.2(d)**), but those were for expediency. They did not alter the fact that ED was the allocatee of the land. Lands D also confirms that the Association's application for additional land in 1983 was refused.

4.10 Lands D considers EDB to be the allocatee of the Site. As such, EDB should be responsible for monitoring the use of the Site by the Association. If there is evidence of under-utilisation or abuse, EDB should consider whether the original policy justification for the allocation is still valid. If not, EDB should recover the Site from the Association and return it to Lands D.

4.11 As Lands D is not a party to any agreement between EDB and the Association and does not have the locus to be involved in instigating any action against the Association, it is not appropriate for Lands D to contact the Association for the return of the Site.

EDB’S REVISED STANCE

4.12 Towards the end of the investigation by this Office, EDB reversed its position, explaining that “before Lands D requested EDB to return the Site on 25 August 2006, EDB was not aware that **it** (emphasis added) was the allocatee (of the Site)”. EDB attributed this to the following:

- (a) The records concerning the allocation of the Site had been lost or mislaid or prematurely destroyed due to restructuring and relocation of offices of ED and EDB over the years.
- (b) GPA and its predecessor had rented part of the Site from the Association for use by ED and EDB from 1977 to 2004 (**para. 2.7**).
- (c) Lands D had never asked ED or EDB about the use of the Site since its allocation.

4.13 Since receiving a copy of the allocation document from Lands D on 8 September 2006, EDB has taken measures to “supervise” the use of the Site by the Association. They include regular visits to the Association, attendance at its annual general meetings and collection of statistics for monitoring of the use of the Site.

4.14 EDB’s latest stance is that “As the land allocatee status has been clarified, EDB will continue to (supervise the use of the Site by the Association)”.

5

OBSERVATIONS AND RECOMMENDATIONS

OVERALL

5.1 As set out in Chapter 1, this investigation concerns the discharge of duties by EDB and Lands D (and their forerunners) in allocating and monitoring the use of the Site (**para. 1.8**). Whether the Association deserved and still deserves support from ED/EDB and merits higher priority than other NGOs for the use of the Site is not our concern.

5.2 Our observations are as follows.

SHIRKING OF RESPONSIBILITY

5.3 EDB had argued that “the Site was actually allocated to the Association using the technical means of GLA ... to effect an administrative convenience”. It cited the naming of the Association under the caption of the Engineering Conditions and the direct contacts between NTA and the Association (**para. 4.2**).

5.4 Such an argument is, however, unconvincing. ED’s request to NTA for land and NTA’s allocation of the Site to ED in 1974 were stated in unequivocal language and documented on file (**paras. 2.1 – 2.2**). The allocation conformed with the prevailing policy for allocation of land to Government departments (**para. 4.7**). The caption of the Engineering Conditions and the direct contacts between NTA and

the Association, though interesting, are no evidence that the Site was allocated to the Association.

5.5 With no doubt whatsoever, we find ED, and now EDB, to be the allocatee of the Site. As the allocatee, EDB is best placed to decide whether the Site should continue to be used in the existing manner. It should have accepted responsibility for the Site when approached by Lands D in 2006. It continued to resist in as late as 2009 when this Office started this investigation. EDB steadfastly argued that Lands D, being the sole competent authority to decide on the matter, should contact the Association direct (**paras. 3.1(g) and (i)**), and that it would be more appropriate for Lands D to take EDB's efforts to help liaise with the Association as goodwill action rather than to assume that EDB had the authority to take back the Site (**para. 4.3**). In our view, EDB's response fell short of the standard required of an accountable Government department.

5.6 If "the technical means of GLA" had, as alleged, been used "to effect an administrative convenience" for awarding the use of the Site to the Association, thereby bypassing the procedures for Short Term Tenancy or Private Treaty Grant (**para. 4.7**), that would have been an abuse of GLA and a serious act of maladministration.

5.7 Only after much toing and froing that EDB accepts that it is the allocatee of the Site with full responsibility for monitoring its use (**para. 4.14**).

LACK OF MONITORING

5.8 EDB claimed to have "supervised" the Association by collecting yearly figures of activities and visiting the Association twice a year (**paras. 4.4(a) and (c)**). We have no reason to doubt its claim.

5.9 However, as the allocatee of the Site and ex-officio member of the Executive Committee of the Association, EDB should have done more than just collecting statistics and paying infrequent visits under the notion of promoting school sports activities.

5.10 If EDB had exercised due care and diligence as allocatee of the Site, it would have noticed that the Site was seriously under-utilised (**para. 1.4**) and taken

early and appropriate remedial action to remedy the anomaly, for example, discontinuing the use of the Site by the Association and returning it to Lands D. At the very least, it should have worked out proper arrangements with the Association for monitoring and appraisal to ensure that the Bureau's policy support to the Association continued to be justified.

5.11 It was reasonable of Lands D to expect EDB, the allocatee of the Site, to account for its use (**para. 4.10**). When Lands D questioned the usage of the Site, it checked that with EDB and considered the need for reallocating the Site to other users. Lands D has duly discharged its duty in this respect.

PAYMENT OF RENT

5.12 We find it absurd that ED had to pay rent to the Association for using part of the Site, of which the Department itself was the allocatee. We are also baffled by the lack of a written agreement between ED/EDB and the Association for the lease of the premises.

RECOMMENDATIONS

5.13 In the light of the above, The Ombudsman recommends that:

- (a) **EDB** keep a close watch over the use of the Site by the Association to ensure that the agreed aims and objectives are achieved;
- (b) **EDB** make proper arrangements (including setting of standards) for monitoring and appraising the activities of the Association;
- (c) **EDB** discontinue the use of the Site by the Association in case of under-utilisation or abuse, and return it to Lands D; and
- (d) **Lands D**, in consultation with all bureaux/departments, examine whether any similar cases exist and rectify any anomalies as soon as possible.

FINAL REMARKS

5.14 EDB and Lands D have accepted our observations and recommendations.

5.15 The Ombudsman thanks the Secretary for Education and the Director of Lands and their staff for assistance throughout this investigation.

Office of The Ombudsman

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